

**IN THE COURT OF APPEAL
AT NAKURU**

(CORAM: WARSAME, MATIVO & GACHOKA,

JJ.A.) CIVIL APPEAL NO. E012 OF 2021

BETWEEN

JOSEPH WAGURA NG'ANG'A.....APPELLANT

AND

KENYA POWER AND LIGHTING COMPANY.....RESPONDENT

(An appeal against the judgment and decree of the Environment and Land Court of Kenya at Nyahururu (M.C. Oundo, J.) delivered on 18th January 2018

in

ELC Case No. 24 of 2017)

JUDGMENT OF THE COURT

1. This is a second appeal. We are therefore reminded that our scope is limited to determining matters of law, unless it is shown that the courts below considered matters they should not have considered, failed to consider matters they should have considered, or that, in looking at the entire decision, it is perverse. (See **Otieno, Ragot & Company Advocates vs. National Bank of Kenya Limited** [2020] eKLR).

2. This appeal arose from a dispute filed before the Nyahururu Principal Magistrate's Court in **PMCC No. 70 of 2008**. Vide a plaint dated 18th April 2008, the appellant averred that it was the registered proprietor of all that parcel of land namely **Muhotetu/Melwa/1888** where he continued to reside. In the months of January and February 2007, he contended that the respondent entered upon his land and erected an electricity post and supply lines without his knowledge, consent or authority. In the process, the appellant alleged that the respondent destroyed his trees, barbed wire fence and fencing posts all valued at Kshs. 13,700.00. In his view those actions amounted to trespass. It is those reasons that compelled the appellant to file suit and seek several reliefs against the respondent.
3. In a judgment dated 27th February 2010, the trial magistrate found that the appellant had proved his case on a balance of probabilities. Accordingly, judgment was entered in the sum of Kshs. 213,700.00 together with costs and interest against the respondent. Aggrieved by those findings, the respondent filed **Nyahururu ELCA No. 24 of 2017** (formerly Nakuru HCCA No. 263 of 2010). In a judgment dated 18th January 2018, the learned judge allowed the appeal by setting

aside the award of Kshs. 200,000.00 on general damages. The learned judge held in part as follows:

“36. On the first issue for determination, the appellant has attacked the learned magistrate's findings and holding contending that the trial magistrate had no jurisdiction to decide on any of the issues wherein there was no evidence adduced to support the same. Further, that by so determining on the issues as stated above she went on her own frolic which was a gross misdirection.

37. A look at the Respondent's evidence at page 3-4 of the proceedings wherein he testified that; 'They came back and cut down the trees they had pruned and planted a post Pg 4 they came and removed the post from my shamba'

This evidence that was repeated again in his cross examination.

38. The trial Magistrate in her Judgment however referred (sic) to the single post as 'posts' and went ahead to state that due to the presence of posts on the Respondent's land, the Respondent had been denied of its use of mixed farming since 2006. With due respect to the trial magistrate, this finding that was contrary to the evidence adduced in court and amounted to misdirection.

39. The second and last issue for determination was whether the Respondent was entitled to mesne profits and special damages to the tune of Ksh 200,000/=...

41. Having found that the learned trial Magistrate had made an erroneous estimation on the award of the general damages because she had been influenced by a wrong consideration

and or misdirection on the facts, namely the Appellant's failure to settle the case

out of court and the number of 'posts' that had been erected on the Respondent's land which had denied him the use of mixed farming on the land since 2006, I find justification in interfering with the award.

42. On general damages thereof this court finds that on or about early 2006, the appellant entered onto the Respondent's land No. Muhotetu/Melwa/ 1888 without a letter of consent and erected one distribution post. That this trespass continued until June 2008 when they removed the post.

43. That although the Respondent prayed for mesne profits and damages in his plaint which the learned trial magistrate obliged him, there had been no evidence adduced on the quantum of mesne profits the Respondent was entitled to.

45. Having considered the fact that there was neither evidence adduced at the trial on the amount of mesne profits claimed by the Respondent nor was there evidence on the nature of the suit land or economic activity carried thereon to assist the court on the amount to be awarded for the damages, I find that it would be improper in the circumstance to sustain the award of mesne profits on figures that cannot be substantiated."

4. It is those findings that have provoked the present appeal. The appellant filed his notice of appeal dated 26th January 2018. He also filed his memorandum of appeal dated 12th February 2018 that raised six grounds disputing the findings of the learned judge. We have summarized those grounds as follows: the

learned judge ignored the evidence adduced to justify the award
on mesne profits

as well as the nature of the suit land or economic activity carried thereon adduced by the appellant; the learned judge failed to make a distinction between general damages for trespass and mesne profits; and that the decision of the first appeal court went against the weight of evidence and ignored the appellant's submissions. For those reasons, the appellant prayed that the appeal be allowed by setting aside the judgment of the Environment and Land Court and upholding the decision of the trial court. He further prayed for costs of the appeal.

5. The appeal was canvassed by way of written submissions that were orally highlighted on 2nd February 2026. Learned Counsel Mr. Ojare Peter appeared for the appellant. The respondent was absent in spite of being duly served with the hearing notice. It was however confirmed that it had filed its written submissions.
6. According to the appellant's written submissions, list and bundle of authorities dated 8th October 2024, the issues for determination were two pronged: whether the appellant was entitled to general damages for trespass and who bears the costs of the suit and the two appeals. Submitting on the first issue, learned counsel argued that the award of Kshs. 200,000.00 as general damages for trespass was necessary

as there was diminution in value of the land owing to the damage occasioned by the respondent on the appellant's parcel of land.

7. Additionally, the post and power lines erected by the respondent unlawfully, and without the consent of the appellant, stayed on the parcel of land for approximately two years. Counsel submitted that in the circumstances, it was not clear why the learned judge spoke of mesne profits when the trial court was clear that the award was for general damages. In his view, that was unjustified as it was a clear misapprehension of the law. He urged this Court to allow the appeal with costs. He also prayed for costs of the suit at trial and in the Environment and Land Court.
8. The respondent opposed the appeal. It filed written submissions dated 23rd October 2024. It submitted that from a cursory look at the memorandum of appeal, the same did not satisfy the threshold set out in section 72 (1) of the Civil Procedure Act for failing to raise issues of law. On that ground alone, it prayed that the appeal be dismissed in totality. On the substance of the appeal, the respondent submitted that the learned judge properly reevaluated the evidence and arrived at a correct finding in overturning the findings of the

learned magistrate. Be that as it may, no issues of law had been raised. It prayed that the appeal be dismissed with costs.

9. As stated earlier, our jurisdiction in determining this appeal is limited. The main issue for determination is whether the learned judge arrived at a correct or incorrect finding in setting aside the findings of the learned magistrate by disallowing the award of Kshs. 200,000.00. From the record, it is not disputed that the appellant, **PW1**, is the registered proprietor of all that parcel of land namely **Muhotetu/Melwa/1888**. It is also uncontroverted that sometime in 2006, the respondent erected an electric post on his suit land.
10. Dissatisfied with the actions of the respondent, the appellant wrote a letter dated 30th October 2006 informing it that its actions damaged his trees. In response, the respondent wrote a letter dated 17th November 2006 informing him that they would revert upon conducting their investigations. Instead of reverting however, the respondent returned to the suit land and cut down all the trees therein to erect a post. He therefore complained again vide a letter dated 2nd February 2007. He thereafter lodged a complaint at the respondent's offices located in Nyahururu and later Nakuru.

11. The appellant contended that in June 2008, the respondent removed the post. He was told that he would be compensated vide a letter dated 3rd July 2008 after the suit was filed. The appellant lamented that the post was erected without his consent. For that reason, he prayed for compensation assessed as follows: 93 eucalyptus trees each valued at Kshs. 4,650.00 and three wattle trees each valued at Kshs. 880.00.
12. **PW2** Cecily Muthoni Muriithi, an extension officer working in the Ministry of Agriculture, assessed damage as reported by the appellant. She discovered that there were nine grevillea trees each valued at Kshs. 200.00. She also observed that there were 92 damaged blue gum trees costing Kshs. 50.00 each and three mahogany trees each valued at Kshs. 700.00. She also recorded that there were damaged posts and barbed wire both costing Kshs. 100. She thereafter compiled a report. Later, the appellant complained of further damages which she assessed at Kshs. 150.00 where it was noted that rafters had been felled.
13. In setting aside the award of Kshs. 200,000.00 the learned judge held that it was improper for the learned magistrate to allude to posts when only one electric post had been found. Furthermore, the

appellant was not entitled to mesne profits. The relevant part of the

magistrate's findings are produced as follows:

“The next question on whether any damages were suffered. The plaintiff narrated how the Kenya Power & Lighting Company workers pruned (sic) his trees he went and complained they stopped. Then later they cleared the trees and planted their posts. The plaintiff called an Agricultural Officer who visited the scene and assessed damages and produced a report. Definately (sic) the plaintiff suffered damage. I am not told what he used to do with the land but it is clear he had planted trees on it and he said he had been denied its use since 2006. I believe todote Kenyans like day mix farming their land would have been used for other farming. It is his land. The defendant showed interest in settling but never settled.

I award a sum of Kenya Shillings Two Hundred Thousand (Kshs.200,000/=) as General damages.”

14. While indeed the learned magistrate made reference to posts, we do not think that would be a basis for setting aside general damages for trespass. Those are semantics that do not go to the root of the dispute. After all, it was not denied by the respondent that they did in fact erect a post belonging to them without the permission of the appellant. That action amounted to the tort of trespass. The learned judge erred in her analysis and we find that the trial magistrate correctly analyzed the evidence to arrive at a

just finding.

15. As was seen from the evidence at trial, the respondent indeed reached out to the appellant to compensate him for erecting the post without his consent. It has also been established that the appellant was entitled to an award for general damages for trespass as his evidence was indubitable.
16. With due respect, we do not find any legal or justifiable basis why the learned judge referred to mesne profits when the trial court categorically awarded general damages. We therefore find that the appellant was correctly entitled to an award of general damages for trespass. We reiterate the ruminations of this Court in **Wanyeki vs. Bhudiya & another** [2023] KECA 87 (KLR) that held as follows on damages for trespass:

“It is trite law that trespass to land is actionable per se. Once it is proved the appellant is under no duty to prove that he suffered any specific damage or loss. In other words, where trespass is proved as in this case, the affected party such as the appellant need not prove that he suffered any damage or loss as a result so as to be awarded damages. The court under the circumstances is bound to award damages depending on the facts of each case. See Simiyu vs Sinino. [1985] eKLR.”

- 17.** In claiming for general damages, we have applied the general principle set out by this Court in the case of **Kenya Pipeline**

Company Ltd vs. Ndegwa & another [2023] KECA 226 (KLR)

that held as follows:

“In principle, general damages are a type of compensatory damages, which are granted by a court in a lawsuit to redress loss or damage resulting from another person's wrongdoing. If the plaintiff can prove that the defendant's actions directly led to the loss or damage, the defendant will be ordered to pay damages. The court must then decide how much should be paid in compensation. We need not overemphasize the fact that the quantum of damages on his head depends on many variables on which we need not pronounce ourselves in extenso. Suffice it to observe that quantification or assessment of general damages is subject to the court's discretion, and is not specific or provable. The victim's suffering may be interpreted in different ways depending on the parties and their own interests in the case. In exercise of its discretion, the trial court may consider, among other things, the nature and factual details of the tort or negligence, and recklessness of the party who caused the loss or damage; the loss of enjoyment caused by the injury; and the stress and worry over the particular loss or damage complained of.”

- 18.** Looking at the award given to the appellant, we find that the award of general damages for trespass applied the correct principles in line with the case of **Ken Odoni and 2 Others vs. James Okoth Omburah T/A Okoth Omburah and Company**

Advocates [2013] eKLR and we see no reason to disturb those findings. The Court held:

“We agree that this Court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this Court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge.”

19. Before penning off, we would also wish to reiterate to counsel for the respondent that this Court is not bound by the dictates of the Civil Procedure Act and the Rules thereunder. This Court derives its jurisdiction from the Appellate Jurisdiction Act and the Court of Appeal Rules. Accordingly, the ground raised by the respondent alluding to section 72 (1) of the Civil Procedure Act the must be rejected.
20. We will say no more to state that the ELC misapprehended the evidence and therefore arrived at an erroneous decision. Accordingly, we do not hesitate to find that the present appeal is merited. We hereby set aside the decision of the ELC dated 18th January 2018 and substitute the same with the judgment of the trial court dated 27th July 2020. For avoidance of doubt, trial court judgment dated 27th July 2020 is hereby reinstated in its entirety. We order further

that the appellant shall have the costs in this appeal and those in the ELC.

Dated and Delivered at Nakuru this 25th day of March, 2026.

M. WARSAME

.....
JUDGE OF APPEAL

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR