Superior Homes (Kenya) PLC v Water Resources Authority & 9 others (Civil Appeal E330 of 2020) [2024] KECA 1102 (KLR) (19 August 2024) (Judgment)

Neutral citation: [2024] KECA 1102 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E330 OF 2020

HA OMONDI, K M'INOTI & KI LAIBUTA, JJA

AUGUST 19, 2024

BETWEEN

SUPERIOR HOMES (KENYA) PLC ..... APPELLANT

AND

WATER RESOURCES AUTHORITY ..... 1ST RESPONDENT

GEMS MANAGEMENT LTD ..... 2ND RESPONDENT

MICHAEL ANTHONY NYABUTI ..... 3RD RESPONDENT

ROSALIND KATUMBI KOTI ..... 4TH RESPONDENT

NANCY NTHAMBI KATINGIMA ..... 5TH RESPONDENT

JAMES MAINGI MBITHI & EMMA MBINYA MUTIO ..... 6TH RESPONDENT

DANIEL GICHUKI KARIUKI & EMILY NJERI KAROKI ..... 7TH RESPONDENT

FAITH WANGUI THIONG'O & ALLAN NJUGI MURIMI .... 8TH RESPONDENT

STELLA BONARERI MOGERE & KEPHA NYAMONGO OENGA ..... 9TH RESPONDENT

ANTHONY MAGANDA CHACHA & RUTH MUTHONI NJIHIA ..... 10TH RESPONDENT

(Appeal from the Judgment and Decree of the Environment & Land Court at Machakos (Angote, J.) dated 8th November 2019 in (ELC Const. Pet. No. 12 of 2018 Consolidated with JR. Misc App. No. 192 of 2018.)

JUDGMENT

1. The central question in this appeal is whether the Environment and Land Court (ELC) at Machakos (Angote, J.), erred by declining to award the appellant, Superior Homes (Kenya) PLC, the sum of Kshs 466,955,673.00 as special damages for loss of business and reputation, and interest. The 1st respondent, the Water Resources Authority, has filed in the appeal a Notice of Grounds for Affirming the Decision of the ELC as well as a Notice of Cross-Appeal where it challenges part of the decision of the ELC regarding that court's jurisdiction as well as some factual findings by the court in favour of the appellant.

2. For background and context, it is apposite to briefly sketch the history leading to the appeal.

3. The appellant is the registered proprietor of the property known as LR No. 27409 IR No. 103926/1 on which is developed a housing estate known as Green Park Estate (the Estate). The 2nd respondent, Gems Management Ltd., is an incorporated management company, which manages the Estate. The 3rd to 10th respondents are lessees and owners of eight (8) units in the Estate known as House Nos. FB 23A, TB 24A, FB 25A, FB 26A, FB 27A, FB 28A and FB 30A. For convenience, we shall refer to the 3rd to 10th respondents as "the purchasers" and their houses as "the units."

4. On 31st May 2018, the 1st respondent issued an enforcement order requiring the appellant to demolish and remove the eight units owned by the purchasers in the Estate and restore the riparian reserve to its original state within 21 days. The said units abuts the Stoney Athi River, a tributary of the Athi River, with the boundary of the estate laying between the units and the river. The enforcement order was based on the assertion that the units had encroached on riparian land bordering the river.

5. On 19th June 2018, the appellant filed in the High Court of Kenya at Machakos a judicial review application seeking an order of certiorari to quash the enforcement order, and an order of prohibition to stop the 1st respondent from enforcing the enforcement order. The court granted the appellant leave to apply for judicial review and directed that the leave do operate as stay of the enforcement order.

6. Before the judicial review application could be heard, the appellant filed in the High Court of Kenya at Machakos Constitutional Petition No. 12 of 2018 challenging the enforcement order as unconstitutional and in violation of its right to property and fair hearing under Articles 40 and 50, respectively, of *the Constitution*. The 2nd respondent and the purchasers were named as interested parties.

7. The appellant pleaded that, previously, the 1st respondent had carried out a survey of the Estate and confirmed in writing on 3rd September 2013 that the Estate did not encroach on riparian land and that, acting on that assurance, the appellant obtained all the requisite authorisations and certificates and embarked on the development of the Estate. It was further pleaded that, on 16th April 2018, the 1st respondent, arbitrarily and without lawful cause, changed its position and claimed that the riparian reserve of the Stoney Athi River was 20 meters. Claiming that the units had encroached on the riparian reserve of the river, the 1st respondent demanded demolition of all structures within 20 meters of the riparian reserve.

8. The appellant further pleaded that, upon receiving the enforcement order, it instructed independent surveyors who, on 11th June 2018, confirmed that the units had not encroached on the riparian reserve.

9. By way of remedies, the appellant prayed for declarations that the enforcement order was null and void for violating its right to property under Article 40 of *the Constitution* and the right to fair hearing under Article 50 of *the Constitution*; that the Estate and the units did not encroach on the riparian reserve as defined by regulation 116(2) of the Water Resources Management Rules, 2007; a permanent injunction restraining the 1st respondent from enforcing the enforcement order or otherwise interfering with the petitioners' and the purchasers' enjoyment and quiet possession of the Estate and the units; special damages, general damages, and costs.

10. The 1st respondent opposed the petition vide a replying affidavit sworn on 28th September 2018 by John N. Kinyanjui, its Athi Catchment Area regional manager. It was the 1st respondent's contention that the petitioners had misapprehended the tenure and effect of its letter of 3rd September 2013, which expressly stated that the Estate's masonry wall was in the flood plain which experiences flooding during high flow, and that the flood plain was within the riparian reserve.

11. The 1st respondent further pleaded that it directed the appellant to liaise with it for authorisation to construct a dyke, and to submit hydrological assessment report and technical design of the dyke, but that the appellant ignored the direction and proceeded to construct the units on the flood plain. It was further pleaded that the appellant belatedly applied for authorisation to construct the dyke, but that the 1st respondent declined to grant the same because the dyke was within the river channel.

12. The 1st respondent defended the enforcement order as issued within the law and after hearing the petitioners, and also challenged the validity of the report of the independent surveyor appointed by the petitioners, which indicated that the units were not on the riparian reserve.

13. The judicial review application and the constitutional petition were consolidated vide a ruling dated 6th July 2018 and, by an order dated 19th February 2019, the matter was transferred from the High Court to the ELC. The dispute was ultimately heard by Angote, J., who also visited the locus in quo. The learned judge framed five issues for determination, namely:

    i. whether the ELC had jurisdiction to hear and determine the dispute;

    ii. whether the units were on riparian land;

    iii. whether the enforcement order was valid and lawful;

    iv. whether the appellant had suffered loss and damage as a result of the enforcement order; and

    v. whether the appellant was entitled to the reliefs sought.

14. On the first issue, the learned judge held that the proper forum to hear and determine the appellant's grievance was the Water Tribunal established by section 119(1) of the *Water Act*, 2016. However, because as of the date of the appellant's claim the Tribunal was yet to be constituted, its members appointed, and rules of procedure to guide it and litigants promulgated, the court found that the ELC had jurisdiction. The court concluded thus:

> "A litigant who cannot move a Tribunal due to structural and legal bottlenecks cannot go without a recourse, especially in a situation where urgent interim orders are to be issued. In the circumstances of the dispute herein, and on the grounds that I have given above, the petitioner was entitled to institute the petition and the Judicial Review Application in this court.
>
> This court therefore has the requisite jurisdiction to hear and determine the dispute."

15. Regarding the question as to whether the units were on riparian land, the court held that, under the Water Resources Management Rules, 2007, it was the responsibility of the 1st respondent to demarcate the riparian reserve of rivers; that the 1st respondent did not mark the highest level of the Stoney Athi River before construction of the Estate; and that, from the evidence adduced, the riparian reserve of the Stoney Athi River to the appellant's perimeter wall was beyond the minimum required distance of 6 meters and maximum distance of 30 meters under the Water Resources Management Rules.

16. On the third issue regarding the legality and validity of the enforcement order, the court concluded that the same was illegal, null and void.

17. As regards the issue as to whether the appellant had suffered loss and damage of Kshs. 466,955,673.00 as a result of the enforcement order, the trial court noted that the bulk of the amount claimed by the appellant consisted of estimated loss of profit from June 2018 to December 2018 and reputation and brand damages alleged to have been occasioned by the issuance of the enforcement order. However, the court found as follows:

> "The evidence before me shows that the Petitioner's wall collapsed due to the flooding that occurred in March-May, 2018. It is true that the said flooding of a portion of the Petitioner's land could have contributed to the loss of business, reputation and unrecoverable costs. Considering that it is not the Respondent who caused the flooding of the suit land, and in view of the fact that the re-construction of the perimeter wall could not be done until the issue of whether the Petitioner's land is on riparian land or not has been determined by the court, I decline to award to the Petitioner the damages stipulated in its Further Affidavit."

18. Ultimately, by a judgment dated 8th November 2019, the trial court issued a declaration that the enforcement order was in breach of the appellant's right to a fair hearing under Article 50 of *the Constitution* and in violation of its right to property under Article 40 of *the Constitution*, and therefore illegal, null and void. The court issued a further declaration that the units were not on riparian reserve; a permanent injunction restraining the appellant from implementing the enforcement order; and an order allowing the appellant to reconstruct its collapsed perimeter wall. The appellant was also awarded costs of the constitutional petition as well as of the judicial review application.

19. The appellant was aggrieved by part of the judgment of the trial court and lodged the present appeal. Although the appeal is based on seven grounds, they all revolve around the refusal of the trial court to award the appellant special damages of Kshs. 466,955,673.00.

20. On its part, the 1st respondent filed a Notice of Grounds for Affirming Decision of the ELC as well as a cross-appeal challenging the findings of the ELC as regards its jurisdiction, the definition of riparian reserve, and alleged failure to consider the appellant's evidence.

21. The appellant and the 1st respondent addressed both the appeal and the cross-appeal together. For convenience, we shall consider the appeal and notice of grounds for affirming the judgment together, followed by the cross-appeal.

22. In its written submissions dated 3rd March 2021, the appellant, represented by Mr. Nyachoti, learned counsel, submitted as regards the appeal and the grounds for affirming the decision of the ELC that the loss of Kshs.466,955,673.00 suffered by the appellant was a direct result of the enforcement order issued by the 1st respondent. It was contended that the said sum was made up as follows:

    (i) Unrecoverable costs - 5,604,163.00

    (ii) Loss of business - 458,269,651.00

(iii) Reputation and brand damage - 3,081,859.00

Total - 466,955,673.00

23. Counsel submitted that the assessment was by an expert, whose evidence was not controverted by the 1st respondent and that, in denying the appellant the special damages, the learned judge erred by misapprehending the evidence and submissions, thereby arriving at a wrong decision. He added that the enforcement order for the demolition of the units, which was widely publicised in the media, occasioned the appellant a public relations disaster and financial loss for which the appellant was entitled to compensation. In support of the submission, the appellant relied on the judgment of this Court in Leonard Gethoi Kamweti v. National Bank of Kenya Ltd (2020) eKLR.

24. It was the appellant's further submission that the ELC erred by concluding that the appellant was seeking special damages from the 1st respondent on account of the floods, which was not the case. Counsel contended that the appellant had properly pleaded and particularised the special damages in that, although the particulars were not set out in the petition, it was indicated that the special damages would be particularised later, which was done in the further affidavit sworn by Judith Maroko (PW2) on 15th February 2019. He urged us, on the authority of the decision of this Court in Gitobu Imanyara & 2 others v. Attorney General [2016] eKLR, to reverse the ELC and award the special damages.

25. The 1st respondent opposed the appeal vide submissions dated 22nd September 2022. Submitting in opposition to the appeal, Mr. Chenge, learned counsel for the 1st respondent, submitted that the ELC properly declined to award special damages because the loss and damage allegedly suffered by the appellant was occasioned by flooding, for which the 1st respondent was not responsible, and that any negative publicity suffered by the appellant was not attributable to the 1st respondent. Counsel relied on the appellant's evidence which stated that the decrease of the company's total turnover was attributable to the floods experienced in the beginning of the year.

26. Turning to the grounds for affirming the decision of the ELC, counsel submitted that the ELC erred by failing to address the issues raised by the 1st respondent, namely that the appellant had not specifically pleaded or particularised the special damages in the petition. It was contended that the purported particularisation of the special damages was done irregularly, in instalments and in violation of the 1st respondent's right to a fair hearing because the affidavit of Judith Maroko was sworn on 15th February 2019 whilst those of Peter Kahi (PW4) were sworn on 17th May 2019 and 14th June 2019, and served upon the 1st respondent barely two days before the hearing. Counsel relied on the decision of this Court in Gitobu Imanyara & 2 Others v. Attorney General (supra); and the decision of the Supreme Court in Nathif Jama Adam v. Abdikadir Osman Mohammed [2014] eKLR, and submitted that the particulars of special damages could not be validly introduced through affidavits because the appellant's petition did not complain of any loss of business, reputation and recovery costs.

27. Next, counsel submitted that, other than failure to plead special damages, the appellant did not strictly prove special damages as required. It was contended that the appellant's witnesses, PW2 and PW4, did not adduce any evidence to prove the alleged reduction of the number of potential buyers of its units, or refusal by Kenya Commercial Bank Ltd to approve mortgages to potential buyers.

28. Turning to the cross-appeal, the 1st respondent submitted that the learned judge, having correctly held that the appropriate forum to hear and determine the dispute was the Water Appeals Tribunal, ought to have downed his tools as he had no jurisdiction in the matter. It was contended that the non-existence of the Tribunal did not justify assumption of jurisdiction by the ELC. It was further contended that the ELC erred by holding that there were no rules and regulations for the Tribunal, and yet, by dint of

section 24 of the Interpretation and General Provision Act, the earlier Water Appeals Boards Rules, 2007 made under the *Water Act*, 2002 were applicable to the dispute.

29. As regards the definition of riparian reserve, Mr. Chenge submitted that, although the learned judge acknowledged that, in the determination of a river's riparian land what ought to be considered is the meaning to be assigned to the words "top edges of the bank of the watercourse", he ignored the definition of "watercourse" in the *Water Act*, 2016 and rule 116 of the Water Resources Management Rules, 2007. Counsel submitted that, before considering the measurements presented by the parties, the ELC had to first determine the river's watercourse with certainty and that, in this case, the court erred by holding that the units were not in the riparian reserve.

30. Counsel further referred to section 2 of the *Water Act*, 2016, which defines a "water course" to mean "any natural channel or depression in which water flows regularly and intermittently", but noted that the Act does not define the term "natural channel." He relied on the decision in Board of Commissioners of Sheby County v. Castetter (7 Ind. App. 309 (Ind. Ct. App 1893) where the Indiana Court of Appeals held that "watercourse" is broader and more comprehensive than "river" and that in its legal sense, "it consists of bed banks and water, a living stream confined in a channel."

31. As regards developments near water bodies, counsel relied on two sets of regulations made under the *Environmental Management and Co-ordination Act*, 1999, namely the Environmental Management and Coordination (Water Quality) Regulations, 2006 which prohibit development activity within a minimum of 6 meters and a maximum of 30 meters from the highest ever recorded flood level, and the Environmental Management and Coordination (Wetlands and Riverbanks) Regulations, 2009 which define "river bank." Counsel urged that had the court applied these regulations, it could not have concluded that the units were not on riparian land.

32. The 1st respondent further submitted that the ELC erred by failing to evaluate all the evidence, which showed that the Environmental Impact Assessment (EIA) licence granted to the appellant on 8th March 2006 was conditional upon the appellant ensuring protection of the Stoney Athi River by establishing a 6 meter riparian reserve from the highest flood level, not constructing in the riparian reserve, and complying with the relevant laws and guidelines. It was submitted that the appellant did not comply with the conditions, and did not produce any evidence of assurance or certification from the 1st respondent which allowed the appellant to undertake the construction. As for the letter of 3rd September 2013, the 1st respondent maintained that it was nothing more than a response to the appellant's request for authorisation to construct a dyke.

33. In the 1st respondent's view, the evidence adduced by the appellant's witnesses (PW1 and PW3) and the measures they had undertaken were not based on the Regulations and the ELC erred by relying on the evidence and shifting the burden to the 1st respondent to show that it had marked the high-water mark. The 1st respondent therefore submitted that the enforcement order was lawfully issued and relied on the decision of the ELC in Nairobi Splendour Management Ltd v. National Environmental Management Authority & 4 Others [2019] eKLR for the proposition that measurement of the riparian reserve should be based on the high and low watermarks and not the centre of the river.

34. In answer to the cross-appeal, the appellant submitted that the ELC correctly held that it had jurisdiction because the Water Appeals Tribunal was yet to be constituted and its rules promulgated. In addition, the enforcement order issued by the 1st respondent required the appellant to demolish the units within 21 days; and that in the circumstances, the appellant was entitled to approach the ELC to protect its constitutional rights.

35. On the issue as to whether the ELC erred by holding that the units were not on riparian land, the appellant submitted that, according to the definition of riparian land in rule 2 of the Water Resources Management Rules, 2007, the units were outside riparian land as further confirmed by the 1st respondent's letter of 3rd September 2013. It was further contended that the report of the surveyors hired by the appellant, which was produced in evidence, as well as the evidence of the appellant's hydrologist, also confirmed that the units were outside the riparian reserve. Accordingly, the appellant submitted that the 1st respondent had no legal basis to subsequently claim that the units were on riparian land, and to issue the enforcement order without involving the appellant. On the authority of the decisions of this Court in Kenya Power & Lighting Co Ltd. v. Margaret Akoth Olang [2019] eKLR; and INN v. MSC [2018] eKLR, the appellant submitted that the court was entitled to rely on the evidence of experts that was not controverted.

36. Lastly, the appellant submitted that, having obtained the requisite approvals prior to the construction of the estate, the enforcement order was in violation of its legitimate expectation. The appellant denied that the trial court had illegally shifted the burden to the 1st respondent, or that it had ignored the 1st respondent's evidence.

37. None of the other respondents filed submissions or appeared for the hearing of the appeal.

38. We have carefully considered the record of appeal, the judgment of the ELC, the submissions by counsel, the cited authorities, and the law. The appeal, the Notice of Grounds for Affirming Decision and the cross-appeal raise three issues on which this appeal turns, namely:

    i. whether the ELC erred by holding that it had jurisdiction in the matter;

    ii. whether the ELC erred in holding that the units were not on riparian land and by declaring the enforcement order unconstitutional, null and void; and

    iii. whether the ELC erred by declining to award the appellant special damages of Kshs. 466,955,673.00.

39. As regards issue No. 1, Part V of the *Water Act*, 2016 makes provision for dispute resolution under the Act. Section 119 establishes a one-person tribunal known as the Water Tribunal made up of a chairperson appointed by the Judicial Service Commission. The jurisdiction of the Tribunal is provided in section 121 as follows:

    1. The Tribunal shall exercise the powers and functions set out in this Act and in particular shall hear and determine appeals as the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.

    2. In addition to the powers set out in subsection (1), the Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there's a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism."

40. By section 122, the Tribunal is empowered to make rules to govern its procedure. A party aggrieved by the decision of the Tribunal has a right of appeal to the ELC on a point of law, within 21 days of the decision. A decision of the Water Resources Authority, the Regulatory Board or the Tribunal which has not been appealed within 30 days, takes effect and is binding on all the parties.

41. It is patently clear that the Act has provided an elaborate dispute resolution mechanism, which requires an aggrieved party to first approach the Tribunal, and only resort to the ELC by way of appeal. Under

the Act, the ELC has no original jurisdiction to hear disputes under the Act. Its jurisdiction is only appellate.

42. The principle is firmly settled in our jurisdiction that where a statute had provided a dispute resolution mechanism, that mechanism must be utilised before a party can resort to any of the Superior Courts (trial). In Speaker of the National Assembly v. Karume [1992] KLR 21, this Court held as follows:

> " Where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed."

43. In Mutanga Tea & Coffee Company Limited v. Shikara Limited & Another [2015] eKLR, this Court upheld the reasoning in Speaker of the National Assembly v. Karume (supra) and stated as follows:

> "We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2)(c) and the very raison d'etre of the mechanisms provided under the two Acts."

44. The above reasoning was affirmed by the Supreme Court in Albert Chaurembo & 7 others v. Maurice Munyao & 148 Others [2019] eKLR where the Court held that when jurisdiction is vested in a body, a dispute falling within that jurisdiction must first be determined by the body established by law to hear and pronounce itself on the legal issues, subject to any other alternative or appellate remedies provided by law. The Court further stated that, where there exists an alternative method of dispute resolution established by legislation, courts must exercise restraint in exercising their jurisdiction as conferred by *the Constitution*, and must give deference to the dispute resolution bodies established by statute with the mandate to deal with such specific disputes in the first instance. The Court concluded that:

> "...even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute."

45. However, the Supreme Court has recognised that there may arise exceptional circumstances where the court may assume jurisdiction even though an alternative method of dispute resolution is established by legislation. In Abidha Nicholus *v. Attorney General & Others, Pet. No. 16 of 2019*, a petition filed in the ELC was resisted on the ground, among others, that the petitioner had not exhausted the dispute resolution mechanisms provided under the Environmental Management Coordination Act and the *Energy Act*. The ELC sustained the objection and, on appeal, this Court upheld the decision of the ELC. The petitioner appealed to the Supreme Court where one of the issues was whether the petitioner was required to exhaust the alternative dispute resolution mechanisms before resorting to the ELC.

46. The Supreme Court reiterated the holding in Albert Chaurembo & 7 Others v. Maurice Munyao & 148 Others (supra). However, the Court added, citing with approval the decision of this Court in Republic v. National Environmental Management Authority [2011] eKLR that, in exceptional

circumstances the court may assume jurisdiction where an alternative method of dispute resolution is established by legislation. The Court further cited the *Fair Administrative Action Act* and stated:

> " Section 9(2) of the *Fair Administrative Action Act*, we must add, provides that where there exist internal mechanisms for the resolution of a dispute, the court will not review the administrative action until the internal dispute mechanism has been exhausted. As we had earlier stated, in our view, that fact notwithstanding, there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. That is also why Section 9(4) of the *Fair Administrative Action Act* creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party." (Emphasis added)

47. Ultimately, the Court concluded thus:

> "... the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court...
>
> Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism." (Emphasis added).

48. In this appeal, it is common ground that, as at the time the 1st respondent issued the enforcement order for the demolition of the units, the Water Tribunal created by section 119 of the *Water Act* had not been constituted and operationalised. The appellant faced a real conundrum in that, 21 days from the date of the enforcement order, the units stood to be demolished. The Tribunal, which was the appellant's first point of call, was not in operation, whilst the ELC had only appellate jurisdiction in the matter. Yet, Article 50(1) of *the Constitution* guaranteed the appellant the right to fair hearing in these terms:

> "Every person has the right to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

49. In view of the above unequivocal guarantee of the right to fair hearing, which right cannot be abridge under Article 25 (c) of *the Constitution*, coupled with the binding decisions of the Supreme Court, where the tribunal or body prescribed by law to hear and determine a dispute is not in existence, an aggrieved party does not lose the protection of the law, and is entitled to approach the court with jurisdiction for protection in lieu of the prescribed body.

50. On the first issue, we find that the ELC did not err in the circumstances of this appeal by hearing and determining the appellant's claim because the Water Tribunal had not been constituted.

51. On the second issue as to whether the ELC erred in holding that the units were not on riparian land; and by declaring the enforcement order unconstitutional, null and void, the starting point must be the definition of riparian land. The Black's Law Dictionary, 8th Ed. Thomson/West, 2004 defines the word "riparian" to mean:

> " Of, relating to, or located on the bank of a river or stream (or occasionally another body of water, such as a lake)."

The Dictionary defines "riparian land" to mean:

1. Land that includes part of the bed of a watercourse or lake;

2. Land that borders on a public watercourse or public lake whose bed is owed by the public."

52. Whilst the Dictionary defines the word "riparian" relative to a river bank, it defines "riparian land" relative to a river bed or bed of a lake. For purposes of resolving the issue raised by the parties, these definitions are not particularly helpful and, accordingly, we must resort to the definitions in the Water Resources Management Rules, 2007, which were in force at the material time. Rule 2 defined "riparian Land" as follows:

> " riparian land" means land in respect of which, management obligations are imposed on the owner by the Authority due to its proximity to water body."

53. Again, it must be noted that the Rules do not define "riparian land" with precision. Any land over which the Authority has imposed obligations upon the owner on account of its proximity to a water body qualifies as riparian land. An important aspect of the definition is proximity to a water body.

54. Part IX of the Rules provides for conservation of riparian and catchment areas. Rule 116 provides as follows:

> " Determination of Riparian Land 116
>
> 1. - Riparian land", as defined in Part I of these rules shall not imply a change of ownership but impose management controls on land use for water resource quality as defined in these Rules.
>
> 2. Unless otherwise determined by a Water Resources Inspector, the riparian land on each side of a watercourse shall be defined as a minimum of six metres or equal to the full width of the watercourse up to a maximum of thirty metres on either side of the bank.
>
> 3. The width of the watercourse shall be equal to the distance between the top edges of its banks.

4. The riparian land shall be measured from the top edge of the bank of the watercourse and this shall also apply to seasonal and perennial watercourses.

5. Unless otherwise determined by a Water Resources Inspector-

   a. the riparian land adjacent to a lake, reservoir or stagnant body of water shall be defined as minimum of two metres vertical height or thirty metres horizontal distance, whichever is less, from the highest recorded water level.

   b. The riparian land adjacent to the eye of a spring shall be a minimum radius of three metres to a maximum radius of fifteen metres, measured from around the edge of the spring.

   c. the riparian land adjacent to the ocean is defined as a minimum of two metres vertical height or thirty metres."

55. From the above rule, it is crystal clear that a declaration of land as riparian land does not affect its character or proprietorship. Such declaration merely imposes on the proprietor management controls on land use for the benefit of water quality. Rule 116(2) provides how riparian land is to be determined where the 1st respondent has not already determined such land. The rule states the default position. It is common ground that, in this case, the 1st respondent had not determined the riparian land.

56. By dint of rule 116(2), riparian land is defined with reference to a watercourse, so that riparian land is a minimum of 6 metres on either side of the watercourse or equal to the full width of the watercourse up to a maximum of 30 metres on either side of the riverbank. For the purposes of the rules,the full width of the watercourse is the distance between the top edges of the river's banks. Rule 116 (4) provides how riparian land is to be measured, which is from the top edge of the bank of the watercourse.

57. The *Water Act*, 2016 defined a "watercourse" to mean:

> " any natural channel or depression in which water flows regularly or intermittently, unless declared not to be a watercourse under this Act; From the Act, it is plainly clear that there is a major difference between a river and a watercourse. This is because the definition of a stream, which includes a river, means "water contained in a watercourse." In effect a watercourse is broader than a river.

58. In Board of Commissioners v. Castetter (supra) which was cited by the 1st respondent, the United States Indiana Court of Appeals defined a river as follows:

> "A river is a body of flowing water, a running stream of no specific dimensions, larger than a brook or rivulet and pent on either side by walls or banks."

However, the same Court defined a watercourse more broadly as follows:

> "The word watercourse is a broader and-more comprehensive word than river. In its most general sense, it means a course or channel in which water flows. In its legal sense, it consists of bed, banks and water, a living stream confined in a channel, but not necessarily flowing all the time, for there are many watercourses which are sometimes dry."

59. From the evidence on record, the appellant commenced construction the Estate and the units in 2007. Prior to the construction, the appellant obtained the requisite Environmental Impact Assessment License from the National Environment Management Authority (NEMA) on 8th March

2006. Condition No. 9 of the NEMA conditions substantially reproduced rule 116(2) of the Water Resources Management Rules, 2007 and provided as follows:

> " 9. The proponent shall ensure protection of Stoney Athi River by establishing a six (6) meter riparian reserve from the highest flood level allowing the river to follow its natural meandering course, planting of suitable indigenous tree species and no construction at all shall take place in the reserve."

60. From 2007, neither NEMA nor the 1st respondent alleged that the units had encroached on riparian land. Indeed, in its letter to the 1st respondent dated 1st August 2013, way before the 1st respondent issued the enforcement order, the appellant indicated that it hand complied with the above condition. The appellant stated that:

> "During commencement of the construction (of the Estate) we protected the Stoney Athi River by establishing the 6 metres riparian reserve from the highest flood level."

61. In the same letter of 1st August 2013, the appellant requested for authorisation to construct a dyke along the bank of the Stoney Athi River due to flooding, which it attributed to climatic change. In response to that letter, on 3rd September 2013 the 1st respondent informed the appellant, inter alia, as follows:

> " Following your request on the above through a letter reference No. WRMA/010813 dated 2nd August, 2013, the site was visited on 27th August, 2013 by officers from this office and it was noted that:

Your land is adjacent to Stoney Athi River on the right river bank.The river stretch adjacent to your property measured 337 meters.The distance from the river bank to the existing masonry boundary wall is twenty five (25) meters upstream and thirty (30) metres downstream"

62. By dint of section 12 of the *Water Act*, 2007, the 1st respondent was responsible for, among others, formulation and enforcement of standards, procedures and regulations for management of water resources and fold mitigation. More specifically the 1st respondent was charged with the responsibility of enforcement of the regulations made under the *Water Act*. Under 117(1), the 1st respondent was also responsible for demarcating the riparian boundary of any water course or body on any land.

63. In its letter of 3rd September 2013, the 1st respondent informed the appellant that the distance from the Estate's masonry wall to the river bank was 25 meters upstream and 30 meters downstream, which was clearly within the requirements of rule 116(2). Notwithstanding its responsibilities under the Act and the Rules, the 1st respondent did not inform the appellant that the units were on riparian land, if indeed they were. On the contrary, the 1st respondent affirmed that the distance from the Estate's boundary wall to the riverbank was 25 meters upstream and 30 meters downstream. From this communication from the authority responsible for determination of riparian land, it is not surprising that the appellant understood the 1st respondent to be confirming that its development was within the area prescribed by rule 116(2).

64. What spurred the 1st respondent to issue the enforcement were the torrential rains experienced in the country in 2018, leading to flooding of the Stoney Athi River. On 11th April 2018, the appellant

once again applied to the 1st respondent for authorisation to construct a dyke. In a response, the 1st respondent presented a different scenario and stated:

> " The riparian reserve for the river should be 20 meters based on guidelines provided for in the Water Resources Management Rules Part IX Section 116(3), (4) and (5).
>
> Greenpark estate has seriously encroached on the riparian and all structures within 20 meters riparian reserve should be demolished and the riparian restored to its original state."

65. In this response, which ultimately formed the basis of the enforcement order, the 1st respondent was telling the appellant something else totally different from what it had assured the appellant earlier. Upon issuance of the enforcement order, the appellant instructed a firm of surveyors, Messrs. J. R. R. R. Aganyo & Associates, whose terms of reference were to:

    i. Identify top edge of the Stoney Athi River banks at various intervals of the watercourse along its boundary with Greenpark Estate;

    ii. Measure the width of the Stoney Athi River watercourse along the boundary with Greenpark Estate in accordance with regulation 116(3) of the Water Resources Management Rules, 2007;

    iii. Determine the riparian land in accordance with rule 116 92) and (5) of the Water Resources Management Rules, 2017; and

    iv. Establish if the security wall and house numbers FB 23A, TB 24A, FB 25A, FB 26A, FB 27A, FB 28A and FB 30A or any there development undertaken by Superior Homes as part of Greenpark Estate are in riparian land as defined by regulation 116(2) and (5).

66. After conducting the survey, the surveyors concluded as follows:

    i. "The average width of the watercourse as measured from the top edge of the bank of Stoney Athi River is 36 meters. The average distance from the top edge of the bank of Stoney Athi watercourse on the eastern side to green park security wall is approximately 32.6 meters. Therefore, (the) distance between the top edge of the Stoney Athi bank on the eastern side is beyond the minimum of six (6) meters and maximum of thirty (30) meters as provided by section (sic) 116(2) of the Water Resources Management Rules 2007. From the measurements there is approximately 2.6 meters buffer between the riparian land as defined and the security wall.

    ii. The average distance from the top edge of the bank of the Stoney Athi watercourse on the eastern side to Greenpark houses numbers FB 23A, TB 24A, FB 25A, FB 26A, FB 27A, FB 28A and FB 30A is approximately 75.7 meters. Therefore, (the) distance between the top edge bank of the Stoney Athi watercourse on the eastern side is beyond the maximum of 30 meters provided in section (sic) 116(2) of (the) Water Resources management Rules, 2007. From measurements there an average of 45.7 meters buffer between the riparian reserve as defined and house numbers FB 23A, TB 24A, FB 25A, FB 26A, FB 27A, FB 28A and FB 30A."

67. As a result of those findings, the surveyors concluded that the units and the security wall were not on riparian land as defined by rules 116 (2) and (5) of the Water Resources Management Rules, 2007. This report was adduced in evidence by Noel Mghenyi (PW3). The other witness on behalf of the appellant was Dr. Samuel Mureithi Kioni (PW1), an hydrologist, who testified that the flooding experienced at the Estate was attributable to unusually high rains and the then on-going construction and blockage on Mombasa Road.

68. The 1st respondent called one witness, John Ng'ang'a Kinyanjui (DW1) its Regional Manager, Athi Basin. He prepared a report dated 20th August 2018, after the appellant had filed its petition. He concluded that the units were in a flood plain, which he told the court was not different from riparian land. However, the witness never explained why the 1st respondent's position had markedly shifted from what it had stated in its letter of 3rd September 2013.

69. After considering the evidence on record, as we have earlier stated, the learned judge was not satisfied that the units were on riparian land. On our part, and taking into account the fact that the learned judge had the advantage of seeing and hearing the witnesses as they testified and assessing their credibility, we are not persuaded that the ELC came to the wrong conclusion. In Muiruri v. Kimemia [2002] 2 KLR 677, this Court stated:

> " In this appeal we are being asked to interfere with the learned judge's findings of facts. This Court would rarely interfere with findings of fact made by a trial judge who had the advantage of seeing and hearing the witnesses, unless it is satisfied that there was a misapprehension of the facts on the part of the trial judge or that he/she overlooked some evidence having a bearing upon the case. It does not appear to us that this is a case in which this court would be justified in reversing the decision of the trial judge founded on the judge's opinion of the credibility of witnesses formed after seeing and hearing their evidence."

70. The 1st respondent's letter of 3rd September 2013 read with the appellant's surveyor report persuades us, as found by the ELC, that the units are not on riparian land as defined by rule 116 of the Water Resources Management Rules, 2007. Accordingly, we are satisfied that the ELC did not err in finding that the units were not on riparian land, and that the enforcement order was unlawful, null and void.

71. The last issue is whether the trial court erred in declining to award the appellant special damages of Kshs. 466,955,673.00. It is patently clear from the record that the appellant did not particularise in the petition the special damages it allegedly suffered as a result of the issuance of the enforcement order. Prayer No. 6 in the petition merely stated:

> " 6. Special damages (to be particularised and quantified).

72. As a matter of fact, the appellant never applied to amend the petition to introduce the particulars of special damages. Instead, on 15th February 2019 before the hearing, one of its witnesses, Judith Maroko (PW2), swore an affidavit purporting to particularise the special damages suffered by the appellant as a result of the enforcement order.

73. It is a basic principle that, before a court can award special damages, those damages must be specially pleaded and strictly proved. In Ouma v. Nairobi City Council [1976] KLR 207, Chesoni, J. (As he then was) held as follows:

> " Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence."

The authors of McGregor on Damages (10th Edition), Para. 1498 explain why special damages must be specially pleaded, as follows:

> " Where the precise amount of particular item of damages has become clear before the trial, either because it has already occurred and so become crystallised, or because it can be measured with complete accuracy, the exact loss must be pleaded as special damages".
>
> Similarly, in Banque Indosuez v. D J. Lowe & Co. Ltd. [2006] 2 KLR 208, this Court held as follows:
>
> "It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the court and expect them to be awarded. It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct and natural or probable consequences of the act complained of and may not be inferred from the act."

74. When the law requires special damages to be specially pleaded, it means that those damages must be stated with certainty and particularity in the plaint or petition. If the damages are not tabulated in the plaint or petition, the party claiming them must apply to amend the plaint or petition to include them. Such party cannot purport to specially plead special damages in a subsequent affidavit. The reason for this is plain to see. In Esso Petroleum Co. Ltd v. Southport Corporation [1956] AC 218, Lord Normand explained that:

> " The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his evidence to the issue disclosed by them."
>
> And, in Gandy v. Caspar Air Charters Ltd [1956] 23 EACA, 139, the predecessor of this Court held that:
>
> " the object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given."

75. By dint of Order 2 rule 2 of the Civil Procedure Rules, pleadings are confined to facts, not evidence. On the other hand, under Order 19 of the Civil Procedure Rules an affidavit is concerned with matters of evidence. A party who has not pleaded special damages in the plaint or petition cannot purport to prove those damages in an affidavit. The evidence in the affidavit must be founded on pleading in the plaint or petition. It is for this reason that in in Coast Bus Services Ltd v. Murunga Danyi & 2 Others, CA No. 192 of 1992, this Court held:

> " We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filling suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars.

76. Section 2 of the *Civil Procedure Act* defines "pleading" as follows:

> " pleading" includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant."
>
> From the above, an affidavit is not a pleading, and alleged special damages set out in an affidavit cannot be considered as pleaded special damages. Indeed, in Stephen Boro Githua v. Family Finance Building Society & 3 Others [2015] eKLR this Court held that:

> " As is trite law the contents of an affidavit constitute evidence on oath. An affidavit does not constitute a pleading. A pleading includes a summons, petition, a statement of claim or demand or a defence, a reply to a defence or counterclaim, all of which are subject to amendment, unlike an affidavit, which is evidence."

77. The 1st respondent had specifically contended that the appellant was not entitled to special damages because those damages were not pleaded in the petition. Unfortunately, the ELC did not address this fundamental issues and we agree with the 1st respondent that, in the absence of pleaded special damages in the petition, the appellant was not entitled to award of special damages. We would accordingly affirm the decision of the ELC on this further ground.

78. There is a further reason why we agree with the 1st respondent that the appellant was not entitled to an award of special damages. As we have stated earlier, such damages must be strictly proved. The party seeking the damages must adduce cogent evidence that the damages were suffered as a result of the defendant's unlawful conduct, and the quantum of those damages. We are in agreement with the 1st respondent that the appellant did not demonstrate cogently that it suffered the alleged losses as a result of the enforcement order. On the contrary, the appellant's own evidence suggests that the losses were suffered, not as a result of the enforcement order, but because of the flooding of its Estate, which put off or discouraged potential buyers. Mr. Peter Kahi (PW4), a certified public accountant from Messrs. PKF Consulting Ltd., who testified on behalf of the appellant, swore an affidavit on 14th June 2019 to which was annexed, among others, the appellant's Annual Report and Financial Statement for the Year Ended 31st December 2018. As regards "Business Review" the accountants stated as follows:

> " During the year 2018 (the year of the enforcement order) the total turnover of the company decreased from Shs. 787 million to 499 million. This was mainly attributed to fewer house sales occasioned by the floods experienced in the beginning of the year thus making the property less attractive."

79. In light of the appellant's own evidence, we would still not have faulted the ELC for declining to award the appellant special damages. There was no cogent evidence to justify such an award. As regards issue number three, we conclude that the ELC did not err in declining to award the appellant special damages of Kshs. 466,955,673.00.

80. For all the foregoing reasons, we do not find any merit in either the appeal or the cross-appeal and hereby dismiss both. Accordingly, our final orders are as follows:

i. The appellant's appeal is hereby dismissed.

ii. The 1st respondent's Notice of Grounds for Affirming Judgment is hereby allowed to the extent that the appellant was not entitled to an award of special damages of Kshs.466,955,673.00.

iii. The 1st respondent's cross-appeal is hereby dismissed.

iv. Each party shall bear their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2024.

K. M'INOTI

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA, C.Arb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.