



Kirinyaga Water & Sanitation Company v Mwangi & another (Environment and Land Appeal E019 of 2023) [2025] KEELC 6268 (KLR) (24 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6268 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E019 OF 2023
JM MUTUNGI, J
SEPTEMBER 24, 2025**

BETWEEN

KIRINYAGA WATER & SANITATION COMPANY APPELLANT

AND

EUNICE MUTHONI MWANGI 1ST RESPONDENT

COUNTY GOVERNMENT OF KIRINYAGA 2ND RESPONDENT

(Being an appeal against the Judgment and Decree of the Honourable C.C. Kipkorir, Principal Magistrate in Kerugoya CM ELC No. E039 of 2022 delivered on 23rd August 2023)

JUDGMENT

1. This Appeal arises from the judgment of Hon. Cheruto C. Kipkorir (PM) delivered on 23rd August 2023 in Kerugoya CM ELC No. E039 of 2022. By the Judgment, the Learned Magistrate held that the 1st Respondent, as the registered owner of land parcel Mutira/Kaguyu/6220, had proved her claim of trespass after demonstrating that a public road had been unlawfully carved out of her land and that the Appellant had laid water pipes thereon without any valid wayleave or her consent. The Court relied on official correspondence confirming that no road existed on the suit land, found that no wayleave agreement had been produced, and underscored the testimony of DW2 admitting that continuous repairs had been carried out on the pipes, which the court treated as evidence of continuing trespass.
2. On that basis, the trial Magistrate entered judgment for the 1st Respondent granting a permanent injunction and a declaration of trespass, awarding damages of Kshs. 384,000/- against each defendant, mesne profits at Kshs. 70,000/- per month from 2016 until the determination of the suit, together with interest and costs.
3. Aggrieved and dissatisfied with the Judgment, the Appellant lodged this appeal through a Memorandum of Appeal dated 19th September 2023, setting out the following grounds:



1. That the Learned Trial Magistrate erred in law and fact by failing to hold and find that the 1st Respondent's suit was statutorily time-barred in view of Section 4(2) of the *Limitation of Actions Act*, thus the 1st Respondent's claim for a continuing tort failed to disclose a reasonable cause of action, thereby occasioning a gross miscarriage of justice.
 2. That the Learned Trial Magistrate erred in law and fact by failing to hold and find that the 1st Respondent's claim was barred under the doctrine of exhaustion in view of section 5 of the *Wayleaves Act*, thereby occasioning a gross miscarriage of justice.
 3. That the Learned Trial Magistrate erred in law and fact by misapprehending the evidence as presented by the parties by failing to make a finding that the valuation report did not cover aspects of trespass by the Appellant; thus, the learned Trial Magistrate erred in law and fact by condemning the Appellant to compensate the 1st Respondent, thereby occasioning a gross miscarriage of justice.
 4. That the Learned Trial Magistrate erred in law and fact by applying the wrong principles of law, while the 1st Respondent had not proved her case to the required standards, thereby occasioning a gross miscarriage of justice.
 5. That the Learned Trial Magistrate erred in law and fact by taking into account extraneous and irrelevant considerations, thus arriving at an erroneous finding in the judgment, thereby occasioning a miscarriage of justice.
 6. That the Learned Trial Magistrate failed to address her mind to the pleadings on record, the documentary evidence by the parties, the Appellant's submissions, and the law, thereby occasioning a miscarriage of justice.
4. The 1st Respondent opposed the appeal through a Notice dated 25th October 2023, contending that the trial court's judgment was well-founded. She argued that the Appellant's persistent unlawful use of her land violated Article 40(3) of the *Constitution*; that the Appellant's own request for her to execute a wayleave agreement was clear proof that no such right existed; and that under Section 148(1) of the *Land Registration Act* she was entitled to compensation for any wayleave or easement imposed on her land. She further maintained that the Appellant's defence was contradictory since, while denying trespass, it claimed to have obtained wayleaves from her and her late husband yet produced no evidence of such agreements. In her view, the Appellant failed to rebut her evidence, and the trial Court properly entered Judgment in her favour.
 5. The background to this matter is that the 1st Respondent filed an amended plaint dated 22nd September 2022 and her case was that she was the registered owner of land parcel Mutira/Kaguyu/6220 measuring approximately 0.05 hectares, having acquired the same through transmission following the death of her husband. She pleaded that upon becoming the proprietor, she fenced the land and began preparations to develop it by constructing fourteen (14) rental units on the plot which would each be rented at Kshs 5,000/- per month. She averred that in or about July 2016, the 2nd Respondent wrongfully entered the property, brought down her fence, destroyed crops and trees, and opened a road across the land, which remains in use by the public. She further averred that in 2017, the Appellant unlawfully laid water pipes through her parcel of land, which remain on her land to date. She contended that, as a result, she has been denied the use and occupation of her land. She averred that there had been no agreement between the parties in respect of the road, and that the Appellant had at one point offered to compensate her for the portion taken. She added that her intended development was frustrated, as she was denied approvals, and she has suffered loss in the form of mesne profits. In the suit, she sought a permanent injunction restraining the Appellant and 2nd Respondent from remaining on or interfering



- with her land, a declaration that they had no right to use the portion excised, or in the alternative, an order compelling them to fully compensate her, damages for trespass, and mesne profits at the rate of Kshs. 70,000/- per month from 2016 until the determination of the suit.
6. The Appellant filed a statement of defence dated 4th October 2022 in which it denied the 1st Respondent's claim in its entirety. At paragraph 4 of the defence, it pleaded that the 1st Respondent had granted it a wayleave, and on that basis urged the trial court to dismiss the suit with costs.
 7. The 1st Respondent filed a reply to the defence dated 7th October 2022 in which she categorically denied ever granting a wayleave to the Appellant. She described the Appellant's defence as frivolous, vexatious, and an abuse of the Court process. She intimated that she would seek to have it struck out or dismissed at the earliest opportunity.
 8. The suit proceeded to hearing, and the parties adduced evidence in support of their respective positions. The 1st Respondent testified as PW1 and stated that she was the registered owner of Mutira/Kaguyu/6220. She told the Court that in 2017, the Appellant unlawfully laid water pipes across her land while the 2nd Respondent opened a road through it, actions that destroyed her development and denied her use of the property. She denied that her late husband, who died in 2015, had ever been compensated or had granted the Appellant any valid wayleave, insisting that her development plans were frustrated and that her complaints to the Appellant were ignored.
 9. PW2, a licensed surveyor, confirmed that a road had been constructed on part of the suit land. PW3, a registered valuer, testified that he valued the suit property at Kshs. 3,000,000/- and assessed the encroached portion at Kshs. 384,000/-, noting that he did not value the section where the pipes lay since it was treated as a wayleave area.
 10. The Appellant's witness, DW1, its Technical Services Manager, testified that the water pipes in issue were not within the suit land but lay within an adjacent road reserve. He stated at one point that the pipes had been laid as far back as 1984, but later suggested it was 2002 after the passing of the Water Act, and at another point 2007, thereby giving inconsistent timelines. He maintained that no wayleave was necessary as the pipes were within a road reserve. Under cross-examination, however, he conceded that they had no evidence to show they had not encroached upon the suit property. He further confirmed that the pipes had in fact been laid on the land, that negotiations with the 1st Respondent had been initiated before being abandoned, and that no wayleave agreement had been produced.
 11. The Appeal was canvassed by way of Written Submissions. The Appellant filed written submissions dated 24th February 2025, and inter alia submitted that the 1st Respondent's suit was time-barred under Section 4(2) of the Limitation of Actions Act, as the 1st Respondent had affirmed that the water pipes were laid in 2017, yet the suit was filed in March 2022, more than three years later. The Appellant contended that the doctrine of continuing trespass could not apply in the circumstances, asserting that equity only aided the vigilant and not the indolent. The Appellant further submitted that under Section 5 of the Wayleaves Act and the Water Act, 2016, the 1st Respondent ought to have raised her objections before the statutory bodies with jurisdiction in the first instance and as she did not do so, her suit was barred by the doctrine of exhaustion. On trespass, the Appellant maintained that the 1st Respondent's late husband had granted it a wayleave, and that laying of the pipes did not amount to trespass. The Appellant faulted the trial Court for relying on the valuation report, which it argued only stated the market value of the land but did not assess trespass or damage. The Appellant relied on, among others, Simon Ndwiga Murage v Embu Water & Sanitation Co. Ltd [2020] eKLR, Speaker of the National Assembly v Karume [1992] KLR 21, Geoffrey Muthinja Kabiru & Others v Samuel Munga Henry & 1756 Others [2015] eKLR, and Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR.



12. The 1st Respondent filed written submissions dated 3rd April 2025, urging that the Appeal be dismissed. She submitted that the Appellant's claim of having been granted a wayleave was unsupported, as no agreement was produced, and in fact the Appellant's own witness conceded as much. She pointed out that the Appellant had even attempted to negotiate a fresh wayleave in 2022, which was inconsistent with its assertion that there was a wayleave in existence. She argued that under the Land Act, 2012, and Section 148 of the Land Registration Act, compensation was payable where private property was used for public purposes, and the Appellant's failure to compensate her amounted to a violation of Article 40 of the Constitution. She emphasized that the trespass was continuing, as evidenced by the admission that repairs on the pipes were ongoing, and therefore her suit was not time-barred. She relied on, among others, Mursal & Another v Manase (CA No. E20 of 2021), Stanley Munga Githunguri v National Land Commission & Another [2015] eKLR, Machareus Obaga Anunda v Kenya Electricity Transmission Co. Ltd [2015] eKLR, and Eliud Njoroge Gachiri v Stephen Kamau Ng'ang'a [2018] eKLR.
13. I have carefully considered the Record of Appeal, the evidence tendered before the trial Court, the Judgment appealed from, and the rival submissions of the parties.
14. This Court, being an Appellate Court of first instance, is obligated to consider and re-evaluate the evidence and material that was before the Learned Trial Magistrate at the time she rendered the impugned Judgment, to satisfy itself whether or not the decision of the Learned Trial Magistrate was justified. This was in keeping with the principle established by the Court of Appeal in the case of Selle & Another v East African Motor Boat & Others (1968) EA 123.
15. It is now well settled that the role of this Court, as a first appellate Court, is to revisit the evidence on record, evaluate it, and reach its own conclusions in the matter (see the case of Selle & Another v Associated Motor Boat Co. Ltd (1968) EA 123). However, this Court will not ordinarily interfere with the findings of fact made by the Trial Court unless those findings were based on no evidence, on a misapprehension of the evidence, or if it is demonstrated that the Court acted on incorrect principles in reaching its conclusions (see Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga v Kiruga & Another (1988) KLR 348).
16. In my view, three broad issues arise for determination in this Appeal, namely:
 1. Whether the 1st Respondent's claim was statute-barred by limitation.
 2. Whether the Appellant had a valid wayleave or other lawful authority to be on the suit land.
 3. Whether the trial Court was right to find trespass and to award damages and mesne profits (and if so, whether the quantum and apportionment are sustainable).

Whether the 1st Respondent's claim was statute-barred by limitation.

17. Section 4 (2) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya prescribes the limitation period regarding an action founded on tort and provides as follows: -

An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.
18. In the Case of Bosire Ongero v Royal Media Services [2015] eKLR, the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims, and therefore, if a matter is statute-barred the Court has no jurisdiction to entertain the same.



19. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, where Justice Nyarangi of the Court of Appeal stated as follows:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

20. The 1st Respondent's pleaded timeline is (i) a road opened across her land in or about July 2016 and (ii) pipes were laid by the Appellant in or about 2017 which remain in situ and continue to supply water. Importantly, DW1 (the Appellant's Technical Services Manager) admitted under cross-examination that repairs and maintenance on the pipes has been conducted from time to time and that necessitated the Appellants' servants and/or agents to routinely gain access to the disputed portion of the 1st Respondent's land. The act of the Appellant laying pipes on the 1st Respondent's land and gaining access to maintain the laid pipes was not an isolated act but constituted a continuous act of deprivation of the owner's right to exclusive possession and use of the portion on which the pipes were laid.

21. In the case of *Eliud Njoroge Gachiri v Stephen Kamau Ng'ang'a* [2018] eKLR the court stated as follows; -"

21. The Defendant pleaded limitation of time on the Plaintiff's claim for trespass. This is a correct plea going by the provisions of the *Limitations of Actions Act* section 4(2), which provide that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. This presupposes a case of a one-time trespass. The term accrue in the context of a cause of action means to arrive, to commence, to come into existence, or to become a present enforceable demand or right the time of accrual of a cause of action is a question of fact (see *Black's Law Dictionary* at Page 23). However, in a case of a continuing trespass, a trespass consists of a series of acts done on consecutive days that are of the same nature and that are renewed or continued from day to day so that the acts in the aggregate form one indivisible harm.

22. Trespass is described under the Trespass Act Cap 403 to mean 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.

22. A continuing trespass is defined in *Jowitt's Dictionary Of English Law* 2nd Edition as follows: -

"A continuing trespass is permanent in its nature; as where a person builds on his land so that part of the building overhangs his neighbor's land". In *Black's Law Dictionary* 8th Edition, a continuing trespass is defined as: "A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property". Finally, in *Clerk & Lindsell On Torts* 16th Edition, paragraph 23 - 01, it is stated that: - "Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues". The Court further held that; "The Defendant, therefore, is reasonably



in occupation of a section of plot T/19. The Plaintiff's claim for trespass being a continued tort is not time-barred."

23. As per the holding in the Case of *Eliud Njoroge Gachiri* (*supra*), with which I agree, every act of trespass on entry onto land without authority gives rise to a fresh cause of action, and therefore the suit filed in 2022 by the 1st Respondent was competent with regard to all causes of action arising within the three years before filing, as well as for ongoing injury continuing to the date of suit. The record demonstrated an uninterrupted physical presence and maintenance of the pipes and continued public use of the road; the complaint was an ongoing deprivation of use. On that evidence, the limitation defence fails.

Whether the Appellant had a valid wayleave or other lawful authority to be on the suit land.

24. Since the Land laws were consolidated, the regime for creating public rights of way and for wayleaves is governed by the *Land Act* and the *Land Registration Act* (and prior to consolidation, the *Wayleaves Act* existed). The *Land Act* provides for the making of public rights of way and compensation where private land is used for a public purpose or where a wayleave/easement is created; the Act also contemplates formal procedures for creation and valuation/compensation. (See Section 143-148 of the *Land Act* No. 6 of 2012).
25. The Appellant pleaded that it had been granted a wayleave by the 1st Respondent's late husband in 2007. However, no wayleave agreement or any other documentary evidence was produced to support that assertion. On the contrary, the evidence shows that the Appellant initiated negotiations for a fresh wayleave years later, which was inconsistent with the claim of an existing grant of easement/wayleave. PW1 testified that her late husband could not have lawfully granted a wayleave on his own since the land was co-owned, and this was not controverted. Section 148 (1) of the *Land Act* 2012 entitles a proprietor to compensation where private land is subjected to a wayleave or easement, and the Appellant's failure to compensate the 1st Respondent further demonstrates that no lawful process had been followed. In these circumstances, the burden which lay on the Appellant to prove the existence of a valid wayleave was not discharged, and the Trial Court was correct in so finding.

Whether the trial court was right to find trespass and to award damages and mesne profits (and if so, whether the quantum and apportionment are sustainable).

26. The 1st Respondent, as the registered owner of the suit land, was entitled to exclusive possession and use of her land under Sections 24 and 25 of the *Land Registration Act*. The laying of water pipes and construction of a road without her consent amounted to an infringement of her proprietary rights under Article 40 of the *Constitution*. Trespass is actionable *per se*, and once proved, damages are awardable without proof of any damage. The surveyor (PW2) confirmed that a road had been opened on the land without authority, while the valuer (PW3) assessed the encroached portion at Kshs. 384,000/- and valued the entire parcel at Kshs.3,000,000/-. The trial Court awarded Kshs. 384,000/- against each Defendant for trespass, together with mesne profits of Kshs. 70,000/- per month from 2016 until Judgment. Mesne profits represent compensation for loss of use and were justified by the evidence of the Respondent's thwarted development plans and the valuer's report. There is no indication that the trial Court applied wrong principles or awarded excessive sums, and the award does not amount to double recovery since it separately compensates for the value of the encroached portion and for the continuing loss of use.
27. In the premises, I am satisfied that the trial Court properly evaluated the evidence before it, applied the correct principles of law, and reached conclusions that were supported by the evidence. The Learned Trial Magistrate was justified to reach the conclusions that she did and the determinations she made.



28. I find no merit in the Appeal and dismiss the same with costs to the 1st Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 24TH DAY OF SEPTEMBER 2025.

J. M. MUTUNGI

ELC – JUDGE

