



REPUBLIC OF KENYA



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**Wagathiru v Gathii (Environment and Land Appeal E017 of 2024)
[2025] KEELC 5665 (KLR) (Environment and Land) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5665 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E017 OF 2024**

MC OUNDO, J

JULY 31, 2025

BETWEEN

PETER KAMAU WAGATHIRU APPELLANT

AND

JOHN NGANGA GATHII RESPONDENT

(An Appeal from the Judgement of Hon. Nathan Lutta (Chief Magistrate) in Naivasha CMCC No. E600 of 2021 delivered on 30th October, 2024 at Naivasha)

JUDGMENT

1. Coming up for determination on Appeal is a matter which was heard and determined by Hon. Nathan Lutta, Chief Magistrate wherein upon considering the evidence of both parties, vide his Judgment delivered on 30th October, 2024, the learned Magistrate had dismissed the Plaintiff's suit with costs to the 1st Defendant for being unmeritorious.
2. The Appellant being dissatisfied with the said findings and Judgement, has now filed the present Appeal based on the following grounds in his Memorandum of Appeal:
 - i. That the learned magistrate erred in law and in fact in dismissing the Appellant's suit against the weight of the evidence.
 - ii. That the learned magistrate erred in law by failing to consider the appellant submission adequately or at all.
 - iii. That the learned magistrate erred in law by failing to take into account the mandatory provision of Section 152B and 152E of the Land Act 2012.



- iv. That the learned magistrate erred in law and fact in failing to give reasons for his decision in contravention of the mandatory provisions of order 21 Rule 4 of the [Civil Procedure Rules 2010](#).
 - v. That the learned magistrate erred in law and fact in failing to hold that Notice was mandatory under the [Land Act 2012](#) before the removal of the appellant crops.
3. The Appellant thus prayed for the following orders:
- i. That the instant Appeal be allowed in its entirety.
 - ii. The judgement delivered by the Learned Magistrate be set aside and substantiated (sic) with a Judgement in favour of the Appellant.
 - iii. The Respondent be condemned to pay costs of the Appeal and the Appellant's costs in the Lower Court.
4. The Respondent opposed the Appellant's Memorandum of Appeal vide his Grounds of Opposition dated 15th April 2025 on the following ground:
- i. The Appeal is devoid of merit.
 - ii. The Appellant did not discharge the burden of proof as was required of him by Section 107, 109 and 112 of the [Evidence Act](#).
 - iii. The Respondent was not bound by Section 152B of the [Land Act](#) as the Appellant was neither utilizing the land nor was he in occupation thereof.
5. The Appeal was disposed of by way of Written submissions wherein the Appellant vide his submissions dated 14th April 2025 summarized the factual background of the matter as well as the trial court's determination to submit that the conclusion that had been reached by the trial court on the non-culpability of the Respondent and the law applicable was not based on an accurate analysis of the facts and the law as had been presented by the parties to the case and that his factual findings and conclusions could not be supported by the evidence that had been presented before him.
6. He placed reliance on the provisions of Sections 152A and 152G of the [Land Act](#) to submit that the said provisions were the only ones applicable in respect of evictions of persons occupying public, community or private land and that the same may not be carried without a court order. That it was a requirement that notices be issued by the owner of the private land as the case may be before eviction. Further reliance was placed on the provisions of Section 152B of the [Land Act](#) to the effect that an unlawful occupant of private, community or public land should be evicted in accordance with the Act to submit that the trial court did not put its mind on the provisions of the law as it never considered the application of the said provisions to the case before it. That subsequently, the trial court had failed to take into consideration something that it ought to have taken into account and in the process committed an error of principle.
7. That indeed, the Respondent had admitted that he never issued any notice to the Appellant to remove his crops thus he had failed to follow the steps set under the provisions of the [Land Act](#) for eviction without a court order hence his actions had been unlawful, illegal thus he was liable for the damage that had been caused. He placed reliance on the decisions in the cases of [Atik Mohamed Omar Atik & 3 others v Joseph Katana & Another](#) [2019] eKLR and [Conpak Industries Limited v Samuel Ndebe Muturi](#) (Environment and Land Miscellaneous Application E041 of 2021) [2023] KEELC 16241 (KLR) as well as the provisions of Regulation 65 of Legal Notice 280 of 2017 ([Land Regulations](#)) to



- submit that having failed to follow the provisions of the Land Act and in particular the issue of the 3 months' Notice, the Respondent was liable for damage caused by his actions, and it was an error for the trial court to fail to hold so.
8. That further, the trial magistrate had failed to properly evaluate the evidence on record while rendering his judgement, as the judgement had only addressed the aspect of ownership of the land without due consideration of the other evidence that had been presented. That it was not disputed that the Appellant had been in possession of the land for a period of over one year wherein he had planted Rhodes grass that were about to mature. That however, the said Rhode grass that had been assessed at a value of Kshs. 600,000/= had been destroyed by the Respondent despite the knowledge that the same belonged to the Appellant. He thus submitted that the evidence that had been availed had been sufficient to find in favour of the Appellant hence the trial court had erred in dismissing the suit against the weight of the evidence.
 9. That whereas the Respondent had in his grounds of opposition stated that he was not bound to give any notice under section 152B of the Land Act as the Appellant was neither utilizing the land nor in occupation thereof, the said ground was never canvassed by the Respondent in the lower court neither was it made an issue for determination by the trial court. That the law was to the effect that a party could not on appeal raise a new ground that had not been canvassed, pleaded and/or raised at the lower court and made an issue at trial. He thus submitted that having failed to raise the issue before the trial court, the Respondent was estopped from raising the said ground on appeal. He placed reliance on the decisions in the cases of Thomas Openda v Peter Martin AHN Civil Appeal No. 42 of 1981, Saggaf v Algeredi 1961 EA 767 and Stallion Insurance Company Limited v Ignazzio Messina & C.S.P.A (227) eKLR where had cited the case of Sir Raymond Evershed M.R in United Dominion Trust Ltd v Bycroft (1954) ALL ER 455.
 10. He urged the court to allow the appeal and grant the prayers that had been sought as per the Plaintiff and for the costs of the Appeal.
 11. The Respondent, in his submissions dated 10th June 2025, framed one issue for determination, to wit; could Section 152B and 152E apply where there was no active occupation? His submission was that there could not be an eviction where there was no occupation. He placed reliance on the provisions of Section 152E of the Land Act and the definition of eviction under the provisions of Section 2 of the Land Registration Act to submit that the definitional requirements of "possession" and "occupation" underpinned the logical conclusion that one could not be evicted from land that they did not possess or effectively occupied. Further reliance was in the decided case of Amadeal Trust Limited & another v Kenya Forest Service & Another [2024] KEELC 4670 (KLR).
 12. That the provisions of Section 152B and 152E must not be read in isolation. Reliance was placed in the Supreme Court's decision in Mitu-Bell Welfare Society v Kenya Airports Authority: Initiative for Strategic Litigation in Africa (ISLA) (Applicant) [2019] KESC 18 (KLR) to submit that the law had been crafted to give meaningful protection to actual dwellers, those whose homes and dignity were at stake under the provisions of Article 43(1) of the Constitution but not to individuals making speculative or passive claims such as the Appellant who had neither occupied the land nor treated it as his residence. That subsequently, to stretch the protective shield under the provisions of Section 152B and 152E to cover absentee claimants would be to simply misapply the law and encourage illegality.
 13. He thus urged the court to approach the interpretation of the provisions of Section 152B and 152E of the Land Act with measured caution and fidelity to the rule of law and find that the said provisions were never intended to cloak unlawful acts with a veneer of legality. That to read the same loudly as



the Appellant would invite the Court to do, was to weaponize statutory safeguards into instrument of abuse.

14. That the law must not lend its hand to shield trespassers nor should it provide refuge for those who would seek to manufacture procedural breaches in order to legitimize an otherwise illegal presence on the land. That the protective scope of the said provisions was not without limits; it did not extend to persons who had no semblance of lawful possession. That the court must refrain from rewarding unlawful conduct but must instead construe the said provisions strictly, tethering them firmly to their constitutional purpose, namely, the safeguarding of human dignity in lawful occupation and not as a license for impunity subversion of property rights. That the Appeal had no merit and should be dismissed with costs.

Analyses of the evidence.

15. According to the proceedings in the trial court, Peter Kamau Wagathiru, the Plaintiff/Appellant herein instituted the instant suit against the Respondent herein and Joseph Gathiru Kamau as the 1st and 2nd Defendants respectively vide Naivasha CMCELC No. E600 of 2021 in a Plaint dated 12th October, 2021 wherein he had sought for the following orders;
 - i. Kshs. 600,550/=
 - ii. Costs of the suit together with interest thereon at such rate and for such period as the Honourable court may deem fit.
 - iii. Interest on the principal sum at court rates from the date of filing the suit until payment in full.
16. Subsequent to the filing of the suit, the 1st Defendant filed his Statement of Defence dated 1st November, 2021 denying the allegations contained in the Plaint while putting the Plaintiff to strict proof wherein he stated that he was the registered owner of parcel of land known as Naivasha/Mwichiringiri Block 4/1506 with indefeasible title over the same and that at no point in time had he offered to lease the property to the Plaintiff or anyone else. That subsequently, it was within his rights to enter into the land and perform any acts he so chooses and that if any crops had been destroyed, the same had been planted by a trespasser thus the Plaintiff's claim was without merit and lay with the individual who had duped him into leasing the land that he did not have.
17. That it was a basic requirement for any party wishing to lease out land to conduct due diligence so as to affirm that he was dealing with the registered owner of the subject land hence in the absence of such demonstration, the Plaintiff could not seek a remedy from the 1st Defendant as he was to be blamed for his own misfortunes. That the Plaintiff was not entitled to any orders as had been set out in the Plaint as the same was non-suited.
18. The 2nd Defendant neither entered appearance nor filed any defence
19. The case proceeded for hearing wherein the Plaintiff while testifying as PW1 adopted his witness statement as his evidence in chief and produced the documents in his filed List of documents in evidence as follows;
 - i. Lease Agreements (2) as Pf exh 1.
 - ii. OB number/records as Pf exh 2.
 - iii. Pasture Crop Damage Assessment Report as Pf exh 3.
 - iv. Photographs (3) as Pf exh 4.



- v. Demand Letter as Pf exh 5.
 - vi. Search Records as Pf exh 6.
 - vii. Receipts as Pf exh 7.
20. When cross examined by the Counsel for the 1st Defendant, he confirmed that he was relying on his witness statement as his evidence in chief and that he had leased the land from John Mburu Kimani in the year 2019. He admitted that the lessor did not show him a copy of the title and that he did not conduct a search to ascertain ownership of the land. That however, he had done an agreement with the owner's agent and that the land belonged to a person called Gikonyo Wanjiru.
21. PW2, one Albert Mwangi Kiarie, a tractor driver adopted his witness statement as his evidence in chief and when cross-examined by the Counsel for the 1st Defendant, he confirmed that he was not an employee of the 1st Defendant since it was the 2nd Defendant who had employed him. That the 1st Defendant whom he previously did not know had instructed him to plough the land.
- The Plaintiff had thus closed his case
22. John Ng'ang'a Githi, the 1st Defendant herein adopted his witness statement as his evidence in chief and produced a Copy of title deed as Df exh 1.
23. In cross-examination by the Counsel for the Plaintiff, he confirmed that he was still the owner of the land having been registered as such on 8th July 2019. That he had subdivided the same and sold plots but used to visit and check on the land which he had prepared for planting. That there was someone who had alleged that he had planted the grass. That since he had not leased out the land, he had no business issuing the said person with any notice. He confirmed that he did not obtain any orders from the court. That he was aware of a report that had been made at Longonot Police Station wherein he had been told to grant the Plaintiff time.
24. In re-examination, he confirmed that he had produced a title showing ownership of the land. That the 1st Defendant (sic) had cultivated a portion of the land without his authorization.
- The 1st Defendant had thus closed his case.

Determination.

25. I have considered the record of Appeal, the holding by the trial Magistrate, the written submissions by learned Counsel, the authorities cited and the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision Appealed against, assess it and make my own conclusions as was stated by the Court of Appeal in *Paramount Bank Limited v First National Bank Limited & 2 Others* (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR) where the court held as follows;

“A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the *Civil Procedure Act*, a first Appellate Court can appreciate the entire evidence and come to a different conclusion.”



26. The summary of the Plaintiff's case as adduced and vide his adopted statement was that to the best of his knowledge, one Gikonyo Wanjiru was the proprietor of a parcel of land situated within Longonot area wherein on 26th November 2019, he had leased the said parcel of land No. Naivasha/Mwichiringiri Block 4/1506 and measuring 3 acres, from one John Mburu Kimani his agent.
27. That their agreement had been in writing, had been witnessed by a witness and was with the consent and knowledge of Gikonyo Wanjiru. That the lease was for a period of 1 year at an annual rent of Kshs. 12,000/= which he had duly paid. That upon taking possession, he had planted Rhode Grass in full view of the neighbors. That on 26th November 2020, the one-year lease had lapsed and was further renewed for another period of one year at which time the Rhode Grass was fully grown and was about to mature.
28. That on the morning of 10th December 2020, he received a call from one John Mburu informing him that some people had allowed their animals to graze on his Rhode Grass. That he had immediately visited the land and found some herders grazing therein who then informed him that Mr. John Nganga, the 1st Defendant, had permitted them. When he sought an explanation from the 1st Defendant, he retorted that he (the Plaintiff) had planted grass on his (1st Defendant) parcel of land without his consent and knowledge.
29. That his plea to allow the grass mature so that he could remove it fell on deaf ears and that was when he had decided to make a report at Longonot Police Station vide OB No. 2/10/12/2020. The 1st Defendant was summoned wherein he informed the police that he was the registered proprietor of the land and it had been within his right to enter into his land and perform any acts he so chose. That the police had then informed him that they could not handle matter that was purely civil in nature.
30. That he went to the department of agriculture, livestock and fisheries at Naivasha and was allocated the Deputy County Production Officer who had gone and assessed the damaged Rhode Grass and thereafter issued him with a pasture crop damage assessment report dated 10th December 2020, that had assessed the damage on Rhode Grass at Kshs. 100,000/=.
31. On the 11th December 2020, the 1st Defendant had descended on the land wherein he supervised a tractor registration No. KTCB xxxL as it ploughed the parcel of land therein maliciously and deliberately uprooting and destroying all his Rhode Grass.
32. That a search at the NTSA records established that Joseph Gathiru Kamau, the 2nd Defendant herein was the registered owner of the tractor Reg No. KTCB xxxL. On 14th December 2020, the Deputy County Production Officer had assessed the damage caused therein at Kshs. 600,000/= and had issued a Crop Assessment Report dated 14th December, 2020.
33. That despite laying claim to the Rhode Grass, the 1st Defendant had not issued him a 3 months' written notice requiring him to remove his crops as required by the law. That the 1st Defendant had also failed to obtain a court order for the removal of the said crops. That the 1st Defendant had failed to follow the laid down procedure under the *Land Act* and that his action had been unlawful and without justification. He prayed that judgement be entered in his favour for a sum of Kshs. 600,000/= plus costs and interest.
34. The 1st Defendant's defence both at the trial and in his adopted witness statement was that he was the registered owner of that land known as Naivasha/Mwichiringiri Block 4/1506. That he had neither sold, leased or parted with the possession of the property to the Plaintiff or anyone else. That by virtue of ownership bestowed upon him, he was within his rights to enter into the land and perform any acts



he so chose. That if any crop was destroyed, a fact he denied, the same had been planted by a trespasser thus the Plaintiff's claim was without merit.

35. That the Plaintiff could not demand damages as he remained a trespasser with no claim over the land and/or produce thereon. That his demand lay with the individual who had duped him into leasing the land. That he ought to have conducted due diligence in the absence which he could not seek a remedy from the 1st Defendant as he was to be blamed for his own misfortunes. That the Plaintiff was thus not entitled to any orders set out in his Plaintiff as the same was non-suited and could not be granted.
36. Having given a brief history of the matter herein, I find the issues arising therein for determination as follows:
- i. Whether Appellant was a trespasser, if yes;
 - ii. Whether the Respondent ought to have given a 3-month Notice if not;
 - iii. What are the remedies of the Appellant as a trespasser?
37. On the first issue for determination, it is trite that the registration of a person and Certificate of title held by a person as a proprietor of a property was conclusive proof that such a person is the absolute and legal owner of the property pursuant to the provisions of Sections 24, 25 and 26 of the [Land Registration Act](#), which stipulate that the owner of a registered title attains indefeasible rights, and interests on the land vested in them by the law.
38. The provision of Section 24(a) of the [Land Registration Act](#) outlines the interests and rights of a registered proprietor of land as follows:
- “the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....”
39. Section 25(1) of the [Land Registration Act](#) also stipulates that ;
- “The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...”
40. The law is very clear on the position of a holder of a title deed in respect of land. Indeed Section 26(1) of the [Land Registration Act](#) provides as follows:
- “the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –
- a. On the ground of fraud or misrepresentation to which the person is proved to be a party
 - b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme



41. It will be seen from the above provisions of the law, that title to land is protected and the title held by the Respondent herein not having been disputed, its proprietorship of the suit property remained sacred.
42. Trespass has been defined by the 10th Edition of *Black's Law Dictionary* as;
“an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.”
43. Section 3(1) of the *Trespass Act*, also defines trespass as follows;
“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.”(Emphasis mine)
44. The Court in *John Kiragu Kimani vs Rural Electrification Authority* [2018] eKLR also in defining trespass relied on *Clark & Lindsell on Torts*, 18th Edition on page 923 which defines trespass as;
“any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason”.
45. In the preset case, the Appellant conceded to having leased the suit land from one John Mburu Kimani whom he believed was an agent of Gikonyo Wanjiru the alleged proprietor of the suit land. That having realized that the Respondent was its proprietor and having already planted his Rhode Grass on the land, the Respondent ought to have served him with a 3 month Notice to vacate as is envisaged under Section 152B and 152E of the *Land Act* 2012.
46. Section 152B of the *Land Act* provides as follows;
“An unlawful occupant of private, community or public land shall be evicted in accordance with this Act.”
47. While Section 152E of the *Land Act* further provides as follows;
1. If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.
 2. The notice under subsection (1) shall—
 - (a) be in writing and in a national and official language;
 - (b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
 - (c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
 - (d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.
48. The law provides that even though a person may be a trespasser, there ought to be due process and humane eviction procedures carried out to eject such person from one's land. This means that a



landowner cannot simply forcefully remove a trespasser without following the prescribed legal steps as was the case in this matter wherein the Respondent having found that the Appellant had planted some Rhode Grass on his land, first permitted some herders to graze their animals on the said grass before using a tractor to plough the same for reason that it was within his right to enter into his land and perform any acts he so chose to do.

49. The law recognizes certain rights for the persons facing eviction, including the right to apply to the court for relief against the eviction notice. The court can then confirm, cancel, vary, alter, or suspend the notice, or even order for compensation. Furthermore, Section 152G outlines mandatory procedures for all evictions, emphasizing respect for dignity, right to life, and security of those affected, with special measures for vulnerable groups.
50. In essence, while a trespasser has no legal claim or title to the land, the Land Act provides a framework for their eviction, ensuring that even in such circumstances, fundamental human rights are considered and protected during the process and this eviction does not apply to trespass by persons in actual occupation of the land but also covers the act of planting crops without consent, even if the person doesn't physically reside on the land. The act of cultivating is therefore a form of occupation or interference with the landowner's rights even without residing on the land as is defined under Section 3(1) of the Trespass Act as herein above stated.
51. This being the case, I am in agreement that the provisions of Section 152B and 152E of the Land Act 2012 were applicable in the circumstance which means that even though the Appellant was a trespasser who had planted Rhode grass on the Respondent's parcel of land without permission, the Respondent could not simply get into the land and then use a tractor to proceed to plough the whole land thus uprooting and destroying the Appellant's Rhode grass, retorting that he could do what he wished to do on his land, without following the proper legal channels outlined in the Land Act for which he was required to issue the three-month written notice as per Section 152E of the Land Act.
52. While the trespasser/Appellant was not asserting any claim to the suit land, yet the issue of compensation for crops destroyed arose especially because the landowner/Respondent allowed the crops/Rhode grass to mature before initiating the eviction process without notice as envisaged in Section 152E (1) of the Land Act. Courts often lean towards ensuring some level of humane treatment and might consider the value of the crops if they are destroyed without allowing for harvest, though this is not a right to "harvest" the crops, but rather a consideration in the context of avoiding excessive damage or hardship during eviction. It is often better for the landowner to clarify in the notice that the trespasser must remove their crops by a certain date wherein should the trespasser fail to comply with the notice, the landowner would then apply to Court for an eviction order.
53. There having been no Notice issued to the Appellant herein to remove his Rhode Grass, and further there having been evidence adduced to the effect that the damage caused had been assessed by the Deputy County Production Officer to the tune of Kshs. 600,000/= as per the Crop Assessment Report dated 14th December, 2020 where the credibility or accuracy of the said report was not challenged by the Respondent, I accordingly allow the appeal, set aside the judgment of the learned Trial Magistrate and substitute thereto with the orders allowing the Appellant suit vide his Complaint dated 12th October, 2021. I award costs of the suit in the Magistrates' Court and this appeal to the Appellant.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 31ST DAY OF JULY 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

