THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MUKONO
CIVIL SUIT NO. 157 OF 2017

SABA GIFCO UGANDA LTD:: PLAINTIFF

VERSUS

1. **DFCU BANK LTD**
2. **CRJE (EAST AFRICA) LTD**
3. **DFCU LTD :: DEFENDANTS**

BEFORE: HON. LADY JUSTICE. MARGARET MUTONYI, JUDGE HIGH COURT.

J U D G M E N T:

1.Saba Gifco Uganda Ltd a company duly registered under the laws of Uganda and therefore a legal entity that can sue and be sued ,hereinafter called the plaintiff filed a suit against DFCU BANK LTD ,CRJE (EAST AFRICA) LTD , AND DFCU LTD all legal entities here in after referred to as the 1st, 2nd and 3rd defendants seeking for the following orders

a) A declaration that the defendants, their employees and or agents negligently carried out construction/excavation works that caused the collapse and or damage to the plaintiff's 3 walls and internal water channel at the premises.
b) An order directing the Defendants to pay for the cost of the reconstruction of the collapsed and or damaged plaintiff's perimeter walls and internal water channel damaged during the construction/excavation works.
c) An order directing the defendants to pay the plaintiff special damages, general damages and
d) Costs of the suit.

2. ***Brief background of the case.***

On 23rd October 2015, the Plaintiff and 3rd Defendant entered into a Joint Venture Agreement for the construction of a joint perimeter wall on their adjoining sides wherein the plaintiff undertook to appoint a construction company to execute the construction work. The whole venture was valued at $28,500 USD to be shared

equally. Each party contributed a sum of $14,250 USD as required. About a year later, the wall collapsed giving rise to this dispute.

At the hearing of this case and in view of the amended plaint filed in court on 31 October 2017, the 1st defendant substituted DFCU Bank LTD with DFCU LTD. The case thus proceeded against DFCU LTD as the 1st defendant and CRJE (East Africa) LTD as the 2nd defendant.

3. Plaintiff's case

The plaintiff's case is that on the 23rd of October 2015, the plaintiff and the 1st defendant entered into a Joint Venture Agreement (JVA) to construct a perimeter wall fence separating the plaintiff's plot of land located at Namanve Industrial Park and comprised in Kyagwe Block 113 Plot 411 in Mukono District adjoining the 1st defendant's plot.

That it was a material term of the JVA that the parties would equally contribute towards the construction costs of $ 28,500 USD and each party contributed a sum of $14,250 USD as required. The joint perimeter wall was duly completed and handed over to the parties herein by the contractor.

Sometime in 2016, the 1st defendant engaged the 2nd defendant a construction company to carry out development works on its adjoining plot including excavation that the plaintiff understood would jeopardize the structural integrity of the joint wall. The plaintiff's General Manager accordingly wrote to the 1st defendant's Estates manager duly notifying them of the material risk of damage to the perimeter wall arising from the construction and or excavation works ongoing on the defendant's adjoining plot.

The defendants adamantly continued with the construction and or excavation works culminating in the eventual collapse and or damage to the perimeter walls and damage to the plaintiff's internal water channel.

The plaintiff subsequently engaged Geo-Technical Engineers to construct a structural audit of the collapsed perimeter walls that revealed that construction and/ or excavation works in the 1st Defendant's plot were the primary cause of the said collapse a fact that also admitted by the defendants in their insurance claim forms.

The plaintiff thus holds the defendants liable.

4. On the other hand the defence case as per the WSD filed by the **2nd Defendant** on 31st October 2017 is a total denial of all the allegations of the plaintiff with regards to responsibility for the damage and collapse of the perimeter walls and blockage of the drainage channel.
Their case is that whereas they were contracted to carry out development works on property belonging to DFCU LTD the 3rd defendant, the works did not include any kind of excavation that was capable of jeopardizing the structural integrity of the perimeter wall.

All through the construction of the said building from foundation to roof top, all the perimeter walls on either side were at all material times intact and unaffected by the ongoing construction. The plaintiff's fears in paragraph 4 (e) were uncalled for because from the technical assessment and skills, the said works could be and were undertaken with no material damage to the perimeter wall and at the time of the collapse of the wall, the construction was already completed.

That it was not the excavation works but rather, the exposure of the wall to an influx of large volumes of storm water which the plaintiff failed to manage that eventually led to the initial collapse of the upper wall and the boundary wall.
That in fact at the time of commencement of works on the 3rd defendant's premises, the plaintiff had its rain water channeled into the 3rd defendant's land.

The 3rd defendant notified the plaintiff of their intention to utilize the property and advised the plaintiff to find an alternative channel through its own land but the plaintiff neglected to do so.

The 2nd defendant therefore contends that the collapse of the boundary wall was caused solely by the plaintiff's negligence and denies any liability for any purported loss or damage suffered by the plaintiff. That it has been greatly inconvenienced in the completion of its work due to the collapse of the wall and thus prays that this suit be dismissed with costs.

3rd Defendant's case.

The 3rd defendant filed a written statement of defence and a counter-claim in this court on 11th June 2018. Its case is that it is the plaintiff's negligent conduct that caused the collapse of the perimeter wall and as such, the plaintiff is not entitled to any of the remedies sought. That the suit should be dismissed with costs.

The plaintiff took responsibility for the construction of the boundary wall and undertook to appoint a construction company to carry out the said construction with appropriate skills and good workmanship a duty they neglected or failed to discharge. They gave to the 3rd defendant a 5 year warranty and indemnity against any loss caused by the wall collapsing.

Approximately 1 year and 5 months after the execution of the JVA and before the wall could be handed over to the parties as completed, it collapsed. The plaintiffs breached the terms of the JVA to that effect making them liable to pay compensation to the defendants.

Whereas the 3rd defendant engaged the 2nd defendant to carryout construction works on its site, the same did not jeopardize the structural integrity of the perimeter wall because the said works were undertaken safely and without any damage to the perimeter wall.

The collapse of the wall and damage to the internal water channel resulted from the plaintiff's failure to manage its storm water and the initial poor construction of the perimeter wall for which the plaintiff took responsibility.

5. On the Counterclaim

DFCU LTD the counter-claimant/the 3rd defendant avers that it entered into a JVA with the counter-defendant/plaintiff for the construction of a common boundary wall for the parties' common boundary at Namanve Industrial park wherein the total cost for the construction was agreed at 28,500USD to be paid equally by both parties at $ 14,250 USD each.

The counter-claimant paid its $ 14,250 USD share and the counter-defendant took responsibility to appoint a construction company for the construction of the wall

with appropriate skill and good workmanship. Under clause 4 of the JVA, the counter-claimant was given a 5 year warranty in which the counter-defendant would indemnify for any loss caused by the wall collapsing.
The boundary wall eventually collapsed and the structural assessment report procured by the counter-claimant revealed that the wall had not been constructed to standard and it was constructed with inferior material and poor workmanship see "SRL".

The counter-claimant thus contends that the counter defendant breached the JVC when its appointed construction company failed to construct the boundary wall with appropriate skill and good workmanship and according to the specifications agreed upon as it collapsed in a period of less than 2 years after construction and as a result, the counter-claimant did not receive any value for its money.

There was a total failure of consideration for which the counter-claimant is entitled to be restituted by compensation of the monies it contributed, thus a sum of $14,250USD, general damages and costs of the suit.

6. **Legal representation**

At the hearing, the plaintiff was represented by Counsel Gerald Batanda of Signum Advocates while Counsel Sarah Kisubi and Cyrus Baguma of Kalenge Bwanika Ssawa& Co. Advocates appeared for the defendants.

7. **Issues for Resolution**.

The parties agreed on the following issues for this court's determination;

1. **Whether the defendants are responsible for the collapse of the plaintiff's perimeter walls and its internal water channel?**
2. **Whether the defendants are liable for the loss suffered by the plaintiffs, if any?**
3. **Whether the defendants breached their statutory duties and obligations in the manner in which they carried out developments that compromised the structural integrity of the shared perimeter wall.**
4. **What remedies are available to the plaintiff?**

8. Legal Principles

It is trite law that the burden of proof in civil matters rests on the person who desires any court to give judgment as to any legal right or liability dependent on the existence of facts. ***Sections 101,102,103,106 of the Evidence Act*** refers.
The standard of proof in civil matters unlike in criminal cases is on the balance of probabilities. This case is premised on negligence.

Negligence, is defined as the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do. Or doing something which a prudent and reasonable man would not do. It must be determined in all cases on the basis of particular facts. I need to add that negligence entails a duty of care expected of a reasonable man.

Duty of care was defined in Donogue V Stevenson [1932]7AC 562 by Lord Atkin to mean;

> ***"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question who is my neighbour? Receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be- persons who are so close and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I was directing my mind to the acts or omissions which are called in question"***

9. Resolution of Issues.

Having found the first two issues co-related, the parties opted to resolve them jointly. I will follow suit in my resolution.
Both parties filed submissions which I will refer to as and when is necessary.

Issue1; Whether the defendants are responsible for the collapse of the plaintiff's perimeter walls and its internal water channel? And Issue2: Whether the defendants are liable for the loss suffered by the plaintiffs, if any?

The plaintiff's case is premised on the fact that the defendants owed them a duty of care which they breached and are liable for the damage on the plaintiff's

perimeter walls and internal drainage water channel which affected the structural integrity of the plaintiff's boundary wall separating their premises.

To prove its case, the plaintiff relied on the evidence of one witness; PW1 Kassim Mohammed, the General Manager of the plaintiff company who noted that the facts and matters before court were well within his knowledge.
It is trite law that no particular number of witnesses is required to prove facts of the case.

He informed court through his witness statement that the parties to wit the plaintiff and 3rd defendant entered a Joint Venture Agreement (JVA) wherein they agreed to construct a perimeter wall on their adjoining plots to which they were to contribute USD 14250 each to make a total sum of USD 28,500.
The plaintiff consequently appointed a contractor Sight Construction Uganda Ltd to construct the wall. Throughout the period of construction, the 1st defendant never complained about the quality of the work or any material deviation.

In paragraphs 9-12, he noted that the 1st defendant engaged the 2nd defendant to carry out development works including excavation on its plot near the perimeter wall which works blocked the plaintiff's storm water drainage channel and also affected the structural integrity of the perimeter wall.
That on 18th July 2016 he wrote to the 1st defendant's estates manager expressing concerns about the ongoing construction works which letter was admitted in evidence and marked as exhibit PE3 and the same was responded to by the 1st defendant's Estates Manager who confirmed that works had resumed on their premises and committed that the works would not jeopardize the integrity of the neighboring structures. The reply to PW1'S letter was admitted in evidence and marked as Exhibit PE4
He went on to state that on 16th September 2016, he personally met with the 1st defendant's General Manager over the fact that their construction projects had caused cracks on the wall, and the manager informed him that he was aware and he would send the contractor to rectify . This communication was marked as (exhibit PE5).

That nonetheless, the defendants continued with their construction works neglecting the risk posed to the perimeter wall which eventually culminated into severe damage to the perimeter wall and blocked the internal water channel.

According to paragraph 16, the plaintiff engaged Geo-Technical Engineers to conduct a structural audit of the collapsed perimeter wall and it was confirmed that the construction on the 1st defendant's land was the main primary cause of the said collapse.

In cross-examination he confirmed that there was a JVA but there was no clause to the effect that DFCU LTD would hire their own consultant to supervise the wall. That upon completion of the construction which was in strict compliance to the quotation given, the wall was upright. That there was an official handover of the wall although he did not have evidence of the same. That the works on the DFCU plot blocked the plaintiff's storm water channel and in PW1's view it was the obligation of the 1st defendant to unblock the channel. That it was not a natural water channel but rather one that was constructed by the plaintiff inside their land to control the natural flow of water. Whereas the wall collapsed, the defendant's building next to the wall remained intact. That the wall erected first had collapsed then the two companies entered into a JVA for the construction of the joint wall.

On the other hand, DFCU LTD called 2 witnesses Albert Mucunguzi the Estates Manager (DW1) and Richard Turyahabwe, a professional architect with Arch design limited (DW2) while the 2nd defendant called one witness Zhao Jianguo the sight engineer of the 2nd defendant company who became DW3.

DW1's evidence was that the plaintiff's negligent conduct had caused the collapse of the wall because; it failed to design and construct a proper water channel, That it failed to manage, re-direct and channel the storm water through a proper channel, and failed to ensure construction of a boundary wall with appropriate skill and good workmanship.
He emphasized that as the Estates Manager for DFCU LTD he never attended the handover of the wall that was constructed by the plaintiff and its agent. That whereas the plaintiff expressed fears with the works on the DFCU plot, the 2nd defendant assured them and took steps to ensure that the said works could be and were undertaken safely and without any damage to the perimeter wall.

In cross-examination he confirmed that as DFCU LTD they did not raise any objection to the quality of the land. That according to the insurers, the excavation works caused damage to the wall so there was no indemnification.

And that indeed there were cracks on the wall during the course of DFCU's construction and the same was rectified by DFCU. That however, according to the reports the construction works on DFCU land did not affect the collapsed wall.

According to DW2, it was not necessary to carry out a structural integrity test because they were excavating on the minimum which is 1.5 meters and it applies to general structures. That precaution is only necessary when excavating beyond the minimum acceptable excavation. That the water channel was so small and since all the water could not go through, it caused a build-up which eventually caused the collapse of the wall.

DW3 testified that whereas they made a claim to their insurers Britam insurance, he learnt that they were not indemnified as per PE18 and PE19. That DFCU plot is on the lower side and the plaintiff's plot is higher. That the works on the 1st defendant's land could not jeopardize the wall because they were constructing a 4 storied building whose foundation was only 1.5 meters. The distance between the wall and the building was 1.2 to 2 meters which is a safe distance. That their soil from excavation was put back on their land for backfilling. The wall did not collapse because of accumulated rain water only but it was also because the wall was not strong enough. There is an external water channel that was not blocked by DFCU Ltd because it is outside their land. Basically the above was the evidence from both sides.

EVALUATION OF EVIDENCE IN RESPECT OF THE FIRST TWO ISSUES.

Having analyzed the evidence on either side, I'll now proceed to resolve the issues; Negligence was defined in ***Blyth Vs Birmingham Water Works (1856) 11 EX 781*** to mean;

> ***"The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."***

Plaintiff's counsel relied on the case of ***Kiga Lane Hotel td vs Uganda Electricity Distribution Company HCCS No. 557/2004*** where Justice Yorokamu Bamwine noted that;

> ***"A tort consisting of the breach of care resulting in damage to the claimant. Negligence in the sense of carelessness does not give rise to civil liability unless the defendant's failure to conform to the standards of the reasonable man was a breach of care owed to the claimant, which has caused damage to him."***

The pertinent questions herein are whether the defendants are responsible for the loss occasioned to the plaintiff thus the collapse of the perimeter walls and damage to the internal water channel and if so whether they are liable for the same.

It is undisputed from the evidence on either side that the parties entered into a JVA for the construction of a wall on their adjoining plots and it was the plaintiff that undertook to execute the task by hiring a contractor at a fee that was to be paid equally by both parties. The plaintiff indeed went ahead to contract Sight contractors who according to the plaintiff did the job in compliance with the specifications given and in their opinion did a good job.

On the other hand, the defendants fault the plaintiff for a shoddy job on the strength of the report by Arch Design ltd exhibit DE1 wherein it is indicated in paragraph 2.0 of the report about the structural integrity of the wall that;

> ***"… from the structural assessment report of the perimeter wall, it was revealed that the quality of concrete used was very poor (see Table 55 extracted from the Structural Integrity Report). The comprehensive strength of the concrete tested was below 20Mpa, values which are deemed to be too low for structural concrete. The foundation for the wall was shallow, extending a depth of about 600m below the DFCU parking level. The wall was therefore not naturally sound."***

The defendants submitted that whereas it is undisputed that they did excavation and construction works on their plot, they were done with maximum care and workmanship to ensure that the integrity of the wall was not jeopardized for instance, it was evident that the DFCU building next to the wall was tied with ropes to keep the wall firm and intact.

The locus in quo revealed that this area remained intact even after some part of the walls had given way.

It was noted that by law, any building is supposed to be a minimum of 3 meters away from the wall, when measurements were made between the wall and the DFCU constructions after measurements during the locus in quo revealed that it was 3.6 meters apart.

It was also established that the part were the wall gave way was the lower part of the DFCU plot where save for the two poles that had gone into the ground, the rest were close to the surface works which according to the defendants' witnesses were electricity cables. This also showed that that part of the DFCU plot was exposed below the Joint Venture wall foundation.

According to the evidence led, it is inferred that if the Joint Venture Wall had been built to the required standard, it would have been able to withstand the force of further construction because court also noticed that on the other side of the DFCU plot was a wall that had stayed intact throughout the excavation and construction works on the plot.

That this was attributed to the retainer walls constructed by DFCU and its neighbor Master wood which walls are strong enough to with stand water retention and any other force exerted on to the wall.

Unlike the walls described above, SABA GIFCO had constructed ordinary walls including the Joint Venture wall and these require the construction of water channels among other measures to be put in place to ensure their safety and durability.

It was also observed by the defendants that in addition to the poor workmanship exhibited by the plaintiff in the construction of the Joint Venture Wall, the plaintiff failed to design and construct a proper water channel and it further failed to manage, re-direct and channel the storm water through a proper channel which caused flooding into its plot and eventual collapse of the wall.

Whereas the plaintiff blamed the defendants for the blockage of its water channel, during the locus in quo, court observed that there was a drainage right above the first wall in the plaintiff's plot that was not maintained, it was separated from the wall by iron sheets. As a matter of fact, court had to ask that the shrubs thereon be cleared before a manmade channel was exposed just right above the 1st wall.

This proved that other than the naturally flowing water channel as guided by the investment authority, the plaintiff had gone ahead to dig a water channel (external

channel) along its 1st wall which also poured into the channel built along the Joint Venture wall also created by the plaintiff. Court observed that this channel was so narrow and blocked by soil. It did not allow proper water flow especially during heavy rains.

Whereas, the plaintiff submitted that it had constructed an internal water channel to let out water from its plot and that the said water channel was built simultaneously with the Joint Venture Wall, court observed that the internal channel had no connection to the external channel. Further that the wall of the water channel was literally pasted on the main Joint Venture Wall and it was very narrow, so when the wall gave way, the concrete water channel fell off and there is a clear split portraying the two as separate structures, one simply pasted on the other, which visibly points to poor workmanship on the part of the contractor.

During the testimony of PW1, he stated in paragraph 9 that the excavation works on the defendant's adjoining plot blocked their storm water drainage channel which affected the structural integrity of the perimeter wall. When court at page 10 of the record asked him who was responsible for the unblocking of the channel, he responded that in his opinion, it was the obligation of DFCU to unblock the channel.
This court was not impressed with this kind of reasoning and laxity and entitlement on the part of the plaintiff because in essence and with regards to land ownership rights, a land owner is entitled to utilize their land to their advantage and to the exclusion of all others except with their express permission.

In addition, the ***NEMA Act Cap 153 (certificate of Approval) attached to PE6 paragraph (xix)*** *mandates the investor to put in place a proper drainage system including embankments in and around the project site, to handle storm-water runoff, and to control flooding in the surrounding areas; and use appropriate methods to control soil erosion and accumulation of sediments in the main-storm water channels draining into the adjacent low lying area and roadside drains.*

The above quote implies that it is the responsibility of each investor to ensure proper drainage management in and out of their plot and to ensure that measures are put in place to handle any possibilities of overlap.

A look at PE6 which is a structural audit report by one Ephraim E. Turinawe on the instructions of the plaintiff, he observed under;

Paragraph 5 that;

> ***"By virtual inspection there was physical major cracks on both sides which survived collapsing, parts of external walls next to the boundary affected, inconsistence in the wall robustness that was cracked, plinth and reinforced retaining wall was equally crashed by storm water forces, cracked and sounded loose and separated from the main boundary wall.***

Paragraph 6.2;

> ***"…the standing both wall sides of the affected boundary were found to be inadequately robust and hence had lost the capacity to carry the assumed loads to their designed lifetime periods.***
>
> ***The boundary wall had moved out of plumpness and was likely not to withstand the horizontal forces like wind as it was designed"***

From the above evidence, it is apparent that there was poor workmanship on the part of the contractors of the retaining wall between the two warring parties. The substandard work was apparent to the eye of even a lay person which this court has attributed to negligence because construction of any structure be it a retainer wall like in the instant case, or building must be done with utmost care and workmanship by the responsible contractor because they owe a duty of care to the client and users of the finished product.

In view of the evidence submitted and the reports on record, it is undeniable that the joint venture wall and all the walls of the plaintiff were indeed constructed below the requisite standard as they were all ordinary and not retainer walls hence the need for water channels which as detailed above were also poorly done. Important to note is the undisputed fact that indeed there was a wall exactly where the joint venture wall stands which had been constructed by the plaintiff earlier but it gave way even before the 1st defendant occupied the adjoining wall.
And that the parties did not investigate the cause of the collapse before embarking on the construction of the joint wall.

It is also surprising that the plaintiff and their contractors did not deem it necessary to completely demolish the collapsed wall before constructing the joint venture wall but rather chose to build up on the same even without establishing the

strength of the same. This points squarely to poor workmanship on the part of the plaintiff and its contractors.

Be that as it may, since both reports and even the witnesses emphasized that it was the influx of water that was not managed that caused the collapse of the walls, it goes without saying that it is the responsibility of a land owner to manage the drainage system of their plot.
It was gross negligence on the part of the plaintiff to sit back and fold its arms while watching storm water damaging its plot because it felt that it was the responsibility of the defendants to clear channels for them.

Whereas the defendant's works may have indeed blocked the water channel on their own plot and perhaps had an effect on the wall, it was not reasonable for the plaintiff to expect the defendants not to utilize their land simply because it was adjoining with the plaintiffs,

It is also important to note that at all material times the defendants took measures to ensure safety of the wall which still gave way anyway and this was because of the outright poor workmanship employed by the plaintiff's contractors as already established.

In view of my finding above, the two issues are resolved in the negative, as the plaintiff was squarely responsible for the entire collapse of the wall and damage to its drainage channels due to the poor workmanship during the construction of the wall as agreed in the JVA.

Issue 3: Whether the defendants breached their statutory duties and obligations in the manner in which they carried out developments that compromised the structural integrity of the shared perimeter wall.

It is the plaintiff's case that the defendants had a duty under the **Public Health (Building) Rules, the Physical Standards and Guidelines** and under PE11, this duty was breached.
That the defendants encroached on the plaintiff's plot in a manner in which they carried out development works, thereby causing damage to the plaintiff's perimeter walls and internal drainage as explained in paragraphs 24-27 of PW1's statement which was not controverted.

The above rules/guidelines require for a building to be a safe distance away from the perimeter wall.
Whereas the defendants' witnesses had stated in court that the distance from the wall to the building was about 1.5 meters, measurements at the locus in quo revealed that the distance was actually 3.6 meters apart which falls well in the range of the 3 meters required under the law.

Even further, all the defendant's developments and plans were duly approved by the concerned authorities in Mukono District.

As already discussed in issues 1 and 2 above, the compromise of the Joint Venture Wall was not the fault of the defendants who carried out their developments well within the ambit of the law.

I accordingly find this issue in the negative.

Issue 4: What remedies are available to the parties?
The plaintiff's remedies were sought under paragraph 3 of the amended plaint.
Having found their entire claim in the negative, they are not entitled to any of the remedies sought.

<u>On the counter claim.</u>
The counter-claimant, prayed for;

a) A refund of the 14,250USD incurred in the construction of the failed wall.
   This claim was duly substantiated throughout the trial and in fact admitted to by the plaintiff in all its documents.
b) General damages;
   These are awarded at the discretion of court depending on the gravity of the damage and or inconvenience suffered by the injured party.

It is the counter-claimant's evidence that the collapse of the boundary wall has caused the company much loss and inconvenience resulting from the interruption and delays in the completion of its works and non-use of the premises for which they prayed for damages.

It is trite law that equity cannot suffer a wrong without a remedy.

The defendant/counterclaimant argued that the plaintiff indeed breached clause 4 of the JVA wherein the 1st defendant was given a 5 year warranty for indemnity by the plaintiff for any loss caused by the wall collapsing and damaging the 1st defendant's property provided the cause was not as a result of the actions of the 1st defendant or its agents.

According to the 1st defendant, the plaintiff breached a duty of care owed to them when it constructed ordinary walls instead of retainer walls that would withstand the forces of storm water given their location.

That in addition, the locus in quo established that indeed, the plaintiff had maliciously dug a manmade channel other than the natural channel that it had directed to pour into the DFCU plot but which it also neglected to maintain causing blockage and spillovers which compromised the already weak wall hence its collapse.

Counsel relied on the persuasive authority of **Gianfelice Pappalardo Vs. Gary Hau ZASCA 160** where the case of **Barklie Vs Bridle 1956 (2) SA** was quoted, where Beadle J stated that;

> ***"In my view if the owner of an urban tenement, by the lawful development of his stand, increases, concentrates and alters the natural flow of water onto his lower neighbor's stand he is not entitled to discharge that water onto his lower neighbor's stand at a point which may be most convenient to himself but most inconvenient to his lower neighbor. He must take reasonable steps to ensure that by the discharge of the water, no injury is done to his lower neighbor; and if by use of reasonable measures, he can discharge that water onto the adjoining street so that the water may be harmlessly drained down that street, then I consider he should do so"***

As already mentioned above, it is the responsibility of the land owner to ensure that he/she manages the drainage system **WITHOUT** inconveniencing the neighbor.
In the instant case, a visit at the locus revealed a flow of storm water from the upper side of both plots belonging to the plaintiff and 3rd defendant.

Court observed that had the plaintiff managed the drainage well, through his plot, the flow would have not damaged the wall.

Court also observed that there was no natural water flow channel. Both parties had to work on the drainage system given the terrain of their respective plots. Notably, the plaintiff is on lower part while the 3RD DEFENDANT is on the upper part. The flow of storm water that affected the plaintiff's part was not from the defendant's part but from the side of the plaintiff and then would divert right at the end of the plaintiff's plot and at the beginning of the defendants plot.
The plaintiff argued that because the defendant blocked the drainage, it compromised the wall.

Court observed that the plaintiff's officials did not act prudently to avert the likely damage from the natural flow of storm water yet they acquired the trust from their partners in the JVA to handle the situation. They breached that trust by allowing substandard work that did not stand the test of time. The wall collapsed before the guaranteed period of five years.

It is true that vibrations on the other side could have contributed to the fast weakening of the wall that was poorly constructed.

This court therefore finds some contributory negligence on the side of the counter claimant. Since it was a joint venture, they ought to have actively participated in the entire process. I am therefore holding the counter claimant / defendant liable up to 30%. The plaintiff/ counter defendant should therefore refund 70% of the USD 14,250 which is USD $ 9,975.

On the issue of **general damages for the counter claimant**, these are awarded for injuries suffered or breach of contract. They are not specifically pleaded or proved. They are therefore left to the judgment and common sense of the court leaving a wide range of possibilities in terms of amount to be awarded based on evidence.

The conduct of the parties more so the one held liable in the end, has a very strong bearing on the award. I have considered both parties here especially the plaintiff. I also considered the counterclaimant who constructed too close to the wall much as it was within the prescribed distance. The two parties are neighbors who should be encouraged to reconcile. In the result, no order is made as to general damages for the counter plaintiff/ defendant.

Cost of the counter-claim

It is trite law that costs follow the event, where a party has been inconvenienced unjustly through the court process, it is only fair that they are compensated for their time and money spent throughout the trial.

I do not see any reason why I should not award costs to the defendant.

In the result, the suit is dismissed and counter claim partially allowed with the following orders;

1) The plaintiff/counter-defendant is hereby ordered to pay to the 3rd defendant the sum of USD $ 9,975 being the monies invested in the failed joint venture.
2) Costs of the suit are awarded to the counter-claimant.

Dated this **17TH** day of **July 2020.**

MARGARET MUTONYI
JUDGE