

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ELCLC No. E003 OF 2025

JOSIAH ONYANCHA
..... **PLAINTIFF**

VERSUS

IRENE OMBOGA
1ST DEFENDANT

PEUTER NYAKUNDI
2ND DEFENDANT

THOMAS NYAMWEMBE
3RD DEFENDANT

JUDGMENT

1. Proceedings in this matter commenced in the Environment and Land Court at Kisii when the Plaintiff filed Plaint dated 19th August 2024. The matter was later transferred to this Court, hence its current case number.
2. The Plaintiff averred in the Plaint that he was the registered proprietor of parcel of land number Nyaribari Chache/B/B/Boburia/6924 (the suit property) and that the Defendants who were carrying out construction in an adjoining parcel had trespassed into the suit property, erected timber posts, damaged his fence and property, allowed debris and dirt to escape into the suit property, curtailed his free movement and denied him the right to a clean environment.

3. The Plaintiff therefore prayed for judgment against the Defendants jointly and severally for:

- a. Special Damages of Kes. 236,670*
- b. General Damages for Trespass*
- c. General Damages for Nuisance*
- d. General damages for infringing on the Plaintiff's right to a clean environment*
- e. General damages for infringing on the Plaintiff's right to free movement on his land*
- f. General Damages for annoyance and mental torture*
- g. Cost of the suit*
- h. Permanent Injunction from trespassing into the Plaintiff's Parcel of Land*
- i. Permanent Injunction from allowing debris, dirt and falling objects from their construction activities to escape into the Plaintiff's Parcel of Land*
- j. Interest at Court rates on (a) (b) (c) (d) (e) (f) & (g) above.*

4. The Defendants filed Statement of Defence dated 12th September 2024 through which they admitted undertaking construction on an adjoining parcel but denied the other averments in the Plaint. They prayed that the suit be dismissed with costs.

5. At the hearing, the Plaintiff testified as PW1. He adopted his witness statements dated 19th August 2024 and 14th October 2024 and produced copies of the documents listed as item number 1 to 9 in his list of documents dated 19th August 2024 as well as copies of the documents listed as item number 1 and 2 in his further list of documents dated 14th October 2024, as his exhibits.
6. He stated in the statements that he was the registered proprietor of the suit property and that on 26th April 2024, the Defendants who were carrying out construction in an adjoining parcel trespassed into the suit property, erected timber posts, damaged his kei-apple fence and chain-link fence and that he reported the matter at Kisii Central Police Station under OB No. 34 on 28th April 2024.
7. He added that the Defendants continued with the trespass despite the report to the police and even allowed debris and dirt from their construction activities to escape into the suit property, curtailed his free movement and denied him the right to a clean environment. That the Defendants damaged his roofs and endangered his safety and that of his family. He added that he wrote to the Defendants a demand letter on 3rd May 2024 through his advocates, that he tabulated special damages at KShs 236,670 and that the Defendants continued to allow debris to escape into the suit property even after the filing of this case.

8. The Plaintiff went on to testify that he had lived on the suit property for over twenty-six years since he bought it, that the Defendants had tormented him for over twenty years and that he had not had a good relationship with the First Defendant. He denied that the First Defendant constructed for him a permanent toilet and conceded that he stopped them from constructing a ladder on his side for purposes of plastering the wall.
9. He also stated that he obtained the details of the special damages from a hardware shop and that he purchased the suit before the First Defendant bought hers. That upon acquiring her land, the First Defendant started claiming that he had encroached on her land and that as a result, the Land Registrar visited the plots and found that there was no encroachment.
10. The Plaintiffs' case was then closed.
11. The Second Defendant testified as DW1 and adopted his witness statement which he filed on 12th September 2025. He stated in the statement that he dealt with building and construction and that he worked with the Third Defendant. That in November 2023, the First Defendant who was his client instructed him to erect a concrete wall between her property and the suit property and also to build a pit latrine that had already been dug. That after completing the wall, he started working on the pit latrine and since the Plaintiff had

complained about storm water, he dug a trench and laid pipes to control the storm water.

12. He further stated that the Plaintiff and the First Defendant had agreed that the First Defendant was to purchase materials to be used in both the concrete wall and pit latrine and further that a pole would be erected on the Plaintiff's plot to help erect ladders to be used during plastering and painting of the storey building. That before plastering, he made sure that cartons were laid on the roof of the pit latrine that been constructed for the Plaintiff by the First Defendant, to protect it from debris.

13. He also stated that after plastering, the First Defendant instructed him to do an extension of her storey house and that when he started the construction, the Plaintiff started complaining that DW1 was supposed to leave some inches from the boundary and then forbade them from stepping on the suit property. That he kept on working using the ladder that was supported by the pole erected on the suit property and that he did not step on the suit property after the warning.

14. DW1 went on to state that while construction was ongoing, he received a message from the Plaintiff on 1st May 2024 informing him that the Plaintiff had reported a case of malicious damage to property at Kisii Central Police Station to the effect that DW1 and his workers including the Third Defendant had trespassed into the suit property and destroyed

the Plaintiff's kei-apple and chain-link fence. He added that the allegations were false as the chain-link wire was removed by the Plaintiff after he had erected the wall and toilet while the kei-apple fence was cut from the Plaintiff's side while DW1 was building the extension. That police officers visited the site on 10th April 2024 and confirmed that the allegations were false.

15. In his oral testimony, DW1 stated that they erected a net to trap the debris, but the net alone could not stop everything and that water, for example, could go through. During cross examination, DW1 severally refused to answer questions put to him by Plaintiff's counsel. Upon an application by Plaintiff's counsel, the Court warned DW1 to co-operate but there was still no change on his part.

16. He stated that there was an oral agreement between the Plaintiff and the First Defendant's family allowing them to access the Plaintiff's compound and that they did not construct on the boundary but left space that allowed debris to fall on the First Defendant's side. He added that no dirty water escaped from the First Defendant's side.

17. The Defence case was then closed.

18. Directions were thereafter given that parties file and exchange written submissions. The Plaintiff filed submissions dated 14th October 2024 while the Defendants filed submissions dated 23rd January 2026.

19. The Plaintiff's Counsel submitted that during cross examination, the Defendants' witness was asked questions by the Plaintiff's Advocate that meant to elicit a yes or no response only. He stated that the Defendants' witness despite being cautioned by the Court severally, took no heed and deliberately responded to all questions posed in a manner that did not elicit a yes or no response.
20. Counsel submitted that the witness in cross-examination only answers the questions he was asked as held by the Court of Appeal in **Ephantus Mwangi another v Duncan Wambugu 1984 KECA54 (KLR) (CIVIL APPEAL NO. 77 OF 1982)** as the object of cross-examination is to test the witness's veracity.
21. Counsel submitted that the Plaintiff led evidence and established a continued trespass to his land and once a trespass to land is established, it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages as held in **Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited another 2013 KEHC 6408 (KLR)** .
22. Counsel further submitted that the Plaintiff proved special damages of KShs 236,670 and urged the Court to award KShs 3,000,000 as general damages for trespass, KShs 500,000 as general damages for nuisance, KShs 300,000 as general damages for violation of his right to a clean, safe and healthy

environment, KShs 300,000 as general damages for violation of his right to free movement on his land and KShs 1,000,000 as general damages for annoyance and mental torture. He further urged the Court to grant the permanent injunctions sought and costs of the suit.

23. On her part, Counsel for the Defendants submitted that having analysed the entire plaint and the reliefs sought, although there appeared to be a mistake between the Plaintiff and the Defendants, the claim was better addressed through mediation. That when things go wrong, the best approach is to communicate about it instead of rushing to court and wasting judicial time.

24. Counsel further submitted that the Plaintiff's case was actuated by malice together with jealousy and a desire for unjust enrichment. She contended that special damages were not proven and that the receipts could be from a different construction elsewhere. On the issue of injunction, counsel submitted that there was nothing for the court to injunct. She submitted that the Plaintiff had not proved his case and urged the Court to dismiss it with costs.

25. I have carefully considered the pleadings, the evidence and the submissions. It is not disputed that the Plaintiff is the proprietor of the suit property and that the First Defendant owns and was undertaking construction work on an adjoining parcel. The parties have been neighbours for a long time. The

construction in issue had the potential of causing debris to fall on the suit property, hence the admission by the Defence witness that netting was erected and that the Plaintiff's adjoining roof was covered with carton papers to guard against that eventuality. Further, it is manifest from Defence testimony that a pole was erected on the suit property to support ladders which were used during plastering and painting. The issues for determination are whether trespass has been established and whether the reliefs sought should issue.

26. Trespass is defined in the 10th Edition of **Black's Law Dictionary** as an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.

27. In **Charles Ogejo Ochieng vs. Geoffrey Okumu [1995] KECA 169 KLR**, the Court of Appeal described trespass thus:

Trespass 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.

28. The Court of Appeal restated the position in **Doshi v Chemutut & 7 others (Civil Appeal E020 of 2023) [2025] KECA 776 (KLR) (9 May 2025) (Judgment)** as follows:

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.

29. As the registered proprietor of the suit property, there is no dispute that the Plaintiff is entitled to exclusive possession thereof. As noted earlier, the Defendants admitted that a pole was erected on the suit property to support ladders which were used during plastering and painting. The question that arises is whether the entry to erect the pole was permitted by the Plaintiff. The Plaintiff asserts that there was no permission. The Defence contends that access was permitted. I am inclined to believe the Plaintiff. The Defence witness was unreliable and non-cooperative in his testimony.

30. Furthermore, I note that the Defence witness stated that the Plaintiff forbade them from stepping on the suit property, that he continued working above the suit property using the ladder that was supported by the pole erected on the suit property and that he did not step on the suit property after the warning. All that goes to show that there was no consent and that any notion of consent was clearly removed through the warning.

31. Trespass to land is actionable *per se*. The Court of Appeal restated the principles in **Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited [2017] KECA 358 (KLR)** thus:

It is trite law and as correctly submitted by counsel for the respondent that trespass to land is an actionable tort per se and proof of damage is not necessary or required. In other words, where trespass is proved as in this case, the affected party such as the respondent need not prove that it suffered any damage 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. See Simiyu v Sinino [1985] eKLR and Obadiah K. Macharia v Kenya Power and Lighting Company Limited.

32. The Court of Appeal distilled the principles applicable to assessment of quantum of damages for trespass in **Kenya Power & Lighting Company Ltd v Ringera & 2 others [2022] KECA 104 (KLR)** as follows:

i) Harlburys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner's land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.

ii) Duncan Nderitu Ndegwa vs. Kenya Pipeline Company limited & Another [2013] eKLR - damages payable for trespass are the amount of

diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.

iii) Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.

33. The Plaintiff has urged the Court to award KShs 3,000,000 as general damages for trespass. I note from the photographs that were produced that debris fell on the suit property. The quantum proposed by the Plaintiff is however on the higher side. Beyond the debris falling, no actual damage has been demonstrated. The activities complained of took place from 26th April 2024 and the suit was filed about four months later. Having regard to the circumstances and doing the best that I can, I am persuaded that an award of KShs 250,000 is reasonable under this heading.

34. The Plaintiff has claimed KShs 236,670 being special damages. The law is that special damages must be specifically pleaded and strictly proved with a degree of certainty and particularity. See **Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR.**

35. A reading of paragraph 14 of the plaint reveals that although it is headed “particulars of special damages,” what is narrated is a list of what is claimed to have been damaged but without specific quantum attached to each item. The sum of KShs 236,670 is included as a block figure. The purported receipt that was produced does not add up to the figure of KShs 236,670 and worse still, is dated 13th February 2024 which is two months before the pleaded date of trespass. I find and hold that special damages have not been proven.

36. The Plaintiff has also claimed general damages for nuisance and for annoyance and mental torture. The claim under the heads of nuisance and annoyance and mental torture arise from the same circumstances as those in support of the tort of trespass. I am not persuaded that I should award damages under those heads having awarded damages for trespass. Doing so would amount to double compensation.

37. Regarding the claim for general damages for infringement of right to a clean environment and for infringement of right to free movement on the suit property, I note that **Article 42** of the **Constitution** guarantees the right to a clean and healthy environment while **Article 39** guarantees freedom of movement and residence. Pursuant to **Article 23**, the Court has authority to uphold and enforce the Bill of Rights and in that regard may grant appropriate relief including an order for compensation. Further, under **Article 70**, a person whose

right to a clean and healthy environment has been violated may be granted compensation.

38. In **CMM (Suing as the Next of Friend of and on Behalf of CWM) & 6 others v Standard Group & 4 others [2023] KESC 68 (KLR)**, the Supreme Court held as follows regarding assessment of quantum for compensation for violation of constitutional rights:

In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum will afford the victim adequate redress to vindicate the victim's constitutional right. Assessment of the right quantum for compensation will take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing in mind any aggravating features. We stress that the purpose of constitutional relief of an award of compensation is not necessarily intended to punish the violator, but only to vindicate the right of the victim. ...

Therefore, once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the petitioner may not present

evidence of any loss or damage suffered as a result of the violation. For these reasons, it can be said that the approach in awarding damages or compensation in constitutional rights violation cases is different from that in tortious claims.

39. The Plaintiff sought KShs 300,000 as general damages for violation of his right to a clean, safe and healthy environment. He has demonstrated that debris fell on the suit property and that the source of the said contamination was the Defendants' construction activity. Nevertheless, I find that the proposed quantum of KShs 300,000 is on the higher side. Given the circumstances and the totality of the case, I consider KShs 50,000 as appropriate as general damages for violation of right to a clean, safe and healthy environment. Accordingly, I award the said sum.

40. Regarding the issue of violation of right to free movement, I note that it has not been shown in what manner the Plaintiff's freedom of movement was curtailed. It has not been shown that he was in any way confined without possibility of moving within and outside the suit property. The claim under that head is not proven.

41. The Plaintiff also claimed permanent injunction to restrain further trespass and falling debris due to construction activities. The Plaintiff has established his case in that regard, and I will therefore grant a permanent injunction.

42. In view of the foregoing, I enter judgment against the Defendants jointly and severally as follows:

- a) KShs 250,000 (Two Hundred Fifty Thousand) being general damages for trespass.**
- b) KShs 50,000 (Fifty Thousand) being general damages for violation right to a clean, safe and healthy environment.**
- c) Permanent injunction restraining the Defendants from trespassing into the parcel of land known as Nyaribari Cache/B/B/Boburia/6924 and/or allowing debris and falling objects to escape from their construction activities into the Plaintiff's said parcel of land.**
- d) Costs of the suit.**
- e) Interest on a, b and d above.**

Dated, signed, and delivered at Nyamira, this 25th day of March 2026.

**D. O. OHUNGO
JUDGE**

Delivered in the presence of:

Ms Chenger for the Plaintiff

Ms Ondande for the Defendants

Court Assistant: B Kerubo