REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 416 OF 2009

MIARAHO LIMITED...PLAINTIFF

=VERSUS=

SYNOHYDRO CORPORATION LIMITED....... DEFENDANT

JUDGMENT

Background

1. The plaintiff brought this suit on 21/8/2009 through a plaint of even date. It contended that sometime in June 2009, unknown to it, the defendant trespassed onto its parcel of land, Land Reference Number 4927, situated along Kamiti Road in Githurai (**the suit property**), and commenced excavating the top soil and murram and refilling the excavated area with black cotton soil. It further contended that the defendant's actions had caused destruction, depletion and loss to the suit property, and the loss was continuing as at the time of bringing this suit. The plaintiff gave the following verbatim particulars of destruction, depletion and loss:

> **a. Excavating the red top soil and refilling the excavated parts with road waste and garbage.**
>
> **b. Excavating the murram down deep the land leaving an inhabitable crater.**
>
> **c. Refilling the excavated site with black valueless cotton soil and purporting to levelize the same with machinery.**
>
> **d. Using heavy machinery all over the once agricultural land to the detriment of arable parts**
>
> **e. Using massive earth movers and causing tremors to the entire landscape**

2. The plaintiff further contended that the said excavation had occasioned great loss to the suit property. It itemized the following verbatim particulars of loss:

> **a. Total acreage excavated as at 20/8/2009 – 256 acres.**
>
> **b. Cost of excavation of both the red soil and murram - Kshs 163,000,000**

3. Consequently, the plaintiff prayed for the following verbatim reliefs against the defendant:

> **a. Wastage of total land area measuring 256 Acres in the sum of Kshs 163 Million.**
>
> **b. Cost of return, filling and ramming the land with red top soil and murram per the status quo before excavation at a cost of Kshs 128 million.**
>
> **c. Costs of the suit.**

4. The defendant responded to the claim through a statement of defence dated 14/11/2011. It contested the plaintiff's claim. Its defence was that it entered into a lawful agreement with one Rose Nyambura Mwangi (sic), the legal representative of Mwangi Githinji (deceased) who was a shareholder of the plaintiff company. It added that pursuant to a confirmation of grant relating to the estate of Mwangi Githinji, the said Rose Nyambura Mwangi had a life interest in the plaintiff company and an interest in the suit property. It denied the allegation that the plaintiff company had suffered loss and damages. It further denied the plaintiff's claim of Kshs 163,000,000 as the cost of the excavated red

top soil. It contended that the plaintiff's suit was bad in law and an abuse of the court process. It urged the court to dismiss the suit.

Agreed Issues

5. On 27/10/2014, the parties filed a statement of agreed issues itemizing the following as the issues falling for determination in the suit:

> **1. Whether the subject land LR No 4927 belongs to the plaintiff company?**
>
> **2. Whether the defendant commenced excavation of top red soil and murram on LR No 4927 situated along Kamiti Road in Githurai and if so, when?**
>
> **3. Whether the defendant's acts of excavating top red soil and murram amounted to trespass?**
>
> **4. Whether the defendant's aforesaid acts has caused destruction, depletion and loss to Land Reference Number 4927?**
>
> **5. If the defendant's acts have caused loss/destruction, then to what extent has such loss been caused?**
>
> **6. Whether the defendant had a basis of a contractual agreement for performing its acts on LR No 4927 without consent of the plaintiff?**
>
> **7. Whether the defendant and or its agents or servants had legal capacity to enter into any agreement with any third party without the knowledge and or consent of the plaintiff?**
>
> **8. Whether at the time excavation of murram and or red top soil or stones commences, there were any identifiable portions and or parcels of land belonging to any individual person or entity?**
>
> **9. Whether the plaintiff is entitled to special damages of Kshs 163,000,000/=?**

Plaintiff's Evidence

6. At the hearing, the plaintiff called two witness; Stephen Maina Kimanga (PW1) and Joseph John Wahome (PW 2). PW1 adopted his written witness statement. In summary, the testimony of PW1 was that he was a director of the plaintiff company. The plaintiff was the owner of the suit property in 2009. In June 2009, the defendant company, through its employees and/or agents, commenced excavation of top red soil and murram from the suit property. The plaintiff company did not authorize the defendant to do the excavation on its land. The defendant was a trespasser on the land. Apart from excavating the land, the defendant was also filling the trenches with waste and covering the waste with black cotton soil. The actions of the defendant had rendered the once arable land valueless. The excavation had been valued at Kshs 163,000,000 and the cost of refilling red soil and ramming the land had been assessed at Kshs 128,000,000. The plaintiff company had instructed Mr Joseph John Wahome to carry out valuation of the land. The land had not been subdivided and no shareholder had been assigned any portion of the land when the trespass took place.

7. The testimony of PW1 under cross-examination was that the plaintiff company was formed in 1974. His late father was a majority shareholder in the company. He became a director of the company after his father died. Beatrice Wacera Mwangi was a daughter to Mwangi Githingi who was also a shareholder in the plaintiff company. Rose Nyambura Mwangi was the widow of Mwangi Githinji and mother to Beatrice Wacera Mwangi. Rose Nyambura Mwangi was involved in arbitration proceedings with the other shareholders of the plaintiff company and on 24/6/2009 the arbitral tribunal rendered a ruling which was adopted by the parties. The arbitral tribunal gave an award relating to the sharing of the suit property. At page 38 of the arbitral award, the arbitral tribunal made a pronouncement on the issue of depletion of the suit property through quarrying. The arbitrator found that a certain portion of the land was occupied by the Estate of Mwangi Githinji and that the Estate of Mwangi Githinji was to be allocated that portion of the land. The land had not been sub-divided at the time Wacera Mwangi entered into a contract with the defendant. The land was 302 acres. The land had since then been sub-divided and sold. Government acquired part of the land subsequent to the trespass. The Estate of Mwangi Githingi was allocated between 37 and 39 acres. The sub-division happened after the cause of action herein arose.

8. PW1 added that quarrying was done in different parts of the land and it was not possible to give to the Estate of Mwangi Githinji all the excavated areas because the Estate of Mwangi Githingi was only entitled to the equivalent of his shareholding in the company. Arbitral proceedings started in 2008 and evidence was taken by the arbitrator in August 2008.

9. It was PW1's further evidence under cross examination that besides excavation relating to the cause of action in this suit which commenced in June 2009 and was stopped by the court upon commencement of this suit in August 2009, there was also excavation on the land by other parties. He added that the valuation report presented by the plaintiff covered the entire area although he had instructed the valuer to value the area which had been depleted by the defendant.

10. PW1 added that the suit property had since been subdivided into plots and the plots had been sold. He testified that each acre was selling at between Kshs 15,000,000 and Kshs 20,000,000. It was his testimony that the land could have fetched better price had the excavation not taken place.

11. PW 1 produced the following five exhibits: (i) Contract between the defendant and Wacera Mwangi, purportedly allowing the defendant to excavate the land; (ii) ID Card of Wacera Mwangi; (iii) Arbitral Award relating to the shareholders of the plaintiff company; (iv) Photographs; (v) Copy of Certificate of Tittle relating to the suit property.

12. Joseph John Wahome (PW2) adopted his written statement filed on 16/12/2011 and produced his Damage Assessment Report as P. Exhibit 5. His testimony was that he was a registered valuer practicing at Tembo House under the name Waco Consultants. In August 2009, PW1 instructed him to undertake a valuation of the suit property. He inspected the suit property on 20/8/2009. He found heavy machinery (caterpillars) excavating red soil and loading the soil onto lorries. He assessed the loss caused to the land at Ksh 163,000,000 and assessed the cost of restoration at Kshs 128,000,000. He took photographs of the site and gave them to PW1.

13. PW1 further testified that he had looked at the valuation report which the defendant was relying on and he had noted that the terms of reference were different from his terms of reference. He added that the land acreage had changed because part of the land had been acquired by the Government for the construction of a road.

14. In cross-examination, PW2 stated that he did not annex his practicing certificate to the report. He added that he was not able to tell the identity of the company which was undertaking excavation on 20/8/2009 when he inspected the suit property. He had assessed the value of damage to the suit property at 20% of the prevailing land value. 85% of the land had been affected by the excavation. He arrived at the figure of Kshs 500,000 as the cost of restoration of one acre based on the cost of soil at the time. He did not have data to support the figures he arrived at.

Defendant's Evidence

15. The defendant called two witnesses: Nelly Karimi Mbugua (DW1) and Xia Anquan (DW2). PW 1 adopted her written statement dated 5/11/2014. In summary, her testimony was that she was a qualified and registered land valuer working at Cityscape Valuers & Estate Agents Limited. In October 2014, she received instructions from the defendant and its advocates to: (i) value the current market value of the suit property; (ii) estimate the size of land excavated by M/s Sinohydro Corporation Limited; (iii) estimate the cost of murram excavated from the section of land as at June 2009; (iv) estimate the cost of restoration of the land as at November 2014; and (v) provide evidence of usability of the land. She undertook the exercise and prepared her report. She produced a report as defence exhibit 1.

16. DW 1 stated that the total acreage of the land comprised in the title was 302 acres which translated to about 205 standard football pitches. She focused on the section which was pointed to her as the portion where murram had been extracted by the defendant. She pointed out the area marked blue at page 99 of the defendant's bundle, measuring 3 acres. She stated that the total cost of murram extracted from the land as at June 2009 was Kshs 850,000. The cost of restoration of the 3 acres of land was assessed at Ksh 2,100,000. She added that there were buildings on the land and the Eastern By-Pass cuts through the land. She further testified that the land was fully in use and there were ongoing developments on the land. She added that there was ongoing excavation and fresh dumping by unknown persons and entities at the time of inspection in 2014.

17. In cross-examination, she stated that at the time of inspection, the land had been sub-divided and sold. She added that her estimate at page 79 was based on the approximate number of lorries of murram extracted from the suit property and she obtained that information from the defendant. She further stated that the 3 acres where excavation took place were pointed out to her by the client.

18. Xia Anquan (DW 2) adopted his written statement dated 3/9/2012. In summary, his testimony was that he was the Contract Manager of the defendant's company. The plaintiff had concealed from the court the fact that on 10/8/2009, he swore an affidavit in support of his application for restraining orders against Nyambura Mwangi in Nairobi High Court Civil Case Number 716 of 2005 in which he accused Nyambura Mwangi of engaging in excavation resulting into massive and serious depletion and wastage of the suit property to the detriment of the other beneficiaries of the suit property. He added that the material excavation was done on a portion assigned to the Estate of the late Mwangi Githingi who was a shareholder of the plaintiff company.

19. DW2 added that from the arbitral award attached to PW1's Affidavit in Nairobi HCCC No 716 of 2005, Mwangi Githinji was a shareholder in the plaintiff company. He stated that Rose Nyambura Mwangi who was the administrator of the Estate of Mwangi Githinji entered into an agreement with the defendant company authorizing the defendant company to excavate murram from the deceased's portion of the suit property. Pursuant to the Certificate of Confirmation of Grant issued on 21/7/1995, Rose Nyambura Mwangi was entitled to a life interest in part of the deceased's property.

20. In cross-examination, he stated that the agreement for excavation was between the defendant and Wacera Mwangi. He added that the Grant relating to the Estate of Mwangi Githinji was not issued to Wacera Mwangi. He added that the duration of the contract was 24 months effective from 5/6/2009. He could not remember the exact date when excavation started. Wacera Mwangi was supposed to avail a copy of the title. According to the title of the suit property, the registered proprietor in 2009 was the plaintiff.

Plaintiff's Submissions

21. Counsel for the plaintiff itemized the following five issues as falling for determination in the suit: (i) who was the *bona fide* owner of the parcel of land, to wit, Land Reference Number 4923? (ii) Whether or not Wacera Mwangi had the capacity to enter into any agreement in relation to the suit property; (iii) Whether or not the defendant trespassed on the suit property, to wit, Land Reference Number 4923 and excavated on the same; (iv) Quantum of damages; and (v) Whether the plaintiff is entitled to the prayers sought in the plaint.

22. Counsel submitted that between June 2009 and August 2009 when the cause of action arose, the suit property belonged to the plaintiff and the interests of Rose Nyambura Mwangi and Wacera Mwangi in the suit property had not been defined. She added that the impugned excavation was not limited to the 37-39 acres subsequently given to the Estate of the Late Mwangi Githinji. Counsel made reference to the arbitral award and argued that the award confirmed that there was depletion of the suit property and that the extent of depletion in the year 2007 could not be ascertained. Counsel argued that Wacera Mwangi did not have the legal capacity to enter into an agreement relating to the suit property in June 2009.

23. On quantum of damages, counsel submitted that the general principle as regards the measure of damages to be awarded in case of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land

and not both. She submitted that the overriding principle is to put the claimant in the position in which he was prior to the infliction of the harm. Counsel contended that PW2's evidence on the depleted acreage was to be accepted because PW2 visited the site in 2009 while DW1 visited the site in 2014, almost six years after the cause of action arose. She urged the court to award the plaintiff Kshs 163,000,000 based on 256 acres as the acreage depleted by the defendant. She added that the plaintiff's claim related to the damage caused to the suit property as a result of the illegal excavation and did not relate to the cost of the soil or murram purportedly excavated from the land.

Defendant's Submissions

24. Counsel for the defendant condensed the agreed issues into the following four issues: (i) Did the defendant excavate land belonging to the plaintiff? (ii) When did the defendant start excavating the land and what was the size of the land excavated? (iii) What is the value or cost of the soil excavated? (iv) What damage, if any, is the defendant (sic) entitled to?

25. Counsel submitted that the question as to whether or not the defendant excavated land belonging to the plaintiff should be answered in the context of the dispute. He added that although the title to the suit property was in the name of the plaintiff and the contract between the defendant and Wacera Mwangi did not make reference to a particular land parcel number, the evidence on record showed that the contract related to the suit property and the suit property was to be sub-divided into various portions and shared out among the shareholders of the plaintiff company. He added that Rose Nyambura Mwangi had an interest in the excavated portion and her daughter Wacera Mwangi had the right to enter into the excavation agreement with the defendant in relation to the particular portion of the suit property.

26. Counsel for the defendant added that the plaint specified that the material excavation started in June 2009. He made reference to the evidence tendered to the arbitral tribunal in 2007 by a valuer by the name Job Kamau who stated that in 2007, the suit property was depleted through quarrying of stones and murram. Counsel contended that it was clear from the findings of the arbitral tribunal that as at 2007, the suit property had been depleted. Counsel argued that it was incorrect to assert that the depletion of the suit property was solely done by the defendant between June 2002 and August 2009. Counsel further made reference to two affidavits sworn in Nairobi HCCC No 716/2005 by PW1 in a suit he filed against Rose Nyambura Mwangi and contended that there was prior excavation.

27. Counsel added that the defendant had tendered evidence indicating that the excavation was done pursuant to an agreement dated 5/6/2009 and DW1 had tendered expert evidence on the size of land required to excavate 2000 lorries of soil. It was counsel's contention that the contract was prematurely terminated through a court order. He urged the court to find that the defendant excavated soil equivalent to 1000 lorries within an area of 3 acres.

28. On the value or cost of soil excavated, counsel submitted that because the land had been subdivided and sold, the rationale for compromised sub-divisional potential was eliminated. He added that in the absence of evidence of coffee growing on the land, the rationale for lost opportunity to grow coffee was far-fetched. Counsel contended that the figure of Kshs 163,000,000 was plucked from the air. Counsel argued only logical estimate is the one given by DW1 in relation to the cost of 1000 lorries of soil.

29. Counsel for the defendant argued that in order to arrive at the diminution value of the suit property, the plaintiff was required to compare the value of the suit property before the alleged excavation and the value after the alleged depletion or the purchase price after sale but had failed to do so. It was counsel's view that to arrive at the diminution value of the suit property where damage is caused by excavation, one has to look at the estimated volume of the soil excavated and the cost of the said soil. Counsel argued that the other formula was to look at the value of land before excavation and its value after excavation. Council contended that because the plaintiff had failed to adduce evidence relating to diminution, then its claim stood to be dismissed.

Analysis and Determination

30. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant statutory framework, relevant common law principles and relevant jurisprudence applicable to the key issues in this suit. The parties filed a statement of issues containing nine issues. However, the parties in their subsequent respective written submissions condensed the nine issues.

31. In its submissions dated 25/7/2019 and 14/8/2019, the plaintiff condensed the nine issues into the following five issues for determination by the court: (i) Who was the *bona fide* owner of the parcel of land, to wit, Land Reference Number 4927? (ii) Whether or not Wacera Mwangi had the capacity to enter into any agreement in relation to the suit property; (iii) Whether or not the defendant trespassed on the suit property, to wit, Land Reference Number 4927 and excavated on the same; (iv) Quantum of damages; and (v) Quantum of damages; and (vi) Whether the plaintiff is entitled to the prayers sought in the plaint.

32. In its written submissions dated 7/8/2019 at page 2, the defendant condensed the nine agreed issues into the following four issues: (i) Did the defendant excavate land belonging to the defendant? (ii) When did the defendant start excavating the land and what was the size of land excavated? (iii) What is the value or cost of the soil excavated? (iv) What damages, if any, is the defendant entitled to? (sic). It is obvious from the parties' pleadings, evidence and submissions that the word "defendant" in issue number (vi) should read "plaintiff".

33. Taking into account the parties' respective pleadings, evidence and the signed statement of agreed issues, together with the subsequent condensed statements of issues set out in the parties' respective written submissions, I discern the following as the six key issues falling for determination in this suit: (i) Whether the defendant was a trespasser on the portion of Land Reference Number 4927 where it carried out excavation of red soil and murram between June 2009 and August 2009; (ii) How much of the suit property was affected by the said excavation? (iii) Whether the said excavation caused destruction, depletion and loss to the suit property; (iv) Whether, as a consequence of the said excavation, the plaintiff is entitled to damages? (v) If so, what should be the measure of the damages; and (vi) What order should be made in relation to costs of this suit?

34. The first issue is whether the defendant was a trespasser on the portion of Land Reference Number 4927 where it carried out excavation of red soil and murram between June 2009 and August 2009. There is common ground that the suit property was at all material times registered in the name of the plaintiff company. The defence of the defendant was that the defendant entered into a lawful agreement with

Rose Nyambura Mwangi allowing the defendant to carry out the excavation. The defendant further contended that the excavation was carried out on a portion of land allocated to the estate of the late Mwangi Githinji. The evidence on record however does not support the defendant's defence. Firstly, the agreement which the defendant tendered in evidence, dated 5/6/2009, was between the defendant and Wacera Mwangi. Rose Nyambura Mwangi was not a party to the said agreement. No agreement relating to Rose Nyambura Mwangi was adduced in evidence. Secondly, as at 5/6/2009, the time the defendant purported to enter into the alleged agreement, the shareholders of the plaintiff company still had an ongoing dispute before the arbitral tribunal relating to the distribution of the company's assets. No determination had been rendered by the arbitral tribunal. No sub-division of the suit property had taken place. No allocation of any specific portion of the land had taken place. The land was still a single parcel belonging to the plaintiff company. Thirdly, Wacera Mwangi was neither a director of the plaintiff company nor a shareholder. She was not an authorized agent of the plaintiff company. She did not therefore have any mandate to enter into an excavation agreement relating to the suit property which belonged to the plaintiff. The agreement dated 5/6/2009 was therefore an illegality. My finding on the first issue therefore is that the defendant was a trespasser on the suit property and the excavation it carried on the suit property was illegal.

35. The second issue relates to the acreage of land which was affected by the said excavation. There is common ground that the cause of action in this suit relates to the excavation which took place between June 2009 and August 2009. The plaintiff contends that the excavation affected 256 acres. The defendant contends that the excavation affected 3 acres. The suit property measured 302 acres at the time the cause of action accrued. PW1 relied on the arbitral award which at page 5 reads as follows:

> **"The last respondent's witness was Job Kamau who is a valuer at Mark Property Company. He stated that he had inspected the property in the year 2007 and found that it had been depleted through quarrying of stones and murram. He noted that the area affected is about 32 acres though he was not on the ground. He gave some figures of how much it would cost to rehabilitate the land".**

36. Job Kamau was a witness who was presented to the arbitral tribunal by PW1. It is therefore apparent that the suit property was depleted through quarrying of stones and murram as early as 2007 when Job Kamau prepared a report for use by PW1. PW1 similarly admitted in his evidence under cross-examination that other excavations unrelated to the cause of action in this suit had taken place on the land. It was therefore the duty of the plaintiff to place before court evidence relating to the total acreage of land which had been depleted prior to June 2009 and the acreage of land which was depleted by the defendant between June 2009 and August 2009. Regrettably, the plaintiff did not provide that evidence. The plaintiff instead lumped together all the excavations which had taken place as forming part of the cause of action in this suit. For this reason, I reject the plaintiff's contention that the defendant was responsible for the depletion of 256 acres.

37. DW1 testified that she inspected the suit property in 2014. She was shown the area where the material excavation took place. She measured it and she ascertained it to be 3 acres. This in my view is the only credible evidence the court is left with. I will accordingly accept it. It is therefore my finding that based on the evidence before court, three acres of the suit property were affected by the material excavation by the defendant which took place between June 2009 and August 2009.

38. The third issue is whether the said excavation caused destruction, depletion and loss to the suit property. PW2 observed in his damage assessment report dated 20/8/2009 that the target of the excavation was the top red soil and the underlying murram layer. He assessed the extent of the damage caused to the land at 20% of the prevailing land value. Although DW1 did not expressly admit that there was damage done to the land, she assessed the cost of restoration of the 3 acres at Kshs 2,100,000. In my view, the only reason why restoration would be necessary in 2014 is that there was damage caused to the land through the excavation of June 2009 to August 2009. It is therefore my finding that there was destruction, depletion and loss to the suit property as a consequence of the excavation.

39. The fourth issue is whether, as a consequence of the said excavation, the plaintiff is entitled to damages. The fifth issue relates to the quantum of damages. I will make brief pronouncements on the two issues simultaneously because they are related. The suit property having suffered destruction and depletion, it follows that the proprietor of the land at the material time is entitled to damages.

40. The general principle governing assessment of general damages of this nature was outlined by **Lord Justice Donaldson in Dodd Properties (Kent) Limited and another v Canterbury City Council and others [1980] 1 All ER 928** in the following words:

> **"The general object underlying the rules for the assessment of damages is, so far as possible by means of monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of be that wrong a tort or a breach of contract. In the case of a tort causing damage to real property, this object is achieved by the application of one or other of two quite different measures of damage, or occasionally, a combination of the two. The first is to take the capital value of the property in an undamaged state and to compare it with its value in a damaged state. The second is to take the cost of repair or reinstatement. Which is appropriate will depend on a number of factors, such as the plaintiff's future intentions as to the use of the property and the reasonableness of those intentions. If he reasonably intends to sell the property in its damaged state, clearly the diminution in capital value is the true measure of damage. If he reasonably intends to continue to occupy it to repair the damage, clearly the cost of repairs is the true measure. And there may be in between situations.**"

41. Faced with a question precisely similar to the present issue, **Nyamweya J** reaffirmed the above approach in **Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & Another [2013] eLKLR** in the following words:

> "**The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land, and not both. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm. The test that guides the court in deciding which of the two measures of damages to employ is the reasonableness of the said reinstatement in light of the extra costs that may be incurred by the defendant in this regard."**

42. In the present suit, the suit property has since been sub-divided and disposed by the plaintiff. Secondly, neither of the parties presented evidence on the value of the affected portion of the suit property prior to the excavation and the value of the same portion after the excavation. Thirdly, PW1 testified that at the time of disposing the 302 acres comprised in the title, an acre was fetching between Kshs 15,000,000 and Kshs 20,000,000. He contended that the price could have been better if excavation had not taken place. Fourthly, PW2 assessed the cost of restoration of one acres at kshs 500,000 in 2009. DW1 assessed the cost of restoration of three acres at Ksh 2,100,000 in the year 2014.

43. Evidence presented indicates that the property was shared out and disposed soon after the arbitral tribunal rendered an award in 2009. In the absence of evidence relating to the value of the affected portion prior to and after the excavation, the logical measure of damages to use would be the cost of restoring the 3 acres in 2009 were it to happen then. Based on PW2's assessment of Kshs 500,000 per acre, this cost translates to Kshs 1,500,000 for the three acres which were affected by the illegal excavation. Consequently, I assess and award the plaintiff Kshs 1,500,000 as damages resulting from the waste occasioned to the suit property.

44. Lastly, the defendant shall bear the costs of this suit because it committed a tort which it should not have committed if it had done proper due diligence.

Summary of Findings

45. In summary, it is my finding that the defendant was a trespasser on the portion of Land Reference Number 4927 where it carried out excavation of red soil and murram between June 2009 and August 2009 when the High Court (Sitati J) issued an order stopping the excavation. Secondly, it is my finding that three (3) acres of the suit property was affected by the said illegal excavation. Thirdly, it is my finding that the said excavation caused destruction, depletion and loss to the said portion of the suit property. Fourthly, I find that the plaintiff is entitled to damages for the illegal excavation. Fifth, the quantum of damages payable to the plaintiff is assessed at Kshs 1,500,000. Lastly, the defendant shall bear costs of the suit due to its tortious activities.

Disposal Orders

46. Arising from the above findings and in line with the prayers made in the plaint, I make the following disposal orders:

> **a. The plaintiff is hereby awarded Kshs 1,500,000** ***as damages for the waste occasioned to the suit property by the defendant between June 2009 and August 2009.***
>
> **b. The plea for Kshs 128,000,000 as cost of return, filling and ramming of the affected land is rejected.**
>
> **c. The damages awarded herein shall attract interest at court rate from the date of judgment.**
>
> **d. The defendant shall bear costs of this suit.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF DECEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Mwachiro for the plaintiff

Mr Kioko holding brief for Mr Mutua for the defendant

Court Clerk - June Nafula