



Mwakia & 4 others (Suing for Themselves and on Behalf of the Entire Miasenyi-Majengo Mapya Village of About Two Hundred and Seventy Affected People) v Kenya Pipeline Company; National Environment Management Authority (Interested Party) (Land Case E002 of 2023) [2025] KEELC 850 (KLR) (Environment and Land) (27 February 2025) (Judgment)

Neutral citation: [2025] KEELC 850 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
LAND CASE E002 OF 2023
EK WABWOTO, J
FEBRUARY 27, 2025
IN THE MATTER OF OIL SPILL AT MIASENYI-
MAJENGO MAPYA VILLAGE, TAITA TAVETA COUNTY**

BETWEEN

**MARTHA MWAKIA 1ST PLAINTIFF
GLADYS JOHN 2ND PLAINTIFF
BERNARD DEGHUA 3RD PLAINTIFF
JANE MATANO 4TH PLAINTIFF
CYRILL MWAVIDU 5TH PLAINTIFF
SUING FOR THEMSELVES AND ON BEHALF OF THE ENTIRE MIASENYI-
MAJENGO MAPYA VILLAGE OF ABOUT TWO HUNDRED AND SEVENTY
AFFECTED PEOPLE**

AND

KENYA PIPELINE COMPANY DEFENDANT

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED
PARTY**



JUDGMENT

1. The suit was filed by the Plaintiffs on their own behalf and on behalf of the entire Miasenyi- Majengo Mapya village in Taita Taveta County where they listed two hundred and seventy affected persons. Vide a plaint dated 29th August 2023 the Plaintiffs sought the following reliefs:-
 - i. That this court finds and so declares that the defendant and interested party have jointly and severally been responsible for the denial/violation/infringement of the plaintiff's rights and fundamental rights in the bill of rights under Articles 10(2)(b), 26(3), 29(f), 42, 43(1)(d), 47, 69 and 232(1)(c) of the Constitution.
 - ii. That this court finds and so declares the defendant liable for the denial/violation/infringement of the Plaintiff's rights and fundamental rights in the bill of rights under Articles 10(2)(b), 26(3), 29(f), 42, 43(1)(d), 47, 69 and 232(1)(c) of the Constitution.
 - iii. That this court be pleased to issue permanent conservatory orders compelling the defendants to implement permanent rehabilitation and restoration of the Miasenyi and Majengo Mapya Village lands and ecosystem.
 - iv. That this court be pleased to award the Plaintiffs compensation for loss of user based on breach of their subsistence rights.
 - v. That this court be pleased to award the Plaintiffs compensation for breach of their fundamental rights in the bill of rights.
 - vi. That this court be pleased to award the Plaintiffs damages.
 - vii. Costs.
2. The suit was contested by the Defendant who filed a Statement of Defence dated 8th December 2023. The Interested Party never filed any pleadings in the matter but they participated in the proceedings.

The Plaintiffs case

3. The Plaintiffs case is contained in their plaint dated 29th August 2023, Plaintiffs bundle of documents dated 29th August 2023, their witness statements and oral evidence tendered in court and the written submissions dated 13th June 2024.
4. It was the Plaintiffs case that sometimes in December 2016, the main pipeline owned by the Defendant that traverses Miasenyi and Majengo vilalges in Taita Taveta County burst spilling volumes of oil thereby affecting more than 150 villages since the oil spilled over and spread to the farms destroying all the crops consequently leading to experiencing of respiratory diseases like coughing, flue and asthma by the residents.
5. It was the Plaintiffs case that the oil spill left a toxic and poor air quality with persistent pungent smell which gets stronger whenever it rains or at night when it is cool or when the wind blows and the same causes congestion and persistent breathing problems as the air is polluted.
6. It was averred that the oil spill tampered with the soil and its impact still persists since the soil is now completely infertile and further to that whenever water pipes burst, oil sips into the drinking water which in most instances has led to people unknowingly using drinking and washing contaminated water in what has led drastic effect in terms of health on members of the community.



7. It was also averred that the oil spill resulted into property value reduction based on the high magnitude of the oil spill and in essence affecting the entire spectrum of properties in the area exposed to the oil spill pollution by causing extensive damage to the ecology with many of the environmental and social consequences of the oil spillage now irreversible.
8. It was pleaded that the oil spill resulted into compromising of the Plaintiffs subsistence rights which were recognized in the case of *Yanomami* in which the Inter-American Commission called on states to restore, protect and preserve the rights of indigenous people and states to restore, protect and preserve the rights of indigenous people to their ancestral territories because they depend upon them for farming, hunting, subsistence and continuity of life.
9. The Plaintiffs also pleaded that the oil spill had a dilapidating effect on the Wildlife Habitat and breeding grounds at the Miasenyi-Majengo Mapya Village with long term environmental effect to various species and resting grounds and they depended on it for survival. It was also pleaded that Miasenyi-Majengo Mapya Village is near the Taita Hills Forest of the Tsavo National Park which is a bio diversity hotspot and holds several threatened subspecies of birds which have at times been considered separate species such as Taita (Olive) Thrush *Turdus (olivaceus) helleri*, Taita (Bar-throated) *Apalis (thoracica) fuscigularis* and Taita (Montane) White-eye *Zosterops (poliogaster) silvanus*.
10. The Plaintiffs also pleaded particulars of Defendants and Interested Party's breaches of their duty as was particularized at paragraph 42 of their plaint.
11. During trial, 2 witnesses testified on behalf of the Plaintiff. The 4th Plaintiff Jane Matano testified as PW1 while Cyril Mwavadu testified as PW2.
12. Jane Matano testified that she is a resident of Miasenyi – Majengo Mapya Village in Taita Taveta County. She also stated that the case is a class action claim by the 270 (Two Hundred and Seventy) members being residents of Miasenyi – Majengo Mapya Village who had given her authority to file the instant suit and testify on their behalf. She also adopted her witness statement and produced the Plaintiffs bundle of documents dated 28th August 2024 in her evidence in chief.
13. On cross-examination by Learned Counsel Mr. Mwangi for the Defendant, she stated that her property has no title and that nobody in the entire village has title to the said land. She also stated that she acquired the property after purchase but she did not have its sale agreement in court. She also stated that she had filed the suit on behalf of other 429 members.
14. When asked about the list of the members that had been filed in court, she conceded that some members in that list had not indicated their identification numbers. She also stated that some of the names missing identification numbers were from children residing in the area.
15. She also stated that the case is about an oil spill on that occurred. The oil spill affected their health. Their soil was polluted and they became sick. She also stated that they cannot farm in their land. She also stated that the matter was reported to NEMA and NEMA visited the site.
16. She further stated in cross-examination that the Plaintiffs were able to file medical reports and treatment notes as part of their documents in court. When asked about the said medical reports and treatment notes she stated that the same did not state what she was suffering from. She also stated that the doctor who examined them is not a witness in the matter.
17. She also stated that she had filed photos showing how their farms were affected. The Defendant has never been on the said property. She had seen the Defendant's report that showed that there was no



- evidence of the produce in the area and that clean up measures had significantly reduced the product on the ground.
18. On cross-examination by Learned Counsel Mr. Ngara for the Interested Party, she stated that NEMA officials came to the site but never consulted them when preparing their report. She also stated that NEMA had not complied with any measures that they were to undertake.
 19. When re-examined, she stated that the impacts of oil spill are being experienced to date. She also stated that air pollution was the cause of their sickness.
 20. Cyril Mwavadu testified as PW2. He stated that he had been listed as the 5th Plaintiff in the suit. He equally adopted and relied on his witness statement dated 29th August 2023 in his evidence in chief.
 21. On cross-examination by Counsel for the Defendant, he stated that his property has no title and he has no agreement for sale in court. He also stated that his kidney was affected and their water was contaminated with oil particles. He also stated that he had to relocate to another house which he was forced to pay rent but he did not have any receipt showing how much he was paying for the same.

The case of the Defendant

22. The Defendant's case is contained in its Statement of Defence dated 8th December 2023 the Defendant's witness statement and bundle of documents dated 13th December 2023 together with the Defendant's closing submissions dated 17th July 2024.
23. It was the Defendant's case that on or around 19th November 2016, at 1am, the Defendant's staff who were on a right-of-way patrol spotted a puddle which was suspected to have occurred from seepage of petroleum products from the pipeline. A formal report was filed and the Defendant was immediately notified that there was a leakage in KM-87 at the Village area near Pump Station (PS3), Bachuma. The leak was located from Pump Station –PSI, Chagamwe.
24. The station controller was notified and an emergency response procedure triggered via the Nairobi Control Centre (NCC) to stop oil transmission through that line. The emergency response comprised of staff from Mombasa and Nairobi regions and others who were carrying out maintenance work along the line.
25. An emergency truck and an excavator were brought on site together with two fire rovers as a precautionary measure in the event of a fire outbreak. The Defendant's staff excavated the line to identify the possible point of leak. On exposing the line, a clamp was installed to stop the leak and a permanent sleeve was later welded on the leaking spot. This was done through Non-Destructive Testing (NDT), applying primer coat, recoating of the pipe and backfilling of the trench. The produce that leaked was contained, recovered and returned to the Chagamwe depot, Mombasa for purposes of processing it back to the line. Due to the collective efforts and professionalism of the Defendant's staff, an estimated 106.15m³ of kerosene was recovered.
26. On 21st November 2016, the Defendant notified the Interested Party herein, the Energy Regulatory Commission (ERC) and the Ministry of Energy and Petroleum of the product release incident as required by law.
27. On 27th November 2016, the Pump Station 3 (PS-3) House Committee met and carried out a detailed investigation of the incident as per procedure. The House Committee made a recommendation to fast-track the replacement of line 1 project and also intensify the sleeving works of hotspots as identified during the inline inspection project, commonly known as Intelligent Pigging.



28. It was averred that the recommendations have been progressively implemented and a continuous implementation programme is in place.
29. The Defendant also averred that it is cognisant of its responsibility to maintain a safe environment during its operations and to mitigate any chances of that safety being compromised. It was also averred that after the incident, site clean up and remediation were carried out successfully within the confines of the legal framework. It was also averred that the Defendant took corrective measures including:
- a. Excavating product recovery pits to collect and contain the produce from escalating to the nearest farms and seasonal water streams;
 - b. Institution of a remedial/restoration program;
 - c. Recovery of petroleum product through digging ditches that were used for monitoring ground activity and recovering any petroleum product that had soaked into the ground;
 - d. Monitoring of the hydrocarbon levels that reduced to less than 200 litres and eventually stopped with the onset of the rains;
 - e. Conducting weekly clean up exercises on the site from 20th November 2016 to 17th December 2016;
 - f. Undertaking baseline sampling report to delineate the extent of the spill in terms of depth and geographical distance of the plume. The baseline sampling report triggered the bioremediation exercise which commenced on 27th November 2016. During the bioremediation exercise:
 - i. Trenches were dug to determine the extent and depth of contamination. This provided the baseline quantities for the purchase of material to undertake remediation;
 - ii. Ditches were dug to ensure maximum introduction area of the bioremediation concentrates for faster action;
 - iii. The bioremediation exercise was done in stages with an introduction of the concentrates at the very bottom of the excavated ditch with a lot of water being used to disperse the concentrates. This was to ensure percolation of the concentrates to cover the depths that the hydrocarbons had reached.
 - g. Partial backfilling was done with an introduction of more concentrates at the end depth to ensure maximum nutrient supply at subsurface layers where the soils had hydrocarbon smell;
 - h. Complete backfilling and reintroduction of the very top bioremediation concentrates;
 - i. An environmental self-audit for the incident was done and a report submitted to the Interested Party on 30th January 2017, which report was approved.
30. The Defendant also averred that its clean up and restoration activities were monitored, supervised and approved by the Interested Party in accordance with its mandate under Section 9(2) of the *Environmental Management and Coordination Act*, 1999 and the *Regulations* thereunder and reports including the following were made and submitted to the relevant regulations: -
- a. An environmental self-audit for the incident, which report was submitted to the Interested Party on 30th January 2017, and approved;
 - b. Detailed investigation report of the incident and the corrective actions undertaken by the Defendant;



- c. Third party environmental assessment report for the site by SGS (K) Ltd at the start and end of the clean-up process;
 - d. Reports for environmental clean-up and restoration undertaken by the Defendant;
 - e. Hydrological survey and environmental monitoring at the spill site;
 - f. Environmental Impact Assessment (EIA) undertaken by the Defendant and
 - g. Site close-up reports.
31. The Defendant contended that the environmental rehabilitation and restoration was comprehensively undertaken and the same was confirmed vide the Interested Party letter dated 28th March 2017 and the SGS (K) Ltd. Geophysical Investigations Report on the environmental monitoring.
32. It was also contended that the matter before the court not being a Constitutional Petition, this court could not grant the constitutional remedies pleaded by the Plaintiff since that the Plaintiffs have not demonstrated the harm and the loss they have suffered as a result of the Defendant's action or inaction.
33. During trial, Anthony Ngige Ng'anga testified on behalf of the defence. He relied on his witness statement dated 13th December 2023 and bundle of documents dated 13th December 2023 in his evidence in chief.
34. On cross-examination, he stated that the spillage occurred in December 2016. The incident report dated 19th November 2016 stated that the cause of the leakage was external commission of the Pipeline and that the staff of the Defendant were not doing regular patrols. The pipeline was laid in 1973 and the community came after the pipeline had been laid.
35. He also stated that he is aware of the double pipe segments and that the same would not have prevented the leakage. He also stated that the pipe in the area did not have a second layer protection.
36. He also stated that he was not aware that oil spills have long term irreversible effects and that spillages can be mitigated and reversible. He also stated that the oil spill currently has no effect on the land and people of the area.
37. On further cross-examination, he stated that he does not have any report on the effect of the oil spill on the water, air and land of the area. He also stated that the clean-up measures have significantly reduced the impact of oil spill on the ground. The contamination of the hydrocarbon was only significant on the first 4 months. The Defendant had not submitted any subsequent report after that.
38. He also stated in cross-examination that the Defendant did not engage the Plaintiffs on any environmental and restoration program. He also stated that rehabilitation happened from 6th to 11th February 2021 and the defendant was able to contain it. He further stated that the oil spill had been cleared by February 2017. He also stated that total breakdown of hydrocarbon takes 8 weeks.
39. On cross-examination by Counsel for the Interested Party, he stated that the oil spill referred to herein was in respect to kerosene which evaporates after some time. He also stated that clean up normally starts immediately after the incident. He also stated that it takes about 8 weeks to have 986 containment of the oil spillage. He also stated that the Defendant notified NEMA and NEMA sent its staff to the site. He further stated that after clean up the Defendant received a compliance letter dated 28th March 2017 from NEMA and NEMA confirmed that it had undertaken remedial actions.



The Plaintiffs submissions

40. The Plaintiffs filed their written submissions dated 13th June 2024. Counsel for the Plaintiff submitted on the following issues:-
- i. Have the Plaintiffs demonstrated that the Defendant and/or Interested Party have jointly and severally been responsible for the denial/violation/infringement of the Plaintiff's rights and fundamental right sin the bill of rights under Articles 10(2)(b), 26(3), 29(f), 42, 43(1)(d), 47, 69 and 232(1)(c) of the Constitution.
 - ii. Should the court issue permanent conservatory orders compelling the Defendant to implement permanent rehabilitation and restoration of the Miasenyi and Mejengo Mapya village land's and ecosystem.
 - iii. Should this court award the Plaintiffs compensation for breach of their fundamental rights in the bill of rights.
 - iv. Should this court award the Plaintiffs compensation for loss of user based on breach of their subsistence rights and damages.
 - v. Should the court award the Plaintiffs costs.
41. It was submitted that the documents filed by the Defendant have established liability by confirming that indeed there was oil spillage as claimed by the Plaintiffs and that the same resulted in the release of toxic substances more specifically hydrocarbons like BTEX, PH in levels beyond that recommended by such international bodies as the CCME Interim Canadian Environmental Quality Criteria for Contaminated Sites. The detailed incident investigation report dated 19th November 2016 on the KM 87.3 Pipeline Leakage confirmed the main line pipe leaking product at 1320hours on 19th November 2016 and the same was stopped at 1755hours after loss of product quality of 139.150 m³ hence confirming that indeed there was a serious leakage for which the Defendant is liable.
42. It was further submitted that the incident report further confirmed that the leakage was caused by external corrosion of the pipeline owing to old age which it fixed at 37 years hence demonstrating negligence on the part of the Defendant as an obvious cause of the spillage. It was also submitted that DW1 had confirmed during cross-examination that the Defendant had not considered alternative routes through selective diversion from the village or the usage of double pipe segments to add a second layer of protection against leakage which would have protected against severe loading or external shocks that caused the spill.
43. The Plaintiffs submitted that the committee findings and recommendations in the report indicted the Defendant for lack of consistent and regular reports, staff not being familiar with the essence of regular patrols, the fact that the main pipeline line 1 was ageing and heavily attacked by external corrosion caused by soil acidity as the causes of the spillage which position is also confined in the Defendant's product Spill Cleanup Weeklong Report for the week 20 – 26 November 2016. It was further submitted that the letter from the Managing Director of the Defendant dated 21st November 2016 had confirmed that the product release incident of 19th November 2016 was occasioned by a corroded pipeline and gave a proposal for an environmental audit after remediation works.
44. The Plaintiffs also submitted that the Investigation Report on the Review of the Clean Up at KM-87 at Miasenyi Taita Taveta conducted by the Defendant in March 2017 demonstrated that there was a zone about 11 meters along the pipeline that still had hydrocarbon residuals detected by ERT method



- and the said report further confirmed from the soil sampling program that despite the clean up the plume was still detected by ERT method in an area measuring 11mx7mx4m deep.
45. It was argued that the Defendant destroyed the Plaintiffs supply of food hence affecting the farmers and families who essentially depend on the same for their livelihood contrary to Article 43(1)(c) of the Constitution. The oil spill resulted in contamination of drinking water hence causing serious health hazard to the residents contrary to Article 43(1) and 42 of the Constitution with the potential of causing deaths through the residents drinking contaminated water contrary to Article 26(3) of the Constitution. It was also argued that the spill has caused persistent and irritating air pollution through strong and pungent smell contrary to International Human rights instruments to which Kenya is a signatory for instance Article 25 of the Universal Declaration of Human Rights 1948 which provides for the right to adequate standard of living.
 46. On whether the court should issue permanent conservatory orders compelling the Defendant to implement permanent rehabilitation and restoration of the Miasenyi and Majengo Mapya Village lands and ecosystem, it was submitted that the Defendant did not take any action at all in terms of rectifying the environmental degradation that was occasioned by the oil spill but they only laid modalities for removal of the spilled oil with the object of re-transporting the same to the part which was basically in their favour by protecting their economic interest and that much interaction they did with the affected people was to advise them to stop cooking for about three days which they compensated a few people by buying them snacks in an exercise that was bewilderingly callous.
 47. It was also submitted that the Defendant was only interested in the portion of parcels that touched on their oil but they were not concerned about the exact length and span of the spread of the extent of the oil spill and they did not even bother to engage the community. The case of Supreme Court of Nigeria in SC 319 of 2013 Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation was cited in support.
 48. In respect to the compensation for breach of their fundamental rights it was submitted that the same has been proven owing to the Defendant's action and this court should award a cumulative sum of Kshs. 429,000,000/= being adequate to the 421 Plaintiffs.
 49. On whether this court should award compensation for loss of user based on breach of their subsistence rights and damages, it was submitted that it has been eight years since the Plaintiff's lost everything in their farms and as such they are entitled to a sum of Kshs. 1,716,000,000/= Billion as fair and reasonable compensation for the 421 Plaintiffs.
 50. In respect to the injuries suffered as a result of breaches occasioned by the Defendant it was submitted that the same are still continuing and a sum of Kshs. 214,500,000/= as adequate compensation for the 429 Plaintiffs.
 51. The Plaintiffs concluded their submissions by urging the court to award them consolidated damages of Kshs. 1,930,500,000/= and costs of the suit.

The Defendant's submissions

52. The Defendants filed written submissions dated 17th July 2024 and Counsel submitted on the following issues:-
 - i. Whether the oil escaped beyond the immediate surrounding of the Defendant's pipeline and to the Plaintiff's villages.



- ii. Whether the Plaintiffs have been adequately identified and their losses/injuries particularized and proved.
 - iii. Whether the Plaintiffs are guilty of laches and their case is time barred.
53. It was submitted that the Defendant does not dispute that there was an oil spill. However, it disputes the extent of the spill as claimed by the Plaintiffs. It was argued that the presence of oil in an environment can be proved directly through scientifically testing soil samples in that environment for example. It can also be proved indirectly through effects in the environment/people whose cause is scientifically demonstrated to be an oil spill. In both cases of direct and indirect proof expert evidence is necessary bearing in mind that matters to do with the environment are scientific and technical in nature. Reliance was placed on the case of *Mohamed Ali Baadi and Others v Attorney General & 11 Others* (2018) eKLR.
 54. It was argued that the Plaintiffs failed to have any expert report as part of their evidence, the Plaintiffs' witnesses confessed their lack of expertise and they sought to interpret the Defendant's own reports to support their claims.
 55. It was argued that the Plaintiffs had selectively read the report. The contamination area had been previously identified in the weekly cleanup reports as being between the Defendant's right of way (ROW), not outside it where there would be settlements.
 56. According to the Defendant the oil did not escape to the Plaintiffs' village. After the self-audit, the Defendant continued to carry out bioremediation which was witnessed by an official from the Interested Party and a report was prepared accordingly.
 57. We submit that by virtue of all the Defendant's actions, the oil spill did not escape beyond the Defendant's pipeline & right of way onto the Plaintiffs' village.
 58. It was contended that the clean - up measures that were undertaken, significantly reduced the product in the ground and that the Plaintiffs have failed to prove that the oil spilled beyond the immediate surroundings of the Defendant's pipeline.
 59. On whether the Plaintiffs have been adequately identified and have their losses and injuries particularized and proved, it was submitted that the 429 Plaintiffs were not properly identified and neither were their injuries and losses particularized.
 60. It was also submitted that a careful scrutiny of the further list of documents dated 7th September 2023 reveals glaring problems in the identification of the Plaintiffs and which were put to PW1, Jane Matano, during her cross-examination. For example, several names are listed without identification numbers i.e., those listed as nos. 175, 246, 305 and 315. Other names were admitted to belong to minors who lack legal capacity to sue i.e., those listed as nos. 134, 191, 208 – 219, 221, 222, 223, 234, 236 – 239, 241, 247, 254, 255, 257 (a four-year old), 285, 327, 328, 337, 356, 357, 369 and 377. The ambiguity in the identification of the Plaintiffs in this case is not its only problematic feature. None of the Plaintiffs have provided any particulars of the losses or injuries that they claim to have suffered.
 61. It was further submitted that in respect to the Plaintiffs' medical evidence of alleged injuries. The Plaintiffs did not call any of the examining doctors to testify about the contents of the various medical documents.
 62. According to the Defendant, the Plaintiffs failed to indirectly prove by means of its effects that there was an oil spill, hence the Defendant should not be found to be liable.



63. On whether the Plaintiffs are guilty of laches and their case is time barred, it was submitted that the cause of action arose in November 2016 and the suit was filed in January 2017 and as such their case is time barred and ought to be dismissed. The Court of Appeal case of *Daniel Kibet Mutai & 9 Others v A. G* (2019) eKLR was cited in support.

Analysis and Determination

64. The court has considered the pleadings filed herein, the evidence adduced and the written submissions of the parties. The main issues for determination in this suit are as follows:-

- i. Whether the suit is time barred.
- ii. Whether the Plaintiffs have proved and demonstrated that the Defendant and Interested Party herein have been responsible for denial/violation/infringement of their rights under Articles 10(2)(b), 26(3), 29(f), 42, 43(1)(d), 47, 69 and 232(1)(c) of the *Constitution*.
- iii. Whether the Plaintiffs are entitled to the reliefs sought.

65. The court shall now proceed to address the said issues sequentially.

Issue No. (i) - Whether the Plaintiffs claim is time barred

66. The Defendant pleaded at paragraph 4 of its defence that the Plaintiff's cause of action as presented before this court is time barred and that this court lacks jurisdiction to hear and determine the same on account of Section 4 of the *Limitation of Actions Act* Cap. 22.

67. It was contended that the cause of action arose in November 2016 and the suit was filed in August 2023 being close to 7 years later.

68. From a perusal of the Plaintiffs pleadings filed herein, It was pleaded that there can be no limitation of time in respect to the pursuit of the Plaintiffs fundamental rights in the bill of rights under the *Constitution*.

69. It is the observation of the court that the Plaintiffs claim is not one that is styled as being based solely on tort of negligence but one that is based on the enforcement and or violation of their fundamental rights as stipulated in the *Constitution*. It is also evident that according to the Plaintiffs, the actions of the Defendant led to pollution of the environment thereby causing injury, loss and damage which they seek to hold the Defendant liable for the same.

70. It is also evident that in this suit that the Plaintiffs have combined their causes of actions based on negligence, breach of statutory duties, rights and constitutional provisions. The law allows a party to bring a suit on multiple but related causes of action. A cause of action is conduct on the part of the Defendant which raises a complaint on the part of the Plaintiffs. The *Constitution* expects this court to be broad based in exercising its adjudicatory or normative framework on constitutional rights and freedoms.

71. In view of the foregoing it is the finding of this court that the Plaintiffs cause of action and or claim against the Defendant is not time barred.



Issue No. (ii) - Whether the Plaintiffs have demonstrated that the Defendant and Interested Party herein have been responsible for the denial/violation/infringement of their rights under Articles 10(2)(b), 26(3), 29(f), 42, 43(1)(d), 47, 69 and 232(1)(c) of the Constitution.

72. According to the Plaintiffs, the main pipeline owned by the Defendant Kenya Pipeline Company that traverses Miasenyi and Majengo Mapya vilages in Taita Taveta County burst spilling volumes of oil thereby affecting more than 150 villagers since the oil spilled over and spread to the farms destroying all the crops consequently leading to experiencing of respiratory diseases like coughing, flu and asthma by residents. The consequence of the toxic hydro-carbons from the oil has persisted is an upsurge of respiratory diseases like chest and throat pains, coughing, flu and asthma which have interfered with the children's education particular as a result of choking smell which affected schooling at the Miasenyi Primary School, the destruction of all crops for instance banana and vegetable farms have since dried and yet farming was the main stay of this community which is highly populated with poor households. The long term consequence of the oil spill is the total collapse of crop production in that the residents who would initially receive high yields in terms of vegetables, avocados and other fruits now cannot grow anything on their lands which as a matter of fact can now not sustain any production including the rearing of domestic animals such as goats which assisted in provision of meat and milk.
73. It was also the Plaintiffs case that the oil spill left a toxic and poor air quality with a persistent pungent smell which gets stronger whenever it rains, or at night when its cold/or otherwise when the wind blows and the same is so irritating and strong that it causes congestion and persistent breathing problems as the air is strongly polluted.
74. It was also the Plaintiffs case that the oil spill completely tampered with the soil and its impact still persists in that the soil is now completely infertile and further to that whenever water pipes burst, oil sips into the drinking water which in most instances has led to people unknowingly using, drinking and washing using contaminated water in what has had drastic effects in terms of health on members of the community.
75. It was averred that the oil spill happened in an area with wildlife hence causing significant damage as it destroys the insulating ability of fur on mammals and impacts the water repelling qualities of a bird's feathers and without the insulation or water repelling qualities mammals and birds died from hypothermia. It was stated that that they suffered loss because their income-earning resource to which they had rights of use the land was physically and permanently harmed due to the spill thereby and further that the consequence was denying them access to what has otherwise been their sole income-earning activity.
76. According to the Plaintiffs, the consequences of the oil spill are dire in that the same resulted into property value reduction based on the high magnitude of the oil spill and in essence affecting the entire spectrum of properties in the area exposed to the oil spill pollution by causing extensive damage to the ecology with many of the environmental and social consequences of the oil spillage now irreversible. The negative effect on property value applies not only to those properties directly affected by the oil spill, but to all properties within the vicinity of the area exposed to oil spill pollution or at risk of becoming polluted at some point in time hence environmental damage compensation is vital to finance the rehabilitation and restoration of the ecosystem.
- That the spillage resulted in damage to the Plaintiffs land as a result of toxic chemicals from the oil and oil dispersants to aid the clean-up resulted into complete alteration of the efficacy of their lands.
77. It was also contended that the oil spill had a dilapidating effect on the Wildlife Habitat and breeding Grounds at the Miasenyi-Majengo Mapya Village with long term environmental effects to various



species and nesting grounds and the habitats they depended on for survival. Miasenyi-Majengo Mapya Village is near the Taita Hills forests of the Tsavo National Parks which is a bio diversity hotspot and holds several threatened subspecies of birds.

78. The Defendant on their part denied any liability and contended that they took active and immediate steps to deal with the oil spill and stated as follows:-
- a. On or around 19th November 2016, at 1p.m, the Defendant's staff who were on a right-of-way patrol spotted a puddle which was suspected to have occurred from seepage of petroleum products from the pipeline. A formal report was filed and the Defendant was immediately notified that there was a leakage in KM-87 at the Village area near Pump Station (PS3), Bachuma. The leak was located from Pump Station –PSI, Chagamwe.
 - b. The station controller was notified and an emergency response procedure triggered via the Nairobi Control Centre (NCC) to stop oil transmission through that line. The emergency response comprised of staff from Mombasa and Nairobi regions and others who were carrying out maintenance work along the line.
 - c. An emergency truck and an excavator were brought on site together with two fire rovers as a precautionary measure in the event of a fire outbreak;
 - d. The Defendant's staff excavated the line to identify the possible point of leak. On exposing the line, a clamp was installed to stop the leak and a permanent sleeve was later welded on the leaking spot. This was done through Non-Destructive Testing (NDT), applying primer coat, recoating of the pipe and backfilling of the trench;
 - e. The product that leaked was contained, recovered and returned to the Chagamwe depot, Mombasa for purposes of processing it back to the line. Due to the collective efforts and professionalism of the Defendant's staff, an estimated 106.15m³ of kerosene was recovered;
 - f. On 21st November 2016, the Defendant notified the Interested Party herein, the Energy Regulatory Commission (ERC) and the Ministry of Energy and Petroleum of the product release incident as required by law;
 - g. On 27th November 2016, the Pump Station 3 (PS-3) House Committee met and carried out a detailed investigation of the incident as per procedure. The House Committee made a recommendation to fast-track the replacement of line 1 project and also intensify the sleeving works of hotspots as identified during the inline inspection project, commonly known as Intelligent Pigging;
 - h. The recommendations have been progressively implemented and a continuous implementation programme is in place.
79. It was also averred that the Defendant undertook site clean up and remediation works successfully after the incident.
80. During trial, PW1 Jane Matano confirmed that they encountered the oil spill on 17th December 2016, it affected their health, polluted their soil to the extend that they were unable to undertake any farming activities on their land. She also stated that their livestock were affected because they had no place that they graze. PW1 also showed photos of how the farms were affected and the extend of the oil spill.
81. PW1 also reiterated that the impacts of oil spill are still being felt up to date.



82. PW2 Cyril Mwavadu stated in his testimony that their water was contaminated, he had to move to another house to rent.
83. Anthony Ng'anga who testified as DW1 confirmed the occurrence of the incident during trial and stated that the same was caused by external corrosion of the pipeline.
84. From the evidence tendered herein which the court has considered, it is not in dispute that the incident in respect to the oil spill occurred on 19th November 2016 at around 0100hours in Miasenyi area in Taita Taveta County.
85. The sequence of events in respect to the incident was stated as follows:-

Date	Time	Events
19/11/2016	01:20hrs	<p>The leaking product at KM 87.3 spotted by hired guard of Lavingtone Security system.</p> <p>Shift Technician PS3 was informed of the Mainline Pipe leaking, and informed NCC control of the same and even advised the NCC to stop the main line.</p> <p>Police officers from PS2&3 were deployed to KM 87.3 and driven to the site by driver B. Limo accompanied by A.Bakari Operation Technician at PS3. N/G At 02:52hrs Ag.OM called SC-PS3 Mr. A. Ochola but they did not talk at that time; Mr. Ochola's phone was not effective.</p> <p>Main line was stopped by NCC apparently after further consultation with Ag. OM.</p>
19/11/2016	01:56hrs	
19/11/2016	02:15hrs	
19/11/2016	05:55hrs	
19/11/2016	06:05hrs	<p>Shem Okello PTM-who was in Voi Town called Mr. A. Ochola and informed him of what had happened at KM87.3, Mr. Ochola immediately called Ag. OM and both talked on the same including action plans to be carried out at KM 87.3</p>



86. From the evidence that was tendered and the investigation report dated November 2016 which was produced in evidence, the cause of the incident was due to the external corrosion of the pipeline owing to its age. DW1 in cross-examination stated that the pipeline had been laid sometimes in 1973.
87. Strict liability, as set in *Rylands v. Fletcher* (1868) LR3 HL 330, provides that a person who for his purposes brings on his land, collects, and keeps anything likely to do mischief if it escapes must keep it in at his peril and if he does not, he is prima facie answerable for all the damage which is a natural consequence of its escape.
88. EMCA, as a comprehensive law, was enacted to remedy the deficiencies in the obtaining law at the time. Section (3) thereof domesticated the right to a clean and healthy environment and imposed a duty to safeguard and enhance the environment; the polluter pays, intergeneration equity, precautionary principle, prevention public participation access to court for redress and environmental management, monitoring, and enforcement organs were set up. Courts were also mandated to handle and widen up on standing on environmental matters. See *Park View Shopping Arcade Ltd v Charles M. Kang'ethe & others* (2006) 1 KLR (E & L) 591.
89. In *Waweru v Republic* (KLR) E & L (1) pp 677, the court observed that development that threatens life was not sustainable, and under environmental law, life must have this expounded meaning as a matter of necessity. In *NEMA & another v. KM (Minors suing through mother and best friend (SKS) & 17 others* (2020)eKLR, the court underscored the shared obligations and responsibilities for environmental protection management of both the state and non-state actors under Article 69 of the Constitution and the role of NEMA in systems of environmental impact assessment, environment audit and monitoring of the environmental as means of being more proactive than reactive as preventive measures designed to reduce or eliminate the risk of environmental damage and the incorporation of the environmental principle of sustainable development to reconcile the conflicting demand of economic development and environmental protection so as to ensure that the benefit of any development outweighed its costs, including costs to the environment.
90. The court further underscored that the typical regulatory process involves the establishment of general policies on the environment, setting standards for specific policies in relation to environmental issues, applying the standards and policies to individual situations, licensing and enforcing standards and permissions through administrative, criminal sanctions and providing information about the environment.
91. The court further underscored the difficulties and costs involved in proving causation in injuries caused by environmental pollution, especially in proving exposure to injuries, its extent and geography, identified ascertainment, and compensation of the claimants. The court said that the polluter pay principle was an economic instrument that initially required a producer of goods and services or other items to be responsible for the costs of preventing or dealing with any pollution that the process causes, including the direct cost to people or property, costs incurred in avoiding pollution as well as any damage.
92. The evidence adduced herein indeed establishes liability on the party of the Defendant as it confirmed that there was oil spillage as was claimed by the Plaintiffs and that the same resulted in the release of toxic substances.
93. The Investigation Report of November 2016 on the KM 87.3 Pipeline Leakage confirmed the mainline pipe leading product at 1.20 Hrs on 19th November 2016. The said leakage as stated earlier was caused by external corrosion of the pipeline owing to old age and hence demonstrating liability on the part of



the Defendant. The Defendant was indeed unable to maintain the said pipeline knowing it was ageing and heavily attacked by external corrosion caused by soil acidity.

94. To protect the right to a clean environment guaranteed under Article 42 of the Constitution, Article 70 states that any person who alleges that this right is being or is likely to be denied or violated, infringed or threatened; the person may apply to the court for redress. the Constitution gives Kenyans access to court even where there are only threats of violation. In the instant suit, the court is satisfied that the Plaintiffs did not just demonstrate that their rights under the stated articles were likely to or were threatened to be violated. They proved the actual violation violations owing to the oil spill incident and as such it is the finding of this court that Plaintiffs have been able to demonstrate liability solely on the part of the Defendant and not the Interested Party. The cause of the oil spill incident was not beyond the control of the Defendant.

Issue No. iii - Whether the Plaintiffs are entitled to the prayers sought

95. The Plaintiffs sought for various reliefs before this court as enumerated in their plaint.
96. In this suit the Plaintiffs were able to demonstrate that the Defendant failed to prevent the oil spill which occurred due to external corrosion of its ageing pipeline.
97. There was no evidence adduced that after the oil spill incident, the defendant was able to engage the Plaintiffs in rectifying the environmental degradation caused by the oil spill. It only appeared that the Defendant was only interested in the portion of the parcel that touched on their oil but were not concerned about the exact length and span of the spread of the effect of the oil spill and they did not even bother to engage the community.
98. Having regard to the evidence adduced during trial, the court has no doubt that the oil spill adversely effected the Plaintiffs and their right of enjoyment of their land was interfered with and/or curtailed.
99. In their submissions, the Plaintiffs submitted that they lost everything in their farms and that the said lands are for all intents and purposes dead unless rehabilitated and they urged the court to grant each one of them a sum of Ksh 4,000,000 per person which would translate to Ksh 1,716,000,000 considering that they are 429 Plaintiffs.
100. The Defendant did not submit on any possible quantum however the Defendant objected to the grant of any damages on the reason that the Plaintiffs could not be properly identified owing to the glaring inconsistent in the list that was filed in court.
101. It is not lost to the Court that the Plaintiffs were not able to demonstrate to the Court what income they were generating or have generated at any one time from their activities on the farm. The Plaintiffs were also not able to indicate the approximate size and or acreage. There was no clear evidence of the proportion of this land that was affected by the oil spillage. However, from the evidence adduced it was evident that a larger part of the Miasenyi -Majengo Mapya village was not being put to full utilization owing to the oil spillage.
102. While the Plaintiff submitted that the village had about 429 persons who were seeking compensation, the Pleadings filed in court only confirmed the existence of 290 persons including minors.
103. The Plaintiffs herein pleaded violations of various rights as set stipulated in the Constitution. With or without demonstration of personal loss or injury, Articles 21,22,23,42,69 & 70(3) of the Constitution of Kenya mandate this court to grant appropriate reliefs to the plaintiffs. It is worth nothing that under the provisions of Article 70 (3) of the Constitution, an applicant does not have to demonstrate that he/she has incurred loss or suffered injury. From the decisions cited it is clear that even in the absence



- of clear evidence to quantify the damage caused by the breach, courts may still award remedies based on the principle that the violation of constitutional rights itself warrants redress. The Plaintiffs are therefore entitled to an award of damages, the question being what should be the quantum payable.
104. Polluter pays principle, precautionary principle, duty of care principle, strict liability and environmental compensation are some of the tools used to protect the environment by penalizing monetarily those who pollute nature and the environment and affect human health. These tools make society change and appreciate that environmental laws are enacted to protect the sanctity of our nature, common heritage, and society. In applying these principles, the court has the power to impose monetary penalties on any perpetrators.
 105. There can be no doubt that oil spillage into the environment has adverse effects to the environment and the ecosystem and would be an impediment to sustainable development. The Defendant under the provisions of Article 69(2) of the *Constitution* has an obligation to ensure the environment is protected and conserved and therefore ought not to engage in any activities that could pose a threat to the environment. Spillage of oil into the ecosystem has the potential of polluting the environment which could expose many to potential health risks.
 106. In *Costa Rica v Nicaragua* ICJ Judgment on 2nd February 2018, the International Court of Justice held that compensation would be an appropriate form, particularly in those cases where restitution was materially impossible or unduly burdensome, and that it should not be punitive or exemplary in character. The court said that in cases of alleged environmental damages, particular issues may arise as to the existence of damage and causation and that there must be a causal link between the wrongful act and the damage or injury. The court said that the absence of adequate evidence as to the extent of material damage could not, in all situations, preclude an award of compensation for the damage. The court cited with approval *Story Parchment Co. v Peterson Parchment Paper Co.* (1931) U.S.R Vol. 282 P 555 that where the tort itself was of such nature as to preclude the ascertainment of the damages with certainty, it would be a perversion of fundamental principles of justice to deny reliefs to the injured person and thereby relieve the wrongdoer from making any amends for his acts. The court said that damage to the environment and the consequent impairment or loss of the ability of the environment to provide goods and services was compensable under international law, and such compensation may include indemnification for the impairment or loss of environmental goods and services in the period prior to recovery and payment for the restoration of the damaged environment.
 107. In *Friends of Turkana Trust v. AG and others ELC AG & others* ELC No. 825 of 2012, the court underscored the need for environmental information as a prerequisite to monitoring governmental and public sector activities on the environment. Article (1) of the *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment* appreciates that assessment of compensation may be problematic. Chapter IV thereof provides that where damage consists of a series of continuous incidents, the period of 3 years starts from the last occurrence.
 108. In *Gorrsow Factory Case* PCJ (1927) Section a No. 17 & 47, the court said that reparations as far as possible should wipe out all the consequences of the illegal act and restore the position that existed before the act was committed.
 109. In *Bondo Community and Another v The Shell Petroleum Development Co of Nigeria* (2014) EWHC 1973 CC, the court noted that the existence of statutory measures did not exclude the application of common law in determining the amount of compensation to the people affected by the oil spillages. See also *Shell Petroleum Development Co v Councilor S.B Farah* (1995) 3 NWLR 148.
 110. Guided by the preceding principles and guidelines, both from national and international forums, the plaintiffs have made a case that they suffered loss and damage.



111. In *Orbit Chemicals Industries v Prof. David M. Ndeti* (2021) eKLR, the trial court awarded Kshs.269,439,464.15 costs for restoration of soil, general damages for loss of use of land, and general damages for nuisance. The respondent had alleged that the appellant had failed to take any or sufficient precautionary measures against causing or preventing nuisance, namely, offensive nuisance, unwholesome odors, smoke, industrial dust, vapors, gases, noise, filthy effluents, sewage, and contaminated stormwater spread, entering, seeping, diffusing or percolating into his suit premises, defiling or rendering it unhealthy or unfit for habitation as residential or agricultural thereby interfering with his quiet enjoyment of title.
112. In the Case of *Mohamed Ali Baadi and Others v A.G & 11 others* (2018) eKLR commonly referred to as the LAPSSET case, the project proponent agreed to pay monetary compensation to the persons who were affected to the tune of Kshs.1,760,424,000. Since this was still an ongoing project, the court ordered the project proponent to include a demonstrably specific programme for consultation with the petitioners and the other Lamu Island residents about the impact the LAPSSET project is likely to have on their culture as a district indigenous community and how to mitigate any adverse effects on the culture.
113. In the case of *KM & 9 others v Attorney General & 7 others* [2020] eKLR the Court awarded the Petitioners a sum of Ksh 1, 300,000,000. as compensation of loss of life and personal injury.
114. This court has, therefore, been asked by the Plaintiffs as residents of Miasenyi – Majengo Mapya to uphold, enforce, and find the right to a clean and healthy environment among other rights as binding on the Defendant. Article 42 of the *Constitution* guarantees every person a right to a clean and healthy environment and provides as follows: -
42. Every person has the right to a clean and healthy environment, which includes the right—
- (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
- (b) to have obligations relating to the environment fulfilled under Article 70.
115. In the instant case, it is not in doubt that the Plaintiffs and the 270 affected persons are all residents of Miasenyi Majengo Mapya village in Taita Taveta County. The persons who were missing National Identity cards were identified as children residing in the area who could not have procured their National Identity cards as at the time of filing the suit.
116. In the case of *Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uburu Village in Mikindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 others* [2024] KESC 75 (KLR) the Supreme Court held that a class action relates to proceedings in which an individual or a group of people with a common complaint lodge a legal challenge in court against an organisation or an individual on behalf of a larger group or class of people. If successful, all consumers aggrieved stand to get compensated.
117. In view of the foregoing, the Defendant’s contention that compensation for damages for the Plaintiffs herein cannot be granted has no basis.
118. This court having considered the comparative case law cited awarded amounts which is close to the submitted amount and further taking all the factors into consideration, this court will make an award of Kshs 200,000,000/- which it considers reasonable and adequate compensation to the Plaintiffs being the residents of Miasenyi Majengo Mapya village for the damages they suffered.



119. The Plaintiffs also sought for orders compelling the Defendant to implement permanent rehabilitation and restoration of the Miaenyi and Majengo Mapya Village lands and ecosystem, however from the evidence tendered herein it was evident that the same had already been undertaken and as such it would be not necessary to grant the said relief.
120. In respect to costs, as a general rule, costs follow the event unless the court for good reason orders otherwise. In the present case, the Plaintiffs have succeeded in their claim. The Plaintiffs shall have the costs of the suit payable by the Defendant.

Final orders

121. In conclusion and after a careful evaluation of the evidence, this court is satisfied that the Plaintiffs have proved their case against the Defendant on a balance of probabilities. The Court in the premises enters judgment in favour of the Plaintiffs against the Defendant and makes the following final orders: -
- a. A declaration is hereby issued that the Defendant is liable for the denial/violation/ infringement of the Plaintiffs rights and fundamental rights under Articles 10(2)(b), 26(3), 29 (f), 42, 43(1)(d), 47, 69 and 232(1)(c) of the Constitution.
 - b. The Plaintiffs are awarded compensation of Kshs 200,000,000/- payable by the Defendant.
 - c. The Plaintiffs are awarded costs of the suit payable by the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY/OPEN COURT AT VOI THIS 27TH DAY OF FEBRUARY 2025.

E.K. WABWOTO

JUDGE

In the presence of:-

Ms. Nyambeki for the Plaintiffs.

Mr. Mwangi for the Defendant.

N/A for the Interested party.

Court Assistants: Mary Ngoira and Norah Chao.

