



REPUBLIC OF KENYA



**Kibunyi v Thomas (Environment and Land Appeal E014 of 2025)
[2025] KEELC 7282 (KLR) (Environment and Land) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7282 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E014 OF 2025
EK WABWOTO, J
OCTOBER 23, 2025**

BETWEEN

GEOFREY GACHUHI KIBUNYI APPELLANT

AND

JPHNSTONE KITONGA THOMAS RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. C.K. Kithinji
(PM) delivered on 29/05/2025 in Taveta PMC ELC No. E002 of 2022)*

JUDGMENT

Background

1. The Appellant, who was the Defendant at the lower court, had been sued at the lower court vide an Amended Plaint dated 21st September 2022. The Respondent had sought:
 - a. A permanent injunction restraining the Defendant by himself, his agents and or/ servants from entering onto/or encroaching, cultivating, selling and/or remaining on and/or constructing on and/or in any manner interfering whatsoever with Plot No. Taita/taveta/challa/njukini/3139.
 - aa. An order do issue compelling the Defendant whether by himself, his agents, and/ or servants to demolish the structures encroaching on the Plaintiff's Plot No. Taita Taveta /challa/njukini/3139 and subsequently return the portion encroached at his own costs within 14 days from the date of the Court's judgment.
 - ab. In default to prayer (aa) above, the Plaintiff do demolish the said structure encroaching on Plot No. Taita Taveta /challa/njukini/3139 at his own costs and afterwards the bill the said costs upon the defendant for indemnification.



- ac. General damages for trespass unto the suit property being Plot Taita Taveta /challa/njukini/3139
- b. Costs of the suit and interests.
2. The Respondent claimed that he was the registered owner of the land and had a title deed of the same. He had been in peaceful use and occupation since it was allocated and registered in his name. Sometimes in 2021 the Appellant started constructing a slab which and without any just cause and or authority encroached onto a portion of the suit property. As a result of the encroachment the foundation of his building was exposed during the excavation and the building subsequently weakened. He has been denied peaceful use of the property, the developments therein as well as the encroached portion thus subjecting him to loss and damage. It was also claimed that the Appellant has refused to vacate and or stop the encroachment.
 3. The Appellant opposed the suit through a Defence dated 2nd November 2022. He denied the contents of the Amended Plaintiff and averred that he constructed on his parcel being Taveta/challa/njukini/3138 after the boundaries of his land was pinpointed by the surveyor. It was also averred that the weakening of the building was not occasioned by his construction activities but by the poor construction of his house. It was further averred that he had engaged the Respondent for an out of court settlement but the same was declined and thus the Respondent is the author of his own misfortune.
 4. At the trial, Johstone Kitonga Thomas the Respondent testified as PW1. He relied on a witness statement dated 21st September 2022 as his evidence-in-chief. He produced all his documents as exhibits in his list and bundle of documents dated 31st January 2022.
 5. Briefly, he told the court that he was the owner of the suit plot which borders Plot No. 3138 which belongs to the Appellant. He also stated that the Appellant crossed the boundary dug a foundation and put up a slab in his plot which affected the foundation of his building.
 6. When cross examined he stated that the Appellant's plot borders his plot. He rejected and out of court settlement because the Appellant was the one who encroached on his plot. He was aware that the Appellant had engaged a surveyor before undertaking his construction.
 7. When reexamined he stated that he had not seen the Appellant's maps and development plan and that the same cannot be ownership documents. He reiterated that the Appellant is the one who had encroached on his property.
 8. Geoffrey Gachuhi Kibunyi the Appellant testified as DW1. He relied on a witness statement dated 2nd November 2022 as his evidence-in-produced all his documents vide a list and bundle of documents dated 2nd November 2022. It was his testimony that his property borders the Respondent's property when the Court sent a surveyor to the site, it was established that there was a slight encroachment on the Respondent's property. He tried to engage the Respondent for an out of court settlement but the same was declined.
 9. When cross examined he conceded that his construction extends to the Respondent's parcel and he is willing to vacate from the said portion.
 10. In reexamination he stated that there was no report nor any evidence indicating that his foundation weakened the Respondent's building. He wrote to the Respondent to settle the matter but the same was not accepted.



The Appeal.

11. After reviewing the evidence, the trial court rendered its judgment in favour of the Respondent. The Appellant, by a Memorandum of Appeal dated 27th June 2025, faults the same for awarding the Respondent mense profit that was higher, excessive and had no legal backing. Based on the said Memorandum of Appeal, he sought to have the Appeal allowed, the awarded mense profit be varied downwards and costs of the Appeal be borne by the Respondent.
12. The Appeal was contested by the Respondent.

Appellant's submissions

13. In support of the grounds, the Appellant relies on written submissions dated 26th September 2025 isolating 3 issues for the court's determination. It was submitted that for a party to be awarded mense profit he or she should prove to the Court that the act of trespass has resulted in substantial loss that would require the said relief and that the sum of Ksh 600,000/= was excessive and only Ksh 50,000/= .Reliance was placed on the cases of Nakuru Industries Limited vs S.S Mehta & Sons [2016] eKLR, Phillip Aluchio vs Crispus Ngayo [2014] eKLR, Kenya Power & Lighting Company vs Fleetwood Enterprises Limited [2017] eKLR among others.
14. The Appellant contended that the Learned Magistrate was wrong and the Court was urged to allow the Appeal with costs.

Respondent's submissions

15. The Respondent relied on written submissions dated 27th September 2025. The Respondent submitted on 2 issues; excessiveness or otherwise of the damages awarded of Ksh 600,000/ and costs of the Appeal.
16. Citing several authorities, it was argued that trial court did not err when it awarded the sum of Ksh 600,000/= and a challenge on such decision must be based on the basis that the trial Court misapprehended the evidence on record or that the trial court proceeded on wrong principles.
17. It was submitted that during trial, the Respondent had stated in his testimony that he had been denied the use of his portion of the plot where the Appellant had put a slab while the Appellant on the other hand had stated that his construction had encroached on the Respondent's portion and further the surveyor's report confirmed that the portion encroached had a slab.
18. It was further submitted that the trial court considered the totality of the evidence on record in its judgment, the extent of the encroachment among other factors before awarding the damages.
19. It was submitted that the trial court cannot be faulted for its holding. The Respondent also prayed for costs of the Appeal.

Analysis and Determination

20. In Ciero & Another -vs- Njanja & Others Civil Appeal 111 of 2022 [2025] KECA 1541 KLR] (3rd October 2025) (Judgment), the court said the mandate of the appellant court of first instance is to analyze and re-assess the evidence on record and reach its own conclusion, but, as held in Gitobu Imanyara -vs- Attorney General [2006] eKLR, it has to give credit to the lower court, which saw and heard the witnesses testify.
21. Having looked at the lower court record, the issues calling for my determination are:



1. Whether the lower court was justified based on the facts, evidence and the law in arriving at the decision to grant the Respondent the reliefs that were sought.
 2. If the Appellant has a meritorious appeal.
 3. What is the order as to costs?
22. In this appeal, the appellant relies on grounds No. (1), (2), and (3) regarding the excessiveness of the mesne profit of KSH 600,000/= awarded by the trial court. The Respondent on the other side maintains that the trial court decision cannot be faulted.
23. A reading of the Appellant's submissions shows that the he was not entirely opposed to the award of mesne profit of Ksh 600,000/- but faulted the same for being high and excessive. The Appellant even proposed an award of Ksh 50,000/- which in his view would have been reasonable in the circumstances.
24. The Appellant also faulted the trial court for not using its discretion judiciously.
25. In the case of *United India Insurance Co. Ltd V East African Underwriters (Kenya) Ltd (1985) E.A* a court sitting on Appeal will not interfere with a discretionary decision appealed from simply on the ground that the court, if sitting at first instance, would or might have given different weight to that given by the court to the various factors in the case. This court sitting on Appeal is only entitled to interfere if one or more of the following matters are established; first, that the court misdirected himself in law; secondly, that the court misapprehended the facts; thirdly, that the court took account of considerations of which he should not have taken account; fourthly, that the court failed to take account of considerations of which he should have taken account, or fifthly, that the court's decision, albeit a discretionary one, is plainly wrong.
26. Equally the principles under which an appellate court may award damages is outlined in the landmark case of *Butt vs Khan (1977) 1 KAR 1* as follows:
- “ An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”
27. In the instant case, it is not in dispute that the evidence tendered before the trial court and considering the Appellant's own admission, he had encroached on the Respondent's property and he had even sought to have the issue amicably resolved out of Court, a request which was declined by the Respondent. The main issue in contention is the amount of the award made by the trial court.
28. The Court of Appeal in the case of *Attorney General v Halal Meat Products Ltd (2016) eKLR*, where the court stated as hereunder;
- “ It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See *McGregor on Damages*, 18th Ed. para 34-42.”
29. From the evidence that was adduced during trial, the structure of the Respondent's building was exposed when the Appellant dug his foundation. The surveyor's report dated 5th November 2024 showed the encroachment as 1.4m on the front side and 4.7m on the rear side. Basing on this the Respondent urged the Court to grant him Ksh 1,000,000/= which was opposed by the Appellant on



the basis that there was no assessment report to confirm whether the Respondent's building had been weakened to warrant the grant of such sum. The trial court upon considering all the factors proceeded to grant Ksh 600,000/=.

30. Turning to the contention that the award of mense profits was excessive, I beg to state that an award of such manner is an exercise of discretion. In this regard, the 1st Appellate court can only interfere with the discretion of the trial court only where it is demonstrated that the trial court acted on wrong principles, or the award is inordinately low or high. Moreover, the 1st Appellate court must exercise deference. The principles to be considered before the 1st Appellate court can interfere with the discretion of trial court were enunciated in the case of Mbogo Vs Shah 1968 (Supra). [See also the case of Gitobu Imanyara versus Honourable Attorney General [2016] eKLR.
31. Bearing in mind the principles espoused in the decision [Supra] and considering the manner in which the learned magistrate exercised her discretion, I am of the opinion that the assessment and award of mense profits was based on the established principles. For good measure, the learned magistrate considered various factors underpinning the assessment and award of mesne profits.
32. In the premises, I find and hold that the Appellant has not proven any injudicious or improper exercise of discretion by the learned magistrate. It is apparent that the assessment and award of mesne profits was sound.
33. I am afraid that the Appellant herein have neither established nor demonstrated any misdirection on the part of the learned magistrate. On the contrary, and having considered the guiding principles enunciated above, I come to the inevitable conclusion that the appeal beforehand is devoid of merit.
34. In respect to costs of the Appeal, the same normally follow the event unless otherwise directed by the court. In this case, the Court has considered that from the evidence that was tendered before the lower court, the Appellant conceded on the encroachment and even reached out to the Respondent to have the matter amicable settled but the Respondent declined the said request. Considering these circumstances, it is only prudent that each party bears own costs of the Appeal.

Final orders

35. The upshot is that after careful review and analysis of all the grounds of appeal and the entire record, I find no fault with the decision of the trial magistrate. Consequently, the appeal fails and is hereby dismissed. Each party to bear own costs of this Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 23RD DAY OF OCTOBER 2025.

E. K. WABWOTO

JUDGE

In the presence of:

Mr. Mwazighe for the Appellant.

Mr. Mutinda for the Respondent.

