



**Mucheke & 5 others v Kinyua (Environment and Land Appeal
E060 of 2022) [2024] KEELC 597 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 597 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E060 OF 2022**

CK NZILI, J

FEBRUARY 7, 2024

BETWEEN

**HAWO ABDI MUCHEKE 1ST APPELLANT
RUKIA ABDI M'MUCHEKE 2ND APPELLANT
HEZEKIAH ABDI 3RD APPELLANT
HASSAN ABDI 4TH APPELLANT
JAMILA ABDI 5TH APPELLANT
SHARU ABDI 6TH APPELLANT**

AND

OBADIAH MUGAMBI KINYUA RESPONDENT

*(Being an appeal from the Judgment of Hon. C.K Obara S.P.M.
Maua delivered on 17.10.2022 in Maua E.L.C. Case No. 260 of 2018)*

JUDGMENT

1. The appellants at the lower court had been sued by the respondent by a plaint dated 13.3.2018 for trespass, destruction, malicious damage, loss, user damage, and permanent injunction out of their invasion into the respondent's L.R No. Nyambene/Antubetwe/Njoune/2290, in April 2014.
2. The appellants opposed the suit through a preliminary objection dated 5.3.2019, that the court lacked jurisdiction under Section 18 (2) of the *Land Registration Act* and the *Survey Act*; it disclosed no cause of action and hence was an abuse of the court process. Further, the appellant filed a defense and counterclaim dated 1.4.2019. The appellants denied there was any subdivision of the initial land by the deceased before she died, and if so, the same was illegal and fraudulent, and any transfer thereof to the appellants must have occurred long after the death of their late father.



3. Additionally, the appellants averred that if any survey report was needed in the High Court as a result of boundary claims, the same would have been implemented by the High Court, or else the respondents would have been charged with contempt of court or before a court of law for criminal activities. The appellants denied the alleged developments on or occupation of the suit land by the respondent.
4. By way of a counterclaim, the appellants averred L.R No. Antubetwe/Njohne/2290 was family land illegally hived from L.R No. Antubetwe/Njohne/551, through collusion between the appellant and the then administrators of the deceased's estate, which amounted to intermeddling given the appellants' mother was not given any land. The appellants averred that the appellant fraudulently and illegally transferred the suit land in collusion with the then administrators to the estate long after their late father; as such, the deceased could not have gifted the appellant or her mother any land after he had passed on. They termed the appellant as coming to court with unclean hands seeking unjustified orders. The appellants sought the cancellation of the title held by the respondent and its merger with L.R No. Antubetwe/Njohne/551, mesne profits and for a permanent injunction.
5. The counterclaim had no titular heading or a consent to sue and plead duly signed by the appellants. Payment for the requisite filing fees for the two prayers in the counterclaim was also missing.
6. From the lower court file and the record of appeal, a reply to the defense and defense to the counterclaim the respondent may have filed against the respondent's counterclaim was missing. Be that as it may, the appellants filed statements dated 21.3.2021, a list of documents, and a further list of exhibits dated 26.4.2019, while the respondent relied on a list of witnesses and documents dated 10.9.2019.
7. At the trial, Obadiah Mugambi Kibayaa testified as PW 1 after adopting his witness statement dated 20.3.2021 as his evidence in chief. He told the court his late mother gave him a portion of her land to construct a building on L.R No. Antubetwe/Njohne/2290, where she had erected a shop and two rear rooms and took over the entire premises to construct a house behind the shop.
8. PW 1 told the court that his mother transferred the land to him in February 2014 and obtained a title deed on 27.3.2014. He said that when he brought workers to land in early April 2014 to begin construction, the appellants pulled down the fence separating his land from Parcel No. 551 and forcefully occupied the land. PW1 said that in November 2016, the appellants served him with an application in Meru H.C.C. Succession Case No. 265 of 2014 dated 31.10.2016. After considering the application, PW 1 said the High Court ordered a site visit by the District Land Surveyor to mark the boundaries between L.R No's. 551 and 2290 and furnish a report to the court.
9. PW 1 said the appellants mobilized goons to disrupt the site visit on 23.3.2017 and chased away the land surveyor. He said the officer reported to the court on 11.4.2017 that he could not effect the work. After that, PW 1 said a ruling was delivered on 2.5.2018 that the two parcels of land were distinct and separate, so he was directed to move to this court. PW 1 said that despite the court ruling, the appellants denied him access to work on or occupy his land. He said he wrote a demand letter dated 23.7.2018. PW 1 said he incurred loss and damage because he had to look for alternative accommodation from October 2014 since he could not complete the house after the appellants denied him vacant possession.
10. The respondent produced a demand letter, a green card for L.R No. 2290, a sketch map, a green card for L.R. No. 551, an application dated 31.10.2016, a High Court order dated 1.2.2017, a land surveyors report dated 11.4.2017, a ruling dated 2.5.2021, a bundle of rental receipts and a Ministry of Land's letter dated 13.1.2017 as P. Exh No's. 1-10 respectively.
11. PW 1 told the court that his mother's shop and rental houses were erected on the land over 15 years ago and that Parcel No. 2290 was never part of L.R No. 551. He said Parcel No. 2290 was registered



- in his mother's name on 9.12.1997, while Parcel No. 551 was registered in the name of M'Mucheke M'Itirichia on the same day.
12. In cross-examination, PW 1 said that he had rented a house from Muthinja, where he had stayed for 7 – 8 years, but had no lease agreement before court. PW 1 said the appellants were his aunt and cousins. He denied that he was a beneficiary in his late uncle's estate, the subject matter in Meru Succession Cause No. 65 of 2001. Regarding the counterclaim, the respondent said he was surprised his lawyer had not filed a defense to the cross-suit.
 13. In re-examination, PW 1 said he had been paying rent as per the receipts produced, for the appellants stopped or disrupted him from fully completing his house or accessing his land. He denied that his land was a subdivision of parcel No. 551, which he said he had no interest in.
 14. Hawo Abdi testified as DW 1 and adopted her witness statement dated 12.6.2019 as her evidence in chief. She told the court that she was the wife of the late Adi Mucheke M'Itarachia, who, upon marriage, established a matrimonial home on L.R No. 551 in Kiengu village, where they resided with her co-wife Rukia Abdi and their children. DW 1 said that after her husband passed on, Zipporah Kanja forcefully and without any color of right moved into the Suitland. Efforts to settle their land disputes at the clan level were futile. DW 1 also said that before long, Ismael Abdi, a stepson, colluded with Zipporah Kanja and filed the succession cause, where they filed objection proceedings, only to learn of the fraudulent subdivision on the title in favor of the respondent.
 15. Further, DW 1 said the respondent filed a false report at Maua police station in February 2019 for malicious property damage, leading to her family members' arrest. DW1 said that after investigations, they were unconditionally released by the police. She said the respondent had caused them untold physical and psychological stress due to the illegal invasion of the land and the unprocedural manner of acquiring his title through a corrupt scheme. In addition, DW1 produced a copy of green cards for L.R No's. Nyambene Antubetwe/Njoune/2290, and 551, minutes for the clan meeting and a gazette notice as D. Exh No. 1-4, respectively. She asked the court to allow her counterclaim and dismiss the respondent's suit.
 16. In cross-examination, D.W.1 said she was unaware that the two title deeds were issued on 9.12.1997. She could not tell if the boundary between the two parcels of land was ever fixed. Further, she admitted that L.R No. 2290 was never the subject in the probate court. DW1 said her husband died in 1993 and had never sued Zipporah Kanja over her occupation, developments and subdivision of the land allegedly illegally obtained from them. She termed the title for L.R 2290 as fraudulently obtained.
 17. The next witness was DW 2, who told the court the probate cause was filed in 2002. She said they discovered the fraudulent registration of the respondent's title in 1998 and registered a caution. Further, DW 2 said they attended the Succession Cause in 2004, where an order to establish a boundary was made, for a land surveyor visited the land. DW 2 said that after the site visit, the respondent was never allowed to visit or occupy the land, even though he had initiated some construction of houses on the land.
 18. DW 3 was Adan Hirka Alake Hawo. He told the court that the respondent's mother had separated from her husband and returned to seek refuge at DW 1 late husband's land. He denied that the deceased had given out any land to Zipporah Kanja. DW3 also said the construction on the suit land was done after the late M'Mucheke passed on in 1993. Asked by the court if he had any land nearby, DW 3 said he possessed none.



19. Following the close of defense testimony and written submissions, the trial court allowed the respondent's claim and dismissed the appellants' defense and counterclaim. By a memorandum of appeal dated 24.10.2022, the appellants fault the judgment dated 17.10.2022.
20. The grounds are;-
- i. Finding that the respondent had proved his case despite misrepresentation of facts.
 - ii. For being biased against them.
 - iii. For finding L.R No. 2290 as the respondent's property despite contrary evidence.
 - iv. For awarding general damages.
 - v. For striking out the counterclaim for lack of jurisdiction.
 - vi. For wrongly interpreting the ruling in the succession cause.
 - vii. For finding the ownership of the suit land by the respondents unchallenged.
 - viii. For finding the balance of convenience as titling in favor of the respondent contrary to the evidence tendered.
21. With leave of court, parties were directed to canvass the appeal through written submissions to be filed by 15.12.2023. The appellants sustained their grounds of appeal by written submissions dated 23.11.2023, isolating five issues for determination. As to the transfer of L.R No. 2290 to the respondent, it was submitted that there was no dispute that it was initially part of L.R No. 551, belonging to the 1st appellant's late husband, which was never subdivided and transferred before his death in 1993. The appellants submitted that the respondent failed to produce any evidence to show that he acquired the land from his mother, either through a witness from the land registrars or the land adjudication's office.
22. The appellants submitted that without the support of the deceased Abdi, M'Mucheke M'Itirichia, the respondent's mother illegally subdivided L.R No. 551 into L.R No. 2290 in 1990 and caused it to be transferred to the respondent, hence the root title was unlawfully and unprocedurally obtained.
23. The appellants submitted that the burden of proof was on the respondent to prove the validity and legality of his title. Reliance was placed on Hubert L. Martin & others & Margaret J. Kamar and others (2016) eKLR and Dina Management Ltd vs County Government of Mombasa & others, Pet 8 (E010) of 2021 (2023) KESC 30 KLR (21st April 2023) Judgment.
24. On whether fraud was proved, the appellants submitted as a first appellate court, the court has the mandate to evaluate the evidence tendered at the hearing. To this end, the suit land was the ancestral land of the deceased, where the appellants were born, raised, settled, and resided before and after the late registered owner passed on, and therefore, he could not have gifted the land to the respondent's mother at the expense of his family. Hence, there was something wrong with the land acquisition by the respondent.
25. Relying on paragraphs 48 and 49 of the appeal record, the appellants submitted one Ismael Meme sold the land to Zipporah Kanja without the consent of other family members. Relying on Sections 26 & 80 of the *Land Registration Act*, the appellants urged the court to find that the respondent participated in the fraud, had never occupied the land, and therefore his title deed was not protected under the law. Further, the appellants submitted that failing to call Zipporah Kanja as a witness was fatal to the respondent's claim since she was a necessary witness.



26. On whether the appeal is merited, the appellants submitted they had demonstrated fraud on how the title deed was acquired, and since the respondent failed to call vital witnesses such as the land registrar, land adjudication officer, and his mother, the trial court should not have allowed his claim. The court was urged to allow the appeal.
27. The role of an appellant court of the first instance was set out in *Selle & another vs Associated Motor Boat Co. Ltd & Another* (1968) E.A 123. The court said an appellant court is not bound by the findings of fact by the court below. It must reconsider the evidence and conclusions on facts and law, bearing in mind that the trial court benefited from seeing and hearing the witnesses, including observing their demeanor.
28. I consider the following issues for determination:
- i. If the respondent pleaded and proved trespass, malicious damage, forceful and illegal occupation of his land between 2014 – 2018.
 - ii. If the appellants were justified in entering, driving out, destroying, and denying the respondent the right to use, occupy, develop, or enjoy his land.
 - iii. If the respondent suffered any loss and damage from the appellants' acts.
 - iv. If the respondents pleaded and proved any loss and damage.
 - v. If there was a competent counterclaim by the appellants.
 - vi. If the appellant pleaded and proved fraud, illegality, and the unprocedural manner in which the respondent had obtained the title.
 - vii. If the respondent was entitled to the relief sought in his plaint.
 - viii. If the appeal has merits.
29. The primary pleadings before the trial court were the plaint dated 13.11.2018 and the statement of defense and counterclaim dated 1.4.2019. Even though at the hearing, PW 1 insisted he had filed a reply to the defense and defense to the counterclaim, none appeared in the lower court record or was captured in the record of appeal. The counterclaim by the appellants had no titular heading. The plaintiffs and the defendants in the counterclaim were not pleaded. The court receipt for the defense and counterclaim dated 1.4.2019 was for Kshs.1,650/= instead of Kshs.3,150/= for the two prayers in the counterclaim. I find there was no competent counterclaim before the trial court.
30. Trespass under Section 3 (3) of the *Trespass Act* is illegal entry without justification, to private land without consent or approval of the owner. In *Park Towers Ltd vs. John Mithamo Njoka & others* (2014) eKLR, J.M, Mutungi held that where trespass is proved, a party need not prove that he suffered any specific damage or loss. In *Duncan Nderitu Ndegwa vs Kenya Pipeline Company Ltd & another* (2013) eKLR, Nyamweya J as she then was observed trespass to land if proved was actionable per se. Further, in *Nguruman Ltd vs Shompole Group Ranch & others* (2007) eKLR, the Court of Appeal cited Clerk and Lindsell on Torts 16th Edition paragraphs 23 – 01 that every continuance of a trespass was a fresh trespass.
31. Additionally, in *Isaack Ben Mulwa vs Jonathan Mutunga Mweke* (2016) eKLR, the court said that a continuous injury to land caused by the maintenance of tortious acts creates separate causes of action. Moreover, in *Attorney General vs Halal Meat Products Ltd* (2016) eKLR, the court observed that where a person was wrongfully deprived of his property, she was entitled to damages known as mesne profits suffered as a result of the wrongful periods of occupation of her land by another. Similarly, in



- Peter Mwangi Mbuthia & another vs Samow Edin Osman (2014) eKLR, the court observed that it was upon a party to place evidence before the court to demonstrate how the amount claimed for mesne profits was arrived at. Article 40 of *the Constitution* grants an owner the right to protection from being deprived of his land.
32. Having set out the broad principles on trespass to land, the question is whether the respondent had pleaded and proved the tort of trespass to his land. The respondent pleaded that he was a registered owner of the suit land and gave the history of the acquisition process of his title in 2014 and the manner of his entry to the suit land.
 33. Further, the respondent pleaded that he embarked on improving the old buildings his mother had erected over 15 years ago and started new ones on the suit land, only for the appellants to forcefully interfere and deny him occupation of the land until he moved to court. PW 1 produced a copy of the green card for L.R. No's Antubetwe/Njohne 2290 and 551, showing that they were distant and separate parcels of land as per P. Exh No. 3, a sketch map. Further, the respondent produced a land surveyor's report, a Ministry of Lands letter, a ruling, and an order from the probate court.
 34. Section 27 of the *Land Registration Act* provides that registration of a person as a proprietor bestows absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. In Noah Onyango Amwayo vs Sylvanus Otumba & another (2013) eKLR, the court of appeal held a green card and certificate of official search constituted an extract of title and were better evidence of the appellant's title than his title, for they contained entries on the register which was current information relating to the parcel of land. The court said the failure to produce the title concerning the land was not fatal. The court said an adjudication record was not evidence of title, for an adjudication process ends when the Chief Land Registrar opens a parcel on the land register.
 35. In this appeal, the appellants' basis for attacking the title held by the respondent was raised in paragraphs 2 - 5 of the defense and counterclaim dated 1.4.2019. Fraud denotes the concealment or misrepresentation of facts. It must be pleaded and proved. See Vijay Morjaria vs Nansingh Madhusingh Darbar (2000) eKLR and Arthi Highway Developers vs West End Butchery Limited & 6 others (2015) eKLR.
 36. The copy of the green card shows the registers for L.R No's.2290 and 551 were opened on 9.12.1997. Entry No. 2 in L.R No. 2290 shows that Zipporah Kanja obtained a title deed on 13.8.2002, while the respondent acquired his title on 27.3.2014. Entry No's. 1, 2, and 3 in the title register for L.R No. 551 show that M'Mucheke M'Tirichia became the registered owner on 9.12.1997 and acquired his title. The two parcels of land have distinct measurements, namely 0.05 ha and 0.43 ha, and are from the Registry Index Map Sheet No. 10.
 37. The appellants produced no evidence showing that the two parcels arose from a common parcel belonging to the late M'Mucheke M'itirichia. No history of the suit land was produced before the register opened on 9.12.1997, to show that Zipporah Kanja was the author or architect of the alleged illegal subdivisions and creation of titles.
 38. DW1 told the court that her late husband passed on on 7.5.1993. A copy of the register or title deed for L.R No. 551 as of 1993 was not produced to show that there was any interference with the records or ownership after the death of the deceased. No material was availed to show that L.R No.2290 was a subdivision of L.R No. 551. The appellants averred that there was collusion between the respondent's mother and the former administrators of the estate. The former legal administrators were not included in the counterclaim. No evidence was availed from the land registry on the alleged subdivisions through mutation forms over L.R No. 551, creating L.R No. 2290.



39. Registration of titles and changes in the registration status of land is a formal process. To allege that there were illegal entries in the title register without proof is what the appellants did at the lower court. The names of the alleged former legal administrators of the estate were not mentioned or summoned before the trial court. Documents used to register and transfer L.R No. 2290 as part of L.R No. 551 were not availed before the trial court.
40. Fraud, illegality, and collusion may not be inferred or assumed from the facts. It has to be pleaded and proved with tangible and cogent evidence. See *Virjay Morjaria vs. Nansingh Darbar & another* (supra) and *R.G Patel vs Laljo Makanji* (1957) E.A 314. A title deed is an end product. The process leading to the acquisition is equally essential, as held in *Daudi Kiptugen vs Commissioner of Lands & 4 others* (2015) eKLR.
41. The onus was on the appellants to prove fraud, illegality, and improprieties on how the respondent obtained his title deed. The respondent produced evidence that he acquired the land from his mother in 2014. The appellants failed to join the mother of the respondent as a party to the suit. She was a necessary party to the cross-suit. It was not upon the respondent to prove his innocence of the alleged fraud or illegality. As held in *Raila Odinga vs. IEBC* (2017) eKLR, the balance of proof is on who will likely lose if specific facts are not proved. Once the respondent pleaded and proved the legality of his title deed and produced a copy of records, the burden was on the appellants to impeach his title deed by showing that the title was founded on fraud, illegality, or was unprocedurally obtained through a corrupt scheme. Therefore, my finding is that the trial court was right to hold that the respondent was the absolute owner of the suit land.
42. The issue is whether the respondent was denied the right to own, use, and develop the suit land. The appellants raised a preliminary objection based on Section 18 of the *Land Registration Act* and the *Survey Act*. In paragraph 6 of the appellants' counterclaim, they denied the existence of a survey report or order of the High Court and a breach of the same. In Paragraph 7 of the defense, the appellants denied that the respondent had developed his land or could not access, build and complete his houses due to their alleged interference. They termed the allegations of trespass as a witch hunt.
43. In paragraph 8, the appellants denied entering, occupying, and obstructing the respondent from his land or receiving any demand letter. The appellants sought mesne profits for lack of peace and a permanent injunction from working or interfering with L.R No. 2290, which title they prayed to be canceled and to revert to the estate of the deceased for distribution. Further, the appellants sought a permanent injunction stopping the respondent from utilizing the suit land. In support of their defense and counterclaim, the appellants denied that the respondent's mother had acquired L.R No. 2290. They also admitted the High Court had issued orders on 1.2.2019 for boundary establishment and fixing between the two parcels of land as P. Exh No. (6). DW 1 said his late husband died in 1993 without a title deed for L.R No. 551 was yet to be obtained. She admitted that subdivisions to the land occurred during the adjudication process.
44. DW 2 told the court that collusion occurred between her stepbrother and the respondent's mother in 1998, and they registered a caution. DW 2 admitted the High Court ordered a scene visit by a land surveyor. DW 2 admitted in cross-examination that the respondent had erected some buildings on his land and was not utilizing L.R No. 551.
45. DW 3 told the court that after the respondent's mother divorced her former husband, she was accommodated at the late M'Mucheke's home. Similarly, DW 3 denied that the late M'Mucheke permanently gave out any part of his land to Zipporah Kanja. D.W.3 said that if there were any structures on the suit land by the respondent and his mother, the same must have been erected after the deceased died in 1993. She was never aware of the land ownership by the respondent's mother.



46. In P. Exh No. 5, the appellants had sued the respondent for intermeddling with L.R No. 2290, said to belong to the deceased's estate. P. Exh No. 6 was issued for the re-establishment of the boundary. P. Exh No. 7 shows that the appellants stopped the implementation of the court order. In P. Exh No. 8, the probate court did not make a finding on the appellants' allegations of fraudulent acquisition of L.R No. 2290. The court referred the issue to the Environment and Land Court. The court, based on the evidence of Imam Kiunga Mosegwe and the area chief, made a finding that the respondent had been in occupation of the suit land as early as 1995.
47. DW 1, DW 2, DW 3, Joseph Kanyi, Zipporah Kanja and Hirka Alake testified before the probate court. Zipporah Kanja confirmed that she owned Plot No.2305 and also acquired plot No. 2290 from the deceased, which she later transferred to her son, the respondent herein.
48. The respondent's title was, therefore, legally, procedurally, and regularly obtained from his mother. The appellants were aware of this, given the evidence from the predecessor to the title before 2014. Therefore, in the absence of superior rights or title, there was no justification for the appellants to enter into the land in 2014, occupy it, or stop the respondent from enjoying his rights of ownership up to 2016.
49. Evidence in the probate court showed that Zipporah Kanja, the mother of the respondent, was in occupation of the land as of 1995 with the knowledge of the late M'Mucheke M'Itirichia, who never repossessed, evicted, or took out any recovery proceedings. Any alleged fraudulent occupation and or acquisition of title by the respondent was also known by DW 1, DW 2, and DW 3 as early as the 1980s and 1990, going by their witness statements. For instance, Hawo Abdi said it was Zipporah Kanja who forcefully and with no color of right entered the land and also colluded with Ismael Meme to acquire the land.
50. The appellants did not file the counterclaim as the legal representatives of the estate of the late M'Mucheke M'Itirichia. They cannot advance the claim without letters of administration. They did not produce any confirmed grant to show that they could advance any rights accruing to the estate.
51. Consequently, I find the respondent was justified in seeking court enforcement of his right of protection to use, occupy, and enjoy his rights over the suit land which the appellants denied him since 2014. It is clear from P. Exh No. 18 that the appellants used the High Court to stop the respondent from enjoying his land. Even after the ruling of 21.1.2019 made it clear that the suit property did not form part of the estate of the deceased, still the appellants continued without justification to deny the respondents his rights to own, use and develop the land. I find the acts of the appellants were inconsistent with the ownership rights of the respondent.
52. Trespass, as indicated above, is actionable per se. The respondent pleaded the nature of the loss and damage he suffered between 2014 and the filing of his suit. The appellants, in their pleadings, still insisted the land did not belong to the respondent, yet there was evidence and findings by a court of law to the contrary due to prior developments on it by Zipporah Kanja as of 1995.
53. Therefore, at the time the appellants filed the defense and counterclaim and witness statements for DW 1, 2 & 3 on 11.7.2019, they already knew the existence of the ruling by the High Court on 21.1.2019. The appellants, alongside the respondent and his mother, had also testified during the objection proceedings before the High Court. The appellants were, therefore, estopped in law filing and testifying before the trial court with witness statements and oral evidence inconsistent with what they had earlier stated on oath regarding occupation and ownership of the suit land.
54. Coming to whether the respondent was entitled to damages for trespass in Kenya Power and Lighting Company vs Nkirote Ringera (2022) KECA 104 (K.L.R.) (4th February 2022) Judgment, the Court of



Appeal cited KPLC vs Fleetwood Enterprises Ltd (2017) eKLR that where trespass is proved a party affected need not prove that he suffered damages or loss as a result of trespass because once trespass is proved the court is bound to assess and award damages. In Duncan Ndegwa vs. Kenya pipeline Limited Company (supra) the court said trespass was actionable per se, while in Ryce Motors Ltd & another vs Muchoki (1995 – 1998) 2 E. A 363, the court further said it was not enough to waive a piece of paper with figures on it and ask the court to award the amount as special damages without proof. In KPLC vs Ringera (supra), the court further said consideration on damages for trespass include the loss of user, loss of opportunity to deal in and develop the suit land, and the resultant denial and deprivation of usage of the suit land. The court observed that the trial court had rightly relied on professional expert evidence in the absence of rebuttal evidence.

55. In this appeal, the respondent had pleaded loss of user, obstruction to develop his land, and expenses he had incurred in looking for an alternative accommodation. He produced a bundle of receipts for the loss and damage, which the appellant did not object to.
56. As to general damages in KPLC vs Ringera (supra), the court cited Halsbury's Law of England 4th Edition Vol. 45, page 1503, that nominal damages may be paid where no actual damage was occasioned. Exemplary damages may be made where the conduct to the owner was not only oppressive and cynical but carried out in deliberate disregard of the right of the owner with the aim of making a gain through unlawful conduct and general damages where trespass includes aggravating circumstances to the detriment of the owner. The court cited Duncan Ndegwa vs Kenya Pipeline (supra) eKLR that damages in trespass were the amount of diminution in value or the loss of reinstatement of the land before the period of infliction of harm. Further, the court cited Philip Anyaya Aluchio vs Crispinus Nyayo (2014) eKLR, that the measure of damages for trespass was the difference in the value of the land before and immediately after the trespass or the cost of restoration, whichever was less.
57. In this appeal, Kshs.300,000/= general damages awarded by the trial court are in line with the principles distilled in the caselaw cited above. The upshot is that I find no merits in the appeal. The same is otherwise dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 7TH DAY OF FEBRUARY 2024

In presence of

C.A Kananu

Ngumoto for Omari for appellant

HON. CK NZILI

JUDGE

