



**Kimani v Company (Environment & Land Case 100 of 2024)  
[2025] KEELC 872 (KLR) (Environment and Land) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 872 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA  
ENVIRONMENT AND LAND  
ENVIRONMENT & LAND CASE 100 OF 2024  
MC OUNDO, J  
FEBRUARY 27, 2025**

**BETWEEN**

**JACINTA WAMBUI KIMANI ..... PLAINTIFF**

**AND**

**CHINA COMMUNICATION CONSTRUCTION COMPANY ..... DEFENDANT**

**JUDGMENT**

1. Vide a Complaint dated 9<sup>th</sup> June, 2014 and amended on 8<sup>th</sup> August, 2023, the Plaintiff herein sought for the following orders:
  - i. A declaration that the Defendant's excavation of the Plaintiff's parcel of land to wit; Longonot/Kijabe Block 6/749 (Kiambu Nyakinyua) was unlawful and arbitrary.
  - ii. A declaration that the excavation of the Plaintiff's parcel of land to wit; Longonot/Kijabe Block 6/749 (Kiambu Nyakinyua) without and/or against the consent of the Plaintiff amounts to trespass to property, conversion and breach of the Plaintiff's proprietary rights.
  - iii. A declaration that the Defendant's impugned conduct has deprived the Plaintiff of her Constitutional and legal rights to the use and enjoyment of the subject parcel of land being Longonot/Kijabe Block 6/749 (Kiambu Nyakinyua).
  - iv. An order for compensation for the current value of the portion excavated and the Plaintiff's loss as per the valuation report.
  - v. General damages for trespass.
  - vi. Interest on (iv) and (v) above.
  - vii. Costs of the suit.



- viii. Any other relief(s) that the Honourable Court may deem fit in the circumstances.
2. Pursuant to service of the Plaintiffs claim, the Defendant filed its Statement of Defence dated 25<sup>th</sup> August, 2023 in which it denied the contents of the Plaint putting the Plaintiff to strict Proof. It stated that it had never acquired or had any intentions to acquire a portion of the alleged Plaintiff's property for the construction of the Naivasha Inland Port thus issuance of the alleged Notice had been unnecessary. That the Plaintiff was not entitled to any compensation or any notice of inquiry to tender a written claim for compensation because it had not acquired her alleged property.
  3. It denied the authenticity of the finding in the valuation report to the effect that if the said portion had indeed been excavated as alleged, then the said excavation had not been carried out by the Defendant. That further, the alleged value of Kshs. 21,250,000/= for the 8.6 acres portion of land alleged to have been excavated had been highly exaggerated and lacked basis, principle or foundation in law under which the valuer had arrived at the said figure. The Defendant thus prayed that the suit be dismissed with costs.
  4. Vide a Reply to Defence dated 21<sup>st</sup> November, 2023, the Plaintiff reiterated, in their entirety, the contents of their Plaint stating that the Defendant's heinous conduct had reduced the Plaintiff's agricultural farm into a quarry. That it was clear beyond peradventure that the Defendant had blatantly encroached into the Plaintiffs parcel of land and had no explanation whatsoever for that encroachment. That the Defence offered nothing but mere denials.
  5. Upon compliance with the pretrial directions the matter had proceeded for hearing on the 9<sup>th</sup> July, 2024 wherein PW 1 Jacinta Wambui Kimani, the Plaintiff herein introduced herself as a farmer who carried on dairy and crop farming and that she lived in Ridgeways –Nairobi. That she filed suit against the Chinese Community because they had excavated her land parcel No. Longonot/Kijabe block 6/749 measuring 10 acres, the suit property herein. She sought to adopt her witness statement dated 8<sup>th</sup> August, 2023 as her evidence in chief as well as a bundle of documents filed.
  6. Her evidence was that she was the owner of the suit property having bought the same from Kiambu Nyakinyua Farmers Co. Ltd on 29<sup>th</sup> August 2012 at a purchase price of Kshs. 700,000/=. She produced a receipt as Pf exh 1 and proceeded to state that after payment of the purchase price, she had been issued with a ballot paper No. 749 which ballot she produced as Pf exh 2. That she had then proceeded and had been issued with a title deed dated 21<sup>st</sup> January, 2012 which she produced as Pf exh3.
  7. That the Defendant had excavated her land as seen in the Photographs produced as Pf exh4 (a-j) which excavation had been very deep and covered a portion of about 8 acres of the suit property. That she had also filed a valuation report dated 3<sup>rd</sup> July, 2023, which report she produced as Pf exh5.
  8. Her evidence was that after the excavation, she had tried to follow up with the Defendant to make right their wrong wherein she had gone to their office but she could not gain access as there had been security personnel who were armed with firearms and who had chased her away.
  9. That subsequently she had hired a lawyer who had issued the Defendant with a demand letter dated 20<sup>th</sup> July, 2023 herein produced as Pf exh6. That despite service and receipt on the 21<sup>st</sup> July, 2023 by one Edgar Alema, there had been no response to the said demand letter.
  10. That not only was she is seeking justice from the court, but for compensation of the excavated 8 acres portion of the suit property which amounted to a sum of Kshs. 21,250,000/= as per the Valuation Report herein produced.



11. On cross-examination, she confirmed that the Defendant had trespassed on her land and excavated the same. That she was aware that the Defendant was a company, had directors, the Chairman, Secretary, and workers among others. She confirmed that the person who had received and signed the demand letter was an employee of the Defendant, but admitted that she had not brought documents to show that a person had entered the suit property. That whereas there had been no photographs taken of the many lorries/trucks that had excavated her land, they had the Defendant's name inscribed on them. She however admitted that she had not conducted a search from the registrar of motor vehicles to verify whether or not that the said lorries/trucks belonged to the Defendant.
12. When she was referred to Pf exh 4, she confirmed that she did not have a certificate to show the person who had taken the photographs or the device that had taken the same. A further response was that whilst she was not a surveyor and did not a surveyor's report, she could produce one if asked to and that the photographs had been taken after the workers had left for which none of the Defendant's employees had been captured in the said photographs.
13. Upon being referred to Pf exh4 (g), she confirmed that the same had not been soil erosion but excavation and explained that whereas the result of soil erosion was a valley, the result of an excavation was a hole.
14. On being referred to Pf exh 5 she confirmed that she was not a valuer hence she had not made the document but that the same had been made by Peter Kenyango whom she had hired to value the suit property. That the document had given the market value of 8.5 acres portion of the suit property.
15. She confirmed that she wanted compensation from the Defendant since they had excavated her suit property. That whereas she did not have a report to state how much soil had been removed, she had already been inconvenienced for 3 years. She also admitted that she did not have a report to show how much money was to be used to restore the suit property to its original status. That she had been using the suit property measuring 10 acres for farming but the Defendants had excavated a portion of the all the said land measuring 8.6 acres and damaged it so that she could no longer carry out farming activities therein. She confirmed that the land had no fence.
16. That whilst she had bought the suit property in the year 2012, she had started farming therein around the year 2017 and that she had not farmed on the 1.5 acres portion of the suit property because there had been a lot of soil erosion therein. She confirmed that there had been beacons on the suit property and when she was referred to Page 32 of the pictures on the Google map, she maintained that she had beacons on her land.
17. In re-examination, she reiterated that the Defendant had excavated her land where it had mined the rocks to be used to build Naivasha Inland Port. When she was referred to Pf exh4 (g-h), she confirmed that the photographs depicted the murrum on her land that had been caused by the excavation. She reiterated that she could no longer use her land for cultivation and maintained that the damage therein caused was due to the excavation and not by soil erosion.
18. Joseph Ngungu Gitau, was PW2, who confirmed that he was a farmer who lived in Satellite Maai Mahiu. He adopted his witness statement dated 20<sup>th</sup> November, 2023 as his evidence in chief before testifying that the Plaintiff herein and her husband had informed him that they were owners of the suit property and that he should inform them of any activity therein since he was neighboring the suit property.
19. That one time, there were lorries/trucks which had excavated the soil from the suit property which lorries/trucks had the name China Communications Construction Company (the Defendant herein) inscribed on them. That at the time, he had lost his phone and therefore could not inform the Plaintiff



- on the happenings on the suit property. His evidence was that the soiled excavated therein had been used to construct the SGR wherein the said excavation had left a hole measuring about 7 meters deep on the suit property and which hole now contained water. That the suit property measuring about 10 acres had all been dug up in the year 2020 leaving the hole which was still on the ground,
20. When he was referred to Pf exh4 (g-h), he confirmed that the top had been the ground level and that the suit property was slanted. He explained that the water from the rain ran from up the ground in trenches into the hole in the suit property. That the effects seen the photographs was not caused by soil erosion since he had witnessed the suit property being excavated. That it had only been the Plaintiff's land that had been excavated because all the other surrounding parcels of lands had crops growing in them. That only the Plaintiff's land had been bear with nothing on it.
  21. On cross-examination, he confirmed that he lives in block 6 and that he was the Plaintiff's neighbor. He confirmed that from the pictures that he had been shown, there had neither been a house in the vicinity nor anything to show that anybody lived there. He confirmed that his land was number 648.
  22. When he was referred to Pf exh 5, specifically the Map attached to the valuation report, he confirmed that his land was not on the map and that he had not brought anything to show that he was the Plaintiff's neighbor. He however testified that he had known the Plaintiff in the year 2013, when she had shown him the suit property and the beacons therein despite the absence of a surveyor.
  23. He confirmed that it had been the Defendant that had excavated the suit property because he had seen their vehicles although he had not brought anything to show that the said motor vehicles belonged to the Defendant. He however confirmed that the excavation by the Defendant had begun in the year 2019 and had ended in the year 2020.
  24. On being referred to Pf exh4 (c, e, f, g, h), he confirmed that the same looked like 7 meters. When he was referred to paragraph 9 of his statement, he confirmed that whereas he had seen machines, he did not take any photographs. He agreed that it was possible for someone to lease vehicles and put their labels thereon. That whilst he did not bring searches for the vehicles, they were driven and supervised by the Chinese.
  25. When he was referred to Pf exh4 (g -h) he confirmed that the pictures showed soil erosions. He confirmed that whereas the suit property had no fence, it as well as all the lands surrounding it, had concrete beacons. That whereas from the pictures one could not tell the boundaries, the same could be identified on the ground.
  26. In re-examination, he confirmed that the distance between his parcel of land and the Plaintiff's parcel of land was less than 1km. He maintained that he did not take photographs of the lorries/trucks since he had lost his phone at that time and when he was referred to Pf exh4 (g - h), he maintained that the same had been soil erosion.
  27. He explained that the excavators had caused the land to be sloppy such that when it rained, the water collected into the hole thus causing soil erosion. That cattle would also drink water that had collected in the hole.
  28. When he was examined by the Court, he testified that before the Chinese went into the suit land, it had been bare, since there had been no farming taking place therein.

**The Plaintiff thus closed her case.**

29. The Defence case proceeded for hearing with a testimony from Edgar Alema Usagi, the Defendant's Legal Officer and an Advocate of the High Court of Kenya to the effect that he lived in Nairobi and that



he had neither entered into the suit property nor was he aware of where the same was situated. That indeed, before the 9<sup>th</sup> August, 2023 when he had been served, he had not been aware of the existence of the suit property.

30. He adopted his witness statement as his evidence in chief and produced a survey report of November 2020 as D exh 1 wherein he proceeded to testify that that he was not aware that the Defendant had entered on that particular piece of land.
31. On cross-examination, he reiterated that he had never been to the suit property. That whereas he worked for the Defendant who was constructing the dry port, he was not aware that it was the only company building the dry port. He explained that the Defendant had used government land and where private land had been used, the individuals had been compensated. He however testified that he was not aware of any compensation to the Plaintiff.
32. In re-examination, he testified that he was not aware whether or not the Plaintiff's land had been acquired for the dry port.

The Defence closed its case.

33. Parties filed their written submissions wherein the Plaintiff summarized the factual background of the matter before framing her issues for determination as follows:
  - i. Whether the suit herein was filed out of time.
  - ii. Whether the Defendant has and still is trespassing on the Plaintiff's parcel of land known as Longonot/Kijabe Block 6/749.
  - iii. Whether the Defendant should pay damages including but not limited to the damages for trespass.
34. On the first issue for determination as to whether the instant suit had been filed out of time, she submitted that whereas the Defendant had posited that the instant suit had been filed outside the statutory three-year limitation, such limitation did not apply where the trespass complained of was continuing. She hinged her reliance on the Court of Appeal's decision in the case of *Muthiora v Marion Muthama Kiara* (Suing on behalf of the Estate of Erastus Muthamia Kiara-Deceased) (Civil Appeal 43 of 2017) [2022 KECA 28 (KLR)] (4<sup>th</sup> February 2022) (Judgment) to submit that the trespass in the instant suit was permanent in nature as her 8.5 acres portion of land had been reduced into a large 7-meter-deep quarry. It was thus her submission that the present trespass was continuing hence the three-year statutory limitation period did not apply.
35. On the second issue for determination as to whether the Defendant had and was still trespassing on the Plaintiff's parcel of land known as Longonot/Kijabe Block 6/749 (suit property), she placed reliance on the definition of trespass from a combination of decisions in *Muthiora's* case (*supra*), *Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited* [2019] eKLR and *John Chumia Nganga v Attorney General & another* [2019] eKLR to submit that whereas it had not been in dispute that the Plaintiff was the legally registered proprietor of the suit property, the Defendant had invaded the said land to extract soil for the construction of the Naivasha inland dry port without her knowledge and/or consent hence committing a blatant act of trespass.
36. That the Defendant's legal officer had admitted that there were instances where private land had been used in the construction of the dry port for which its owners had been compensated, there had been no compensation whatsoever extended to the Plaintiff. It was thus her submission that the Defendant had invaded, intruded and/or had trespassed into the suit land which trespass had been continuing to date.



37. On the third issue for determination as to whether the Defendant should pay the damages including but not limited to the damages for trespass, reliance was placed on the decided case of *Nasela & Mukakaik Ltd v Kenya Urban Roads Authority & 2 others; County Government of Kitui (Interested Party) (Environment and Land Appeal 13 of 2021) [2023] KEELC 21544 (KLR) (31 October 2023) (Judgment)* to submit that the Defendant having used the Plaintiff's parcel of land to achieve its objective in utter disregard of the Plaintiff's proprietary right over the same, she was entitled to both compensatory damages and the nominal damages which were automatically awarded whenever trespass was established. She also sought compensation to a tune of Kshs. 21,250,000/= being the value of the excavated area that had now been rendered completely and permanently unusable.
38. That further, the Honourable Court should award exemplary damages for the anguish that the Defendant had caused the Plaintiff by invading and using her property thus rendering it permanently unusable. That her personal efforts to seek audience with the Defendant had been repulsed by the heavily armed officers guarding its premises.
39. She placed reliance in the decided case of *Gujral Sandeep Singh Ragbir v Minister for Public Works, Road and Transport County Government of Kajiado & another [2018] eKLR* to submit that the Defendant herein having intruded into her parcel of land and excavated the same making it permanently unusable, she was entitled to exemplary damages of at least 9,000,000/=. She sought that the Honourable Court grants her all other orders sought in the Plaint dated 8<sup>th</sup> August, 2023 and/or any other order as the court deemed fit.

#### **Defendant's Submissions**

40. The Defendant's submission was that the claim against it had no chances of succeeding because in the first instance, the suit had been filed out of time contrary to the provisions of Section 4(2) of the [Limitation of Actions Act](#) which required that a tort claim based on trespass to land be filed within three (3) years from the date on which the cause of action had arisen. That in any case, the claim for trespass could not succeed because the Plaintiff did not plead or prove that the employees of the Defendants had entered into the suit property and excavated marram therefrom as had been alleged.
41. The Defendant then proceeded to frame its issues for determination as follows:
  - i. Whether the suit was filed out of time.
  - ii. Whether the Defendant trespassed into the suit property.
42. On the first issue for determination as to whether the present suit had been filed out of time, the Defendant's submission was that whereas the instant case had been filed on 9<sup>th</sup> August, 2023 alleging that marram had been excavated from the Plaintiff's land for the construction of the Naivasha Inland Dry Port, the uncontroverted evidence of DW1, one Edgar Alama had demonstrated that the construction of the said Port had begun in December 2019 and completed in May, 2020. That subsequently, the claim herein having been based on a cause of action that had arisen during the construction of Naivasha Dry Port had been filed outside the three (3) years limitation period. That indeed, the Plaintiff had been aware of the same hence she had not pleaded the date when the alleged cause of action had accrued in order to avoid or defeat an objection based on limitation.
43. That further, the Plaintiff had attempted to assert the exception of continuous trespass in her submissions, which exception could not apply herein because the facts that had been pleaded in the Plaint did not disclose the elements of continuous trespass. That indeed, in paragraphs 6 and 7 of the Plaint as well as the evidence that had been led by the Plaintiff, it had been alleged that the Defendant



had entered into the land, excavated soil and abandoned the land leaving a huge quarry. It thus urged the court to dismiss the instant suit without belaboring on its merit.

44. On the second issue for determination as to whether the Defendant had trespassed into the suit property, it submitted that whereas it was not in dispute that the Defendant was a company which could only act through its employees and officials, thus to prove trespass, the Plaintiff had to prove that the Defendant through its agents or employees had entered into the suit land and excavated marram therefrom. That however, the said burden was never discharged since the Plaintiff had not produced any admissible evidence to prove that the persons who had allegedly entered into the suit property had been the Defendant's employees.
45. The Defendant submitted that the evidence given by PW1 and PW2 in cross-examination had confirmed that there had been no believable evidence to prove that any of its employees or vehicles had entered the Plaintiff's land and excavated soil therefrom. That further, the photographs that had been relied upon by the Plaintiff to demonstrate the entry could not be evidence of entry, the same being inadmissible for failure by the Plaintiff to produce a certificate of electronic evidence to show the authenticity of the said photographs contrary to the provisions of Section 106B of the *Evidence Act*. Reliance was placed in the decided case of Rachael Njoki Kahara v Gideon Migiro Nyambati [2020] eKLR. It was thus its submission that the Plaintiff had not proved her case on a balance of probabilities. Further reliance was placed in the decided case of Ngungu v China Road Bridge Corporation (K) & another (Environment & Land Case 378 of 2017) [2022] KEELC 15299 (KLR) (24 November 2022) (Judgment).
46. In conclusion, it submitted that without evidence to show that the alleged trespassers had been employees of the Defendant or that the alleged vehicles had belonged to the Defendant, the Defendant could not be held vicariously liable for alleged excavation. It thus urged the court to dismiss the suit with costs.

#### **Determination.**

47. I have carefully considered the pleadings, the evidence adduced, the submissions by the parties, the law and the authorities herein cited. It must be remembered that submissions cannot take the place of evidence (See Court of Appeal decision in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR.
48. I have also considered the fact that it is trite law that (s)he who asserts must prove their case where the burden of proof lies with whoever would want the court to make a finding in their favour in support of what they claim.
49. Section 107 of *Evidence Act* succinctly states:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
50. And Section 108 of *Evidence Act*, further states thus:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
51. Having made these statements which I shall repeatedly refer to later in the judgment, I find the issues that stand out for determination as being;
  - i. Whether the Plaintiff has proved her case.



- ii. whether the Plaintiff should be granted the reliefs sought
52. The Plaintiff's case was that she was the proprietor of land parcel No. Longonot/Kijabe Block 6/749 measuring 10 acres having acquired the same in the year 2012. That she had used the land to cultivate her crops up to the year 2017 when she had stopped. That subsequently on a date she did not mention, the Defendant had trespassed on her land excavated soil, on a portion of land measuring 8.6 acres, for the construction of the Naivasha dry port. That the Defendant had then left the land dilapidated, with deep holes and completely damaged wherein no farming activities could take place again. Incidentally her witness PW2 had testified that unlike the surrounding neighborhood, the Plaintiff had not carried out any farming on her land which been bear with nothing on it and that was the reason why it had been excavated. The Plaintiff had produced in evidence Google map pictures as well as photographs that depicted the damaged portion of land. She further produced a valuation report dated 3<sup>rd</sup> July, 2023 that had put the value of the excavated area on land parcel No. Longonot/Kijabe Block 6/749 at Ksh. 21,250,000/=
53. Her only evidence that suggested that the perpetrator of the heinous act had been the Defendant, was that the lorries/trucks and machines which had excavated the soil from the suit property had the name "China Communications Construction Company" inscribed on them. That her effort to gain access to their office and ventilate her dissatisfaction had been thwarted by the presence of the armed security.
54. The defence on the other hand denied the allegations brought forth by the Plaintiff stating that they neither trespassed, excavated or carried out the impugned activities on the Plaintiff's parcel of land. That the Defendant was not the only company building the dry port and that it had used government land and where private land had been used, the individuals had been compensated.
55. Excavation is the process of removing earth to form a cavity in the ground. It is a broad term that can refer to a variety of activities, from digging a small hole with a shovel to using heavy machinery to remove tons of earth. Excavation is often done for construction purposes, such as building foundations for buildings or roads. It can also be done for other purposes, such as mining, archaeology, or even landscaping.
56. In the matter before the court, the Plaintiffs claim against the Defendant had been that it had excavated soil from her parcel of land to construct the Naivasha dry inland port. Although the standard of proof herein was not akin to that in criminal matters, yet it was not sufficient to produce photographs of a disturbed parcel of land, and allege that because the vehicles that had excavated soil on her land bore the Defendant's name, that definitely it must have been the Defendant who had excavated her land. The Plaintiff ought to have gone a step further to ascertain whether a contract had been awarded the Defendant carry out the impugned activity since excavators are a production machinery, and do not necessarily require registration like motor vehicles. Alternatively the Plaintiff should have provided at least the registration numbers and certificate of search of the registration of the lorries/trucks that carried away the excavated soil, identity of the persons operating the machines, whether they were the Defendant's employees or not, she could also have provided photographic evidence of the presence of excavation equipment and Defendants' workers on the suit land. The Plaintiff did not produce any evidence to demonstrate that the Defendant was the owner of the said vehicles or its servants or agents were operating the said vehicles.
57. The court notes that during cross examination, the Plaintiff and her witness had been subjected to a possibility of the damage on the Plaintiff's suit land having been caused by soil erosion, for which they were adamant that the damage had been caused by excavation. It was therefore incumbent upon the Plaintiff called an expert witness to dislodge the notion that the destruction of her parcel of land had not been caused by soil erosion but due to excavation. There was no an expert testimony of a geologist



or engineer to provide testimony about the nature of the excavation, evidence of the excavator's identity etc as proof of the allegations she had made against the Defendant.

58. Since as stated herein above that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given, I therefore find and hold that the Plaintiff having failed to establish the identity of the Defendant as the company that had excavated soil from the Plaintiffs land, it cannot therefore be said that the Defendant had trespassed on the said parcel of land and committed the heinous crime complained of. In the end, the Plaintiff having failed to establish her claim against the Defendant on a balance of probabilities, the upshot of the foregoing is that the Plaintiff's suit against the Defendant is herewith dismissed with costs.

**DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 27<sup>TH</sup> DAY OF FEBRUARY 2025.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

