Rutere & 11 others v Reynolds Construction Company (NIG) Ltd (Environment & Land Case 28 of 2013) [2024] KEELC 5369 (KLR) (10 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5369 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE 28 OF 2013

CK NZILI, J

JULY 10, 2024

BETWEEN

JAPHET MBAE RUTERE ..... 1ST PLAINTIFF

JAKUBU M'ARIMI M'IKIUGU ..... 2ND PLAINTIFF

MONICA MWARIUMWE KITHINJI ..... 3RD PLAINTIFF

JAMES GATOBU M'IKIUGU ..... 4TH PLAINTIFF

GILBERT MBAABU ..... 5TH PLAINTIFF

MARY M. MUTWIRI ..... 6TH PLAINTIFF

JOSHUA KABURU KIMATHI ..... 7TH PLAINTIFF

MOSES GITUMA HARUN ..... 8TH PLAINTIFF

PATRICK KINYUA M'IRINGO ..... 9TH PLAINTIFF

MICHAEL MUGAMBI J. KABUGO ..... 10TH PLAINTIFF

DOUGLAS MUTUMA MAGANA ..... 11TH PLAINTIFF

FELICIAN MUTHONI RUTERE ..... 12TH PLAINTIFF

AND

REYNOLDS CONSTRUCTION COMPANY (NIG) L.T.D ..... DEFENDANT

JUDGMENT

1. The plaintiffs are all residents of Kigane Village Nkuene Division Imenti South District - Meru County, situated along Mikumbune – Marimba Mitunguu road. They complain that the defendant built and operated a campsite for an Asphalt Plant (-the Plant) used to process road construction materials

within their neighborhood between 2010 and 2013. The plaintiffs averred that in operating the Plant, the defendant did not fully comply with the relevant environmental laws. As a result, the Plant polluted and diminished the environmental quality standards around it generally and, in particular, caused severe pollution to them in terms of air, soil, water, noise, houses, crops, and all other developments in their parcels of land surrounding the campsite.

2. The plaintiffs averred that as direct neighbors to the Plant, they suffered environmental losses and damage. Again, the plaintiffs averred that the loss and damage were caused by, among others, the emission of toxic and hazardous wastes, dust, soil, noise, tar, oil spillages, and surface runoffs for a period of slightly over three years, hence lowering health standards of both livestock, human beings, crops, plants, and general vegetation. The particulars of pollution, as pleaded, were the emission of toxic and hazardous wastes, excessive dust, spillage of tar, high noise and sound levels, poor waste management, and general pollution of the environment.

3. As a consequence, the plaintiffs averred that they complained to the National Environmental Management Authority (NEMA) over the pollution, who wrote to the defendant to remedy the situation. However, the defendant refused or failed to mitigate the pollution or address their complaints or concerns, hence causing more injuries, loss, and damage.

4. The plaintiffs set out individual losses and special damages as:

    i. 1st & 12th plaintiffs, owners of L.R No.'s Nkuene/Taita/2779, 2780, 2782 and 2783 at Kshs.30,515,000/=.

    ii. 2nd plaintiff's mother, as owner of L.R No. Nkuene/Taita 861 at Kshs.5,460,000/=.

    iii. 3rd plaintiff as owner of L.R No. Nkuene/Taita/2655 at Kshs.4,395,000/=.

    iv. 4th plaintiff as owner of L.R No. Nkuene Lower Mikumbune/499 near the Plant at Kshs.9,582,500.

    v. 5th plaintiff as the owner of L.R No. Nkuene/Taita/440 near the plant at Kshs.12,585,000/=.

    vi. 6th plaintiff as owner of L.R No. Nkuene/Lower Mikumbune/202, near the Plant at Kshs.10,550,000/=.

    vii. 7th plaintiff as owner of L.R No. Nkuene/Lower Mikumbune/1799, near the Plant at Kshs.3,060,000/=

    viii. 8th plaintiff as owner of L.R No. Nkuene/Taita/2471, near the Plant at Kshs.8,055,000/=.

    ix. 9th plaintiff as owner of L.R No. Nkuene/Lower Mikumbune/1798, near the Plant at Kshs.4,030,000/=.

    x. 10th plaintiff as owner of L.R No. Nkuene/Taita/2041 & 2042 near the plant at Kshs.12,195,000/= and lastly;

    xi. 11th plaintiff as owner of L.R No. NKuene/Taita/1991, near the plant at Kshs.4,100,000/= all totaling to Kshs.108,597,500/=.

5. Besides the particularized losses and special damages, the plaintiffs averred that they also suffered poor health, poor living conditions, daily exposure to environmental hazards, and general adverse effects and professional fees of Kshs.1,500,00/=.

6. The plaintiffs also sought:

a. Special damages of Kshs.117,097,500/=.

b. General damages for the pollution, environmental degradation and the consequent damage.

c. Restoration order of the environment to its status before the pollution.

d. Any other better relief as the court may deem fit.

e. Costs and interests.

7. In support of their claim, the plaintiffs filed a list of documents dated 23.1.2013, a list of witness statements dated 18.3.2017, a list of expert witnesses dated 26.2.2018, paginated documents dated 24.2.2021, a further list of witnesses dated 12.10.2024 and a further paginated bundle dated 24.3.2023.

8. The defendant opposed the claims through a statement of defense dated 11.3.2013. Apart from admitting the descriptive parts of the initial plaint dated 23.1.2013, the defendant denied that the plaintiffs were residents in the area where the defendant's processing Plant was located or where the road construction was being effected by it or at all.

9. The defendant denied building a processing plant at Kigane village in 2010, save that it was awarded a contract to undertake the rehabilitation and upgrading of Meru-Marimba-Kionyo-Chogoria road, Marimba-Nkubu road, and Nkubu Mitunguu road, by the Government of Kenya designated as D482, D483, D474, D476, and D475, respectively.

10. The defendant averred that the portion on which it located its works was an area identified by the Government of Kenya through the Ministry of Roads and Public Works in consultation with the Ministry of Livestock Development. The defendant averred that if at all the plaintiffs lived in the area as alleged, which was denied, the said occupation was irregular, as the occupation therein could only have been on a road reserve.

11. The defendant averred that it built the processing Plant, which it operated during the period of construction, and then closed it upon the completion of the project way before the suit herein was filed.

12. The defendant averred that the road project in question was part of the Government of Kenya financed Mt. Kenya infrastructure project, in respect of which an environmental impact assessment study was undertaken, a report prepared, approved and by NEMA experts, who confirmed that there was overwhelming public support for the road rehabilitation and or upgrading, as it was going to bring significant socio-economic benefits to the area, far outweighing any adverse environmental impacts that were likely to arise.

13. The defendant averred that the conduct and feedback of the plaintiffs and other members of the public were supportive of the project and that the plaintiffs failed to object to the road construction project, whose implementation was commenced in 2007 and completed in 2012.

14. The defendant averred that all environmental issues that were raised with the relevant authorities were duly addressed by restoring the environment to its original status as contemplated under the Environmental Management and Co-ordination Act (EMCA) and contrary to the allegations by the plaintiffs, the defendant averred that it operated the Plant in full compliance with environmental laws and in particular the provisions of EMCA, to which NEMA gave an approval letter for the Plant dated 28.4.2010.

15. The defendant denied that the Plant had emitted any toxic and hazardous wastes, dust, noise, tar, oil spillage, and other surface run-off or caused any pollution to air, soil, water, noise, crops, and other developments as alleged by the plaintiffs or at all.

16. The defendant denied the particulars of pollution in paragraph 8 of the plaint. On the contrary, it averred that the dust management system installed at the Plant was among the best in the industry, capable of capturing dust and treating it without emitting it into the ambient environment. Consequently, the defendant averred that no toxic or hazardous wastes were emitted into the environment as the plant was also noiseless.

17. The defendant averred that the Plant was regularly inspected on a monthly basis by the regional office of NEMA, which was satisfied with its compliance with environmental standards and requirements. Additionally, the defendant denied that the plaintiffs owned any cows, chickens, goats, rabbits, coffee, bananas, fruit trees, fish, trees, homesteads, businesses, or nappier grass as alleged or at all. On the contrary, it averred that there was very little agriculture that was practiced on the parcels of land in question.

18. The defendant denied that the plaintiffs had suffered any loss or damage, as alleged or at all in terms of poor health, from any emissions out of the Plant. Further, the defendant averred that the leading cause for the poor crop yield from the parcels of land in question, as alleged under paragraphs 10 & 11 of the plaint, was the poor nutritional conditions of the soil and other factors and not alleged emissions from the asphalt plant; otherwise, the suit was a camouflaged attempt by the plaintiffs to enrich themselves unjustly. The defendant averred that the claimed expert fees were allegedly incurred out of the plaintiffs' own volition.

19. The defendants termed the alleged special damages as unrealistic or unbelievable and, hence, could not be held liable for them. The statement of defense by the defendant was accompanied by a list of witnesses, an indexed bundle of documents dated 19.6.2017, a supplementary list of witnesses dated 3.4.2018, an environmental report dated 24.8.2018, and a further supplementary list of documents dated 18.5.2023.

20. At the trial, Japhet Mbae Rutere testified as PW 1 and adopted his witness statement dated 8.3.2017 as his evidence in chief. He told the court that in 2010, the defendant leased out the land from his brother and erected a processing Plant amidst land occupied by the plaintiffs in Kigane village. He said that the activities of the defendant at the campsite caused pollution to air, soil, water, noise, and crops and affected all other developments on their land parcels. He blamed the defendant for not fully complying with environmental laws, standards, and regulations in operating the Plant. PW 1 said that the pollution included emissions of toxic and hazardous wastes, fumes, vibrations, dust, noises, and runoffs from the Plant that were carried out on a daily basis for a period of 3 years.

21. PW 1 said that he jointly owned L.R No. Nkuene/Taita/2779, 2780, 2782, and 2783 with the 12th plaintiff, which is next to the Plant. PW 1 said that a complaint was written to NEMA over the pollution, who ordered the defendant to remedy the situation but in vain. PW1 said that he had complained to the defendant in 2011, who visited his land parcels to verify the complaint and brought officers from Kenya Agricultural Research Institute (KARI), who took soil samples from his land for testing. The 1st plaintiff told the court that despite their complaints, the defendant continued with its operations unperturbed for over three years, causing them more injuries, loss, and damage.

22. As a result, PW 1 said that the plaintiffs incurred huge environmental damages and losses due to diminished farm income from cows, chickens, goats, rabbits, coffee, bananas, house rent, fruits, trees, nappier grass, mango trees, pawpaw trees, horticulture, macadamia trees, and avocado. By consent dated 27.3.2023, PW1 produced documents appearing on pages 47-52 and 63 of the paginated bundle dated 24.2.2021.

23. PW 1 said that although NEMA had initially licensed the defendant to erect the Plant for making bitumen in a residential area, the defendant ought to have complied with the law by being mindful of the plaintiffs' rights to a clean and healthy environment. PW1 told the court that the defendant had failed to comply with the EIA report, study, and license by effecting mitigation and remedial measures to avoid, reduce, or minimize the adverse environmental impacts as envisioned in the E.I.A. report. PW 1 said that after the plaintiffs complained, NEMA ordered the defendant to stop the pollution and undertake remedial work but declined or ignored it. Therefore, PW1 said that the only option left for them was to file the suit.

24. PW 1 told the court that the plaintiffs engaged two environmental experts from the University of Nairobi, who came to their parcels and collected air, soil water, and noise samples for analysis and the results indicated high-level pollutants, whose point source was the Plant. Similarly, PW 1 said that they suffered untold environmental loss, which made their lives and livelihoods pathetic. He said that after the plant was decommissioned, the situation was slowly normalizing, even though some pollutants were still visible on their rooftops, plants, soils, and trees, and were still affecting some crops.

25. PW 1 told the court that the two lead experts had warned them that the environment was not likely to normalize until after ten years. PW 1 said that the bitumen used in the Plant was highly carcinogenic and had caused two of his brothers to succumb to cancer, while some of his neighbors had suffered amputation of their limbs or arms. He urged the court to allow the claim on special and general damages, as per the estimates made by Dr. Mwenda.

26. PW 1 produced a certificate of confirmation grant for the late Mutwiri Inoti dated 20.7.2012, a limited grant for the estate of Rugiri Torucho, a limited grant for the estates of M'Muguna M'Rutere & Rukiru M'Kiongo, a bundle of receipts from the experts dated 3.4.2012 as P. Exh No's. 1-6, copy of records for L.R No. Nkuene/Taita/2779, 2780, 2782, 2783, 861, 2655 as P. Exh No. 7 (1) – (f), copies of records for L.R No. Nkuene/L-Mikumbune/499 as P. Exh No. 7 (a), L.R No. 7 (h), copies of records for L.R No. NKuene/L Mikumbune/202, 1799 as P. Exh No. 7 (1) & (5), a copy of the record for L.R No. Nkuene/Taita/247 & 2042 as P. Exh No. 7 (K), & (L), and a copy record for L.R. No. Nkuene/L-Mikumbune/1991 as P. Exh No. 7 (M) and a copy of the limited grant of letters of administration for Mary Mutiwri dated 5.7.2021 as P. Exh No. (8). Similarly, PW 1 produced a certified copy of the NEMA restoration order dated 1.2.2012 as P. Exh No. (9), and a copy of the Kenya gazette dated 25.7.2008, as P. Exh No (10).

27. In cross-examination, PW 1 told the court that before the defendant's operations commenced, even though local community members' views had been sought and obtained, fully supportive of the road project, little did they know at the time that it would pose severe environmental damage to them, mainly the Plant, for they had not been briefed or informed of its operations and implications in the first instance.

28. PW 1 said that operations of the Plant in the area increased the frequency of unusual deaths due to cancer and other respiratory diseases in the locality. PW1 had no medical reports attributing the cause of the deaths to the environmental impacts of the Plant. Further, PW1 said that he had extensively developed his parcels of land as per P. Exh No. 7 (a) and, hence, was entitled to special damages of Kshs.30,515,000/=.

29. PW1 also said that some of the conditions in the E.I.A. license, study, or report from NEMA were not fully complied with by the defendant, leading to excessive noise and dust pollution, oil, and air spillage. Similarly, he blamed the defendants for not undertaking any mitigation or remedial measures to address their concerns and or comply with the restoration order as per P. Exh No.9. PW1 said that

going by the letter dated 26.4.2010 in the defendant's list of documents, conditions 1.5 and 1.6 of the EIA license were never complied with by the defendant.

30. PW 1 said that even though he had no registry index maps or reports showing the locality of the campsite, the said fact was known and admitted by the defendant, given that its engineer had visited his land in 2020 after he had complained. Again, PW1 said that he lived on his parcels of land together with the 12th plaintiff and his family, where he has erected a residential home, put up rental houses, and run a business known as a fun city in operation since 2014. PW 1 said that he had incurred rental losses for three years. He did not produce any lease agreements with third parties before the court.

31. As to agriculture, horticulture, and livestock losses, PW 1 admitted that his documents in support of his claim lacked farm records on inputs, outputs, stock, income, acreage, delivery cards or records, receipts, or suppliers' reports. He denied that the alleged loss or damage was attributable to climate change or other point sources of pollution. Similarly, PW 1 said that he had no comparative monthly or annual records or analysis for his farm production before 2010 and after the Plant was decommissioned in 2013.

32. Additionally, PW 1 admitted that his evidence lacked agricultural, forest, or livestock officer's reports showing the production status of his farm before and after the Plant was commissioned and decommissioned.

33. Moreover, PW 1 admitted that he had no reports for the loss and damage from either the area chief, agricultural, livestock, forest, or public health officers, save for the first complaint in 2011 to the defendant resident engineer, the late Engineer Mbai, who visited his land with officers from (the Kenya Agricultural Research Institute (KARI); as per P. Exh. No (6).

34. PW 1 admitted that no plant, trees, or crop investigations were carried out to establish the cause of the withering or drying up of his trees, crops, and plants. He, however, said that after the plant was decommissioned, his farm produce and income had significantly improved. He told the court, however, that some of the debris of cement dust, tar, and oil spills were still visible in the village. PW 1 said that the defendant had leased out approximately three acres of land for the campsite, going by page 124 of the defendant's bundle of documents.

35. PW 1 denied that there were other nearby asphalt plants within the vicinity apart from the one owned by the defendant, which may have been a contributory cause of the loss or damage. Even though KARI experts were brought to his land by the defendant, PW 1 said that the defendant did not share with him the results of the samples collected from his farm. As an established farmer, investor, homeowner, and an immediate neighbor of the plant, PW 1 insisted that he was entitled to general and special damages for the environmental loss or damage.

36. In the re-examination, PW 1 told the court that the EIA license issued to the defendant had several conditions, among them clause numbers 1.3 and 2.2, which the defendant breached to the detriment of the plaintiffs, who then lodged complaints with NEMA, and a restoration order was issued as per P. Exh. No (9). PW 1 said that Dr. Mwenda scientifically determined his total claim at Kshs.30,515,000/ =.

37. Godfrey Wafula testified as PW 2. As a lecturer at the University of Nairobi for the last 23 years, a holder of a Bachelor's and Master's in science and chemistry, and currently a PhD candidate, he told the court that the plaintiffs engaged him to assess air, soil, noise and water quality within the Kigane village, Nkubu area next to the Plant. He said that he visited the village and carried out the exercise on 3.4.2012 after identifying three sites where he carried out sampling, accompanied by Dr. Mwenda.

38. PW2 said that the Plant was in operation during his visit where he spent a day and found some pollutants on the plaintiffs' parcels of land, whose point source was the Plant. PW 2 said that the pollutants were sulfur dioxide, nitrogen dioxide, particulate matter, or dust. Regarding sulfur and nitrogen dioxide, PW 2 said they were being emitted during the heating of fossil fuels in the Plant. Similarly, PW 2 said that during the heating, he observed that the Plant was producing elevated levels of noise. He produced the report dated 9.6.2012 as exhibits 11 and 12.

39. PW 2 said that the methodology he used to measure sulfur dioxide was the para rosa lime method, while for nitrogen dioxide, he used the modified Griess Salt Zan method. As for particulate matter, PW 2 said that they used the filtration technique. Further, PW 2 said that before the enactment of Air Quality Regulations 2014, the applicable standards were the World Health Organization (WHO) Regulations.

40. Relying on the report, PW 2 said that his findings were that the particulate matter levels exceeded the 24-hour and one-year guidelines for ambient air in the first site, while in the 2nd and 3rd sites, it exceeded the long-term guidelines. For sulfur dioxide, PW 2 said that the concentration in the three sites exceeded the long-term guidelines. As for nitrogen dioxide, PW 2 said that for the three sites, the levels were below the long-term guidelines. Concerning noise levels, PW 2 said that he followed the NEMA guidelines as per L.N. No. 20 of 2009. He said that the noise levels for the three sites were beyond the sixty decibels required in residential areas.

41. Regarding soil quality in the neighborhood of the Plant, PW 2 said that he found traces of petroleum products (hydrocarbonates), namely benzene, toluene, ethyl benzene, and xylene. PW 2 said that they used the GC FID method to determine petroleum hydro carbonates and Betex. He added that the two have adverse effects on human beings, given that they are carcinogenic in nature.

42. PW 2 said that the said pollutants take ages to manifest themselves since they are found only where there has been contamination. Again, PW 2 said that after carrying out a quantitative determination on the identified sites, there were traces of metals of relatively higher levels compared to the background levels.

43. PW 2 summarized his findings and conclusion in his report as follows: -

    i. That the air quality around the defendant's Plant was contaminated.

    ii. Noise levels were higher due to the heavy machinery.

    iii. Soils were contaminated with total petroleum hydro-carbonates and BETEX from the tar mixing process and machinery fuels.

    iv. There were traces of metals on the soil due to the tar and cement mixing process.

44. Subsequently, PW 2 stated that he identified the point source of the pollution through visual observations. He said that the pollutants were capable of causing respiratory ailments and affecting photosynthesis in plant leaves. PW 2 said that pollutants and the adverse effects were capable of being affected by other parameters, such as wind movement. He added that sulfur dioxide was capable of causing respiratory ailments, withering of plants, and soil acidity, making soils less fertile. Similarly, PW 2 said that sulfur dioxide had caused accelerated corrosion of metallic surfaces, which he observed on rooftops, tree leaves, and the wilting of plants in the subject suit parcels of land. He said that whereas the EIA license, the study, report, and management plan had provided for mitigation measures, the defendant had done little compared to what it was supposed to do, leading to adverse effects. PW2 similarly said that apart from the report dated 3.4.2012, he made another report dated 2.10.2017 for the plaintiffs.

45. Commenting on the state of affairs of the suit lands as of 3.4.2012, PW 2 said that the activities at the asphalt plant were non-natural and, therefore, pollution took place since the defendant failed to put in place adequate mitigation measures or controls to reduce misuse or avoid the pollution. He also said that the technical audit report prepared or submitted in April 2012 confirmed his findings that the defendant had not fully complied with the European Union Framework contract ESTABEX. PW 2 stated that after the Plant was decommissioned in 2013, an expert report was carried out and submitted dated 14.8.2015. According to PW2, the report showed that the pollution levels were much lower since the Plant had stopped working, as compared to his report, which he made when the Plant was still in operation. He added that pollution is a phenomenon that keeps on changing based on different scenarios.

46. Additionally, PW 2 said that the assessment carried out on 19.6.2017 was within the Plant in line with Occupational Regulations, compared to reports that had been carried out in Kigane village, where the plaintiffs had no Personal Protective Equipment (P.P.E.). He said that the report dated 19.6.2017 was good for the Plant but not for the plaintiffs who were the receptors outside the Plant; otherwise, the levels at the plant were equally higher than was permitted and were likely to have adverse effects on the villagers. PW2 said that the Plant was situated in a residential area, hence the need to put in place adequate mitigation measures to avert any adverse impacts.

47. PW 2 was of the view that the Plant should not have been erected in a residential area in the first instance. PW 2 clarified that he was also a member of the Committee of Air Quality in the Kenya Bureau of Standards. Commenting on the defendant's report dated 24.8.2018 by Mr. Philip Abuor, PW 2 said that his report was an assessment and not a research that was carried out under the Department of Chemistry University of Nairobi, which has a gazetted laboratory with the capacity to undertake air and soil quality as per P.Exh. No. (10). He said that he used a calibrated Charles Haslen Portable Air Pump. PW 2 said that it was impossible to get a baseline survey or soil reports before the Plant was erected in the area since none was carried out in the first instance, either by the plaintiffs or the defendant.

48. In cross-examination, PW 1 said that he used the University of Nairobi Department of Chemistry facilities to undertake the assessment and paid Kshs.1,500,000/= for the services by the plaintiffs. PW 2 said that he took out air and soil samples from the suit lands, and his reference point was the defendant's main gate, from the plaintiffs' parcels of land situated approximately within a range of 30 – 60 meters from the asphalt plant. He said that he took average results and values in the three sites, for he was unable to enter the Plant.

49. PW 2 told the court that he had published his work in several peer-reviewed journals and was also a supervisor for master's students at the university. Again, PW2 stated that his report was based on WHO guidelines on air quality applicable at the time, which under EMCA had been cascaded into air quality guidelines, though in draft form. Asked if he followed any known soil quality assessment guidelines, PW2 was unable to pinpoint any.

50. PW 2 said that the collection of samples for compliance purposes could vary with the times they are taken. However, he said that what matters is the quality of the pollutants in a given volume. PW 2 said that a sampler would draw a certain amount of air. He said that the particulate matter in the air would also be affected by the wind direction, speed, flow, and humidity. Further, he added that it was not mandatory to have a baseline survey before he carried out the tests and that his sampling was subject to the prevailing meteorological parameters in terms of wind speed, relative humidity, rainfall, and temperature. He admitted that his report was silent on the parameters, given that his primary mandate was to determine the presence of pollutants and their concentration levels at the time.

51. PW 2 said that he took samples using one sampler in the morning and the afternoon for comparison purposes, given that the prevailing meteorological parameters likely to affect the results were not expected to be the same. In the two circumstances, PW2 said that the results were positive.

52. Similarly, PW 2 stated that a point source usually dispenses pollutants. In this case, PW2 told the court that his role was to determine whether the complaints by the plaintiffs were genuine or not. Given the circumstances and his mandate, PW2 said that he did not pre-determine the point source or extend his assessment to other possible sources of the pollutants.

53. Equally, PW 2 said that he took samples from the plaintiffs' parcels of land that were in the area near the Plant. PW 2 made an admission that his report was silent on whether there were other likely sources of pollutants, such as motor vehicle emissions, dust arising out of vehicular movements in and out of the village and agricultural activities during the time of the sampling. PW2 termed the said possible causes as negligible or minor sources of pollutants that had minimal or insignificant impact on his results and findings.

54. Commenting on P. Exh No. (11), PW2 said that even though his report was silent on the prevailing meteorological parameters, such as wind direction or temperature, his findings were scientific since he relied on the permissible limits for twenty-four hours under WHO guidelines. More so, PW2 stated that it was expected that the concentration levels could keep on fluctuating depending on the point source, in which case one was permitted to take averages during the sampling process. Additionally, PW 2 confirmed that the NEMA guidelines on noise and air were different in residential, industrial, and commercial areas. In this case, PW 2 said that he used the noise levels for occupational settings.

55. Further, PW2 said that he undertook simultaneous sampling for both noise and air between 8:30 am to noon and in the afternoon between 2:30 pm – 5:00 pm. He said that P. Exh No. (11) was a summarized version of his findings, despite lacking though it had no background information and coordinates (geo-reference) for sites I, II & III. PW2 insisted that his conclusions were based on the concentration of the one-day samples, showing that the pollutants were above average levels vis-à-vis adverse effects on human health. Again, PW 2 said that in all three sites sampled, 95% of the pollutants were from the Plant. He admitted that his report had not factored in any source apportionment.

56. Regarding soil quality tests dated 3.4.2012, PW 2 said that it was Dr. Mwenda who took out the samples sufficiently describing the particular site(s). He said that there had been no baseline survey before the erection of the Plant and after the decommissioning. In order to avoid sample contamination, PW 2 said that the samples were carried out in total compliance with the established protocols. In this case, PW 2 said that he was the one who conducted the actual testing of the soil samples to determine whether the pollutant was present or not; otherwise, it was not necessary to assess the soil P.H., nitrogen, potassium manganese, and calcium contents given that they were not relevant to his mandate, as he was only interested in T.P.H. and BETEX.

57. PW 2 said that the soil fertility of the area was likely to be affected by the presence of the contaminants and that standards for what is allowable were dependent on the available guidelines for the respective plants. PW 2 said that his standardization was indicated on page 10 of P. Exh No. (11).

58. Asked about the Dutch Standards, PW 2 said that he was not familiar with it as part of the literature studies he was supposed to consider. However, he said that he was aware of the Kenya Soil Survey Department within the Kenya Agricultural Research Institute (KARI) and its soil laboratories. He said that his report did not make references to any desktop soil surveys by other experts on soil in the subject area since he only concentrated on the background levels.

59. According to PW 2, T.P.H. is ordinarily derived from the combustion of fossil fuels, while the presence of Benzene was a figure print of fossil fuels. In this case, PW 2 said his study concluded that the Plant, based on literature studies, was using bitumen or tar. He said that he was unable to access the campsite to verify the facts. PW2 acknowledged the fact that what the Plant was actually using would have had an impact on his report.

60. Regarding the trace metals, PW 2 said that he was the one who carried out the exercise from the samples he had taken on 3.4.2012. He said that he based the report on the expected standard, based on background contents and literature studies, though lacking in his report,

61. Further, PW 2 acknowledged that the standard practice was to refer to other literature studies carried out by other scientists, which, unfortunately, in this case, he did not refer to. That notwithstanding, PW 2 denied that his report or study was rushed and was not reflective of the reality on the ground. He admitted that his report was limited since no background measurements had been taken before 2010, during and after the Plant was decommissioned. Nevertheless, PW 2 insisted that his report was helpful in so far as confirming the presence of the pollutants in the plaintiffs' parcels of land whose point source was well known and had adversely affected the plaintiffs' environment.

62. Regarding omissions in indicating the distances of the three sites from the source point, PW 2 acknowledged that the distance may have been a necessary factor in his results, though only in so far as the concentration of the pollutants was concerned.

63. In re-examination, PW 2 said that his report was both scientific and relevant since it covered the source point of the pollutants available and was based on WHO guidelines/ standards; otherwise, the prevailing meteorological parameters would only have had an impact on the pollutants' concentration. PW 2 said the terms of reference by the plaintiff were solely on whether there was pollution, the pollutants, and their source point.

64. PW 2 said that he did not factor in other possible sources of the pollutants since there was an apparent and pre-dominant source. Again, he added that he carried away the samples from the sites in full compliance with the established protocols and ensured that there was no possible contamination. Commending on Kshs. 1,500,000/= expert fees. PW2 said that it covered all the consumables, including the hiring of the equipment, expenses, and the actual work done.

65. Answering questions from the court, PW 2 said that in relation to the report relied upon by the defendant, the levels of the pollutants were much lower than what P. Exh No. (11) established. Additionally, PW 2 said that the E.U. Report on control measures relied upon by the defendant that it had failed to take the necessary control measures to avoid adverse effects. Similarly, PW 2 said that the defendant failed to comply with all the Occupational Safety and Health Act (OSHA) levels set by NEMA and more so in addressing the complaints raised by the plaintiffs.

66. Jacob M'Rutere testified as PW 3 and adopted his witness statement dated 18.3.2017 as his evidence-in-chief. He told the court that he owned L.R No. Nkuene/Taita/2655, as indicated in P. Exh No. 7 (f), was approximately 100 meters from the Plant where PW3 said that his land had banana and coffee trees, which were affected by the pollution. PW3 also stated that there was corrosion of his sheets. His estimated loss was Kshs.4,395,000/=.

67. PW 3 confirmed that the demand letter, P. Exh No. (2) was jointly written by the plaintiffs to NEMA, who visited the area and sent a letter dated 1.2.2012, produced as P. Exh No. (3). PW3, however, had no farm records to substantiate his farm investments, inputs, outputs, farm proceeds, rental income, and losses incurred. PW 3 told the court that he usually lived in Nairobi and, therefore, was not able to

know if the defendant had undertaken any periodic environmental audits during the period the Plant was in operation.

68. Monica Mwariumwe Kithinji testified as PW 4 and adopted her witness statement dated 18.3.2017 as her evidence-in-chief. She told the court that she was a director of a small, medium enterprise undertaking farming activities and running a banana drying machine on L.R No. Nkuene /Taita/440. Her testimony was that her homestead and farmland were on the western side of the Plant, where dust, fumes, and debris would be blown by the wind to her farm, causing her environmental loss and damage.

69. PW4 said that the activities of the defendant affected her livestock, trees, crops, and a hotel and or restaurant that she was operating on her parcel. Even though she initially welcomed the defendant's Plant in the neighborhood, she said that in no time, there was air, soil, water, and noise pollution. As a consequence, PW4 told the court that she developed recurrent coughing out of the air fumes and dust. She said that despite their complaints through NEMA for the defendant to take remedial measures to forestall the damage or loss, it neglected or refused to act, compounding her suffering. PW 4 said that the asphalt machine was running twenty-four hours a day, hence causing them maximum loss and damage.

70. PW 4 said that when the defendant started operating in the area, it interfered with a water spring near her land, hence causing a pool of water to accumulate on her land following the natural course's blockage or diversion by the defendant. All the water flowed to her restaurant. She estimated her loss at Kshs.12,583,000/=. PW4 said that after retiring as a teacher in 1996, she ventured into crop farming and horticulture on the suit land initially owned by her late husband, as per P. Exh No. (7) (b). She said that she obtained letters of administration to represent the estate in the course of this suit as per P. Exh No. (4). She also confirmed that the Plant was occupied by L.R No's. Nkuene/Taita/2419, 2108, 2443, and 2420, which it leased out from Yetu Sacco Society Limited, sharing a common fence with her land.

71. PW 4 said that due to the pollution, she lost 400 chickens, one cow, five goats, 890 coffee trees, 1,800 banana trees, assorted fruit trees, and nappier grass. PW 4 no farm records showing her farm number, chicken stock, tree population, farm inputs and outputs, suppliers, customers and the farm in court.

72. PW4 said that in her value addition project, she was using electricity, biomass, and solar systems to generate energy. In her view, the said energy sources had minimal environmental adverse effects on the environment. PW4 confirmed that before NEMA wrote P. Exh No. (3) officers from the defendant had paid a visit to her farm and the neighborhood and noted the adverse effects in the area, especially noise, air, dust, and oil spillage coming from the Plant.

73. PW 4 admitted that she did not engage public health, agricultural extension officers, veterinary doctors, or soil experts to undertake any tests over the cause of trees withering and death of her cows, chickens, and goats. PW 4 said that her farm production went down during the period between 2010 – 2017 and attributed the cause to the pollution. As to the water pool collecting on her land, PW 4 said that she made a report to both NEMA and the defendant, who intervened by digging a tunnel to discharge the accumulated water out of her land; otherwise, she also incurred some expense in unblocking the stray ballast which had clogged the water spring.

74. PW 4 said that her recurrent cough began in 2011 and became worse in 2014. She had no medical reports to substantiate the allegations. Even though motor vehicles were plying the nearby road coupled with domestic use of gas and firewood both in her homestead and the restaurant, PW 4 denied the same were the predominant or contributory factors to the pollution of the environment. Similarly, PW 4 denied that organic farming and the use of pesticides by the plaintiffs was the sole cause of the pollution. Additionally, PW4 said that her restaurant was opened in 2009, soon after she had finished putting up the building, and operated until 2013, when the premises became very dusty, leading to a

closure. She had no documentary evidence on ownership, licenses, or business income for the period it was in operation.

75. PW 4 said that she was in occupation of her land even before the defendant moved into the area; hence, she was directly affected by the pollution before her husband passed on. She blamed the defendant for breaching the E.A.I. special conditions, as alluded to in P. Exh No. (3). PW 4 clarified that she was able to see, observe, and experience dust, noise, water pollution, and oil spillage on her land. Similarly, PW 4 stated that P. Exh No. (3) had noted the natural waterway that the defendant had blocked, causing water to accumulate as a pool on her land. Additionally, PW 4 said that the NEMA report had recommended that the defendant restore the environment, which it failed to undertake, leading to the filing of this suit. In addition, PW 4 said that had the defendant comprehensively audited its systems and addressed the complaints raised by the plaintiffs, including visiting her land to ascertain her concerns or extending some corporate social responsibility to the neighborhood, they would not have suffered any environmental loss or damage.

76. Moses Gikuna Harun testified as PW 5 and adopted his witness statement dated 18.3.2017 as his evidence-in-chief. Being the owner of L.R No. Nkuene/Taita/2471, PW 5, told the court that the defendant erected the Plant next to his house, hence exposing him to dust, noise, and air and water pollution. As a consequence, PW 5 said that all his tenants on his three rental premises had to vacate, where he earned Kshs.6,000/= per month, only to resume after the Plant was decommissioned. PW5 had no building plans, licenses, valuation reports, tenancy agreements, or financial reports to verify his loss and damage captured in the valuation report dated 24.3.2023.

77. Gilbert Mbaabu testified as PW 6. He adopted his witness statement dated 18.3.2017 as his evidence-in-chief. He told the court that he was the registered owner of L.R No. Nkuene/L-Mikumbune/202, near the Plant. PW6 told the court that he lost cows, chickens, goats, rabbits, coffee, bananas, assorted fruits, and nappier grass, estimated at Kshs.10,550,000/=. His evidence was that the defendant operated the asphalt machine twenty-four hours every day for close to four years. He said that as per the limited grant, his late father passed on 15.12.2001 leaving all his siblings occupying the suit land together with his mother.

78. PW6 said that he was suing as the legal representative of the estate of his late father's report. He did not have a tabulated report for his trees, livestock records, statements of the farm produce, and earnings. Similarly, PW 6 did not have agricultural extension officers or veterinary doctor's records regarding any coffee, fruits, animals, and related farming activities on his land. PW 6, however, clarified that his parcel of land was approximately 300-500 feet opposite the defendant's office stores near the Plant, whose clouds of dust, noise, smoke, water, and air pollution caused immense loss and damage to him.

79. PW 7 was Michael Mugambi Kabugu. As the owner of L.R Nos, Nkuene/Tiata/2041 & 2042, PW7 told the court that the Plant emitted soil, dust, and fumes that would cover water, crops, fruits, and the environment in general for humans. Further, PW7 said he had contracted blood cancer of the stomach. He attributed the sickness to the pollution arising from the yard. PW7 quantified his loss and damage at Kshs.12,195,000/=. He also said that the Plant was erected on land belonging to the 1st plaintiff's brother, Kiogora Rutere. PW 7, however, had no records showing the farm number, nature, status, number of inputs, outputs, and earnings from his land. Similarly, PW 7 had no records for the rental houses and income and any soil tests.

80. Douglas Mutuma Magana testified as PW 8. He adopted his witness statement dated 18.3.2017 as his evidence-in-chief. Being the registered owner of L.R No. Nkuene/Taita/1991, PW 8 told the court that his land, house, and farm were near the Plant. Associating his evidence with the rest of the plaintiffs, PW8 said that he incurred farm losses for coffee trees, food crops, and semi-permanent rental houses

assessed at Kshs.4,100,000/=. He had no farm or rental house records showing his total business income. PW 8 stated that his family used to live on his land and suffered a lot due to dust, noise, water, and air pollution.

81. James Gatobu M'Ikugu testified as PW 9 and adopted his witness statement dated 18.3.2017 as his evidence-in-chief. He told the court that his homestead and rental houses were on L.R No. Nkuene/Lower Mikumbune/499, situated next to the Plant where he kept livestock, chicken, coffee, bananas, assorted fruits, trees, nappier grass, and food crops. He estimated his loss and damage at Kshs.9,582,500/=. He attributed the reduction in farm production to vibrations, noise, air, soil, and dust pollution. He produced a limited grant produced as P. Exh No. (5) and a copy of the green card as P. Exh No. (7) (g).

82. PW 9 admitted that he made no reports to the relevant government agencies over the withering, wilting, or damage to his crops, trees, and livestock. Additionally, PW 9 had no farm records showing the type, nature, status, inputs, outputs, and income for all the farming and livestock activities on the land.

83. Joshua Kaburu Kimathi, the owner of L.R No. Nkuene/Lower Mikumbune/1799 as per P. Exh No. (7) (i), testified as PW10. He told the court that he lost rental income and assorted trees and livestock assessed at Kshs.3,060,000/=. PW 10 He said that his land was approximately fifty meters from the Plant which he acquired in 2012. He was unable to produce any building approval licenses or permits from the county government for the alleged developments on his land. Further, he told the court that he had to dispose of the land in 2016 to one Rhoda Mukami since it was not generating any income for him between 2013/2014 due to the pollution. PW 10 had no documents or reports on farm income, report on the cause of the withering of the trees, evidence of reduced farm produce, and the cause of the death of his livestock.

84. Hon. Ken Maingi Mutwiri testified as PW 11. He adopted his witness statements dated 12.10.2021 as his evidence-in-chief. He told the court that his late mother, Mary Mutwiri, was the initial plaintiff, whose land was L.R No. Nkuene/Taita/861. He estimated his loss and damage at Kshs.5,460,000/=. PW 11 said that his late mother was rearing fish in fish ponds that were affected by an oil spillage from the Plant.

85. Similarly, PW11 told the court that his coffee trees and dairy project production diminished due to the pollution of the environment, alongside the farms of his co-plaintiffs. PW 11 had no farm records for alleged loss and damage. He clarified that the noise, air, sound, and water pollution were spectacular in the area. He insisted that the defendant took no mitigation measures as required under the EIA license, which would have included erecting kilns, sock pits, and purifiers around the operation area to keep away, minimize, avoid, or reduce the noise, oil, spillage, water, dust, soil and air pollution.

86. Elizabeth Milbey testified as DW1 and adopted her witness statement dated 19.6.2017. As a holder of a bachelor of science and master's degree in environmental science and an EIA lead expert registered with NEMA, DW1 said that she had a wide range of experience on environmental matters nationally and internationally. Further, DW1 said that she was among the people who domesticated the National Environmental Action Plan, a precursor of EMCA, establishing NEMA. Again, DW 1 said that she had undertaken various assignments on an environmental impact study, locally and internationally. Later, she was the in-charge EIA section of NEMA before she was seconded at the Ministry of Roads to establish the Environmental Unit.

87. In this matter, DW1 told the court that she was contracted by the defendant and worked on various steps of the project cycle. DW1 produced the report dated 19.3.2010, as D. Exh No. (1), a submission of E.I.A. project report dated 9.3.2010, as D. Exh No. (2), an E.I.A report dated 8.3.2010, as D. Exh No.

(3), a NEMA acknowledgment of the audit report dated 14.10.2011, as D. Exh No. (4), the Nkubu Plant, environmental audit dated 14.10.2011, D. Exh No. (5), KARI soil test dated 24.8.2011 for the 1st and 12th plaintiffs' land, as D Exh No. (6), a NEMA license to emit noise dated 16.1.2013 as D. Exh No. (7), the R.C.C. environmental audit report dated 12.9.2011 as D. Exh No. (8), an Air quality report dated June 2015 as D. Exh no. (9), EUC STABEX report dated April 2012 as D. Exh No. (10), KURA periodic technical report dated May 2010 as D. Exh. No. (11) a forwarding letter dated 21.3.2011 as D. Exh No. (11) (a), the NEMA conditions for approval of E.I.A license dated 26.4.2010 as D. Exh No. (12), the environmental audit report for decommissioning of the Plant dated 16.9.2013 as D. Exh. No. (13) and a photocopy of the Plant as D. Exh. No. (14).

88. DW 1 told the court that the defendant engaged her in September 2011 to look into the approved E.I.A report, particularly the environmental management and monitoring plan, which had predicated all the impacts that the asphalt plant could cause. DW 1 said that the law required that after one year of the operation of the Plant, an initial environmental audit be carried out.

89. DW1 told the court that in terms of compliance, the defendant had to put in place all the required measures as approved in the conditions of the license of operations by NEMA as contained in the E.I.A license, issued pursuant to an E.I.A report. DW1 said that D. Exh No. (3) that was carried out on 8.3.2012, indicated the lead expert for NEMA as Sylvester Kasuku, who had predicted the various impacts the project was likely to cause.

90. DW1 told the court that during the E.I.A study, public participation was carried out involving the local community and lead agencies such as forest, water, land, and agricultural departments. She said that the E.I.A. report covered all the vital elements, such as water, air, noise, and soil pollution. Further, DW1 said that before the defendant commenced the project, it was given a leeway by the roads department to find a site, discuss with the owners of the land, and agree on the terms and conditions, after which an E.I.A was carried out to establish if the site was ideal. In this case, DW1 said that the site remarks were captured on pages (9) – (11) of D. Exh No. (3), indicating that the campsite was on private land.

91. DW1 told the court that the project was acceptable to the local community, given that it was going to make their lives better. DW1 said that the E.I.A report had looked at all the aspects regarding the adverse impact of the asphalt project, following which an environmental audit report was prepared. She said that ordinarily, an asphalt plant had low emissions, as captured on page 9 of D. Exh No. (3). DW1 had no scientific on the assertion that an asphalt plant was incapable of emitting any emissions generally and in particular, the one operated by the defendant.

92. Further, DW1 told the court that upon the issuance of the E.I.A license or certificate, the defendant had to comply with the conditions specified in the license and the E.I.A report submitted on 9.3.2010 as D. Exh No. (2), which NEMA had acknowledged receipt of. DW1 said that the EIA report submitted had to undergo critique by NEMA to ensure that the project proponent had followed due process before a license could be issued.

93. DW1 told the court that eventually a license was issued to the defendant, inclusive of the conditions to be adhered to. In this case, DW 1 said that the defendant was supposed to employ a NEMA lead expert to ensure that the conditions were complied with. DW 1 said that D. Exh No. (12) considered the impact predictions on the E.I.A process during the one year of operations.

94. In the audit process, DW1 said that there were three stages. In pre-audit, the stage involved the selection of the activities to be audited and the development of the audit plan. According to DW1, the second stage involved the document review, interviews along the affected area, and inspection of baseline environmental conditions. The post-audit stage, on the other hand, according to DW 1, involved collating information, preparation of the draft, and the final audit report.

95. D.W. 1 told the court that she carried out the audit report on 14.10.2011 and prepared a report D. Exh No. 4, which NEMA acknowledged as per (D. Exh No. 3). DW 1 also said that her main areas of concern covered occupational health and the safety measures to which she analyzed some environmental aspects that could arise at the plant for the environmental and safety welfare of the workers, waste management and its disposal.

96. Further, DW 1 told the court that she would frequently visit the campsite to ensure that the defendant adhered to the required processes by looking at the whole network almost every month or two. DW1 did not share with the court any copies of monthly inspection reports that she had made individually or in conjunction with NEMA for the period that the plant was in operation.

97. DW 1 told the court that the plant was fenced all round to ensure animals and people could not get in. Similarly, there was a watchman on-site at the gate who would keep records of people coming in and out and for any equipment. Moreover, she said that there was a weighing bridge for vehicles carrying materials in and out of the site. Other equipment at the camp included a concrete mixing plant, plant, drainage channels, fuel storage tank, dispensing area, bitumen container, aggregate and quarry dust stockpiles, and toilets.

98. In terms of drainage, DW 1 told the court that there were stone-pitched stormwater drains discharging wastewater from the concrete mixing plant, which would then be collected in a sock pit. DW 1 said that all the waste was taken to the sock pit and then would be scooped and returned to the concrete mixing plant for re-use. DW 1 stated that the defendant said that the defendant ensured that there was no spillage and had installed some emission abatement equipment.

99. Similarly, DW1 said that the defendant used to spray water on all materials that were likely to emit dust and would cover from any wind exposure. From the initial audit report, DW 1 said that it was evidence that the defendant had taken all the requisite remedial steps to stop any possible emissions from the plant.

100. DW 1 testified that she worked closely with Albert Muriuki, an E.I.A expert, who analyzed the air, noise, soil, and water at the plant to check for any possible pollution and, if so, whether the same was within the permissible levels. In this case, DW 1 said that the report to that effect was produced showing that the pollutants were below the threshold, going by page 33 of D. Exh No. (5). Albert Muriuki was not called to produce his monthly reports on air, water, noise, and soil samples, yet he was vital in producing the asphalt plant emissions inventory.

101. Further, DW 1 told the court that she participated in the decommissioning stage of the project which entailed the moving out of all the equipment from the campsite and restoring the site to its original conditions as per NEMA requirements. After the decommissioning, DW 1 told the court that she prepared and submitted D. Exh No. (13). According to DW 1, some of the equipment decommissioned included the weighing bridge, bitumen containers, bitumen silo tanks, control room for MRIN, asphalt MRIN, plant for A.C. cold feed bins, drier drums, fuel tanks, generator, office, and storage containers.

102. DW 1 told the court that, in her considered view, the defendant followed due process as required under the NEMA licenses. Eventually, DW 1 said that the report was accepted and stamped by NEMA, marking the end of the project. The evidence DW1 was silent on whether she visited the neighborhood of the campsite to verify whether the local community was satisfied with the operations of the plant. Additionally, DW1 was unable to share with the court any monthly inspection reports from NEMA before and during the decommissioning stage or soon before the acceptance of her report. Moreover, DW 1 did not tell the court what measures were undertaken after the decommissioning by

the defendant to ensure the restoration of the environment to its status as of 2010, pursuant to the E.I.A license.

103. DW 1 told the court that her work involved ensuring that environmental issues were appreciated, accepted, and implemented by all Kenyans. In this case, DW1 said that she visited the plant and looked into all sides of the environment, the reaction of the local community, and the duty of the project proponent to minimize any adverse impacts while enhancing the positive impact of the project. Records of interaction with the local community at the decommissioning stage by DW 1 were not shared with the court.

104. DW 1 told the court that the road network in the locality was done in line with international standards while at the same time addressing the concerns, needs, and issues that were raised by the local community. DW 1 said that all issues of concern arising from NEMA and the community were captured in the questionnaires and or interviews. DW1 told the court that all issues affecting the local community were duly addressed to ensure that any adverse impacts of the project were identified and compensation given to the affected persons.

105. Additionally, DW 1 categorically stated that she never came across or witnessed any reports of adverse impacts of the plant; otherwise, she would have considered or addressed them in her reports. Given that it was her moral duty as a NEMA lead expert to ensure that Kenyans were given what was due to them.

106. As a matter of fact, DW 1 told the court there were farmers and homesteads around the asphalt plant. She, however, denied knowledge of any complaints sent to NEMA and the defendant by the plaintiffs; otherwise, she would have documented them. Similarly, DW 1 told the court that her report had captured air, noise, water, and soil issues and there were adverse impacts on the local community. She said that according to their findings, asphalt plants globally had known common impacts.

107. In re-examination, D.W. 1 said that flowing from the questionnaires and public participation record, the lead experts had factored all the issues raised by the local community and ensured that the defendant complied with the law; otherwise, her reports were clear that any air, noise, water, and soil pollution in the project was within the permitted limits. Similarly, DW 1 told the court that mitigation measures were undertaken by the defendant in compliance with the E.I.A license as captured in her audit report and the independent audit report on page 195, paragraphs 4.13 and page 202 thereof.

108. Philip Abuor testified as D.W. 2. He told the court that he was a holder of a Bachelor of Science from the University of Nairobi and a Master's degree in Environmental Science (JKUAT) and was a PhD candidate (KU). He adopted his witness statement dated 24.8.2018 as his evidence in chief. DW 2 told the court that he had been registered with NEMA as an air and noise specialist since 2008. Similarly, DW 2 said that he had a certificate on air dispersion modeling acquired from South Africa (2014) and was also a member of the International Association of E.I.A assessors and approved by the Government of Kenya as an air quality monitor (2017 – 2018). He said that he had also been trained on noise in Norway (2015) and produced his curriculum vitae as D. Exh No. (15).

109. Commenting on the evidence of the PW2, DW 2 criticized the reports for lack of objectivity for it lacked source apportionment; otherwise, it was merely about finding out who was responsible for the pollution. According to DW 2, the choice principle on where to take samples was vital since there could be a variety of sources of the pollutants. DW 2 said that source apportionment helps in ascertaining the source of the pollutant.

110. DW 2 said that the sampling process is usually carried out using an approved software and that in Kenya, NEMA was the one mandated to approve the software among them the air mode and calpuff based on the topography of the area. Again, DW 2 stated that air mode software was preferred in a

plain place while calpuff was more applicable in a complex topography. He said that the software helps in identifying the sources and the frequency of the pollutants.

111. DW 2 took the view that PW 2 had failed to follow the check principle in picking the location of the sampling. Additionally, DW 2 said that the duration of the sampling was critical and that the best practice in Kenya and worldwide was to take samples for 24 hours in a continuous manner, preferably both at night and during the day, in line with Air Quality Regulations 2014. Prior to 2014, DW 2 said that the practice was to use the U.S.A. – E.P.A. standards.

112. Moreover, DW 2 told the court that the report relied on by PW 2 had no methodological data, especially the direction of the wind, since such data was helpful in analyzing the impact. DW 2 went on and said that there was confusion in the conclusion and the results made by PW 2. For instance, DW 2 said that on page 8 of the report dated 9.6.2012, item number (1) related to sulfur dioxide. Additionally, the particulate matter for site three was indicated as 172 micro gen per meter cubicle, yet under WHO guidelines, the permitted limit was 172, meaning that the conclusion should have been that the figure of 172 was within the range of 150-230. DW 2 said that all the data except for site number 1 was within the permitted range.

113. Again, DW 2 said that samples were taken for two hours in the morning and two hours in the afternoon instead of 24 hours as per the NEMA Regulations. DW 2 faulted the grad sampling technique used by PW 2 since, for regulatory compliance, the preferred technique was continuous sampling for 24 hours. DW 2 said that the annual concentration was also lacking in the report.

114. Regarding noise, DW 2 said that PW 2 used a spot check – screening of the place instead of a confirmatory test of the data. DW 2 said that under NEMA Noise Regulations 2009, a type one level meter was the preferred mode for it establishes where the noise was coming from since it has frequency data. In addition, DW 2 stated that noise was a highly complex nuisance whose frequency data was a critical element. DW 2 said that the report by PW 2 was silent on whether the noise was for occupational or environmental purposes.

115. On the collection and transportation of samples, DW 2 told the court that there were established protocols governing the chain of custody. In this case, DW 2 said that the report was silent on the holding time of the samples and how the whole chain of custody was undertaken. DW 2 said that without a filed chain of custody report, especially for sulfur dioxide, which was very reactive in nature, the integrity of the samples and the results were doubtful.

116. DW 2 told the court that the defendant had obtained a NEMA license with specific conditions before the project was started. In this case, DW 2 said that the defendant was at liberty to apply for noise variation when a need arose to work extra hours. DW 2 faulted the sampling done by PW2 without reference to any earlier data and compliance with the known standards. He further faulted PW 2 for failing to indicate the type and the equipment he had used to prepare the report, including its calibration and compliance with known equipment. He said that the calibration certificate and the equipment number were missing in the said report.

117. Other than criticizing the plaintiffs' scientific reports, DW2 was unable to tell the court if he visited the locus in quo at any given period to verify or discount the existence of any pollutants, their source point, the existence of other potential pollutants and lack of a causal link between the plaintiffs claim on loss and damage and the emission from the Plant. In cross-examination, DW 2 said a point source was a fixed or known source, and, in this case, it could also include the plant alongside other possible source points.

118. Stephen Wachira Githinji testified as DW 3 and adopted his witness statement dated 13.7.2018 as his evidence in chief. He told the court that he was an employee of the defendant working as a plant technician. DW 3 told the court that he had worked with the defendant since 2010, and previously he was working with H-Young between 2004-2008. DW 3 told the court that he was the operator of the asphalt plant between 2010 – 2013 in Nkubu. According to him, the yard occupied approximately three acres of land and consisted of an asphalt plant, an MRIN type, a mixing plant, three generators, a laboratory office, a weighing bridge, toilets, and a loading zone.

119. DW 3 told the court that the asphalt plant used bitumen and aggregates composed of ballast of different sizes. He said that ordinarily, the Plant would mix the aggregates with bitumen, and once heated, it used to be loaded into a waiting vehicle. DW 3 said that the plant would operate twice a week, especially on Mondays and Fridays, between 3:00 am to 8:00 pm.

120. DW 3 said that for the three years that he operated the Plant, he used to live in a rental room next to the yard and received no complaint from the local community regarding adverse effects on their environment. DW 3 confirmed that the area neighboring the campsite had banana plantations and homesteads. He denied observing or witnessing any oil or bitumen spillage in the neighborhood.

121. Additionally, DW 3 told the court that there used to be occasional clean-up and maintenance of the asphalt plant. DW 3 said that the machine was enclosed in such a way to protect it, and once materials were supplied to the site, water would be spread on them to avoid any dust being blown up by the wind. DW 3 told the court that NEMA officers would occasionally pay visits to assess or inspect the yard and the plant and found no adverse effects on the environment or human beings outside the yard. DW 3 gave no details or reports on the plant operation, its manuals, monthly inspection reports by NEMA, certification details, efficiency status, outputs, and the occasional reports by NEMA inspectors over its impact for the three years the project was ongoing.

122. In cross-examination, DW 3 said that the regular monthly reports by NEMA during its inspection visits were not shared with him. Similarly, DW 3 said that he was not privy to any complaints, internal reports, or NEMA letters that the plaintiffs may have written to the defendant. DW 3 confirmed that the Plant was situated within a residential area. Though DW3 said that mitigation measures had been taken up by the defendant in line with the conditions in the E.I.A license, he was unable to pinpoint any of them that were undertaken involving the local community neighboring the plant.

123. DW 3, in re-examination, told the court that walls had been erected around the yard to ensure that there was no excessive adverse effect on the environment. Again, DW 3 told the court that the asphalt machine was made in such a way that it could not produce any excessive noise or fumes. Other than relying on his written witness statement. DW 3 did not refer to any documents specific to the type of asphalt plant, year of manufacture, model, manufacturers, date, features, output, input, unique features, and maintenance details. The defendant during the site visit, did not show the court where some of the mitigation measures the witness was referring to, particularly the wall around the yard.

124. At the close of the defense case, the parties, by consent, agreed for the court to have a scene visit at Kigane village. Therefore, the court visited the site on 14.5.2024 between 12.17 pm – and 1.00 pm in the presence of the parties' lawyers on record and the 1st – 4th, 8th, and 12th plaintiffs. Its lawyers on record represented the defendant.

125. At the scene, Mr. Agwara described the site as sloping along the corner of Nkubu – Mikumbune road on land belonging to Yetu Sacco, which was approximately 5 acres with a barbed wire fence around. Mr. Mutuma advocate for the plaintiffs while standing at the site and showed the court the locality

of the plaintiffs' parcels of land, their homesteads, and all their individual developments. From the campsite, it was possible to see at least from a distance all the plaintiff's parcels of land.

126. Further, Mr. Agwara, accompanied by Mr. Kamande advocate, described and showed the court where the Plant was erected, the generators, offices, two sock pits, batching plant, and the barbed wire fence. The 6th plaintiff's homestead was approximately 50 meters away from the sock pit next to the fence, and near the 1st & 12th plaintiffs homestead, Mikumbune Primary School is approximately 300 meters from the Plant. The water pond was still at the campsite.

127. At the scene, the court was able to get firsthand details of the plaintiffs, parcels of land, and their approximate distances from the campsite. Mr. Mutuma advocate gave the following details: the 1st plaintiff's land runs from the tarmac's eastern side all the way to where there were some banana plantations not far away from the asphalt plant. The 2nd plaintiff's land was across the main road. Similarly, the court observed that the 3rd plaintiff's land was after the 1st plaintiff's land, bordering the 5th plaintiff's land towards the 6th plaintiff's land on the southern side, running all the way up to the 1st plaintiff's land. The 7th plaintiff's land was next to the 1st plaintiff's land on the Kigane roadside, while the 9th plaintiff's land was below the 6th plaintiff's land. Again, the 10th plaintiff's land was opposite the road next to the 5th plaintiff's land.

128. Further, the court observed that the 11th plaintiff's land bordered the 8th plaintiff's land. At the campsite, the court was able to observe some debris and remains of the aggregates. Oil and tar remnants were also visible in the yard. The general vegetation in the yard was still recovering from the effects of oil and tar spillage. Asked why the campsite had not been restored to its original status as per the EAI license, Mr. Agwara, for the defendant, told the court that the owner of the land had instructed the defendant to leave all the remaining materials on the land for his use. The materials contained treated mountains of ballast, traces of bitumen, and cement dust. All these appeared uncovered and left in the open. Homesteads and farms belonging to the plaintiffs were visible within a range of approximately 100 meters around the campsites; some houses belonging to the plaintiffs were as close as 4 meters from an old but rusty barbed wire separating them from the site. As a fact-finding visit, it left no doubts in the mind of the court that the campsite was situated in a populated residential area, occupied, possessed, and owned by the plaintiffs. The defendant did not show or refer to the court any restoration measures that the defendant undertook to return the site to its original status.

129. With leave of court, parties were directed to file and exchange written submissions by 26.6.2024. None of the parties complied with the directives. The plaintiffs relied on written submissions dated 25.6.2024. It was submitted that they called 12 witnesses and two experts in support of the amended plaint filed on 14.10.2021, who tendered evidence of ownership and occupation of L.R No. Nkuene/Taita/2279, 2780, 2782 & 2783 in respect of the 1st and 12th plaintiffs, L.R No. Nkuene/Taita/861, Nkuene/L-Mikumbune 499, L.R No. Nkuene/Taita/440, L.R No. Nkuene/L-Mikumbune 202 & 1799, L.R No. Nkuene/Taita/2471, 2041 and, 2042, and 1991 in respect of the 2nd, 3rd, 5th, 6th, 7th, 8th, 10th & 11th plaintiffs respectively, as well as their losses and damages.

130. Further, the plaintiffs submitted that the two experts called, and the reports concluded that there was contamination of the environment by pollutants from the defendant's Plant and estimated the damage. Therefore, the plaintiffs submitted that their pleadings and evidence were corroborated by the scientific evidence, which the defendant did not controvert reports through rival experts reports, save for the general reports done during the construction of the road and in the decommissioning stage, which reports, in any event, do not exonerate the defendant from liability and loss.

131. The plaintiffs submitted that the defendant's report showed non-compliance with the environmental standard and conditions in the E.I.A and conditions in the E.I.A license and the need to remedy the situation, which was not undertaken. Further, the plaintiffs submitted that DW 2 commented extensively on the defendant's report, whose opinion was more academic than real, for he did not carry out any tests or experiments on the alleged pollution to support his evidence and the defendant's case or defense and or discredit the evidence of Chemical & Industrial Consultancy Unit (CICU) which NEMA accredits vide gazette notice dated 25.7.2005 as per P. Exh No. 10.

132. The plaintiffs submitted that the decommissioning report was inaccurate, for it did not include the complaints raised by them prior to the report and any mitigation measures to it; otherwise, it was purposely made by DW 1 to please the defendant. Relying on Articles 42, 69, and 70 of the Constitution, Sections 3 (3), 87, 108, and 111 of EMCA as read together with Principle 13 of Rio Declaration on Environmental and Development 1992, Article 12 of the International Covenant on Civil and Political Rights (I.C.C. P.R), Article 24 of African Charter on Human & Peoples Rights, the plaintiffs submitted that the right to clean and health environment was a fundamental right bestowed on every person where this court is called upon to protect, promote and enforce by applying the among other things, the principle of polluter pay. Reliance was placed on Adrian Kamotho Njenga vs Council of Governors and Others (2020) eKLR.

133. The plaintiffs submitted that the defendant violated their rights by failing to conduct its routine environmental audit and monitoring, leading to loss and damage to them, including on-air, soil, and ambiance that they lived on. The plaintiffs submitted that they had demonstrated the loss, damage, and justification of the reliefs sought through oral, documentary, scientific evidence, and the scene visit reports in terms of special and general damages at Kshs.414,067 500/=. Reliance was placed on K.M. & others vs AG & others (2020) eKLR.

134. The defendant filed their submissions dated 4.7.2024. On the evidence of PW1, it was submitted that he was unable to prove his claims; his allegations were completely bare, unspecific, and incapable of being proved by way of documentary evidence, which he claimed was done by his “experts.” The defendant also submitted that PW1 could neither justify the special damage claimed nor could he tell how they were arrived at, more so when the said experts were not called to testify. Further, during the site visit, the defendant submitted that there were no visible adverse environmental effects on PW 1’s alleged property, to be associated with the defendant’s operations that took place in less than two years.

135. Regarding the evidence of PW 2, the defendant submitted that it was of no probative value since he did not speak on the matter in dispute and failed to adduce any documentary evidence to support his claims before the court. On PW3, the defendant submitted that he confirmed that he did not witness any environmental issues since he ordinarily lived in Nairobi and that his loss computation could also not be ascertained as he did not adduce evidence in support of his allegations.

136. As concerning PW4, the defendant submitted that he was not the landowner given that the property was subdivided between himself and his brothers, which evidence was not tendered in court as well as evidence to ascertain his loss.

137. On PW 5, the defendant submitted that she did not adduce any actual evidence to demonstrate her alleged loss or even confirm that she suffered any remote loss as alleged or at all. Further, it was submitted that she was oblivious to what comprised the figures claimed and instead alleged that her experts had prepared the same.

138. With regard to PW6, it was the defendant’s submission that the witness failed to explain how the loss was arrived at and lay a link to the Plant on the alleged losses. Further, the defendant submitted that

PW 7 was neither a resident of the area nor did he own the alleged parcel. Therefore, the defendant submitted that his testimony was based on half-truths and was unable to support his claims before court. On PW8, the defendant further submitted that he was also not a resident, had no livestock, and did not suffer the alleged losses; Otherwise, his claim abated after death.

139. Additionally, it was submitted that PW10 failed to establish any link by the plaintiffs in relation to the activities of the defendant and the alleged losses. The claims were termed as based on no documentary proof. On PW11, it was submitted that he was based in Kitui and was unaware of the activities that the defendant was carrying out.

140. As regards the expert witness and in particular Mr. Angoe Wafula, the defendant submitted that his testimony did not meet the threshold required of an expert report given that he failed to give and or consider any baseline information on air, soil, noise and was further supposed to consider any other available source of pollution before apportioning the source to the defendant. Moreover, the defendant submitted that PW 2 failed to indicate, describe, or disclose the equipment used in the sampling, including if it was calibrated for purposes of the tests as well as the prevailing weather conditions, making the tests applied hollow and unreliable. Similarly, the defendant submitted that the plaintiff's expert report was of no probative value and could not be relied upon due to the absence of any consideration of baseline studies or comparable pre-existing data.

141. The defendant submitted that the plaintiffs' experts could not ascertain that the said tests were ever carried out. As to DW2, the defendant submitted that he further confirmed that there were no relations between the products used in the plant and the metals indicated in the report and that the metals listed are also naturally found in the soil. As such, a further study ought to have been done on the surrounding area so as to get the background measurement of the area on naturally existing metals. It was submitted that DW2 critiqued the plaintiffs' expert report as of no probative value to be relied upon because of its very loud and glaring failings.

142. On the evidence of DW3, it was submitted that the asphalt plant installed at the site was among the best in the industry since it was capable of capturing dust and treating it without it being emitted into the ambient environment, and consequently, there were no toxic or hazardous wastes being emitted into the environment. Further, the defendant submitted that the activities taking place inside the plant were carried out from a closed space, and nothing escaped the environment.

143. On the scene visit, it was submitted that there were no visible adverse effects on the environment; the plaintiffs were going on with their everyday lives and they could not demonstrate any signs of pollution.

144. The defendant isolated three issues for the court's determination. On whether plaintiffs had pleaded and proved a case of environmental pollution to warrant the grant of the general damages and or a restoration order as sought, the defendant submitted that it was styled as an environmental claim but premised mainly on the tort of negligence whose absence of a solid expert report to support the plaintiffs' allegations remain bare and unproven.

145. The defendant also submitted that the plaintiffs were unable to prove that there was a breach of the said duty by the defendant. Further, it was submitted that the plaintiffs not only failed to demonstrate that their alleged loss arose from the defendant's operations but also failed to tender scientific evidence on the loss of trees, animals, and farm produce having any relationship with the operations of an asphalt plant to establish a causal link.

146. It was submitted that the plaintiffs also failed to establish the damage suffered, the alleged losses due to the activities of the asphalt plant which in its usual nature nothing but minor irritants. Having failed

to prove their case within the required legal standards, the defendant submitted that the only fair thing for the court was to dismiss the prayer for general damages.

147. Reliance was placed on Hazell vs British Transport Commission (1958)1 WLR 169, 171, Chapter 3 Of The 7th Edition Markesinis and Deakin's, citing Lochgelly Iron And Coal Co. vs Mcmullan (1934) Ac 1, 25, Criticos vs National Bank of Kenya Limited (As The Successor In Business To Kenya National Capital Corporation Limited (Kenya) & Another (Civil Appeal 80 Of 2017) [2022] KECA 541 (KLR), Stephen Kinini Wang'ondu Vs The Ark Limited [2016] eKLR, National Environment Management Authority & Another vs Km (Minor Suing Through Mother And Best Friend SKS) & 17 Others (Civil Appeal E004 of 2020 & E032 of 2021 (Consolidated)) [2023] KECA 775 (KLR) (23 June 2023) (Judgment), Harvard Law Review [Vol. 128:22561 Quoted With Approval; The Case of Norris V. Baxter Healthcare Corp., 397 F.3d 878, 885–88 (10th Cir. 2005), Fraser vs 301-52 Townhouse Corporation., 870 Nys2d 266 (App Div 2008), Lujan, Secretary of The Interior vs Defenders of Wildlife Et Al. 504 U. S. 555 (1992), National Environment Management Authority & Another vs KM (Minor Suing Through Mother and Best Friend SKS) & 17 Others (Civil Appeal E004 Of 2020 & E032 of 2021 (Consolidated) [2023] KECA 775 (KLR) (23 June 2023) (Judgment, Rylands vs Fletcher(1861-73) All ER Repi and Residents of Owino-Ohuru Village, Mombasa Civil Appeal No. E004 Of 2020,

148. On whether the plaintiffs had proved a case to warrant the grant of special damages amounting to Kshs.108,597,500/- and Kshs.1,500,000/- being fees for the experts, the defendant submitted that both the burden and incidence of proof lay on the plaintiffs to prove their claim on a balance of probabilities as provided by Sections 107, 108, and 109 of the Evidence Act.

149. In this case, the defendant submitted that the claim for Kshs.108,597,500/= was alleged to be quantifiable special damage losses, which comprised of coffee, cows, trees, bananas, nappier grass, and rabbits, among others. The defendant submitted that special damages must be specifically pleaded and proved. To this end, it was submitted that the plaintiffs had failed to demonstrate any actual loss incurred from the alleged pollution to warrant the award of any special damages. Reliance was placed on Patmose Technical Services (K) Limited vs. Rural Electrification Authority [2020] eKLR, Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2004] eKLR, Mbuthia Macharia vs. Annah Mutua & Another [2017] eKLR, Hahn vs. Singh, Civil Appeal No. 42 of 1993 (1985) KLR 716, Union Bank of Nigeria Plc vs. Alhaji Adams Ayabule & Another (2011) JELR 48225 (Sc) (Sc 221/2005 (16/2/2011), Hydro Water Well (K) Limited vs Sechere & 2 Others (Sued In Their Representative Capacity as the Officers Of Chae Kenya Society) (Civil Suit E212 Of 2019) [2021] KEEHC, Attorney General vs Zinj Limited [2021] eKLR, Stanley Mombo Amuti vs Kenya Anti-Corruption Commission [2019] eKLR.

150. Regarding whether the suit should be dismissed with costs, the defendant submitted that costs should be awarded to the defendant for the reasons that the subject suit was directly caused by the plaintiffs, who were well aware that their claims were fictitious and incapable of being proved. Reliance was placed on CMC Aviation Ltd. vs Cruisair Ltd (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835 and Galaxy Paints Company Limited vs Falcon Guards Limited (1999) eKLR.

151. On the issue of pollution, it was submitted that none of the plaintiffs established that the plant was the pollutant and had solely contributed to the alleged losses. The defendant submitted that there were no medical tests and or reports, autopsy carried out, or evidence on the nature of the environment before the commissioning and after the decommissioning of the Plant to demonstrate any of the alleged environmental degradation claims.

152. The court has carefully gone through the pleadings; evidence tendered, written submissions, and the law. The issues calling for my determination are:

i. Whether the plaintiffs have the capacity to institute the suit against the defendant

ii. If the plaintiffs pleaded and proved that it was the defendant that made the site choice, built and operated a plant on Kigane Village Nkuene in a residential area occupied by the plaintiffs.

iii. If the occupation of the plaintiffs in the neighborhood of the site was irregular, unlawful, and unjustified.

iv. If the defendant owed a statutory duty of care to the plaintiffs and or was constitutionally and statutorily obliged to observe the said duty alongside the right to a clean and healthy environment.

v. If the asphalt plant, its operations, management, and the overall project management complied with the environmental laws and the Constitution to ensure no loss, damage, or adverse effects on the environment.

vi. If there were any monthly or regular inspection visits or reports of the asphalt plant by the NEMA and its appointed lead experts to ensure that the defendant fully or satisfactorily complied with constitutional and statutory environmental standards and requirements.

vii. If the plaintiffs proved any breach of their statutory and constitutional right to a clean and healthy environment by the defendant.

viii. If the plaintiff acquiesced or should have raised the complaint, if any, between 2007 and 2013.

ix. If the plaintiffs exhausted the internal dispute mechanisms under the statute before resorting to this court.

x. If the alleged complaints or environmental hazards by the plaintiffs were solely or substantially caused by the defendant's operations in the asphalt plant, its activities, and or actions.

xi. If the defendant received, processed, acted, and or mitigated the plaintiff's concerns on time or at all.

xii. If the defendant undertook any reasonable mitigation or remedial measures in compliance with EMCA during the period before, during, and after the decommissioning of the asphalt plant.

xiii. If the defendant's operations of the asphalt plant interfered with the environmental quality standards, resulting in loss and damage.

xiv. Whether the defendant has substantiated its defense that the asphalt plant was of high standards and incapable of emitting or discharging any emissions beyond permitted levels, capable of posing adverse effects to the environment, or breaching the EIA license and the reports made thereunder.

xv. If public interest or benefits in undertaking the road project outweighed the plaintiff's right to a clean and healthy environment and the duty of care or statutory and constitutional duty expected of the defendant in undertaking development projects.

xvi. If the plaintiffs proved any special damages or loss by the defendant's acts of omission or commission to be entitled to the reliefs sought.

xvii. Whether the defendant is liable for the loss and damage claimed by the plaintiff.

xviii. What is the order as to costs?

153. It is trite law that parties are bound by their pleadings and from where issues for the court's determination arise. The plaintiff's claim is captured in paragraphs 5, 6, 7, 8, 9, and 10 of the amended plaint filed on 14.10.2021. It was averred that the defendant built and operated a plant in Kigane village, where the plaintiffs had been residents and continued to reside without fully complying with the relevant environmental laws, licenses, and conditions on environmental protection and as a result, which diminished the environmental quality standards around it with severe ramifications to the environment.

154. Further, in paragraph 8 of the amended plaint, the plaintiffs averred that the plant caused air, soil, water, and noise pollution, affecting humans, crops, houses, and all other developments around the Plant. As a result, the plaintiffs averred that as direct neighbors to the plant, they were subjected to suffer loss or damage as a result of the emissions of toxic and hazardous waste, dust, noise, tar, oil slippages, and surface runoff for at least three years.

155. The plaintiffs pleaded the particulars of pollution as emissions of toxic and hazardous wastes to their parcels of land, homesteads or shambas or businesses, excessive dust lowering health conditions for both humans, crops, and animals, tar spillage, poor waste management, sound pollution and generally polluting the environment.

156. The plaintiffs averred that a complaint was written to NEMA, which was forwarded to the defendant in order to remedy the situation but refused or failed to take action, causing more injuries, loss, and damage to the environment in which they lived.

157. The plaintiffs, therefore, tabulated individual special damages and losses in paragraphs (10) (a) – (k) and 12 – 13 thereof. Further, the plaintiffs in paragraph 11 of the amended plaint averred that they also suffered poor health, poor living environment, and general adverse effects on the environment, a loss estimated at Kshs.8 million. They, therefore, prayed for special damages, general damages for environmental pollution and degradation, and consequent damage restoration orders.

158. In answer to the claim, the defendant relied on a statement of defense dated 11.3.2013. The defendant denied that the plaintiffs were all residents of Kigane village and that it built the Plant in 2010 but admitted there was a contract for D482, D483, D476 and D475 by the government of Kenya to construct roads in the area. The defendant denied all the alleged breach of constitutional and statutory duties as to the environment, nuisance, duty of care and the alleged loss, damage, and adverse effects on the environment.

159. The defendant, on pages 20-24, submitted that the plaintiffs' suit was a styled environmental claim based on a tort of negligence. The defendant contends that the plaintiffs cannot sue it and have failed to establish a causal link on the alleged duty of care, breach, loss and damage. Reliance was placed in Hazell vs. British Transport Commission (supra), Lockgelly Iron & Coal Co. vs Mc Mullan (1934) A.C1, Donoghue vs Stevenson, Criticos vs NBK (supra), Stephen Kanini Wanyimbu vs the Ark Ltd (supra), Owino Uhuru case, Norris vs. Baxter Healthcare Corp (supra), Fraser vs Townhall Lujan, Secretary of the Interior vs Defenders of Wildlife, Rylands vs Fletcher (supra).

160. On the other hand, the plaintiffs have submitted that their claim is based on Articles 42,69 and 70 of the Constitution, given that the defendant failed to adhere to the EAI license issued under EMCA, thereby polluting their environment and causing injury, loss, and damage, which it is liable for. The plaintiffs urge the court to find that neighbors of the asphalt plant whose pollutants affected them have affected their rights. Additionally, the plaintiffs submitted that the evidence tendered on ownership of land parcels next to the asphalt plant, the complaints raised with the regulator against the defendant

and not acted, coupled with scientific evidence that pollutants whose point source was the asphalt plant prove liability on the part of the defendant.

161. Environmental law is principally concerned with ensuring the sustainable utilization of natural resources in adherence to the principles of sustainability, intergenerational equity, prevention, precaution, polluter pay and public participation. See David Hunter James, Salzman & Darwood Daelke International Environmental Law and Policy (New York Foundation Press 2nd edition (2002) and The Convention on Biological Diversity.

162. Prior to 1999, Kenya's environmental matters were governed by the common law of torts, nuisance, negligence, trespass, and statutory breach of sectoral laws touching the environment. Nuisance involves interference with another's use and enjoyment of land. Trespass involves direct and physical interference with another's ownership or occupation of land. Negligence requires an establishment of injury caused by a foreseeable or owed duty of care. See KWS vs Rift Valley Agriculture Contractors Ltd (2018) eKLR.

163. Strict liability, as set in Rylands vs. Fletcher (supra), provides that a person who for his purposes brings on his land, collects, and keeps anything likely to do mischief if it escapes must keep it in at his peril and if he does not, he is prima facie answerable for all the damage which is a natural consequence of its escape. See sectoral laws governing environmental matters, such as the Water Act, Factories Act, Trespass Act, Radiation Protection Act, Public Health Act, and Mining Act.

164. After 1999, EMCA, as a comprehensive law, was enacted to remedy the deficiencies in the obtaining law at the time. Section (3) thereof domesticated the right to a clean and healthy environment and imposed a duty to safeguard and enhance the environment; the polluter pays, intergeneration equity, precautionary principle, prevention public participation access to court for redress and environmental management, monitoring, and enforcement organs were set up. Courts were also mandated to handle and widen up on standing on environmental matters. See Park View Shopping Arcade Ltd vs Charles M. Kang'ethe & others (2006) 1 K.L.R. (E & L) 591.

165. In Republic vs Minister for Transport & Communication and five others exparte Waa Ship Garbage Collector and 15 others (K.L.R.) E & C (1) 561, the court held that NEMA, under Section 9 (2) of the Act, had the authority to take steps to implement regional and international conventions and agreements to which Kenya was a party and that NEMA and other lead agencies were mandated to ensure a discharge of sludge was made to an acceptable reception facility.

166. In Waweru vs Republic (KLR) E & L (1) PP 677, the court observed that development that threatens life was not sustainable, and under environmental law, life must have this expounded meaning as a matter of necessity. In NEMA & another vs. KM (Minors suing through mother and best friend (SKS) & 17 others (supra), the court underscored the shared obligations and responsibilities for environmental protection management of both the state and non-state actors under Article 69 of the Constitution and the role of NEMA in systems of environmental impact assessment, environment audit and monitoring of the environmental as means of being more proactive than reactive as preventive measures designed to reduce or eliminate the risk of environmental damage and the incorporation of the environmental principle of sustainable development to reconcile the conflicting demand of economic development and environmental protection so as to ensure that the benefit of any development outweighed its costs, including costs to the environment.

167. The court further underscored that the typical regulatory process involves the establishment of general policies on the environment, setting standards for specific policies in relation to environmental issues, applying the standards and policies to individual situations, licensing and enforcing standards

and permissions through administrative, criminal sanctions and providing information about the environment.

168. The court said that under Regulation 17 of EMCA (Waste Management) Regulations 2006, no person could engage in an activity likely to generate hazardous waste without a valid E.I.A license, and similarly for NEMA while issuing the license to ensure standards or hazardous waste under the Fourth Schedule of the Regulations 2006 are adhered to.

169. The court further underscored the difficulties and costs involved in proving causation in injuries caused by environmental pollution, especially in proving exposure to injuries, its extent and geography, identified ascertainment, and compensation of the claimants. The court said that the polluter pay principle was an economic instrument that initially required a producer of goods and services or other items to be responsible for the costs of preventing or dealing with any pollution that the process causes, including the direct cost to people or property, costs incurred in avoiding pollution as well as any damage.

170. The court said that a linkage must be established between the wrongful act and the damage or injury caused by the environmental hazard. The court observed that under Section 58 of EMCA, an E.I.A. was an essential environmental law and regulation mechanism on likely environmental impacts on development, projects, plans, and processes conducted before potentially harmful decisions were made. Citing with approval Bell & M.C Gillivray Pg 432, the court said that an environmental assessment was both a technique as well as a process through which the main environmental impacts of a project and mitigating measures are proposed to be undertaken in order to reduce the significance of those adverse impacts in the event they were to occur. The court said that it was the responsibility of NEMA to not only ensure compliance with the requirements progress of EIA but also take into account the information thereon while deciding whether or not to approve and license a project.

171. In this suit, the plaintiffs have combined their causes of actions based on negligence, trespass, breach of statutory rights, and the constitutional right to a clean and healthy environment. The law allows a party to bring a suit on multiple but related causes of action. A cause of action is conduct on the part of a defendant which raises a complaint on the part of a plaintiff. As indicated above, parties are bound by their pleadings. Therefore, this court cannot hide under silos as submitted by the defendant and look at this claim as purely a simple common law claim. The Constitution expects this court to be broad-based in exercising its adjudicatory or normative framework on constitutional rights and freedoms. See Mark Latham's "The Intersection of Tort and Environmental Law. Where the Twains Should Meet and Depart (2011) 80 Fordham Law Review 742.

172. The plaintiffs' claim is based on infringement of the statutory and constitutional right to a clean and healthy environment under EMCA as read together with Articles 42 and 70 of the Constitution. They seek redress for environmental harm based on the right to a clean and healthy environment.

173. The burden of proof on the plaintiffs to show that the whole process of identifying and choosing the site, erecting and operating the Plant was done by the defendant when it knew of their existence, residences, developments, possession, and occupation and foresaw the proximate distance, probability and the potential of the plant to pose or cause adverse effects on the environment. Again, the burden was on the plaintiffs to prove that they were envisaged as the direct Project-Affected Persons (PAPS) in the EIA, report, license, study and the environmental management plan that was submitted, approved, and was to be implemented by the defendant as part of the mitigation or remedial measures on the potential adverse effects identified before the project was commissioned in 2010.

174. The defendant has denied knowledge of the existence of the plaintiffs in the vicinity, the ownership of the alleged parcels of land, and as neighbors to the Plant. The plaintiffs, to counter this denial have

produced title documents showing the locality of their parcels of land as within the neighborhood of the Asphalt plant.PW1 and his wife, the 12th plaintiff, were among the interviewees by the defendant while undertaking the initial EIA report. He gave his views as part of public participation.PW1 testified that he made a complaint to the defendant, who sent officers to his land and took soil samples as per the soil report produced by the defendant. He says the defendant is estopped from denying that he was a close neighbor. See County Government of Kiambu exparte Robert Gakuru and Anor (2016) eKLR and Mohamed Ali Baadi and others vs. Attorney General and others (2018) eKLR.

175. The evidence in the form of title documents produced by plaintiffs shows that ownership of the parcels of land pre-date 2010. Title deeds for parcels of land issued after 2010 have been explained to the satisfaction of the court. Therefore, and in the absence of rival evidence from the defendant challenging the standing and ownership of the suit parcels land by the plaintiffs, my finding is that the plaintiffs' presence and ownership of parcels of land next to the Plant is uncontested.

176. Further to this, Articles 42, 69 & 70 of the Constitution grant any person the right on his behalf, a group, or in the public interest to move the court for redress on a breach of the right to a clean and healthy environment. To this end, the plaintiffs are not only land owners, users, occupiers, and villagers but also (PAPS) living next to the Plant. They have a direct interest in their environment and are, hence, capable of suing individually and collectively for any loss or damage out of breach or infringement of their right to a clean and healthy environment.

177. The next issue is whether the defendant set up a campsite in the plaintiffs' neighborhood operating a Plant. The defendant admits the fact that the site was identified and approved by the Government of Kenya on LR. No. Nkuene/Taita 2421 & 2422. A brother of the 1st plaintiff was the owner of the subject parcels of land where the campsite was set. Judicial notice can be taken that the parcel numbers share the same series with those owned by the plaintiffs. The proximity of the neighborhood of the plant to the plaintiffs' land parcels is not in dispute. During the site visit, the plaintiffs' homesteads and farms were noted right next to the campsite.

178. The defendant admitted that he moved into the site, erected and operated a plant in full knowledge and approval of the local community who participated in the questionnaires and interviews prior to the issuance of an E.I.A license. For instance, the interview over PW 1 is on page 71. Section 58 of the EMCA provides that the proponent of a project must carry out an E.I.A. involving, among other things, local communities.

179. The burden was on the defendant to provide evidence that the immediate neighbors of the Plant were all consulted and consented to the potential environmental impact the project was going to bring to their communities. It may very well be true that some of the plaintiffs were involved in public participation regarding the improvement of their local road network and the setting up of a site office in their locality. The defendant has admitted that he brought to the campsite an asphalt plant.

180. An asphalt Plant, as described by DW 1 and DW 3, has several components, among them a drum burner that generates fuel gas from the asphalt and a discharge chimney. Its work involves initial screening, heating, metering and mixing to ensure that the asphalt mixture is of high quality and performance. Dust is also generated in the process. The storage, unloading, and heating of the asphalt also generates fumes, vibrations, smells, and dust. It is not a typical machine in Kenya where locals are expected to know its potential adverse impacts. See Joshua, Seth Dembo and others "Measurement of radionuclides and their impact on the environment around asphalt plants in Delta State Vol 6 no 2 2023 Research journal of pure science and technology accessed from http//www.iiarjournal.org.;

181. Further, DW3, in his evidence, described an asphalt plant's components, workings, and operations. Noise is generated by the loader loading induced draft fan operation, drying cylinder rotation,

aggregate hoist lifting, and vibrating screen screening. Waste water and waste liquid are mainly derived from aggregate storage. Steam in the wet aggregate is discharged from the chimney, the storage area of the cold material and the lighting of the factory. All these are potential pollutants that could cause hazards to the environment and humans.

182. Asphalt smoke or fumes, as indicated by PW 2, have benzopyrene, which is highly carcinogenic and toxic, likely to cause headaches, dizziness, nausea, and vomiting, among others. Dust interferes with the body's respiratory system. Sulfur dioxide is primarily soluble in water and can cause erosion and other human respiratory ailments. See preferred and alternative methods for estimating air emissions from hot-mix asphalt plants final report July 1996.

183. Carbon monoxide is poisonous nitrogen oxide that has effects on the eyes and respiratory system. Noise affects the auditory organs and may cause loss of hearing and affect the work environment. Odor can affect the growth and development of humans, animals, and plants. See Itodo Udoji Adams (Environmental impact of an abandoned asphalt production site on soil, water, and vegetables from near farmlands) January 2018, Journal of Geoscience and Environment Protection accessed from http//www.researchgate.net

184. So, the defendant, before embarking on setting up and operating the Plant in the plaintiffs' neighborhood, had both a statutory duty and a constitutional obligation to ensure that the right to a clean and healthy environment of the plaintiffs and the community at large was observed, safeguarded, taken care of and realized. See Hot Mix Asphalt Plants Assessment Report, US Environmental Protection Agency December 2000 accessed in https;//www3.epa.gov, chief.

185. The defendant pleaded before this court that it was not aware that the plaintiffs were its immediate neighbors, land owners, developers, occupiers, and potential persons to be directly affected by the setting up of the Plant and its operations. That allegation holds no water given that the 1st plaintiff was not only interviewed at the project inception, but also after he complained, the defendant sent Engineer Mbai to visit and assess his land as per D. Exh No. (6). Therefore, the defendant knew or ought to have known and considered in its operations who were the immediate neighbors, the project-affected persons, the possible adverse effects, and the applicability of the equipment that it was bringing to the vicinity and the approximate range from the neighbors.

186. It is the defendant who knew the nature and work of that equipment it was bringing to the plaintiffs' neighborhood. During the site visit to the locus in quo, the court made observations on the distances of the plaintiffs' parcels of land vis-a-vis the Plant and other public amenities in the neighborhood, including a primary school hardly 300 meters away. The homesteads, farms, and developments on the plaintiffs, parcels of land which are hardly a stone's throw away from the campsite, were evident for the defendant to see, observe, and know who its neighbors were in a year or two. The defendant should not have assumed and or expected the court to believe that asphalt plants have no known adverse effects. Studies elsewhere have shown that it can be a significant pollutant to the environment. See Dal Singh Kharat 'Emissions from hot mix asphalt plants and their impact on ambient air quality "accessed from https//doi.org/10137/s11270-022-05950.

187. Precautionary measures were therefore necessary at the inception of the project. The neighborhood principle in Donoghue vs Stevenson(supra), therefore applies in this case. Mitigation measures regarding the adverse impacts of the asphalt Plant operations specific to the neighborhood occupied by the plaintiffs in the E.I.A study, report, and license had to be implemented. The purpose of monthly and regular inspection and compliance reports by NEMA is what the defendant should have supplied to the court to show that the defendant fully complied with the law as regards any concerns of the plaintiffs.

188. DW1, 2 and 3 were general in their evidence. None of them was specific to the precautionary measures that the defendant had put in place for dust collection, such as cytogenic separation with effect to collectors, electoralstalic collectors, fabric filters, noise reduction measures, scavengers, air systems, and odor control.DW1 was unable to supply to the court an air quality permit, which the defendant obtained before the commencement of the asphalts operations in 2010. The one that was produced was for 2015, long after the plant had been decommissioned. Such a permit includes production limits to avoid the applicability of Prevention of Significant Deterioration (PSD), rules in line with EPA AP-42 Section 11.1 emissions. See http;//www3.epa.gov.

189. DW 2 talked of USA /EPA standards on air quality control. He did not tell the court the specific menu of control measures (MCM) on carbon dioxide, nitrogen dioxide, Sulphur dioxide, and particulate matter that the defendant had put in place to comply with USA/EPA National Ambient Air Quality Standards as of October 2011. See http;//epagov/air/criteria.html.

190. The monthly reports that NEMA must have generated for the years the asphalt plant was in operation would have shown that the defendant was preparing and keeping emission inventory data to identify the emission sources, totals of each source, and the levels. The failure to call the air quality NEMA lead person, Albert Muriuki, was fatal to the defendant's case. The witness was the one mandated by the regulator to follow up on the implementation of the conditions set in the E.I.A. as to the potential pollutants, levels, trends, concentrations, and mitigation measures he put in place and their effectiveness to minimize adverse effects on the environment. Failure to call a witness or produce a document in control, possession, or knowledge of a party leaves a court with the option of drawing an adverse inference. See Kimotho vs KCB (2003)EA108.

191. Other than general comments, DW1 and DW 2 did not rely on any specific air, noise, water, soil, and odor reports regarding the Plant detailing the daily, monthly, and annual emission rates, if any, and the measures that the defendant may have put in place to ensure that the levels of the pollutants adhered to the specifications in the E.I.A license and EMCA. DW 3, the plant operator is, in law, required to be aware of the control and maintenance standards of an asphalt plant and how the dust collector systems, performance affects and may result in pollution. It was not enough for the plant operator to give general comments without emissions inventory data. It is this data that is used to calculate permit fees, perform toxic air pollutant modeling evaluation, provide appropriate data to the regulator, monitor progress and trends, and establish or confirm compliance status. See AP-42 supra

192. DW 3 was unable to tell this court what he did to ensure cleanliness in maintaining and adjusting the accessories of the Plant to ensure minimal production of noise, air, dust, fumes, and vibrations in order to safeguard the environment. Evidence on the efficiency of the defendant's plan to ensure reduction or stoppage, including the use of anti-pollution equipment such as dust collectors, water spray nozzles, and bay house filters, was not tendered before the court.

193. D. Exh No. (3) was dated 8.3.2010. On page (8), it identified the possible adverse effects as air and dust, noise pollution, water and soil contamination, barrier effect, decrease in productive area, and interruption of irrigation water. Page (9) listed the mitigation measures, such as a bay house or emission control equipment and rehabilitation of the site. The report was silent on the potential impacts on the immediate neighbors, such as the plaintiffs.

194. Other than stating on pages (14) & (15) that there should be continuous awareness creation among the local community, free medical camps, corporate social responsibility, and incorporation of all safety provisions, the defendant failed to plead in its statement of defense and call evidence to prove that it undertook any awareness creation campaigns during its operations on the potential benefits and negative impacts of the Plant. Further, the defendant failed to specifically address the concerns of the

local communities through effective communication, education, and awareness and in implementing the mitigation measures set out on page (15) of D. Exh No. (3).

195. On causation and standing, the defendant relied on Lujan Secretary of Interior vs Defenders of Wildlife and the Scholarly Work of Kristin E. Schleiter II Provisions in Environmental litigation citing with approval Fraser vs 30152 Torts Corporation, King vs Burcling Northern Saula F. E Railways G. The court guided by the cited caselaw urged the court to rule out any pollution attributable to the asphalt plant, that may have caused loss, or damage on the plaintiffs in the manner and nature pleaded by the plaintiffs.

196. Hannah Wamuyu, Collins Odote & Stephen Onyango, in their seminal paper," Compensating Toxic Tools in Kenya over the Causation Defenses," Vol. 12 2258, 20, the Journal for Sustainable Development and Policy 21st January 2021, take the view that courts should be pragmatic by imposing strict liability on polluters responsible for environmental damage, especially in administrative liability. Hon. Justice Brian Preston takes the view that to make the right to a clean and healthy environment operational and practical, there is a need to delve deeper into what the right to environment involves, recognize and explicate the correlative duties to respect, protect, and uphold the right to the environment by effecting systematic and structural laws, policies, institutions, and governance systems to achieve sustainable development. See "The right to a clean, healthy and sustainable environment; how to make it operational and effective" talk to United Nations ambassadors at the permanent mission of France to the United Nations New York on 27th October 2022.

197. The burden was on the plaintiffs to bring cogent and tangible evidence to establish the nexus between the acts the defendant complained against and how it adversely affected their environment. The court takes cognizance that Article 70(3) provides that any applicant alleging breach, violation, or infringement of the right to a clean and healthy environment need not demonstrate the loss incurred or injury suffered.

198. DW 1, 2 & 3 told the court that there were no adverse impacts, complaints, or concerns raised by the plaintiffs or the local community between 2007 and 2013 when the decommissioning occurred. The plaintiffs, on the other hand, urged the court to find that they complained to the regulator who visited the suit parcels of land, established there was pollution, and issued a restoration order to the defendant to cease and remedy the situation.

199. The letter dated 5.7.2012 was received by the defendant on 10.7.2012. NEMA received the complaints letter from the plaintiffs on 19.1.20t2, who wrote to the defendant on 1.2.2012. In this suit, the defendant has vehemently denied or failed to confirm in the statement of defense the contents of paragraph 14 of the initial plaint that notice to sue was issued before the suit was filed. The defendant did not object to the production of the restoration order issued by NEMA as an exhibit before this court.

200. Instead, the defendant pleaded in paragraph 15 of the statement of defense that the plant was inspected on a monthly basis by NEMA regional officers. As indicated above, no such monthly inspection reports were furnished before this court at the hearing to confirm compliance with environmental policies and the law.

201. The plaintiff withheld from the court the specific asphalt plant operation manual, plans, compliance certificates, or permits, alleged to be among the best in the industry, capable of capturing dust and treating it without emissions to the environment. Additionally, no ISO certifications, inspection certificates, permits, or compliance reports were produced by the defendant to show that the Plant was not capable of producing noise vibrations, smoke, fumes, odor, and water discharge to levels beyond the accepted or permitted levels under EMCA.

202. The EIA license that was issued to the defendant was never intended to act as a statutory defense against charges of environmental degradation as per clause 1.3 of the license dated 26.4.2010. The proponent under clauses 1.6, 2.2, 3.2, 3.5, 3.6, 3.8, 3.9, 4.1, 4.3 & 5.2 thereof was to comply with NEMA regulations throughout the project cycle. Other than D. Exh No. (4) done on the first year of the operation cycle and the decommissioning report, the defendant produced no other evidence for project audits done for the second and third years in the operation cycle. Page 108 of the report related to internal adverse effects. It was silent on any external air, noise, wastewater, fumes, vibrations, odor, dust, and other adverse impacts the plant may have caused to the neighborhood. These are the pollutants that the plaintiffs and their experts discovered on their parcels of land, whose point source was the asphalt plant.

203. The air quality assessment report by Albert Muriuki was not carried out in the plaintiff's neighborhood. It was also not carried out for 24 hours if all the permitted samples were required in 24 hours as per US/EPA standards referred to by DW2. Similarly, the testing equipment was not indicated. Soil, water, noise, and waste levels in parcels of land occupied by the plaintiffs were not taken, tested, and analyzed by DW1,2 and 3 for the period 2010-2013, generating negative results contrary to the expert report by PW2. The audit report was specific to the workers and environment within the Plant and in the neighborhood.

204. On page 115, relating to stakeholders' engagement, the sample size, especially involving the immediate neighborhood, was missing. The air and noise quality report by Mr. Albert Muriuki, dated September 2011, related to the environment within the Plant. The soil analytical data was not targeted at any potential pollutants specific to the subject matter in this suit. As to the licenses to emit noise produced as D. Exh No. (7), the same was for 2015. It had no relation to the subject matter before this court. Evidence of average emission levels of pollutants of the Plant for the whole period between installation and decommissioning was not produced by DW1 and DW2 as a baseline or background information to discount the findings by PW2 that there were pollutants in the plaintiffs' parcels of land beyond the permitted levels, that caused loss and damage to the environment.

205. Coming to D. Exh No. 8, evidence of regular or monthly inspection reports on mitigation or remedial actions taken to address the concerns of the plaintiffs or any other local community was not attached. The audit was also specific to the asphalt plant and not the neighborhood. D. Exh No. (9) and (10) were generalized reports over the road network and hence not specific to the plaintiffs' complaints regarding pollutants emitted to their environment by the asphalt plant. The reports had also raised specific complaints of non-compliance with environmental law by the defendant as alluded to by PW2. Curiously, the credibility of the evidence of DW 1 and DW (2) was doubtful for ignoring, omitting, or avoiding to acknowledge, let alone address the issues raised by the plaintiffs, in writing with the defendant as early as 2011 and consistently for almost over a year and a half before the decommissioning, to an extend of the regulator issuing a restoration order.

206. The scope of DW 1 was restricted to the asphalt plant as per pages 4 of D. Exh No. (13). There was nowhere in the report that DW 1 was informed of the plaintiffs' concerns or was required to or directed by the defendant to look into any issues raised by the plaintiffs, yet the defendant had already received and acknowledged receipt of the plaintiffs, complaints before the decommissioning. DW 1, told the court that the letter by the plaintiffs to the defendant through NEMA was not brought to her attention. It is unbelievable that the defendant would have withheld such vital information from DW 1, 2, and 3.

207. Consequently, the attempt to exonerate the defendant from any blame for adverse impacts by DW 1 was made without basis or knowledge of the existing complaints. Similarly, DW 1 undertook and

was not involved in any outreach programs. The defendant produced no records for any sensitization/ community/outreach progress and Corporate Social Responsibility, particularly involving the immediate neighbors of the asphalt plant, to pick out or address any concerns or adverse impacts of the Plant on the local neighborhood.

208. DW 2's evidence was purely a desk analysis of the field reports by PW2 and DW1. He never visited the Plant during its operation cycle or period and or the plaintiffs' parcel of land during the time that the plant was running so as to have a basis discount the findings by PW 2 or form a basis for discrediting the said report, findings, observations, and conclusions. P. Exh No. 5, 7 & 12 were for specific parcels of land that PW 2 visited in the presence of the plaintiffs and during the period that the asphalt plant was in operation.

209. DW 1 & 3 did not visit the plaintiffs' parcels of land while the asphalt plant was operating to verify, authenticate, and or rule out the complaints leveled against the defendant between 2010 and 2013; otherwise, they would have shared photographs and a rival expert report on whether or not there were pollutants on the plaintiffs' trees, crops, grass, rooftops, on soil and water. The defendant would have shared a specific scientific report that there was no noise, odor, vibrations, fumes, general discomfort, irritants, their levels or concentrations, and their alternative point sources apart from the asphalt plant.

210. The defendant used their reports and the critique by DW2 to challenge the plaintiffs' expert reports in my view, lacked basis In P. Exh No. (2) the plaintiffs had sought from NEMA an environmental audit on emissions and injuries to the surrounding environment outside the Plant, covering trees, roofs, crops, vegetables, and nappier grass and affecting humans, animals and plants. A specific complaint had been made in the letter that one-half of an acre of land was full of waste from the processing plant, creating a sheet of cement and toxic dust, causing plants and trees to dry up due to choking. The plaintiffs had invoked the Environmental Impact Assessment and Audit Rules 2003. Regulation 17 of the Environmental (Impact Assessment and Audit) Rules of 2003 required public participation. Had DW1 and 2 conducted a special environmental emissions audit of the Plant and its surrounding areas regarding the complaints by the plaintiffs, they would have had a basis to attack, discount, and discredit the report by PW2.

211. It took the defendant a year and a half down the line after receiving the complaints from the plaintiffs. In the absence of any action after a restoration order was issued, the plaintiffs wrote a demand letter to the defendant seeking damages. Despite all these interventions, the defendant saw no urgency or need to remedy the situation in the spirit of good neighborliness by, at the very least, assessing to verify or otherwise take remedial action measures as requested by the regulator NEMA in its letter dated 1.2.2012, to avoid more damage.

212. Given that there was no dispute that the defendant erected and operated an asphalt plant on L.R No. 2401 and 2402, neighboring the plaintiffs' parcels of land between 2010 and 2013, the duty was upon the defendant to contain the possible emissions within the asphalt plant and, if any escaped from within, to undertake mitigation and remedial measures as stipulated in the EIA license, study, report, and management plan. Due to non-compliance with the specific conditions in the E.I.A license, the emissions found their way to the neighborhood and adversely affected the plaintiffs' environment, as per the scientific reports by PW2. The oral evidence given by the plaintiffs was consistent, credible, and specific on the day-to-day experiences of being subjected to air, noise, fumes, water, soil, and general pollution by the pollutants coming from the asphalt plant for close to two years.

213. In a court of law, expert evidence is considered alongside other evidence based on the substratum of facts, which are proved exclusive of the evidence of the expert as held in Kagina vs Kagina and others Civil Appeal No. 21 of 2017 (2021) KECA242 (KLR) (3rd December 2021 (Judgment). Expert

reports produced by the plaintiffs were consistent in that the predominant or sole point source of the pollutants was the asphalt Plant. DW 1 and 2 had no such set of facts regarding the happenings on the ground at similar times and years as PW2. The value and cogency of his opinion evidence were only as good as the assumptions on which it was based, as held in Stephen Kinini Wangondu vs The Ark Limited (2016) eKLR.

214. Evidence by the plaintiffs who lived in the neighborhood throughout the period of operating the asphalt plant left no doubts of environmental disturbance, discomfort, and interruption of their everyday lives and livelihoods. Remedial or mitigation measures to capture, block, restrain, and or minimize the pollution were not tendered by the defendant contrary to the requirements of the EAI license, study, and report.

215. Escape of the pollutants to the plaintiffs' parcels of land shows that the defendant was not mindful of the right to a clean and healthy environment, strict liability as set out in Ryland vs Fletches (supra) applied to the defendant. Its activities were non-natural use of the land. See John Campbell Law Incorporation vs. Owners of strata Plan 1350 (2001) BCSC 1342 as cited in David M. Ndetei vs Orbit Chemicals Industries Ltd (2014) eKLR as well as MC Mehta vs Union of India (1987) 1 SCC 395 to support the allegations of the pollution.

216. PW 2 testified before the court and tendered scientific reports that after visiting, observing, collecting, and analyzing air, noise, soil, and water samples from the plaintiffs' parcels of land, he established pollutants on the plaintiffs' parcel of land whose point source was the plant. In Kibor Distillers Ltd & 4 others vs. Benson Ambuti Adega and others (2020) eKLR, the Court of Appeal observed that whether there is a threat, harm, or degradation of the environment was a question of facts. The court observed that an empirical scientific causal link between the activities of the appellant and the alleged pollution of the river had to be proved as to the exact point source. The court said that the fact that respondents had raised various complaints over raw effluent discharge to the environment years before filing the suit was not proof of environmental degradation. The court further said that pollution is primarily proved by empirical, technical, and scientific evidence and not by layman's opinion, testimony, or depositions.

217. On the difference between an E.I.A study report vis- a -vis environmental audit, the court said that the former means a report produced at the end of the E.I.A study process. In contrast, the latter means a systematic, documented, periodic, and objective evaluation of how well environmental organization management and equipment are performing in conserving and preserving the environment. The court cited Chief Land Registrars and four others vs. Nathan Tirop Koech & others (2018) eKLR that there is a presumption that all acts done by a public official have lawfully been done and all the procedures have been duly followed.

218. This court has no reason to doubt that a restoration order was lawfully issued to the defendant. A presumption of regularity, which the defendant failed to rebut through cogent, clear, and uncontroverted evidence. A restoration order is one of the powerful instruments NEMA uses to ensure a proponent of a project adheres to the conditions in the license and implements the proposed mitigation or remedial measures set out in the EAI study or report accompanying or lodged during and at the time the license is approved and issued. In this suit, the defendant had made commitments with the regulator pursuant to the EMCA provisions. Such commitments had the backing of the law. They were not empty promises. The plaintiffs testified and produced the restoration order, which the defendant did not challenge within 21 days as required by law and or act on in remedying or addressing the complaints of the plaintiff. It is the defendant who is alleging that the project it undertook was in full compliance with environmental laws, and there were monthly inspection reports by the regulator, who gave it a clean bill of health even up to the decommissioning stage.

219. The certificates of compliance from the environmental regulator for the whole period that the asphalt plant was operating were not availed to court for the defendant to escape the alleged breach of environmental laws and regulations, including disobeying a lawful restoration order and failing to comply with the special license leading to pollutants at the plaintiffs' parcel of land. It was the defendant who offered a defense of full compliance with the EIA license, study, and report issued by the NEMA. It was the defendant would fail if the existence of those sets of facts were not established.

220. Once the plaintiffs proved that they complained to NEMA and action was taken against the defendant by way of a restoration order, the evidential burden shifted to the defendant to refute or rebut the doctrine of legality or regularity that actions taken by public officers in the course of executing lawful duties under statutes are lawfully made. The defendant failed to discharge the burden and call NEMA officers to confirm full compliance with the EAI license, study and report. None of the defendant's witnesses or documents addressed, discounted or vitiated the existence of a restoration order and the implications of not complying with it on time or at all.

221. DW 1, DW 2, and DW 3 told the court that they were not aware of the plaintiff's complaints. A senior officer from the defendant was not called to deny that there was service with demand letters from the plaintiffs on top of a restoration order. DW1,2 and 3 never visited the plaintiffs' parcels of land to establish, verify, discount, and or rule out the existence of pollutants emanating from the plant. Regulation 7 of the E.I.A Audit Regulations 2003 required the defendant to prepare a project report with an action plan to ensure the health and safety of its workers in neighboring communities. Part of this plan would include establishing the ecological, economic, and social-cultural impacts of the project on the local community. My finding is that the plaintiffs have established a statutory and constitutional breach of the right to a clean and healthy environment against the defendant, who not only owed a duty of care to them but also filed to follow the terms and conditions set in the EIA license, study and report, whose targeted and identified as persons directly, likely to be affected by the operations of the asphalt plant.

222. The next issue is whether the plaintiffs suffered loss, injury, and damages as a result of the failure of the defendant to comply with environmental laws, policies and regulations. Section 3 (3) of EMCA grants the plaintiffs powers to approach this court for redress without prejudice to any other action that is lawfully available to them over the same matter. In Elizabeth Kurer Heier & another vs. County Government of Kilifi & others (2020) eKLR, the Court of Appeal was faced with the question of the role of NEMA in enforcing National Environment (Noise Standards and Control Regulations 2003 and NEMA (Noise and Excessive Vibrations Pollution Control) Regulations 2009, as to the measuring of the intensity, duration or frequency of the noise emissions from comeback discotheque.

223. The court said noise levels are set under the 1st schedule of the Regulations and that unless the noise is reasonably necessary for the preservation of life, health, safety, and property, Regulation 6 thereof, it was the responsibility of the lead agency to measure the noise levels. The court cited Mumo Matemu vs. the Rusted Society of Human Rights Alliance and others that it was fundamental to ensure compliance with the E.I.A license and the environmental management plan. The court held that despite receiving complaints through numerous letters and emails, the operator of the facility took no remedial action to address the loud noise, leading to an improvement notice by the county government as well as letters from the ombudsman. The court said that other than the noise levels, other parameters must be considered as per Regulations 3 (2) of the EMCA Regulations 2006 to determine whether the noise was loud, unreasonable, and unnecessary.

224. The court held that the persistent and consistent complaints by the appellants were clear that the 4th respondent played loud music that was recurrent, predominant, and emanating from its premises with

no soundproof. The court found the letters produced by the complaints as corroborative to the pleaded facts, sufficient to sustain the petition that the noise levels had annoyed and disturbed the appellants confront and peaceful response to amount to a breach or violation of the rights.

225. In this suit, the plaintiffs relied on factual, documentary, and scientific or expert evidence. The plaintiffs produced ownership documents of the suit parcels of land. No manager, engineer, or NEMA appointee working with the plant on a day-to-day basis was called by the defendant to deny that a demand letter was sent to the defendant that Engineer Mbai visited the farm of PW1 and took soil samples. Save for D. Exh no 6, no internal or external investigative reports specific to the complaints before the court regarding or discounting the complaints that pollutants from the asphalt plant did not escape and if they did so from the asphalt Plant during its operations, they were within the permitted limits required by law and were therefore enviro-friendly.

226. The plaintiffs' evidence was that the asphalt plant was running 24 hours per day and on a daily basis, hence causing maximum pollution to them and the surroundings. The defendant failed to avail monthly inspection reports from regional NEMA officers, as pleaded in the statement of defense. It was the same regional office that issued a demand letter and restoration order to the defendant. The defendant failed to call NEMA officers and or produce their reports to prove compliance with the environmental laws, orders, and regulations.

227. In Kenya Akiba Microfinance Ltd vs Ezekiel Chebii & others (2014) eKLR, the court said that where a party has custody of or is in control of specific evidence and fails or refuses to tender or produce it, the court is entitled to make an adverse inference that if such evidence were produced, it would be adverse to such a party. In this suit, it is the defendant who pleaded that there was full compliance with environmental laws during the project cycle and the operation of the Plant; hence, there was no pollution at all, as alleged by the plaintiffs. It is the defendant who had custody of all monthly inspection reports by NEMA as the agency bestowed with the authority to enforce compliance with the EIA license, study, and report. It was the defendant who alleged that the plaintiffs' claim came late and after the decommissioning of the project. My finding, therefore, is that the plaintiffs had lodged their complaints to the defendant as early as August 2011 and later wrote letters to the regulator on 1.2.2012, who issued a restoration order to the defendant but was ignored or neglected by the defendant.

228. The defendant pleaded and, through witnesses, testified that the operation of the Plant in 2011, 2012, and 2013 before decommissioning was in line with the law, that they had complied fully with the EMCA Regulations and the conditions in the EIA license, study, and report. Additionally, the defendant relied on a soil testing report to show that the cause of soil infertility was not the alleged pollutants from the asphalt plant.PW1 told the court that the visit by engineer Mbai was after he had complained to the defendant. The soil test report stated that nitrogen, phosphorous, or potassium minerals were deficient in PW1's land.

229. From these two pieces of evidence, I draw the inference that as of August 2011, the 1st and 12th plaintiffs had raised complaints over pollution with the defendant. DW 1, 2 & 3, in their testimony, did not controvert the evidence of PW 1, 2, 3, 4,5, 6 & 11 that the late engineer Mbai, on behalf of the defendant, visited the suit parcels of land as early as August 2011 and carried soil samples from the 1st & 12th plaintiffs' farm for purposes of verifying, ascertaining or establishing if there were any harmful pollutants from the Plant.

230. Even after the defendant was served with the restoration order or letter from NEMA, it did not appeal against it or give reasons one way or the other as required by law within the stipulated period of twenty-one days. The defendant did not deny receipt of the restoration order or the complaint letter by the plaintiffs. PW 1 was categorical before the court that he had made a report on the pollution to the

defendant, and the late engineer Mbai from the defendant visited his land accompanied by officers from KARI, who viewed the parcels of land taken out and carried samples from his land. D. Exh No. 6(a) & (b) indicates that the soil samples were received on 24.8.2011. The owner of the farm was indicated as the 1st plaintiff.

231. The burden of proof is on he who wants the court to believe the existence of specific facts. It is the defendant who pleaded that relevant authorities, such as NEMA, sufficiently dealt with any issues raised by the local community. A restoration order was issued by NEMA to the defendant regarding the plaintiff's complaints. DW1,2 and 3 want the court to believe their version of the story and disbelieve that given by the plaintiffs. The defendant pleaded that the plaintiffs' claim came too late and amounted to unjust enrichment.

232. The defendant, in his statement of defense and evidence, did not refute receipt of the restoration order, which was statutorily issued by the regulator on 1.2.2012 during the project cycle. The letter was also followed by a demand letter dated 5.7.2012, which the defendant received on 10.7.2012. One of the issues for determination listed by the plaintiffs in the list of issues is whether the complaint was written and the defendant ignored a restoration order.

233. DW1, DW 2 and DW 3 were categorical that they were unaware of the complaints by the plaintiff and the restoration order. DW 2 and DW 3 were categorical in their evidence that the defendant had fully complied with EMCA. Section 110 of the Act provides that within 21 days of service with the order, a person served may give reasons in writing requesting the authority to reconsider the order.

234. The plaintiffs pleaded in paragraph 9 of the amended plaint that they wrote to NEMA, who issued a restoration order about the pollution, but the defendant ignored, neglected, and or failed to remedy the pollution, hence causing more injuries to them. The plaintiffs, in my view, discharged the legal burden by producing a restoration order validly issued and acknowledged receipt of by the defendant. In Elizabeth Wambui Njuguna vs HFCK Nairobi HCC 293 of 2006, the court said a party denying receipt of a demand letter should have brought evidence that she did not receive the letter sent by the defendants. The evidential burden shifted to the defendant to discount receipt of the restoration order and the demand notice and to prove compliance with the law as held in Raila Amolo Odinga & others vs. IEBC and others (2017) eKRL.

235. It is the defendant who desires to prove full compliance with the special license and the environmental laws so as to escape liability. The existence of those facts is dependent on regular monthly inspection reports of NEMA lead experts that for three years, there was full adherence with the license, EIA report, study, and management plan to the satisfaction of the local community as was laid out in the EIA license, study and report. See Jennifer Nyambura Kamau vs Humprey Mbaka Nandi (2013) eKLR.

236. Section 108 of EMCA gives NEMA the mandate to take action to prevent the continuation or cause of pollution, restore land, prevent any cause of environmental hazard, and cease any action causing or contributing to pollution or an environmental hazard by issuing and serving a restoration order. A court of competent jurisdiction may, in proceedings brought by any person, issue an environmental restoration order against a person who has harmed, is harming, or is reasonably likely to harm the environment under this section; it shall not be necessary for the plaintiff to show that he has a right or interest in the property, environment or land alleged to have or is likely to be harmed, continued to operate without any due regard to the environment management plans generated for these activities.

237. The restoration order was in full compliance with Section 109 of EMCA. It provided as follows;" Your attention is drawn to the provisions of EMCA Part IX, which provide for the restoration of degraded environment through restoration orders. You are hereby ordered to restore the degraded environment

to a level satisfactory to the authority within a period of 14 days from the date of this order, failure of which the law will take its course without any further reference to you".

238. A restoration order under this Section 109 EMCA must contain the activity, time, the persons addressed to, the action to be taken, powers and penalties, and the right to appeal to the tribunal by the one served with the order. The order must be obeyed unless appealed against and shall continue to apply to the activity in respect of which the order was served, notwithstanding that it has been complied with under Sections 109 (2) – (5) thereof. See Nicholus vs Hon. Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) (2023) KESC 113 (KLR) (28th December 2023) (Judgment).

239. In Elizabeth Kurer Heier & another vs County Government of Kilifi & 4 others (2020) eKLR, the court said the reluctancy or failure of the respondents to exercise their mandate under the Constitution and EMCA by acting on the numerous complaints to curb the nuisance left the court with no option but to declare the rights of the residents, and to make findings as to whether the proponent's business permits were unlawful or illegal and grant a permanent injunction.

240. In this suit, the plaintiffs have tabled evidence showing that they were genuine owners of the suit next to the campsite where the defendant was operating the Plant. There is evidence that the plaintiffs lodged complaints to the regulator NEMA, who brought to the attention of the defendant the nature and manner of environmental complaints by the residents of Kigane village and directed the defendant to restore the environment as per Part IX of the EMCA.

241. The restoration order stated that whereas the materials processing plant had benefitted from E.I.A and E. I A process, NEMA had not benefitted at all and had therefore ordered the defendant to prevent, stop, discontinue, compel, or provide compensation for the victims of the violation of the right to a clean and healthy environment under Article 42 of the Constitution. In Kilimani Project Foundation vs. B Concept Ltd, t/a Bclub Nairobi and others (2019) eKLR, the residents of Kilimani were aggrieved by the conduct of the respondents who were operators of a night club business playing loud music, depriving them of the necessities of sleep on a regular basis and exposing their children to immoral and indecent behavior. The noise emanating from the premises was alleged to deprive the resident's right to life also under Article 26 (1) of the Constitution which includes the right to a clean and healthy environment. The court cited JR Misc Application No. 613 of 2016 Republic vs Nairobi City Council Alcoholic Drinks Control & Licensing Board and others exparte Space Lounge Bar and Grill Ltd that Article 42 guarantees all persons the right to a clean and healthy environment which includes the right to a peaceful environment devoid of noise and further the court cited with approval Mumara Residents vs NCC & others (2018) eKLR, that prevention of noise and vibration pollution forms part of the right to clean and health environment.

242. In Pastor James Jesse Gitahi & others vs. AG Petition No. 683 of 2009, the court said that noise pollution covers sound, which could result in hearing impairment, while vibrations, pollution covers vibrations transmitted to the human body through solid structures. The court said both could cause injury to the body, hence the need to regulate them. The court said that there are regulations prohibiting loud, unreasonable, unnecessary, or unusual noise that annoys, disturbs, injures, or endangers the comfort, repose, health, or safety of others and the environment.

243. The court further said that in determining whether the noise is loud, several factors are considered, including the time of the day, the proximity to a residential neighborhood, whether the noise is recurrent, intermittent, or consistent, the level or intensity of the noise whether the noise has been enhanced by any electronic or mechanized means or whether the noise can be controlled without effort or expense of the person making the noise.

244. Article 70 (3) of the Constitution provides that a party aggrieved by breach of the right to a clean and healthy environment does not have to demonstrate that they have incurred any loss or suffered an injury for the court to make any appropriate remedies.

245. The defendant has submitted that the plaintiffs have failed to establish the causal link between the wrongful acts complained of as to pollution, loss, and damage incurred by them to be entitled to the reliefs sought. As indicated above, D. Exh. No. (2), (3), (4), (5), (8), (12), (13) & (15) were not specific to the complaints raised by the plaintiffs regarding the violation of the right to clean and health environment arising out of the failure by the defendant to fully comply with the EIA license, study and report issued to it by NEMA for the project in general and in particular, the operation of the asphalt plant in utter disregard of the rights of the plaintiffs. P. Exh No. (10) dated 25.7.2008 confirms that the University of Nairobi was a designated laboratory by NEMA under Section 119 of EMCA. My finding is that P. Exh No. (12) was a report generated from a designated laboratory under EMCA.

246. As indicated above, the defendant's witnesses miserably failed to discredit factual and scientific evidence tendered by the plaintiffs showing traces of pollutants emanating from the Plant on their parcels of land with concentrations above the permitted levels. The defendant failed to call or produce monthly inspection reports from NEMA to sustain its statement of defense that there were no pollutants that escaped from its compound with levels outside the permitted limits that were capable of adversely affecting the environment in general and, in particular, the plaintiffs' lives and livelihoods.

247. Additionally, none of the defendant's witnesses visited, collected samples from the plaintiffs' parcels of land, investigated, prepared, and produced expert reports specific to the events or complaints made to the defendant in writing, which led NEMMA to issue a restoration order, that unfortunately was disregarded by the defendant. DW1, 2 and 3 admitted that they were not aware of the plaintiff's specific complaints. Therefore, since DW1, 2 and 3 did not prepare any specific expert report after visiting the suit parcels of land to discount the alleged escape of and presence of pollutants on the plaintiff's environment to levels above those permitted by the regulator, loss, and damage, I find their evidence insufficient, irrelevant and incredible to challenge the expert reports by PW2 as regards causation and the nexus of the point source of the pollution, presence of the pollutants, their concentrations and likelihood of adversely affecting the plaintiffs right to clean and healthy environment.

248. It is a trite law that special damages must be strictly proved. The plaintiffs pleaded for individual losses totaling Kshs.104,567,500/=. All the plaintiffs relied on P. Exh No. (1) & (5), that was an assessment of the damages prepared by Nicholas Mwenda. The maker was not called to testify. The document had no date, signature, or stamp. The acreage and parcel numbers for each of the plaintiffs were not included. Other than giving general figures, the report lacked details of the person(s), parcel no, date of purchase or establishment, quality and quantities, types, timelines, status, and unit cost, the rationale of calculation of cost or value for the cows, poultry, goats, pigs, coffee, bananas, rental houses, coffee, tea, fruits, assorted trees, nappier grass, food crops, rental and business registration and financial records.

249. Additionally, the report indicated figures for a column on health impact without specifying if it is for humans, animals, or plants and the nature of the ailments or diseases. The maker, in a letter dated 10.10.2017, described himself as an environmental chemist. The sources of the information on the items in the report were not disclosed. There were no accompanying reports from the public health inspector, agricultural extension officers, livestock officers, veterinary doctors, accountants, land valuers, actuarial scientists, and loss assessors. The plaintiffs' farm numbers, records, farm books, farm inventories, farm invoices, receipts, banking statements or deposit slips, police OB reports, annual returns for the business or farm, registration certificates as farmers or business persons, business licenses

or permits, inspection reports, and lastly certified records to show that the plaintiffs were recognized, coffee livestock, chicken fish, fruits and tree farmers under Agriculture Livestock Fisheries Authority or by any regulatory authorities within Meru County and beyond.

250. The estimated loss was pleaded as special damages. The defendant urged this court to disallow the same for lack of proof. The maker failed to testify and give scientific formulae on how he arrived at the figures. The maker was not a designated agricultural, fisheries, livestock, medical, business, accountant, or water officer. The Ministry of Agriculture's forest, livestock, crop yield and crop compensation, forest and livestock produce, and animal market rates of sale/price Guidelines that the maker used to arrive at the figure were not specified. See Lesiolo Ltd vs Kenya Seed Co. Ltd. (2017) eKLR. The claim of Kshs.108,000,000/= is disallowed.

251. The plaintiffs pleaded and submitted for general damages of Kshs.308,000,000/= relying on KM & 9 others vs. AG & others (supra). The plaintiffs also prayed for a restoration order. On the other hand, and as alluded to above, the defendant has submitted that the plaintiffs' claim for general damages is unsubstantiated, for there is no causal link to it, as the wrongdoer.

252. In Orbit Chemicals Industries vs Prof. David M. Ndetei (2021) eKLR, the trial court awarded Kshs.269,439,464.15 costs for restoration of soil, general damages for loss of use of land, and general damages for nuisance. The respondent had alleged that the appellant had failed to take any or sufficient precautionary measures against causing or preventing nuisance, namely, offensive nuisance, unwholesome odors, smoke, industrial dust, vapors, gases, noise, filthy effluents, sewage, and contaminated stormwater spread, entering, seeping, diffusing or percolating into his suit premises, defiling or rendering it unhealthy or unfit for habitation as residential or agricultural thereby interfering with his quiet enjoyment of title.

253. The appellant had pleaded, just like in the instant suit, the defense of observance of the highest standard of care, non-production of solid or liquid effluents, recycling of any liquid waste, and conformity with local authority's standards. The appellant had also counterclaimed for specific performance to investigate the alleged wastage or impact, injunction, and special and general damages. A report from NEMA had been produced showing that the appellant had been ordered to rectify a tank that was contaminating groundwater. An expert on environmental science testified on soil pollution after taking oil samples showing the presence of detergents, benzene in soil alkaline materials in borehole water, and hydrocarbons that were injurious to the plaintiff.

254. The court held that even though the respondents' expert evidence was countered by the expert on behalf of the appellant, the report from NEMA indicating there was effluent from the factory, a malfunctioning sewer, and contaminated groundwater, efforts by NEMA to resolve the issues requiring rectification of the defective sewer site visit by the court where it made some observations the respondent’s case on the questions of liability passed the test. The court, guided by Section 2 of the EMCA and Rio Declaration on Environment and Development found the appellant as the polluter had a duty to pay the cost of cleaning up and the element of pollution that it had caused to the environment. On damages payable, the court cited Strong Bruks Aktie Bolay vs Hutchison (1905) AC 515, that general damages were the direct natural and probable consequences of the action complained of.

255. In this suit, the plaintiffs, in their testimony, shared with this court vivid experiences of the air, noise, water, food, and fumes pollution as well as vibrations, odor, discomfort, irritations, disruptions, suffering, loss, and damages, that they went through or were subjected to for close to three years on a daily basis due to the acts of the defendant. All the plaintiffs told the court that the levels of

the pollutants were above the permissible limits, so much so that their everyday lives were grossly affected.PW2 shared the same information by way of expert reports.

256. It is not disputed that NEMA had warned the defendant to compensate the plaintiffs and went to the extent of issuing a restoration order, which the defendant ignored or neglected to comply with. PW 2 told the court that the environment may take close to ten years to recover. The court visited the site close to over ten years after the decommissioning. Debris left by the defendant almost over ten years ago was still evident within the campsite. The restoration of the campsite to its original status was lacking, let alone the neighbors to it. Counsel for the defendant, when asked by the court at the site why there was no restoration of the campsite to its original state he said that the owner of the land had agreed with the defendant to leave the same that way in order that he could collect and use the materials. Such an option, unfortunately, was not in line with the EIA license. By leaving the campsite without restoration, the defendant was in breach of not only the EIA license but also the law. It leaves doubt, therefore, on the credibility of the evidence by DW1 that there was full compliance with the law by the defendant up to the decommissioning stage.

257. Mitigation and restoration measures as were required in the EIA license, study, report and management plan for any adverse effects on the environment in general and in particular regarding the complaints by the plaintiffs were not specifically pleaded and proved by the defendant. A report showing the said measure, time, where, when, cost, and how they were undertaken by the defendant before, during, and after the decommissioning was not shared with the court.

258. The acknowledgment of the existence of the complaints before and during the hearing of this suit by the defendant, let alone attempting to establish if the complaints were genuine or not, is missing. In Chebii and others vs SBI International Holdings (AG)K & another E & L 19 of 2019) (2024) KEELC 3294 9KLR) (11th April 2024) (Judgment), a campsite for the Construction of Marigat – Muchongoi Karanda Ol Ng'arua Mahotela C77 & Mahotela – Sipili road had been set up adjacent to the suit property, barely 4 meters from the plaintiffs dwelling houses interfering with his right to a healthy and clean environment and use of his land. He complained of noise, smoke, fumes, air, and dust pollution hence diminishing his health and medical conditions.

259. The court found that the plaintiff's living conditions had been deplorable between 2017 and 2019 as a result of dust, noise, and fumes emanating from the 1st defendant's campsite, hence violating Article 42 of the Constitution of Kenya. The court said the mere approval and licenses to undertake road construction did not relieve the 1st defendant of its duty of care towards the plaintiffs and to mitigate environmental pollution to its neighbors from the execution of the road projects.

260. The court noted the E.I.A process was selective, leaving out next-door neighbors, and that an E.I.A license did not relieve a project proponent of its duty to maintain a clean and healthy environment or mitigate any adverse effects of environmental pollution, including the safety of its neighbors or persons likely to be affected by the project. The court awarded Kshs.300,000/= as general damages.

261. In this suit, the plaintiffs narrated in their evidence the proximity of their parcels of land, homesteads, buildings, shamba and businesses to the Plant. The court, during the scene visit, was able to see and indeed observed the range of, or the relative distances of, the plaintiffs' homestead, farms, developments, buildings, and businesses from the Plant. In Africa, for Network for Animal Welfare vs. The Attorney General of Tanzania EACC Ref No. 9 of 2010, it was held that while undertaking development obligations, the Tanzanian government was mandated to consider the damage that those projects could cause to the environment. In Jane Wagathuitu Githinji and Others vs Sojanmi Spring Fields Ltd and others (2019) eKLR, the court, relying on expert evidence and site visit reports, made

a finding that there was a direct cause and effect between the bursting of the 1st defendant's dam, the increased volume of water, which was not a natural phenomenon.

262. Guided by the cited case law, the observations made during the scene visit, and the totality of the evidence tendered by the parties, the court is left with no doubt that the defendant knew or ought to have known or reasonably established that the plaintiffs were it immediate, owners, and possessors of the homesteads, houses, buildings, farms, users, and operators of businesses proximate to the asphalt plant. It was, therefore, foreseeable to the defendant that its activities at the campsite would have a direct impact, positive or negative, on the lives and livelihoods of the plaintiffs, including the immediate environment. That is why one of the interviewees during, before, and at the issuance of the E.I.A license, study, or report was the 1st and 12th plaintiffs.

263. So, the defendant should have been mindful of and owed not only a standard law duty of care to the immediate neighbors but also statutorily and constitutionally obligated to guarantee, observe, and bear regard to the plaintiffs' rights to a clean and healthy environment for the plaintiffs. The 1st and 12th plaintiffs began complaining to the defendant as early as August 2011. No specific remedial actions were taken in 2011, 2012, and 2013 when the asphalt Plant was decommissioned, despite the issuance of a restoration order by NEMA. Once NEMA brought to the attention of the defendant that the plaintiffs were complaining about adverse effects from the asphalt plant, the defendant was statutorily required to respond to the concerns, investigate, act, and share with the regulator the remedial measures or mitigation it had taken to remedy the situation. The Internal dispute mechanisms invoked by the plaintiffs were ignored, and therefore, the defendant is estopped from invoking inordinate delay, acquiescence, waiver, and or statute limitation. See Chief Land Registrar and others vs Nathan Tirop and others (supra).

264. With or without demonstration of personal loss or injury, Articles 21,22,23,42,69 & 70(3) of the Constitution of Kenya mandate this court to grant appropriate reliefs to the plaintiffs. See Joseph Leboo & others vs. Director Kenya Forest Services and another (2013) eKLR. In Adrian Kamotho Njenga vs. Council of Governors (supra), the court observed that, unlike other rights in the Bill of Rights, the right to a clean and healthy environment is an entitlement of present and future generations and is enjoyed by every person with an obligation to conserve and protect the environment.

265. In Martin Osano Rabera & another vs. Municipal Council of Nakuru and others (2018) eKLR, the court adopted the decision of the African Commission on Human and People's Rights in Communication No. 155 of 1996 that these rights recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.

266. In Moffat Kamau and nine others vs Aelous (K) Ltd & others (2016) eKLR, the court observed that where procedures for the protection of the environment are not followed, then an assumption may be drawn that the right to a clean and healthy environment is under threat. In Halai Concrete Quarries & others vs. County Government of Machakos ELC Petition No. 19 of 2020, it was held that the precautionary principle is based on Principle 15 of the Rio Declaration should be applied where there were threats of serious or irreversible damage and that lack of scientific certainty shall not be used as a reason for postponing co-effective measures to prevent environmental degradation.

267. In this suit, the defendant was aware of the terms and conditions set in the E.I.A. license, study, and report by NEMA prior to erecting and operating the asphalt plant. Evidence tendered is that PW 1 raised the issues of adverse effects as of August 2011. The complaints were not remedied until he joined the rest of the plaintiffs to write a letter to the regulator. Nothing was taken seriously by the defendant until it decommissioned the asphalt plant two years later. The defendant vacated the campsite without

undertaking any meaningful mitigation or restoration measures as were set out in the EIA license, study, or management plan. The defendant failed to respond to, acknowledge, or address the concerns of the plaintiffs. Such a failure amounted to a breach of the environmental laws.

268. The court is, therefore, invited to determine whether the administrative actions taken by the defendant met the test of both the common law, the applicable statutes, and the Constitution. See M.C. Mehta vs Union of Indian (1987) 1 SCC 395, known as the Oleum Gas Leak case.

269. Polluter pays principle, precautionary principle, duty of care principle, strict liability and environmental compensation are some of the tools used to protect the environment by penalizing monetarily those who pollute nature and the environment and affect human health. These tools make society change and appreciate that environmental laws are enacted to protect the sanctity of our nature, common heritage, and society. In applying these principles, the court has the power to impose monetary penalties on the defaulters so that they do not repeat their acts of commission or omission.

270. In determining the degree of compensation, the factors the court may consider include; -

i. The violation of the license and conditions imposed on the project proponent.

ii. Non-compliance with directions by the regulator.

iii. Operating without obtaining prior consent

iv. Violations of the environmental management plan

v. Failure to implement responsibilities stipulated by the regulator.

vi. Accidental discharge of effluent for a short period.

vii. Intentional discharge of pollutants.

viii. Any Mitigation or remedy measures taken.

271. The scientific reports relied upon by the plaintiffs clearly indicate that there was air, soil, noise, dust, fumes, oil spillage, and water pollution. The reports indicate that the adverse impacts were caused by the different polluting substances found in the plaintiff's parcels of land. Several Concepts, as set out in paragraph 272 above have been developed to guide in environmental damage. The calculations may include potential damage and reduced damage. See World Bank Org "Methodology for Calculating Damages Assessment and Relevant Compensation Vol. I dated 2011".

272. In Costa Rica vs Nicaragua I.C.J Judgment on 2nd February 2018, the International Court of Justice held that compensation would be an appropriate form, particularly in those cases where restitution was materially impossible or unduly burdensome, and that it should not be punitive or exemplary in character. The court said that in cases of alleged environmental damages, particular issues may arise as to the existence of damage and causation and that there must be a causal link between the wrongful act and the damage or injury. The court said that the absence of adequate evidence as to the extent of material damage could not, in all situations, preclude an award of compensation for the damage. The court cited with approval Story Parchment Co. vs Peterson Parchment Paper Co. (1931) U.S.R Vol. 282 P 5SS that where the tort itself was of such nature as to preclude the ascertainment of the damages with certainty, it would be a perversion of fundamental principles of justice to deny reliefs to the injured person and thereby relieve the wrongdoer from making any amends for his acts. The court said that damage to the environment and the consequent impairment or loss of the ability of the environment to provide goods and services was compensatable under international law, and such

compensation may include indemnification for the impairment or loss of environmental goods and services in the period prior to recovery and payment for the restoration of the damaged environment.

273. The court said that the payment for restoration accounts for the fact that natural recovery may not always suffice to return an environment to the state in which it was before the damage occurred. As to the valuation methodology, the court said it would depend on the variety of techniques at both national and international levels, such as the natural complexity and the homogeneity of the environmental damage sustained. The court considered the Guidelines for the development of domestic legislation on Liability, Response action, and compensation for damage caused by activities endangering the environment of the UNEP adopted in 2010. See also Michael Kibui and others vs Impressa Construzioni Giuseppe SPA & others (2019) eKLR.

274. In Friends of Turkana Trust vs. AG and others ELC AG & others ELC No. 825 of 2012, the court underscored the need for environmental information as a prerequisite to monitoring governmental and public sector activities on the environment. Article (1) of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment appreciates that assessment of compensation may be problematic. Chapter IV thereof provides that where damage consists of a series of continuous incidents, the period of 3 years starts from the last occurrence.

275. In Chorzow Factory Case PCI (1927) Section a No. 17 & 47, the court said that reparations as far as possible should wipe out all the consequences of the illegal act and restore the position that existed before the act was committed. In Bondo Community and Another vs The Shell Petroleum Development Co of Nigeria (2014) EWHC 1973 CC, the court noted that the existence of statutory measures did not exclude the application of common law in determining the amount of compensation to the people affected by the oil spillages. See also Shell Petroleum Development Co vs Councilor S.B Farah (1995) 3 NWLR 148.

276. In Samuel Munio Mugo vs County, Government of Nyandarua (2018) eKLR, the court underscored that in a claim for compensation and on infringement of Articles 40, 42 & 47 of the Constitution of Kenya, there was a need to bring an E.I.A to guide the court in making an informed decision other than relying on mere photographs.

277. Guided by the preceding principles and guidelines, both from national and international forums, I think the plaintiffs have made a case that they suffered environmental loss and damage. Evidence tendered by the plaintiffs and their experts is clear that there was human, animal, plant, and environmental pollution caused by the operations of the defendant's asphalt Plant. Despite a restoration order by NEMA and complaints made long before the decommissioning in 2013, the defendant ignored the restoration order by NEMA, overlooked, and failed to undertake any meaningful mitigation or restore the environment to its original status as required by the E.I.A license, study and management plan. As a consequence, the actions of the defendant amount to a breach of EMCA and the Constitutional rights of the plaintiffs to a clean and healthy environment.

278. The right to clean health and sustainable development is globally recognized. The UN General Assembly on 28.7.2023 made the recognition by the adoption of the UN Human Rights Council resolution 48/13 of 8.10.2021. The right to the environment is linked to the right to live. The right to live involves the right to access and enjoy the necessities of life, such as clean water to drink, clean air to breathe, healthy food to eat, and adequate sanitation. These rights have been recognized in courts around the globe.

279. In Subhash Kumar vs State of Bihar (1991) Air SC 420 the Indian Supreme Court held that the right to life includes the right to enjoyment of pollution-free water and air for full enjoyment of life. In Virender Gaur vs State of Haryana (1995) 2 SCC 572, the court held that the right to life encompasses

within its ambit the protection and preservation of the environment. In Farooque vs Government of Bangladesh, WP No. 891 of 1994 1st July 2001, the court held that the right to life includes the right to access and enjoy the necessities of life free of environmental hazards.

280. In Friends of the Irish Environment CL9 vs Fingal County Council High Court of Ireland No. 344 JR 21st November 2007, the court held that the right to an environment consistent with the human dignity and well-being of citizens at large was an essential condition for the fulfillment of all human rights. In Juliana vs United States, 217 Supp 3rd 1224 DOR 2016, the court held that just as marriage is the foundation of the family, a stable climate system is quite literally the foundation of society, without which there would be neither civilization nor progress.

281. The UN Member States in 2015 adopted the 2030 Agenda for Sustainable Development, otherwise known as the 17 Sustainable Development Goals (SDGs). SDG 3 is aimed at ensuring healthy lives and promoting the well-being of all at all ages. SDG 6 seeks to ensure the availability and sustainable management of water and sanitation for all.

282. SDG 13 looks into taking urgent action to combat climate change. SDG 14 is aimed at conserving and sustainably using the oceans, seas, and marine resources. SDG 15 is to protect, restore, and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and biodiversity loss.

283. Sustainable development is that which meets the needs of the present without compromising the ability of the future generation to meet their needs. The needs for the present include economic and social development and environmental protection, all of which have to be integrated and balanced, none being sacrificed in the pursuit of the others.

284. While the court appreciates and as much as the defendant has invoked and submitted on public interest and development in the implementation of a road network within Nkubu township and its surroundings, Article 10 of the Constitution requires this court to apply the national values and principles in interpreting any policy, administrative action, act or law. Among the values and principles are sustainable development, the rule of law, human rights, good governance, participation of the people, and social justice.

285. The right to a clean and healthy environment for the residents of Kigane village could not be sacrificed at the altar of public interest and development. It is for these reasons that the law required an E.I.A. report and study before the project was commenced to identify any possible socio-economic, cultural, and environmental adverse effects that may arise in the course of the project cycle. An environmental management plan that the defendant prepared and submitted to NEMA ought to have been operationalized and implemented at every step of the project cycle to ensure that mitigation or remedial measures identified at the outset through public participation were implemented to minimize, reduce, or eradicate any adverse effects on the environment to the neighborhood communities. See KCB vs Phile Kabita (2002) eKLR.

286. Sustainable development involves achieving economic and social development while maintaining the ecological systems and functioning of the earth on which such development depends. Sustainable development may not be achieved on a deteriorating environmental base. Human activities such as operating an asphalt plant in the neighborhood of the plaintiffs called for, and the defendant was duty bound to factor in and establish the thresholds within which, if crossed, could impact the rights of the plaintiffs and lead to environmental risks and hazards.

287. Principle 10 of the Rio Declaration on Environment and Development and the Aarhus Convention gave the plaintiffs the rights to access information on the environment, participate in environmental

decision-making making and access courts for re-dress to uphold and enforce these procedural rights and other rights. The defendant had admitted that except PW 1, none of the immediate neighbors gave their input or were involved in the preparations of the E.I.A report and the issuance of the E.I.A license. The plaintiffs were the immediate or the first adversely affected persons when the Plant was erected and operated for close to three years within their neighborhood. Even after the plaintiffs raised their concerns, the defendant turned a deaf ear and a blind eye until the asphalt was decommissioned in late 2013.

288. SDG 16 recognizes the rights of the plaintiffs to public participation the goal being to promote peaceful and inclusive societies for sustainable development. Courts have recognized public participation in environmental decision-making as a necessary component for the right to a clean and healthy environment. See M.C Mehta vs Union of India (writ Petition Civil 860 of 1991 and Okay vs Turkey Application No. 36 220/97 ECHR 2005 VII, Sustaining Wild Coast NPC & other vs Mineral Resources & Energy & others (2022) Z AE CMK HC 55 Minors Oposa vs Factoran (1993) 296 Phil 694, Salas Dino & others vs Salta Province (SJN (Arg) S 1144 XLIV 26th March (2009), Future Generation vs Ministry of the environment and others, Colombian Supreme Court 1101 – 22-03-000 2018 – 00319-01, 5th April 2018, Urgenda Foundation vs The State of the Netherlands (ECLI – NL: GHDHA – 2018:2610 and Bushfire Survivors for Climate Action Incorp vs Environment Protection Authority (2021) 250 LFERA 1 (18) 144.

289. This court has, therefore, been asked by the plaintiffs as residents of Kigane Village to uphold, enforce, and find the right to a clean and healthy environment as binding on the defendant, who knew or ought to have known the purpose of the instruments which it prepared and deposited to NEMA and undertook to adhere to in the E.I.A license during the project cycle. The centrality of those instruments was the duty of the defendant to uphold, respect, and be mindful of the rights to a clean and healthy environment as the immediate neighbors of the asphalt Plant.

290. The cries and tears of the plaintiffs for close to three years fell flat on the ground while the defendant turned a deaf ear, became blind, and or damped. Before this court, those cries and tears must mean something and be wiped with something. Having looked at the guiding principles in the reported case law, national land international guidelines on environmental compensation, the length of time, proximity to the point source, the failure to comply with the restoration order, lack of monthly monitoring reports from the regulator, the and the failure of the defendant to mitigate the loss, I find each of the plaintiffs, save for the abated claim, entitled to general damages of Kshs.15,000,000/=. On top of that, there will be a monetary restoration figure of Kshs.20,000,000/= to be paid to an environmental restoration fund in line with Section 117 of EMCA to be held in trust by the plaintiffs and the regional NEMA to rehabilitate the environment surrounding the site, including the nearby community, public facilities on activities to be identified by NEMA. Further, Kshs.1,500,000/= to the plaintiffs expert's fees is granted. The general damages shall attract interest at court rates from the date of this judgment. Costs of the suit to the plaintiffs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 10TH DAY OF JULY, 2024

In presence of

C.A Kananu

HON. C K NZILI

JUDGE