

SYMPOSIUM ON THE CHALLENGES AND PROSPECTS OF NOVEL TYPES OF BUSINESS AND HUMAN RIGHTS LITIGATION

STRATEGIC LITIGATION OF ENVIRONMENTAL BUSINESS AND HUMAN RIGHTS VIOLATIONS: THE CASE OF THE SOLAI DAM TRAGEDY

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Introduction

This essay will use the strategic litigation of the Solai Dam Tragedy in Kenya as a case study to analyze the challenges of addressing environmental business and human rights violations in court proceedings. In the business and human rights framework, strategic litigation serves as a pathway for victims of business-related harm to seek judicial remedy. There is no universally accepted definition for the term “strategic litigation” but it does differ from conventional forms of litigation because the legal “strategy” deployed is oriented not only on solving a past dispute in the client’s interest but also seeks to develop principles that could be used by others and produce a broader societal impact, including the building blocks to change social attitudes and effectuate political reform.¹ In that way, strategic litigation can result in lasting change.

An overarching goal of strategic litigation in the business and human rights field is to change the ecosystem within which corporations are operating and, in turn, improve corporate respect for human rights, strengthen access to remedy and bring a systemic change to the way corporations operate in society. To achieve this goal, litigation seeks meaningful social change that will influence corporate behavior, which can include raising awareness, changing corporate culture, shaping laws and policies and remedying harm.² This essay, through an analysis of the Solai Dam Tragedy, seeks to highlight the growing importance of strategic litigation in addressing environmental, business, and human rights violations in Kenya. It argues that strategic litigation is a promising tool for enhancing access to remedy for the victims but at the same time is not a panacea as there are still hurdles in its implementation.

Background: The Solai Dam Tragedy

On May 9, 2018, an illegally and irregularly constructed man-made dam within the vast Patel Coffee Estates located in Solai, Nakuru County in Kenya broke its banks at around 7:15 p.m., gushing out 190 million liters of water through settlements, leaving in its wake gruesome deaths, horrible injuries (physical, mental, and

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¹ European Center for Constitutional and Human Rights, *Strategic Litigation*.

² Ebony Birchall, Surya Deva & Justine Nolan, *The Impact of Strategic Human Rights Litigation on Corporate Behaviour*, THE FREEDOM FUND (2023).

emotional), massive destruction of property, and unprecedented displacement of people. Most of those who were swept away by the raging waters were women, children, and elderly persons in the local community. The Patels, who are billionaires, owned eight dams, all without the requisite permits.³

Dr. Peter Mbae, a member of the County Assembly in the area, lodged a lawsuit against the National Environment Management Authority (NEMA), the National Water Conservation, and Kenyan corporate entities associated with the Patel family, including Pipeline Corporation, Tindress Patel Coffee Estates, and Salt Manufacturers Company. Through this petition, he sought orders aimed at establishing responsibility for negligence in the construction and maintenance of the dam, compelling NEMA to conduct an environmental impact assessment on the remaining seven dams on the coffee estate and requiring the relevant corporate respondents to conduct environmental impact assessments and social audits on their dams and to restore the ecosystem on their farm after the assessment.

This petition was dismissed.⁴ The *ratio decidendi* was that environmental impact and social audit reports already existed for the relevant period (2014–2018) and that some of the relief sought was deemed by the court to be premature in light of the Environmental Restoration Order that had already been issued. Further, the court found that requests to carry out fell within the jurisdiction of the National Environment Tribunal. These initial civil proceedings were, therefore, dismissed for want of jurisdiction.

In 2019, the Kenya Human Rights Commission (KHRC), a civil society organization, was at the forefront of providing legal representation to victims of this tragedy in subsequent proceedings. In particular, KHRC represented victims in civil proceedings against Solai Holdings Ltd., a company associated with the ownership and operation of the Solai Dam and structurally distinct from the Kenyan corporate entities named in the earlier petition, its owners and associated entities. Solai Holdings Ltd. forms part of a corporate group whose ultimate parent is incorporated in the United Kingdom, thereby introducing a transnational dimension to the litigation.

KHRC also appeared on behalf of victims in the related criminal case against the dam owners and government officials. The criminal proceedings were filed in Naivasha Law Courts⁵ but the matter faced significant delays. In November 2023, the victims and the dam owner reached an out-of-court settlement agreement for monetary compensation, leading to the withdrawal of manslaughter charges by the Office of the Director of Public Prosecutions. Under the settlement, negotiated with KHRC, families of the forty-seven deceased victims were each to receive Kenya Shillings 1.2 million as settlement for the harm suffered. For the families with minors, the settlement amounted to Kenya Shillings 800,000. The compensation offer was made after the criminal court ruled that the accused persons had a case to answer and formed part of the basis on which the proceedings were subsequently discontinued.⁶

It is arguable that KHRC's decision to bring concurrent civil and criminal law cases was important in putting pressure on the respondent company and its owners to enter into a settlement. This case illustrates the nuances and limits of strategic business and human rights litigation. On the one hand, it is an important tool to gain justice for the victims, but on the other hand, it is marred with challenges. While the proceedings ultimately resulted in monetary compensation for victims, the strategic value of the litigation lay less in the settlement outcome itself than in the leverage generated through sustained civil and criminal proceedings. By maintaining legal pressure on both corporate and state actors over an extended period, the litigation contributed to a negotiated resolution that would likely not have been achieved through isolated civil claims alone. At the same time, the prolonged duration

³ Kenya Human Rights Commission Press Release, *Solai Dam Tragedy* (May 28, 2018).

⁴ *Peter Mbae v. Nat'l Env't Mgmt. Auth. & 4 Others; L. Soc. of Kenya & 2 Others (Interested Parties)* [2020] eKLR (Kenya).

⁵ *Bond James Onyango v. Republic* [2020] KEHC 977 (KLR) (Kenya).

⁶ Felix Kipkemoi, *Kenya: Solai Dam's Owner Agrees to Compensate Victims of 2018 Dam Collapse Tragedy*, BUS. & HUM. RTS. RSCH. CTR. (Nov. 7, 2023).

of the proceedings and the modest level of compensation underscore the constraints of strategic litigation as a tool for achieving substantive justice in cases involving severe harm.

The Existing Legal Framework

Business and human rights is predicated on the principle that companies have a responsibility to respect human rights in their operations and supply chains. This principle is directly implicated in cases such as the Solai Dam Tragedy, in which privately owned corporate entities operating large-scale agricultural and infrastructure projects caused severe harm to local communities. The United Nations Guiding Principles (UNGPs) for Business and Human Rights articulate a “Protect, Respect and Remedy” framework that encompasses a three-pillar structure.⁷ Pillar I provides that states have a duty to protect citizens within their territory from human rights abuses caused by third parties, including business enterprises. Pillar II provides that business enterprises should respect human rights, meaning they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. Pillar III provides for access to effective remedy. As part of their duty to protect against business-related human rights abuses, states are expected to take appropriate steps to ensure, through judicial and non-judicial means, that when business-related human rights abuses occur within their territory and/or jurisdiction, those affected have access to effective remedy.⁸

The aspiration embedded within the UNGPs is for multinational corporations operating in a transnational commercial environment to respect human rights in the territories in which they operate. Further, where any business-related human rights abuses occur, there ought to be effective remedy for the victims, including judicial and non-judicial grievance mechanisms. In Kenya, these principles are domesticated in the National Action Plan (NAP) on Business and Human Rights, which reiterates the obligations of the state to fulfill its duty to protect individuals and communities from business-related human rights abuses consistent with its domestic and international obligations as well as offering a roadmap of strengthening access to remedies for victims of business-related harm.⁹

However, there is a glaring gap between the aspirations of existing frameworks such as the UNGPs and the NAP and the realities on the ground. The Solai Dam Tragedy exposes that access to effective remedy is sometimes elusive for victims of environmental business and human rights violations. The victims had to endure years of litigation, with some cases failing at the preliminary stages and long, drawn-out cases thrown out for want of prosecution.

On the other hand, sometimes strategic litigation may also generate value at preliminary stages, even where substantive liability has yet to be determined. A good example is the landmark case against Meta in Kenya brought before the Kenyan High Court by Ethiopian nationals Abrham Meareg and Fisseha Tekle, with support from the tech justice organization Foxglove and the Kenyan public interest organization Katiba Institute. In April 2025, the Court rejected Meta’s jurisdictional objections, holding that it could hear claims concerning alleged harms linked to Meta’s content moderation practices in Ethiopia during the Tigray conflict between 2020 and 2022.¹⁰

In this sense, the case’s significance lies not in a finding on the merits, but in its successful assertion of judicial forum and justiciability in a novel transnational digital harms context. Read alongside the Solai Dam litigation, the

⁷ UN GA Res. 17/4, [Guiding Principles on Business and Human Rights](#) (2011).

⁸ *Id.*

⁹ Kihara Kariuki (Attorney General of the Republic of Kenya), [Sessional Paper No. 3 of 2021 National Action Plan on Business and Human Rights: For the Implementation of the United Nations Guiding Principles on Business and Human Rights](#) (2021).

¹⁰ Katiba Institute, [Court Gives Go-Ahead for Landmark Case to Stop Facebook Spreading Murder and Death Threats Online](#) (Apr. 3, 2025).

Meta case illustrates an emerging pattern in Kenya in which strategic litigation is used either to secure leverage toward remediation (as in Solai) or to establish jurisdictional and legal pathways for future accountability (as in Meta), reflecting a broader evolution in the role of Kenyan courts in business and human rights disputes.

When cases such as the Solai Dam Tragedy arise, they expose the challenges in utilizing strategic litigation in addressing environmental business and human rights violations and that the pathways to successful strategic litigation are lined with pitfalls. However, they also expose the critical role that civil society organizations, such as KHRC, can play in advancing business and human rights through strategic litigation.

The Harsh Reality

State Complicity

In their bid to attract foreign direct investment, some African states have lowered their legal standards to attract foreign investment, thereby implicating the state's human rights obligations.¹¹ In the Solai Dam Tragedy, it was common knowledge that the dam owners were operating without the requisite permits but they were allowed to do so to continue to attract foreign investment into the country. This was at the cost of potential adverse human rights obligations to the people living in the area. In many cases across the continent, government collusion with powerful multinational corporations to suppress international human rights norms and local aspirations has been a key hindrance to holding corporate actors accountable for business activities and operations that affect human rights in local communities.¹² An example of this is in Nigeria, where the African Commission on Human and Peoples' Rights held that the government was liable for violating the rights of the Ogoni people by failing to regulate oil operations adequately, which caused severe environmental harm and health issues.¹³

In the Solai Dam Tragedy case, significant legal challenges were caused by the state and its agencies in the civil and criminal proceedings lodged by the victims. In a constitutional petition raised by employees of one of the agencies—NEMA, which was accused of not carrying out its mandate, leading to the tragedy—state agents argued that they had absolute immunity and protection from personal liability when carrying out their bona fide work.¹⁴ In this petition, counsel for NEMA argued that NEMA was not aware of the existence of the Solai Dam and had no role in its construction. The court held that, given the role of NEMA in monitoring, supervising, and enforcing environmental policies, it could be sued, and its employees responsible for this specific incident could also face criminal proceedings.

Difficulty in Meeting the Burden of Proof

The burden of proof lies with the petitioners, usually the victims of the alleged environmental harm caused by the corporation and/or the state agency. Due to the complexity of cases, it is often difficult to meet the threshold for the burden of proof.

In the Solai Dam Tragedy case, there was contradictory expert evidence: one hydrogeological consultant testified that the collapse was a natural phenomenon, commonly referred to as an “act of God,” caused by

¹¹ Damilola S. Olawuyi & Oyeniyi Abe, *Introduction – Business, Human Rights, and the United Nations Guiding Principles: The Search for Good-Fit Approaches in Africa*, in *BUSINESS AND HUMAN RIGHTS LAW AND PRACTICE IN AFRICA* 2, 4 (Damilola S. Olawuyi & Oyeniyi Abe eds., 2022).

¹² *Id.*

¹³ *The Soc. and Econ. Rts. Action Ctr. for Econ. and Soc. Rts. v. Nigeria*, *Comm'n No. 155/96* (Afr. Comm'n H.P.R. Oct. 27, 2001).

¹⁴ *Willice Omondi Were & Another v. Director of Public Prosecutions & 2 Others* [2018] KEHC 3931 (KLR) (Kenya).

unforeseeable, unusually heavy rainfall beyond human control. To rebut this argument, the petitioners had to prove on a balance of probabilities in civil proceedings that this was a case of negligence and not an act of God. The burden of proof to demonstrate that the accused persons owed a duty of care, that it was breached and the causation to prove that the breach is what occasioned the loss or damage was a complex task.

Additionally, according to a report by the Kenya Human Rights Commission,¹⁵ the task of meeting the burden of proof was further complicated by challenges in obtaining complete and transparent documentation regarding the construction of the dam, inspection reports, and operational history. This lack of clear and reliable records made it difficult for victims to prove negligence and meet the legal standard.

Meeting the threshold of the burden of proof is aggravated by resource imbalances. Petitioners, victims of environmental business and human rights violations, usually have fewer resources than respondents—often corporations and state actors. Gathering the evidence to meet the burden of proof involves extensive documentation, expert opinions, and witness testimonies, which might end up being too expensive for local communities.

Power Imbalance: David v. Goliath

Significant power imbalances existed between the victims of the Solai Dam Tragedy and the accused owners of the Solai Dam, as well as government officials. The adversarial system treats parties as if they were equally endowed with economic resources, investigative opportunities, and legal skills, yet the system privileges the wealthier, more experienced, and better organized party.¹⁶ The parent company of the Solai Dam corporate group was based in the United Kingdom and operated in fourteen countries, while the victims were local, low-income communities, some of whom were employees of the Patel Coffee Estate. The victims were represented by KHRC as they were unable to afford protracted court processes. This is a major pitfall of strategic litigation of environmental business and human rights violations as the respondents tend to be corporations with large budgets while the petitioners, the victims, tend to be from low-income communities. This financial disparity hampers access to justice.

In a KHRC report,¹⁷ instances of state and corporate impunity were highlighted, including allegations of victims being compelled to sign forms absolving the owner from liability in exchange for money. Allegations of coercion from the dam owners and government officials were also documented. These power imbalances against powerful corporations and states lead to delays and miscarriage of justice for the victims.

Power imbalances also act as incentives for the victims to settle. After long, protracted court battles, victims would rather enter out-of-court settlements than continue with expensive, tumultuous court processes. This is also aggravated by the lack of psychosocial support for victims who have undergone traumatic experiences such as loss of family members and friends, injuries to self, and loss of property. In the Solai Dam Tragedy case, civil society, such as the Kenya Red Cross and World Vision Kenya, stepped in to offer psychosocial support to the survivors and affected families. However, at the point of settlement, many victims expressed a strong need for closure to begin the process of healing and rebuilding their lives.

The outcome of the Solai Dam Tragedy highlights the importance of strategic litigation in environmental business and human rights violations not only in the sense of compensation for the victims but also to be able to advocate for accountability from powerful corporations and their owners who are responsible for these abuses. It

¹⁵ Kenya Hum. Rts. Comm'n & Freedom of Info. Network and Mid Rift Hum. Rts. Network, *Damned Dams: Exposing Corporate and State Impunity in the Solai Tragedy* (2018).

¹⁶ Bridgette Toy-Cronin, *Power in Civil Litigation*, 17 POL'Y Q. 29 (2021).

¹⁷ Kenya Hum. Rts. Comm'n & Freedom of Info. Network and Mid Rift Hum. Rts. Network, *supra* note 15.

also helps to drive reforms by challenging an unfair status quo. In this case, there were calls for all dam owners to have the requisite permits and adhere to the environmental laws in Kenya to avoid such tragedies in future. It also empowers the local communities who through this process are able to seek justice and obtain remedies for the violations. It also enhances corporate respect for human rights as envisioned in the UNGPs as corporations operating in other jurisdictions learn through such cases, that they have a responsibility to respect the human rights of the people in the territories in which they operate.

Conclusion

Strategic litigation is by no means a panacea. However, it remains an important tool for societal change in law, policy, and practice, even where it is not necessarily successful in court. The strategic litigation in the Solai Dam Tragedy case raised awareness on the environmental risks faced by local communities and led to advocacy for systematic change in disaster response, dam safety regulations as well as a human rights framework for disaster management and infrastructure development. Specifically, the Water (Harvesting and Storage) Regulations were passed to strictly govern dam construction and operation with provisions on safety inspections, dam classification and risk assessment, emergency plans, and mandatory technical oversights. Further, the National Environment Management Authority and the Water Resources Authority issued stringent orders on all dams at the Patel Farms and subsequently across the country to be audited to ensure compliance with the law and to cease operations for dams lacking proper environmental compliance. There was also a requirement that all dams built before the 1999 Environment Management and Coordination Act (EMCA) still undergo comprehensive environmental audits. This was a win for overall compliance with dam safety regulations.

By initiating the case and releasing numerous reports, Kenya Human Rights Commission shed light on the environmental business-related harm that had been caused and pursued remedies for the victims. The matter ended with an out of court settlement years later, and whether adequate or not, it was a message to powerful corporate actors that there is a need for corporate respect for human rights.

In response to transnational corporate involvement in human rights violations, civil society is increasingly exploring the tools offered by the law and using strategic litigation to complement longstanding practices of campaigning, public protest, boycotts, and negotiation. The language of the law and the format of legal proceedings can provide an impetus for the articulation of the demands of social movements toward corporations and offer an alternative vocabulary, rooted in discourse about rights as well as draw attention to the ways in which companies disregard the human and environmental impacts of their products.¹⁸

Strategic litigation remains a critical tool for civil society to seek remedy for victims of environmental business and human rights violations. It has an untapped potential for advancing justice and accountability beyond the proceedings lodged in court systems and can complement other advocacy efforts by civil society to push for corporate respect for human rights as well as access to effective remedy for victims of business-related harm.

¹⁸ Carolijn Terwindt & Christian Schliemann, *Commentary: Civil Society Is Increasingly Using Strategic Litigation to Address Corporate Human Rights Abuses*, BUS. & HUM. RTS. RSCH. CTR. (June 26, 2017).