REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 34 OF 2018

RHODA S. KILU.....PLAINTIFF

VERSUS

JIANXI WATER AND HYDROPOWER CONSTRUCTION

KENYA LTD.....DEFENDANT

JUDGMENT

A. PLEADINGS

1. Through a further amended plaint dated 10.3.2020 the plaintiff sued the defendant for trespassing into her **Parcels No's 2451, 2394, 2397, 2403, 2398, 2400, 2401, 2399, 2396, 2453, 2452, 2338, 2402 and 2454 Kirindine "B"** (hereinafter the suit parcels) and unlawfully and without justifiable cause dumping, depositing waste and other useless materials, clearing trees, bushes, creating road(s), quarries deep gullies and proceeding to carry out acts of excavation of soil, murram, rocks and carrying and using them for construction of **Athi–Kimongoro–Nkija–Ugoti-Katithine–Auki Thii-Gaiti** and **Kijiji Thii-Gaiti Road** and access road to Meru University in Meru County in 2018 without any colour of right and or authority from her.

2. The plaintiff averred in mid-April, 2018, she discovered the alleged activities and as a consequence she has incurred substantial damage, loss and inconvenience in terms of environmental degradation, destruction of indigenous trees and vegetation covering about 30 acres of **Parcel No's 2338, 2402 and 2454** in a quarry like manner making cultivation impossible, exposing the property to soil erosion, lowering the value of the properties and leaving the property as a complete waste.

3. The plaintiff averred efforts to seek the defendant to stop their activities were ignored until 15.5.2018 when a meeting was convened by the Deputy Commissioner Igembe Sub-County and a resolution was reached for the excavation to cease pending a possible settlement. However, the defendants ignored the same and continued with their activities leaving her with no option but to move to court on 15.8.2018 for temporary injunction.

4. The plaintiff avers that the defendant ignored the court order and continued with its activities leading to a complaint and an OB report at Maua police station.

5. Even after service of the court order on 30.10.2018, the plaintiff avers that the defendant continued with the activities hence occasioning her more loss and damage pleaded as value of murram scooped from the land **Kshs. 108,710,500/=,** costs of rehabilitation and monitoring of the premises and travel charges all totaling **Kshs. 134,180,500/=.**

6. The plaintiff prayed for permanent injunction restraining the defendant from further trespassing into, entering, constructing, continuing with acts of waste, alienating and or interfering with her suit parcels of land, special damages of **Kshs. 134,180,500/=,** general damages for trespass, aggravated, punitive and exemplary damage, costs and interests.

7. The defendant filed a defence dated 17.3.2020. It denied any acts of trespass and illegality over the plaintiff's parcel of land. Instead he defendant averred it actively engaged members of the public and the local administration to get permission to enter contracts with the respective land owners for the use of their parcels of land to get raw materials for the construction of the Kimongoro–Tira–Kathitini road; that all persons who agreed to lease out their parcels were fully compensated as per the term of the agreement(s) signed to that effect; the subject parcels of land were part of an adjudication scheme which were subject of allotment letters and there were no title deeds issued in respect of the sued parcels and their contention was that the allotment letters were not an indefensible title and or entitlement of the land subject to this suit; that the defendant formally entered into lease agreements with one Mr. Mwiti Mbaya Ntoiti who was found as the physical occupier of the sued parcels and it was established through the local administration that he had been in occupation of the sued parcels of land since 1997 and the said occupier was fully paid for the use of the sued parcels of land.

8. The defendant maintained it lawfully and with the prior blessings of the owner of the sued parcels of land entered and used or utilized the

sued parcels as per the terms of the lease agreement to excavate and level the suit properties back to the original form after use.

9. Further, the defendant averred with regard to the allegations in the further amended plaint, it was its tradition to return the used parcels of land to its original state and that it was always an express term of the lease agreements to fill up the man-made excavations, levelise the ground and replace and dispose off the waste in order to make the used parcels of land capable of being productive again and that the sued parcels of land had since been filled up, levelised and made useful, profitable and productive as at the time of the defence.

10. Additionally, the defendant averred that the allegations of the damage contained in paragraph 11 of the further amended plaint that at the time of carrying and or purchasing the raw materials in the area generally, the market price of an acre was less than **Kshs. 450,000/=** and the value of the materials was subject to the agreement of the parties and not based on any form of valuation and therefore the particulars of both special damages as contained thereon was a mere guesswork not founded on concrete valuation and or poof but meant to mislead the court.

11. Similarly, the defendant pleaded it undertook a good background survey and sensitization through the local administration to the members of the public whose parcels of land were deemed as useful and proceeded to enter into agreement(s) and processed the payments respectively under the terms of the lease agreements and that the dispute in question was the ownership of the sued parcels of land and was wrongfully sued as the plaintiff ought to have raised her claim against the person who occupied and or possessed the sued parcels of land and who leased them out to it for excavation hence the suit should be struck out.

12. The defendant further averred the alleged damages were overly exaggerated with the intention to mislead the court to overestimate the damages by ignoring the positive side of the project by the defendant in the area.

13. The plaintiff filed a reply to defence dated 4.9.2020 denying the contents of the defence.

14. In compliance with **Order 3** and **Order 7**, the parties filed list of documents, list of witnesses and list of witness statements dated 13.8.2018, 29.1.2018, 14.5.2019 and a plaintiff supplementary paginated witness statements and list of documents dated 21.9.2020.

15. The defendant filed a list of witnesses, and list of documents dated 16.11.2020.

B. <u>TESTIMONY</u>

16. The plaintiff adopted her witness statement dated 13.8.2018 and produced her exhibits as per THE list dated 14.5.2019 and 21.9.2020, namely case valuation report dated 11.7.2018 as **P exh 1**, photographs of the excavated area as **P exh (2),** Kirindine "B" adjudication section map as **P exh (3),** copy of letters from Maua police station addressed to lands office as **P exh (4),** copy of letter from the Ministry of lands to Maua police station as **P exh (5),** demand letter dated 10.5.2018 as **P exh (6),** plaintiff's copy of identity card as **P exh (7)** , valuation charges and fee note as **P exh (8)**, payment receipts for taxi from Nairobi to Maua as **P exh (9),** report and valuation dated 25.9.2018 as **P exh (10**, report and valuation of excavated murram, dumping and soils dated 21.2.2020 and environment impact assessment study report dated 24.2.2020 as **P exhs 11 and 12** respectively.

17. Regarding the land adjudication, PW1 told the court the adjudication process was complete at the time and locals were awaiting the issuance of title deeds. She said she had occupied the suit land and her homestead had been demolished in 1992 out of the disputes putting Meru and Tharaka Nithi residents at the time, but nevertheless. She availed all documents to show that she owned the land and that despite meetings between her and the defendant, she had not been paid any compensation.

18. PW2 as a licensed valuer told the court upon instructions by the plaintiff, he visited the **locus quo** which the plaintiff confirmed to him that they belonged to her and calculated the murram excavated and gave its value at **Kshs. 108,710,500/=** as indicated in valuation report dated 21.2.2020 at page 17 based on the market value of land which he gave a figure of Kshs. 350,000/= per acre going by the Ministry of Public Works rates for a ton of murram.

19. He also confirmed he had done the initial report dated 11.7.2018 and that as at the time he revisited the site on 14.1.2020, no refilling or rehabilitation had been undertaken by the defendant. He produced the valuation report as a plaintiff exhibit.

20. PW3 a NEMA registered member No. 10031 told the court he received instructions from the plaintiff to visit the site and prepare a report dated 24.2.2020 which he produced as **P exh No. 12.**

21. DW1 adopted his witness statement dated 16.11.2020 and produced his list of documents dated 16.11.2020 namely lease agreement (This was listed in the nature but not attached), demand letter dated 4.7.2018 as **D exh (2),** chief's letter dated 21.3.2018 as **D exh (3),** gazette notice No. 9143 creating the Districts as **D exh (4),** gazette supplement No. 53 of 1993 delineating Tharaka Nithi District as **D exh 5**, Gazette Notice 11412 of 2008 as **D exh (6),** Gazette Notice No. 6064 of 2009 as **D exh (7),** Zakary Ogongo taskforce report of 2008 as **D exh (8)**, petition by the residents of Ntoroni Sub-location to parliament dated 7.3.2009 as **D exh (9),** parliamentary report as **D exh (10),** response and recommendations to the parliamentary committee dated 12.7.2009 as **D exh (11),** report and recommendations to the parliamentary committee as **D exh (12),** response by Ministry of Education by the residents of Ntoroni as **D exh (13),** submissions to parliamentary committee as **D exh (14),** submissions by Tharaka professionals association dated 24.12.2012 as **D exh (15),** bundle of minutes for peace meetings as **D exh (16),** certificate of registration of school in Ntoroni location as **D exh (18)**, list of internally displaced people as **D exh (19),** extract of the Truth and Justice Commission as **D exh (20)** though (not availed) and lastly a map showing the disputed boundary as **D exh (21).**

22. In his view, the subject land was under Ntoroni area, Tharaka North and not Igembe South Sub-counties. He confirmed he had not brought any lease agreement to shoe the transactions between the defendant and the person who gave it the land. He said the land in issue was unknown to him as well as the plaintiff, though he prayed for the court to absolve the defendant from any wrong doing. He was hesitant to explain what he meant by that. Further, he told the court there had been an existing border dispute which was yet to be resolved.

23. DW2 told the court he was an engineer at the defendant's project which was ongoing. He adopted his witness statement dated 16.11.2016. He stated he had visited the area Member of Parliament, the chief and elders before he signed the lease agreements and paid for the material which were excavated.

24. In his testimony, though he had paid for the excavated materials he could not remember the person he had engaged with. He produced no payment receipts or an agreement to that effect though he was certain the person he had paid was different from the plaintiff. He told the court he was always at the site as a supervisor.

25. DW2 denied receiving the demand letter as alleged in the further amended plaint dated 10.3.2020 at paragraph 10 (a). In his testimony, the area Member of Parliament had written to them to continue with the excavation though he denied he sought refuge from the area Member of Parliament to disobey a court order or the demands by the plaintiff.

26. As part of the due diligence, DW2 told the court the office which would have confirmed who owned the land should have been the lands office. Referred to paragraph 10 (e) of the further amended plaint, DW2 confirmed that their offices were situated in Kileleshwa Nairobi but denied that they were served with a court order but continued with the excavation as alleged by the plaintiff.

27. In re-examination, DW2 stated they had documents showing they had leased the sued parcels of land and made payments. Asked about the verification of who owned the sued parcels, DW2 told the court the area had no title deeds.

C. WRITTEN SUBMISSIONS

28. With leave of court, parties were ordered to put in written submissions.

29. The plaintiff filed written submissions dated 8.2.2021 whereas the defendant did not file as at the deadline order as 28.2.2022.

30. The plaintiff submitted the cause of action is on the tort of trespass to land committed by the defendant between April, 2018 and February, 2020 and sought the prayers as per the further amended plaint dated 10.3.2020.

31. The plaintiff submitted she had proved her case based on the fact that she was the recorded owner of the suit parcels as per her **P exh 4 and 5** and that DW1 and DW2 admitted entry into and excavation of materials from her suit parcels.

32. The plaintiff submitted PW2 and PW3 had produced P exhs 11 and 12 on the loss and damages on her land and that there had been no refilling or restoration of the site as at 14.1.2020, as alleged in the defence testimony at all.

33. The plaintiff further submitted the defendant failed to call the area chief or any other Provincial Administrator, area Member of Parliament and or the person(s) allegedly it contracted with and or paid for the land use and materials purporting to own the suit parcels. Reliance was placed on ***Kenya Akiba Microfinancing Ltd –vs- Ezekiel Chebii & 14 Others [2012] eKLR*** on the failure to prove and discharge the burden by the defendant.

34. The plaintiff also submitted that under **Section 3 (1) of Trespass Act Cap 294**, had proved there was an illegal entry into her land and commission of acts inconsistent with her rights hence was entitled to damages for the loss as indicated in her exhibits.

35. Further, it was submitted the defendant had not countered the expert reports by PW2 and PW3. Reliance was placed on ***Dick Omondi Ndiewo T/A Ditech Engineering Service –vs- Cell Care Electronics [2015] eKLR*** on the proposition that evidence of an expert can only be challenged by evidence of another expert.

36. The plaintiff relied on ***Park Towers Ltd –vs- Moses Chege & 7 Others [2014] eKLR, Willisden Investment's Ltd –vs- Kenya Hotel Properties Ltd. [2006] eKLR and Titus Gatitu Njau –vs- Municipal Council of Eldoret [2015] eKLR*** for general damages, aggravated, punitive and exemplary damages.

D. ISSUES FOR DETERMINATION

37. Having gone through the pleadings, evidence and written submissions, the issues commending themselves for determination are:-

1) If the plaintiff was the owner of the suit parcels of land.

2) If the defendant entered into and committed the acts complained about by the plaintiff

3) If the defendant sought the consent or approval of the plaintiff.

4) If the plaintiff incurred any loss and damage.

5) What is the nature, extent and value of (3) above?

6) If the defendant had any justification in fact and in law in the trespass and commission of the acts complained about to enter into and interfere with the suit parcels.

7) If the defendant mitigated the loss and damage and how?

8) If the plaintiff is entitled to the prayer sought.

9) What is the order as to costs and interest?

38. The plaintiff pleaded that she owned **Parcels No's 2451, 2394, 2397, 2403, 2398, 2400, 2401, 2399, 2396, 2453, 2452, 2338, 2402 and 2454 Kirindine "B"** whereas the defendant denied that the suit parcels belonged to the plaintiff at the time that they moved in and contracted with one Mwiti Mbaya Ntoiti who they had allegedly found physically on the land and had confirmed from the local administration together with the area elders that he had been on the suit parcels since 1997.

39. To counter this, the plaintiff produced a letter dated 14.5.2018 from B.N. Mwangi, the adjudication and settlement officer Igembe confirming that the suit parcels fell under Kirindine "B" adjudication section, were recorded in her favour and were at the Records Stage under the **Land Adjudication Act**.

40. In the demand letter dated 10.5.2018, the plaintiff categorically and clearly notified the defendant she was the recorded owner of the suit parcels of land.

41. In the defence, the defendant did produce any document to challenge the validity and or the veracity of the plaintiff ownership documents.

42. DW1 merely on exhibits which largely dwelt on disputes between Meru and Tharaka Nithi Counties which had no relationship to the suit parcels of land and the dispute at hand. The defendant was duty bound to verify the correct owner(s) of the suit parcels of land before it entered the said land parcels. The defendant failed to demonstrate the manner it established and verified the legal owner(s) of the suit parcels of land before engaging the alleged Mwiti Mbaya M'Ntoiti and entering into lease agreements to occupy and use the land.

43. The defendant list of documents talked of document No. 1, a lease agreement. The document was marked but the same was never submitted to court. Similarly, the person(s) who verified to the defendant the genuine owner(s) of the suit parcels of land were not called as witness(es) to support the defence pleadings and evidence that they genuinely and correctly dwelt with one Mwiti Mbaya N'toiti and entered into the suit parcels of land with his consent or approval at the time. There is nothing the defendant has produced from the land and settlement office confirming the aforesaid person to have had any right and or interest over the suit premises protectable in law.

44. Even after the defendant was notified by the plaintiff that the suit parcels of land belonged to her vide the demand letter dated 10.5.2018 and the subsequent court orders, the defendant failed to go the lands office to verify if the plaintiff's assertions were correct and or come up with a counter-report that as at the time they dwelt with Mwiti Mbaya Ntoiti, the plaintiff was not a recorded owner of the suit parcels of land so as to lead credence to their claim that it was their honest and or mistaken belief that at the time of entry they were dealing with a genuine person.

45. The defendant failed to call the local Provincial Administrator(s) who allegedly told them and or gave them a go-ahead and enter into lease agreement(s) with Mwiti Mbaya M'Ntoiti as the then owner of the suit parcels of land. The defendant failed to disclose before this court and or submit the alleged lease agreement(s) and or correspondence with the alleged person(s), government officers and villagers at the time who allegedly claimed to be genuine owner(s) of the suit parcels.

46. In absence of such evidence, documentary or otherwise, my finding is that the plaintiff's evidence on ownership as pleaded and proved remained unchallenged. Issue No. 1 is answered in the affirmative.

47. Coming to the second issue, the defendant has admitted both at paragraph 3 (a), (b), (c), (d) and 4 of the defence as well as through oral evidence of DW1, DW2 and DW3 that indeed it entered into and proceeded to excavate the materials for a period as pleaded by the defendant. It has also been claimed that the excavated materials were paid for and lease agreement(s) issued with the person(s) and allegedly claiming ownership and or possession of the suit parcels of land. Other than the pleadings and bear evidence, the defendants failed to tender any documentary evidence to back its claim.

48. The plaintiff has produced evidence of entry and removal of construction materials from the suit parcels of land for the period 2018 – 2020. The fact of entry, occupation and excavation of materials on the suit parcels is admitted both in the defence and through oral testimony by the defendant.

49. PW2 confirmed that when he visited the site and prepared **P exh 1**, he found the defendant on the site. DW2 has also confirmed that he was the site supervisor at the period the defendant was in occupation of the suit parcels.

50. The question then is under whose authority, approval and or consent did the defendant enter into the land and continue with acts of excavations if not contact the then recorded owner of the suit parcels of land.

51. The onus was on the defendant to explain the manner, justification and reasons why it entered into, remained and excavated materials from the suit parcels of land. No such evidence was tendered by the defendant. Further, once the defendant found out that it had dwelt with unknown owner(s) or someone who possessed no ownership documents to the suit parcels of land, they had a duty to either apologize, regularize and or co-join him or them to the suit for indemnity and or justification that they were either mistaken, mislead or innocent in the entry. **See *Bundi Makube an infant suing by his next friend Thomas Bundi –vs- Joseph Onkoba Nyamuro[1983] eKLR***.

52. Instead of reaching out to the plaintiff so as to apologize or make amends and or mitigate the loss and damage, the defendant continued

unperturbed and in flagrant disregard of the rights and interests and or concerns of the plaintiff. The plaintiff had therefore no choice but to seek for intervention from both the police and the local provincial and local administration but the defendant would hear or heed to none of these. **See *Westlands Triangle Properties Ltd –vs- Westlands Sundries Limited & 2 Others [2020] eKLR.***

53. Evidence was tendered that the defendant continued to disregard the plaintiff. The trespass continued and efforts to resolve the issues through the Assistant County Commissioner was in vain and or thwarted by the defendant.

54. The defendant pleaded it had agreed with the purported Mwiti Mbaya M'Ntoiti that once the excavation of the materials was over, they would as was agreed, and or as per their pleaded tradition redo the damage and return the site to its original form.

55. To the contrary, once the plaintiff notified the defendant that she was the recorded owner of the suit parcels of land, the defendant did not offer at the very least to regularize the stay, use and or occupation of the site and rehabilitate it to the satisfaction of the plaintiff. **See *John Kiragu Kimani –vs- Rural Electrification Authority [2018] eKLR.***

56. The conduct, attitude and the manner the defendant reacted to the complaint by the plaintiff was indicative that they were least concerned of her claim over ownership, loss and damage hence aggravating the situation. **See *Kamau Mucuha –vs- Ripples Ltd [1993] eKLR*.**

57. My finding therefore is that, the defendant did not enter or remain in the suit parcels with the consent or approval of the plaintiff and whatever activities it undertook on the suit parcels of land, they were inconsistent with the rights and interests of the plaintiff as the recorded owner as enshrined under **Articles 40, 42 and 70 of the Constitution** and the **Land Laws**.

58. Turning to the third issue, PW2 and PW3 produced expert evidence on the nature, extent, quantity and value of the activities of the defendant for the period they were in occupation and use of the suit parcels of land. The defendant did not object to the reports and or produce a counter report. **See *Patrick N. Makau & Another –vs- Attorney General & 3 Others [2018] eKLR.***

59. The defendant under the **Environmental Management and Coordination Act,** was expected to have done an Environmental Impact Assessment report before and after the excavation in line with **Schedule 2 of Management and Coordination Act paragraph 6 (9)** as a part of the precautionary principle. It did not file such reports before this court to show the nature of the suit parcels prior to and after they moved out of the site. **See *Carolyne Kerubo Omwoyo & another –vs- Abao Investments Ltd & Another [2019] eKLR*** and ***Tim Busienei & 2 Others –vs- Director General, National Environment Management Authority (Nema) & Another [2007] EKLR.***

60. DW2 was the site supervisor and would definitely be aware of the quantity and quality of the excavated materials. He would also have been expected by law to keep the reports on how much materials they took from the site for the period at issue. Since it was part of the Bill of Quantities, they must have filed with the Kenya Urban Roads Authority who had contracted them to undertake the road project. **See *Jane Ngonyo Muhia –vs- Director General, National Environmental Management Authority & another [2017] eKLR*** and ***Bogonko –vs- NEMA [2006] eKLR***)

61. DW1 was also the custodian of the record on the payments to the alleged owner(s) for the excavated materials. All this information was not shared with the plaintiff and the court so as to support the defence claim that the special damages as pleaded were inaccurate, exaggerated and or baseless.

62. DW2 asserted that he was an engineer for the project. So it was within his expertise to know the quality, quantity and value of materials taken from the site for the period in issue. He did not share that information with the court and more so being a project by the National Government one would have expected a bill of quantities to have been within the knowledge and in the custody of the defendant. The defendant did not produce such evidence. Similarly, the project and the quarry fell under **Schedule 2** of **Environmental Management and Coordination Act** which required an environmental impact assessment as well as licences from the relevant government agencies.

63. Consequently, regarding issue 3 and 4, my findings are that the plaintiff did incur the loss and damage as pleaded and has adequately proved the same to the required standards.

64. As regard the assertion by the defence that at the time the defence was filed, there had been restoration and or refilling. PW1, PW2 and PW3 testified that there had been no restoration as at 15.1.2020. The onus was on the defendant to produce material before the court on the restoration undertaken as at the filing of the defence.

65. In any event, the restorative measures had to be to the satisfaction of the plaintiff as the recorded owner of the land in issue. The defence did not produce any single letter(s) or written reports written to the plaintiff explaining the manner in which the refilling had been done.

66. There were no accompanying reports or evidence by DW2. So the court makes a finding that the defendant undertook no restorative measures as alleged or at all in line with the **Environmental Management and Coordination Act.**

67. The mandate to issue an **Environmental Restoration Order** is the preserve of (**NEMA**) under **Sections 108 (1) and 109 of the Environment Management Coordination Act**. It is not clear if the plaintiff invited the National Environment Management Authority to come and assess the breach and or damage.

68. The above notwithstanding, the defendant has admitted it was their responsibility to restore and rehabilitate the suit parcels after excavating the materials notwithstanding who owned the land.

69. This court under **Section 11 of the Environment Management & Coordination Act** has the powers to make an environment

restoration order requiring a person on whom it is served to restore the environment as near as it may be to the state in which it was before the taking of the action the subject of the order as well as order for compensation to the person whose environment or livelihood has been harmed by the action which is the subject of the order. **See *Kenya Association of Manufacturers & 2 others –vs- Cabinet Secretary, Ministry of Environment and Natural Resources & 3 others [2017] eKLR.***

70. PW1, PW2 and PW3's evidence was that the refilling of the six pits was a necessity. Given the admission by the defendant it was its duty to restore the damages and in absence of evidence that they had undertaken the restoration to the satisfaction of the plaintiff as at the filing of their defence. **See *Mjanaheri Farm Limited –vs- China Road & Bridges Corporation & another [2015] eKLR.***

71. My finding is that they have failed in that duty and therefore the court must exercise its mandate to order for a restoration order.

72. **Article 70 of the Constitution** mandates this court to enforce environmental rights. The plaintiff has clearly shown how defendant violated her rights and the extent of which the site was left unrehabilitated and hence unproductive. **See *Isaac Kipyego Cherop –vs- State Ministry of Water & 142 Others [2017] eKLR, Edward Nyaoga Onsongo –vs- Job Mekubo Mogusu [2019] eKLR and Fadhili S. Ali & 2 Others –vs- National Housing Corporation & Another [2012] eKLR.***

73. PW2 and PW3 gave expert reports on the manner, extent and the nature of the interference. The defendant did not provide any contrary expert report or study showing it rehabilitated the site by the time they left the premises. **See *African Centre for Rights and Governance (ACRAG) and 3 Others –vs- Municipal Council of Naivasha [2017] eKLR.***

74. In ***Michael Kibui & 2 others (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) –vs- Impressa Construzioni Giuseppe Maltauro SPA & 2 others [2019] eKLR*** the court found it was a requirement under the **Environment Management and Coordination Act** for a respondent contractor to cause an environment impact assessment on a quarry site before the commencement of quarrying activities and a licence could be issued with mitigation measures proposed.

75. In this case, the defendant did not disclose it if ever obtained an environmental impact assessment prior to its being issued with a licence to operate the quarry and the nature of mitigating factor(s) that they were to undertake in order to restore the quarries to the position they were prior to the activities complained hereof.

76. The defendant produced no report(s) from the Kenya Highway Authority or Kenya Urban Roads Authority or Public Health or National Environment Management Authority confirming that the defendant undertook the mitigation and or rehabilitation measures as required and if they ever submitted a environmental impact assessment project report for the quarries. **See *Adrian Kamotho Njenga* –vs- *Council of Governors* & 3 others [*2020*] *eKLR.***

77. Similarly, the defendant produced no report to show if the Commissioner of Mines and Geology personnel had inspected the site and recommended for any remedial measures. In absence of all these, my finding is the plaintiff has discharged the burden and is entitled to compensation in line with **Articles 40, 42 and 70 of the Constitution** as read together with **Section 3 of Environmental Management and Coordination Act**. **See *Paul Gitonga Wanjau –vs- Gathuthi Tea Factory Ltd & 2 Others [2016] eKLR.***

78. As concerns the damages pleaded, the defendant pleaded and gave evidence that there was more good undertaken by the defendant in the vicinity and hence public interest must be considered.

79. It is now commonly held principle that there can be no sustainable development without the concern(s) for the environment. **See *Kenya Association of Manufactures (supra). Kwanza Estates Ltd –vs- Kenya Wildlife Services [2013] eKLR, John Muthui & 19 Others –vs- County Government of Kitui & 7 Others [2020] eKLR and Coal Basin. Local Community) –vs- Permanent Secretary Ministry of Energy & 14 others [2014] eKLR.***

80. The defendant did not share with this court it is considered the environmental implication(s) of the quarry site(s) to the plaintiff especially the negative impacts. The damage caused to the suit parcels had a root cause in the quarrying activities of the defendant for the period it occupied the plaintiff's parcels of land.

81. The **polluter pays principle** expected the defendant to meet the costs of rehabilitation and reinstatement of the plaintiff's suit parcels.

82. P exhs 1, 11 and 12 gives details of the plaintiff's loss and damage which in the absence of a contrary report is taken as prove of loss and damage.

83. The defendant has not contested the values as given in the exhibits through an expert report. **See *Jane Wagathuitu Githinji & 2 others –vs- Sojanmi Springfields Limited [2019] eKLR.***

84. The law is that special damages must be specifically pleaded and proved. In ***Richard Okuku Oloo –vs- South Nyanza Sugar Co. Ltd. [2013] eKLR***, the court held special damages must specifically be pleaded and proved with a degree of certainty and particularity depending on the circumstances and the nature of the act complained of.

85. PW2 produced the valuation report dated 21.2.2020 to restore and rock fill the pits based on the **Institute of Quality Surveyors of Kenya 2017-2018** showing it would require 493,392.74 tonnes of soil to restore the damage to its original for the six pits.

Item	Quarry	Area	Amount

a)	Pit 1	6,300M^3	51,030,000/=
b)	Pit 2	30,976 M^3	15,488,000/=
c)	Pit 3	30,976 M^3	4,725,000/=
d)	Pit 4 & 5	5,250 M^3	37,467,500/=
	TOTAL	**1,678,761 M^3**	**108,710,500/=**

86. The valuation took into consideration the excavated murram, rook fill, top soil and subgrade. The rock fill cost was estimated at Kshs. 900 per M^3 while the excavated murram was estimated at the cost of Kshs. 500 per M^3 going by the building construction costs of the Institute of Surveyors of Kenya dated 20.7.2018.

87. The plaintiff has pleaded for special damages of **Kshs. 108,710,500/=** for the value of the excavated murram. **Kshs. 470,000/=** for valuation fees, taxi charges of Kshs. **117,000/=** and **Kshs. 25,000,000/=** for the rehabilitation and monitoring of the site. This has been proved on account of **P exhs 1, 11 and 12**.

88. The defendant failed to produce any decommissioning report by the time it left the plaintiff's parcel of land and proof of clearance and approval that it had refilled the site as alleged in it pleadings and evidence. This is in line with **Environmental Management and Coordination Act Regulation** on rehabilitation of quarry sites. In absence of that, my finding is that the plaintiff is entitled to special damages of **Kshs. 25,000,000/=** for habilitation and monitoring

89. As regards general damages for trespass, in ***Kenya Power & Lighting Co. Ltd. & Another –vs- Ringera & 2 Others, Civil Appeal E 247 and 248 of 2020 [2022], KECA 104***, the Court of Appeal granted **Kshs. 6,000,000/=** and **Kshs. 1,200,000/=** as damages where there was a continuing trespass.

90. In this case, the defendant was in occupation of the suit parcels of land from 2018 to 2020. The defendant benefitted immensely during the trespass period.

91. In ***Kenya Power & Lighting Co Ltd*** **(supra)** the court made a finding that compensatory damages should be commensurate to the loss of use suffered by the respondents and in accordance with the laid down principles on calculation of appropriate damages for a continuing trespass.

92. In this case, the plaintiff alleges the suit parcels of land have been rendered useless and inaccessible to her from 2018 until restoration is effected.

93. In ***Total Kenya Ltd -vs- Jenevams Ltd [2015] eKLR***, the court held in a claim based on either contract or tort, the accruing awardable damages was aimed at putting a party aggrieved into a good position as if there had been no such breach or interference by the trespass. In the circumstances, I find **Kshs. 5,000,000/**= to be adequate compensation under the limp.

94. Turning to aggravated, punitive and exemplary damages. In ***Diana Muchiri –vs- Lydia Wariara Njenga & Another [2022] eKLR***, **Okongo J** while quoting **Halsbury Laws of English Fourth Edition Vol 45 paragraph 26 150 3**, it was stated:

> ***"… where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such amount as would reasonably be paid for that use. Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making gain by his unlawful conduct, exemplary damages, general damages may be increased".***

95. In this case, the plaintiff failed to produce any report over the value of her suit parcels of land as a basis of how much her properties could have been rented out in the open market or their value at the time between the trespass and presently.

96. That notwithstanding, evidence was lead that after the demand notice and service of the initial court order, the defendant disregarded the rights of the plaintiff for over six months leading her to file the suit in court. Consequently, I find damages payable under this limp at **Kshs. 5,000,000/=.**

97. My final orders are as follows:-

> **a) A permanent injunction be and is hereby issued restraining the defendant either by itself, it's employees, servants and agents from further trespassing into, entering onto the suit property thereby committing acts of waste, alienating and/or interfering with the plaintiff's parcels of land No's 2451, 2394, 2397, 2403, 2398, 2509, 2400, 2401, 2507, 2399, 2396, 2508, 2453, 2452, 2388, 2402 and 2454, KIRINDINE "B".**

b) Special damages of Kshs. 109,615.000/=.

c) General damages of Kshs. 5,000,000/=.

d) Aggravated, punitive and exemplary damages Kshs. 5,000,000/=.

e) Kshs. 25,000,000/= for the restoration and rehabilitation of the suit parcels of land.

f) Costs of this suit

g) Interests on (b), (c) and (d) above at court rates

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

THIS 9TH DAY OF MARCH, 2022

IN PRESENCE OF:

JOHN MUTHOMI FOR APPELLANT – PRESENT

MR. KIRUNDI FOR RESPONDENTS – ABSENT

COURT ASSISTANT - KANANU

HON. C.K. NZILI

ELC JUDGE