



REPUBLIC OF KENYA



Murira & 26 others v China Communications Construction Company Limited (Environment & Land Case 2 of 2020) [2025] KEELC 599 (KLR) (10 February 2025) (Judgment)

Neutral citation: [2025] KEELC 599 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 2 OF 2020
MN GICHERU, J
FEBRUARY 10, 2025**

BETWEEN

- WILLIAM MUNGAI MURIRA 1ST PLAINTIFF**
JOSEPH KIPRUTO NGETICH 2ND PLAINTIFF
BONIFACE KIPLIMO 3RD PLAINTIFF
DAVID NYANGAU OKEMWO 4TH PLAINTIFF
FREDRICK OTIENO AMOLLO 5TH PLAINTIFF
LIDIAH MAKENA MUGUNA 6TH PLAINTIFF
WILFRED WAMBURA KARANJA 7TH PLAINTIFF
KEZIAH WAIRIMU KAMAU 8TH PLAINTIFF
THOMAS MBOYA ONYANGO 9TH PLAINTIFF
KIPKOECH MUTAI 10TH PLAINTIFF
PAUL AMWOMA MOKAYA 11TH PLAINTIFF
LUKA MOMANYI OMBATI 12TH PLAINTIFF
REUBEN MAKORI OMARE 13TH PLAINTIFF
EMILY MOKEIRA ORIOKI 14TH PLAINTIFF
MARTHA ACHIENG AKELLO 15TH PLAINTIFF
PAMELA ACHIENG KOKONYA 16TH PLAINTIFF
EXZEL NDUMBI MWANGI 17TH PLAINTIFF
CHARLES KARANJA NGUNJIRI 18TH PLAINTIFF
PROF. ALFRED ORINA ISAAC 19TH PLAINTIFF



FRED DSOUZA ONGWARE 20TH PLAINTIFF
STENLEY MARETE JACKSON 21ST PLAINTIFF
BOB SITATI KHAREMWA 22ND PLAINTIFF
ANDREW KAGWA ONYAMO 23RD PLAINTIFF
ANTHONY KUNGU KIARIE 24TH PLAINTIFF
DENNIS WAFULA WAMALWA 25TH PLAINTIFF
JANET NIELSEN NAMALWA 26TH PLAINTIFF
JOSEPH MWANGI THATI 27TH PLAINTIFF

AND

CHINA COMMUNICATIONS CONSTRUCTION COMPANY
LIMITED DEFENDANT

JUDGMENT

1. The 1st, 2nd, 3rd, 6th, 7th, 8th, 10th, 11th, 12th, 13th, 14th, 16th, 17th, 19th, 21st, 22nd, 23rd, 24th, 25th, 26th and 27th Plaintiffs seek the following reliefs against the Defendant.
 - a. A declaration that the Defendant breached clauses 1.4, 1.8 and 2.11 of the E.I.A Licence and their acts are in contravention of Article 42 of *the Constitution* of Kenya.
 - b. The court be pleased to issue an environmental restoration order against the Defendant as regards the quarries and borrow pits in the vicinity of the 16th, 19th, 21st and 26th Plaintiff's properties.
 - c. Compensatory for damages for repair and restoration of the Plaintiff's residences and/or farm structures in the aggregated sum of Kshs. 62,345,378.60 as determined by the licensed Quantity Surveyor.
 - d. Compensatory for environmental, social and economic damages in the aggregated sum of Kshs 96,797,964.00 as determined by the licensed Environmental Expert.
 - e. In the alternative to Kshs.96,797,964.00 as per paragraph 25C above, compensation to the Plaintiffs for general damages for distress , pain and sufferings.
 - f. The Defendant to meet the costs of the structural engineers and environmental experts in the sum of Kshs. 3,200,000/= for preparing the Structural Audit Reports and Environmental Audit Reports.
 - g. Costs of this suit.
 - h. The court be at liberty to make such further and other order it deems just and expedient to meet the ends of justice.
2. The Plaintiffs' case is as follows. The Plaintiffs and the registered owners of the following parcels of land.

Plaintiff Land Parcel Number



1st KJD/KIT/16248-9
2nd KJD/KIT/16085
3rd KJD/KIT/16134
6th KJD/KIT/38975-6
7th KJD/KIT/16126
8th KJD/KIT/16333 and 16336
10th KJD/KIT/16501
11th KJD/KIT/15855
12th KJD/KIT/15853
13th KJD/KIT/15780
14th KJD/KIT/15740-1
15th KJD/KIT/16389
16th KJD/KIT/59440-1
17th KJD/KIT/12922 and 5944
19th KJD/KIT/21087 and 19224
21st KJD/KIT/13608
22nd KJD/KIT/16301
23rd KJD/KIT/16301?
24th KJD/KIT/16211
25th KJD/KIT/16112-3
26th KJD/KIT/3855
27th KJD/KIT/16077

Secondly, each one of the Plaintiffs has developed their land by building residential houses and farm structures. The estate is called Milimani Estate, Tuala Kajiado East Sub-County. Thirdly, their land is approximately 300 metres away from the constructed standard Gauge Railway Line from Nairobi to Naivasha on the Location known as AK9 to 17. The construction of the SGR reached the vicinity of the Plaintiff's property around December 2017. The construction of the SGR involved the excavation of rocks by way of blasting to achieve the gradient of the railway line. Fourthly, the blasting affected the Plaintiffs' house which developed cracks and other structural defects.

3. The 1st Plaintiff's house had the following damage caused by the blasting. Randomly cracked masonry walls exposing the mortar joints and sometimes breaking the building stones, fundamentally cracked concrete slabs, columns and beams to expose reinforcement bars which comprise the structural integrity of the buildings, punctured roof covering that exposes the houses to leakage, thus affecting the ceilings and buckling of walls for septic tanks and underground water tanks leading to massive leakages.



The recommended remedies included the following. Retrofitting of structural frame by installing steel beams to tie the building so as to avert its total collapse, new masonry walls in place of cracked walls, replacement of punctured iron sheets and refitting of ceiling boards, painting of walls to match what is existing, provision of alternative sewage disposal mechanism, provision of alternative water tanks in place of the leaking underground tanks and making good of any other miscellaneous repairs caused by the blasting to the electrical and mechanical systems. The estimated cost of the above repairs was Kshs. 3,019,212.00.

4. The damage caused to the 2nd Plaintiffs house was similar to that of the 1st Plaintiff and the recommended restoration was similar. The estimated cost of repair was Kshs. 2,608,137/=. A close look at the valuation report filed by the Plaintiffs will show that all the buildings had more or less similar defects. The randomly cracked masonry walls exposing the mortar joints and sometimes breaking the building stones, the fundamentally cracked concrete slabs, columns, beams to expose reinforcement bars which comprise the structural integrity of the buildings; the punctured roof covering that exposes the houses to leakage thus affecting the ceilings and the buckling of wall for septic tanks and underground water leading to massive leakages are common features in each of the individual report for each of the buildings.
5. The amounts claimed by the rest of the Plaintiffs are as follows;

Plaintiff Amount in Kshs.

3rd 2,247,525/=

6th 4,861,668/=

7th 2,225,916/=

8th 3,732,372/=

10th 2,014,425/=

11th 2,714,600/=

12th 2,208,465/=

13th 2,727,774/=

14th 1,709,883/=

15th No assessment

16th 3,582,935/=

17th 1,784,670/=

19th 7,271,645/=

21st 2,707,433.40

22nd 2,926,028/=

23rd 2,883,863/=

24th 2,683,674/=

25th 2,884,581/=

26th No assessment



27th 3,162,789/=

6. According to the Plaintiffs, the Defendant obtained an Environmental Impact Assessment Licence No. NEMA/EIA/PSL/4099 which had the following three clauses, among others.
 - a. Clause 1.2 and Clause 1.4, the Licence shall be valid for 24 months from the date of issue and the Defendant shall implement and maintain an Environment Management and Organization structure to achieve compliance with the conditions of E.I.A Licence.
 - b. Clause 1.8 provided that the Defendant shall submit an Environmental Audit report in the 1st year of operations to confirm efficacy and adequacy of the Environmental Management Plan.
 - c. Clause 2.11 provided that the Defendant shall ensure proper relocation, compensation and restoration of livelihoods of the project affected persons and develop a plan for emerging issues and redress mechanism.

It is the Plaintiffs' case that the Defendant failed to comply with the above conditions of the E.I.A Licence and this led to the deterioration of the Plaintiffs' livelihoods during the period of the construction.

Even though the Plaintiffs raised complaints with the Defendant, it failed to develop a consultative plan of the emerging issues relating to the damage to their houses, noise and air pollution.

7. In a bid to resolve the concerns, the Plaintiffs selected the 1st Plaintiff as the Chairman of Tuala Milimani Residents Association with the mandate of engaging the Defendant. In this connection, the Plaintiffs wrote a letter to the Defendant dated 23rd May 2019, requesting a second structural survey on the Plaintiffs' houses and farm structures. Earlier and prior to the commencement of the blasting, the Defendant had conducted a baseline survey of the Plaintiffs' houses and generated reports which demonstrated that they were in good condition. Furthermore, the Defendant and its agent, while conducting the baseline survey had informed the Plaintiffs that the blasting of the rocks would only cause minimal cracks to their property and that at the conclusion of the blasting, the Defendant would assess the damage and compensate all the Plaintiffs.
8. When the Defendant eventually responded to the Plaintiffs' request for compensation, it presented secretive and skewed valuation reports which were too meagre and unreasonable. They failed to take into account the probable damage caused on the foundation of the property and its impact; failed to capture the damage and the redemption necessary and did not consider the environmental and social impact compensation.
9. Before the filing of this suit, the Plaintiffs informed the Defendant of their rejection of the Defendant's valuation report and presented their own which the Defendant did not honour. Ultimately the Plaintiffs filed this suit when an out of court settlement failed.
10. In support of their cases the Plaintiffs filed the following evidence.
 - i. Witness statement by the 1st Plaintiff dated 31st January 2020.
 - ii. Witness statement by Masila Ngula dated 8th August 2020.
 - iii. Copy of the 19th Plaintiff's structural integrity report for building on L.R. No. Kajiado/Kitengela/21087.
 - iv. Copy of Bills of Quantities for proposed residential development on Plot No. Kajiado/Kitengela/21087.



v. Witness Statements by Prof. Odira, Grace Ndanu and Lewis Sitoki.

11. In its amended statement of defence dated 21st October 2021, the Defendant states as follows. Firstly, it denies the Plaintiffs' claim in its entirety. Secondly, the Defendant avers that no cause of action arises against it because it is merely an agent, the principal being the Government of Kenya. Thirdly, it is the defence case that the Plaintiffs' buildings and structures were illegal since the land on which they were built is agricultural under the *Physical and Land use Planning Act* yet the Plaintiffs did not have any valid change of user from Agricultural to Residential.

Furthermore, the structures were constructed without development permissions or occupation permits from the Director of County Government. Fourthly, the Defendant adds that it complied with all conditions issued by NEMA for the project and all applicable laws. Fifthly, the activities by the Defendant did not cause actionable levels of noise, dust pollution or the cracks to the Plaintiffs structures. Sixthly, it is the Defendant's case that the valuation reports by the Plaintiffs are fundamentally flawed and are not a fair estimate of the alleged damage.

12. Seventhly, the Defendant intends that it comprehensively addressed genuine issues and grievances by relocating, fully compensating and restoring the bona-fide project affected persons. Eighthly, the 4th, 5th, 9th, 15th, 18th and 20th Plaintiffs compromised their claims at Kshs. 357,050, Kshs.150,150, Kshs.663,630, Kshs.696,600, Kshs.138,050 and Kshs.600,325 respectively. The Defendant settled those claims. Ninthly, all the relevant stakeholders were consulted and participated in the Environment Impact Assessment. Finally, the Environment and Land Court does not have jurisdiction to grant the declaration sought since the Environmental Management and Coordination Act reserves the primary jurisdiction for the National Environment Management Authority(NEMA) and National Environment Tribunal (NET).

For the above and other reasons, the Defendant prays for the dismissal of the Plaintiffs' suit with costs.

13. In support of its case, the Defendant filed the following evidence.
- i. Copies of agreements between the Defendant and the 4th, 5th, 9th, 15th, 18th and 20th Plaintiffs showing that the accepted settlements of Kshs. 357,050, Kshs.696,600/=, Kshs.138,050/= and Kshs.479,875/= respectively.
 - ii. Summary reports for blasting operations conducted between 14th November 2018 at 11:30 hours and 15 February 2019 at 12:20 hours. The total number of blasting operations was twelve (12).
 - iii. Final report of assessment of blasting vibrations damage complaints in Oloosirkon and Kibiko areas dated June 2020.
 - iv. Report of visual assessment and associated costs for damages associated with blasting activities at various homes in Tuala, Kajiado County dated October 2022.

14. At the trial on 17/7/2021, 4/11/2021, 23/3/2022 and 14/3/2021, the Plaintiffs called four witness while the Defendant, called two. The Plaintiffs' witnesses included William Mungai, Jeniffer Musyimi, Stanislans Masila and Professor Odira. The Defendants' witnesses were Dan Odera and Ann Omufira.

The Plaintiffs' witnesses merely reiterated the Plaintiffs' claim for repair of their houses to the condition before the damage and compensation for environmental social and economic damages in the sum of Kshs. 96,797,964.00 or in the alternative the same sum of Kshs. 96,797,964 in general damages for distress pain and suffering.



On the part of the Defendant's witnesses, they disagreed with the claims by the Plaintiffs as per the written defence. They blame the damage on poor workmanship, method of construction and the materials used. According to the witnesses the cracks observed on the floor, windows and walls are superficial and they do not affect the structural integrity of the buildings. The quantity surveyor called by the Defendant differed with the opinion of the one called by the Plaintiff. While the Plaintiffs' Quantity Surveyor recommends a process called underpinning, the Defendant's quantity surveyor says that such a process should only be recommended by a structural engineer. In this case, there is no such a recommendation. Underpinning involves exposing the foundation as one repairs the superstructure. In repair of superficial cracks like the ones in this case, a rich mixture of plaster and fiber mesh is sufficient. In the assessment of the Defendant's Quantity Surveyor, the quantities in the report of the Plaintiffs Quantity Surveyor are exaggerated and some of the prices were on the higher side. The other differences between the two reports are as follows. Firstly, the Defendant's Quantity Surveyor visited the ground while the Plaintiffs' did not. Secondly the Plaintiff's Miscellaneous item is a lumpsum while the Defendant's is broken down and thorough. Thirdly, Professor Orina's house is far from the blasting and therefore not affected by the same. Fourthly, the recommendation by the Plaintiff's Quantity Surveyor to prop, strut, break the column to expose the steel bar, pour a mixture of concrete and add structural steel members to support the structure are all not necessary because they are not recommended by a structural engineer. Fifthly in all the houses, the Defendant's Quantity Surveyor recommended a bio-box which is more competitive. Sixthly, it is cheaper to paint an existing wall than a new one because an existing one does not require sanding. Seventhly, none of the houses was built with structural steel which is more expensive than ordinary steel and none of the Plaintiffs' houses was condemned.

15. The case was referred to Alternative Dispute Resolution (ADR) but there was no settlement. There is however an umpire's report dated 14/9/2023 which was produced by the consent of both parties to form part of the court record.
16. Counsel for the parties filed by written submissions dated 10/9/2024 in the case of the Defendant and 4/12/2024 on the part of the Plaintiffs. The issues identified for determination are as follows.
 - a. Whether the ELC has Jurisdiction to grant prayer No. (a) and (b) of the amended Plaint seeking a declaration that the Defendant breached three clauses of the EAI Licence and Environmental restoration order respectively.
 - b. Whether the Plaintiffs discharged their burden of proving the alleged EAI Licence and the Law in place.
 - c. Whether the Court has jurisdiction to find the Defendant liable under any other cause of action if the Plaintiff has not pleaded it.
 - d. Whether the doctrine of *Ex turpi causa non oritur actio* prohibits the Plaintiffs from claiming compensation for illegal structures.
 - e. Without prejudice to the objection to jurisdiction, whether the activities of the Defendant caused the alleged damage to the structures.
 - f. Further, without prejudice to denial of issues (a) to (e) above, what is the cost of repairing or replacing.
 - g. Whether the Plaintiff proved the special damages of extra expenses allegedly arising from breach of conditions of EIA Licence.



- h. Whether the Defendant is liable to pay the costs of the Plaintiffs’ Structural Engineer and Environmental expert.
 - i. Who should pay costs.
17. I have carefully considered all the evidence adduced in this case by both sides including the witness statements , documents and the testimonies of the six witnesses who gave evidence. I have also considered the written submissions filed by the learned Counsel for the parties as well as the law cited therein. I agree with the learned Counsel that the issues identified by the Defendant’s Counsel will determine the dispute. I make the following findings on the Nine(9) issues.
18. On the first issue, I find that this Court has no Jurisdiction to grant prayers (a) and (b) in the amended plaint dated 19th May, 2021. It is trite law that the only jurisdiction that this court has under EMCA is appellate and not original. See Section 130 of the Act which provides as follows;

“(1) Any person aggrieved by a decision or order of the Tribunal may within thirty days of such decision or order, appeal against such decision or order to the High Court”.

The National Environment Management Authority established under Section 7 of the *Environmental Management and Co-ordination Act* (NEMA) is the body with the mandate to exercise general supervision and coordination over all matters relating to the environment and to be the Principal instrument of Government in the implementation of all policies relating to the environment.

It has been held in the case of Mutanga Tea and Coffee Company Limited =v= Shikara Limited and another Mombasa Civil Appeal No. 54 of 2014 and other cases that;

“Where there is a clear procedure for redress of any particular grievances prescribed by *the Constitution* or an Act of Parliament, that procedure should be followed strictly.....”

I am persuaded by the submissions, by the Defendant’s Counsel on this issue. Prayers (a) and (b) in Paragraph 25 of amended plaint dated 19 May, 2021 are not for granting. This finding necessarily applies to the second issue which is ancillary to the first. Since the court has no jurisdiction in regard to the EAI licence and environmental restoration order, then the burden of proof in regard to the EIA licence has not been discharged.

19. As for the third issues, I find that this court has jurisdiction to find the Defendant liable for other causes of action. Firstly, under Article 162 (2) (b) of *the Constitution*, this court has jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to land. Secondly, under Section 13 (7) (c) of the *Environment and Land Court Act (Act No. 19 of 2011)* this court has power to award damages among other powers. Thirdly, my understanding of the Plaintiffs’ claim is that it arises from their occupation of their land. This, therefore places their claim right within the jurisdiction of this Court.
20. The Principle of “Ex turpi causa nor oritur actio”, which means, “no action can arise from an illegal act”, does not apply in this case for the following reasons. Firstly, the Plaintiffs have not been found to have committed any illegal act. They own the land which they occupied at the time the cause of action arose. The fact that they may not have approved plans does not make their buildings illegal. Secondly, the Defendant’s own witness, Ann Omufira, said that the houses, which she inspected, were structurally sound and none of them was condemned. It is not therefore, correct to say that the buildings are illegal. Thirdly, in my finding, the principle would apply if the Plaintiffs were trespassers



on the Defendant's land and they brought this suit against the Defendant. For the above stated reasons, the principle of "ex turpi causa non oritur actio" has no place in this case.

21. As for the fifth issue of whether the activities of the Defendant caused the alleged damage to the Plaintiffs' structures, I find that they did, for the following reasons. Firstly, the Defendant has admitted vide Paragraph 11(a) and (b) of the amended statement of defence dated 21st October, 2021 to have settled the claims by the 4th, 5th, 9th, 15th, 18th and 20th Plaintiffs. This would not have happened if the Defendant's activities did not cause the damage complained of. We have evidence from the 1st Plaintiff that all the Plaintiffs live in one estate. Secondly, at Paragraph 11 of the same defence, the Defendant admits that it relocated, fully compensated and restored the bona fide project affected persons. This means that the Defendant's activities caused damage in the area. Thirdly, there is no way all the houses in the estate would suffer similar damages only after the Defendant's blasting activities. From Paragraph 11 of the defence it seems to me that more people than the 27 Plaintiffs in this case were affected by the Defendant's activities. It is therefore obvious that were it not for the Defendant's activities, the homes of the Plaintiffs would not have suffered the damage that they did.
22. On the issue of the costs of the restoration of the homes, I find that both the Plaintiffs and the Defendant have gone the extremes. The Plaintiffs claim for the restoration to include structural steel when their houses did not have structural steel in the first place is to ask for more than restoration. What the Plaintiffs are entitled to is "restitutio in integrum" which is restoration to the original condition. What they are asking for is more than they are entitled to. On the other hand, I find that the awards proposed by the Defendant are way below what is reasonable compensation to restore the Plaintiffs to their original positions. What is offered is too meagre. In the case of Amosam Builders Developers Ltd Vs Betty Ngendo Gachie and 2 Others, Nakuru Civil Appeal No. 193 of 2001,(2009) eKLR, the Court of Appeal had this to say in part.

"The Court is at liberty to accept or reject evidence of experts depending on the circumstances of the case before it.....in the case before us there is a conflict of opinion by the experts called by both sides. It was the responsibility of the trial court to come to a decision one way or the other after analyzing all the evidence before it...."

In this case, the Plaintiffs' and the Defendant's experts do not agree. The Court is entitled, for good reason, to reject the two reports by the quantity surveyors of the two parties.

23. I reject the two reports for the two reasons. Firstly, they are so different that they could not possibly be referring to the same property. Secondly it seems that each expert bent to the whims of the party that hired them and therefore lost their objectivity. Thirdly, there exists an umpire's report which provides a middle ground between the two extremes presented by the two parties. I find the umpire's assessment fair and reasonable bearing in mind that she was not hired by either of the two parties. The report is backed by a visit to the locus in quo and an inspection of the premises.
24. Coming to the question of compensation for environmental, social and economic damages in the aggravated sum of Kshs. 96, 797,964.00, I find that they are not proved for the following reasons. Firstly, the particulars of environmental, social and economic damages suffered by each of the Plaintiffs ought to have been pleaded as required by Order 2 rule 10 of the Civil Procedure Rules which provides as follows.

10. "Subject to Subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded....."

In this case the noise pollution and the dust pollution suffered by each Plaintiff ought to have been particularized. The amended Plaint dated 19th May 2021 does not contain the particulars of even one



of the Plaintiffs. Secondly, no evidence was adduced to prove the loss referred to above. Only one of the Plaintiffs testified and though he talked of loss of livelihood in his poultry business, he had no farm records to back his claim. The claims by the rest of the Plaintiffs cannot be found in the body of the Plaint or in the evidence adduced on their behalf. No medical doctor testified to prove any impairment in the sight or the hearing of any of the Plaintiffs.

25. On the penultimate issue of the costs of the Plaintiff's structural engineer and the environmental expert, I find that the Defendant is liable to pay the said costs for the simple reason that the Plaintiffs are the successful parties in this case. They have been awarded higher awards than those proposed by the Defendant. Under the proviso to Section 27(1) of the Civil Procedure Act, costs follow the event. In this case, there is no reason why they should not.
26. On the final issue, I find that it is the Defendant to pay the costs of the suit for the same reasons that I have given in the foregoing paragraph.
27. In conclusion and for the reasons already given I enter Judgement for the Plaintiffs against the Defendant as follows.

Plaintiff Amount in Kshs.

1st 1,376,400/=

2nd 1,386,000/=

3rd

6th 2,046,400/=

7th 1,453,600/=

8th 1,661,200/=

10th 975,000/=

11th 1,688,900/=

12th 685,000/=

13th 878,000/=

14th 1,041,000/=

15th

16th 1,515,000/=

17th 961,000/=

19th 2,250,000/=

21st 1,285,000/=

22nd 2,369,400/=

23rd 1,876,500/=

24th 941,000/=

25th 1,742,000/=

26th



27th 1,558,500/=

The Plaintiffs will also have the costs of the suit and interest.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF FEBRUARY, 2025.

M.N. GICHERU

JUDGE

10/2/2025

Delivered online in the presence of; -

Court Assistant – Mwangi Njonjo

Plaintiffs' Counsel – Mr Chenge Advocate

Defendant's Counsel – Mr Ondego Advocate

