REPUBLIC OF KENYA

IN THE ENVIONMENT AND LAND COURT AT THIKA

ELC NO. 372 OF 2017

(FORMERLY NAIROBI HCCC 816 OF 2014)

DANIEL MUCHERU & OTHERS.....PLAINTIFFS

VERSUS

NAIROBI CITY COUNCIL.....1ST DEFENDANT

STRABAG-BAU-AG.....2ND DEFENDANT

LIMA LIMITED.....3RD DEFENDANT

JUDGMENT

There are seven consolidated cases herein for determination; being **HCCC No.5730, 5351, 5348, 5349 and 5350 all of 1990.** However, only five out of the seven cases that were consolidated were heard and proceedings recorded in **HCC 5348 OF 1990,** which was later changed to **Nairobi ELC 816 of 2014,** and subsequently **Thika ELC No.372 of 2017**. The Plaintiffs though in separate Plaints, all brought claims against the Defendants vide their various Plaints and sought similar orders against the Defendants. The orders sought were;

(a) General Damages.

(b) An order for an injunction restraining the defendants and or their agents, servants from carrying on the said activities until the determination of this suit.

(c) Costs of this suit and interest thereon.

(d) Any other or further relief that this Honourable Court may deem fit to grant.

The Plaintiffs in their Plaints averred that on or about **1988**, the City Council of Nairobi acquired land in **Ndakaini** area in **Muranga District** for construction of the **3rd Nairobi Water Project**. That the 2nd and 3rd Defendants were given work for construction and vide Kenya Gazette Notice **No.970 of 3rd March 1989**, the City Council of Nairobi acquired part of their parcels of and being **No. 3/Gituru/418, 419,420,421 and 422** for a quarry site and the Defendants started their operations at the said site. It was their contention that prior to the commencement of the operations, the 2nd and 3rd Defendants had declared an area of about 300 metres surrounding the quarry site as a dangerous or risky zone due to the effects of the operations to be carried out in the quarry without compensating the Plaintiffs and other affected people and/or putting alternative measures to prevent the likely disturbance and loss, damage and destruction and therefore they have suffered a lot of loss and Damage.

The Plaintiffs outlined the particulars of loss and Damages as; presence of vibrations caused the Plaintiffs stone built houses to have cracks all over, flying stones destroyed roof tops causing unrepairable holes, stones landed on their parcels of land thus damaging crops that were growing and prevented the Plaintiffs from working on their shambas, destroyed tea shrubs and in effect tea leaves and the Plaintiffs could not keep their domestic animals on the land, Their children's were affected mentally and their safety was not guaranteed and generally causing disturbance and they therefore claimed jointly and severally against the Defendants.

The suit is contested by the 1st and 2nd Defendants who filed their separate Defences.

The 1st Defendant, denied the contents of the Plaints and averred that there was no principal and agency relationship between them and the 2nd Defendant who was a contractor. It was their contention that the acts complained of did not amount in law to a nuisance and none of the acts complained of create the alleged or any nuisance to the Plaintiffs as per the Plaints or interfere with the use or enjoyment or cause inconvenience or suffering to the Plaintiffs or their families as alleged. The 1st Defendant averred that the Plaintiffs suits are misconceived and should be struck out as they do not have the **locus standi** in the proceedings and the remedy sought by them is misconceived in law. That the 1st Defendant is not a party to the alleged acts and the court was urged to dismiss the Plaintiffs' suits.

The 2nd Defendant in its defence denied the contents of the Plaints and averred that it awarded to **Lima Limited** the contract in respect of the project and further averred that they were executing the same not as agents of Nairobi City Commission but as independent contractors.

They further averred that the warnings that were given to the Plaintiffs had been given without any legal obligation on them and they were therefore not obliged to compensate the Plaintiffs as alleged. It was their further contention that the Plaintiffs have not suffered any loss and or Damages and though they were not obliged to have taken all necessary measures to minimize inconveniences if any, that was caused to the Plaintiffs as a result of operating the quarry in question and prayed that the suits be dismissed.

After many years and numerous Applications, the matter was finally set down for hearing and proceeded via viva voce evidence wherein **five** Plaintiffs gave evidence in support of their claims and the Defendants did not call any evidence or witnesses.

PLAINTIFF'S CASE

PW1 - Danson Njoroge Kinyanjui who filed his Plaint on **2nd November 1990,** adopted his witness statement dated **28th January 2014,** and list of documents dated **29th January 2015** as part of his evidence. He further testified that he sued Nairobi City Council because it acquired **0.18 ha** of his parcel of land known as **Loc.3/Gituru/422**, to construct **Ndakaini Dam**. That 1st Defendant had contracted **Strabag –bau Ag** and **Lima limited** to carry out the construction and who excavated materials from his land. He stated that his land was in the risk zone and he produced a map of the portion acquired as exhibit 2, and the title deed exhibit 1.

It was his evidence that the acquisition of the land was gazetted in the Kenya Gazette Notice of **3rd March 1989** and the same is listed as an exhibit in his list of documents. He further testified that when the construction work began, he and his family were not given an alternative place to move to. It was his further testimony that the contractors cleared the area and drilled holes and filled them with explosives and in the process, the drilling and explosion caused his house to develop cracks and holes. Further that the said work took four years and that they were warned that during the drilling they needed to move out of the risk zones and they would occasionally be chased away by Administration Police Officers and security guards and moved about 600 metres from the risk zone, around three or four days before the explosions and the said activities would go on during the day.

It was his evidence that the said explosions caused great disturbance as a lot of dust fell on their tea bushes and land and there was nothing growing on their land and their children could not sleep during the

day and at night and he was forced to move out of the house with his 3 months old children.

It was his testimony that he tried to seek help from the District Commissioner, Muranga who visited the site and saw the damages, but he was not able to stop the construction. He also stated that the Agricultural Officer also visited their farms and confirmed that the tea bushes could not sprout properly because of the dust from the crashing of the stones. He stated that he had displayed the photographs of the cracked houses in documents No. 7 and 8. It was his evidence that on **15th October 1990,** officers from the Defendants took photographs of his houses and informed him that the same would be used for analysis. He also testified that his toilet also sank and it was impossible to use it and he produced the list of documents as exhibit.

He urged the Court to award him **General Damages** and **costs** of the suit. Further that he suffered special damages as his permanent house was destroyed, he lost the house, water tank, his kitchen and he hired grazing pastures for his cows and lost his tea and tea farm and his family was disturbed for the four years. He further testified that the 2nd Defendant in his Defence admitted that it was contracted by the 1st Defendant.

On cross examination, he stated that his land was **5.35ha** and part of it was acquired for purposes of construction of Ndakaini dam. He further testified that he got the title deed in **2008,** and that in **1990**, he did not have it. He stated that as per Kenya Gazette Notice dated **15th February 1989(no.970)** the acreage to be acquired from him was **0.64 Ha** and that the same was to be acquired by the Government. He also testified that the Government acquired **0.18ha,** from him and there was no other Kenya Gazette Notice to revoke the acreage. He also stated he did not have any documents to show that his **0.18ha** was acquired and what he was paid as compensation. It was his testimony that though it was the government that acquired this land, the same was done on behalf of the City Council of Nairobi and he had sued the 1st & 2nd Defendants who in turn said that there was another Defendant called **Lima Limited**. It was his evidence that in the **Security Range** by blasting, his land is shown and it is completely under the **risk zone** and his land was in plot 79 which had been subdivided into various plots. He stated that the Security Range does not refer to the area but only referred to quarry A. It was his evidence that the area District Commissioner gave out the Security Range document on **12th October 1990.**

He further testified that the Security Range was given to the District Commissioner to show that they were occupying the risk zone and the same was drawn in **1987**, and the land was subdivided in **1985** and it fell within the **Security Range** by blasting. He stated that his entire

land was not acquired and he lives on the portion that was left after acquisition .He got a report from the Agricultural Officer on **17th June 2004,** after he had filed the present suit and by the time of complaining to the Agricultural Officer in **1990**, the work had stopped and he was advised to remove the stone and to wait for the rains to wash out the dust but some of the tea bushes dried up before the rains. It was his evidence that he had nothing to show on how much he would have harvested from the tea bushes. He testified that before the construction of the Dam, he kept cows and chicken, and when the blast began, he transferred his cows. Further that his family was affected mentally as his children were in and out of hospitals and could not sleep well though he did not have evidence to prove the same. On the photographs, he testified that the house was his and it was photographed by the 2nd Defendant, and the machines were 100 meters from his house, though the house could not be seen. It was his testimony that he has not shown the stones which were on his land as there were green maize on the side. However he showed the photographs of the trucks that were on his land and that he sold **228.5 kgs** of tea in November 2003.He did not show what he sold **1989** and **1990**. He further stated that the government did not compensate him for the whole of his land but a portion of it.

In re-examination, he stated that the Report from the Agricultural officer was compiled in 2004, though she had visited the land in 1991. He testified that the parcels of land are given and his parcel is **No.422** the said report showed that on **12th October 1991**, there was reduction of tea harvested. He further testified that his title deed was issued in **2008**, but it was registered in **18th December 1985,** and the register was opened on **2nd September 1985**, as per the title deed. He stated that his land **No.422** was on the risk zone

and was partially acquired.

PW2 Alphazard Karago Kinyanjui testified that he is the Plaintiff in **HCCC No. 5351/1990,** and adopted his witness statement dated **8th January 2014**, and relied on his list of documents. He also stated that Nairobi City Council participated in acquisition of his land **Loc.3/Gituru/418,** and the title in his name was issued in 1986. He testified that the land acquired was **0.14ha** which is approximately one **1 acre** and his land was **1.04ha** and he had a **Kenya Gazette Notice** to show that his land was acquired. It was his evidence that his land was partially acquired and then the Defendants started to clear the area. Further that and the 2nd Defendant began drilling holes on the acquired area and there was a distance of **300 metres** within the risk zone and his home was 100metres from the risk zone and that was where they were excavating ballasts through explosions and they were using dynamites to detonate the explosives. Further that before detonations, there were sirens and they were all required to run away from the risk zone and thereafter there would be heavy tremors and shaking of the grounds and the stones would scatter all over and there was even one person who lost his life due to the explosions. He stated that the explosions would be heard about 5km away and they would run and hide, carry their families return in the evening after sirens were sounded for them to go back.

He stated that the explosions lasted from **1990** to **1994** and at one time the detonations swept their homes and stones were scattered all over. That he went to see the **Muranga District Commissioner** over the said explosions, who visited the area on **12th October 1990** and the area residents complained to the District Commissioner about the explosions. That he was accompanied by the **Nation Media Group** and the District Commissioner gave the residents a map to show what areas were risk zones. That is when he discovered that his land was within the risk area being plot **No.418**. Further that the said damages were reported by the Daily Newspaper of **18th October 1990** which also showed the crashes and the ballast.

It was his testimony that his house got cracks on the walls and the iron sheets were pierced. Further that he was an employee and member of KTDA and he produced a certificate issued in **1976** to that effect. He further stated that he planted 3000 tea bushes which bushes were affected by the explosions as per the Agricultural Officer Report exhibit 6. The said report showed that his tea delivery had reduced by 50%. It was his evidence that the reduction continued until 1995, and all other crops were also affected. It was his testimony tthat his affected land was 1.5 acres and he valued his house after repairs. He also produced as exhibits, **10 receipts** showing that he paid for the repairs of his house amounting to **Kshs.405,305/=.** He further testified that he had to sell his cows at a throw away price and sought for damages as the disturbances caused by the explosives affected his life.

On cross examination, he stated that he wrote a demand letter to the Commissioner of Lands and his land was **No. 418**.Further that he has not been paid any compensation and from the Kenya Gazette Notice, his land was compulsorily acquired by the government, and the land was not acquired fully which was supposed to be **1.04ha**. He stated that his title deed, dated **10th February 1986**, was a freehold and the acreage is not indicated. He testified that he did not know if the Kenya Gazette Notice was revoked and that he acquired the title deed before the land was acquired. It was his contention that the process began in **1988**, but the work on the ground began in **1990**, and that the Plaintiffs had not been compensated by the Government then, but they were later partly compensated. They received money from the Ministry of Lands and his cheque showed compensation was for **0.14ha** and had no record to that effect. That he was paid about **Kenya Shillings Sixty Thousand (Kshs.60,000/=)** in **1989** or **1990**. It was his evidence that the Defendants began occupying the land in **1988** and started clearing the area in **1989-1990** and his house was just outside the security zone. That the affected Plaintiffs only moved out during the blasting and they had not been required to vacate their parcel of land absolutely.

Further that his land was not shown on the security zone and is marked outside security zone, but his house was damaged and he produced receipts of **1993**, to show that he bought materials to repair the house but the receipts did not indicate that the materials were for plot No.418.That he took a loan to assist in the said repairs and had receipts showing that he had six cows and calves.The expenses for hiring grazing grounds for the cows were given at Kshs.200/= per day and thus a total of Kshs.43,200/=.Further that the Agricultural officer in charge of the area prepared a report via a letter dated **17th June 2004,**

showing that production of the tea harvest had gone down since the detonation and explosions began and also due to pollution. The said report was on what the officer saw in 1991. Further that though a valuation of his home was done in 1995,it did not indicate the defects as per the repairs.. It was his evidence that the tree leaves were covered by dust and were brown in colour and the blast used to take place during the day but not on a daily basis.

PW3 - Daniel Muchiuri Joel, filed his Plaint on **13th October 1990**. He adopted his witness statement **dated 25th January 2014,** and produced a list of documents as exhibits. Since the matter was consolidated one, adopted the evidence of the other witnesses who had already testified. It was his evidence that he was claiming for damages and that the 1st Defendant in his Defence had stated that the 2nd Defendant should be held liable.

On cross-examination, he stated that the Defendants were served with his Claim though he did not have evidence of such service. That he lives in Gituru village which is about 150 meters from the quarry. It was his contention that before the project started, strangers visited his homestead and surveyed the area. Further that he was aware of the project and was told that the area under the risk zone would be affected by the explosions. He admitted to having seen the Kenya Gazette Notice three months after the project had started and that is when he learnt that his land had been acquired. He demanded for compensation and was assured of it by Nairobi City Council. He then filed a suit and reported the matter to the District Commissioner on **9th October 1990,** who visited the affected area. That during the visit the District Commissioner confirmed that there were damages .

Further that during the period of construction, he lived on his parcels of land and the work continued for 4 years .That due to the said explosions, his property was destroyed and such records are with the Defendants as the surveyor took photographs of his homestead. Further that the Defendants had assured them that damages would be paid by the 1st Defendant. He stated that he did not know the magnitude of the risks before the work began and the 1st Defendant was beneficiary of the Dam and the Construction work was done by the 2nd Defendant. It was his evidence that his land was declared a risk zone and the Defendants knew the risks involved.

On re-examination, he testified that he had seen the Kenya Gazette **No.970** of **2nd March 1989** that made reference to his land and that 0.66ha of his land **Loc 3/Gituru/419** was to be acquired but the 1st Defendant only acquired **0.105ha** and **0.606ha** was left intact. He produced the map showing risk zone as exhibit and that his land was in the risk zone but he was not given an alternative land. It was his contention that his witness statement was served upon **Kittuny & Wanyala Advocates** in **2014** and **Waruhiu Gathuru Advocates**. Further that the District Commissioner's visit was covered by the Daily Nation of **13th October 1990** and **16th October 1994.** That Agricultural officer visited the land and prepared a report already produced as exhibit. He also produced documents evidencing that he used to earn income from the tea harvest.

PW4 - Joseph Ngure the Plaintiff in **HCC 5349 of 1990,** testified that he filed a witness statement and list of documents and relied on them entirely and urged the court to adopt the evidence adduced by other

witnesses and he sought for damages and costs.

On cross-examination he testified that he lived on the same suit land and which was supposed to have been acquired by the 1st Defendant and that he was aware the project would take place. He further testified that he saw the Kenya Gazette Notice after the land was acquired and that he does not know how to read. Further that he saw the Kenya Gazette Notice when the District Commissioner showed it to them and he did not follow up on the compensation. He testified that he knew a project was being undertaken and his land was in the risk area zone. However, he never took any step to move out and several items were damaged and produced evidence to that effect.

On re-examination, he stated that his land is **No.421** and the **District Commissioner, Muranga** visited

after the work had started and that his land was acquired partially but not the whole of it. He admitted to have seen the map and his remaining land was also in the risk zone. He further testified that he used to sell his tea to KTDA and the tea production was affected. He stated that he did not move away from the area as he did not have any other place to go.

PW5 - Esther Wambui Njoroge stated her claim was in the Plaint dated **13th October 1990** and the same was filed by her husband who died in **2006**.She later took out Letters of Administration and substituted him. She testified that she filed her witness statement dated **29th January 2014,** together with a list of documents and relied wholly on the same and the evidence of the other Plaintiffs. She sought for damages and costs of the suit.

On cross-examination, she testified that her home is about 100 metres from the project and that she saw the Kenya Gazette Notice after two months. She further stated that she did not file a claim for compensation and did not move out of the project. Further that her property was destroyed and the project Administrators used to chase them before the explosion and they would then move back after the explosions. That she has children and although they were affected mentally, she had not filed a report on the said health issues. It was her testimony that they reported the matter to the District Commissioner, Muranga, who was given the map showing the parcels of land in the risk zone and he was also given the Agricultural report. It was her testimony that the Defendants should compensate them since the map of the risk zone was prepared by the project surveyor.

On re-examination, she testified that the **District Commissioner, Muranga**, got the Risk Zone map from the City Council of Nairobi and that her land s **Loc 3/Gituru/420** which Land initially belonged to her father –In law before it was distributed to her husband. That her her land was acquired partially although her whole land was in the risk zone. That she had grown tea bushes in her land, had kept cows and also had built a permanent house which she could not demolish.

The Plaintiffs closed their case and the 1st Defendant erected not to call any witnesses despite having numerous chances to present its case. The 2nd Defendant also failed to call any witnesses and closed its cases. The Parties were thereafter directed to file written submissions.

The Plaintiffs through the **Law Firm of King'oo Wanjau & Co. Advocates,** filed their submissions on **10th April 2018,** and submitted the Plaintiffs parcels of land after subdivision of **Loc.3/Gituru/79,** were all in the risk zone and all the Plaintiffs herein suffered damages as a result of the explosions and detonations due to the actions of the Defendants and the duty of acquisitions of the land lied with the 1st Defendant .Further that the Defendants ought to have acquired the whole parcels of land and then order the Plaintiffs to move out. The Plaintiffs submitted on the damages each of them suffered and urged the Court to award them the said damages. Further they urged the Court to consider the pain and suffering suffered by the Plaintiffs and also the inflation plus costs of the suit.

The 1st Defendant through the **Law Firm of Koceyo & Co. Advocates**, submitted that no documentary evidence was produced to prove the alleged damages and or injuries to life or properties. They relied on provisions of law and case laws amongst them **Section 107 of the Evidence Act Cap 80 laws of Kenya** that provides;

> ***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.''***

They therefore submitted that the Plaintiffs have not proven their case against the 1st Defendant as it is on record that the 2nd Defendant was acting as an independent contractor and therefore the 1st Defendant is

not liable for the actions of the 2nd Defendant and further submitted that the court is incapable of granting the orders sought in prayer 3 as the said Ndakaini Dam was already constructed to its conclusion.

The 2nd Defendant through the **Law Firm of Njenga Muchai** through the **Law firm of Waruhiu & Gathuru Advocates,** filed their submissions on **5th July 2018,** and submitted that the Plaintiffs titles to their land were extinguished in **1989** after they were compulsorily acquired by Government and compensation paid. They further submitted that the Plaintiffs did not prove that the Kenya Gazette Notice was revoked and on this they relied on the case of **Mike Maina Kamau…Vs…The Attorney General Elc No.1303 of 2014,** where it was submitted that the said case is distinct from the present case as the present Plaintiffs lay claim to what they had already been paid for. It was further submitted that the special damages have never been pleaded and therefore cannot be candidates for consideration. The court was therefore urged to dismiss the Plaintiffs suit with costs.

This Court has now carefully read and considered the available evidence and the exhibits produced in court thereto. The Court has also considered the written submissions the cited authorities and relevant provisions of law. It is the Courts opinion that the issues for determinations are;

1. ***Whether the Plaintiffs rights to the suit property were Extinguished.***

2. ***Whether the Plaintiffs are entitled to the reliefs sought.***

1. Whether the Plaintiffs rights to the suit property were extinguished.

It is not in doubt that vide Kenya Gazette Notice dated **15th February 1989**, the government allegedly compulsorily acquired some land parcels that belonged to the Plaintiffs and the Plaintiffs have acknowledged as much. Though in their evidence in court some of the Plaintiffs complained about the compensation that was given to them terming it as little while some of the Plaintiffs testified that they were never compensated, it is important to note that from the prayers sought in this instant claims, the Plaintiffs have not sought for proper compensation nor have they complained about the process of acquisition leading to compensation. If the Plaintiffs thought that the compensation that was afforded to them was not fair nor the process of acquisition, nothing prevented them from seeking orders from the Court for the same to be determined. In fact by the time these suits were being filed, it is clear that the government had already taken possession of the parcels of land in issue. The Plaintiffs alleged that they suffered damages as a result of the activities that was going on in the area. In the case of **Kenya National Highway Authority…Vs… Shalien Masood Mughal & 5 others (2017)eklr** the Court of Appeal in quoting the words of Mumbi J stated that;

> ***''It is not the duty of the Court to inquire into whether or not the acquisition process undertaken in the 1970's was done in accordance with the law. The validity or otherwise of that process could only have been questioned and determined within the time frame specifiefd in the Land acquisition Act, and by the parties from whom the land was being acquired….''***

Further in the case of ***Erastus Njonjo Mote & 3 others…Vs… Attorney General &2 others (2017)eklr***

> ***''On the contention by the Petitioners that although they were compensated the same was not adequate since valuation was not carried out, it is an issue which the Petitioners ought to have raised at the time of acquisition or with the Environment and Land Court……If after being compensated the Petitioners were not satisfied , they should have aired their grievances then, before the land vested in the National and/or county government or before the process was completed and construction commenced.''***

From the foregoing therefore, this Court finds that the Plaintiffs cannot complain about compensation while they had a chance of doing so but failed to do it. Once the Government acquired the land compulsorily, the suit lands therefore vested in the government and all rights held by the Plaintiffs with regards to the acreage of the suit land that was acquired therefore automatically was extinguished. See the

case of ***Niaz Mohammed Jan Mohammed…Vs… The Commissioner of Lands & 4 Others (1996)eKLR,*** the Court held that;

> ‘***’I am persuaded that the land in issue was acquired for a specific purpose which is consonant with the constitution and he Land Acquisition Act, namely for the construction of the public road. It matters not that the entire portion acquired was not used for that purpose. Unutilized portions in my view would remain as road reserves….I am persuaded by the argument that since the acquisition was done for the purpose of making a public road thus made remained a public road or street and vested in the local authority, the municipal Council of Mombasa to hold in trust for the public in accordance with the law. Needless to say this included the portion usually utilized for the tarmack road and the remaining portions which form part of the road reserve. Finally I am persuaded by the argument that as such trust land neither the local authority nor the government could alienate the land under the Government lands Act.’’***

It has not been denied by the Plaintiffs that the government took possession, of some portions of their parcels of land. However, their complaint is that upon taking possession, the Defendants embarked on a series of activities that would cause damages to them. Section **19(4) of the Land Acquisition Act** (Repealed) provided that;

> “***Upon taking possession, the land shall vest in the government absolutely free from encumbrance.’’***

Therefore having taking possession of the acquired portions of Land, ordinarily, all the rights that the Plaintiffs had in relation to the acreages that were compulsorily acquired, were supposed to have ben extinguished. See the case of **Erastus Njonjo Mote & 3 others …Vs… Attorney General &2 others (Supra)** the Court held that;

> ‘***’In any event the land currently vests in the National and/or county government and having been duly compensated the Petitioners have no rights over the same.’’***
>
> ***‘’they should have aired their grievances then before the land vested in the government.’’***

The Plaintiffs have contended that only part of their parcels of land were partly acquired as they were only paid part payment for compensation. It is significant to note that at the time their parcels of lands were being acquired, the Commissioner of lands was responsible for such acquisition on behalf of the government. Further the Commissioner of Lands was in charge of keeping the records pertaining to the acquisition of the suit properties.

In relation to whether or not the Plaintiffs had rights to the suit properties after Acquisition, this Court finds that their rights over the acquired portions of land were extinguished immediately the government took possession and the same vested in the acquiring entity. However the dispute herein is not whether the government acquired the stated suit properties but on whether the Defendants are liable to pay the Plaintiffs for the loss and the damages they allegedly suffered due to the activities that were undertaken by the Defendants during the construction of Ndakaini dam over the remaining portions of land that the Plaintiffs occupied and they still occupy todate

The Defendants have not disputed the said acquisition but have only alleged that upon acquisition of the suit property by the government, the Plaintiffs right on the acquired parcels of land were extinguished. The Plaintiffs alleged that the Government only acquired portions of their parcels of land and not their whole parcels of land. It is evident that the Plaintiffs did remain on their respective parcels of land and none of them move out. The Plaintiffs continued to live on the respective parcels of land and they are still there even todate. That is evident that not whole of their land parcels were acquired. The Court will hold and find that indeed the government did acquire portions of the Plaintiffs parcels of land and the Plaintiffs rights over the acquired portions were extinguished but the Plaintiffs remained in occupation and possession of the remaining unacquired portions of the parcels of land and their rights over the unacquired portions of land were never extinguished.

2.Whether the Plaintiffs are entitled to reliefs sought?

The Court has found that the dispute is not over the acquisition of the parcels of land but nuisance allegedly committed by the Defendants as against the Plaintiffs which nuisance caused loss and suffering on the part of the Plaintiffs. The Plaintiffs have therefore sought for damages for the loss suffered. The Plaintiffs claim is therefore not on land ownership and occupation but on pure environmental issues.

The Court has considered the Court record and noted that the Plaintiffs claims were filed in the **1990's.** In their respective Plaints, the Plaintiffs herein sought for Judgment against the Defendants for;

a) General Damages

b) An order of injunction

c) Costs of the suit

d) Any other relief that the Court may deem fit to grant.

The Plaintiffs gave evidence in Court and elaborated how the activities of the Defendants caused various injuries, damages and suffering on the part of the Plaintiffs. The Plaintiffs produced various exhibits to support their claim. The exhibits produced in Court were in support of Special damages. However, it is trite that parties are bound by

their pleadings. See the case of **Independent Electoral and Boundaries Commission & another…Vs… Stephen Mutinda Mule & 3 Others (2014)eklr the Court cited the case of Adetuon Oladeji NIG Ltd …..Vs…Nigeria Breweries PLC S.C 1/2002** where the court held that;

> ***''….it is now a very trite principle of land that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.''***

Though the Plaintiffs attempted to amend their Plaints or pleadings, to include to include various claims of Special damages, the said Application for amendment were declined by the Court and therefore the Plaintiffs are bound by their initial Plaints that were filed in the year **1990.**

It is not in doubt that the Construction of **Ndakaini Dam** was commissioned by **Nairobi City Commission** in **1989** and which later acquired the name of Nairobi City Council (Defunct) which is now referred to as County Government of Nairobi after the promulgation of the Constitution 2010.

The 1st defendant Nairobi City Council (Defunct) admitted that it awarded the construction of Ndakaini Dam (3rd Nairobi Water Supply project) to the 2nd Defendant. The 1st Defendant however submitted that the 2nd Defendant and **Lima Limited** were not agents of the 1st Defendant but were independent contractors and therefore the Plaintiffs suits raise no cause of action against the 1st Defendant and for the above submissions the 1st Defendant relied on the case of **Duncan Nderitu Ndegwa ….Vs Kenya Pylic Company Ltd & Another (2013)eklr** where the Court relied on the definition of **servant** and **independent contractor** as stated in **Bowstead** and **Reynolds on Agency**, **Nineteenth Edition at para 1? 030** which stated as follows;

> ***"the dichotomy of servant (or employee) and independent contractor stems from the law of tort; a person is more readily liable for the tort of his servants than for those of his independent contractor the difference thus on the degree of control exercise.''***

However, it is evident that the Defendants herein did not call evidence and specifically the 1st Defendant opted not to call any witness. Further the Plaintiffs had issued a **Notice to Produce** upon the Defendants

and in the said **Notice to Produce documents** dated **25th June 2004,** the Plaintiffs had sought for the copies of the Contract Agreement that would have stipulated the relationship between the Defendants herein and confirm whether the 2nd and 3rd Defendants were independent contractors or servants of the 1st Defendant. It is trite that he who alleges must prove as provided **by Section 107 of the Evidence Act** which provides;

> ***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.***
>
> ***When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.''***

Further it is trite that if a party fails to produce any evidence that is in its possession, the presumption is that such evidence would be detrimental to its case, See the case of **Abdnego Mutunga Muinde…Vs… Republic (2018) Eklr in which the Court cired the case Nguku …Vs…Republic (1985) KLR 412** where the Court of Appeal held that;

> ***"Where a party fails to produce certain evidence, a presumption arises that the evidence produced would be unfavourable to that party.''***

Therefore the court finds that there is no evidence that the 2nd and 3rd Defendants were independent contractors and that the 1st Defendant was not liable for their actions. This Court finds and hold that the 1st Defendant Nairobi City Council (Defunct) was the one which had mandate of constructing the **Ndakaini Dam**, and therefore it cannot be heard to say that the Plaintiffs have no cause of action against it.

It is evident from the Plaintiffs claims in their various Plaints stipulated the particulars of loss and damages that they suffered due to the actions of the Defendant s. The Plaintiffs also produced a report from the Agricultural officer dated **17th June 2004,** which showed that the Plaintiffs farming activities and produce suffered due to the effects of explosives and tremors during the construction of **Ndakaini Dam**. Further it is also evident that the then **District Commissioner, Muranga**, visited the site of the construction and witnessed the said destruction as per the **Daily Nation Newspaper Report** of **13th October 1990**. The Plaintiffs have testified that they used to be asked to move out of their homes when an explosion was imminent and they would return after sirens were given to alert them that the area was safe after the explosions. If that was the case, then it is evident that the Defendants allowed the Plaintiffs to live on their respective parcels of land during the said construction of Ndakaini Dam and cannot accuse the Plaintiffs of not moving out of the suit properties even after the said parcels of land were acquired by the government.

The Plaintiffs have sought for various payments of damages due to the alleged loss that they suffered during such explosions, detonations and blasts.

In the Plaintiffs submission it was admitted that the plaintiff in **HCCC No,5730 of 1990, Danson Njoroge Kinyanjui** suffered Special Damages of **Kshs.2,933,475/=** which was supported by receipts produced in Court. He also sought for damages for pain and suffering. However as the Court held earlier, the Plaintiffs are bound by their pleadings wherein they only sought for **General damages** and **No** special damages were claimed. Therefore this Court finds that the Plaintiff in HCC **No. 5730 of 1990** is not entitled to any special damages on pain and suffering but only General damages.

In respect of **HCCC No.5351 of 1990, A.K Kinyanjui,he** sought for special damages of **Kshs.3,500,000/=.** However, the said claim was not pleaded in the Plaint and he is consequently not entitled to the same.

Further in **HCCC No.5348/1990 Daniel Muchiri Joel** claimed **Kshs.1,640,000/=** as special damages which he tripled to **Kshs.4,750,000/=.**The Court also finds such claim not payable as the same was not pleaded and therefore the said **Daniel Muchiri Joel** is not entitled to that amount as Special damages.

In respect to **HCC No.5349 of 1990, Joseph Ngure Joel** claimed special damages of **Kshs.4,600,000/=** which he had not pleaded in his Plaint and therefore he is not entitled to it.

In respect to **HCCC No. 5350 of 1990,** the Plaintiff claimed special damages of **Kshs.4,869,805/=** which she had not pleaded in the Plaint as she is bound by her pleadings and she is not entitled to the same.

This Court has however considered the pleadings and the annextures thereto. The Plaintiffs did testify and elaborated their various loss as and damages that they suffered due to the activities of the Defendants on the areas around their parcels of land which activities were undertaken by the Defendants due to the construction of **Ndakaini Dam**. The plight of the Plaintiffs had even been highlighted by the Daily Nation Nesapaper of **13th October 1990** and which plight caused the then **Muranga District Commissioner** ,to visit the site and there was a Security Risk Range Map which was produced in court and it showed that the Plaintiffs parcels of land which were subdivision of **Loc.3/ Gituru/79,** were within the said **Security Risk Range** and were thus affected by the activities of the Defendants which included blasting of stones through explosives and which explosives caused tremors and spread of dust which dust, destroyed the Plaintiffs tea bushes. Further the Plaintiffs farming activities were affected. The plaintiffs are therefore entitled to General damages.

Blacks Laws Dictionary Ninth edition described General damages as follows;

> ***"General damages are damages that the law presumes follow from the type of wrong complained of; compensatory damages for harm that so frequently result from the tort for which a party be sued that the harm is reasonably expected and need not be alleged or proved. General Damages do not need to be specifically claimed.''***

As the Court has found and held above, the Plaintiffs suffered some losses and damages due to the explosive activities around their parcels of land which explosive activities affected them and their farming activities. The Plaintiffs needed not to prove the said General damages and the Court will take a global figure for all the Plaintiffs herein. Given the age of the

matter, herein the Court finds that each of the Plaintiff herein is entitled to General damages of **Kshs.2,000,000/=** for the loss and suffering suffered by each of the Plaintiff herein due to the activities of the Defendants during the construction of **Ndakaini dam**.

Further the Court finds that the Plaintiffs are entitled to costs and interest of the suit from the date of filing of their suits upto the date of payment in full at the Courts rate.

On any other **Relief** that the Court **may deem fit** to grant, the Court awards each and every Plaintiff herein incidental damages of **Kshs.100,000/=** due to expenses incurred in the course of pursuing their claims from **1990**.

Having now carefully considered the available evidence, and the rival submissions by the respective parties herein, the Court finds that the Plaintiffs have proved their respect claims on the required standard of balance of probabilities against the Defendants herein only in respect of award of **General damages**, **costs**, **interests** and **incidental damages.**

For the above reasons the Court enters Judgment for the Plaintiffs against the Defendants jointly and severally in the following terms;

a) ***Each of the Plaintiff is awarded general damages of Kshs.2, 000,000/=.***

b) ***Plaintiffs are entitled to costs of the suit and interest at the Court rate from the date of***

filing of the suits to the date of payment in full.

c) ***Each of the Plaintiffs herein is awarded incidental damages of Kshs.100,000/=.***

It is so ordered

Dated, Signed and ***Delivered*** at **Thika** this **14th** day of **June** 2019

L. GACHERU

JUDGE

14/6/2019

In the Presence of

Mr. Kere H/B for Ms. Kingoo Wanjau for the Plaintiffs

N/A for the 1st Defendant

N/A for the 2nd Defendant

N/A for the 3rd Defendant

Lucy Court Assistant

Judgment read in open Court

L. GACHERU

JUDGE

14/6/2019