

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC APPEAL NO. E085 OF 2024**

**ALICE WANJIKU MATU .....**

**APPELLANT**

**=VERSUS=**

**NAOMI WAITHIRA KARURI .....**

**RESPONDENT**

*(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Ruiru in MCELC Case No. E002 of 2022 delivered by Hon. Joseph Were, Chief Magistrate on 2<sup>nd</sup> August 2024.)*

**JUDGMENT**

1. The Respondent (Plaintiff in the lower court) filed suit against the Appellant (Defendant in the lower court) through a Plaint dated 5.1.2022, claiming that she was the registered owner of land parcel LR No. 7418/117, Ruiru, part of which she leased to the Appellant in October 2020. Under the lease agreement, the Appellant was granted occupation of a clearly demarcated portion of land measuring 180 feet by 54 feet for a period of seven years (2020 to 2027) at a monthly rent of Kshs. 100,000, and she duly paid Kshs. 460,000 to cover three months' rent and a one-month deposit.
2. The Respondent contended that after taking possession, the Appellant unlawfully extended her occupation beyond the leased

area by encroaching onto the frontal portion of the Respondent's land, measuring approximately 180 feet by 23 feet, where she erected new prefabricated stalls and displaced existing tenants. The Respondent maintained that this additional portion was not part of the lease and that the Appellant's conduct amounted to trespass upon her property.

3. She further stated that her attempts to have the Appellant vacate the encroached area were unsuccessful, despite issuing a demand and notice of intention to sue. The Respondent asserted that the encroachment deprived her of the peaceful enjoyment and use of her land and was both unlawful and unjustifiable.
4. Accordingly, she sought a declaration of ownership over the disputed frontal area, injunctive and mandatory orders restraining and compelling the Appellant to vacate the portion, damages for trespass, and costs of the suit with interest.
5. Through the Plaint she sought a declaration that the frontal land area of Land Parcel No. 7418/117/Ruiru adjacent to the lease of the Appellant and measuring 180 ft x 23 ft within the same property belongs to the Respondent or as may become specified by a government licensed surveyor upon the direction of the court. Secondly, she sought a permanent injunction restraining the Appellant from dealing with the aforementioned area of the property and a mandatory order compelling the Appellant to vacate the said

area. She also sought damages for trespass, costs of the suit and interest on both.

6. In response to the suit, the Appellant filed a Defence and Counterclaim

dated 14.3.2023 denying the Respondent's claim. The Appellant's case was that in July 2020, she identified the suit premises as a suitable site for her business and, upon meeting the Respondent, agreed to lease part of the land. She paid Kshs. 100,000 to secure the premises and was shown the access road to be shared with an adjoining car wash. Since the area was swampy and undeveloped, the parties allegedly agreed on a three-month grace period for clearing and development, during which the Respondent would improve basic amenities while the Appellant would connect electricity.

7. The Appellant further stated that after visiting the site with her family, it became apparent that she required additional space at the frontal portion, which the Respondent permitted her to use and develop. She claimed to have paid Kshs. 300,000, and that they agreed she would enjoy a two-year grace period for the extra portion before discussing rent. Acting on that understanding, she carried out extensive works, including excavation, backfilling, levelling, and construction of stalls and a car wash, which began operating in September 2020 with the Respondent's knowledge and supervision.

8. She alleged that despite this, the Respondent later blocked the only access road and, after the business became successful, began harassing her tenants through threats, disconnection of utilities, and eviction attempts. The Appellant stated that mediation efforts failed after the Respondent and her family insisted that she vacate. She subsequently sought legal redress before the Milimani Commercial Court and later at the Business Premises Rent Tribunal, where the matter remained pending.
9. The Appellant maintained that her entry and use of both the leased and frontal portions were with the Respondent's full consent and that the allegation of trespass was an afterthought made only after she had substantially developed the land. She contended that the disputed portion had never been designated as parking space and that her occupation was lawful. She therefore urged the court to uphold her right to peaceful possession and business operations and expressed willingness to pay rent for the extra portion at a rate to be agreed upon.
10. Through her counterclaim, she sought dismissal of the Respondent's suit, costs of the suit plus interest and any other relief deemed fit by the court.
11. The suit proceeded for hearing, and a judgment was entered in favour of the Respondent.

12. Being aggrieved by the said judgment, the Appellant filed the instant appeal citing the following grounds of appeal.

- i. *That the learned magistrate erred in fact and in law by finding that the Appellant herein had trespassed onto the frontal land area of Land Parcel No.7418/117/Ruiru;*
- ii. *That the learned magistrate erred in fact and in law by completely disregarding the fact that there existed two exclusive agreements entered by the parties herein for the main demised property of Land Parcel No. 7418/117/Ruiru and the frontal area of the demised property;*
- iii. *That the learned magistrate erred in fact and in law by disregarding evidence adduced before the Honourable Court regarding how and when the lease agreement was entered for the main demised property and the frontal area;*
- iv. *That the learned magistrate erred in fact and in law by failing to take into account the developments undertaken connecting the main demised property and the frontal land area of the demised property;*
- v. *That the learned magistrate erred in fact and in law by disregarding and or ignoring the appellant's pleadings and counter-claim and finding that the Appellant had not proven their case beyond the necessary standards; and*
- vi. *That in all the circumstances of the case, the findings of the learned magistrate are not supported by the evidence adduced in court.*

13. The court directed that the Appeal be canvassed through written submissions, and both parties duly complied.

### **Appellant's Submissions**

14. The Appellant's written submissions dated 10.6.25 were filed through the firm of Waceke Thindugua & Company Advocates. Learned counsel for the Appellant identified 3 issues for determination:

- i) Whether the learned magistrate erred in fact and in law by finding that the Appellant herein had trespassed onto the frontal land area of Land Parcel No. 7418/117/Ruiru and in awarding Kshs. 500,000/ as damages for trespass.*
- ii) Whether the learned magistrate erred in fact and in law by disregarding and/or ignoring the Appellant's pleadings and counter-claim and finding that the Appellant had not proven their case beyond the necessary standards.*
- iii) Who should bear the costs.*

15. On the first issue, the Appellant's advocate submitted that the trial magistrate erred in finding that the Appellant was a trespasser on the frontal area of the demised property and in awarding Kshs. 500,000 as damages for trespass. She explained that under **Section 3(1)** of the **Trespass Act**, trespass occurred when a person entered, remained on, or erected structures on private land without the consent of the occupier and without reasonable excuse. He cited **Clerk & Lindsell on Torts** and **Black's Law Dictionary** to emphasize that trespass was defined as unjustifiable intrusion on

another's land without lawful authority. She referred to dictionary definitions of "reasonable" and "excuse" to argue that the Appellant's entry and development of the property was justified.

16. Counsel relied on the Court of Appeal decision in **Municipal Council of Eldoret vs Titus Gatitu Njau [2020]eKLR**, which in turn cited **M'Mukanya vs M'Mbijiwe [1984]KLR 761**, to argue that trespass required proof of an immediate and exclusive right to possession. She contended that the Respondent had not demonstrated such a right, and that her claim resembled breach of contract rather than trespass.
17. It was argued that the Appellant had entered the property with the Respondent's consent and later formalized the arrangement through a lease agreement. Counsel added that the Respondent had also agreed that the Appellant could occupy the frontal area for two years, without specifying restrictions. Counsel stressed that the parties had negotiated over rental terms, and that the Appellant had proceeded with developments with the Respondent's full knowledge and encouragement. Counsel argued that the foregoing created a legitimate expectation that the arrangement was lawful, particularly since a similar process had occurred with the leased property earlier.
18. Counsel noted that the issue of trespass was only raised months after the Appellant had completed developments and rented out the premises. She suggested that the Respondent's complaint was

influenced by dissatisfaction or envy at the Appellant's success. It was submitted that, from the standpoint of a reasonable person, the Appellant clearly had consent, and it would have been impossible to utilize the land without first developing it. Accordingly, counsel submitted that the claim of trespass was baseless and faulted the trial magistrate for awarding damages.

19. On whether the learned magistrate erred in fact and in law by disregarding and/or ignoring the Appellant's pleadings and counterclaim and finding that the Appellant had not proven their case beyond the necessary standards, counsel submitted that the trial magistrate erred by disregarding the Appellant's pleadings and counterclaim, despite clear evidence that the Appellant had made substantial improvements to both the demised and frontal portions of the property, which were initially swampy and undeveloped. It was argued that the Appellant's developments significantly transformed the land; yet, the trial court failed to consider or analyse this evidence.
20. Counsel further contended that the trial court's judgment merely restated the Appellant's defence and undisputed facts without engaging with the substantive issues raised. She argued that the Respondent's claim was more akin to breach of contract than trespass. She faulted the magistrate for relying on isolated and unverified text messages instead of addressing the overall understanding and conduct of the parties.

21. In conclusion, counsel submitted that the trial court adopted an unduly narrow approach by focusing solely on trespass while overlooking material evidence that contextualized the Appellant's occupation and improvements. He maintained that the learned magistrate therefore erred both in fact and in law by failing to properly evaluate the Appellant's case and counterclaim.
22. On costs, counsel submitted that costs followed the event, and the Respondent ought to bear them. She relied on authorities such as **Cecilia Karuru Ngayu vs Barclays Bank of Kenya [2016]eKLR** and **Party of Independent Candidate of Kenya vs Mutula Kilonzo [2013]eKLR**, to argue that the successful party was ordinarily entitled to costs unless misconduct was shown.
23. Counsel therefore prayed that the Appeal be allowed as prayed, and that the Respondent be condemned to pay the costs.

### **Respondent's Submissions**

24. In his submissions dated 27.6.2025, learned counsel for the Respondent identified the following issues for determination:
- i). *Whether the Appellant is in trespass regarding the frontal part of the demised property belonging to the Respondent.*
  - ii). *Whether there exist two agreements on the property and if indeed the second agreement blessed the Appellant's occupation of the frontal area.*

25. On whether the Appellant is in trespass regarding the frontal part of the demised property belonging to the Respondent, counsel for the Respondent submitted that the Appellant had unlawfully entered and occupied the frontal portion of the Respondent's property without consent or lawful authority, thereby committing trespass as defined under Section 3 of the Trespass Act, Cap 294. He stated that trespass to land occurred when a person entered another's land without permission or legal justification, and that the Respondent had sufficiently proved ownership of the land and the Appellant's unauthorized entry before the trial court.
26. Counsel emphasized that the disputed portion, measuring approximately 180 by 23 feet, was part of the Respondent's land and that despite the trial court's finding, the Appellant continued to occupy it with impunity. He argued that the facts presented at trial satisfied all the legal requirements for trespass under the Trespass Act and that the Appellant's own Memorandum of Appeal indirectly admitted the act of encroachment.
27. It was further submitted that trespass was actionable per se, and that one only needed to demonstrate interference with another's possession or enjoyment of land without lawful cause. Relying on the decision in **Ricks vs Chebet & Another [2025]eKLR**, counsel contended that the Appellant's continued occupation denied the Respondent the right to use and enjoy her property.

28. The Respondent's Counsel outlined the evidence adduced before the trial court, including testimonies from the Respondent, her daughter Eva Karuri, and one Johnstone Mwai, which confirmed that the Appellant had extended her occupation beyond the demised portion, constructed structures thereon, and driven out other tenants. He added that the Appellant had neither purchased nor leased the frontal portion and had ignored multiple notices and police interventions requiring her to vacate the premises. Counsel asserted that the Respondent had suffered and continued to suffer loss and damage as a result of the continuing trespass.
29. On the issue of whether a second agreement existed to justify the Appellant's occupation, he maintained that the alleged verbal agreement was a fabrication meant to mislead the court. He cited Section 3(3) of the Law of Contract Act, noting that any agreement relating to an interest in land must be in writing. The Respondent's Counsel argued that the purported WhatsApp messages relied on by the Appellant did not demonstrate any valid contractual relationship but instead revealed hostility and a breakdown in relations between the parties.
30. He submitted that even on equitable grounds, no enforceable agreement could arise where one party approached the court with unclean hands. Referring to the Supreme Court's decision in **Harcharan Singh Sehmi vs Tarabana Company Limited and Attorney General & 4 Others**, he reiterated that equity followed

the law and that no equitable relief could arise where fraud or bad faith was evident.

31. Counsel concluded that the alleged second agreement did not exist and that the trial court had properly rejected that claim. He urged the appellate court to note the continuing trespass and to uphold the Respondent's right to damages as outlined in Halsbury's Laws of England (4th Ed., Vol. 45, para 26 pg 1503), which recognizes nominal, general, and exemplary damages for trespass depending on the circumstances. He prayed that the damages awarded by the trial court be enhanced to reflect the prolonged and aggravated nature of the trespass.
32. Finally, Counsel submitted that the Appellant's new arguments on losses and damages were improper, as they were not grounded in the Memorandum of Appeal, and that parties were bound by their original pleadings. He maintained that the trial magistrate had correctly applied the principles of law on trespass and urged the court to dismiss the appeal with costs while enhancing the damages awarded to the Respondent in the interests of justice.

### **Analysis and Determination**

33. This being a first appeal, it is essential to reaffirm the parties' right to a full and independent re-evaluation of the entire record. The jurisdiction of this court, sitting as the first appellate authority

demands a fresh and thorough scrutiny of the evidence, guided by the law, culminating in a reasoned and coherent decision.

34. The principles governing this court's role are well articulated in ***Selle and Another v Associated Motor Boat Co. Ltd and Another (1968) EA 123***, where the Court held that a first appeal bears the character of a retrial. It imposes upon the appellate court a solemn duty to re-examine the evidence, draw its own conclusions, and support those conclusions with clear and persuasive reasoning. This obligation is to be discharged carefully, with due regard to the fact that the trial court had the distinct advantage of observing the witnesses as they testified and assessing their credibility.
35. In re-evaluation of the entire record, the court finds that the essential issues for determination are: (i) whether the Appellant had committed trespass in respect of the frontal portion of the property, and (iii) whether the Appellant proved her Counter-Claim.
36. The statutory definition of trespass is contained in section 3(1) of the Trespass Act which provides, in summary, that any person who, without reasonable excuse, enters, remains upon or erects a structure on private land without the consent of the occupier shall be guilty of an offence; and the accused bears the burden of proving that he had reasonable excuse or the occupier's consent.
37. The authorities make it clear that the tort of trespass involves interference with the right to possession and that a plaintiff must

ordinarily prove an immediate and exclusive right to possession (which is a possessory right distinct from title).

38. Section 3 of the Trespass Act provides that:

*(1) 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.*

*(2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.*

39. Trespass is actionable *per se*, once unlawful entry or remaining on one's land is shown, the plaintiff may recover, but defences such as consent or licence can relieve the defendant of liability.

**Was there trespass, and were damages properly awarded?**

40. The Respondent (Plaintiff in the trial court) bore the burden of proving that she had the possessory rights which were being interfered with and that the Appellant had entered or remained on that part of the land without lawful authority. Once those facts were established, the burden shifted to the Appellant to prove that she had the occupier's consent or some reasonable excuse for her occupation.

41. The Respondent produced a written lease between her and the Appellant for a defined portion (180ft × 54ft) on Land Parcel Number 117/7418. She also produced a sketch map of the area, messages sent to the Appellant asking her to stop construction on the disputed area, a notice of eviction sent to Johnstone Mwai, who was also a tenant on the property, OB reports bespeaking the encroachment by the Appellant.
42. During the hearing, she provided testimonial evidence by herself, her daughter (Eva Karuri) and Johnstone Mwai that the Appellant had extended occupation and erected structures on the frontal strip (about 180ft × 23ft), displacing existing tenants and refusing to vacate despite notices and police reports. The trial court accepted that evidence and found that the Appellant had trespassed on the respondent's land.
43. The Appellant, on the other hand, relied on a different factual narrative. It was her case that she secured the site in July 2020, paid sums of money to the Respondent (Kshs.100,000 and later Kshs.300,000). She claimed that she was shown the access road and permitted to use and develop the frontal portion. Further that she was promised a grace period (first three months) for clearing the land and later an alleged two-year grace for clearing the frontal area. She stated that she carried out extensive excavation and construction with the Respondent's knowledge and approval. She also pointed to meetings, message exchanges and the presence of

the Respondent during works as supporting her claim of consent and of a legitimate expectation that she could use the frontal area.

44. Consent, as alleged by the Appellant is a statutory defence under Section 3(2) of the Trespass Act. The Appellant's case was that a separate arrangement existed in respect of the frontal area initially a licence/grace period and later an agreement to discuss rent after a two-year period whereas the Respondent maintained that no second agreement existed and that any reliance on messages was misplaced. The law does not preclude oral licences or informal arrangements; however, an agreement that creates an interest in land is ordinarily expected to be documented. A perusal of the message communication between the parties reveals that the Respondent directed the Appellant to stop construction on the encroached area until an agreement was reached and signed. No evidence was provided that a second agreement was eventually executed between the parties. In short, the Appellant did not, on the present record as analysed by the trial court, establish a legally enforceable second lease over the frontal portion that would displace the Respondent's possession.

#### **Was the Award of Damages Proper?**

45. The Appellant faulted the learned trial magistrate for awarding damages to the Respondent, arguing that the same was unjustified in view of her alleged developments on the suit property. Upon

reevaluation of the record, this Court finds no merit in that complaint.

46. The Respondent's evidence before the lower court established that the Appellant went beyond the area covered by the lease and encroached upon an unleased portion of the Respondent's land. The evidence of such encroachment was not materially controverted, and the Appellant did not produce a survey plan, addendum to the lease, or written authority showing that she had been permitted to occupy the additional area. Her claim that the Respondent acquiesced in the encroachment was not substantiated by any formal variation of the lease or corroborative correspondence.
47. Trespass is a continuing tort, and once proven, it entitles the proprietor to general damages without the necessity of showing actual loss. The trial court therefore acted within the law in awarding damages to the Respondent. The measure of such damages, as has been held in various authorities, is at the discretion of the court and is intended to vindicate the right to possession and ownership rather than to compensate for pecuniary loss.
48. This court is satisfied that the trial magistrate properly exercised that discretion, having found that the Appellant had indeed occupied land outside the leased boundaries and deprived the Respondent of the full enjoyment of her property. The award of damages was therefore justified and proportionate to the infringement proven.

49. In the circumstances, this court finds no basis to interfere with the trial court's finding on liability or the quantum of damages awarded. The assessment was neither excessive nor founded on wrong principles, and it will accordingly be upheld.

**Did the Appellant prove her counter-claim?**

50. The Appellant counterclaimed for compensation in respect of the extensive improvements she allegedly made to the property when the land was swampy and undeveloped. Having found that the Appellant was illegally in possession of the said area, I am in agreement with the trial court that the counterclaim is unsustainable.

51. In view of the foregoing, it is my finding that there is no valid reason to interfere with the findings of the trial magistrate. The Appeal lacks merit and it is hereby dismissed with costs to the Respondent.

**Dated, signed and delivered virtually at Thika this 8<sup>th</sup> day of October 2025.**

.....  
**J. M ONYANGO**  
**JUDGE**

In the presence of:

1. Mr Kemboy for Miss Waceke for the Appellant
2. Mr Otieno for the Respondents

Court Assistant: Hinga