



REPUBLIC OF KENYA



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**Nganga v Gachiri (Civil Appeal 213 of 2018) [2025] KECA 1415 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1415 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NYERI**  
**CIVIL APPEAL 213 OF 2018**  
**W KARANJA, LK KIMARU & AO MUCHELULE, JJA**  
**JULY 31, 2025**

**BETWEEN**

**STEPHEN KAMAU NGANGA ..... APPELLANT**

**AND**

**ELIUD NJOROGE GACHIRI ..... RESPONDENT**

*(Being an appeal from the Judgement of the Environment and Land Court of Kenya at Murang'a (J G Kemei, J.) delivered on 8th March 2018 in ELC No. 121 of 2017)*

**JUDGMENT**

1. This appeal arises from the decision of the Environment and Land Court (ELC) (J G Kemei, J.) delivered on 8<sup>th</sup> March 2018. In the decision, the learned Judge entered judgment in favour of Eliud Njoroge Gachiri (the respondent), against Stephen Kamau Ng'ang'a (the appellant).
2. The background to the appeal is that the respondent (who was the plaintiff before the ELC instituted a suit against the appellant by way of a plaint dated 25<sup>th</sup> May 2016. The subject matter in dispute was a parcel of land known as Plot No. LOC 1/GAKIRA/T19 (the suit land). In the plaint, the respondent sought the following orders, inter alia;
  - a. a permanent injunction against the appellant, his servants, and or agents from interfering with the suit land,
  - b. eviction from the suit land under supervision of nearest police station; and
  - c. damages, detinue, costs and mesne profits.
3. In his statement of defence, the appellant denied the respondent's claim and averred that he was the legal owner of the suit land; that he was allocated the suit land on 30<sup>th</sup> July 2007 by the Town Council of Kangema at a cost of Kshs. 50,000.00 in order to construct a sewer plant. That at the time of allocation the Council did not have any records of previous allotment of the suit land.



4. The suit was heard by way of viva voce evidence. It was the respondent's case that he is the legal representative of Geoffrey Godfrey Gachiri (the deceased) having been issued with a grant of letters of administration ad litem on 22<sup>nd</sup> March 2016. The respondent claimed beneficial interest in the suit land and that he was entitled to possession and occupation of the same.
5. He testified that the suit land was allotted to his deceased father in the 1960's and he registered it in his name, later on 19th January 1974 the deceased applied to the Murang'a County Council for an extension of his plot to include an adjacent V- shaped piece of land that was vacant. That the extension of the plot was allowed by an extra 10 feet by the Council which was amalgamated to the Plot No. LOC 1/Gakira/T19.
6. He stated that in the year 2015 after the demise of his father, the appellant, who owns an adjacent plot to the suit land, encroached and started occupying the suit land. The respondent stated that he wanted the appellant evicted from the suit land which he contended was legally acquired by his deceased father.
7. He averred he was informed by his late father that he applied to be allotted the suit land as an extension to his Plot No. 19 in 1974 and his request was granted, and the plot was extended by 10 feet. He said that the deceased misplaced the documents that had been issued to him by the Council to that effect. That he searched in their house after the demise of his father and found the said documents. That the appellant started trespassing on the suit land in the year 2010 by constructing a sewer and later constructed mabati stores on the property. He produced the documents in support of his claim.
8. In cross-examination the respondent testified that after he found the documents, he had to wait to be granted the letters of administration in order to institute this suit. He also stated that he was aware the deceased had confronted the appellant over the trespass on his land and both of them went to the Council to determine its ownership but he was not able to institute legal action against the appellant as he had misplaced the documents from the Council that allotted the suit land to him. He confirmed that the appellant had done some developments on the suit land before the year 2015. He maintained that the documents produced in court were authentic.
9. PW2, the respondents' mother testified that she was aware that her late husband applied for extension of his Plot No. 19 and the suit land was allotted to him. That later the appellant trespassed on the suit land even when her late husband was alive and when he was confronted about it, he said that it was allotted to him by the Council. She could not clearly recall the year when the appellant commenced developments on the suit land. That her husband did not file suit against the appellant as he had misplaced the documents from the Council and the Council had refused to give him certified copies of the same. That the documents were later found by her children after the demise of her husband.
10. The appellant testified that the respondent's family is known to him and the deceased was his friend. That he was allocated the suit land on 30<sup>th</sup> November 2007 and paid Kshs. 50,000.00. He produced two copies of minutes dated and signed on 18<sup>th</sup> October 2007 from the Town Council of Kangema and a letter dated 30<sup>th</sup> November 2007 from the Town Council of Kangema advising him that his application for allocation of a septic tank space had been approved and the suit land had been allocated to him. He claimed that at the time of allocation the suit land was vacant and undeveloped. That the allocation was done during the life time of the respondent's father and he constructed the sewer way back in 2007 before his demise and he never raised any objection.
11. In cross-examination, the appellant denied that they ever went to the council to determine the ownership of the suit land with the deceased. He confirmed that the minutes produced were dated the same date (18<sup>th</sup> October 2007) though relating to two different meetings/events. He also stated that he



- did not apply to be allotted the plot whilst the letter he produced dated 30<sup>th</sup> November 2007 indicates that it was in response to his application to the Council.
12. DW2 who is a mason testified that he was contracted to construct a sewer, a wall and mabati stalls on the suit land by the appellant. That he drew maps and sketches for the construction and produced them in court though they did not have authorization from the Council. That he constructed the sewer in 2007 and later constructed the wall and the stalls in 2015. That no one ever interrupted him or objected while he did the work.
  13. After considering the evidence on record, the learned Judge (J.G. Kemei J.) observed that the respondent produced the following documents all which have reference to Plot No. T. 19 stated in the plaint:-
    - a. letter dated 9<sup>th</sup> January 1974 addressed to the Municipal Council of Murang'a seeking allocation of the triangular or V – shaped plot and its annexation to the main Plot T19;
    - b. an extract of the minutes of the Trade and Markets Committee of municipal Council of Muranga of 15<sup>th</sup> February 1974 where the resolution was made that the plot No T19 is extended by 10 feet. This is the measure comprising the triangular/V-shaped portion allegedly invaded by the defendant; and
    - c. letter dated the 21<sup>st</sup> December 1989 by the Municipal Council of Muranga advising that the triangular/V- shaped plot therein described be incorporated to plot T19.
  14. The appellant produced in evidence the following documents none of which bears any reference to either the triangular/V-shaped plot:-
    - a. extract of Council minutes of the Town Council of Kangema dated the 11<sup>th</sup> October 2007;
    - b. extract of the minutes of the Town Council of Kangema dated the 20<sup>th</sup> September 2007; and
    - c. letter by Town Council of Kangema dated the 30<sup>th</sup> November 2007.
  15. The learned Judge found that the evidence given by and on behalf of the respondent was verifiable, truthful and believable because all the documents produced by the respondent were consistent in reference to which the triangular/V-shaped plot was annexed on application and approval in an authentic manner.
  16. The learned Judge found that, on the contrary, the evidence and documents that the appellant produced referred to matters undertaken at Kangema Town Council which was then part of the then the larger Municipal Council of Muranga. According to the learned Judge those documents did not refer to any verifiable piece of land or parcel of land allocated to the appellant and that indeed the appellant stated that the undisclosed land allocated to him was subject to payment of Ksh.50,000.00 but it did not bear or give any evidence of such monies paid to Kangema Town Council.
  17. The Judge found that in the absence of any documents of allocation to the appellant referring to any verifiable plot and evidence of any payment, the court was unable to verify or believe the evidence of the appellant by himself and that given on his behalf by his witnesses.
  18. On the issue of limitation of action on trespass as pleaded by the appellant, the learned Judge found that unauthorized entry whether present or continuous is trespass. The Judge found that it was indeed common ground that the appellant entered into and has remained in occupation of the triangular/V-shaped land which the court had found was properly allocated and amalgamated into the Plot T19 in respect of which the suit lies. The learned Judge held that the appellant's continued occupation of the



suit land from the 1<sup>st</sup> date of entry in so far as it is unauthorized is and remains trespass to date and that indeed the said land does not exist independent of Plot T19. The Judge found that the appellant therefore was in occupation of a section of Plot T/19 and that the respondent's claim for trespass being a continued tort was not time barred.

19. In conclusion the learned Judge ordered the appellant to vacate the premises and remove all the buildings, structures and restore the suit land to its original condition within 60 days from the date of the judgement; and in the event of default the respondent be at liberty to so evict or cause to be evicted from the suit land in strict adherence to the law and to remove all the appellant's buildings and structures thereon and restore the suit land to its original condition at the appellant's cost. A permanent injunction was granted against the appellant, his servants, and or agents from interfering with the suit land; damages for trespass was also awarded in the sum of Kshs.100,000.00 annually from 2015 and similar amount annually or a part thereof until vacant possession is delivered to the respondent and the appellant was to pay the respondent the costs of the suit.
20. Aggrieved, the appellant invoked this Court's jurisdiction by filing a Notice of Appeal dated 10<sup>th</sup> March 2018. He has raised six (6) grounds of appeal in which the learned Judge is faulted for erring in fact and in law; in finding that the respondent proved his case on a balance of probabilities; in failing to make any finding regarding the respondent's failure to call a scheduled witness to wit: the Kangema sub-county administrator who was to explain to the court how Plot No.19 Kangema Market was encroached, and to whom the court had issued a witness summons on the respondent's application; misconstruing the law on limitation as pertains to the trespass; that the award of Kshs.100,000.00 as general damages per annum for trespass was hypothetical and unjustified in both law and fact, more so in the absence of any evidence as to the actual loss; in believing one set of ownership documents without making a finding on the authenticity of such documents.
21. The appellant prays that the appeal be allowed with costs, the respondent's suit be dismissed with costs and the award of damages be set aside.
22. When the appeal came up for plenary virtual hearing on 12<sup>th</sup> June 2023, learned counsel Mr. Mbutia appeared for the appellant while learned counsel Mr. Kimwere appeared for the respondent. Both counsel relied on their written submissions, which they highlighted briefly. The submissions by the parties are dated 8<sup>th</sup> June 2023 and 4<sup>th</sup> June 2023 respectively.
23. The appellant submitted on grounds 1, 2, 5 and 6 of the appeal that the respondent on 21<sup>st</sup> September 2017 applied for summons to issue to Kangema Sub County Administrator to "explain to the court how Plot No. 19 Kangema Market was encroached," but the respondent closed his case without calling the said witness. It was stated that no explanation was given to the court regarding the said witness who was to give vital evidence to court. The Court was urged to make an inference that the evidence the said witness would have given had he testified would have been adverse to the respondent.
24. It was submitted that in the plaint the respondent stated that the disputed portion was added to his Plot in 1974 according to unnumbered minutes of a meeting held on 15<sup>th</sup> February 1974.

That in his witness statement the respondent claimed that the disputed portion was incorporated into his plot in the year 2010. It was submitted that apparently the respondent was allotted the area after the appellant got the property. Further, that the father to the respondent applied by letter dated 19<sup>th</sup> January 1974 for an extension of his Plot No 19 to give him better and more area for development. It was submitted that in the minutes dated 15<sup>th</sup> February 1974 granting the extension of the Plot by 10 feet the area in which the extension was to be granted was not specified.



25. The appellant contended that despite the alleged extension of Plot 19, no evidence was tendered to show the dimension of the old Plot 19 and the new larger one. That it is apparent that other than the minutes, no actual extension was ever carried out. Further it was submitted the respondent annexed an undated and unsigned letter which had a sketch drawn by G.G. Gachiri, and the authenticity of the said letter was questionable.
26. It was submitted, further, that at page 20 there is a letter dated 21<sup>st</sup> December 1989 headed “correction of min 45/87 (16) on replanning of Plot No 19 Kangema Market”. It was submitted that the letter mentioned Minutes: - 45/8716 and 36/88(b). It was stated that the map of the planned Plot No. 19 Kangema Market was not produced. The letter dated 21<sup>st</sup> December 1989 reads “Min 45/87(16) erroneously recorded and amended for correction under Min 36/88(b)”. It was submitted that the error that was being corrected was not disclosed.
27. Counsel emphasised that the said letter was not an extract of minutes but it purported to quote a resolution allegedly in minutes 36/88(b) where it was resolved “That the V-Shaped small vacant area between the back lane and the road leading to Muringini be incorporated to Plot No. 19 In Kangema Market”. It was stated that the said resolution was that the small area be incorporated to Plot No. 19 in Kangema Market which in this context means to combine with something else.
28. On ground 3 on limitation it was submitted that trespass to land is a tort and, therefore, subject to the 3-year limitation under section 4(2) of the Limitation of Actions Act. It was stated that the trial Judge addressed the issue to the effect that the trespass being a continued tort is not time barred. It was submitted that the respondent while bound by the 3 years time bar rule, added another 6 years before suing which was a cumulative 9-year delay and that during the 9 years there is no evidence of a complaint or letter indicating that the appellant should vacate suit land.
29. It was contended that as earlier pointed out, the respondent claimed that the plot was allocated in 2010 but the action was filed in 2017. The appellant submitted that where a person is aware of the trespass such as the respondent was but they ignore the alleged tortfeasors, the court should find that the limitation period applied and the land owner was estopped from making the claim. Further, it was submitted that the owner has to explain why he failed to take action within 3 years limitation period of the trespass.
30. Lastly, it was submitted that the award of damages was based on no evidence in that the respondent was not the owner of the disputed portion. We were urged to allow the appeal and to set aside the ELC judgment.
31. On the part of the respondent, it was submitted that, the learned Judge clearly explained that the respondent’s case was consistent, verifiable, truthful and believable as all the documents produced made reference to the triangular V-shaped piece of land as opposed to the appellant documents which did not refer to any verifiable parcel of land allocated to the appellant.
32. Learned counsel for the respondent submitted that from the evidence produced before the trial court, the trial Judge clearly discerned that the appellant’s evidence seemed fabricated as it did not refer to any land save for a septic tank which the appellant applied to build and that it was not indicated where the same was to be built or exactly where it was allotted or possibly adjacent to which land nor were any dimensions given whatsoever.
33. With regards to ground 2 it was submitted that being the respondent’s case the respondent could decide to call or not to call witnesses based on the probative value of evidence the witnesses shall produce. Further that as held by the trial court, it is the larger Murang’a County Council which was seized of the matter and hence that the officials at Kangema Sub-County office could not have a say in the matter.



34. With regards to ground 3 it was submitted that after the learned Judge found that the limitation period of trespass is 3 years and that in the instant case the trespass was continuous and that she cannot be faulted for that.
35. With regard to ground 4 on the award of Kshs.100,000.00 as general damages for trespass it was submitted that in awarding the same the learned Judge was alive to the fact that trespass is an actionable claim that would naturally attract damages and that having found that the appellant was in trespass it was only just that the appellant pay damages.
36. We are urged to dismiss the appeal with costs.
37. As a first appellate court, our mandate is underpinned by rule 31(1)(a) of this Court's Rules, which is to reconsider the entire evidence, re-evaluate it and draw our own conclusions in determining whether or not to uphold the trial Judge's decision. Even as we do so, we have to bear in mind that, unlike the trial court, we did not have the advantage of seeing and assessing the demeanour of the witnesses. See *Kenya Ports Authority -vs- Kuston (Kenya) Ltd (2009) 2 EA 212*.
38. Further, we are cognizant of the fact that we should not interfere with the findings of fact by the trial court simply because we would have arrived at a different finding. We would only interfere with the finding of fact by the trial court if it is based on no evidence, or on misapprehension of the evidence, or on the basis that the Judge acted on wrong principles. This principle was enunciated in *Ephantus Mwangi -vs- Duncan Mwangi Wambugu [1984] eKLR*.  
See also *Bundi Murube -vs- Joseph Omkuba Nyamuro [1982-88] 1KAR 108*.
39. Having re-considered and re-analyzed the evidence as stated above along with the rival submissions by learned counsel and the law, we discern the issues falling for our determination to be: -
- i. who between the appellant and the respondent is the lawful proprietor of the suit plot; and
  - ii. when the cause of action of trespass arose.
40. Both the appellant and the respondent claimed that they were duly allotted the the triangular or V – shaped plot by the Town Council of Kangema and Muranga County Council respectively.
41. The respondent contended that Plot No. LOC 1/Gakira/T19 was allotted to his deceased father in the 1960's and registered it in his name. That later on 19th January 1974 the deceased applied to the Murang'a County Council for an extension of his plot to include an adjacent V- shaped piece of land that was vacant. That the application for the extension of the plot was allowed by an extra 10 feet by the Council which was amalgamated to the Plot No. LOC 1/Gakira/T19. That the suit land became part of the Plot No. LOC 1/Gakira/T19.
42. On the other hand, the appellant contended that he was allocated a plot on 30<sup>th</sup> July 2007 by the Town Council of Kangema at a cost of Kshs.50,000.00 to enable him construct a septic tank. That at the time of allocation the Council did not have any records of previous allotment of the suit land.
43. Like the trial court, we note that the respondent produced documents referring to the triangular or V – shaped plot being; a letter dated 9<sup>th</sup> January 1974 addressed to the County Council of Murang'a seeking allocation of the triangular or V – shaped plot and its amalgamation to the main Plot T19; an extract of the minutes of the Trade and Markets Committee of County Council of Muranga of 15<sup>th</sup> February 1974 where the resolution was passed that the Plot No T19 is extended by 10 feet; and a Letter dated the 21<sup>st</sup> December 1989 by the County Council of Muranga advising that the triangular/ V-shaped plot therein described be incorporated to Plot T19.



44. On the other hand, the appellant produced; an extract of Council minutes of the Town Council of Kangema dated the 11<sup>th</sup> October 2007; extract of the minutes of the Town Council of Kangema dated the 20<sup>th</sup> September 2007 and a letter by Town Council of Kangema dated the 30<sup>th</sup> November 2007. A perusal of the said documents produced by the appellant does not identify the specific area/space allocated to the appellant; for instance, the letter dated 30<sup>th</sup> November 2007 stated that:-

“The council during Works and Town Planning Committee meeting under Min. WTPMPHE & E/45/2007 of 20<sup>th</sup> September 2007 and Full Council meeting Under Min. FC/22/2007 of 11<sup>th</sup> October 2007 resolved that you be allocated an open space measuring 10 x 10 square feet for a septic tank at a cost of Kshs.50,000 (Fifty Thousand) only.”

45. Looking at the documents produced by the respondent and those produced by the appellant it is clear that the dates appearing are 1974 and 2007 respectively. So even if we were to assume that the triangular or V – shaped plot was available for allocation, then the issue of who had better title in law comes into play. It is clear from the respondent’s documents that he had been allotted the triangular or V – shaped plot on 15<sup>th</sup> February 1974 as indicated in the extract of the minutes of the Trade and Markets Committee of County Council of Muranga of 15<sup>th</sup> February 1974 where the resolution was made that the plot No T19 is extended by 10 feet. This is the measure comprising the triangular/V-shaped portion alleged to have been trespassed by the appellant.

46. The question that, therefore, arises is whether the plot in question was available to be allotted to the appellant? We find that it was not.

47. In regard to the 1<sup>st</sup> issue we find, as the trial Judge did, that all the documents produced by the respondent are consistent in reference to the triangular/V-shaped plot. On the contrary the evidence and documents of the appellant do not refer to any verifiable piece of land or parcel of land allotted to the appellant.

48. It is trite that he or she who alleges must prove. Section 107 of the *Evidence Act* provides that he or she who asserts must prove that the facts alleged exist. Under section 109 of the same Act, the burden of proof lay with the appellant to establish his right to the subject plot. See Swaleh Mohamed Waziri & 3 others -vs- Houd Mohmoud Athman & another [2020] eKLR; and Monica Wangu Wamwere -vs- Attorney General [2019] eKLR.

49. In the case of Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & another [2004] eKLR, this Court held:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* Cap 80...There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act...The two sections carry forward the often-repeated evidential adage: ‘he who asserts must prove.’”

50. Without any evidence that demonstrated ownership of the subject plot by the appellant, the appellant failed to discharge the burden of proof that he was allocated the plot by Kangema Town Council.

On the contrary, the evidence adduced by the respondent, together with the chronology of events coupled with the letters and extracts of meetings from the County Council of Muranga from 1974 explained how his deceased father came to be in ownership of the subject plot. We are satisfied that the respondent’s evidence sufficiently proved the ownership of the subject plot, which rebutted the



appellant's claims that the plot had been allocated to him. The appellant having failed to furnish the trial court with any cogent evidence on the allocation or any proof of ownership he was unable to demonstrate that he owned the subject plot. This inevitably leads us to the conclusion that the appellant was a trespasser in the suit property.

51. Was the suit against him statutory time barred? Section 4(2) of the *Limitation of Actions Act* provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. This presupposes a case of a one-time trespass. The term "accrue" in the context of a cause of action means to arrive, to commence, to come into existence or to become a present enforceable demand or right. The time of accrual of a cause of action is a question of fact (see Black's Law Dictionary at Page 23). However, in a case of a continuing trespass, a trespass consists of a series of acts done on consecutive days that are of the same nature and that are renewed or continued from day to day so that the acts in the aggregate form one indivisible harm.

52. Trespass is described under the *Trespass Act* Cap. 294 to mean –

“any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof.”

On the other hand, a continuing trespass is defined in Jowitt's Dictionary of English Law 2<sup>nd</sup> Edition as follows:

“A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbour's land.”

53. In Black's Law Dictionary, 8th Edition, a continuing trespass is defined as:

“A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property.”

54. Finally, in Clerk & Lindsell on Torts 16th Edition, paragraph 23

- 01, it is stated that:

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.”

55. From the above definitions of the term “trespass” by the eminent learned authors, it is clear that any unauthorized entry whether present or continuous is trespass. In this case, it is indeed common ground that the appellant entered into and has remained in occupation of the suit property and has even constructed some structures thereon. The appellant's continued occupation of the said property from the 1<sup>st</sup> date of entry in so far as it is unauthorized by the respondent amounts to trespass and remains as such to date. The respondent's claim for trespass being a continued tort is, therefore, not time barred. We find no fault with that finding by the trial court.

56. We are also in agreement that the option given by the trial court for the appellant to compensate the respondent for the continued trespass for Kshs.100,000.00 was fair, reasonable and just in the circumstances of this case. The respondent had pleaded damages for mesne profits, which the court declined to award and the amount of Ksh.100,000.00 was for the trespass itself, which was actionable per se. It was at the discretion of the learned Judge to determine the amount which was fair. We cannot



substitute her discretion for ours unless we are satisfied that the said discretion had not been properly exercised. We find no reason whatsoever to interfere with that decision.

57. Having reconsidered and re-evaluated the evidence on record, we find this appeal devoid of merit. The same is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT NYERI THIS 31<sup>ST</sup> DAY OF JULY 2025.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

**A.O. MUCHELULE**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

