IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, ASIKE-MAKHANDIA & SICHALE, JJ.A)

CIVIL APPEAL NO. 445 OF 2018

BETWEEN

ORBIT CHEMICALS INDUSTRIES.....APPELLANT

AND

PROFESSOR DAVID M. NDETEI.....RESPONDENT

(Being an Appeal against the judgment and decree of the High Court of Kenya

at Meru by (Emukule, J.) Dated 13th June, 2014 **in Meru H.C.C.C. No 147 of 2014)**

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JUDGMENT OF THE COURT

[1] This is a first appeal from the Judgment and decree of the High Court of Kenya at Meru by **Emukule, J.** dated 13th June 2014 arising from **Meru High Court Civil Case No 147 of 2014**. This was a highly protracted matter that was initially filed in the High court at Nairobi and was handled by more than a half a dozen Judges in the eighteen (18) years that it stayed in the courts. The suit finally landed in the docket of **Emukule, J.,** who moved with it to the High court in Meru where he concluded it after hearing very lengthy and mostly technical evidence from almost a dozen witnesses most of them experts in Chemistry and Environment.

[2] After considering the evidence, submissions and the law, the learned Judge ruled in favour of the respondent; restraining the appellant, its agents or servants from re-directing the storm water that originates from their premises away from the respondent's property using drainages with impervious liming. The Judge also awarded the respondent a total sum of Kshs.269,439,464.15 being costs of restoration of soil, general damages for loss of use of land and general damages for nuisance. The appellant's counter-claim was dismissed and the respondent was awarded costs and interests.

[3] Aggrieved by the said judgement, the appellant filed the instant appeal and being a first appeal, ***Rule 29*** gives this Court power to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **Peters Vs Sunday Post Limited [1985] EA 424** where in the latter case, the court rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

[4] That said, a brief overview of the pleadings and evidence that was before the trial court will contextualize this judgment. ***Prof. David Ndetei*** (the respondent) filed suit before the High court claiming damages as a result of alleged negligence on the part of ***Orbit Chemicals Industries*** (the appellant). The respondent is the registered proprietor of all that agricultural /residential land known as **LR No 1504/13** (the suit premises). In or about 1988 the appellant acquired **LR No 1504/12** (factory premises) which is adjoining the suit premises. The appellant applied to the relevant government authorities and obtained a change of user of the factory premises from agricultural use to an industrial use whereupon it became **LR 14817 Athi River**. The appellant built a manufacturing plant for Industrial Chemical (plant) on its parcel of land.

[5] It was alleged by the respondent that the appellant failed to take any or sufficient precaution, measures against causing or preventing nuisance such that from 1992, offensive noxious and unwholesome odours, smoke, industrial dust, vapours, gases, noise, dirty and filthy effluents, sewage and contaminated storm water spread, seeped, percolated diffusing themselves into and upon the respondent's suit

premises. As a result, the respondent claimed that his suit premises were defiled and rendered unhealthy, unfit for habitation as a residential or for agricultural activities there by interfering with his quiet enjoyment of the title.

[6] As a result of the alleged pollution and damage caused, the respondent sought several reliefs against the appellant as follows:-

> **"a) An injunction to restrain the defendant by itself, its servants or agents or otherwise from:**
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> > **i. Causing or continuing to cause nuisance by odours, noise, dirt, industrial dust, sewage or percolation of effluents or untreated contaminated storm water coming into or about the Plaintiff's L.R No. 1504/13;**
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> > **ii. Disposing contaminated or untreated sewage water through unlined and open drainage soak pit; and**
> >
> > **iii. Emptying untreated septic tank contents or dumping untreated sewage water on the open ground.**
>
> **b) A permanent mandatory injunction directing the defendant by itself, its servants or agents to:**
>
> > **i. Re-direct all storm water that originates from the defendant's premises away from the respondent's property using drainages with impervious lining;**
> >
> > **ii. To stop or discontinue any act or omission deleterious to the plaintiff's premises.**
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> **c) Damages for nuisance or in the alternative damages under the rule in RYLANDS VS. FLETCHER.**
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> **d) Damages for negligence.**
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> **e) Special damages as particularized in paragraph 9 in the total sum of Kshs. 946,467,513.95.**
>
> **f) Exemplary damages.**
>
> **g) Costs.**
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> **h) Interest."**

[7] In response to the suit, the appellant filed a defence and counter-claim denying all the allegations of negligence; it stated that even prior to its acquisition of the factory premises the previous owner had successfully obtained the change of user of the land from agricultural to industrial use. In answer to the particulars of negligence, the appellant contended that it observed the highest standard of care; that it gave the Director of Medical Services an undertaking vide a letter dated 17th February, 1989 confirming that it does not produce any solid or liquid effluents; that all solid or liquid waste from the chemical processing plant is collected and either recycled for use in the plant or sold and that the sanitary waste from the factory is disposed of in a septic tank in conformity with the local authorities standards.

[8] The appellant thus prayed that the respondent's suit be dismissed and its counter claim for damages be allowed for reasons that the respondent made false and malicious allegations against the appellant thereby subjecting it to economic loss in that their operations licence was delayed. The appellant prayed in the counter-claim for: -

> ***"a) Specific performance be granted to the defendant to investigate a portion of specific area of 250 square metres or 25,000 square feet within the plaintiff's property that is already wasted by the plaintiff to examine, irrigate, input and grow seedlings within a specific time frame of six calendar months;***
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> ***b) An injunction restraining the plaintiff, his servants or agents from entering in the defendant's premises;***
>
> ***c) Special damages of Kshs. 258,426/=.***
>
> ***d) General damages;***
>
> ***e) Costs of the counter-claim.***
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> ***f) Interest on the special damages from the date of filing the counter-claim at court rates and interest on general and exemplary damages from the date of the judgment."***

[9] A total of six (6) witnesses testified on behalf of the respondent, beginning with his own evidence of how he purchased the suit premises measuring about 6 hectares in 1987/1988 at a price of Kshs 1.2 million with a loan from the Agriculture Finance Corporation. Upon purchase, the respondent took possession and built a modern residential house, sank a bore hole, built a poultry house where at one time he said he was keeping 70,000 chickens as a contracted farmer by Kenchic. He also kept dairy cows, built servants quarters

and was carrying out other farming activities. However, all this was frustrated when the appellant purchased the factory premises and put up the industrial plant that emitted effluent to the respondent's suit premises thereby polluting the water from the bore hole and other industrial waste seeping therein and affected the soils thereby rendering them unsuitable for agricultural use. There was also a foul smell that made the suit premises unpalatable for occupation and farming. The respondent filed complaints with the Local authorities, the police and the government ministries but he contended that the appellant did not stop therefore he filed the suit.

[10] ***Lucy Wanja Kinuthia*** who at the time worked with the **Public Complaints Committee** and of the **National Environment** Management Authority (NEMA) testified as **PW2**. She stated that in the month of February, 2002 the respondent complained of pollution of the suit premises which pollution was attributed to the activities undertaken by the appellant at the factory premises. This witness produced a report that was prepared by NEMA following the complaint by the respondent. ***Mr. Maurice Migera*** **(PW3)** also testified on behalf of NEMA that upon receiving the complaint, they dispatched a team to investigate the complaint and to prepare a report. After the visit, NEMA team tried to mediate the issue by bringing the parties to an agreement that the appellant should rectify its septic tank that was contaminating the ground water. However, the issues of chemical and water pollution were not addressed by the parties.

[11] The respondent also relied on expert evidence given by a Professor of Environmental science ***Prof. Willington Nganga*** who testified as **PW4**. According to him, in 2000, he was approached by the respondent who was also his friend to study the soil in the suit premises and give a report in line with the complaints made by the respondent and also the civil suit that was filed. PW4 gave a detailed account of how he studied the reports submitted by the appellant regarding the complaint of soil pollution. He produced a report that in summary indicated that in his analysis of the soil samples he detected the presence of detergent benzene which was indicative of contamination.

[12] PW4 went on to state that upon his analysis of the bore-hole water, there was presence of alkaline materials which made it not good for human consumption. During cross- examination, PW4 stated that the soils would require a chemical called gyposium- calcium to replace the sodium and sulphate. He also confirmed that ingredients that make detergents such as carbon, Sulphur, sodium, oxygen and hydrogen which materials exist independently are not harmful on their own apart from sodium which is corrosive as an element on its own. Another Chemical and Environmental scientist who testified on behalf of the respondent was **Dr. Wambua Kalili (PW6)** who also gave an opinion of the amount of damages that would compensate the respondent in restoring the soils. We will revisit that evidence later in this judgement.

[13] ***Daniel Mukuku Saiva*** (**PW5**) gave evidence on the noise pollution on behalf of the respondent who had instructed him to carry out noise emission levels from the appellant's factory in relation to the respondent's suit premises. He visited the suit premises twice and took measurements along the boundary wall of the factory premises using a microphone and data recording devise to determine the noise levels. He produced his report and testified that there was noise emanating from the factory premises which could be mitigated by using silencers to dilute the level of noise. Also, he noted the respondent had planted trees to mitigate the noise levels, the appellant should also have done likewise to reduce the amount of noise reaching the suit premises for environmental protection. During cross-examination, this witness was taken through the various approvals that the appellant had obtained before establishing the factory and the fact that there were unmitigated noises from the busy Mombasa road which was more prominent while at the suit premises.

[14] Several witnesses also testified for the appellant led by ***Walter Mochoge*** **(DW1)** who worked as the administrator and export manager for the appellant for a period of twenty (20) years. He testified that the appellant carries out chemical trading, import and sale of bulk chemicals in the factory premises as well as manufacture of detergents and packaging of milk. The factory premises has many divisions which mainly deal with manufacturing of soap, detergent and items of personal hygiene as well as other activities such as packaging. That the appellant acquired the factory premises in March 1991 according to the transfer of title that was adduced in evidence. That the construction of the factory started in 1988 which was done after obtaining all the approvals from the local authorities and the factory inspectorate unit and all the approvals and licences for manufacturing were obtained including a certificate from NEMA.

[15] ***Elizabeth Njoki Karanjahi*** the quality assurance manager and Head of Production testified as **(DW2).** She told the court that she had worked with the appellant for twenty six (26) years. That there were seven (7) production divisions and the 8th division deals with chemical trading of sodium sulphate, sodium chloride, and sodium illiterate which are sourced from various manufacturers outside Kenya. These chemicals are warehoused in separate designated areas separate from dairy goods and food materials. According to DW2, the appellant does not boil any caustic to produce soaps and no waste is generated and in cleaning of the various machines the waste is transferred to the detergent division for further regeneration and re-use. As far as emission of waste in the atmosphere was concerned, she stated that the appellant uses special filter gas to capture and clean the air to prevent any air pollution. This witness explained how production is carried out in each of the divisions thereby discounting the evidence of the respondent of any kind of emission or escape of dangerous materials, chemicals or water that may have caused any harm on the suit premises.

[16] ***Albert Wachira Muriuki*** **(DW3)** described himself as an Environmental expert who was involved in carrying out the noise assessment of the factory premises. He testified that the factory is located along a busy Mombasa Highway near Mlolongo. He carried out measurements to help him carry out his analysis of the noise pollution being informed by the reports that were tabled by the respondent's experts and the allegations contained in the suit. He produced a report that concluded that the noise did not offend the occupational exposure level that are set by the World Health Organization especially at night.

[16] ***Joseph Kuria Mwangi*** (DW4) a Civil Engineer was also instructed by the appellant to carry out an assessment of water pollution in regard to their factory premises and the suit premises while responding to the allegations made by the respondent. He carried out the

assessment and, in his report, which was produced in evidence, he stated that the factory premises did not discharge any industrial water waste. As regards waste water generated from washing and sanitation he claimed that it was discharged into a sewer owned by the Mavoko water and sewerage company. In terms of surface run-off from the rain water and from the washings, this water is collected into a container tunnel within the appellant's premises and when the tunnel is filled, overflow is discharged into an open surface for it to drain towards Nairobi National Park.

[17] DW4 went on to describe the bore hole on the suit premises that the respondent contended was ruined by foul water from the appellant's factory and stated that it was constructed below the Kenya Railways line way leave and due to the layout of the land, in the event of heavy rains, it would flood and contaminate the water due to the gentle slope. As regards the evidence by ***Dr. Wambua*** that there was presence of chemical waste in the soil, this witness stated that if any detergent was noted in the soil, the same would cause no damage as it was highly biodegradable. This witness also poked holes on the evidence of ***Dr. Wambua*** for not pointing out where the waste was discharging from the appellant's perimeter walls.

[18] ***Paul Nyambura Ombui***, **(DW5)** described himself as a soil scientist and used to teach at the Egerton University. He was instructed by the appellant to carry out soil analysis from fifteen (15) designated units to test PH, Nitrogen, Prosperous, Potassium, Organic Carbon among other chemicals. He carried out the tests and prepared a report which he produced in evidence, he found nothing different in these soils as compared with the soils in the area which had similar contents of phosphorus that was found in the general area.

[19] ***Prof. Charles Mweru Ngutu*** **(DW6)** described himself as a Professor in analytical chemistry and also gave evidence on how he carried out laboratory analysis of the soil samples. He reviewed all the reports that were presented by the respondent on the general effects caused to the environment by the operations of the appellant. This was in regard to pollution by gaseous works, pollution by particular water or generally and noise pollution. In his view there were no hazardous gaseous chemicals that were being emitted from the boiler operations of the factory. This was demonstrated by the presence of vegetation, wild life and birds with nests. If there was environmental pollution as alleged by the respondent, according to this witness, the flora and fauna that he found in the vicinity would have been disturbed. On water pollution, he discredited the report by ***Dr. Wambua and Prof. Willington*** as there was no channeling of water from the appellant's factory premises to the respondent and in the event of heavy rain there was a perimeter wall to prevent any water from escaping.

[20] Upon weighing the evidence, for and against the respondent's claim and the appellant's counter-claim, the learned Judge dismissed the counter-claim and entered judgement for the respondent. This is what the Judge posited in a pertinent portion of the said judgment:-

> ***"The Plaintiff has proved on a balance of probability that there was effluent which escaped from the factory into his land and caused substantial damage to the soil and water which in turn led to loss of plants. The court was shown an abandoned poultry house and zero grazing project. It was shown where the Plaintiff had planted crops which had all died except for the cactus. 69. As to the claim for special damages, I agree with the Defendant 's submissions that the same has to be specifically pleaded and proved. Having failed to provide proof for the professional consultancy charges, the costs of transport and miscellaneous expenses, that leg of claim fails and will not be awarded. THE DEFENDANT'S COUNTER-CLAIM 72. I find the allegations by the Defendant to be without merit. The Plaintiff cannot be faulted for raising concerns and complaints over the activities of the Defendant or on the fact that these complaints were acted upon. The Plaintiff did not err for trying to ensure that his property is not polluted. I therefore dismiss the counterclaim in its entirety with costs to the Plaintiff.***
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> ***(a) an injunction to restrain the Defendant by itself, its servants or agents or otherwise from:***
>
> ***(ii) disposing contaminated or untreated sewage water through unlined and open drainage soak pit; and***
>
> ***(b) a mandatory injunction directing the defendant by itself, its servants or agents to re-direct all storm water that originates from the Defendant's premises away from the Plaintiff's property using drainages with impervious lining,***
>
> ***(i) Costs of restoration of soil.....Kshs. 267,439,464.15/=***
>
> ***(ii) Ggeneral damages for nuisance...Kshs. 1, 500,000.00/=***
>
> ***(iii) General damages for loss of use of land Kshs. 500,000/=***
>
> ***(d) Costs of the suit and the counter-claim.***
>
> ***(e) Interest."***

[21] The appellant has appealed against the entire judgment by raising some eighteen (18) grounds of appeal which are prolix and repetitive. They can be summarized as follows that the learned Judge erred in fact and law by; misinterpreting the golden rule in **Rylands vs Fletcher** by finding that there was escape of waste water; failing to take into account that the appellant had obtained all the relevant authorizations and licences to operate a legitimate business including the change of user; that both parties had lived harmoniously for five (5) years; that the respondent also used his land for industrial purposes namely water purification; failing to consider that if there was any escape of water from the appellant's factory the same was due to heavy rains which was an act of God and the respondent had dug out trenches and interfered with the appellant's manholes when the inspection was carried out.

[22] The Judge was also faulted for failing to take note of the perimeter wall; that the soak pits were properly constructed and did not allow

waste emission to the environment; that the nature of the soils from the general area did not allow seepage of water; that there were other manufacturing plants within the area; awarding a whooping sum of Kshs.267,439,464.15 as costs of restoration of soil as special damages without cogent evidence of proof; subjecting the appellant to double jeopardy by ordering it to restore the environment in addition to other awards of general damages which was an erroneous estimate and inordinately high. For this the appellant prayed that the appeal be allowed with costs.

[23] This appeal was heard virtually vide GOTO MEETING Platform pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID - 19 Pandemic. ***Mr. Etole***, learned counsel for the appellant, relied on the written submissions and made some oral highlights. Counsel for the appellant summarized the appeal in two broad categories, contending that the Judge misapplied the principles in **Rylands vs Fletcher** and therefore arrived at an erroneous finding as there was no proof that any hazardous chemicals had escaped from the appellant's factory. There was no proof that there was unnatural substances that escaped in form of dangerous water from the appellant's factory premises and caused damage to the respondent's suit premises.

[24] According to counsel for the appellant, the finding that the appellant was using hazardous chemicals was against the evidence as the evidence regarding how the appellant was producing detergents and chemicals clearly demonstrate the process did not emit any foul water or any other environmental pollutants based on the expert evidence that was adduced. That the Judge ignored the appellant's evidence by distinguished experts who confirmed that the appellant's factory had been designed in a manner that did not allow any emission of chemicals or waste to the environment. Apart from the claim of water pollution there was no proof of noise pollution, but the Judge disregarded evidence from DW6 who visited the premises and found there were birds and nests which was indicative of a conducive environment whereby the respondent could not have lost his poultry and daily cows

[25] Lastly, counsel submitted that the Judge awarded special damages to the respondent for the restoration of land without any proof and against the established principals that special damages must be pleaded and specifically proved; that the appellant obtained all required approvals and permits to produce the detergent and the use of the factory premises for industrial use was approved and that the Judge misapprehended the law by concluding that there were hazard emissions therefore the use of factory premises was unnatural. There was no conclusive evidence to show any harmful substance escaped from the appellant's factory premises. On the award of damages, the **Rylands - vs- Fletcher** case was not proved. The appellant was ordered to restore the land at the sum of Kshs. 267,439,464.15 in form of special damages which were not specifically proved as there was evidence that the respondent was seriously involved in manufacturing bottled water and, in any event was inordinately too high.

[26] Opposing the appeal, Mr. Kyengo, learned Counsel for the respondents, started by first revisiting the application to strike out the appeal on the grounds that the appellant's failed to comply with the provisions of ***Rule 87*** of the Court of Appeal Rules. Stating that the appellants omitted to include crucial documents namely sixteen (16) exhibits that were produced in evidence and that in the absence of those key documents of evidence the appeal cannot pass the competency test.

[27] On the merit of the appeal counsel submitted that that there was ample evidence to show that the Judge properly adopted the four elements of **Rylands - vs- Fletcher**; that is the collection of hazardous elements that escaped; the use of land was unnatural; there was escape of hazardous elements and there was damage proved by the respondent at the trial. That the use of the factory premises by the appellant was unnatural, as the land was meant for agriculture which the appellant converted to industrial with the result that the factories emitted dangerous chemicals to the suit premises. It was the artificial or unnatural use of the factory premises that produced ultra-hazardous material and waste that caused damage to the suit premises.

[28] As far as the assessment of damages were concerned, counsel for the respondent defended the discretion of the trial Judge in awarding the sums, as he did, arguing that there was cogent evidence by the witnesses on the effects and extent of damages caused to the suit premises. The court also visited the suit premises in July 2000 and saw the damage caused, therefore all heads of damages were proved as the respondent produced the receipts for the restoration of the soil. Moreover, the special damages fell under the **Environmental Management and Coordination Act** which requires the polluter of the environment to pay the damage caused. Counsel urged us to dismiss the appeal as lacking in merit.

[29] By way of a brief rejoinder, ***Mr. Etole*** stated that failure to include some documents is not a fatal mistake that warrants the striking out of an appeal. That they endeavored to include all the documents but, in the event, that the respondent was aware of any document that was omitted it was at liberty or had the option to file them by way of a supplementary record.

[30] On the outset, we appreciate that, this appeal lies on two limbs, the assessment of evidence and award of damages. We will also dispose of the issue raised by counsel for the respondent challenging the validity of this appeal. Counsel for the respondent urged us to strike the appeal on the grounds that the appellant failed to include some documents. We are not at all persuaded there is merit in this submission, because counsel did not point out which primary documents were missing from the record of appeal, and how his client was prejudiced. Moreover, Rule 84 of the Court of Appeal provides that an application to strike out an appeal be made within thirty (30) days from the date when the record of appeal was served. Lastly, counsel for the respondent was at liberty to file any document that was left out if it was considered necessary.

[31] This now takes as to the merit of the appeal. The first question is whether the respondent proved his case to the required standard that hazardous elements escaped from the factory premises to the suit premises? If so what was the extent of the damage caused? We say this while recognizing that an award of damages is an exercise of discretion by the trial court, and our duty as an appellate court is to exercise restraint in seeking to impose our own assessment of damages over the trial court's, unless it was excessively high or oppressively low. In **Kenya Bus Services& Another vs. Frederick Mayende [1991] 2 KAR 232** this Court held that:-

"The principles on which an appellate court will interfere with the trial judge's assessment of damages are well settled in the Court of Appeal.

The Court will only interfere where an error of principle by the trial judge is shown, or where the damages awarded are so high or so low that they must be wholly erroneous estimate and an error of principle must be inferred."

[32] We have considered the grounds of appeal, the parties' respective written submissions, and bearing the aforesaid principles in our minds, the question that lends itself for determination first is whether the respondent proved his case according to the rule in **Rylands v. Fletcher, (1868) UKHL 1**, where it was held that:-

"We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the Plaintiff's own default, or, perhaps that the escape was a consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaped cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others as long as it is confined to his property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief would have accrued, and it seems just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences."

"If it does escape and cause damage, he is responsible, however careful he may have taken to prevent the damage. In considering whether a defendant is liable to a Plaintiff for the damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage."

[33] Did the appellant cause nuisance by emitting odours, noise, dirt, industrial dust, sewage, percolation of effluents and / or untreated contaminated storm water coming to the suit premises by:-

(i) ***emptying untreated septic tank contents or dumping untreated sewage water on the open ground and***

(ii) ***directing storm water that originates from its premises away from the respondent's property using drainages with impervious lining?***

First of all, it is not disputed that both the appellant and respondent are neighbours and their respective parcels of land were originally agricultural land. That the appellant applied and obtained change of user of its factory premises from agricultural to industrial and set up a factory. That the factory carries out many activities that include manufacturing of detergents and chemical trading, it also imports chemicals for sale. Manufacturing detergents involve the use of chemicals which included bromine, sodium, zinc, lead, iron among others.

[34] The appellants Manager in charge of administration and import denied vehemently that there was any discharge of waste water or chemicals stating that the systems used for manufacture of detergents was incompliance with all the safety regulations. The appellant's counsel also submitted that the appellant had acquired all the licenses and the construction of the septic tank did not amount to un-natural use of the land. And to bolster this argument counsel cited the case of **Kenya Ports Authority v East African Power & Lighting Co Ltd [1982] eKLR** where this Court held that: -

"the storage of oil on land by a person licensed to generate electricity there, the oil being essential for the production of electricity, did not amount to unnatural user of the land."

[35] We have considered all this evidence against the backdrop that apart from the evidence from the two opposing sides, the learned trial Judge saw and heard the witnesses testify and also did visit both the suit premises and the factory premises. He had the advantage of assessing the demeanour of the witnesses and the extent of the pollution and apart from hearing, he saw. From what the court observed from the ground, the Judge was satisfied that there was cogent evidence that hazardous waste comprising of waste water laced with dangerous chemicals escaped from the appellant's factory premises to the suit premises. The Judge was persuaded that the effluent, from the appellant's septic tank and the embankments

constructed along the perimeter wall interfered with the natural flow of storm water and he was therefore satisfied that the pollution was from the non-natural use of the land which was meant for agriculture but the appellant had changed it to industrial use. This conclusion was supported by evidence of the respondent's witnesses who testified and produced reports of how foul water seeped from the appellant's factory premises and found its way to the respondent's suit premises.

[36] We recognize that this evidence was strenuously contested by the appellant's witnesses who discounted it blow by blow, however, upon weighing each account, and on a balance of probability, we are satisfied that the respondent proved his case and the Judge's finding on liability cannot be faulted. This is because in addition to respondent's own evidence where he recounted the efforts he made trying to seek intervention from NEMA, the local government to prevail upon and stop the pollution from the appellant's factory premises, all his efforts were in vain. The respondent was also charged with a criminal offence of creating nuisance and although it was dismissed, it further demonstrates that the respondent's complaints were live matters and that he seriously engaged the relevant agencies and a team from NEMA

also visited the scene. That notwithstanding the appellant went on to obtain its licenses and to establish a manufacturing plant.

[37] It is not lost to us, how, over the years the respondent made concerted efforts which he documented with numerous letters of complaints which he kept writing after the appellant moved in the neighbourhood and started the manufacturing plant. The respondent unsuccessfully protested when the appellant applied for change of user of its factory premises from agricultural use to industrial use and eventually filed suit. We have already stated that the expert evidence by the respondent's witnesses was countered by the experts who testified on behalf of the appellants, nonetheless, respondent's case was supported by the report made by NEMA. This report indicated that there was effluent from the factory, a malfunctioning sewer and contamination of ground water. NEMA tried to resolve the issues by mediation by requiring the appellant to rectify the defective sewer.

This evidence coupled with the visit by the Judge where the court made its own observation regarding the claim of pollution, the respondent's case on the question of liability passed the test. We are content that the Judge was well guided by the Principal under ***Section 2*** of the Environment Management and Coordination Act and other International Conventions that he cited such as the Rio Declaration on Environment and Development that emphasize 'the polluter pays the cost of cleaning up any element that they cause to the environment.'

[38] This being our view, on the question of liability, the next issue is on the assessment of damages In **Kemfro Africa Limited t/a Meru Express Services (1976) & another vs. Lubia& Anor. (No. 2) [1985] eKLR**, this Court settled the guiding principles for setting aside or interfering with the award of damages as thus; -

> **"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."**

[39] Did the Judge exercise his discretion judiciously in the award of damages? General damages are meant to compensate a claimant for the non-monetary aspects of the specific harm suffered; whereas special damages compensate the claimant for quantifiable monetary losses suffered as a result of the defendant's act or omission. The respondent was awarded a total of Kshs. 269,439,464.15 made up of the following: -

> **(i) Special damages-costs of restoration of soil Kshs. 267,439,464.15**
>
> **(ii) General damages for loss of use of land Kshs. 1,500,000.00**
>
> **(iii) General damage for nuisance Kshs. 500,000.00**

The evidence in regard to the cost of restoration of the soil was awarded as special damages and we think it bears repeating that the respondent had the burden of not only specifically pleading but proving this item.

[40] In the case of **Stroms Bruks Aktie Bolag vs Hutchison[1905] AC 515**, **Lord MacNaughten** sought to distinguish between the nature of special and general damages and explained that:-

> **"General damages'… are such as the law will presume to be the direct natural and probable consequence of the action complained of. 'Special damages' on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and, therefore must be claimed specifically and proved strictly."**

Counsel for the appellant pointed out that the respondent did not produce receipts to support the claim for special damages which is borne out of his own evidence and also his counsel at one time when he attempted to amend the claim but abandoned it because he did not have the receipts. Granted that the soil had not been restored, the Judge relied on the evidence adduced by PW4, ***Prof. Wellington Nganga Wachira*** who testified that the restoration of the soil would take ten (10) years and the costs for each hectare of land was going to be Kshs. 1,852,000/= for eight (8) hectares he proposed a sum of – Kshs. 14,816,000/=. He also added the cost of inflation for ten (10) years from 2002 that brought the total costs to Kshs. 267,439,464.15. We are persuaded that the Judge erred for not considering the evidence and a report that was prepared by ***Dr. Wambua*** that showed the budget estimate for soil de-contamination of the suit premises was a grand total of Ksh 21,981,536.

[41] It is self-evident that these two expert witnesses who apparently testified on behalf of the respondent gave very varied figures for soil restoration. The margin of difference was so huge which gives credence to the appellant's submission that the Judge fell in error. We agree the Judge erred by failing to evaluate this evidence and give reasons why he accepted the evidence of ***Prof. Willington Wachira*** and not that of ***Dr. Wambua***. We have revisited the reports, it is apparent that the cost of restoration according to ***Dr. Wambua*** was placed at Ksh 18,949,600 plus VAT while the assessment of ***Prof. Wachira*** was about 14 million but it was inflated by factoring in the cost of inflation.

[42] We are persuaded the Judge fell in error by including this huge item of inflation wholesomely without evaluating certain elements. These elements include mitigation factors and we find there was unchallenged evidence that the respondent was manufacturing bottled water in the suit premises. Further, that there were birds and vegetation in the vicinity which on a balance of probability suggested that the respondent could have continued with his poultry and daily farming and therefore the Judge needed to interrogate those mitigating factors. Had he done so, and further evaluated the evidence of soil restoration by all the witnesses, including even the evidence by the respondent

himself who said that he purchased the land for Ksh 1.2 million in or about 1986, we are of the view that the Judge would not have made that award. We are conscious that land prices have since sky rocketed but if all factors were considered, including mitigation and the actual acreage where the soil was being restored, we are of the view that the cost awarded for soil restoration was way too high and represents an error on the part of the Judge.

[43] In the circumstances we have re-evaluated the evidence and taking the two reports of Prof Willington Wachira and Dr Wambua along the evidence that was adduced. We have also taken note of what the Judge stated under paragraph 69 which shows the respondent was awarded other damages. This is what the Judge posited in his own words: -

> ***"As to the claim for special damages, I agree with the defendant's submissions that the same has to be specifically pleaded and proved. Having failed to provide proof for the professional consultancy charges, the costs of transport and miscellaneous expenses, that leg of claim fails and will not be awarded***
>
> ***I am of the view that the claim for loss of the poultry project, crop horticultural production and dairy cattle would properly be awarded under the head of general damages for loss of use of the suit land."***

[44] Having taken the entire evidence and all the factors into consideration, our view is that interest or inflationary costs of restoration of the soil did not factor in a key element of mitigation evidence that was adduced. There is no justification of the actual acreage that needed restoration because some of the suit premises were built up and the award of special damages looked so much futuristic and cannot be ascertained as an actual expenditure. One thing that was clear is the respondent's soil was damaged and he incurred or will incur some expenses in restoring it. In our view, the average cost for restoration of soil per acre going by the two reports is about Kshs.1,500,000 giving a total of Kshs.12,000,000.

[45] This is how we have arrived at it. According to ***Dr Wambua*** the actual cost was about 1.2 million per Hectare while ***Prof. Willington Wachira*** proposed Ksh 1.8 million as the costs of soil restoration. We have already explained not all the suit premises required soil restoration as some areas were built up and the fact that the respondent himself had started manufacturing bottled water was a significant mitigating factor not considered by the Judge.

[46] Having so determined, the appeal by the appellant partially succeeds as we interfere with the award of Kshs.267,439,464.15 and substitute thereto with Kshs.12,000,000. The Judgment of this Court is therefore as follows;

> **(a) an injunction to restrain the Appellant by itself, its servants or agents or otherwise from:**
>
> **(ii) disposing contaminated or untreated sewage water through unlined and open drainage soak pit; and**
>
> **(b) a mandatory injunction directing the defendant by itself, its servants or agents to re-direct all storm water that originates from the appellant's premises away from the suit premises using drainages with impervious lining,**
>
> **(i) costs of restoration of soil.....Kshs. 12,000,000.00**
>
> **(ii)General damages for loss of use of land…Kshs...1,500,000.00**
>
> **(iii) General damage for nuisance …….....…**Kshs. 500,000.00
>
> **Total…… Kshs, 17,000,000.00**

Interest on the said sum to accrue from the date of the Judgement of the High court.

Since the appellant has partially succeeded in this appeal we make no order as to costs but the respondent will have the costs in the High court limited to the aforesaid sum.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

M. K. KOOME

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR