



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 981 OF 2004

KIAMBAA COFFEE GROWERS

CO-OPERATIVE SOCIETY LIMITED.....PLAINTIFF

-VERSUS-

VALENTINE GROWERS LIMITED.....DEFENDANT

THE HON. ATTORNEY GENERAL.....THIRD PARTY

JUDGMENT

1. The plaintiff herein lodged a suit vide the plaint dated 20th September, 2004 in which it sought for reliefs in the nature of special damages in the sum Kshs.3,154,765.50 with interest at court rates with effect from 18th November, 2002, general damages, costs of the suit and interest thereon.
2. The plaintiff pleaded in its plaint that it was at all material times the proprietor of Kanunga Coffee Factory while the defendant was the proprietor of Kibubuti Estate in Kiambaa, Kiambu County and that the defendant had constructed a water dam in the said Estate.
3. The plaintiff pleaded that on 18th November, 2002 the defendant's dam burst open, releasing the water therein and which water flowed to and flooded the plaintiff's Factory, resulting in damage to its structures and materials.
4. It was therefore the plaintiff's averment that the defendant is liable for the damage occasioned to its property as a consequence of the escape of the water from its premises and in the alternative, that the escape of the water was the result of negligence on the part of the defendant and has set out the particulars of negligence.
5. The plaintiff also particularized the items damaged and the estimated cost of repair, totaling a sum of Kshs.3,154,765.50 which sum the plaintiff now claims against the defendant.
6. Upon service of summons, the defendant entered appearance and filed its statement of defence dated 1st October, 2004; amended on 13th June, 2006 and further amended on 12th March, 2010 to deny the plaintiff's claim. More particularly, the defendant pleaded in its defence that the construction of the dam was done in accordance with the requisite regulations and approvals, and that the escape of water was not the result of any negligence/liability on its part.
7. The defendant further pleaded that the escape of water from its dam was solely caused by a landslide which hit the area and for that reason relied on the defence termed 'Act of God.'
8. The defendant also denied the particulars of damage pleaded in the plaint and also pleaded that any damage occasioned to the plaintiff's properties was the result of negligence on its part in erecting the said properties along a river course.
9. The defendant sought for and was granted leave of the court to take out third party proceedings against the Hon. Attorney General, the third party herein, following which the defendant served a third party notice upon it.
10. Following the application dated 19th October, 2006 filed by the defendant, an order was made by the court on 24th February, 2009 directing that the present suit be tried as a test suit on the issue of liability in respect to all claims arising from the incident of 18th November, 2002 and that the remaining suits be stayed pending the outcome of the present suit.

11. Thereafter, the third party entered appearance and filed its statement of defence on 1st April, 2010 and 15th July, 2010 respectively, to deny the defendant's claims against it. According to the third party, the defendant was at all material times an independent contractor hence fully responsible for any actions undertaken by itself or on its behalf. The third party therefore pleaded in its defence that no claim whatsoever lies against it.
12. At the hearing of the suit, the plaintiff called two (2) witnesses while the defendant and third party called three (3) and two (2) witnesses respectively.
13. George Gaithuma Gatenjwa who was PW1 adopted his signed witness statement and stated that he is a member and Chairman of the plaintiff. He also stated that at the time he purchased the land in which Kanunga Coffee Factory is based, the dam in question was in existence, having originally been built by the colonialists, and that the defendant only upgraded it. The witness produced the plaintiff's list and bundle of documents as exhibits 1 to 15.
14. In cross-examination, PW1 testified that he was not present at the Factory when the incident took place but confirmed that there were rains during that period and also confirmed that the dam is 6 kilometres from Kanunga Coffee Factory. He further testified that the dam was built by the Ministry of Agriculture but that it had been transferred to the defendant at the time of the incident. According to the witness, the rains that fell in the period preceding the bursting of the dam were not heavy.
15. PW1 blamed the defendant for interfering with the original structure of the dam by digging a dam on the same spot as the original dam.
16. On being re-examined, it was the evidence of PW1 that the dam being referred to is the one constructed by the defendant and not the original one.
17. Antony Mwangi Mathia in his evidence as PW2 began his testimony by stating that he is the Secretary to the plaintiff's Board and that following the incident, various persons visited the scene and compiled reports to indicate the damage/loss suffered by the plaintiff. The witness then adopted his signed witness statement before proceeding to state that the dam was built under the Ministry of Agriculture and that following the incident, the plaintiff's officials were given a quotation of the damage occasioned to the Factory.
18. It was the evidence of PW2 that repairs were undertaken on Kanunga Coffee Factory over a prolonged period of time owing to the extensive nature of the damage. The witness further stated that the costs incurred and pleaded in the plaint exclude costs of damage to the coffee.
19. In cross-examination, PW2 testified *inter alia*, that he had never in his lifetime witnessed bursting or flooding of any of the adjacent dams which were built by the colonialists. The witness also testified that though repairs were undertaken following the incident, they do not have any receipts to show the nature of repairs done or the costs incurred.
20. On being re-examined, the witness stated that the plaintiff is registered under the Co-operative Societies Act, thereby marking the close of the plaintiff's case.
21. Peter Thirima Ndung'u who was DW1 testified that he is a quantity surveyor by profession and stated that he worked for the defendant at all material times as the maintenance manager of Kibubuti Estate. The witness stated that upon construction of the dam, the same was handed over to the defendant. It was his testimony that in the days leading up to the incident, there were heavy rains which were confirmed by the meteorological department.
22. According to DW1, there was no handover of the dam to the defendant following its construction hence at the time of the incident, it was still under AMS (Agriculture Mechanization Services) being the body which was contracted by the defendant to construct the dam, even though the defendant had substantially paid AMS for its services. He further testified that Kanunga Coffee Factory was about 7 kilometres from the site of the dam
23. In cross-examination, the witness averred that he was unable to tell whether there was any written agreement between AMS and the defendant in respect to construction of the dam and that his main duty was to oversee the project to ensure it went on smoothly. The witness equally could not tell whether the relevant approvals were sought for and granted though he stated that as far as he was aware, the proper procedures had been followed in constructing the dam.
24. He went on to assert that it was not his duty to maintain the dams; rather, such duty fell on AMS whose contract with the defendant lasted about three (3) years. He also stated that the defendant had three (3) separate dams and that 90% of the work had been done by AMS at the time of the incident though he could not tell the exact amount paid by the defendant towards construction of the dam in question.
25. It was also the testimony of DW1 that the bursting of the dam was reported in the local newspapers and that previously, the defendant through its agents had expressed displeasure with the compaction level of the dam and conducted their own tests on the same separate from those conducted by AMS.
26. On being re-examined, the witness restated his role while working under the employment of the defendant save to add that he was not in charge of supervising AMS since they were working on contract.
27. Christine Owuor in her evidence as DW2 equally adopted her witness statement and stated that she works for Kenya Meteorological Department which is in charge of measuring and recording data in respect to rainfall. According to this witness, on the material date the records show that the rainfall in the relevant areas was 83 millimetres over 24 hours while mentioning that the normal or average rainfall in that area is 10.5 millimetres, meaning that the rainfall on that date was on the higher side.

28. The witness also mentioned that according to history, the El-Nino rains were experienced in the country in 2002 and recently in 2017 while adding that long rains are experienced in March, April and May and that short rains usually come around the months of October to December. In this respect, it was the evidence of the witness that it was not part of the ordinary weather system for heavy rains to fall in the material month of November, 2002.
29. In cross-examination, DW2 testified *inter alia*, that she did not bring original records for the rainfall for the reason that once received and analyzed, such records are cleaned up and thereafter digitized.
30. Bernard Njoroge who was DW3 informed the court that he is a professor in civil engineering with experience in the construction of dams. He explained that the process begins with investigations involving various professionals such as engineers and surveyors.
31. The witness stated that he did not participate in the construction of the dam in question but mentioned that a contractor ought to abide by certain standards. He went ahead to testify that a dam can fail for various reasons including poor workmanship, use of sub-standard material, faulty designs and Acts of God.
32. On being cross-examined, DW3 expounded that before a dam can be constructed, the general area must be investigated particularly the embankment. The material to be used should also be investigated, as should the soil on which the dam is to be constructed. The information gathered then ought to be forwarded to the relevant engineer together with the size, depth and width of the dam. The witness further stated that the relevant approvals must be sought and obtained in writing.
33. The witness testified that in a situation where a dam is still under construction and there is a heavy downpour, then that is an Act of God.
34. On being cross-examined, DW3 restated that he did not visit the site and added that though tests were done on the soil therefrom, he did not have such tests with him, neither could he find the results. However, the witness stated that the soil in question was red soil which is good for construction of dams.
35. In re-examination, the witness stated that he did not know the contractor of the dam in question and that when constructing dams, one ought to take into consideration the history of rainfalls in the relevant area. This marked the close of the defence case.
36. Julius Kathurima Limbua testified as TPW1. He adopted his witness statement and asserted that he worked for AMS as a manager at all material times and that he became professionally involved with the defendant after it contracted AMS in respect to construction of a dam on 3 sites. According to this witness, AMS conducted a survey of the area and disqualified one of the sites (for dam no. 1) before commencing construction in the remaining 2 sites.
37. The witness stated that they subsequently constructed dam no. 2 to completion and left the site with their equipment, only to return later on upon learning that the defendant had excavated and expanded the dam from 5 metres to 8 metres water level and that the wall had similarly been expanded from 7 metres to 13 metres.
38. It was the evidence of TPW1 that upon further follow up, he was informed that the defendant had claimed to have sought advice from elsewhere on the expansion and that he later came to learn of the collapse of the dam through the local news at a later date. The witness produced the third party's list and bundle of documents.
39. In cross examination, the witness testified that he has been in the business of constructing dams since 1983 and that the dams whose construction does not require approvals are those with water levels of less than 5 metres. He also stated that he had issued warnings to the defendant on the possible collapse of the dam upon expansion, adding that the damage to the plaintiff's Factory was both man-made and an Act of God since the dam had previously survived heavy rains between March and May of 2002. The witness also pointed out that he did not have the contract signed between the defendant and AMS but produced a sample contract in court which he stated was similar to the one executed between the two.
40. It was the evidence of the witness that he noticed the dam was steeper than when it was initially built by AMS and that the defendant hired the excavator sometime in June, 2002 after construction of the dam was completed. He stated that a soil test was done prior to the construction and that AMS was paid in full for the work done.
41. Kennedy Makudih testified as TPW2 and stated that he is a registered engineer, working for the Ministry of Agriculture, Livestock and Fisheries. His role was to interpret the two (2) maps which were adduced as evidence. It was his evidence that water should not go beyond 5 metres in a low risk dam and that the amount of soil must be calculated before a dam is built. The witness confirmed that excavation had been done on the dam.
42. Furthermore, it was the testimony of TPW2 that where the height of a dam is increased, the risk increases since the quantity of water stored therein will increase in the event of heavy downpour.
43. In cross-examination, the witness testified that from his study of the maps, he arrived at the conclusion that the dam in question was low risk and that if everything had been done in accordance with the drawings, it would have been close to impossible for the dam to give way. He admitted that he did not see any photographs to indicate the enlargements alleged to have been made to the dam but asserted that the dam was possibly interfered with since it had endured prior seasons of heavy rain and yet it did not collapse previously.
44. The witness further gave evidence that where a dam withstands two (2) seasons of rainfall, any damage or loss that occurs cannot be attributed to negligence on the part of the contractor. He went ahead to state that handover of a project of such kind is simple: once the project is complete and the client is ready with the requisite funds, handover takes place.

45. In re-examination, TPW2 stated that AMS followed the plans as drawn and that in projects of such nature, inspections are ordinarily done before handing over the project, following which the contractor is free from any further responsibilities in respect to inspection of the project. This marked the close of the third party's case.

46. This court then invited the parties to file and exchange written submissions, which submissions were thereafter highlighted by the parties' respective advocates. The plaintiff on its part submitted that they proved by way of evidence that their properties were destroyed as a result of the defendant's negligence/recklessness through the breach of the dam constructed by the said defendant, while submitting that the defendant did not prove otherwise. The plaintiff drew this court's attention to the case of **Mbuthia Macharia v Annah Mutua Ndwigwa & another [2017] eKLR** where the Court of Appeal held that:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose...”

As well as **Section 107** of the **Evidence Act** which succinctly provides that:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”

47. More specifically, it was the plaintiff's argument that the defendant did not establish that there was a breach of contract or non-completion of construction of the dam by AMS.

48. The plaintiff was also of the view that it had proved its case against the defendant in tandem with the principles established in the case of **Rylands v Fletcher** which requires a party to demonstrate that destruction to his or her property was a direct consequence of the negligent/reckless actions/omissions of the defendant. In this regard, the plaintiff cited inter alia, the Court of Appeal's decision in the case of **Lalji Bhimji Sanghani and another v Chemilabs [1978] eKLR** that:

“The general rule as laid down in Rylands v Fletcher is that prima facie a person occupying land has an absolute right not to have his premises invaded by injurious matter, such as large quantities of water which his neighbour keeps on his land. The general rule is, however, qualified by some exceptions, one of which is that, where a person is using his land in the ordinary way and damage happens to the adjoining property without any default or negligence on his part, no liability attaches to him.”

49. On damages, it was the plaintiff's contention that a sum of Kshs.3,000,000/ would constitute sufficient general damages, further contending that it is also entitled to the sum of Kshs.3,154,765.50 on special damages for the loss occasioned to its properties. The plaintiff opted to rely on the authorities of **Loyford Gitari Leonard v Weru Tea Factory [2017] eKLR** where the Environment and Land Court (ELC) awarded general damages in the sum of Kshs.2,000,000/ for the tort of nuisance and **Tim Mwai & 2 others v Extra Mile Limited [2018] eKLR** where the ELC awarded a comparable sum of Kshs.1,500,000/ under the same head and in respect to a similar tort.

50. On its part, the defendant through its submissions dated 20th November, 2019 argued that by virtue of it proving that AMS was an independent contractor, the defendant could not and should not be held liable for its actions/inactions. The defendant quoted the case of **Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & another [2013] eKLR** where the court distinguished the definitions of a servant and an independent contractor in the manner hereunder:

“...A servant has been defined as a 'person employed by another to do work for him on terms that he, the servant, is to be under the control and directions of his employer in respect of the manner in which his work is to be done.'

An independent contractor has been defined as 'one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the orders or control of the person for whom he does it, and may use his discretion in things not specified beforehand'.”

51. The defendant further submitted that the plaintiff did not prove the manner in which it is entitled to an award of special damages in the absence of evidence by way of receipts or other credible evidence. The defendant drew this court's attention to the legal principle that for special damages to be awarded, the same have to be specifically pleaded and strictly proved, as reiterated by the Court of Appeal in the case of **Herbert Hahn v Amrik Singh [1985] eKLR**. The defendant similarly took the view that the plaintiff is not entitled to an award of general damages while submitting that it is entitled to indemnity against the third party in the sum of Kshs.3,154,765.50.

52. On the principles enunciated in **Rylands v Fletcher**, it was the defendant's argument that not only was the dam a natural use of land, but that any damage occasioned to the plaintiff's Factory was unforeseeable. The defendant submitted that the flooding was caused by heavy rains, thereby maintaining its defence of 'Act of God.' The defendant argued that the plaintiff was equally to blame for erecting its structures along a river course in contravention of the law, which would constitute another viable defence to the rule established in **Rylands v Fletcher**.

53. Last but not least is the third party, who submitted that the claim against it is time barred pursuant to the provisions of **Section 3(1) and (2) of the Public Authorities Limitations Act** which provides that no proceedings in tort shall be brought against the government or a local authority after the end of 12 months from the date of the cause of action and that no proceedings founded on contract shall be brought against the government after the end of three (3) years from the date of the cause of action.

54. The third-party contended that AMS was not an independent contractor of the defendant hence not liable for any acts/omissions associated with the defendant, relying on the case of **Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & another [2013] eKLR** cited earlier on in the defendant's submissions.

55. The third party took the view that the defendant was solely to blame for the damage occasioned to the plaintiff's Factory and that the third party in no way contributed to the escape of the water from the defendant's dam.

56. On damages, it was the submission of the third party that the plaintiff is entitled to the special damages sought in the plaint and that the same ought to be borne by the defendant.

57. I have considered the evidence tendered in court and the contending submissions coupled with the various authorities quoted. I have identified the following as the key issues for determination:

(a) Whether the plaintiff has satisfied the principles established in Rylands v Fletcher (1868) LR 3 HL 330.

(b) Whether the defendant established the defence(s) pleaded.

(c) Whether the defendant proved any liability on the part of the third party.

(d) Whether the claim against the third party is time barred.

(e) Whether the plaintiff is entitled to the reliefs sought.

(f) Whether the defendant is entitled to indemnity against the third party.

(g) Who should bear the costs of the suit.

58. I will now address the issues in the order set out hereinabove.

(a) Whether the plaintiff has satisfied the principles established in Rylands v Fletcher (1868) LR 3 HL 330.

59. It is clear that the plaintiff's claim fundamentally rides on the principles set out in the renowned case of **Rylands v Fletcher (1868) LR 3 HL 330**. The relevant principles were laid out in paragraph 6 of the plaint and I will list them with reference to the relevant cases cited hereinabove:

i) Whether the defendant's activities amounted to non-natural use of land.

ii) Whether the defendant caused the elements to flow to the plaintiff's property.

iii) Whether the escape of the elements is dangerous.

iv) Whether the plaintiff has suffered damage as a result of the above.

60. On the first principle, it is for this court to ascertain whether the defendant's action of building and use of the dam can be deemed natural use of the land in question. Going by the evidence, it is not disputed that the defendant prompted the construction of the dam in question. It is also apparent that the general area was mostly agricultural and/or commercial in terms of its use. Be that as it may, in my view, the defendant's act of constructing a water dam would fall in the category of non-natural/special use of its land.

61. In respect to the second principle, the plaintiff's witnesses testified that the water from the dam flowed from the defendant's land to that of the plaintiff which was in close proximity of approximately 6 kilometres. A similar position was taken by TPW1 as indicated earlier on in this judgment. Moreover, the defendant did not bring any evidence to refute the flow of water from its water dam to the plaintiff's Factory. As to who was to blame between the plaintiff, the defendant and the third party, the court will consider that later on in the judgment.

62. On the third principle, I took into consideration the testimonies given on behalf of the respective parties and I find that given the nature of use of the land, the defendant either knew or ought to have known of its hazardous impact in the event that the water dam gave way. The evidence available from the plaintiff's witnesses is that the escape of the water was dangerous in that it caused damage to its factory which damage has been pleaded in the plaint.

63. In close reference to the above principle is the fourth principle to do with whether damage resulted to the plaintiff's Factory. I considered the evidence of the plaintiff's witnesses regarding the extent of damage occasioned to Kanunga Factory. I also looked at the bundle of documents and identified a few correspondences between the plaintiff and defendant in this regard, as well as photographs of the Factory site following the incident. Moreover, I considered a valuation report prepared by Engineer Steve Ojiambo listing the particulars of the structures that were damaged and the estimated cost of repair. Whereas the Engineer was not called as a witness, the valuation report was produced as evidence. It therefore follows that the plaintiff demonstrated that damage was occasioned to its properties as pleaded and proved by way of evidence.

64. In view of the foregoing, I find that the plaintiff has reasonably and on a balance of probabilities satisfied the principles set out in

Rylands v Fletcher (*supra*).

(b) Whether the defendant established the defence(s) pleaded.

65. Going by the pleadings and evidence, it is clear that the defendant relied on the defence of “Act of God.” This was advanced in the evidence of the defence witnesses. The defendant also produced the rainfall records which were explained by DW2 who stated that the rainfall during that period was higher than usual.

66. What then constitutes an ‘Act of God?’ In answering this, I turn to the **Black’s Law Dictionary** for the definition of the term as follows:

“An overwhelming, unpreventable event caused by forces of nature such as an earthquake, flood or tornado... the effect of which could not be prevented or avoided by the exercise of due care of foresight.”

67. From the evidence, it is apparent that at the time of collapse of the defendant’s dam, there was a reasonably heavy downpour. Be that as it may, the defendant was required to demonstrate that the escape of the water from the dam was unavoidable even after exercising due care. DW3 mentioned that where a dam is incomplete and there is a heavy downpour, then any escape of the water and resulting damage would amount to an Act of God.

68. Nonetheless, while the defendant took the position that the dam was incomplete at the time of the incident, TPW1 stated that an inquiry was made into establishing the cause of the breach though he indicated that no report was subsequently made. The witness also asserted that the dam had long been completed at the time of the incident. Further to this, TPW2 was of the professional opinion that following a number of rainy seasons, a contractor should not be held liable for any incidents that may follow from the collapse of a dam.

69. From the correspondences produced by the defendant and/or the third party, I find the position of the third party to be more plausible concerning the fact that construction of the dam had been completed long before the breach and handed over to the defendant.

70. In their evidence, the two third party witnesses stated that after the dam was completed, it had survived heavy rains earlier in the months of March – May and the accident happened during the short rains. Third party witness number two was categorical that two seasons are enough to consider worthiness of a dam and that if there is a spillway, it will not cause a breach even if there is an usual flow as the catchment area is fixed.

71. In view of the foregoing, I am not satisfied that the defendant has demonstrated that the collapse of the dam was an Act of God.

(c) Whether the defendant proved any liability on the part of the third party.

72. The bone of contention apparent in this issue is whether AMS which is the institution being represented by the third party in the suit was an independent contractor or a servant of the defendant.

73. From the oral evidence tendered before this court, it is uncontroverted that AMS was contracted to construct the dam on behalf of the defendant, though none of the parties produced a copy of the actual contract for this court’s reference. Being guided by the evidence available and the authorities which have differentiated the two (2) above terms, I am of the opinion that AMS was an independent contractor as opposed to a servant of the defendant, for the reason that there is nothing to indicate that its construction of the dam was strictly governed or directed by the defendant, as reflected in the evidence of DW1.

74. The evidence available to the court is that soil testing was done before construction of the dam started. This was confirmed by DW3 who stated that he was approached by the late Engineer Njuguna to assist them in carrying out the tests. Further, the evidence of DW1 is clear that during the construction of the dam, the defendant had engaged the services of external consultants. It was his evidence that as far as he was concerned, the procedure of building of dams was followed. DW1 was the maintenance manager and he was in charge of the supervision of the project to ensure that the project went on well without any hitches.

75. The defendant did not tender any evidence to show that the third party did not construct the dam as per the specifications. In fact, none of the defendant’s witnesses suggested that the breach of dam occurred due to the poor workmanship or use of sub-standard materials that were used by the third party. This is notwithstanding that the defendant had engaged their consultants whose duty, I believe, was to ensure that the dam was constructed professionally.

76. In his evidence TPW2 told the court the checks and balances that they had put in place to ensure that the dam does not breach which included; the soil tests; catchment area had been defined; reservoir capacity had been stated; building the dam to a safe height and to ensure that the spillway had been sized. He referred to the maps that were produced as exhibits 1(a) and (b). This evidence was not controverted by the defendant.

77. The third party also raised a very fundamental issue to the effect that the defendant interfered with the dam by increasing the height of the dam from 7 meters to 13 meters and that of the water level from 5 meters to 8 meters. TPW1 in his evidence stated that when he went to the defendant’s premises, he confirmed that indeed the dam had been interfered with and he warned the defendant of a possible breach. I note that the defendant has denied interfering with the dam as alleged but has instead shifted the blame to the third party.

78. In view of the evidence adduced by the plaintiff’s witnesses and those of the third party, I am satisfied that the defendant must have

interfered with the dam for it to have breached. Otherwise, from the evidence on record, there is no other reason why the dam could have breached. I therefore come to the conclusion that the defendant has not proved any liability against the third party and I find the defendant fully liable.

79. Though the defendant pleaded that the plaintiff through its negligence contributed to the damage, it did not bring any tangible evidence to support its averments. It would have been necessary for the defendant to call a witness from the Ministry of Water and Sanitation to prove to the court that indeed the plaintiff's factory was erected and/or constructed along a river course in contravention of the law as alleged. That was not done.

80. Needless to say that, the defendant did not adduce any evidence to demonstrate that the construction of the water dam was either done in the absence of the relevant approvals or that there was any form of breach on the part of AMS for liability to fall upon the third party.

(d) Whether the claim against the third party is time barred.

81. This issue was first raised in the Third party's defence. In the submissions, the third party contends that the suit against it violates the Public Authorities Limitation Act in that the alleged cause of action occurred in November 2002 and the plaintiff filed the suit two years later, in September, 2004. From the record, the third party proceedings were commenced on the 12th March, 2010 which was nearly seven (7) years and 4 months from the time the cause of action arose and six (6) years from the time the defendant filed its defence.

The defendant did not submit on this issue. This court has perused the pleadings filed herein. The court notes that by the time the plaintiff filed its claim, a period of 12 months had lapsed. It is important to note that the plaintiff does not have any claim against the third party and therefore the period of 12 months does not affect the plaintiff's claim against the defendant.

However, considering when the defendant filed its defence and the time it took them to enjoin the third party, a period of six years had lapsed. Even if the court was to give the defendant the benefit of doubt and assume, for purposes of limitation, that its cause of action against the third party started to run from the moment it filed its defence, there is a period of a whole six (6) years. No extension was sought by defendant.

In the case of Rawal vs, Rawal (1990) KLR 275, the court stated the object of any limitation enactment in the following terms;

“The Object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims.”

The same position was affirmed in Iga v. Makerere University (1972)EA65 in which it was held;

“A plaint which is barred by limitation is a plaint “barred by law”. A reading of the provisions of section 3 and 4 of the Limitation of Actions Act (cap 70) together with order 7 Rule 6 of the Civil Procedure Rules seems clear that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption, the court “shall reject” his claim..... The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief.”

Having said that, I find that the defendant's claim against the third party is time-barred.

(e) Whether the plaintiff is entitled to the reliefs sought.

82. Having found that the plaintiff proved its case against the defendant, it is now for me to determine which reliefs it is deserving of. As earlier noted, the plaintiff sought for both general and special damages.

83. On *general damages*, I considered the amounts proposed by the plaintiff, the authorities relied upon and the nature of damage occasioned to its Factory. I also noted that neither the defendant nor the third party offered any suggestions. That being said, I will award a reasonable sum of Kshs.2,000,000/ under this head going by the authority of Tim Mwai & 2 others v. Extra Mile Limited (2018) eKLR and bearing in mind the rate of inflation since 2018.

84. In respect to *special damages*, it is noted that though the plaintiff did not produce any receipts to indicate the repairs done on the Factory premises following the incident, it produced a valuation report indicating the estimated costs for repair of the damaged structures and which report was not challenged by the defendant at the trial. The total cost stipulated in the report is Kshs.3,154,765.50 which is the sum pleaded in the plaint. In any event, this is essentially a material damage claim in which a claimant would only be required to show the extent of damage and the cost of expected repair, both of which I am satisfied the plaintiff herein has done. In so finding, I am backed by a similar decision arrived at by the Court of Appeal in the case of Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya [2010] eKLR as follows:

“In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of.”

85. I thus find that in the circumstances of this case, the plaintiff is similarly entitled to the special damages sought in its plaint.

(f) Whether the defendant is entitled to indemnity against the third party.

86. On this issue, my determination is simple and straightforward: the defendant having not proved liability against the third party, is not entitled to any indemnity and in any event, even if the court had found the third party liable to indemnify the defendant its case against the third party is time barred.

(g) Who should bear the costs of the suit.

87. It is trite law that costs follow the event and I will exercise my discretion in that respect.

88. Consequently, judgment is hereby entered in favour of the plaintiff and against the defendant in the manner hereunder:

a) Liability	100%
b) General damages	Kshs.2,000,000/
c) Special damages	Kshs.3,154,765.50
Total	Kshs.5,154,765

89. The indemnity claim by the defendant against the third party is hereby dismissed.

90. The plaintiff shall have interest on special damages at court rates from the date of filing suit and interest on general damages at court rates from the date of judgment until payment in full. The plaintiff and third party shall have costs of the suit to be borne by the defendant.

Dated, Signed and Delivered at Nairobi this 7TH day of MAY, 2020.

.....

L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

..... for the Third Party