

**IN THE COURT OF
APPEAL AT ELDORET
(CORAM: WARSAME, MATIVO & GACHOKA,
JJ.A.) CIVIL APPEAL NO. ELD E57 OF 2020**

BETWEEN

**FLORENCE JUMA NABISWA.....1ST
APPELLANT SARAH CHEPKEMBOI NABISWA2ND
APPELLANT**

AND

OBED READON ONYANGO.....RESPONDENT

*(An appeal from the judgement and decree of the
Environment and Land Court of Kenya at Kitale (Yano,
J.) dated 15th July 2019*

in

ELC Case No. 93 of 1997).

JUDGMENT OF THE

COURT

1. In this appeal, the appellants seek to set aside the judgment delivered on 15th July 2019 by *Yano, J.* in Kitale Environment and Land Court (ELC) Case No. 93 of 1997. The dispute as captured in the respondent's amended plaint dated 13th February 2023 is the ownership, use and occupation of a parcel of land described as Plot Number 225 measuring 11.26 acres which is part of LR No. 5777/3

(Chekorok Farm), previously described as Plot Number 46 or Number 232.

2. The respondent's case was that at all material times he was a member of the Chepkorok Farm Limited, where he held 1(one) share valued at Kshs.2,000/-. Pursuant to the said share, he owned the above parcel of land (the suit property). The respondent claimed that he bought the said land from one Kuna Arap Cheboiboch (deceased) for a consideration of Kshs.150,000/- as shown by the sale agreements between himself and the deceased dated 1/11/1987, 12/12/1987, 9/10/1988 and 28/1/1989. It was his case that he took possession of the land sometime in 1996. It was his case that the deceased's lawful ownership of the said land was affirmed by a decision rendered in his favour by the Rift Valley Land Disputes Tribunal. Further, it was also his case that he and the deceased held shares in Chepkorok Farm. The respondent also averred that one Johnson Juma Nabiswa was also allocated 11.26 acres in the said farm but he subsequently sold a portion of the same to third parties.
3. The respondents' grievance was that the said Johnson Juma Nabiswa and the appellants herein unlawfully and without justifiable cause entered into his aforesaid land in

1994/1995 and curved 3 acres and erected structures thereon, after which

they gradually trespassed and occupied the entire parcel of land measuring 11.26 acres or thereabouts and wantonly uprooted his properties as a consequence of which he suffered loss and damage.

4. As a consequence of the foregoing, the respondent in his suit prayed for special damages amounting to Kshs.83,000/- damages for trespass, general damages, mesne profits, a declaration that he was the lawful owner of the suit land, a declaration the appellants' occupation of the suit land is unlawful, an order of eviction and a permanent injunction restraining the appellants from trespassing into the said land, costs of the suit and any other reliefs the court may grant.
5. The appellants strenuously opposed the suit. In their amended statement of defence dated 25th February 2014, they denied the respondent's claim maintaining that if at all there existed an agreement between the respondent and the late Kuna Arap Cheboiboch, the same was null and void for want of Land Control Board Consent. They also denied the alleged trespass, encroachment or damage to the respondent's property.

6. After a detailed analysis of the respective parties' evidence, the trial judge isolated three issues for determination, namely; (a) whether the respondent is the legal proprietor of the suit land;

(b) whether the appellants had encroached into the suit land; and, (c) whether the appellant is entitled to the reliefs sought. The learned judge resolved the above issues in favour of the respondent and granted the following reliefs:

- a) A declaration that the plaintiff is the lawful owner of all that parcel of land known as Plot No. 225 measuring about 11.26 acres which parcel of land is part of the land known as LR No. 5177/3 (Chepkorok Farm) and which was also previously described as Plot No. 46 or Plot No. 232.**
- b) A declaration that the defendants' occupation of the suit land is unlawful and that the same amounts to trespass.**
- c) An order of eviction to issue against the defendants to vacate the suit property and give vacant possession to the plaintiff.**
- d) An order of permanent injunction to issue against the defendants, their agents, or servants restraining them from trespassing upon destroying the plaintiff's properties, alienating or in any other manner dealing with the plaintiff's said parcel of land or any part thereof.**
- e) General damages for trespass in the sum of Kshs.2,000,000/=.**
- f) Costs of the suit shall be paid by the defendants.**

7. The appellants in their memorandum of appeal dated 20th

April 2020 seek to overturn the above verdict faulting the

learned judge for: (a) failing to find that the respondent admitted that occupying 10 acres of land at Chepkorok farm but failed to explain how he acquired it; (b) misapprehending their defence and evidence particularly their exhibit No.5, which was a clearance form in respect of Plot No.99, thus arriving at a wrong Judgment; (c) failing to find that the respondent did not prove his case since he did not call officials of Chepkorok farm to corroborate his evidence especially on the frequent changes of the Plot Number; (d) issuing declaratory orders which are inappropriate in un-surveyed land; (e) failing to find that there was no official area list with a map with actual Plot Numbers and their respective acreages; (f) for finding that the appellants were trespassing on the respondent's 11 acres despite lack of credible evidence; (g) failing to find that the land was un-surveyed; (h) misapprehending the evidence; (i) awarding the respondent Kshs. 2,000,000/- as general damages without any basis; and (j) failing to find that the respondent's claim was untenable for lack of evidence.

8. We heard this appeal virtually on 19th January 2025. The

appellants were represented by learned counsel Mr.

Onyancha. There was no appearance for the respondent despite having been duly served with the hearing notice nor did they file submissions.

9. The appellants counsel relied on his written submissions dated 14th November 2023. The appellants' counsel maintained that the land was un-surveyed and that the trial court failed to appreciate that the respondent relied on un-pleaded issues. He contended that the respondent in his plaint claimed 11.26 acres and yet he bought 10 acres from Mr. Kuna. Therefore, he did not plead that 1.26 acre was for public utilities. Further, he did not plead what happened to the other acres leaving him with 9.48 acres in Plot Number 225. To buttress his argument, counsel cited Order 2 Rule 6 (1) of the Civil Procedure Rules and ***IEBC & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR*** in support of the proposition that parties are precluded from introducing un-pleaded issues.
10. Lastly, counsel maintained that the award of Kshs. 2,000,000/- as nominal damages is excessive as it's not supported by any credible evidence.

11. This being a first appeal, the whole case is open for rehearing both on questions of fact and law. Therefore, this Court is required to review the trial court's judgment and ensure that the decision aligns with justice, fairness and the law's tenets. Generally, appellate courts are bound by the factual findings of a trial court unless those findings are clearly wrong, unsupported by the evidence, or demonstrate misdirection. (See **Selle vs. Associated Motorboat Company [1968] E.A. 123**). As decided cases suggest, we must emphasize that findings of fact must be firmly rooted in the evidence presented during the trial, rather than on conjecture, speculation, or mere suspicion.
12. Much as the appellant has mounted a raft of grounds of appeal as highlighted earlier, the germane issue in this appeal is whether it was established by way of credible evidence that the respondent is the legal proprietor of the suit land. Closely tied to this issue is whether the appellants had encroached on the suit land, and, lastly, whether the respondent was entitled to the reliefs granted by the trial court.

13. In support of their diametrically opposed positions, the parties tendered their respective versions of evidence. As is usually expected in adversarial litigation, the trial Court was faced with two mutually destructive versions of evidence presented by the parties and left it to the trial court to determine the dispute. In order to assess which version is more probable, the Court is required to evaluate the diametrically opposed evidence adduced by the parties' and satisfy itself which of the two versions carry a reasonable degree of probability. (See **Lord Denning statement in Miller vs. Minister of Pensions [1947] 2 ALL ER).**

14. Where the Court is faced with two mutually destructive versions, the proper approach for the Court to adopt was elucidated by the Supreme Court of Appeal of South Africa in **Stellenbosch Farmers Winery Group Ltd & Another vs. Martell & Others [2003] (1) SA 11 (SCA) at 14J-15E** where Nienaber, JA said:

“To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its

***impression about the veracity of the witness.
That in turn will depend on a***

variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

15. In National Employers' General Insurance Co. Ltd vs.

Jagers, [1984] (4) SA 437(E) at 440E, the Labour

Appeal Court of South Africa (Eksteen AJP) stated:

“. . . where there are two mutually destructive stories, [the plaintiff] can only

succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate

and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

16. In the impugned judgment, answering the question whether the respondent is the legal proprietor of the suit land, the learned judge had this to say:

"24. It is evident that the defendants' late husband, Johnson Juma Nabiswa was a member of Chepkorok Farm LR No. 5777/3 and had one share equivalent to 11 acres or thereabouts. It is also evident that the plaintiff who was a member of the said Farm, bought the share of another member, the late Kuna Arap Cheboiboch. The plaintiff produced the sale agreements between him and the late Kuna Arap Cheboiboch. The said agreements were also witnessed by the widows of the late Kuna Arap Cheboiboch who testified as PW2 and PW3. The plaintiff testified that the plot he purchased was plot No. 46 measuring 11.26 acres at a cost of Kshs.150,000/=.

He took possession in 1988 and utilized the said

parcel of land after the seller and his family relocated to Cherangany until 1995. It is the plaintiff's evidence that in 1995, the late Johnson Nabiswa Juma invaded the plaintiff's land and moved into it together with the 1st defendant. The plaintiff then filed this suit against the late Johnson Nabiswa Juma. However, upon the demise of the late Johnson Nabiswa Juma, his widows and legal representatives of his estate were substituted as defendants.

25. The plaintiff explained that following surveys, his plot number changed, as were those of other members, including Mr. Juma's. The plaintiff's plot changed from plot No. 46 to plot No. 52 then to plot No. 232 and finally to plot No. 225. The plaintiff produced the allotment letter in his name given on 6/2/1998 indicating that the plaintiff was legible to 11 acres. His evidence was that one share was 11.26 acres.

Whereas the defendants have denied the plaintiff's claim, in their evidence they both admit that the plaintiff has a plot in Chepkorok Farm. It is therefore my finding and I do hold that the plaintiff is the owner of the property known as Plot No. 225 measuring 11.26 acres or thereabouts which was previously described as Plot No. 46 or plot No. 232 and which is part of LR No. 5777 /3, Chepkorok Farm."

17. In the above excerpts, the learned judge who, unlike this Court, had the benefit of seeing and hearing the parties who testified before him, was satisfied that the respondent's late husband was a member of Chepkorok

Farm LR No. 5777/3

and he had one share equivalent to 11 acres or thereabouts. The trial judge was persuaded that the respondent produced the sale agreements between him and the late Kuna Arap Cheboiboch. More important, the learned judge was satisfied that it was established as a fact that the said agreements were also witnessed by the widows of the late Kuna Arap Cheboiboch who testified as PW2 and PW3 respectively in support of the respondent's case. The respondent testified that the plot he purchased was Plot No. 46 measuring 11.26 acres at a cost of Kshs.150,000/-. He took possession in 1988 and utilized the land after the seller and his family relocated to Cherangany until 1995 when the late Johnson Nabiswa Juma invaded the land and moved into it together with the 1st appellant.

18. The learned Judge was also persuaded by the respondent's explanation that following survey, his plot number changed, as were those of other members, including Mr. Juma's. His plot changed from Plot No. 46 to No. 52 then to Plot No. 232 and finally to Plot No. 225. The learned judge noted that the respondent produced the allotment letter in his name given on 6/2/1998 indicating that he was eligible to

11 acres. It was

also common ground that one share was 11.26 acres. As the learned judge correctly noted, the appellants in their evidence admitted that the respondent had a plot in Chepkorok Farm and arrived at the finding that the respondent owned Plot No.

225 measuring 11.26 acres or thereabouts which was previously described as Plot No. 46 or Plot No. 232 and which is part of LR No. 5777 /3, Chepkorok Farm.

19. As the earlier cited cases suggest, the Court must look at the inherent strengths, weaknesses, probabilities and improbabilities of the evidence tendered by both sides. In the absence of a demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be wrong. We have carefully re-evaluated the evidence and the conclusions arrived at by the trial court. We are persuaded that the trial judge correctly appreciated the totality of the evidence and arrived at the correct finding that the respondent lawfully owned the land in question. We therefore, find no reason to fault the trial court's finding on the issue under

consideration. We can only add that the trial judge did evaluate the respondent's evidence in isolation but rather he

considered the totality of the evidence and arrived at the correct finding that the respondent lawfully owned the suit land.

20. The next issue is whether the learned judge correctly held that the appellants had encroached into the respondent's land. In determining the said issue, the learned judge stated:

“26. Regarding the issue whether the defendants have encroached or trespassed on the plaintiff's said plot, the court notes that in her evidence, the 1st defendant (DW1) testified that her late husband's plot is not plot No. 99 measuring 11 acres. She produced the clearance form as D. Exhibit 5. I have perused the said clearance form. I note that the area of plot No. 99 is indicated as 7.07 hectares which translates to about 17.675 acres. The 1st defendant was categorical that her late husband's entitlement is 11 acres. From the evidence on record, this translates to one share in Chepkorok Farm.

27. On her part the 2nd defendant (DW2) when cross-examined by Mr Ingosi, counsel for the plaintiff, she confirmed that their deceased husband had one share at Chepkorok Farm and that each share was equivalent to 11 acres. DW1 confirmed that her co-wife. (DW2) occupies 5 acres which she did not know how she acquired.

28. In her evidence DW2 testified that she

lives on plot No. 80 measuring 6.5 acres. Whereas it was her testimony that she was given a clearance form for plot No. 80 (D. Exhibit 7), DW2 when cross-examined stated that the

plot she lives in is the one her late husband was entitled to. She further stated that she did not know how the plot the 1st defendant is staying on was acquired. From the evidence on record, both defendants agree that their late husband was entitled to one share in Chepkorok Farm. As already stated, one share was about 11.26 acres. However, it is apparent that from their own evidence, the defendants are occupying over 22 acres, which is about two shares. If their entitlement was one share which translates to about 11 acres or thereabout, it is apparent that they are also occupying 11 acres, or thereabouts, over and above their entitlement of about 11 acres. In my view the only logical conclusion one can make in the circumstances is that the defendants, besides occupying their plot measuring about 11 acres, have in addition encroached on the plaintiff's plot measuring 11 acres or thereabouts. I say so because from their own evidence, the defendants were categorical that their late husband's entitlement was one share, which is 11.26 acres. The plaintiff testified that he bought the entire one share of the late Kuna Arap Cheboiboch. This means the plaintiff's entitlement is 11.26 acres. Of course, the plaintiff testified that some portion of his land went to public utilities, leaving him with about 10 acres. It is therefore the finding of this court that the defendants have trespassed on the plaintiff's parcel of land."

21. As the above excerpt shows, the 2nd appellant admitted that her late husband owned one share which was

equivalent to 11 acres but the evidence tendered before the trial court showed that they were occupying 11 acres over and above their

entitlement. Accordingly, we agree with the trial court that the appellants had encroached into the respondent's land.

22. Arising from our conclusions on the issues discussed above, it is our finding that the learned Judge arrived at the correct findings on the issues discussed above.

23. Regarding the award of the sum of Kshs.2,000,000/-, it is settled law that award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. This Court in **Kivati vs. Coastal Bottlers Ltd, Civil Appeal No. 69 of 1984** (un reported) stated:

"The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."

24. In **Ken Odondi & 2 Others vs. James Okoth Omburah t/a Okoth Omburah & Company Advocates Kisumu, CA No 84 of 2009** (unreported) stated:

"We agree that this Court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the

case it would

have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled."

25. Trespass to land is a tortious act involving direct, physical and unauthorized interference with possession of land which is actionable per se. Because trespass is a violation of the right to exclusive possession, nominal damages are awarded if no actual damage occurs, simply to vindicate the right. Further, when a trespasser occupies the land, the owner is entitled to mesne profits. The Supreme Court of India in ***Union of India vs. Bawari Lal & Sons (P) Ltd, [2004]*** held that where the trespass is illegal, damages can be based on the income/profit the owner would have derived or a fair rental value. However, if the trespass is wanton, high-handed or malicious, courts may award higher compensatory or exemplary damages. Further, if the trespass caused physical damage such as demolition of structures or cutting trees, the cost of restoring the property to the original state is considered. (See the Supreme Court of India decision in ***Rajkumar Gurwara vs.***

M/s S.K. Sarwagi & Co Pvt. Ltd [2008].

26. In this case, the trespass is not contested. The respondent's case was that the appellants trespassed into his land in 1994/1995 and progressively occupied the entire 11 acres. However, even though the respondent alleged that the appellants destroyed his properties, the details remained scanty. Nevertheless, considering the fact that as at the date of the trial court's judgment, the appellants had been in possession for over 25 years, it is our finding that the damages awarded are not excessive.

27. In conclusion, it is our finding that this appeal is devoid of merit. Accordingly, we dismiss it with costs to the respondent. **Dated and delivered at Nakuru this 27th day of February, 2026.**

M. WARSAME

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**JUDGE OF
APPEAL**

J. MATIVO

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**JUDGE OF
APPEAL**

M. GACHOKA C.Arb, FCI Arb.

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**JUDGE OF
APPEAL**

*I certify that this
a true copy of the*

original.
Signed.

DEPUTY REGISTRAR.