REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC APPEAL NO 25 OF 2017

JOHN MUTUNGU WAITITU.....APPEALLANT

VERSUS

CHINA WUYI (KENYA) CO. LIMITED.....RESPONDENT

AND THE CROSS APPEAL BETWEEN

CHINA WUYI (KENYA) CO. LIMITED.....APPELLANT IN CROSS APPEAL

VERSUS

JOHN MUTUNGU WAITITU.....RESPONDENT IN CROSS APPEAL

Being an appeal against part of the Judgment/decree of the Hon. D.N Musyoka, Resident Magistrate at the Nyahururu Principal Magistrate Court delivered on 14th October 2011

in

PMCC No. 219 of 2010

JUDGEMENT

1. What is before me for determination is an Appeal and Cross Appeal arising from a matter which was heard and decided by *Hon. D.N Musyoka RM in the Principal Magistrate Court at Nyahururu in Civil Case No. 219 of 2010* in which **JOHN MUTUNGU WAITITU** (the Appellant herein) was the Plaintiff while **CHINA WUYI (KENYA) CO. LIMITED** were the Defendant herein. The learned trial Magistrate, upon taking the evidence of both parties, delivered his judgment *on the 14th October 2011 wherein he found that the Plaintiff had proved his case on a balance of probabilities to the effect that the Defendant's activities in the plaintiff's land, though lawful, had culminated into environmental degradation which ought to be rectified. The learned Magistrate then entered judgment against the Defendant as follows;*

> *i. That the defendant move onto the Plaintiff's land and ensure that it is put into sound environmental standard which is not harmful to the environment and to the area residents.*
>
> *ii. That the District environment officers do ensure that the Defendant restores the Plaintiff's land in good environment.*
>
> *iii. Failure which the Defendant do compensate the Plaintiff for the environmental violation of the right to a clean and healthy environment to the tune of Ksh. 200,000/=*
>
> *iv. That the Defendant do pay to the Plaintiff the balance of Ksh. 15,000/= plus interest at 18% from the date of filing this suit. The Plaintiff was also awarded the costs.*

2. The Appellant, being dissatisfied with the judgment of the trial magistrate immediately filed his notice and Memorandum of Appeal on the 25th October 2011 with the Respondent herein filing their Cross-Appeal on the 9th November 2011.

3. The Appellant's record of appeal was then filed on the 14th November 2011 wherein he raised grounds in his Memorandum which grounds were in contravention of the provisions of Order 42 Rule 1(2) of the Civil Procedure Rules which provides as follows;

> *The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order*

appealed against, ***without any argument or narrative****, and such grounds shall be numbered consecutively*.

4. *The Grounds relied upon by the Appellant in his Memorandum of Appeal included;*

i. The learned Magistrate erred both in law and in fact in holding that the Defendant whom the learned Magistrate found liable for gross environmental degradation of the suit property, can wiggle out of the duty and obligation to restore the suit property to reasonable environmental standards by making a payment/compensation of Ksh. 200,000/= to the Plaintiff in lieu thereof.

ii. The learned Magistrate erred in law by misinterpreting the provisions of Article 70(2)(c) of the Constitution of Kenya by providing for compensation in lieu of restoration of the degraded environment whereas compensation to a victim of a right to a clean environment and healthy environment under the Article 70(2)(c)of the Constitution of Kenya can only be awarded in addition to an order decreeing restoration of the degraded environment for the duty and the obligation to conserve the environment is meant for the posterity and not for the aggrieved party only.

5. The learned trial Magistrate erred both in law and in fact by not sufficiently appreciating that once the learned trial Magistrate(sic) found the Respondent liable for degradation of the suit property, the proper and main remedy was an order directing the Respondent to forthwith restore the suit property to the required and /or reasonable environmental standards as prayed for by the Appellant in the plaint and not in lieu of the order of restoration for no amount of compensation can ideally restore the degraded environment.

6. The Appellant thus sought for the following reliefs:

i. *That the aforesaid portion/part of the judgment /decree denoted (c) of Hon D.N Musyoka RM made in Principal Magistrate Court at Nyahururu in PMCC No. 219 of 2010 on the 14th October 2011 be and is hereby set aside and be substituted with one directing the Defendant to forthwith* restore the suit property to the required and/or reasonable environmental standards and in addition the Respondent do compensate the Appellant for degradation of the suit land by the Respondent(sic) for a sum to be assessed by this court or another court to which the issues of compensation may be remitted to by this honorable court.

ii. The Respondent bears the cost of this Appeal.

iii. Any other orders and/or reliefs the court may deem fit to grant.

7. The Grounds of the Respondent's Cross-Appeal on the other hand were to the effect that;

i. That the honorable Court erred in Law and fact in failing to accept that the parties had entered into a contract which spelled out terms and conditions and the defendant strictly adhered to it without any breach.

ii. That the court erred in law and fact in re-writing a new contract for the parties.

iii. The court erred in law and fact in failing to appreciate that the parties were aware of the sloppy nature and gradient of the plaintiff's land before entering into the agreement and that is why clause 4 of the agreement between them provided for pushing back of the top soil only after excavation.

iv. The court erred in law and fact in failing to appreciate that the plaintiff had unequivocally admitted in court that the back wall after excavation was definitely expected and the defendant made sure it was sloppy as possible owing to rock embankments. He should have dismissed the suit.

v. The court erred in law and fact in failing to appreciate that the plaintiff was forcing the defendant to excavate all the murram and indirectly create a flat field for the defendant to build rental houses which was not part of the agreement they entered.

vi. The court erred in law and fact in pushing the defendant for what it called the environmental degradation under the new Constitution when the agreement and excavation were done before the said Constitution came into effect on 27th August 2010.

vii. The court erred in law and fact in failing to consider the evidence by the defendant and the defence submissions on the issue of liability at all.

viii. The court erred in law and fact in failing to dismiss the plaintiff's case after the defendant admitted that the top soil could not be retuned on a wall.

ix. The court erred in law and fact in deciding the case on liability relying on extraneous matters but not on the evidence on record.

x. The court erred in law and fact in ordering the defendant to pay the plaintiff 15,000/= together with interest thereon at commercial rate of 18% p.a. from the date of filing suit until payment in full when the plaintiff had unequivocally admitted in court that the defendant ordered to pay him and he is the one who refused to take the money even when it was brought to court on 3rd December 2010, and he refused to take it.

xi. The court erred in law and fact in awarding the plaintiff illegal interest rate of 18% p.a. without any basis of law.

xii. The court erred in law and fact in holding that the defendant had caused a degradation of the suit property when the defendant actually stopped excavation to avoid blasting the encountered rocks which would have meant leaving a vertical wall at the plaintiff's boundary with the upper neighbor.

xiii. The court erred in law and fact in failing to appreciate that any further sliding of the back wall will mean excavating into the plaintiff's upper neighbors land which was not part of their agreement and without his authority.

xiv. The court erred in law and fact in awarding excessive damages which are three times more than the value of murram sold by the plaintiff to the defendants.

xv. The court erred in law and fact in failing to appreciate that the plaintiff's evidence was contrary to his own pleadings, incoherent, contradictory, not truthful, and far below the required standard of proof and the suit should have been dismissed with costs.

REASONS WHEREFORE: - It is hereby proposed to ask this court for orders:-

a. That the whole judgment of the subordinate court in Nyahururu PMCC No. 219 of 2010 be set aside and substituted with an order dismissing the suit with costs.

b. That the appellant bears the costs of this Appeal.

8. Although this Appeal was admitted on the 20th September 2012, it did not take off until the 17th July 2015 wherein directions were taken in the High court sitting in Nakuru to the effect that both the Appeal and Cross-Appeal were be canvassed by way of written submissions.

9. Subsequently the Court noting that this matter was a preserve of the Environment and Land Court, transferred the same to this court vide an order dated the 14th July 2016.

10. On the 7th March 2017 when the matter came before me, only Counsel for the Appellant was present and submitted that parties would not highlight on their written submission but would rather take a date for judgment. Upon the court being satisfied that the Respondent was served with the days mention notice vide an affidavit of service sworn by one Jacskon Muthii Gaturu on the 17th January 2018 and filed on the 8th March 2018, but failed to appear in court, obliged Counsel for the Appellant's request to deliver judgment without Counsel highlighting on their respective written submissions.

11. Both Parties filed their written submissions on 4th November 2015 with the Appellant titling his written submission as **Appellant's Skeleton submission** while the Respondent titled his written submissions as Respondent's **Submissions and Submissions in support of the Cross-Appeal**. I have read both of them and do proceed to summarize them as follows;

12. That the Appellant herein was the registered owner of Plot No. Nyandarua/Wanjohi/1649. That pursuant to the Respondent's activities on the said land, the same resulted into environmental degradation. That the matter was filed in court wherein it proceed for hearing. After the close of the case, the trial learned magistrate found that the Respondent's activities on the plaintiff's land, though lawful, had culminated into environmental degradation.

13. The Appellant's grievance then comes in to the effect that even after having found the Respondent guilty as herein above stated, the trial Magistrate instead of ordering that the Respondent restore the suit property to reasonable environmental standards and leaving it at that, went ahead and gave them a leeway, which was a soft landing, of paying a paltry payment/compensation of Ksh. 200,000/= to the Appellant in lieu thereof.

14. According to the Appellant, since environmental matters have taken a center stage in the world order of affairs, protection and conservation of the environment under both domestic legislation and international legal gambit, and further that under Article 42 and 70 of the Constitution of Kenya, the same provides for a right to a clean environment, no amount of money could be awarded as an alternative to an order for restoration of a degraded environment.

15. The Appellant faulted the trial magistrate's order in portion denoted(c) of the judgment which portion according to the Appellant, ought to be set aside and the same be ordered to be in addition to the grant of the orders denoted in (a) and (b) of the decree dated the 14 th October 2011.

16. The appellant further submitted that under Order 42 of the Civil Procedure Rules, the same did not provide for Cross Appeals and that if the Respondent was dissatisfied with the court's judgment, the only avenue available to them was the filing of an Appeal against the said judgment thus having failed to do so, they could now only respond to the Appellant's Appeal.

17. The Appellant further submitted that the Respondent could not challenge the Judgment of the trial court as save for the portion denoted in the portion (c) because the said judgment could not be impugned. He relied on the case of **Mwanakosi vs Kenya Bus Service Limited [1985] KLR 931**.

18. The Appellant also relied on the decided case of **Ephantus Mwangi and Another vs Wambugu, 1983/84 KCA 118** to submit that findings of facts could only be challenged on appeal only when the same was based on no evidence, or misrepresentation of the evidence, or the Judge is shown demonstrably to have acted on the wrong principles in reaching the finding as he did. He asked the court to apply the same principles in the present Appeal which he prayed that the same be allowed.

19. The Respondent's submission on the Appeal and Cross Appeal was to the effect that, the origin of the suit herein was premised on a written land lease contract between the parties herein entered on the 19th August 2009 for the Respondent to excavate murram upon the Appellant's land and thereafter push back the top soil.

20. The Respondent framed issues for determination as ;

i. Whether or not the parties had agreed to the terms of the contract dated the 19th August 2009.

ii. What was the expected gradient of the excavation site by the Plaintiff after all the murram had been excavated viz a viz the sloppy nature of the terrain at the site.

iii. Whether or not the defendant left a 'shimo', hole at the site

iv. Whether or not the defendant left a vertical or sliding wall at the back of the site.

v. Whether or not the Plaintiff has acclaim for breach of the contract against the defendant.

vi. Whether or not the Defendant has refused to pay the Plaintiff Ksh. 15,000/= being the balance of the price of murram.

vii. Who should bear the cost.

21. On the first issue, it was the Respondent's submission that the parties had agreed on the terms of the contract before signing the agreement, in compliance with Section 3 of the Law of contract. That the said terms were clear and there is no dispute to the same.

22. On the second issue, the Respondent submitted that both parties knew that the excavation was to be carried out on a sloppy site and that definitely the a wall would remain at the back hence the reason why they had agreed, at clause 4 of the agreement, that after the Respondent had excavated the murram, he would push back the top soil to fill any hole that was left at the bottom so as to leave the land as flat as possible. The Respondent had dutifully complied.

23. The Respondent further submitted on the third issue that the court had visited the site and had noted that there was no 'shimo' as claimed by the Appellant herein.

24. It was the Respondent's submission, on the issue of whether or not they had left a vertical or sliding wall at the back of the site which had amounted to environmental degradation, that when parties entered into the agreement, the Appellant had sold all the murram on his land to the Respondent which naturally left a wall as a boundary between him and his neighbors. Further that the Appellant had accepted the payment for the murram excavated from the Respondent save for the Ksh 15,000/= which he had intentionally refused to collect.

25. The Respondent further submitted he had not caused the environment any degradation as particularized in paragraph 5 of the plaint because he did not excavate the Appellant's entire piece of land because of the presence of a rock that blocked them from excavating any further thus they had left behind the said rock and a wall that was sloppy. He explained that excavating further would have meant trespassing into the Appellant's neighbor's land and was categorical that the he had not degraded the environment.

26. On the issue as to whether or not the Appellant has a claim for breach of the contract against the Respondent, it was their submission that they had not breeched the terms therein set out in their contract that was signed on the 19th August 2009. He faulted the trial Magistrate's court for re-writing the said contract on alleged Constitutional breaches based on the 2010 Constitution, which Constitution according to the Respondent, did not act in retrospective.

27. In regard to the ninth issue as to whether or not the Respondent had refused to pay the Appellant his balance of Ksh. 15,000/= being, the price for the murram, it was the Respondent's submission that the Appellant had refused to collect the said sum of money despite having been summoned to do so. That the Appellant was even offered the money in court at the hearing wherein he declined to take it stating that he would take it after the determination of the case herein. That clearly the trial court erred in awarding the Appellant an *interest of 18% of the Ksh 15,000/ when the Appellant was at fault.*

28. The Respondent argued the court to dismiss the Appellant's Appeal with costs to himself.

29. The Respondent further relied on their grounds in thier Cross-Appeal as herein above stated.

30. I have considered the Appeal and Cross Appeal as well as the submissions by both Counsel.

31. I find that the subject matter and cause of action in this matter arose after the Respondent herein had leased the Appellant's land for a period of one year, with the purpose of excavating murram. That after excavating the murram, the Respondent had failed to push back the top soil in order to make the ground level and/or leave the ground the way they had found it. This in turn left the land vulnerable and prone to grave environmental degradation.

32. The Appellant was dissatisfied with part (c) of the Judgment/decree delivered on 14th October 2011 by Hon. D.N Musyoka, Resident Magistrate in Nyahururu Principal Magistrate Court Civil Case No. 219 of 2010 prompting him to file this appeal.

33 I find matters or determination as being;

i. Whether there was a breach of contract by the Respondent herein.

ii. Whether the Respondent herein committed an environmental degradation on the suit land.

iii. Whether the Appellant is entitled to an order against the Respondent for restoration by the Respondent of the suit property to the required and or reasonable environmental standard.

34. Based on the decided case of **Selle vs. Associated Motor Boat Company Ltd, [1968] EA 123, t**his being a first appeal, I am enjoined to revisit the evidence that was before the trial court afresh, analyze it, evaluate it and come to my own independent conclusion. The ordinary caution that I should equally bear in mind and make allowance for is the fact that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanor, which is diminished in this Appeal because the hearing took place before a Magistrate.

35. I am also reminded that an Appellate Court will not normally interfere with the finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or where the trial Court is shown to have acted on wrong principles in arriving at the decision subject of the appeal.

36. I shall first consider the appeal by John Mutungu Waititu against China Wuyi (Kenya) Company Limited wherein I shall endeavor to analyze and evaluate the case herein afresh.

37. Briefly, the evidence adduced in the trial court before by Hon. D.N Musyoka RM was to the effect that the Appellant herein, PW1, who was the registered proprietor of land parcel No. Nyandarua/Wanjohi/1619 measuring 0.20 hectares had entered into a contract with the Respondent on the 19th August 2009, to scoop murram from his land so as to construct the Njambini –Olkalou road.

38. That parties had agreed that the Respondent do harvest Murram from the Appellant's land at a cost of Ksh 70,000/= and further that the Respondent would pay Ksh 55,000/= as a first installment, leaving a balance of Ksh. 15,000/=

39. That indeed the Respondent did scoop the said murram but left the Appellant's land open without any fence demarcating it from the neighbor's land and hilly on one side so that when it rained, the soil was is swept downward. This necessitated the Appellant to put some stones thereupon to act as barriers so that the soil is not washed downwards.

40. That when he brought this state of affair to the attention of the Respondent, the Respondent asked him to take the balance of his money instead which he refused demanding that then Respondent restores the land back to its original state and also put a divert access to the Appellant's home.

41. To support his evidence, the Appellant produced photographs depicting the status of his land and even invited the court to visit the site.

42. The Appellant filed the present case when Respondent refused to make good the terms of their agreement.

43. In cross examination the A ppellant reiterated what he had testified during his examination in chief and confirmed that although he had been called by the Respondent to go and collect the balance of his money being Ksh. 15,000/=, he had refused to do so because the Respondent had not fulfilled his end of the bargain but had left the land without a culvert, with holes and without a boundary between his land and that of his neighbor.

44. He confirmed that his land was on a slop and that they had an agreement with the Respondent that upon excavation of the murram that the Respondent would return the top soil to level the land and put back the fence as it had originally been.

45. The Appellant was recalled and the matter proceeded on site wherein he pointed out where the boundary ought to be and further informed the court that the Respondent had promised to refill the excavated area by putting soil on the land but when he visited their office, they had informed him that they were going out of the country and that he should instead just take his balance. He complained that despite the Respondent having not filled up the place they had excavated, they had excavated deeper than what they had agreed upon in their agreement, thereby leaving a cliff that was dangerous to human beings and animals as stones kept falling from the said cliff.

46. He produced the agreement as exhibit as exhibit 2 indicating at paragraph 4 showing that the Respondent had agreed to put soil on top of the excavated ground upon completion the same way they had done in the adjacent land.

47. The Appellant's next witness was Pw2, a Chief of Wanjohi location Mr. Peter Kamau Kiarie, testified to the effect that he had witnessed the agreement between the two parties and that prior to the excavation by the Respondent, the Appellant's land was gently sloppy and not as vertically sloppy as it now was. That the agreement was to the effect that the Respondent would put top soil on the land after excavation had been completed but when they failed to do so, the dispute was referred to him by the Appellant. He visited the site and confirmed that unlike what the Respondent had done on the Appellant's neighbor's land in regard to the Appellant's land, he had not met his end of the bargain.

48. He confirmed like the Appellant that that been the first excavation carried out on the Appellant's land and that the Respondent had informed him that the cliff was too high for them to fill it up. The witness testified that all they had wanted was for the Respondent to fill the hole with soil slating downwards otherwise the cliff they had left was dangerous and was causing a lot of soil erosion.

49. The defence on their part adduced evidence through their contractor one Peter Nzababa Eram, who worked as the personnel manager of

the Respondent Company, to the effect that Respondent was contracted by the Ministry of roads to build the road from Wanjohi to Olkalou wherein they started looking for murrram and landed in the Appellant's plot. That they collected samples from a wall that was thereon and upon tests having been conducted, they established that the land had murram which they sought to use.

50. They had looked for the Appellant and entered into a contract with him to excavate the murram form his land at a cost of 35,000/. That since the Appellant's land was small, and therefore the murram theron would not be sufficient, they also contracted his neighbor and bought murram from him to add onto the murram from the Appellant's land.

51. That is was during the excavation that they came across a layer of rock that they had stopped the excavating process since their machines could not excavate anymore. The only solution available was the blasting of the rock which would have created an environmental degradation.

52. He testified that the normal process when they excavated on someone's land, was that they would put the top soil aside and push it back after the excavation, but that many a times it was not a must that the soils refills where they had excavated.

53. The witness testified that an example was the Appellant's land where they had removed very little top soil which after the excavation, they had pushed it back but unfortunately the same was not enough to make the land level. He explained that pushing back the top soil did not mean returning the land back to how it was before excavation. He also testified that unlike the Appellant's land his neighbor's land had enough top soil which they returned to his satisfaction.

54. He testified that the Appellant's land was too sloppy and to make it level, it would mean using top soil from other people's land, an action they had no authority.

55. He testified that nowhere in the agreement had there been a clause to the effect that any wall should be made to slope downwards, further that far as the fence was concerned, it was the responsibility of the proprietor of the land to put it back. The witness pointed out to paragraph 2 of the agreement which was to the effect that the Appellant was to remove the house and Fence free of charge to provide access, which he did. There was no provision in the Agreement for the Respondent to return the fence thereafter.

56. He testified that trying to fill up the cliff as the Appellant wanted them to do would cost the Respondent a lot of money and further that they had not refused to give the Appellant his balance of Ksh 15, 000/= but that the Appellant had refused to take his balance.

57. During cross examination the witness confirmed that he was a witness to the agreement between the parties which was done in the Respondent's office.

58. That he was not an expert in excavation matters but his work was to employ workers and pay them thereafter.

59. That the Appellant's neighbors' piece of land had better soil and that is why good grass had grown on the top soil they had pushed back, unlike the soil on the Appellant's land which was rocky.

60. The witness was then recalled to produce photographs of the site as his Defence exhibits 1-5 which then marked the close of the Defence case.

61. Having carefully considered the evidence on record, is not contested, vide exhibit 1 in the form of a title deed, that indeed the Appellant herein was the registered proprietor of land parcel No. *Nyandarua/Wanjohi/1619 measuring 0.202 hectares.*

62. it is also not contested that vide the evidence adduced by both parties and supported by exhibit 2, the agreement herein, that on the 19th August 2009 parties herein entered into a contract, to which they had agreed that the Appellant leases out his land to the Respondent for ksh 70,000/= to enable the Respondent excavate murram from therein. That the Appellant was charged with the responsibility of removing his the house, fence and plants within the leased area without compensation so as to provide an access road for the Respondent to enter the leased area free of charge.

63. I therefore find that after the Respondent had excavated the said murram, the agreement was to the effect that he returns or pushes the top soil back accordingly. The lease was for one year.

64. I shall endeavor to produce the lease agreement herein under for ease of reference;

65. Through negotiations, party A and B have come to the agreement as follows:-

i. Party A requested from Party B for the excavation of the murram. The leased area is **0.202 acre** in square and the total amount to be paid to the owner is **ksh 70,000**/= (seventy thousand shillings only). The payment shall be done in two installments. The first installments of **ksh 55,000/=** (fifty five thousand only) shall be paid on agreement being singed by both parties while the second portion of **ksh 15,000**/= (fifteen thousand) shall be paid after the excavation is compete.

ii. That Party B shall remove the house, fence and plants within the leased area without compensation and provide an access road for Party A to enter the leased area at free of charges.

iii. That during the leasing period, party B shall not sell murrum from the leased area to other parties.

iv. After excavation party A will push back the top soil accordingly

v. That the lease period will be one year.

vi. That all the above information is true and confirmed by both parties.

vii. This agreement is signed and comes into effect on 19th August 2009. Party A and Party B, each hold one copy of the agreement.

66. Based on the signed agreement between parties and more so at paragragh ii, the same was clear to the effect that the Appellant was to remove his property which included his house fence and plants within the leased area without compensation, so as to give access to the Respondent. Nowhere in the contract did it stipulate that after the excavation, the Respondent was to put back the fences as they had originally been nor was there a provision that the rRspondent was to build a culvert on the suit land as the Appellant wants the court to believe. **A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved which in this case, is lacking.**

67. From the evidence adduced, I find that after the Respondent had excavated murram on the Appellant's land, they did not push back the top soil as agreed thus leaving the suit land unleveled, with a cliff and/or what witnesses descried as a wall.

68. According to the description of the trial magistrate who visited the scene, what was left on the ground was;

> '**….**..not an impressive scenery. It is as I observed a scenery in slightly post excavation land scape. No top soil was pushed back as water can even settle in the middle of the excavated area further exacerbating the degradation of the environment.'

69. Based on the above finding, did the Respondent herein then breach any terms of the **contract between him and the Appellant? From the wording** of the said lease agreement more so at paragraph iv the same was clear to the effect that;

> '**……**After excavation party A will push back the top soil accordingly'

70. In the case **of Nakana Trading Co. Ltd vs Coffee Marketing Board 1990 – 1994 EA 448**, the High court in Kampala on the issue whether there was a breach of contract court stated:-

> ***"In contract, a breach occurs when one or both parties fail to fulfill the obligations imposed by the terms since the contract between the parties was reduced into writing, the duty of the court is to look at the documents itself and determine whether it applies to existing facts. No evidence can be adduced to vary the terms of the contract if the language is plain and unambiguous. Support for the proposition can be found in Sarkar on Evidence at 849 where the author said."***

71. The general rule with regard to damages in breach of contract were set out in the often quoted case of **Hudley's paxendale [1854] 9 Exch 341** where the court said:-

> "***where two parties have made a contract which one of them had broken the damages which the other party ought to receive in receipt of such breach of contract should be such as may fairly and reasonably be considered either naturally that is in accordance to the usual course of things from such a breach itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."***

72. Clearly from the evidence of the Appellant and his witness as well the observation of the trial Magistrate, and the photographs produced herein as exhibits, I find that the Respondent was in breach of paragraph iv of their agreement as they did not push back the top soil as agreed but tried to wriggle out of their obligation by stating that the top soil on the Appellant's land was too little to level the ground.

73. Following the Respondent's breach of contract in terms of paragraph iv, the Appellant had to use his own resources to put some stones thereupon to act as barriers so that the soil is not washed downwards when it rained. This in turn exposed the Appellant in additional cost which was not claimed as special damages.

74. The distinction between general damages and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded. **(See *Chitty on Contracts* 26 edition para 1772 at p117 *et seq*.)**

75. Although the Appellant did not quantify the loss he was entitled to award in terms of special damages, in terms of the actual amount, yet the fact that he had proved a breach of the contract, the loss suffered was capable of compensation by an award of nominal damages.

76. In *'**Medina' and the 'Mediana'* [1900] AC 113, 116 Earl of Halsbury LC** as he then was defined nominal damages as:-

> *'Nominal damages' is a technical phrase which means that you have negatived anything like real damages, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damages does not mean small damages. The extent to which a person has a right to recover what is called by the compendious*

phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages."

77. *Order 42 Rule 32 of the Civil Procedure Rules* grants this Court the power to pass any decree or make any order which ought to have been made by the trial Court. In this regard thereof I find that nominal damages would be sufficient to compensate the Appellant herein for the unquantified loss flowing from the breach.

78. Having found that the Respondent herein flaunted the term in paragraph iv of their contract, the next issue for determination would be thus by **flaunting** paragraph iv **of the contract, whether the Respondent contributed to an environmental degradation on the suit land.**

79. The Environmental Management and Co-ordination Act No. 8 of 1999 (EMCA) is an Act of Parliament that commenced on the 14th January, 2000 and assented on the 6th January, 2000 to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto. That although the said Act does not provide for the definition of the term 'Environmental degradation', yet, but it is the deterioration of the environment through depletion of natural resources such as air, water and soil; the destruction of ecosystems and the extinction of wildlife.

80. **The United Nations International Strategy for Disaster Reduction** defines environmental degradation as;

"*The reduction of the capacity of the environment to meet social and ecological objectives and needs.*

81. Humans and their activities for example mining, overpopulation, air and water pollution, deforestation, global warming, excavation of soils, are some of the major sources of environmental degradation

82. Section 3(1)of the Environmental Management and Co-ordination Act No. 8 of 1999 (EMCA provides for the e**ntitlement to a clean and healthy environment to the effect that:**

(1) ***Every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws and has the duty to safeguard and enhance the environment.***

83. Further Section 3(3) of the same Act provides an avenue for an aggrieved party to come to the court for redress if the said right is violated. The said provisions reads as follows:

(3) ***If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to—***

(a) prevent, stop or discontinue any act or omission deleterious to the environment;

(b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;

(c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;

(d) Compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and

(e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.

84. That pursuant to the above provisions and further, Section 3(3)(d) and Section 111 of the Act which provide as follows:

(1) Without prejudice to the powers of the Authority under this Act, a court of competent jurisdiction may, in proceedings brought by any person, issue an environmental restoration order against a person who has harmed, is harming or is reasonably likely to harm the environment.

(2) For the avoidance of doubt, it shall not be necessary for a plaintiff under this under this section to show that he has a right or interest in the property, environment or land alleged to have been or likely to be harmed.

85. Pursuant to the evidence on record thereof and the finding by the Trial magistrate to the effect that indeed the Respondent's activities culminated to environmental degradation, I hold and confirm the same position and shall not interfere with the said finding of fact by the trial Court.

86. In the result thereof, upon considering the appeal and cross appeal herein, I make the following orders.

i. The Appeal by the Appellant John Mutungu Waititu is allowed in the following terms;

ii. The Appellant is awarded an award of Kshs 25,000/- nominal damages

iii. That the Respondent move onto the Appellant's land and ensure that the same is restored to sound environmental standard which is not harmful to the environment and to the area residents and animals.

iv. That the County Environment officers do ensure that the Defendant restores the Appellant's land in good environmental condition.

v. The order for compensation of Ksh. 200,000/= to the Appellant by the Respondent in the alternative of the Environmental restoration be and is hereby set aside.

vi. The Respondent do pay to the Appellant the balance of Ksh. 15,000/= plus interest at courts rate from the date of filing this suit until the payment in full.

vii. *The Cross Appeal by* China Wuyi (Kenya) Co. limited *is dismissed.*

viii. Costs to the Appellant both in this court and in the Magistrate's court.

ix. This judgment be served upon the National Environment Management Authority to serve upon the Respondent an environmental restoration order within 21 days of the delivery of this Judgment.

87. It is so ordered.

Dated and delivered at Nyahururu this 17th day of May 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE