



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

ELC PETITION NUMBER E001 OF 2023

**IN THE MATTER OF ARTICLES 2, 10, 19, 20, 22 AND 23 OF
THE CONSTITUTION OF KENYA AND LAND REGISTRATION
ACT, 2012**

AND

**IN THE MATTER OF VIOLATION AND THREATENED FURTHER
VIOLATION OF ARTICLES 2, 10, 19, 20, 21, 27, 28, 40, 42,
47 AND 50(1) OF THE CONSTITUTION BY THE COUNTY
GOVERNMENT OF ELGEYO MARAKWET**

AND

**IN THE MATTER OF ABUSE AND MISUSE OF POWER BY THE
COUNTY GOVERNMENT OF ELGEYO MARAKWET**

AND

**IN THE MATTER OF THE COUNTY GOVERNMENT OF ELGEYO
MARAKWET ACT OF TRESPASSING, DEMOLISHING THE
PETITIONER'S BOUNDARY FENCE AND FORCEFULLY
CONSTRUCTING A ROAD FOR PUBLIC USE ON THE
PETITIONER'S PARCEL OF LAND KNOWN AS
CHERANGANY/KAPCHEROP/1300/1174**

AND

**IN THE MATTER OF TRESPASS AND COMPULSORY
ACQUISITION OF THE PETITIONER'S LAND WITHOUT
FOLLOWING DUE PROCESS AND CONTRAVENTION OF THE
CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

= BETWEEN =

PIUS KIPTUM YANO PETITIONER

AND

COUNTY GOVERNMENT

OF ELGEYO MARAKWET RESPONDENT

JUDGMENT

1. By a Petition dated 31st January, 2023 and amended on 30th October 2024, the petitioner instituted the instant suit alleging/claiming that his constitutional and legal rights were violated by the respondent in or about February 2022 by: -

- i) Trespassing on his parcels of land known as Cherangany/Kapcherop/1174 and Cherangany/Kapcherop/1300 (hereinafter referred to as the suit properties);
- ii) Demolishing the perimeter fence in the suit properties thereby exposing his family and him to insecurity and depriving him of his privacy;
- iii) Constructing an access road measuring 9m by 135m on the suit properties; and
- iv) Destroying his crops, mature trees and vegetation.

2. It is the petitioner's case that owing to the respondent's actions and/or omissions complained of, he suffered and continues to suffer loss and damage. The particulars of loss and damage are given in paragraph 17 of the amended petition thus: -
- a) Destruction of perimeter fence;
 - b) Destruction of crops and vegetation;
 - c) Cost of restoration of the suit land to its previous status, being Kshs.3,580,000/;
 - d) Loss of use of the said area of land up to the time restored.
3. The petitioner avers that he did not concede to invasion of his land by the respondent and complains that he was not given an opportunity to be heard before the action complained of was taken by the respondent.
4. It is the petitioner's further pleaded case that owing to the actions of the respondent complained of, he has suffered

mental torture, substantial losses and damage as his perimeter fences were demolished leaving the suit properties exposed for invasion by intruders and animals.

5. For the foregoing reasons, the petitioner seeks judgment against the respondent for: -

- a) A declaration that the action of the respondent complained of is illegal, unconstitutional and amounts to trespass to private land;
- b) A declaration that the respondent is in violation of **Articles 2, 10, 19, 20, 21, 40, 42, 47** and **50(1)** of the Constitution of Kenya 2010 and the Fair Administrative Action Act;
- c) Compensation for the demolished perimeter fence, destroyed crops, fruits, grown trees, use of land; and cost of restoration of the suit properties valued at Kshs.3,580,000/-;
- d) General damages for violation of the petitioner's fundamental rights;
- e) Exemplary and aggravated damages;

- f) A permanent injunction prohibiting the respondent or its employees, servants and agents from ever trespassing into his land or in any manner whatsoever interfering with his properties known as Cherangany/Kapcherop/1174 and Cherangany/Kapcherop/ 1300.
- g) Costs of the suit.

6. In reply and opposition to the suit, the respondent filed the replying affidavits of Regina Kibor, Joan Jepkosgei Cheboswony and Barnabas Kibet all sworn on 14th August 2025, in which it contends that the impugned activities of the respondent were done in public interest and that they were done with the knowledge, permission, consent or authority of the petitioner. The respondent blames the appellant of acting against public interest by interfering with the re-routing or re-designing of the public access road, which was being carried out by it at the behest of the community, including the petitioner.

7. Asserting that the impugned activities were done with the permission or acquiescence of the petitioner, the respondent contends that the petitioner is not entitled to the reliefs sought.
8. The petition was disposed of by *viva voce* evidence.
9. When the suit came up for hearing, the petitioner who testified as PW1, relied on the affidavit he swore in support of the petition, dated 31st January 2023; a further affidavit sworn on 13th March 2023, a further-further affidavit sworn on 5th May 2023 and a supplementary affidavit sworn on 26th July 2025 after they were adopted as his evidence in chief. The petitioners also produced the documents annexed to his affidavits as exhibits in support of his case.
10. The petitioner informed the court that he sued the respondent because it encroached on his land and damaged his land-destroyed his perimeter fence, crops and vegetables; that he incurred costs to restore the suit

property to its previous state, lost use of his land and had been abused by his neighbours and community. The petitioner urged the court to find that the respondent trespassed into his land, to compensate him for the demolished fence, crops, costs of restoration and costs of the suit.

11. In cross examination, the petitioner stated as follows: -

“...I have not encroached on parcel number 1175. I have not been summoned by the area chief to explain how I have encroached on parcel No.1175...I am not aware that parcel No. 1300 is not in the RIM....The access road proposed was not only passing through my land. I have other neighbours whose parcels the road was to pass through. There is a surveyor who visited my land and I objected to him why they wanted to build a public road on my land. It is not true that I initially cooperated; that the graders were being packed in my house; that I was feeding the

drivers and that I had allowed them to remove the fence.

I moved to court immediately the respondent encroached on my land and started grading it to create the road. By this time they had not put murrum...currently there is no murrum.... restoration of the land will only be to return the soil that had been removed.... I never donated land to build the road. If the respondent needed my land they could have approached me and we reach an agreement but not forcefully entering my land to create a road. My objective is not to get compensation from the respondent. I just want my land restored. When the court ordered that my land be restored to it's original state, I engaged the county government and told them to bring the red soil. Instead of bringing the red soil, which is useful to me, they brought 2 lorries of murrum which I could not use. The murrum is still on my land because I cannot plant using it. ...

I do not agree that the respondent would use approximately Kshs.290,000/- to restore my land.... I do not know if I am the only one among my neighbours whose parcels of land were affected by the public road. I have come to court because I am aggrieved because the respondent entered the land forcefully.

I do not have any report from the agricultural officer showing the crops destroyed on my land...I am not aware whether a demand letter was written to the respondent by my advocate before I went to court.”

12. In further cross examination, the petitioner stated as follows:

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“...I took the photographs using my phone model Huawei. I do not have it with me as it got spoilt 2 years ago. Land parcel Cherangany/Kapcherop/1300 belongs to me. I obtained title on 12th January 1990. It is a

subdivision from parcel 1175 which belonged to Kibet Kibiwot. I know William Kibiwot. He is a son of Cherutich Kibiwott and Kibet Kibiwott. They are the ones who subdivided the land..."

13. In re-examination, the petitioner stated as follows: -

"...in my petition my claim is about my parcels 1174 and 1300. In my amended petition, paragraph 4, I gave a history of parcel 1175 and how I obtained my title deed for parcel No. 1300. I occupy parcels 1174 and 1300. I have never been sued that parcel No. 1174 and 1300 do not belong to me. The family of Kibet Kibiwot have never sued me about the land not being mine. I'm surprised to hear that they are claiming the land. In my petition I have disclosed that parcel No. 1300 is not in the map. When the respondent started digging the road I was not aware that it was meant to pass through my land. I realized the road was going to pass through my land

when they entered my land. I was not issued with any notice. We were called to a Barasa for farmers after building of road started and informed about the road. I never allowed/agreed surrendered any portion of my land for construction of the road.

I utilize my land for domestic and commercial farming. I also live there. The road being constructed did not affect my land only. Several other persons were also affected.

My complaint is that I was never consulted and compensated. The fact that others did not complain does not mean I should be quiet....after the respondent entered my land I moved to the High Court in Eldoret and obtained an order of injunction. The suit was then transferred to this court. I pray that the court considers my pleadings and evidence and grants me the orders sought.”

14. Ezra Kipsang Kibet PW2, informed the court that on instructions of the petitioner, he prepared a valuation report in which he estimated the cost of restoring the suit property to the original status as Kshs. 3, 580,000/-. He produced the report as **Pexbt 7**.

15. In cross examination, PW2 *inter alia* stated as follows: -

“The report I have produced ...relates to backfilling of a road....the petitioner could not have continued using the land where the road had been excavated because above the red soil was murrum and no crop could have done well there.”

16. In re-examination PW2 stated as follows: -

“When the petitioner gave me instructions he showed me his 2 titles deeds for parcel 1174 and 1300. For the exercise I was engaged to do, I only needed to be shown the physical boundary and title deed. I did not require RIM. I combined the

cost for the 2 plots because the owner was the same and the works were the same. The petitioner gave me instructions and I carried out the assignment based on my professional skills. What I was preparing was not a survey report and I did not require a surveyor...the estimated valuation of 3.5 million is not exaggerated. There is vegetation on the road which is natural vegetation. The petitioner has not planted anything on the road. The figure in our report is an estimate. At the point of construction there can be a variation of minus 5 or plus 5%.”

17. PW2 further stated that at the point of carrying out the assignment, he found that the respondent had graded the road and cut off the top soil and that they were in the process of putting murrum. PW2 reiterated that his report is based on restoring the land to what it was originally before the road construction exercise started.

18. RW1 Jackson Chepkwong, an employee of the respondent, informed the court that the respondent was upgrading roads in the County and that one of the roads that was being upgraded is Kapcherop-Chepkerengoi road; that the owner of land parcels Cherangany/Kapcherop 1174 and 1300 was complaining that the road was passing through his parcels of land; that they were tasked to visit the two parcels and value the cost of reinstating the suit parcels to their original state after the respondent had graded the road; that they were accompanied by a surveyor to establish boundaries and length of the road and that they found that there was excavation of 1.1m against 7 metre totaling approximately 354 cubic metres.

19. RW1 further informed the court that to back fill the area, they found that there was soil that had been moved but was still lying on the ground and could be used for back filling to the extent of 70% of the materials needed; that they only needed about **Kshs.290, 448/-** to restore 1174 to its original state. With regard to parcel number 1300, RW1

stated that they excluded it because it was not on the Registry Index Map.

20. RW1 told the court that he does not agree with the claim by the petitioner that he would need Kshs.3, 580,000/- to restore the road to its original status because the respondent would have spent Kshs. 2,200,000/- on 2.2 km of road yet the petitioner's area that requires restoration is 135 metres, including parcel number 1300.
21. RW2 Joan Jepkosgei Chebwoswony, an employee of the respondent, relied on several affidavits sworn by her in this case. Her testimony is that the respondent did not enter the petitioner's land forcefully; that the petitioner was made aware that the respondent wanted to construct a road in the area and that a survey was done. According to the RW2, the petitioner gave verbal consent to the project and removed the perimeter fence in his land voluntarily to pave way for construction of the road on the southern side. RW2 stated

that they did not destroy any crops or bring down any trees as alleged by the petitioner.

22. In cross examination, RW2 maintained that the petitioner gave verbal consent to carrying out of the impugned activities and that there was a unanimous agreement to construct the road from the residents of the area.
23. As to whether the petitioner was present when the agreement was reached, RW2 stated that he was not. She further stated that a public participation notice was given but had nothing to prove that fact.
24. RW2 stated that she had a list of the members of the community who attended a public participation meeting after construction of the access road and not before.
25. RW2 admitted that the petitioner did not attend the meeting and acknowledged that the meeting was called after the petitioner had closed the road and filed the instant suit. RW2

conceded that the petitioner's fence was removed by youth and that his land was excavated by a private contractor hired by the respondent.

26. On further cross examination RW2 stated as follows: -

“I am aware that any transaction on land should be in writing. I am also aware that the petitioner did not sign any agreement giving a portion of his land. In all my affidavits I have not attached any plan or map for the road or any minutes on public participation, survey report, EIA report on this road, NLC report, a letter by the respondent showing how much of his land the Respondent needed to use...there is a stream touching on the petitioner's land. By the time the petitioner moved to court we had not put any culverts...I am aware the petitioner reported a case of trespass to the police. All the parcels of land along the road are private properties. The County

Government of Elgeyo Marakwet does not own any land there.”

27. In re-examination RW2 stated as follows: -

“We had not put the culverts because culverts were to be put after the road was graded. We had not gone that far with this road. The contract to construct the road was given to a private contractor. When we were served with the court order we informed the contractor but later learnt that he had sold the contract to another contractor who was not aware of the court order and that’s how/why grading of the road continued. All roads done by the Respondent use internal experts. We have never done EIR on our roads. The land where the road is built belongs to private individuals who donated the land for public use and the county government did the construction. The petitioner is one of the residents who donated land voluntarily because

the existing road was very steep and residents were having difficulty ferrying the sick and produce through the road. No written agreement has been entered into with any of the residents who donated land. If the petitioner had raised an objection at the stage of pegging, we would not have proceeded with the construction.

What exists on Mr. Kiptanui's land is a stream not a river. The stream passes through parcel 1174 and diverts to other parcels of land. There is no stream on parcel number 1300. The culverts were to be put over the stream between parcel number 1174 and the neighbouring land. The perimeter fence was removed by the youth in the presence of the petitioner and his wife and daughter. The youth were not rowdy....the fence that was removed was on the boundary of parcel number 1300."

28. RW3 Barnabas Kibet's, testimony is in *pari materia* to that of RW2 in that he states that the petitioner gave consent to the impugned activities (claims that the petitioner even fed the contractor and conceded to the excavator machine being kept in his compound). He acknowledges/admits that the petitioner did not attend the public participation meeting called before start of the project. He also acknowledges that the petitioner has 2 parcels of land and had lived there for a long period of time, over 10 years. He further informed the court that before construction of the road, the petitioner's two parcels were fenced off using barbed wire all round. Unlike RW2, he stated that when the grader got near the petitioner's parcels of land, the petitioner and his wife, and not he or the youth removed the fence. He stated that the petitioner did not complain. He maintained that the petitioner conceded to the grader being kept in his compound and even paid one Peter to watch over it for 2 days.

29. On the impact of the road on the petitioner, RW3 stated as follows: -

“...the road was to pass across his 2 parcels of land (almost cutting the parcels into 2). When grading started, the petitioner’s land was interfered with and has changed because there is no fence and there is grading that has been done on the land”.

30. In re-examination, RW3 *inter alia* stated as follows: -

“I am aware that the court issued an order that respondent restores the petitioner’s land to its original state. This did not happen because members of the public refused...I wish to reiterate that the petitioner initially agreed for the road to be constructed on his land but later retracted...the petitioner just like everyone else took care of the grader and the driver.... the petitioner like other neighbours were removing their fences voluntarily. He was not threatened

by anyone. During the grading exercise no tree in the petitioner's land was felled...no notices were issued to all residents because they had all agreed..."

31. RW4 was Regina Kibor, an employee of the respondent and a Senior Roads Inspector. Her testimony is similar to that of RW1 and RW3 in that she acknowledged that the petitioner's parcels of land, 1174 and 1300, were affected by the exercise. She produced the report referred to in her testimony as Rexbt 1.

32. In cross examination, RW4 stated as follows: -

"... I undertook the verification of Kapcherop-Chepkerongoi road in the company of Engineer Salame, Engineer Chepkwong and Sammy Chebet (Senior Inspector Roads). All the 3 officers named above are still in the employment of Elgeyo Marakwet County and they are senior to me. The report was prepared by us (officers of the County

Government of Elgeyo Marakwet collectively) and on the letter head of the Respondent. The report was our perspective of what we saw on the ground. It was not independent. There was a surveyor who accompanied us but did not sign the report. He was to prepare his own report but I do not know whether he prepared one and presented it to court.

The report relates to parcels number 1174 and 1300. On the ground we were able to identify both parcels. However, parcel number 1300 is not in the RIM”.

33. In re-examination, RW4 stated as follows: -

“The report dated 3rd July 2025 is a report (joint) by officers working for Elgeyo Marakwet County, office of the CECM Roads, Public Works and Transport. The report is a true reflection of our observations on the ground. When we started the exercise we were under the impression that the

petitioner had two parcels of land that were affected by the road. He showed us both parcels (1174 and 1300). However, when the surveyor showed us the map, parcel number 1300 was not on the map. What is on the map are parcels number 1174 and 1175. On whether I am a qualified engineer, I reiterate that I hold a diploma in civil engineering former Mombasa Polytechnic.”

34. RW5 Susan Kabisa, the Land Registrar Elgeyo Marakwet led evidence to the effect that according to records held at the land registry, land parcel number Cherangany/Kapcherop/1175 has never been subdivided. In that regard, RW5 produced the green card for the parcel as Rextb 2.

35. In cross examination, RW5 admitted and/or acknowledged that parcel number 1174, 1175 and 1176 do exist as subdivisions of the original parcel number 21. She stated

that their records show that parcel number 1176 was the one which was subdivided and not 1175 but acknowledged there is an anomaly concerning the records they hold. She could not tell whether the anomaly was a mistake.

36. In re-examination, RW5 stated as follows: -

“...the subdivided parcels in 1176 are not numbered...there is no evidence that parcel number 1175 was ever subdivided.”

37. After hearing closed, parties filed submissions which I have read and considered.

38. From the pleadings filed in this case, the evidence and the submissions by the parties, I find the main issue for the court's determination to be whether the petitioner has made up a case for being granted the prayers sought or any of them. Concerning that issue, I have carefully read and considered the case urged before me. From the totality of

the evidence adduced before me the following facts about the case are either common ground or uncontroverted: -

- a) That the respondent on request at the instant of the community where the suit properties are situated was re-routing and redesigning a public access road because the one that existed was not serving the community adequately.
- b) That the members of the community had agreed to donate the land on which the project was to be implemented and that the respondent's role was to implement the project on behalf of the community.
- c) That the members of the community whose parcels of land would be affected by the project were not approached individually and asked to give their consent.
- d) That the petitioner was not involved in the public participation meetings which were called to discuss the issue of donation of land on which the project would be implemented;

- e) That the petitioner opposed the decision to construct the access road through his land and lodged a complaint with the police and filed a case in court to stop the respondent from implementing the access road through his land;
- f) That the court issued an order of temporary injunction restraining the respondent from implementing the road project on the petitioner's parcels of land, 1174 and 1300, pending the hearing and determination of the suit;
- g) That despite being aware of the orders of the court, the respondent through its agent, the contractor who was contracted to implement the road project, in disobedience of the order of the court issued in favour of the petitioner, went ahead and implemented the road project on the petitioner's parcels of land thereby destroying or causing to be destroyed the petitioner's perimeter fence and construction of a public access on the petitioner's parcels of land;

h) That as a result of the impugned activities of the respondent the petitioner suffered loss and prejudice.

39. Both the petitioner and the respondent acknowledge that the petitioner suffered loss, damage and prejudice. Their only point of departure is on the extent of loss, damage and prejudice suffered and whether in the circumstances of this case, where the respondent claims to have been acting in public interest, the petitioner is entitled to the reliefs sought.

40. Concerning the loss and damage suffered, based on the report of PW2 produced in evidence as Pexbt 7, the petitioner submits that he has made up a case for being awarded the pleaded special damages of Kshs.3,580,000/- for restoration of the suit properties to their original state. The respondent on the other hand, based on the report of its officers that was produced as Rexbt 2 have submitted as follows concerning that report: -

“The respondent challenges the valuation report produced by the petitioner through his valuer, Ezra Kipsang Bett of Leitab Investment Ltd on grounds of material inaccuracies and methodological errors. First, the report adopts a rectangular cut section, a method properly applicable to excavation works such as trenches, pits and foundations. This approach is fundamentally flawed in the present circumstances, where the terrain is sloping and would require a triangular cut section to achieve ground levelling for road construction. The use of an inappropriate method inevitably led to exaggerated quantities. Secondly, the valuation improperly includes approximately 43 meters of road length falling within adjacent parcels namely Cherangany/Kapcherop/19 and 1175, which are not part of the suit property, Cherangany/Kapcherop/1174. This inclusion artificially inflates the quantities and the

resultant costs attributed to the petitioner's land."

41. The respondent further submits that petitioner's valuation is disproportionate and unreasonable as the total cost of opening the entire road measuring approximately 2.2 kms is indicated at Kshs. 2, 208,000 making it illogical and unjustifiable to claim Kshs. 3580,000/- for backfilling a mere 0.092 kilometres of the same road.
42. Terming their assessed cost of backfilling, being Kshs. 290, 448/- reasonable and a reflection of the accurate measurements and appropriate methodology, the respondent urges this court to rely on it in case it is inclined to award the petitioner any compensation.
43. I have considered the report relied on by the petitioner and the evidence of PW2 in respect thereof, particularly his admission on cross examination that when backfilling a triangular drop, one uses $\frac{1}{2}$ the material because the area is

not uniform. Whereas PW2 claims that he factored the triangular shape, that fact is not discernable or capable of being established from his report. PW2 also admitted or acknowledged that there are some materials left on the ground which can be using in backfilling part of the road yet he did not take into account that fact when preparing his report. For those reason, I find the report to be incapable of being relied on in determining the estimated cost the petitioner would incur in restoring the suit property to its original state.

44. I equally find the assessment by the respondent to be incapable of guiding the court on the actual cost to be incurred by the petitioner to restore the suit property to its original state as it only relates to a portion of the petitioner's destroyed land. The claim that parcel number 1300 is none existence merely because it does not feature in the Registry Index map cannot be a good excuse for failure to assess damage sustained by the petitioner in respect thereof yet there was is evidence that the parcel exists on the ground

and that it is owned by the petitioner. I agree with the petitioner's submission that in the absence of any pleading alleging fraud and/or irregularity in the registration of the parcel in question in the name of the petitioner and evidence led in respect thereof, to the required standard of proof, the respondent's cannot be heard to say the land parcel number 1300 was fraudulently registered in the name of the petitioner and/or is none existent.

45. The foregoing notwithstanding, I do find as a fact that the respondent violated the petitioner's constitutional and legal right to property and also violated the petitioner's right to a fair administrative action, guaranteed under **Article 47** of the Constitution and worse of all, violated the petitioner's right to legal protection by disobeying a lawful order of the court issued in favour of the petitioner thereby unnecessarily occasioning the petitioner loss, damage and prejudice.

46. The impugned action of the respondent of constructing a public access road through the petitioner's parcels of land,

1174 and 1300, amounts to trespass to land, which courts have adjudged actionable *per se*. In this case, the respondent, through its authorized agent, not only illegally trespassed into the petitioner's parcels of land but also occasioned tangible damage thereon which damage the petitioner would incur costs to repair.

47. The excuse offered by the respondent of having acted in public interest and the orders of the court having been disobeyed by a third party, (sub-contractors as their agent), cannot hold for the simple reason that it was the duty of the respondent to ensure that the project it was implementing was implemented lawfully and without violating the rights of others.
48. Taking into account the circumstances upon which the impugned activities were carried out and the impact of the activities on the petitioner, I assess general damages payable to the petitioner at Kshs.2,000,000/-.

49. The upshot of the foregoing is that the petitioner has made up a case for being granted some of the reliefs sought in his amended petition, dated 30th October 2024. Consequently, I enter judgment in his favour and against the respondent as follows: -

- i) A declaration be made and is hereby made that the action of the respondent complained of is illegal, unconstitutional and amounts to trespass to private land;
- ii) A declaration be and is hereby made that the respondent is in violation of **Articles 2, 10, 19, 20, 21, 40, 42, 47** and **50(1)** of the Constitution of Kenya 2010 and the Fair Administrative Actions Act;
- iii) General damages for violation of the petitioner's fundamental rights assessed at Kshs.2,000,000/-;
- iv) An order of permanent injunction be and is hereby made prohibiting the respondent or its employees, servants and agents from ever trespassing into

the petitioner's land or in any manner whatsoever interfering with the petitioner's properties known as Cherangany/Kapcherop/1174 and Cherangany/Kapcherop/1300.

v) Costs of the suit.

**Judgement dated, signed and delivered virtually at Busia
this 23rd day of April, 2026**

L. N. WAITHAKA

JUDGE

In the presence of;

Ms Kiptum for the Petitioner

Mr Wafula for the Respondent

Court Assistant; Tracy