Rural Electrification Authority v Muriithi (Civil Appeal 40 of 2023)
[2025] KEHC 2452 (KLR) (Civ) (6 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2452 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CIVIL

CIVIL APPEAL 40 OF 2023

CM KARIUKI, J

FEBRUARY 6, 2025

BETWEEN

RURAL ELECTRIFICATION AUTHORITY ..... APPELLANT

AND

NICHOLAS MUTURI MURIITHI ..... RESPONDENT

(Being an appeal from the judgment of Senior Resident Magistrate Hon S. N. Mwangi dated 15th January 2018 in Nyahururu Chief Magistrates Court Civil Suit No. 112 of 2016)

JUDGMENT

1. The Appellant being aggrieved by the judgment of Senior Resident Magistrate Hon S. N. Mwangi dated 15th January 2018 in Nyahururu Chief Magistrates Court Civil Suit No. 112 of 2016 appealed against the whole of the said judgment vide the memorandum of appeal dated 7th February 2019 on the following grounds: -
2. The leaned trail magistrate erred in law and fact by considering documents not admitted in evidence as part of the court's record.
3. The learned magistrate erred in law and fact in dismissing the Appellant's suit against the weight of the evidence on record.
4. The learned magistrate erred in fact and law in basing her judgement on unsubstantiated documentation knowing them to be documents of questionable origin.
5. The learned magistrate failed, refused or was inclined not to appreciate the case and entire submissions of the Appellant.

6. The learned magistrate erred in law in dealing with matters not in controversy before her and thereby misapplied the law.

7. The learned magistrate erred in law by failing to appreciate contractual liability relating to special damages thereby awarding unfounded sums of money in unwarranted and questionable circumstances.

8. The learned magistrate erred in law and fact in failing to consider the defence filed by the Respondent/ Appellant.

9. The learned magistrate erred in law and fact in entering judgment in favour of the plaintiff against the defendant in spite of plaintiff's miserable failure to establish her case on a balance of probability.

10. The learned magistrate erred in law and fact in failing to appreciate the legal position in respect of grant of damages. The court's order is unsubstantiated and baseless in the circumstances.

11. Reasons wherefore it is proposed to ask this appellate courts for orders:-

12. That the appeal be allowed with costs.

13. That the order of the subordinate court and all consequential orders therefore be set aside with costs to the Appellant both in the lower court and an appeal.

14. Appellant's Written Submissions

15. The Appellant in their submissions dated 7th September 2021 stated that in the case before the learned magistrate the Respondent did plead but miserably failed to prove the claimed damages. The evidence adduced by the Respondent being the valuation report (Pexhibit 7) was of questionable origin: a forgery and as such failed to prove the claim for special damages. It was their assertion that there was no basis for the amount of Kshs. 972, 843/- as awarded to the Respondent by the Trial Magistrate.

16. It was stated that the trail magistrate did indeed err in law by basing her judgement and more specifically the award of special damages upon a document with questionable origin. The trial court heavily placed reliance on a report allegedly prepared by the Ndaragwa Kenya Forest Service in awarding Kenya Shillings Nine Hundred and Seventy- Two Thousand Eight Hundred and Forty-Three (KSHS 972.843/-). Two different reports were produced in court allegedly prepared by the manager of Kenya Forest Service from the station at Ndaragwa. The First Report which is found on page 35 of the Supplementary Record of Appeal dated 17th February 2020 ("the Supplementary Record of Appeal") on record before the lower court had no name of the signatory.

17. Further, it was asserted that at the hearing, the Respondent Counsel attempted to produce a second report which was not part of the record before the Court. The said report had a different outlook and a different signature signed by an alleged Ndaragwa Forest Station Manager going by the name of Urbanas Katiwa The report is found on page 34 of the Supplementary Record of Appeal. As evidenced on pages 16 to 25 of the typed proceedings in the Supplementary Record of Appeal, when the matter came up for hearing on 23rd January 2018 counsel for the Appellant did object to the production of the second report which the Respondent sought to produce as exhibit 7 and rely on the same in his claim for special damages

18. The Appellant contended that as per page 19 of the typed proceedings the learned magistrate did agree with the Appellant's Counsel and disallowed the production of the second report noting that the said report was "made or written almost 2 years later which even to this Court raises doubt as to how the said forest station officer Mr. Urbanas Katiwa did not include the alleged Kshs 48.642.15/- in his report

or even state that the same was being the cost. If indeed it could have been a genuine one, it would have been dated in 2015 and not in 2017. Which raises doubts an seems to be an afterthought... that having ben stated I do agree with the Defendant's Counsel and disallow it's production"

19. As set out on page 22 of the typed proceedings the learned magistrate further noted as follows:-

    a. "This Suit was filed in 12/05/2016 and the Plaintiff complied with the said order and annexed copies of the documents they were going to rely on. Among the said document sated as No. 8 in the list of documents dated 11/05/2016 is a valuation report dated 15/10/2015. On looking at it and what has been produced as Pexhibit 7; although I am not a document examiner by profession, these 2 documents are different and the signature therein is also different. The table herein has 5 columns in the originally filed documents while the 2nd one has 4 columns. It has no name of the said Ndaragwa Forest station manager but the 2nd one does. My question then, is where did (Pexhibit 7) emanate from? Is the said Urbanas Katiwa really a manager at Ndaragwa Forest Station? A court of law should be respected hence saying, he who comes to court, must come with clean hands. This has not been displayed by the Plaintiff herein. I do also consider article 159(2) (d) of *the Constitution* which talks of justice being administered without undue regard to technicalities therein, but this is not a technicality but fooling the court hence total disrespect. Therefore, I shall strike out (Pexhibit 7) from the record and replace it with the said copy in the court file which forms part of the court pleadings as (Pexhibit 7)"

20. It was averred that in addition to the above the Appellant's counsel took the liberty of writing to the Kenya Forest Service vide the letters dated 7th August and 21st August 2019 copies of which are found on pages 32 and 33 of the Supplementary Record of Appeal seeking clarity on the authenticity of the two reports produced by the Respondent and on the signatory of the 2nd Report, Urbanas Katiwa. The Kenya Forest Service did respond through its letter date of their confirming that neither of the two reports emanated from any of their as confirmed by the Ecosystem Conservator Laikipia after thorough investigations at Ndaragwa forest offices. A copy of the said letter is found on page 31 of the Supplementary Record of Appeal.

21. The Appellant contended that despite the fact the letter dated 8th January 2020 from the Kenya Forest Service was not part of the evidence before the lower court. Reliance was placed on the case of Dorothy Nelima Wafula vs. Hellen Nekesa Nielsen & Paul Fredrick Nelson [2017] eKLR. Additionally, despite the glaring discrepancies in the two reports and it being clear to the lower court that both reports could have been a forgery the learned magistrate still proceeded and relied on the first report in awarding the special damages as pleaded by the Respondent.

22. It was asserted that the facts of the case and/or the evidence introduced at trial do not in way support the learned magistrate's decision in respect to the award of special damages. The magistrate made a decision that is completely out of line with what happened at trial. In the circumstances of the case, no sound and substantial basis exists to support the trial magistrate's decision. In sum, the Respondent failed to prove with a degree of certainty and particularity his claim for Kshs. 972,843/- as special damages and the trial court erred in awarding the same to the Respondent.

23. It was contended that the trial court intentionally or inadvertently erroneously states that that the Appellant did not oppose the proof of the special damages as claimed by the Respondent and that the government rates were not produced in court as exhibits to discredit the Respondent's evidence yet the Appellant did oppose the production of the said reports during trial. Most importantly, the Appellant did file and produced as Dexhibit 2 the compensation rates as stipulated by the government (page 28 of the Typed Proceedings contained in the Supplementary Record of Appeal) which it relied on when computing the damages payable to the Respondent amounting to Kshs 371.790/-. This report was

not in way challenged nor opposed by the Respondent and the record before this Honourable Court substantiates the same.

24. On whether he learned magistrate erred in law and fact in failing to consider the defense and submissions filed by the Appellant?

25. The Appellant pointed out that during trial in the lower court, evidence was called from DW1-Caroline Oliech who was the Appellant's Senior Wayleaves officer. She testified that the Respondent's complaint was brought to her attention vide the letter from the Respondent's (Pexhibit 3). Afterwards, she called the Respondent and made arrangements to visit the Property in Shamata area to assess the damage which she did in the company of the Respondent and his representative and they counted the felled trees. Additionally, she testified that the felled trees were predominately cypress trees and they counted 143 stumps and included others which had rotted brought the number of the felled trees to approximately 173 trees. This figure was also agreed to by the Respondent. She also produced exhibit 1: a report dated 26/10/2015 which was prepared for their legal department to enable her deal directly with the Respondent's counsel. The said report contained details and tabulation of the amount payable to the Respondent by the Appellant.

26. Furthermore, it was part of her testimony that damages and rates of compensation are given to them by the government having been determined by the Ministry of Land and Ministry of Agriculture and in determining compensation payable they measure the width of the stump and calculations are made accordingly The same rates were also used in computing the value of the damage caused by the Appellant's contractors on the fence at the Property. The document stipulating the said rates was produced as exhibit 2 by DW1.

27. In addition to the foregoing, the Appellant averred in its defense under paragraph *8* found on page 21 of the Record of Appeal, that it was clearly understood and agreed that the felled trees were left with the Respondent and that he would sell them to mitigate the value of the damage suffered by him.

28. They submitted that, the learned magistrate misdirected himself by failing to take into consideration that the felled trees were left with the Respondent and proceeded to award special damages as if the trees had been carted away by the Appellant. Reliance was placed on the case of John Mung'aya Makotsi v. Kenya Power and Lighting Company Limited and Another (2014) eKLR

29. It was stated that the law imposes a duty on the Party to take reasonable steps to mitigate the loss caused by a tort or breach of contract, and debars him/her from claiming compensation for any part of the damage which is due to his/her neglect to do so.

30. Moreover, the Appellant argued that the trial magistrate erred in law and in fact by disregarding the Appellant's submissions and only considered the Respondent's submissions, relied on a forged report and proceeded to make award special damages equivalent to the full value of the trees and in doing so disregarded the fact the said trees were left with the Respondent with the understanding that he would endeavor to mitigate his losses. Furthermore, even if the valuation report were legitimate, it would be unjust and unfair for the Appellant to be ordered to compensate the full value of the trees which had been left with the Respondent. Reliance was placed on the case of Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR

31. On whether the Learned trial Magistrate erred in law and fact by awarding general damages which were manifestly excessive and wholly erroneous in the circumstances of the case?

32. The Appellant revealed that in this case the. Respondent did not adduce any evidence before the trial court as to the state or the value of his property before and after the trespass. This makes it difficult if not impossible to assess the general damages. Having awarded special damages that were inordinately

high and premised on a forged report as expounded above, it is the Appellant's humble submission that the award of Kshs 250,000/- as general damages given the circumstances of the case clearly amounted to an abuse of discretion by the learned magistrate which warrants a review by this Honourable Court.

33. Reliance was placed on Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR, Amos Wenyere & Another v Ashford Murithi Muregi & 2 others [2017] eKLR, *Kemfro Africa Ltd T/A Meru Express Services & Gathogo Kanini -vs- Aziri Kamau Musika Lubia & Another (NBI C.A No. 21 of 1984*)

34. It was stated that the award on general damages of Kenya Shillings Two hundred and Fifty (Kshs. 250,000/= was manifestly excessive in the circumstances of the case before the frial magistrate so as to amount to an injustice on the Appellant and unjust enrichment to the Respondent. Reliance was placed on the cases of Phillip Aluchio -vs- Crispinus Ngayo [2014] eKLR.

35. On what is the justifiable quantum of compensation due to the Respondent from the Appellant for the trees felled by the Appellant?

36. It is common ground that the Respondent ought to be compensated by the Appellant. Reliance was placed on Section 6 of the Wayleaves Act Cap 292 of the Laws of Kenya. Accordingly, the question to be dealt by this Honourable Court is the quantum of damages payable by the Appellant to the Respondent. Unlike Kenya Forest Services Guidelines, which values Forest produce, the Ministry of Agriculture guidelines are for compensation and it applied to a case like this one, as the Appellant was not purchasing the trees nor taking them for his use. The trees were left on the Property with the mutual understanding between the parties that the Respondent will sell the said trees to mitigate his loss which as expounded on above is a well settled principle in law.

37. It was asserted that premised on the foregoing the amount payable to the Respondent by the Appellant as special damages is Kenya Shillings Three Hundred and seventy- One Thousand Seven Hundred and Ninety (KSHS 371,790/-). This is the amount that the credible evidence before the lower court supported.

38. In conclusion, the Appellant submitted that given the circumstances that have necessitated the filing of this Appeal including but not limited to the filing of a forged valuation report by the Respondent, this court should exercise its discretion as mandated by section 27 of the *civil procedure Act* and award the Appellant costs both on Appeal and at the lower court. But for the Respondent's falsification of documents produced before the lower court, these proceedings would have been entirely unnecessary and as such the Appellant prays for costs. Further, premised on the foregoing, the Appellant humbly submitted that this Honourable Court is inclined to hold that the Appellant has raised sufficient grounds in support of the Appeal and the same ought to be allowed.

39. Additionally, on the Respondent's preliminary objection on this court's jurisdiction to handle the instant matter, the Appellant vide the written submissions dated 1st February 2022 submitted that having admitted liability, the question before the trial court and this court was on quantum of damages and therefore this court has proper jurisdiction to handle the same. It was argued that the predominant issue of dispute in this matter does not touch on the title, use and occupation of land as submitted by the Respondent's counsel.

40. Furthermore, it was asserted that the predominant issue dispute in this matter does not fall within the confines of Section 13 of the *Environment and Land Court Act*. It does not relate to any of the disputes provided for under Section 13 (2) of the *Environment and Land Court Act*, 2011. That the dispute between the parties herein is on the quantum of the compensation that the Respondent is entitled to for the trees felled by the Appellant and that is a matter that this honorable court has the jurisdiction to hear and determine as provided for under Article 165 (1) (a) of *the Constitution*. Reliance was also

placed on Suzanne Butler & 4 Others v. Redhill Investments & Another [2017] eKLR, In the Matter of Interim Independent Electoral Commission [2011] eKLR, Republic v National Land Commission & 2 Others; Kakuzi Division Development Association & 6 Others (Interested Parties) exparte: Kakuzi PLC [2020] eKLR & Prof. Daniel N. Mugendi vs. Kenyatta University & Others [2013] eKLR

41. Respondent's Submissions

42. The Respondent submitted that the Appellant in an attempt to misled the Court has submitted that the court struck out Pexhibit 7 but referred to it in the Judgment and that Counsel for the Appellant is misleading the court further by stating that two reports were produced as exhibits. The record of the lower court shows that on the question of valuation of the trees, the Plaintiff had a valuation report dated 17.10.2015 which had been filed in the list of documents. However, during the hearing counsel first produced an undated report whose contents were much the same save for arrangements of the contents and the signature. This report was produced by consent without need to call the maker.

43. However, in cross-examination, counsel for the Appellant sought striking out of the undated report on the ground that it is different from what had been filed in the list of documents. Counsel further asked the court to instead rely on what the Plaintiff had filed. Therefore, it is actually counsel for the Appellant who asked the court to rely on the report filed in the list of documents instead of the undated report. In the end, the court agreed to strike out the undated report as the initial exhibit 7 and instead replaced it with the report dated 17.10.2015 which had been filed in the list of documents.

44. It was asserted that the Plaintiff had tried to produce a hand-written agreement dated 18.5.2017 between him and the forestry office showing the cost of preparation of an assessment report for Kshs. 48,642.15/- Counsel for the Appellant objected on the ground that it was signed by the Plaintiff and others not before the court. The court upheld the objection and the document was not produced. This document is therefore different from Pexhibit 7. Since the Appellant did not produce it as part of the record, they annexed the same to this submission for ease of reference by the court. It is therefore not true that the trial court relied on documents that had not been admitted in evidence and the first ground of appeal must therefore fail.

45. The Respondent averred that he proved his case on a balance of probability. He proved that the Appellant entered his land without permission and thereat cut and/or destroyed his 173 trees. In fact, trespass was expressly admitted by DW1 in her testimony before the trial court. further, on the issue of the value of trees, it was admitted that the trees were cut when the Plaintiff was away. He averred that he was sick at the time and by the time he came back, some of them had rotten and others stolen by unknown people.

46. It was stated that he produced an assessment report dated 17.10.2015 that gave the class of the trees, the number, unit cost and the total value which came to Kshs. 972,843/-. This assessment report was produced without requirement of calling the maker. The Appellant's counsel therefore lost the opportunity of challenging it whatsoever and its contents remained unchallenged.

47. On the other part, the defendant purported to produce what was termed as Recommended Property Damage Compensation Rates as Dexhibit-2. The witness stated that the rates are normally set by the Government through the Ministry of Agriculture. However, the witness did not provide any gazette notice to that effect. Further there was nothing to show that the rates had been set by the Ministry of Agriculture and Land as alleged.

48. It was averred that it is common knowledge that any time that the government comes up with guidelines such as the payment rates that the Defendant alluded to, the same have to be communicated to the public through the Kenya Gazette. Secondly, the document itself is entitled

"RECOMMENDED" which clearly implies that those rates are not binding whatsoever. Further, the witness stated that the Appellant had asked the Respondent to do valuation of the damage and present an assessment report. Therefore, it is upon consideration of the foregoing that the court was persuaded that the plaintiff had proved his case on a balance of probability and granted the award of the damage sought

49. The Respondent contended that the Appellant has not specified which documents were unsubstantiated. The main assessment report was produced without the requirement of the maker. The Appellant having consented and having lost the opportunity to cross examine the maker cannot turn around and call it unsubstantiated. In fact, it is the Appellant's counsel who asked the court to strike out the document earlier produced as exhibit 7 and replace it with the document that had been filed as part of the list of documents.

50. Moreover, it was argued that it is clear from the Judgment of the court that the submissions of both parties were considered. The Court considered that liability was admitted. The question for determination by the court was therefore compensation. The court weighed the evidence tendered by both parties and in the end held that the defendant having alleged that the compensation rates are set by the Ministry of Agriculture and Land but failed to produce the gazette rates to counter the valuation report produced by the Plaintiff, the court was persuaded that the proper value is what was assessed by the Forestry Department. Therefore, it is therefore not true that the Appellant's submissions were not considered and this ground must fail.

51. The Respondent pointed out that the issue of contractual liability does not arise in this matter. The Appellant by its own admission trespassed on the Respondent's land. Destroyed/cut trees and in the process even destroyed the fence. Special damages were pleaded and proved by the Respondent and therefore the amount awarded by the trial court as special damages was well founded.

52. They reiterated that the statement of defense was a mere admission of liability of both cutting trees and trespass. The defense merely disputed the amount of damages sought by the Plaintiff and further stated that he ought to have mitigated his loss. Further, it is noteworthy that the Defendant entered the land at a time when the Plaintiff was in hospital and away. They just cut trees and left them to thieves and others to rot. In fact, the DW1 corroborated the evidence of the Plaintiff that indeed some trees had rotten meaning there was almost no value in them.

53. The Respondent averred that they established that he proved his case on balance of probability and the same can be demonstrated in the questions below:-

54. Did the Plaintiff establish the claim for trespass? This was admitted by the Defendant. The defendant entered the land without permission, cut trees and even destroyed the fence in the process. He was therefore entitled to general damages which are at the discretion of the Court.

55. Did the Plaintiff plead and proof special damages, the answer is in the affirmative. Special damages were expressly pleaded. The Plaintiff produced a report prepared by the Forestry Department. The Defendant did not even seek to have the maker produce it for purposes of cross-examination. This report therefore was not challenged.

56. It was stated that it is trite principle of common law that trespass is actionable per se without proof of actual damage. Further, that the award of Kshs. 250,000/- as general damages was proper. The court in awarding that amount held that the entry to the land was callous, insensitive and inconsiderate attitude on the part of the Appellant. Reliance was placed on Rhoda S. Kiilu vs. Jiangxi Water and Hydropower Construction Kenya Limited (2019) eKLR, Nakuru Industries Limited vs. SS Mehta & Sons (2016) eKLR

57. On the preliminary objection, it was asserted that the dispute before this court is purely on land use and occupation. The case is one for trespass to land and the damages arising therefrom. That the Jurisdiction to hear the appeal therefore lies with the Land and Environment Court which is created under Article 162 (2) of *the Constitution*. The Respondent contended that this court has no jurisdiction to hear the appeal and the same should be struck out with costs.

58. Analysis and Determination

59. I have carefully considered the memorandum of appeal and the parties' written submissions, any annexures thereto, the trial record and the evidence tendered in support thereof.

60. First and foremost, the Respondent raised a preliminary objection that this court lacked jurisdiction to deal with the dispute in the instant matter. It was asserted that the dispute before this court is purely on land use and occupation

61. Accordingly, on whether this court has jurisdiction to entertain the suit, as was held in the celebrated case of Owners of Motor Vessel "Lillian S", jurisdiction is everything and it goes to the root of the case; without jurisdiction, the court must down its tools.

62. Further, the Supreme Court of Kenya in the case of Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011, observed that:

    a. "A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

63. As asserted by the Appellant, the predominant issue in the instant matter is on quantum of the compensation that the Respondent is entitled to for the trees felled by the Appellant.

64. Article 165 (3) of *the Constitution* states as follows: -

    (3) Subject to clause (5), the High Court shall have—

        a. unlimited original jurisdiction in criminal and civil matters;

        b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

        c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

        d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

            i. the question whether any law is inconsistent with or in contravention of this Constitution;

ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

iv. a question relating to conflict of laws under Article 191; and

e. any other jurisdiction, original or appellate, conferred on it by legislation.

65. Consequently, Article 165 (3) (a) confers this court jurisdiction to handle civil matters as espoused in the instant matter. I disagree with the Respondent that the matter herein is purely on land use and occupation which is the Environment and Land Court's forte. Having established that the central issue in the instant appeal and the trial court matter is on the compensation owed by the Appellant which is a civil matter, I find that thus court has the requisite jurisdiction to determine this appeal.

66. That being the case, the Appellant herein was aggrieved by the quantum of compensation awarded to the Respondent by the trial court. it was contended that the evidence adduced by the Respondent being the valuation report (Pexhibit 7) was of questionable origin: a forgery and as such failed to prove the claim for special damages. It was their assertion that there was no basis for the amount of Kshs. 972, 843/- as awarded to the Respondent by the Trial Magistrate.

67. The Appellant asserted that the forged documents that the trial court heavily placed reliance is a report allegedly prepared by the Ndaragwa Kenya Forest Service in awarding Kshs. 972.843/-. Further, that two different reports were produced in court allegedly prepared by the manager of Kenya Forest Service from the station at Ndaragwa. The First Report which is found on page 35 of the Supplementary Record of Appeal dated 17th February 2020 ("the Supplementary Record of Appeal") on record before the lower court had no name of the signatory. The Respondent's counsel also attempted to produce a second report which was not part of the record before the Court. The said report had a different outlook and a different signature signed by an alleged Ndaragwa Forest Station Manager going by the name of Urbanas Katiwa The report is found on page 34 of the Supplementary Record of Appeal.

68. It was averred that the Appellant's counsel took the liberty of writing to the Kenya Forest Service vide the letters dated 7th August and 21st August 2019 copies of which are found on pages 32 and 33 of the Supplementary Record of Appeal seeking clarity on the authenticity of the two reports produced by the Respondent and on the signatory of the 2nd Report, Urbanas Katiwa. The Kenya Forest Service did respond through its letter dated 8th January 2020 confirming that neither of the two reports emanated from any of their offices as confirmed by the Ecosystem Conservator Laikipia after thorough investigations at Ndaragwa forest offices. A copy of the said letter is found on page 31 of the Supplementary Record of Appeal.

69. At this point, it is important that I mention that this court allowed the Appellant adduce new evidence before the court i.e. the aforesaid letter, copies of the aforementioned two forged assessment reports adduced by the Respondent in the trial court, letters by the Appellant to Kenya Forest Service dated 7th and 21st august 2019 seeking clarity on the authenticity of the two reports produced by the Respondent and a letter dated 19th December 2021 lodging a formal complaint and requesting investigations against the Respondent and any other co-conspirators if any at the Ndaragwa Forest Station in respect to the forged documents.

70. On the other hand, the Respondent averred that he established that he proved his case on balance of probability because he proved his claim for trespass as the Appellant had admitted that they entered the land without permission, cut trees and even destroyed the fence in the process. He was therefore entitled to general damages which are at the discretion of the Court. moreover, he stated that the had expressly pleaded and that he produced a report prepared by the Forestry Department. Which the Appellant did not even seek to have the maker produce it for purposes of cross-examination. This report therefore was not challenged.

71. I observe that the fact of trespass in this case is undisputed. The dispute is on compensation for the damage occasioned by the trespass. The trial magistrate entered judgement for the Respondent in the following terms: -

> "In conclusion, judgement is entered in favour of the plaintiffs' as against the defendants jointly and severally as follows:
>
> That the plaintiff's claim for general damages for trespass is hereby allowed as the costs of Kshs. 250,000/-
>
> The plaintiff is further awarded special damages of Kshs. 972,843/-
>
> The costs of this suit and interest therein are also awarded to the plaintiff."

72. Turning to the award of general damages, this is a first appeal arising from the trial court's exercise of its judicial discretion in awarding the impugned damages in favour of the Respondent against the Appellant to proven trespass committed against the Respondent by the Appellant.

73. Halsbury's Laws of England 4th Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action for trespass:-

> If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.
>
> If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
>
> Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.
>
> Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded.
>
> If the trespass is accompanied by aggravating circumstances

74. The appellate court in Ephantus Mwangi & Another vs. Duncan Mwangi [1981 – 1988] I KAR 278, stated that-

> An appellate court is not bound to accept and act on the trial court's findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence.
>
> Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.

75. Johnson Evans Gicheru vs. Andrew Martin & Another [2005] eKLR, the court held as follows:-

> This Court on appeal will be disinclined to disturb the finding of the trial Judge as to the amount of damages awarded by the trial court merely because if it had tried the case itself in the first instance, it would have awarded either a higher or lesser sum
>
> b) justification for reversing a trial Judge on an award of damages only applies where the court is convinced either that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very low as to make it an entirely erroneous estimate of the damage to which the aggrieved party is entitled.

76. Further, in Duncan Nderitu Ndegwa vs. Kenya Pipeline Company Limited & Another [2013] eKLR, it was held that:-

> Damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.

77. Further, in Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR, it was asserted that:-

> The measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.

78. Having applied the above parameters to the instant appeal in regards to the award of general damages, it is evident that the fact of trespass was not denied by the Appellant. The trial magistrate in her judgement correctly asserted that the Appellant's actions of entering the Respondent's suit parcel of land without notifying him and without his respective permission to do so was tantamount to trespass. The Respondent's action of cutting down the Appellant's trees and damaging the fence without giving him notice and given the opportunity to do so was in contravention with the provisions of Section 55 of the *Energy Act*. For these illegal acts of entry, the Appellant needs to compensate the Respondent in general damages for trespass.

79. It is my finding that the learned magistrate did not err in arriving at the award of damages under the head of general damages. She took into consideration principles of case law highlighted above to exercise her discretion and I find that the Appellant failed to establish that the trial magistrate erred in law and/or fact in arriving at her decision. I therefore affirm the sum of Kshs. 250,000/- awarded to the Respondent as general damages.

80. Moving along, the trial magistrate awarded the Respondent Kshs. 972,843/- in special damages. The trial magistrate based her award under this head on the valuation report produced by the Respondent supposedly from an officer based at Ndaragwa Forest Station. From the material placed before me by the Appellant in this court it evident that the valuation report was a forgery. Interestingly, the trial magistrate expressed similar reservations in the trial court but went ahead and relied on one of the reports to award the Appellant Kshs. 972,843/-

81. A party who comes to equity must come with clean hands. In Alice Njoki Mugo v KCB Bank Kenya Limited & another [2020] eKLR, the court stated as follows: -

> " Having made a determination that the Plaintiff contradicted herself in her pleadings before the Thika Chief Magistrate's Court matter with what she pleaded in this matter it becomes

clear that the Plaintiff approached this court seeking equitable relief with unclean hands. He who comes to equity must come with clean hand. in Kyangaro v. Kenya Commercial Bank Ltd & Another (2004) 1 KLR 126 as cited in Patrick Waweru Mwangi & Another v. Housing Finance Co. of Kenya Ltd (2013) eKLR at page 145 stated:

"Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently, he has not done equity."

82. Regarding, the forged valuation report produced by the Appellant, it is my finding that the Appellant came to equity with unclean hands and this court is not prepared to allow the Appellant to benefit from the same. I agree with the Appellant that the valuation report relied upon by the trial magistrate in her ruling was illegally obtained and its source, origin, legitimacy and authenticity were questioned by the Appellant during trial. The Respondent did not make any attempt to disprove the Appellant's evidence that the report was forged and therefore the award of special damages was not substainted.

83. In the end, and considering the foregoing assessment and reasoning, the appeal partially succeeds. I proceed to make the following orders: -

    a. The award of general damages of Kshs. 250,000/- awarded by the trial court is upheld and the costs of the same amount in the trial court is awarded.

    b. The award of Kshs. 972,843/- in special damages is set aside.

    c. Each party shall cater for their own costs in this appeal.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 6TH DAY OF FEBRUARY, 2025

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CHARLES KARIUKI

JUDGE