



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. E124 OF 2021

**LIVINGSTONE GICHERU WARUINGE.....
.....PLAINTIFF**

VERSUS

**CHINA ROAD & BRIDGE CORPORATION (K)
LTD.....DEFENDANT**

JUDGMENT

- 1) The Plaintiff filed a Plaint dated 19/10/2021 claiming that the Defendant through its employees, servants and/or agents, unlawfully without the consent of the Plaintiff on or about May 2019 entered into the suit property and caused to be installed a huge industrial water-pump for water abstraction from the Ruaka River, which borders the suit property.
- 2) The said suit property to which the Plaintiff lays claim to is LR No. Kiambaa/Thimbigua/5453 since 2010 which he alleges to be the registered and lawful owner and that he is in possession.
- 3) The Plaintiff claims that in the process of installation of the said water pump and construction of the path to its point of installation at the edge of the suit property the Defendant and through its employees, servants and/or agents caused

damage to the crops and flowers planted along the illegal patch created by pouring tonnes of gravel and compacting the same with machinery.

4) The Plaintiff avers that the trespass by the Defendant on the suit property has led to loss and damage particulars of which have been itemized as:

a) The Plaintiff has been deprived of the use and quiet enjoyment of the suit property.

b) The Defendant's misuse of the suit property, including erecting a semi-permanent gravel pathway on the suit property has occasioned detriment to the Plaintiff.

c) Further, the Defendant has prevented the Plaintiff from obstructing its access to the Ruaka River despite earlier written notice.

d) The Defendant, through its employees/guards, threatened the Plaintiff with physical violence whenever he attempts to deny it entry into the suit property.

e) The Defendant's installation of the water pump and gravel pathway on the suit property and operation of the same to date damages and devalues the suit property.

5) That the wrongful entry by the Defendant has led to wrongful possession and continued trespass. The Plaintiff therefore claims:

- a) A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit property.
 - b) A declaration that the Defendant, whether by itself or its servant or agents or otherwise howsoever, is wrongfully in occupation of the suit property and is accordingly, a trespasser on the same.
 - c) A declaration that the Defendant, whether by itself or its servants or agents or otherwise howsoever, is not entitled to remain on the suit property.
 - d) A declaration that the actions of the Defendants constitute trespass and nuisance to the Plaintiff.
 - e) An order of Permanent Injunction restraining the Defendant, by itself or through its servants and/or agents from entering, trespassing, interfering with or in any other manner whatsoever dealing with the suit property.
 - f) Vacant possession of the suit property.
 - g) General Damages for trespass.
- 6) The Defendant filed a Statement of Defence dated 16/06/2022 and filed on even date. The Defendant denied all the averments of the Plaintiff stating that the Defendant abstracted water from the Rui Ruaka River for use on the construction of the Western Bypass after acquiring proper authorization from the Water Resources Authority and set up

the pump on riparian land off Rui Ruaka River and not on the Plaintiff's property.

- 7) At the same time the Defendant denies the particulars of loss and damage and avers that the Defendant accessed the water abstraction point using a public access road and took due care in accessing the site at every instance. Further that it completed abstracting water from the Rui Ruaka River on or around May 2021 and the claim by the Plaintiff for continued trespass is unfounded.
- 8) Further that during abstraction of the water the Defendant avers that its equipment was always on the riparian land off Rui Ruaka River.
- 9) The Defendant also denies all the allegation of trespass and nuisance and avers being a stranger to the allegations of confrontation between the Plaintiff and the Defendant's employees, servants and/or agents.
- 10) The Defendants states that the suit discloses no cause of action against the Defendant and that it is malicious, vexatious and bad in law and an abuse of the Court process. It is the prayer for the Defendant that the suit be dismissed with costs to the Defendant.

Plaintiff's Evidence

- 11) The Plaintiff, Livingstone Gicheru Waruinge, testified as PW1. He adopted his witness statement as evidence-in-chief and produced the documents contained in his list of documents, which were collectively marked as **Exhibits 1 to**

4 in the order listed. He also produced the documents on the supplementary list dated 14/11/2022.

- 12) Upon cross-examination, the Plaintiff testified that he did not know when the Defendant left his land but he thinks it was round May 2021. He told the Court that he did not produce any document to show that there was a bump on his land. Also, he stated that he never produced any document about reduction of value of his land because he said that the never at any point talked about the value reducing.
- 13) At the same time, he told the Court that he had not produced any documents to show that flowers and crops were destroyed. It was his testimony that the Defendant passed on his land to access water. He told the Court that he wrote to them twice and visited their office but they did not wish to resolve the matter. He testified not to have reported the matter to the Police.
- 14) His Counsel re-examined him and he testified that from the supplementary list there is a surveyor's report which shows the extent of his land. That the Defendants went and constructed a place without his permission on his land. That they informed him that they had permission from the Chief and they removed his tree nursery and bananas.
- 15) With that the Plaintiff closed his case.

Defendant's Case

- 16) **DW1 - William Ochieng Ouko** was sworn in English and he testified and stated that he is the Public Relations

Officer with China Road. He adopted his witness statement and a list of documents as exhibits both dated 16/02/2022. He testified that the Defendant Company was constructing the western by-pass and it had several sources of water, some were from rivers that were near the road.

- 17) With regard to the suit before the Court the source was water of River Ruaka at a location based between Ndenderu and Karuri. He told the Court that he was aware that the Plaintiff has claimed that the Defendant placed a pump on his land. The size of the water pump was 50 KVA which can be lifted by about 5 people. That the abstraction site is between the road that links Karuri and Ndenderu.
- 18) According to him, the pump was placed between the road reserve and the river riparian. Thus, the pump was on public access point not private land. He testified that he had not placed any maps before the Court to show where the pump was placed. It was his testimony that they were accompanied by the area administration who showed them where water is to be abstracted from.
- 19) He told the Court that the local administrator, the Chief never showed them the owner of the land but he confirmed to them that they could abstract water from the area where they placed the pump.
- 20) From the letter that he produced in Court dated 17/02/2018 produced at page 8 of the Defendant's bundle, he stated that it does not specify where or which parcel is to

be used nor is the LR provided. He told the Court that he received a demand letter from the Plaintiff. But that he can confirm that the Defendant got authority to abstract on 7/11/2019 which was after they received the demand letter. It was his testimony that despite them receiving the demand letter, abstraction cannot happen on a private property.

- 21) That though the Defendant received the demand letter they never responded to the demand letter nor engaged the Plaintiff and they completed the abstraction in 2021 without the Defendant seeking the Plaintiff's permission but that they had permission from government authorities.
- 22) On the issue of land being riparian he testified that he had not produced any document to support the claim that the pump was placed on riparian land. Also, that the report they produced does not identify the land as riparian but according to DW1 this is an oversight on the part of the person who wrote the report.
- 23) From his testimony he told the Court that they placed the pump on the intersection and they poured concrete to minimize on dust which was a distance of 5 metres to the road and when they were done with the road construction, they never removed the gravel since it had been washed away.
- 24) Upon re-examination, he testified that the pump was not near the Plaintiff's property but near the river. That in order to get a licence from Water Resources Authority for

abstraction one had to show they are not creating conflict with owners of land. At the same time, he stated that they obtained permission from the County Government.

- 25) He testified that the Plaintiff never visited the site at any time to alert the Defendant that they were on his land and that there were members of Water Resources Authority at the site.
- 26) With that the Defendant closed their case.
- 27) The Court gave directions on filing of submissions and reserved a date for delivery of Judgment.
- 28) The Plaintiff filed their submissions dated 5/12/2025 and the Defendant's submissions are dated 20/02/2026. I will provide a summary of the Plaintiff's and Defendant's submissions.

Plaintiff's Submissions

- 29) The Plaintiff in his submissions maintains that he is the absolute, registered owner of **LR No. Kiambaa/Thimbigua/5453**. In support of this, he relies on the Certificate of Title and Mutation Form produced in evidence. The Plaintiff further rely on Section 26(1) of the Land Registration Act, which mandates that such a certificate be taken by all Courts as prima facie evidence of indefeasible ownership, immune to challenge except as provided by law.
- 30) Regarding the act of trespass, the Plaintiff relies on Section 3(1) of the Trespass Act (Cap 294), which

criminalizes the entry or erection of structures on private land without the occupier's consent. This statutory protection is reinforced by the common law principle established in **Entick v Carrington (1765)**, as cited in **Mama Kabuchwa v Gachuma Gacheru [2018] eKLR**, which maintains that property is sacred and no person may enter a neighbor's land without permission.

- 31) The Plaintiff contends that in May 2019, the Defendant unlawfully entered the property, installed a large industrial water pump, and constructed a gravel access road using heavy machinery, causing significant damage to crops and flowers. While the Defendant claims authorization from the Water Resource Authority, the Plaintiff submits that such authority is not absolute. That under Section 39(1) of the Water Act, a permit holder whose works are situated on land not held by them must acquire an easement.
- 32) The Plaintiff argues the Defendant failed to obtain this easement, making their continued presence a trespass regardless of the water permit. Furthermore, the Plaintiff disputes the Defendant's unsubstantiated claim that the works were restricted to a riparian reserve, noting that his uncontroverted title documents prove ownership of the land adjacent to the river.
- 33) The Plaintiff argues that the Defendant's actions have devalued the property and deprived him of quiet enjoyment. In seeking damages, the Plaintiff cites **Bhagwani Singh**

Kalsi v National Housing Corporation [2017] KEELC 391 (KLR), which confirms that trespass to land is actionable *per se*; once trespass is proven, the claimant does not need to prove actual loss to receive general damages. The Plaintiff further references ***Halsbury's Laws of England (4th Ed, Vol 45)*** to outline the criteria for assessing damages, including nominal damages for the infringement and compensatory sums for the actual use of the land.

34) To justify the quantum of damages, the Plaintiff points to **Mwangi v China Road and Bridge Corporation [2022] KEELC 15096 (KLR)**, where the Court awarded Kshs. 1,000,000 for similar acts of trespass and nuisance. Additionally, the Plaintiff seeks exemplary damages, citing **Mikidadi v Khaigan and Another [2004] eKLR**. He argues that because the Defendant is a profit-making multinational that exploited private land for commercial gain while frustrating amicable settlement attempts, its conduct was oppressive and arbitrary, meeting the high threshold for punitive awards.

35) The Plaintiff concludes his submissions by stating that he has proved his case on a balance of probabilities. He therefore prays that this Honourable Court grants the reliefs sought in the Plaint dated 19/10/2021.

Defendant's Submissions

- 36) The Defendant in their submissions maintains that the Plaintiff's suit is built upon bare, unsubstantiated allegations and fails to meet the requisite legal standards for proving trespass or nuisance.
- 37) The Defendant asserts that at no point did its employees or equipment enter the Plaintiff's property. All water abstraction activities for the Western Bypass Link Road were conducted on riparian land and accessed via public roads, authorized by the Water Resources Authority (WRA).
- 38) According to the Defendant, he further submits that in law, he who alleges must prove, as stipulated under **Section 107(1) of the Evidence Act**. That the said principle is reinforced by the Court of Appeal in **nne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of 2000 [2005] 1 EA 334** which places the legal burden on the party asserting the affirmative of an issue. The Court of Appeal in the case stated thus:

“As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is

captured in section 109 and 112 of the Act. In this case the appellants' case was that they were never notified of the meeting at which the resolution was passed. The Respondents while insisting that there was in fact such a notice were unable to produce the same. In effect the appellants were alleging a negative. Since it was the Respondents who were alleging a positive, pursuant to section 109 of the Evidence Act, it was upon them to prove that there was in fact such a notice. As was held by Seaton, JSC in the Uganda case of JK Patel vs Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85:

“The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general the rule which applies is ei qui affirmat not ei qui negat incumbit probatio. It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons... As applied to judicial proceedings the phrase “burden of proof” has two distinct and frequently confused

meanings, (1) the burden of proof as a matter of law and pleading - the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence..... The onus probandi rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgment if no further evidence were adduced.” See Constantine Steamship Line Ltd vs Imperial Smelting Corp [1914] 2 ALL 165 (H.L); Trevor Price vs Kelsall [1975] EA 752 at 761; Phippson on Evidence 12th Ed Para 91; Phippson at para 95.”

- 39) It is the Defendant’s argument that the Plaintiff has failed to produce any technical evidence such as a survey report, beacon certificate, or Registry Index Map to prove that the pump or gravel path was situated within his boundaries. As held in **M’Mukanya v M’Mbijiwe (1984) KLR 761**, a claimant must prove exclusive possession and a physical violation of that possession. Furthermore, the Defendant relies on **Ogolla v Agwedo [2023] KEELC**

22068 (KLR), where the Court dismissed a trespass claim because the Plaintiff failed to provide surveyors' reports or photographs showing the exact extent of the alleged illegal activities. Notably, a Ministry of Lands report dated 21/04/2022, failed to confirm the presence of any pump or pathway on the suit property.

- 40) Regarding the claim of nuisance, the Defendant submits that the Plaintiff has provided no evidence of escape or damage. Citing **Nakuru Industries Ltd v S.S. Mehta & Sons [2016] eKLR**, the Defendant distinguishes nuisance from trespass by noting that while trespass is actionable *per se*, nuisance requires proof of actual damage or unreasonable interference. Following the precedent in **Hunter & Others v Canary Wharf Ltd [1997] [1997] AC 655**, the Defendant argues that mere inconvenience is insufficient to sustain this claim, and the Plaintiff has offered no environmental or expert reports to prove substantial interference.
- 41) The Defendant maintains that the prayers for declaratory orders and a permanent injunction must fail because they cannot be granted in a vacuum. Under **Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others [1997], KECA 58 (KLR)** declaratory remedies only issue where a legal right has been clearly established.

- 42) Furthermore, since the water abstraction works ceased in May 2021 before the suit was even filed there is no existing or threatened injury to restrain. That in the case of **Kenya Power & Lighting Co. v Sheriff Molana Habib [2018] eKLR** and **Tolimwo v Koikai [2025] KEELC 5760 (KLR)**, it is established that a permanent injunction is an equitable remedy granted only on the merits where a right is being infringed. As the Defendant is not in occupation of the land, the prayer for vacant possession is also legally untenable.
- 43) The Defendant submits that because trespass was not proved, the claim for general damages must be denied, as supported by **Maangi v Ndemwa & another [2024] KEELC 4027 (KLR)**. Regarding exemplary damages, the Defendant cites **Obongo & another v Municipal Council of Kisumu [1971] EA 91** and **Godfrey Tulus Ndumba Mbogori & another v Nairobi City County [2018] eKLR**, arguing that such damages are only for high-handed, malicious, or oppressive conduct, none of which applies here. The Defendant acted in good faith under statutory permits.
- 44) Finally, the Defendant submits that pursuant to Section 27 of the Civil Procedure Act and **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Anor [2016] KEHC 7064** costs follow the event and they should be awarded to the Defendant.

45) In conclusion the Defendant submits that the Plaintiff has failed to prove entry, occupation, or damage. According to the Defendant, they participated in a lawful public project on public land, and so they humbly pray that this Honourable Court dismisses the suit in its entirety.

Analysis and Determination

46) Based on the pleadings, the evidence adduced, and the written submissions of both parties, this Court identifies the following key issues for determination:

1. ***Whether the Plaintiff has established absolute ownership and lawful possession of the suit property.***
2. ***Whether the Defendant's activities constituted trespass to land and nuisance.***
3. ***Whether the Plaintiff is entitled to the reliefs sought, including permanent injunction and damages.***

47) On ownership and possession, the Plaintiff's ownership of **LR No. Kiambaa/Thimbigua/5453** is anchored in a Certificate of Title and Mutation Form dated 9/02/2010. Under **Section 26(1) of the Land Registration Act**, a certificate of title is prima facie evidence of absolute and indefeasible ownership. The Supreme Court of Kenya in **Dina Management Limited v County Government of Mombasa & 5 Others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment)**

affirmed that while a title is protected, it must have been acquired legally. Here, the Defendant does not challenge the Plaintiff's title but rather the location of the alleged trespass. In terms of **Black's Law Dictionary**, possession is the exercise of dominion over property. The Plaintiff has sufficiently demonstrated both *de jure* ownership and *de facto* possession of the suit premises.

48) Regarding the issue of trespass to land and nuisance the Plaintiff alleges that the Defendant installed a water pump and constructed a gravel road on his land. The Defendant contends the pump was on riparian land and public access roads. Trespass to land is the unjustifiable interference with the possession of land. According to **Halsbury's Laws of England (4th Ed)**, trespass is actionable *per se* without proof of special damage. The Plaintiff produced a surveyor's report as part of his supplementary list which, upon re-examination, points to the Defendant constructing works on his land without permission.

49) Conversely, the Defendant's witness (DW1) admitted that the Water Resources Authority (WRA) permit was obtained after the Plaintiff's demand letter and did not specify the exact coordinates or parcel for abstraction. Crucially, the Defendant admitted to pouring concrete and gravel to facilitate their activities. Under Section 39(1) of the Water Act, even with a permit, a party must acquire an

easement if the works sit on land not held by the permit holder. The Defendant failed to prove the existence of such an easement or provide any map/survey evidence to support the riparian land defense. As held in **Mama Kabuchwa v Gachuma Gacheru (2018) eKLR**, property is sacred; any entry without leave is a trespass.

50) Regarding nuisance, which is the unreasonable interference with the use and enjoyment of land, the Plaintiff testified to the destruction of his tree nursery and bananas. While the Defendant relies on **Hunter v Canary Wharf Ltd (supra)** to argue that mere inconvenience is insufficient, this Court finds that the physical alteration of the land which include pouring gravel and concrete exceeds mere inconvenience and constitutes a physical nuisance.

51) On the issue of burden of proof, the Defendant relies on **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi (supra)** and Section 107 of the Evidence Act, arguing the Plaintiff failed to prove the pump's physical location. However, in civil cases, the standard is the balance of probabilities. The Defendant's own testimony (DW1) was contradictory admitting they did not know the owner but relied on a local Chief rather than a land surveyor. The failure of the Defendant to respond to the demand letter or produce a survey map to support their riparian claim shifts the weight of probability in favor of the Plaintiff.

- 52) The Plaintiff seeks permanent injunction and damages to protect the Plaintiff's Constitutional right to property under Article 40, while the Defendant argues the works ended in 2021. The question therefore is what is the appropriateness of issuing a permanent injunction where the works are completed?
- 53) In the case of **Jane Marete v Joseph Waitki Ndegwa & 2 Others (2018) KEELC 1136 (KLR)** the Court issued a permanent injunction to protect the Plaintiff's quiet possession and enjoyment of the property after illegal attempts to subdivide and interfere with the land title had already occurred. Also, in the case of **Mutisya v Mwanzia (Environment & Land Case 214 of 2017) [2022] KEELC 3806 (KLR) (28 July 2022) (Judgment)**, the Defendant completed a building that encroached on the Plaintiff's plot, blocking natural light and access. The Court granted both a permanent injunction to prevent future interference and a mandatory injunction compelling the demolition of the illegal structures. The Court emphasized that a wrongdoer cannot keep what he has taken simply because they can pay for it. And in **Loyelei v Ekeno & 5 Others (Environment & Land Case E031 of 2022) [2025] KEELC 4923 (KLR) (25 June 2025) (Judgment)** the Court held that where a right has been violated or is threatened, it can issue a permanent injunction.

54) Regarding damages, the Court notes that trespass is actionable *per se*. Following **Bhagwani Singh Kalsi v National Housing Corporation (supra)**, the Court has the discretion to award general damages. Given the commercial nature of the Defendant's project and their disregard for the Plaintiff's notices, exemplary damages are warranted to deter high-handed conduct by contractors on private land, as per **Mikidadi v Khaigan (supra)**.

Final Orders

55) This Court, having considered the totality of the case, finds that the Plaintiff has proved his case on a balance of probabilities and issues the following orders:

- i) A Declaration is hereby issued that the Plaintiff is the lawful owner and entitled to exclusive possession of LR No. Kiambaa/Thimbigua/5453.***
- ii) A Declaration is hereby issued that the Defendant's entry, installation of a water pump, and construction of a gravel pathway on the suit property constituted an act of trespass and nuisance.***
- iii) A Permanent Injunction is hereby granted restraining the Defendant, its servants, or agents from entering, trespassing, or in any way interfering with the Plaintiff's quiet enjoyment of the suit property now and in future.***

iv) General Damages for Trespass and Nuisance are hereby awarded to the Plaintiff in the sum of Kshs. 1,000,000.

v) Exemplary Damages are hereby awarded in the sum of Kshs. 200,000 due to the Defendant's high-handedness in ignoring the Plaintiff's demand letters.

vi) Costs of this suit are awarded to the Plaintiff.

vii) Interest on the damages awarded in (iv) and (v) shall accrue at Court rates from the date of this Judgment until full payment.

It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY AT THIKA VIA
VIDEOLINK THIS 4TH DAY OF MAY, 2026.**

.....
**MOGENI J
JUDGE**

In the presence of:

Mr. Mwathe for the Plaintiff

Miss Munza holding brief for Mrs. Ndira for the Defendant

Mr. Melita - Court Assistant

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**MOGENI J
JUDGE**