



REPUBLIC OF KENYA



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**Njoroge v Hebatullah & 4 others (Environment and Land Case
1513 of 2013) [2025] KEELC 6627 (KLR) (2 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6627 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 1513 OF 2013**

OA ANGOTE, J

OCTOBER 2, 2025

BETWEEN

AGNES WANJIKU NJOROGE PLAINTIFF

AND

HUSSEINBHAI AHMEDALI HEBATULLAH 1ST DEFENDANT

NAIROBI CITY COUNTY 2ND DEFENDANT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
DEFENDANT**

NASSER ABDULHAMID AHMED BAKSH 4TH DEFENDANT

MAKARIM AHMED OMAR 5TH DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff, has through an Amended Plaint dated 11th December 2013, sought judgment against the Defendants in the following terms:
 - a. An order do issue compelling the 1st Defendant to rebuild the parameter/boundary wall/guard post, servants quarter and leisure centre on the Plaintiff's suit premises OR the Plaintiff be allowed to rebuild the same at the Defendant's own cost.
 - b. The 1st Defendant be ordered to remove the gabions towering above the Plaintiff's premises and restore the soil contours to the original position under the supervision of the 2nd and 3rd Defendants.



- c. The 1st Defendant be restrained by way of temporary injunction from constructing, digging, committing further acts of damage, waste and other harmful acts in the suit premises that are hazardous and deleterious to the environment and occupants/persons.
- d. Punitive and exemplary damages against the 2nd and 3rd Defendants for failure in their statutory duty and allowing illegal and substandard constructions to proceed.
- e. General damages against the 1st, 4th and 5th Defendants jointly and severally.
- f. Special damages in the sum of Kshs. 20,627,182/- from the 1st, 4th and 5th Defendants jointly and severally as particularized in Paragraph 15 above.
- g. Any other relief that this Honourable Court may deem fit to grant.
- h. Costs of this suit and interest thereon.

Pleadings

2. In the Complaint, the Plaintiff averred that she is the registered proprietor of L.R. 7741/255, while the 1st Defendant was, at the material time, the registered owner of the adjacent parcel, LR No. 7741/254 and that during the pendency of this suit, the said parcel was transferred to the 4th and 5th Defendants.
3. The Plaintiff contended that the 1st Defendant and his agents and servants constructed gabions on Plot Number L.R. 7741/254 on or near her boundary in a reckless and unprofessional manner, leading to the collapse of the boundary wall and adjacent structures on the night of 28th December 2012.
4. It is the Plaintiff's case that the collapse of the boundary wall was occasioned by the substandard nature of the gabions and their improper installation; that as a result of the substandard construction and collapse of the boundary wall, she suffered severe loss and damage and that the 1st Defendant never rectified the situation.
5. Instead, it was averred, the 1st Defendant trespassed onto her property and built a wall inside his own property leaving her (the Plaintiff's) wall unbuilt. She further claims that the 1st Defendant reconstructed the gabions which remain highly visible from her compound, exacerbating the loss of her privacy.
6. The Plaintiff contended that the 1st Defendant has occasioned a continuous nuisance by maintaining structures overlooking her property and that, notwithstanding the transfer of the 1st Defendant's parcel to the 4th and 5th Defendants on 11th April 2012, the nuisance persists under their ownership.
7. She further attributed liability to the 2nd and 3rd Defendants for failing to discharge their regulatory and statutory mandates by permitting the impugned construction to proceed in contravention of the Physical Planning Act and environmental regulation.
8. Arising from the foregoing, the Plaintiff alleged loss and damage, including: loss of privacy and security; loss of income from employment in the United Kingdom occasioned by her extended stay in Kenya to secure rectification of the damage; destruction of her wall, servant's quarters and guard house; trespass upon her property; and theft and unauthorized use of materials from the collapsed wall and guard house.
9. The Plaintiff further asserted that the 3rd Defendant, despite knowledge of the ongoing construction, neither demanded nor published an Environmental Impact Assessment Report and failed to avert the resulting environmental degradation. She averred that the 1st Defendant undertook the construction



of the wall and gabions without approval from the National Environment Management Authority, contrary to the provisions of the Environmental Management and Coordination Act.

10. In quantifying her claim, the Plaintiff has sought damages as follows:
 - a. Loss of rental income from December 2011, particularised as Kshs. 320,000 per month for the period January 2012 to April 2015 (40 months), totaling Kshs. 12,800,000;
 - b. Damages for loss of rental income at the rate of Kshs. 320,000 per month from May 2015 until the Defendants repair the damage to her property;
 - c. Cost of repairs to the servants' quarters, garage, leisure centre, boundary wall, cabro parking and guard post, as per the engineer's report, in the sum of Kshs. 6,381,842.24;
 - d. Professional fees being: engineer's costs at Kshs. 75,000 and agent's fees at Kshs. 205,000, totalling Kshs. 280,000;
 - e. Value of building materials allegedly taken by the 1st Defendant's agents, being: six lorry loads of stones from the wall at Kshs. 15,900 per load (Kshs. 95,400), one lorry load of sand from her car park at Kshs. 16,000, and half a lorry of ballast from her car park at Kshs. 8,000, totaling Kshs. 119,400; and
 - f. Out-of-pocket expenses comprising: air tickets and related expenses at £1,228.85; loss of income from May to November 2014 at £2,000 per month (total £12,000); phone cards for calls from the United Kingdom to Kenya at £300; and Power of Attorney legal fees at £120, in aggregate £13,645.85, equivalent to Kshs. 2,005,939.90.
11. In their Statement of Defence dated 4th September 2015, the 1st, 4th and 5th Defendants averred that the 1st Defendant had divested his interest in LR No. 7741/254 prior to the commencement of the proceedings. They denied the allegations of negligence and damage, and contended that, if any harm had been occasioned, the same had resulted from an act of God, namely, heavy rainfall, for which they bore no liability.
12. In its Amended Defence, the 2nd Defendant denied having received any report or complaint regarding the impugned construction. It maintained that no development applications, plans or approvals relating to the gabions had been submitted to it, and disclaimed responsibility for the Plaintiff's alleged losses.

Hearing and Evidence

13. The Plaintiff, Agnes Wanjiru Njoroge (PW1), adopted her witness statement dated 4th May 2018 as her evidence-in-chief and produced a bundle of documents marked PEXB1.
14. In her statement, PW1 reiterated the facts set out in the Plaint. She produced photographs depicting her house, the 1st Defendant's wall, and the gabions which are the subject of the complaint. PW1 also tendered images showing the collapsed gabions which, she stated, damaged her boundary wall, the garage, and guard house; photographs of the Defendants' servants removing stones from her property in 2013; and images of the subsequent reconstruction of the gabions. She maintained that the 1st Defendant used her stones to erect his wall.
15. In cross-examination, PW1 testified that she purchased her land in 2003 when it was already enclosed by a masonry wall, which she considered appropriate for the area. She stated that, without the gabions, the interior of her property could not be seen from outside. She confirmed that she was in the United Kingdom when the incident occurred, and returned in October 2013 when the wall had already been



rebuilt, and has remained in Kenya since June 2016. She further stated that she lost her job in the UK in 2016.

16. PW2, James Kibuchi Karanja, a civil and structural engineer, testified that, at the request of the Plaintiff's representative, Allan Thairu, his firm, Truebase Engineers & Associates Limited, inspected the suit property to assess the damage caused by the collapse of the boundary wall. PW2 stated that he prepared a report dated March 2014 and a witness statement, both of which he produced in evidence. He stated that he reviewed the other engineering reports and met with the engineer who had prepared the 1st Defendants' report.
17. In his report, PW2 concluded that, as at 25th February 2012, the gabions were failing due to an inadequate ratio of thickness to height, rendering them unable to withstand horizontal lateral forces. It was his evidence that the lower section of the gabions had been pushed towards the masonry boundary wall, causing severe structural distress. It was his further evidence that the section of the wall which was adjacent to the 4.5-metre-high gabions collapsed on 28th December 2012, damaging the gatehouse, double garage, servants' quarters, and the leisure area.
18. PW2 stated that on 14th October 2016, the Plaintiff engaged his firm, Buildworth Construction Company, to supervise reconstruction works, including the boundary wall, garage, servants' quarters, changing room walling, and ceiling. He testified that his role was to review the approved drawings and ensure compliance with the specifications and Kenyan construction standards. He also carried out a further assessment of the damage following the Defendants' construction and prepared a report dated 14th March 2018.
19. PW2 testified that a quantity surveyor costed the Plaintiff's masonry wall. In his view, the 1st Defendant had carried out backfilling on his property without first constructing a foundation. He stated that proper compaction should be done by the 1st Defendant in layers after foundation works, and that a retaining wall was necessary to counter forces resulting from level changes. He attributed the gabions' collapse to the absence of such a retaining wall.
20. PW2 further stated that retaining walls require drainage piping and concreting to hold the soil effectively, and opined that the remaining gabions would also require a retaining wall to protect the Plaintiff's side.
21. PW2 testified that there was currently only one boundary wall; that the Defendants had constructed another wall between the garage and their wall, leaving a gap of about 0.2 metres and that the estimated length of this section was approximately 15 metres plus another 2.5 metres, with the remaining 12.5 metres of the wall left unsupported, this being the collapsed section.
22. PW2 described the rebuilt wall as masonry wall with structural columns, but not a retaining wall, and stated that the 15-metre section retained water in the gap, thus weakening it.
23. PW2 stated that the garage had not been rebuilt since the 2012 damage. He recommended that the Defendants rebuild their wall from the foundation using a structural wall. For privacy, he proposed that the Plaintiff's wall be 1.5 metres higher than the Defendants' wall if the gabions remained, making the retaining wall height 6 metres in total.
24. In cross-examination, PW2 confirmed that he inspected the site in 2016, after the collapse of the wall and gabions. He stated that the absence of a visible foundation from the Plaintiff's side indicated that none had been constructed. He testified that he engaged with the Defendants and their engineer, Antony, to explore a professional resolution to the problem.



25. PW2 stated that their discussions and agreed points were recorded in his report. He observed that when the gabions were installed, soil had already been deposited and the only existing wall was the Plaintiff's. In his opinion, the gabions were built without a strong foundation and, without the deposited soil, the wall would not have been subjected to the same pressure. He stated there had been no prior soil erosion, which may have led the contractor to omit a concrete wall.
26. PW2 concluded that the backfilling on the 1st Defendant's side altered the slope and that a structural retaining wall was necessary for sloping terrain to hold deposits on the higher side. Without such deposits, he stated, a structural wall would not have been required.
27. PW3, Susan Ndugi, adopted her witness statement dated 8th September 2021. She testified that she had previously lived in the United Kingdom and, during visits to Kenya from as early as December 2005, would stay at the Plaintiff's property on a short-term basis. She described the area as prime and secure, and stated that the Plaintiff's rate of Kshs. 8,000 per night for a double room with a kitchen was attractive compared to hotels.
28. PW3 stated that from 2013, she ceased staying at the property due to the erection of the four-metre-high gabions on the adjoining parcel, which in her view compromised privacy and security and that she was aware that the gabions had pushed over the Plaintiff's boundary wall and adjacent structures, which collapsed in December 2012.
29. In cross-examination, she stated that she had last stayed at the property for an extended period in 2006 but had made shorter visits in 2009 and 2011. She testified that on visiting in July 2013, she found the property exposed, as people on top of the gabions could see into the Plaintiff's compound, and that she did not feel safe, particularly as she was with her child. She confirmed that she had learned of the 2012 collapse through a video sent by the Plaintiff while she was abroad.
30. In re-examination, PW3 stated that after 2006, she visited Kenya in 2009 for a few days and again in March 2011 for ten weeks. She testified that she stayed on the suit property intermittently, and that her last extended stay there was in 2006.
31. PW4, Fransisca Makena Wanjiku, adopted her witness statement dated 8th February 2021. She testified that she was a retired nurse who had worked in the United Kingdom. It was her evidence that she knew the Plaintiff and had leased her house on the suit property for two years from 1st July 2008 at a monthly rent of Kshs. 290,000, with a refundable security deposit of Kshs. 870,000 and electricity and water deposits of Kshs. 5,000 and Kshs. 10,000 respectively.
32. PW4 stated that during her occupation, the 1st Defendant erected gabions approximately 20 feet high, filled his compound with topsoil, and raised the ground level by about four metres. PW4 stated that she informed the Plaintiff of these developments, which she said compromised the privacy and security of the suit property, as persons on the adjoining land could see directly into it.
33. She testified that in November 2011, she vacated the house for safety reasons after observing cracks on the perimeter wall, servants' quarters, garage, and guardhouse, which she attributed to the gabions. It was her testimony that she was aware that the gabions collapsed on 28th December 2012, causing extensive damage to the Plaintiff's property.
34. According to PW4, in 2013, she sought to resume the tenancy at an increased rent of Kshs. 320,000 but found, upon inspection, that no repairs had been carried out, frustrating her interest.
35. In cross-examination, PW4 testified that she returned to reside permanently in Kenya in 2015, having previously made frequent visits. She stated that, prior to her permanent return, she entered into



- another tenancy agreement with the Plaintiff dated 24th June 2010 for a term of two years commencing on 1st July 2010 at a monthly rent of Kshs. 320,000.
36. She further testified that she occupied the house intermittently during that period and produced a copy of the said agreement which indicated that the tenancy commenced in June 2010 and was to terminate in November 2011.
 37. PW4 stated that she was not at the property when the wall collapsed but learned of it from the Plaintiff. By the time she vacated in 2011, she stated, the wall had begun cracking and water was seeping through. She reiterated that the repairs had not been done by 2013, and that she was no longer interested in living at the property, being aware that the Plaintiff had by then relocated to Kenya.
 38. PW5, Anthony Maina Mugane, adopted his witness statement dated 2nd March 2021. He testified that he visited Kenya in July 2012 and stayed at the Plaintiff's property for one month in a single room at Kshs. 5,000 per day on a bed-and-breakfast basis. At that time, he stated, the gabions erected by the 1st Defendant were already in place. He later learnt that in December 2012, the gabions collapsed, damaging the Plaintiff's wall and garage.
 39. PW5 stated that since July 2012, he had made annual visits to Kenya and had been interested in staying at the Plaintiff's property, but the issues relating to the gabions, particularly privacy and security, had not been resolved. It was his testimony that on his visit in December 2020, he stayed for one month, inspected the suit property, but declined to stay there due to these concerns and the state of the property.
 40. In cross-examination, he stated that he resided in the United Kingdom and visits Kenya about once a year for four to six weeks. He confirmed that the gabions had already been constructed by the time of his July 2012 visit, and that he was informed by the Plaintiff of their collapse later that year. He added that in 2019, he visited the property to view the damage.
 41. PW6, David Kibunja, adopted his witness statement dated 22nd September 2021. He testified that his last tenancy agreement with the Plaintiff, dated 31st January 2012, was for the first floor of the house for a term of two years from 1st February 2012 at a monthly rent of Kshs. 195,000.
 42. PW6 stated that gabions had been erected on the adjoining property facing the Plaintiff's land, and that in December 2012 they collapsed, damaging the Plaintiff's boundary wall, servants' quarters, garage, and guard house. Due to the extent of the damage, he was unable to continue leasing the premises, terminated the tenancy in February 2013, and obtained a refund of his security deposit.
 43. He further testified that in January 2014, he paid a deposit to renew the lease but, upon inspection, found the car park, garage, and servants' quarters in poor condition. He withdrew from the arrangement and was refunded his deposit.
 44. PW6 stated that he resides in the United Kingdom. He confirmed that the tenancy agreement of 31st January 2012, produced at page 126 of the Plaintiff's documents, was to run until January 2014. He explained that he had agreed to renew the lease in January 2014 believing the situation had improved, but found that the condition of the property remained unchanged.
 45. He stated that he was at the premises in December 2012 and personally witnessed the collapse of the wall and associated damage, and that the situation had not been rectified by the time of his return.
 46. DW1, Stephen Munyao Mwanza, adopted his witness statement as his evidence-in-chief and testified that he had been employed by the 1st Defendant as a building contractor since 2003. He testified that he observed the state of the area separating the two properties prior to the collapse of the boundary wall.



47. DW1 testified that before the wall collapsed, he and the 1st Defendant's construction team had sought permission from the Plaintiff's representative, Mr. Thairu, to demolish and rebuild the wall, but access was denied. He said that following the collapse, the parties agreed that each would appoint an engineer to redesign both the gabions and the wall, but the Plaintiff later refused them access for reconstruction as excavation would be required.
48. He stated that the gabions were eventually demolished and rebuilt without access to the Plaintiff's property, making the work more difficult and costly. DW1 stated that he worked on the 1st Defendant's house for about three years and that during that time, the Plaintiff had no tenant on the property, and only Mr. Thairu lived there.
49. In cross-examination, DW1 stated that he was not registered, had no formal qualifications, and had no written employment contract with the 1st Defendant.
50. DW1 informed the court that he first went to Kitisuru in 2011, and that the terrain on the 1st Defendant's land was a gentle slope. He averred that the work he went to do on the 1st Defendant's land was to build a bungalow, some landscaping and the boundary wall. It was during the landscaping that they built the gabions. He stated that they varied the gabions between 3-4 metres.
51. He stated that prior to the construction of the gabions, he discussed the condition of the masonry wall with Mr. Thairu, as the Plaintiff was not in the country, noting that the wall already had cracks. He testified that no soil compaction was undertaken; rather, the ground was excavated and prepared to a firm base before laying the gabions, and that there was an 8-inch (200 mm) gap between the wall and the gabions, and not two metres.
52. He stated that the gabions were filled with hardcore materials sourced from outside and later planted with grass. He further testified that he was arrested by City Council officers in 2014 during the construction, but was released the same day and resumed work.
53. He maintained that the gabions did not collapse or push over the Plaintiff's wall, asserting that cracks in the wall existed before the first gabions were built. He stated that he saw approvals for the gabions from Nairobi City Council but did not have them. He confirmed that from the top of the gabions, one could see into the Plaintiff's compound.
54. DW1 stated that he was once arrested by City Council officers during construction but was released the same day without charge. He also admitted entering the Plaintiff's compound on two occasions, and that the Plaintiff indeed had tenants resident on her property from time to time.
55. DW1 confirmed the joint meeting by the two engineers and the parties' agreement to re-construct the wall. He stated that this was however frustrated when the Plaintiff refused to give her permission to re-do the wall.
56. In re-examination, DW1 clarified that his role was to supervise workers while the architect and contractors oversaw the works. He reiterated that the Plaintiff's wall had cracks even before the first gabions were constructed.
57. DW2, Peter Kamau, a gardener who had been employed by the 1st Defendant since 1989, adopted his witness statement as his evidence-in-chief. He stated that he resided in the area and was able to observe activities on the Plaintiff's property.
58. He testified that the Plaintiff's representative, Mr. Thairu, lived in the house whose boundary wall later collapsed, and that the property had originally belonged to the 1st Defendant before being sold to a third party and subsequently to the Plaintiff.



59. DW2 further stated that he never observed any tenant occupying the Plaintiff's house during his employment with the 1st Defendant, and that Mr. Thairu remained in occupation until the Plaintiff returned to live there with her children. He estimated the monthly rent for houses of similar size in the area between 2012 and 2014 was about Kshs. 150,000.
60. In cross-examination, DW2 stated that he first went to the Kitisuru property around 2019–2021, which was long after the wall had collapsed in 2011. He confirmed that he had no knowledge of the construction of the gabions. He stated that he had seen people on the Plaintiff's property whom he understood to be tenants, and that he had accessed the Plaintiff's compound, where Mr. Thairu showed him the collapsed wall.
61. DW3, Sheikh Husseinbhai Hebatullah, adopted his witness statement as evidence-in-chief and produced documents Nos. 1, 2, 3, 4, 6, and 7 in his bundle as DEXB1. He testified that he purchased LR No. 7741/254 from Onali Mohamedali on 23rd October 1996 and subsequently constructed a house thereon in accordance with the approved building plans.
62. At the time of purchase, he stated, there was already a masonry boundary wall separating his property from the Plaintiff's, which he did not replace.
63. He stated that the two properties were on a sloping terrain, with the Plaintiff's land lying on the lower side, causing rainwater to flow naturally towards it. From his building experience, he considered the existing wall, though built with masonry pillars, structurally inadequate for the long term, and noted the presence of cracks. According to DW3, to address soil retention and protect the boundary wall, he erected gabions on his property, leaving a gap of 300mm between them and the wall.
64. DW3 testified that he instructed Engineer Anthony Wandu of Abba & Wandu Engineers to assess the wall and make recommendations. He stated that in a report dated 12th January 2012, Eng. Wandu observed that the wall, approximately 3.5 metres high, was leaning towards the Plaintiff's side, and that the height of the gabions was excessive for a masonry wall without reinforcement.
65. The engineer recommended demolition of the wall, reuse of some blocks, reconstruction with reinforced concrete columns, horizontal tie beams, and weep holes for drainage, as well as shifting the top gabion layer two metres away from the wall.
66. DW3 stated that, acting through construction workers, he sought permission from the Plaintiff's representative, Mr. Allan Thairu, to demolish and rebuild the wall in line with Eng. Wandu's recommendations and to construct a protective wall, but access was denied, and that the gabion works proceeded without access to the Plaintiff's land, under his supervision.
67. He testified that he sold LR No. 7741/254 to the 4th and 5th Defendants by an agreement dated 28th March 2012, and the transfer was registered on 11th April 2012; that in December 2012, part of the boundary wall collapsed after heavy rains, and that efforts to repair the wall and structures within the Plaintiff's property were frustrated by the Plaintiff and her representative.
68. DW3 described negotiations between the parties' advocates that occurred from March to September 2014 and that on 20th February 2014, an agreement was reached for the 1st Defendant to carry out all repairs. However, by a letter dated 5th March 2014, the Plaintiff added demands for nominal damages for inconvenience, lack of privacy, and disturbance since 2012.
69. DW3 stated that following a site visit on 23rd April 2014, it was agreed that the 1st Defendant would undertake all repairs, with Eng. Wandu executing the works and the Plaintiff's engineer, Josephat Oruru, supervising and that the Plaintiff proposed that the 1st Defendant meet the costs of her



- engineer's report at Kshs. 53,000 and pay Kshs. 200,000 in nominal damages to Mr. Thairu, with payment terms to be discussed.
70. DW3 stated that on 19th June 2014, the Plaintiff demanded Kshs. 2,172,870 to carry out the repairs herself, contrary to the earlier agreement; that by a letter dated 29th August 2014, he informed the Plaintiff that removal of the gabions and demolition of the wall had commenced and requested that her engineer attend the site and that the Plaintiff's response of 1st September 2014 stated that the engineer would not supervise the works until his fees was paid.
 71. DW3 further testified that on 11th November 2014, he informed the Plaintiff that construction of the wall on his property was ongoing and that he was ready to repair the Plaintiff's house with the engineer's approval, and that by a letter dated 13th March 2015, his advocates confirmed completion of the wall on his side and sought the Plaintiff's consent to erect a wall on her side to conclude the matter.
 72. According to DW1, on 27th July 2016, the parties' advocates met onsite, and by a letter dated 10th August 2016, his advocates forwarded the contacts of Eng. Wandu to the Plaintiff's advocates for liaison with the Plaintiff's engineer and that by a letter dated 26th October 2016, the Plaintiff's advocates shared the contacts of Eng. James Karanja, who was to liaise with Eng. Wandu to assess the materials required for rebuilding the wall and other remedial works.
 73. DW3 testified that on 28th November 2016, his advocates emailed the Plaintiff's advocates a note from Eng. Wandu outlining the agreed structural details of the wall, and that these were confirmed as agreed in the Plaintiff's advocates' email of 17th January 2017 and that by a letter dated 20th August 2017, he expressed willingness to reconstruct the collapsed wall.
 74. However, at a settlement meeting on 7th February 2019, the Plaintiff insisted on terms that included both reconstruction and payment of her monetary claims. DW3 stated that he offered to rebuild the wall, repaint the house to the Plaintiff's satisfaction, and pay Kshs. 2 million, but the offer was declined.
 75. He maintained that the wall has not been repaired because the Plaintiff has consistently denied construction workers access, even after agreeing on the works to be carried out. He contended that the Plaintiff failed to mitigate her losses by either reconstructing the wall herself or permitting him to do so, and that any continuing loss was the result of her inaction.
 76. He stated that Mr. Thairu remained in the house before and after the collapse and only vacated when the Plaintiff returned permanently from the United Kingdom around June 2016, hence, in his view, the claim for loss of rental income was unfounded. He argued that the Plaintiff had not shown that she would have secured a tenant for the entire period claimed, and that the testimony of her witnesses showed they would have rented the house sporadically and for short durations.
 77. DW3 stated that the Plaintiff's house was in poor condition even before the wall collapsed, and that he had offered during negotiations to assist with glasswork and painting. He asserted that the rental sums claimed were grossly overstated, relying on a valuation survey of Keriasek & Company Limited, which he said confirmed the overestimation.
 78. In cross-examination, DW3 stated that he had once owned the Plaintiff's land before selling it to another person, who later sold it to the Plaintiff. He confirmed that the boundary wall had been constructed by the intermediate owner. He described himself as an experienced property developer with twelve houses in Kitisuru, and that he built the gabions in 2011 but not produce the NEMA permit or EIA report for the works, as the gabions were designed by Eng. Wandu.
 79. DW3 denied allegations of backfilling with red soil, stating that gabions were constructed using wire frames filled with stone. He said the land was sold to the 4th and 5th Defendants, not to the



- 2nd Defendant, and admitted that no approvals had been obtained from Nairobi City County for construction of the gabions, although a permit had been issued for construction of the house.
80. In re-examination, DW3 explained that the gabions comprised a wire frame (approximately one metre by one metre) filled with stone, with a 300mm gap between the gabions and the boundary wall. He stated that the City Council did not interfere with the works and that the 1st Defendant had never been sued or prosecuted over the construction of the wall.
81. DW4, Anthony Wandu, adopted his witness statement as his evidence-in-chief and testified that he is a registered engineer with the Engineers Board of Kenya and a partner in the consultancy firm of Abba & Wandu Engineers.
82. He stated that in early 2012, the 1st Defendant instructed his firm to assess the boundary wall between the two properties. Following a site visit on 12th January 2012, he observed that the wall was built using 200mm thick masonry blocks with 400mm x 400mm masonry pillars at 2.5-metre intervals, which retained the soil for the upper property, LR No. 7741/254. He stated that he noted cracks that had been observed by the 1st Defendant's workers in November 2011, and a gap of 300mm between the gabions and the wall.
83. He testified that he recommended demolition of the existing shared wall and shifting of the gabions to two metres from the wall. He stated that access to the Plaintiff's property for reconstruction was denied. In his view, heavy rains in December 2012 caused the already weak masonry wall to collapse, while the gabions remained intact.
84. He opined that a masonry wall was not suitable for retaining soil in the sloping terrain. Acting on the 1st Defendant's instructions, he stated, his firm prepared proposals, designs, structural drawings, and bills of quantities for remedial works, which were to be supervised jointly with Engineer Josephat Oruru.
85. DW4 stated that the works commenced in April 2014, with foundations, excavations, and blinding completed, but access to the Plaintiff's property was again denied by her representative, Allan Thairu, who raised concerns about workmanship and made financial demands before allowing the works to continue. DW4 maintained that the works and materials met the required standards, and that without access, the team constructed a boundary wall within LR No. 7741/254, requiring new plans and additional costs.
86. He confirmed that on 1st November 2016, the parties agreed on the structural details for reconstructing the damaged boundary wall and on bearing the costs of their respective consultants. While the engineering teams agreed on the way forward, he said no works were carried out since access was denied.
87. In cross-examination, DW4 stated that when he received instructions in January 2012, the gabions had already been erected, and he was not involved in their construction. He stated that he was aware that the Plaintiff had lodged a complaint to the Nairobi City Council on 25th October 2011 alleging that the gabions had caused cracks to the wall. He described the existing wall as an ordinary masonry wall with pillars, not a retaining wall, and stated that a retaining wall should have been erected before depositing material on the upper side.
88. DW4 testified that he did not know how the gabions were erected, but recommended moving them two metres from the wall because gabions directly above or too close to the wall could exert pressure on it.
89. He conceded that the gabions should not have been above the existing wall and that in January 2012, the gabions standing at four metres, one metre above the wall, were removed and repositioned. He admitted that he had no report challenging the Plaintiff's expert evidence and acknowledged that the



gabions were initially too high and not properly constructed. He further stated that he was not aware of any permits having been obtained for their construction.

Submissions

90. Counsel for the Plaintiff submitted that Article 42 of *the Constitution*, read together with Section 3(3) of EMCA, guarantees the right to a clean and healthy environment. He further referred to Article 70 of *the Constitution* on the enforcement of environmental rights, and urged the court to be guided by the principles set out under Section 3(5) of EMCA, including the polluter pays principle and the precautionary principle. Counsel placed reliance on the decision in *Phoebe Wangui Gakui vs Lucy Wambui & 2 others* [2021] eKLR on the scope and content of the right to a clean and healthy environment.
91. It was submitted that the 1st Defendant erected the gabions in contravention of Section 30(1) and (2), and 33 of the Physical Planning Act, without development permission and without approved structural plans. Reliance was placed on the evidence of DW1 and DW4, who confirmed that no such approvals were obtained. Counsel also invoked Section 58 of the Environmental Management and Coordination Act (EMCA), which requires submission of a project report and environmental impact assessment before undertaking activities listed in the Second Schedule.
92. It was urged that the erection of the gabions was out of character with the surroundings and constituted a major change in land use, relying on *Mereka & another vs Director General, NEMA & 2 others* [2022] KEELC 3137 (KLR) and *Ken Kasinga vs David Kiplagat & 5 others* [2014] eKLR for the proposition that failure to follow statutory environmental procedures implies a violation of the right to a clean and healthy environment.
93. Counsel argued that the erection of gabions falls under Clause 3 of the Second Schedule to EMCA, which categorises as high-risk any activity or structure “out of character” with its surroundings or not in keeping with the general character of the area.
94. It was further submitted that the gabions were negligently erected without a retaining wall, without a foundation, without compacted soil, without supervision by a qualified structural engineer, and to a disproportionate height, citing the testimony of PW4, DW1 and DW4.
95. Counsel argued that the gabions deprived the Plaintiff of privacy and security, amounting to a nuisance, and that the 4th and 5th Defendants, as successors in title, had adopted and continued that nuisance. Reference was made to the definitions of private nuisance and continuation of nuisance in *Halsbury’s Laws of England* (5th Ed., Vol. 78).
96. On damages, it was submitted that the gabions pushed over the boundary wall and caused cracks and structural failure to the guardhouse, servants’ quarters and garage. PW2’s expert testimony was said to have been corroborated by the unchallenged reports of Engineers Oruru and Karanja.
97. It was contended that, apart from a brief arrest of the 1st Defendant, the 2nd and 3rd Defendants took no steps to stop or remove the gabions, contrary to their statutory mandates. Relying on *Kenya Airways Ltd vs Satwant Singh Flora* [2013] eKLR, counsel submitted that no rights can accrue from an illegality, and under Section 11 of EMCA, the court should issue an environmental restoration order together with damages.
98. Counsel urged that the 1st, 4th and 5th Defendants be ordered to rebuild the Plaintiff’s wall and facilities, citing the case of *Jane Wagathuitu Githinji & 2 Others vs Sojanmi Springfields Ltd & 2 others* [2022] KEELC 1958 (KLR), which circumstances, they contend, are similar to the ones herein.



99. It was contended that the 2nd Defendant breached Sections 30 and 38 of the Physical Planning Act by failing to stop the construction, while the 3rd Defendant breached Section 108 of EMCA by failing to issue an environmental restoration order. Reliance was placed on *M’ithilai vs County Government of Meru & Another* [2022] KEELC 14956 (KLR), in which damages were awarded against a county government and NEMA for similar inaction.
100. On damages, reliance was placed on *NEMA & another vs KM (minor) & 17 others* [2023] KECA 775 (KLR) and *Gitobu Imanyara & 2 others vs Attorney General* [2016] eKLR for principles of compensation for constitutional violations.
101. While acknowledging that the present matter involved private law claims, counsel argued that damages should reflect environmental harm and continuing breach of the right to a clean and healthy environment, including loss of rental potential, devaluation, and loss of privacy and security.
102. It was submitted that PW4 had leased the suit property between 2011 and 2012 at Kshs. 320,000 per month, and four other witnesses testified to short-term leases which terminated due to the nuisance and damage. Counsel argued that the Defendants’ valuation report dated 20th April 2021 by Keriasek & Co. Ltd carried no weight as no witness was called to prove its contents.
103. The Plaintiff sought for Kshs. 6,381,842.24 for repairs as per Engineer Karanja’s report, later revised on 14th March 2018 to Kshs. 8,046,260. Counsel urged the court to take judicial notice of a 40% rise in construction costs, adjusting the claim to Kshs. 11,264,764, and prayed for costs of the suit.
104. Counsel for the 1st, 4th and 5th Defendants submitted that the Plaintiff had introduced new issues in her final submissions which were not pleaded, namely, enforcement of rights under Articles 40, 42 and 70 of *the Constitution* and allegations that the gabions were erected in breach of the Physical Planning Act and EMCA.
105. Relying on *Independent Electoral and Boundaries Commission & Another vs Mule & 3 others* [2014] eKLR, it was urged that parties are bound by their pleadings and the court should disregard these arguments.
106. On negligence, counsel cited the test set out in *Clerk & Lindsell on Torts* (23rd Ed.) and argued that the duty on the 1st Defendant was to exercise reasonable care in erecting gabions so as not to cause damage to the Plaintiff’s property.
107. It was submitted that the 1st Defendant, an experienced builder, acted prudently by leaving a 300mm gap between the gabions and the boundary wall and by consulting engineers. Counsel contended that the collapse could have been avoided had the Plaintiff allowed the 1st Defendant to implement Eng. Wandu’s recommendations of 12th January 2012.
108. It was argued that the Plaintiff failed to prove a causal link between the Defendants’ conduct and the alleged damage. It was submitted that both the 1st Defendant and Eng. Wandu attributed the collapse of the wall on 28th December 2012 to heavy rains acting on an already weak masonry wall.
109. Counsel submitted that the gabions, erected less than two months earlier, could not have caused the wall to tilt. The report of Eng. Karanja was challenged on the basis that he inspected the property more than a year after the collapse.
110. On nuisance, reliance was placed on *Haroun O. Nyamboki vs Catholic University of Eastern Africa* [2017] eKLR for the definition of private nuisance. It was submitted that the Plaintiff had not demonstrated that the Defendants acted offensively or negligently so as to cause a nuisance. Without prejudice, it was argued that if negligence or nuisance were found, it would be limited to the collapse



event and would not constitute a continuing nuisance, as the Defendants had made repeated but frustrated attempts to carry out repairs.

111. On damages, counsel submitted that any award should be confined to the natural consequences of the wrongful act, citing Clerk & Lindsell on Torts (23rd Ed.) and Overseas Tankship (UK) Ltd vs Morts Dock & Engineering Co. Ltd. It was argued that direct damage was limited to the wall, gatehouse and remedial works to the servants' quarters and garage, quantified in the Plaintiff's letter of 19th June 2014 at Kshs. 2,172,870.
112. It was submitted that loss of rental income, if recoverable, should be limited to a three-month repair period, at the rental value of Kshs. 170,000 per month as per their expert valuation, totalling Kshs. 510,000.
113. Counsel submitted that claims for professional fees, air tickets, loss of employment income, and phone cards were too remote and unforeseeable. The Plaintiff, it was argued, had a duty to mitigate her loss but failed to do so by neither undertaking repairs nor allowing the Defendants to carry them out. Counsel relied on the case of African Highland Produce Ltd vs John Kisorio [2001] eKLR.
114. On the claim for building materials worth Kshs. 119,400, counsel submitted that no evidence was adduced to prove theft by the Defendants or their agents, nor to substantiate the valuation, rendering it a special damage claim not specifically proved, citing Ryce Motors Ltd & another vs Elias Muroki [1996] eKLR.
115. Counsel for the 2nd Defendant relied on the definition of negligence in Blyth vs Birmingham Waterworks Company (1856) 11 EX CH 781, as cited with approval in Board of Trustees Diocese of Embu Kairu Parish vs Antony Njeru Ngugi & Another (2020) eKLR. It was submitted that, under Section 109 of the *Evidence Act*, the burden of proving negligence lay upon the Plaintiff.
116. Counsel contended that while the 1st Defendant constructed gabions on LR No. 7741/254 without seeking the 2nd Defendant's approval, no documentation, architectural drawings, or engineering plans were submitted to the 2nd Defendant to convey the structural integrity of the works.
117. It was their submission that the Plaintiff neither reported the construction of the gabions to the 2nd Defendant nor informed it of the subsequent collapse. Counsel argued that the Plaintiff had failed to establish breach of duty on the part of the 2nd Defendant and that the mere occurrence of damage to the Plaintiff's property was not, of itself, proof of negligence against it.
118. On the claim for punitive and exemplary damages, counsel relied on the principles set out in Godfrey Julius Ndumba Mbogori & another vs Nairobi City County [2018] eKLR, submitting that such damages are intended to punish and deter. It was urged that the claim did not lie against the 2nd Defendant, as there was no failure in the discharge of its statutory duties and no facilitation of illegal or substandard construction as alleged.
119. Counsel for the 3rd Defendant maintained that this Court is properly seized of jurisdiction pursuant to Article 162(2)(b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*, as the construction of the gabions relates to the use and occupation of land. He nonetheless submitted that, from the pleadings, the Plaintiff's grievance lies primarily in private tort claims against the immediate perpetrators, and not against the 3rd Defendant.
120. Reliance was placed on the Court of Appeal's decision in Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) and the Supreme Court's pronouncement in Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 others [2012] eKLR, to affirm that jurisdiction flows from *the Constitution* and statute.



121. Reference was further made to the predominant purpose test as articulated in *Suzanne Achieng Butler & 4 others vs Redhill Heights Investments Limited & Another* [2016] eKLR and applied in *Kisekem Limited vs National Bank of Kenya Limited* [2024] KEELC 5233 (KLR).
122. On the question of whether the construction of the gabions required an Environmental Impact Assessment Licence, counsel submitted that neither the Environmental Management and Coordination Act (EMCA) nor its Second Schedule impose upon the Authority an obligation to supervise works of this nature undertaken on private property. In their view, the construction of gabions does not fall within the listed categories under Section 58(1) of EMCA, which necessitate an EIA licence.
123. It was admitted that NEMA neither granted permission for the construction of the gabions nor issued any order to restrain the 1st Defendant from proceeding with the construction. Counsel contended that the dispute is essentially private and that statutory bodies, such as the 3rd Defendant, have no role to play in its resolution.
124. In reply, Counsel for the Plaintiff, while acknowledging the general rule that parties are bound by their pleadings, invoked the exception under the doctrine of *ex turpi causa non oritur actio*, that no cause of action may arise from an illegal or dishonourable act.
125. Reliance was placed on the Court of Appeal decision in *Kenya Airways Ltd vs Satwant Singh Flora*, Civil Appeal No. 54 of 2005, which reiterated the holding in *Mapis Investment (K) Limited vs Kenya Railways Corporation* [2006] eKLR, that the question of illegality may be raised even if it emerges for the first time on appeal.
126. It was urged that the evidence on record establishes that the 1st, 4th and 5th Defendants unlawfully erected the impugned gabions, and that it is immaterial whether or not such illegality was expressly pleaded. Counsel argued that this Court ought not to permit the Defendants to derive benefit from acts which are illegal and in contravention of *the Constitution*, the Physical Planning Act and EMCA.
127. Further, it was submitted that in determining environmental claims under Section 3 of EMCA, the Court is not constrained to strictly classify them as purely civil, tortious, constitutional, or criminal. Rather, if evidence demonstrates that a party's right to a clean and healthy environment is likely to be infringed, the Court is empowered to grant appropriate reliefs.

Analysis and Determination

128. Upon consideration of the pleadings filed by the parties, the issues for this court's determination are as follows:
 - a. Whether the 1st Defendant lawfully constructed the gabions on his property.
 - b. Whether the 1st Defendant's gabions were negligently constructed and caused the collapse of the Plaintiff's wall
 - c. Whether the 2nd and 3rd Defendants were negligent in the performance of their duties.
 - d. Whether the Defendants have created a continuing nuisance that has caused the Plaintiff to suffer loss of privacy and loss of security.
 - e. Whether the Plaintiff is entitled to the prayers sought.
129. The undisputed facts in this matter are that the Plaintiff is the proprietor of the land known as LR No. 7741/255 located in Kitisuru, Nairobi. Adjacent to the Plaintiff's property is LR. No. 7741/254 which



until 11th April 2012, was registered in the name of the 1st Defendant. By an Agreement of Sale dated 28th March 2012, the said property was sold to the 4th and 5th Defendants and was duly transferred to them on 11th April 2012.

130. It is common ground that in 2011, the 1st Defendant constructed gabions on LR No. 7741/254 measuring approximately 4.5 meters in height. The said gabions bordered the Plaintiff's masonry wall. It is further uncontested that on the night of 28th December 2012, the boundary (masonry) wall separating the two properties collapsed, causing damage to various amenities on the Plaintiff's property including the guard's house, the servant's quarter, the garage, the leisure center and the cabro parking.
131. The Plaintiff attributes the collapse of the boundary wall and the resultant loss and damage to the gabions. It is her case that the gabions were erected negligently and unlawfully by the 1st Defendant, without the requisite permits and approvals from the 2nd and 3rd Defendants; that the gabions were structurally unsound; and that their presence precipitated the collapse of the wall.
132. She further contends that the height of the gabions has occasioned loss of privacy and security to her property. It is also her position that the 2nd and 3rd Defendants were negligent in failing to act upon her complaint, thereby allowing the construction to proceed.
133. The 1st, 4th and 5th Defendants dispute any causal link between the gabions and the collapse of the wall. Their case is that the damage was caused by other factors, and if any loss was suffered, it was due to an act of God for which they cannot be held liable.
134. The 2nd Defendant disclaims any knowledge of the construction of the gabions on LR No. 7741/254 and maintains that no approvals for such works were issued by it.

Whether the 1st Defendant lawfully constructed the gabions on his property.

135. In the Amended Plaint, the Plaintiff averred that the 1st Defendant constructed gabions on his property without approvals from the 2nd and 3rd Defendants.
136. Specifically, the Plaintiff's case is that the 1st Defendant constructed the gabions without obtaining an Environmental Impact Assessment (EIA) licence from the 3rd Defendant and without a development permit from the 2nd Defendant, contrary to Sections 30 and 33 of the Physical Planning Act, Cap 286.
137. It is her position that under Section 58 of the Environmental Management and Coordination Act (EMCA), any person undertaking a project listed in the Second Schedule must first submit a project report to the National Environment Management Authority (NEMA) and, where required, undertake a full EIA study before being issued with a licence.
138. According to the Plaintiff, the gabions constructed by the 1st Defendant are out of character with the surrounding environment and, by virtue of Clause 3 of the Second Schedule to EMCA, fall within the category of high-risk projects.
139. It is her position that Clause 3 captures activities or structures that are inconsistent with their surroundings, and that such projects require the proponent to undertake an EIA study before a licence can be issued by the relevant authority.
140. Section 30 of the Physical Planning Act (repealed in 2019) provides that no person shall carry out development without permission granted under Section 33. The term "development" under Section 2 includes the making of any material change in the use or density of any buildings or land or the subdivision of any land and the erection of buildings or works for improvement or alteration.



141. The Plaintiff contends that the construction of the gabions constituted such development and therefore required development permission from the 2nd Defendant.
142. The question for this court's determination is whether the construction of the gabions in this case fell within the ambit of either the Second Schedule to the EMCA or the definition of "development" under the Physical Planning Act.
143. Gabions are wire-mesh cages filled with stones, primarily used for erosion control and slope stabilization. Landscaping, which includes such structures, is ordinarily a low-impact activity intended to conserve rather than degrade the environment. The National Environment Tribunal in *Burnt Oak Securities Limited vs NEMA* [2022] KENET 758 (KLR) held that landscaping and similar low-risk works do not necessitate an EIA study.
144. By their nature, gabions do not pose a high risk to the environment, and they are properly classified as mitigation or stabilization measures. Gabions do not materially alter the use of land, save for exceptional cases where large-scale construction changes riparian access or effects reclamation.
145. PW2, James Kibuchi Karanja, a civil and structural engineer, testified that as at 25th February 2012, the 1st Defendant's gabions were failing due to an inadequate ratio of thickness to height, rendering them unable to withstand horizontal lateral forces. It was his evidence that the lower section of the gabions had been pushed towards the masonry boundary wall, causing severe structural distress.
146. It was the evidence of PW2 that the backfilling on the 1st Defendant's side altered the slope of his land and that a structural retaining wall was necessary for a sloping terrain to hold deposits (gabions) on the higher side. Without such deposits, he stated, a structural wall would not have been required.
147. The evidence by PW 2, and the photographs that were produced by the Plaintiff in evidence shows that the erection of the 5 meters high gabions constructed adjacent to the boundary wall of the development on LR No. 7714/255, which collapsed on 28th December, 20212, and damaged part of the Plaintiff's wall, was out of character with the surroundings and constituted a major change in land use.
148. The erection of the gabions for purposes of landscaping of the 1st Defendant's land falls under Clause 3 of the Second Schedule to EMCA, which categorises as high-risk any activity or structure "out of character" with its surroundings or not in keeping with the general character of the area, which in this case was sloppy.
149. Therefore, this court is in agreement with the Plaintiff's submissions that the 1st Defendant erected the gabions in contravention of Section 30(1) and (2), and 33 of the Physical Planning Act (repealed), without development permission and without approved structural plans, and Section 58 of the Environmental Management and Coordination Act (EMCA), which requires submission of a project report and environmental impact assessment before undertaking activities listed in the Second Schedule.
150. Consequently, it is the finding of this court that the impugned gabions were unlawfully constructed by the 1st Defendant.

Whether the 1st Defendant's gabions were negligently constructed and caused the collapse of the Plaintiff's wall

151. Negligence is established where there exists a duty of care, a breach of that duty, and a causal link between the breach and the loss, the type of loss being reasonably foreseeable. These principles, as set out in *Blyth vs Birmingham Waterworks Co.* (1856) 11 Ex Ch 781 and *Donoghue vs Stevenson* [1932]



AC 562, require the court to consider whether the 1st Defendant failed to take reasonable precautions to avoid acts or omissions likely to cause harm to his neighbour or her property.

152. In *Blyth vs Birmingham Waterworks Company* (1856) 11 Ex Ch 781 Baron Alderson defined negligence in the following terms: -

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done” (See Salmond and Heuston on the Law of Torts 9th Edition).”

153. Lord Atkin in the case of *Donoghue vs Stevenson* [1932] A.C. 56 aptly articulated the principle of foreseeability and proximity in the following words:

“The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, “Who is my neighbour?” receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be 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. This appears to me to be the doctrine of *Heaven v. Pender* as laid down by Lord Esher when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith L.J. in *Le Lievre v. Gould*, 1893, 1 Q.B. 497. Lord Esher at p. 497 says :

“That case established that under certain circumstances one man may owe a duty to another even though there is no contract between them. If one man is near to another or is near to the property of another a duty lies upon him not to do that which may cause a personal injury to that other or may injure his property.”

154. There is no dispute that the 1st, 4th and 5th Defendants owed the Plaintiff a duty not to undertake works on their land in a manner that would endanger her property. Whether this duty was breached is a question of fact to be determined from the evidence adduced. Pursuant to Section 107 of the [Evidence Act](#), the burden rested on the Plaintiff, as the party alleging the breach, to prove the facts upon which her claim is founded.
155. The evidence before the court shows that the boundary wall was already in place when the 1st Defendant purchased LR No. 7741/254 in 1996. In 2011, the 1st Defendant constructed gabions approximately 5 metres high running alongside the boundary wall.
156. By November 2011, less than a year later, cracks had appeared on the boundary wall and ancillary structures, prompting the Plaintiff’s tenant to vacate the premises. PW4, who resided on the property, gave direct evidence of this deterioration, which was corroborated by DW4, the Defendants’ own engineer, who confirmed that cracks had been noticed at the time.
157. PW2, Engineer James Karanja, inspected the wall and found that the collapse was caused by horizontal forces from the adjacent gabion, whose ratio of thickness to height was insufficient to withstand lateral pressure. Photographs taken in February 2012 showed the gabion already failing. He concluded that



- the lower portion of the gabion had been pushed towards the boundary wall, leading to its eventual collapse.
158. According to the evidence of PW2, the gabions were vertical and the successive courses of the gabion boxes were not staggered. It was his evidence that there was also no provision of the weep holes for dissipation of hydrostatic pressure where the gabions bordered the double garage, servant quarters and leisure center.
 159. PW2 recommended that the design of the gabion need to be checked prior to reconstruction to ensure that the heights, width and foundation requirements are sufficient to withstand forces that will not cause further pushing, overturning and sliding effect.
 160. He further recommended that the existing gabions behind the masonry wall, gate house, double car garage, servant quarter and leisure need to be removed to relieve the facilities from further damage, and any foam of walling adopted should not transmit any loading to the masonry wall.
 161. This opinion was not effectively challenged. Indeed, DW4 conceded in cross-examination that the gabions were too high, improperly positioned above the existing wall, the gap of 300mm between the gabions and the wall was insufficient, and that a gap of 2 metres was necessary to avoid exerting pressure. DW1, the contractor who oversaw the construction of the gabions, admitted that he had no professional qualifications in the construction of gabions.
 162. On this evidence, this court is persuaded to accept PW2's findings as more credible. His assessment was based on professional qualifications, site inspection, photographic evidence, and engineering principles, while DW4's testimony contained significant concessions thus undermining the Defendants' case.
 163. The sequence of events is telling: a stable wall for fourteen years; gabions constructed in 2011; cracks within months; and collapse in December 2012. On a balance of probabilities, the Plaintiff has proved that the gabions, as constructed, were the proximate cause of the damage to the Plaintiff's wall, garage and servant quarters. The harm was reasonably foreseeable, and no adequate preventive measures were taken despite visible signs of strain.
 164. This court therefore finds that the Plaintiff has established negligence on the part of the 1st Defendant in the construction of the gabions, and that this negligence caused the collapse of the boundary wall and the damage to the Plaintiff's property.

Whether the 2nd and 3rd Defendants were negligent

165. Although this court has found that the construction of the gabions by the 1st Defendant fall within the projects specified in the Second Schedule to EMCA, and constitute "development" as defined under the Physical Planning Act, there was no statutory obligation on the 2nd and 3rd Defendants to issue approvals or to exercise oversight over the construction when they were not made aware of the construction of the same in the year 2011.
166. Consequently, it is the finding of the court that the Plaintiff has not demonstrated, on a balance of probabilities, that any act or omission by the 2nd or 3rd Defendants caused or materially contributed to the collapse of the wall or the damage to her property.



Whether the 1st, 4th and 6th Defendants created a continuing nuisance that has caused the Plaintiff to suffer loss of privacy and loss of security

167. The Plaintiff further contends that the gabions constructed on the 1st, 4th and 5th Defendants' property have created a continuing private nuisance by allowing persons standing on them to overlook her land, thereby depriving her of privacy and security.
168. Private nuisance refers to the unlawful interference with a person's use and enjoyment of land. A person is entitled to bring a cause for private nuisance if they have suffered invasion of some propriety or other interest in land. (Winfield and Jolowiz' at page 494).
169. As stated in Clerk & Lindsell on Torts, 18th Edition at page 973, private nuisance arises where an act or omission interferes with the ownership, occupation, or lawful enjoyment of land or rights connected to it, as distinct from public nuisance, which concerns rights enjoyed by the public at large.
170. Private nuisance protects against a reduction in the usefulness or enjoyment of the land itself, not against personal discomfort suffered by the people living on it. (see Prof. Francis Newark's "The Boundaries of Nuisance" (1949) 65 LQR 480, p 488-489).
171. In Haroun O. Nyamboki vs Catholic University of Eastern Africa (A.M.E.C.E.A) [2017] KECA 744 (KLR), the Court observed that private nuisance arises where the consequences of a person's lawful use of his land extend beyond its boundaries onto a neighbour's land, causing either damage or interference with its use and enjoyment.
172. The law of private nuisance is concerned with balancing the rights of an occupier to what they like as against the rights of their neighbour not to be interfered with. (see Sedleigh-Denfield vs O'Callaghan [1940] AC 880,903).
173. The law of private nuisance accords priority to the ordinary use of land over particular or uncommon uses. Thus, even where a defendant's activity substantially interferes with the ordinary enjoyment of a claimant's land, no liability will arise if the activity itself constitutes the ordinary and reasonable use of the defendant's own land.
174. In Bamford vs Turnley (1862) 3 B & S 66 at 83, Bramwell B explained that "acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action." He justified this principle on grounds of mutual benefit, noting that the very nuisance one landowner might complain of is often mirrored by similar acts in the ordinary use of his own land. He termed this the rule of "give and take, live and let live."
175. This principle of reciprocity, which is one of equal justice, was endorsed in Grace Nyangwechi Fay vs David Achango & Another [2013] KEHC 3439 (KLR), where Mutungi J observed that the true test is whether the degree of interference amounts to an unreasonable user of one's land to the detriment of a neighbour.
176. In Fearn vs Board of Trustees of the Tate Gallery [2023] UKSC 4, the United Kingdom Supreme Court held that intrusive visual overlooking, where it is persistent, substantial, and out of the ordinary, can amount to an actionable nuisance. That case involved a public viewing gallery attracting hundreds of thousands of visitors, creating constant and oppressive visual intrusion into neighbouring flats.
177. In the present case, the Plaintiff has testified, and her former tenants PW4 and PW5 have confirmed, that persons standing on the gabions build by the 1st Defendant can see into her property. Photographs have been produced to this effect.



178. The Plaintiff has shown that the gabions are used in a manner that results in persistent or oppressive overlooking beyond what may be expected between neighbouring properties.
179. Indeed, the 1st Defendant changed the natural contours of his land by building the gabions, which in effect allows people on his land to see inside the Plaintiff's property. Had the 1st Defendant not changed the contours, the Plaintiff's right to privacy would not have been breached. Consequently, the court concludes that the 1st, 4th and 5th Defendants' use of their land is unusual, excessive, and unreasonable and constitutes private nuisance.

Whether the Plaintiff is entitled to the prayers sought

180. Having found that the 1st Defendant unlawfully and negligently constructed gabions on LR No. 7741/254, thereby causing the collapse of the Plaintiff's boundary wall and damage to ancillary structures including the gate house, double car garage, servant's quarters and leisure centre, and having further found no negligence on the part of the 2nd and 3rd Defendants, this court now turn to the question of remedies.
181. The Plaintiff seeks, inter alia, orders compelling the Defendants to reconstruct the damaged boundary wall and ancillary structures, or in the alternative, to permit her to do so at their cost. She also seeks the removal of the gabions, general and special damages, and costs of the suit.
182. The evidence before this court shows that the parties engaged in prolonged negotiations between 2014 and 2020, during which they appointed their respective engineers, James Karanja (PW2) for the Plaintiff and Anthony Wandu (DW4) for the Defendants.
183. The Plaintiff produced a report prepared by Eng. Josephat Oruru of Truebase Engineers & Associates Limited, dated March 2014. Upon investigations, Eng. Oruru concluded that the collapse of the Plaintiff's boundary wall was occasioned by horizontal forces arising from the gabions constructed by the 1st Defendant, which exerted undue pressure upon the masonry wall.
184. He further concluded that the consequential collapse of the gate house, double car garage, servant's quarters and leisure centre was directly attributable to the said pushing effects of the gabions and the granular material deposited at the higher level of the Defendants' property.
185. In that report, Eng. Oruru recommended, inter alia, the following remedial measures: that a reinforced concrete retaining wall be constructed with adequate provisions for storm water and ground water drainage; that all existing gabions be removed and replaced with properly compacted granular fill material in accordance with AASHTO T180 standards; that a new boundary wall be constructed for the Plaintiff's property, including the sections incorporating the servant's quarters and leisure area, complete with an electric fence system; and that the gate house, double car garage, servant's quarters and leisure centre be professionally reconstructed and refurbished.
186. Additional measures included the unblocking of storm drains, construction of an open drain along the retaining wall, a paved walkway to minimise silting, and that all works be undertaken under the supervision of a competent structural engineer.
187. The report was accompanied by a Bill of Quantities which placed the estimated cost of implementing the recommendations at Kshs. 6,381,842.25 inclusive of contingencies.
188. The Plaintiff also produced a subsequent report prepared by Eng. J. K. Karanja of Buildworth Construction Company, dated 14th March 2018. This report reiterated the conclusions of the 2014 report and provided an updated appraisal of the Bill of Quantities. The revised figures placed the



total estimated cost at Kshs. 8,046,260.00 inclusive of contingencies. The cost of repairing the amenities(excluding the retaining wall) was put at 2,905, 523 in the 2018 report.

189. Taking into account the two reports produced by the Plaintiff and the totality of the evidence on record, this court is satisfied that the appropriate remedy is to adopt the updated appraisal contained in the 2018 report of Eng. J. K. Karanja.
190. For avoidance of doubt, the 1st, 4th and 5th Defendants shall bring down the wall that was reconstructed, which shall be replaced with a professionally designed retaining wall, taking into account the necessary height, width and foundation to prevent pushing, overturning and sliding effects.
191. The Plaintiff has also claimed loss of rental income from December 2011, particularised as Kshs. 320,000 per month for the period January 2012 to April 2015 (40 months), amounting to Kshs. 12,800,000, together with continuing damages for rental income at the rate of Kshs. 320,000 per month from May 2015 until the Defendants undertake the repair of the suit property.
192. In support of this particular claim, the Plaintiff called several witnesses who testified as to their tenancy arrangements over the property known as LR No. 7741/255. PW3 stated that between 2005 and 2013 she occupied the property intermittently on a short-term basis, but ceased to do so after 2013 on account of the construction of the gabions. In cross-examination, she confirmed that she had resided at the premises in 2006, 2009 and 2011.
193. PW4 testified that she had entered into a tenancy agreement with the Plaintiff for two years commencing 1st July 2008 at a rent of Kshs. 290,000 per month, followed by a further two-year lease dated 24th June 2010 at a monthly rent of Kshs. 320,000. She vacated the property in November 2011 when she observed cracks on the perimeter wall, garage, servants' quarters and guardhouse. She stated that she expressed interest in resuming tenancy in 2013 at an increased rent of Kshs. 320,000 per month, but the lack of repairs frustrated her interest.
194. PW5 testified that he had resided at the Plaintiff's property intermittently during his annual visits to Kenya commencing July 2012. He stated that on his visit in December 2020, he inspected the premises but declined to stay there due to its dilapidated state. In cross-examination, he confirmed that he generally visited Kenya once a year for periods of between four and six weeks.
195. PW6 testified that he had entered into a tenancy agreement with the Plaintiff dated 31st January 2012 for the first floor of the house at a monthly rent of Kshs. 195,000. He produced in evidence the tenancy agreement. He vacated the property in February 2013 following the collapse of the gabions in December 2012, at which point he obtained a refund of his security deposit. He further stated that in January 2014, he sought to renew the lease but found the property uninhabitable on account of its poor condition.
196. From the evidence, it is clear that only PW4 and PW6 produced tenancy agreements for defined periods of two years. PW4 leased the entire property between 2008 and 2011, while PW6 leased the first floor from January 2012 until February 2013. Both produced notices showing that their non-renewal was due to damage to the premises. The other witnesses, PW3 and PW5, did not establish tenancy of comparable duration.
197. PW3 confirmed that she only occupied the property intermittently in 2006, 2009 and 2011, while PW5 resided at the premises occasionally during annual visits. Their evidence, while corroborative of the state of disrepair, does not amount to proof of sustained rental arrangements. The Court further notes that the Plaintiff testified that she resumed possession in June 2016.



198. The principles governing causation and remoteness were restated by the High Court in *Anastassios Thomos vs Occidental Insurance Company Limited* (2017) eKLR, the High Court held that:-

“When it comes to remoteness of damages, the court ought to determine whether there was sufficient cause or proximate connection between the defendant’s negligence and the damages suffered by the Plaintiff that is recognisable as a matter of policy that the Defendant should pay the damages.”

199. The court further stated as follows:

“In the work of Charles worth & Peray on Negligence, 7th Edition, it is stated as follows:

“Evidence of causation must be given on behalf of the plaintiff. Before a case can be considered, either direct or circumstantial evidence must be called on behalf of the plaintiff. Whatever evidence is so called, it must tend to show how the accident happened and how, as a result, he sustained his personal injuries or suffered his damage. Such evidence also must show that on a balance of probabilities, the most likely cause of the damage was the negligence or breach of duty of the defendant, his servant or agent and not solely the negligence of some other person. If he fails to establish that the defendant caused the harm, of which he complains, or some part of it, then his action will fail. Such a failure will result whether this happens to be expressed in terms of lack of result or for reasons of remoteness.

It is a question of law, whether the evidence adduced allows a reasonable finding of causation, but it is a question of fact, whether any particular head of damages is so caused by a defendant’s negligence or breach of duty.” (emphasis added)

200. Applying those principles, this Court is satisfied that loss of rental income was a direct and foreseeable consequence of the collapse of the Plaintiff’s boundary wall. On the evidence, the Plaintiff is entitled to loss of rental income at the rate of Kshs. 320,000 per month from January 2012 until June 2016, a period of 54 months. This yields a total of Kshs. 17,280,000.00.

201. The Plaintiff also claimed direct expenses comprising engineering fees of Kshs. 75,000/- and agent’s fees of Kshs. 205,000/-. These were supported by documentary evidence in the Plaintiff’s bundle and are therefore allowed.

202. As regards the claim for loss of employment income, the Court is not persuaded. While the Plaintiff contended that she forfeited her employment in the United Kingdom due to her extended stay in Kenya, she adduced only payslips for 2013 and 2014. She did not adduce any contract of employment or termination notice. More fundamentally, such a loss was not foreseeable as a natural consequence of the Defendants’ negligence. This claim is therefore disallowed.

203. Similarly, the out-of-pocket expenses comprising air tickets and related expenses at £1,228.85, phone cards at £300, and legal fees for Power of Attorney at £120, though pleaded, are not recoverable. They are too remote to have been within the reasonable contemplation of the Defendants.

204. In conclusion, judgment is entered for the Plaintiff as follows:

- a. A declaration be and is hereby issued that the 1st Defendant was negligent in the construction of the gabions on LR No. 7741/254, which negligence caused the collapse of the Plaintiff’s boundary wall and consequent damage to her gate house, double car garage, servant’s quarters and leisure centre.



- b. A declaration be and as hereby issued for the removal of the existing gabions on the 1st, 4th and 5th Defendants' land by the said Defendants, and restore the soil contours of the said land to the original position, before the construction of the gabions, within 90 days of this judgment.
- c. In the alternative to (b) above, the 1st, 4th and 5th Defendants, jointly and severally, within 90 days, to re-do the gabions, after obtaining permits and or licenses from the 2nd and 3rd Defendants, and in strict compliance with the Report of Engineer Karanja of 14th March, 2018, and whose height should be of such a nature that one cannot see inside the Plaintiff's property while standing on the said reconstructed gabions.
- d. In the event the 1st, 4th and 5th Defendants opt for (c) above, an order be and is hereby issued that the 1st, 4th and 5th Defendants bring down the reconstructed wall and replace it with a professionally designed retaining wall as set out in the report of Engineer Karanja dated 14th March, 2018, and to the satisfaction of Engineer Karanja, with the attendant open drains, upon receiving approvals from the 2nd and 3rd Defendants.
- e. An order be and is hereby issued that the 1st Defendant pay the Plaintiff Kshs. 2,905,523 for the construction of a new boundary wall, including the sections incorporating the servant's quarters and leisure area, complete with an electric fence system, the gate house, double car garage, and servant's quarters.
- f. An order be and is hereby issued that the 1st Defendant pay the Plaintiff Kshs. 17,280,000. being the loss of rental income.
- g. An order be and is hereby issued that the 1st Defendant pay the Plaintiff Kshs. 280,000 being the engineer's and agent's fees.
- h. An order be and is hereby issued that the 1st Defendant pay to the Plaintiff general damages of Kshs. 8,000,000 for private nuisance.
- i. The 1st Defendant to pay interest on the above amounts at court rates from the date of the filing this suit until payment in full.
- j. Costs of the suit to be borne by the 1st Defendant.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 2ND DAY OF OCTOBER, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Ms. Nyangweso for Muthuri for Plaintiff

Mr. Ondieki for 1st, 4th and 5th Defendant

Mr. Karimu for Gitonga for 3rd Defendant

Ms Atieno for Koceyo for 2nd Defendant

Court Assistant: Tracy

