



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 471 OF 2013**

**(FORMERLY HCCC NO. 331 OF 2007)**

**TERRA FLEUR LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA CUTTINGS LIMITED.....DEFENDANT**

**JUDGMENT**

This suit was brought by way of a plaint dated 27<sup>th</sup> June 2007 and filed on the same date. The suit was filed in the High Court. It was transferred from the High Court to this court on 17<sup>th</sup> April, 2013 on the ground that it concerned the use of or occupation of land. In its plaint, the plaintiff averred that it was in the business of growing flowers for domestic and international market while the defendant was in the business of growing flower cuttings for international market. The plaintiff averred that its farm and the defendant's farm were adjacent to each other and that they were both using water from a dam on Kabuku river to water the flowers and flower cuttings.

The plaintiff averred that it would either pump water from the said dam to its own water reservoirs before using the same to water its flowers or would directly pump the water from the dam to the flowers. The plaintiff averred that in September, 2005, the defendant negligently carried out fumigation on its farm using a chemical known as Metham Sodium. The plaintiff averred that after fumigation, the said chemical that was mixed with water was drained into the common dam on Kabuku river thereby contaminating the same with a by-product of the said chemical known as Methyl Isocyanate(MIT).

The plaintiff averred that in September and early October 2005, the plaintiff without knowing that the defendant had released the said contaminant chemical into Kabuku river dam pumped the water from the said dam and used the same to water the flowers on its farm. The plaintiff averred that its use of the said contaminated water destroyed 3 hectares of flowers that had been grown on its farm. The plaintiff averred that as a result of the defendant's negligence it had suffered loss and damage.

The plaintiff averred that it lost its first crop of 630,000 new plants valued at Kshs. 7,326,000/-. The plaintiff averred further that since the said chemical also contaminated the soil, it could not plant the second and third crops resulting in the loss of Kshs. 7,326,000/- for each crop cycle. The plaintiff averred that it also paid Kshs. 6,075,000/- as royalty to the breeders on the lost crops. The plaintiff averred further that it incurred additional sum of Kshs. 250,000/- in laboratory tests and expert assessment and reports.

The plaintiff averred that this was not the first incident of pollution of the said dam by the defendant that

caused damage to the plaintiff's flowers. The plaintiff averred that it was entitled to general and punitive damages against the defendant. The plaintiff sought judgment against the defendant for;

1. A permanent injunction restraining the defendant from directing and/or depositing any run-off chemicals into the dam whose water is shared with the plaintiff.
2. Special damages in the sum of Kshs. 28,303,000/-.
3. Interest at 16% per annum from September, 2005 until the date of filing suit.
4. General damages.
5. Punitive damages.
6. Interest on 4 and 5 at court rates from the date of filing suit until payment in full.
7. Any other or further relief that the court may deem fit to grant.

At the trial, the plaintiff called six (6) witnesses in proof of its case. The plaintiff's first witness was Julius Mungai Muiruri(PW1). PW1 stated as follows: He was an employee of the Ministry of Water and Natural Resources. He specialised in applied biology but was designated by the Ministry of Water as a laboratory technologist. His duties included water pollution control. In May, 2006, the plaintiff's General Manager visited their offices in Thika and lodged a complaint about pollution of Kabuku river and destruction of some of the plants on the plaintiff's farm. Together with the Environment Officer, they accompanied the plaintiff's General Manager to the plaintiff's farm to investigate the complaint.

At the farm, they found some water samples that had been collected by the plaintiff. After looking at the water samples, he found that the salt content was very high. They also found a concrete water channel emanating from the defendant's farm to a reservoir and then to a dam on Kabuku river. At the time of the visit, the water channel was dry but it was emitting a foul smell. They thereafter went to see the flowers that had dried up. The flowers were being irrigated using water from Kabuku river dam and the plaintiff's reservoirs. After looking at the flowers, they concluded that the flowers dried up as a result of some chemical that was in the water that was used for irrigation. They arrived at this conclusion based on the fact that the flowers that were not watered with water from Kabuku river dam were not affected.

From the plaintiff's farm, they visited the defendant's farm. At the defendant's farm, they found another concrete channel leading to river Kabuku. This channel had an effluent. The concrete channel originated from the defendant's greenhouses where the defendant was fumigating flower cuttings. The defendant informed them that the chemical they were using in fumigation was Metham Sodium. They found that it was this Metham Sodium that was leaking into the concrete channel and it had the same smell that they encountered on the plaintiff's farm. They thereafter went to Kabuku river. At the river, they found that there was encroachment and that there was nothing to clean the effluent. After the visit, they prepared a report dated 30<sup>th</sup> May, 2006. He produced the report as PEXH.1.

The plaintiff's second witness was Gerald Muniu Wakiru(PW2). PW2 stated as follows in his evidence. He held a Master's Degree in Soil Science. He was instructed by the plaintiff to determine why its flowers were drying up. He carried out investigations and prepared a report and further report dated 22<sup>nd</sup> February, 2006 and 28<sup>th</sup> June, 2007 respectively. He found that the sodium levels in the plaintiff's farm, Block 3G and 5G were high. He investigated where the high sodium level was coming from. He tested the dam water and the water in the reservoir. He found that the sodium level in the dam water was higher than that in the water in the reservoir. He took samples from the dam, the reservoir and the river. He carried out sodium level analysis in the samples at Jomo Kenyatta University of Agriculture and Technology(JKUAT). His findings were that the sodium levels were abnormally high on the drainage from the defendant's farm that flowed into the dam. He stated that the effluent from Delmonte farm also drained into the dam and gets into river Kabuku before the dam but it did not use Metham Sodium in fumigation. He stated that the effect of high sodium level on plants was that it causes them to dry up. He

stated further that coffee is not affected as much as flowers by sodium concentration.

The plaintiff's third witness was Hasit Shah (PW3). PW3 was the Managing Director of the plaintiff. PW3 testified as follows: The plaintiff was incorporated in 2002 to grow flowers for the export market. The plaintiff's farm was about 50 hectares. The plaintiff grew Hypericum flowers. The plaintiff's farm was divided into blocks of ½ hectare each. The plaintiff had set up on its farm two water reservoirs for watering the flowers. The plaintiff pumped water from river Kabuku to the two reservoirs from where they pumped it to the flower fields. In each block, the plaintiff was planting 210,000 plants per hectare. The plants would grow for between 20 to 24 weeks before being harvested. After being cut, the flowers would take another 20 to 24 weeks to get ready for another harvest. This harvesting cycle would go on for 3 to 4 years after which the plants would be replaced. The defendant on the other hand were propagating flower stems. They had green houses on which they were carrying out the business adjacent to the plaintiff's farm.

The plaintiff and the defendant's premises were on a hill and there was a river below. The plaintiff had a pump house on the river dam from which it would pump water to the reservoirs on its farm. That river dam was the main source of water for the plaintiff. On 3<sup>rd</sup> October, 2005, he was informed by the plaintiff's managers that they were smelling methanol sodium which damages the soil. The chemical has a very foul smell which acts as a warning of its presence. The managers of the plaintiff were aware of the smell because the plaintiff had also used the chemical and had an earlier incident with the defendant involving the same. The plaintiff had used the chemical for fumigation during the month of June, 2005. The plaintiff had used methanol Sodium in accordance with the set standards and had no issues with the same. The said managers informed him that they had seen methanol sodium running down the trench to the dam and that they had pumped water from the dam to the plaintiff's reservoirs and to the field blocks. PW3 took several photographs during his visit to the farm which he produced in evidence. The photographs show the river dam, the pump houses at the river dam, the defendant's green houses, the concrete channel running from the defendant's premises to the river dam, the run-off that was emitting the foul smell, the dried grass and the defendant's reservoir. The defendant's reservoir was on Swan Coffee land. Some of the photographs were taken between the defendant's reservoir and the river dam and show the flow of liquid and some outflow going towards the river. Some of the photographs were taken at the base of the river dam.

PW3 stated that after the plaintiff's said managers spoke to the defendant's officers, the defendant blocked the channel and created a diversion directly to the river. The liquid that was flowing in the channel had a strong foul smell and was concentrated near the river dam. The colour of the liquid was whitish and was consistent with Sodium. The water that the plaintiff was pumping from the river dam was used to irrigate its flowers. At the material time, the water was being pumped to blocks 1C, 3G, 5B, 5G, 6A, 6B and 6F. These blocks measured ½ hectare each save for 6A and 6B which together measured ½ hectare. The plants on all these blocks had just been planted and were being irrigated. The plaintiff planted 210,000 plants on one hectare blocks which matured after 20 to 24 weeks.

When the plaintiff used the contaminated water to irrigate the plants, the same were very young. The plants were poisoned by the water and they did not come out as was expected. Sodium has the effect of blocking roots from absorbing nutrients. The result was that the plants became stunted. In the end, the plaintiff lost all the 630 plants in the affected blocks. The plants did not reach maturity and did not flower within the usual 20 to 24 weeks. The plaintiff used to have two harvest in each year and the plants had a life span of 3 to 5 years. The plaintiff was unable to replant the flowers on the same blocks immediately. That is why the plaintiff claimed loss for 3 harvest cycles. At the material time, the market price for each flower stem was between Kshs. 10/- to Kshs. 11/-. The loss incurred by the plaintiff for each harvest was Kshs. 7,326,000/-.

The plaintiff had to pay royalties to the breeders of the flowers in Netherlands. The royalty was paid at the rate of US\$1000 per hectare per month. The plaintiff paid a total of Kshs. 6, 075,000/- at the then exchange rate as royalties. The plaintiff also paid Kshs. 250,000/- to the experts for their analysis and reports. PW3 told the court that the plaintiff was claiming compensation for the losses the plaintiff incurred as a result of contamination of the plaintiff's farm by the defendant. He urged the court to grant

the prayers sought in the plaint.

The plaintiff's fourth witness was Richard Mutuku Mutua (PW4). In his evidence, PW4 adopted his witness statement dated 13<sup>th</sup> February, 2012 that was filed in court on 27<sup>th</sup> February, 2012 as his evidence in chief. The plaintiff's fifth witness was Elijah Mwaura Nganga (PW5). PW5 also adopted his witness statement dated 13<sup>th</sup> February, 2012 and filed in court on 27<sup>th</sup> February, 2012 as his evidence in chief. The plaintiff's last witness was Chrispin Kaluku Omondi(PW6). PW6 also adopted his witness statement dated 13<sup>th</sup> February, 2012 filed in court on 27<sup>th</sup> February, 2012 as his evidence in chief.

#### The Defendant's Case:

The defendant filed a statement of defence on 29<sup>th</sup> October, 2007. In its defence, the defendant admitted that the plaintiff was engaged in the business of growing flowers for domestic and international market while the defendant was in the business of growing flower cuttings for international market. The defendant admitted further that the plaintiff's farm was adjacent to the defendant's farm and that both were using water from Kabuku river dam for watering their flowers and cuttings.

The defendant denied that on or about September, 2005, it negligently drained a fumigant, Metham Sodium that it had used to fumigate its farm into the common water source at Kabuku river and that the plaintiff used the contaminated water to water its flowers with disastrous consequences. The defendant averred that it had several drainage channels on its farm which it used not only to drain excess contaminated industrial waste water to several soak pits on the farm but also for draining rain water into its water reservoir. The defendant averred that its said soak pits and water reservoir had huge capacity such that the same had not filled up even with the El Nino rains. The defendant denied the particulars of negligence pleaded against it. The defendant averred that for its entire existence, it had never let any contaminated excess water or run-off water containing sodium salts or Methyl Isocyanate (MIT) to drain into Kabuku river. The defendant admitted that its drainage channels were sometimes used to drain excess water released after fumigation. The plaintiff contended however that most of the water used during fumigation process was drained into the soil and that hardly any significant quantity remained to be drained into the soak pits. The defendant averred that it did not let any contaminated water to run off to the dam on Kabuku river as alleged by the plaintiff.

The defendant averred that its soak pits were large enough and were designed to absorb all salty water that were drained thereto. The defendant averred that its drainage channels had gate valves whose purpose was to ensure that no salty waste water entered the clean water reservoir or the dam on Kabuku river. The defendant averred that the contamination of the said dam could also harm its flower cuttings since it was also using the same water. The defendant denied that it had any duty to report to the plaintiff a non-existent water contamination. The defendant averred that this was the second time an allegation of this nature was being made against it by the plaintiff. The defendant averred that the plaintiff had made a similar allegation and claim in 2002 which upon investigation was found to have no basis and was abandoned by the plaintiff.

The defendant denied that it had released dangerous chemicals into Kabuku river in September and October, 2005 and denied the allegations of loss and damage pleaded by the plaintiff together with the particulars thereof. The defendant averred that the plaintiff's claim was speculative and had no basis. The defendant denied general, special and punitive damages claimed by the plaintiff. The defendant urged the court to dismiss the plaintiff's suit with costs on a higher scale.

At the trial, the defendant called four witnesses. The first witness was Charles Kiio Manthi(DW1). DW1 was the defendant's senior supervisor in charge of maintenance. DW1 told the court that the plaintiff used to have a flower farm adjacent to the defendant's premises. He adopted his witness statement dated 1<sup>st</sup> July, 2011 as his evidence in chief. In cross-examination, he denied that the defendant used to mix fresh rain water with contaminated water. In re-examination, he stated that they had a drainage channel that used to drain excess storm water to the dam on Kabuku river and that there was another drainage channel that drained contaminated water to the soak pits.

The defendant's second witness was Philip Kavusi (DW2). DW2 told the court that he was the defendant's chief plant fumigator. He stated that he had no formal training on fumigation but had gained experience on the job. DW2 adopted his witness statement dated 1<sup>st</sup> July, 2011 as his evidence in chief. In cross examination, he admitted that the defendant used to fumigate its plants using Metham Sodium. He stated that the chemical kills bacteria and other living organisms. He stated that if the chemical is applied directly to a plant, it can kill the plant and that if applied to the soil, it kills all that is in the soil including plant roots. DW2 explained to the court how they used to carry out fumigation in the defendant's green houses. He stated that the water used to flush out the chemical used in fumigation would be drained into a soak pit before being drained into the dam. The water was not being drained directly into the dam. In re-examination, DW2 stated that the drainage that leads to the soak pit is not the same one for storm water. The third witness for the defendant was John Odhiambo Ouma(DW3). DW3 was the defendant's production manager. DW3 adopted his witness statement dated 1<sup>st</sup> July, 2011 as his evidence in chief. In cross-examination, DW3 admitted that if Metham Sodium is applied directly to a plant, the plant would not grow. He stated further that when the chemical is flushed with water during fumigation, it turns into gas and that the water that comes out after fumigation contains only sodium parts. He stated that it was not advisable to use such water to spray plants as it could harm the plants.

The defendant's last witness was Darminder Paul Birdi(DW4). DW4 was the defendant's General Manager. He told the court the defendant grew ornamental plants and that they exported both plant and root cuttings. DW4 explained to the court how the defendant used to fumigate its green houses with Metham Sodium. He stated that the water used to flush the chemical drained into its soak pits. DW4 adopted his witness statement dated 1<sup>st</sup> July, 2011 as his evidence in chief and produced the documents annexed to the defendant's list of documents filed in court on 2<sup>nd</sup> July, 2010 as DEXH 1.

After the close of evidence, the parties were directed to make closing submissions in writing. In its submissions dated 19<sup>th</sup> October, 2020 but filed much later, the plaintiff submitted that it lost approximately 630,000 plants. The plaintiff submitted that the plants did not mature as they did not take in the soil nutrients due to sodium salt. The plaintiff submitted that it used to harvest flowers twice every year and that the plants had a life span of 3-5 years. The plaintiff submitted that it had limited its claim to 3 harvests. The plaintiff submitted that the market price for each flower stem at the material time was between Kshs.10/- to Kshs.11/-. The plaintiff submitted that the loss incurred in each harvest that never took place was Kshs.7, 326,000/- bringing the total loss for the three aborted harvests to about Kshs.22, 000,000/-.

The plaintiff submitted that PW3 and PW6 confirmed in their evidence that the plaintiff paid royalties to the breeders of the flowers in the Netherlands at the rate of US\$1000/- per hectare per month even after its plants were damaged. The plaintiff submitted that a total of Kshs.6, 075,000/- was paid as royalty fees. The plaintiff relied on the cases of Rylands v Fletcher [1861-73] All ER1 and Kenya Shell Limited v Milkah Kerubo Onkoba [2010] eKLR and submitted that the defendant was strictly liable for damage that was occasioned to the plaintiff's plants by Metham Sodium that escaped from its premises. The plaintiff submitted further that the courts in India had developed the concept of absolute liability for incidences such as the one that gave rise to this suit. In support of this submission, the plaintiff cited MC Mehta v Union of India [1987] 1Scc 395 that was cited in Indian Council for Enviro-Legal Action & Others v Union of India & Others [1996]2 Lrc.

The plaintiff relied on Rio Declaration on Environment and Development that was adopted by Kenya in 1992 and submitted that under the polluter pays principle, the defendant should pay for all the loss and damage that was occasioned by its acts of pollution. On the defendant's contention that it had not mitigated its losses, the plaintiff submitted that it did what was necessary to mitigate its losses. The plaintiff submitted that it had proved its case against the defendant and urged the court to enter judgment in its favour as prayed.

In its submission dated 9<sup>th</sup> October, 2020, the defendant submitted that the plaintiff had failed to establish that the defendant had discharged Metham Sodium into the dam on Kabuku river and that it was the said chemical that caused the damage to the plaintiff's plants. The defendant submitted that the plaintiff failed

to prove acts of negligence pleaded against the defendant and as such the defendant was not liable for the loss if any that was incurred by the plaintiff. The defendant submitted that the evidence and the reports that were tendered in evidence by the experts that were engaged by the plaintiff were at variance with the particulars of negligence that were pleaded by the plaintiff. The defendant submitted that the plaintiff was bound by its pleadings. In support of this submission, the defendant cited Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014]eKLR and Adetoun Oladeji (Nig) Ltd v Nigeria Breweries Plc. S.C 91/2002.

The defendant submitted that even if the plaintiff had proved that the defendant was negligent and that it had suffered loss and damage as a result thereof, the plaintiff had a duty to mitigate its losses. The defendant submitted that the plaintiff had claimed that the incident that gave rise to this suit was not the first one. The defendant submitted that the plaintiff had claimed that a similar incident occurred in 2003. The defendant submitted that even after the alleged first incident, the plaintiff continued to use the water in Kabuku dam instead of looking for another source of water for irrigation. The defendant submitted that this was a failure on the part of the plaintiff to mitigate its losses. In support of this submission, the defendant cited South Nyanza Sugar Copany Ltd. v Donald Ochieng Mideny [2018] eKLR.

On proof of the damages claimed, the defendant submitted that special damages must not only be pleaded but must also be proved. The defendant submitted that plaintiff placed no documentary evidence before the court in proof of its special damage claim. The defendant submitted further that there was no basis for the general and punitive damages claimed by the plaintiff.

The defendant submitted that the plaintiff had failed to prove its case to the required standard and urged the court to dismiss the suit.

#### Analysis of the issues arising and determination:

The parties filed a statement of agreed issues dated 12<sup>th</sup> February, 2008. The issues as framed by the parties were as follows:

1. Whether the defendant negligently fumigated its farm with Metham Sodium in September, 2005 that led to contamination of the farm with Methyl Isocyanate(MIT).
2. Whether the defendant complied with the local legislation and international guidelines on release of toxic waste into the environment.
3. Whether the defendant let excess contaminated water or run-off water to drain into Kabuku river.
4. Whether the defendant's soak pits had the capacity to cope with the excess contaminated or run-off water within the defendant's premises.
5. Whether the defendant had taken measures to ensure that excess run-off and contaminated water did not reach Kabuku river.
6. Whether there was a previous incident in which the contaminated water from the defendant's premises damaged the plaintiff's flowers.
7. Whether the defendant released dangerous chemicals into Kabuku river in October, 2005.
8. Whether the plaintiff suffered any loss and/or damage as a consequence of the said release of dangerous chemicals into Kabuku river and if so how much?
9. Whether the plaintiff took any steps to mitigate its loss and/or damage if any.
10. Whether the defendant is liable for the plaintiff's alleged loss?

11. Whether the plaintiff is entitled to the reliefs sought in the plaint.

For the purposes of clarity, I will summarise the above issues as follows;

1. Whether the defendant released a chemical known as Metham Sodium or its byproduct Methyl Isocyanate(MIT) into river Kabuku in September, 2005 or thereabouts.
2. Whether the said chemicals were dangerous to plants/flowers.
3. Whether the defendant was negligent in releasing the said chemicals if at all into the said river.
4. Whether the plaintiff's flowers were damaged by the said chemical that was released into river Kabuku if at all.
5. Whether the plaintiff suffered loss and damage as a result of the destruction of its flowers.
6. What is the quantum of such loss and damage?
7. Whether the plaintiff mitigated its loss.
8. Whether the plaintiff is entitled to the reliefs sought in the plaint.

Whether the defendant released a chemical known Metham Sodium or its byproduct Methyl Isocyanate(MIT) into river Kabuku in September, 2005 or thereabouts.

I am satisfied from the evidence on record that the defendant fumigated its farm adjacent to the plaintiff's farm with a chemical known as Metham Sodium in September, 2005 or thereabouts. The defendant's witnesses admitted that before planting flowers, they used to fumigate the polythene bags on which the flowers were being planted with Metham Sodium. The defendant did not deny that when mixed with water, Methan Sodium turned to Methyl Isocyanate(MIT). The plaintiff's witnesses testified that they were familiar with Metham Sodium since they had also used the same for fumigation. They stated that they knew it by colour and smell. PW4 and PW5 who were managers at the plaintiff company were alerted by the other employees of the plaintiff in late September, 2005/early October, 2005 that they had detected some liquid with a pungent smell flowing through the concrete channel from the defendant's greenhouses towards river Kabuku. PW4 and PW5 tried to investigate the matter. They walked along the said concrete channel towards the river dam. Inside the concrete channel they found pools of a solution with very strong smell characteristic of Metham Sodium. The flow of the said chemical into the river dam had however ceased as at the time of their inspection. PW5 stated that the defendant tried to contain the run-off of the said chemical by digging another pit to divert the effluent but the damage had been done. PW1 also visited the site and observed that the defendant was draining affluent characteristic of a fumigant, Metham Sodium into river Kabuku. PW3 who was the plaintiff's director was also notified of the incident. On 4<sup>th</sup> October, 2005, he went to the said concrete channel where he observed a liquid flowing down the channel from the defendant's green houses. He told the court that he knew Metham Sodium and that it has a pungent smell. PW3 arranged for photographs to be taken. The said photographs which were produced in evidence show clearly that there was indeed a whitish liquid flowing down the concrete channel owned by the defendant towards the river dam as of 4<sup>th</sup> October, 2005. The photographs also show that there was an attempt to block the flow at some point along the channel to a newly dug temporary channel. PW2 carried out Sodium analysis on the samples which were collected on various dates from; plants from the plaintiff's farm, soil from the plaintiff's farm, water from the plaintiff's water reservoir, water from the river dam, water from the river and water from the defendant's concrete drainage channel. In his reports dated 22<sup>nd</sup> February, 2006 and 28<sup>th</sup> June, 2007, PW2's findings were that the Sodium level in the water that was analyzed was high and that the soil collected from the blocks that were affected in the plaintiff's farm had high sodium content and this led to the rise in Sodium content in the plant tissue. PW2 observed that high sodium levels in the soil restrict the absorption by the plant of Potassium which is a very important nutrient for its growth. PW2 concluded that the high Sodium content in the soil that was absorbed by the plants in the plaintiff's farm may have contributed to the decline in

the quality of the said plants and the yield. From the two reports, it is clear that the increase in Sodium level in the soil and the plants that were affected in the plaintiff's farm were as a result of accumulation of high level of Sodium in the irrigation water the plaintiff was using whose source was the river dam. The Sodium in the river dam from the reports by PW2 may have come from many sources. However, the concrete drainage channel from the defendant's greenhouses was found to have had the highest level of sodium concentration. The defendant did not convince me that their soak pits used to absorb all their contaminated water. In cross-examination, DW2 stated that after fumigation "*The water first goes to the soak pit before draining to the dam. That is the procedure. The water has to settle in the soak pit first. We are not allowed to drain the water directly to the dam.*"

I wonder why water from the soak pit which is contaminated would be drained into the river. It is therefore my finding that the defendant did release a high level of sodium from its use of fumigant, Metham Sodium into the dam on Kabuku river that was being used by the plaintiff to irrigate its flowers.

Whether the said chemicals were dangerous to plants/flowers.

In his report dated 28<sup>th</sup> June, 2007, PW2 stated as follows in the introductory part on the effect of Sodium on plants:

*"Salt spray and excess soil salts can cause branch dieback, stunted growth of stems and foliage, overall lack of vigour and death. Concentrated quantities of Sodium can damage plants by direct absorption into the roots causing toxic effects or root dehydration (reverse osmosis). Injury caused by excessive up take of soil salts includes browning along the leaf edges, stunted growth or fewer and smaller leaves, flowers and fruits."*

In his conclusion, PW2 stated as follows:

*"The high Sodium content in the soil and hence the resultant high Sodium levels in the plant tissue may have contributed to decline in quality and yield as it restricted availability of potassium which is one of the prime movers nutrient in crop production."*

The defendant claimed that a test had been conducted on the effect of Sodium Metham on flowers that were being grown by the plaintiff (Hypericum) the result of which was that it had no negative effect. What was produced in evidence by the defendant cannot be described as a report on the alleged test. The document was not signed by whoever conducted the test. There is also no conclusion. What is contained in the document are observations. DW3 had stated that Hypericum is resistant to salt. That in my view was a general statement that was not supported by any authority. In his supplementary statement, DW3 referred to some authority in support of his contention on the issue. The authority was however not placed before the court for perusal.

From the evidence before me, it is my finding that excessive amount of sodium in the soil is dangerous to plants. I am in agreement with the evidence of PW2 that there is a limit to the level of sodium that a plant can tolerate beyond which the consequences enumerated earlier will ensue.

Whether the defendant was negligent in releasing the said chemicals into the said river.

In the text, Thomson Sweet & Maxwell, Commercial Environmental Law & Liability at paragraph C1.2 the ingredients of negligence are outlined as follows;

- a) The existence of a legal 'duty of care' owed to the Plaintiff by the defendant;**
- b) Breach of that duty of care;**
- c) Damage to the Plaintiff which results from that breach; and**
- d) Foreseeability of the act of the defendant that such conduct would have inflicted upon the**

**plaintiff the particular type of damage which he now complains of.**

In Donoghue v Stevenson [1932] A.C.562 Lord Atkin stated as follows:

**“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would likely to injure your neighbour. Who, then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”**

The rule in Rylands v Fletcher that was relied on by the plaintiff imposes strict liability on the owner of land for damage caused by the escape of substances to his neighbour's land. In Mwita Merengo v Joseph Tunei Marwa & 2 Others [2012] eKLR the court stated that:

**“22. Regarding the tort of strict liability in Rylands v. Fletcher, one must prove the following:**

- a) That defendant has brought on his land for his own purpose something likely to do mischief.**
- b) The use of land must be unnatural.**
- c) The thing must escape.**
- d) And as a result of the escape it must cause foreseeable damage.”**

What amounts to a "non-natural use" of land was explained by Lord Moulton in Rickards v Lothian, [1913] A.C. 263 (C.A.) as follows:

**“It must be some special use bringing with it increased dangers to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.”**

From the literature that I have reviewed, Metham Sodium is a common soil fumigant which is not inherently dangerous when handled with care. In Hayes' Handbook of Pesticide Toxicology, Third Edition, 2010, Linda L. Carlock and Timothy A. Dotson have stated that:

**“Metam-sodium is a slightly to moderately toxic compound that when used according to label directions has been shown to be safe and versatile product for over 45 years.”**

I am of the view that the circumstances of this case do not give rise to strict liability on the part of the defendant. It should also be noted that Metham Sodium did not escape from the defendant's land to the plaintiff's premises. It was drained to the river from where the plaintiff pumped it together with water to its farm. In any event, the plaintiff's case was based on negligence and not on strict liability. The issue of strict liability was raised for the first time in the submissions.

On the issue of negligence, it is common ground that the plaintiff and the defendant's farms were adjacent to each other and that they were both growing flowers. From the evidence on record, the defendant was aware of the damage that could be caused to the plaintiff's flowers by Metham Sodium. It follows therefore that the defendant owed the plaintiff a duty of care while using Metham Sodium. The defendant had a duty to ensure that it handled Metham Sodium in such a manner that it did not find its way to the plaintiff's farm where it was likely to cause damage. I have already made a finding that the defendant drained remnants or byproducts of Metham Sodium after fumigation into the river dam which was the source of the plaintiff's water for irrigation. Without knowing that the dam was contaminated, the plaintiff irrigated its flowers using the water therefrom thereby causing damage to the flowers. As a result of that damage, the plaintiff suffered loss. The defendant was also aware that it was illegal to drain water

contaminated with chemicals into a river. The defendant had a duty to contain the chemically laden water run-off from its fumigation exercise in its own premises. Since the defendant was aware that Metham Sodium posed danger to the environment and to the plaintiff's flowers when not handled with care and that it was illegal to drain water mixed with Metham Sodium into a river, it breached a duty of care that it owed to the plaintiff when it allowed the remnants of Metham Sodium to drain to the dam on river Kabuku whose water the plaintiff used for irrigation resulting in damage to its flowers. For the foregoing reasons, it is my finding that the defendant was negligent in its handling of the said chemical.

Whether the plaintiff's flowers were damaged by the said chemical that was released into river Kabuku.

From the evidence on record the flowers that were planted on blocks 1C, 3G, 5B, 5G,6A,6B and 6F in the plaintiff's farm were completely damaged. I am satisfied from the evidence adduced by the plaintiff that the said damage was caused by the high level of sodium that was in the river dam whose water the plaintiff used to irrigate the said blocks. The heightened level of salt concentration in the said dam was caused by the salt remnants from Metham Sodium that was used by the defendant in fumigation of its greenhouses which were drained into the said dam as I have found earlier. According to the evidence of PW2, the high sodium level in the soil caused by among others the high concentration of salt in the water used for irrigation may have caused the damage to the plaintiff's flowers. In the absence of any other evidence as to what may have caused the damage to the said flowers, it is my finding from the evidence on record that the most probable cause of damage to the flowers in the plaintiff's farm was high sodium level in the soil whose origin was the Metham Sodium used by the defendant in fumigation that found its way to the river dam. It is safe in the circumstances to conclude that the damage to the said flowers was caused by the byproducts or remnants of Metham Sodium that was released by the defendant to the dam on river Kabuku that was being used by the plaintiff for irrigation.

Whether the plaintiff suffered loss and damage as a result of the destruction of its flowers.

In Kenya Ports Authority v East African Power & Lighting Company Ltd [1982] eKLR, the court stated that:

**“.....proof of actual damage was an essential ingredient of the tort of negligence, and that there is no cause of action in negligence, or in cases involving strict liability, unless actual physical damage is done to the person or property of the plaintiff.”**

In Joseph Kimani Gatheca v Gatundu South Water and Sewerage Company [2018] eKLR, the court stated as follows:

**“Compensation for negligence as was in the case of Rylands vs Fletcher (Supra) that he relied upon envisages damage or loss as having occurred before compensation is paid. It does not deal with a speculative scenario. In other words, compensation cannot be paid for a future event which it is not known when or whether the same will occur. The basis of a claim for negligence is that there must be damage or a loss for compensation to be paid.”**

From the evidence adduced by the plaintiff, I am satisfied that the plaintiff suffered loss and damage as a result of damage to its flowers.

What is the quantum of such loss and damage?

The plaintiff claimed damages under several heads. The plaintiff claimed special, general and punitive damages. For special damages, the plaintiff claimed a total of Kshs. 28,303,000/- comprising of Kshs. 21,978,000/- being the value of the flowers that it would have harvested from the plants that were destroyed, Kshs. 6,075,000/- being the amount they paid to the breeders of the destroyed plants and Kshs. 250,000/- being the amount that was paid for laboratory tests and expert reports. The law on special damages is settled. Special damages must not only be pleaded with the necessary particulars but must also be strictly proved. In its plaint the plaintiff averred that it had planted 630,000 new plants from which it expected to harvest flowers for a period of between 3 to 4 years. The plaintiff averred that it expected to

harvest flowers from the said plants twice a year after they reached maturity. The plaintiff averred that the flowers harvested from the 630,000 plants could fetch Kshs. 7,326,000/-. The plaintiff averred that each flower stem was being sold at between Kshs. 10/- to Kshs. 11/-. The plaintiff did not tell the court how many flower stems each flower plant would yield at any harvest cycle. In the absence of such information, I would take it that each plant would have yielded one flower stem per harvest. Using the lowest amount each stem could fetch at the market which is Kshs. 10/-, each harvest would have earned the plaintiff Kshs. 6,300,000/- and not the claimed amount of Kshs. 7,326,000/-.

I am of the view that the claim for royalties paid was not proved. First, the cultivation contract which formed the basis of the claim is dated 21<sup>st</sup> February, 2006 while the damage to the plants took place in September/October, 2005. Secondly, the plaintiff did not place before the court any evidence that it made any payment to Gebr.Kolster B.V. Clause 14 of the agreement sets out the procedure of making the payment. The plaintiff was to issue to Gebr.Kolster B.V. a statement setting out the acreage or area of the land it had cultivated. On receipt of that statement, Gebr.Kolster B.V. would issue an invoice to the plaintiff for settlement. The plaintiff did not place before the court evidence of any statement that it issued, the invoice by Gebr. Kolster B.V. and the payment that was made by it.

The claim for Kshs. 250,000/- was also not proved. The plaintiff proved that it engaged experts who carried out tests and submitted reports that were produced in court. No evidence was however placed before the court showing that the said experts rendered any invoice and that they were paid. There was no evidence as to what each expert charged. It is therefore not clear as to how the plaintiff arrived at Kshs. 250,000/- which has been claimed.

With regard to the claim for general damages, the law is that the same is compensatory in nature. In this case, the plaintiff has claimed as special damages the entire loss and damage that it incurred as a result of the damage that was caused to it as a result of the defendant's negligence. The plaintiff did not lay any basis for its claim for general damages. I can see no rationale for compensating the plaintiff through general damages for an injury in respect of which it has claimed special damages.

For punitive damages, again, the law is settled. The principles applied by the court in awarding exemplary damages were summarized in Godfrey Julius Ndumba Mbogori & Another v Nairobi City County [2018] eKLR as follows:

**The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard [1964] AC 1129* where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are:**

- i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,**
- ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and**
- iii) where exemplary damages are expressly authorized by statute.**

The conduct of the defendant in this case does not warrant an award of exemplary or punitive damages. The defendant's conduct cannot be said to have been calculated to make a profit for itself neither was it oppressive and intended to cause harm to the plaintiff.

Whether the plaintiff mitigated its loss.

I am in agreement with the defendant that the plaintiff had a duty to mitigate its losses. I am of the view that the plaintiff is not entitled to base its loss on three harvest cycles. After its plants were completely destroyed while still young as it claimed, the plaintiff had a duty to uproot the same, cure the soil and

plant new flowers. The plaintiff could not sit idle for two more harvest cycles and claim the full amount of flower sales that it would have earned had the flowers that were destroyed grown to maturity. The plaintiff did not tender evidence showing that the salty soil could not be cured and replanted with fresh flowers. I have also noted from the report dated 28<sup>th</sup> June, 2007 that was produced by PW2 that there were a number of steps that the plaintiff could have taken to minimize the injury that was suffered by its flowers having regard to the fact that this was not the first incident of its flowers being damaged by excess salt. Due to the plaintiff's failure to mitigate its loss, I would deny it the amount claimed for the second and third harvests.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

From my findings above, the plaintiff has proved the defendant's negligence and that it suffered loss as a result thereof. The plaintiff has also proved the loss suffered. The plaintiff has in the circumstances proved its case against the defendant. The plaintiff is however not entitled to all the reliefs sought in the plaint. In addition to damages, the plaintiff had sought a permanent injunction restraining the defendant from directing and/or depositing any run-off water into the dam shared with the plaintiff. It is common ground that this relief has been overtaken by events. The plaintiff no longer owns the flower farm next to the defendant's premises. As I have also stated earlier, the plaintiff is not entitled to general and punitive damages. As for special damages, the court will only award Kshs. 6,300,000/- being the loss incurred for one harvest.

Conclusion.

In conclusion I enter judgement for the plaintiff against the defendant for;

1. Kshs. 6,300,000/- as special damages.
2. Interest on 1 above at court rates from the date hereof until payment in full.
3. Costs of the suit.

**Delivered and Dated at Nairobi this 17<sup>th</sup> day of June 2021**

**S. OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;**

Mr. Oluoch Olunya for the Plaintiff

Ms. Gichuru h/b for Mr. Kyalo Mbobu for the Defendant

Ms. C. Nyokabi-Court Assistant