



**Murithi v Wakhu & another (Environment and Land Appeal
25 of 2023) [2024] KEELC 1534 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1534 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 25 OF 2023**

CK NZILI, J

MARCH 20, 2024

BETWEEN

HARUN MUCHAI MURITHI APPELLANT

AND

JOAB INDECHE WAKHU 1ST RESPONDENT

PHYLLIS NYOROKA MBIJIWE 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. DW Nyambu –
CM in Meru CM ELC No. 106 of 2019 delivered on 10.3.2023)*

JUDGMENT

1. The respondents, who were the plaintiffs at the lower court, had sued the appellant as the defendant for trespass into the respondents' Plot No. 172 A II Nkubu market on 3.11.2014. It was averred that the appellant allegedly claimed that the respondents' plot was part of his plot and proceeded to erect semi-permanent buildings therein illegally. They sought a permanent injunction, eviction, and general damages for the loss of the user.
2. The appellant opposed the claim through a statement of the defendant and a preliminary objection dated 11.11.2014. It was averred that the court had no jurisdiction to hear and determine the suit, the 1st respondent had no locus standi to institute the suit, the suit was bad in law, defective, and an abuse of the court process. Further, the appellant denied the alleged trespass or fraud.
3. From the record, the trial court, by a ruling dated 14.01.2015, dismissed a preliminary objection based on locus standi and pecuniary jurisdiction, given that the preliminary objections were not pure points of law. Additionally, an order was made on 23.1.2015 for a scene visit to be undertaken by the District Surveyor and the County Physical Planner. Interim orders of injunction were also issued to preserve the subject property.



4. The trial court visited the locus in quo on 5.6.2015 and conducted some proceedings at the scene with the 1st respondent and 2nd respondent testifying as PW 1 and PW 2. The appellant testified as DW 1. Musyoka Paul, a physical planner, made some remarks regarding the history of the two plots. He told the court that the structure standing on the plot belonging to the appellant was illegally constructed and had no plot number. The physical planner said it had not been planned or demarcated and that it initially belonged to the post office. He said the developments on the plot had not been approved. Michael Murithi, a county surveyor, also testified at the scene. He told the court his office had no records for Plots No. 172 A (1) & 172 A II and that the two plots did not exist in their record. The witness was stood down for further hearing in the open court.
5. Following protracted interim applications and rulings, the hearing of the matter commenced on 6.2.2019, with the 1st respondent as PW 1. He adopted his witness statement dated 7.11.2014 as his evidence in chief. PW1 told the court that the appellant trespassed into his Plot No. 172 A (I), which he acquired from the 2nd respondent as per a sale agreement dated 12.7.2014, a transfer form, and photographs that he produced as P. Exh No. 1-4. PW 1 told the court his plot bordered the appellant's Plot No. 172 A 11. He said the appellant unlawfully fenced off a portion of his plot measuring approximately 5ft.
6. PW 1 said his efforts to call the director of physical planning, Meru County, through a letter to intervene, were futile as the appellant became violent and denied the officer any access to establish the boundary. He told the court his plot was next to the Meru – Nkubu Highway. He said the two plots were vacant when he bought it but the appellant defied court orders and instead commenced works on the disputed portion.
7. In cross-examination, PW 1 told the court the plot was still under the 2nd respondent's name, though he had taken possession immediately after he signed the sale agreement and the transfer form. He said he had conducted due diligence before purchasing the plot by visiting the plot in the presence of a Land Surveyor and establishing its measurements, notwithstanding that the size of the plot was not captured in P. Exh No. (1). He admitted that P. Exh No. (3) was obtained from the physical planning office in 2007. The letter did not bear the stamp or date on its face. PW 1 said that there were interim orders of injunction binding on the appellant until the hearing and determination of the suit.
8. PW 1 told the court that he had paid consideration for the plot, which at the time of sale was fenced and had distinct boundaries with the appellant's plot. He said the search certificate and the physical planner's letters had been produced as his exhibits; otherwise, he had verified the status of the plot and its boundaries before purchasing it. PW1 said that the appellant had illegally interfered with the boundary, which effectively stalled the process of the transfer and development of his plot by the seller.
9. Phyllis Nyoroka Mbijiwe testified as PW 2 and adopted her witness statement dated 7.11.2014 as his evidence in chief. She said that she sold Plot No. 172 A 1 to the 1st respondent after he had verified its status on the ground and ownership. PW2 said she had acquired the plot from one Peter Kiambi in 2009. Eventually, she said she signed transfer forms in favor of the 1st respondent. She denied selling and transferring 5ft of her land to the appellant. In cross-examination, PW 2 said she was still the recorded owner of the plot as per the register of the plot since the transfer had not been effected. PW 2 said the 1st respondent took vacant possession of the plot after they signed the sale agreement.
10. PW 2 said Peter Kiambi had filed a transfer form in her favor in 2009, which they took to the county council officers who effected the changes in her favor. PW 2 said all the beacons were visible when he sold the plot to the 1st respondent. She said that before selling the plot, it had been leased to some jua



kali artisans. PW2 said the appellant started construction on the disputed plot in November 2014 after removing the boundary/fence even though there was a pending court order.

11. After the closure of the respondents' case, an order was made on 6.2.2019 for the county physical planner and the Nkubu Town administrator to visit the locus in quo and file a report before the court. Before this could happen, the respondents filed an application dated 29.3.2019, in which the appellant filed a preliminary objection, and an application dated 29.3.2019, on the basis that the suit property was valued at Kshs.25,000,000/= the court lacked pecuniary jurisdiction to hear and determine the suit.
12. The trial court, by a ruling dated 15.5.2019, dismissed the application and ordered the matter to proceed on a priority basis. The appellant eventually filed a notice to act in person and asked the presiding court to recuse itself. By a ruling dated 14.8.2019, the presiding court withdrew from hearing the matter. The same was placed before the presiding judge, ELC Meru, for reallocation. The matter was transferred to the Chief Magistrates Court Meru for hearing and disposal. Directions were eventually taken on 3.11.2020 that the matter proceed from where the former trial court had left it.
13. Elizabeth Mburu, a Director of the Physical Planning Department Meru County Government, testified as PW 3 and produced a site visit report conducted on 1.4.2019 and filed in court on 3.4.2019. She confirmed the owners of the plots as the 2nd respondent and the appellant. PW 3 produced the report as P. Exh No. (5). Her evidence was that the record for the plots in the Nkubu offices was altered contrary to the records held in the main office by changing the acreage from 25 ft by 37ft for Ntoruchiu to Harun Muchai to 20 ft by 80 ft, while the sizes of Plot No. A2 intact. PW 3 said PW 2 remained the owner of Plot No. 172 A2 as per receipts for payments of rates dated 27.1.2021 and the register produced as P. Exh No. (6) & (7), respectively.
14. In cross-examination, PW 3 said verification was done on the ground with what was in their records, and that is how it was established that the plot size had been altered from 25ft by 37 ft to 20 ft by 80 ft. PW 3 said the application for transfer did not include the alteration of the size of the plot. She said it was illegal to cancel the names of the appellants. PW 1 said the appellant disrupted the site visit; therefore, she could not ascertain the acreage the appellant had built on. Further, PW 3 said the appellant built structures on his plot without any approved authority from the county government of Meru and despite the pendency of a court order. PW 3 said the two plots are supposed to be 25ft by 37 ft each since the Embu – Meru Highway altered the position on the ground after the government compulsorily acquired land.
15. PW 3 said the illegal cancellation was on the register entry for Plot No. 172 A 1. Therefore, PW 3 said the construction on Plot No. A 1 had extended into plot no. A 2 contrary to the registrar of plots and the existing orders of the maintenance of status quo.
16. Harun Muchai testified as DW 1 and adopted his witness statement dated 11.11.2014 as his evidence in chief. He told the court that he was the owner of Plot No. 172 A 1, which he had occupied for five years without any interruption or complaint. He denied that the 1st respondent was his neighbor. DW 1 said that his plot was developed with structures and had not interfered with anybody's going by his boundaries. He termed the respondents' allegations as false, farfetched and misplaced. He produced a minute check & extracts dated 4.9.2014 as D. Exh No. (1), transfer form dated 22.4.2014 as D. Exh No. (2), full council minutes of 4.9.2014 as D. Exh No. (3), measurement consent as D. Exh No. (5), list of persons present as D. Exh No. (4), receipts for payment, transfer, plot fee as D. Exh No. 6, 7 & 8, transfer form D. Exh No. (9), annual payment receipts D. Exh No. (10), building plans approvals as D. Exh No. (11), Nema approval reports dated 2.8.2016 as D. Exh No. (12), approval plans dated 13.6.2014 as D. Exh No. (13), stamps of the registration of structural engineer dated 29.3.2016 as D.



- Exh No. (14), ground layout plan as D. exh No. (15), development plan as D. Exh No. (16), compliance certificate dated 19.9.2016 as D. Exh No. (17), map as D. Exh No. (18), photos as D. Exh No. (19).
17. In cross-examination DW 1 told the court he did not capture all his evidence in the witness statement dated 11.11.2014. He termed the evidence by PW 3 as personal and not the official positions of the county government of Meru. DW 1 confirmed the plot was as per P. Exh No. (5) but he eventually put up a one-storey permanent building starting in 2014 as per D. Exh No. (19). He said his approvals were made on 17.1.2017 and constructed the building even though he was aware of a fake court order stopping any further development.
 18. DW 1 said he bought his plot from Catherine Saber. He blamed the physical planner for canceling his name in P. Exh No. 6. Further, he admitted that D. Exh No. 9 did not include the acreage of his plot. He said if there were genuine court orders against him, the respondents would have applied for contempt of court proceedings against him. DW1 said the police were investigating a case of service with fake court orders going by the O.B. report he produced as an exhibit. The trial court eventually delivered judgment against the appellant.
 19. The appellant appeals against the judgment delivered on 10.3.2023 for finding the claim based on trespass as proved, yet no surveyor report was tendered to establish the extent of the alleged intrusion. Secondly, the appellant faults the trial court for finding that Plot No. 172 A II and A I belonged to the respondent and himself in equal sizes, measuring 25ft by 37ft, yet there was overwhelming evidence that his plot was 20ft by 80 ft, as were the approved building plans and other attendant documents. The appellant faults the trial court for granting Kshs.12,000,000/= as general damages that were unproved, punitive, excessive, unmerited, and not grounded on evidence. Lastly, the appellant faulted the judgment as against the weight of the evidence tendered.
 20. With leave of court, parties canvassed this appeal and relied on written submissions dated 15.2.2024 and 21.2.2024. The appellant submitted that trespass under Cap 294. He submitted that he produced a surveyor's report showing the size of his land as opposed to that of the respondent, coupled with a court's site visit whose cumulative effect was that no trespass had been established against him, and the court had disregarded his evidence. The appellant submitted that the respondent's evidence had not passed the evidentiary test.
 21. The appellant submitted, guided by Sections 107 and 109 of the *Evidence Act* ELC Appeal No. 24 of 2018 and *Mwangi vs Wambugu* (1984) KLR 453, Black's Law Dictionary, that this court should intervene since the trial court misapprehended the surveyor's report.
 22. Regarding the award of Kshs.12,000,000/=, the appellant, guided by *Kemfro Africa Ltd vs Lubia & another* (1987) KLR 30, submitted that the trial court made the award without taking into account the value of the specific land and its probable income.
 23. The respondents, on the other hand, isolated two issues for determination by this court. Regarding trespass, the respondents submitted it was pleaded and proved to the required standard. Reliance was placed on *Rhoda S. Kiilu vs Jiangxi Water and Hydropower Constructions (K) Ltd* (2019) eKLR and *John K. Koech vs Peter Chepkwony* (2019) eKLR, on the proposition that trespass involves two elements, ownership and intrusion. The respondents submitted that they produced a sale agreement and a register for the plots as P. Exh No. (1) & (2).
 24. The respondents submitted that the appellant despite pending court orders issued on 7.11.2014, 4.7.2017, and 16.8.2017, continued with the erection of a permanent building on the disputed land of five feet as proved by PW 3 and a report produced as P. Exh No. (5).



25. The respondents submitted that no surveyor's report vide Min/L.P/comm/18/01/05 was produced before the trial court, and none has been included in the record of appeal. Reliance was placed on *Siparo vs Kantai* (2023) KEELC 16704 (KLR). Regarding the Kshs.12,000,000/= general damages, the respondents submitted that trespass was actionable per se, and in this instance, whereas there was no requirement to prove damage, the trial court was correct in awarding general damages. Reliance was placed on *Park Towers Ltd vs. John Mithamo Njika & 7 others* (2014) eKLR and *Ramadhan Makal Lalalngole vs Lopusikou Kori Lokamar* (2022) eKLR. The respondents submitted that the appellant is on record in his testimony that he was collecting monthly rent of Kshs.250,000/= as a benefit for over eight years he has been alleging occupying the land; hence, the figure was not excessive.
26. The primary role of a first appellate court, as stated in *Jasper Maluki Kitavi vs Minister of Land Settlement and Physical Planning & Another* (2017) eKLR, is to re-evaluate, re-assess, and reanalyze the evidence on the record and determine whether the conclusion reached by the trial court were sound or not and give reasons either way. The court cited *Kenya Ports Authority vs Kuston (K) Ltd* (2009) 2 E.A 212, that an appellate court must give credit to the trial court for it has neither seen nor heard the witnesses. The court further said the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See *Mwangi vs Wambugu* (1984) KLR 453.
27. The primary pleadings before the trial court were the plaint dated 7.11.2014 and the statement of defense dated 11.11.2014. The respondents had pleaded the particulars of trespass, fraudulent removal and interference with the boundary, and conversion of the annexed portion by the appellant without any justification.
28. The respondents further pleaded that the appellant had stealthily refused to vacate the land, hence the prayer for permanent injunction, eviction, and general damages for trespass and loss of user. In the statement of defense dated 11.11.2014, the appellant specifically denied the contents of paragraphs 4 & 5 and termed them as strange. He denied the particulars of trespass and fraud under paragraph 7. The appellant did not specifically deny the contents of paragraphs 9 and 10 of the plaint. The appellant did not plead to any ownership of Plot No. 172 A 1, its size, boundaries, locality, origin, nature of developments, occupation, approval of developments, and justification for encroaching onto the respondents' land. Order 4 Rule 3 of the Civil Procedure Rules provides that where the subject matter of a suit is immovable property, the plaint shall contain a description of the property sufficient to identify it.
29. From the court record, it is apparent that on 7.7.2014 and 7.11.2014, the trial court issued interim ex parte orders of injunction, which the appellant sought to vary set aside or discharge by an application dated 11.11.2014. The appellant's preliminary objection was dismissed on 14.11.2015. The interim orders were duly extended. They were again extended on 13.2.2015. The orders were to last until the hearing of the suit. They were specific that no construction should take place on the suit land. There is no evidence that the appellant prosecuted his application seeking to vary, discharge, or set aside the interim injunctive orders until the suit was heard and determined. The interim injunctive orders were further reinforced by the application dated 4.7.2017, which was confirmed as unopposed on 16.8.2017. The orders were to last until the suit was heard and determined. The appellant sought by an application dated 9.3.2018 to vary the orders made on 16.8.2017. The same application was dismissed by a ruling dated 18.7.2018.
30. From the evidence tendered on pages 120 – 127 of the record of appeal, the respondents were claiming the width between plots No. 171 and 172 (b). They had indicated who had put up a structure on the disputed width. The appellant, at the scene visit, had claimed his plot was 20ft by 80 ft. He had claimed



- to be the owner of the fence between plot No. 172 A II and A.I. The trial court made some remarks during the trial that the mabati looked new and recent, unlike the description of the respondents that the fence initially was rusty and old.
31. Coming to the evidence by the respondents, they relied on a report dated 2.4.2019 tracing the ownership of their plot from form PPD/349 11/89 dated 21.8.2007. It indicated the position of Plot No. 172 A II and its dimensions. The report traced the history of the two plots from 2010 – 2013 up to 2017 – 2019. Further, PW 3 produced the report as P. Exh No. (5) as well as the register of plots from the County government of Meru. The two exhibits were not challenged or objected to by the appellant through rival reports. PW 3 gave a vivid history of the two plots vis a vis the impact that the relocation of the Embu-Meru Highway had on the plots' overall dimensions.
 32. PW 3 also explained that there were attempted illegal alterations on the register to increase the appellant's size of his land from 35ft and 37 ft to 20ft by 80 ft. PW 3 also confirmed that the developments that were established on the ground on 1.4.2019, were against a valid court order and were also not approved by her office.
 33. D.W. 1, in his evidence, relied on D. Exh No. 1-18. Min/Lip/Comm/2018/240 appeared on page 66 of the record of appeal which bore no date. It does not contain a survey report. The makers of the documents were not called to testify. The alleged approval stamp overleaf of the said document was made on 20.8.2015, during the pendency of the court order, stopping any construction on the suit land. It lacks a court stamp to show that it was filed as a document before the trial court. The same applies to pages 66-73 of the record of appeal. If the documents were filed together with a list of documents, they were supposed to bear a court stamp and a date of the filing. The property payment tax dated 19.1.2017, the NEMA certificate dated 17.1.2017, the EIA license dated 19.9.2016, the NEMA assessment project report dated 2.8.2016, the receipt payment to NEMA dated 2.8.2016 and the signpost were all made after the issuance of the court orders initially on 7.7.2014 and 7.11.2014. All these exhibits, in my view, were procured after 2014, when the suit was already before the trial court, as an attempt to justify the encroachment and the developments thereon. Had the documents been available, the appellant would have used them at the earliest point to oppose the application filed alongside the plaint, seeking the stoppage of the construction on the disputed plot. No single beacon certificate was produced by the appellant to show that the boundaries to his plot were marked and effected before his alleged building plans were approved and construction works commenced. In my view, therefore, it is not true that the appellant produced any land survey report to justify ownership, encroachment, or developments, and or superior rights over the suit land entitling him to enter into, remain upon, erect any structure on and continue to occupy the respondents Plot No. 172 AII with effect from 3.11.2014 up to the hearing and determination of the lower court suit. See *Rhoda S. Kiilu vs Jiangxi Water & Hydropower Constructions. (K) Ltd (supra)* and *John K. Koech vs Peter Chepkwony (supra)*.
 34. The respondents were consistent in their evidence and documentation that the appellant had trespassed onto their plot even after court orders were issued against him. The appellant in his evidence, termed the court orders as fake. In his affidavits, the appellant had admitted the existence of the interim orders. That is why he had at least thrice unsuccessfully sought their discharge, variation, or setting aside. In *Isaack Ben Mulwa vs Jonathan Mutunga Mweke (2016) eKLR*, the court observed that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action. See also *Kenya Power & Lighting Company vs Ringera KECA (104) KLR 4th February (2022) Judgment*.
 35. The respondents called PW 3, who was the officer in charge of the County Department of Physical Planning. The officer gave vivid expert evidence on the root of the two plots between 2010 and



- 2019, their size, measurements, status and ownership history. Evidence of experts is to be considered alongside all other evidence. See *Amosan Builders Developers Ltd vs. Betty Ngendo Gachie and others* (2009) eKLR,
36. In *Azzuri Ltd vs. Pink Properties Ltd* (2018) eKLR, the court held that a survey report must meet the general boundary survey standards and methodology. See also *Josephine Mburugu vs Silas Mwiti Mugwika* (2022) eKLR. The appellant did not call the experts who allegedly prepared for him the consent for measurements of his plot, which he has termed in this appeal as a survey report that was not challenged by the respondents or relied upon by the trial court. A party who fails to call evidence in support of his case, risks leaving his claim unsubstantiated. See *Trust Bank Ltd vs Paramount Universal Bank Ltd and others Milimani HCC No. 1243 of 2001*. On a claim of trespass, a claimant must prove ownership and invasion of his property by an intruder without consent or justification. The respondents discharged that burden of proof on the ownership, size, and locality of Plot No. 172 A II through the primary register of plots held by the county government of Meru and P. Exh No 5.PW 3 supported the facts pleaded by the respondents through P. Exh No. 1 & 5 that the suit plot belonged to the 2nd respondent and had been encroached upon by the appellant, whose plot should have been of the same size as that of the 1st respondent. Encroachment was proved through cogent evidence. See *Julius Njuguna Nduati vs Lucy Nyokabi Mwangi* (2017) eKLR.
37. It was the appellant who was asserting a superior right as justification that his land was 20ft by 80 ft as opposed to the history of the plot as given by PW 3 in their records. In *Elizabeth Wambui Githinji & others vs Kenya Urban Roads Authority & others* (2019), eKLR, the court underscored the purpose of due diligence in establishing boundaries and the protection under Article 40 (6) of *the Constitution* on the illegally obtained title. The appellant's acts interfered with or disturbed the respondents in the enjoyment of their plots. See *Nakuru Industries Ltd vs S.S Menta & sons* (2016) eKLR.
38. The appellant appropriated part of the respondents' land for his benefit. Conversion of the portion in law attracts compensation to repair the actual loss that the claimant has suffered by reason of conversion. The general rule is that damages in tort must, as far as possible, put the person whose right has been invaded in the same position as if he had been restituted. See *Peter Ndungu vs Ann Waithera Ndungu & others*.
39. Trespass is actionable per se. Once it is proved a party need not prove any specific damage or loss. The court looks at the unique facts and circumstances of each case. See *Park Towers Ltd vs John Mithamo Njika & others* (supra). In *Peter Aluchio vs Chrispinus Ngayo* (2014) eKLR the court observed that general damages in trespass was the difference in the value of the plaintiff's property. Immediately after the trespass or the costs of restoration, whichever was less. In *Maina Kabucha vs Gachuma Gacheru* (2018) eKLR, the court said that where a party claims both mesne profits and damages for trespass, the court can only grant one relief. The report by PW 3 was conclusive on ownership and encroachment save the extent of the encroachment and nature of the developments thereon. PW 3, in cross-examination, said it was the appellant who blocked them from assessing the same. The appellant did not plead that the encroachment was trivial negligible.
40. To make matters worse the appellant proceeded with the buildings on the suit land while the trial court had issued injunctive orders. A letter was written to him by the County Government of Meru to stop the developments with immediate effect. The appellant responded to it by a letter dated 6.8.2019 which he copied to the trial court and was received on 6.8.2019. In the said letter, the appellant admitted that there was a pending suit over the boundary before court. Photographs accompanying the plaint dated 7.11.2014 as compared by the appellant as D. Exh No. 19 & 20 are clear evidence of how the appellant ignored the warnings of both the respondents, the county government of Meru and the trial court, on



stopping any more trespass, occupation, annexation, development and conversion of the respondents' parcel of land.

41. Anybody ignoring a court order and deciding to build on another's persons land takes upon himself the risk of suffering losses if the owner insists on his rights. He cannot be heard to say once the hour of recognizing arrives that he was not aware of the danger should the court uphold the rights of the claimant. The warning signs were staring at the appellant right from 7.11.2014 to 1.4.2019 and up to the hearing of the respondent's suit. The appellant took no heed or care. Instead, in his evidence before the trial court, he termed the orders of the court as fake and asked the trial court why it had not held him for contempt of court. If at all he had disobeyed any court order. The appellant did not complain to the County Government of Meru if at all his land size or acreage had been reduced by either mistakes or otherwise.
42. The appellant took no remedial or mitigation measures to ascertain the whereabouts of his beacons vis a vis those of the respondents before embarking on fencing a portion of the 2nd respondent's land and putting up a permanent building thereon. See *Nelson Kakai Sikanga vs Sirengo Mohammed Samuel* (2020) eKLR.
43. The appellant took the law into his own hands yet he was obligated to maintain the rule of law and good order so that the authority and dignity of the court is upheld at all times. See *Refrigeration & Kitchen Utensils Ltd vs Gulabchand Popatlal Shah & another* C.A No. 39 of 1990. The stage at which the building was in 2014 and the present shows that the appellant decided to put up a building worthy over Kshs.25,000,000/= regardless of the consequences. The orders had been served upon the appellant and was duly aware of them, hence the reason he had sought for variation. See *Shimmers Plaza Ltd vs National Bank of Kenya* (2015) eKLR. The appellant even took the root of purporting to seek building approvals and licenses two years after the orders had been in existence going by *D. Exh No. 10 & 18* see *Basil Criticos vs Attorney General & another* (2012) eKLR.
44. The appellant terms the amount of ksh.12,000,000/= general damages for trespass as punitive, excessive, unsubstantiated, and unnecessary. On the other hand, the respondents term the amount as fair given that the appellant was on record in admitting the value of his developments and the monthly income he was deriving from the suit premises.
45. In *Gitobu Imanyara & 2 others vs. Attorney General & others* (2016) eKLR, the court cited *Butt vs Khan* (1981) KLR 349 that an appellant court will not disturb an award of general damages unless it was so inordinately high or low as to represent an entirely erroneous estimate or was based on wrong principles or there was a misapprehension of the evidence of some material respect. In *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini vs AM Lubia and another* (supra), the court said the appellate court would seek to establish, if irrelevant factors were considered or left out the relevant ones. Similarly, in *Gicheru vs Morton & another* (2005) 2kLR 333 the court said it had to be convinced that the trial court acted on wrong principles of law or the amount was extremely high.
46. In *KPLC vs Ringera* (supra), the court said interference with discretion occurs if there is a misapprehension of facts or evidence. In the case at hand, the court said the trial court had rightly looked at the appellant's evidence & rebuttal by the respondent on continuous trespass to the benefit of the appellant. The court said the mere failure to adduce rebuttal evidence should not have been the sole reason to exercise discretion.
47. In this appeal I have not seen evidence by the respondents on the value of the land said to have been converted by the appellant. Admission was, however, made by the appellant that he has been earning some monthly income from the building. The basis of the computation of Kshs.12,000,000/= is derived from figures issued by the appellant in his evidence. From *D. Exh No. 19*, the appellant



confirmed that he had put up a storeyed building worthy of 16,000,000/=. He confirmed collecting Kshs.250,000/= per month as rental income. Guided by the case law of KPLC vs. Ringera (supra) and the admission that the appellant went against a court order, the figure of Kshs.12 million as general damages for trespass is not unreasonable or made without basis.

48. Prayers (a) & (b) of the plaint are hereby confirmed. A notice of eviction shall hereby be issued for the appellant to hand over vacant possession of the 5ft portion of 2nd respondent's Plot No. 172 A II within three months from the date hereof in default, of which eviction & demolition orders shall be issued.
49. The appellants shall meet the costs of any eviction or demolition exercise. Costs of the appeal to the respondents. Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 20th DAY OF MARCH, 2024

In presence of

C.A Kananu

Miss Kerubo for the appellant

Kariuki for respondent

HON. C K NZILI

JUDGE

