



**Onditi v Kenha & 2 others (Civil Appeal E003 of 2023)
[2025] KEELC 8353 (KLR) (27 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 8353 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
CIVIL APPEAL E003 OF 2023
MN KULLOW, J
NOVEMBER 27, 2025**

BETWEEN

DAVID ODHIAMBO ONDITI APPELLANT

AND

RESIDENT ENGINEER, KENHA 1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY 2ND RESPONDENT

**CHINA HENAN INTERNATIONAL CO-OPERATION GROUP CO
LTD 3RD RESPONDENT**

JUDGMENT

1. The present appeal arose from the judgment of the trial court delivered on 2nd March 2023 by the Honourable R. K. Langat, Principal Magistrate, at Rongo, in ELC Case No. 56 of 2018, wherein the court dismissed the appellant’s suit with costs, having found, inter alia, that the appellant had failed to prove that the respondents had heaped sand and soil at the entrance to his motel, or that the diversion of the A1 road works had deprived him of access in a manner warranting an award of general damages.
2. The appellant was dissatisfied with the said judgment, and consequently filed the present appeal. By a Memorandum of Appeal dated 29th March 2023, The appellant anchored the appeal on grounds 1 to 5 as set out on the face of the memorandum; these principally complained that the learned magistrate (i) misdirected himself on the facts by finding alternative access negated loss; (ii) failed to recognize and remedy the infringement of the appellant’s constitutional right to acquire and own property (Article 40(1)); (iii) wrongly applied an onerous standard of proof more appropriate for special damages when the claim was for general damages; and (iv) produced a judgment that was internally inconsistent and therefore unsafe.
3. In that regard, the appellant is seeking the orders as infra: (a) that the lower court’s dismissal be set aside insofar as it denied the appellant general damages; (b) that the appellant be awarded general damages



for loss of business in a sum to be assessed (the appellant prays Kshs 1,300,000); and (c) costs here and below.

Submissions

4. The appeal was heard by way of written submissions. The appellant filed submissions dated 8th September 2023, the 1st and 2nd respondents filed submissions dated 12th October 2023, and the appellant filed rejoinder submissions dated 23rd October 2023.
5. In his submissions dated 8th September 2023, the appellant maintained V the learned magistrate failed to recognise that the closure of the A1 Highway between Rongo and Kamagambo constituted a direct infringement of his constitutional right under Article 40(1) to acquire and own property.
6. He argued that his motel business operated purely on the basis of passing vehicular traffic, and that by diverting all vehicles away from the stretch passing his premises and erecting clear signage and barriers reading “Road Closed Under Construction Sorry for the inconvenience” and “Diversion to Kisii/Rongo” the respondents effectively deprived him of the income stream arising from his property.
7. He relied on his pleaded issues, contending that the road-closure evidence at pages 26–29 of the Record of Appeal clearly demonstrated a complete diversion of traffic in both directions and that the trial court misapprehended this factual matrix.
8. The appellant further submitted that the trial court erred in failing to appreciate the effect of Article 23(3)(e) of *the Constitution*, which empowers a court to grant appropriate relief, including compensation, where a constitutional right has been violated. He argued that compensation was the natural remedy since the respondents themselves admitted during cross-examination that neighbouring businesses along the A1 had received payments for losses arising from the diversion, whereas he had been excluded solely because he had instituted a court case. He asserted that this amounted to discrimination contrary to Article 27, as all affected business owners were entitled to equal treatment and full enjoyment of their rights without arbitrary distinction.
9. The appellant also faulted the learned magistrate for applying the evidential standard required for specific damages, yet he had expressly pleaded general damages for loss of business under paragraph (c) of his amended plaint. He submitted that his management accounts demonstrated a substantial reduction of business revenue during the closure period, and that the court should have applied the ordinary standard applicable to general damages instead of demanding the strict proof required for special damages.
10. He further criticised the inconsistency between paragraph 24 of the impugned judgment, which correctly identified the issues for determination, and paragraph 32, which introduced unrelated matters and referred to “Plaintiffs” in the plural, asserting that such internal contradictions made it unclear on what basis his suit had been dismissed. For those reasons, he urged this Court to find that the lower court wrongly dismissed his claim and to award him general damages, which he assessed at Kshs 1,300,000 based on his management accounts.
11. In their submissions dated 12th October 2023, the 1st and 2nd respondents opposed the appeal. They contended that traffic diversions are standard practice during major road construction projects and that an alternative route was provided through Kamagambo–Riosiri to Rongo, while local access was facilitated via the Rongo Weighbridge.
12. They submitted that the appellant failed to prove that the diversions prevented access to his premises or that any alleged loss of business was attributable to the respondents. They emphasized that the appellant’s financial records were prepared for purposes of litigation, and that he did not produce



- contemporaneous business permits, tax returns, or bank statements, thereby falling short of the evidentiary threshold required to sustain a monetary award.
13. The respondents further raised procedural and jurisdictional objections. They argued that, as the appellant had previously been represented by counsel in the lower court, he was obliged to file a Notice to Act in Person under Order 9 Rule 8 of the Civil Procedure Rules.
 14. They also submitted that the enforcement of constitutional rights under Article 40 and the grant of remedies under Article 23(3)(e) fall within the High Court's constitutional jurisdiction, relying on the reasoning in *Kenya National Highways Authority v Penis Aguta* [2015] eKLR. On the applicable standard of proof for damages, they cited *Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2021] eKLR, submitting that even claims framed as general damages must be supported by cogent and credible evidence, which they argued the appellant had not provided.
 15. In rejoinder, through submissions dated 23rd October 2023, the appellant responded that the procedural objection regarding representation amounted to a mere technicality, contrary to Article 159(2)(d) of *the Constitution*, which requires courts to administer justice without undue regard to technicalities.
 16. He further relied on section 22 of the *Environment and Land Court Act*, which expressly permits parties to appear in person, asserting that the appeal should be determined on its merits rather than defeated on procedural grounds. He submitted that this dispute was inherently land-related, arising from interference with the use and enjoyment of his business premises, and therefore squarely within this Court's jurisdiction under section 13(1) of the ELC Act and Article 162(2)(b) of *the Constitution*.
 17. On substance, the appellant reiterated that the photographic evidence and the respondents' own testimony confirmed that the A1 road was closed and that all vehicular traffic was diverted through Riosiri, depriving his motel of public passing customers who constituted the backbone of his business.
 18. He maintained that the supposed access through the Rongo Weighbridge did not constitute a public right of way and did not restore passing trade. He further asserted that neighbouring businesses had been compensated, yet he had not, which he argued was inconsistent with the constitutional requirement for just compensation under Article 40(3) and the remedial jurisdiction conferred by Article 23(3)(e). He therefore urged the Court to accept the management accounts as credible evidence and to award general damages commensurate with the loss suffered.

Analysis And Determination

19. The issues for determination have been usefully condensed from the grounds of appeal and the parties' submissions as follows:
 - a. Whether the appeal is tenable; and
 - b. What orders should be made in this appeal to meet the best ends of justice.
20. This being a first appeal, the Court is obligated to reconsider the evidence, re-evaluate it, and draw its own conclusions, while bearing in mind that the trial court enjoyed the advantage of observing the witnesses. This duty is settled in *Mwanasokoni v Kenya Bus Services Ltd* (1982–88) 1 KAR 278, and reaffirmed in *Titus Ong'ang'a Nyachieo v Martin Okioma Nyauma & 3 others* [2017] eKLR. Guided by those principles, I have carefully reviewed the Record of Appeal, the impugned judgment, and the submissions tendered before this Court.
21. The respondents raised a procedural point that the appellant, having been represented in the trial court, did not file a Notice to Act in Person under Order 9 Rule 8 of the Civil Procedure Rules. While that



- non-compliance is acknowledged, it does not go to the substance of the dispute. Article 159(2)(d) of *the Constitution* enjoins courts to administer justice without undue regard to technicalities, and section 22 of the *Environment and Land Court Act* expressly permits a party to appear in person. No prejudice was demonstrated. In the interests of substantive justice, the Court considers the appeal on its merits.
22. The respondents also argued that claims invoking Articles 40 and 23(3)(e) fall within the High Court’s constitutional jurisdiction, relying on *Kenya National Highways Authority v Penis Aguta* [2015] eKLR. While that authority is relevant to constitutional enforcement actions, the present dispute arises from alleged interference with property and access occasioned by public road works. Disputes concerning land use, access and compensation fall squarely within the jurisdiction of this Court under section 13(1) of the ELC Act and Article 162(2)(b) of *the Constitution*. I therefore hold that this Court is properly seized of the appeal.
 23. Turning to the merits, the appellant alleged that the respondents heaped sand and soil at the entrance of his motel and that the diversions implemented during the construction works denied him access and caused loss of business. Upon re-evaluation, I find no evidence proving that the motel gate was at any time blocked by sand. The photographs produced do not depict such obstruction, and the appellant conceded under cross-examination that the images did not show the alleged heap. The trial court properly found that allegation unproved, and I affirm that conclusion.
 24. The more substantive question is whether the diversions amounted to a denial of access. It is common ground that diversion signage and physical barriers were placed on the Rongo–Kamagambo stretch of the A1 highway. The photographs confirm the existence of diversions.
 25. However, the evidence also shows that access was not cut off entirely: the 2nd respondent’s engineer testified that small vehicles and residents could still reach the premises, and the appellant himself acknowledged that he could access the motel via Texas Petrol Station. The photographs do not depict a complete sealing-off of the motel. At most, they show a reduction in through-traffic, not a denial of access, yet denial was the basis upon which the appellant’s claim was pleaded. The learned magistrate was therefore correct in finding that access was inconvenienced but not denied.
 26. The appellant further claimed general damages for loss of business. Although general damages do not demand the strict itemization required in claims for special damages, the claimant must nevertheless provide credible evidence linking the impugned conduct to the alleged loss.
 27. This principle was correctly highlighted by the respondents through *Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2021] eKLR. In the present case, the appellant relied on management accounts that were admittedly prepared for the purposes of litigation and did not produce contemporaneous tax returns, audited statements, bank records, or business permits to substantiate the alleged downturn. The trial court found this evidential foundation insufficient, and upon independent assessment I reach the same conclusion. The alleged business loss was not proved on a balance of probabilities.
 28. The appellant also criticized paragraph 32 of the trial court’s judgment, arguing that the reference to “Plaintiffs” introduced matters not pleaded. While this appears to be a clerical or typographical error, the substance of the judgment is grounded in the issues the magistrate identified earlier, particularly paragraph 24. The determination is traceable to the evidence and the real controversies before the court. A drafting lapse does not vitiate an otherwise legally sound judgment, and no miscarriage of justice is shown.
 29. Having re-evaluated the entire record and the law, I am not persuaded that the appellant demonstrated any factual or legal basis upon which this Court should interfere with the findings of the trial court.



The appellant did not prove that access to his premises was denied; he did not prove the alleged sand obstruction; and he did not prove business loss attributable to the respondents' actions. The learned magistrate correctly applied the law, properly evaluated the evidence, and reached conclusions supported by the record. This Court therefore finds no merit in the appeal.

Final Disposition

For the foregoing reasons, and upon a full reconsideration of the entire record, the Court makes the following orders:

- a. The appeal is hereby dismissed in its entirety.
- b. The judgment of the Principal Magistrate's Court at Rongo delivered on 2nd March 2023 in ELC Case No. 56 of 2018 is upheld in full.
- c. Costs of this appeal are awarded to the 1st and 2nd respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF NOVEMBER, 2025.

MOHAMMED N. KULLOW

JUDGE

Judgment delivered in the presence of: -

for the Appellant

for the 1st Respondent

for the 2nd Respondent

for the 3rd Respondent

Philomena W. Court Assistant

