Sojanm Springfields Limited v Githinji & 4 others (Civil Appeal 73 of 2019) [2024] KECA 953 (KLR) (26 July 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 73 OF 2019

F SICHALE, P NYAMWEYA & WK KORIR, JJA

JULY 26, 2024

BETWEEN

SOJANM SPRINGFIELDS LIMITED ..... APPELLANT

AND

JANE WAGATHUITU GITHINJI ..... 1ST RESPONDENT

ISAAC KAMAU KABIRA ..... 2ND RESPONDENT

JACKSON GICHUKI KABIRA ..... 3RD RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 4TH RESPONDENT

COUNTY GOVERNMENT OF NAKURU ..... 5TH RESPONDENT

(An appeal from the Judgment and decree of the Environment and Land Relations Court at Nakuru (Munyao Sila J.) delivered on 19th June 2019 in Nakuru ELC No. 405 of 2017.)

JUDGMENT

1. This appeal arises from a judgment delivered by the Environment and Land Court (ELC) at Nakuru (Munyao Sila J.) on 19th June 2019 in Nakuru ELC Case No 405 of 2017. Jane Wagathuitu Githinji, Isaac Kamau Kabira and Jackson Gichuki Kabira, who are the 1st, 2nd and 3rd Respondents herein, had instituted the suit in the ELC against Sojanm Springfields Limited, the Appellant herein, as well as against the National Environment Management Authority (NEMA) and County Government of Nakuru who are the 4th and 5th Respondents herein. The Appellant and 4th and 5th Respondents were the 1st. 2nd and 3rd defendants respectively in the ELC.

2. After conducting a trial, the ELC granted the following orders in the impugned judgment:

1. NEMA is hereby directed to liaise with the relevant agencies/institutions to ensure that the water quality discharged within and without the 1st defendant's farm is not contaminated and is safe to be discharged to the environment.

2. That NEMA is hereby directed to liaise with the relevant agencies/institutions to assess the quality, capacity, and effectiveness of the soak pits used by the 1st defendant, and if need be, provide requisite guidance and/or changes in the manner of discharge and treatment of chemicals from the 1st defendant's property.

3. That it is hereby declared that it was improper and contrary to the provisions of Sections 58 of the *Environment Management and Coordination Act*, Act No 8 of 1999, and the second schedule thereof, for NEMA to issue an EIA licence to the 1st defendant for construction of a dam based only on a project report when the law required a full environmental impact assessment study report.

4. That the EIA licence issued for the construction of the dam was issued contrary to law and is hereby revoked. The 1st defendant is directed to undertake a fresh EIA as required by law within 60 days from today if it intends to continue with the operations of the dam within its premises or else it decommissions the dam.

5. That NEMA is hereby barred from issuing an EIA licence for the construction of a second dam before a full environmental impact assessment study is conducted in accordance with the law.

6. That NEMA in consultation with other relevant agencies/institutions is hereby directed to undertake a dam integrity test and provide the requisite guidance depending on the results of such assessment.

7. That NEMA is hereby directed to investigate whether the 1st defendant applied for an EIA licence to expand its operations by a further 13 greenhouses, and if it is found that no EIA was ever conducted, direct that one be conducted forthwith and no later than 60 days from today, and if none is conducted, prepare to decommission the 13 additional greenhouses.

8. The subject to the above orders, the 1st defendant is hereby ordered to ensure full compliance with the restoration orders issued by NEMA and any further orders that NEMA may issue.

9. That NEMA in consultation with all relevant agencies/ institutions, is hereby directed to undertake a study on the changed topography and hydrology of the Mwihoti area, and direct mitigation measures and a master plan on how to manage the same to avoid loss to the population of the locality.

10. That the 3rd defendant is hereby directed to undertake an assessment of the damage to the infrastructure of the area and consider taking measures to rehabilitate the said infrastructure.

11. That the 1st defendant is hereby directed to undertake a rehabilitation programme of the land of the plaintiffs within the next 3 months, and if it is unable to do so, or if rehabilitation is not possible, to pay the plaintiffs the full value of the land that has been wasted, as noted and directed in this judgment.

3. A procedural history of the matter in the ELC is necessary to put these orders in context. The 1st, 2nd and 3rd Respondents claimed that they were owners of various parcels of land, namely land parcels LR Number 1507/15 and LR Number 1507/16 both measuring approximately 16.253 hectares which were owned by the 1st Respondent, land parcel LR No 1507/09 measuring 12.10 hectares owned by the 2nd Respondent; and the 3rd Respondent claimed he was the owner of the land parcel LR No 1507/10

measuring 12.10 hectares. These parcels of land were located within Kang'utu village, Njokerio sub-location, in Njoro sub-county, Nakuru County, and the Respondents stated that the parcels of land were used for farming, particularly for growing maize, Boma Rhodes grass for hay, Kalkadi, and also for dairy and mixed farming.

The Appellant on the other hand operated a flower farm in Mwigito area towards the Mau Forest area of Njoro Sub-County, measuring about 45 hectares with 45 greenhouses. The farm was situated on a hill about 2 kilometres from the 1st, 2nd and 3rd Respondents' farms, and was separated by Michorui village with a population of about 300 farmers' families.

4. The 1st, 2nd and 3rd Respondents claimed that in August 2014, the Appellant's dam broke its banks and its waters raged downhill resulting in amongst others, the carting away of domestic animals and farm produce. and the destruction of roads, property and farms in Michorui, Kang'utu and Rurii villages. Further, the burst waters full of debris percolated on the 1st Respondent's land and damaged her fence in addition to carting away approximately 3.3 hectares of Boma Rhodes grass for sale and Kalkadi meant for consumption by her dairy cows; destroyed the 2nd Respondent's fence bordering the road next to the 1st Respondent's land and carted away two acres of maize; and destroyed the boundary fence shared by the 2nd and 3rd Respondent and carried away 3 acres of the 3rd Respondent's maize.

5. The gist of the 1st, 2nd and 3rd Respondents' case is that whereas the Appellant embarked on an exercise to compensate villages and affected parties for the crops and livestock that they lost, it excluded the 1st, 2nd and 3rd Respondents. Furthermore, that in the year 2015, the Appellant's management apologized to the 1st Respondent for the damage and the parties then mutually agreed that the Appellant would create measures to ensure that their water was contained within their farm and would rehabilitate the 1st Respondent's farm by filling in gulleys created and removing the debris dumped by the raging waters to return the same to its original form as far as humanly possible.

6. However, that the Appellant under the guise of rehabilitating the 1st Respondent's land and without approval, deliberately dug trenches thereon to serve as water channels for draining water from the Appellant's farm. Additionally, in furtherance of their mischief, and despite the burst dam, the Appellant applied to NEMA to extend the farm by 9 additional hectares of greenhouses, which permission was granted on condition that, inter alia, the main dam being functional, the Appellant would build an additional dam to hold the drain water from the additional 9 hectares. It was asserted that in granting the said permission, NEMA failed to ensure that there was public participation by the actual residents of the area especially those affected by the flash floods from the burst dam. It was further pleaded that the Physical Planning Department of the County Government of Nakuru, irregularly and illegally approved the development plans for the 9 hectares of greenhouses despite the Appellant failing to meet the conditions and regulations set down by NEMA.

7. The 1st, 2nd and 3rd Respondents further claimed that the Appellant proceeded to construct and utilize the 9 extra hectares of greenhouses with no pan area and consequently proceeded to release the water collected from the extra 9 hectares of greenhouses into private property and downhill to their property.

   In addition, that the Appellant proceeded to dig boreholes for their farm use instead of recycling water from the dam and due to alleged weakness of the existing dam, the Appellant released effluent from the chemical spray areas, which mixed with water from the dam and runoff water from the greenhouses, and which effluent was then continuously released downhill in the trenches dug by the Appellant in pretence of rehabilitating the 1st Respondent's land. Furthermore, that NEMA and the County Government of Nakuru confirmed on 21st and 28th September 2017 that the Appellant's water was overflowing downstream from the channel adjacent to the main dam; greenhouses were discharging water into the open channel and down into the wetland; there was a lack of proper treatment of effluent

which eventually found its way into the 1st, 2nd and 3rd Respondents' property and that it was operating without an effluent discharge licence from NEMA.

8. The specific damage pleaded by the 1st, 2nd and 3rd Respondents was that the water and effluent from the Appellant's dams and greenhouses was causing landslides which had divided their land into 3 portions with one being totally inaccessible and not able to be utilized; they had as a result lost more than 6 hectares of land and crops which land had been turned into dumping grounds, gullied waste and mash lands and had become a damp site for debris as a result of the runaway effluent: the formation of deep gulleys with persistently flowing effluent with consequent but devastating soil erosion; turning the 6 hectares of fertile agricultural and grazing pasture into unusable land; destruction of wheat and other farm produce planted by the 1st to 3rdRespondents which got carted away and/or the land has become marshy; threat to the 1st 2nd and 3rd Respondents' lives and that of their employees occasioned by the deep gulleys and the 'flash floods' of effluent caused by the Appellant, and which have rendered certain parts of their land inaccessible; the death of the 1st to 3rd Respondents' livestock which fall into the gulleys and break their limbs; the infection of their livestock with liver fluke and leeches transmitted through the effluent waters deliberately released by the Appellant; the turning of the 2nd and 3rd Respondents' 2.5 hectares into a permanent swampy and marsh land consistently percolated in effluent that harbours water snakes and other pests; and the depreciation in the value of the 1st, 2nd, and 3rd Respondents' property.

9. The 1st to 3rd Respondents therefore prayed that judgment be entered against the Appellant and the 4th and 5th Respondents for:

    a. Costs of rehabilitation and reinstatement of their land;

    b. A permanent injunction restraining the Appellant from releasing, dumping, or in any way allowing the flow of effluent downhill into their land;

    c. General damages;

    d. Exemplary damages;

    e. Costs of this suit;

    f. Interest on a, b, c, d and e, above;

    g. Any such and further relief as this Honourable Court may deem fit and appropriate in the circumstances.

10. The Appellant on its part admitted operating a flower farm business in Mwigito area towards Mau forest which had two dams. The Appellant stated that before the said dams were constructed, an Environmental Impact Assessment (EIA) was done and a report thereof prepared in accordance with the Environmental Management and Coordination Act; there was public consultation; and the construction of the two dams was duly approved by NEMA and the Water Resource Management Authority (WRMA).

11. On the events of August 2014, the Appellant's case was that one of its dams burst due to no fault on the part of the Appellant, due to the high water table caused by natural high water pressure from underground which was beyond human control. The Appellant stated that the Area Chief requested the Ministry of Agriculture, Livestock and Fisheries, State Department of Agriculture to conduct a crop damage assessment and it was done and a report prepared. The Appellant further stated that all people who were affected were fully compensated and the matter was amicably settled and closed. Furthermore, that following the bursting of the said dam in 2014, it took measures to avert the said

pressure especially during the heavy rains and lined the said dam with High Density Polyethylene to strengthen the dam and avoid leakage. In addition, it installed a network of water catchment drains to control seepage water and channel it to a holding tank which then pumped back to the dam for its irrigation, cleaning and other domestic use.

12. The Appellant denied that its management team visited the 1st Respondent's farm and apologized for the damage, or that it entered into a mutual agreement with the 1st Respondent to rehabilitate her land and that the Appellant would create measures to ensure that the water would be contained in the Appellant's farm. It was further denied that the Appellant agreed that it would rehabilitate the 1st Respondent's farm by filling the gulleys created and remove the debris dumped by the raging waters to return it to its original form as far as humanly possible. The Appellant admitted to applying to NEMA for the extension of thirteen (13) greenhouses and approval was granted after due process was followed and prior to the approval being granted, an Environmental Impact Assessment (EIA) was conducted and a report prepared and submitted to NEMA. Public participation formed part of the report. The Appellant stated that EIA had been done for the additional dams and they were awaiting a response form NEMA.

13. The Appellant further denied any form of irregularity and/or illegality and admitted drilling two boreholes which are aimed to meet its rose flower production for irrigation during dry season and also domestic purposes, and pleaded that the dam water was usually pumped back for the farm use; that it had an operational and highly effective Effluent Treatment Plant (ETP) where effluent was properly treated and chemical analysis done and all waste water drainages were cemented to avoid percolation of effluent into the ground before treatment. Further, it had a valid Effluent Discharge Licence (EDL) from NEMA which was issued after satisfying all conditions required by the law and NEMA, and mechanisms to contain spillages, including use of standardized soak pits and monitored its fertilizer and pesticide use. The Appellant contended that the suit, in the ELC was brought in bad faith after it declined to purchase the 1st Respondent's wetland

14. NEMA in its defence stated that if the 1st, 2nd and 3rd Respondents were aggrieved by issuance of any EIA licence to the Appellant, they had the option of appealing against such decision before the National Environment Tribunal (NET) pursuant to section 129 of Environment Management and Coordination Act (EMCA). Further, the allegations of failing to ensure public participation by the 4th Respondent were vague and baseless and brought too late in the day, for such allegations could only be substantiated against a specific EIA licence issued by NEMA. It was averred that upon receipt of complaints from the 1st to 3rd Respondents, NEMA conducted a joint site visit with WRMA, a report was prepared and a restoration notice issued on 28th September 2017 to the Appellant, seeking rectification of various breaches that were identified. It is asserted that the report had not been completed by the time the suit was filed. Therefore, that the allegations of collusion levelled against it were malicious and unfounded.

15. The County Government of Nakuru on its part stated that it was a stranger to the pleadings by the 1st to 3rd Respondents and denied that its Physical Planning Department illegally approved the development plans for the Appellant's greenhouses, or that the Appellant failed to meet the conditions and regulations set by NEMA. In addition, that it granted approvals to the Appellant in line with the provisions of the Physical Planning Act, and was not privy to the transactions between the Appellant and NEMA, and did not aid, collude, or condone the Appellant's actions.

16. The ELC (Munyao Sila J.) in the judgment delivered on 19th June 2019 noted that the court alongside the parties and their counsel visited the site in issue and observed the three parcels of land in the matter and their surrounding area, and the Appellant's flower farm. Further, that the court also walked

from the 1st to 3rd Respondents parcels of land to the Appellant's farm for purposes of assessing the claim that the water from upstream is from the Appellant's farm and to have a general assessment of the topography, hydrological system and the environment of the area. We will discuss the procedure adopted at the site visits in more detail later on in this judgment. The learned trial Judge also made various substantive findings. Firstly, on whether NET had jurisdiction, that the dispute was not confined to the manner in which an EIA licence was issued to the Appellant and there were other matters raised, such as the bursting of the Appellant's dam and compensation arising therefrom and questions about the continuous flow of water from the Appellant's land to the Respondents' land which had nothing to do with the manner in which the EIA licence was issued, and that the case was therefore properly before the ELC.

17. Secondly, that that the Appellant had a dam in its premises which burst and spilled water into the land of the Respondents, and there was also a continuous or intermittent flow of water from the Appellant's to the Respondents' land, which was a classical case in which the rule in the case of *Rylands v Fletcher* (1861-73) All ER 1 was applicable. Further, that the breaking of the dam or the continuous flow of excess water from the dam or the greenhouses in the Appellant's farm were not an act of God but due to a poor design being employed, and even if this was not the cause, the fact that the dam burst invited the doctrine of *res ipsa loquitor*. The Appellant could therefore not escape liability for the damage caused to the Respondents' land by the water released from its land.

18. Thirdly, that the Respondents had not proved to the required standard that there was contamination of the water from the Appellant's land, but it was necessary for continuous tests to be conducted of the water discharged from the land by NEMA in conjunction with other relevant institutions and/or agencies, so as to ensure that the persons downstream and the general population were not exposed to dangerous chemicals that may adversely affect health or endanger life. Further, that NEMA also needed to ensure that the terms of the discharge licence were strictly adhered to and ought to act decisively if there was default. Lastly, that it was wrong for NEMA to issue an EIA licence for the dam without there being an EIA study report as required by the law. In addition, that since no EIA study report was ever undertaken, the provisions relating to publication of the project and public participation as outlined by Section 59 of EMCA and in the *Environment (Impact Assessment and Audit) Regulations, (2003)* could not have been followed.

19. The Appellant, being aggrieved by the said decision lodged an appeal, and raised six grounds of appeal in its Memorandum of Appeal dated 20th August 2019 and lodged on 2nd September 2019 as follows:

    1. The Learned Judge erred in law and fact by applying and misinterpreting the principles of strict liability echoed in the case of *Ryland v Fletcher* (1868) L. R. 3 H. L. 330 (UKHL) thereby erroneously holding the Appellant liable.

    2. The Judge erred in law and fact by issuing orders and directives that were never sought nor prayed for in the Plaint as was filed.

    3. The Trial Court erred in law and fact when it failed to properly evaluate the pleadings and evidence on record and to take into account critical aspects of evidence relating to the use of land by all the parties.

    4. The Learned Judge erred in law and in fact by holding that the Petitioners had established a cause of action actionable by the Court.

    5. The Learned Judge erred in law and in fact by making an award for loss of use whereas there was no proof of the activities allegedly undertaken for such an award to issue.

6. The Learned Judge erred in law and in fat by assuming jurisdiction of the National Environmental Tribunal as established by law and thereby usurping it of its power.

20. The appeal was heard on this Court's virtual platform on 17th October 2023. Learned counsel Mr. Henry Opondo, appeared for the Appellant, learned counsel Mr. Jaoko Nchoe, appeared for the 1st, 2nd and 3rd Respondents, learned counsel Mr. Ngara appeared for the 4th Respondent, while learned counsel Mr. Lawrence Karanja, appeared for the 5th Respondent. The counsels highlighted their respective written submissions. This being a first appeal, we are mindful that the duty of this Court, as set out in the decision of *Selle & another v Associated Motor Boats Co. Ltd & others* (1968) EA 123, is to reconsider the evidence, evaluate it and draw our own conclusion of the facts and law, and this Court will only depart from the findings by the trial Court if they were not based on evidence on record, where the said Court is shown to have acted on wrong principles of law as was held in the *Jabane v Olenja* (1968) KLR 661, or where its discretion was exercised injudiciously as held in *Mbogo & another v Shah* (1968) EA 93.

21. The counsel submitted on three issues. The first was whether the trial Court assumed the jurisdiction of NET, and the Appellant's counsel in this respect submitted that NET had original jurisdiction to determine issues regarding licences with the ELC having appellate jurisdiction, and that the ELC therefore erred and acted beyond its jurisdiction by making the order revoking the licences issued to the Appellant by NEMA and the consequent orders. The second issue was whether the orders issued by the trial Court were sought or prayed for in the amended petition, and the Appellant's counsel opined that the directions given by the Trial Court was based on issues not pleaded and this was tantamount to throwing back the parties into the arena of litigating and contesting issues which never came for determination by the trial Court. The last issue was whether the trial Court failed to properly evaluate the pleadings and evidence on record and to take into account critical aspects of evidence relating to the use of land by all the parties. One of the allegations made by the Appellant's counsel in this respect was that the Court on its own motion decided to conduct a site visit and took down proceedings as evidence of its own observation, without subjecting it to any examination by the Appellant or the parties.

22. The Appellant's counsel in this respect submitted that the nature of evidence taken particularly during the site visit, did not afford the Appellant time to rebut the allegation raised; that the trial Court allowed all the 1st to 3rd Respondents to testify on site without the chance of cross examination which was against fundamental principles of fair trial and a right to be hear as enshrine under Article 48 and 50 of the *Constitution* of Kenya; and that random people, namely one Rose Auma, one John Njenga and one Richard Tanui, not by coincidence were examined without corroboration. In particular, that Rose Auma was allegedly constructing a bridge on her own to allow school children to pass without any assistance from the community from where the children came from. The Respondents did not address this issue in their submissions.

23. The Appellant has alleged that the procedure adopted by the trial Court during the site visit was irregular and prejudiced its right to a fair trial, and this is a preliminary issue that we need to interrogate, since, if there are any adverse implications found to arise therefrom, there is a possibility that they may affect the integrity of the entire trial. A site visit is in this respect an in- person visit by a Court to the scene or subject matter of the trial before it, and the Court is in such instances described as having proceedings locus in quo (at the place where an event took place). Under Order 18 Rule 11 of the *Civil Procedure Rules*, which govern the proceedings in the ELC, a court has discretion whether or not to conduct a site visit at any stage of the trial, and it is provided that the court may at any stage of a suit inspect any property or thing concerning which any question may arise.

24. It is however necessary in this regard to distinguish between a pre-hearing site visit, which is made by a court to confirm the existence of, or status quo of the subject matter of the suit before the actual hearing, usually for purposes of interlocutory directions; and a site visit made during a hearing, whose purpose is to enable the Court understand the evidence better or verify and test the evidence against the state of facts relating to the subject matter of the suit. During the pre-hearing site visit, the Court may take notes but these do not constitute evidence since at this stage, the witnesses have not yet testified. On the other hand, in a site visit held during a hearing, the witnesses for each party testify under oath and indicate or clarify what their claim is in relation to the subject matter, and are cross examined on their testimony.

25. This Court (differently constituted) noted in *Kenya Bureau of Standards v Kwale International Sugar Company Limited & 4 others* (Civil Appeal 2 of 2020) [2022] KECA 937 (KLR) that an opportunity should be provided for all the parties to participate and make representations on the manner of site visit to be conducted, and that it is preferable in this regard that procedural directions are given by the trial Court at the pre-trial stage, for the orderly and efficient proceedings by the Court during the site visit.One of the most important considerations in this regard should be when the site visit should occur. Other practical considerations include:Whether the parties will be allowed to make presentations at the site and who may speak.What limits will be placed on the content of any presentations or evidence adduced during the site visit.The logistics of getting the parties to the site.How long the site visit will last.

26. In the present appeal, a perusal of the proceedings in the ELC shows that on 13th February 2018 the trial Judge set a hearing date of the suit for 9th May 2017 (sic) and directed that "we may do part of the hearing on site but we first meet in court at 9.00 am". On 9th May 2018, the counsel for the Appellant, 1st to 3rd Respondents, and NEMA were present and ready to proceed with the hearing of the suit. The counsel for the County Government of Nakuru was not present. The trial Judge then directed that "we will proceed to Njoro to see the site and take evidence of the plaintiff and the expert". The trial Court then visited the 1st Respondent's and 2nd Respondent's parcels of land where the two Respondents gave sworn testimony, but were not cross-examined. The Court on the same day proceeded to the Appellant's land, where the 1st Respondent gave additional testimony on oath, and two of the Appellant's witnesses, a Dr. Taruru and Ms. Bokea made some clarifications on the 1st Respondent's testimony, but did not testify on oath. Once more, there was no cross-examination of the said witnesses.

27. A second site visit was conducted on 25th May 2018, and it is indicated in the proceedings that the trial Judge on that day indicated that "we intend to walk up from the Plaintiff's farm to the 1st defendant's farm to assess the general topography and possible sources of the water lending(sic) to the plaintiffs' farm". The record of the proceedings of that day provide the Court's observations, and the comments and statements made by the Respondents' and Appellant's witnesses, as well as some members of the public that the Court encountered on the site. Part of the proceedings of that day were captured in the judgment as follows:

> " 19....On this day, the court noted an actual increase in the flow of water in the main gulley and a new smaller channel next to the gulley. It was apparent as we walked upstream, that the source of water in the smaller channel and in the main gulley was the same. I observed that this gulley is quite deep, about 6 feet deep, and according to the 1st plaintiff, it was formed when the 1st defendant's dam burst. I noted the Mwihoti Water Project which is a borehole about 100 metres from the edge of the 1st plaintiff's farm. On the way, we met a lady, Rose Auma, who was trying to create a bridge across the road, for the road had been washed away

and subsumed into the deep main gulley. Ms. Auma stated that the road was previously passable and was used to access a quarry, but because of the deep gulley, the road is cut off and no longer passable. She also stated that they have been trying to create a bridge since schoolchildren find difficulty crossing to access their school. Away from the main gulley, there were small rivulets running down the walking path. The source of these rivulets was disputed, the 1st plaintiff believing to be from the 1st defendant's farm, whereas the 1st defendant's expert witness, Dr. Taruru (and who later testified as DW-2)stating that they are natural drains of water. These rivulets lead into the main gulley thus draining into the 1st plaintiff's land and later the land of the 2nd and 3rd plaintiffs. At some point, the gulley ended up in a rock channel, without any soil, which was explained by Dr. Taruru to be due to erosion. The court also noted concrete culverts, which were not too old, but which had been washed down by the heavy and fast flow of water in the gulley. It was mentioned while in this area, that previously and prior to the bursting of the 1st defendant's dam, what was present was a seasonal stream which would drain into a farm owned by one Mr. Kiberenge and which formed a small swamp on his farm. This appears to be the position as an inquiry by the court addressed to a passer-by, one Mr. John Njenga, brought forth the same answer, that there was only a seasonal stream, and a small bridge which was washed away when the dam burst, and since then, the flow of water has been continuous. We reached a fork where two streams meet and drain to form the one stream which leads to the gulley downstream. It was explained that one of the two streams is natural and the other stream is from the 1st defendant's farm. An interview by the court to another bystander, one Richard Tanui, elicited the explanation that the stream was seasonal without a deep channel but the flow became strong about a couple of years back..."

28. The hearings thereafter proceeded in the court room from 26th June 2018 to 15th November 2018, when the 1st, 2nd and 3rd Respondents testified and called four additional witnesses including expert witnesses, and were all cross-examined on their testimony. The Appellant also called two witnesses to testify one of whom was an expert witness and who were likewise cross- examined on their evidence. NEMA called one witness who was also cross- examined, while the County Government of Nakuru did not call any witness to testify on its behalf.

29. The issue of the proper conduct of locus in quo proceedings was the subject of the decision by the Court of Appeal in Tanzania (Korosso, Kwariko, Mugasha, JJ.A.) in *Kimonidimitri Mantheakis v Ally Azim Dewji & others* (Civil Appeal No 4 of 2018) [2021] TZCA 663 (3 November 2021) where the court observed as follows:

> "Whereas the visit of the locus in quo is not mandatory, it is trite law that, it is done only in exceptional circumstances as by doing so a court may unconsciously take a role of witness rather than adjudicator. In this regard, where the court deems it warranted, then it is bound to carry it out properly so as to establish whether the evidence in respect of the property is in tandem with what pertains physically on the ground because the visit is not for the purposes of filling gaps in evidence. Therefore, where it is necessary or appropriate to visit a locus in quo, the court should attend with the parties and their advocates, if any, and with such witnesses as may have to testify in that particular matter. See: *Nizar M.h Ladak v Gulamali Fazal Janmohamed* (supra). The essence of the court attending the locus in quo with the parties was emphasised in the case of *William Mukasa v Uganda* [1964] E.A 696 at page 700, Sir Udo Udoma G (as he then was) held as follows:
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> > "A view of a locus in quo ought to be, I think, to check on the evidence already given and where necessary and possible, to have such evidence oculary

demonstrated in the same way a court examines a plan or a map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view of a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence."

30. The Court then laid down the guiding principles for the conduct of site visits by a court as follows:

> " In the light of the cited decisions, for the visit of the locus in quo to be meaningful, it is instructive for the trial Judge or Magistrate to: one, ensure that all parties, their witnesses, and advocates (if any) are present. Two, allow the parties and their witnesses to adduce evidence on oath at the locus in quo; three, allow cross-examination by either party, or his counsel, four, record all the proceedings at the locus in quo; and five record any observation, view, opinion or conclusion of the court including drawing a sketch plan if necessary which must be made known to the parties and advocates, if any."

31. We adopt these guidelines, and note that in the circumstances of the present appeal, the site visit conducted by the trial Judge was part and parcel of the hearing, during which key witnesses gave evidence. The procedure adopted by the trial Judge however raises a number of concerns with respect to its fairness and risk of prejudice to the parties. Firstly, no opportunity was given to the parties to cross- examine the witnesses who testified during the site visit. Secondly, no opportunity was given to the Appellant and the 3rd, 4th and 5th Respondents to adduce sworn evidence during the site visits. Thirdly, no opportunity was given to the parties to comment on the evidence introduced by the Court during the site visit, when it questioned persons it described as "bystanders" it met on the site, as set out in the account of the proceedings during the site visit which we reproduced earlier in this judgment. In effect, new evidence was introduced by the trial Judge during the site visit.

32. What then are the implications and effect of the site visit as it relates to this appeal? Firstly, the trial Judge did make various findings of fact in the judgment arising from the site visit as follows:

> "83. Now, to the issues, I think that it is important that I outline some important facts which came forth during the site visit and from the evidence of the parties. First, there is no question that there is serious degradation of the land of the plaintiffs. The 1st plaintiff's land has indeed borne the brunt of the deep gulley which channels water from upstream. This gulley has separated parts of the 1st plaintiff's land from the rest and has also created a marshy area. For the land of the 2nd and 3rd plaintiffs, part of their land is flooded and is now akin to a swamp, with swamp vegetation such as Egyptian reeds now taking over from what previously was land that was arable and graced with acacia trees. The source of this swampy area is the water from the gulley which spills into their land. Secondly, there is no debate that the 1st defendant operates a flower farm upstream. The flower farm comprises of several greenhouses which harvest rain water. A majority of the greenhouses, discharge this water into the dam that is in the 1st defendant's land, while some (9 according to the 1st defendant) discharge water into a swampy area, the so called "wetland" within the 1st defendant's farm. It is also common ground that the dam of 1st defendant burst in the year 2014. There is one important fact which is claimed by the plaintiffs but denied by the 1st defendant, and that is whether the source of the water in the plaintiffs' farms is from the 1st defendant. That is the point that I opt to start with."

33. Secondly, it is also notable that the trial Judge also relied on information given by persons who were not parties to the suit that he met and questioned on the site, in making the following finding in the judgment on "the General damage to the locality and environment" :

> " 110. An important matter that has come to light in these proceedings, apart from the damage to the farms of the plaintiffs, and for which this court cannot close its eyes and ears, is the deleterious impact to the environment that the activities of the 1st defendant have caused. It is obvious that the 1st defendant is unable to contain the large amount of water harvested in its farm. This huge volume of water has flooded the roads, washed away bridges, and generally led to hardship to the general population of the area. The effect is that people find it difficult to access their homes, and for some residences and places of business, no vehicle can reach. Children are finding it difficult to go to school; they are forced to take risks crossing flooded roads and the flowing water gulley. Some lands including portion of those of the plaintiffs have been rendered unusable."

34. The net effect therefore is that not only was the subject site visit irregular and prejudicial in material respect as we have already found in the foregoing, but it also vitiated the subsequent proceedings conducted by the ELC, and the resulting judgment cannot therefore also be spared. We are of the view that this finding is dispositive of this appeal, as it would not be fair nor just to address the remaining issues which touch on the merits of the decisions made by the trial Judge arising from the vitiated proceedings. The parties' respective cases as pleaded in the ELC therefore still remain unsolved, and the appropriate course of action we find to be merited in the circumstances is to nullify the trial proceedings, quash the judgement and order an expedited retrial before another Judge.

35. We accordingly allow the Appellant's appeal for these reasons, and order as follows:

I. We hereby set aside the entire proceedings of and judgment delivered by the Environment and Land Court at Nakuru (Munyao Sila J.) on 19th June 2019 in Nakuru ELC Case No 405 of 2017.

II. Pursuant to the provisions of Rule 33(c) of the Court of Appeal Rules of 2022, we hereby remit Nakuru ELC Case No 405 of 2017 back to the Environment and Land Court at Nakuru for a new trial to be held on a priority basis by a Judge other than Munyao Sila J.

III. The suit in Nakuru ELC Case No 405 of 2017 shall be mentioned before the Duty Judge of the ELC at Nakuru within 30 days from the date of delivery of this judgment for purposes of giving directions regarding the hearing and disposal of the suit.

IV. Considering the circumstances giving rise to our decision, we order that each party shall bear their own costs of the appeal and of the proceedings of the Environment and Land Court.

V. The Deputy Registrar of this Court is directed to immediately transmit this judgment to the Presiding Judge of the ELC at Nakuru.

36. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JULY, 2024.

F. SICHALE

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR