



Kenya Power & Lighting Company Limited v Kamau (Environment and Land Appeal 19 of 2022) [2023] KEELC 16001 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16001 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL 19 OF 2022
LN GACHERU, J
MARCH 9, 2023**

BETWEEN
KENYA POWER & LIGHTING COMPANY LIMITED APPELLANT
AND
KIRUBI KAMAU RESPONDENT

(Being an appeal against the Judgment of the Resident Magistrate's Court at Murang'a in PMCC NO. 191 OF 2014 by E WAMBO delivered on 9th March, 2016)

JUDGMENT

1. The Respondent herein filed a suit against the Appellant vide a Plaintiff dated 9th June, 2014. The matter proceeded for hearing and the trial Court pronounced itself in its judgment of 9th March 2016, the subject matter of this appeal. Being dissatisfied with the Judgment, the Appellant preferred instant appeal raising ELEVEN grounds in the Memorandum of Appeal dated 2nd October, 2018.
2. In the suit, the Respondent raised a claim of trespass against the Appellant. The basis of it was that in November, 2013 the Appellant trespassed unto the Respondent's parcel of land L.R No. LOC.19/RWATHIA/2830, fell tress and erected electricity poles and transmission lines thereon. That as a result thereof, the Appellant acted negligently and in violation of the law, thus occasioning the Respondent to suffer financial loss as enumerated in paragraph 4 of the Plaintiff. The Respondent sought orders inter alia damages of Kshs. 1,585,000/= general damages for trespass, negligence and breach of statutory duty and an order directing the Appellant herein to remove the electricity poles and power lines on his parcel of land. The Appellant herein denied the contents of the Plaintiff and invited the Respondent to strict proof of the averments thereof.
3. The matter proceeded for hearing, and the Respondent maintained that his consent was never sought before the Appellant could erect the electric poles. He added that the erection caused him loss and he invited a Valuer to buttress his claim. The Appellant submitted that they had erected the poles on a



- public road and also confirmed to having fell some of the Respondent trees and proposed a sum for compensation.
4. The trial Court entered judgment in favour of the Respondent and awarded Kshs. 1,170,000/= for loss suffered and Kshs. 300,000/= as general damages for trespass. The trial Court in declining to award the Respondent for loss of use noted that the Appellant had removed the transmission lines and there was no evidence that the Plaintiff could not use the demised land. The Appellant now challenges the award and faults the judgment of the Court as evident in the Memorandum of Appeal.
 5. The Appeal was dispensed with through written submissions. The Appellant through the Law Firm of Muga & Muga Associates filed their submissions on the 19th March 2021, raising four grounds for determination by this Court.
 6. On the issue of whether the trial Court erred in finding that the Appellant had trespassed into the Respondent's land, the Appellant submitted that the Court ought to have considered that the Plaintiff had in his testimony told the Court that he gave consent for a way leave to be erected. That within the meaning of trespass, the Plaintiff's consent absolved them from any liability. The Appellant relied on the cases of *Karuri Civil Engineering (k) Limited vs Equity Bank Limited* {2019}eKLR and *Justin Gatumuta vs Kenya Power & Co. Lt* {2018} where the Courts noted the role of an appellate Court as espoused in Section 78 of the Civil Procedure Rules.
 7. The Appellant submitted that the award of Kshs. 1,170,000/= was against the back drop of evidence adduced by the Appellants. The Appellant pointed out in his submission that the trial Court ought not to have been guided by the evidence of PW2 who did not attach a practising certificate or a gazette notice as per the directions of the Court. That with no Certificate, PW2 was in contravention of the provisions of Section 21(1) (a-c) of the *Valuers Act* and as a result therefore the Court ought not to have relied on his report. The Appellant invited this Court to the holding of the Court in *Tomas Kimagut Sambu vs. National Land Commission & 2 Others* {2018} eKLR, where the Court disregarded a report produced for contravention of Section 21 (c) of the *Valuers Act*. The Appellant faulted the report against the testimony of PW2 and submitted that the trial Court was not bound by the report and relied on the case of *Shah vs Shah* {2003}IEA 290, where the Court opined that an expert opinion is not binding on the Court. He relied on a litany of cases to buttress his assertion that the award of Kshs. 1, 170,000/= was not justified. In the end he urged this Court to allow the appeal.
 8. Equally, the Respondent through the Law Firm of James Joroge & Company Advocates filed his submissions on the 11th March 2021, raising three issues for determination by this Court.
 9. On the issue of trespass, the Respondent submitted that the Appellant had a statutory duty donated under Section 46 of the *Energy Act* to seek his permission and failure to which pay compensation contemplated under Section 52 of the same Act. It was the Respondent's submissions that the consent referenced to by the Appellant was not in respect of the suit property.
 10. On the award of damages, the Respondent invited this Court to consider the pronouncement of the Court in *Gitobu Imanyara & 2 Others vs. Attorney General* {2016} eKLR, where the Court extensively discussed the role of Appellate Court in cases of award of damages. He submitted that the trial Court did not error in awarding general damages and added that the valuation report was admitted into evidence and the trial Court was right in using the report. Further, he added that the trail Court was well guided by his submissions at the hearing.
 11. The Respondent submitted that the appeal is not competently before this Court for want of procedure specifically the Appeal injures the provisions of Section 79G of the *Civil Procedure Act*. It was the Respondent's submission that the appeal was filed without leave of Court and relied on a litany of cases.



- He added that the Memorandum of Appeal was incompetent for making reference to a judgment that was non-existent. In the end, the Respondent urged this Court to dismiss the appeal.
12. Before delving into the merits of this appeal, it is important for this Court to this point determine whether the appeal is fatally defective for want of procedure as submitted by the Respondent.
 13. It is the Respondent's submission that the appeal was filed out of time and thus breaches the provisions of Section 79G of the *Civil Procedure Act*. He faults the Certificate of delay for not indicating when the decree was ready and asserts that the appeal ought to have been filed by 3rd September, 2018. Additionally, he contends that the appeal is defective as it seeks to set aside a non-existing judgment. He submits that Appellant makes reference to a judgment and decree of 9th March 2019, yet the judgment in the trial Court was delivered on 9th March, 2016. In light of this, he submits that the Appellant has not sought leave as contemplated in Order 42 Rule 3(2) of the Civil Procedure Rules.
 14. A perusal of the record of appeal informs this Court that:
 - i. The judgment, the subject matter of this appeal, was delivered on 9th March, 2016.
 - ii. The Appellant applied for certified proceedings on 30th June, 2016
 - iii. The Notice of Appeal was filed on 13th July, 2016
 - iv. The Appeal was filed on 3rd October, 2018
 - v. The Certificate of Delay was issued on the 13th September, 2018
 - vi. The Appellant filed an application for stay on 21st July, 2016 and the Court delivered its ruling on 19th September, 2017
 - vii. It is evident from the ruling that the impugned judgment was delivered in the absence of the Appellant herein
 15. Section 79G of the *Civil Procedure Act* makes provision for the time for filing of appeal from the Subordinate Court. It provides as follows:

"Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time."
 16. The impugned judgment was delivered on the 9th March 2016, and within the requirement above, the appeal ought to have been filed 30 Days from the date thereof. Order 50 Rule 4 is categorical on how time is computed. It states:
 4. Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the Court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction"



17. Indubitably, there was nothing that stopped time from running which means the appeal ought to have been filed on or before 11th April, 2016. The Memorandum of Appeal was filed on 3rd October, 2018. Without having to look into facts the appeal was filed out of the required timeline. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, when considering whether to allow an application for leave to extend time for filing of appeal held that

No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court’s Record.”

18. However, the Court of Appeal in *Charles Karanja Kiiru v Charles Githinji Muigwa* [2017] eKLR, took an interesting application of the *Nicholas Kipkorir Arap Too*, supra which I agree with. The Court held:

In our view however, the Salat case was in respect of Rule 53 of the Supreme Court Rules which simply provides as follows;-

“The Court may extend the time limited by these Rules, or by any decision of the Court.”

19. That Rule only applies to applications before the Supreme Court and not before any other Court. Conversely Rule 4 Court of Appeal Rules provides as follows on extension of time.

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court, or of a superior Court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended”. (emphasis supplied)

We find it necessary to cite the above Rule in entirety because even assuming the learned Judge was wrong in deeming the appeal as having been deemed to have

been duly filed, this Court would still have jurisdiction to validate the said leave if it deemed it appropriate to do so. Moreover, in our view, under Order 50, Rule 6 of the Civil Procedure Rules on which the learned Judge relied, the Court has power to enlarge time “upon such terms as the justice of the case may require...”

20. Regrettably, there is no leave that has been filed before this Court seeking to extend time this Court would have been well guided as above.

21. The issue of delay was first raised by the Respondent in his response to the Appellant’s application for stay of execution of 21st July, 2016. The trial Court in its ruling to the application held “This Court has considered the issues raised and submissions by the counsel and it is this Courts humble finding



that declining the application will greatly prejudice the Respondent as the judgment was delivered in the absence of the parties”

22. It is safe to conclude that both parties to this appeal were not aware of the judgment. The Appellant was jolted into action by the Respondent, who presumably started the process of execution. The Notice of Appeal was filed on 13th July 2016, at least four months from the date of the judgment. According to Order 42 Rule 1 of the Civil Procedure Rules the form of appeal to the High Court ought to be through a Memorandum of Appeal and which memo was filed on 2nd October, 2018. There is no requirement that a Notice of Appeal be filed though this has been made applicable by practice.
23. According to the record of appeal, the Appellant sought to be issued with the typed proceedings after being aware of the existing judgment as per the letter dated 30th June 2016, addressed to the Executive Officer. The process led to the issuance of a certificate of delay which was issued on 13th September, 2018. The Certificate of Delay informs this Court that the time for preparing and delivering of the proceedings, judgment and ruling took two years. Even so, there is no requirement that preparation of Memorandum of Appeal will require that the typed proceedings be availed. Additionally, what was appealed against was the decree as contemplated under Section 79G of the Civil Procedure Rules and the Appellant ought to have at least given reason why the decree could not be obtained. The Certificate of Delay does not reflect that either and even supposing the decree was not available Order 42 Rule 2 of the Civil Procedure Rules allowed the Appellant to file the Memorandum of Appeal and soon thereafter file the Decree appealed against. There is no evidence that the Appellant attempted to follow the available procedure to appeal on time.
24. It cannot be gain said that no leave has been sought in this case. The Appellant had in the application for stay in the lower Court sought an order inter alia that the trial Court to extend time for filing the Notice of Appeal. There is nowhere in the law that required the Appellant to file a Notice of Appeal, he was mandated to file a Memorandum of appeal which seemingly he attached a draft Memorandum of Appeal.
25. The Respondent in response to the application for leave refuted the trial Court’s jurisdiction to extend time. Even though the trial Court in its ruling did not address its mind to the issue of extending time, it allowed the application on the premise that parties were not informed about the delivery of judgment. However, the Appellant ought to have been well guided by his counsel on the legal and procedural steps to take upon discovery of the judgment including seeking leave to file the Memorandum of Appeal out of time to the required Court.
26. A perusal of the lower Court file informs this Court that the Appellant on the 17th June 2016, wrote to the Executive Officer seeking information about the judgment, which had failed to be delivered on three occasion. In response to the letter, the Respondent notified the Appellant that judgment had been issued. In the application for stay the Appellant gave the chronology of events founding the judgment and attached a copy of Decree. This implies that the decree was ready as at the time the Appellant became aware of the judgment.
27. According to Order 42 Rule 13(4) of the Civil Procedure Rules before a Court can admit an appeal for hearing, a Court is required to first ensure all the relevant documents contemplated therein are filed. The rule provides:
 - (4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the Court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:
 - (a) The memorandum of appeal;



- (b) The pleadings;
- (c) The notes of the trial magistrate made at the hearing;
- (d) The transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- (e) All affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- (f) The judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

28. Presently, the appeal was admitted for hearing on 10th June, 2019, which means the Court was satisfied that the above had been complied with. The Respondent never appealed against the decision of the Court to admit the appeal leave notwithstanding or filed any application seeking to have the appeal struck out for want of procedure. The Court admitting the appeal was of concurrent jurisdiction and this Court cannot purport to set aside the admission. It follows therefore that the appeal is competently before this Court.

29. On making reference to a wrong judgment this Court appreciates the possibilities of error, noting that ground two of the Memorandum of Appeal notes the correct date. The error does not go to the root of the appeal and does not prejudice the Respondent in anyway. The error is excused.

30. On the merits of the Appeal, this Court takes cognizance of its role. The role of an appellate Court has been echoed in a number of judicial decisions. This role is espoused under Section 78 of the *Civil Procedure Act* to: ‘..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.’

31. The Appeal Court is therefore required to analyze both facts and law and draw a conclusion distinct from that of the trial Court. This Court agrees with the findings of the learned judge in *Mursal & another Vs Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) wherein the Court held;

A first appellate Court is the final Court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal, parties have the right to be heard on both questions of law as also on facts and the first appellate Court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a Court of first appeal can appreciate the entire evidence and come to a different conclusion.”

32. The issues for determination are

- i. Whether a claim for Trespass was established
- ii. Whether the award of Kshs. 1,170,000/= was sufficiently proved
- iii. Whether this Court should disturb the award on general damages
- iv. Whether the appeal is merited



i. Whether a claim for trespass was established ?

33. It was the Respondent' case that the Appellant without his consent gained ingress into his land and caused to be erected electric poles and transmission lines. Section 3 (1) of the Trespass Act, Cap 294 provides that:

Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

34. The Court in the case of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR, when determining an issue of trespass considered the following findings

35. In *M’Mukanya v M’Mbijiwe* (1984) KLR 761, the ingredients of the tort of trespass were revisited by this Court and restated as follows:

“trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See *Thomson v Ward*,(1953) 2QB 153.”

36. Further, in *Winfield & Jolowicz on Tort*, Sweet & Maxwell, 19th Edition at page 428 states as follows:

Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.” [Emphasis supplied].”

35. Thus for a claim of trespass to issue, the right of possession of the registered proprietor must have been curtailed without his consent. It is common evidence that the suit land belonged to the Respondent. It was the testimony of the Respondent at the hearing of the suit that he was not consulted when his tress were cut down to pave way for installation of transmission line. However, he testified that “I granted a way leave for power pole and transmission line to pass through my land. It was the lower section of my land”
36. DW1 in his evidence acknowledged that they removed trees on the Respondent’s land. It was his testimony that they valued the trees at Kshs. 25,660/= but could not pay the Respondent since they could not trace him.
37. Amusingly, he contradicts the foregoing by asserting that the power lines pass through a road reserve. But this Court notes in the proceedings that “In June 2014, we had an invitation as he said we trespassed on his land. There is a road reserve. By the time I went there, the contractor had removed them and put them on the road reserve” This is a clear admission of the previous action which was setting up the transmission lines on the Respondent’s land.



38. Section 107 of the *Evidence Act* placed the evidentiary burden on the Respondent to demonstrate that there was trespass. The Respondent produced a copy of title deed which showed that the land belonged to him. As per the title, there is no registered wayleave against the suit property.
39. The *Land Act* under Part X makes reference to Easements and Analogous Rights, and which Wayleave falls under it. This is also echoed in Section 98 of the *Land Registration Act*. These rights are enjoyed by the dominant land owner and the successor of title. Section 144 of the *Land Act* allows the Appellant herein to make an application for Wayleave over the property of a registered proprietor but must be done in accordance with the law.
40. Aside from attaching the title deed, the Respondent showed the trial Court a number of photographs which he claimed showed the intensity of destruction. The legal burden remains constant throughout a trial, and it rests with the person alleging, what shifts is the evidentiary burden. Presently, the Respondent maintained throughout the hearing at the trial Court that he never consented to the wayleave being registered on his property. The only way the Court would have been guided that the Appellant's herein legally obtained consent would have been production of evidence of registration of wayleaves and the Respondent's consent. The Respondent exhausted his evidentiary burden which shifted to the Appellant. The Appellant herein had the evidentiary burden of demonstrating compliance with the law, this was not done. In *Mbuthia Macharia v Annah Mutua Ndwiga & another Civil Appeal No. 297 of 2015 [2017] eKLR* the Court of Appeal when dealing with the issue of burden of proof observed as follows:

"The legal burden is discharged by way of evidence, with the opposing party having corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift" to the party who would fail without further evidence?"

41. DW1 admitted to having put up transmission lines on the Respondent's land. As per the photographs produced as evidence, to the trial Court, electric poles are visible which corroborates the Respondent's testimony. Even though the poles were later removed as noted by the trial Court in her judgment, the wrong had already occurred. The Appellant ought to have demonstrated that the erection of electric pole was done as the law required. To this end this Court finds and holds that the Learned Magistrate did not error in concluding that the Respondent herein had proved a case of trespass on a balance of probability.

ii. Whether the award of Kshs. 1,170,000/= was sufficiently proved?

42. The Respondent made a claim for Kshs. 1,585,000/= as special damages for the loss caused by the trespass. It is trite law that special damages must not only be specifically pleaded, but must be strictly proved. This was echoed by the Court in *Herbert Hahn v Amrik Singh [1985] eKLR* where it held:

Now the next two grounds of the memorandum concern special damages which must be not only claimed specially, but proved strictly for they are not the direct natural or probable consequences 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 the nature of the acts themselves."



43. This was reiterated by the Court in *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] eKLR where the Court held

it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit.”

44. The Respondent enlisted the particulars of special loss in paragraph 4 of the Plaint. To buttress his claim, he adduced evidence through PW2, who testified as a valuer and told the Court that he was responsible for valuing the costs for the loss suffered by the Respondent.
45. On cross-examination by Counsel for the Appellant, he challenged the authenticity of his Report and pointed out the loop holes in it. He confirmed to the Court that he did not have a practicing Certificate attached to the Report. At the end of the hearing, parties consented to have the Gazette Notice bearing the name of PW2 attached to the written submissions.
46. The Court awarded Kshs. 1,170,000/= as the costs for the loss suffered guided by the Valuation Report. The Respondent now objects to the award on the premise that the same valuation report was illegal and inadmissible. The *Valuers Act* requires that for one to be a Valuer, he or she needs to obtain a Certificate of Registration by the Valuers Registration Board as envisioned in Section 7. The credibility of PW2 was put on the test and there was a consent that a Gazette Notice showing he is a registered proprietor was to be attached to the submissions, but this was not done.
47. The Court in *Mutonyi & Another Vs Republic* [1982] eKLR though a criminal case analyzed what encompasses expert evidence which this Court finds convincing and authoritative. It held;

Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.

Section 48 of the *Evidence Act* (Cap 80), provides that where, inter alia, the Court has to form an opinion upon a point “of science or art, or as to identity or genuineness of handwriting or finger or other impressions”, opinions on that point are admissible if made by persons “specially skilled” in such matters.

In *Cross on Evidence*, 5th edition at p 446, the following passage from the judgment of President Cooper in *Davie v Edinburgh Magistrates* [1933] SC 34, 40, is set out as stating the functions of expert witnesses:

“Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts put in evidence.”

So, an expert witness who hopes to carry weight in a Court of law, must, before giving his expert opinion:

1. Establish by evidence that he is specially skilled in his science or art.
2. Instruct the Court in the criteria of his science or art, so that the Court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.



3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness.”

48. The Appellant challenged the credentials of the Valuer. The report produced in Court was signed by D M Gichangi and JJ Wahome, but only bared one practicing certificate. PW2 confirmed he prepared the report but had not attached a Practicing Certificate. While it is true that an expert opinion must be challenged by another expert opinion, it is important that such an expert must be qualified. As per the Gazette Notice attached, PW2 who admitted to preparing and produced the report never featured therein.
49. Also the Report indicated him as a registered Valuer and within the *Valuers Act* he was “a person whose name is for the time being entered on the register” The Act also recognizes that a practising Valuer is “a person who carries out and prepares valuations in respect of any type of movable or immovable property” Thus for one to prepare a report, one needed to be practising valuer which PW 2 was not. Even if this Court was to find the report as credible, the contents thereof are questionable. The Valuer noted that 78 trees were cut down, but based on the photographs, it is not in dispute that 78 trees could not be accommodated there. The Valuer did not bother to tell the age of the gravellier trees to at least decipher the costs of it. Additionally, it is not clear the exact size of land that was affected in the process. This was an expert opinion if any, and the same ought to have been adequately drawn.
50. This Court has already established hereinabove that special damages must be strictly proved. Basing its mind on the above analysis, this Court would not find it difficult to find and hold that the special damages were not proved to the required standard. Thus the learned Magistrate erred in adopting the proposed assessment in the valuation report.

iii. Whether this Court should disturb the award on general damages ?

51. A registered proprietor on whose land a Wayleave is registered has a right to receive compensation as contemplated under Section 148 of the *Land Act*. Where any Wayleave is set up without consent, the action amounts to trespass. The Court has already established above that there was trespass and it follows therefore that the Respondent was entitled to an award. The trial Court award Kshs. 300,000/ = as general damages for trespass.
52. In *Catholic Diocese of Kisumu vs. Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 the Court held:

It is trite law that the assessment of general damages is at the discretion of the trial Court and an appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate Court can justifiably interfere with the quantum of damages awarded by the trial Court only if it is satisfied that the trial Court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

53. The Appellant submitted that the award was inordinately high in the circumstance. The Respondent suffered the tort of trespass and is thus entitled to compensation. The Court in *Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited* [2017] eKLR, held:

“In other words, where trespass is proved as in this case, the affected party such as the respondent need not prove that it suffered any damage or loss as a result so as to be



awarded damages. The Court is under the circumstances bound to award damages, of course depending on the facts of each case.”

54. The Appellant has not set a basis for this ground or led this Court to a different finding on the award of general damages. This Court finds no reason to disturb the award.

iv. Who should pay costs of this Appeal?

55. Save for what has been established by this Court above, the judgment of the Court meets the threshold of a valid judgment and this Court will only interfere with the award of special damages. The appeal partially succeeds.
56. This Court has the discretion to award costs. Taking into consideration the laxity employed by the Appellant’s before the matter could be set down for hearing, this Court exercise the discretion in favour of the Respondent. The Respondent shall have the costs of the appeal.
57. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 9TH DAY OF MARCH, 2023.

L. GACHERU

JUDGE

Delivered virtually in the presence of;

M/s Judy H/B Mr Muga for the Appellant

Mr Njoroge for Respondent

