



Biwott v Cheboswony, Ward Administrator Kapcherop & 4 others (Environment and Land Appeal E016 of 2024) [2026] KEELC 1844 (KLR) (19 March 2026) (Judgment)

Neutral citation: [2026] KEELC 1844 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E016 OF 2024
L WAITHAKA, J
MARCH 19, 2026**

BETWEEN

MJ GENERAL RTD BENJAMIN BIWOTT APPELLANT

AND

**JOHN CHEBOSWONY, WARD ADMINISTRATOR KAPCHEROP 1ST
RESPONDENT**

REGINA KIBOR, ROAD SUPERVISOR-KAPCHEROP 2ND RESPONDENT

HON DAVID KIPKETER, MCA SENGWER 3RD RESPONDENT

**GEOFFREY KIMAIYO, CO ROADS & INFRASTRUCTURE ELGEYO
MARAkwET COUNTY 4TH RESPONDENT**

**COUNTY GOVERNMENT OF ELGEYO MARAKWET COUNTY 5TH
RESPONDENT**

*(Being an appeal against the judgment of Hon. Gladys Adhiambo
delivered on 31st October, 2024 in Iten MCELC 27 of 2022)*

JUDGMENT

Introduction

1. By a plaint dated 23rd May, 2022 and amended on 12th September 2023, the appellant instituted a suit in the lower court to wit Iten SPMC ELC Case No.10 of 2022 (later given number 27 of 2022) seeking judgment against the respondents, herein for:-
 - i. A declaratory order that the defendant's actions complained of were illegal, null and void and for payment of Kshs. 800,000/- being compensation for the destruction of the appellant's



family house and subsistence residential charges as averred in paragraphs 9, 9A, 9B till payment in full;

- ii. Damages
 - iii. Costs and interest
 - iv. Any other or further relief as this Honourable Court may deem expedient to grant.
2. As can be discerned from the averments/contentions in the amended plead, the appellant's suit was premised on the grounds that the respondents in a meeting held on 21st April 2021, resolved that a road at Kapcherop Centre, be expanded that is made wider by (9 metres instead of 6 metres) as it was in the cadastral map for Cherengany/Kapcherop registration Section; that the decision of the respondents resulted in destruction of the appellant's boundary and main house valued at Kshs.800,000/- situated on the appellant's land parcel number Cherangany/Kapcherop/1203 and that as a result of the destruction of the house, the appellant had to hire alternative shelter at Kshs.15,000/- per month.
 3. The particulars of damage allegedly suffered by the appellant are given in paragraph 9B of the amended plead, thus:-
 - a. The roofing structure was dismantled completely;
 - b. The iron sheets were removed and some of them are missing;
 - c. The electronic conduits and cables were damaged;
 - d. The doors and windows were damaged subjecting the plaintiff to forceful eviction and loss of business namely picking tea on time.
 4. The 1st, 2nd, 4th and 5th respondents filed a statement of defence, dated 13th December, 2022 in which vide paragraphs 6, 7 and 8 they acknowledge that the 5th respondent, in conjunction with its officers and members of public, carried out the impugned road construction and expansion exercise leading to destruction of the appellant's house. However, the 1st, 2nd, 4th and 5th respondents claim/contend that the portion of the appellant's property that was destroyed during the road construction and expansion exercise had encroached on the public road, a fact which the appellant was aware of.
 5. Terming the appellant's claim unfounded in law, the 1st, 2nd, 4th and 5th urged the court to dismiss the appellant's suit with costs.
 6. The 3rd respondent filed a statement of defence dated 21st November 2022, in which he denied the allegations leveled against him.
 7. The appellant filed a reply to defence, dated 13th December 2022, in which he reiterated the allegation made against the 3rd respondent.
 8. When the case came up for hearing, the appellant called 2 witnesses. PW1 Major retired Benjamin Biwott from Kapcherop, identified himself as the owner of land parcel No. Cherangany/Kapcherop/1203 on which parcel his home is situated. PW1 testified that on 3rd February 2022, he received a call from one John Cheruiyot Arusei informing him that his home had been destroyed by the County Government of Elgeyo Marakwet for road expansion. He stated that in the year 1987 when he acquired the land, there was road provision and beacons had been put on his land. He explained that there was an alleged Kapcherop Trading Centre Draft Development plan which had proposed that the road be expanded along his boundary and that of Kapcherop Catholic Church from the original 6 metres to 9 metres. He stated that the process of expanding the road was hurriedly and very speedily done and several individuals were affected including his neighbour Pius Yano who filed a constitutional



petition and obtained judgment in his favour over the changed road expansion. He stated that the County Government encroached and destroyed his home valued at Kshs.800,000 during the road expansion exercise although from the original survey map, his house was 2.5 metres away from the 6 metres road.

9. When he enquired from the ward administrator why they carried out the road expansion on his land when it was far from the road, the administrator told him that the decision to expand the road was made by residents of the area. It was his contention that the County Government did not follow the procedure for compulsory acquisition, there was no public participation and he was not issued with a notice. He stated that members of public do not have an automatic right to make decisions touching on private property.
10. In support of his case, he produced the following documents:
 - 1) The title deed of land No Cheranganyi/Kapcherop/1203 as P exhibit 1;
 - 2) The certificate of official search for the said parcel of land as P exhibit 2;
 - 3) Surveyors report as P exhibit 3;
 - 4) The valuers report as P exhibit 4
 - 5) Cadastral Map as P exhibit 5.
11. On cross examination, he reiterated his earlier testimony and admitted that the valuation report does not indicate that he was living on the land. He admitted that the land in question is not matrimonial property and that he did not avail receipts to prove that he pays Kshs.15,000 per month as rent. He also admitted that the photos he produced do not show machineries from the County Government and a certificate of electronic evidence was not availed.
12. On further cross examination, he admitted that the valuation report shows the open market value of the land but it does not show the value of the damage; that the report only talks of iron sheets because his house was constructed in 1989 using wood and was demolished on 3rd February, 2022. He confirmed that he did not report the matter and that he did not witness the incident or file a certificate of beacons.
13. PW2 John Cheruiyot Arusei, identified himself as a caretaker of the plaintiff. He stated that on 1st February, 2022, Mr Korir the area village elder told him that there was a road which would be constructed to join the old road adjacent to Mr Biwott's home and other plots. He stated that when the construction of the new road began, the village elder told him to remove the fence as it would end up being covered by soil making it difficult to remove the posts there after. He removed the posts as directed after consulting Mr Biwott and the road construction went on. When they reached near Mr Biwott's house and they were about to pull down the house, he pleaded with them to allow him disconnect the electricity and remove the household items from the house but they refused and proceeded to pull down the house. In the process, the living room and two bedrooms were damaged. After pulling down the plaintiff's house which was the only one demolished, they left without pulling down the neighbour's house on the south which he found to be malicious and discriminatory. As a result of the destruction, they were robbed of their shelter and had to look for alternative shelter.
14. On cross examination, he stated that he does not know the owner of the caterpillar that demolished the house or the registration number but was categorical that it is the County Government that damaged the plaintiff's house.
15. When the matter came up for hearing of the defendants' case, all the defendants opted not to testify.



16. At close of hearing, parties filed submissions.
17. Upon considering the case urged before her, the learned trial magistrate determined that the appellant had not proved his case on a balance of probabilities and dismissed it with costs to the respondents. In arriving at the above decision, she inter alia stated/held;

“It is noted that the plaintiff did not witness as his house was allegedly being demolished as such, he cannot tell who participated in the alleged demolition of the house. The PW2 who alleged that he was an employee of the plaintiff and who alleged that he witnessed the demolition could not state the registration number of the caterpillar that allegedly pulled down the house and I noted that at the time of the closure of the plaintiff’s case no nexus had been established between the said caterpillar and any of the defendants herein. Section 107 of the *Evidence Act* provides that;

- 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.

The same position was held by the court in the case of Mohammed Guyo Boru vs Richard Mwilaria Aritho [2022] where the court stated “(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 ...”

The onus was on the plaintiff to prove that all or any of the defendants encroached into land parcel Cherangany/Kapcherop/1203 measuring 0.74 Hectares. Though the land registrar and the county surveyor were crucial witnesses in this case none of the parties appreciated the need to call the said witnesses. The plaintiff produced an alleged surveyors report allegedly prepared on undisclosed date. The maker of the said expert report if at all she/he exists did not appear before court to prove his academic qualifications, explain how he arrived at the conclusion, to prove the authenticity of his report and to be cross-examined. Though the defendants slept on their rights by failing to object to the production of the said surveyor’s report by the plaintiff who could not respond to most questions posed at him regarding the surveyor’s report during cross examination, the plaintiff had an obligation to prove the allegations made in the surveyor’s report and this could have only been proved by an expert more especially the maker of the report. It is noted that at the time of the closure of the plaintiff’s case the plaintiff had not availed a beacon certificate as prove that the same was issued the plaintiff had no idea as to who the members of the road committee were. He did not avail prove that he expended Kshs.15,000 per month as rent as such even if he was to prove that his house was unlawfully damaged, which is not the case, he did not lay a basis for this court to issue orders for compensation in relation to the alleged monthly rent of Kshs.15,000. The plaintiff further admitted that the maker of the valuation report was best placed to explain how the value of the damaged house was arrived at yet he did not appreciate the need to call the valuer to produce his report and be cross examined on the same. Though the plaintiff alleged that it is the 3rd defendant who incited the members of public to do the alleged demolition he did not avail prove of those allegations. I have noted that among the prayers sought by the plaintiff, the plaintiff did not seek any



prayer to do with the court ordering the defendants or any of the defendant to vacate his aforesaid parcel of land neither did he seek orders of declaration that the defendant or any of the defendants encroached into his parcel of land. It is not enough for a party to make allegations in his testimony and to expect the court to rely on those allegations merely because that testimony was not controverted by the defence. The onus remains on the plaintiff to prove his case on a balance of probability. As at this point it has not been proved on a balance of probability that it is the defendants herein who expanded the road, that the defendants encroached into the plaintiff's parcel of land aforesaid in the course expanding the road and that it is the defendants who pulled down the plaintiff's house. Without the plaintiff proving that there was encroachment into her parcel of land the plaintiff's suit cannot stand.....

The plaintiff made allegations and failed to avail the maker of the surveyors and valuation reports which reports were allegedly prepared by experts.....

It is noted that the name of the surveyor who allegedly prepared the survey report was not indicated, she or he did not appear before court to testify, confirm the authenticity of the surveyor's report, explain how he arrived at the conclusion that the corner beacons had been disturbed and be cross examined. The plaintiff tendered allegations which were not proved. It is in view of the foregoing that I hereby find that the plaintiff has failed to prove his case against the 1st, 2nd, 3rd, 4th and 5th defendants on a balance of probability and do hereby dismiss the plaintiff's suit with costs to the said 1st, 2nd, 3rd, 4th and 5th defendant. It is so ordered.”

18. Dissatisfied with the decision of the trial court, the appellant appealed to this court on 27 grounds that can be reduced to three (3) as follows:
 - i. That the learned trial magistrate erred in determining that the appellant had not proved his case against the respondents on a balance of probabilities;
 - ii. That the learned trial magistrate erred by failing to carefully examine the pleadings filed by the parties; and
 - iii. That the learned trial magistrate was biased against the appellant.
19. The appellant prays that the appeal be allowed with costs, the judgment, decree, order or decision of the lower court delivered on the 31st day of October 2024 be set aside, dismissed and/or quashed and that he be awarded costs of the suit in the lower court.
20. Pursuant to directions given on 26th June, 2026 that the appeal would be disposed of by written submissions, the appellant filed submissions on 6th November 2025 and the 1st, 2nd, 4th and 5th respondents filed submissions on 22nd November 2025, which I have read and considered.

Analysis and determination

21. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In



that regard see *Selle & Another vs. Associated Motor Boat Co. Ltd* (1968) E.A 123 and *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988) KLR 348.

22. As pointed out herein above, the appellant's suit/claim was based on the ground that the respondents in a meeting held on 21st April 2021, resolved that a road at Kapcherop Centre be expanded; that is, the road be made wider by (9 metres instead of 6 metres) as was in the cadastral map for Cherengany/Kapcherop registration Section; that the decision of the respondents resulted in destruction of the appellant's boundary and main house valued at Kshs.800,000/- situated on the appellant's land parcel number Cherangany/Kapcherop/1203 and that as a result of the destruction of the house, the appellant had to hire alternative shelter at Kshs.15,000/- per month.
23. The particulars of damage allegedly suffered by the appellant are as listed in paragraph 3 herein above.
24. Upon review of the pleadings filed by the parties, I do find as a fact that the appellant complained about destruction of his property, namely house, by the respondents during a road construction and expansion activity which was being carried out by the 5th respondent and its officers, employees or agents.
25. Whereas the appellant did not adduce evidence capable of identifying the officers of the 5th respondent who carried out and/or authorized the impugned activity, the totality of the evidence adduced by the appellant when considered alongside the averments in paragraphs 6, 7, 8 and 9 of the 1st, 2nd, 4th and 5th respondent's statement of defence, which are in the nature of admissions, leaves this court without doubt that the impugned activity was being carried by the officers, employees and/or agents of the 5th respondent.
26. The appellant produced evidence in the form of a survey report, which evidence the respondents neither objected to its production nor challenged its contents through cross examination.
27. The survey report produced by the appellant, shows that the impugned activity, which the 1st, 2nd, 4th and 5th respondents admitted, resulted in encroachment on the appellant's land and destruction of the appellant's house.
28. The learned trial magistrate erred by disregarding that evidence, when no evidence was adduced by the respondents capable of controverting the evidence adduced by the appellant concerning the alleged encroachment.
29. It is noteworthy that the 1st, 2nd, 4th and the 5th respondents claimed that the house had encroached on a road reserve. The appellant having tendered evidence showing that the destruction was as a result of the road expansion exercise that was being carried by the 5th respondent, the burden shifted to the 5th respondent to prove that the appellant's house had indeed encroached on a road reserve.
30. Even assuming that the appellant's house was erected on a road reserve, the 5th respondent owes a legal duty to the appellant to ensure that his eviction from the suit property was done lawfully. In that regard, see the provisions of sections 152B the *Land Act*, 2012 which provides as follows: -

“An unlawful occupant of private, community or public land shall be evicted in accordance with this Act”.
31. Regarding eviction from public land, Section 152C provides as follows:-

“The National Land Commission shall cause a decision relating to an eviction from public land to be notified to all affected persons, in writing, by notice in the Gazette and in one



newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before eviction.”

32. Section 152F provides for the rights of a person served with an eviction notice, which rights include making an application to court against the notice.
33. Section 152G, on the other hand, provides for mandatory procedures that must be complied with in carrying out evictions.
34. Having determined that the 5th respondent and/or its officers had a legal duty to ensure that the activity it was carrying out that resulted in destruction of the appellant’s property was carried out lawfully, I find and hold that the learned trial magistrate erred in determining that the appellant had not proved his pleaded case, at least against the 5th respondent, when the 1st, 2nd, 4th and 5th respondents had admitted/acknowledged in their pleadings that the impugned activity was carried out by its officers and that it resulted in destruction of the appellant’s house.
35. As to whether the appellant proved the pleaded special damages suffered, I agree with the learned trial magistrate that the evidence adduced by the appellant was incapable of forming the basis of awarding the appellant the pleaded special damages of Kshs.800,000/- or the alleged expenditure of Kshs.15,000/- being monthly house rent.
36. As to whether the appellant was entitled to general damages for trespass to land, although the appellant did not expressly urge a case for trespass to land, I do find that the claim was impleaded and adequately canvassed in the parties submissions.
37. Being of the view that the appellant proved a case for being awarded damages for unlawful encroachment to his property and cognizance that trespass to land is actionable per se, I find that the learned trial magistrate erred by failing to assess the damages payable to the appellant on account of the 5th respondent’s unlawful activities on the appellant’s land and property.
38. Taking into account the circumstances leading to the impugned activity, the conduct of the 5th respondent and/or its officers and the impact thereof on the life and property of the appellant, I assess damages payable to the appellant by the 5th respondent at Kshs. 350,000/-.
39. I do not agree with the defendants’ submissions that because the activities complained of amount to criminal offences, the appellant’s recourse is in criminal prosecution of the culprits. The acts also amounted to trespass to land which, in addition to being a criminal offence, renders the offenders civilly liable.
40. As the appellant has partially succeeded in his appeal, I award him the cost of the appeal and the costs of the suit at the lower court, to be paid by the 5th respondent.
41. The upshot of the foregoing is that the appellant’s appeal has merit and is allowed in the following terms:-
 - i. The judgment delivered by Hon. G. Adhiambo SPM in Iten SPMC ELC Case No.27 of 2022 on 29th October 2024 dismissing the plaintiff/appellant’s suit with costs and any decree or orders issued pursuant thereto is hereby set aside;
 - ii. The judgment delivered by Hon. G. Adhiambo SPM in Iten SPMC ELC Case No.27 of 2022 on 29th October 2024 dismissing the plaintiff/appellant’s suit with costs is hereby substituted with a judgment determining that the plaintiff/appellant proved his case against the 5th defendant on a balance of probabilities.



- iii. I award the plaintiff/appellant general damages for trespass to his land and destruction of his property, house, assessed at Kshs.350,000/-;
- iv. I also award the plaintiff/appellant costs of the suit in the lower court and costs of the appeal to be paid by the 5th respondent.

42. Orders accordingly.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT BUSIA THIS 19TH DAY OF MARCH, 2026 IN THE ABSENCE OF THE PARTIES

L. N. WAITHAKA

JUDGE

Court Assistant; Tracy

