

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MACHAKOS**

**ELC CIVIL SUIT NO. 9 OF 2019**

**ERDEMANN PROPERTY LIMITED .....**

**PLAINTIFF**

**VERSUS**

**SAFARICOM STAFF PENSION  
SCHEME REGISTERED TRUSTEES .....**

**DEFENDANT**

**JUDGEMENT**

1. The Plaintiff commenced this suit vide a plaint dated 3<sup>rd</sup> January 2019 and amended on 7<sup>th</sup> November 2022. It averred that it constructed a project christened “*The Great Wall Gardens*”, situated in Mavoko Municipality, comprising of two (2) and three (3) bedroomed apartments and several commercial units, which hosts over 3,500 families. Further, that since the project required adequate supporting infrastructure including road network and sewer line, it

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***Judgement***

commenced construction of a sub-trunk sewer line abutting the embankment along quarry road (Q39) and elevated along the corridor of existing roads including road reserves, and more particularly along the Nairobi Mombasa Highway and the Quarry Road (Q39).

2. It averred that the project was halted pursuant to this Court's Orders of 12<sup>th</sup> May 2017 (Hon. Justice Angote) in **Machakos ELC Petition No. 4 of 2017 [Safaricom Staff Pension Scheme Registered Trustees v Erdemann Property Limited, Kenya Urban Roads Authority, Mavoko Water & Sewerage Company Limited and Kenya National Highways Authority**, herein referred to as '*the Safaricom petition*'. Further, following the halting of the project, it was forced to adopt expensive alternatives, which included construction of a waste treatment plant measuring 7,840 cubic meters at an additional cost of kshs.150 million.
3. It is its case that on diverse dates including on 29<sup>th</sup> and 30<sup>th</sup> January 2019, the Defendant through its contractors and

agents commenced unlawful interference with its private property by excavating and demolishing its sub-trunk sewer line. It claims that the Defendant's said actions of destroying part of its sewer infrastructure caused substantial financial loss as it will cost about kshs. **324, 886, 269/=** to reconstruct it.

4. The Plaintiff sought for judgement against the Defendant for:
  - a) **An order of permanent injunction restraining the Defendant whether by themselves, their contractors, subcontractors, servants, agents, representatives, employees and /or anyone claiming under or through their name or title whatsoever; from excavating, demolishing or howsoever interfering with the Plaintiff's property in the sub-trunk sewer line constructed abutting the embankment works along the quarry road (Q39),and elevated along the corridor of existing roads and road reserves, and more particularly designed to run along the Nairobi Mombasa Highway and the Quarry Road (Q39).**

**b) Special damages for the reconstruction of the destroyed part of the Plaintiff's sewer line now at the sum of kshs.324, 886, 269/=.**

**c) General damages for loss and destruction of the Plaintiff's sub-trunk sewer line.**

**d) Interest on (b) and (c) at court rates from the date of filing this suit until payment in full; and;**

**e) Costs of the suit, on a full indemnity basis.**

5. The suit is opposed by the Defendant vide its amended statement of defence and counterclaim dated 15<sup>th</sup> February 2023. It denied allegations levelled against it in the amended plaint and contended that it is the registered owner of **LR No. 337/5183 [Original No. 337/974]**, where it is undertaking a mixed-use development christened '*Crystal Rivers*' which comprises residential units and a mall known as Crystal Rivers mall. Further, that in 2016, it became aware that the Plaintiff was undertaking sub-trunk sewer construction works, which would interfere with its

development thus it lawfully challenged the project vide the Safaricom petition and pursuant to the Court's judgment, the project was halted.

6. It alleged that after stoppage of the said sewer project, Mavoko Water & Sewerage Company Limited herein referred to as "MAVWASCO" implemented an alternative underground pumped sewer system to which the Plaintiff connected, rendering its original one redundant. It contended that the Plaintiff left remnants of its abandoned sub-trunk sewer line along Quarry Road (Q39) and off Mombasa Road, thereby interfering with the Defendant's Crystal Rivers Project and the access roads.
7. In the Counterclaim, it sought for the following Orders:

- a) **An order be issued, directing the Plaintiff to demolish, at its costs and expense, any and all remnants of its sub-trunk sewer line lying along Quarry Road (Q39) and off Mombasa Road within fourteen days, failure to which, the**

**Defendant be at liberty to demolish any and all remnants of the sub-trunk sewer line lying along Quarry Road (Q39) and off Mombasa Road, at its cost and expense, subject to such cost and expense being recoverable from the Plaintiff in a summary manner.**

**b) An order for restoration as against the Plaintiff directing the Plaintiff to restore, at its cost and expense, Quarry Road (Q39) to its original state, particularly in relation to height and state, within a period of thirty (30) days. In the event the Plaintiff fails to do so, the Defendant is at liberty to restore Quarry Road (Q39) to its original state, at its cost and expense subject to such cost and expense being recoverable from the Plaintiff in a summary manner.**

**c) A declaration that the Plaintiff shall fully indemnify and hold harmless the Defendant against any and all claims by the main contractor and sub-contractor's arising out of delays in the Crystal Rivers project directly attributed to this cause and related delays in completing the access road through Quarry Road (Q39) and Mombasa Road.**

**d) General damages for loss of business opportunity.**

**e) General damages.**

**f) Interest on (d) and (e) at 12 % per annum from the date of filing suit until payment in full.**

**g) Costs of main suit and of the counterclaim.**

- 8.** The matter proceeded for hearing where the Plaintiff called two witnesses while the Defendant had three witnesses.

#### **Evidence of the Plaintiff**

- 9.** The Plaintiff's case was advanced by two witnesses. PW1 was Otieno John Kenneth Rajwayi, its planning manager. He produced the Plaintiff's list and bundle of documents dated 25<sup>th</sup> April 2022 as P. Exhibit No. 1,2, 3 and 5 and marked documents Nos. 4, 6, 7 and 8 for identification. The documents marked for identification were photographs allegedly taken on site depicting ongoing excavation, report on total reconstruction cost of the destroyed portion of the sub-trunk sewer line and a report on financial loss on

construction claim on sewer line, both prepared by Jabbal Limited, Chartered Quantity Surveyors. In the supplementary list and bundle of documents dated 15<sup>th</sup> September 2023, PW1 marked the first document as MF19 while the rest were produced as P. Exhibits 10 to 12.

**10.** It was his testimony that since the Plaintiff's Great Wall Gardens Estate required adequate supporting infrastructure including a sewer line, the Plaintiff commenced construction of a sub-trunk sewer line abutting the embankment along the Quarry road (Q39), which sits on an elevated level and along the corridor of Nairobi Mombasa Highway. He testified that before it commenced construction, the Plaintiff undertook due diligence including obtaining approvals from Kenya Urban Roads Authority herein referred to as "KURA", MAVWASCO and Kenya National Highways Authority, herein referred to as "KENHA".

**11.** He explained that the sewer was in line with the need to have a proper waste management and disposal system to

serve the entire Mavoko neighbourhoods and was to be handed over to MAVWASCO and or the Export Processing Zone Authority (EPZA) but that notwithstanding, the Defendant filed the Safaricom petition complaining that the elevated sewer line, would cause a major challenge in access to its subject property. Further, that the project was halted by the Court, and had ripple effects on the Plaintiff's project as phase one (1) of its Great Wall Gardens project was delayed owing to lack of a functional sewer line and this spiraled into further delays on commencement and eventual completion of its next phases.

12. It was his further testimony that in the Safaricom petition, the Court directed the reconsideration of the Plaintiff's resubmitted designs and restrained further construction. He explained that having sold units in Great Wall Gardens, the Plaintiff was constrained to adopt expensive alternatives on discharge of the effluent from the project and its alternative measures including connecting to an already existing

underground sewer line constructed by the Sunset Housing Limited and utilized by Sunset Boulevard Estate and construction of a waste treatment plant measuring 7,840 cubic meters at an additional cost of kshs.150 million. Further, that the said alternatives did not suppose abandonment of the existing sub-trunk sewer line.

**13.** He averred that on diverse dates including on 29<sup>th</sup> and 30<sup>th</sup> January 2019, the Defendant, through its contractors and agents commenced unlawful interference with the Plaintiffs sewer line, which is private property by excavation and demolition works on part of its sewer line along Quarry road and old Mombasa Road and destroyed as well as removed culverts, action calculated to defeat the Plaintiff's right to property.

**14.** He pointed out that between 1<sup>st</sup> and 5<sup>th</sup> February 2019, between 15<sup>th</sup> and 18<sup>th</sup> of April 2019 and 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> of February 2022, the Defendants were involved in further destruction in disregard of injunctive orders issued herein,

occasioning further losses and as a result, the Plaintiff recorded a complaint of malicious damage to property at Athi River Police Station and was booked in OB No.51/5/2/2019.

- 15.** He estimated the total cost of the Plaintiff's sub-trunk sewer line to be kshs.250,024,847.92 while reconstruction costs for the destroyed portion would be approximately Kshs. 324,886,296.
- 16.** In cross-examination, PW1 admitted that the Plaintiff's sewer line was constructed on a road reserve and contended that a private entity of its nature would later revert the sewer line to the local authority/regulator in this case MAVWSCO, thereby making it a public utility for use by the general public or in the alternative, the Plaintiff could become a service provider in a private partnership arrangement.
- 17.** He explained that the Plaintiff's sewer line is 12 km from the Plaintiff's property to the sewer plant, and that it was not entirely constructed above the ground. He insisted that the sewer line did not touch the Defendant's boundary. He

however did not know the total length of sewer line abutting the Defendant's land.

**18.** He reiterated that the portion of the sewer line that was destroyed by the Defendant is both on Mombasa Road and Quarry Road (Q39) and that it rendered the entire sewer line non-functional. He further confirmed that the Plaintiff did not have KURA's approval to lay sewer line on Quarry road (Q39) and KENHA'S approval with regard to Mombasa Road but he contended that since it had approval to construct the sewer line, it did not need a wayleave approval.

**19.** He was emphatic that the Plaintiff's claim as per the Bill of Quantities prepared by Jabbal Limited has not been exaggerated. He clarified that this was in light of the Bill of Quantities at page 113 of the Defendant's bundle, estimating that the sewer cost is about kshs.20 million. Further, he confirmed that the Plaintiff did not intend to use the sewer line which was demolished as it already had an alternative sewer solution.

20. While he could not recall the land reference number where the waste water treatment is constructed, he confirmed that it is slightly larger than one quarter of an acre and it is owned by the Plaintiff but it is to be transferred to MAVWASCO and it was valued in the financial loss report.
21. On being referred to the paragraph 17 of the replying affidavit of one Zeyun Young, sworn in the Safaricom petition (D. Exhibit 9) in which he swore that the Plaintiff abandoned the trunk sewer line, he stated that while the said deponent is the chairman of the plaintiff, he was referring to a different sewer line.
22. PW1 also confirmed to the Court that the Plaintiff's Appeal on the Safaricom petition filed in the Court of Appeal **vide Appeal No. 185 of 2017** was dismissed and so was its Appeal to the Supreme Court. He also confirmed that in his statement, he did not mention that PW2 was in his company

and that he took photographs of the alleged excavation herein using his phone.

**23.** PW2 was Mathews Sumbi, the Plaintiff's head of security. He confirmed taking the photos at pages 54-58 and 62-86 of the Plaintiff's bundles using PW1's phone when he accompanied him to the subject site. He produced them as P. Exhibit 4 (a) and 4 (b) respectively. He explained that there was an excavator, which was carrying out the demolition.

**24.** In cross-examination, PW2 stated that he used PW1's phone to take the photographs but he could not recall its make and the date he took the photographs. He only knew that it was in the year 2019. He could also not recall who time stamped and dated the photographs.

**25.** He explained that while at the site of demolition, which was at the perimeter wall of Crystal Rivers bordering Quarry 39 road side and Mombasa road side, he could not remember who called the police but confirmed they came to site. He

also stated that he saw an excavator and a lorry but he could not recall their registration.

**26.** In re-examination, PW2 stated that the camera used to take the photographs could show the date they were taken.

### **Evidence of the Defendant**

**27.** DW1 was Richard Gitahi, it's Trust Secretary. He produced and marked the Defendant's list and bundle of documents dated 11<sup>th</sup> November 2024 as D. Ex 1, MFI2-17, D. Ex 19-22, MFI23, MFI 25-28 and left out documents at page 175-181 of their bundle.

**28.** He explained that the Defendant's mixed-use development on **LR No. 337/5183 [Original No. 337/974]** (Crystal Rivers Project), is bordered on the western side by Quarry 39 road and the southern side by an access road adjacent to the old Mombasa Road. It was his testimony that in 2016, the Defendant became aware that the Plaintiff was undertaking sub-trunk sewer construction works along the said Quarry 39

road and old Mombasa road near an Engen petrol station. He claimed that the said construction works conflicted with some aspects of its project as they were problematic to even other stakeholders as it was over one meter above the existing road level on Quarry 39 road while along the old Mombasa road, the sewer line cuts across the main access to the Crystal Rivers Mall at a height of about one (1) metre above the access road level, thus it would completely block access to its Project.

**29.** It was his testimony that the Defendant's concerns were communicated to the Plaintiff vide letters dated 23<sup>rd</sup> November 2016 and 20<sup>th</sup> January 2017 respectively and with a view of resolving the problem amicably, the Defendant convened a stakeholders' meeting chaired by Engineer J Kivanguli of KURA in which it was resolved that the Plaintiff's engineers and those of the Defendant would meet to come up with a collaborative design that would take into account the interest of both parties and other stakeholders.

Further, that the road level would be lowered from the height of 2.8 m to 1.24m, which is the invert level of the sewer line and the Plaintiff's Engineers would look into the proposal of re-routing the sewer fronting the Crystal Rivers Mall accesses to the side of the Old Mombasa Road. Further, that the Plaintiff would halt all ongoing work until a solution was reached.

- 30.** It was his testimony that in disregard to the said resolution, the Plaintiff continued with works in bad faith, prompting the Defendant to file the Safaricom petition, which was heard on merit and vide a judgement delivered on 12<sup>th</sup> May 2017, Hon. Judge Angote restrained the Plaintiff from proceeding with construction of the sewer line, and ordered regulatory authorities to reconsider the designs of the sewer and make a decision after public participation. He contended that after the judgement in the Safaricom petition, the Plaintiff pursued an Appeal to the Court of Appeal and to the Supreme Court but they were all dismissed. It was his further testimony that

during the pendency of the Safaricom petition, the Plaintiff had abandoned its sewer works.

**31.** He claimed that the Defendant has learnt that the Plaintiff has since connected its main sewer to an existing underground sewer line belonging to Sunset Housing Limited. Further, that it has also installed a sewer treatment plant to serve its Great Wall Gardens project and connected its sewer line to the underground sewer line of the regulator, MAVWASCO.

**32.** He denied allegations that the Defendant excavated and/or demolished the Plaintiff's sewer line and pointed out that, in a replying affidavit sworn by Zeyun Yang (Managing Director of the Plaintiff) on 5<sup>th</sup> September 2018 in the Safaricom petition, the Plaintiff admitted that it had completely abandoned its sewer line project. Consequently, he urged the Court to order its immediate destruction and averred that the abandoned materials are being used in the suit to

demonstrate “destruction and interference” with the Plaintiff’s sewer line.

**33.** DW1 also revealed that in view of cost consideration for completion of its Project, the Defendant opted to draw designs/roadworks, conduct stakeholder meetings and seek approval from KENHA and KURA for completion of old Mombasa road and Quarry 39 road and KENHA approved designs for old Mombasa Road, taking into account that KENHA was dualling the Athi-River Machakos turnoff. Subsequently, the Defendant commenced works on the basis of the said approvals though the Plaintiff had appealed at the National Environment Tribunal (NET) but its Appeals were dismissed.

**34.** He acknowledged that after filing this suit, the Plaintiff and the Defendant engaged with a view of resolving the matter and technical representatives of both parties drew harmonized drawings but when it came to implementation,

the Plaintiff refused to implement it, which demonstrates bad faith on its part.

**35.** He reiterated that due to the injunction issued in the instant matter in 2019, road works for Quarry 39 road and Old Mombasa road which border the Defendant's project were delayed and as a result, there has been limited access to the Defendant's project, which saw numerous purchasers and anchor tenants in its project terminate their Leases citing environmental, health, aesthetics concerns as well as lack of easy access to the property, which culminated in the Defendant suffering losses plus contractual damages with respect to idle time.

**36.** He insisted that the Plaintiff's sewer line is built on public property, thus the Plaintiff has no proprietary rights over it and it ought to be removed. Further, that none of the Defendant's trustee was ever summoned by police or charged in respect to the Plaintiff's complaint, which is false.

**37.** He revealed that the Defendant has since completed its project, though they had projected to complete it in 2018. Further, that the access road from old Mombasa Road to its project had also been tarmacked and is in use. He averred that at the time he testified, tarmacking of Quarry 39 road was ongoing.

**38.** In cross-examination, DW1 was referred to paragraph 40 of the judgement of the Court of Appeal in **Civil Appeal No. 185 of 2017**. While he acknowledged that the Court of Appeal indicated that this Court (Angote J), in the Safaricom petition ignored alternative access to the Defendant's property therefore reached an erroneous finding that construction of the sewer would curtail the Defendant's right to use its property, he stated that the Plaintiff remained injuncted permanently from constructing the sewer line and insisted that the Plaintiff abandoned its sewer line.

**39.** He further testified that on Quarry 39 road next to the Defendant's boundary, the sewer line had substantially been

done, but it was not complete and that embankments were present before elevation of Mombasa road. DW1 reiterated that KENHA approved construction of access road to Crystal Rivers in July 2018 and the Defendant constructed it before the Plaintiff was issued with an injunction herein in January 2019. Further, that the terms of the injunction did not preclude it from continuing with its project.

**40.** DW2 was Engineer Josephat Muthumbi, director of Xenocan Consulting Engineers, which he claimed was one of the firms retained by the Defendant as consulting civil/structural engineers for its Crystal Rivers project. He produced documents at page 173 -197 of the Defendant's bundle as D. Exhibit 25 and his report on redundancy of Plaintiff's sewer as D. Exhibit 26.

**41.** He testified that after stoppage of the Plaintiff's sewer line pursuant to

the judgement in the Safaricom petition, MAVWASCO organized a stakeholder's meeting to discuss their

alternative proposal for a sewer for the area through pumping and after approval by stakeholder's, MAVWASCO implemented it. Further, that it is underground, about 1.5 m below the original ground levels along the proposed sewer line alignment and it necessitated pumping of sewage up to a chamber on Mombasa road just before Athi River, from where it would flow by gravity to MAVWASCO's connection manhole at Engen. It was his testimony that the Plaintiff connected its waste water through the said MAVWASCO's pumping main, thus its proposed gravity main was no longer necessary and became redundant.

**42.** On the Plaintiff's allegations that its sewer line would benefit the general public, he stated that the Crystal Rivers project has its own biodigester while other residences like Sunset Boulevard, Everest Park and London Distillers have their own sub -surface sewer lines.

**43.** He explained that the Defendant's access off both Quarry Road (Q39) and Mombasa Road cannot affect the Plaintiff's

sewer connection or MAVWASCO pumping main as it is below the original ground of 1.5 m.

**44.** DW2 informed the Court that he was part of the team that harmonized

the Plaintiff's and the Defendant's drawings and that part of the drawings were implemented. He insisted that the Plaintiff's sewer line on Quarry 39 road and Mombasa Road was abandoned so what remains there are just remnants of the sewer line, while along Mombasa Road, materials were cleared by the contractors dualling the said road.

**45.** In cross-examination, DW1 insisted that the harmonized drawings (page 135 and 136 of the Defendant's bundle) did not interfere with the existing sewer line. Further, that there was a suggestion to create a temporary access to the Defendant's project by cutting embankment on the side fronting Crystal Rivers and currently, KENHA has tarmacked the road at high embankment level and also tarmacked where the entrance to Crystal Rivers is, as well as Quarry 39

road. Further, that KENHA did not follow the recommendations from the parties harmonized drawing, but adopted their own design thus there are now three access to the Defendant's project but it is steep.

46. DW3 was Manjit Singh, Director-Land Mark Holdings Limited, which company was the contractor for Crystal Rivers Mall project. He produced a Letter dated 29<sup>th</sup> April 2019 at page 174 of the Defendant's bundle and list of documents as D. Exhibit 23. He explained that part of the scope of Landmark's work included construction of the access roads on both the Quarry 39 side and Mombasa Road side. Further, that during the period identified in the plaint, being 29<sup>th</sup> and 30<sup>th</sup> of January 2019, neither the Defendant nor its consultants, Land Mark included, commenced excavation or demolition works on parts of the Plaintiff's sewer line as alleged and that at no point were any culverts removed as alleged. He insisted that none of its directors or employees was arrested or charged in relation to allegations

of destruction of the Plaintiff's sewer line/malicious destruction of property.

**47.** With respect to the allegation of interference post the injunction order issued by the Court on 31<sup>st</sup> January 2019, restraining the Defendant from excavating and demolishing the Plaintiff's sewer line, he insisted that Landmark did not interfere with it. He explained that it only collected hardcore that it had deposited along the old Mombasa road. Further, that the allegation that contempt took place between the 1<sup>st</sup> and 5<sup>th</sup> February 2019 does not arise and in any case, Landmark was served with orders of 31<sup>st</sup> January 2019 through a letter dated 13<sup>th</sup> February 2019.

**48.** With respect to photographs at page 54-58 of the Plaintiff's bundle, he stated that all the photos exhibited are with respect to the old Mombasa Road side and not Quarry 39 side and none demonstrates excavation, demolition, destruction or interference with the Plaintiff's sewer line. It was his

testimony that Landmark did not own any of the graders and machinery exhibited. He urged the Court to consider the photographs in the context that Crystal Rivers project was ongoing at the time hence construction work for all works unaffected by the Court order issued on 31<sup>st</sup> January 2019 were continuing thus mere existence of excavation machines does not suggest breach. Further, that KENHA was also dualling Athi River-Machakos turnoff and as part of that project, the embankment of Mombasa Road was raised substantially hence the debris along the said road.

**49.** He confirmed that the Defendant was expected to suffer prejudice, injury and cost as contractors were liable to claim delay damages and there was a depressed sale of the units in the Crystal Rivers project due to poor access and environmental concerns due to the dust and associated noise.

**50.** He acknowledged that the excavators and machines appearing in

photographs at page 54, 62 and 65 of the Plaintiff's bundle belongs to Land Mark Limited, as they have an identification sign and that excavators were loading hardcore meant for gabions.

51. In cross-examination, DW3 insisted that he could identify Landmark's machines as they had a religious sign of the Kalasingha but he could not remember registration numbers though he had an inventory of all the company's machines. He did not know how far the plaintiff's sewer line had extended nor its state.
52. On the injunction of January 2019, DW3 stated that when it was issued, they were instructed by the project manager to stop work, which they did thus they had idle machines lying around leading to losses.
53. Parties thereafter filed written submissions.

### **Submissions**

54. The Plaintiff submitted that the Defendant's actions of demolishing its sewer infrastructure constitutes trespass and unlawful interference with its lawfully constructed infrastructure, which infrastructure forms part of a commercial development and constitutes proprietary property capable of protection by the courts by way of recovery of financial consequences arising therefrom. It pointed out that the Defendant's action set into motion a chain of events that forced it to incur additional engineering, operational and contractual costs in order to maintain sanitation services within its development. To this end, it relied on the following decisions: **Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited [2017] eKLR; Kenya Power & Lighting Company Ltd v Ringera & 2 others [2022] KECA 104 (KLR) and Capital Fish Kenya Ltd v Kenya Power & Lighting Co. Ltd [2016] eKLR.**

55. It invited the Court to award it special damages and financial losses in the sum of Ksh.1,108,176,553.82 which it claimed has been proved through documentary evidence, expert reports and the testimony of PW1 who explained the financial implications of the demolition and the costs incurred by the Plaintiff. To this end, it relied on the case of **Kenya Hotel Properties Limited v Willesden Investments Limited [2009] eKLR.**

56. On its prayers for damages, it submitted that the circumstances surrounding the demolition revealed that the Defendant's conduct was deliberate, high handed and undertaken with disregard to its proprietary rights and that such conduct attracts aggravated and exemplary damages in addition to compensatory damages, to deter similar unlawful conduct. To this end, it relied on the decisions of **Obongo & another v Municipal Council of Kisumu [1971] EA 91** and **Rookes v Barnard [1964]AC 1129.**

57. With regard to the Defendant's counterclaim, it submitted that the Defendant failed to demonstrate the essential legal elements required to sustain a claim for damages as the Plaintiff's sewer infrastructure was undertaken pursuant to approvals issued by the relevant statutory authorities responsible for regulating road corridors and sewer infrastructure. Further, that there is no proof that the Plaintiff's sewer infrastructure caused any loss to the Defendant and there was no proof of liability including quantum yet section 107 of the Evidence Act places the burden of proof on a party asserting the existence of a fact.

58. The Plaintiff also submitted that since the pleadings herein raise issues concerning unlawful interference with its property and infrastructure rights and the damages arising therefrom, this Court has jurisdiction to determine the issues. To buttress this position, it relied on the decisions of **Odd Jobs v Mubia [1970] EA 476** and **Galaxy paints Co. Ltd v Falcon Guards Ltd [2000] eKLR**.

**59.** The Defendant in its submissions insisted that it was not involved in destruction of the Plaintiff's sewer line on the dates alleged in the plaint and in PW1's statement. Further, that PW1 did not testify to witnessing the alleged destruction and no evidence was tendered to the extent of the alleged damage to the sewer line. It further submitted that the evidence of PW2 did not establish nexus to the Defendant's agents.

**60.** It argued that injunctive orders issued on 31<sup>st</sup> January 2019 lapsed one year later by virtue of Order 40 Rule 6 of the Civil Procedure Rules thus the allegation that they were in contempt on 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> February 2022 is not factual. Further, that on 10<sup>th</sup> February 2022, the suit was dismissed for want of prosecution and the then subsisting injunction was lifted.

**61.** It was also its submission that since the Plaintiff filed two applications for contempt of court alleging that the

Defendant had destroyed the sewer line on 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> of February 2019 (as claimed in the Application dated the 8<sup>th</sup> of February 2019) and 18<sup>th</sup> and 15<sup>th</sup> of April 2019 (as claimed in the Application dated the 26<sup>th</sup> April 2019), which applications were dismissed through a Ruling delivered on the 7<sup>th</sup> of February 2020, then the issue of alleged destruction was settled thus revisiting the same issue is barred under the doctrine of res judicata.

**62.** The Defendant also submitted that the Plaintiff has no legal basis in seeking to benefit from an illegality. It pointed out that no wayleave approval was obtained from KURA and KENHA to construct the sewer line on a public road. Further, that having been built on public land, the subject sewer line is not private property. Further, that while Section 93 of the Water Act contemplates entry into a public private partnership between a licensed water service provider and a third party, no such approval was tabled in evidence. The Defendant also submitted that since the Plaintiff abandoned

its sewer line and it was erected above ground level, it was exposed to vandalism and ordinary waste.

**63.** The Court was also urged to take judicial notice that the Defendant /its agents were not summoned by the police on the Plaintiff's allegation of malicious damage and the fact that there were ongoing KENHA works for dualling the Mombasa - Machakos Road. On the Plaintiff's claim for damages, the Defendant submitted that the Plaintiff seeks to profit because it was compelled to consider alternative sewer solutions after the Court declared its sewer line an illegality and that it is grossly exaggerated. Further, that no evidence was proffered as to what was destroyed, the degree of destruction and the attendant cost as the Plaintiff failed to call an expert witness to quantify its special damages claim. It urged the Court to exercise its powers under section 111 of the Environmental Management and Coordination Act to issue a restoration order as against the Plaintiff to restore

Quarry road (Q39) to its original state and level (ground level) at its costs.

- 64.** On its counterclaim for damages under various heads, it submitted that the institution of this suit (with the attendant injunctive orders) occasioned it injury since construction speed slowed down and interested tenants and purchasers withdrew from potential transactions. Further, that the main contractor and sub-contractors remained on site for a prolonged period of time and subsequently made a financial claim thus it suffered losses.
- 65.** To this end, it submitted that the Plaintiff is liable for damages in tort for; loss of business opportunity, unlawful interference with the Defendant's trade or business, inducement of breach of contract and conspiracy to injure and sought an award of damages in the sum of Kshs.10,000,000.00 to compensate it under the various heads of damages.

**66.** To support the arguments, the Defendant relied on the following decisions: **Haile Menkerios v Mureithi & another; Wina Trading Company Limited & another (Third party) (Civil Suit 197 of 2018) [2024] KEHC 13993 (KLR) (Commercial and Tax)** and **Nairobi Civil Appeal No. 165 of 2007 D. Njogu & Company Advocates v National Bank of Kenya Limited (2016) eKLR.**

### **Analysis and Determination**

**67.** Upon consideration of the Amended Plaint, Amended Defence including Counterclaim, testimonies of the witnesses, exhibits and rivalling submissions, the following are the issues for determination:

- **Whether the Plaintiff's sub-trunk sewer line constructed along Quarry road (Q39) and Old Mombasa road is its lawful property and if the Plaintiff has proprietary rights over it.**
- **Whether the Plaintiff has proved that the Defendant destroyed its sub-trunk sewer line.**

- **Whether the Plaintiff is entitled to General Damages as well as Special damages amounting to kshs. 324, 886, 269/=.**
- **Whether the Defendant has made a case for demolition and restoration orders.**
- **Whether the Defendant has demonstrated entitlement to indemnity and damages of kshs.10 million for loss of business opportunity.**
- **Whether the Plaintiff is entitled to the Orders as sought in the Plaint.**
- **Whether the Defendant is entitled to the Orders as sought in the Counterclaim.**

**Whether the Plaintiff's sub-trunk sewer line constructed along Quarry Road (Q39) and Old Mombasa Road is its lawful property and if the Plaintiff has proprietary rights over it.**

**68.** The Plaintiff contends that the Defendant destroyed its property, being its sub trunk sewer line along old Mombasa Road and Quarry 39 Road in 2019. Vide the statement of PW1, he alleged that the acts of destruction continued even

after this Court's injunctive orders issued on the 31<sup>st</sup> January 2019 restraining the Defendant from further interference.

**69.** The Defendant has denied destroying or interfering with the said sewer line in the manner alleged. It contends that the Plaintiff abandoned its sewer line and that materials that remained on site were cleared along the Crystal Rivers Mall side on Mombasa Road as part of Mombasa Road dualling works by KENHA. It also argues that none of its directors or agents were arrested or charged on account of malicious damage to the Plaintiff's sewer line, which it also contends is built on public land. Further, that there was illegality in the manner in which the sewer line was constructed thus the Plaintiff ought not to benefit from an illegality.

**70.** The Plaintiff claims that alternative solutions have been implemented by the regulator, MAVWASCO and the Plaintiff has connected to the said sewer line and has its own sewerage treatment plant.

**71.** At this juncture before the Court can make a determination of the issues raised by the Plaintiff, it is pertinent for the Court to consider what the Plaintiff deems as its property. The Plaintiff's 'property' has to be considered in the context that it is a project that was halted by the Court in the Safaricom petition and the Plaintiff's appeal on the said judgement was dismissed vide **Civil Appeal No. 185 of 2017** in a judgement delivered on 17<sup>th</sup> March 2023.

**72.** In its line of questioning during cross-examination, the Plaintiff tasked DW1 on the import of Paragraph 40 of the aforementioned Court of Appeal decision where the Court stated inter alia:

***“It is apparent to us that the alleged infringement of the right to access their property was blown out of proportion, and the court ignored the alternative access in the Appellant’s design, leading to the trial court making an erroneous finding that there had been violation of the affected parties’ constitutional rights.”***

73. Even after its aforementioned remarks, the Court of Appeal still went ahead to dismiss the Plaintiff's impugned Appeal on the basis that there was no meaningful public participation before the project was commenced.

74. The Plaintiff's attempt to contest the Court of Appeal's decision at the Supreme court was thwarted as its Notice of Appeal and Record of Appeal were struck out vide a Ruling of the apex Court delivered on 22<sup>nd</sup> September 2023, on the basis that it was defective for failing to comply with Section 37(1) of the Supreme Court Rules and that the Record of Appeal was incomplete.

75. It is not disputed that the sub trunk sewer line that the Plaintiff seeks this Court to protect is built on a public road. PW1 in his testimony admitted that the sewer line was built on a road reserve. The question we need to ponder is whether the Plaintiff has proprietary interest on such property?

76. In **Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 others [2021] KESC 50 (KLR)**, the Supreme court held that constitutional protection to property extends to only that which is lawfully acquired. The Court stated thus:

*“These constitutional rights as guaranteed under the cited provisions are only in relation to property that has been legally acquired, and does not extend to property that has been unlawfully acquired. In that regard, article 40(6) of the [Constitution](#) is instructive and provides that; “The rights under this article do not extend to any property that has been found to have been unlawfully acquired.”*

77. Further on this issue, the Defendant contended that the Plaintiff’s sewer line having been declared an illegality, the Plaintiff should not benefit from it. In the case of **Kenya Airways Ltd v Satwant Singh Flora (2013) eKLR**, the Court stated that;

***“No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality, the court ought not to assist him.”***

**78.** In the foregoing, I find that since the Plaintiff constructed the disputed sub trunk sewer line on a road reserve, it cannot claim that it is its lawful property and that its right to property has been violated as the said land did not belong to it.

**Whether the Plaintiff has proved that the Defendant destroyed its sub-trunk sewer and if it is entitled to General Damages as well as Special damages amounting to Kshs. 324, 886, 269/=**

**79.** The Plaintiff claims that the Defendant trespassed on its property and destroyed its sub trunk sewer line on diverse dates in January to April 2019, and this forms the fulcrum of the dispute herein. PW1 stated that the Defendant including its agents destroyed the Plaintiff's sewer line culminating in the Plaintiff looking for alternative means for a sewer for its Great Wall Gardens project. During cross examination, PW1 explained that the sub trunk sewer line was on Quarry 39 road and Old Mombasa Road. Further, that the Plaintiff had intended to surrender the sewer line to MAVWASCO once it was completed. On being challenged on whether the Plaintiff acquired approvals, it was emphatic that it did not need any way leave approval to construct the said sewer line. PW1 however confirmed during cross examination that the Plaintiff did not intend to use the sewer line, which was demolished as it already had an alternative sewer solution.

**80.** There were certain photographs which the Plaintiff produced as

exhibits to demonstrate how the Defendant destroyed its sewer line. It emerged that it is PW2 who took the said photographs using PW1's cell phone. Further, PW2 confirmed having taken the said photographs in 2019 but he could not explain the dates and times on the photographs. PW2 stated that he took photographs of the excavator, compactor and lorry but could not recall the registration numbers. On a keen perusal of the said photographs, there was no indication of any person or machine destroying the disputed sewer line. Further, both PW1 and PW2 did not demonstrate to Court whether the sewer line that was allegedly destroyed had been completed or not.

**81.** It is worth noting that the Plaintiff had actually pleaded at paragraph 9 of the amended Plaint that the sewer line had been incomplete and stated thus:

***“With the pendency of the said Petition, and the Defendant’s action, the Plaintiff could not finalize construction of the sub - trunk sewer line; due to the restraint that occasioned stoppage of the sub***

***- trunk sewer line construction. There was consequently a significant delay in the completion and uptake of the Plaintiff Phase 1 Project, owing to lack of a functional sewer line. The completion, hand over and subsequent occupancy of the Plaintiff's units was thus delayed. These delays spiralled into further delays on commencement and eventual completion and handover of phases II and III".***

**82.** From this excerpt alone, it is evident that the Plaintiff had not completed the sub - trunk sewer line as claimed. If so, then what portion was destroyed. PW2 in his testimony did not confirm if he indeed witnessed the Defendant or its agents destroying the sewer line or the portion deemed to have been destroyed. Further, insofar as the photographs produced showed machines including equipment, there was no indication of what was being destroyed as the said equipment seemed to have been on a road. PW2 even confirmed that despite the fact that Police came to the site where the sewer line was situated, no one was charged for

destroying it. It further emerged in evidence that actually KENHA had finalized constructing the section of the Mombasa Road where the sewer line was, and to my mind, if indeed KENHA had finalized the road construction, cleared the debris, then how did they deal with the sewer line. Further, why was the Plaintiff only seeking to blame the Defendant for the same.

**83.** DW2 who was an Engineer and part of the team that even collaborated with the Plaintiff to redesign its sewer line, insisted that the Defendant did not destroy the said sewer line. He was emphatic that after the Court case, the Plaintiff abandoned the sewer line. He explained that it is the Engineers who were dualling the Mombasa Road that cleared the materials on the said road but as for the section on Quarry 39 road, it still had debris. DW3 who was the contractor denied destroying the Plaintiff's sewer line and insisted that no one was charged for doing so.

Further, that the injunction affected the works on the Defendant's project and they had to stop.

**84.** I note vide a Ruling dated 7<sup>th</sup> February, 2020, delivered by Justice Oscar Angote, in respect to the Plaintiff's Notice of Motion applications dated the 8<sup>th</sup> February, 2019 and 26<sup>th</sup> April, 2019 where it sought to cite the Defendant including its agents for contempt of orders issued on 31<sup>st</sup> January, 2019, the Court at paragraph 40 and 43 observed as follows:

***"40. The order of this Court of 31<sup>st</sup> January, 2019 did not restrain the Defendant and its agents from excavating any road. I have perused the photographs carefully and I have not seen the excavation, demolition, destruction or interference with the Plaintiff's sewer line...43. Having not demonstrated the damage or demolition of the sewer line between 31<sup>st</sup> January, 2019 and 8<sup>th</sup> February, 2019, this Court is unable to arrive at a decision that indeed there was excavation, demolition or destruction of the Plaintiff's sewer line between those dates, or even thereafter".***

**85.** In the related matter of **Safaricom Staff Pension Scheme Registered Trustees v Erdemann Property Limited & 5 others [2017] KEELC 2891 (KLR)**, Justice Angote in his judgement which was upheld by the Court of Appeal, ordered as follows:

*a. A declaration be and is hereby issued that the approvals granted to the 1<sup>st</sup> Respondent by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents with respect to the construction of a sewer line along Quarry road and Old Mombasa Road for the Great Wall Gardens Project was illegal, unconstitutional and tantamount to an infringement of the Petitioner's right to use of its property as enshrined in Article 40 of the Constitution and contravened the Petitioner's right to fair administrative action that is lawful and procedurally fair as enshrined in Article 47(1) of the Constitution of Kenya.*

*b. An order by way of Judicial Review to call before the court and quash the decisions issued by the*

***2<sup>nd</sup> to 3<sup>rd</sup> Respondents on dates unknown to the Petitioner granting approval to the 1<sup>st</sup> Respondent to proceed with the construction of a sewer line along Quarry Road and Old Mombasa Road for its Great Wall Garden Project be and are hereby issued.***

***c. A permanent injunction is hereby issued restraining the 1<sup>st</sup> Respondent from proceeding with the construction of the sewer line along Quarry Road and Old Mombasa Road on the basis and/or on the authority of the approvals granted by the 2<sup>nd</sup> to 4<sup>th</sup> Respondents.***

***d. An order by way of Judicial Review being an order for mandamus directed at the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents be and is hereby issued directing them to reconsider the submitted designs for construction of a sewer line by the 1<sup>st</sup> Respondent along Quarry Road and Old Mombasa for its Great Wall Gardens Project and make a decision thereon in line with the applicable law and after full public participation by the Petitioner and all other affected stakeholders as provided for in the law.***

**86.** From the excerpt from the impugned judgement, it is evident that the Court found the Plaintiff culpable in construction of the sewer line one metre above the ground and proceeded to stop the project as well as revoke the approvals which the Plaintiff had obtained from different government agencies.

**87.** Based on the facts as presented while relying on the decision cited, I find that the Plaintiff failed to discharge its burden of proof as stipulated under section 107 of the Evidence Act, to demonstrate that the Defendant indeed undertook excavation and destruction of its sub trunk sewer line, which it even admitted in the amended Plaint had been incomplete. It is worth noting that there was indeed equipment on the road which was next to the Defendant's project, which parties have not denied was ongoing. To my mind, the mere fact that there were Defendant's equipment in the vicinity of the sewer line does not make it responsible for destruction. In the foregoing, I find that the Defendant did not destroy the Plaintiff's sub trunk sewer line as claimed.

**88.** The Plaintiff has sought for Special damages of kshs.324,886,269/= for reconstruction of its sewer line as well as general damages. On its part, the Defendant contended that in view of the Plaintiff's voluntary abandonment of the sewer project and subsequent implementation of alternative solutions, damages sought cannot issue. It also contended that no experts were called to prove the claim for special damages.

**89.** It is a fundamental principle of law that he who alleges must prove. Section 107(1) and (2) of the Evidence Act provides as follows:

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

**90.** While sections 109 and 112 of the same Act states thus:

***“109.The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

***112.In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”***

**91. In Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] KECA 56 (KLR), the Court of Appeal stated inter alia:**

***“... it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit.”***

**92. Based on the facts as presented while relying on the legal provisions cited and the quoted Court of Appeal decision, even though the Plaintiff has made serious arguments in its**

submissions on its entitlements to general and special damages amounting to over one (1) billion shillings, it did not tender any evidence to strictly prove the same as the Expert witness who was supposed to do so failed and no documents were produced as exhibits to confirm its allegations, I find that it has not proved its claim on general including special damages as circumstances permit and will decline to award them. In the foregoing, I find that the Plaintiff is not entitled to the orders as sought in its amended Plaintiff.

**Whether the Defendant has made a case for demolition and restoration orders and if it has demonstrated entitlement to indemnity and damages of kshs.10 million for loss of business opportunity.**

- 93.** The Defendant in its Counterclaim has sought for orders to be directed to the Plaintiff to demolish the remaining portion of sub trunk sewer line as well as restoration orders. It has further sought for damages of Kshs. 10 million for loss of business opportunity. I note DW2 admitted that construction

of the old Mombasa Road was complete and debris cleared. It emerged in evidence that it is KENHA that was constructing both old Mombasa road as well as Quarry 39 road. DW2 in his testimony also confirmed that by the time he was testifying Quarry 39 Road was also being tarmacked. It is trite that road reserves are public land and it is hence the government responsible for its maintenance. On the Defendant's prayer for restoration of and demolition of the sewer line, this Court stated as follows in **Milimani Splendor Management Limited v National Environment Management Authority & 4 others [2019] eKLR:**

***“Sections 108 and 111 of EMCA empower NEMA and the court respectively to issue an environmental restoration order to any person to prevent the person from taking any action that is reasonably likely to cause harm to the environment. This places the court and NEMA on the forefront in the protection of the environment and lends credence to the preamble to the Constitution which states that the people of Kenya are respectful of the environment and are***

***determined to sustain it for the benefit of future generations.”***

- 94.** Since it is KENHA that is responsible for the construction of the two roads where the sewer line had been situated, I find that it should be the entity to clear the debris on Quarry 39 Road since the sewer line had been abandoned.
- 95.** On the issue of indemnity and damages of kshs.10 million for loss of business opportunity, the Defendant claims its project was delayed and it lost business opportunities. DW1 in his testimony claimed that due to the injunction issued in 2019, road works for Quarry 39 Road and Old Mombasa Road, which border the Defendant’s project were delayed and as a result, there has been limited access to the Defendant’s project, which saw numerous purchasers and anchor tenants terminate their Leases citing environmental, health including aesthetics concerns as well as lack of easy access to the property. Further, that the Defendant hence suffered losses plus contractual damages with respect to idle time. DW3 also

claimed they stopped working and machines were idle. I note the Defendant produced various correspondence at pages 175 to 182 of its bundle, from third parties relinquishing their commitment to take up space in the mall. However, in the communication none of the authors indicated whether they had a challenge with the sub trunk sewer line. Further, I note the Defendant did not produce any sale agreements or proposed leases to confirm that they had already engaged with tenants and purchasers. In that regard, I find that the Defendant failed to discharge its burden of proof to the required standard and find that this claim is remote. I will hence decline to grant it. I hence find that the Defendant has not proved its claim in the Counter claim and is hence not entitled to the Orders as sought.

**96.** In the circumstances, I find that the Plaintiff has not proved its case on a balance of probability and will dismiss it with costs to the Defendant. I will also proceed to dismiss the Counterclaim but make no orders as to costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS  
23<sup>RD</sup> DAY OF MARCH, 2026**

**CHRISTINE OCHIENG  
JUDGE**

**In the presence of:**

Miano for Plaintiff

Nyaribo for Defendant

Court Assistant: Joan

ORIGINAL