Greenland Realtors Company Ltd v China Civil Engineering Construction Corporation (K) Ltd (Environment & Land Case 143 of 2021) [2024] KEELC 4155 (KLR) (3 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4155 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT & LAND CASE 143 OF 2021

AE DENA, J

MAY 3, 2024

BETWEEN

GREENLAND REALTORS COMPANY LTD .... PLAINTIFF

AND

CHINA CIVIL ENGINEERING CONSTRUCTION CORPORATION (K) LTD .... DEFENDANT

JUDGMENT

1. This suit was commenced by way of plaint dated 22/5/20. The Plaintiff claim It is the absolute proprietor of title No. Kwale/Ng'ombeni/2453 (suit property) in which it intended to construct houses for sale. In June 2019 the Defendant trespassed into the suit property and without the consent of the Plaintiff excavated approximately 40,230 cubic metres of the top subsoil (moran) covering an area of 8056 meters. That as a result the trespass and damage Plaintiff's land valued at Kshs. 4,000,000/= looks like a quarry site, useless for the intended purpose unless it is rehabilitated.
2. It is averred that the Defendant obtained profits of Kshs. 201,400,000/= by commercially using the said excavated soil. Further that the Defendant has violated the Plaintiff's right to own property and to a clean and healthy environment. The Particulars of the breaches are outlined under paragraph 15 of the Plaint.
3. The Plaintiff prays for Judgement against the Defendant for: -
    a. A declaration that the Defendant trespassed upon the suit property and excavated soil.
    b. Damages for trespass.
    c. Mesne Profits.
    d. Value of top and subsoil excavated of Kshs.80,000,000/=

e. An Anton Piller order directed at the Defendant to produce before court records of all mesne profits obtained from the Plaintiff and the records of the contract that covered the price of the murram road.

f. Any other relief that the Honorable court may deem fit and just.

4. The Defendant filed a Statement of Defence dated 18/9/20 and aver that it was awarded a contract by Kenya National Highways Authority to construct the Mteza Kibundani road. It leased a property adjacent to the suit property for the projects murram requirements. That a section of the access road to the suit property was rendered impassable by heavy rains necessitating repairs by the Defendant for the benefit of the public. That it obtained permission to enter into the suit property from the Plaintiff's agent Ali Mwadarasi Mohamed and fetched top soil from a portion thereof. The rest of the allegations of the Plaint are denied and specifically the particulars of breach and damage. The Plaintiff is put to strict proof.

Hearing

5. The case proceeded for hearing virtually on 3/11/2022, 9/3/2022, 13/6/23 and 26/9/23. The Plaintiff was represented by Musundi Advocate and the Defendant by Ms. Ngigi Advocate.

Plaintiff's Case

6. PW1 Saad Migdad Saadwho is also an advocate of this court gave evidence as the Plaintiffs Managing Director and adopted his witness statement dated 22/5/20. PW1 reiterated the averments in the Plaint that the entry and excavation on the suit property was unlawful and illegal as the Plaintiff did not consent to it. That this was in breach of Constitutional and statutory laid down procedure for compulsory acquisition including lack of compensation. That on 20/6/19 the company instructed Ms. Procost Valuers Ltd to establish the suit property market value and the report confirmed the excavation where top and sub soils were harvested and backfilled with loose black loam cotton soil. The report further stated the excavation and harvesting would hamper structural development and the property could not be used for its original intended purpose.

7. That a Professional Land Surveyor report also confirmed the ongoing excavation which was without the Plaintiff's consent. It was his evidence that no written evidence had been produced before court to show that the Defendants obtained the Plaintiff's permission. That the Plaintiff did not know about the excavation until its agent informed them of the presence of excavators in the suit property. He urged the court to grant the prayers as stated in the Plaint.

8. While under cross examination PW1 stated the user of the property is Agricultural. Though it could be changed to any other user the Plaintiff had not applied for the same. The witness added that the dynamics of the area had changed and the property cannot be restricted to agriculture use. That while he had an agent who took care of the property and who was always in the vicinity, one Ali Mwandarasi the Plaintiff didn't give him permission to have anyone enter the property. That the Plaintiff had no prior knowledge of the excavation nor the back filling. He confirmed Ali Mwandarasi was not the Plaintiff's witness in the proceedings as he had no role to play.

9. In further cross examination PW1 chose to rely on the report by Ms. Procost Valuers Ltd that estimated the value of damages at Ksh. 80 million and confirmed the market value of the suit property as Ksh. 4 million as stated therein. He conceded the report is prepared by a land valuer and who was not a quantity surveyor. That the Plaintiff was seeking mesne profits for the reason that the Defendant came into the property without giving any financial consideration. That having used the same for the

Defendant's gain the Plaintiff was entitled to compensation. The witness stated that he was not privy to how and the purpose for which the excavated soil was used by the Defendant.

10. According to the witness a very big portion of the property was affected as what was not touched is very small. He confirmed he wanted the property restored to what it was before. PW1 disagreed that restoration would return it back to agricultural property.

11. The witness could not confirm the suit property would currently fetch Kshs. 4 million in the market because of the changed dynamics. He insisted the Kshs 80 million was not exaggerated but stated was the value of what was taken away from the land and what is taken away earns a value. On being referred to paragraphs 4, 5 and 6 of the Plaint the witness conceded they alluded to top and subsoil as having been removed equivalent to 40,230 cubic metres and which was backed by his witness statement.

12. That while the plaint described the Defendant as a company with heavy machinery in construction he would still have a problem with them restoring the suit property even if they were capable since he did not believe they can get it back to where it was. That based on the experts report he was not sure the land can be fully restored. But on being referred to the geological report prepared on behalf of the NLC the witness conceded that the same recommended compensation (see page 12 paragraph 3.5) in terms of restoration which could be one of the remedies. He agreed this was an independent report and stated he would be guided by the report table 1 page 9 in as far as the same gave 1478m^2 translating to 18010 cubic meters of material?? The witness still reiterated that restoration is achievable back to usable state as agricultural land and not construction.

13. PW2 was Geoffrey Chege Wambui proprietor of Ms. Procost Valuers Ltd and a registered land valuer. He confirmed he prepared the report herein and adopted it as his evidence in chief. The witness confirmed he assessed damages at Ksh. 80 million.

14. Upon cross examination PW2 confirmed the land is agricultural. He stated the excavation was not on the entire property but only 48% had been excavated but which he did not capture in his report. That the land market value of Kshs. 4 million was the value of a property that is not damaged, could be sold for that price and within the locality they can get the same property at 4 million. That the Kshs. 80 million comprised cost of backfilling and compaction. That since only 48% had been excavated and not the entire land this affected the stability of the property and the need to restore it. That restoration will require to excavate the entire land and back fill it. That their instructions was to only give the value. That though he is not a geologist he was able to tell what a rock looks like. That he obtained the unit cost from the cost estimation manual (Ksh. 3,476.00).

15. According to the witness a land valuer is qualified to give the depth of excavation. That if the width and is obtained by a simple tape measure the volume can be determined. That the depth is determined by using a section that was left unexcavated and which was about 1.2 acres. That he didn't have to go and remove what was back filed. The witness stated the compaction assessment was undertaken by an Engineer though he did not have this report before court. That "profit undergone" referred to the money lost as a result of excavation or income lost thereof. That though he was informed that the client had sought change of use to build residential houses, he did not see the change of user. PW2 reiterated suit property was economically obsolete and no one can buy the property. He confirmed only 48% has been affected. That for the property to be usable it must be restored.

16. PW2 clarified in re-examination that the cost estimation manual is issued by the Kenya Roads Board. That he is qualified to prepare and present the workings produced before court. That he went to site, the excavation is not in one place but was all over and for the property to serve its purpose one must excavate the entire 2 acres fully and compact.

17. With the above the Plaintiff's case was marked as closed.

18. Paul Mwadimeis referred to by the parties as PW3. Cross examined by Ms. Ngigi for the Defendant he told the court he is a geologist working with Ministry of Mining Blue Economy and Maritime Affairs. The witness testified that he prepared a geological report under instructions from the NLC. He confirmed he was required to be un-biased because his report did not emanate from either of the parties. That the office had prior information from NLC that the land was quarried for murram by China Civil Engineering.

19. Mr. Mwadime informed the court that while he knew the total acreage of the entire land he had not calculated the percentage of $1478m^2$. That the excavation area and disturbed area were different though he did not calculate their percentages. The unit used to give the summary on the shallow section (see page 11 item) was obtained from the estimation manual for road maintenance 2019 (see plaintiff supplementary list of documents) by the Kenya Roads Board which he downloaded but did not annex to his report. That he did not know the use of the land. He used the manual because those are the standards that were used in the industry. That he did not use the market value because it changes and was higher. That he didn't give the market comparables.

20. He stated in geology there is no difference between Rock and Stone. That in his report cost of compaction was the same as costs of reclamation since compaction is always required in reclamation. The degree of compaction differs and its extent or degree is determined by an engineer. That while he had the measure of the compaction he had not included it in the report. He explained subgrade fill is external material brought in to re-fill a quarry though he did not know what it would mean for road construction. He confirmed that the figures in the manual were cost estimates. He stated that while he saw the area had been refilled what was used was not commensurate to what was removed- they ought to have used rock for reclamation. He however stated that one could use other material depending with their preference. He conceded he was not qualified to give evidence on land reclamation/rehabilitation. He conceded he did not use a quantity surveyor in coming up with the cost estimation.

21. Cross examined by Mr. Musundi stated he was qualified to execute the terms of reference that were outlined. That the undisturbed area had rock, silt, stone, sandstone, soil material sandish/clay and vegetation cover. Highlighting the nature of the equipment he had he stated that he was able to calculate the volumes and from them the cost. He confirmed he did not plug figures from the air but used the manual to arrive at the cost given in the report. The manual used was the only version available. He stated the market rate for hard rock was higher though negotiable and the cost of rehabilitation of the land could be higher at the current market value depending with where one obtains the material from. He confirmed that while he saw a trench he did not calculate the cost for filling it though he conceded it would require to be backfilled adding to the costs. He reiterated what was removed is what was required to be replaced and not clay material. The same was not enough causing the depressions. That compacting was not done well resulting to cracks. In his opinion as a geologist should one want to build houses the clay would have to be removed since foundations are done on rock. He stated the land was not fit for building houses. He was not shown any permits for quarrying. He confirmed they received Kshs. 187,400/- for the three geologists that took part in the report. Further that a payment of Kshs. 20,000/- would suffice for the court attendance. According to him the cost could be more than Kshs. 49 million but he would be surprised if it came to Kshs. 80 million.

22. Elizabeth Makau is a senior a Senior Valuer at NLC and is referred to by the parties as PW4. She testified in cross examination by Ms. Ngigi that she was and had made two visits to the site to prepared a report submitted by the NLC. That she returned an unimpaired value of the suit property of Kshs. 3,600,000/-. That while she considered some comparable she did not include them in the report. They

made an assumption that the area is agricultural based on the neighborhood. She had no document to show change of user. That she concluded the diminution value would be the cost of reclamation and which cost could only be determined by an expert that is a geologist. That diminution means how much the property has been affected by a certain event. She could not confirm it would be the market value in its original status. She confirmed she ignored the excavation and thus the request to Ministry of Mining. She confirmed she saw some loose soil which was not similar to other areas but which she did not consider in her adjustments. That while the comparables used were estimated at Kshs.2.03 million per acre she applied Kshs.1.8 million having factored power lines and the roads. She reiterated from her naked eye and being a layman she did not see the excavations but only the loose soil. She confirmed she has experience in valuations for purposes of compulsory acquisition though the present case was not a case of compulsory acquisition. That she recommended reclamation for compensation on the basis of the assumption that the land can be reclaimed. Asked to comment on her figure of Kshs 3.6 million vis a vis the Kshs 49 million she testified that it depended with the dimension one looked at the issue especially the user perspective. To reclaim would mean putting the land back to be suitable for agricultural use. According to the witness everything appeared to be fine from the natural vegetation.

23. Upon cross examination by Mr. Musundi outlining her qualifications she confirmed she was competent to execute the terms of reference. That there were no crops on the land just natural vegetation. She confirmed that there were changes in the area due to the newly constructed Dongo Kundu by pass such as subdivisions and land buying for speculation. That the search confirmed Green land Realtors as the registered proprietors. That a realtor is one involved in real estate dealings and she would not be surprised to learn the Plaintiff was a builder of houses for sell to general public in the area. From her site visit she noted the plot was largely fairly level except the sections said to be excavated which was uneven though she could not confirm if this was due to sinking or not. She confirmed she saw a trench at the boundary but she could not confirm its use. She confirmed it was in the Plaintiffs land. That she did not take its measurements because she was dealing with unimpaired value meaning any excavation on the property was disregarded. She conceded that if reclamation was to be done then the cost for the trench would have to be considered. She stated there was no road running through the excavated area. That the road and power lines mentioned in the report would not affect the reclamation. She did not measure the surface area of the excavated portion.

Defence Case

24. DW1 was Abraham Masinde Wangilaan employee of the defendant. his evidence was that his duties were to manage the social environmentaland impact and safety of the workers. He adopted his witness statement dated 5/2/21 as his evidence in chief and produced DExh 1- 3 per the Defendant's list of documents dated 5/2/21. The Topographical survey report dated 8/2/21 and QS Report dated 5/5/21 were marked for identification. That they entered the suit property as contractors for the MPDP III project. That there was road leading to Kiteje and its environs that had been made impassible by the rains and it had been agreed through the Community Liaison Committee consisting the DCC and Project Affected Persons (PAPS) to have it fixed. That Ali Mwadarawa came to the suit property and indicated he was the agent for the owner thereof. They did convince him that they only needed to place 200 mm layer of soil on the road. That they made effort to get permission to enter the land and fortunately Ali was present. That there procedure is to always take a picture and ID of the landowner found on the ground. He stated they took topsoil which was dry and a little bit of shell soil underneath it and which they put on the said road measuring about 225 metres. The witness pointed this was not part of the road they were doing under MPDP III project and none of the above soil was used for their said project. They later filed the area which was less than 10 square meters and for every layer filled there was compaction using a bulldozer. They used left over material from their project and some clay from the property for the back filing to a usable state since this was agricultural land.

25. Referring to the Dexh 2 report by Njehia Muoka & company the witness gave the impairment figure as Kshs. 1,200,000/= and disturbance allowance at Kshs. 360,000/=. as stated in respect of the Plaintiffs claim for the material. DW1 termed the Kshs.80 million given by the Plaintiff as absurd. He did not see the rationale for paying for the entire land and stated his bosses were ready to immediately restore the same if there was a problem. That as per the topographical report the difference in elevation between the highest and lowest point was less than 2 metres. That the disturbance was not as major as alleged. DW1 stated that according to the QS report the quantity and cost of the material excavated was Kshs. 388,694.25/=. The material is shale and not prime murrum and the defendant had the capacity to undertake the restoration using the Plaintiff's specifications. Referring to page 10 of the cost estimate manual (PEX7) and the subgrade infill he stated that the same was not applicable for the road in issue since there was no such subgrade in Kenya. That you only need the same shale material but with improvement on the compaction. That there was no need to import as the material to be used is soft material. That hard rock is only used for filling a quarry and not backfilling.

26. On being cross-examined DW1 confirmed the content of the Defence and his witness statement, conceded they were ready to restore though this had not been factored therein. On being referred to page 8 of the report by Procost Valuers Ltd, the photos of the property therein and paragraph 4 of his witness statement stating they had leased the Plaintiff's neighbours plot, he confirmed he had not presented the lease in court. He stated Ali Mwadarasi did not show them any documents of ownership by the Plaintiff. He conceded they did not undertake any search neither did they sign any agreement of lease with him. His evidence was they did not pay any consideration and were never given any written authority to enter the property. That he did not have any minutes of the liaison committee since he was not a member of the same, it was only the defendant's vehicle for reaching the community.

27. Asked to comment on the QS report noting a depression, he stated that the place was depressed even before it was disturbed. He confirmed they did excavate some material. That the backfilling was prompted by agreement with Ali Mwadarasi. That he could not tell the size of the excavated area since he did not take the measurements for same though they did not excavate the entire land. He disagreed with the 48% given by Procost Valuers Ltd as the excavated area as it includes access roads which are not accurate. He disagreed with Mr. Mwadimes report 56% was the disturbed area and which required restoration. According DW1 the material they needed from the property was just dry soil and there was no murram on the property but shale which was sedimented clay. That the same had hardened to look lie rock but dissolves upon soaking with water and this is what was harvested. He conceded he did not present any document to show the quantities of the material removed but reiterated they were small quantities. Outlining his qualifications he stated he was neither a geologist or a civil engineer nor a QS. He stated his qualifications were limited to EAI and which EAI was not required for the present activities. He stated they did not choose the property for a site office because it was an upcoming upmarket area. That he had not seen any new developments the place was the same. That they received demand letter after a year and which was an afterthought and the reason the defendant did not offer to restore.

28. Referring to page 9 of the Geological report table 1 he noted that item no.1 gave the excavated area based on geophysical measurement as 1478 and which he believed was the surface area of the excavated area. He clarified that the disturbed area is not called the excavated area. The arrangements were on short term basis and a lease was not necessary but a gentleman's agreement. He indicated the area was agricultural as per the areas physical plan. DW1 confirmed they were willing to restore the land to the state required by the Plaintiff.

29. DW2 was Rashid H. Swalee a property valuer with Njihia Mwoke and confirmed he prepared 27/7/2020 "DEX 2". He told the court he was a Registered valuer with 25 years' experience. The TOR

was to advise on correct net value for compensation for excavation. That he visited the land, there was vegetation grass and the purported excavated section had been backfilled. That physically they could tell from the gradient differences, the area said to have been disturbed. That the user of the land is Agricultural Land. That he returned a market value of Ksh. 1,200,000/= informed by compactor analysis (see valuation methodology).

30. DW2 stated with regard to compensation that they looked at fair compensation upon survey (See valuation page 8). Alternative was partial compensation for the affected area being Ksh. 360,000/=. The witness stated that the 15% disturbance allowance was a statutory requirement for compulsory acquisition under the *Land Act*. The 30% economic loss is from the extent of excavation. Referring to page 8 paragraph 3 of bundle 3 his evidence was that the land could still be used for agricultural activity without issue. The witness disagreed with the proposition on total loss since after the backfilling the land could still be used for Agriculture and total loss cannot suffice. According to him the economic loss was 30%. The witness noted National Land Commission report is dated 28/4/2022 while his report was prepared in July 2020 a difference of 2 years. He indicated time is of essence and its at the time of visit that you get demand and supply after 2 years demand will have necessitated development and supply of amenities all these makes the figure appreciate as time impacts the value.

31. Upon cross examination DW2 he stated the area is well known to him and that after construction of the road people were settling but not in large numbers. That the search he undertook confirmed Green Land Realtors as the owners. That a realtor deals with Real estate. He would not doubt the Plaintiff was in the business of buying and building for sale. He clarified that at the time of valuation, the property was largely agricultural used. He confirmed the road next to the property had been murramed by the Defendant and improvement was ongoing. DW2 testified that the area was still agricultural and plot owners have done their houses but there are no rental buildings there. His opinion was that for a realtor who wishes to develop the excavation would not have impact because he would still have excavated anyway. That even without the disturbed area you would still have to excavate to get to the hard rock and diminutive value isn't an issue. Its with my scope to give value of the disturbed portion. My report was done 2 years before and if I prepared another report as of today I will go back and capture the changes. As to the value given by Elizabeth the witness reiterated he would stand by his report because I had factored analysis. A value can go up or down depending with the circumstances. But with the current activities around the land would increase the value of the land. That at the time of preparing his report did not have the benefit of the report by Procost Valuers Ltd.

32. DW3 was Nyange Erick Mwanyumba a registered quantity surveyor. He produced his report dated 5/5/21 which advised on the cost of fill material required to make the site level on the ground. He testified that there was a depression and he took pictures and measurements thereof. That the depression was sliding at an angle of 45 degrees and not the same everywhere. The longest length was 25 meters and width 23 meters and triangle shaped. He recommended murrum fill whose cost is Kshs.1,295/= per cubic metre thus Kshs. 335,051.25/= plus 15% VAT making a total of Kshs. 388,694.25/=. That the figures were also based on the Survey report dated 8/2/21 prepared by DW2. That the unit cost of 1295/= was informed by the Cost estimate Manual 22.72.01 which gave the price of Kshs.1000/= which he slightly enhanced to carter for the cost of compaction.

33. Upon cross examination he clarified he was a quantity surveyor and not geologist. That he did not inquire on the depth of excavation before the backfilling. That he would not know the type of material used for the backfilling because the area was covered with vegetation. On being referred to paragraph 40 of his report he conceded he mentioned soil and not murrum. That only an engineer can confirm if the backfilled material would have to be removed before construction of a residential house. On paragraph C he noted he did not give the cost estimate of the material that was excavated but conceded

it would require similar volume of excavated material to rehabilitate the area. However it would not be the same cost because back filing had been done. That the source of the cost estimate were derived from Handbook of Quantity Surveyors of Kenya but which he did not disclose in his report.

34. The witness added he did not consider the disturbed area since the plot was near the road and this may have been caused by the Lorries. That had he seen the Report by Procost Valuers Ltd showing lorries deep into the suit property he would have captured this and changed the report. He stated compacting is labour and did not require heavy compacting machinery. The land was agricultural land and did not require such backfilling. Further that the title was Settlement Scheme and can be regarded as good for settlement. He confirmed while he went to site two years down the line the depression was still evident to the naked eye. That he did not request for the excavation permit neither was he shown one. He did not do a geological survey but was shown the depressed area which was naked to the eye and proceeded to deal with the depression.

35. The witness clarified in reexamination that he was only interested with where there was a visible depression and not what was below the depression. He reiterated he had given the buildup cost which entails cost of murrum and cost of compacting.

36. DW4 is Bartholomew Mwanyungu a Land Surveyor. He confirmed preparing the report dated 8/2/2021 that he produced as "DEX 4". His evidence he visited the plot where he saw and noted there was an excavation as well as a depression. The highest point observed was 60.76 and the lowest was 58.952 a difference of approximately 1.8 metres. The average of the differences was 0.9 metres. The height is compared with the height between the excavated and the un-excavated area. He testified that the area excavated was about 1450 – 1460 metres square and in trapezium shape.

37. Upon cross examination DW4 indicated the purpose of topography survey is to show any remarkable features. That he did not measure the depth below the soil since this was not part of the instructions. He confirmed he was shown the photos of the time the excavation was taking place. That according to photos annexed to his report the excavated area was next to the murrum road and was a very small portion. That the unexcavated area had contours but disagreed the same were due to the excavation. The witness confirmed there was a trench in the plot which had collated waste though he did not measure its length and depth and he did not inquire about its use.

38. With the above the Defendant closed its case.

Submissions

39. Parties filed and exchanged final written submissions which I have summarized herein below.

Plaintiff's Submission

40. Summarising the pleadings and the Plaintiff's case as enumerated by the Plaintiff's various witnesses vis a vis the Defendants defence and evidence led by the defence during trial the Plaintiff identified the following issues for determination by the court; -

    a. Whether the Defendant trespassed onto land parcel number Kwale/Ng'ombeni/2453?

    b. What acreage of land was affected by the Defendant's excavation?

    c. Whether the said excavation caused destruction, depletion and loss to the suit property?

    d. Whether the Plaintiff is entitled to the reliefs sought?

41. On whether the Defendant trespassed onto the suit property, reliance was placed on section 24(a) of the Land Registration conferring absolute ownership of land on registered proprietor and Section 3(1) of the *Trespass Act* Cap 294. It was submitted that he who owns the land owns everything extending to the heavens and to the depth of the earth. That no consent was filed in court by DW1 to support his testimony that Ali Mwadarasi who presented himself as the Plaintiff's agent gave them consent to enter into the Plaintiff's land and carry out excavation. That PW1 denied entering into such agreement and denied Ali was the Plaintiff's agent. Reliance was placed on the case of Miaroho Limited -Vs- Synohydro Corporation Limited [2022] eKLR where the court held that the Defendant was a trespasser and the excavation carried out on the suit property was illegal for the reason that the owner of the land was not party to the agreement entered and by a person who was not their authorized agent.

42. It was submitted that the testimonies by the DW2, DW3, DW4, PW1, PW2, PW3 and PW4 were in agreement that indeed excavation was done on the Plaintiff's land by the Defendant. DW1 confirmed in cross-examination that materials for the construction of the road were obtained from the Plaintiff's parcel of land. The court was invited to find that the Defendant trespassed into the Plaintiff's parcel of land and the excavations done were illegal and breached the law. Reliance was placed in the case of George Awuor Okullo Vs China Wuyi Company Limited & 2 Others [2019] eKLR.

43. On the acreage of land affected by the excavation, it was submitted that PW1 and PW3 evidence that the acreage affected by the excavation is 0.8ha was not challenged. That the court should find the acreage affected by the Defendant's illegal excavation be 3463.4m^2 /0.856acres as submitted by PW1 and PW3 a government geologist and that the entire parcel was disturbed and need total rehabilitation through levelling, backfilling of open trenches and compaction to achieve a stable ground level.

44. On whether the said excavation caused destruction, depletion and loss to the suit property it was submitted that based on the testimonies and the evidence produced in court, it was clear that the Plaintiff's parcel of land has faced depletion. That the Plaintiff is a Realtor involved in building houses and putting them up for sale. The illegal excavation done by the Plaintiff has destroyed the Plaintiff's parcel of land as some areas are uneven and therefore unstable.

45. The court was invited to rely on the most recent values submitted by PW2 Mr. Chege Wambui who valued the unimpaired land at Kshs.4M which is the market value as at 2022 and the cost of reclamation at Kshs.80,000,000/= assessed as cost of current backfill and compaction including the entire disturbed area and the trenches for evacuating water which were still open but all the valuers missed to include this cost except PW2. The assessment of PW2 of Kshs.80,000,000/= as the cost of rehabilitating the land taking into consideration the harvested silted rock and murram soil was thus more realistic and believable taking into consideration all factors and the evidence.

46. On whether the Plaintiff is entitled to the reliefs sought the Plaintiff relied on the case of Miaroho Limited -Vs- Synohydro Corporation Limited [2022] eKLR where the court referred to Lord Justice Donaldson in Dodd Properties (Kent) Limited and Anor Vs Canterburry City Council and others [1980] 1ALLER 928 who stated that in the case of a tort causing damage to real property, the object of placing the Plaintiff in the position he would have occupied if he had not suffered the wrong complained is achieved by either taking the capital value of the property in an undamaged state and comparing it with its value in a damaged state; or by taking the cost of repair or reinstatement or a combination of the two depending on the Plaintiff's future intentions as to the use of the property and the reasonability of those intentions.

47. Further reliance was also placed on the case of Duncan Nderitu Ndegwa Vs Kenya Pipeline Company Limited & Anor [2013] eKLR where Nyamweya J. held that the general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the

land is the amount of diminution in value or the cost of reinstatement of and or both. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm. The court was urged to make an award of Kshs.80,000,000/= being the cost of reclamation of the Suit property as per the report produced in evidence by Mr. Chege Wambui of M/s Procost Valuers Limited being the most accurate of all considering the extent of damage and depletion of the property.

48. On general damages for trespass it was contended that the same are at the discretion of the court. That the Plaintiff having proved that indeed trespass occurred and that the Defendant excavated materials, caused disturbance and dug trenches on its parcel of land, the court urged to consider and be guided by the extent of destruction caused by the Defendants and the cost of restoration of the Plaintiff's parcel of land and award the Plaintiff Kshs.10,000,000/= as general damages for trespass.

49. On mesne profits the Plaintiff submitted that the Defendant having failed to produce records of all mesne profits obtained from the plaintiff and records of the contract that covered the price of the murram road, an award of mesne profits should be made in form of interest on the awarded sum at court rates from the date of filing the suit until payment in full. The court was referred to Attorney General v Halal Meat Products Limited [2016] eKLR which held that where a person is wrongfully deprived of his property, he/she is entitled to damages known as mesne profits for loss suffered.

50. The court was invited to award Kshs. 663,400 as special damages and interest thereon from date of delivery of judgement.

    i. Preparation of Report and Court attendance by Mr.

       Chege Wambui.............Kshs. 130,000

    ii. Site visit of 29.4.2022 by National Land

       Commission Valuer Ms. Elizabeth Makau....Kshs. 157,000

    iii. Site visit of 25.6.2022 by National Land

       Commission Valuers.............Kshs.129,000

    iv. Site visit of 25.6.2022 by Geologists

       From Ministry of Mining..........Kshs.187,400

    v. Attending Court by National Land

       Commission Valuer Ms. Elizabeth Makau and

       Geologists Mr. Paul Mwadime from Ministry of Mining on 9.3.2023 @ Kshs.30,000..Kshs. 60,000

       Total.......................Kshs.663,400

51. It was submitted that since costs follow the event the court was entitled to costs and interest from the date of filing of the suit until payment in full. The Plaintiff prayed for judgment for the Plaintiff against the Defendant as submitted and as prayed in the Plaint dated 22nd May, 2020.

Defendant's Submissions

52. The Defendant identified several issues for determination by the court namely;

    a. Did the Plaintiff trespass into the suit property?

    b. What is the value of the topsoil and sub soil?

c. What is the proper measure of damages?

d. Did the Defendant demonstrate a more appropriate measure of damages and whether the Claimant is entitled to the value of the topsoil and subsoil?

53. On whether the Defendant trespassed into the suit property it was submitted that the defendant did not trespass upon the land, but that it was granted permission to enter upon the land by the Plaintiff's authorised agent Ali Mwadarasi Mohamed to remove top soils and backfill the land. Upon cross-examination, That PW1 admitted that the Plaintiff indeed has an agent by the name Ali Mwandarasi who takes care of the suit property and is always within proximity. The said agents ID was produced as part of the Defendants bundle. It was submitted in the alternative that should the court find the defendant is liable for trespass the court should determine the measure of damages for trespass payable.

54. Guided by the cases of Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & another [2013] eKLR and Miaraho Limited v Synohydro Corporation Limited [2019]eKLR and Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited [2019] eKLR, it was submitted that the general rule for measure of damages occasioned to land due to trespass is the reasonable cost of restoration of the land or the diminution in fair market value, whichever is less. Consequently, the court was called to determine whether the Plaintiff proved either reasonable cost of restoration of the suit property or diminution in value and compare the amounts and award the lesser of the two. It is the defendant's case that neither of these two were proved by the Plaintiff.

55. On diminution value it was submitted that PW4 admitted she did not determine the diminution in value. That PW2, a Valuer from Procost Valuers Ltd did not also give the diminution in value. Referring to Black's Law Dictionary definition of Diminution in Value it was urged that the same cannot be equated with the definition of land restoration/rehabilitation that two are distinct and cannot mean one and the same thing as alluded to by PW4.

56. On market value of the suit property the court was urged to adopt DW3's report to be the better report and find that the market value of the suit property is Kshs. 1,200,000/- since the value of Kshs. 3,600,000/- based on PW4 the Senior Valuer from NLC lacked documented comparables.

57. Submitting on the cost Reclamation/restoration of the suit property it was posited that the Plaintiff did not prove reasonable cost of restoration of the suit property. That based on PW3 admission he could not give evidence on the cost of reclamation of the suit property since he was not qualified to determine the method or nature of rehabilitation or repair required to be done on an agricultural land. That it would be absurd in the circumstances to conclude that the cost of reclamation of the suit property is the cost or value of the materials removed from the suit property plus the cost of compaction.

58. Consequently it was contended that the Plaintiff having failed to prove the proper measure of damages by not offering proof of diminution in value of the suit property or the restoration/reclamation cost as required by the law, which would be the lesser of the two, then there was no evidence against which proportionality or reasonableness of the Plaintiff's claim might be assessed by the court. Guided by the case of Hesbon K. Limisi v Delilah Achieng Mathews & 2 others [2020] eKLR, which cited the case of Philip Ayaya Aluchio vs Chrispinus Ngayo [2014] eKLR the court was urged to only award a nominal sum as general damages for trespass.

59. Further that there was no evidence presented to prove that the Plaintiff had any intentions to develop the land. The Plaintiff's assertion was not supported by any or sufficient evidence to the effect that the suit property has lost its purpose completely. Moreover, the Plaintiff had also not applied for change of user of the property from agricultural to commercial residential nor even exhibited any building plans, it was not enough to merely suggest that the plaintiff was inclined to develop the land. Counsel

proposed that general damages of Kshs. 100,000/= will sufficiently compensate the Plaintiff. Reliance was placed on the case of Keiyian Group Ranch v Samwel Oruta & 9 others [2021] eKLR.

60. That even assuming the restoration cost is Kshs. 49,238,430/= as presented by PW3, it was submitted that it cannot be the proper measure of damages as it far exceeds the market value of the suit property which according to DW3 is Kshs. 1,200,000/=. That damages in an amount greater than the total value of the land would be excessive and unreasonable and unjustly enrich the Plaintiff.

61. The Defendant further submitted that conversely the Defendant demonstrated that there is a more appropriate measure of damages, which is the diminution in value. That based on the evidence of DW2 & DW3, which gave the diminution in value of Kshs. 360,000/= and the cost of backfilling the affected area with murram of Kshs. 335,081.25/= and which are nearly equal, then the court ought to award the Plaintiff the sum of Kshs. 360,000/= in respect of diminution value as it is reasonable in the circumstances.

62. On whether the Plaintiff is entitled to the value of the topsoil and subsoil, it is submitted that the said claim is one for special damages which must be pleaded and specifically proved. Referring to the Valuation Report dated 25th June, 2019 prepared by PW2 where the workings were stated to include the cost of rock filling, compaction, profits undergone, plus 50% damage and professional and miscellaneous costs, totaling Kshs. 80 Million and further referring to PW3 workings in the Geological Report (PExh No.5) showing the materials excavated (Sandy Clay, murram and hard rock) the area and depth excavated, the volume of the materials, the cost of the materials and also the cost of compaction (required for reclamation); it was submitted that it was clear that the Plaintiff did not amend its Plaint to capture these particulars in its pleadings despite being armed with all the material and information set out in the said reports to enable it particularise its claim to a certain degree. The Plaintiff is bound by its pleadings and in the absence of amendment the said claim must fail. It is contended that Plaintiff could not prove its claim for special damages by simply producing the Valuation Report of PW2 and the Geological Survey report of PW3, it needed to have specifically pleaded and proved the same. Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited [2010] eKLR is relied upon to buttress this position.

63. On the value of the top soil and sub soil it was submitted that the Cost Estimation Manual for Road Maintenance Works (Popular Edition, 2019) produced by the Plaintiff and used by PW3 to arrive at the Kshs. 30,366,858/- for material is to be applied for tender documentation by procurement entities and formulation of work plans by the road agencies. Consequently, it does not provide a proper basis for the estimation of market value of excavated material and will be highly prejudicial if the rates given in the Manual were applied in this case. The case of Nakuru Industries Limited v SS Mehta & Sons [2016] eKLR was relied upon.

64. That the above notwithstanding, it was submitted that the rates/cost relied on by PW3 were on the higher side, yet the manual clearly provided for cheaper materials.

65. On cost of compaction it was submitted that the Plaintiff did not plead nor particularize its claim for the cost of compaction and it ought to be dismissed. Further that the nature and extent of compaction required for a subgrade cannot be the same as the one required for an agricultural parcel of land and it would thus be prejudicial to apply such a rate for compaction of an agricultural parcel of land.

66. It was additionally submitted the amount or rate of the Mesne profits was not pleaded nor specified and that PW1 did not also lead any evidence to prove the claim for mense profits. The court was also invited to disallow the following claims for special damages;

i. In respect of PW2, Geoffrey Chege, no receipt for Kshs. 130,000/= in respect of the cost of preparation of his Valuation Report or his court attendance was produced.

ii. The visit by PW3, Elizabeth Makau on 29/4/2022 was done without notice and/or involvement of the Defendant as ordered by the court.

The Defendant challenged the same and the court ordered the Plaintiff to conduct the exercise as per the court order. Hence the Plaintiff cannot seek a payment of the sum of Kshs. 157,000/ = and we pray that the same be disallowed.

In any event, no receipt(s) were provided to prove this cost.

iii. The Defendant paid its share of Kshs. 64,500/= in respect of the costs of the site visit done on 26th June, 2022 by the National Land Commission Valuers.

iv. The Geological report was not sanctioned by the court and no receipt has been produced by the Plaintiff to prove that it incurred the cost of Kshs. 187, 400/= for the same.

v. No receipts in respect of the court attendance fees for the PW3 and PW4.

67. Reliance was placed on the cases of Nakuru Industries Limited v SS Mehta & Sons [2016] eKLR, and Peter Lavatsa Kabwoya v Nicholas G Karira & another [2021] eKLR to buttress the above.

Analysis and Determination

68. I have considered the facts and prayers sought in the pleadings, the evidence led by both parties in support of their cases including the rival submissions and the case law cited. The court has identified the following issues for identification; -

a. Whether the Defendant trespassed onto land parcel number Kwale/Ng'ombeni/2453 and excavated without the permission of the owner.

b. What is the area or coverage of the suit property excavated?

c. Whether the Defendants acts of excavation has caused damage to the land parcel number Kwale/Ng'ombeni/2453.

d. If the answer to c) is in the affirmative what is the extent of the damage?

e. What relief would the Plaintiff be entitled to?

f. Who bears the costs of this suit?

69. Briefly my understanding of this case is that the Plaintiff being the registered proprietor of the suit property claims that the Defendant entered into the same without its consent and proceeded to excavate some soil therefrom to the tune of 40,230 cubic meters. That the said excavation has left the land unfit for the purpose it was intended for being the construction of houses for sell unless it is rehabilitated. The Plaintiff terms the Defendant's actions as trespass and also claims the value of the said soil/material that was excavated from the suit property as well as cost of rehabilitation of the land.

70. It is trite that the burden of proof lay on the Plaintiff to prove his claim as required under the provisions of section 107 of the *Evidence Act* Chapter 80 of the Laws of Kenya.

Whether the Defendant trespassed onto land parcel number Kwale/Ng'ombeni/2453 and excavated without the permission of the owner.

71. I will first lay out the law on trespass. Section 3[1] of the *Trespass Act* chapter 294 of the Laws of Kenya provides that;

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.

72. Trespass also consists of any unjustifiable intrusion by one person upon land in possession of another (see Clerk & Lindsell on Tort (21st Edn) page 1345). The court in the case of Nyangeri Obiye Thomas Vs Yunuke Sakagwa Nyoiza ELC Case No. 277 of 2018 observed as follows on trespass:

> " Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines trespass as follows: "Any unjustifiable intrusion by one person upon land in possession of another."

73. Arising from the foregoing there must be entry into another's land (private land), such entry must be without permission of the occupier of the land and or without reasonable excuse.

74. It is not in dispute that the suit property is registered in the name of the Plaintiff as absolute proprietor. PW1 produced in court a copy of the title deed of parcel No. Kwale/Ngombeni/2455 and the attendant Certificate of Official Search. The title deed reveals the land was registered to Greenland Realtors Limited, the Plaintiff herein on 23/11/2012 and a title issued on the same date. This is also confirmed by the Certificate of Official Search dated 23/11/2012.

75. The suit property is registered under the Registered *Land Act* Chapter 300 of the Laws of Kenya (now repealed). By dint of the saving clause under the provisions of section 107 of the *Land Registration Act* 2012, the applicable legal regime is the *Land Registration Act* 2012. Sections 24,25 and 26 thereof state the position of a holder of a title in respect of the land as follows;

Section 24(a) of the *Land Registration Act* provides for the interest conferred by registration. It provides;

> " Subject to this act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto."

76. Section 25 of the *Land Registration Act* provides for the rights of a proprietor. It provides as follows:

a. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided by this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject......

77. Section 26(1) of the *Land Registration Act* provides as follows:

a. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except;

b. On the ground of fraud or misrepresentation to which the person is proved to be a party or;

c. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

78. The Plaintiff's title is not being impeached by the Defendants in these proceedings and from the foregoing it is clear that the suit property is registered in the name of the Plaintiff the prima facie owner. It is private land and does not belong to the Defendant. Was the Defendant entry into the suit premises without permission of the registered owner, the Plaintiff herein?

79. PW1 stated in his evidence that sometime in June 2019 they learnt that Defendant entered into and trespassed into the suit property. In the Particulars of breach listed under paragraph 15 of the Plaint it is alleged the Defendant entered the land without the Plaintiff's consent. DW1 Abraham Masinde Wangila an employee of the Defendant admitted during his evidence in chief that they entered the suit property. Accordingly, it is therefore the permission to enter that was the issue. He stated in evidence that they made effort to know the owner of the land and fortunately one Ali Mwadarawa came to the suit property and informed them he was the agent for the owner of the suit property and they convinced him that they only needed abit of soil to pour on the road leading to Kiteje and its environs that had been made impassible by the rains. This seems to me is what the Defendant treated as permission. On this basis they entered the suit property and excavated the said soil. No evidence was produced by the Defendant with regard to the alleged permission except a copy of Ali Mwadarasi's Identity Card. DW1 explained that it was their procedure to obtain a copy of the ID card of the person they find in the land and which they did. Would this suffice for proof of consent? In my view no, there was need for the Defendant to ensure and or satisfy themselves that the said Ali Mwadarasi was indeed the agent of the Plaintiff and that he obtained proper authority from the owner to allow the entry and including its purpose thereof. In cross examination DW1 stated Ali Mwadarasi did not show them any documents of ownership by the Plaintiff. DW1 conceded they did not undertake any search neither did they sign any agreement of lease with Mwadarasi as an agent of the Plaintiff. That they were never given any written authority to enter the property. I think the Defendant handled this matter very casually for a company that matches the description given in paragraph 2 of the Plaint and however minimal they thought the amount of soil they needed.

80. Based on the foregoing and in the absence of proof of the Plaintiff's consent, I find that the entry into the suit property was illegal without authority of its owner the Plaintiff. It is the court's finding the Defendant trespassed into the Plaintiffs land and carried out excavation which was also not authorised by the Plaintiff.

What area or coverage of the suit property was excavated and did the Defendants acts of excavation cause damage to the land parcel number Kwale/Ng'ombeni/2453.

81. The fact that there was excavation is not in dispute and has been admitted by the Defendant as shown above including the statement of defence. It is only Elizabeth Makau of NLC (PW4) who was non-committal on this point stating that she did not see any excavation when curiously every expert saw it. DW4 confirms he visited the plot and noted and saw there was an excavation including depression on the plot. It was therefore incumbent upon the Plaintiff to prove that the trespass caused damage to the land and the extent of the damage.

82. PW1 stated in his witness statement which he adopted that on 20/9/2019 Procost Valuers Limited were instructed by the Plaintiff to inspect the suit property who found that the land was excavated, top sand sub soil harvested and then backfilled with loose black loam soil. That as a result the suit property could no longer be used for its intended purpose. The Plaintiff called PW2 Geoffrey Chege

Wambui the proprietor of Ms. Procost Valuers Ltd who produced a report dated 25/06/2019 which he confirmed he prepared.

83. It is important to first determine the extent of the said excavation in terms of the acreage it covered. In other words, how much of the suit property was affected by the excavation. From the title presented in court by the Plaintiff, the suit property measures approximately 0.80HA translating to slightly below 2 acres. PW1 did not specifically state in his oral testimony the exact size of the area that was excavated. However, PW2 of Procost Valuers testified in cross examination that the excavation was not on the entire property but only 48% had been excavated though he had not included this information in his report dated 25th June, 2019. He however recanted this in reexamination by stating that the excavation was on the entire land which to me is a contradiction.

84. Did the Defendant manage to displace the above evidence as to size of the excavated area? DW1 Abraham Masinde stated the area excavated was a very small area about 10 square meters but later contradicted himself in cross examination that he did not measure the excavated area to be able to tell the size of the area that was excavated. The report dated 5/5/21 produced as DEX 5 states at paragraph G; -

> Amount of filing materials
>
> In our measurements the depressed area is approximate rectangular with a maximum length of 25 meters and width of 23 meters, the amount required to fill the depressed area amounts to 25m x 23 m x 0.45m = 258.75 metres

85. The court also considered the geological survey report produced by Mr. Paul Mwadime. Paragraph 3.1 of the report states the excavated area based on geo physical measurements of the deep section is 1478m^2 (also see figure 9) and disturbed area based on satellite image is 3340. However, Mr. Mwadime testified in cross-examination that while he knew the total acreage of the entire land he had not calculated the percentage of 1478m^2 neither did he calculate percentage of the disturbed area. It was therefore not clear to the court the exact acreage of the excavated area.

86. The court finds that the report dated 5/5/21 came closer to giving the excavated area and places more weight on it. This is in view of the contradictions shown in PW2 evidence where the witness gave two contradicting statements culminating to the statement in re-examination that the entire land was excavated and which was not the case from my review of the evidence.

87. But in-spite of the above it is still behoved the court to make a determination of the value of compensation there being no contention that there was excavation and which excavation affected the suit property by causing depression and which to some extent affected the land. But what is the extent of the damage and quantum?

What is the extent of the damage.

88. The question that then arises is, how is trespass to be compensated in law and indeed the nature of the damage in the present proceedings. Justice L. Naikuni in Mombasa ELC Civil suit No. 334 of 1996 Halal Brothers Limited Vs. Roy Rimba & 3 Others (Unreported) in his judgement delivered on 7/11/23 cited Halbury's Law of England 4th Edn. Vol. 45 at paragraph 26, 1503, thus; -

    a. If the Plaintiff proves the trespass he is entitled to recover nominal damages even if he has not suffered any actual loss.

    b. If the trespass has caused the Plaintiff actual damage he is entitled to receive such amount as will compensate him for her loss.

c. Where the Defendant has made use of the Plaintiffs land, the plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.

d. ....

89. In the case of Philip Ayaya Aluchio…Vs…Crispinus Ngayo [2014] eKLR, Obaga J held as follows: -

> " The plaintiff is entitled to General Damages for trespass. The issue which arises is as to what is the measure of such Damage. It has been held that the measure of Damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less." See Hostler Vs Green Park Development Co. 986 S.W 2d 500 (No. App.1999). (Emphasis is mine).

90. Faced with almost similar facts with the present case, the court in the case of Miaraho Limited v Synohydro Corporation Limited [2019] eKLR, referred to by both parties herein cited with approval the case of Dodd Properties (Kent) Limited and another v Canterbury City Council and others [1980] 1 All ER 928 where it was held as follows;

40. The general principle governing assessment of general damages of this nature was outlined by Lord Justice Donaldson in the following words:

> "The general object underlying the rules for the assessment of damages is, so far as possible by means of monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of be that wrong a tort or a breach of contract. In the case of a tort causing damage to real property, this object is achieved by the application of one or other of two quite different measures of damage, or occasionally, a combination of the two. The first is to take the capital value of the property in an undamaged state and to compare it with its value in a damaged state. The second is to take the cost of repair or reinstatement. Which is appropriate will depend on a number of factors, such as the plaintiff's future intentions as to the use of the property and the reasonableness of those intentions. If he reasonably intends to sell the property in its damaged state, clearly the diminution in capital value is the true measure of damage. If he reasonably intends to continue to occupy it to repair the damage, clearly the cost of repairs is the true measure. And there may be in between situations."

91. Guided by the foregoing it follows that if the trespass causes damage the owner of the land is entitled to some compensation. For real property and which is what we are dealing with in the instant suit two options are given firstly the reasonable cost of restoration of the land, or secondly the diminution in fair market value but the applicable one should be the one that is less. I also note that the court also envisaged in between situations which I understand to mean a combination of the two but which is the exception rather than the rule.

92. I will start with the option of the cost of repair or reinstating the land to its original state. This is dependent upon the Plaintiffs future intentions of use of the property and reasonableness of those intentions. In the particulars of damage, it is pleaded that the Defendant degraded the suit property thereby making it unfit for its intended purpose being commercial and industrial uses upon application for a change of use from Kwale County Government. In the present case PW1 evidence is that the report prepared by Procost Valuers Ltd on behalf of the Plaintiff stated the excavation and harvesting would hamper structural development and the property could not be used for its original intended purpose. The report dated 25/06/2019 and which formed part of the Plaintiffs bundle of documents

states under 'Remarks', that excavation was in progress at the time of the visit and a section of the excavated portion had been backfilled with loose black cotton soils or left derelict and whose effect would be firstly, the property would be prone to flooding in the event of heavy rain, secondly it had been rendered unfit for any structural development and thirdly unfit for agricultural purposes. The report concludes that the land had been rendered economically obsolete.

93. From PW1 witness statement dated 22/5/2020 which he adopted as his evidence in chief, his testimony is that the Plaintiff had planned to construct houses for sale. It is important to note no evidence of this future intentions was placed before court not even the company objectives as would be deduced from its Memo Arts. A company investing for future real estate development would have its developments plans or professional reports informing their investment decisions and even future projections. I had nothing before court to cement this testimony. It cannot be enough for the court to infer this from the name of the Company as counsel for the Plaintiff attempted to do during cross examination of Elizabeth Makau. Further the land as shown in all the reports filed is for agricultural use. PW1 had conceded in cross examination that he had not made an application for change of user. PW2 stated in cross examination that though he was informed that the client (Plaintiff) had sought change of use to build residential houses, he did not see the actual change of user. All this did not build the courts confidence to the future intentions of the company.

94. Connected to the cost of repair or reinstatement is the Plaintiffs claim for Kshs. 80million. To cement this, claim the Plaintiff called PW2 who prepared the report by Procost Valuers to testify on its behalf. PW2 testified in cross examination that since only 48% of the land was excavated it affected the stability of the land. That the entire land would have to be excavated and backfilled to restore it at the cost of Kshs. 80 million. But I have already shown how this witness contradicted himself on the acreage excavated. This amount is pleaded in prayer 18(d) of the Plaint 'as value of top and subsoil excavated.' The Plaintiff in its submissions invited the court to rely on PW2 Mr. Chege Wambui evidence as to cost of reclamation of Kshs. 80 million as more realistic and believable taking into consideration what was harvested.

95. Based on the evidence and cross examination the court noted various emerging issues that called into question the probative value of the above figure as assessed and its soundness as follows; -

a. Starting with the plaint herein it is pleaded that this is the value of 'top and subsoil excavated'. The valuation report by Procost Valuers Ltd does not give a breakdown of this figure but only gives it as we assess the cost of damages on Title No. Kwale/Ng'ombeni/2453 for compensation purpose in the sum of Kshs 80,000,000/=. Nowhere does the report explain this vis a vis the top soil and subsoil excavated'.

b. I then looked at the Report and Workings by Procost Valuers Ltd produced under the Plaintiffs supplementary list of documents dated 12/2/21. The report includes a claim of Kshs. 24,082,486.4632 being rocks filing. The question I posed is why you would require rocks filing when what is pleaded as having been removed is top soil and subsoil?

c. The geological report from NLC states that there is no rock exposure (see page 2 ontop of figure 1). In any event rock is shown at level 3 going down which clearly is not the top soil or subsoil.

d. On the Volume excavated the court noted a departure from the 40,230 cubic meters of soil earlier pleaded under paragraph 10 of the plaint and this appears to have been influenced by the fact that the client initially intended to develop the property with commercial building based on approval by the county government. I have already stated there was nothing in evidence to back the future intentions. Even the change of user approval which is alluded to was not

produced. I have already discussed this matter surrounding change of user and future plans elsewhere in this judgement.

e. Compaction is placed at 11,764,114.5036. However, the court was not led to how much level of compacting was required. PW2 from Procost Valuers Ltd admitted to this figure having been influenced by the future plans which I have already stated were not proved. The degree of compaction was not given to inform this figure. It is noteworthy that PW3 informed the court in cross examination that the services of an expert would be required (an engineer). PW2 stated he secured the expert services but admitted he did not include the engineers report to his report.

f. Moreover, it is not in dispute backfilling had been undertaken by the Defendant except the material used and whether it should be like for like. However, Procost valuers Ltd did not factor this in its computation. I say so because logically whatever has been brought in and used for backfilling ought to have been recognised and a value placed on it and factored and or subtracted.

96. The Plaintiff's case is that the excavated material was deployed for road construction by the Defendants. I hear the Plaintiff intimating that this was the main Mteza Kibundani road which the defence pleaded they were awarded a tender to construct. I note that at paragraph 10 of the Plaint it is averred the Defendant obtained profits by commercially using 40,230 cubic meter of soil value at Kshs. 5000/= per cubic meter making a total of Kshs. 201,400,000/=. However, PW1 did contradict himself in cross examination when he conceded he was not privy to how and the purpose for which the excavated soil was used by the Defendant. DW1 evidence is that they did not use the material for their project but the road leading to the suit property. This evidence was not displaced by the Plaintiff. This claim it is my finding was not proved infact it appears to have been abandoned and replaced with the Kshs. 80,000,000/=.

97. It is imperative that the court comments on the Kshs. 49,000,000/= returned by the geological report presented by Paul Mwadime the geologist from Ministry of Mining (PW3). The court equally picked some observations that created some doubts. He testified that the cost of compaction was the same as cost of reclamation which to me based on the evidence of the other expert witnesses clearly cannot be the same. I have already explained earlier herein my doubts on his testimony with regard to compaction. He proposed rock filing but at the same time contradicted himself when he stated one could use other material depending with their preference. Was this a matter of preference given the circumstances, clearly not. He also conceded he was not qualified to give evidence on land reclamation/rehabilitation which confirmed my reservations.

98. I think I have said enough to demonstrate why the claim for Kshs. 80,000,000/= and even that of Kshs. 49,000,000/= could not be sustained and adopted by this court as reasonable.

99. The court reviewed the evidence of DW3 Nyange Erick Mwanyumba. The witness recommended murrum fill whose unit cost he raised to Kshs. 1,295/= per cubic metre against Kshs.1000 prescribed in the Cost estimate Manual 22.72.01 to carter for the cost of compaction thus returning a figure of Kshs. 335,051.25/= plus 15% VAT making a total of Kshs. 388,694.25/= I found this evidence more compelling, honest and reasonable in light of the emerging concerns noted by the court on the figures of Kshs. 80 and 49 million and further against the background that the user of the suit property was agricultural and the future intentions having not been proved.

100. The other consideration is to establish capital value of the property in the undamaged state and to compare it with its value in a damaged state. To me this would be the difference between the unimpaired market value and taking into consideration the damage or impairment. It is therefore the reduction in

value. Could this be termed as the diminution value? Wikipedia defines diminution in value 'as a legal term of art used when calculating damages in a legal dispute, and describes a measure of value lost due to a circumstance or set of circumstances that caused the loss.' The Defendant in their submission's provided the Black's Law Dictionary definition of Diminution in Value as: Rule of damages which provides the difference between "before" and "after" values of property, which has been damaged or taken.

My further understanding guided by the above is that the diminution would be a percentage that is removed from the unimpaired market value.

101. Three values were given Elizabeth Makau Senior Valuer of NLC, returned a value of Kshs. 3,600,000/=, PW2 Kshs.4,000,000/= and DW2 Rashid H. Swalee Kshs.1,200,000/=. According to PW4 (Elizabeth) report the valuation methodology required that transaction data of similar properties in the neighborhood are collected and analysed. These were not shown in the report. PW4 admitted to this stating while she had comparables she did not include them in her report. Procost valuers report dated 25/06/19 while it states the land value to be Kshs. 4,000,000/- there is no scientific explanation on how the same was arrived at. While the PW1 stated they bought the plot in 2012 the purchase price was not disclosed. On the other hand DW2 in his report prepared by Njihia Muoka dated 27/7/2020 produced as DEX2, gives the valuation methodology which is stated as comparative method and the comparatives were indeed listed. It is however noteworthy Elizabeth Makau admitted in cross examination that she did not determine the diminution in value. PW2 from Procost Valuers Ltd did not give the diminution in value either. DW2 on the other hand assessed the suit property and determined that it had lost 30% of its value due to the excavation, amounting to a loss of Kshs. 360,000/=. To me this was reasonable considering the property values returned and also considering my earlier observations on the cost returned by DW3. I will also state that the disturbed area was not an excavated area as it was not excavated anyway. Its impact in my view would be negligible whether looked at from the perspective of agriculture as the user or even the alleged future intentions.

What relief would the Plaintiff be entitled to?

102. Prayer a) and b) of the Plaint have already been discussed in the foregoing analysis and I do not wish to risk repeating myself. It however behooves the court to address the prayer for mesne profits. Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya defines mesne profits as follows: -

> "Mesne profits", in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

103. The Court of Appeal in Attorney General v Halal Meat Products Limited [2016] eKLR stated that;

> ".........where a person is wrongfully deprived of his property, he/she is entitled to damages known as mesne profits for loss suffered...."

104. It is however trite that mesne profits are special damages and ought to be particularized and proved. See Karanja Mbugua & another v Marybin Holding Co. Ltd [2014] eKLR.

105. The Court of Appeal in the case of Peter Mwangi Mbuthia & another v Samow Edin Osman [2014] eKLR held that;

> "We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne

profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established."

106. I will not belabor this issue. The Plaintiff prays for mesne profits under prayer c) of the Plaint. My review of the Plaint did not particularize the mesne profits. I agree with the Defendants observations that the claim for mesne profits simply appears on the prayers in the Plaint where the Plaintiff simply prays for "Mesne Profits" The amount or rate of the Mesne profits is not pleaded nor specified in its prayers. The only paragraph in which the Plaintiff has given figures is paragraph 10. The paragraph has already been quoted verbatim elsewhere in this judgement. Assuming this is the claim Procost valuers Ltd report on workings has given particularization of the various heads but which are not specifically reflected in the plaint. In Independent Electoral And Boundaries Commission & Another Vs Stephen Mutinda Mule & 3 Others [2014] eKLR the court cited the decision of the Supreme Court of Nigeria in Adetoun Oladeji (Nig) Vs Nigeria Breweries PLC SC 91/ 2002 where Adereji, JSC expressed the importance and place of pleadings and stated;

"... It is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded..."

107. The court has noted the Defendant's invitation to award mesne profits in form of interest on the awarded sum at court rates from the date of filing this suit until payment in full for the reason that the Defendant failed to produce documents which would guide the court and the Plaintiff. I'm afraid that based on the court precedents cited herein the court must decline this invitation. The court finds no basis for granting mesne profits.

108. In its submissions the Plaintiff has moved this court to award Kshs. 663,400/= being special damages made up as follows; -

i. Preparation of Report and Court attendance by Mr.

Chege Wambui...........Kshs. 130,000

ii. Site visit of 29.4.2022 by National Land

Commission Valuer Ms. Elizabeth Makau....Kshs. 157,000

iii. Site visit of 25.6.2022 by National Land

Commission Valuers...............Kshs.129,000

iv. Site visit of 25.6.2022 by Geologists

From Ministry of Mining........Kshs.187,400

v. Attending Court by National Land

Commission Valuer Ms. Elizabeth Makau and

Geologists Mr. Paul Mwadime from Ministry of Mining on 9.3.2023 @ Kshs.30,000..................Kshs. 60,000

Total..........................Kshs. 663,400

109. It is trite that special damages must be pleaded and proved. However, the court notes that there has been some mix up in the above tabulation where counsel has mixed up special damages and costs of conducting the proceedings. Why do I say so? The preparation of the report by Procost valuers is

pleaded at paragraph 14 of the plaint. It is stated the expert was retained to carry out an inspection of the suit property with a view to advising on its market value. To me this is a special damage which ought to have been particularized and proved. It was not. Moreover, the alleged payment was not supported with proof that it was indeed paid and received. But having said that, the mix up in item i) above is that the court attendance by Mr. Chege is not a special damage, it is a cost and specifically witness expense and ordinarily follows the event and is subject to proof during taxation. I will therefore not award the amount prayed for Mr. Cheges professional fees.

110. With regard to Ms. Elizabeth Makau her attendance in court like I have observed above is not a special damage, it is a cost and specifically witness expense and ordinarily follows the event and is subject to proof during taxation.

111. I have further noted the Plaintiff's objections to the site visit of 29.4.2022 on the basis that it was undertaken without notice and/or involvement of the Defendant as ordered by the court. The Plaintiff calls it a boycott by the Defendant. The issue of the objection arises from the proceedings 14/12/21 when this court pointed that the two expert reports filed by both sides varied substantially on the extent of excavations and proposed a joint report by the District surveyor. I have perused the proceedings of 14/12/21, 16/02/22, 18/02/22, 20/04/22, 24/05/22 and 29/6/22 culminating to the filing of the joint report on 25/7/2022. Ms. Ngigi did cross examine Ms. Elizabeth Makau who confirmed she made two visits to the suit property and that on the said date she visited site and did what she needed to do but the representatives were not present. The witness confirmed both visits cost Kshs. 129,000/= exclusive of the air tickets. Let me state that Ms. Njomo and Ms. Ngigi on 24/05/22 informed the court that their experts did not attend because of the short notice and therefore to me both would have suffered prejudice by dint of the absence of their experts. I think I will let this matter rest at that. Having said this none of the parties to the dispute had introduced the additional experts in their pleadings. They came in later following prompting by this court. For me therefore payment of a portion of these costs by parties is not special damages. It is a cost incurred by both the parties while conducting the case. Since the court had directed that the costs be shared, this is what will obtain and the 1st visit shall be treated as such and during taxation.

112. About the site visit by the geologists it is stated the report was not sanctioned by the court. The geologists were deployed by the NLC and the reason was explained that the Commission did not have the expertise among their pool of experts to establish the dimunition in value. At no point did Ms. Ngigi apply for the expunging of this report and with due respect to counsel the objection cannot be sustained. The court directs that these shall be treated as costs to be dealt with at taxation including their court attendances.

113. It is trite law that trespass to land is actionable per se (without proof of any damage). In the case of Park Towers Ltd v. John Mithamo Njika & 7 others (2014) eKLR, J.M Mutungi J., stated: -

> "I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case."

114. The Defendant has proposed Kshs. 10,000,000/=. This court noted elsewhere in this judgement that the Defendant handled the issue of obtaining the registered owners consent to the entry and excavation very casually and without professionalism and the court awards Kshs.3,000,000/=. In this regard the court is guided and persuaded by Justice Eboso award in Miaraho Limited Supra while factoring the passage of time.

115. As to the cost of restoration of the land the court found the evidence of DW3 Nyange Erick Mwanyumba and DW2 Rashid H. Swalee to be more convincing. I will add that even assuming the land was meant for building the houses for sale, I would agree with DW2 that one would still have to excavate anyway to be able to set up a foundation for the said developments. Further it is also noteworthy that there was already some material brought into the land by the Defendant as there was evidence of backfilling that had occurred and which cannot be ignored. But I think it is also important to recognise the existence of the trench whose presence in the suit property was admitted by DW4. Its refilling will definitely enhance the costs involved in restoring it. I had earlier stated that in Miaraho Limited v Synohydro Corporation Limited [2019] eKLR, supra Lord Justice Donaldson who was quoted by the court also envisaged an in between situation which I observed I understood to mean a combination of the two but which is the exception and not the rule. Every case is decided based on its unique circumstances. Based on the evidence the court also notes there was no absolute loss of the property to term it obsolete. I'm inclined therefore to adopt both the Kshs. 335,051.25/= and Kshs 360,000/= as reasonable compensation under this head compared to the figures proposed by the Procost Valuers Ltd and the geology report.

116. Costs of the suit follow the event and I'm inclined to award the same to the Plaintiff and which will also be subject to the findings herein during the court's discussions on the expert witness's costs.

117. The upshot of the foregoing is that the court finds that the Plaintiff has proved on a balance of probability that the Defendant unlawfully entered into the Plaintiffs land Parcel No Kwale/ Ng'ombeni/2453 and excavated soil therefrom without the Plaintiffs consent, causing damage to the property. I enter judgement in favor of the Plaintiff against the Defendant in the following specific terms; -

    i. A declaration that the Defendant trespassed upon the suit property and excavated thereof.

    ii. General Damages of Kshs. 3,000,000/=

    iii. Cost of land restoration 695,051.25/=

    iv. The value of top soil and subsoil excavated of Kshs. 80,000,000/= is rejected

    v. Interest on ii) and iii) above from the date of judgement.

    vi. The Defendant shall bear the costs of this suit.

    Orders accordingly

JUDGEMENT DATED SIGNED AND DELIVERED THIS 3RD DAY OF MAY 2024.

....

A.E DENA

JUDGE

In the presence of: -

Ms. Njomo for the Plaintiff

Ms. Ngigi for the Defendant

Ms. Asmaa Maftah – Court Assistant