



Aberdare Investments Limited v Kenya National Highways Authority & 4 others (Environment and Land Case Civil Suit 486 of 2014) [2024] KEELC 4419 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4419 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 486 OF 2014**

EK WABWOTO, J

MAY 30, 2024

BETWEEN

ABERDARE INVESTMENTS LIMITED PLAINTIFF

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST DEFENDANT

CHINA WU YI COMPANY LIMITED 2ND DEFENDANT

ATHI WATER SERVICES BOARD 3RD DEFENDANT

NAIROBI WATER SEWERAGE & COMPANY LIMITED 4TH DEFENDANT

NAIROBI CITY COUNTY 5TH DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide a plaint dated 23rd April 2014 seeking for the following reliefs:
 - a. A mandatory injunction compelling the Defendants to reconnect the Plaintiff's property being land reference number 209/2389/104 situated in Nairobi within Pangani area along Thika Highway one plot up Mathare River Valley and next to Simba Oil Petrol Station, together with the developments therein to the main sewer and ensure that the same is properly served by the Nairobi City's main sewer system.
 - b. Special damages (To be particularized).
 - c. General damages.
 - d. Cost of the suit plus interest at court rates.
2. The suit was contested by the Defendants. The 1st Defendant filed a statement of Defence dated 12th June 2014. The 2nd Defendant filed a statement of Defence dated 3rd June 2014, the 3rd Defendant



filed a statement of Defence dated 23rd May 2017, the 4th Defendant filed a statement of Defence dated 22nd July 2014 while the 5th Defendant filed a statement of Defence dated 27th August 2014. All the Defendant denies liability for the loss and damages suffered by the Plaintiff and prayed for dismissal of the Plaintiff's suit with court.

The Plaintiff's case.

3. It was the Plaintiff's case that it is the registered proprietor of L.R 209/2389/104 situated in Nairobi within Pangani area along Thika Highway one plot up Mathare Valley and next to Simba Oil Petrol station. It was averred that the Plaintiff has developed its property with 25 residential rental units and 7 rental offices at a cost of Kshs 100,000,000/=. The sewer line to the said property has always been connected to the main sewer line running down along Mathare river. The same was connected a long time ago.
4. It was further averred that sometime in the year 2008 the 1st Defendant contracted the 2nd Defendant together with various other Chinese companies to reconstruct and/or redevelop the Muranga road and transform it to part of the Thika Super Highway. Before that all the storm water from the road and outside the Plaintiff's building notwithstanding the volume used to flow down the Mathare River.
5. It was contended that when the construction of the Thika Super Highway was completed, no adequate allowance had been made for storm water flowing down Mathare River from both sides of the super highway to drain into the river and as a result the storm water and debris from both sides of the Super Highway flows into the basement of the Plaintiff's property.
6. It was further contended that during the heavy rains of April 2012 all the muddy water and debris flowed into the basement of the Plaintiff's property and as a result the entire basement which comprises 40 motor vehicle parking slots was not being used thus occasioning monetary loss to it. It was also contended that despite the issue being brought to the attention of the Defendants none took any action to remedy the situation. This necessitated the Plaintiff to keep hiring exhauster services every three weeks at a cost of Kshs 30,000 /.=.
7. The Plaintiff averred that due to the sewer problem most of its tenants vacated the premises and this occasioned loss amounting to Kshs 7,250,000/= loss of rent so far to Kshs 2,800,000/= and the same continues to increase monthly at Kshs 115,000/.=.
8. The Plaintiff faulted the 1st Defendant for declining and refusing to grant the necessary approvals to allow for reconnection works. It was averred that the 1st Defendant is responsible for the road and the construction therein and ought to have ensured that damages and losses are not visited upon the Plaintiff by the 2nd Defendant who is an agent of the 1st Defendant. The 3rd Defendant was faulted for failing to ensure that the sewer line is not negligently blocked and or that the Plaintiff's premises are not delinked from the main sewer. It was averred that the 3rd Defendant ought to have ensured that the sewer line is fully operationalized before the same could be negligently sealed off by the 1st and 2nd Defendants. The 4th Defendant was faulted for receiving monthly payment for sewer services from the Plaintiff's premises and yet it failed to ensure that the sewer line is not blocked without an alternate line being provided to serve the Plaintiff's premises. The 5th Defendant on the other hand was faulted for allowing the Plaintiff's property to waste away yet they collect land rates for provision of services to the said premises.
9. During trial, five witnesses testified on behalf of the Plaintiff. Virginia Gathoni Nyaga testified as PW1. She stated that she was a director of the Plaintiff's company. She adopted her witness statement dated



22nd July 2022 and also produced her bundle of documents dated 18th August 2017 in her evidence in chief and urged the court to grant the reliefs sought.

10. During cross examination by Mr. Obok Learned Counsel for the 1st Defendant, she stated that her husband was the one involved in the construction of the building and that she hadn't produced the approved building plans as part of her evidence in court. She further stated that her husband was the one who was involved in most of the matters relating to the property, she also stated that her husband was an engineer by profession and all the contractors involved during the construction of the building were qualified. She further stated that the building had a drainage system which directed water to the road and they never experienced any problems prior to the construction of the Thika Super Highway.
11. When asked about the width of the road, she stated that she had not measured its width and that her concern was not about the size of the road but its drainage. She also stated that the property had adequate drainage system before 2012. In April 2012 there was flooding which went up the basement of the building and that after April 2012 they never experienced the said problem again.
12. On cross examination by Learned counsel Mr. Ochieng for the 2nd Defendant she stated that her husband had engaged the project manager on the issues relating to the flooding. She stated that some tenants moved out after the flooding that occurred in April 2012. She also stated that she was not sure of how many tenants that had moved out.
13. When asked about the rent collected, she stated that her husband was responsible for its collection and couldn't not tell how much rent had been collected before April 2012, she also stated that the flooding only affected them in April 2012.
14. On cross examination by Mr. Odoyo Learned counsel for the 3rd Defendant, she stated that the sewer was destroyed by the Chinese contractor who were constructing the road. She also stated that the Plaintiff's claim is based on the fact that the Plaintiff lost tenants and that the loss of rent was from April 2012 when the tenants moved out because it was not easy getting new tenants. She conceded of not having receipts in respect to the rent payable and also receipts for the repair works.
15. When cross examined by Learned Counsel for the 4th Defendant Mr. Kithinji, she stated that she was not dealing with tenants and that her husband was the one who used to keep records for rent that payable. She also stated that the demand letter that was issued prior to the filing of the case did not include the name of the 4th Defendant.
16. When reexamined, she stated that after the death of her husband she remained as the sole director of the Plaintiff's company, she also stated that the flooding occurred in April 2012. She also stated that some tenants came back to the property after they had removed the sludge.
17. John Githinji testified as PW2. He relied on his witness statement dated 9th March 2015 in his evidence in chief.
18. On cross examination by Learned Counsel Mr. Obok for the 1st Defendant he stated that he is a director of Jothem Plumbers who were engaged by the Plaintiff to do some works, he stated that the design of the road led to flooding to the Plaintiff's property and this was due to the fact that the Plaintiff had not experienced that problem before the construction of the said road.
19. He also stated in cross examination that he had not offered any exhauster services to the Plaintiff before 8th May 2013. He stopped offering those services sometimes in 2015 and he would be paid Kshs 30,000/= for each service.



20. When cross examined by Mr. Ochieng Learned counsel for the 2nd Defendant, he stated that the cause of flooding was rain water and overflowing sewer. He also stated that at some point the sewer line had been disconnected.
21. On cross examination by Learned Counsel Mr. Odoyo he stated that the flooding started in the year 2012 but could not remember the exact month. He could not remember which contractor destroyed the sewer line. He also stated that he started offering his services to the Plaintiff around March 2012 and he was not sure of how many months he had been paid.
22. When asked whether he was aware if the property had tenants, he stated that he could not know whether there were tenants because his works was from the basement. He also stated that the manhole of the said building was located outside the premises and the Plaintiff's property and they did not have any control of the same.
23. On cross examination by Mr. Kithinji Learned Counsel for the 4th Defenant, he stated that he signed the agreement with the Plaintiff on 3rd March 2012 and he started offering his services on the same day. He also stated that his first receipt was dated March 2012, the next one was April 2012, June 2012 and then August 2012. When asked why the receipts serial numbers were following each other sequentially, he stated that he had one receipt book designated only for the services offered to the Plaintiff.
24. When asked about the condition of the sewer line, he stated that the same was damaged and is still in that condition to date. He could not tell who broke it and he did not see the contractor damage the same.
25. On reexamination he stated that he started offering his services in March 2012.
26. David Mutonyi testified as PW3. He sated that he is a professional engineer. He adopted his witness statement dated 2nd February 2015 and a report dated 3rd March 2022 in his evidence in chief. He testified that he was engaged by the Plaintiff after the flooding incident at the Plaintiff's premises. He stated that there was a problem with the flooding and there was also a problem with the storm water and foul smell from the sewer.
27. He also stated that following his review of the problem, he found out that the storm water was flowing on the surface of the road. The flooding problem followed a rainfall event. The road had been expanded to a total of 12 lanes from the initial 4 lanes and hence the water drainage system was overwhelmed.
28. Upon cross examination by counsel for the 1st Defendant Mr. Obok the witness told the court that he first visited the site on 29th August 2013 and on that day he did not see any flooding. He stated that the property is located at the bottom of the valley. The report was an assessment of the drainage system. He also stated that there is a way water could be directed down to the river without flowing through the Plaintiff's building. He also stated that the problem of flooding at the Plaintiff's premises has not re-occurred despite subsequent heavy rains.
29. On cross examination by counsel for the 2nd Defendant he stated that he visited the property at least 5 times before preparing his report and there was no flooding. He did not find any smell. His report did not factor the drainage system within the building. The construction of the road had an effect on the storm water problem. The existing drainage was overwhelmed.
30. When cross examined by Mr. Odoyo advocate for the 3rd Defendant, he stated that he was instructed in August 2013 and finalized preparing the report in 2015. The information on flooding doesn't appear in his report though KENHA should be held liable because they caused the problem.



31. When cross examined by Counsel for the 4th Defendant, he stated that he had not produced any document to confirm that he is a professional engineer. He stated that any building may produce storm water and that fact position had been stated in his report. The alleged flooding exceeded its capacity. Foul smell is not relevant for the engineering report. He could not ascertain how many times the exhauster services were being used. He did not look at the design of the storm water of the building. He did not file any bill of quantities.
32. When re-examined, he stated that his professional registration number is A2888. The building was constructed earlier than the road and the main problem was the water from the road.
33. Peter Kamau an Auditor with P & K Associates testified as PW4. He relied on his witness statement dated 9th March 2015 and a report on the loss of rental income dated 2nd February 2016. In his evidence in chief. He testified that he was appointed by the Plaintiff to review loss of income from 2012 to February 2015. In April 2012 there was flooding which caused tenants to relocate from the house.
34. On cross examination by 1st Defendant's Counsel, he stated that it was flooding in April 2012 and that houses were vacated after that incident. He analyzed the receipts of the Plaintiff before preparing his report though the receipts were not produced in court. He also did not have the lease agreement in court. Flooding was occurring whenever there was rain.
35. When responding to the cross examination by Learned Counsel Mr. Ochieng for the 2nd Defendant, he stated that the Plaintiff was paying taxes but the same had not been stated in his report. The flooding affected units at the basement.
36. When cross examined by Mr. Odoyo Learned counsel for the Defendant, he stated that the flooding occurred in February 2015 though he had been told that it took place in April 2012. The foul smell did not affect other tenants. He did not have the lease agreements of the tenants. He relied on bank statements and receipts together with lease agreements when preparing the report. The flooding only occurred once.
37. On cross examination by counsel for the 4th Defendant, he stated that his report was prepared in February 2015. His report did not refer to expenses. The leases had termination clauses. He did not factor in any advance payment on rent. He was not sure if the plaintiff was operating in 2011.
38. When reexamined, he stated that the report was prepared based on the information provided to him by the Plaintiff. The basement houses were affected by flooding. The other houses were affected by foul smell.
39. The last witness to testify on behalf of the Plaintiff was Anthony Kariuki a contractor who testified as PW5. He adopted his witness statement dated 9th March 2015 in his evidence in chief. He testified that he was engaged by the Plaintiff to ensure the debris and sludge occasioned by flooding are removed and to renovate the walls. He stated that he did restore the paint and cleared the property from any debris and sludge.
40. On cross examination by Counsel for the 1st Defendant he stated that the damage was caused by flooding even though the flooding happened occurred only once. He took more than 3 months to finalize the works. When cross examined by counsel for the 2nd Defendant he stated that he did not put any measures to prevent future flooding. To the 3rd Defendant's cross examination he responded that he commenced the work sometime in in 2013 after signing the agreement on 8th May 2013



The case of the 1st Defendant.

41. The 1st Defendant filed a Statement of Defence dated 12th June 2014. It was the 1st Defendants' case that it contracted the 2nd Defendants as an independent contractor to redevelop Muranga Road. The 2nd Defendant was responsible for executing the contract professionally. There was neither a design nor construction flaw in the construction of the Thika Super Highway at the section adjacent the Plaintiff's property. It was not the 1st Defendants mandate to commission construction of the sewer line nor to grant approvals of sewer lines or draining sewer lines. The Section of The Thika Super Highway adjacent to the Plaintiff's property is located at the lowest point in relation to the surrounding ground topography. The invert levels for the installed drains of the building in relation to those along the highway were not sufficient to handle free flow of water from the building's drain to the service lane drains. The developer of the Plaintiff's building had originally channeled storm water in heavy rains and to restructure outlet flows to the public drains especially during a storm.
42. During trial, two witnesses testified on behalf of the 1st Defendant namely Engineer Michael Orege the Corridor Director for Corridor "C" and Engineer Daniel S. Cherono the Deputy Director of the 1st Defendant. Engineer Michael Orege adopted his report dated 15th June 2022 in his evidence in chief.
43. On cross examination by the 1st Defendant's Counsel, he stated that he had no opportunity to renew the report filed by the Plaintiff. He was not aware of any complaints of flooding. His report had recommended the Plaintiff to do water retention tanks. Flooding of the property was not as a result of the construction of the road.
44. On cross examination by Counsel for the 3rd Defendant, he stated that he visited the premises in August 2021 and sometimes later in 2022. He stated that the building was at the lowest point of the water way and was prone to flooding. The construction of the road was not a contributing factor and the owner of the building was to blame.
45. On cross examination by Counsel of the 4th Defendant he stated that the main issue with the area was the general topography which affects the flooding of the area. He visited the site on or about August 2021. The road was designed to address surface run off. The flooding was beyond their control.
46. On cross examination by Ms. Otieno Learned Counsel for the 5th Defendant he stated that they have never made any recommendations to the City County. The developer should have factored the issue of retention tanks.
47. When cross examined by Mr. Masafu Learned Counsel for the Plaintiff, he stated that the report was done in 2022 and he was not aware of the actual situation in 2013 and 2009. The complaint was done to the Principal Secretary Roads in 2014. The initial road had 4 lanes the run off was minimal when it was upgraded to 12 lanes the surface run off water may not necessarily increase. He was not aware of any additional drains that were done after the complaint. From the repair works additional drains were done to accommodate surface run off. Based on his report further flooding may not occur unless there are extra ordinary circumstances. The Plaintiff needs to have a retention tank.
48. When reexamined, he stated that there was no construction flaw and there was no design flaw. The road was originally 4 lanes and was upgraded to 12 lanes. There was a need to construct retention tanks which were based at the Plaintiff's property.
49. Engineer Daniel Cherono while testifying on behalf of the 1st Defendant, relied on his witness statement dated 22nd June 2021 in his evidence in chief. He testified that when KENHA entered into contract for the construction of the Thika Super Highway there was need to relocate utilities and



- KENHA was required to provide funds for the said relocation even though the utilities belong to other entities. He stated that the 1st Defendant never contracted motorways as they entered into contract with China Wu Yi Company.
50. On cross examination by Mr. Ochieng, Learned Counsel for the 2nd Defendant he stated that KENHA was in charge of designing the road and that the design included the drainage. The design of the road was done properly but due to the location of the Plaintiff's property it was bound to experience flooding during heavy rains.
 51. On cross examination by Learned Counsel Odoyo for the 3rd Defendant, he stated that he joined KENHA in 2009 when part of the work in respect to the construction of the road was ongoing. The road had three contractors and the obligation of the contractors was to construct the works according to the design. Works would include construction of footbridges and facilities that would enhance safety. The contractors were liable for non-completion of any works.
 52. When responding to the cross examination by Mr. Kithinji Advocate for the 4th Defendant, he stated that the design done by KENHA had factored in drainage. The design for different elements like sewer and lanes is the sole responsibility of the owner of those utilities. The 4th Defendant had the obligation of granting approvals for sewer lines. The owner of the facility was responsible for the utility relocation. KENHA was only supposed to fund the cost of the relocation by the main contractor.
 53. On cross examination by Learned Counsel Ms. Otieno for the 5th Defendant, he stated that they never contacted the 5th Defendant to relocate any utilities.
 54. When re examined by the Learned Counsel for the Plaintiff Mr. Masafu, he stated that the construction of the road was within the mandate of KENHA. The entity that was supposed to relocate utilities like sewer lines was to be blamed for the flooding. KENHA would only be responsible for drainage lines.
 55. On reexamination, he stated that KENHA had no role in the relocation of sewerage services.

The case of the 2nd Defendant

56. The 2nd Defendant filed a Statement of Defence dated 3rd June 2014 and also filed a bundle of documents of even date. The 2nd Defendant denied the allegations made in the plaint and sought for the dismissal of the Plaintiff's suit.
57. It was contended that the 2nd Defendant was contracted by the 1st Defendant who is mandated by [Kenya Roads Act](#) to manage, develop, rehabilitate and maintain national roads to reconstruct the Thika Super Highway amongst other companies. The 2nd Defendant denied that they carried out their works without causing the sealing of the sewer line and further that it was not the role of the 2nd Defendant to carry out sewer works when it was contracted for the reconstruction of the Thika Super Highway and they denied any liability.
58. On cross examination of the 2nd Defendant's witness by Counsel Obok, he stated that he had no accusations against KENHA, he doesn't blame KENHA for any damage and they had nothing to do with the relocation of sewer lines.
59. When cross examined by Mr. Odoyo Advocate, he stated that the sewer construction works was being done by another company and they were being supervised by the 3rd and 4th Defendants.
60. On cross examination by Counsel Kithinji for the 4th Defendant, he stated that the 3rd Defendant was responsible for the sewer works.



61. Upon cross examination by Counsel for the Plaintiff, he stated that the 2nd Defendant was only supposed to do the road and not the sewer line. The 3rd Defendant was supervising the works.
62. When re examined he stated that they did not have any engagement with the 3rd Defendant and they were not to do any sewer works.

The case of the 3rd Defendant.

63. The 3rd Defendant filed a statement of Defence dated 23rd May 2017. The 3rd Defendant denied each and every allegation made in the plaint. It maintained that it had no knowledge of any arrangement between the 1st and 2nd Defendants and that if the Plaintiff's premises was blocked and/or delinked from the main sewer, then the same was as a result of negligent act on the part of the independent contractor contracted to construct the Thika Super Highway and not the 3rd Defendant. The 3rd Defendant denied liability and maintained that there is no reasonable cause of action against it.
64. During the trial, Engineer Kiprono Dominic Kiprop testified on behalf of the 3rd Defendant. He adopted and relied on his statement dated 20th July 2022 together with the 3rd Defendant's bundle dated 20th July 2022 in his evidence in chief.
65. On cross examination by he stated that the designs were for relocation of sewer and water lines. The disconnection of sewer could have occurred during construction of the road. The 3rd Defendant had no role in the sewer connecting to the Plaintiff's property. They only deal with the trunk sewer. The supervisor of the sewer relocation in this case was the 4th Defendant. Athi Water was not involved in the disputed section.
66. He also stated that the 3rd Defendant was tasked to carry out the relocation of the sewer trunk and that could not confirm if the sewer line in the disputed area was relocated. He was not aware whether the 2nd Defendant did any sewer works.
67. On further cross examination he stated that he was not responsible for this site. There were other engineers who were responsible. The 3rd Defendant is responsible for sewer lines and they were also to take directions from the 4th Defendant.
68. When cross examined by Counsel for the Plaintiff, he stated that Funan Contractors had been contracted as an independent contractor. There existed a contract between Athi Water and Funan and the said contract had 8 components.

The case of the 4th Defendant.

69. The 4th Defendant filed a statement of Defence dated 22nd July 2014. The 4th Defendant denied liability and maintained that it was just a supervisor for the works and assisted the 3rd Defendant with the technical knowledge/expertise during the construction of the Thika Super Highway. It was contended that the construction of Thika Super Highway was the preserve of the 1st, 2nd and 3rd Defendants. The 3rd Defendant contracted Funan Construction Company to carry out the sewer relocation and upon being dissatisfied with the works by Funan Construction it contracted Motor Ways Construction to relocate the water and sewerage facilities along Thika Super Highway. The Plaintiff was aware that the issue of the sewer line could only be resolved by the 2nd and 3rd Defendants.
70. During trial, Engineer Ephantus Mwangi testified on behalf of the 4th Defendant. He relied on his witness statement dated 22nd July 2014 and bundle of documents of same date, in his evidence in chief.



71. When cross examined he stated that Athi Water had delegated its responsibility to the 4th Defendant. The 4th Defendant was tasked to relocate water and sewerage works. He had no evidence that KENHA signed a contract with Motorways. There was no way KENHA could have been blamed, KENHA adhered to the best practices. The 2nd Defendant did not have the mandate of relocating the sewer line.
72. On cross examination by Counsel for the Plaintiff, he stated that it is not true that Motorways failed to carry out the works.
73. When re examined he stated that the 1st Defendant also signed the agreement with three sub-contractors, the 3rd Defendant are the owners of the sewerage infrastructure.

The case of the 5th Defendant.

74. The 5th Defendant signed its statement of Defence dated 27th August 2014 denying any liability on its part and sought for the dismissal of the plaintiff's case. During trial they closed their case without availing any witness to testify on its behalf. The 5th Defendant filed written submissions dated 12th February 2024 which the court has considered.

The Plaintiff's submissions.

75. The Plaintiff filed written submissions dated 12th January 2024. Counsel for the Plaintiff submitted the on following issues;
 - a. Whether the Defendants are jointly liable for negligence and the result of damage occasioned to the Plaintiff.
 - b. Whether the Plaintiff is entitled to special and general damages as sought and who should bear the costs of this suit.
76. Relying on the cases of Kenya Wildlife Service –Vs- Rift Valley Agricultural Contractors (2018) eKLR, and Donoghue -Vs- Stevenson (1932) AC 562, it was submitted that the said cases gave the essential limbs for a test of negligence to be proved which are a person owes a duty of care to persons who are closely and directly affected by his act, he ought to reasonably foresee they will be affected. There is a breach of trust duly involving a failure to take reasonable care and finally the Plaintiff suffers damage as a result of the said breach of duty. It was argued that none of the Defendants despite alleging the existence of the independent contractor had provided their respective contracts as amongst themselves to prove the issue of the independent contractor. The case of *Kenya Pipeline Co Ltd – Vs- Duncan Ndegwa and Another, Civil Appeal No. 235 of 2020* was cited in support.
77. It was argued that the 1st Defendant negligently left its responsibility and there is no way it could commence construction of the road with the 2nd Defendant knowing whether the utilities have been moved or not. The 2nd Defendant proceeded to seal off the road knowing very well that there was a problem with drainage and the sewer lines had not been reconnected. The 3rd Defendant breached its duties by failing to address the problem of the drainage and sanitation. The 4th Defendant negligently failed to discharge their role of overseeing and ensuring the relocation of the sewer line and reconnecting the same to the main sewer so that the Plaintiff does not suffer damage and irreparable harm. The 5th Defendant being responsible for sanitation of the city dwellers and smooth running of the city had a duty to the Plaintiff.
78. In respect to the claim of special and general damages, it was submitted that the Plaintiff was able to prove its claim of special damages by producing the following receipt of Kshs 200,000/= from Engineer David Mutonyi, receipt of Kshs 50,000/= issued by Geotec Consortium Surveyors, loss of income due



to flooding Kshs 1,501,000/= payment to Anthony Kariuki for repairing the building due to damage by floods Kshs 1,447,400, and payment to Jotem Plumbers for exhauster services damage by floods Kshs 1,447,400/=.

79. In respect to general damages, it was submitted that the Plaintiff's claim for general damages was caused as a result of the negligent act of the 1st, 2nd, 3rd, 4th and 5th Defendants, the case of Kenya Pipeline Company (supra) was cited in support. The court was also urged to award the costs of the suit.

1st Defendant's submissions.

80. The 1st Defendants submissions were dated 24th January 2024. Counsel for the 1st Defendant submitted on the following issues; whether the 1st Defendant is responsible for the alleged flooding of Plaintiff's property alleged to be instigated by rainfall event following construction of the Thika Super Highway and the damages and losses allegedly suffered as a result and whether the 1st Defendant is responsible for the alleged disconnection of the sewer connecting the plaintiff's premises to the main trunk sewer line and the damages and losses allegedly suffered as a result. Citing the case of Kiambu County Tenants Welfare Association -Vs- Attorney General and Another (2017) eKLR it was agreed that the plaintiff has failed to establish his case to the required standard of proof which is on a balance of probabilities.
81. It was argued that the construction work of Thika Super Highway was lawfully carried out by the 2nd Defendant as an independent contractor. The 1st Defendant is not answerable for the alleged test of an independent and competent contractor and reliance was placed on the case of Board of Governors St. Mary's School -Vs- Boli Festus Andrew Sio (2020)eKLR it was also argued that the Plaintiff could not demonstrate how the drainage installation in his property considered the future full use of the road reserve adjacent to the said property, including the use of the road reserve to construct a Super Highway. It was also argued that the fact that the 1st Defendant constructed an additional drainage for stakeholders in this particular section of the Super Highway which is adjacent the Plaintiff's property neither amounts to an indictment of the 1st Defendant nor an admission of culpability of the 1st Defendant. The additional drainage was constructed as part of the normal maintenance of town roads. It was also submitted that the alleged damages and losses incurred by the Plaintiff could not have been as a result of a rainfall event that happened only once in the month of April 2012. There was no recurrence of the storm water flooding of the Plaintiff's property. The 1st Defendant designed and installed adequate and effective drainage infrastructure along Thika Super Highway to ensure that increased surface run off on the road attributed to natural rainfall did not cause damage to neighboring properties. The damages and losses allegedly suffered by the Plaintiff if at all cannot be attributed to the 1st Defendant.
82. On whether the 1st Defendant is responsible for the alleged disconnection of the sewer connectivity to the Plaintiff's premises to the main trunk sewer line and the damages and losses allegedly suffered, it was submitted that an employer is not responsible for the actions of an independent contractor and that the 1st Defendant being the employer was not legally answerable for the alleged acts of an independent and competent contractor such as the 2nd Defendant.
83. It was submitted that it was the responsibility of the 3rd Defendant and 4th Defendant herein being the owner of the sewer infrastructure and the agent of provisions of the sewer services respectively and reliance was placed on the case of ELC No 930 of 2012, Joseph Wathua Kigwe and Another -Vs- Kenya National Highway Authority and 4 Others.
84. It was further submitted that the design and construction of the Thika Super Highway was neither the direct nor indirect factor that caused storm water flooding of the basement of Plaintiff's property nor was the 1st Defendant responsible for the sewer works which the Plaintiff complained of. In respect to



the Plaintiff's claim of special damages. It was submitted that the Plaintiff had stated in its plaint that it would give particulars of the special damages but the Plaintiff never amended its plaint to give those particulars. The court was urged to dismiss the same with the costs.

The 2nd Defendant's submissions

85. The 2nd Defendant filed its written submissions dated 17th February 2024. Counsel Submitted on the following Issues; whether the Defendants are jointly liable for negligence and the resulting damage occasioned to the Plaintiff and who would bear the cost of the suit.
86. It was argued that from the evidence adduced, there was no design nor construction flaw, no particulars of negligence were pleaded on the part of the 2nd defendant, the cases of ELC No. 930 of 2012 Joseph Wathua Kiguwe (Supa) and Mount Elgon Hardware -Vs- United Millers Ltd (1996) eKLR were cited in support.
87. The court was equally urged to dismiss the Plaintiff's suit with the court

The 3rd Defendant's submissions

88. The 3rd Defendant filed its submissions dated 16th February 2024. The following issues were outlined for consideration by the court; whether the 3rd Defendant is liable for the negligence and /or inaction of an independent contractor, whether the plaintiff has proved its case and whether the Plaintiff is entitled to the special and general damages sought and cost of the suit.
89. Citing the cases of Lalji Bhimji Sanghani and Another -Vs- Chemilabs (1978) 3 eKLR and Board of Governors St Marys School -Vs- Boli Festus Andrew Sio (2020) eKLR and an extract from Charlesworth on Negligence 4th Edition, Sweet and Maxwell, it was submitted that the Plaintiff has not demonstrated that the alleged blockage and delinking of the sewer line was attributed to the 3rd Defendant. The same was as a result of the negligent act of the independent contractor contracted by the 1st Defendant to construct the Thika Super Highway and the 3rd Defendant cannot be held responsible for such negligent actions. It was also submitted that the alleged blockage of water and sewer lines occurred around April 2012, a period which the 1st Defendant and its contractor Motorways Construction were working on the relocation of the water ways and it was undisputed that the 1st Defendant was in charge of the relocation works since March 2011.
90. It was further submitted that Engineer David Mutonyi did not have a valid license and was not registered and hence not qualified to prepare his report. The court was urged to disregard the said report.
91. In respect of the claim for special and general damages it was argued that the same has not been proved. The Plaintiff did not provide bank statements, receipts, income statements and tax returns to establish his claim of loss of rent of Kshs 1,500,000/=. There was no valuation report done nor any competitive bidding for the repair works. The Plaintiff had not established and proved its claim for general damages, no general damages have been specifically pleaded as against the 3rd Defendant. The court was urged to dismiss the suit with costs.

The 4th Defendant's submissions

92. In its written submissions dated 1st February 2024, the 4th Defendant submitted on the following issues; whether the plaint meets the legal threshold to warrant the issuance of the prayers sought and to whom should costs be awarded to. It was submitted that the Plaintiff has not laid any claim to the actions of the 4th Defendant nor is there any claim alleged to have been done to an action or commission nor



inaction on the part of the 4th Defendant. The Engineer was not licensed by the Engineers board and hence was not a qualified expert.

93. In respect to the reliefs sought by the Plaintiff, it was submitted that the Plaintiff seemed to have abandoned the prayers for mandatory injunction in its respective submission. In respect to the prayers for general damages it was submitted that the Plaintiff was not entitled to the same because it did not submit any authority to support the said claim. In respect to special damages, it was submitted that the same was not particularized and as such it was not for granting. The court was urged to dismiss the suit with costs.

The 5th Defendant's submissions.

94. The 5th Defendant urged the court to consider its written submissions dated 12th February 2024 though it did not call any witness to testify on its behalf. Counsel outlined the following issues for consideration by the court; whether there is a cause of action against the 5th Defendant and whether the Plaintiff has proved its case the 5th Defendant on a balance of probabilities.
95. It was argued that the 5th Defendant does not share any mandate with the 1st Defendant. The 5th Defendant does not share any responsibilities with any of the other Defendants and as such no action on the part of the 5th Defendant gave the Plaintiff a cause for complaint. The 5th Defendant concluded its submissions by urging the court to dismiss the suit against it with costs.

Analysis and Determination.

96. The court has considered the pleadings of the parties, the evidence adduced and written submissions filed and has outlined the following salient issues for consideration;
- I. Whether the Defendants are liable for negligence and the loss and damage occasioned to the Plaintiff.
 - II. Whether the Plaintiff is entitled to the reliefs sought.
 - III. What orders should issue as to costs of the suit herein.
97. The court shall now proceed to examine the said issues sequentially.

Issue No 1. Whether the Defendants are liable for negligence and loss and damage occasioned by to the Plaintiff.

98. An Examination of the Plaintiff's suit is that it alleges that during the construction of Thika Super Highway the 2nd Defendant destroyed and sealed part of the main sewer and also the part connecting the Plaintiff's premises to the main sewer, as a result of which during heavy rains in April 2012, there was flooding and all the muddy water and debris flowed into the basement of the Plaintiff's property occasioning huge loss to the Plaintiff. The 1st Defendant was faulted for failing to supervise the 2nd Defendant during the construction of the particular section of the road that led to the misfortune of the Plaintiff. The 3rd Defendant was faulted for being responsible for the sewer line and ought to have ensured that the same is not blocked. The 4th Defendant on the other hand was faulted for being responsible for draining sewer within the city of Nairobi and was bound to ensure that the sewer line is not blocked without an alternate line being provided to serve the Plaintiff's premises. The 5th Defendant was faulted for sitting back and just watching as the Plaintiff's property was being washed away.



99. It does emerge from the evidence adduced during trial that the 1st Defendant contracted the 2nd Defendant to undertake the construction of the road. It also emerged that the Plaintiff's property was located at the lowest point along the section of the road that was under construction. It was also evident that while the 2nd Defendant was contracted to construct the road another entity known as Funan Construction Company was contracted to relocate the sewer line. It also emerged that Funan construction company limited failed to undertake the said works. It was also evident from the evidence adduced that when Funan Construction Company failed to do the works, the 1st Defendant contracted Motorways Construction Company to relocate water and sewerage facilities along that section of the Thika Super Highway.
100. The question then that the court needs to consider at this stage is if at all the actions of the Defendants herein were negligent to the extent that the Plaintiff suffered loss and damages owing to the heavy rains experienced in April 2012.
101. It is not in doubt that the construction of the road affected the Plaintiff's sewer line which had not been fixed as at April 2012 when the Plaintiff's property was affected by the rains. The evidence adduced herein confirmed that the 3rd Defendant was responsible for supervising the reconnection of the Plaintiff's property to the sewer. The 1st Defendant had contracted the 2nd Defendant to construct the road but the 2nd Defendant was not in charge of the relocation of the sewer lines. The 1st Defendant in an attempt to remedy the situation had contracted the Funan Contractors who failed to do the work and later constructed Motorways Construction who were specialized in that area. The sewerage reconnection works were started after April 2012 when the Plaintiff had already suffered loss and damage to its property.
102. The 1st Defendant had a statutory duty imposed on it in respect to the construction of the Thika Super Highway. While the 1st Defendant tried to absolve itself by blaming the 2nd Defendant and other contractors, it did not furnish this court with the agreement it had with the said contractors and further it did not join the said contractors as parties to this suit.
103. The 1st Defendant was negligent in its actions and owed a duty of care to all the road users including the Plaintiff herein and it breached the said duty. In *Blyth v Birmingham Water Works Co* [1856]
- “Negligence is the omission to do something which a reasonable man, grieved upon those considerations which ordinarily regulate the conduct of human affairs, would do or something which a prudent and reasonable man could not do.”
104. The 1st Defendant commissioned the project which no doubt had very good intentions but failed to consider the impact on adjacent roads and road users and business on the roads. It was the responsibility of the 1st Defendant to ensure that as it sought to sort out one problem, it did not create other problems.
105. The 3rd Defendant as earlier stated was responsible for the sewer lines. It failed to adequately supervise the relocation of the sewer lines during the construction of the road and this occasioned loss and damage to the Plaintiff's premises during the heavy rains of April 2012. The 1st and 3rd Defendant owed a duty of care to the Plaintiff and they adequately failed in doing so. They cannot escape liability not to mention that as public entities they had a responsibility to safeguard the Plaintiff's right to a clean and healthy environment and in the circumstances, it is the finding of this court that they are liable for the loss and damage suffered by the Plaintiff. The claim against the 2nd, 4th and 5th Defendants was not proved and this court does not find any fault on their part and as such they are not liable.



Issue No. 2 Whether the Plaintiff is entitled to the reliefs sought.

106. The Plaintiff sought for an order of mandatory injunction together with special and general damages as against the Defendants, however in its written submissions, the Plaintiff appeared to have totally abandoned the relief of mandatory injunction and it never addressed the court on the same and as such the court would not pronounce itself on the said relief.

107. In respect to special damages it is trite law that special damages must be pleaded and strictly proved. In *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited* [2016] eKLR, the Court of Appeal reiterated that it is a legal requirement that apart from pleading special damages, they must also be strictly proved with as much particularity as circumstances permit. In *Jogoo Kimakia Bus Services Limited v Electrocom International Limited* [1992] eKLR, the Court of Appeal stated: -

“The distinction between general damages and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”

108. Equally the Court of Appeal in the case of *Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd* [2013] eKLR stated as follows: -

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.

In the *Jivanji* case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes *Coast Bus Service Limited v Murunga & Others Nairobi CA No. 192 of 1992 (ur)* appears in the *Jivanji* case:

“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of *Kampala City Council vs Nakaye* [1972] EA 446, *Ouma v Nairobi City Council* [1976] KLR 297 and the latest decision of this Court on this point which appears to be *Eldama Ravine Distributors Limited and another v Chebon Civil appeal number 22 of 1991 (UR)*. In the latest case, *Cockar JA* who dealt with the issue of special damages said in his judgment:

“It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In *Ouma v Nairobi City Council* [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. *Chesoni J* quoted in support the following passage from *Bowen LJ*'s judgment at 532-533 in *Ratcliffe v Evans* [1892] QB 524, an English leading case of pleading and proof of damage.

“The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with



which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

109. In this instant case the Plaintiff was unable to specifically prove its claim of special damages to the required standard and neither was it specifically pleaded as such, the same is declined.
110. As regards to general damages, general damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. In the case of *A.A.M. Vs Justus Gisairo Ndarera & Another* (2010) eKLR the court held;

“Money cannot renew a physical frame that has been battered and shattered and all the courts can do is to award sums which must be regarded as giving reasonable compensation and the award must be fair---”.

111. The Plaintiff did not submit on any quantum to guide the court in assessing general damages. The court would have expected the Plaintiff to do so in its submissions but none was provided. That notwithstanding this court is still obligated to consider the same as general damages are awarded as recognition of an infringement of a legal right or duty. The award of general damages is also a discretion of the court and this court having found liability on the part of the 1st and 3rd Defendant, it shall proceed to award what may be deemed as adequate compensation.
112. In the case of *Kigwe and another -Vs- Kenya National Highways Authority and 4 others* (Environment and Land case civil suit 930 of 2012)(2023) KEELC 18472 (KLR) (16TH March 2023) Judgement, which had similar circumstances like the instant case, the cost awarded Kshs 500,000/= equally in the case of *Mwangi -Vs- China Road and Bridge Corporation (Environment and Land court case E409 OF 2021)*(2022)KEECL 15-96 (KLR) 24 November 2022 (Judgement), the court awarded general damages of Kshs 1,000,000/= . Considering all the circumstances herein and being guided by the aforementioned cases, this court shall proceed to award general damages of Kshs 2,000,000/= Each of the 1st and 3rd Defendants to pay to the Plaintiff a sum of Ksh 1,000,000/=.

Issue No. 3 What orders should issue as to costs of the suit.

113. In respect to costs of the suit, Section 27 of the *Civil Procedure Act* grants the court discretionary power in the award of costs which ordinarily follow the event unless the court for good reasons orders otherwise. In the instant case, considering that the Plaintiff's claim has succeeded only as against the 1st and 3rd Defendants, the Plaintiff shall be entitled to the costs of the suit payable by the 1st and 3rd Defendants herein.
114. In its closing remarks, this court wishes to express its sincere gratitude to each and every counsel who appeared in this matter for their industry and able presentation of their respective client's cases.

Final Orders.

115. In conclusion, it is the finding of this court that the Plaintiff has indeed proved its case to the required standard as against the 1st and 3rd Defendants and this court proceeds to enter judgment in favour of the Plaintiff as against the 1st and 3rd Defendants in the following terms;



- i. General damages are awarded to the Plaintiff in the sum of Kshs 2,000,000/-. Each of the 1st and 3rd Defendants to pay Ksh 1,000,000/-.
- ii. The Plaintiff's claim against the 2nd, 4th and 5th Defendants is hereby dismissed.
- iii. 1st and 3rd Defendants to pay the Plaintiff's costs of the suit.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON 30TH MAY 2024

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Thenya and Mr. Masafu for the Plaintiff.

Mr. Obok for the 1st Defendant.

Mr. Ochieng for the 2nd Defendant.

Mr. Odoyo for the 3rd Defendant.

Mr. Kithinji for the 4th Defendant.

Ms. Nyakundi h/b for Mr. Okeyo for the 5th Defendant.

Court Assistant; Caroline Nafuna.

