



Kenya Electricity Transmission Company v Mugah (Environment and Land Appeal E062 of 2025) [2026] KEELC 1212 (KLR) (26 February 2026) (Judgment)

Neutral citation: [2026] KEELC 1212 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E062 OF 2025
JO MBOYA, J
FEBRUARY 26, 2026**

BETWEEN

KENYA ELECTRICITY TRANSMISSION COMPANY APPELLANT

AND

PAUL MURUNGAH MUGAH RESPONDENT

(Being an appeal against the judgment of the Chief Magistrate Court Kenya at Meru Honourable J M Njoroge [C M] delivered on 6th August 2025 in ELC Case No. E096 of 2023)

JUDGMENT

1. What constitutes trespass has been subject of various court decisions. In the case of Doshi v Chemutut & 7 others [2025] KECA 776 (KLR); the Court of Appeal underscored the ingredients /elements that must be proven to establish trespass. The court stated thus:

“Trespass, as stated by this Court in the case of Charles Ogejo Ochieng v Geoffrey Okumu [1995] KECA 169 (KLR), is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. As for the ingredients of trespass, the Court in William Kamunge Gakui v Eustace Gitonga Gakui (Civil Appeal 16 of 2013) [2014] KECA 39 (KLR) stated that trespass is a violation of the right to possession, and that a plaintiff must prove that he has the right to immediate and exclusive possession of the land.”

2. The Respondent herein approached the lower court vide Meru CMCELC No. 96 of 2023 [herein after referred to as the original suit] and wherein the Respondent contended thus: The same is the registered owner of LR No. Kiirua/Nkando/6473; the said parcel of land is a subdivision of Kiirua/Nkando/1075; the Appellant has since entered upon and trespassed onto the suit property; the actions and activities of the Appellant constitutes trespass; the Respondent has suffered loss/harm/damages;



the Respondent is entitled to an order of permanent injunction; or an order of compensation for loss of user of the suit property.

3. The Appellant [who was the defendant in the lower court] duly entered appearance and filed a statement of defence dated 18.01.2024 and wherein the Appellant raised various issues. The issues raised by the Appellant are: the Appellant had entered into and executed a way leave agreement with one Veronicah Wanjuki; Veronica Wanjuki was the registered owner of Kiirua/Nkando/1075 [herein referred to as the original parcel of land]; the Appellant paid the requisite compensation to Veronicah Wanjuki; the compensation was received by the Respondent herein on behalf of Veronicah Wanjuki; Veronicah Wanjuki was/is the mother of the Respondent; the suit property is a subdivision of the original parcel of land; the suit property comprises of the portion which was the subject of the way leave Agreement; the suit before the lower court is intended to accrue unjust enrichment; and the suit in the lower court does not disclose any reasonable cause of action.
4. The suit in the lower court was heard and disposed of vide judgment rendered on 06.08.2025 and wherein the learned Chief Magistrate [HON. J. N. Njoroge] found and held that the Respondent had established /proved his claim to the requisite standard. To this end, the learned chief magistrate proceeded to and awarded in favour of the Respondent the sum of Kshs. 2,000,000/= only on account of loss of user of the suit property. The court also awarded costs and interests to the Respondent.
5. It is the said Judgment and the consequential decree, which has aggrieved the Appellant and thus provoking the subject appeal. The appeal is premised on the memorandum of appeal dated the 28.05.2025. The grounds underpinning the appeal are as hereunder:
 - i. That the Learned Trial Magistrate erred in law and fact by failing to appreciate the provisions of Section 28 of the Land Registration Act on overriding interests and coming to an erroneous conclusion that the Appellant's easement was breach of the Respondent's ownership rights.
 - ii. That the Learned Trial Magistrate erred in law and fact by awarding the Respondent one hundred percent [100%] compensation of the land value contrary to the provisions of section 1a48[1] of the Land Act and the Appellants duly approved compensation policy.
 - iii. That the Learned Trial Magistrates erred in law and fact in disregarding the Appellant's evidence and the Respondent's admission that the previous owner of the Kiirua/Nkando/1075 [suit property] Ms. Veronica Wanjiku, had previously been compensated the sum of Kshs. 130,452.000 for loss of limited use of land nonetheless proceeded without any basis to award the Respondent and additional, Kshs. 2,000,000.00 for Kiirua/Nkando/1075 which is subdivision of the suit property, thereby resulting in double compensation and unjust enrichment.
 - iv. That the Trial Magistrate erred in law by relying on valuation report obtained in 2023 long after compensation for the easement had been done in 2015 hence disregarding the express provisions of Rule 3 & 5 of the Land [Assessment of just compensation] Rules on factors to be considered in the assessment of compensation and factors not to be considered in the determination of an award.
 - v. That the Learned Trial Magistrate erred in law and fact by overlooking or disregarding the Appellant's evidence in opposition to the Respondent 's



claim, the law together with submissions and decided cases thus shifting the burden of proof to the Appellant's contrary to Section 106B of the Evidence Act.

- vi. That the Learned Trial Magistrate erred in law and fact in wholly relying on the Respondent's evidence, without being sufficiently pleaded or sufficient proof adduced thereto and further allowing inadmissible photographic evidence to be produced contrary to Section 106B of the Evidence Act.
6. The subject appeal came up for directions on 25.11.2025, whereupon the advocate for the Appellant intimated to the court that same had filed and served the record of appeal. In addition, learned counsel posited that the record of appeal was complete. To this end, learned counsel sought directions on the hearing and disposal of the appeal. Moreover, counsel proposed to have the appeal canvassed by way of written submissions.
7. With the concurrence of learned counsel for the Respondent, the court proceeded to and issued directions concerning the hearing and disposal of the appeal. The directions were thus: The appeal shall be heard before one judge sitting at Meru; the appeal shall be canvassed by way of written submissions; the Appellant shall file written submissions within 14 days from the date of directions; the Respondent shall be at liberty to file written submissions within 14 days from the date of service; and the Appellant shall have leave to file and serve rejoinder submissions [if any] and same to be filed and served within 7 days from the date of service.
8. The Appellant filed written submissions dated the 27.01.2026 and wherein the Appellant has highlighted three key issues. The issues highlighted by the Appellant are: Whether the trial court erred in fact and in law in concluding that the Appellant's easement was a breach of the Respondent's ownership rights; whether the trial court erred in fact and in law in awarding Kshs. 2,000,000/= only to the Respondents; and whether the trial court erred in fact and in law in overlooking/disregarding the Appellant's evidence in opposition to the Respondent's claim and by shifting the burden of proof to the Appellant.
9. Learned counsel for the Appellant thereafter canvassed the foregoing issues and contended that the Appellant herein had entered into and executed a way leaves agreement with Veronica Wanjuki [the Respondent's mother] over and in respect of a portion of the original parcel of land. In addition, it was submitted that the Appellant proceeded to and paid the agreed sum to Veronica Wanjuki. Moreover, it was submitted that the said compensation was indeed received by the Respondent herein albeit on behalf of his mother.
10. Additionally, learned counsel for the Appellant has submitted that the entry into and execution of the way leaves agreements bound the portion of the original parcel of land and hence same constituted an easement. Furthermore, it was submitted that the easement attaches to and runs with the designated land.
11. It was the further submission by the learned counsel for the Appellant that the original parcel of land was subsequently subdivided culminating of inter alia the suit property. Nevertheless, it was contended that despite the subdivision, the easement which had been created on the basis of the way leaves agreement remained in existence and in situ. Moreover, it was submitted that the suit property falls within the segments/area which was the subject of the easement.
12. Arising from the foregoing, it was submitted that the actions by and on behalf of the Appellant did not amount to trespass. Furthermore, it was submitted that the Respondent did not prove or establish the contention pertaining to and concerning trespass. Simply put, learned counsel for the Appellant



- has submitted that the judgment of the trial court was premised/anchored on misapprehension and misconception of the totality of the evidence on record.
13. Secondly, learned counsel for the Appellant has submitted that the claim for loss of user/compensation, which was sought by the Respondent, is in the nature of liquidated/special damages. In this regard, it has been submitted that the said claim could not be awarded in the absence of the requisite pleadings. To this end, it has been submitted that the award of Kshs. 2,000,000/= only, in favor of the Respondent was contrary to the established principles governing liquidated claims.
 14. Learned counsel for the Appellant has thereafter cited and referenced various decisions inter alia: Ramji and 2 others versus Kenya Power and Lighting Company Limited [2023] KEELC 407; Hahn versus Signh 1985 KECA; Wasike versus Nzoia Sugar Company Limited; Diamond Trust Bank Limited and 2 others [2023]KEELRC; Kenya Electricity Transmission Company Limited versus James Kinoti M’Twerando [2018] KEHC and Kenya Electricity Transmission Company Limited versus Malicha [2023] KEELC 71.
 15. Flowing from the foregoing, learned counsel for the Appellant has invited the court to find and hold that the appeal before hand is meritorious and thus same ought to be allowed. In particular, the court has been implored to set aside the judgment of the trial court and to dismiss the Respondent’s suit in the lower court. The Appellant has also sought costs of the appeal and costs in the lower court.
 16. The Respondent filed written submissions dated the 13.012.2026 and wherein the Respondent has highlighted and raised two [2] key issues. The issues highlighted by the Respondent are: Whether the appeal herein is meritorious and ought to be allowed; and whether the orders sought by the Appellant are warranted in the circumstances.
 17. Learned counsel for the Respondent has thereafter submitted that even though the Appellant had entered into and executed a way leaves agreement with Veronica Wanjuki, the said agreement only touched on and concerned LR No. Kiirua/Nkando/1075. In addition, it was submitted that despite having the way leave over the said parcel of land, the Appellant herein veered off and entered upon the suit property. The entry upon the suit property was contended to constitute trespass and thus the judgment of the lower court is well grounded.
 18. Secondly, it has been submitted that insofar as the actions or activities of the Appellant were not authorized, same therefore constituted a violation of the Respondent’s property rights over and in respect of the suit property. To this end, learned counsel for the Respondent has submitted that the Respondent was therefore entitled to compensation. Moreover, it has been submitted that the award of Kshs. 2,000,000/= only, was based on the valuation report, which was tendered and produced before the court.
 19. Additionally, it has been submitted that the valuation report was never challenged and therefore same constituted a suitable guide towards the assessment and award of compensation. Counsel has thereafter cited and referenced the decision in the case of Zinj Limited versus Attorney General and 3 others [2019] KECA 894.
 20. From the foregoing submissions, learned counsel for the Respondent has invited the court to find and hold that the Learned Trial Magistrate correctly appraised the evidence on record; and arrived at correct conclusions. The court has been implored to find and hold that the appeal beforehand is meritless and deserves to be dismissed. The court has been invited to dismiss the appeal; affirm the judgment and decree of the lower court; and to award costs to the Respondent.
 21. Having reviewed the record of appeal; the pleadings that were filed by/on behalf of the parties; the evidence tendered [both oral and documentary] and upon consideration of the written submissions



on record, three [3] issues crystalize for consideration and determination the issues are: Whether the Respondent established /proved the plea of trespass onto the suit property or otherwise; whether the award of Kshs. 2,000,000/= on account of loss of user was lawful; and whether the said award constitutes unjust enrichment on the part of the Respondent or otherwise.

22. What is before me is a first appeal. By virtue of being a first appeal, I have the mandate or jurisdiction to subject the evidence on record to fresh and exhaustive scrutiny, review, evaluation and analysis in an endeavor to discern whether the findings and conclusion arrived at by the trial court are sound and well grounded. Moreover, it is instructive to underscore that this court is at liberty to arrive at an independent conclusion and to depart from the findings and conclusions of the trial court where apposite.
23. Nevertheless, it is instructive to underscore that even though this court is seized of the authority to depart from the findings and conclusion of the trial court, it suffices to state that such departure can only be undertaken where it is proven/established that the conclusions of the trial court are based on no evidence; based on misapprehension of the evidence on record; are perverse to the evidence on record or where it is demonstrably shown that there is an error of principle which vitiates the findings/ conclusion arrived at. Absent proof of the said element, the 1st appellate court is called upon to defer to the factual finding[s] and conclusion of the trial court.
24. The jurisdictional remit of the first appellate court has been the subject of various court decisions. In the case of Kenya Urban Roads Authority & another v Belgo Holdings Limited [2025] KECA 764 (KLR), the Court of Appeal stated as hereunder

‘We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement. This position is anchored in section 78 of the *Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions.

These provisions have been underscored in numerous decisions of the Superior Courts among them *Peters v Sunday Post Limited* [1958] EA 424, where the predecessor to this Court expressed itself as follows: “Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide.

But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial



Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...

Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”

25. The Respondent herein is the one who approached the lower court contending that the Appellant had entered upon and trespassed onto a portion of the suit property. The Respondent posited that the portion that had been trespassed onto constitute[s] and forms part of the suit property belonging to and registered in his name. Moreover, the Respondent contended that the actions by the Appellant were neither authorized nor consented to by himself. Simply put, the Respondent posited that the Appellant's actions were illegal and thus constituted trespass.
26. On its part, the Appellant contended that same had entered into and executed a way leaves agreement with one Veronica Wanjuki, who is the mother of the Respondent. Furthermore, it was contended that the way leaves agreement was executed over and in respect of a portion of LR No. Kiirua/Nkando/1075. In addition, it was posited that the portion that was affected by the way leaves measured 0.6212 acres.
27. Additionally, the Appellant contended that Veronica Wanjuki was duly compensated. Notably, the evidence of compensation was acknowledged by the Respondent.
28. It was equally contended that the original property, namely; Kiirua/Nkando/1075 was subsequently subdivided culminating into the creation of inter alia the suit property. Nevertheless, the Appellant maintained that the portion which was affected by the way leaves falls within what now constitute[s] the suit property. The Respondent however, denied the said position.
29. Insofar as the Respondent contended that the Appellant had trespassed onto the suit property and that the suit property, was not affected by the way leave, it was incumbent upon the Respondent to tender



evidence and demonstrate that the upon the subdivision of the original parcel of land, the portion that was impacted upon; or affected by the way leaves fell elsewhere, and not on the suit property. To my mind, the Respondent was enjoined to tender a surveyor's report to demonstrate the ground location of the portion of the original parcel of land affected by the easement vis a viz the ground position of the suit property.

30. It is instructive to note that no surveyors report was tendered and or produced by the Respondent. In any event, and when the Learned Trial Magistrate was faced with the stalemate as to whether or not the act of trespass had been proven, same resorted to shifting the burden of proof.
31. The Learned Chief Magistrate is on record stating that the Appellant herein ought to have [sic] called the contractor to adduce evidence; and contradict the assertion that same had not entered onto the Respondent's land.
32. The Learned Chief Magistrate stated thus:

“ the defendant on the other hand, did not avail evidence to contradict the plaintiff's position by placing evidence that shows that their contractors adhered to the easement agreement and that after the pylon line fell, why they shifted the same to the plaintiff's parcel of land. The defendant did not provide evidence to contradict the facts in [sic] in the fresh excavation or show that they were not on the plaintiff's land. The defendant ought to have called their contractor or the representatives who would have been best suited to contradict the plaintiff's case as they were the ones carrying out the works at the site. [emphasis added].
33. What I hear the Learned Chief Magistrate to be saying is that the Appellant herein ought to have proved or established that the portion where its contractor was undertaking the construction / activities complained of, fell within the area impacted/covered by the easement agreement; and that the same [Appellant] had not trespassed onto the suit property.
34. In my humble view, the burden of proving that the portion of land where the the pylon line was being erected fell outside the area covered by the easement [wayleave agreement] and lay on the Respondent's Land. Simply put, it is the Respondent who was making the assertion. The Respondent was called upon to prove the assertion. Simply put, the Respondent bore the burden/obligation of proving the fact. Instructively, the Respondent had to discharge the evidential burden of proof, before the Appellant could be called upon to rebut.
35. It is settled law that the burden of proof lays with the claimant. In respect of the suit before the lower court, the Respondent was the claimant. He was therefore obligated to discharge the burden. The Appellant, as the Defendant could not be called upon to rebut the evidence before the evidential burden of proof was discharged.
36. In the case of *Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] KESC 66 (KLR), the Supreme Court discussed the burden and standard of proof in civil matters. Moreover, the apex court also ventured forward to highlight the manner in which the burden of proof is discharged by the duty bearer.
37. The apex court stated as hereunder:
 49. “ Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”



50. This Court in *Raila Odinga & others v Independent Electoral & Boundaries Commission & others*, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms: "...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."
51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st Respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st Respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st Respondent."]
38. The manner in which the burden of proof is to be discharged and by whom, was also highlighted in the case of *James Muniu Mucheru versus National Bank of Kenya Limited* [2019] eKLR. The court of appeal stated thus:

On matters evidence, Madan, JA (as he then was) in *CMC Aviation Ltd v. Crusair Ltd (No1)* [1987] KLR 103 stated: "...Proof is the foundation of evidence. As stated in the definition of "evidence" in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven...."

18. The *Evidence Act* is clear enough upon whom the burden of proof lies. Section 107 provides as follows:

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person."

Section 109 of the same Act further provides:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact lie on any particular person."

19. In *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347, this Court held that the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.
20. In that regard, before a trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities, the court must be satisfied that the plaintiff has adduced some credible and believable evidence which can stand in the absence of rebuttal evidence by the defendant. The plaintiff must adduce evidence, which, in the absence of rebuttal evidence by



the defendant convinces the court that on a balance of probabilities proves the claim.

39. The Respondent knew that the Appellant had entered into and executed a wayleave agreement with his mother. The way leaves agreement affected a portion of LR No. Kiirua/Nkando/1075 before same was subdivided. The original parcel was thereafter subdivided. The suit property is indeed a subdivision of the original parcel. The Respondent ought to have shown that the portion which was impacted on by the way leave did not fall on the suit property. This could only have been done on the basis of a surveyor's report.
40. Sadly, nor surveyors report was tendered. The court was therefore left in wonderland. The court could not proceed on the basis of supposition and hypothesis; and come to the conclusion that trespass had been proven.
41. On my part, I find and hold that no evidence was tendered to prove trespass. In any event, it is not lost on me that for as long as the wayleaves agreement [easement] exist, the Appellant is deemed to have the authority to pass the pylon line on the affected area. The existence of easement negates the plea of trespass. I so find.
42. Regarding the second issue, it is important to highlight that the Respondent sought compensation of the land. In addition, the Respondent posited that the quantum of compensation was to be determined by the court. The trial court indeed proceeded to and determined the quantum of compensation by awarding the sum of Kshs. 2,000,000/= only, [sic] on account of loss of use.
43. It suffices to state that what is contended to be compensation for the land or for loss of use of the land, is something that was ascertainable and quantifiable, prior to and before filing of the suit. In any event, there is no gainsaying that the Respondent thereafter retained a valuer and who prepared a valuation report. The valuation report returned a value of Kshs. 2,000,000/= only.
44. To my mind, it was incumbent upon the Respondent to the specifically plead and thereafter particularize the compensation [if at all] that was payable. The claim in question was liquidated/special in nature. The claim was not one of general damages. It was not one that was subject to the discretion of the court. The damages in question were not at large. Same were known and ascertainable beforehand.
45. Insofar as the claim for compensation for the value of land; or loss of user was liquidated in nature, the learned chief magistrate could not award the sum of Kshs. 2,000,000/= only, bearing in mind that same had neither been pleaded nor particularized.
46. The award of Kshs. 2,000,000/= only was therefore made in vacuum and in contravention of the established position of the law that guide award of liquidated damages. Suffice it to state that the position of the Law in this regard is trite; established and hackneyed.
47. In the case of Superior Homes (Kenya) PLC v Water Resources Authority & 9 others [2024] KECA 1102 (KLR), the Court of Appeal revisited the principles that guide liquidated and special damages. The court reiterated that no award on account of liquated damages or special damages can arise until and unless same has been pleaded; particularized; and thereafter specially proved.
48. The court stated thus:
 73. It is a basic principle that, before a court can award special damages, those damages must be specially pleaded and strictly proved. In Ouma v. Nairobi City Council [1976] KLR 207, Chesoni, J. (As he then was) held as follows:



“Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence.” The authors of *McGregor on Damages* (10th Edition), Para. 1498 explain why special damages must be specially pleaded, as follows:

“Where the precise amount of particular item of damages has become clear before the trial, either because it has already occurred and so become crystallised, or because it can be measured with complete accuracy, the exact loss must be pleaded as special damages”. Similarly, in *Banque Indosuez v. D.J. Lowe & Co. Ltd.* [2006] 2 KLR 208, this Court held as follows: “It is simply not enough for the Respondent to pluck figures from the air and throw them in the face of the court and expect them to be awarded. It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct and natural or probable consequences of the act complained of and may not be inferred from the act.”

74. When the law requires special damages to be specially pleaded, it means that those damages must be stated with certainty and particularity in the plaint or petition. If the damages are not tabulated in the plaint or petition, the party claiming them must apply to amend the plaint or petition to include them. Such party cannot purport to specially plead special damages in a subsequent affidavit. The reason for this is plain to see.

In *Esso Petroleum Co. Ltd v. Southport Corporation* [1956] AC 218, Lord Normand explained that: “The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his evidence to the issue disclosed by them.” And, in *Gandy v. Caspar Air Charters Ltd* [1956] 23 EACA, 139, the predecessor of this Court held that: “the object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given.”

49. The compensation of land or the loss of user [whichever the case] was a claim in the nature of liquidated damages. The sum claimable was ascertainable and quantifiable. The said sum ought to have been ascertained and thereafter pleaded. In any event, the Respondent was at liberty to amend his plaint. However, and taking into account that liquidated claim was never pleaded, the award was therefore misconceived.
50. Turning to the last issue, I wish to state that even though the learned chief magistrate [sic] awarded compensation in the sum of Kshs. 2,000,000/= to the Respondent, no order was made to divest the Respondent of ownership or title to the suit property. The bottom line is that the Respondent is deemed to have received compensation for the land and yet the Respondent remained with the same land. To my mind, the impugned judgment brought forth double compensation and unjust enrichment. The situation beforehand cannot be countenanced or allowed to stand.



51. What amounts to unjust enrichment was highlighted in the case of Standard Chartered Financial Services Limited v Manchester Outfitters (Suiting Division) Limited Now Called King Woolen Mills Limited & 2 others [2025] KESC 68 (KLR). The supreme court stated thus:

In Chase International Investment Corporation and Another v Laxman Keshra and 3 others [1978] KECA 7 (KLR), Madan, Wambuzi (as they then were) & Law, JJA, Madan, JA, citing with approval, Goff and Jones in their treatise, Law of Restitution (page 11), made the point that: “Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment. There are many circumstances in which a defendant may find himself in possession of a benefit which, in justice, he should restore to the plaintiff. Obvious examples are where the plaintiff has himself conferred the benefit on the defendant through mistake or compulsion. To allow the defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff’s expense, and this, subject to certain defined limits, the law will not allow ... The principle of unjust enrichment presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff’s expense; and thirdly, that it would be unjust to allow him to retain the benefit”.

52. Without belaboring the point, the judgment of the trial court, if left standing, would surely amount to unjust enrichment on the part of the Respondent. Equity frowns upon such unjust enrichment.

Conclusion

53. From the analysis contained in the body of the Judgement, I have found and held that the Respondent [who was the plaintiff in the lower court] did not establish trespass. On the contrary, evidence abound that the impugned acts were premised/predicated on the existence of the way leaves agreement. Furthermore, it is common ground that easement attaches to and runs with the land, irrespective of the subdivision.
54. Additionally, it is also apparent that the award of the sum of Kshs. 2,000,000/= only, on account of compensation of land; or loss of user, was made in vacuum. Such an award can only be granted subject to the necessary pleadings and upon proof in the conventional manner.
55. Similarly, there is no gainsaying that the compensation which was [sic] awarded, while the Respondent remained with the title of the suit property amounted to and constituted unjust enrichment.
56. In the premises, I hold the view that sufficient basis has been establish to warrant departing from the findings; holdings; and conclusion of the trial court. I respectfully depart; and come to the conclusion that the impugned Judgement is colored with and vitiated by errors of principles.

Final orders:

57. The final orders that commend themselves to the court are:
- i. The Appeal be and is hereby allowed.
 - ii. The Judgment of the learned trial court dated the 06.08.2025 and the consequential decree be and are hereby set aside.
 - iii. In lieu thereof, an order be and is hereby made dismissing the Respondent’s suit vide Meru CMC ELC No. E096 of 2023.
 - iv. Costs of the Appeal be and are hereby awarded to the Appellant.



- v. Costs of the suit/proceedings in the lower court be and are hereby awarded to the Appellant.
- vi. The costs in terms of clause [iv] and [v] above shall be agreed upon and in default be taxed/assessed in the conventional manner.

58. Before concluding on the Judgment, it is important to recall that this court issued an order of stay of execution of the decree pending the hearing and determination of the appeal. The order of stay was conditional to the decretal sum being deposited in an escrow account in the names of the advocates for the parties. Now that the appeal has been determined, the order of stay stands discharged/vacated. Furthermore, the monies in the escrow account shall be released to the Appellant.

59. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF FEBRUARY, 2026.

OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].

JUDGE

In the presence of:

Naserian : Court Assistant

Mr. Kichwen for the Appellant

Mrs. Mutegi for the Respondent

