



REPUBLIC OF KENYA



KENYA LAW
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**Wandere v H Young & Co (EA) Ltd (Civil Appeal 63 of 2020)
[2024] KEHC 1137 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 63 OF 2020
TW CHERERE, J
FEBRUARY 8, 2024**

BETWEEN

BERNARD NDERITU WANDERE APPELLANT

AND

H YOUNG & CO (EA) LTD RESPONDENT

*(An Appeal from the Judgment and Decree in Meru CMCC
77 OF 2018 by Hon. T.M. Mwangi (SPM) on 30th July, 2018)*

JUDGMENT

1. By plaint amended on 02nd April, 2019, Appellant made a claim that on or about 15th November, 2017, Appellant had trespassed on his LR. No. Ntima/igoki/6999 by placing a culvert on the said land, diverting motor vehicles onto the said land causing damages to the land and crops. Appellant therefore sought damages as follows:
 1. Special damages in the sum of KES. 212,405/-
 2. General damages for trespass
 3. Costs of the suit and interest
2. Respondent by statement of defence dated 20th August, 2019 conceded the trespass in the manner that was pleaded by the Appellant but blamed the resident engineer, Kenya Urban Rural Authority (KURA) from whom it allegedly received designs, directions and instructions.
3. After the conclusion of the trial, the court by judgment dated 30th July, 2020 found Appellant's claim was proved and awarded Appellant for KES. 51,000/- special damages, KES. 150,000/- general damages for trespass, costs of the suit and interest.



4. Appellant has appealed the award mainly on the ground that the award for KES. 150,000/- general damages for trespass is inordinately low.
5. When the matter came up for hearing, the court directed that the appeal be canvassed by way of written submission. Both parties complied and the appellant filed his submission on 23rd March,2023 and the Respondent on 16th January,2024.
6. It is the Appellant's case that though he tendered receipts for special claim in the sum of KES.212,000/- but the court awarded him only KES.51,000/-. Appellant urged the court to review the special damages. Additionally, Appellant faulted the trial magistrate for disregarding the agricultural officer's report as a result of which the court awarded KES. 150,000/- general damages for trespass and nuisance which he contends is inordinately low.
7. The Respondent on the other hand vehemently opposes the appeal in its entirety and urged the court to uphold the trial court's decision and dismiss the appeal with costs.

Determination

8. I have considered the appeal in the light of the trial court record, the submissions and authorities cited by the parties.
9. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. (See *Selle vs Associated Motor Boat Co.* [1986] EA 123, *Peters v Sunday Post Ltd* [1958] EA 424 and *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR).
10. At the hearing, it was established by way of a search certificate that Appellant was the registered owner of LR. No. Ntima/Igoki/6999 which is the subject matter of the dispute between the parties. On the other hand, Respondent did not deny having trespassed onto the said land.
11. The evidence on record demonstrates that although the Appellant specifically pleaded special claim in the sum of KES.212,000/-, he specifically proved only KES.51,000/-.
12. It is trite that special damages must be specifically pleaded and strictly proved. In *Capital Fish Kenya Limited vs. The Kenya Power and Lighting Company Limited* [2016]eKLR, the Court of Appeal observed:

“The appellant apart from listing the alleged loss and damage, it did not...lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed, there was not credible documentary evidence in support of the alleged special damages.”

1. And in *David Bagine v Martin Bundi* (CA No. (Nbi) 283 of 1996), the Court of Appeal, referring to the judgment by Lord Goddard CJ in *Bonhan Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177), once again observed that:

“It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the



head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.”

13. From the foregoing, I find that the trial court’s finding on special damages was well grounded in fact and law and it is upheld.
14. Concerning general damages for trespass, which trespass was proved, Appellant submitted that the Respondent’s acts amounted to nuisance which is defined in *Clerk and Lindsell on Torts* 17th Edition page 1354 para 24-01 as “an act or omission which is an interference with, disturbance of or annoyance to, a person’s rights used or enjoyed in connection with land. It is caused, usually when the consequences of a person’s actions on his land are not confined to the land, but escape to his neighbour’s land causing an encroachment and causing physical damage or unduly interfering with the neighbour’s use and enjoyment of his land” and prayed for damages”.
15. Appellant submitted that he had demonstrated actual damage to his land and was therefore entitled to damages to restore the land to the position it was before the trespass. At the trial, Appellant sought damages in the sum of KES. 1,500,000/- and relied on *Nakuru Industries Limited v S. S. Mehta & Sons* [2016] eKLR where the court awarded KES. 500,000/- for trespass and damage to land by way of excavation.
16. At the hearing, Respondent offered KES. 100,000/- and placed reliance on two authorities:
 1. *Philip Aluchio v Crispinus Ngayo* [2014] eKLR, where the Court awarded KES.500,000/- as general damages for trespass on the ground that they plaintiff had not adduced any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass.
 2. *John Chumia Nganga v Attorney General & another* [2019] eKLR where the Court awarded KES.100,000/- as general damages for trespass on the ground that the Plaintiff did not provide the value with which the Court was to work with.
17. *Halsbury’s Laws of England* 4th Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action for trespass:
 - a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.
 - b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
 - c) 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.
 - d) 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.
 - e) If the trespass is accompanied by aggravating circumstances.
18. The issue for my consideration is whether the quantum of damages was inordinately low. An appellate court will not disturb an award of damages unless it be shown that the trial court proceeded on wrong principles or that he misapprehended the evidence.
19. The Court of Appeal in *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR settled the principles to be applied in assessing damages and stated that:



Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

20. A survey report by Unique-link Dynamic Ltd dated 11th December, 2017 tendered in evidence demonstrates that Respondent encroached on 0.07 acres of Appellant's 0.405 Ha land by diversion of the road onto the land and dumping of material onto the land.
21. There is no doubt that the trespass on Appellant's land caused not only physical damage to the land but unduly interfered with Appellant's use and enjoyment of his land.
22. Looking at the cases cited before the trial court, I find that they are between 10 and 14 years old and considering the lapse of time and the fact that the trespass continued for more than one year, I find that an award of KES. 150,000/- was low in the circumstances of this case.
23. From the foregoing, I find that this is a matter that warrants this court's interference. I therefore set aside the KES. 150,000/- awarded for general damages and substitute it with KES. 1,000,000/-.
24. From the foregoing, I the appeal partially succeeds and is hereby order:
 1. The award for special damages remains as awarded by the learned trial magistrate.
 2. General damages in the sum of KES. 150,000/- is substituted with KES. 1,000,000/- (One million)
 3. Appellant is awarded costs of the appeal.

DATED AT MERU THIS 08TH DAY OF FEBRUARY 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

For Appellant - Ms. Aketch for Vivian Loice Aketch & Co. Advocates

For Respondent - Ms. Owuor for Okwach & Co. Advocates

ORDER

Stay of execution for 30 days from today's date

