



**Byegon & 2 others v Ngeno (Environment and Land Appeal E005 of 2024)  
[2025] KEELC 6187 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6187 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT AND LAND APPEAL E005 OF 2024  
LA OMOLLO, J  
SEPTEMBER 25, 2025**

**BETWEEN**

**CHARLES BYEGON ..... 1<sup>ST</sup> APPELLANT**

**JEPHETH KIPTOO BYEGON ..... 2<sup>ND</sup> APPELLANT**

**KIPKOECH PETER BYEGON ..... 3<sup>RD</sup> APPELLANT**

**AND**

**PAUL KIPRONO NGENO ..... RESPONDENT**

*(Being an appeal arising from the judgement of Hon. Kimang'a G.O  
delivered on 29th July, 2021 in Kericho CM ELC Case No. 22 of 2015)*

**JUDGMENT**

**Introduction.**

1. By a Memorandum of Appeal dated 3<sup>rd</sup> May, 2024, the Appellants challenge the decision of Hon. Kimang'a G.O in Kericho CM ELC Case No. 22 of 2015.

**Factual Background.**

2. In the subordinate Court, the Respondent filed the Complaint dated 16<sup>th</sup> January, 2015 against the Appellants herein and one Andrew Kipyegon Rogony seeking the following orders;
  - a. Special damages suffered by the Plaintiff as a result of the Defendants of unlawful and unjustified destruction of his fences. (sic)
  - b. General damages for the trespass and destruction of his trees as well as mesne profits derived from the illegal occupation and use of his land.



- c. Costs of this suit and interest of (a) and (b) above.
3. The Appellants and Andrew Kipyegon Rogony filed their Statement of Defence dated 16<sup>th</sup> February, 2015 where they denied the averments in the Plaint and sought that the suit be dismissed with costs.
4. The Learned Trial Magistrate delivered his judgement on 29<sup>th</sup> July, 2021 as against the Appellants and Andrew Kipyegon Rogony as follows;
- “ 1. The Plaintiff is awarded damages to be paid by Defendant (sic) as follows;
- a) Special Damages - Nil
  - b) General Damages -Kshs. 100,000/=
  - c) Mesne Profits out of illegal occupation and use of the subjectland-Kshs. 100,000/=
- Total -Kshs. 200,000/=
2. Costs is to the Plaintiff as well as interests at Court rates. (sic)”
5. The Appellants being aggrieved by the said judgement approached this Court by way of Appeal.
6. The Appeal was admitted for hearing on 18<sup>th</sup> November, 2024 and the Court issued directions that the appeal be heard by way of written submissions.
7. The Appeal was mentioned severally to confirm filing of submissions and on 25<sup>th</sup> February, 2025 it was reserved for judgement.

### **The Appeal.**

8. The grounds of appeal are as follows;
- a. That the Learned Trial Magistrate erred in law and in fact in finding in favour of the Respondent when both the evidence on record and the circumstances of the case militated against.
  - b. That the Learned Trial Magistrate erred in law and in fact in failing to consider the surveyor’s report dated 20<sup>th</sup> November, 2015 produced as Defence Exhibit 2 which confirmed that there was no trespass thus occasioning a miscarriage of justice.
  - c. That the Learned Trial Magistrate erred in law and fact in failing to consider in totality the Appellants’ written submissions and in so doing put a lot of reliance on the Respondent’s.
  - d. That the Learned Trial Magistrate erred in law and in fact in awarding general and mesne profits despite clear guidelines and judicial precedents that provide that mesne profits are special damages which must not only be pleaded but also proved.
  - e. That the Learned trial judge (sic) erred in law and fact in awarding costs to the Respondent.
9. The Appellants pray for orders that;
- a. That this appeal be allowed and the judgement of the Hon. Kimang’a G.O Senior Resident Magistrate at Kericho in Kericho CMCC No. 22 of 2015 dated 29<sup>th</sup> July, 2021 delivered on 7<sup>th</sup> January, 2022 be set aside accordingly. (sic)
  - b. That the costs of this appeal and of the lower Court be provided for.



### **Issues for Determination.**

10. The Appellants filed their submissions dated 13<sup>th</sup> January, 2025 while the Respondent filed his submissions dated 10<sup>th</sup> February, 2025.
11. The Appellants submit on whether the Trial Court erred in law and in fact by allowing the Respondent suit. (sic)
12. The Appellants rely on the judicial decisions of *Selle & another versus Associated Motor Boat Co. Ltd & Others* [1968] EA 123, *David Kahuruka Gitau & another versus Nancy Ann Wathithi Gatui & another* Nyeri HCCA No. 43 of 2013 and submit that this Court sitting as an appellate Court should review the evidence adduced before the trial Court in order to determine whether the Learned Trial Magistrate's determination should stand.
13. The Appellants submit that the Learned Trial Magistrate failed to consider the fact that the Respondent did not adduce any evidence to show the alleged destruction of the perimeter fence and poles.
14. The Appellants also submit that the Learned Trial Magistrate failed to consider their evidence that the Respondent had purchased 0.2 acres and not 0.4 acres. The said evidence included a sale agreement entered into in the year 1998 which detailed the transaction that gave rise to the suit.
15. The Appellants further submit that the Learned Trial Magistrate erred by failing to consider their submissions.
16. The Appellants rely on the judicial decisions of *Provincial Insurance Co. EA Ltd vs Mordekai Mwangi Nandwa KSM CACA 179 of 1995 (ur)*, *National Social Security Fund Board of Trustees vs Sifa International Limited* [2016] eKLR and submit that the Learned Trial Magistrate awarded the Respondent special damages even though he did not prove them.
17. The Appellants submit that even though the Respondent gave particulars of general damages in his Complaint, he did not produce any documents in support of his claim.
18. The Appellants further submit that no receipts and/or valuation report was produced in support of the claim for general damages.
19. The Appellants rely on the judicial decision of *Bonham Carter versus Hyde Park Hotel Limited* [1948] 64 TLR 177 as was cited in *David Bagine versus Martin Bundi* [1997] eKLR, the judicial decision of *Philip Ayaya Aluchio versus Crispinus Ngayo* [2014] eKLR in support of their submissions.
20. The Appellants submit that they produced a Surveyor's Report dated 20<sup>th</sup> November, 2015 as Exhibit D2 which stated that there was no boundary defining the suit parcel of land.
21. The Appellants also submit that the Surveyors found that there was no boundary between land parcel No's Kericho/Kabianga/3024 and 3026. The Surveyors further found that the alleged fence that was destroyed was within land parcel No. Kericho/Kabianga/3025.
22. It is the Appellants submissions that the Learned Trial Magistrate in his judgement failed to rely on the Surveyor's report without giving solid reasons.
23. The Appellants rely on the judicial decision of *Kimatu Mbuvi versus Augustine Munyao Kioko* [2001] eKLR and submit that a surveyor's report which is produced without objection in Court is of a probative value and cannot be departed from without any explanation.



24. It is also the Appellants submissions that the Learned Trial Magistrate erred in his finding by superintending over a survey exercise and fell short of the provisions of Sections 18 and 19 of the [Land Registration Act](#).
25. The Appellants rely on Section 26 of the [Land Registration Act](#) and submit that even though the Respondent produced a title deed to demonstrate ownership of the suit parcel, they (Appellants) produced a sale agreement which was stated that he only purchased 0.2 acres.
26. The Appellants also submit that the Respondent did not explain how the size of the suit parcel was extended to 0.4 acres from the 0.2 acres he had purchased.
27. The Appellants admit that they did not file any Counter Claim before the trial Court.
28. It is the Appellants submissions that the Learned Trial Magistrate erred in law and in fact in awarding both damages for trespass and mesne profits and rely on the judicial decision of Kenya Hotel Properties Limited versus Willesden Investments Limited [2009] eKLR and submit that where a party seeks for both mesne profits and damages for trespass, the Court will only grant one and not both because they mean one and the same thing.
29. The Appellants rely on Section 2 of the [Civil Procedure Act](#), the judicial decision of Peter Mwangi Mbuthia & another versus Samow Edin Osman [2014]eKLR and submit that mesne profits must be pleaded and proved and also submit that the Respondent did not lead any evidence in support of his claim for mesne profits.
30. The Appellants conclude their submissions by urging the Court to allow the appeal as prayed.
31. The Respondent submits on whether the Appeal has merit. The Respondent relies on the judicial decision of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR as was cited in Prime Steel Company Limited v Rop & another (Appeal E002 of 2021) [2023] KEELRC 1675 (KLR) and submits that a first appellate Court has a duty to examine issues of both law and facts and draw its own conclusions.
32. The Respondent also submits that he proved before the trial Court that he was the registered owner of land parcel No. Kericho/Kabianga/3026 measuring 0.4 acres by producing copies of a title deed and a certificate of official search.
33. The Respondent further submits that the Appellants destroyed his fence without any justifiable cause and grazed their cows on his parcel of land for a period of two years beginning from 4<sup>th</sup> October, 2012 to 7<sup>th</sup> August, 2014.
34. It is the Respondent's submissions that the Appellants merely denied the trespass and justified their actions by alleging that the he (Respondent) was only entitled to 0.2 acres of the purchased land and not 0.4 acres but they did not file any Counter Claim.
35. The Respondent relies on Section 3(1) of the [Trespass Act](#), Section 26 of the [Land Registration Act](#), the judicial decision of Charles Ojwang Otako v Geoffrey Owuor Ochieng (Environment and Land Appeal 36 of 2021) [2022] KEELC 2806 (KLR) and submits that his title deed is prima facie evidence that he is the absolute and indefeasible owner of the suit parcel.
36. The Respondent also submits that the Appellants were charged, prosecuted and convicted of the offence of forcible detainer in Kericho CM Criminal Case No. 201 of 2013. The Appellants admitted in their evidence that they were charged.



37. It is the Respondent's submissions that in Kericho CM Criminal Case No. 201 of 2013 the Court issued an order that a Surveyor's report be prepared on the boundaries of land parcel No's Kericho/ Kabianga/3024 and 3026. This is because the Appellants had destroyed the fence before involving surveyors.
38. It is also the Respondent's submissions that the Appellants were convicted based on the findings of the Survey Report which conviction leads to inevitable conclusion that the Appellants trespassed and were in illegal occupation of the Respondent's land.
39. It is further the Respondent's submissions that the Appellants did not show any justifiable reasons before the trial Court for destroying the fence and occupying his land.
40. The Respondent submits that the trial Court took into consideration the oral evidence and the documents produced in finding that the Appellants trespassed on the suit parcel.
41. On whether he was entitled to damages, the Respondent submits that trespass to land is actionable per se and therefore if trespass is proved then the Court is under a duty to access the damages that can be awarded.
42. The Respondent also submits that the Learned Trial Magistrate did not misdirect himself in awarding both general damages and mesne profits as he suffered loss. The loss he suffered included the loss of trees and unwarranted interference with his property.
43. The Respondent further submits that the Learned Trial Magistrate did not award special damages as they were not proved.
44. The Respondent relies on Halsbury's Laws of England 4<sup>th</sup> Edition Volume 45 para 26 1503 on computation of damages in an action for trespass, the judicial decisions of Kenya Power & Lighting Company Limited vs Fleetwood Enterprises Limited [2017]eKLR, Kemfro Africa Limited vs Lubia & another (No. 2) [1987] KLR 30 and submits that a Court on appeal can only interfere with an award of compensatory damages after considering the set out principles as damages are awarded at the discretion of the Court.
45. The Respondent submits that the Learned Trial Magistrate exercised his discretion in awarding him general damages of kshs. 100,000/=.
46. The Respondent relies on Section 2 of the *Civil Procedure Act*, the judicial decision of Attorney General vs Halal Meat Products Limited [2016] eKLR and submits that he pleaded and proved his claim for mesne profits.
47. The Respondent also relies on the judicial decision of Rajan Shah T/A Rajan S. Shah & Partners vs Bipin P. Shah [2016] eKLR and reiterates that the Learned Trial Magistrate found that the Appellants had destroyed his fence and entered his parcel of land where they grazed their cows for a period of about two years.
48. The Respondent submits that the sum of Kshs. 100,000/= awarded as mesne profits was reasonable in the circumstances.
49. The Respondent also submits that the Learned Trial Magistrate confined himself to the pertinent issues raised by the respective parties therein and did not take into consideration any extraneous issues.
50. The Respondent also relies on the judicial decision of United India Insurance Company Limited vs East African Underwriters Kenya Ltd [1985] KLR 898 in support of his submissions.



51. The Respondent concludes his submissions by urging the Court to dismiss the appeal with costs.

**Analysis and Determination.**

52. The issues that arise for determination are as follows;

- a. Whether the Learned Trial Magistrate erred in law and in fact in failing to consider the Surveyor's Report dated 20<sup>th</sup> November, 2015 which stated that there was no trespass.
- b. Whether the Learned Trial Magistrate erred in law and in fact in awarding the Respondent general damages and mesne profits.
- c. Whether the Learned Trial Magistrate erred in law and in fact in awarding the Respondent costs.
- d. Who should bear costs of the appeal.

**A. Whether the Learned Trial Magistrate erred in law and in fact in failing to consider the Surveyor's Report dated 20th November, 2015 which stated that there was no trespass.**

53. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of *Gitobu Imanyara & 2 others Vs Attorney General* [2016] eKLR. It was held as follows;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

54. In *Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR the Court held as follows;

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

55. The Appellants submit that they produced before the trial Court a Surveyor's Report dated 20<sup>th</sup> November, 2015 and that the Surveyors in their report found that there was no boundary between land parcel No's Kericho/Kabianga/3024 and 3026. He submits that the surveyors also found that the fence that was destroyed was on land parcel No. 3025 and it did not belong to the Respondent.

56. The Appellants also submit that the Learned Trial Magistrate erred in failing to abide by the findings of the said Report.

57. The Respondent on the other hand submit that the Appellants were charged, prosecuted and convicted of the offence of forcible detainer in Kericho CM Criminal Case No. 201 of 2013.

58. The Respondent also submit that in the said suit, the Court issued an order that a survey be done to demarcate the boundaries of land parcel No's Kericho/Kabianga/3024 and 3026.

59. The Respondent further submits that the Appellants were convicted based on the findings of the said report.



60. It is the Respondent's submissions that the trial Court considered the findings of the said report in its judgement.
61. A perusal of the judgement delivered on 29<sup>th</sup> July, 2021 by the Learned Trial Magistrate shows that he did not rely on the Surveyors report dated 20<sup>th</sup> November, 2015.
62. Instead, the Learned Trial Magistrate in making the finding that the Respondent had proved that the Appellants had trespassed onto the suit parcel stated as follows;
- “Through the Certificate of Official Search dated 24<sup>th</sup> July, 2014 it has been confirmed by the Land Registrar that the suit properties are owned by the Plaintiff. Plaintiff never authorized the Defendant (sic) to enter his land and carry out wrongful occupation. The 1<sup>st</sup> to the 3<sup>rd</sup> (sic) Respondents were charged and convicted of forcible detainer before the lower Court in CR No. 201 of 2013. I am therefore inclined to find that Defendants had trespassed on the suit parcels belonging to the Plaintiff.”
63. A further perusal of the proceedings before the Trial Court shows that the 2<sup>nd</sup> Appellant testified as PW5 (sic). He produced a copy of the Surveyors Report dated 20<sup>th</sup> November, 2015 as D.Exhibit 2.
64. The Report is titled “Report on Establishment of Boundaries between parcel Kericho/Kabianga/3024 and (sic) 3026, Civil CASDA No. 201 of 2013”.
65. The Report is prepared by G.K Kibowen the District Surveyor, Kericho on 20<sup>th</sup> November, 2015 after a boundary establishment exercise carried out on 11<sup>th</sup> November, 2015.
66. The members present were surveyors, two security officers, a village elder and the owners of land parcel No's Kericho/Kabianga/3024, 3025 and 3026.
67. The boundary establishment exercise was conducted pursuant to an order issued in Criminal case No. 201 of 2013.
68. The following were the findings of the report;
- “-Scaled distances on the were (sic) corresponding with the ground.
- The road serving parcel Ker/Kabianga 3025 is(sic) between parcels no Ker/Kabianga 3024 and 3026, its undefined on the ground.
- There was no distinct boundary defining parcel no Ker/Kabianga 3026. Ker/Kabianga 3026, 2593 and 2490 was merged on the ground as one parcel on the ground. (sic)
- Ker/Kabianga/3024 was merged with Ker/Kabianga/3025 since there was no distinct boundary defining the two parcels.
- The existing fence in (sic) the ground is as marked on the RIM.”
69. The concluding remarks on the report are as follows;
- “Ker/Kabianga3026 and 3024 was marked in the ground (sic) with respect to the corresponding scaled distances on the map.
- The road of access marked F-H on the map was also marked on the ground.
- The Existing fence in the ground (sic) fall within the parcel Ker/Kabianga/3025.”



70. It is important to note that contrary to the assertions by the Appellants, the Surveyors Report did not address the issue of the destroyed fence. Instead, the Report stated that the only existing fence on the ground was on land parcel No. Kericho/Kabianga/3025.
71. It is not disputed that the Surveyors Report dated 20<sup>th</sup> November, 2015 was prepared after the Court in Criminal Case No. 201 of 2013 issued an order that boundaries between land parcel No's Kericho/Kabianga/3024 and 3026 be established.
72. A perusal of the proceedings before the trial Court shows that on 16<sup>th</sup> October, 2019 the 2<sup>nd</sup> Appellant gave his evidence where he admitted that he was charged with the offence of forcible detainer in Criminal Case No. 201 of 2013.
73. The 1<sup>st</sup> and 3<sup>rd</sup> Appellants also testified that they were charged with the offence of forcible detainer in Criminal Case No. 201 of 2013. They were found guilty and sentenced to twelve months imprisonment.
74. It is not disputed that the Respondent is the registered owner of land parcel No. Kericho/Kabianga/3026.
75. In the Complaint filed before the trial Court, the Respondent contends at paragraphs 6, 7 and 8 that the Appellants destroyed his fence, cut down his trees and trespassed onto his land and begun to graze their animals.
76. As afore stated, the Appellants contend that the Surveyors Report confirmed that there was no boundary between land parcel No's Kericho/Kabianga/3024 and 3026.
77. The Appellants submit that the Surveyors Report stated that the fence that was destroyed was on land parcel No. 3025 which fence did not belong to the Respondent. However, I note that the Surveyors Report did not address the issue of the destroyed fence.
78. The findings of the said Surveyors Report have been set out in the preceding paragraphs. Part of the findings of the said report were that land parcel No. Kericho/Kabianga/3026 did not have a distinct boundary defining it.
79. The Conclusion Section of the Surveyor's Report has been set out in the preceding paragraphs but I will nonetheless replicate it as hereunder;

“...The Existing fence in the ground (sic) fall within the parcel Ker/Kabianga/3025.”

80. As aforementioned, the Respondent contends that his fence was destroyed and the Appellants trespassed onto his parcel of land.
81. Contrary to the assertions by the Appellants, it is my view that the Surveyors Report confirmed the Respondent's contention as it found that there was no other fence on the ground other than the fence on land parcel No. Kericho/Kabianga/3025.
82. It is not disputed that the Surveyors Report dated 20<sup>th</sup> November, 2015 was filed in Criminal Case No. 201 of 2013 which Court found the Appellants guilty of forcible detainer.
83. In the judicial decision of Honam Holdings Limited v Maithya & 2 others [2025] KEELC 3096 (KLR) the Court held as follows;

“Therefore, a registered proprietor of land has absolute ownership thereof and is entitled to enjoy quiet possession and use of such land without interference from third parties. In



this case, the Plaintiff has shown by photographs produced in evidence that the Defendants have trespassed on the suit property and constructed thereon. The judgment in Machakos High Court Criminal Appeal No. 29 of 2019 show that the 2<sup>nd</sup> Defendant's appeal against conviction of the offence of forcible detainer regarding the suit property was dismissed. Therefore, the Defendants have no proprietary interest in the suit property, hence have no right to be on the suit property or in any way interfere with the same and their presence thereon is unlawful, without lawful justification and the same amounts to trespass."

84. In the above cited judicial decision, the Defendants were charged and found guilty of forcible detainer. They filed an appeal which was also dismissed. In a suit filed before the Environment and Land Court, the court relied on the judgments in the criminal case together with evidence adduced before it and found that the Defendants had no proprietary interest in the suit land, had no right to be on it and were therefore trespassers.
85. Even though the Appellants expressly admitted in their evidence that they were convicted of the offence of forcible detainer, neither of the parties produced the proceedings and/or the judgement that was delivered in Criminal Case No. 201 of 2013. In effect, this Court cannot establish the facts and circumstances surrounding the conviction. Further, those proceedings were criminal in nature, they were before a subordinate court and the trial Court was in no way bound by those findings.
86. My view is that the Learned Trial Magistrate ought to have evaluated the facts presented to him and situated them in the law, separate and apart from the criminal proceedings. While evidence of a conviction on the offence of forcible detainer is relevant in proving the tort of trespass, an independent finding must be made when investigating a claim of trespass.
87. Halsbury's law of England 3d edition, Volume 38 at page 739 paragraph 1205 defines trespass as follows:

"A person trespasses upon land if he wrongfully sets foot on, Or rides or drives over, it, or takes possession of it, or expels the person in possession of pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it, or it seems if he erects or suffers to continue on his own land anything which invades the air space of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land to another's land."
88. The said text at Paragraph 1213 explains the nature of extent of possession that is sufficient to support an action of trespass thus:

"What possession is sufficient? Any form of possession, so long as it is clear and exclusive and exercised with the intention to possess, is sufficient to support an action of trespass against a wrong doer."
89. From the foregoing, it is evident that trespass is wrongful possession. The survey report suggests that Kericho/Kabianga/3024 was merged with Kericho/Kabianga/3025 as there was no distinct boundary defining the two parcels. In the circumstances, it was erroneous to find that the Appellant's occupation was wrongful and/or amounted to trespass.
90. In my view the dispute before the trial Court was actually a boundary dispute disguised as a dispute arising from trespass.
91. It is therefore this Court's view that the Learned Trial Magistrate erred in law and in fact in failing to rely on the Surveyors Report.



92. This ground of appeal succeeds.

**B. Whether the Learned Trial Magistrate erred in law and in fact in awarding the Respondent general damages and mesne profits.**

93. Taking into consideration my finding on the question of trespass, it follows that there should have not been any award on general damages or mesne profits.

94. However, I shall, for its worth, consider this question on its merits.

95. The Appellants submit that the Learned Trial Magistrate erred in awarding damages for trespass and mesne profits. The Appellants also submit that where a party seeks damages for trespass and mesne profits, the Court can only grant either of the two as they mean one and the same thing.

96. The Appellants further submit that the Respondent did not specifically plead and prove mesne profits.

97. The Respondent on the other hand submits that the trial Court exercised its discretion in awarding him general damages for trespass of Kshs.100,000/=.

98. The Respondent also submits that since the Appellants illegally occupied and used his land, the sum of Kshs. 100,000/= awarded to him as mesne profits was reasonable in the circumstances.

99. The Learned Trial Magistrate held as follows in his judgement;

“On the issue of general damages for trespass, what arises is the question of measure...

It being that general damages for trespass entail the difference in value of the Plaintiffs (sic) property after the trespass or costs of restoration the Plaintiff is entitled to general damages resulting from wrongful use and illegal acquisition of his land by the Defendants. (sic) In his submission (sic) dated 19<sup>th</sup> November, 2019, the Plaintiff avers that the Defendants took down the fence and took possession of his land grazing cattle on it until the month of August 2014 when the Plaintiff regained possession of it. This culminated in the arrest of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants and their subsequent prosecution in Criminal Case No. 201 of 2013 for the offence of forcible detainer of the parcel LR No. Kericho/Kabianga/3026.

The other question is to (sic) whether or not mesne profits arose...

I have therefore awarded mesne profits as compensation to the Plaintiff for the period of close to two years between 4<sup>th</sup> of October 2012 and 7<sup>th</sup> August 2014 in which the Defendants illegally occupied, denied and trespassed the Plaintiff's property thus deriving benefits from the illegal occupation thereon. In this particular case, I find that the mesne profits sought have been pleaded and proved as per the provisions of Order 21, Rule 13 of Civil Procedure Act.(sic)..."

100. The Learned Trial Magistrate proceeded to award the Respondent Kshs. 100,000/= as general damages and Kshs. 100,000/= as mesne profits.

101. The Court of Appeal in *Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees* [2020] KECA 536 (KLR) held as follows;

“It is settled law that where a party claims for both mesne profits and damages for trespass, the Court can only grant one and not both. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black's Law Dictionary 9th edition). Mesne Profits



must be pleaded and proved. In the case *Peter Mwangi Msuitia & Another v Samow Edin Osman* [2014] eKLR, this Court held as follows:

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

In the case of *Inverugie Investment v Hackett* (Lord Lloyds [1995]3 ALL ER 842 it was held thus:

“Our understanding of the above persuasive authority is that once the learned Judge made the award under the subhead “mesne profits” there was no justification for him awarding a further Kshs.10 million under the subhead “trespass” since both mean one and the same thing...”

The above decision was followed by this Court’s decision in the case of *Kenya Hotel Proprietors Ltd v Willesden Investments Ltd* [2009] KLR 126.

In the instant appeal, the trial Court made a finding that the appellant was a trespasser from the time the respondent rescinded the agreement. As such the respondent was entitled to compensation for the period the appellant was in occupation of the suit land. The respondent sought both mesne profits and damages for trespass. The law is that trespass to land is actionable per se (without proof of any damage). In *Park Towers Ltd v John Ithamo Njika & 7 others* [2014] eKLR it was stated:

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case...”

Therefore, granted that trespass to land is actionable per se, and indeed no proof of damage is necessary for the Court to award general damages. We note that the Respondent did not claim any amount to guide the Court in assessing general damages for trespass. The Court would have expected the Respondent to obtain the actual benefits accrued by the appellant from the suit property for the duration of the trespass. It is common ground that the Appellant had erected a mansion on the suit property. Such information represents the opportunity of cost of the deprivation of the use of land by the Appellant’s continued occupation.

In tort damages are awarded as a way to compensate a party for the loss he or she had incurred due to a wrongful action on the part of the other party. The damages so awarded are intended to return the party back to the position he or she was in before the wrongful act was committed...

We have no doubt that when the appellant was constructing a mansion on the suit property; she had neither sought nor obtained the consent of the respondent to so develop the suit property. The Appellant was not acting in good faith. She was aware of the pending balance of the purchase price and her duties and responsibilities as a licensee of the Respondent while in possession of the suit property. She was notified of the unlawful act and trespass by the Respondent’s advocate’s letter dated 31<sup>st</sup> May, 2010. The Appellant’s actions on the suit land were therefore unlawful and thereby altered the use of the suit property. The Respondent is therefore entitled to compensation. No evidence was adduced as to the state



of suit property after the trespass and it thus becomes difficult to assess general damages for trespass. The exact value of the land before trespass was Kshs. 3,000,000/- but the value after the trespass is not proved. However, as we have found that the Appellant did trespass onto the Respondent's land and started construction thereof, we would award the Respondent a nominal figure of Kshs. 500,000/- plus interest from the date of this judgment until payment in full as general damages for trespass." (Emphasis mine)

102. In the above cited judicial decision, the Court of Appeal held that where a party claims for mesne profits and general damages for trespass, the Court can only grant one and not both.
103. As afore stated, the Respondent was awarded kshs. 100,000/= as general damages and Kshs. 100,000/= as mesne profits.
104. The Respondent having been awarded Kshs. 100,000/= as general damages, he ought not to have been awarded kshs. 100,000/= as mesne profits.
105. This ground of appeal succeeds and considering my finding on the question of trespass. The awards of general damages and mesne profits are hereby set aside.

**C. Whether the Learned Trial Magistrate erred in law and in fact in awarding the Respondent costs.**

106. The Appellants at ground 5 of their Memorandum of Appeal state that the Learned Trial Magistrate erred in law and in fact in awarding the Respondent costs of the suit.
107. Neither of the parties addressed this issue in their submissions.
108. In *Khetshi Dharamshi & Company Ltd v Obuyumbi* (Appeal 10 of 2023) [2023] KEELRC 2664 (KLR) (30 October 2023) (Judgment) the Court held as follows;

“4. To answer the 1<sup>st</sup> issue, the Court returns (sic) that the Appellant has made no submissions on the issue of want of jurisdiction by the Trial Court per grounds 1 and 2 of appeal and as submitted for the Respondent, the Appellant is deemed to have abandoned the two grounds. The Court returns that the two grounds stand abandoned accordingly.”

109. In the judicial decision of *Kamonde v Mulonzya & another* (As Administrators of the Estate of Paul Vinzi - Deceased) (Civil Case E213 of 2022) [2024] KEHC 5648 (KLR) (9 May 2024) (Judgment) the Court held as follows;

“There was no submission on other grounds of Appeal hence they are deemed abandoned.”

110. In the above cited judicial decisions, the Court held that a ground of appeal not submitted on is deemed abandoned.
111. In the present case, since the Appellants did not submit on ground (5), they are deemed to have abandoned it.
112. Before penning off, this Court notes that the Appellants extensively submit that the Respondent purchased a portion of land measuring 0.2 acres and not 0.4 acres as alleged.
113. The Respondent submits that the Appellants justified their actions by alleging that he (Respondent) was only entitled to 0.2 acres and not 0.4 acres but they did not file a Counterclaim to that effect.



114. In the judicial decision of *Koloi & 4 others v Lokwee & 2 others* (Environment & Land Case 10 of 2022) [2024] KEELC 712 (KLR) (16 February 2024) (Judgment) the Court held as follows;

“...In other words, a Defendant cannot purport to seek a remedy without laying claim in the form of a Counterclaim. Black’s law Dictionary 11th Edition defines a defence as one “which is alleged by a party proceeded against in an action or suit, as a reason why the Plaintiff should not recover or establish that which he seeks by his complaint or Petition.” That a Defence can only dispute or justify why the Plaintiff should not be awarded the reliefs sought. It cannot purport to claim in the same fashion as a Plaintiff.

58. Had the Defendants felt that they were entitled to certain prayers, they ought to have filed a Counterclaim which has been defined by Black’s law Dictionary 11th Edition as a “claim for relief asserted against an opposing party after an original claim has been made.”

115. In the above cited judicial decision, the Court held that a Defendant who wants the Court to grant any prayers ought to file a Counterclaim.

116. The Appellants concede that they did not file a Counterclaim. In the absence of a Counterclaim, this Court shall not address itself any further on the said issue.

#### **D. Who should bear costs of the appeal.**

117. The general rule is that costs shall follow the event in accordance with the Provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

#### **Disposition.**

118. In the result, I find that the appeal succeeds and I hereby make orders as follows:

- a. The judgement of the Hon. Kimang’a G.O Senior Resident Magistrate at Kericho in Kericho CMCC No. 22 of 2015 dated 29<sup>th</sup> July, 2021 delivered on 7<sup>th</sup> January, 2022 is hereby set aside.
- b. The Appellants shall have the costs of the appeal.

119. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**L. A. OMOLLO**

**JUDGE.**

In the presence of: -

Mr. Okok for the Appellant.

Mr. Kirui Evanson for the Respondent.

Court Assistant; Mr. Joseph Makori.

