



**REPUBLIC OF KENYA**

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

**AT MIGORI**

**ELC CASE NO. 724 OF 2017**

**(FORMERLY KISII ELCC NO. 538 OF 2015)**

**PATRICK J.O OTIENO.....PLAINTIFF**

**-VERSUS-**

**LAKE VICTORIA SOUTH WATER SERVICES BOARD.....DEFENDANT**

**JUDGEMENT**

**A. INTRODUCTION**

1. The instant dispute concerns land title number Kanyamkago/Kawere II/1424 measuring approximately two decimal five nine six hectares(2.596 Ha) or five (5) acres in area (Hereinafter referred to as the suit land) and a dam constructed involving an erected weir across Oyani River to the north of the suit land. The location of the suit land and the dam is in Kakrao area within Migori County.
2. The plaintiff namely Patrick J. Okwaro Otiemo is represented by learned counsel, Mr. Ken Okongo of Okongo Wandago and Company Advocates.
3. The respondent, Lake Victoria South Water Services Board, a state corporation and a statutory body established pursuant to the provisions of the Water Act, 2016 is represented by learned counsel, B. Asunah of Staussi and Asunah Advocates.
4. Originally, this suit was lodged at Kisii Environment and Land Court. However, on 27<sup>th</sup> June, 2017, it was transferred to this court upon its constitution, for hearing and determination.
5. Notably, the parties attempted to resolve this suit out of court as disclosed in the proceedings of 12<sup>th</sup> November 2018, 12<sup>th</sup> February 2019, 3<sup>rd</sup> July 2019 and 29<sup>th</sup> October 2019 herein. The court encouraged them to embrace Alternative Dispute Resolution (ADR) mechanisms as provided for under Section 20 of the Environment and Land Court Act, 2015 (2011) aligned to Articles 60 (1) (g) and 159 (2)(c) of the Constitution of Kenya, 2010. Nonetheless, their attempt thereof failed resulting to the present decision.

**B. THE GIST OF THE PLAINTIFF'S CASE**

6. The plaintiff commenced the present suit against the defendant by way of a plaint (Fast track) dated 3<sup>rd</sup> December 2015 and duly filed in court on 7<sup>th</sup> December 2015 seeking the following reliefs;
  - a. A declaration that the plaintiff is entitled to and the defendant is liable to make good and pay reparations for the damage occasioned to the plaintiff's land as pleaded in the plaint.
  - b. A declaration that the defendant has violated the plaintiff's right to property and right to clean and natural environment.
  - c. Kshs 11,043,525 being the costs of reparation and lost property.
  - d. Damages by way of compensation for violation of rights to property and environment.
  - e. Damages under the rule in *Rylands vs Fletcher*.

f. Costs of the suit.

g. Interest on c), d), e) and f) above.

h. Any other relief the court deem just and expedient to grant.

7. The plaintiff's claim as contained in the plaint is, inter alia, that in or about the year 2013, the defendant constructed a dam that involved the erection of a weir across Oyani River and raising of the river embankments from the weir upstream for some 200 metres. That prior to the construction of the weir, the plaintiff who was and is still the registered proprietor of the suit land bordering the river to the north and all the proprietors of the neighbouring parcels of land, were neither consulted nor informed of the possible effects of the dam to their farms and no mitigation put in place thereof as required by the law. That the plaintiff had on the suit land, sugarcane plantation, mature sukuma wiki vegetable (kale) and two fish ponds each stocked with 2,500/= fingerlings then aged five (5) months.

8. The plaintiff also claims especially at paragraph 9 of the plaint that upon completion of the works but prior to practical completion of the same,

**“...it transpired that the embankments were erected in such a way that it raised the water levels above all the adjoining parcels of land, suddenly steep at a bend with the consequence that every time the dam is full or it rains, and the river swells, it empties its waters into the plaintiff's land as much as flush floods are shielded from naturally draining into the river with the inevitable consequence that all the crops and fish then growing on the farm were all destroyed and washed out of the ponds and the entire land is currently under permanent floods and can no longer be used for any meaningful activity and indeed has been rendered useless, invalid and environmentally polluted.”**

9. The plaintiff complains that part of the suit land has been rendered unsuitable for any economic activities unless remedial measures are taken to mitigate the losses so far incurred by the plaintiff. That the findings of a study and an economic impact assessment of the defendant's actions are that reparation measures are mandatory to appropriately restore the damage on the suit land to its economic use and to abate the nuisance caused by the unlawful acts of the defendants. Thus, it provoked the instant suit.

10. In his reply to defence dated 29<sup>th</sup> February 2016 and filed in court on 1<sup>st</sup> March 2016, the plaintiff reiterated most contents of his plaint. He further stated that the defendant's construction of the weir across the river effectively caused damage and rendered the suit land worthless. That the said damage to which he is entitled to compensation, is a direct consequence of the defendant's actions and not causes of nature.

11. On 30<sup>th</sup> July 2018, the plaintiff (PW1) testified that the activities of the defendant have caused and continue to cause damage to him and others. He relied on his statement dated 3<sup>rd</sup> December 2015 and a list of documents of even date namely copy of official search dated 12<sup>th</sup> November 2015 (PEXhibit 1), Environment Impact Assessment (EIA) Report dated 15<sup>th</sup> May 2014 (PEXhibit 2a), evaluation report dated 3<sup>rd</sup> July 2018 (PEXhibit 2b), as part of his evidence. He also made reference to Mr. Ochanda's report dated 12<sup>th</sup> March 2018 (PMFI3 also DEXhibit 4 herein) for possible settlement of this dispute.

12. PW1 called Silas Otieno Ojienda (PW2), a specialist in construction landscape and environment consultancy. PW2 testified, inter alia, that the findings in PEXhibit 2 (a) and 2(b) are that there are negative impacts on the suit land caused by the defendant's construction of the weir next to the suit land.

13. Notably, counsel for the respective parties filed and served submissions of pages not in conformity with **Practice Direction No. 33(a) and (b) of the Environment and Land Court Practice Directions, 2010**. Such directions cannot take away this court's unlimited jurisdiction in criminal and civil matters; see the decision of M Thande J in **Shakael Ahmed Khan and anor –vs- Republic and 4 others MSA HC Misc Criminal Application No. 56 of 2019 (2019) eKLR**, hereby endorsed.

14. Nonetheless, I do not lose sight of the excess pages in the said submissions. This is so in the spirit of Articles 25(c), 48 and 50(1) and 159 (2)(d) and (e) of Constitution.

15. By 28-paged submissions dated 27<sup>th</sup> February 2020 and filed in court on even date, learned counsel for the plaintiff made reference to the pleadings and the evidence of the respective parties and analysed the same in favour of the grant of the orders sought in this suit. Counsel did submit that since the defendant raised in the pleading, the issue of lack of jurisdiction on the part of this court to try and determine the present claim though never pressed at the trial, the same remains mere unproved allegations as held by the Court of Appeal in **Kuria Kiarie and 2 others vs Sammy Magera (2018)eKLR**. That the issue is misplaced as the plaintiff is entitled to seek the reliefs set out in the plaint pursuant to Section 3(1) and (3) of the Environment Management and Coordination Act No. 8 of 1999(EMCA herein) as well as Articles 42 and 70 of the Constitution of Kenya, 2010. That the plaintiff has the right of access to justice, and the right of a fair hearing herein.

16. Counsel argued that the suit land which is not a riparian land, is affected by flooding brought about by the defendant's activities which have led to the degradation of the environment. That the plaintiff has proved his claim against the defendant to the requisite standards for entry of judgment as prayed in the plaint.

17. To buttress his submissions, counsel cited Article 69 of the Constitution (supra), and legislations including the Land Act, the Survey Act, the Physical Planning Act, **EMCA (supra), the Water Act, 2016 (supra)**, the Agriculture Act and Regulations, among them, the Survey Regulations Water Quality Regulations 2006 and The Basic Land Usage Rules of 1965. Counsel further fortified the submissions by authorities including; **Rylands vs Fletcher (1868) LR 3H L. 330 and Kenya Shell Limited vs Milca Kerubo Onkoba (2010)eKLR, Independent Electoral and Boundaries Commission and another vs Stephen Mutinda and 3 others(2014)eKLR**, regarding strict liability and that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce respectively.

### C. THE GIST OF THE DEFENDANT'S CASE

18. In the defendant's 23-paragraphed statement of defence dated 3<sup>rd</sup> February 2016 and filed in court on 4<sup>th</sup> February 2016, this court's jurisdiction and cause of action are denied. The defendant sought that the plaintiff's suit be struck out and or dismissed with costs as the same is misconceived, bad in law and legally untenable.

19. The defendant stated that the construction of the dam on River Oyani was not in the manner alleged, but for purposes of supplying water to Migori Town for public use. That prior to its construction, the defendant commissioned relevant Environmental Impact Assessment on the possible consequences of the weir on the neighbouring environment and an EIA report was duly prepared and subjected to public participation. That the plaintiff should direct his claim to the cause of nature and not otherwise.

20. Two (2) engineers namely Samwel Nundu Ochanda (DW1) and Daniel Olonje (DW2) testified for and on behalf of the defendant. They termed the plaintiff's claim untenable. That PW1 be compensated for the crop damages only but the permanent solution is to drain all the water of the affected site and not through reparation as sought in this suit.

21. DW1 relied on his statement dated 11<sup>th</sup> March 2016 and filed in court on 5<sup>th</sup> May 2016 as part of his testimony. He produced a report dated 28<sup>th</sup> February 2018 (DEXhibit 1), a licence No. 0014375 (DEXhibit 2), hydrological report dated March 2013 (DEXhibit 3), DEXhibit 4 which is also PMFI3, his letter dated 27<sup>th</sup> February 2018 to the valuer (DEXhibit 5) and the valuer's report dated 28<sup>th</sup> February 2018 (DEXhibit 6), in support of the defendant's case.

22. As part of his testimony, DW2 relied on his statement dated 11<sup>th</sup> March 2016 and duly filed in court on 5<sup>th</sup> May 2016. He also relied on DEXhibits 1, 2, 3, 4, 5 and 6 and stated that PW1 cultivated on riparian land.

23. On 9<sup>th</sup> July 2020, learned counsel for the defendant filed 11-paged submissions dated 14<sup>th</sup> March, 2020 whereby reference was made to the parties' respective pleadings, framed and analysed in favour of the defendant, six (6) issues for determination namely:

- a. Whether this court has jurisdiction to determine this matter.
- b. Whether the claim is time barred.
- c. Whether the claim is properly brought before the court.
- d. If so, if the plaintiff has proved that he suffered loss and damage?
- e. Whether the defendant is liable to pay for such loss and damage and if so, how much?
- f. Who should pay the costs of the suit?

24. Counsel submitted that should the court find that the plaintiff has proved any loss and or damage as a result of the defendant's willingness to compensate him for the crops only, then the damages be quantified in terms of DEXhibit 4. That PEXhibits 2(a) and (b) are not well founded but should the court be guided by them, all part of the land which is more than  $\frac{3}{4}$  of the suit land falling within the riparian area, be excluded and PW1 be awarded no more than  $\frac{1}{4}$  of the sum of Ksh 9,330,000/= sought by him in the present case.

25. All in all, counsel urged this court to dismiss the plaintiff's case with costs for want of jurisdiction, or for not being properly before court or for not having been proved to the requisite standards. To reinforce the submissions, counsel cited authorities including **Kibos Distillers Ltd and 4 others –vs- Benson Ambuti Atega and 3 others (2020) eKLR, Caltex Oil Kenya Ltd –vs- Rono Ltd (2016) eKLR, Speaker of the National Assembly –vs- Jane Njenga Karume (1992)KLR and Rylands case(supra).**

### D. ISSUES FOR DETERMINATION

26. I have thoroughly considered the pleadings, the evidence and the submissions of the respective parties in this suit. I am also guided by the Court of Appeal decision in **Galaxy Paints Company Ltd –vs- Falcon Grounds Ltd (2000) 2EA 385** that issues for determination in a suit generally flow from either pleadings or as framed by the parties for the court's determination.

27. In view of the foregone, the issues that fall for determination herein are crystallized thus:

- a. **At the outset, is this court seized of jurisdiction over the instant suit?**
- b. **Is the plaintiff's claim time barred?**
- c. **Depending on the outcome of issues numbers (a) and (b) hereinabove, has the plaintiff proved his claim to the requisite standards?**
- d. **The appropriate reliefs available in the instant suit.**

### E. ANALYSIS AND DETERMINATION

28. In respect of the first issue, PW1 stated at paragraph 16 of the plaint and orders numbers (a) and (b) sought at the foot of the plaint that this court has jurisdiction over the suit. He cited **Articles 42,69 and 70 (supra)** and **Kuria Kiarie case**, to fortify the assertion.

29. The contents of paragraph 23 and 24 of the defendant's statement of defence are to the effect that this court is not seized of jurisdiction to entertain this dispute. Learned counsel for the defendant submitted that this court lacks jurisdiction in respect of the instant suit.

30. Quite clearly, the defendant raised a preliminary objection in regard to jurisdiction of this court over the present suit. On that score, I subscribe to the case of **Mukisa Biscuits Manufacturing Company Ltd –vs- West End Distributors (1969)EA 696** where the Court of Appeal was of the considered view that:

**“...a preliminary objection consists of a point of law which have been pleaded or which raises by clear implication out of the pleadings and if argued as a preliminary objection will dispose of the suit. Examples are an objection to jurisdiction of the court plea of limitation or a submissions...”** (Emphasis laid)

31. In the celebrated decision of **Owners of Motor Vessel “Lilian S” –vs- Caltex Oil Kenya Ltd (1989)IKLR 1**, Nyarangi JA reasoned;

**“...jurisdiction is everything...jurisdiction must be acquired before judgment is given...”**

32. The Black's Law Dictionary 10<sup>th</sup> Edition at page 980 defines the term “Jurisdiction” thus:

**“ A court's power to decide a case or issue a decree”**

33. In the case of **Samwel Kamau Macharia and another –vs- Kenya Commercial Bank Ltd and others (2012)eKLR**, the Supreme Court of the Republic of Kenya held;

**“...A court's jurisdiction flows from either Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction conferred by the Constitution or other written laws. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.....”**

34. Additionally, a court of law cannot confer jurisdiction on itself and any assumed jurisdiction is a nullity as observed in **Desai vs Warsama (1967) EA 351**; see also Lord Denning's remarks in the case of **Macfoy vs- United Africa Company Ltd (1961)3 ALLER 1169**, alongside the decision of the Supreme Court of Kenya in **Republic –vs- Karisa Chengo and 2 others (2017)eKLR** where it was held;

**“...Lack of jurisdiction thus renders a court's decision void as opposed to it being voidable. When an act is void, it is a nullity ab initio...”**

35. It is trite law that a preliminary objection is a threshold question which calls for a definitive, determinative and prompt pronouncement; see **Kakuta MaiMai Hamisi –vs- Peris Pesi Tobiko and 2 others (2013)eKLR**.

36. In the instant suit, the preliminary objection calls for its immediate determination before Judgment is given as held in **Owners of Motor Vessel and Hamisi cases (supra)**. The claim relates to environmental planning and protection. Section 13 (1) and (2) of the Environment and Land Court Act 2015 (2011) reads:

**“1. The court shall have original and appellate jurisdiction to hear and determine all dispute in accordance with Article 162(2) (b) f the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.**

**2. In exercise of its jurisdiction under Article 162 (2)(b) of the Constitution, the court shall have power to her and determine disputes relating to environmental planning and protection, climate issues, land use planning, title tenure, boundaries, rates, rents valuations mining, minerals and other natural resources...”** (Emphasis added)

37. More fundamentally, by Articles 42,69,70 and 162(2)(b) of the Constitution (supra), this court has the mandate to hear and determine disputes including the present one; see also the **Karisa Chengo and Samwel Kamau Macharia cases (supra)**, by which I am guided accordingly.

38. As regards the second issue, the defendant pleaded at paragraphs 11 and 22 of the statement of defence that the plaintiff's complaints are not only spent but are barred by the provisions of the EMCA. Counsel for the defendant submitted that the plaintiff's claim touches on National Environmental and Management issues which are governed by the National Environment Management Authority (NEMA), and in particular, Section 58(2) of the EMCA. That by DEXhibit 1 issued pursuant to DEXhibit 2 issued under Sections 52(2) and 63 of the EMCA, the plaintiff is barred from raising issues not before this court.

39. The plaintiff contended that the damage caused to the plaintiff's land by the defendant was intentional and occurred after the defendant was issued with NEMA licence and the defendant breached and violated express terms of the licence. His counsel submitted that Sections 3(1) and (3) and 11 of the EMCA 1999 are in line with Articles 42 and 70(1) (supra) and that the evidence on record including oral testimonies and documents, are to the effect that the defendant's activities culminated to environmental degradation, not only to the suit land as pleaded herein, but to other parcels of land clearly, enumerated in DEXhibit 4.

40. The plaintiff's lamentations herein touch on allegations of violation of various constitutional provisions. In the case of **USIU –vs- Attorney General and 2 others (2012)eKLR**, it was held that courts of equal status as the High Court have jurisdiction to deal with any constitutional issue; see also **Jane Francis Angalia vs Masinde Muliro University of Science and Technology and others (2010)eKLR** and **Christopher Gatwiri –vs- Commissioner of Police (2008)eKLR**.

41. It is settled law that a plea of limitation or a party's submissions can amount to a preliminary objection; see **Mukisa Biscuits case (supra)**.

42. Quite plainly, this court is mandated by the **Constitution (supra)** and statute to deal with the instant matter touching on alleged violation of some Constitutional provisions. The suit is therefore, not statute barred even in view of the relevant provisions of the Limitation of Actions Act Chapter 22 Laws of Kenya.

43. Regarding the third issue, PW1 asserted that he is the proprietor of the suit land as shown in PEXhibit 1. That the same borders Oyani River and that he had planted sugar cane, mature kale vegetables and had two fish ponds each stocked with 2,500 fingerlings which were destroyed by the activities of the defendant hence suffered loss of Ksh 11,043,525/= as revealed in PEXhibit 2(a) and (b). Recommendations numbers 1 to 5 at page 13 of PEXhibit 2(a) are well grounded and useful guide in this matter.

44. PW1 testified as per his statement that the defendant's erection of the embankments raised the natural water levels above all the adjoining parcels of land including the suit land. That the river now steeps at a bed causing flush floods and the entire suit land is currently under permanent floods. That all the crops and fish were destroyed and washed away. That as a result, the land has been rendered useless, invalid and badly environmentally polluted.

45. PW1 further testified (in his oral testimony) that the damage continues and has affected him and others. That the suit land is not riparian. In cross exam, he stated in part;

**“...for restoration of the environment.**

**...The defendant has not shown any interest of protecting the environment.”**

46. It was the testimony of PW2 that the affected area of the suit land is 2.47 acres. That the area was hit by backflow flooding from the weir constructed by the defendant. His evidence affirmed the testimony of PW1 in material aspects.

47. I take into account DEXhibits 1 to 6 and the testimonies of DW1 and DW2 in their entirety. DW1 termed the plaintiff's case untenable. However, during cross examination, he extensively stated, inter alia;

**“...It is true the suit land is registered in the name of PW1. There are fish ponds as shown in DEXhibit 4. I stand by DEXhibit 4 which was prepared for this case. It was for purposes of this case. DEXhibit 4 refers to PW1, The said report indicates that the problem can be resolved at Kshs. 199,000,000/= in favour of several people including PW1. I know the claim. I do not agree that he is entitled to Kshs. 10,000,000/= as sought herein. PW1 can use his land. Dexh 4 appreciates that PW1 has a problem which can be solved..”**

48. In further cross examination, DW1 stated in part:

**“...I do agree that PW1 did suffer damage due to construction of the weiv at Oyani River. The elevated weir caused back flow and overflow at the disputed area...”**

49. DW2 referred to DEXhibits 1, 2,3,4,5 and 6 and stated that the permanent solution to the plaintiff's claim is to drain all the water at the affected site. In cross examination, he stated that:-

**“...I do agree that the person including PW1 affected.....as a result of the construction of the weir...”**

50. I bear in mind all authorities including **Rylands -vs -Fletcher case (supra)** cited in the rival submissions. So, is the defendant strictly liable in the circumstances? The Black's Law Dictionary 10<sup>th</sup> Edition at page 1055, defines “strict liability” as:

**“Liability that does not depend on proof of negligence or intend to do harm but is leased instead on a duty to compensate harms proximately caused by the activity or behavior subject to the liability rule.”**

51. The elements of strict liability in the case of **Rylands –vs- Fletcher case(supra)** were crystallized as hereunder:

- a. The defendant must make an on-natural use of the land.
- b. The defendant must bring something onto his land which is likely to do mischief if it escaped.
- c. The thing in question must actually escape; and

d. Damage must be caused to the plaintiff's person or property as a result of the escape.

52. The term "non-natural use" was further given meaning by the decision in **Richards –vs- Lothian (1913)A.C 263 (C.A)** where it was observed that:

**“...It must be some special use bringing with it increased danger 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.”**

53. Admittedly, PEXhibits 2(a), 2(b) and DEXhibits 1, 2,3,4,5 and 6 are opinion evidence as provided for under Sections 48 to 54 of the Evidence Act Chapter 80 Laws of Kenya. However, as a general rule, opinion evidence is not binding on the court which is at liberty to accept or reject it depending on the facts and circumstances as recognized in the case of **Amosam Builders Developers Ltd –vs- Gachie and 2 others (2009) KLR 628**. The experts' reports were well prepared, presented and noted but the veracity of PEXhibits 2(a) and 2(b) is not displaced by DEXhibits 1 to 6 herein. The totality of evidence on record is that the defendant is liable and that the plaintiff claim has met the threshold in **Rylands –vs- Fletcher case (supra)**.

54. The defendant asserted that the plaintiff should direct his claim to nature. The **“act of God”** is given meaning in the Black's Law Dictionary (supra) at page 41 and the decision of the Supreme Court of Kenya in **Kenya Wildlife Service –vs- Rift Valley Agricultural Contractors Ltd (2018)eKLR**. In the obtaining scenario, the defence of **“act of God”** does not apply to the present case.

55. On issue number 4, this court being acutely aware of Articles 10, 40,42,69,70 and 159(2)(a) and (e) of the **Constitution (supra)**, the plaintiff's has proved that the defendant participated in the construction of the weir which culminated to the damage to his property, the suit land. The issue of liability on the defendant is therefore, beyond challenge; as recognized in the case of **County Government of Meru –vs- Isaiah Mugambi M'Muketha (2017) eKLR**.

56. The plaintiff distinctly pleaded special damages at Ksh 11,043,525 in paragraph 12 of his plaint and in prayer(c) therein. He has proved the same distinctly by way of PEXhibits 2(a) and 2(b) as noted in **Caltex Oil, Kuria Kiarie cases and Mohammed Ali cases (supra) and Vijay Morjaria –vs- Nansingh Madhusingh Darbar and another (2000)eKLR**.

57. In **Total Kenya Ltd formerly Caltex Oil (Kenya)Ltd –vs- Janevams Ltd (2015)eKLR**, the Court of Appeal stated as:

**“...But whether the claim is in contract or tort the only damages to which the appellant is entitled is a pecuniary loss; it is to put the appellant into a good position as if there had been no such breach or interference. Normally this would entitle the appellant to recover damages for the expenses caused by and gains foregone because of the breach or interference.”**

58. The assessment of damages in a suit is a discretionary remedy and must be fair to both parties as observed in **Vancouver (city) vs Ward 2010 SCC 27, (2010) 2 S.C.R 28** restated in **Municipal Council of Eldoret –vs- Titus Gatitu Njau (2020)eKLR** by Court of Appeal sitting at Eldoret. Considering the entire case, I think an amount of **Kshs. 4,800,000/=(four Million eight hundred thousand only)** would be appropriate in the circumstances of the case. So, I award the same to the plaintiff.

59. To that end, this court finds and hold that the plaintiff has proved his claim against the defendant to the requisite standards. He is entitled to the reliefs(a),(b),(c),(e), (f),(g) and (h) as sought in the plaint.

60. Grant of order (d) sought in the plaint would amount to double compensation since it is a common law remedy covered under Order No. (e) sought therein. Accordingly, I agree with the defendant's submissions thereof.

61. Wherefore, judgment be and is hereby entered for the plaintiff against the defendant in the following terms:-

i. A declaration that the plaintiff is entitled to and the defendant is liable to make good and pay reparations for the damage occasioned to the plaintiff's land as pleaded in the plaint.

ii. A declaration that the defendant has violated the plaintiff's right to property and right to clean and natural environment.

iii. Kshs. 11.043,525 being the costs of reparation and lost property.

iv. Damages under the rule in **Ryland –v- Fletcher** at Kshs. **4,800,000/= only**.

v. Costs of this suit.

vi. Interest at court rates for orders (iii) from the date of filing suit and for orders (iv) and (v) from the date of this Judgment.

vii. In view of relief number (h) sought in the plaint and pursuant to the permeable to the Constitution of Kenya,2010 and Articles 10 (2) (d) and 60 (1) (e) of the same constitution regarding the environment, the sound recommendation in from of bullet number 1 at the foot of page 13 in PEXhibit 2(a) of May 2014 as well as bullet numbers 2,3 and 5 at page 14 therein shall be implemented accordingly by the defendant within the next six (6) months from this date.

62. It is so ordered.

**Delivered, Signed and Dated at Migori in open Court and through email pursuant to,inter alia, Articles 7 (3) (b),159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge this 28<sup>th</sup> day of JULY , 2020.**

**G.M.A ONGONDO**

**JUDGE**

**In presence of :-**

Mr. Bosire Gichana holding brief for Staussi learned counsel for the defendant

Ms. W. Ochwal holding brief for Mr. Odero learned counsel for plaintiff

Tom Maurice – Court Assistant