

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELCA NO. E097 OF 2022

CAREY INVESTMENTS CO. LIMITED - APPELLANT

VS

SINO HYDRO TIANJIN

ENGINEERING CO. LTD - 1ST

RESPONDENT

SINOHYDRO CORPORATION LIMITED - 2ND

RESPONDENT

JUDGMENT

1. Vide a Memorandum of Appeal dated 17/10/2022, the Appellants instituted this appeal against the Judgment delivered by Hon Kagoni E.M. (PM) on 20/9/2022 in CMCC No. 7028 of 2019 on the following grounds;
 - a. The trial magistrate erred in principle in finding that the Respondent had encroached onto the Appellants land but failed to award general damages which was discretionary in the circumstances.
 - b. The trial magistrate erred in law and in fact in finding that the Plaintiff had not explained the merits for the claim for general and aggravated damages despite the Appellant having adopted his witness statement and list of documents as his evidence in chief in support of the Appellants case which was not controverted at all.
 - c. The trial court erred in principle in holding that special damages had not been pleaded and that there was no evidence submitted in support of claim for special damages despite the same vividly being on the record and documentary evidence having been submitted in court which was a travesty of justice.
 - d. The decision of the trial court was erroneous and was occasioned a gross injustice on the Appellant.
2. The Appellant has sought the following orders;
 - a. The appeal be allowed.
 - b. The Lower Courts' Judgment be reviewed and be varied accordingly.

- c. The Court be pleased to enter Judgment in favour of the Plaintiff as prayed in the Plaint.
 - d. Costs be awarded to the Appellant in both the Lower Court and in the Appeal.
3. The Appellant's case in the Lower Court, as stated in the Amended Plaint dated 3/2/2020, is that it is the registered proprietor of the suit property known as LR No. Nairobi/Block 82/2028 (New Donholm). The Appellant alleged that it purchased the suit premises in vacant possession and free from any encumbrances and has been in quiet and peaceful possession and use since the purchase. It further claimed that around June 2016, the Defendant invaded the suit property and unlawfully carved out a road right through the property and installed culverts across the said road, all without its knowledge and consent.
 4. The Appellant argued that despite being asked to stop the illegal encroachment and wastage of the suit premises, it ignored the request, and the encroachment and wastage continued from June 2016 until 14/9/2016, when a court order issued on 7/9/2016 restrained the Defendant. It was stated that the Appellant suffered specific and severe damages due to the loss of capital value of the suit plot, inconvenience, loss of building materials on the plot, loss of income because tenants vacated the premises, and the costs of repairing the sewer line and the plot to make it habitable again.
 5. The Appellant therefore prayed for the following reliefs;
 - a. A permanent injunction to restrain the Defendants, their agents or servants or anybody else claiming under them from encroaching alienating or using the said illegal road or interfering with the suit premises and its quiet and peaceful possession and use by the Plaintiff pending the hearing and determination of this suit.
 - b. A permanent injunction restraining the Defendants, their agents or servants, or any other person claiming under them, from encroaching, alienating, or using the said illegal road, or interfering with the suit premises and its quiet and peaceful possession and use by the Plaintiff.

- c. General and aggravated damages for the unlawful encroachment and wastage of the suit land.
 - d. Special damages Kshs. 7,916, 444/=.
 - e. Costs of this suit plus interest.
6. The suit proceeded to a formal proof hearing, with the Appellant's Director, Charles Jeremy Gichohi, testifying as the sole witness. After examining the pleadings and the evidence presented, the court delivered judgment on 20/9/2022. The learned Magistrate found that the Appellant was the registered proprietor of the suit premises and that the Respondent had indeed encroached upon the property. The trial court granted a permanent injunction preventing the Defendants from further encroachment. However, the court declined to award the damages sought. The Appellant was awarded costs of the suit. It is this finding that now forms the subject of this appeal.
7. The appeal was canvassed by way of written submissions. Both parties filed their respective submissions. The Appellant's submissions are dated 16/10/2025 whereas the Respondent's submissions are dated 19/11/2025.

Appellant's submissions

8. The Appellant combined grounds 1 and 2 of the Memorandum of Appeal. The Appellant argues that the Respondent's failure to contest the suit amounted to an admission of the Appellant's allegations, thereby strengthening the Appellant's claim that relief, including general damages, should have been granted by the trial court. The Appellant maintains that although the Plaintiff did not prove the actual damage suffered apart from the loss of machinery and equipment, which are covered under special damages supported by a valuation report, the Appellant was still entitled to general damages, albeit nominal.
9. The Appellant contends that Grounds 3 and 4 of the appeal dispute the trial court's conclusion that special damages had neither been specifically pleaded nor proved. The Appellant argues that this conclusion was fundamentally flawed and led to a miscarriage of justice. Counsel directs the Court to pages 30-33 of the Record of Appeal,

especially paragraph 10 and prayer 3A of the Amended Plaintiff, asserting that special damages were explicitly pleaded. Additional reference is made to pages 34 and 35 of the Record, notably paragraphs 8, 9, and 10 of the Appellant's witness statement (PW1), which allegedly outlined the evidentiary basis of the claim.

10. It is also submitted that on page 21 of the Record, PW1 produced documentary evidence, including a valuation report appearing at pages 44-82, which formed the basis of the claim for special damages. The Appellant contends that this evidence was presented to the trial court but was entirely disregarded. Reliance is further placed on Section 109 of the Evidence Act (Cap 80) in support of the burden of proof argument. In essence, the Appellant asserts that both the pleading and evidentiary requirements for special damages were met, and that the trial court erred in holding otherwise.
11. On that basis, the Appellant urges this Court to find that there was a clear misapprehension and/or misdirection on the evidence and an error in principle, and accordingly to allow the appeal as prayed.

The Respondent's submissions

12. The Respondents contend that although the main suit was not defended, the Appellant had the burden of proving its case on a balance of probabilities for the court to grant the relief sought. They argue that the Appellant failed to meet this burden, and therefore, the court could not automatically grant the relief sought. It is further submitted that the court correctly found that special damages had not been proved. Concerning the amount claimed for loss of rental income over 10 months, totalling Kshs. 250,000,000/=.
13. Regarding the loss of building materials amounting to Kshs. 1,300,000/-, the Respondents argue that the claim should fail because the Appellant did not demonstrate to the court when and what materials were destroyed. They also contend that the Appellant relies on a report by Crystal Valuers, which was not produced by the makers, and its contents are therefore unreliable and should be disregarded.

14. Regarding the cost of repairing the sewer line amounting to Kshs. 4,116,444/-, the Respondents argue that the claim has not been proven, as it is not demonstrated that the actual loss was incurred. They assert that the documents presented do not reveal the source, authorship, or authenticity, and fail to itemise the specific works carried out, materials utilised, or how the total sum was calculated. Without any verifiable breakdown or supporting evidence, the Appellant has not satisfied the strict requirements needed to prove special damages.
15. Regarding whether the Appellant is entitled to an award of damages, the Respondents argue that the burden of proving trespass, land wastage, and entitlement to damages as specified in Sections 107-109 of the Evidence Act rests with the claimant. They contend that no credible evidence has been presented to establish unlawful encroachment or any resulting damage. The Appellant has not provided a certified survey report, valuation, expert assessment, or coherent testimony indicating the extent of the alleged encroachment or any actual wastage. They highlight that no evidence was submitted to demonstrate diminution in value, loss of use, or any measurable harm. Furthermore, the threshold for aggravated and exemplary damages—namely proof of malice, high-handedness, oppression, or deliberate misconduct—has not been satisfied, nor has any aggravating conduct been attributed to the Respondents. Such damages are not awarded in the absence of exceptional circumstances and must be specifically pleaded and proven beyond reasonable doubt. The court is urged to decide the matter solely on the basis of proven facts rather than unsubstantiated allegations, and accordingly, to find no basis for the damages claimed and to dismiss the appeal with costs.

Analysis and Determination

16. I have reviewed the Memorandum of Appeal, the Record of Appeal, and the evidence presented before the Lower Court and have duly considered the parties' submissions. The main issues for determination are;

- a. Whether the Appellant was entitled to an award of damages sought;
- b. Whether the Appeal is merited.

Whether the Appellant was entitled to an award of damages sought

17. Since this is a first appeal, this Court must evaluate the evidence presented in the lower Court, while bearing in mind that it did not have the opportunity to see and hear the witnesses.

18. The duty of an appellate court is stipulated under Section 78 of the Civil Procedure Act which states as follows;

1. "Subject to such conditions and limitations as may be prescribed, an appellate

court shall have power;

- a. to determine a case finally;
- b. to remand a case;
- c. to frame issues and refer them for trial;
- d. to take additional evidence or to require the evidence to be taken;
- e. to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."

19. The principles which guide a first Appellate Court were summarized in the case of *Selle & Another -vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at P.126 as follows:

"... Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the

evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”

20. In the case of Kapsiran Clan -vs- Kasagur Clan [2018] eKLR the summarized the applicable principles as follows:
- a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. In reconsidering and re-evaluating the evidence, the first appellate Court must bear in mind and give due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses testify before her; and
 - c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.
21. Turning to the first issue, the ownership of the suit property has not been contested before the Court. Indeed, the Plaintiff has presented a copy of the title deed to the suit property, demonstrating that they are the lawful and absolute registered proprietors of the land with indefeasible rights, interests, and title vested under the law. These are supported by the provisions of Sections 24, 25, and 26 of the Land Registration Act, No. 3 of 2012.
22. Undoubtedly, it is not in dispute that the Respondents encroached and/or trespassed on the Appellant’s property as held by the trial court. Section 3 of the Trespass Act provides that;
- “(1) 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.
- (2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”
23. Thus, trespass is an intrusion by an individual into the land of another person who possesses and owns it.

24. The Court of Appeal in *Kenya Power & Lighting Company Limited -vs- Fleetwood Enterprises Limited* [2017] eKLR and stated that,
- “Trespass is proved as in this case, the affected party such as the respondent need not prove that it suffered any damages or loss as a result so as to be awarded damages. The court is under the circumstances bound to award damages, of course, depending on the facts of each case.”
25. Section 13(7) (c) & (d) of the Environment and Land Court Act No.19 of 2011 grants this Court the power to award damages. In the case of *Livingstone ...Vs...Rawyards Coal Co. (1880) 5 App Cases 25*, where Lord Blackburn stated as follows; -
- “that sum of money which will put the injured party in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation.”
26. In assessing the damages payable, the Court will consider, among other factors, the size and location of the property and the length of time that the trespass has occurred. If there is damage to the property, then that would influence the amount of damages.
27. In the present suit, the Appellant sought an award of general and aggravated damages for the encroachment and wastage of the suit land. The Appellant alleged that it had suffered specific and aggravated damages due to the reduction in capital value of the suit plot, inconvenience, loss of building materials on the plot, loss of income as the tenants residing on the suit plot moved out, and the cost of repairing the sewer line and the plot to make it usable again.
28. It therefore follows that the trial court erred in refusing to award damages to the Appellant after **finding that the Respondents had encroached on its property.**
29. In the case of **Hostler - VS - Green Park Development Co. 986 S. W 2d 500 (No. App. 1999)** the Court held;
- “The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the

value of the plaintiff's property immediately after the trespass or the costs of restoration, whichever is less See *Hostler - VS - Green Park Development Co.* 986 S. W 2d 500 (No. App. 1999).

30. The Halsbury's Laws of England, Third Edition vol. II, defines nominal damages as follows:

"388. Where a plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom, or fails to prove that he has; or although the plaintiff has sustained actual damage, the damage arises not from the defendant's wrongful act, but from the conduct of the plaintiff himself; or the plaintiff is not concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are called nominal... Thus in actions for breach of contract nominal damages are recoverable although no actual damage can be proved".

31. In *Kinakie Co-operative Society v Green Hotel* (1988) KLR 242, cited in the case of *Peter Umbuku Muyaka v Henry Sitati Mmbasu* [2018] eKLR, the Court of Appeal held that; where damages are uncertain and cannot be precisely quantified, the court may need to assess damages using some conventional standard. However, if a specific loss is to be compensated and the party was given an opportunity to prove the loss but failed to do so, they cannot be awarded more than nominal damages - See *Nyamogo & Nyamogo Advocates v Barclays Bank of Kenya Limited* (2015) eKLR.

32. In *Nakuru Industries Limited -vs- S S Mehta & Sons* [2016] eKLR where the court faced such a similar situation it was held as follows:

"A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff's land and conduct some excavation. For this reason, I award the defendant damages in the amount of Kshs. 500,000/= (five hundred thousand

only) plus interest and costs of this suit from the date of this judgment until payment in full.”

33. In the case of Willesden Investments Limited vs. Kenya Hotel Properties Limited NBI H.C.C. NO. 367 of 2000, the court stated that;

“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that Kshs. 10, 000, 000/= is a reasonable award for general damages”.

34. The Appellant did not specify the value of the suit property before and after the alleged trespass. The Appellant did not assist the court regarding the amount or costs involved in restoring the land. As determined by the trial court, the Respondents trespassed on the Appellant’s property. According to the Amended Complaint, the trespass began in June 2016. It was only after the court issued an injunction on 7/9/2016 that the Respondents were restrained from further trespassing on the property.

35. From the aforementioned decisions, the court must consider the value of the land both before and after the trespass. Although the Appellant submitted a Valuation Report, it did not specify the land's value prior to and following the trespass, which would assist the Court in determining general damages.

36. Notwithstanding the absence of the valuation report showing the land's value before and after the trespass, trespass is actionable per se. The Court finds that a sum of Kshs.1,000,000/= is reasonable in the circumstances.

37. The Appellant also sought an award of aggravated damages. Exemplary and aggravated damages are granted at the discretion of the court. In East African Court of Appeal in the case of Obongo and Another -vs- Municipal Council of Kisumu (1971) EA 91, the Court of Appeal stated:

“Exemplary and punitive damages are appropriate in two classes of cases; oppressive, arbitrary, or unconstitutional action by the servants

of the government and conduct by a defendant calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff....

It might also be argued that aggravated damages would have been more appropriate than exemplary. The distinction is not always easy to see and is to some extent an unreal one. It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of are regarded as still being essentially compensatory in nature.”

38. In the present case, the Respondents constructed a road that traversed the subject property used to transport heavy materials on their trucks. They damaged the mains sewer line, causing foul effluent to drain onto the property. Based on the Respondents' conduct, I award a sum of Kshs. 500,000/= as aggravated damages.

39. The Appellant also claimed special damages of Kshs. 7,916,444/=. The specifics include loss of rental income for 10 months amounting to Kshs. 2,500,000/=:, loss of building materials valued at Kshs. 1,300,000/=:, and the cost of repairing the sewer line at Kshs. 4,116,444/=:.

40. The law on specific damages is well spelt out. Special damages must not only be specifically pleaded but must be strictly proved. In the case of Hahn -Vs- Singh (1985) KLR 716, the Court of Appeal held that: -
“special damages must not only be specifically claimed (pleaded) but must also be strictly provedfor they are not the direct natural or probable consequence of the act complained of and many not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

41. In Total (Kenya) Limited formally Caltex Oil (Kenya) Ltd - vs- Janevans Ltd (2015) eKLR the court insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is

not enough for a party to provide pro forma invoices issued by a third party. See also the case of Arthur K. Apungu -vs- Justice Limited (2023) eKLR.

42. In the present case, the Plaintiff should have provided receipts confirming that payments were made. The Appellant, in his submissions, argues that the claimed special damages are as outlined in the valuation report. In the case of Andrew Mwori Kasaya -vs- Kenya Bus Services Limited [2021] KEHC 9511 (KLR), the court stated that special damages must not only be specifically pleaded but also strictly proved; they should list the alleged loss and furnish supporting evidence.
43. Starting with the first claim under this head, the Appellant asserts a loss of rent for 10 months, amounting to Kshs. 2,500,000/=. The court has reviewed the Tenancy Agreement attached to the Valuation Report; the rent payable is a monthly sum of Kshs. 250,000/= along with an equivalent deposit. The tenancy commenced on 1/8/2016 for a period of 2 years. As of 5/9/2016, when the Appellant filed the suit, the rent due should have been Kshs. 250,000/=. However, the Appellant has not provided any evidence of rent payments. Neither a termination notice nor a complaint letter regarding the premises' untenability has been produced. Without such evidence, the court cannot determine the existence of the tenancy or when it was terminated. Therefore, the court has no grounds to award the alleged loss of rental income.
44. The Appellant also claimed a sum of Kshs. 1,300,000/= for the loss of building materials valued at Kshs. 1,300,000/=. From the record of appeal, the receipts on page 81, Invoice No. 1214 dated 1/9/2016, are similar to those on page 82. The receipt covers payment for the lorries of sand and fencing poles at a total of Kshs. 820,000/= in cash. Since the receipts on pages 81 and 82 are the same, the court can only award one. Therefore, the court awards a sum of Kshs. 820,000/= under this claim.
45. Under special damages, the Appellant also claimed a sum of Kshs. 4,116,444/= as the cost of repairing the sewer line. However, the Appellant did not produce receipts to substantiate such payment. There is no contract from the contractor who carried out the repairs, nor any

Bill of Quantities or approvals by Nairobi County for the alleged sewer line repairs. Without such evidence, the court has no basis to award the amount claimed as special damages.

Whether the Appeal is merited

46. Based on the above reasoning, this appeal succeeds. The Court hereby sets aside the trial court's finding on damages, in the manner set out hereinabove. Consequently, the Appellant is hereby awarded damages as follows:

- a. General damages in the sum of Kshs. 1, 000,000/=
- b. Aggravated damages in the sum of Kshs. 500,000/=
- c. Special Damages in the sum of Kshs. 820,000/=.
- d. The Appellant shall have costs of the suit and interest on (a), (b) and (c) above at court rates from the date of this judgment until payment in full.
- e. The Appellant shall also have the costs of the appeal.

47. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5TH DAY OF MARCH 2026 VIA MICROSOFT TEAMS.

**J G KEMEI
JUDGE**

Delivered online in the presence of;

- 1. N/A for Appellant**
- 2. Mr. Bwire H/B for Ms. Sang for Respondents**
- 3. C/A - Ms. Yvette Njoroge**