Winds of Change Limited v Kenya Rural Roads Authority & another (Environment and Land Appeal E006 of 2024) [2025] KEELC 1060 (KLR) (Environment and Land) (6 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1060 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND APPEAL E006 OF 2024

MC OUNDO, J

MARCH 6, 2025

(FORMERLY NAKURU ELC APPEAL NO. 23 OF 2023)

BETWEEN

WINDS OF CHANGE LIMITED ..... APPELLANT

AND

KENYA RURAL ROADS AUTHORITY ..... 1ST RESPONDENT

SS MEHTA & SONS CONSTRUCTION COMPANY LIMITED .... 2ND RESPONDENT

(An Appeal against the Judgement and Decree of the Honourable Mr. Yusuf Barasa, issued on the 7th March 2023 in Naivasha CMELC Number 10 of 2020)

JUDGMENT

1. Coming up for determination on Appeal is a matter which was heard and determined by Hon. Y.M Barasa, Principal Magistrate wherein upon considering the evidence of both parties, vide his Judgment dated 7th September, 2023, the learned Magistrate allowed the Plaintiff's claim against the 1st Defendant where it was awarded Kshs. 200,000/= as general damages for nuisance. The claim against the 2nd Defendant as well as prayers (a), (b), (c) and (f) of the Plaint was dismissed with no order as to costs. Each party was ordered to bears its costs.

2. The Appellant, being dissatisfied with the Judgement and Decree of the trial Magistrate has now filed the present Appeal based on the following grounds in its Memorandum of Appeal:

    i. The Learned Trial Court erred in fact when it found and held that it was not disputed that the culvert that was the subject of the proceedings before the court was already in existence at the

time of the rehabilitation of the Moi South Lake Road, when the issue of the existence of the culvert was in fact disputed by the Appellant.

ii. The learned Trial Court erred in fact and in law when it found and held that it was not disputed that the culvert that was the subject matter of the proceedings before the Court was already in existence at the time of rehabilitation of the Moi South Lake Road when the Appellant had adduced evidence to demonstrate that the culvert was not in existence prior to the rehabilitation of the Moi South Lake Road, which evidence was not disputed by the Respondents.

iii. The learned Trial Court erred in fact and law in refusing to issue an order of mandatory injunction for the removal of the culvert obstructing the Appellant's access to its premises being Land Reference Numbers 6785/6, 7, 8, 9 and 10 on the basis that the culvert that was subject of the proceedings was already in existence prior to the rehabilitation of the Moi South Lake Road, when there was no evidence of the culvert being in existence prior to the rehabilitation of the Moi South Lake Road.

iv. The Learned Trial Court erred in fact and in law in refusing to issue an order of a permanent injunction restraining the Respondents from obstructing the Appellant's access to its premises on the basis that the culvert that was subject of the proceedings was already in existence prior to the rehabilitation of the Moi South Lake Road when there was no evidence of the culvert being in existence prior to the rehabilitation of the Moi South Lake Road.

v. That the learned Trial Court erred in fact and in law in holding and finding that the impugned culvert was indeed a nuisance as it discharged water on the Appellant's premises, which caused and continues to cause interference with the Appellant's use and occupation of the premises, but ironically failing to make appropriate order for the removal of the offending culvert.

vi. The learned Trial Court erred in fact and in law by finding and holding that there was no evidence that the Respondents trespassed on the Appellant's premises, and in the same breath holding that the culvert is a nuisance, discharged water into the Appellant's premises, which caused and continues to cause interference with the Appellant's use and occupation of the premises.

vii. The learned Trial Court erred in law by awarding the Appellant a sum of Kshs. 200,000/= as general damages on account of the nuisance caused by the culvert facing the Appellant's premises directly, as the said assessment of damages was inordinately low in the circumstances of this case.

viii. The learned Trial Court erred in law in failing to award the Appellant costs of the suit on the grounds that the case involved public interest when the case was initiated by the Appellant with respect to its private property and its right to own and enjoy quiet possession of its premises as protected under Article 40 of *the Constitution* of Kenya.

ix. The learned Trial Court erred in fact and in law in dismissing the suit against the 2nd Respondent, S.S, Mehta & Sons Construction Company Limited when the 2nd Respondent was equally liable for the tortious acts committed against the Appellant and in particular oversaw the construction of the offending culvert that blocked the Appellant's access to its premises.

3. The Appellant thus sought for the following orders:

i. That the appeal be allowed.

ii. A mandatory order of injunction compelling the Respondents to forthwith remove the stormwater drainage on the Moi South Lake Road hindering access to the Appellant's properties known as Land Reference Numbers 6785/6, 7, 8, 9 and 10, the said removal to be done at the Respondents' costs.

iii. A permanent injunction restraining the Respondents and/or their authorized servants, agents, or employees from in any way obstructing the Appellant's access to the properties known as Land Reference Numbers 6785/6, 7, 8, 9 and 10 (the properties)

iv. The costs of the Appeal and the proceedings in Naivasha Chief Magistrate's Environment and Land Court Case Number 10 of 2020 be awarded to the Appellants.

4. The Appeal was admitted on 2nd October, 2024 and directions issued for the same to be disposed of by way of written submissions wherein the parties complied and filed their submissions which I shall summarize as herein under:

Appellant's submission

5. The Appellant's founded its submission on the decided case of Selle v Associated Motor Boat Co. Ltd (1968) EA 123, 126 to the effect that this being a first appeal, the court's duty was to review the evidence adduced before the lower court and satisfy itself that the decision of the Court was well founded. That the court was not duty bound to necessarily accept the findings of fact by the court below since an appeal to the court from the lower court was by way of re-trial. That the court ought to re-consider the evidence, evaluate it itself and draw its own conclusion. The Appellant then proceeded to submit on each head of the condensed grounds of appeal.

6. On Ground 1 of appeal as to whether the trial court had erred in fact by holding that the Culvert had existed prior to the rehabilitation of the road, the Appellant submitted that the erroneous finding of fact by the trial court ran contra to the Appellant's uncontroverted evidence, and had not been supported by any of the parties' evidence before the Court. That whereas PW1 and PW2's evidence was to the effect that the culvert had been constructed during the rehabilitation of the Road in the year 2020, shortly before the filing of the suit in the lower Court, the Respondents did not provide any proof that the Culvert had existed prior to the complaint by the Appellant. The lower court had thus made a glaring error of fact in finding otherwise.

7. That since it was trite law that legal burden rested with the person alleging facts, where the said allegation had ben proved to the required standards in law, the burden to prove otherwise rested on the Respondents who did not disprove the fact that had been alleged by the Appellants. That the erroneous finding of fact by the trial court was the cause for its refusal to grant the Appellant injunctive reliefs as sought in the Plaint hence it was imperative that the court upsets this finding of fact by the trial court.

8. That the Appellant having demonstrated a strong prima facie case that its right had been infringed by the Respondents, who had blocked the only legal access to its properties on the account of the construction of the Culvert, which fact the trial court had found and held to constitute a nuisance on the properties, the trial court had thus erred in failing to issue the injunctive reliefs sought by the Appellant. Reliance was hinged on a combination of decisions in the case of Kenya Breweries Ltd & Another v Washington O. Okeyo [2002] eKLR and Locabail International Finance Ltd v Agroexport and others (1986) 1 ALL ER 901.

9. That the Appellant run cottages on the properties thus the continued obstruction of the properties was likely to continue to cause the Appellant serious loss and damage such that it would be difficult for the Respondents to compensate the same. That in the unlikely event that Respondents would be able to

compensate the Appellants, the said Respondents should not be allowed to maintain an advantageous position in law simply because they could pay for it.

10. That the balance of convenient had been in favour of allowing the Application for injunction since the culvert that allowed storm water and excess to drain at the mouth of the Appellant's premises was of a permanent nature and the Respondents would not re-construct the cross culvert or storm water drainage unless they were compelled to do so by the Court.

11. On the third ground of its Memorandum, the Appellant submitted that the trial court had erred in dismissing the suit as against the 2nd Respondent who was an agent of the 1st Respondent and who in its professional capacity could be held liable for its wrong actions of the negligent construction of the Culvert at the opening of the access Road to the properties. That whereas it was a generally accepted legal principle that an agent of a disclosed principal could not be sued, the said rule of law was not absolute. That in the instant case, the actions that had been complained of by the Appellant as against the Respondents were of a tortious nature, in particular the nuisance that had been caused by the construction of the Culvert.

12. It placed reliance in the decided case of Unilever Tea Kenya Limited v National Land Commission & 2 others [2018] eKLR and the Halsbury's Laws of England, 5th edition at page 121 to submit that an agent was liable for tortious act. That had the learned trial court properly directed itself to the above legal precedents, it would have found and held that the 2nd Respondent, admittedly being an agent of the 1st Respondent, was equally liable for the loss, damage and harm that had been suffered by the Appellant on account of the construction of the culvert. That at the very least, it was the duty of the learned trial court to record its reasons for the dismissal of the suit against the 2nd Respondent and the dismissal of the suit against the 2nd Respondent had no basis in law.

13. As to whether the trial court had erred in law by awarding the Appellant the inordinately low amount of Kshs. 200,000/= as damages, while placing reliance on a combination of decisions in the case of Mahendrakumar Keshavlal Ladha Shah & Sushma Mahendrakumar Shah v Peter Kinoro Mwicigi [2021] eKLR and John Chumia Nganga v Attorney General & another [2019] eKLR the Appellant submitted that the trial court had the jurisdiction to award a much higher sum than Ksh 200,000/=.

14. On Ground 5 of appeal as to whether the trial court had erred in law by failing to award the Appellant costs of the suit, reliance was placed on the provisions of Section 26(1) of the *Civil Procedure Act* to submit that the learned trial court was duty bound to award costs to the Appellant since it had been successful in its suit that had sought the intervention of the Court in protecting its private right.

15. The Appellant concluded by submitting that the totality and weight of the evidence that had been presented before the trial court, had met the threshold in law to be allowed in full. It thus sought that the instant Appeal to be allowed as prayed, with an order of costs.

1st Respondent's Submissions.

16. In response to and in opposition to the Appellant's Appeal, the 1st Respondent's submission and issues for determination was as per the grounds of Appeal in the Memorandum of Appeal.

17. That the trial court had not erred in holding that the culvert had existed prior to the rehabilitation of the road, as the said finding had been based on the uncontroverted evidence produced before the court which had included pleadings, documentary evidence, witness testimonies and a site visit that had been conducted on 3rd March, 2023.

18. While placing reliance on a combination of decisions in the case of Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) and Taura Mtsanganyiko v Julius Jumbae Mundu [2017] eKLR, the 1st Respondent invited the court as a first appellate court, to scrutinize the evidence produced in the trial court by the parties, consider the pleadings, and the site visit that had been conducted on 3rd March, 2023 and reach the same finding of the trial court that the culvert had existed prior to the rehabilitation of the road.

19. That indeed, the appellate court could not readily interfere with findings of fact by the trail court, on the issue of the existence of the culvert prior to rehabilitation of the road because it was an issue of fact in respect of which the trial court had made a proper finding. It submitted that the works that had been undertaken on the disputed area had been rehabilitation and maintenance work of an already existing road and incidental structures such as the culvert. That the 1st Respondent did not undertake fresh construction of the culvert.

20. Secondly that the trial court had not erred in failing to issue injunctive reliefs that had been sought by the Appellant, this was because the Appellant had failed to meet the threshold for the grant of the said injunctive orders as was held in the decided case of INN v NK [2020] eKLR which had cited the case of Lucy Wangui Gathara v Minudi Okemba Lore [2015] eKLR.

21. That it had been in the best interest of the public that the culvert be rehabilitated as the area had been prone to flash floods which caused flooding on the road that was used by the residents of the area. That the culvert had had thus been rehabilitated strictly within the road reserve and not on the Appellant's properties thus the 1st Respondent had not trespassed and/or blocked access to the said properties so as to warrant the grant of mandatory injunction to remove the culvert. That in any event, the Appellant's properties being situated at the lower point of the road, an accumulation of storm water was occasioned by natural causes out of control of 1st Respondent.

22. That Appellant's claim for an injunction had thus been overtaken by events since the rehabilitation of the same had been completed on 24th February, 2020 and therefore the trial court could not issue an order to restrain what had already happened. Reliance was placed in the decided case of PAK & an*other v Attorney General & 3 others (Constitutional Petition E009 of 2020*) [2021] KEHC 262 (KLR)

23. While placing its reliance on the decided case of Paul Gitonga Wanjau v Gathuthi Tea Factory Company Limited & 2 others [2016] eKLR the 1st Respondent's submission was that the Appellant had failed to prove that it had suffered injury, the culvert having been in existence prior to the rehabilitation of the road. That the cottages run by the Appellants were accessible through an alternative route known as access to Naivasha County Club.

24. That the Appellant could not seek monetary damages for an obstruction to access its properties when it had been clear from the evidence that had been produced in the trial court that there had been no obstruction by the 1st Respondent as the culvert had existed prior to rehabilitation of the road. That further, the Appellant had failed to demonstrate that the balance of hardships tilted in its favour. That indeed, the balance of hardship tilted towards the 1st Respondent as the maintenance and rehabilitation of the culvert had been done for the protection of the public who would be affected by the flooding of the road as the area was prone to flash floods which issue the trial court had noted. That it was thus clear that the trail court had made a correct, proper and reasonable finding in refusing to grant the injunctive orders as had been sought by the Appellant.

25. On whether the Appellant had been entitled to a sum of Kshs. 200,000/= for nuisance, the 1st Respondent submitted that the trial court had reached a proper and reasonable finding in awarding

the said amount since it had been guided by the John Chumia Ng'ang'a's case (supra) where the court had awarded damages of Kshs. 100,000/= thus the trial court in considering the inflation had awarded a sum of Kshs. 200,000/=. That in any case, the Appellant had failed to demonstrate the value of the nuisance. That further, the Appellant had not been specific in its plea for general damages as to whether it had been for nuisance or trespass as had been noted by the trial court hence the court had been lenient to the Appellant in considering their prayer for general damages and awarding damages of Kshs. 200,000/= for nuisance as it had an option of dismissing the prayer for not being specific. Reliance was placed in the Mursal case (Supra) to the effect that award of damages was an exercise of discretion of trial court. That court's award of Kshs. 200,000/= in damages had been just, fair and reasonable as it had been guided by case law where the court had also taken into consideration the current inflation rates as required by law.

26. As to whether the trial court had erred in ordering parties to bear their own costs of the suit, the 1st Respondent, while hinging its reliance in the decided case of Hermanus Phillipus Steyn v Giovanni Gnnecchi-Ruscone; Sup Ct APPL No. 4 of 2012 [2013] (Tunoi, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ) submitted that the trial court had found that the case involved public interest where the primary concern had been the rehabilitation of an already existing culvert on a public road for purposes of channeling stagnant water on the road to Lake Naivasha, so as to protect the general public who used the road, from negative effects of flooding of road. That further, the case had involved public interest since the 1st Respondent was a state corporation established under the *Kenya Roads Act* No. 2 of 2007.

27. That in any case, the trial court having found that the Appellant had only partially succeeded, it would not be in the interest of justice to award costs since the injunctive orders had failed. That subsequently, the trial court's order that parties bear their own costs had been just and fair given the circumstances of the case.

28. In conclusion, it submitted that the Appellant had failed to demonstrate that the trial court's judgement dated 7th September, 2023 had been unfair, unjust, improper or unreasonable to warrant interference by the Appellate court. It thus urged that the instant Appeal be dismissed with costs to the 1st Respondent.

2nd Respondent's Submissions.

29. The 2nd Respondent's opposition to the Appellant's Appeal was first based on the decision in the case of Mugacha v Kyenza (Civil Appeal E085 of 2023) [2024] KEHC 10651 (KLR) (CIV) (13th September 2024) (Judgement) to submit that that the 1st appellate court was under an obligation to re-evaluate and assess the evidence and make its own conclusion while bearing in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

30. On Grounds 1 and 2 of appeal, the 2nd Respondent submitted that the trial court had rightly found that the culvert had been in existence before rehabilitation of the road and that the area was prone to flash floods which posed a danger of flooding the road hence a decision to rehabilitate and widen the culvert. That indeed, throughout the hearing in the lower court, the Respondents had maintained that Moi South Lake Road had not been a new road and that the constructions and repairs that had been undertaken had involved the replacement of old culverts with new ones. That during the site visit on 3rd March, 2023, in the presence of the learned Hon. Magistrate, DW2 had pointed out and showed the learned Magistrate a previous existing culvert of 600mm in diameter, which had been replaced with a new one of 900mm diameter.

31. That the learned Magistrate having personally observed that the disputed culvert had been in existence even before the rehabilitation of the road, the Appellant could not now argue that the learned Magistrate had erred in concluding that the culvert had been replaced. That the court should find as such.

32. On Grounds 3, 4 and 5 of Appeal seeking injunctive reliefs and damages for trespass, the 2nd Respondent submitted that the construction of the culvert complained of had been completed in February 2020 as had been evidenced by the approval of work dated 27th February, 2020 wherein the completion of the entire road had been on 3rd March, 2021 wherein the 1st Respondent, having confirmed that the repairs and construction had been carried as per its instructions, had accepted the work and officially taken over the road on 21st December 2021.

33. That subsequently the Appellant sought injunctive orders over an event that already taken place. Reliance was placed in the decided case of Nyote Muhia v Lydiah Wairimu Kagodo & 2 others [2019] eKLR to submit that a court could not issue injunctive orders to restrain an event that had already occurred. That in any case, as it had been held by the learned Magistrate, that the disputed culvert had been constructed within the road reserve which finding had not been disputed by the Appellant. That in fact the learned Magistrate had concluded that he could not issue an order for a mandatory injunction to remove the disputed culvert, as the public interest outweighed private rights. That since there was no dispute that all the repairs to the road, including the disputed culvert, had been carried out within the road reserve, the Appellant could not claim trespass by the Respondents. Reliance was [placed on the decision in Mathare Quick Service Linited & 7 others [2016] eKLR to submit that pubic interest must override any private rights.

34. That further an injunctive order against the 2nd Respondent would be unenforceable and should not be issued since it no longer controled, possessed or had any authority over the said road. Reliance was placed in a combination of decisions in the case of Erick Makokha & 4 Others v Lawrence Sayani & 2 Others [1994] eKLR and Eunice Grace Njambi Kamau & another v Kenya National Highways Authority & 3 others [2022] eKLR. It submitted that the Appellant had failed to lay a proper basis to prove entitlement to the injunctive orders against the 2nd Respondent.

35. The 2nd Respondent's submission was that the trial court had not erred in dismissing the Appellant's case against it because the evidence that had been tendered was that it had acted as a disclosed agent of the 1st Respondent wherein it had carried out the rehabilitation of the Moi South Lake Road under the instruction and supervision of the 1st Respondent. No evidence had been adduced by the Appellant to show that the 2nd Respondent had acted outside the scope of the instruction by the 1st Respondent. Reliance was placed on the decisions in the case of Satellite Aviation Telecommunications System Limited v Kenya Railways Corporations & another [2020] eKLR among others. That the Appellant had failed to establish a case against the 2nd Respondent hence the trial court had correctly dismissed its suit against the 2nd Respondent.

36. On Grounds 7 of the Appeal on general damages and costs, the 2nd Respondent submitted that the Appellant's claim for an award of Kshs. 1,000,000/= instead of the Kshs. 200,000/= as awarded by the trial court lacked merit. That there had been no evidence to suggest that the trial court had applied any wrong principles in its assessment, nor had there been any indication that the awarded sum had constituted an erroneous estimate of damaged. That the case of Mahendrakumar Keshavlal Ladha Shah's (supra) relied upon by the Appellant in support of its claim for Kshs. 1,000,000/= was distinguishable for in that case, the Defendant had trespassed on the suit property and erected illegal semi-permanent structure whereas in the present case, the disputed culvert had been located on the

road reserve. It thus urged the court to decline the Appellant's invitation to disturb the award of Kshs. 200,000/= in general damages that had been awarded by the trial court.

37. On Grounds 8 of the Appeal with regard to costs. The 2nd Respondent's submission was that an award of costs was a discretionary matter where the appellate court should not interfere unless it was demonstrated that the decision had been made whimsically or injudiciously. Reliance was placed in the decided case of Kimani v Gilanis Supermarket Ltd (Civil Appeal 169 of 2019) [2023] KECA 1145 (KLR) (22 September 2023) (Judgement). That there had been no such evidence hence the trial court's exercise of discretion in ordering each party to bear its costs should not be interfered with.

38. In conclusion, the 2nd Respondent submitted that the Appellant had not established that the impugned judgement had plainly been wrong to warrant interference by the court and therefore the present Appeal should be dismissed with costs.

Summary of evidence tendered before the trial court;

39. I have considered the record of Appeal, the holding by the trial Magistrate,

> the written submissions by learned Counsel and the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision Appealed against, assess it and make my own conclusions as was stated by the Court of Appeal in Paramount Bank Limited vs. First National Bank Limited & 2 Others (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR) where the court held as follows;
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> > " A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the *Civil Procedure Act*, a first Appellate Court can appreciate the entire evidence and come to a different conclusion."

40. According to the proceedings, the Appellant herein instituted the suit against the 1st and 2nd Respondents herein in CMCELC No. 10 of 2020 vide a Plaint dated 4th March, 2020 wherein it had sought for the following orders;

    i. A permanent injunction restraining the Defendants, whether by themselves and/or their servants, agents or other person under their control from continuing with the construction of the storm water drainage impending the Plaintiff's access to its suit properties known as Land Reference Numbers 6785/6, 7, 8, 9 and 10.

    ii. A mandatory order of injunction compelling the Defendants to forthwith remove the storm water drainage on the Moi South Lake Road hindering access to the Plaintiff's properties known as Land Reference Numbers 6785/6, 7, 8, 9 and 10, the said removal to be done at the Defendant's costs.

    iii. A permanent injunction restraining the Defendants and/or their authorized servants, agents or employees from in any way obstructing the Plaintiff's access to the properties known as Land Reference Numbers 6785/6, 7, 8, 9 and 10.

    iv. General Damages.

v. Costs of the suit.

vi. Interest on (iv) and (iv) above at Court rates from the date of filing of the suit until payment in full, and

vii. Any other order or relief the Honourable Court may deem fit to grant.

41. Subsequent to the filing of the suit, the 1st Defendant had filed its Statement of Defence dated 25th February, 2021 wherein it had denied the allegations contained in the Plaint putting the Plaintiff to strict proof while stating that it had been undertaking the rehabilitation and maintenance works which had only involved the repair of the already existing road and incidental structures hence it had not been undertaking any new construction of drainages. That the Plaintiff's property was situated at the lowest point of the road and therefore, any accumulation of storm water had been occasioned as a result of natural causes totally out of control of the 1st Defendant.

42. That it had not been liable for any actions that had restrained the Plaintiff from accessing the suit property. That further, there had been efforts by the 1st Defendant to amicably resolve the dispute through a stakeholder meeting that had been held on 31st March, 2020 where it had been proposed that the water be channeled to the lake through the boundary between Block Hotel and Kenya Wildlife Service Premises. That it had also attempted to resolve the dispute by planning to excavate and line with stone pitching an out fall drain all the way to the lake hence eliminating any adverse condition to the surrounding area, which had required the Plaintiff's consent and which consent had not been acquired.

43. It thus prayed that the Plaintiff's suit be struck out and/or dismissed with costs to the 1st Defendant.

44. The 2nd Defendant on the other hand vide its Statement of Defence dated 25th January, 2022 also denied the allegations contained in the Plaint putting the Plaintiff to strict proof while stating that under the instruction of the 1st Defendant, it had constructed a cross culvert of 900mm in diameter within the road reserve for drainage of the road at km 3 +187 (the 'culvert complained of') which had been constructed on the lowest point of the road hence it did not obstruct or divert the natural flow of water to the alleged Plaintiff's properties. That subsequently, if at all any loss had occurred, then the same had been an act of God caused by circumstances beyond its control.

45. He outlined the events leading to the construction of the Culvert complained of and then stated that it had acted on authority and supervision of the 1st Defendant in accordance with the instructions that had been provided by the 1st Defendant thus any claim against it lacked merit and therefore the claim for orders of injunction, general damages and costs as had been pleaded in the Plaint were not sustainable. That further, the honorable Court lacked jurisdiction to hear and determine the matter against it by virtue of the provisions of Section 67 of *Kenya Roads Act* No. 2 of 2007. That the court also lacked jurisdiction to entertain the suit for failure to comply with the provisions of Order 4 Rule 1 (2) and (4) of the Civil Procedure Rules.

46. That prior to the commencing of the instant suit, it had not been made aware of any effort to settle the matter amicably hence it would not have made good the Plaintiff's claim.

47. In response to the defence herein above filed, the Plaintiff reiterated the contents of its Plaint stating that the 2nd Defendant had neither been absolved from its negligent actions nor liability on account of its wrongful actions by reason of the alleged instructions and approval by the 1st Defendant and sought for judgement against the Defendants jointly and severally as prayed

48. The case proceeded for hearing wherein Patrick Mbugua Kinuthia, the Plaintiff's General Manager adopted his witness statement as his evidence in chief and sought to produce the documents filed. He then proceeded to testify as PW1 to the effect that in the year 2020 when the 1st Defendant begun repairing Moi South Lake road, he had been informed that a culvert directed to the Plaintiff was being constructed. That despite showing the surveyor's map to the engineer in charge informing him that the culvert would make the road inaccessible wherein the water would flood from the lake, the construction had continued.

49. That he had then showed him the access road and told him that the same led to people's properties wherein they had organized a meeting with the neighborhood on 16th March, 2020 in wherein in attendance were KWS, Fisheries, himself and Savanna farm. That at the time there had already been a heavy downpour wherein the KWS staff houses had been flooded. That nonetheless, the construction of the cross culvert had continued which then formed the cause of action before court. He stated that the affected parcels of land had been LR No. 6785/6, 7, 8, 9 and 10. That whereas the Plaintiff had been given an alternative access by a neighboring hotel, this arrangement was not permanent.

50. The Plaintiff's list of documents, Supplementary List of Documents and Further List of Documents dated 4th March, 2020, 8th February, 2021 and 11th January, 2022 comprised of the following;

    i. A copy of Certificate of Title to Land Reference Number 6785/6

    ii. A copy of Certificate of Title to Land Reference Number 6785/7

    iii. A copy of Certificate of Title to Land Reference Number 6785/8

    iv. A copy of Certificate of Title to Land Reference Number 6785/9

    v. A copy of Certificate of Title to Land Reference Number 6785/10

    vi. Photographs showing blockage of the access to the properties.

    vii. Report by Mr. Samson Gahuhi-Land Surveyor dated 8th December, 2020.

    viii. Map showing the Culvert on L.R Numbers 6785/6-10.

    ix. Survey Map for Plot Numbers 6785/6-10.

51. In cross examination by the counsel for the 1st Defendant, he confirmed that Moi South Lake road was a public road and that the construction of the culvert had been undertaken within the road reserve although he could not remember the specific date when the construction of the said culvert was completed. That whereas he had testified that they had been given access through Naivasha County Club, he had not indicated so in his witness statement but that they had all along been accessing the cottages through Naivasha County Club. That further, whereas he had stated that the culvert had been emptying into unused private access road, at the time the culvert had been constructed, the private access road had overgrown with grass. That it had not been a natural connection en-route to lake Naivasha as there had been no water galleys on the road.

52. He confirmed that was familiar with the fresh floods from Longonot towards the area as well as several culverts that had been constructed along the road especially at Karagita area because of the topography of the area. He also confirmed that he had also been aware of the demonstrations by the residents in the area because of the poor condition of the road although he could not comment that the bad condition of the road had been because of floods. Nevertheless, when he was probed further, he admitted to have experienced floods on the lower side of the road after it had rained. That in the meeting that had been held on 10th March, 2020, Engineer Obwocha had made a proposal of how the water could be managed.

When he was referred to document number 16 which is a chain-link, he confirmed that before the chain-link there had been an old culvert. That however, he could not comment as to whether there had been need to control water on the road.

53. In cross examination by the counsel for the 2nd Defendant he admitted that they had not served any notice to the 1st Defendant before filing the instant suit. He confirmed that the 2nd Defendant had been receiving instructions from the 1st Defendant as Engineer Obwocha had not disputed the same. That whereas he had invited the 2nd Defendant to attend the meetings, there had been no minutes of the said meeting. That further, whilst there had been flooding in the properties, he had no proof to show that he had made a complaint.

54. In re-examination, he confirmed that in his photos, he had indicated the access road and the properties and that an entrance did not have to have a gate. He reiterated that they had been granted alternative access road by lake Naivasha country club which had been temporary and that they had been using the said alternative access road for security reasons. That there was a possibility of one of the properties being sold off and the new owner could need access through the blocked access road. That there had been disruption of business due to blocking and destruction of property when it flooded.

55. PW2, one Samson Githura, a surveyor practicing in Naivasha town testified that in December, 2020, he had been approached by the Plaintiff's manager who wanted to know the position of a culvert placed next to their property since a road was being constructed and they had a problem with access. That he had then procured data to establish the property which had comprised of five parcels of land that had been sub-divided from the large parcel with the resultant subdivisions being Land Reference Numbers 6785/6, 7, 8, 9 and 10 which had been on a survey land map 371/57 (folio registration number) and that there had been a confirmation book number 610386.

56. That he had proceeded to locate the said parcels of land on the ground wherein he had noted that there had been a long strip measuring about ½ km through Moi South Lake road going to the five parcels of land. That the width of the access road measured 7.62 meters while the acreage of the said road had been 1.12 acres. That on the ground, he found that there had been a culvert directly opposite the entrance and that the same measured 2.6 meters. He explained that to the left of the lake there was Kenya Maritime and Fisheries while on the right of the lake there was Savana Farm Ltd. That the culvert had been introduced on the tarmac road and for purposes of harvesting the water coming from the highlands. That in the opposite side was a big village known as Karagita and that the culvert was meant to carry water from Karagita and part of Nyandarua hence were all the water to flow down, it would be a disaster in waiting because at LR No. 6785/6, there was no exit and so the water would it lodge there. He thus stated that the culvert was disastrous hence it should not remain there. He produced the supplementary list of documents as exhibits.

57. In cross examination by the Counsel for the 1st Defendant and in reference to paragraph 1 of the Plaint, he confirmed that his assignment had been to locate the culvert and its effect on access to the Plaintiff's parcels of land. That the said assignment had extended to drawing concern as to the effects of water on the Plaintiff's property since issues relating to drainage of water was general knowledge. That in his opinion, the water that collected from within and without had been flowing from Karagita downwards. That whereas the water was flowing from the high ground because of the road, the culvert had been part of the same.

58. He confirmed that whilst he had accessed the Plaintiff's property through the Naivasha County Club, they did not disclose to him that there had been a road they had been using since they put up the cottages. He confirmed that the culvert measured 2.6 meters wide and that it was not true that he had

converted himself to a valuer and an engineer so as to mislead the court. That whereas there had not been huge volume of water since the culvert had been constructed, he had told the court the truth.

59. When he was cross examined by the Counsel for the 2nd Defendant, he confirmed that he had come to court as an expert witness in land surveying and that the work of a surveyor was to provide information relating to land. He explained that a surveyor normally dealt with location on a boundary of the property and that his instruction had been to locate the culvert thus he did not have instructions to do valuation. That all the Plaintiff's properties did not form part of the access road, instead it was a narrow strip that had touched the road which was supposed to serve the properties. He confirmed having seen the entrance to the properties.

60. In re-examination, he maintained that his instructions had been to locate the culvert and its effects to the property and that he had been instructed to measure its width. That Moi South Lake road had been the access road to the properties and that the said access road was part of the properties. That he had not done any valuation since he had not been instructed to do so. That however, it was not prudent to wait for disaster before taking caution, since the water heading to culvert had not been controlled.

The Plaintiff had thus closed his case

61. Engineer Johanes Museti Obwocha, adopted his witness statement as his evidence in chief wherein he proceeded to testify as DW1 to the effect that he was a registered Engineer working for the 1st Defendant as a Principal Engineer. That he had worked as a resident engineer at the Moi South Lake road and that he wished to state that his role as a resident engineer had been that one of a lead consultant of Junction 108 through Karagita to the end of Kongoni. That the project had commenced in early 2020 with a contractor and as a lead consultant he was to instruct and supervise the contractor. That the road had deteriorated because there had been no culvert to control the flow of water hence he had instructed the contractor to put up the culvert at the place it had been before.

62. The 1st Defendant relied on its list of documents dated the 25th February, 2021 to wit;

    i. Minutes of a meeting held on 31st March, 2020.

    ii. A photograph showing the area where water has accumulated.

    iii. A digital map showing the access route to the Plaintiff's premises.

    iv. A photograph showing the gradient of land along Moi South Lake Road.

63. In cross-examination by the counsel for the Plaintiff, he confirmed that he had been present at the site during the rehabilitation of the road and that the same had not been a construction but a rehabilitation of an already existing road. He confirmed that the culvert had been there prior to the rehabilitation. That the photographs in the 1st Defendant's list of documents had been taken after the meeting of 31st March, 2020 had been held and that the said meeting had been held because the residents had been complaining of the water from the culvert. That in attendance in the meeting had been he, Mr. Patrick and Lucia Kithuku. That he could not confirm whether the Plaintiff was the registered owner of the properties. He confirmed that the area around the culvert was a thicket and that the Plaintiff's cottage could be accessed through an alternative route. He however confirmed that any premise would have a designated access area which should be free from obstructions.

64. That whereas he wished to rely on the minutes, they had no letter to the effect that they had tried to settle the matter amicably. He explained that the location and the citing of the culvert had been informed by the eco system and being the lowest point, they could not have taken it elsewhere. He confirmed that they had a surveyor on board and that they had instructed the contractor and attached

all the inlet levels and also had the drawings for the intended culverts. However, on being probed further, he admitted that there had been no survey report that had been filed in court.

65. When he was cross-examined by the counsel for the 2nd Defendant, he confirmed that the culvert had been constructed within the confines of a road reserve and that the same had existed before. That the lake was the lowest point and that the Plaintiff's properties were at the lowest point and adjacent to the lake thus even if there had been no culvert, the water would still flow and find its way to the lake. That in the minutes, he had confirmed that the culvert had been constructed at the lowest point and that if the same had not been constructed, the storm water would have flooded the road and flowed to the land since there was nothing that they could have done to prevent water from flowing to the lake. That the 1st Defendant had been the one responsible in constructing the culvert and not the 2nd Defendant since the said 2nd Defendant had been instructed by the 1st Defendant.

66. In re-examination, he confirmed that whereas there had been a clear alternative route, the route in dispute was a thicket that had never been used.

The 1st Defendant had thus closed its case.

67. DW2, Lucia Kituku, the 2nd Defendant's Engineer testified to the effect that the 2nd Defendant had been awarded a tender to construct the Moi South Lake road wherein she had been attached as a site engineer. She adopted her witness statement as her evidence in chief and produced the list of documents filed and then proceeded to testify that the road, including the culverts were owned by the 1st Defendant who had contracted 2nd Defendant pursuant to submission of a list of culverts, to construct them under its supervision. She explained that the water flowed from left to right where the lake was located and that the culvert had been constructed and completed at the lowest point. That she could not confirm if there had been an access road since when they had started the project, it had just been a bare land. That whereas they had filed a notice to the 1st Defendant, the same had not been responded to.

68. The 2nd Defendant relied on its list of documents dated 25th January, 2022 to wit;

    i. Site Instructions dated 29th June, 2019.

    ii. Request for approval of work dated 24th February, 2019.

    iii. Minutes for completion and acceptance of work.

69. In cross examination by the Counsel for the Plaintiff, she confirmed that she had been on the site during the construction and had also been present in the meeting that had been held on 3rd March, 2020 to address the complaints about the storm water that had been destroying properties. She confirmed that the 2nd Defendant had been instructed to construct and repair culverts and that they had acted on the said instructions. That whereas it had been the first time that they had been awarded the contract to construct, their previous interests had been within the road reserve hence she had utmost duty and care and would have noted if there was adverse effect to the property. She confirmed that the road had been a public road.

70. When she was cross-examined by the Counsel for the 1st Defendant, she confirmed that they had acted on the 1st Defendant's instructions which included the construction and repair of culverts. That there had been an existing culvert that they had been instructed to repair. That their instruction had been accompanied by drawings that had indicated that the culvert had been at the lowest point. That the instructions and the notes that they had been given were confined to the road reserve which had been bare and full of shrubs and trees and that there had been nothing to show that the same had ever been

used. She confirmed that the culvert had been located at the lowest point and were it to be removed, the water would cut the road at that point and there would be an issue with accessibility. That it was the drainage problem that had led to the rehabilitation of the road which had been addressed by the construction of the culvert.

71. In re-examination, she confirmed that before the meeting, an injunction had been issued after the work had been completed. She also confirmed that there had been a culvert that needed to repair and that they could not have removed it without instructions.

The 2nd Defendant had thus closed his case.

Analyses and Determination.

72. Having summarized what transpired during the hearing at the trial Court, as herein above captioned, I find the issues arising herein for determination as follows: -

i. Whether there existed a culvert prior to the rehabilitation of the Moi South Lake Road.

ii. Whether the said impugned culvert was a nuisance as it discharged water on the Appellant's premises.

iii. Whether the learned Trial Magistrate Court erred in fact and law in declining to issue an order of mandatory injunction for the removal of the culvert.

iv. Whether the Respondents trespassed on the Appellant's premises.

v. Whether learned Trial Magistrate erred in law by awarding the Appellant a sum of Kshs. 200,000/= as general damages on account of the nuisance caused by the culvert.

vi. Whether learned Trial Magistrate erred in fact and in law in dismissing the suit against the 2nd Respondent.

vii. Whether learned Trial Magistrate erred in law in failing to award the Appellant costs of the suit.

73. Before I proceed on determining the matters here in above captioned, I wish to remind Counsel, that grounds of appeal should be concise, without repetition, argument or narrative and that unduly wordy and expansive grounds of appeal serve no purpose other than to obfuscate the issues. (See the court of Appeal's remarks in Abdi Ali Dere vs. Firoz Hussein Tundal & Others, Civil Appeal No. 310 of 2005 (unreported) and LSK vs Centre For Human Rights & Democracy & 13 Others, Civil Appeal No. 308 of 2012 (unreported).

74. That said then done, typically a culvert is a structure that channels water under the road, railway or past an obstacle to a subterranean waterway. It is normally made from a pipe, reinforced concrete or other material.

75. Briefly this matter had been filed before the trial Magistrate's court by the Appellant who was the registered proprietor of land parcels LR No. 6785/6, 7, 8, 9 and 10 within Naivasha and whose main claim against the Respondents was to the effect that pursuant them constructing a culvert on the Moi South Lake Road, its suit properties had become inaccessible wherein the water would flood from the lake. That whereas it had been given an alternative access by a neighboring hotel, this arrangement was not permanent. The Appellant thus sued the Respondents for the orders herein above captioned.

76. In response the Respondents denied the allegations brought forth by the Appellant stating that they had only rehabilitated the existing old culverts which were on the public road that so as to ease flooding and to direct the storm water, which was occasioned by natural causes out of their control, into the lake.

77. On the first issue for determination as to whether there existed a culvert prior to the rehabilitation of the Moi South Lake Road, I find that this is an uncontested issue because looking at the evidence of PW2 at paragraph *52* the same was to the effect that before the chain-link, there had been an old culvert. Further, the evidence of DW1 the Principal engineer working on the project at paragraph *61* and *63* was to the effect that the road had deteriorated because there had been no culvert to control the flow of water hence he had instructed the contractor to put up the culvert at the place it had been before. That the road had not been constructed but rehabilitated and that the culvert had been there prior to the rehabilitation. This evidence was further supported by the evidence of the site engineer at paragraph *71* who confirmed that there had been a culvert that needed repair and that they could not have removed it without instructions. I therefore find that there existed a culvert prior to the rehabilitation of the Moi South Lake Road, which culvert was rehabilitated from 600mm to 900mm in diameter so as to channel the water into the lake.

78. On the second issue for determination as to whether the said impugned culvert was a nuisance and that it discharged water on the Appellant's premises, nuisance refers to an interference with the enjoyment of land, it is the unreasonable, unwarranted, or unlawful use of property that causes inconvenience or damage to others and involves actions that interfere with the rights of either the public or private citizens. In essence, the legal concept of nuisance aims to balance the right of individuals to use their property with the right of others to enjoy their own property without unreasonable interference.

79. In the case Sedleigh- Denfield v O'Callaghan [1940] 3 All ER 349. In that case, Lord Atkin said (at page 360):

> 'Nuisance can be sufficiently defined as a wrongful interference with another's enjoyment of his land or premises by the use of land or premises either occupied – or in some cases, owned – by oneself. The owner or occupier is not an insurer. There must be something more than the mere harm done to the neighbour's property to make the party responsible. Deliberate act or negligence is not an essential ingredient, but some degree of personal responsibility is required, which is connoted in my definition by the word "use". This conception is implicit in all the decisions which impose liability only where the defendant has "caused or continued" the nuisance.'

80. Having found that there existed a culvert prior to commencement of rehabilitating the road, can it therefore be said that the rehabilitation of culvert as well caused a nuisance to the Appellant's property? It is not disputed that the culvert was constructed adjacent to the Appellant's properties. It is further not disputed that prior to the rehabilitation, there had been an outcry by members of the public that the area was prone to flash floods which caused flooding on the public road which was used by the residents of the area. PW1 confirmed during cross examination that the culvert had been emptying into an unused private access road, which had now overgrown with grass, and which had blocked access to the suit parcels of land therein being a nuisance as it had interfered with the use and enjoyment of its land, whereby they had to gain access through Naivasha County Club to access the cottages.

81. Whereas the Respondents denial that the rehabilitated culvert did not cause any nuisance, yet evidence by the Principle engineer, was to the effect that the area around the culvert was a thicket that had never been used and that the Plaintiff's cottage could be accessed through an alternative route. His sentiments was echoed by DW2 also an engineer who confirmed that the water flowed from left to right where the lake was located and that the culvert had been constructed and completed at the lowest point. That she could not confirm if there had been an access road since when they had started the project, it had just been a bare land.

82. Apart from the evidence from the two opposing sides, the learned trial Magistrate saw and heard the witnesses testify and also visited the suit premises wherein from what the court observed from the ground, the Magistrate was satisfied that there was cogent evidence that the culvert had caused water to flood into the Appellant's properties. Indeed, the court had noted as follows:

> 'PW1, Patrick Mbugua showed the court the location of the private access road to the Plaintiff and that it was part of the Plaintiff properties. That they had a challenge of the water flooding the properties and that it had been impossible to access the said properties due to the culvert'

83. In his judgement the learned trial magistrate confirmed that indeed there had been proof that the culvert discharged water into the Appellant's premises which caused and continues to cause interference with the Appellant's use and occupation of his premises.

84. Based on the above, I am satisfied that the impugned culvert had obstructed access to the Appellant's premises being Land Reference Numbers 6785/6, 7, 8, 9 and 10 wherein it also discharged water into the Appellant's premises thereby causing a nuisance.

85. On the issue as to whether the learned Trial Magistrate Court erred in fact and law in declining to issue an order of mandatory injunction for the removal of the culvert, it is not in dispute that first there had only been a rehabilitation of an existing culvert, secondly, it has also not been disputed that by the time the Appellant filed the matter in court, rehabilitation of the culvert had been completed.

86. In the case of Lucy Wangui Gachara v Minudi Okemba Lore [2015] KECA 277 (KLR) the Court of Appeal held that:

> " Among the special circumstances that may justify the grant of a mandatory injunction at interlocutory stage is where the injunction involves a simple act that could be easily reversed or remedied should the court find otherwise after trial; the defendant has accelerated the development that the plaintiff seeks to retrain, with the intention of defeating the plaintiff's claim or where the defendant is otherwise bent on stealing a match on the plaintiff.
>
> On the other hand, the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing."

87. In a persuasive case of PAK & an*other v Attorney General & 3 others (Constitutional Petition E009 of 2020*) [2022] KEHC 262 (KLR) (24 March 2022) (Judgment) the High Court had observed as follows:

> " Drawing from the principles in Kenya Power and Lighting Company vs Sheriff Molana Habib (2018) eKLR and Ngurumani Limited v Jan Nielsen (2014) eKLR. For the court to grant a permanent injunction an applicant must pass the four-step test.
>
> a. That the applicant has suffered an irreparable harm or injury.
>
> b. That the remedies available at law such as monetary damages are inadequate to compensate for the injury.

c. That the remedy in equity is warranted upon consideration of the balance of hardships between the applicant and the respondent.

d. That the permanent injunction being sought would not hurt public interest." (my emphasis)

88. From the above cited authorities, it is clear that before this court can issue the injunction sought by the Appellant, it must take into consideration whether the detriment such injunction would inflict is disproportionate to the benefit it would confer, if monetary damages are inadequate to compensate for the injury and lastly whether such injunction would hurt public interest.

89. It is not disputed that prior to the rehabilitation of the culvert there had been a hue and cry from members of the public that the area was prone to flash floods which caused flooding on the road. Indeed, the engineers had opined that the culvert had been constructed at the lowest point and that if the same had not been constructed, the storm water would have flooded the road and flowed to the land since there was nothing that they could have done to prevent water from flowing to the lake. Secondly that were the culvert to be removed, the water would cut the road at that point and there would be an issue with accessibility. That it was the drainage problem that had led to the rehabilitation of the road which had been addressed by the construction of the culvert. Judging from the evidence of the experts, I find that the trial learned magistrate did not err in refusing to grant the injunction sought as granting the same would have cost more damage then good more so to the greater public.

90. On the issue as to whether the Respondents trespassed on the Appellant's premises, Trespass has been defined by the 10th Edition of Black's Law Dictionary as;

> " an unlawful act committed against the person or property of another; especially wrongful entry on another's real property."

91. Section 3 (1) of the *Trespass Act*, also defines trespass as follows;

> " Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

92. The Court in John Kiragu Kimani vs Rural Electrification Authority [2018] eKLR while defining trespass, relied on Clark & Lindsell on Torts, 18th Edition on page 923 which defines trespass as;

> 'any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason'.

93. In the case before me, no evidence had been submitted that the Respondents had trespassed on the Appellant's parcel of land. Indeed, what came out clearly had been that Moi South Lake road was a public road and that the offending cross culvert of 900mm in diameter had been constructed within the road reserve for drainage of the road at km 3 +187 on the lowest point of the road. In this regard this line of argument must fail.

94. On whether learned Trial Magistrate erred in law by awarding the Appellant a sum of Kshs. 200,000/= as general damages on account of the nuisance caused by the culvert. Having found that the impugned culvert obstructed access to the Appellant's premises and also discharged water into the said premises thereby causing a nuisance to the Appellant, wherein the Appellant has sought for the general damages

for the nuisance caused and considering the evidence herein adduced, as well as the fact that it is common knowledge of what havoc water can cause and further in consideration of the inconvenience and discomfort, the Appellant's evidence has established of the nuisance caused by the culvert, I find that the Appellant was entitled to a much more higher cost of damages than that which was awarded in the trial Magistrate's court.

95. In assessing the quantum of damages, I have considered that this was a business premises wherein access to the cottages had been hindered by the flood waters and having considered the persuasive authorities in :

i. Tim Mwai & 2 others v Extra Mile Limited [2018] eKLR where an award of Ksh.1,500,000/= was made as general damages for nuisance caused by diversion of storm water drainage thereby resulting in disruption of peaceful enjoyment of the property.

ii. Loyford Gitari Leonard v Weru Tea Factory [2017] eKLR where an award of Ksh. 2,000,000/= was made as general damages for nuisance caused by trees, animals, smoke, dust etc.

96. In the case at hand, I assess general damages for the inconvenience and discomfort suffered by the Appellant at Ksh 1,000,000/= keeping in mind that no special damages were pleaded.

97. Onto the issue as to whether learned Trial Magistrate erred in fact and in law in dismissing the suit against the 2nd Respondent. I find that from the evidence here adduced there had been no contestation that the 1st Respondent had contracted the 2nd Respondent to rehabilitate the impugned culvert and therefore the 2nd Respondent was an agent to the 1st Respondent. It is trite that where the principal is disclosed, the agent cannot be sued with an exception that such agent is personally liable for the wrongful acts committed in the course of its contract.

98. In City Council of Nairobi vs Wilfred Kamau Githua t/a Githua Associates [2016] eKLR, the Court of Appeal held: -

> " In the circumstances of this case, the 2nd respondent cannot be sued as agent where there is a disclosed principal (the appellant). There is therefore no cause of action against the 2nd respondent. The principle of common law is that where the principal is disclosed, the agent is not to be sued. In the circumstances of this case, the principal (the appellant) is disclosed and the agent (the 2nd respondent) cannot therefore be sued. There are no factors vitiating the liability of the disclosed principal. Accordingly, the enjoinment of the 2nd respondent in this case is unwarranted."

99. Further, the Court of Appeal in Anthony Francis Wareheim T/a Wareham & 2 others v Kenya Post Office Savings Bank (2004) eKLR held that: -

> " It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued."

100. There hasn't been evidence adduced that the 2nd Respondent in the course of its contract, committed a wrongful act. In fact what came out clearly was that the citing of the culvert had been informed by the eco system and being the lowest point, they could not have taken it elsewhere. I therefore do not find merit in the Appellant dissatisfaction of the trial court's verdict on this issue and the same must fail.

101. Lastly the Appellant questioned as to whether the learned Trial Magistrate erred in law in failing to award it costs of the suit. The provisions of Section 27 of the *Civil Procedure Act* is to the effect that that costs follow the event. In this regard, and although the awarding of costs is at the court's discretion, I find that the trial court having found that the Appellant had partially succeeded in its claim against the 1st Respondent, the trial court erred in not awarding the Appellant costs.

102. In the end, I thus find it necessary to interfere with the trial court's decision. I shall allow this appeal and set aside the judgment and decree of 7th September, 2023, by Hon. Mr. Y. M Barasa (PM) in Naivasha CMELC No. 10 of 2010 wherein I hereby substitute in its place the following orders.

    i. The claim against the 2nd Respondent still stands dismissed.

    ii. Judgment is entered against the 1st Respondent and the Appellant is awarded Ksh. 1,000,000/= (One Million shillings only) as general damages for the nuisance.

    iii. The Appellant shall have half costs to both the suit at the trial court and this Appeal.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 6TH DAY OF MARCH 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE