Ahmed & another v Kenya Electricity Generating Company Limited & another (Environment & Land Case 10 of 2017) [2024] KEELC 5551 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5551 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ENVIRONMENT & LAND CASE 10 OF 2017

JM MUTUNGI, J

JULY 25, 2024

BETWEEN

AHMED DOLAL, MUSA AHMED ..... 1ST PLAINTIFF

FATUMA KADID & 7 OTHERS ..... 2ND PLAINTIFF

AND

KENYA ELECTRICITY GENERATING COMPANY LIMITED 1ST DEFENDANT

KENYA POWER AND LIGHTING CO. LTD ..... 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs commenced this suit vide Nairobi HCCC No. 103 of 2005 by a Plaint filed on 18th August 2005 seeking general damages and an injunction against the Defendants to restrain the continued spillage of harmful substances from the Defendant's premises to the Plaintiffs farmland.

2. The Plaintiffs pleaded that they were the registered owners of an extensive farmland located along the Tana River measuring about 110 acres. They averred that their farmland had been damaged by the oil spillage occasioned by the Defendants negligent acts that consequently rendered the farm land unproductive.

3. The Plaintiffs further averred that the oil spillage resulted from the turbines along the Tana River in the County of Garissa, which the Defendants owned and managed.

4. The Defendants filed their respective statements of defence dated 19th September 2005 and 16th September 2005. The 2nd Defendant denied the contents of the Plaint and averred that it was not within its mandate to generate electric power; it further stated that it was not responsible for the handling and/or managing of the petroleum by-products emanating from the power generating plant in Garissa. The 1st Defendant, on its part, admitted that it generates power along the Tana River in Garissa. The 1st Defendant, however, denied that the operation of its power plants had caused oil spillage into the

Plaintiffs farmland. The 1st Defendant further pleaded that, if at all the Plaintiffs farms were damaged, it was caused by the negligent acts of the Plaintiffs themselves. The 1st Defendant further averred that if the oil spillage did, in fact, occur, it was inevitable and a result of an act of God.

5. On 31st October 2005, the Plaintiffs amended the Plaint to include a special damages claim of Kshs. 368,680,000/=, which was again amended further by an Amended Plaint dated 10 May 2011 to reflect special damages of Kshs. 865,500,661/-.

6. The 2nd Defendant amended its statement of defence and filed it on 21st June 2011. In its amended defence, the 2nd Defendant pleaded that the 1st Defendant was a separate legal entity in charge of the Garissa power generating station and, as such, it had been joined in the suit erroneously. The 1st Defendant further pleaded that, if at all the Plaintiffs' farmlands had been damaged, it was because of the Plaintiffs' negligence as their farmlands lay on well-known storm water paths and wetlands.

7. Similarly, the 1st Defendant amended its statement of defence and in the amended defence, the 1st Defendant pleaded that the 2nd Defendant had been properly enjoined in the suit since the acts complained about occurred in 1995 before the 1st and 2nd Defendant had been separated to form distinct entities. It also pleaded the doctrine of volenti nonfit injuria because the Plaintiffs commenced the cultivation of the farmlands long after the 1st Defendant had set up its major power generating station at Garissa.

8. On 22nd May 2023, Counsel for the Plaintiffs made an oral application for further amendment of the amended plaint to conform with the judgment of the Court of Appeal, which struck out the 27 other Plaintiffs. This application was allowed by consent, and the Plaint was amended by striking out the 27 Plaintiffs who had initially been joined in the Plaint as members of the same group as the 1st, 2nd, and 3rd Plaintiffs.

Evidence of the Parties

9. The Plaintiffs called 2 witnesses in support of the Plaintiffs Case. The Government Chemist report was admitted in evidence by consent of the parties as part of the Plaintiff's evidence. Ahmed Dolal Dire(PWI) testified that he was a farmer and the Chairman of Likoley Farm which was approximately 33.58 hectares and was located approximately 1 Km away from the 1st Defendant's power generating facility. He stated that he pays for the farm's land rates and used the farm to cultivate various crops for commercial purposes but the oil spillage that the Defendants had occasioned damaged his farm. He averred that the oil spillage occurred mainly during the rainy season, and when this happened, the oils and other Petroleum byproducts would be deposited in his farm, thus resulting in the damage complained of. Under cross-examination, PW1 testified that he had inherited the farm from his father and had apportioned 2 acres and 10 acres to his son and wife, respectively. He testified that he did not have title to the land and that despite the land being surveyed, he did not have a beacon certificate. He further testified that he used the irrigation method for farming on his land and affirmed that his water pump did not cause the oil spillage. He averred that NEMA visited the farm after they complained about the spillage and carried out inspection which confirmed there was oil spillage. He affirmed that as per the Government Chemist report only some samples had slight contamination. When asked about the separation of the 1st and 2nd Defendant, PW1 stated that he did not know when the 1st Defendant left and when the 2nd Defendant came in. His position was that while their farm was started in 1967, the Respondents took possession of their site in 1984/85.

10. The Plaintiff called Michael Achola Ogola, PW2, who is an Agriculturalist. He testified that when he visited the Plaintiff's farm, the area had flooded, and he had found oil floating on the water. He said that the flood was a result of the rain and an overflow from the 1st Defendant's dam, which had been

opened to spill the overflow. PW2 testified that he advised the farmer on the crop gross margin and seasons. He stated that he prepared a report on all the farmers' losses and made a witness statement incorporating his analysis, which he tendered in his evidence. Upon cross-examination, he affirmed that his report was factual and relied on each crop's gross margin. He testified that to come up with the report, he relied on the farmers' register illustrating their output and the inputs. He confirmed that he visited the farm after the flooding but did not record whether the sales had decreased and/or increased. The witness confirmed that other factors could have contaminated the Tana River but maintained that the 1st Defendant was responsible for the oil spillage because it had constructed a seasonal canal whose purpose was to take away water from the dam. He affirmed that when he visited the scene, he saw a diesel drum belonging to the 2nd Defendant trapped by the Plaintiff's and his brother's fence. He confirmed that at the time, the 1st Defendant was the one generating power within Garissa County.

11. The 1st Defendant called its first witness, Abdi Zeila, DW1, who testified that he was a soil scientist and an environmental risk specialist who works with the World Bank as a Senior Environmental Specialist. He stated that in 2019, he was requested to analyze two test reports on soil, which the Government Chemist had done. Concerning the KARI report, he found that the report had not indicated whether the soil collected was a composite soil sample; the report had not indicated the depth or the geotaling to show where the soil sample had been obtained from. He averred that the report was within the parameters of soils in Garissa. He further stated that there was no evidence of hydrocarbon contamination and low electrical conductivity. Under cross-examination, DW1 stated that the report indicated that 8 samples of soils were collected, and from the 8, only one was contaminated. He further stated that the one found to be contaminated could be said to be an outlier. It was his position that given that the report concerned with land spread over 24 acres the soil samples should have been collected on at least 8 acres to be representative. He admitted that he never visited the farm when it was flooded. He also admitted that he had not visited the 1st Defendant's plant and was unsure whether the 1st Defendant had put any mechanism to prevent oil spillage. He affirmed that he had not indicated whether an oil spill could affect crops.

12. George Odhiambo Ominde the Legal Manager of the 1st Defendant testified as DW2. He stated that the 1st Defendant separated from the 2nd Defendant in 1998. He affirmed the allegations relating to oil spills were made in 1995 which was before their separation. In Cross-examination, he confirmed that on 29.06.2000, the 1st and 2nd Defendant entered into a power-generating asset agreement in which all the assets and liabilities were transferred to the 1st Defendant following their separation. He affirmed that the oil spill complaint started in 1995. He stated the land on which the plant was situated was allocated by the County Council of Garissa to the 1st Defendant.

13. The 1st Defendant called Hussein Ali Somow, who works as an Assistant Environment Manager. He testified that an EIA report on the Garissa Power plant was conducted in the year 2010, and interalia soil samples were collected and analyzed for petroleum hydrocarbon. The test results he said were within the acceptable parameters. He testified that if the soil had been contaminated by reason of an oil spill, the effect would last for a minimum of 20 years. He testified that he started working for the 1st Defendant in 2010 and could not tell whether the 1st Defendant employed any restorative measures to prevent oil spills.

14. The 2nd Defendant called Ann Mutei Mulela, DW4 as its witness. She adopted her witness statement as her evidence. She averred that the 2nd Defendant was wrongly joined in the matter as the 2nd Defendant was not the owner of the power generating plant at Garissa having transferred all its assets to the 1st Defendant. Upon cross-examination, she confirmed that the complaint about the oil spill was made in 1995, while the assets were transferred to the 1st Defendant in the year 2000. She confirmed that she was

not aware about the spillage canal from the power plant to the river. On re-examination, DW4 stated that the 2nd Defendant never owned any Power Generating Plant and that KENGEN owned the same.

Submission of the Plaintiffs

15. The Plaintiff filed their written submissions on 3rd November 2023 and it was their submission that the Defendants should be held strictly liable for the damage caused by the oil spill on their farm. Counsel for the Plaintiffs submitted that the defendants should be held culpable as they are the ones who built and operated the power plant, and as such, the responsibility to ensure that any spillage from the plant did not cause any damage was theirs. Counsel stated that the Defendants permitted waste oil to spill onto their farm where it caused damage. Counsel relied on the Cases of Rylands v Fletcher [1868] LR 3 HL 330 and David M. Ndetei v Orbit Chemical Industries Limited [2014] eKLR. The Plaintiff's Counsel further submitted that the Plaintiffs are entitled to special damages and general damages as pleaded.

Submissions of the 1st Defendant

16. The 1st Defendant filed their written submissions on 5th February 2024. Counsel emphasized that the allegations against the 1st Defendant had not been substantiated and lacked an expert's opinion. Counsel further opined that the source of the oil spills was unclear and could have been from the generators used by the Plaintiffs. He insisted that the 1st Defendant had not been negligent in its operations and that it complied with all laws. The 1st Defendant's Counsel further submitted that the EIA report could not be relied on as it failed to give some important details, such as where the soil was sampled. Counsel relied on the following authorities to buttress his position: Kibos Distillers Limited & 4 others v Benson Ambuti & 3 others [2020]eKLR, Kagina v Kagina & 2 others [2021]eKLR, Stephen Kanini Wang'ondu v The Ark Limited [2016] eKLR, Kenya Ports Authority Limited v East African Power & Lighting Company [1982]eKLR.

Submissions of the 2nd Defendant

17. The 2nd Defendant filed its' written submissions on 24th November 2023. Counsel for the 2nd Defendant submitted that following the Court of Appeal decision that struck out the 27 Plaintiff from the instant suit, the Plaintiff needed to amend the Amended Plaint further to reflect the changes. Counsel further submitted that the failure to amend the Amended Plaint meant that the Plaintiffs could only claim the damages under false pretence as the same had been claimed on behalf of the entire Likoley farm measuring about 110 acres. Counsel also submitted that the 2nd Defendant was erroneously joined in this suit as it does not do power generation, it does not own the power generators, it did not operate the power generators, and was not responsible or accountable for the petroleum products used by the power generators. The 2nd Defendant finally submitted the suit against it was statute barred as it was instituted against it after the period of limitation had expired.

Analysis and Determination

18. I have considered the Pleadings, the evidence adduced and the rival submissions of the parties. The main issues for determination in this suit are:

    1. Whether the Plaintiffs wrongly sued the 2nd Defendant?

    2. Whether there has been continuous oil spillage from the defendants' power plant onto the Plaintiffs land for the period starting from 1995 to 2011, and if so, whether the defendants were negligent and therefore liable?

3. Whether the Plaintiffs are entitled to the reliefs they sought?

Whether the Plaintiffs wrongly sued the 2nd Defendant.

19. The 2nd Defendant, in its Amended Statement of Defence dated 21st June 2011, pleaded that it had been erroneously joined as a party in this suit for the reason that the 1st Defendant was a separate entity and upon their separation, the 1st Defendant "took over full ownership, liability and management of the Garissa power generating station as part of an asset sharing settlement." DW4, in her evidence, however, confirmed that the alleged complaint relating to oil spillage was made in 1995 which was before the transfer and separation agreement between the 1st and 2nd Defendant was entered into in 2000 before the Defendants separated. The Court has perused and scrutinized the exhibited agreement for the transfer of assets and liabilities produced by the 1st Defendant in its' supplementary list of documents. Clause 9, which appear on page 70 of the bundle reads as follows:

9.1 Liability

Subject to Clauses 9.2, each Party shall be liable to the other Party for the loss directly and foreseeably resulting from any breach by the other Party of its obligations hereunder.

9.2 Own loss:

Notwithstanding Clause 9.1, each Party shall be responsible for and shall indemnify the other Party against claims in respect of loss of or damage to persons or property incurred by the first Party and its contractors, employees and agents resulting from the act, omission or negligence of either Party in relation to the Assets transferred to the other Party before the Effective date.

20. The Plaintiffs, in their Amended Plaint, complained about a continuous oil spillage that dates back to 1995. The 1st and 2nd Defendant separated in the year 2000 and as such, the acts complained about were committed, if at all, before the separation of the two entities. Even so, it means that in the year 1995 and thereabout, the Garissa land was under the care and control of the 2nd Defendant and as such, the claim against the 2nd Defendant is proper pursuant to Clause 9.2 of the transfer of assets agreement.

Whether there has been continuous oil spillage from the defendants' power plant onto the Plaintiffs land for the period starting from 1995 to 2011, and if so, whether the defendants were negligent and therefore liable?

21. The Plaintiff's claim in the suit is that there has been oil spillage from the Defendants Power Plant during the rainy season onto the Plaintiffs farm and into the Tana River. As a consequence the Plaintiffs claimed their farm had become unproductive due to the damage caused to the soil. Both defendants denied the allegations, with the 2nd Defendant distancing itself from the ownership and management of the power plant. The 2nd Defendant contended further that if indeed there was oil spillage, the Plaintiffs contributed because they established their farms in well-known storm water paths and wetlands. The 1st Defendant, on its part, denied that the Plaintiffs owned the farmland and further denied that the operation of its power plant caused the oil spillage into the farmland and stated that if the oil did, in fact spill, it was because of the Plaintiffs' negligence of setting their farm in the storm path and wetland.

22. PW2 confirmed that he found oil floating on the water when he visited the farmland. He further confirmed that the area had flooded as a result of the rain and from the overflow from the 2nd Defendant's dam. DW3 confirmed that the EIA Report on the Garissa power plant conducted in 2010 affirmed that there was evidence of petroleum hydrocarbon in the soil samples collected though minimal. Various correspondences also indicated that oil did, in fact, spill to farms and that Likoley farm was one of the most affected. It is evident that the National Environment Management Authority

(NEMA) had written to the 2nd Defendant severally concerning the oil spillage through letters together with a Report dated 24/11/2005. The report by the sub-committee observed that there had been a lot of oil spills in the compound and in the stream that drained in the farms. The Ministry of Agriculture also wrote to the District Environment Committee, affirming that there had been evidence of oil spilling into the farms through lagaas from the Kengen Station. The evidence of the oil spillage to farms, in particular, is irrefutable. It is also evident from the minutes of 7th April 1997 of the District Development Committee (DDC) meeting that the oil spilling into the Plaintiff's farmland had been a thorn in the flesh of the Plaintiff. In fact, Minute No. 1 entailed issues involving Kenya Power and Lighting Co. In particular, the minute read that "...the oil has destroyed crops along the river and have found its way into the river raising fears that it may end up into the water supply systems."

23. The Plaintiffs in their bundle of documents filed in Court on 13th December 2018 exhibited various correspondences going back to 1997 which indicated there had been a running complaint relating to oil spillage into the farmlands emanating from the power plant of the Defendants at Carissa which was situated along the Tana River. The Plaintiffs exhibited Minutes of DDC meeting held on 7th April, 1997 "DEX4" where under minute 4/97 the issue of Kenya Power & Lighting Company relating to discharge of oil was raised. Interalia the minute stated as follows:-

> "Members complained over continued blackouts and the Company's handling of the oil discharge. The oil have destroyed crops along the river and have found its way into the river rising fears that it may end up into the water supply system---.
>
> The Committee recommended that adequate funds be allocated to enable safe disposal of the sludge as it is posing a great danger to the lives of both human beings and livestock."

24. The Plaintiffs further exhibited a letter dated 20th January 2006 from the District Environment Officer to the DC Garissa making a report on "Re: Oil spillage to Farms from Kengen Station, Garissa". The NEMA Officer interviewed both the farmers and Kengen Staff ("DEX 9") and prepared a factual report which was shared with the DC and was shared with Kengen and the Farmers groups among other persons.

25. The report was in respect of four farms namely:- Likoley Farm belonging to the Plaintiffs, Maendeleo Farm; Shariff Farm; and Dashea Farm. The report explained that at the Kengen Power Plant there are four engines, 3 of which use industrial diesel oil while one (1) used heavy fuel oil. The report observed that the engines were serviced 4 times in a year and that in a year they produced 15,330 litres of waste oil which was released through surface oil channels under the engine to designated collection pit and pumped to storage tank drums. In the report the District Environment Officer made the following observations:-

    i. That Kengen is located on a natural storm waterway that empties into Tana River and natural depressions/lagoon where the subject farms are located.

    ii. That some percentage of oil spillage occurs during, filling top-up washing pumping and storage estimated at between 10-15% of the fuel used.

    iii. That during unpredicted heavy down pours storm water (which often sweep through the whole station including the engine rooms), empties collection pit contents, oil in leaking and open storage drums and other spilled oil in the engine room and yard stream to the farms and river.

    iv. That despite this critical and persistent problem farmers and Kengen there is no evidence of collaborative dialogue to give direction to environmental issues them.

v. That farm produce from affected farms are unhealthy and farmers are compelled to use a lot of fertilizer/manure to realize below average produce.

vi. That some depressed parts of the farms are abandoned for being unproductive because of deposits of oil from Kengen station.

26. The District Environment Officer interalia made the following recommendations:-

a. Kengen to immediately commission Environmental Audit conducted by an EA expert registered with NEMA and the report submitted to DEC Garissa within 40 days from the date of this report.

b. As immediate short term strategy; Kengen to relocate its oil collection pit, storage tank and drums site to higher grounds away from the natural water way. In addition oil leakage and spillage should be minimal in all stages of generation processes.

27. The complaints relating to oil spillage from the Kengen Power Plant apparently never ceased as the District Agricultural Officer vide his letter dated 13th December 2006 to the Chairman District Environment Committee exhibited in the Plaintiffs bundle of documents outlined the challenges the farmers were facing. The full content of the letter is reproduced here below:-

The Chairman Date: 13th December 2006

District Environment Committee

Box 1

Garissa

Re:- Oil Spillage From Kengen Station

Following several complaint by farmers in Township location, Central Division, I paid a visit on 13th November 2006 to one of the farms affected in the company of the District Officer 1 and a farmer, Mr. Ahmed Dolal of Likoley Farm. I also made a similar visit in August 2005. In all these visits there was a clear evidence of oil spilling into the farms through a natural water ways (laghas) from the Kengen station.

The matter has a grave environmental concern as it is going to pollute the environment. In addition, the oil waste will adversely affect the crops and render certain essential macronutrients unavailable. The affected farms include Likoley, Shariff Abdi, Dasheg and Maendeleo.

These concerns have been raised in many forums including the District Agricultural Committee, the District Environment Committee and the District steering group meetings. However, the problem still persists.

It is the humble request of this Office that Kengen be asked to address this matter by stopping the oil spilling into the farms and river within the shortest time possible. In addition, the District Environment Officer's recommendations on the above dated 20th January, 2006 be implemented.

Thank you in advance

Bashir A. Muhumed

District Agricultural

Garissa.

CC

The District Environment Officer

Box 294

Garissa

The Provincial Director of Environment

Box 294

Garissa

The provincial Director of Agriculture

Box 34

Garissa

Mr. Ahmed Dolal

Likoley Farm

Garissa

28. The Plaintiffs further exhibited in their bundle of documents a letter dated 30th May, 2010 by the District Agricultural Officer to the District Environment Officer Garissa which annexed a copy of report on alleged oil spillage to farms from Kengen Station, Garissa. The report was to the DC Garissa, the Plaintiffs and Kengen. The report was in the following terms:-

Oil Spillage In Likoley And Other Farms

Following the unrelenting complaints from farmers on pollution of their farms by washed down oil/ fuel residue from Kengen station Garissa, a fact finding tour was done on 12/4/10. The following observations and recommendations were drawn:

Observations
Dasheg, Likoley and Maendeleo farms were mostly affected. Likoley farm which is 2Km from the Kengen station is mostly polluted because of its location in the depression where the storm water settles after a heavy downpour.During heavy down pour, storm water washes the spilled oil to River Tana and farms. This was evidenced by the oil deposits in wet lagahs emptying into the farms and the presence of oil floats on water within drainage lagahs coming from the same stations to the farms and River Tana.Some farm sections were abandoned, i.e not being under any meaningful agricultural activity because of the farmer's fear for dismal agricultural output.Soils in the affected farms might be deficient of the necessary crop nutrients.

Recommendatiions
Kengen Garissa station should put in place a proper fuel residual disposal system to avoid pollution of farms (and River Tana).Dialogue, as a priority of conflict resolution mechanism, should be embraced before resorting to other measures.Further soil tests/analysis should be carried out to establish that the experienced deficiency in crop nutrients in the affected farm is due to oil spillage.Effort should be put towards the use of crop nutrient's enhancing techniques (e.g regular use of recommended fertilizers and manure) in the farms.

29. On the basis of the correspondences exchanged as highlighted herein above there can be no doubt that during the period from 1996 through to 2010 there was oil spillage traceable to the Kengen station at Garissa. Equally the fact that the Farm Likoley associated with the Plaintiffs was affected by the spillage particularly during the rainy seasons cannot be disputed. The Plaintiff it is evident raised the issue of the oil spillage with the appropriate and relevant agencies including the District Development

Committee, the Ministry of Agriculture and the District Environment Officer. The record shows that all these agencies acknowledged there was oil spillage as documented in the reports prepared by the District Agricultural Officer and the District Environment Officer following site inspections. On the evidence I am therefore satisfied that there was repeated oil spills from the Kengen Power station during the rainy seasons and that the Plaintiffs Likoley Farm was one of the farms that were adversely and negatively affected by the oil spills.

30. The 2nd Defendant pleaded that following the Agreement with the 1st Defendant entered into in the year 2000 where the 1st and 2nd Defendant separated and became separate entities and Assets and Liabilities were apportioned and assigned as at 29th June 2000, the 2nd Defendant could not be held liable for any liability accrued prior to the separation agreement as any action founded on such liability would have become statute barred. It is clear from the separation agreement that each entity was to take responsibility for liabilities accrued by the entity before the effective date of the agreement as per clause 9.2 of the Agreement.

31. The Plaintiffs claim herein is founded on the tort of negligence and the initial Plaint was filed on 18th August 2005. This was after 5 years from the date the 1st and 2nd Defendants entered into the separation agreement. For the 2nd Defendant to be culpable for any tortious acts relating to the operation of the power generating plant prior to the separation agreement such tortious acts must have related to the period before the signing of the separation agreement and the action must therefore have been instituted before the expiry of three years from the date the tortious act was committed.

    Section 4(2) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya provides as follows:-

    (2) An action founded on tort may not be brought in respect of any matter after the end of three years from the date on which the cause of action accrued.

32. The Plaintiffs claim is founded on the tort of negligence that the Defendants failed and/or neglected to take precaution to prevent the oil spill onto their farm that caused damage to their crops. In regard to the 2nd Defendant, the acts of negligence complained about, action ought to have been instituted before the expiry of three years from 29th June 2000 when the separation Agreement between the 1st and 2nd Defendant was entered into. The suit in the instant matter was instituted in August, 2005 well after the expiry of three years from the time the Defendants entered the separation agreement. The Plaintiffs suit against the 2nd Defendant therefore was statute barred on account of Limitation and is unsustainable.

33. As regards the 1st Defendant there is no dispute that they are the persons who presently are involved in the generation of power and are the ones who are in control and have been managing the Garissa Kengen Power Station. As per the evidence adduced by the parties the alleged oil spillages continued and was repeated during every rainy season. The reports prepared by the District Agricultural Officer and the District Environment Officer which I have highlighted earlier in this Judgment affirm this position. On the basis of the evidence adduced, the Court accepts as a proven fact that there were repeated oil spillages from the Kengen storage tanks that was routinely washed away whenever there was water overflow during the rainy weather and that some of the overflow found its way onto the Plaintiffs and neighbours farms. Both inspection reports by the District Environment Officer, Garissa and the District Agricultural Officer, Garissa prepared in 2005 and 2010 respectively confirm this position.

Whether the Defendants were negligent?

a. The tort of negligence

34. The four elements that a Plaintiff must prove to establish liability under the tort of negligence are – a duty of care, a breach of that duty, causation and damage see the Case of – Eric Omuodo Ounga v Kenya Commercial Bank Limited[2017]eKLR.

35. To prove breach of the duty of care, it is settled law the Plaintiff must first concisely set out the particulars of the alleged breach of duty of care/particulars of negligence in the Plaint. See the Case of Lomolo [1962] Limited v Juma Oduor[2019] eKLR. The Court in the case of Paul Gakunu Mwinga v Nakuru Industries Ltd [2009] eKLR held as follows:-

    It is trite law that particulars of negligence or breach of contract must be pleaded in clear and unambiguous terms. Stating clearly what was expected of the Defendant, the particulars must be framed in such way as to enable the Defendant to know the exact breach of contract or statutory duty of care or the negligence that he occasioned the Plaintiff.

36. After pleading the particulars of breach, the Plaintiff must also prove at least one of those particulars already pleaded. In negligence, the fact that the oil from its turbine spilled does not by itself prove that the Defendants are liable for either the spillage or the consequent loss suffered by the Plaintiffs. What is it that the Defendant did, or failed to do, that caused this spillage and the resultant damage? It is essential that the Defendant is shown to have done and/or omitted to do some act that resulted in the oil spill.

    b. The tort of strict liability (the principle in Rylands v Fletcher [1868] LR3 HL 330.

37. The foundational elements of the principle in Rylands v Fletcher were affirmed in the Case of – Mwita Merengo v Joseph Tunei Marwa & 2 Others [2012]eKLR where the Court stated the principle to be as follows:-

    a. The Defendant must make a non-natural use of his land;

    b. The Defendant must bring something onto his land which is likely to do mischief if it escaped;

    c. The thing in question must actually escape; and,

    d. Damage must be caused to the Plaintiff's person or property as a result of the escape.

38. The rule in Rylands v Fletcher is a subtype of the tort of nuisance, which deals with the interference with the right of enjoyment of land by one occupier on the land of another. A claim under the rule in Rylands v Fletcher can only arise if the events complained of occur across separate parcels of land. In other words, there must be an escape of a thing from the Defendant's land to the Plaintiff's land, resulting in damage. Additionally, the thing that escapes must have been held by the defendant in an unnatural use of the land.

39. The Court of Appeal in Mombasa Civil Appeal No. 41 of 1981 – Kenya Ports Authority v East African Power & Lighting Company Limited [1982] eKLR held that:-

    > 'The storage of oil on land by a person licensed to generate electricity there, the oil being essential for the production of electricity, did not amount to a non-natural user of the land. I agree, especially as the defendant was licensed by the Plaintiff who must have known that oil would have to be brought to the land, and stored there, for the purpose for which the license was granted.'

40. In Transco plc v Stockport Metropolitan Borough Council [2004] 2ACI the House of Lords held that a party must prove negligence where an activity has been authorized by a statute for the rule in Ryland

v Fletcher to apply. This was best captured by Lord Scott of Foscote at Paragraphs 88-90 (pages 32-33) where he stated thus:

> 89.Before answering that question it is, I think, worth reflecting on why it is that an activity authorized, or required, by statute to be carried on will not, in the absence of negligence, expose the actor to strict liability in nuisance or under the rule in Rylands v. Fletcher. The reason, in my opinion, is that members of the public are expected to put up with any adverse side-effects of such an activity provided always that it is carried on with due care. The use of the land for carrying on the activity cannot be characterized as unreasonable if it has been authorized or required by statute. Viewed against the fact of the statutory authority, the user is a natural and ordinary use of the land. This approach applies, in my opinion, to the present case. The council had no alternative, given its statutory obligations to the occupiers of the flats, but to lay on a water supply. Strict liability cannot be attached to it for having done so."
>
> 90. So, to return to the question whether the council's use of its land was a natural and ordinary use that did not attract strict liability under the rule in Rylands v Fletcher, or, for that matter, in nuisance, there can, in my opinion, be only one answer. It did not. (emphasis ours).

41. Lord Moulton in Rickards v Lothian [1913] AC 263, 280 as cited with approval by Lord Walker of Gestingthorpe in Transco plc v Stockport Metropolitan Borough Council (supra) above had this to say on the element of unnatural use of land (page 36):

> " It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community" (emphasis mine).

42. In our instant case it is not in dispute that the Defendants and notably the 1st Defendant have mandate to generate and supply and distribute electric power and that in the execution of their statutory mandate they have to use diesel oil to power their engines. The issue that the Court needs to interrogate and determine is whether the Defendants were negligent in the manner that they disposed their waste fuel/oil. Did they take sufficient precaution to ensure it did not escape and cause injury to their neighbours?

43. On the evidence adduced by the Plaintiffs it was evident that the used oils from the 1st Defendant's power station found its way to the Plaintiffs farm through an open channel that the 1st Defendant used to drain storm water back into Tana River. The evidence adduced was to the effect that during the rainy season all the waste oil generated from routine washing of the engine room and the waste oil collection pit and all the spilled oil from the engine room was washed down to the neighbouring farms but the Plaintiffs farm was the one that was most affected. The 1st Defendant in my view has failed to take appropriate measures and/or actions to ensure the waste oil is not washed out into the Plaintiffs farm. Indeed the waste oil ought not to be allowed to find its way into the Tana River. The fact that it does, constitutes pollution of the river. The 1st Defendant ought to ensure that there is no oil spillage or waste oil that ends up either in peoples farms and/or into the River Tana. The 1st Defendant simply has not taken sufficient precaution to ensure it has an effective and efficient waste fuel/oil disposal mechanism that does not allow spillage of the sludge onto the neighbouring farms and onto River Tana.

44. On the evidence I therefore find and hold that the 1st Defendant allowed waste oil fuels to escape from its premises onto the Plaintiffs land. The 1st Defendant knew or should have known, that if the waste oil escaped and was deposited onto the Plaintiffs land as the evidence shows it was, it would be

detrimental to the farming activities of the Plaintiff. I hold the 1st Defendant was negligent and was liable for negligence to the Plaintiffs.

Claim for Damages

45. The Plaintiffs vide the Amended Plaint claimed general damages and special damages in the sum of Kshs 865,500,661/- as particularized under paragraph 5(1)(b) and (c) of the Plaint. The evidence on the special damages claim was given by PW2, Michael Ogola who essentially was giving expert opinion evidence. However, the basis and foundation of his "expert opinion" evidence was lacking in the sense that there was no demonstration that the Plaintiffs were at any time engaged in commercial farming where records of inputs and yields were maintained such that it was possible to say that in a given year the Plaintiffs had a turnover of so much but owing to the oil spillage and the resultant soil degradation the output plummeted. The Plaintiff's had no previous records of production and/or sales. PW2's evidence in the Court's view was speculative and was not based on any receipts, records and registers furnished to him by the Plaintiffs. The report tendered by PW2 in Court cannot be substantiated and the Court cannot rely on the same as proof of the special damages claim. In the Case of Stephen Kinini Wang'ondu –vs- The Ark Ltd (2016) eKLR the Court commenting on opinion evidence stated thus:-

> " It is trite principle of evidence that the opinion of an expert whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the Court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the Court of an important opportunity of testing the validity of the process by which the opinion was formed, and substantially reduces the value and cogency of the evidence. An expert report is therefore only as good as the assumptions on which it is based. An expert gives opinion based on facts ----"

46. Special damages further must not only be specifically pleaded but should also be strictly proved. The Court of Appeal in the Case of Hahn –vs- Singh (1985) KLR 716 underscored this principle when they held thus:-

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved ---- for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the facts themselves."

47. Having regard to the evidence adduced in support of the special damages claim it is my determination that the claim was not proved and the same is disallowed in its entirety.

48. As concerns the claim for general damages, the Court has found and held that there was an infringement of the Plaintiffs rights as the 1st Defendant failed to prevent the oil spill from reaching and damaging the Plaintiffs crops. The reports from the District Agricultural Officer and the District Environment Officer earlier referred to in this Judgment clearly explained the impacts the oil spill had on the Plaintiffs farm. In his letter of 13th December 2006 to the District Environment Committee, the District Agricultural Officer, Garissa stated that after receiving complaints from farmers, he on 13th November 2006 visited Likoley Farm in the company of the District Officer 1 and that he had made a similar visit in August 2005. He stated that during these visits there was clear evidence of oil spilling into farms through a natural water way (Laghas) from the Kengen station. He expressed the view that the situation posed a grave environmental concern as it could lead to pollution of the environment and the oil waste could adversely affect the crops yield.

49. The report by the District Environment Officer of 24th November 2005 exhibited in Plaintiffs bundle of documents was categorical that Kengen did not have adequate storage capacity for waste oils. The report was clear that during heavy down pour all the spilled oil, oil within the delivery channels, oil in the collection pit, oil in the open drums within the station water way emptied their contents to the farms and the river.

50. Having regard to the evidences, I have no doubt that there was repeated oil spills as captured in the correspondences and reports I have referred to and to my mind this constituted the tort of nuisance and perfectly fitted the principle enunciated in Rylands –v Fletcher (supra). There were adverse effects visited on the Plaintiffs and their right of enjoyment of their land was interfered with and/or curtailed. The Plaintiffs are entitled to an award of damages. The question is what should be the quantum of the damages?

51. This Court in the Case of Park Towers –vs- Moses Chege & 7 others (2014) eKLR sitting at Nairobi stated as follows concerning assessment of damages for trespass:-

> " I agree with the Learned Judges (O. K. Mutungi, J and Bosire J in Willesden Investments Ltd –vs- Kenya Hotels properties Ltd and Kamau Macharia –vs- Mwangi Kigondu & 2 others respectively) that, where trespass is proved a party need not prove that he suffered any specific damages. The Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. As observed in the cases referred to, there is no mathematical or scientific formula in such cases for assessment of general damages. However in the case before me I consider that the suit properties are sizeable parcels sitting on nearly three quarters of an acre of land located in the Central Business District (CBD). This is a prime property in the City Centre and any unlawful act of aggression and/or intrusion that prevents the rightful owner of the property from enjoyment of his ownership rights of possession and use is to be frowned at and is punishable by way of an award of damages."

52. The Court of Appeal in the case of Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd [1992] KLR 177 drew a distinction between special and general damages and in their Judgment stated as follows:-

> " The Law of damages stipulates various types of damages. The distinction between general 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 flowed from the peculiar facts set out in the pleadings. They must be specifically pleaded."

53. In the present matter the Plaintiffs in their submissions have prayed for an award of Kshs 200,000,000/- in general damages. Their argument to justify the award in that sum appears to be that the matter has been pending for an ordinately long time stretching to over 18 years. It is not lost to the Court that the Plaintiffs were not able to demonstrate to the Court what income they were generating or have generated at any one time from their farming activities on the farm. The Court rejected the Plaintiffs claim for special damages for want of proof and substantiation. The Plaintiffs also indicated their farm was approximately 110 acres. There was no clear evidence of the proportion of this land that was affected by the oil spillage. From the evidence it was only parts of the Plaintiffs land that was not being put to full utilization owing to the oil spillage and not the whole farm.

54. Taking consideration of all the factors I will make an award of Kshs 10,000,000/- which I consider would be reasonable compensation to the Plaintiffs for the damages they have suffered over time.

55. The Plaintiffs prayed for injunctive relief against continued oil spillage. I consider that would not be an appropriate relief to grant because the oil spillage can only be prevented by the 1st Defendant if remedial action is taken to ensure there is no oil spillage at all even during the rainy seasons. In that regard the 1st Defendant should be required within a specified period to undertake mitigation and restorative measures that will stop any further spillage of used oil beyond their premises by putting in place an effective waste fuel disposal system that ensures no oil spillage would be washed away to the neighbouring lands or into the Tana River.

Article 42 of *the Constitution* guarantees every person a right to a clean and healthy environment and provides as follows:-

42. Every person has the right to a clean and healthy environment, which includes the right—

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and

(b) to have obligations relating to the environment fulfilled under Article 70.

56. There can be no doubt that oil spillage and/or discharge of waste fuel oil (sludge) into the environment has adverse effects to the environment and the ecosystem and would be an impediment to sustainable development. The 1st Defendant under the provisions of Article 69(2) of *the Constitution* has an obligation to ensure the environment is protected and conserved and therefore ought not to engage in any activities that could pose a threat to the environment. Spillage of waste fuel/oil into Tana River has the potential of polluting the river which could expose the users potential health risks.

. In conclusion and after a careful evaluation of the evidence, I am satisfied that the Plaintiffs have proved their case against the 1st Defendant on a balance of probabilities. The suit as against the 2nd Defendant was statute barred on account of limitation and the suit as against the 2nd Defendant is dismissed. The Court in the premises enters Judgment in favour of the Plaintiffs against the 1st Defendant and makes the following final orders:-

a. The Plaintiffs are awarded general damages of Kshs 10,000,000/- as against the 1st Defendant together with interest at Court rates from the date of Judgment until payment is made in full.

b. The 1st Defendant under the supervision of the County Director of Environment Garissa is ordered to within a period of six (6) months from the date of this Judgment to put in place such mitigation and restorative measures including a waste fuel disposal system as will stop any oil spillage and/or waste fuel oil from being washed onto the neighbouring farms or into the Tana River including during the rainy season.

c. The County Director of Environment Garissa shall file in Court a status report on the implementation of (b) above on or before 31st March 2025.

d. The Court directs that the Judgment to be served upon the Director General NEMA and the County Director of Environment Garissa.

e. The Plaintiffs are awarded the costs of the suit as against the 1st Defendant.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 25TH DAY OF JULY 2024.

J. M. MUTUNGI

ELC-JUDGE