

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELCLA NO. E031 OF 2026**

**CHINA ROAD AND BRIDGE CORPORATION .....**

**APPELLANT**

**— VERSUS —**

**GEORGE KARANJA .....**

**RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Hon. M.A. Otindo (SPM) delivered on 29th January 2026 in Milimani Commercial ELC Case No. MCELC E1429 of 2020)*

**JUDGMENT**

**Introduction**

1. This is an appeal by **China Road and Bridge Corporation (hereinafter "the Appellant")** against the Judgment and Decree of the **Hon. M.A. Otindo, Senior Principal Magistrate (SPM)**, delivered on 29th January 2026 in **Milimani Commercial ELC Case No. MCELC E1429 of 2020**. The Appellant is aggrieved by, inter alia, the finding

of trespass made against it, the alleged shifting of the burden of proof, the admission and reliance on photographic evidence, the failure to properly evaluate the defence of pre-existing public road, and the award of general damages in the sum of Kshs. 1,500,000/=.

2. The Respondent, George Karanja, was the Plaintiff before the lower court and opposes the appeal, urging this Court to uphold the decision of the learned Magistrate in its entirety.
3. Upon admission of the appeal, this Court issued directions that the appeal be canvassed by way of written submissions. The parties duly complied and their respective submissions have been filed and considered. I have further considered the Record of Appeal, the Supplementary Record of Appeal filed on 20th April 2026 which contains the typed proceedings of the lower court and the Decree, the Memorandum of Appeal dated 25th February 2026, the pleadings and all documents filed before the subordinate court.
4. Before proceeding to the substance of the appeal, this Court notes that the record of appeal includes a

Supplementary Affidavit sworn by the Respondent, George Karanja, dated 26th August 2020, filed in the lower court proceedings in response to the Appellant's Replying Affidavit. The Appellant raised no formal objection to the admission of the said Supplementary Affidavit at any stage of the lower court proceedings, and no prejudice has been demonstrated, whether before this Court or the lower court, to have been suffered by the Appellant as a result of its filing or reliance upon it. This Court accordingly admits and has considered the Supplementary Affidavit dated 26th August 2020 as part of the record in the determination of this appeal.

5. Further, this Court notes that the Appellant filed a Supplementary Record of Appeal dated 20th April 2026, comprising the typed proceedings of the lower court (pages 5 to 17) and the Decree issued on 29th January 2026. In respect to the same no prejudice has been demonstrated to have been suffered by the Respondent by reason of its admission. This Court accordingly admits the Supplementary Record of Appeal dated 20th April 2026 and has considered the same, including the typed proceedings

and the Decree contained therein, in arriving at the determination of this appeal

### **Background facts**

6. The material background facts, as discernible from the pleadings, the typed proceedings and the record of the lower court, may be summarised as follows:
7. The Respondent, **George Karanja**, is the registered proprietor of **land parcel No. NAIROBI/BLOCK 115/1186 (originally known as plot No. FD/125 and later as NAIROBI/BLOCK 115/2787)**, situate in Nairobi County (hereinafter "the suit property"). The Respondent purchased the suit property on 27th June 2014 from one Elizabeth Nyambura through Karagita (E.A.) Ltd, which owned the title of Block 115. The transaction was completed at the Karagita offices on the same day. The suit property forms part of the Karangita area of Nairobi and measures 0.05 hectares. The Respondent produced a Certificate of Lease and an official search evidencing his title as the registered proprietor.

8. The Appellant, **China Road and Bridge Corporation (hereinafter "CRBC")**, is a state corporation of the People's Republic of China with a subsidiary office in Kenya, whose principal business is in the construction industry. At all material times, the Appellant was engaged in the construction of the Nairobi Expressway railway and was ferrying construction materials and debris from Kayole to the expressway construction site.
9. The Respondent testified as PW1 at the hearing on 3rd September 2025. He adopted his witness statement dated 10th August 2020, his list and bundle of documents dated 18th August 2020, a further list and bundle dated 7th October 2024, and a supplementary list of documents dated 28th July 2025 as his evidence in chief. The documents in the list dated 18th August 2020 were marked as PExhibits 1 to 8, and those in the further list dated 7th October 2024 as PExhibits 9 to 12.
10. The Respondent testified that in July 2020 he received a call from an agent informing him that his parcel of land was being used as a road. He rushed to the site and found that a road had been freshly constructed through his parcel. He

took photographs of the scene (PExhibit 2). He identified trucks on the ground bearing the logo of CRBC and spoke to persons on site who confirmed it was CRBC that had done the road. He was informed that the trucks were picking materials in Kayole for the Nairobi Expressway. His advocates conducted a motor vehicle search on one of the trucks which confirmed that the said vehicles were owned by the Appellant. He engaged a bulldozer early in the morning, dug deep 7-metre trenches at the base and frontage of his plot to stop the trespass (PExhibits 6 and 7). The same day the Appellant backfilled the trenches and continued to use the road. He attempted to fence the land but was stopped by public service vehicle operators and Kayole bypass persons. The Appellant thereafter stopped using the road but had by then created the perception of a public road, and public service vehicles continued to use it.

11. Critically, the Respondent's viva voce evidence before the lower court established the following material facts regarding the 3-metre lane: During cross-examination by Ms. Luther counsel for the Appellant/Defendant, the Respondent confirmed that between plot numbers 124 and

125 there exists a 3-metre lane, and that the 3-metre lane is for public use. He further confirmed that the Nairobi County Part Development Plan (PDP) (PExhibit 12) shows a 3-metre lane which is described as a construction feature in the Karangita area, and that between parcel 2787 and plot 124 a 3-metre lane is shown. He confirmed there are various sizes of lanes in the area. However and this is of cardinal importance on re-examination by Mr. Senteu counsel for the Respondent/Plaintiff, the Respondent clarified that the 3-metre lane is adjacent to his land and separates his land from plot number 124. He specifically testified that the Appellant's vehicles were using the 3-metre lane plus 6 metres of his land, meaning they encroached 6 metres into the suit property beyond the lane. He further stated that he found a fleet of vehicles with the logo of the Appellant on the ground.

12. The Respondent also gave important evidence regarding the survey map. He testified that the PDP plan indicated a road but the survey map does not match the PDP. He explained that every road has a truncation on the survey map and that the map is not a correct representation of

Nairobi Block 115. He accordingly sought a correction of the map, corresponded with the Director of Survey attaching the PDP, and the map was corrected through Sheet Number 5 by Surveys of Kenya dated 3rd July 2025. He stated that when he bought the land there was no 15-metre road on the land, and that the land was established illegally by the Appellant in 2020.

13. The Respondent confirmed in cross-examination that there are public roads nearby specifically a 25-metre tarmacked road towards the base of the parcel and one above parcel number 126, both tarmacked by the Nairobi County Government. He confirmed that the photographs are not time-stamped and have no coordinates. He admitted that the plot was fallow at the time of valuation and that he was not renting or leasing the property. He stated he had been unable to use his land from 2020. He stated he had a school interested in the four plots.

14. The Respondent filed his Complaint on 18th August 2020, together with a supporting affidavit. He subsequently filed a Supplementary Affidavit dated 26th August 2020 in response to the Appellant's Replying Affidavit sworn on

24th August 2020 by Michael Omondi Ochola, the Appellant's Transport Manager. The Supplementary Affidavit provided additional particulars of the Respondent's ownership history and further responded to the Appellant's specific averments.

15. The Appellant filed a Statement of Defence dated 11th November 2020 denying constructing any road and averring that the road was a pre-existing public road. The Appellant filed a witness statement by Michael Omondi Ochola dated 9th February 2024. However, at the hearing on 3rd September 2025, after the Respondent closed his case, the Appellant's counsel Ms. Luther announced that the Appellant would not be calling any witnesses. The court thereupon directed that since the defence was not calling any witness, the exhibits as produced were sufficient evidence. Both the Plaintiff's and Defendant's cases were accordingly closed on 3rd September 2025, and the parties were directed to file written submissions.

16. The Appellant's application to call the Nairobi Regional Surveyor as a witness made after the close of evidence was declined by the trial court as an afterthought, particularly

since the Appellant's counsel had indicated the surveyor would be called but then reversed that position on the day of hearing.

17. The Decree issued by the lower court on 29th January 2026, as confirmed by the Supplementary Record of Appeal, provides as follows: a declaration that the Respondent is the lawful proprietor of NAIROBI/BLOCK 115/1186 and that the Appellant's entry and use amounted to trespass; a permanent injunction restraining the Appellant, its agents, servants or employees from entering upon, using, constructing on or in any way interfering with the suit property; general damages for trespass in the sum of Kshs. 1,500,000/=; special damages in the sum of Kshs. 18,000/=; costs of the suit; and interest at court rates from the date of judgment until payment in full. The total principal amount under the Decree was Kshs. 1,518,000/=, with taxed costs of Kshs. 156,410/=.

### **The Appeal**

18. The Memorandum of Appeal dated **25th February 2026** raises six grounds of appeal, which may be summarised as follows:

19. First, that the learned Magistrate erred in fact and in law in finding that the Appellant trespassed onto the Respondent's land.
20. Second, that the learned Magistrate erred in law by shifting the burden of proof to the Appellant contrary to Sections 107 to 109 of the Evidence Act, by holding that failure to call evidence rendered the Respondent's case proved.
21. Third, that the learned Magistrate erred in law by relying on photographic evidence whose compliance with Section 106B of the Evidence Act was not demonstrated, thereby admitting and relying on inadmissible electronic evidence.
22. Fourth, that the learned Magistrate erred in fact and in law by failing to appreciate that the existence of a 3-metre access lane between plots raised a material issue as to whether the alleged road was a public access road or a right of way, thereby failing to properly evaluate the defence pleaded.
23. Fifth, that the learned Magistrate erred in fact and in law in awarding general damages of Kshs. 1,500,000/=.

24. Sixth, that the learned Magistrate erred in law by failing to provide sufficient analysis or comparable jurisprudence to justify the quantum awarded.

25. The Appellant prays for the appeal to be allowed, the judgment of the lower court to be set aside in its entirety and substituted with an order dismissing the Respondent's suit with costs, or in the alternative, the award of general damages be set aside and substituted with an award of nominal and/or substantially reduced damages, with costs of this appeal and the lower court proceedings to be borne by the Respondent.

### **Summary of the parties' written submissions**

#### **The Appellant's Written Submissions**

26. The Appellant's Written Submissions were filed on **1st April 2026 by Okwach & Company Advocates**. The Appellant's submissions are summarised as follows:

#### **On burden of proof**

27. The Appellant submits that the learned Magistrate erred in law in her treatment of the burden of proof by placing reliance on the fact that the Appellant did not call any

witness and consequently holding that the Respondent's evidence remained uncontroverted and was sufficient to prove trespass. The Appellant contends that this approach effectively shifted the evidentiary burden from the Respondent to the Appellant, contrary to **Sections 107, 108 and 109 of the Evidence Act (Cap 80)**. The Appellant argues that in civil proceedings the burden of proof lies at all times with the party who alleges, and that the Respondent was under a legal obligation to establish, on a balance of probabilities, that the Appellant unlawfully entered upon the suit property, constructed or expanded a road thereon, and thereby interfered with his proprietary rights. The Appellant submits that this burden was not discharged merely because the Appellant elected not to call oral evidence. In support of these submissions, the Appellant relies on **Yusuf v Mohamed & Another [2022] KEELC 2937 (KLR); Abdul v Mokuu [2025] KEHC 4105 (KLR); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334; Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR; Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013]**

**eKLR; and Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & Another [2016] KEHC 1362 (KLR)**. The Appellant further contends that no surveyor's report was produced to establish encroachment or boundary interference, no expert evidence was called to demonstrate that the road was constructed or expanded beyond its lawful limits, and no documentary or contractual evidence was presented to link the Appellant to any construction activity.

### **On admissibility of photographic evidence**

28. The Appellant submits that the learned Magistrate erred in law in admitting, relying upon and attaching probative value to electronic evidence specifically photographs and videos that did not comply with the mandatory provisions of **Section 106B as read together with Section 78A of the Evidence Act (Cap 80)**. The Appellant argues that the photographs constituted electronic evidence requiring certification identifying the electronic record, describing the

manner of production, providing particulars of the device used, and confirming the integrity of the process; and that no such certificate was produced. The Appellant contends that compliance with these provisions is a mandatory precondition that cannot be waived by the failure to raise an objection at the point of production, since the certificate goes to the very authenticity and reliability of the evidence. The Appellant relies on **County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others [2015] eKLR; Mwanganda v Mbangha [2022] KEHC 17091 (KLR);** and **Dry Associates Co Ltd & 3 Others v Timothy Karungu Karanja & 7 Others [2019] KEHC 9847 (KLR).** The Appellant further submits that even if the photographs were to be considered, they merely depicted vehicles on a road that appeared to be in use by members of the public and did not demonstrate any act of construction, expansion, or encroachment attributable to the Appellant.

### **On the 3-metre road and the public road defence**

29. The Appellant submits that the learned Magistrate erred in fact and in law by failing to properly evaluate the existence

and legal effect of the admitted 3-metre road between the suit property and the neighbouring plot. The Appellant contends that the Respondent's own admission in cross-examination of the existence of a 3-metre road directly raised the question whether the road complained of was in fact a lawful public access route serving the area rather than an unlawful intrusion onto the Respondent's land. The Appellant argues that the documentary evidence, including the official survey map, confirmed the existence of a road next to the suit property, and that the Trial Court was therefore mandated to determine whether the said road constituted a public access way and whether the Appellant's use was lawful. The Appellant submits that the learned Magistrate failed to address this issue altogether, and in particular failed to reconcile the material inconsistency between the Respondent's admission of the existence of a road and his assertion that the Appellant unlawfully created a road through his property. The Appellant argues that had this issue been properly evaluated, the learned Magistrate would have found that

the existence of the recognised access lane fundamentally undermined the Respondent's allegations.

### **On the finding of trespass**

30. The Appellant submits that the finding of trespass was founded on cumulative errors of law and fact: the improper shifting of the burden of proof; the reliance on inadmissible photographic evidence; and the failure to evaluate the existence and legal effect of the 3-metre access lane. The Appellant contends that no technical or expert evidence such as a surveyor's report was produced to demonstrate that the Appellant encroached upon or interfered with the suit property, and that the alleged presence of the Appellant's vehicles on what was an existing road could not, without more, amount to unlawful entry or interference. The Appellant urges this Court to find that the finding of trespass cannot stand as it is not supported by the evidence on record.

### **On the award of general damages**

31. The Appellant submits that the learned Magistrate erred in fact and in law in awarding general damages of Kshs.

1,500,000/= without undertaking any meaningful analysis of the applicable principles or citing any comparable authorities to justify the quantum. The Appellant relies on **Butt v Khan [1982-88] 1 KAR 1**; **Catholic Diocese of Kisumu v Tete [2004] eKLR**; and **Meya Agri Traders Ltd v Elgon House (2010) Ltd [2023] KECA 574 (KLR)** for the proposition that an appellate court will interfere with an award of damages where the trial court acted on wrong principles, failed to consider relevant factors, or arrived at a figure so inordinately high as to represent an entirely erroneous estimate. The Appellant contends that the suit property was largely undeveloped, that no evidence was led to demonstrate that the Respondent suffered any quantifiable loss or interruption of use, and that the award of a substantial sum was neither warranted nor supported by the evidence. The Appellant also relies on **Suleiman v M'Kiunga [2025] ELC 358** and **Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR** for the proposition that comparable injuries should attract comparable awards, and that the failure to consider comparable awards further underscores the arbitrary

nature of the sum awarded. In the alternative, the Appellant prays for nominal or substantially reduced damages.

### **The Respondent's written submissions on appeal.**

32. The Respondent's Written Submissions on appeal dated 20th April 2026 were filed by Senteu & Ndung'u Advocates. At the outset, the Respondent states that he relies fully on his written submissions dated 8th October 2025 and supplementary written submissions dated 10th November 2025 filed before the lower court at pages 132 to 140 and 161 to 165 of the Record of Appeal respectively and makes further submissions in support of the judgment of the lower court, praying that the same be confirmed by this Honourable Court. The Respondent's submissions on appeal are summarised as follows:

#### **On the competence of the Record of Appeal**

33. The Respondent raises a preliminary issue that the Record of Appeal as filed by the Appellant is incomplete, fatally defective and ought to be struck out. Relying on **Order 42**

**Rule 13(4) of the Civil Procedure Rules, 2010**, the Respondent submits that the record is required to contain, among other documents, the notes of the trial Magistrate made at the hearing, the transcript of any shorthand or electronic recording made at the hearing, all affidavits, maps and documents put in evidence before the Magistrate, and the certified decree appealed from. The Respondent contends that the proceedings and notes of the trial court as well as the certified decree were missing from the original Record of Appeal filed on 25th February 2026. The Respondent submits that this Court has not dispensed with the production of those documents, and that accordingly the Record of Appeal as originally filed is incomplete and the appeal is thereby incompetent. The Respondent relies on **Selle and Another v Associated Motor Boat Company Limited and Others [1968] EA 123** on the principles governing first appeals by way of retrial, and invites this Court to evaluate the evidence afresh.

### **On the finding of trespass and the standard of proof**

34. The Respondent submits that the learned Magistrate was correct in finding that the Appellant trespassed onto the Respondent's land. The Respondent contends that the evidence adduced was clear, cogent and uncontroverted: the Respondent is the registered proprietor of NAIROBI/BLOCK 115/1186; the Appellant's trucks, bearing the Appellant's name and logo, were found on the suit property; an NTSA motor vehicle search confirmed that the trucks were owned by the Appellant; the trucks were ferrying construction debris for the Nairobi Expressway project; two formal demand letters were served on the Appellant and ignored; the Respondent's trenches were backfilled by the Appellant's trucks; and the Respondent was harassed when he attempted to fence the property. The Respondent further submits that the Appellant's own Statement of Defence effectively admitted the use of the road on the suit property while merely characterising it as a pre-existing public road, thereby conceding the essential facts of entry and use. The Respondent submits that the Appellant produced no evidence whatsoever no surveyor, no land registrar, no government agency and no witness to

demonstrate that the road was lawfully acquired, delineated by any competent authority or sanctioned as a public road.

### **On the admissibility of photographic evidence**

35. The Respondent submits that the learned Magistrate was correct in admitting and relying upon the photographic and video evidence. The Respondent contends that the Appellant did not object to the production of the photographs at the hearing before the lower court, and that having cross-examined the Respondent on the photographs without objecting to their admissibility at the time of production, the Appellant is estopped from raising admissibility as a ground of appeal. The Respondent further submits that the photographs and videos were produced in open court and form part of the court's record. Relying on **Mable Muruli v Wycliffe Ambetsa Oparanya & 3 Others [2013] eKLR**, the Respondent submits that shutting out electronic evidence on purely procedural grounds particularly where a party has had the full opportunity to cross-examine on it would occasion an injustice. The Respondent additionally submits that the

Respondent is willing and ready to provide the computer printout certificate for the benefit of the court and in the interests of justice. The Respondent contends that the survey maps and part development plans produced were government records whose authenticity the Appellant did not formally challenge.

### **On the 3-metre road and the public road defence**

36. The Respondent submits that the existence of the 3-metre lane does not support the Appellant's defence and that the learned Magistrate correctly evaluated this issue. The Respondent contends that the 3-metre lane shown on the Nairobi County PDP is a construction feature that is adjacent to the suit property and separates it from plot number 124. He submits that the Appellant's vehicles did not merely use the 3-metre adjacent lane but encroached an additional 6 metres into the Respondent's private land, as clarified in re-examination. The Respondent further submits that the survey maps produced at the hearing are government records and that their authenticity was not challenged by the Appellant. The Respondent submits that the Appellant admitted using the road in its own Statement

of Defence, contending only that the road was public which, however, was an assertion the Appellant entirely failed to prove by any evidence.

### **On the award of general damages**

37. The Respondent submits that the award of general damages of Kshs. 1,500,000/= by the learned Magistrate was proper and warranted by the evidence and the circumstances of the case. The Respondent contends that trespass is actionable per se and that the Appellant committed a continuous, deliberate and egregious trespass constructing an entire murrum road through the Respondent's land, operating heavy commercial trucks over it for months, ignoring demand notices, backfilling protective trenches and harassing the Respondent. The Respondent submits that the award is consistent with the applicable jurisprudence and should not be disturbed. The Respondent prays that this Court dismisses the appeal in its entirety, confirms the judgment and decree of the lower court, and awards the Respondent the costs of this appeal.

### **Issues for determination**

38. Having considered the Memorandum of Appeal, the Record of Appeal and the submissions of the parties, the following six issues arise for determination:

**i) Whether the learned Magistrate erred in finding that the Appellant trespassed onto the Respondent's land.**

**ii) Whether the learned Magistrate improperly shifted the burden of proof to the Appellant.**

**iii) Whether the learned Magistrate erred in admitting and relying on the photographic evidence.**

**iv) Whether the defence of pre-existing public road was adequately evaluated.**

**v) Whether the award of general damages in the sum of Kshs. 1,500,000/= was justified.**

**vi) What orders should issue, including as to costs.**

45. This Court's appellate jurisdiction is governed by **Section 78 of the Civil Procedure Act (Cap 21, Laws of Kenya)** and **Order 42 of the Civil Procedure Rules, 2010**. On a

first appeal, this Court is obliged to re-examine and re-evaluate the evidence adduced before the lower court and to arrive at its own independent conclusions on the facts and the law. In so doing, this Court must bear in mind that it did not have the benefit of seeing and hearing the witnesses firsthand. The principles governing appellate intervention were well settled by the Court of Appeal in **Selle v Associated Motor Boat Co Ltd [1968] EA 123**, which held that an appellate court will interfere with the decision of the trial court where: (i) the trial court failed to take account of particular circumstances or evidence; (ii) misdirected itself in law; or (iii) reached a decision that was plainly wrong.

46. On the question of burden of proof, **Sections 107, 108 and 109 of the Evidence Act (Cap 80, Laws of Kenya)** establish that the burden of proving a fact lies upon the person who asserts it. The standard applicable in civil proceedings is proof on a balance of probabilities. It is, however, equally well settled that where a defendant elects not to call any evidence in rebuttal, the plaintiff's uncontroverted evidence must be taken as proved. This

was affirmed in **Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu [2012] eKLR**, where it was held that failure to call evidence renders the opposing party's case uncontroverted.

47. On the admissibility of electronic evidence, **Section 106B of the Evidence Act** governs the admissibility of electronic records. An electronic record is admissible upon certification by a responsible official setting out the device, process and conditions under which it was produced. However, the courts have held that where electronic evidence is produced without formal objection at the hearing and the opposing party cross-examines on it without challenging its admissibility, that party may not thereafter raise admissibility as a ground of appeal. The principle that a party cannot approbate and reprobate has been applied in a number of decisions of this Court.

### **Analysis and determination**

**Preliminary Issue: Whether the Record of Appeal is incompetent and defective.**

48. The Respondent raises a preliminary issue that the original Record of Appeal as filed on 25th February 2026 was incomplete and defective for want of the typed proceedings of the lower court and the certified Decree, both of which are required documents under **Order 42 Rule 13(4) of the Civil Procedure Rules, 2010**. This preliminary issue has been overtaken by events. As noted in paragraph 5 of this judgment, the Appellant filed a Supplementary Record of Appeal dated 20th April 2026, which contains both the typed proceedings of the lower court (pages 5 to 17) and the certified Decree (page 19). This Court has admitted the Supplementary Record of Appeal and has considered its contents in the determination of this appeal. The defect in the original Record of Appeal has accordingly been cured by the filing of the Supplementary Record, and no prejudice has been demonstrated to have been suffered by the Respondent as a result of the initial omission. This Court therefore declines to strike out the appeal on this ground and proceeds to determine the substantive grounds.

**Issue 1: Whether the learned Magistrate erred in finding trespass.**

49. Trespass to land consists of any unjustifiable entry or intrusion by one person upon land in the possession of another. Once ownership or possession is established, any entry without consent or lawful justification amounts to trespass: **Park Towers Limited v John Mithamo Njika & 7 Others [2014] eKLR**. The tort is actionable per se and a claimant need not prove actual damage to be entitled to a remedy.

50. Proof of ownership in the present case is beyond question. The Respondent produced a Certificate of Lease and an official search in respect of NAIROBI/BLOCK 115/1186 evidencing that he is the registered proprietor. Under **Section 26(1) of the Land Registration Act, No. 3 of 2012**, a certificate of title is prima facie evidence that the person named therein is the absolute and indefeasible owner. The Appellant did not challenge the Respondent's title at any point in the proceedings, and no evidence was adduced to the contrary.

51. The Respondent's evidence as to trespass was clear, cogent and uncontroverted. He testified that in July 2020 the Appellant's trucks entered his land, constructed a murrum

road and used it to ferry construction debris and materials. He took photographs and videos of the Appellant's branded trucks on the suit property. A motor vehicle search conducted at the NTSA confirmed that the trucks belonged to the Appellant. Two formal demand letters were served on the Appellant and were ignored. The Respondent's attempts to physically stop the trespass including by digging trenches and attempting to construct a fence were frustrated by the Appellant's employees. None of this evidence was challenged or contradicted.

52. The Appellant's defence was that the road was a pre-existing public road. However, the Appellant elected not to call any witness or produce any evidence at the hearing. It merely filed a witness statement and a list of documents but chose not to tender them in evidence. The evidence of the survey map, the alleged confirmations from local administration and the Director of Survey, and any other documentary proof of a pre-existing public road all remained outside the record of evidence for the purposes of the hearing.

53. The learned Magistrate was therefore correct to hold that the Appellant's pleadings remained mere unproved allegations. As this Court has consistently held, pleadings are not evidence; assertions in a Statement of Defence or witness statement that are not formally tendered and adopted in court cannot constitute proof of the facts asserted: See the case of **Mwangi v Wambugu [1984] KLR 453**. The Respondent's uncontroverted evidence of trespass was accordingly rightly accepted and acted upon.

54. I therefore find no merit in Ground 1 of the appeal. The learned Magistrate did not err in finding that the Appellant trespassed onto the Respondent's land. The finding was properly grounded in the evidence on record.

**Issue 2: Whether the learned Magistrate shifted the burden of proof.**

55. The Appellant contends that the learned Magistrate erroneously shifted the burden of proof by holding that the Appellant's failure to call evidence rendered the Respondent's case proved. This ground is misconceived. The burden of proof is governed by **Sections 107, 108 and 109 of the Evidence Act**. The primary burden lies

with the Respondent (as Plaintiff) to prove his case on a balance of probabilities and he discharged that burden through oral evidence and documentary exhibits that went unchallenged.

56. The evidentiary principle applied by the learned Magistrate is entirely orthodox. It is well settled that where a party adduces evidence of a fact and the opposing party, having the means and opportunity to rebut that evidence, elects not to do so, the court is entitled to conclude that the evidence stands uncontroverted and must be accepted. This was affirmed in **Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu [2012] eKLR**, where the court held that the failure by a party to call evidence renders the opponent's evidence uncontroverted.

57. The Appellant had filed a witness statement and a list and bundle of documents. It had every opportunity to call its Transport Manager, Michael Omondi Ochola, to testify and to formally produce the survey map and other documents. It elected not to do so. In those circumstances, the Appellant cannot complain that the Magistrate treated the Respondent's evidence as uncontroverted that is the legal

consequence of the Appellant's own strategic and deliberate choice not to adduce evidence. The learned Magistrate committed no error of law in this regard.

58. Ground 2 of the appeal accordingly fails.

**Issue 3: Whether the photographic evidence was properly admitted.**

59. The Appellant contends that the learned Magistrate erred in relying on photographic and video evidence without the Respondent having complied with **Section 106B of the Evidence Act**, which requires certification in respect of electronic records. This ground also fails for the following reasons.

60. First, the record of the lower court shows that the photographs and videos were produced and relied upon by the Respondent at the hearing on 3rd September 2025. The Appellant cross-examined the Respondent on the photographs and the videos. At no point during the hearing did the Appellant formally object to the admissibility of the photographs on the ground of non-compliance with Section 106B of the Evidence Act. It is a well-established principle

that an objection to the admissibility of evidence must be taken timeously that is, at the point when the evidence is sought to be admitted. A party who stands by and allows evidence to be admitted without objection, and who thereafter cross-examines on it, cannot subsequently challenge its admissibility on appeal.

61. Second, the learned Magistrate specifically addressed this issue and noted that the photographs were produced at the hearing without objection, the Respondent had testified as to how and when he took them, and the Appellant had cross-examined on them. As this Court held in **Reuben Mwangi Kamau v Kilimo House Ltd [2018] eKLR**, the failure to object to electronic evidence at the time of its production constitutes a waiver of the right to challenge admissibility at the appellate stage.

62. Third, the photographs and videos were directly corroborated by other evidence: the NTSA motor vehicle search results confirming ownership of the trucks by the Appellant, and the demand letters which the Appellant ignored. The admissibility issue, even if it had been timely

raised, would not have been decisive given the totality of the evidence.

63. Ground 3 of the appeal fails.

**Issue 4: Whether the defence of pre-existing public road was adequately evaluated.**

64. The Appellant contends that the learned Magistrate failed to properly evaluate the defence that the road in question was a pre-existing public road or right of way, particularly given the Respondent's own admission in cross-examination that there was a 3-metre lane between Plot Nos. 124 and 125.

65. This ground fails upon a full and careful reading of the typed proceedings now contained in the Supplementary Record of Appeal filed on 20th April 2026. The Appellant has presented a selective and incomplete account of the Respondent's evidence, relying solely on certain cross-examination answers while ignoring the critical clarifications the Respondent gave on re-examination,

which this Court on a first appeal is bound to consider as part of the totality of the evidence on record.

66. The full picture from the typed proceedings is as follows. In cross-examination by Ms. Luther Appellant's counsel, the Respondent confirmed: (a) that between plot numbers 124 and 125 there exists a 3-metre lane; (b) that the 3-metre lane is for public use; (c) that the Nairobi County PDP shows a 3-metre lane which is a construction feature in the Karangita area; and (d) that between his parcel 2787 and plot 124 a 3-metre lane is shown on the map. However, on re-examination by his own advocate Mr. Senteu, the Respondent specifically and critically clarified that the 3-metre lane is adjacent to his land and separates his land from plot number 124. He then gave this unequivocal testimony: that the Appellant's vehicles were using the 3-metre lane plus 6 metres of his land, meaning they encroached 6 metres into the suit property beyond the 3-metre adjacent lane. This is the essence of the trespass not mere use of a public lane, but deliberate encroachment 6 metres into the Respondent's private land.

67. This re-examination evidence is devastating to Ground 4.

The existence of a 3-metre adjacent public lane and the encroachment of 6 metres into the private land are not mutually exclusive facts they are complementary ones that together describe the trespass precisely. The Appellant's trucks used the public lane and then extended their use into 6 metres of private land. That extension is the actionable trespass. The Appellant adduced not a single piece of evidence to contradict this specific testimony.

68. Beyond that, the Respondent gave detailed and uncontroverted evidence about the survey map. He testified that the PDP plan did not match the survey map, that he identified and reported the error, corresponded with the Director of Survey, and obtained a correction through Sheet Number 5 of the Surveys of Kenya dated 3rd July 2025. He was categorical that when he purchased the land there was no 15-metre or vehicular road through his parcel, and that the road was established illegally by the Appellant in 2020. The Appellant called no witness and produced no documentary evidence in rebuttal. Its application to call the Nairobi Regional Surveyor made after both cases had been

closed was rightly declined by the trial court as an afterthought, particularly since the Appellant's own counsel had indicated on pretrial compliance dates that a surveyor would be called, then abandoned that position at the hearing.

69. In the absence of any admissible evidence to support the defence of pre-existing public road as it applies to the suit property itself, the learned Magistrate was entirely justified in rejecting it. As this Court observed in **John Kamau Nduati v James Kung'u Kamau [2014] eKLR**, the existence of a public road through private land is a serious assertion that requires cogent and documentary proof, particularly survey evidence. None was produced.

70. Ground 4 of the appeal fails.

**Issue 5 & 6: Whether the award of general damages of Kshs. 1,500,000/= was justified**

71. The Appellant challenges the award of general damages of Kshs. 1,500,000/= on two related grounds: first, that the quantum was factually unjustified; and second, that the

learned Magistrate failed to provide sufficient analysis or comparable jurisprudence to support the award.

72. The legal principles governing general damages for trespass to land are well settled. Trespass is actionable per se, and a claimant need not prove specific pecuniary loss. The court's assessment of general damages takes into account the nature and gravity of the trespass, the duration of the interference, the degree of deliberateness, and the deprivation of use and enjoyment of the land. In **Duncan Nderitu Ndegwa v KP & LC Ltd & Another [2013] eKLR**, the court held that once trespass is proved, general damages are awardable and the evidence of continued, deliberate trespass involving the construction and use of a road resulting in deprivation of use and enjoyment of land justifies a substantial award.

73. In the present case, the trespass was not a single, fleeting entry. The Appellant's trucks constructed a murrum road through the suit property, used it continuously to ferry construction materials and debris over a period of several months, ignored two formal demand letters, frustrated the Respondent's attempts to stop the trespass by refilling the

trenches he had dug, harassed the Respondent's workers, and effectively rendered the suit property unusable for the Respondent's intended purposes during the period of occupation. The Respondent had planned to develop the property commercially and had a school interested in leasing the same, a business opportunity he lost.

74. This Court has considered the award of Kshs. 1,500,000/= in the context of the foregoing circumstances and the comparable decisions cited. In **Duncan Nderitu Ndegwa v KP & LC Ltd & Another [2013] eKLR**, the court awarded Kshs. 1,000,000/= in general damages for trespass involving construction and use of a road. Regard must also be had to the passage of time and the impact of inflation on the purchasing power of damages awards since that decision. The Respondent suffered continuous, deliberate interference with his proprietary rights, was harassed and intimidated on his own land, and was deprived of the commercial use of the property from 2020. Taking all these circumstances into consideration, this Court finds that the award of Kshs. 1,500,000/= in general damages, while perhaps at the upper end of the range for cases of this

type, is neither manifestly excessive nor unsupported by the evidence and the applicable jurisprudence.

75. It is trite that an appellate court will only interfere with an award of damages where the trial court acted on a wrong principle, misapprehended the evidence, took into account irrelevant matters or failed to take into account relevant ones, or arrived at a figure that is so inordinately high or low as to represent an entirely erroneous estimate: **Butt v Khan [1982-88] 1 KAR 1**. None of those grounds have been established in the present case. The learned Magistrate identified the relevant legal principles, cited applicable authority in **Duncan Nderitu Ndegwa v KP & LC Ltd & Another [2013] eKLR**, and applied those principles to the facts before the court. The award is within the reasonable range and does not call for interference.

76. Grounds 5 and 6 of the appeal accordingly fail.

### **Costs**

77. The general principle under **Section 27 of the Civil Procedure Act** is that costs follow the event unless the court, for good reason, orders otherwise. The Appellant has

failed on all grounds of the appeal. The Respondent is entitled to the costs of this appeal. This Court proceeds to assess those costs and awards a sum of Kshs. 100,000/= all inclusive.

**Final orders**

78. For all the reasons set out above, it is the finding of this court that the Appeal is devoid of merit and this Court makes the following final orders:

- (i) The appeal is hereby dismissed in its entirety.**
- (ii) The judgment of the trial court and the consequential decree arising therefrom be and is hereby affirmed.**
- (iii) The Appellant shall bear the costs of this Appeal, assessed at Kshs. 100,000/= all inclusive.**

**Dated, Signed and Delivered Virtually this 14<sup>th</sup> day of May 2026.**

**E. K. WABWOTO  
JUDGE**

**In the presence of:-**

**Ms. Luther for the Appellant.**

**Mr. Senteu for the Respondent.**

**Court Assistants: Mary Ngoira and David Ngoosa.**

ORIGINAL