



**Imanyara v Bekya Floriculture Limited & 3 others (Environment & Land Case 423 of 2014) [2024] KEELC 6636 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 6636 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 423 OF 2014**

**MD MWANGI, J**

**JUNE 27, 2024**

**BETWEEN**

**MILTON MUGAMBI IMANYARA ..... PLAINTIFF**

**AND**

**BEKYA FLORICULTURE LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**YAACOV MAIMON ..... 2<sup>ND</sup> DEFENDANT**

**ELGON KENYA ..... 3<sup>RD</sup> DEFENDANT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 4<sup>TH</sup>  
DEFENDANT**

**JUDGMENT**

**Background**

1. The Plaintiff filed this case vide the Plaint dated 31<sup>st</sup> March, 2014 filed in Court on 4<sup>th</sup> April, 2014. His claim was that he was at all material times the registered owner of L.R. No. 18997/32, Redhill in Kiambu County whereas the Defendants were the owners of the adjoining properties known as L.R. No. 18997/23 and 18997/27 separated from the Plaintiff's property by a Public Road.
2. The Plaintiff alleges that the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants jointly or severally excavated on their parcels of land without the authority or approval of the 4<sup>th</sup> Defendant, the National Environment Management Authority (NEMA), thereby exposing the Public Road adjacent to the said parcels to landslides and soil erosion, an act that reduced the width of the public road by about 5 metres. The Plaintiff particularized the damage on the road at paragraph 7 of his plaint. The particulars pleaded included excavating the public road without authority, failing to obtain approval of the excavation works from the relevant government and local authorities, failing to take the necessary measures to restore the public road to its original width and condition, causing the neighbouring properties to lose value due



- to the wanton loss and damage to the only access road and making the public road inaccessible by heavy commercial vehicles.
3. The Plaintiff contended that the 4<sup>th</sup> Defendant (NEMA) had neglected its statutory duty of enforcing environmental Laws and Regulations against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants thereby causing the degradation of the aforesaid public road. The Plaintiff further alleged that the 4<sup>th</sup> Defendant was in the process of issuing authority to the 3<sup>rd</sup> Defendant to grow cultural herbs on the two parcels of lands, L.R. No. 18997/23 and 18997/27 which act would lead to further degradation and destruction of the public road due to increased activities on the road. The Plaintiff pleaded that the alleged negligence by the 4<sup>th</sup> Defendant had caused damage and loss to him and the public at large.
  4. Consequently, the Plaintiff prayed for judgment against the Defendant jointly and severally, for:
    - a. A Mandatory injunction directing and compelling the Defendants to restore the public road adjoining the L.R. No. 18997/23 and 1899/27 to its original level and width.
    - b. An order directing the 4<sup>th</sup> Defendant to supervise and approve the aforesaid restoration works and file a report with this Honourable Court certifying successful completion of the restoration works.
    - c. Pending compliance with (1) and (2) above, and the hearing and determination of this suit, a prohibitory order directing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants not to develop, transfer, charge, sell, lease or in any other whatsoever part with possession or ownership of L.R. No. 18997/23 & 18997/27.
    - d. General damages and costs of the suit.
  5. I need to point out that prayer (c) was an interim prayer, pending hearing and determination of the suit. It is therefore spent.
  6. The Plaint filed by the Plaintiff was accompanied by a witness statement of Milton M. Imanyara, the Plaintiff, dated 31<sup>st</sup> March, 2014 and a list of documents listing 8 documents, of even date. The Plaintiff made a subsequent witness statement dated 20<sup>th</sup> June, 2019 and filed a further witness statement by one, Jane K. Miriti, a valuer, dated 20<sup>th</sup> June, 2019. He too added two more documents to his list of documents making them 10 in total.

### **Response by the Defendants**

7. All the 4 Defendants responded to the Plaintiff's claim vide their respective statements of Defence.
8. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a joint statement of Defence dated 9<sup>th</sup> June, 2014 accompanied by a witness statement of YAACOV MAIMON, the 2<sup>nd</sup> Defendant, of even date.
9. In their joint statement of Defence, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants essentially denied the Plaintiff's claim. Though they admitted that the 1<sup>st</sup> Defendant owned parcels L.R. No. 18997/23 and 18997/27, they denied that the said parcels adjoined the Plaintiff's parcel L.R No. 18997/32 Redhill in Kiambu County or that they were separated by a public road. They further denied the Plaintiff's claim that they jointly or severally excavated the parcels of L.R. No. 18997/23 and 18997/27 or that they did so without authority as alleged by the Plaintiff, putting the Plaintiff to strict proof.
10. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied damaging the Public road as alleged by the Plaintiff. They not only denied the allegations of damage as pleaded by the Plaintiff but further denied any responsibility for the alleged damage and loss. Instead, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants asserted that it was not their responsibility



- to make or repair the road which had been worn out by run off rain water emanating from the farms uphill including that of the Plaintiff. The failure, if any was by the responsible public authorities to properly channel and direct the run-off rain water to drain away from the road which runs downhill.
11. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants termed the Plaintiff's suit against them misconceived and without merits. They prayed for its dismissal with costs.
  12. The 3<sup>rd</sup> Defendant's statement of Defence is dated 29<sup>th</sup> May, 2014. The 3<sup>rd</sup> Defendant denies the Plaintiff's claim in its entirety. The 3<sup>rd</sup> Defendant in its statement of Defence was emphatic that the Plaintiff had not exhausted the Dispute resolution mechanisms provided for under section 31 of the *Environmental Management and Co-ordination Act* (EMCA), 1999 before filing this suit in court. The 3<sup>rd</sup> Defendant therefore termed the Plaintiff's suit frivolous, malicious and an abuse of the process of Court. It prayed for its dismissal with costs.
  13. The 4<sup>th</sup> Defendant on its part responded to the Plaintiff's claim by way of the statement of Defence dated 9<sup>th</sup> September, 2014. It averred that the Plaintiff had never filed any complaint against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants with it over the alleged excavations until the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants applied for an Environment Impact Assessment (EIA) License to undertake small Scale Crop farming for herbs much later. It was only during the public hearings for purposes of the EIA license that the Plaintiff raised the issue of excavation of the road which had been done by the previous owners of the properties. The Plaintiff in fact attended the public hearing at the invitation of the 4<sup>th</sup> Defendant.
  14. The 4<sup>th</sup> Defendant denied issuing a license for the project as alleged by the Plaintiff. It therefore denied neglecting its statutory duties and prayed for dismissal of the Plaintiff's suit.

#### **Evidence adduced**

15. This case proceeded to full hearing with the Plaintiff calling 2 witnesses. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants called 1 witness whereas the 3<sup>rd</sup> and 4<sup>th</sup> Defendants called 1 witness each.

#### **Evidence adduced on behalf of the Plaintiff**

16. The Plaintiff testified as the 1<sup>st</sup> witness in his case (PW1). He adopted his 2 witness statements dated 20<sup>th</sup> June, 2019 and 31<sup>st</sup> March, 2014 as his evidence in chief. He too produced as exhibits in support of his case the documents marked as 1-9 on his lists of documents.
17. Responding to questions from the Defendant's Advocates, the Plaintiff stated that the 'search' he had filed as an exhibit was conducted on 6<sup>th</sup> December, 2012 immediately after he acquired the land-parcel No. L.R. 18997/32. The conveyance transferring the land to him was dated 6<sup>th</sup> November, 2012. The purchase price was indicated as Kshs 6.0 million in the conveyance. He transferred the land to Capital Reality Limited sometimes in the year 2015 for Kshs 95,000,000/=.
18. confirmed that the activities he complains about in this suit happened sometimes in the year 2009. By then, the land-parcel No. L.R. 18997/32 had not been transferred to him though he had started paying for it from the year 1989. He had been paying the purchase price by installments. The land-parcel No. L.R. 18997/32 was only transferred to him when he concluded paying the installments. He had been in possession of it though, all through.
19. further stated that the public road had worn off on the sides as a consequence of the excavations in the Defendants' land. Though the activities complained off happened in 2009, the current suit was only filed in the year 2014. The Plaintiff had been hoping that the 1<sup>st</sup> Defendant would take responsibility for the damage to the road and restore it.



20. The Plaintiff claimed that the value of his land was affected by the degradation of the road. According to the valuation conducted by his valuer, the open market value of the Land (in the state at which the road was) was Kshs 92 million. The value would have been Kshs 100,000,000/= if the road had been rehabilitated.
21. Answering questions from Mr. Wafula Advocate on behalf of the 3<sup>rd</sup> Defendant, PW1 stated that the previous owners of the land who were the registered owner of the land in the year 2009 was Bhanumati Ratilal. The Plaintiff affirmed that he was not aware of any complaints filed by the previous owner against the Defendants.
22. At the time of filing his suit, the Plaintiff stated that the 3<sup>rd</sup> Defendant was in possession of the adjoining parcels of land.
23. The Plaintiff asserted that his complaint was in respect of the damage on the public road not on his land. The damage on the road had however, caused him suffering. He had not filed any complaint with the National Environmental Complaints Committee (NECC) or the tribunal established under EMCA before filing this suit in court.
24. Responding to questions by Ms. Sakami, Advocate for the 4<sup>th</sup> Defendant, the Plaintiff confirmed that he was in Court because of the excavations that had affected the public road. PW1 asserted that NEMA had a responsibility to ensure that the activities in the private parcels of Land would not escalate and cause damage to the public road. The Plaintiff indicated that he had no objection to the project proposed by the 3<sup>rd</sup> Defendant in his land; his only concern was the damage to the road.
25. Responding to questions from the Court, PW1 indicated that the road he was complaining about was an earth road and an access road. At the date of the hearing of the case, the road was in the same condition as it had been at the time of filing suit. The Plaintiff though had transferred his land to a 3<sup>rd</sup> Party as a way of mitigating his loss.
26. PW2 was Jane Miriti, a valuer practicing with Capital Valuers Ltd. She adopted her witness statement of 20th June, 2019. She further produced the valuation report dated 21<sup>st</sup> October, 2014, as PE 10.
27. It was the testimony of the valuer that the excavations in a neighbouring plot had affected the access road consequently diminishing the value of the Plaintiff's plot in some way.
28. The valuer confirmed visiting the Plaintiff's Land for purposes of valuation. In the course of undertaking the valuation, she was able to pass through the access road (the subject matter of this suit). She confirmed that the road narrowed towards the bridge. The road was supposedly 30 feet wide but had reduced by almost half due to the excavations. The excavation was in the adjacent parcel of land. The valuer stated that the excavation had just happened as she could tell from her own observation. It was looking freshly excavated. Though she had used the comparisons' approach, she had not attached evidence of the values of the comparable parcels of land she had relied on to arrive at the value of the Plaintiff's land.
29. Responding to Advocate Wafula for the 3<sup>rd</sup> Defendant, PW2 confirmed that she had not attached any documents to confirm that she was a registered valuer. She further affirmed that the degradation of the road cannot entirely be attributed to the activities in the neighbouring land. Erosion by run-off rainwater had also contributed to the degradation of the road. She had no maps to confirm that the access road was supposed to have been 30 feet wide as she had stated. The survey map she had produced did not show the width of the access road. She had also not shown any measurements and calculations in her report.



## Evidence adduced on behalf of the Defence

30. DW1 was MR. YAACOV MAIMON, the 2<sup>nd</sup> Defendant in this case. He adopted his witness statement dated 9<sup>th</sup> June, 2014 as his evidence in chief.
31. DW1 stated that the degradation on the access road complained of by the Plaintiff was caused by run-off rain water since it was an earth road. He denied carrying out any excavations as alleged by the Plaintiff. The witness produced the documents on the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's list of documents dated 2nd February, 2021. He stated that the Plaintiff was only registered as a proprietor of his parcel of land on 20<sup>th</sup> November, 2012 before subsequently selling it off at Kshs 95 million in the year 2015.
32. In cross-examination, DW1 stated that the levelling in his land was done in the year 2009 for purposes of green houses. He subsequently sold the properties to the 3<sup>rd</sup> Defendant around the year 2014.
33. Responding to Ms. Muriithi, Advocate for the Plaintiff, DW1 confirmed that in the year 2009, he was the owner of L.R No. 18997/23 and 18997/27 which are separated by what used to be the Plaintiff's land by an access road. He denied conducting any excavations on his land. What he had done was levelling his land for purposes of green houses.
34. DW2 was Rehema Muthuga, the legal officer of the 3<sup>rd</sup> Defendant Company. She adopted her witness statement dated 10<sup>th</sup> December, 2020 as her evidence in chief. She further produced as exhibits, the documents on the 3<sup>rd</sup> Defendant's list of documents and the additional bundle dated 31<sup>st</sup> January, 2021 as exhibits in support of the 3<sup>rd</sup> Defendant's case.
35. In cross-examination, the witness testified that the road, the subject matter of this case descends into the dam area then ascends to where the Plaintiff's land is. It is an earth road. The 3<sup>rd</sup> Defendant acquired the land from the 1<sup>st</sup> Defendant in 2011.
36. DW2 stated that the 3<sup>rd</sup> Defendant was not issued with a license by NEMA and they have not commenced the activity they had intended to on the land.
37. Responding to Ms Muriithi, Advocate for the Plaintiff, DW2 stated that the 3<sup>rd</sup> Defendant was still the proprietor of the parcels of land previously owned by the 1<sup>st</sup> Defendant. She confirmed that the 3<sup>rd</sup> Defendant had commissioned an EIA report which had been produced as an exhibit in the case. It was prepared in the year 2013 - in the month of August. They were however yet to get an EIA license from NEMA. They have consequently not been able to utilize their land for the intended purposes.
38. DW3 was Josey Njoki Mukuri, an employee of the 4<sup>th</sup> Defendant who was the County Director in Charge of Kiambu in the year 2013. She adopted the witness statement dated 3<sup>rd</sup> January, 2019 as her evidence in chief. She too produced the documents listed on the 4<sup>th</sup> Defendant's list of Documents dated 9<sup>th</sup> September, 2014 as exhibits in support of the 4<sup>th</sup> Defendant's case. She confirmed that NEMA did not issue an EIA License to the 3<sup>rd</sup> Defendant.
39. Responding to Mr. Kairaria, Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, DW3 confirmed that NEMA did not visit the site. Further that the Plaintiff's issue was only in regard to the road. NEMA did not conduct the public hearing that would have culminated into the issuance of an EIA license in respect to the 3<sup>rd</sup> Defendant's proposed project.



## **Court's Directions**

40. Upon the close of the hearing, the court directed parties to file written submissions within the timelines stipulated. All the parties except the 4<sup>th</sup> Defendant complied. The Court has had the opportunity to read and consider the said submissions, which form part of the record of this Court.

## **Issues for Determination**

41. Before framing the issues for determination in this matter, I wish to point out as I did earlier on, that the Plaintiff in his Plaint sued the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants 'as joint owners of L.R. No. 18997/23 and 18997/27' accusing them of excavating on the said parcels without authorization and causing damage to the public road separating the aforementioned parcels with his own land in the year 2009. That was the pleading filed by the Plaintiff.
42. It is trite Law that parties are bound by their pleadings. In the case of IEBC & ANOTHER –VS- STEPHEN MUTINDA MULE & 3 OTHERS [2014] eKLR, the Court cited with approval the decision of the Malawi supreme Court of Appeal in MALAWI RAILWAYS LTD -VS- NYASULU [1998] MWSC3, where the Court quoted with approval an article by Sir Jack Jacob entitled, "the Present Importance of Pleadings", published in 1960, current legal Problems, at page 174 whereof the author stated that:
- “As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a difference and fresh case without due amendments properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves.”
43. I find it necessary to bring this out at this stage because I have noticed that the Plaintiff in his submissions has attempted to reframe his case. The Plaintiff in his submissions states that he was the registered owner of L.R. No. 18997/32 situated at Redhill Kiambu County and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were the registered owners of L.R. No. 18997/23 and 18997/27. He leaves out the 3<sup>rd</sup> Defendant in his submissions.
44. One issue that must be determined then is whether the Plaintiff has established any Lawful claim against the Defendants jointly and or severally. The 2<sup>nd</sup> issue that the court will need to determine is whether the Plaintiff has proved his case on a balance of probabilities before proceeding to decide whether the Plaintiff is entitled to the orders sought in his plaint including the costs of the suit.

## **Analysis and Determination:**

### **A. Whether the Plaintiff has established any lawful claim against the Defendants jointly and severally**

45. Beginning with the 3<sup>rd</sup> Defendant, it was established in evidence that the 3<sup>rd</sup> Defendant acquired the land from the 1<sup>st</sup> Defendant in the year 2011. As at the alleged time when the excavations complained of by the Plaintiff were allegedly made, the 3<sup>rd</sup> Defendant had nothing to do with the parcels of land L.R No.18997/27.
46. The Plaintiff having realized this fact has in submissions reframed his case leaving out the allegation against the 3<sup>rd</sup> Defendant as one of the registered proprietors of the subject parcels. The Plaintiff cannot therefore on the basis of ownership of the land maintain a claim against the 3<sup>rd</sup> Defendant neither



against the 2<sup>nd</sup> Defendant. The evidence produced by the Plaintiff shows that the subject parcels are owned by the 1<sup>st</sup> Defendant. Under Common Law, there is a principle of Company Law of long antiquity pronounced by the House of Lords in *Salomon vs Solomon & Co. Ltd* (1897) AC 22, that a Limited Liability Company has a legal existence independent of its members and that a company is not an agent of its members.

**B. Whether the Plaintiff has proved his case on a balance of probabilities;**

47. The Plaintiff's case is that the 1<sup>st</sup> & 2<sup>nd</sup> Defendants excavated on their land without authorization by the 4<sup>th</sup> Defendant causing damages to the public road lying between what was their land and the Plaintiff's land. Consequently, that the said damage to the road caused the Plaintiff's land to diminish in value.
48. The 1<sup>st</sup> & 2<sup>nd</sup> Defendants denied the Plaintiff's claim. DW1, YACOOV MAIMON who testified on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied carrying out any excavations on the land; rather all that they did was level the land for purposes of green houses to grow flowers. He further stated that the alleged damage to the road was as a result of run-off water caused by the rain.
49. The burden of proof was certainly on the Plaintiff to prove his case on a balance of probabilities. As the Court of Appeal stated in the case of *PALACE INVESTMENT LTD -VS- GEOFFREY KARIUKI MWENDA & ANO* (2015) eKLR, the burden of proof in civil cases is on a balance of preponderance of probabilities. The court referred to the holding by lord Denning in *MILLER -VS- MINISTER OF PENSIONS* (1947) 2 ALLER 372, where he stated that, ‘  

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not. This burden on a balance of preponderance of probabilities means a win however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties ....are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained”.
50. The Plaintiff in this case being the “burden carrier” so to speak had a duty to prove, first and foremost the existence of the public road and its measurements. PW2 who was the expert witness called by the Plaintiff was no clear on the issue.
51. It is pertinent at this juncture to state that access roads constitute what is referred to under the fourth schedule of *the Constitution* of this Country as ‘County roads’ and whose mandate falls under County Governments. The National Government is only responsible for construction and operation of ‘national trunk roads’. The County government of Kiambu is therefore the one in charge of the access road, the subject matter of this road. It is clear from the pleadings that the parcels of land in this matter are in Kiambu County.
52. Nowhere in his pleading or evidence has the Plaintiff demonstrated that he made a complaint on the alleged destruction of the road to the County Government of Kiambu. The 4<sup>th</sup> Defendant has nothing to do with maintenance of roads.
53. PW2 further in response to a question put to her in cross-examination admitted that the degradation of the road could not entirely be attributed to the alleged actions by the 1<sup>st</sup> & 2<sup>nd</sup> Defendants, if at all. Run-off rain water must have contributed to the degradation of the road. She did not apportion what percentage was attributed to the alleged actions by the Defendants and that one attributable to run off



- rain water. PW2 too was merely a valuer. She did not have the expertise to give an informed opinion on the issue i.e. the alleged degradation of the access road.
54. The Plaintiff did not call any expert to support his claims of the degradation of the road as a direct consequence of the alleged actions in the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' parcels of land. He relied on his own layman opinion. His case against the Defendants therefore amounts to mere allegations without proof. There is not an iota of evidence to link the alleged actions in the 1<sup>st</sup> Defendants' parcels of land with the alleged degradation of the road. Considering his case on a balance of probabilities, the court finding is that the Plaintiff has not proved his case as by law required.
55. The last issue to consider is whether the Plaintiff's parcel of land actually diminished in value as alleged. The Plaintiff relied on the evidence and report of PW2, a valuer.
56. I must state that the valuer did not adduce evidence before the court on her qualifications as a valuer; an expert. Indeed there was nothing placed before the court to prove that she was a valuer.
57. Regarding the alleged degradation of the road, PW2 did not even have an authenticated map to help in the determination of the width of the access road that was alleged to be 30 metres wide leave alone its existence. She did not even attach to her reports the measurements taken on the road or even the tabulation of her calculations to demonstrate how she arrived at her conclusions.
58. The Court of Appeal in the case of *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139* held that:
- “... such opinions (expert opinions) are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”
59. In *Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29*, the court held that:
- “It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so.”
60. Under cross-examination from Mr. Kairaria, Advocate, PW2 admitted that her valuation was based on the premises that the Plaintiff's land was commercial-cum multi-residential. She had stated in her report that the land was originally agricultural but had been changed to a gated Community, meaning Commercial cum Multi-residential. She however had not been shown the approved change of user confirming the change of user from agricultural to commercial cum multi-residential. Her valuation was therefore based on false assumptions.
61. Interestingly, the witness, PW2 testified that the alleged excavations on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' parcels of Land looked “fresh”. The witness carried out the valuation exercise in the year 2014 whereas the alleged excavations happened in the year 2009. How could the excavations then look ‘freshly excavated’ five years after? One wonders whether PW2 was referring to the same subject matter as the Plaintiff.
62. I find the ‘expert opinion’ of PW2 wanting in credibility and authenticity. I will reject it.



63. Looking at the Plaintiff's case in its totality, the Court is not persuaded that the Plaintiff has established its case on a balance of probabilities.
64. As against the 4<sup>th</sup> Defendant – NEMA, the Plaintiff accused the 4<sup>th</sup> Defendant of neglecting its statutory duty of 'enforcing environmental Laws and regulations' against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, thereby causing the degradation of the access road which eventually in the Plaintiff's land diminishing in value.
65. In Cross-examination, PW1 admitted that he had not made any complaints against NEMA, the 4<sup>th</sup> Defendant to the National Environmental Complaints Committee (NECC) or to the Environmental Tribunal established under the Statute (EMCA).
66. The Jurisdiction of the Environment and Land Court on matters environmental is largely appellate. The *Environmental Management and Co-ordination Act* (EMCA) requires that Complaints against the Authority (NEMA), be lodged either with the Tribunal established therein or the NECC. Appeals lie with this Court.
67. The Plaintiff did therefore exhaust the statutory remedies provided under the statute. He did not bother to offer an explanation for his decision to come to court, thereby overlooking the institutions established under EMCA.
68. The Court of Appeal in the case of Geoffrey Muthinja & Another -vs- Samuel Muguna Henry & 1756 others [2015] eKLR discussing the exhaustion doctrine held that:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Court is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews ..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of Courts. This accords with article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”
69. The Plaintiff effectively failed to exhaust his remedies and short-circuited the process by filing this suit prematurely against the 4<sup>th</sup> Defendant.
70. Additionally, the Plaintiff's suit against the 4<sup>th</sup> Defendant was vague. He did not specify the environmental Laws and regulations that the 4<sup>th</sup> Defendant failed to enforce against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants while no complaint had been lodged with it. His prayer that the 4<sup>th</sup> Defendant supervises the restoration of the access road too was misinformed. As I stated earlier, it is the responsibility of the County Government under whose jurisdiction the road falls that has the mandate to maintain access roads. The Plaintiff's claims against the 4<sup>th</sup> Defendant were generalized and did not disclose any reasonable cause of action against the 4<sup>th</sup> Defendant.
71. Consequently, the Plaintiff's case against all the Defendants fails. It has not been proved as by Law required.
72. On the issue of costs, the general rule under Section 27 of the *Civil Procedure Act* is that costs follow the cause. Accordingly, the Plaintiff shall bear the costs of his suit.

It is so ordered.



**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF JUNE 2024.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Ms. Muriithi for the Plaintiff

Mr. Kairaria for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr. Wafula for the 3<sup>rd</sup> Defendant

N/A for the 4<sup>th</sup> Defendant

Yvette: Court Assistant

**M.D. MWANGI**

**\_\_JUDGE**

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