

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA

ELCA NO E003 OF 2025

GRACE WANGUI MWANGI & 2 OTHERS.....APPELLANTS

VERSUS

PAUL KARUGA KAHARI.....RESPONDENT

JUDGMENT

In Senior Principal Magistrate Court at Engineer ELC case No E36 OF 2023 Paul Karanja Kahari (Plaintiff in the lower Court (and the current Respondent) sued Grace Wangui Munyi, Joseph wainaina Mutahi and Julius Githaiga Mwangi as Defendants who are now the joint Appellants for: -

- a. Damages for trespass.
- b. Special damages Ksh 814,000/-
- c. Costs of the suit.
- d. Interest in (a) (b) and c.

The Respondent pleaded that at all material time to the suit he was and/or is the lawfully registered owner of the suit property known as NYANDARUA/GETA/3101 and on or about 21/4/2023, the Appellants illegally and without any colour of right destroyed the Respondent's fence, trespassed onto the subject property NYANDARUA/GETA/3101 and therein maliciously destroyed crops and property. He gave the

particulars of illegality/fraud on the part of the Appellants as follows:-

- a. Trespassing onto the Plaintiff's land.
- b. Destroying the Plaintiff's fence.
- c. Destroying the Plaintiff's house/structure without the Plaintiff's consent and/or authority.
- d. Damaging crop on the Plaintiff's property.
- e. Planting maize on the Plaintiff's property without the Plaintiff's consent and/or without any lawful cause.
- f. Assuming proprietorship over the Plaintiff's property without any lawful cause.

He gave the particulars of the loss for damages as follows: -

1. Being deprived of the right to property.
2. psychological stress at the thought of losing his land.
3. Loss of peaceful proprietorship over the property.
4. Damaged house/structure.
5. Damaged fence.
6. Damaged carrot crop.

And those of special damages as:-

- | | |
|--------------------------------------|-----------------|
| a. Carrot crop damaged | Kshs. 120,000/= |
| b. Cost of preparing land (inputs) | Kshs. 390,000/= |
| c. Damaged Fence | |
| Initial cost of putting up fence 150 | |
| posts each at Kshs. 800/= | Kshs. 120,000/= |

5 Rolls of razor blade barbed wire each at Kshs. 7,000	Kshs. 35,000
10kg of nails each at Kshs. 400	Kshs 4,000
<u>Labour</u>	<u>Kshs. 3,000</u>
TOTAL	<u>Kshs. 162,000</u>

Cost of putting up fence after trespass

100 posts each at Kshs. 800/=	Kshs. 80,000/=
5 Rolls of razor blade barbed wire each at Kshs. 7,000/=	Kshs. 35,000/=
10 kgs of nails each at Kshs. 450/=	Kshs. 4,500/=
<u>Labour</u>	<u>Kshs. 3,000/=</u>
Total	<u>Kshs. 122,500</u>

D. Damaged House

Initial cost of putting up house

300 pieces Timber 6 by 1 (7ft) each ft at Kshs. 50/=	Kshs. 105,000/=
50 pieces Timber 4 by 4 (12ft) each ft at Kshs. 50/=	Kshs. 30,000/=
10 kgs of nails each at Kshs. 400	Kshs. 4,000/=
30 pieces of Iron Sheets @ 700	Kshs. 21,000/=

Door	Kshs. 3,000/=
Labour	Kshs. 10,000/=
TOTAL	<u>Kshs. 173,000/=</u>

Cost of putting up house after trespass

300 Pieces Timber 6 by 1 (7ft) each ft at Kshs. 60/= Kshs.
126,000/=

50 pieces Timber 4 by 4 (12ft) each ft at Kshs. 60/= Kshs.
36,000/=

10 kgs of nails each at Kshs. 450 Kshs. 4,500/=

35 pieces of Iron Sheets @ 700 Kshs.
24,500/=

Door Kshs. 3,500/=

Labour Kshs. 10,000/=

TOTAL **Kshs. 204,500/=**

E. Request for typed proceedings and Judgment (Cr E1024/2022)
Kshs. 2,000/=

And the Plaintiff prays for Special Damages of Kshs. 814,000/=.

The total loss amounted to Kshs. 814,000/=.

In the Appellants' joint Statement of Defence, they denied that the Respondent was the lawfully registered owner of the suit premises and that they committed any illegality and/or fraud on the same.

They also do not own up to the particulars of damage, illegality and/or fraud. They contended that the suit is scandalous, inept, spinous, incompetent, an abuse of the process of the Court and that the suit is *res judicata* in view of the existence of ELC case number E035 of 2023 filed by them in the same Court.

They claimed to have appealed against the Judgment and their conviction in Engineer Senior Principal Magistrate's Court Criminal Case No. E1024 OF 2022 vide Naivasha High Court Criminal Appeal Number E037 of 2023 in which case this suit is founded.

The Reply to Defence repeated the Respondent's contents of the Plaintiff. When the suit matured for hearing, the Respondent took to the Witness stand, was sworn and adopted his Statement dated 31/8/2022 as his evidence in chief as follows:

That he is the registered proprietor of L.R. No. NYANDARUA/GETA/3101 measuring approximately 0.405 Hectares which he bought from Mwangi Kiiru Kathogo on 27/10/2008 for a consideration of Kshs. 130,000/= and the same was transferred to him and a Title Deed issued on 23/12/2015 over which he has enjoyed quiet use and possession since the date of purchase. He then filed Engineer Miscellaneous ELC No. E 001 of 2020 against the 1st Appellant and the Land Registrar, Nyandarua for the following orders and the resultant Judgment: -

A claim for: -

- a. A Declaration that the Plaintiff is the absolute owner of the suit land, NYANDARUA/GETA/3101.

- b. A permanent perpetual injunction restraining the Defendant herein either by herself, her agents, employees, servants and/or proxies from transferring, disposing off, entering therein, remaining therein and/or dealing in any other manner whatsoever with the parcel of land known as NYANDARUA/GETA/3101.
- c. Damages for trespass.
- d. Costs and interests of this suit.

With resultant Judgment as follows: -

1. THAT a declaration be and is hereby issued that the Plaintiff is the absolute owner of the suit land, NYANDARUA/GETA/3101.
2. THAT a permanent perpetual injunction be and is hereby issued restraining the Defendant herein either by herself, her agents, employees, servants and/or proxies from transferring, disposing off, entering therein, remaining therein and/or dealing in any other manner whatsoever with the parcel of land known as NYANDARUA/GETA/3101.
3. THAT the Plaintiff is awarded nominal damages for trespass of Kshs. 20,000/=
4. THAT the Plaintiff is awarded costs and interests of this suit.
5. THAT the counterclaim is dismissed with costs.

Earlier on 21/4/2022 the Appellant illegally trespassed on the suit land on 21/4/2022, cultivated thereon and even planted

maize. They destroyed the fence and also carrots, planted thereon as well as maliciously damaging and/or destroying his home.

The Appellants were accordingly arrested and arraigned in Court and charged in Engineer SPM Criminal case No. E1024 of 2022 and where they were convicted of the offence of malicious damage to property and trespass. He accordingly suffered loss amounting to Kshs. 814,000/= for which he was seeking Judgment.

He then produced the following documents to support his case: -

1. A copy of the Plaintiff's Identity Card.
2. Copy of the Title Deed to NYANDARUA/GETA/3101 issued on the 23RD December, 2015.
3. Copy of Decree in Engineer SPMCC ELC No E001/2020 issued on 25/8/2021.
4. Copies of certified proceedings in SPMCC Criminal case No. E1024/2022.
5. Copies of certified Judgment in SPMCC Criminal Case No. E1024/2022.
6. Copies of Receipts.
7. A copy of letter requesting for proceedings and Judgment in SPMCC Criminal Case No. E1024/2022.
8. Copy of judiciary receipt issued on 23/8/2023.
9. Demand notice.
10. Crop Damage Assessment Report.

On cross-examination by Mr. Njihia for the Appellants, the Respondent said that before filing this case there was criminal case No. E1064 of 2022 against the Appellants. There was no report in the criminal case for the amount of value of the home and fence that were destroyed. He also admitted that even in this case he did not have a valuer's report to show the costs of the home and fence. There was no receipt to prove the costs and there were no witnesses who he paid labour and that among the documents he produced in Court none showed photos of the damage or even the fence. He said that he can avail the people who worked on the land.

On re-examination by Mr. Ooga for the Respondent, the witness said that after the destruction by the Appellants, he repaired the damaged property and that he was the complainant in the Criminal case. After the close of the Respondent's case, Grace Wangui Mwangi, the 1st Appellant took oath and adopted her statement dated 2/10/2023 where she described herself as the widow of Mwangi Kairu Kathogo (deceased) son of the late Isabella Njeri Kiiru alias Njeri Githaiga (deceased) who was the allottee of the Settlement Fund Trustees of plot No. 1623 Geta Settlement Scheme out of which the Respondent purportedly bought 1 acre to be occupied thereon for Mwangi Kiiru Kathiogo who died on 1/12/2019 before the Estate of Isabella Njeri Kiiru had been distributed and before the discharge of charge of the parcel of land had been issued by the S.F.T. and therefore the sale agreement of 27/10/2008 between the Respondent and the late

Mwangi Kiiru Kathogo was a nullity and that the sub-division of the land into NYANDARUA/GETA/3099, 3100,3107 and 3102 were all illegal including 3101 that was registered in the name of the Respondent.

She further testified that the Respondent has already been sued in Engineer PMCC ELC case No. E035 of 2023 by the Administrator of the Estate of Isabella Njeri Kiiru for the cancellation of all the Titles purportedly resulting from plot No. 1623 Geta Settlement Scheme. She believes that the lower Court suit should have awaited inter alia Engineer PMCC ELC No E035 of 2023 and Naivasha High Court Appeal No. E031/2023. She then produced the following documents: -

1. Summons to enter appearance, Plaintiff and other Documents
in Engineer ELC Case No E033 OF 2023.
2. Petition of Appeal in Naivasha High Court Criminal Appeal No
E037 of 2023.

She said their land is Nyandarua /Geta/ 1623 which land now belongs to Julius Githaiga Mwangi, her husband's brother and that she did not know the Respondent's land.

On cross-examination by Mr Ooga for the Respondent, Grace said she lived on NYANDARUA/GETA/1623 which belongs to her mother and that her husband died in 2019. Her mother's land was 5 Acres.

She further testified that there was a land dispute case between the Respondent and herself being Engineer ELC case No E01 of 2020.

DW2, Joseph Wainaina Mutahi, the 2nd Appellant said he wished to adopt the Statement of the Defence by the Appellants as his evidence. When cross-examined, the witness said he didn't know whether the Respondent owns NYANDARUA/GETA/3101. He lamented that in 2022 when he went to Court to object to the Criminal case against the 1st and 2nd Appellants, he was also arrested and equally charged with destroying a home and a fence. He was as well convicted and sentenced and in re-examination by Mr Njihia, he said he was not satisfied with the conviction and sentence and has accordingly appealed against the same.

The last Appellant's witness who is also accordingly the last witness in the case, Mr Julius Githaiga Mwangi adopted his Statement of 2/10/2023 as his evidence in chief. He also described himself as son of Mwangi Kiiru Kathogo. He is therefore brother to the 1st Appellant. He gave evidence similar to that of his sister which I don't need to duplicate. But in addition he said that the Respondent has never constructed a home or any other structure at the premises and on cross-examination the witness said his father died on 1/12/2019 and that in the Criminal case against which he has as well appealed, he was like the other 2 co-accused fined Kshs. 100,000 and in default to serve a jail term of 12 months' imprisonment but he did pay the fine.

After the close of the case the learned trial Magistrate Ms. E.N. Wanjala (Principal Magistrate) in pronouncing herself said that the

Respondent's ownership of the suit land was affirmed by the Court in Engineer ELC E1 of 2020 and a Decree was produced in Court which Decree has not been overturned since 25/8/2021, the date of the said Decree and the Appellants were charged with trespassing and causing malicious damage to the Respondent's property on the suit land in Engineer Criminal Case No. E1024 of 2022 and fined Kshs. 100,000/- in default of which to serve a 12 months imprisonment. They opted to pay the fine. Although there is an Appeal against both conviction and sentence, the Appeal is yet to be heard and the conviction and sentence have not been overturned. The conviction accordingly still stands. The Court held that on a balance of Probabilities the Respondent adduced sufficient evidence that the Appellants trespassed and maliciously damaged his property on L.R. NO. NYANDARUA/GETA/3101. Although the learned Trial Magistrate rightly admitted that the Respondent did not provide evidence of the value of the land before the trespass and after the trespass or the cost of restoration to the condition before the trespass in order to enable the Court to assess the diminution in value of the land due to the costs of trespass and that the Respondent did not offer any evidence of the development it had intended or contemplated to carry out and its ability to carry out the same and that he was not prevented from carrying out the developments by the acts of the Appellants, the Court went ahead to award the Respondent Kshs. 500,000/= for trespass that was proved by an assessment Report dated 9/5/2022 - Wanjohi Ward Agricultural Officer, Kshs. 2,000/= for

proceedings in Engineer Criminal Case E1024 OF 2022. No damages for labour costs and the entire Judgment totaled to Kshs. 758,000/=.

After the above Judgment, the Appellants were dissatisfied leading to the Appeal before this Court where the Appellant prayed that the Appeal be allowed, the order of the learned trial Magistrate dismissing the Appellants' Defence be set aside and the same substituted with an order dismissing the Respondent's suit with costs thereof. The grounds for the sought appeal are as follows: _

1. The learned trial Magistrate erred in law and in fact by finding and holding that the Respondent had proved his case on a balance of probabilities yet there was nothing truthful in the Respondent's case to warrant such a finding.
2. The learned trial Magistrate erred in law and in fact by ignoring the evidence of the Appellants while summing up the case leading to the dismissal of the Defence put forth by the Appellants.
3. The learned trial Magistrate erred in law and in fact by finding and holding that the Respondent was entitled to compensation for alleged damage to his houses, properties and crops yet there was a pending appeal notably Nyandarua High Court Criminal Appeal Number E99 of 2023 (An appeal from Engineer Senior Principal Magistrate's Court Criminal Case Number E1024 of 2022) which appeal had a direct bearing on the proceedings before the trial court which matter had the learned trial

Magistrate considered would have led to a finding in favour of the Appellants.

4. The learned trial Magistrate erred in law and in fact by holding that the Respondent was entitled to General Damages and in awarding the same yet no sufficient evidence was tendered by the Respondent in support of the said finding.
5. The learned trial Magistrate erred in law and in fact by relying solely on the Respondent's evidence yet it behoved the Respondent to call the evidence of an expert witness or witnesses to prove the alleged destruction and/or damage to his properties or for that matter the value of the house allegedly constructed following the alleged trespass.
6. The learned trial Magistrate erred in law and in fact by failing to find and hold that the Respondent had not strictly proved his claim for compensation for loss and destruction of his property yet from all the material on record there was no evidence directly linking the Appellants to the alleged damage and loss of his properties.
7. The learned trial Magistrate erred in law and in fact by failing to observe and find that the Respondent's ownership of the subject land had been challenged by the Appellants a factor had she put into consideration would have led to a finding in favour of the Appellants.
8. The learned trial Magistrate erred in law and in fact by awarding the Respondent damages that were manifestly excessive given all the circumstances and, in the process, causing a miscarriage

of justice to the detriment of the Appellants a factor had she addressed herself to would have led to a fair and just finding against the Appellants.

9. The learned trial Magistrate erred in law and in fact by relying on the receipts produced as evidence by the Respondent to justify the award of special damages yet the said receipts were not conclusive proof of the said special and general damages.
10. The learned trial Magistrate erred in law and in fact by failing to find and hold that the Respondent's suit was a scheme to unjustly enrich himself at the expense of the Appellants which factor had she addressed herself to would have led to the dismissal of the Respondent's suit.

This being a first appeal, this Court is duty bound to analyze the evidence adduced in the lower Court.

Coming now to the prayers, the only documents the Respondent has produced to prove Special Damages were copies of Receipts and the Crop Damage Assessment Report. On the Receipts for building materials the same are for the following dates.

1. 15/7/2021

Razor barbed wire	Ksh 35,000/=
Nails	Ksh 8,000/=
Royal Mabati	Ksh 21,000/=
<u>Door</u>	<u>Ksh 3,000/=</u>

(1st, 2nd and 3rd Appellants respectively) guilty of the offences of malicious damage and trespass and accordingly, I convict them under section 215 of the Criminal Procedure Code.....”

This was on 29/6/2023. And the offence of trespass upon private land contrary to the trespass Act that was committed on 21/4/2022. This conviction is still on record and the same has not been disturbed on Appeal. Therefore, it goes without saying that the Appellants are liable for trespass and the Respondent was accordingly entitled to Damages for the same. What remained for the lower Court was to determine the quantum. I find the figure of Kshs. 500,000 not to be unreasonably high and this Court retains the same. This is payable with interest at Court rates from the date of the lower Court Judgment.

It is not shown when this destruction was done but it was certainly after the earlier suit was filed.

The Respondent’s Crop Damage indicates that the maize crop was alleged to have been later established in the same plot by a person well known to the complainant (Grace Wangui Mwangi). This action had an adverse effect on the carrots since there was a lot of trampling and uprooting. The maize crop had not yet germinated but the holes and the maize was said to have been intact. The affected carrot crop had a good germination percentage and would have been expected to produce to its maximum while holding other factors constant.

The loss is shown to be Kshs. 120,000/=. The date of this damage was not given but it was certainly before 5/5/2022 the date of the instruction by the Respondent. This was after Engineer PMCC ELC Case No E001 of 2020 had been concluded on 14/7/2021. This Report was not produced by its maker and the claim can therefore not be entertained. The Respondent did not explain why he did not call its maker. When asked about it, he said that he had evidence that he issued Kshs. 30,000/= to prepare land for planting carrots.

“.....I can avail the persons who worked on that land.....”

I therefore agree with the Counsel for the Appellants in the ground of Appeal No.5 that an expert witness had to be cancelled to prove the alleged damage to the destruction and (paragraph 6) that the Respondent had not strictly proved his claim for compensation for loss and destruction of his property.

Whereas it is shown that the costs of materials for a new home was Kshs. 381,000/=, it was not shown what was the cost of labour. No evidence was produced in Court to prove this and the same can therefore not be availed save the costs of the material.

Accordingly, the Appeal partially succeeds and the Judgment of the lower Court is amended as follows: -

Judgment for the Respondent against the Appellants jointly and severally for: _

- a. General Damages for trespass Kshs. 500,000/=.
- b. Special Damages of Kshs. 381,000/=

- c. Interest on (a) above from the date of Judgment till payment in full.
- d. Interest on (b) above from the date of filing suit till payment in full and
- e. The Appellants shall bear three-quarter costs for both the Appeal and of the lower Court.

Judgment dated, signed and delivered at Nyandarua this 3rd Day of December 2025.

MUGO KAMAU
JUDGE

In the presence of:

C/A Samson.

Mr. Njihia for the Appellants.

Mr. Ooga for the Respondent.