IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E.M. GITHINJI, H. OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 82 OF 2017

BETWEEN

AGRICULTURAL DEVELOPMENT CORPORATION.....APPELLANT

AND

HARJIT PANDHAL SINGH.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(An appeal from the Judgment and Decree of the Environment and Land Court

of Kenya at Eldoret (A. Ombwayo, J.) dated 20th day of May, 2016

in

ELC Cause No. 20 of 2013)

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JUDGMENT OF THE COURT

[**1**] This is an appeal by **Agricultural Development Corporation** (**ADC**) against the judgment of the Environment and Land Court (**Obwayo, J**) whereby the 1st respondent was awarded a total of Kshs. 100,000,000 with costs and interest against the appellant for breach of a covenant in a lease of land jointly with the 2nd respondent. The 2nd respondent in the appeal has also filed a notice of cross-appeal against the judgment for a total of Shs. 150,000,000 for breach of statutory duty and an additional sum of Shs. 100,000,000 totaling to Shs. 250,000,000 entered against him.

[**2**] On 14th September, 2009, ***Harjit Pandhal Singh*** the 1st respondent herein, filed a suit against ADC claiming Kshs. 145,000,000 being the total value of sugarcane crop and assets destroyed by squatters during the 2007/2008 post-election violence, which losses he attributed to breach of a contract of a lease by ADC. The appellant (ADC) filed a defence denying the claim. Following an application dated 12th June, 2015 for leave to amend the plaint, an amended plaint was filed. The amended plaint introduced the additional claim of Kshs. 387,000,000 being the loss of profit and income as a result of the breach of the contract.

[**3**] The hearing of the suit started on 19th June, 2014 and the 1st respondent gave evidence and was fully cross-examined. Thereafter, 1st respondent's counsel applied for adjournment to enable him make an application for leave to amend the plaint to join the Attorney General as a party and the suit was adjourned. In the meantime, the 1st respondent made an application dated 30th September, 2014 for leave to amend the plaint and join the Attorney General as a party. On 3rd March 2015, the application was allowed with the consent of ADC and Mr. Odongo for the Attorney General. The amended plaint was filed on 10th March 2015 joining the Attorney General as a 2nd defendant (2nd respondent).

Paragraph 13F was inserted which states:

> **"The plaintiff's claim against the 2nd defendant is for its negligence of duty resulting to the loss and damage as a result of the 2nd defendant's failure to accord him peace and security as his entitled right and enjoyment** *(sic)***".**

Two other paragraphs were inserted.

The 2nd respondent filed a Defence denying the claim and averred that the claim is statutory time barred; that if the 1st respondent sustained losses, the same was solely or primarily caused or contributed by forces beyond its control, that the claim was frustrated by *force majeure* and that the plaintiff was negligent as he failed to take reasonable and practicable measures to safeguard life and property.

[**4**] The 1st respondent gave evidence at the trial which started *de novo* and produced several documents as exhibits. He called ***Ishminder Singh Pandhal (Pandhal)***, his son as a witness. The 1st respondent's case as disclosed by the pleadings and the evidence was briefly as hereunder.

The appellant is a State Corporation under the Ministry of Agriculture established by the Agricultural Development Corporation Act. **Lands Limited (lessor**) is a subsidiary company wholly owned by ADC and manages farms on behalf of ADC. Lands Limited is the proprietor of LR No. 7697 known as Kipteget Farm comprising of 2581 acres situated in Nandi East, Nandi County. The land was leased by ***Robertson*** and ***Fredrick Edward Jackson*** who transferred the lease to the 1st respondent on 17th January, 1978 with the consent of Lands Limited. In or about 1991 and during the existence of the lease, ADC excised 1000 acres and allocated it to squatters who were living on the farm. Being aggrieved by the excision, the 1st respondent filed **High Court, Civil Suit No. 2757 of 1995**.

[**4.2**] The lease to the 1st respondent expired on or about 30th November, 2004. Upon the expiry of the lease, ADC offered the 1st respondent a lease of 1500 acres for a term of five years and a five-year lease was executed by Lands Limited and the 1st respondent on 3rd December, 2004. The terms of the lease were, *inter alia*, that the 1st respondent would pay annual rent of Kshs. 1,200 per acre per year payable quarterly in advance and the rent was subject to an escalation clause of 5% per annum. However, the rent was reduced from Kshs. 1,200 to Kshs. 1,000 per acre per year. The difference of Kshs. 2,000 was to be treated as compensation for the excision of 1000 acres which was the subject of the suit and the 1st respondent agreed to withdraw the suit. As a covenant of the lease, the parties agreed that the 1st respondent would develop the land for production of sugarcane. By Clause 3(1) the lessor covenanted and agreed:

> **"to permit the lessee… to hold and enjoy the said land during the term hereby granted without interruption by the lessor or any person rightfully claiming under or in trust of it."**

And **Clause 2(S)** provided:

> **"The lessee may from time to time be exempted from liability under the lease arising out of his failure to prevent the encroachment or systematic trespass upon the land by the lessor in writing when such encroachment or systematic trespass results from illegal occupation of the demised land by third parties whose eviction the lessee cannot achieve even after exercising due diligence and employing reasonable measures/efforts and when such eviction may require the intervention of the government of the aforesaid republic. The lessee shall be otherwise expected to observe the covenants hereby provided and notify the lessor immediately of any encroachment".**

The lease had an arbitration clause.

[**4.3**] The 1st respondent utilised the leased land peacefully until about December 2007 when post-election violence erupted as a result of disputed election results. During the violence, the squatters invaded the farm, burned about 1,200 acres of sugarcane plantation, destroyed the buildings on the farm and effectively evicted the 1st respondent. The 1st respondent reported to ADC and to the police but did not go back to the farm because he did not want to risk his life. On 14th March, 2015, ***L.K. Toroitich*** of Sterling Valuers Limited valued the sugarcane crop destroyed at Kshs. 120,000,000/-. The destroyed buildings were valued at Kshs. 20,000,000 and the tractor and other loose assets at Kshs. 10,000,000. The total value of the sugarcane crop, buildings and assets was assessed at Shs. 150,000,000. The 1st respondent also claimed that he suffered loss of profits and income for the three year unexpired term of the lease projected at Kshs. 129,000,000 per year from 2008 to 2010 giving a total loss of profits and income at Kshs. 387,000,000/-.

[**5**] The appellant called ***Samuel Birgen,*** a Legal Assistant of ADC and ***Anthony Ademba***, the Company Secretary of ADC and Lands Limited. The evidence of ***Samuel Birgen*** was in essence that ADC offered the 1st respondent quiet possession of the land; that ADC did allow squatters on the land: that ADC did not owe the 1st respondent security; that the post-election violence was spontaneous and widespread and ADC had no role in it; that ADC also suffered losses and its property destroyed as a result of the post-election violence in most parts of the country and that after security was provided the 1st respondent refused to take possession of the land. On his part, ***Anthony Ademba*** stated, amongst other things, that the post-election violence was spontaneous and criminal; that ADC and Lands Limited did not breach the lease; that he wrote several letters to the Local District Commissioner to secure the leased land; that the 1st respondent abandoned the land and refused to go back.

[**6**] The Attorney General called one witness, ***Obedie Kiio,*** the District Criminal Investigations Officer in Nandi East. His evidence was in essence that between December 2007 and January 2008 the Country experienced the worst ever post-election violence which was sporadic, spontaneous, unplanned and occasioned by political motivations; that there was massive destruction of property and loss of lives; that it was difficult for police to control the situation; that the security forces did what was reasonably practicable; that between 30th December 2007 and 2nd January 2008, the 1st respondent made reports of burning of sugarcane and destruction and theft of property; that the police visited the farm, investigated the reports and assisted in recovery of one tractor.

[**7**] The trial court considered the evidence and made findings that ADC had a duty to put back the 1st respondent in possession of the land; that although there was an attempt to put the 1st respondent back in possession, it happened too late; that the State ought to have detected that violence was likely to erupt as it was an electoral pattern; that the government having settled the squatters on part of the leased land, ought to

have given the 1st respondent security as there was high propensity of crime due to the presence of squatters; that the acts of violence were not instigated by ADC and ADC had no control over acts of commission or omission by the persons or squatters. However, the court made findings thus:

> **"I do find that all State organs failed in the duty they owed the plaintiff in ensuring that his property was protected during the post-election violence and therefore, I find the 2nd defendant liable for the consequential loss incurred by the plaintiff and the defendants are jointly liable for loss of profits for failing to put plaintiff back in possession".**

Regarding damages, the court made a finding that the valuation report was not controverted and awarded Kshs. 150,000,000/- against the 2nd respondent only for breach of statutory duty.

As regards the claim for loss of profits and income, the court made a finding that the sum of Kshs. 387,000,000/ was on the higher side but awarded Kshs. 100,000,000 against the appellant and the 2nd respondent jointly and severally for failing to put the 1st respondent back in possession. The court also awarded costs and interest to the 1st respondent.

[**8**] The appeal by the appellant is against both liability and quantum of damages. It is clear from the judgment that the appellant was found liable for breach of contract for failing to put the 1st respondent back in possession of the leased property. The lease dated 3rd December, 2004 was for a five-year term. The term would have expired in December 2009. The evidence shows that during the post-election violence in December 2007 and January 2008, the 1st respondent was in effect evicted and his sugarcane plantation burnt and other properties destroyed. After the violence ended and security was restored, the 1st respondent did not go back to the land. On liability, the appellant faults the court for failing to make a correct assessment of the evidence. ***Mr. Kibichy,*** learned counsel for the appellant submitted, *inter alia*, that the finding of the Judge contradicted his earlier finding that the appellant did not instigate the violence and had no control over the acts of commission and omission by the person who perpetrated the violence; that the circumstances showed that it was impossible for the 1st respondent to go back to the land; that the 1st respondent did not wish to go back; that the lease did not envisage such an eventuality; that the law did not place such a burden on the appellant and that the lease was frustrated.

On the other hand, ***Mr. Morgan Omusundi,*** learned counsel for the 1st respondent submitted, amongst other things, that, the 1st respondent could not have regained possession without the help or co-operation of the appellant; that failure by the appellant to put back the 1st respondent into possession was a breach of contract and that the performance of the contract was not impracticable. On his part, ***Hassan Abdi,*** learned counsel for the 2nd respondent submitted that the plaint did not disclose a cause of action against the 2nd respondent; that the 2nd respondent did not allow third parties to settle on the land; and that the 1st respondent refused to return to the land.

[**9**] The appellant and the 1st respondent had a contractual relationship and the obligations of each has to be determined from the terms of the lease. The 1st respondent relied on **Clause 3(1)** of the lease by which the appellant covenanted to permit the 1st respondent to hold and enjoy the land without interruption by the lessor or any person claiming under or in trust for it. The interruption of the 1st respondent's possession was not by the appellant or any person claiming under it. It is evident that the disruption was due to political turbulence. The trial court made a finding that the appellant did not instigate the turbulence or have control over it. It is implicit from clause 2(S) quoted in paragraph [4.2] above that the responsibility of evicting trespassers or persons who may illegally occupy the land was on the 1st respondent. Clause 2(S) provided that if the 1st respondent could not succeed in evicting the trespassers and when such eviction may require the intervention of the Government, the 1st respondent would be exempted from liability under the lease. It was not the 1st respondent's case that despite the interruption of possession, the appellant still required him to comply with the terms for payment of rent or any other term for the unexpired term of the lease. There was evidence from ***Anthony Ademba*** that he wrote to the District Commissioner asking him to provide security to the 1st respondent. There was also evidence that after the security was restored, the 1st respondent was asked to take possession of the land but he refused. The trial court made a finding that there was an attempt to put the 1st respondent in possession but was of the view that the attempt happened too late. The 1st respondent stated that he never went back to the land as he did not wish to risk his life.

The 1st respondent testified that when the District Commissioner went to the land his vehicle was stoned and damaged. According to evidence of ***Obedie Kiio***, this was the worst ever post-election violence. It is clear from the terms of the lease that such large scale violence was not in contemplation of the parties nor did the terms of the lease cast an obligation on the appellant to restore the 1st respondent in possession in such circumstances. It is clear that the lease was discharged by the prevailing circumstances and by the conduct of the 1st respondent of refusing to go back to the land.

[**10**] Having re-appraised the evidence, we have come to the conclusion that the finding of the court below that the appellant was liable for breach of contract by failing to restore possession to the 1st respondent was not supported by the terms of the lease or by evidence. We find that liability was not proved and allow this aspect of the appeal.

[**11**] The appeal is also against the award of Shs. 100,000,000/- against the appellant and 2nd respondent jointly and severally for loss of income and profits. The appellant faults the award on the ground that loss of income and profits were not proved on a balance of probabilities nor supported by law. The appellant's counsel submitted, among other things, that the sum claimed was based on projections; that the 1st respondent failed to provide material on the basis of which the claim could be assessed such as, professional report by an Agricultural Officer, a report by an accountant, or financial statements from a bank; that the sum awarded was plucked from the air and was based on speculation. The 2nd respondent has also cross-appealed against the award for loss of income and profits. Counsel for the 2nd respondent submitted that the award was plucked from the air and was not based on accounting books, receipts, delivery notes, payment vouchers, tax returns or any other documents. On the other hand, Counsel for the 1st respondent supported the award and submitted that since the valuation of the sugarcane destroyed was Shs. 120,000,000/-, the award of Shs. 100,000,000 for the remainder of the three years was reasonable.

[**12**] The amended plaint shows the claim of Shs. 387,000,000/- was computed based on the projected harvest of 300,000 tonnes of sugarcane for each of three years 2008, 2009 and 2010 and the price per tonne at Shs. 4,300/- yielding a total income of Shs. 129,000,000/- for each of the three years. The 1st respondent did not give evidence at all relating to the claim for loss of income and profits. However, **Pandhai** testified that 1200 acres were under sugarcane; that a full developed crop yields 30,000 tonnes and that the price per tonne was Shs. 3,000/-. However, the 1st respondent produced the valuation report dated 13th March 2015 prepared by **L.K. Toroitich** of **Sterling Valuers** in respect of the destroyed sugarcane crop which stated in part:

> **"The section of parcel of 1,012 acres was under sugarcane crop before the damage. The available harvest records the average tonnage was 60,698 tonnes which we consider as the value of the standing cane before destruction".**

[**13**] In **McGregor on Damages, Sixteenth edition**, the author states at page 1023 paragraph 1025:

> **"The normal measure of damages where the lessee is evicted from whole property or fails to get possession of it at all, is the value of the unexpired term which will be calculated as the rental value of the premises less the contractual rent which would have fallen to be paid in the future".**

At page 1027 para 1026, the author states:

> **"consequential losses if not too remote, are also recoverable"**
>
> And….
>
> **"so in appropriate circumstances, a lessee might recover loss of profits in a business which the lessor knew he was to carry on upon the premises".**

[**14**] In the instant case, the term of the lease was five years from 3rd December 2004. It is evident that the term was cut short in about January 2008 and the 1st respondent lost the residual of approximately two years. The land was leased for purposes of commercial growing of sugarcane; a fact expressly stated in the lease. There is no doubt that had liability been proved against the appellant, the 1st respondent would have been entitled to consequential loss in the form of loss of profits in the farming business, which, in this case cannot be considered as remote. However, the onus of proof of specific loss was on the 1st respondent. The sum of Shs. 387,000,000 claimed was a projection – an estimate.

Firstly, the estimate was erroneous as it was based on an unexpired term of three years when the unexpired term was two years. Secondly, as correctly submitted by the respective counsel for the appellant and the 2nd respondent, the estimate was not supported by concrete documentary evidence. The expected income of Shs.129,00,000 did not take into account the cost of production in each year. Thirdly, the trial court while rejecting the claim of Shs. 387,000,000/- did not give any justification for the reduced award of Shs. 100,000,000/-.

[**15**] Nevertheless, there is no doubt that the 1st respondent lost profits from sugarcane production. Whilst the best evidence was not availed to the trial court, the court was bound to make the best estimate of the loss from the available evidence and make a reasonable award. The 1st respondent was undertaking large scale sugarcane production. From the evidence, the average acreage on sugarcane was 1000 acres. **Pandhai** stated that a fully developed crop used to yield 30,000 tonnes and that the price of each tonne was an average of Shs. 3,000. That would yield a gross annual income of Shs. 90,000,000 and Shs. 180,000,000 for two years. The award of Shs. 100,000,000 represented a loss of profits for 3 years. The lease was shortened by 2 years and not by 3 years. If the estimated cost of production and other relevant factors are taken into account, the net profits would probably be about Shs. 50,000,000 for the two years. That, in our view, would have been a reasonable estimate of the loss of profits. Had the appeal on liability failed we would have partially allowed the appeal and reduced the award for loss of profits to Shs. 50,000,000/-.

[**16**] As regards the cross-appeal by the 2nd respondent, we would state at the outset that the 1st respondent challenges the cross-appeal only on the merits and not on any other ground. The cross-appeal is supported by the appellant herein. The trial court found the 2nd respondent liable for both the value of sugar cane crop and other assets in the sum of Shs. 150,000,000/- and for loss of profits in the sum of Shs. 100,000,000/- The cross-appeal is against both liability and quantum for damages.

[**17**] The first four grounds of cross- appeal state as follows:

> **"1). The learned judge erred in holding that the state organs failed in their obligation to provide security to the 1st respondent when there was evidence to the contrary.**
>
> **2). The learned judge failed to appreciate that the State's duty to maintain law and order is owed to the general public generally and not specific individuals like the 1st respondent unless he could show that there was special duty owed to him which was not the case here.**
>
> **3). The learned judge failed to appreciate that the violence that occurred during the post-election period was spontaneous and took everyone including the security agencies by surprise and hence it could not be blamed on State agents.**
>
> **4). The learned judge erred in holding the 2nd respondent liable for breach of contract contrary to the evidence on record."**

[**18**] When the plaint was amended to join the 2nd respondent as a party, only three amendments to the plaint were introduced. Paragraph 3E was introduced. As already indicated, it states that the claim against the 2nd respondent is for its negligence of duty resulting to loss and damages as a result of the 2nd defendant's failure to accord him peace and security as his entitled right and enjoyment.

Paragraph 14B was also introduced. It states:

> **"The plaintiffs' further averment is that the actions and interferences by the third parties occasioning him the damages and loss of user is as a result of precipitated post-election violence which was a failure and/or an inaction of the part of the government and hence blames and claims against the Ministry of Special Programmes thereof"**

The particulars of breach of contract and/or right of protection by the defendants were given in paragraph 14B as follows:

> **a) Failure to ensure that plaintiff enjoyed peaceful enjoyment as expressly and/or impliedly stated in the lease and as constitutionally entitled as a citizen.**
>
> **b) Allowing third parties to invade the plaintiff's land thereby, occasioning grave loss to the plaintiff.**
>
> **c) Bringing in and or settling third parties on what was all along part of the plaintiff's leased land thereby making the plaintiff's stay on the land insecure and increasing the risk of attack and destruction of the plaintiff's property.**
>
> **d) Allowing third parties to occupy and harvest the plaintiff's sugarcane.**
>
> **e) Failing to remove third parties from the plaintiff's land in furtherance of the plaintiff's right to peaceful occupation and enjoyment of the same.**
>
> **f) Failure to accord the plaintiff's his right of security while at the land.**
>
> **g) Permitting 3rd parties to cause damages and loss of plaintiff….**

Of those particulars, it is only paragraphs (f) and (g) which were introduced by the amendment after the 2nd respondent was joined. It is clear from the amended plaint that the cause of action pleaded against the 2nd respondent was negligence by failure to accord the 1st respondent security. Particulars Nos. (a) – (e) in para 14B which relate to breach of contract do not apply to the 2nd respondent.

[**19**] The trial court made a finding that there was post-election violence in 1992 and in 1997 and that the State ought to have detected that violence was likely to erupt as it was an electoral pattern and taken measurers to pre-empt the violence. The court further found that the Government having settled squatters on part of the land leased by the 1st respondent ought to have given him security as there was high propensity of crime due to the presence of squatters. Lastly, the court found that the State organs failed in their duty they owed the 1st respondent in ensuring that his property was protected during the post violence.

[**20**] We have considered the respective submissions and the evidence. Firstly, the 1st respondent and his witness did not give evidence relating to 1992 or 1997 post-election violence. Their evidence was that security was not provided in relation to the 2007 and 2008 post-election violence. Secondly, the evidence showed that it is Lands Limited and ADC as lessors who excised part of the land and allocated part to the squatters, some of whom were employees of the 1st respondent. The two are appropriate bodies. The evidence further showed that the allocation was during the existence of the previous lease which had expired. Thirdly, there was evidence that the 1st respondent co-existed with the squatters peacefully before the eruption of the post-election violence at the end of 2007. Furthermore, the 1st respondent caused the lease to be renewed for part of the land measuring 1,500 while aware of the existence of squatters in the adjoining land. Fourthly, the 1st respondent was not present when the destruction took place. He stated that he was not present during the violence and he did not see who destroyed the properties. Fifthly, the 1st respondent's case as pleaded and advanced by the evidence was that his properties were destroyed during the 2007/2008 post-election violence. There was concrete evidence from the appellant's witnesses and from the 2nd respondent's witness, ***Kiio,*** that the violence was sporadic, spontaneous and unplanned. ***Obedie Kiio*** testified that the security forces did what was reasonable and practicable and even responded to the 1st respondent's report. Indeed, the 1st respondent on cross-examination by counsel for the 1st appellant stated in part.

> **"There was no security after the attack. Nobody could get there. The government vehicle for the D.C was attacked and broken."**

The 1st respondent's son testified that the District Commissioner went to the farm and they managed to drive away 4-5 tractors. It is clear from the evidence that the findings of the trial court that the Government organs failed to provide security to the 1st respondent during 2007/2008 post-election violence was not, in the circumstances, supported by evidence.

[**21**] Although the 1st respondent did not in his pleadings rely on any provisions of the Constitution or any statute law to support his claim that the police had a duty to provide security to him, it is clear that **Clause 70** of the former Constitution granted to every person a right, *inter alia,* to security of the person; right of protection for privacy of his home and other property. Further, under **section 14(1)** of the **Police Act** the police have a duty to maintain law and order including the protection of life and property. In addition, by **section 24,** the **National Police Act**, enacted after the promulgation of the Constitution 2010, one of the functions of the police is the protection of life and property.

[**22**] In **Charles Murigu Muriithi & 2 Others [2015] eKLR,** (**Muriithi's case**) a three-judge High Court bench considered the liability of the Government for damages to properties occasioned to the petitioners in that case during 2007/2008 post-election violence in Eldoret. After reviewing the local and foreign decisions the court made a finding at para 53 thus:

> **"It is clear from the persuasive authorities we have referred to above that under the common law and in the United States of America, for an applicant to succeed in a claim grounded on violation of constitutional rights to property owing to police failure to offer protection, the applicant must demonstrate that the acts complained of were directly perpetuated against him by the police; that the police had placed the applicant in danger that he would otherwise not have faced; that a special relationship existed between the applicant and the police on the basis of which police protection had been assured…"**

In para 56 thereof, the court said in part:

> **"On our part, we find that the State's duty through its various security agencies, including police to protect its citizens and their properties from violence is owed generally to the public at large and not specifically to each and every individual resident in Kenya…"**

Lastly, at para 58, the court said:

> **"We make this finding conscious of the fact that due to the poor ratio of police officers against the population in Kenya (a matter we take judicial notice of given its common notoriety), the police cannot be expected to be everywhere at all times or to be guarding individual person's homes or property on a 24-hour basis. The police can only be reasonably expected to offer protection if they have prior information that acts of violence are expected to be perpetuated in a certain area or against specific persons' homes or property so that they can organize to offer the required protection."**

The Muriithi's case is directly relevant and persuasive.

[**23**] The general constitutional and statutory duty of the Government or police to provide security to an individual citizen or his property only crystalizes in special individualized circumstances such as where a citizen has made an individual arrangement with the police, or some form of privity exists or where from the known individual circumstances, it is reasonable for police to provide protection for the person or his property. Otherwise, imposing a limitless legal duty to the Government to provide security to every citizen and his property in every circumstance would not only open floodgates of litigation against the Government, but would also be detrimental to public interest and impracticable in the context of this country. There was no evidence that the 1st respondent or the police anticipated that post-election violence would erupt. There was no evidence that the 1st respondent had reported to police that there was likelihood of his farm being invaded by riotous mob or that he sought police protection. On the contrary, there was evidence that the violence was widespread, spontaneous and unplanned and that the police did all what was reasonably practicable to restore peace. In the circumstances, the 1st respondent did not prove liability in tort against the Government and the judgment of the trial court fixing the Government with liability was erroneous.

[**24**] As regards the appeal against the award of damages, our findings in paragraphs 14 and 15 above apply *mutatis mutandis* to the appeal by the 2nd respondent against the award for loss of profits. The award of Shs. 150,000,000/- for damaged crop and other assets was based on a valuation report. The 2nd respondent's counsel has discredited the valuation report and submitted that the trial Judge should have undertaken an analysis of his own. The valuer did not give evidence. However, the 2nd respondent did not ask that the valuer be called for cross-examination nor call its own valuer. The valuation report was not impugned at the trial. The counsel for the 2nd respondent did not cross-examine the 1st respondent and his witness on the value of the damaged sugarcane crop or of other assets. The trial was adversarial and there is no other evidence that could have guided the court. In the circumstances, there are no grounds for disturbing the award of Shs. 150,000,000/-.

[**24**] Lastly, we have deliberately failed to deal with the 2nd respondent's submission that the suit against the 2nd respondent was time barred. The reasons for that is that although the defence of limitation was raised in the defence, it was not pursued in the trial and no ground of appeal was framed in the cross-appeal relating to limitation. The issue of limitation was only raised in this Court by the 2nd respondent's counsel in his oral submissions. The issue is not even raised in the 2nd respondent's written submissions. Indeed, the 2nd respondent's written submissions dated 22nd March, 2016 and filed in the trial court raised only two issues for determination and limitation was not one of them. That explains why the trial court did not consider the issue of limitation.

[**26**] For the foregoing reasons;

> **(i) The appeal is allowed and the judgment of the Environment and Land Court on liability is set aside. Had the appeal on liability failed, we would have reduced the award for loss of profits to Shs. 50,000,000/-.**
>
> **(ii) The cross-appeal by the 2nd respondent is allowed and the judgment of the Environment and Land Court on liability is set aside in its entirety. Had the appeal on liability failed, we would have affirmed the award of Shs. 150,000,000/- being the value of the 1st respondent's properties destroyed. However, we would have partially allowed the appeal on the award for loss of profits and reduced the award to Shs. 50,000,000/-.**

[**27**] Regarding the costs of the appeal and the costs in the trial court, it is in the interest of justice in the circumstances of this case that each party bears its own costs.

We so order.

Dated and Delivered at Eldoret this 25th day of July, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.