REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KISII

ELC LAND APPEAL NO. E028 OF 2024

COUNTY GOVERNMENT OF KISII ....APPELLANT

Versus

LUCY OKENYURI NYAKEYO
(Suing on behalf of SAMWEL NYAKEYO AYEGA .... RESPONDENT
(Being an appeal from the judgment of the Magistrate's Court at Kisii dated 25th June 2024 delivered by Hon. Stellah Abuya CM in MCELC NO. 135 OF 2021).

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JUDGMENT

1. Being dissatisfied with the decision of the trial magistrate delivered on 25.6.2024, the Appellant lodged this appeal on 17th July 2024. It appealed on the following grounds: -
   a) **THAT the learned magistrate erred in law and in fact in deciding the case in favour of the Respondent against the weight of evidence on record.**
   b) **THAT the learned magistrate erred in law and in fact by failing to appreciate the principles of legal representation as laid down**

in the Law of Succession and in doing so arrived at a wrong decision?

c) **THAT the learned magistrate erred in fact and in law and further misdirected herself by finding that the Appellant trespassed into the Respondent's land contrary to the evidence on record.**

d) **THAT the learned magistrate erred in law and in fact by failing to find that the Appellant was lawfully implementing a Part Development Plan at Suneka Town which is far away from the suit land thereby arriving on a prejudicial decision against the Appellant.**

e) **THAT the learned magistrate erred in fact and in law and misdirected herself by holding that the Appellant's witnesses admitted to destroying the Respondent's property contrary to evidence on record.**

f) **THAT the learned magistrate erred in law and in fact in failing to take into account material facts and in taking into account matters that ought not to be considered, thereby reaching a wrong decision in law.**

g) **THAT the learned magistrate erred in law and approach by failing to take into consideration the Appellant's submissions and make a proper finding thereon.**

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2. Directions were taken for prosecution of the appeal by way of written submissions. The Appellant filed written submissions dated 26.01.2026 and the Respondent's submissions are dated 10th February 2026. In their submissions, the Appellant gave a summary of the evidence tendered by their witnesses in the court below. It argues inter alia that there was a clear error in the judgment as the Respondent failed to specify the damage, plead and prove it. It relies on holding in the case of **British American Insurance Company (K) Ltd =vs= Gamaliel Fauza Anderi, NBI Milimani Civil Appeal No. E247 of 2022**.

3. The Appellant submits that the learned magistrate misapplied the law since DW1 and DW2 had given evidence as expert witnesses in accordance with Section 33 of the Evidence Act, Cap 80. That their evidence regarding the plaintiff (Respondent) encroaching on public land was completely ignored. In support of this submission, they cited the case of **Azzuri Ltd =vs= Pink Properties Ltd, Malindi Civil App No. 93 of 2017, and MBS HCC Constitutional Petitions No. 159 of 2018 and 201 of 2019** (consolidated).

4. The Appellant also raised the issue of legal representation under the provisions of the Law of Succession Act. That the Respondent did not provide material evidence authorising her to represent her deceased father. Additionally, she did not present a registered power of attorney as required under Section 116 (1) of the Registered Land Act. They cited the

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case of **Alfred Njau =vs= City Council of Nairobi (1983) KLR 655** to submit that the Respondent lacked locus standi. It concluded the submissions by urging the court to allow the appeal and grant the orders sought.

5. The Respondent, on her part, submitted that prior to the filing of the suit, the deceased had given her power of attorney to file the suit on his behalf. The power of attorney was registered, and an entry indicating this was contained in the official search produced in evidence. The Respondent states that she also obtained Letters Ad Litem after the demise of her father, which document is found on page 8 of the supplementary record dated 24.6.2026.

6. Regarding the compensation, the Respondent submits that the evidence on record affirms the suit land was freehold and that properties on it were destroyed to make way for the construction of urban roads within Suneka Township. She states that the valuation report by the Appellant confirmed the destruction and valued the damage at Kshs. 5,847,000. Therefore, there was no error on the part of the learned trial magistrate. She urged the Court to dismiss the appeal with costs.

ANALYSIS AND DETERMINATION:

7. Having examined the grounds relied upon in the Appeal and the submissions made by both parties, I identify the following three issues,

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which were also discussed in the submissions, for the determination of the dispute thus:

1) **The capacity of the Respondent to sustain the suit / Appeal;**
2) **Whether or not the evidence of Appellant's witnesses was considered;**
3) **Whether there was proof of special damages and merit to award general damages;**
4) **If the appeal is merited;**
5) **Who bears the costs?**

8. It is submitted by the Appellant and correctly so that, this being a first appeal, this court is mandated to review the evidence adduced before the trial court in arriving at her conclusion. However, I must do so with caution, taking note that I did not have the benefit of seeing the demeanour of the witnesses that testified. This principle was emphasised in the case of **Adana v Ogora (Civil Appeal E006 of 2021) [2025] KEHC 4446 (KLR) (7 April 2025) (Judgment) where Magare J stated thus;**

"This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the

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appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first-hand."

Locus standi of Respondent;

9. The Appellant challenges the competency of the Respondent to lodge the claim the subject of this appeal. The competency is challenged on two fronts that;

   i. **There was no valid registered power of attorney in favour of the Respondent;**

   ii. **She did not obtain letters of administration following the demise of her father (the donor of the power of attorney) to continue the suit.**

10. It is a trite law that a power of attorney over immovable property must be registered. The Respondent submitted that they provided both documents in question. I have perused the record of appeal which at page 264 contains a form dated 9th December 2019 presenting the application for registration of a power of attorney. Page 265 contains the receipt dated 9.12.2019 for payment of the registration.

11. In the proceedings in the court below, during cross-examination, the Respondent referred to an official search for the suit property having the entries of the power of attorney. She clarified that she sued on behalf of her father using the Power of Attorney before he died. I was not able to

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trace the physical copy of the special power of attorney from the record except the evidence of its presentation for registration.

12. I also looked at the impugned judgment and noted that the trial court didn’t address this question of locus standi of the Respondent raised by the Appellant in its submissions. This brings the issue whether the learned trial magistrate erred in not making a finding over the same. I have perused the statement of defence filed on behalf of the Appellant and noted that they did not plead the issue of locus standi of the Respondent. Further, they did not raise the issue in the statement of witnesses filed or in their oral evidence during trial.

13. The Appellant referred to Section **116(1) of the Registered Land Act** Cap 300 (repealed) which strictly provided for the registration of a power of attorney. This law had already been repealed by the time this case was filed hence the section cited does not add strength to the Appellant’s arguments. The operative Act was the Land Registration Act of 2012 which law does not specifically address the issue of registration of a power of attorney.

14. I find provision made under its subsidiary legislation in regulation 18 of the **Land Registration (general) Regulations of 2017** which states thus;

> **“A person who wishes to register specific power of attorney shall present a request to the Registrar in Form LRA 6 set out in the Sixth Schedule.”**

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15. My perusal of the record of appeal finds a certificate of official search at page 9 of the valuation report by Adomag Valuers and Associates. Unfortunately, the search is illegible so I am unable to verify whether there was an entry confirming registration of the special power of attorney sas stated by the Respondent.

16. The burden of proof lay on the Appellant to show that the Power of Attorney used by the Respondent was not registered, in light of her evidence of having presented it for registration and having paid for it. They did not produced the certificate of official search for the suit property as part of their evidence before the learned magistrate.

17. Considering that the locus was substantially raised only in the submissions, which does not permit for pleading of issues, I find no fault on the part of the Magistrate not to have addressed it. Further, no sufficient proof has been made by the Appellant to prove their point.

18. In the course of these proceedings, the Respondent's father died. She obtained letters of administration ad litem dated 25.2.2021. An application to amend the plaint dated 1.3.2021 to introduce her as the legal representative was duly filed and served (contained in the supplementary record of appeal).

19. It appears the application to amend was not opposed and the Plaint was eventually amended. **Section 54 of the Law of Succession Act, Cap 160,** gives power to the High Court to issue a limited grant for any

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specific purpose. In this case, one was issued to the Respondent to continue prosecuting it. Again, the Appellant has not produced evidence that it has challenged the authenticity of the said grant ad litem. In the absence ot such evidence, I find no reason to find that the Respondent is not the legal representative of her father's estate for purposes of this suit.

Whether the evidence of the Appellant was considered:

20. The second point is whether the learned trial magistrate erred in not evaluating the Appellant's evidence on encroachment. The claim before the trial court was that the Appellant on December 2019 commenced construction of a road through the suit parcel of land **Wanjare / Bomarenda /1411** without first acquiring it. On their part, they accused the Respondent of encroaching on an existing road.

21. Under paragraph (d) of the grounds of appeal, the Appellant states;

> **"THAT the learned magistrate erred in law and in fact by failing to find that the Appellant was lawfully implementing a Part Development Plan at Suneka Town which is far away from the suit land thereby arriving on a prejudicial decision against the Appellant."**

22. In this point, the Appellant raises two issues which they felt the magistrate did not consider. First, that they were lawfully implementing the PDP at Suneka Township and second that this implementation was far away from the suit land. By virtue of the provisions of Sections 107 – 109

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of the Evidence Act, it was incumbent on them to prove that the impugned road was constructed as per the PDP and not on the Respondent's land.

23. The Respondent's structures were already existing and it is her case they were built on her freehold title. In disturbing the statusquo, the Appellant argued they were expanding existing roads. According to DW1(Festus Bosire) in his written statement, he said that "***the Plaintiff (Respondent) had illegally encroached onto the road that serves members of the public by erecting structures in the middle of a planned road***."

24. This witness added that it was important to note that it was only the Respondent who was complaining while whereas other affected members of the public are happy with the opening up of the access roads. The Respondent has a right under article 40 of the Constitution to protect her property irrespective whether other members of the public are complaining or not.

25. This court undertook to analyse the evidence of the experts as adduced if they confirmed the Respondent had illegally constructed in the middle of the road. DW1 produced as exhibits documents contained in their list dated 20th January 2020. The list had two documents- **minutes of stakeholders meeting held on 3.6.2019 and a PDP REF KSI/427/2009/010 of Suneka Township**.

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26. The witness had referred to himself as a surveyor working with the department of survey at the appellant’s offices. Therefore, he knew or ought to have known that a survey report showing the ground position of their activities would have been more useful than producing the PDP per se. The evidence of DW2 was that it was their office that prepared the PDP plan produced in evidence. In cross-examination, this expert could not identify where the suit parcel Wanjare/Bomorenda/1411 is and he could not confirm whether or not the road passed through it.

27. In the case of **Kajina Holdings Limited v Kenya National Highways Authority (2024)KEELC 1282 (KLR),** the Court held that notwithstanding the Defendant's statutory mandate to preserve road reserves and demolish structures encroaching thereon, such powers can only be lawfully exercised where encroachment is proved. The Court found that, in the absence of proof of encroachment, the Defendant's actions in entering the suit land and placing demolition marks on the Plaintiffs building were unlawful.

28. In her Judgment, Hon. S. N. Abuya summarised the evidence adduced by the two witnesses called by the Appellant. DW2 said inter alia that “**the road never passed anywhere near the suit being opened, the owner is informed to remove the encroachment but he could not tell if the Respondent was notified.”**

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29. It is true the trial magistrate did not provide any reasons for her conclusion that the Appellant had trespassed onto the Respondent's land. However, having reviewed the evidence presented by the Appellant, I am not convinced to reach a contrary verdict as the trial court.

Award of damages:

30. The third issue raised concerns the award of damages to the Respondent. The Appellant argued that the Respondent failed to specify, plead, and prove the damage. I will examine this point under the two headings of pleading/specifying and proving the damages claimed.

31. In the case of **Coast Bus Service Ltd. v Sisco & Murunga Danii & 3 Others Civil Appeal No. 192 of 1992** (unreported), the Court of Appeal held thus;

"We would restate the position special damages must be pleaded with as much particularity as circumstances pemit and in this connection, it is not enough to simply aver in the plaint as was done in this case that the particulars of special damage were'to be supplied at the the time of the trial if at the time of filing the suit the particulars of special damages are not known with certainty, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only where the particulars of the special damage are pleaded in the plaint

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that a claimant will be allowed to proceed to the strict proof of those particulars. "

32. In answering whether the Respondent pleaded or specified the damages claimed, She stated thus in paragraphs 6, 8 and 11 of the amended plaint suffices, they state as follows:-

"6. The deceased had built on the suit property rental houses which are the plaintiff deceased's father's sole source of income and is dependent on the same for his expensive medication as he suffered stroke, he is diabetic and hypertensive.

8. The 1st Defendant through the 2nd and 3rd Defendant have continued to arbitrarily, without due procedure and unlawfully demolish the developments of the adjacent properties and ten Plaintiff is apprehensive that the development in suit property will be demolished albeit without any form of notice and compensation to the plaintiff who holds a free hold interest in the suit property.

11. The actions of the 1st Defendant through 2nd Defendant and 3rd Defendant constitute a threat and otherwise a violation and/or infringement of the plaintiff's constitutional right to the protection of right to property.

33. Order 2 rule 4 of the Civil Procedure Rules provides thus:

(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release,

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payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

34. In this instance, the Respondent pleaded that her deceased father had built rental houses from which he had been receiving income for his treatment. What she did not specify is the amount of rental income that was being received from the suit premises. Would the non-disclosure of the amount take the Appellant by surprise as stated in **Order 2 rule 4(1)(b)?** I do not think the absence of this specificity on figures only disadvantaged the Appellant taking into consideration that the Respondent had filed and served copies of receipts evidencing rental income.

35. During the hearing, the Respondent produced rental receipts as well as a valuation report which stated the amount of the annual rent received from the demolished buildings. The valuation report produced by the Appellant also confirmed the amount of rental income received which amount was almost equivalent to the figures given by the Respondent. Therefore I also that the special damages claimed were proved.

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36. Was the Respondent entitled to the award of Kshs 7.6 million for the houses/development? Following the demolitions, the Respondent stated that she lost the use of the buildings and suffered a loss of income. In support of her evidence, she produced a valuation report dated 11.12.2019 and receipts which she had issued to the respective tenants on various dates (pages 176-220 of the record of appeal).

37. Additionally, the Respondent produced photographs of the destroyed buildings on page 267 and a truck working on a road on page 266. The Appellant also produced a valuation report which confirmed that the Respondent's structures had been demolished (whether on the road path or otherwise). The Appellant's report also returned a value for the damage.

38. The Appellant referred this court to the case of **Brilani =vs= Gamahel Fauza Anderi** which I find distinguishable from the facts obtaining in this case as it discussed to damages in conversion. The second case of **Andrew Mwoori Kasaya =vs= Kenya Bus services Ltd (2021) KEHC9511 (KLR)** is equally distinguishable as it related to damage arising from a road traffic accident.

39. In this case, the damages awarded comprised both special damages and general damages. The trial court granted Kshs. 7.6 million for the demolished buildings and the land, based on the valuation report submitted as evidence. It was this conclusion that led the Appellant to

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argue that the learned magistrate erred as she disregarded their expert witnesses's evidence.

40. In the valuation report produced by the Appellant (by Joel Ombati Nyamweya), it returned a value for developments damaged at Kshs. 4.5. million plus 675,000 disturbance allowance (calculated at 15% of the value). This report did not return a value for the land, most likely because it was the Appellant's position that the portion of the land was a public road.

41. As stated in the case of **Kemfro Africa Ltd t/a Meru Express Services (1976)** that:-

> **"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."**

42. For this reason, I find that the variance of 7.6 million from 5.175,000 was due to the Appellant's report not including the value of the land. Based on the Respondent's evidence on record, I am unable to conclude whether,

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after the demolition, the road was constructed to pass through her land or not, which would justify her compensation for the land. Consequently, I will vary the award to cover only the demolished buildings and accept the assessment provided by the appellant's valuer of Kshs 5,175,000.

43. The final question is whether there is merit to this appeal and, more specifically, whether the Respondent is entitled to damages awarded if she did not prove the act of trespass. The statement on public participation and the lack of service of notice runs throughout the evidence tendered before the trial court.

44. DW1 stated the road works were being undertaken according to the PDP of Suneka Township. Both witnesses (DW1 and DW2) refer to the public sensitisation done on 3.6.2019. None of them pointed to the trial court a notice served on the Respondent stating that her structures were on public land (the road). None of them identified the plaintiff or the representative of the registered owner who attended this meeting.

45. The Respondent was entitled to notice under Article 47(2) of the Constitution irregardless that these structures had encroached on public land. Article 47 (2) provides that:-

> **" 1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair**
>
> **2). If a right or fundamental freedom of a person has been or is ikely to be adversely affected by administrative action, the**

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person has the right to be given written reasons for the action."

46. The description of the public meeting which took place on 3.6.2019 did not constitute notice, as there were no minutes that those who had been personally made aware and put on notice to remove the offending structures.

47. Therefore, regardless of whether the Respondent did not adduce evidence that the road had encroached on her land, she was entitled to notice before her structures were demolished. She is also entitled to compensation for loss of rent for the period pending the determination of her suit as a result of the actions of the appellant which were carried out without a valid notice.

48. In the result, I uphold the finding of the learned trial magistrate in favour of the Respondent, save for the award on general damages, which has been reduced to Kshs. 5.175,000 for the damaged buildings. The sum of Kshs. 2.5 million awarded as lost rent remains undisturbed. Thus, the appeal succeeds to the extent stated.

49. Since the appeal succeeded to a limited extent, I award costs of the Appeal to the Respondent.

Delivered, Signed and Dated at Kisii this 19th day of March, 2026.

A. OMOLLO

JUDGE

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