



REPUBLIC OF KENYA



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**Wanyeki v Kerai & another (Civil Appeal 65 of 2019)
[2023] KECA 87 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 87 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 65 OF 2019
HM OKWENGU, SG KAIRU & J MOHAMMED, JJA
FEBRUARY 3, 2023**

BETWEEN

JOSEPH MUCHEMI WANYEKI APPELLANT

AND

KHANJI NARAN BHUDIYA 1ST RESPONDENT

PREMJI BHIMJI KERAI 2ND RESPONDENT

*(An appeal from the Judgment of the Environment & Land Court at
Mombasa (A. Omollo, J.) dated 9th April, 2019 in ELC Case No. 127 of 2015)*

JUDGMENT

Background

1. By a plaint dated 9th June, 2015 and amended on 6th October, 2016 Joseph Muchemi Wanyeki (the appellant) sued Premji Bhimji Kerai & Khanji Naran Bhudiya (the 1st and 2nd respondents respectively) seeking *inter alia* the following orders:
 - a. a declaration that he is the rightful owner of all that parcel of land known as Plot Number 1865/Section 1/Mainland North (the suit property) and that he is entitled to exclusive and unimpeded right of possession and occupation of the suit property;
 - b. a declaration that the respondents' title to the suit property is invalid, null and void;
 - c. cancellation and/or revocation of the title to the suit property issued in the name of the respondents and an order directing the Land Registrar, Mombasa to cancel any memorial or entry in the register which is in the name of the respondents and restore and/or register the appellant as the owner of the suit property;



- d. a declaration that the respondents whether by themselves, their servants, agents or otherwise howsoever are wrongfully in occupation of the suit property and are accordingly trespassers on the same;
 - e. a permanent injunction restraining the respondents whether by themselves, their servants, agents, employees or through anyone deriving title through them or otherwise howsoever from selling, transferring, charging, leasing, depositing building materials, erecting further structures and/or in any other manner whatsoever dealing or interfering with the suit property;
 - f. a mandatory injunction compelling the respondents to demolish and remove the perimeter wall and the structures erected on the suit property failing which the appellant be authorized to demolish and remove the said perimeter wall and structures at the respondents' expense;
 - g. vacant possession of the suit property;
 - h. general damages for trespass; and
 - i. costs of the suit and interest thereon.
2. The basis of the appellant's claim was that the respondents had entered into the suit property without his knowledge and/or consent and erected a perimeter wall and other structures on the suit property and have wrongfully remained in possession. It was the appellant's further claim that the respondents were in the circumstances trespassers on the suit property.
 3. The respondents filed a defence dated 21st August, 2015 in which they denied the allegations levelled against them in the plaint dated 9th June, 2015, and averred that in 2012 they entered into an agreement with the owner of the suit property to transfer to them the suit property for Kshs 5,200,000.00.
 4. According to the respondents, a transfer was executed and the suit property transferred to them and they immediately applied for approval to develop the suit property which approval was granted. The respondents denied trespassing on the suit property.
 5. The appellant in prosecuting his case at the Environment and Land Court (ELC) testified as a sole witness. He stated that the respondents entered the suit property without his permission. He produced a letter of allotment issued to him on 20th February, 1980 and original title deed issued to him on 17th February, 1981. He testified that he learnt of the respondents' trespass in 2012 after finding a perimeter wall built around the suit property. The appellant further testified that through his advocates, Messrs Gathumbi & Company Advocates, he lodged a complaint with the Registrar of Titles and the Officer Commanding Station (O.C.S) vide a letter dated 27th September, 2013. The appellant denied ever meeting the respondents, selling the suit property to them or receiving any money as purchase price in respect of the suit property. The appellant further testified that he never surrendered his title deed to the suit property to the respondents. He further stated that he had planned to develop the suit property and as a consequence of the trespass by the respondents he had suffered a loss of Kshs. 300,000.00 per month from 2012 as he had not been able to access the suit property to build rental houses as planned. The appellant prayed for general damages of Kshs. 15 million for trespass.
 6. In defence, the 1st respondent testified that he and the 2nd respondent purchased the suit property from the appellant for Kshs. 5.2 million; that the transaction was carried out at the respondents' advocate's office (Mr. K.M. Karimbhai); that the 1st and 2nd respondent executed all the transfer forms and were later issued with a title deed in respect of the suit property; that subsequently, they processed architectural drawings for approval which approval was given on 6th December, 2012; and that they have paid all the rates in respect of the suit property. It was his further evidence that the appellant is a



different person from the person known as “Joseph” that they paid the purchase price to and that the identification document issued to them does not belong to the appellant.

7. Mr. Kurban Mulla Karimbhai testified as DW2 and confirmed that he has been an advocate from the 1960's and that he prepared the transfer between the appellant and the respondents; and that the transfer dates ought to have been 2nd December, 2011 with the transfer taking place the following year, in March 2012. It was his evidence that he signed the sale agreement although his rubber stamp is missing which could have been as a result of the parties walking out of his office in a hurry. He testified that he identified the vendor using his original Identity Card, a copy of which he made. He further stated that he was surprised that two people could share the same name.
8. The Environment & Land Court, (ELC) (A. Omollo, J.) upon evaluating the pleadings and evidence tendered before the Court determined that the question that arose for determination was which of the two people named Joseph Muchemi Wanyeki bore a genuine title capable of passing title to the respondents. The learned Judge held that the burden was upon the appellant to demonstrate that the Joseph Muchemi Wanyeki who purported to sell the suit property to the respondents was a fraud; that it was also incumbent on the appellant to prove that the title documents in his possession were genuine and that those in possession of the other person named Joseph were fake. The learned Judge held that the appellant ought to have called the Registrar of Titles, Mombasa to identify which of the two titles was genuine and he failed to do so to the detriment of his case.
9. As to whether the respondents were *bona fide* purchasers for value, the learned Judge noted that the respondents conducted a search of the suit property which confirmed that the suit property was in the name of Joseph Muchemi Wanyeki at the time of purchase; and that the respondents not having known the appellant before, it would be asking much more than due diligence to know that at the time of their transaction there was a forgery. Consequently, the trial court dismissed the appellant's case for lack of proof and ordered that each party meets their respective costs of the suit.
10. Dissatisfied with the judgment, the appellant lodged the instant appeal on the grounds *inter alia* that the learned Judge erred in law and in fact: in dismissing the appellant's suit; in failing to appreciate that the appellant proved that he is the lawful and genuine owner of the suit property; in failing to consider that the respondents pleaded that they had purchased the suit property from the appellant and that they were bound by their pleadings; in failing to consider that the evidential burden of proving that the appellant had signed the sale agreement dated 2nd December, 2011 and the transfer dated 26th March, 2012 rested on the respondents; in failing to appreciate that the respondents' evidence that they did not purchase the suit property from the appellant was a diversion from their own pleadings and hence arrived at an erroneous finding; and in holding that the respondents had satisfied the principle of innocent purchasers for value without any pleadings and/or evidence on record in support of the finding.
11. The respondents filed a notice of cross-appeal and preferred one ground namely that the learned Judge erred in law and in fact in failing to award them the costs of the suit. They seek costs of the suit and of the cross-appeal.

Submissions by Counsel

12. At the hearing of the appeal, learned counsel, Ms. Lucy Ngigi and Mr. Obura, appeared for the appellant and the respondents respectively. Both counsel relied on their respective written submissions and briefly orally highlighted the same.
13. Ms. Ngigi submitted that the appellant's cause of action against the respondents was primarily for trespass. Counsel went on to state that the basis upon which the respondents were denying or resisting



the appellant's claim was that the appellant had sold the suit property to them and been paid the purchase price. Counsel further submitted that if the respondents had intended to rely on the fact that they had purchased the suit property from a different person or a person bearing similar names as that of the appellant they were required to specifically and concisely plead that in their defence.

14. Counsel further submitted that the respondents denied being trespassers on the suit property and asserted that they had purchased the suit property from the appellant and therefore did not challenge the genuineness of the appellant's title. Counsel went on to state that the respondents did not file any pleadings denying the fraud allegation against them. While relying on the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR, the appellant submitted that the trial court overstepped its mandate by formulating and determining issues which were not supported by pleadings. The appellant also relied on the authority of *Adetoun Oladeji (Nig) Ltd vs. Nigeria Breweries PLC S.C. 91/2002* for the proposition that parties are bound by their pleadings.
15. It was counsel's further submission that the appellant had proved on a prima facie basis that he was the registered owner of the suit property by virtue of the certificate of title issued to him. Counsel relied on the decision of *Charles Ogejo Ochieng v Geoffrey Okumu* [1995] eKLR in support of his proposition that a certificate of title is prima facie evidence of proprietorship.
16. On the issue of whether the appellant proved fraud on the part of the respondents in the acquisition of the suit property, counsel submitted that the respondents did not file an amended defence to refute the allegations of fraud made against them by the appellant; that the burden of proof shifted to the respondents who sought to rely on the sale agreement and transfer documents being challenged by the appellant to prove that indeed the appellant signed them and that the sale transaction was lawful; and that as a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts in the affirmative of the issue. To support this proposition, counsel relied on Sections 107 and 109 of the *Evidence Act*. Counsel cited the decision of this Court in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR to buttress this point.
Counsel added that the respondents did not discharge the burden of proof and instead they made an admission in their testimony that the appellant did not enter into any transaction with them.
17. Counsel further submitted that if the respondents intended to rely on the doctrine of innocent purchaser for value without notice, which is a legal defence against allegations of fraud, they ought to have put up a plea to that effect as provided for under Order 2 Rule 4(2) of the *Civil Procedure Rules*. Further, that upon discovering the perimeter wall built around the suit property, the appellant's advocates wrote a letter to the O.C.S and Registrar of Titles but no action was taken to address the respondents' unlawful actions. Counsel urged us to allow the appeal with costs and dismiss the cross-appeal with costs.
18. Opposing the appeal, learned counsel for the respondent while relying on the decision of this Court in *Eldoret Express Limited vs. Tawai Limited, National Land Commission* [2019] eKLR submitted that the respondents were *bona fide* purchasers for value without notice; and that the respondents conducted due diligence and obtained a title search which indicated the name of the vendor and it was upon that assurance that they entered into a sale agreement with the vendor.
19. On the issue of fraud, counsel submitted that the evidence adduced clearly demonstrated that the respondents were unaware of the alleged fraud; that at the time of the purchase, the respondents carried out a search which confirmed that the name of the registered owner was similar to the name indicated in the original identity card examined by the respondents' advocate, DW2; that the respondents



- purchased the suit property in good faith; and that the appellant failed to adduce any evidence, either through an expert witness or otherwise, to challenge the authenticity of the titles held by both parties.
20. Counsel went on to state that the evidence adduced by the respondents was in conformity with the pleadings; and that in the event that the appellant considered that the evidence tendered diverted from the pleadings, then he had an opportunity to cross-examine or raise the issue before the trial Court but neglected to do the same and is therefore estopped from raising the issue. According to the respondents, the learned Judge did not err in dismissing the appellant's suit.
 21. On the cross-appeal, counsel submitted that the trial court erred in failing to make any order as to costs or explain why it did not order that costs follow the event.

Determination

22. This being a first appeal, it is the duty of the first appellate court to re-evaluate the evidence led before the trial court both on points of law and facts and come up with its own findings and conclusions. In the case of *Kamau v Mungai* [2006] 1 KLR 15, this Court restated the principle as follows:

“Being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard witnesses hence making due allowance for that.”

23. We have carefully considered the record of appeal, the grounds thereof, the impugned judgment, the rival submissions, the authorities cited and the law. On the question whether the respondents' evidence was a departure from the pleadings and whether the departure was prejudicial to the appellant, the appellant has raised an issue of the variance between the respondents' pleadings and the evidence tendered during trial. The respondents in their defence averred that “The Plaintiff has not come to court with clean hands since his mission is to have the defendant's property together with the purchase price”. When the matter came up for hearing, the 2nd respondent testified that “...The Joseph who has sued me is a different Joseph from the one I paid. I am surprised by his claim.” In cross-examination, the 2nd respondent stated as follows:

“The person we dealt with lives in Nairobi but I do not know where he lives... We have not looked for Joseph after we got our title. That Joseph gave us an identity card. It is true that (sic) identity card given to us does not belong to the Plaintiff.”

24. At the heart of this appeal is the function of pleadings. In *Simon Muchemi Atako & Another v Gordon Osore* NRB CA No. 180 of 2005 [2013] eKLR, this Court discussed the function of pleadings and whether departure therefrom is fatal to the case. The Court observed as follows:

“In our view, the appellants had pleaded their claim with sufficient particularity to enable the respondent understand the case he was to meet. In *Esso Petroleum Company Limited v Southport Corporation* [1956] AC 218, Lord Normand expressed himself as follows on the object of pleadings:

“The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his evidence to the issue disclosed by them.”

25. Applying these principles to this case, can it be said that the respondents' departure from the statement of defence was fatal? At trial, the appellant testified that the signature and passport photograph appearing on the transfer form did not belong to him. There was no amendment to align the pleadings with the evidence.



26. In *Independent Electoral and Boundaries Commission & Another Stephen Mutinda Mule & 3 Others* [2014] eKLR, this Court cited with approval the Supreme Court of Appeal in *Malawi in Railways Ltd vs. Nyasulu* [1998] MWSC 3 in which the learned Judges quoted with approval from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings”. The same was published in [1960] Current Legal Problems, at P174 whereof the author stated as follows:

“...As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves...It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...

In the adversarial system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

27. Further, in *Silpa Adhiambo Bodo vs. South Nyanza Sugar Co. Limited* [2018] eKLR in which the learned Judge cited the Supreme Court of Kenya in the case of *Raila Amolo Odinga & Another vs. IEBC & 2 Others* [2017] eKLR where it was held that:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

28. Each party is bound by his or her own pleadings and it is not permissible to divert from the pleadings without due amendment properly made.
29. On the question whether the appellant proved fraud on the part of the respondents in the acquisition of the suit property, the respondents pleaded that the appellant did not come to Court with clean hands since his mission was to have both the suit property and the purchase price. In the amended plaint, the appellant refuted the respondents’ claim, and pleaded that the respondents had committed fraud by falsifying and/or forging a sale agreement and transfer documents in a bid to deprive him of the suit property.



30. In his testimony, the appellant stated as follows:

“The sale agreement dated 2nd December, 2011 is strange to me. I have not engaged in any sale. It is not true I was paid a sum of Kshs 5.2 million as purchase price. I also did not sign the transfer from my advocate’s office. Except for the name, the Identity Card number quoted, the signature and the photograph does not belong to me...”

31. *Black’s Law Dictionary*, 9th Edition defines fraud as follows:

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

Further, Sections 107 and 109 of the *Evidence Act* provide that:

Section 107(1) – “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.”

And Section 109 – “the burden of proof as to any particular facts lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.”

32. This Court in *Jennifer Nyambura Kamau vs. Humphrey Mbaka Nandi* [2013] eKLR held that:

“We have considered the rival submissions on this point and state that Section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the *Evidence Act* provides that ‘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’ Section 109 stipulates that the burden of proof as to any particular facts lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on the person who would fail if no evidence at all were given on either side.” [Emphasis supplied].

33. Section 112 of the *Evidence Act* provides as follows:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

34. It is notable that the respondents did not file an amended defence to challenge the allegations of fraud made against them by the appellant, in particular that they forged or falsified the sale agreement and transfer documents in their favour. It is also notable that the respondents did not call the person who allegedly sold the suit property to them and who received the purchase price as a witness.

35. On the question of ownership of the suit property, the appellant produced the following documents in his name: an allotment letter dated 20th February, 1982 in respect of the suit property, a certificate of title issued on 6th November, 1980 and a Certificate of Official Search issued on 7th October, 2014 in respect of the suit property.



36. In *Charles Ogejo Ochieng vs. Geoffrey Okumu* [1995] eKLR, this Court held that:

“Moreover, under section 23(1) of the Registration of Titles Act, the certificate of title ... in possession of the respondent shall be taken by all courts as conclusive evidence that the respondent is the proprietor of the said land as the absolute and indefeasible owner thereof... and the title shall not be subject to challenge except on ground of fraud or misrepresentation to which he is proved to be a party...”

37. It is notable from the pleadings that the registered owner of the suit property was not in dispute or challenged. In their statement of defence the respondents pleaded at paragraph 8 that the appellant had sold the suit property to them. The respondents did not lead any evidence to establish that they were innocent purchasers for value without notice. It is trite law that if the respondents intended to rely on the doctrine of innocent purchaser for value without notice, which is a legal defence against allegations of fraud, they ought to have put up a plea to that effect in accordance with Order 2 Rule 4(2) of the *Civil Procedure Rules* which provides as follows:

“A claim to an action for recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.”

38. Further, the fact that the appellant never parted with his legal interest in the suit property in favour of the respondents was admitted by the respondents during trial. The respondents cannot therefore be accorded the protection under Section 23 since it is accorded to bona fide purchasers against equitable interests only. That was the decision of this Court in the case of *Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others* [2015] eKLR in which the Court held that:

“The consequence is that West End did not divest its registered interest in the disputed land which was not an equitable one. It was the proprietor of the legal interest in the disputed land and did not part with it, as alleged or at all. The trial court held, following previous court decision, that an innocent holder of legal Title to land cannot be dispossessed of that interest by a fraudster, and that Section 23 protects “Title issued to a purchaser upon the transfer or transmission by the proprietor thereof.” Those decisions are the Alberta Mae Gacie case (*supra*) and the Iqbal Singh Rai case (*supra*) which emanated from the High Court. With respect, we are persuaded by the reasoning in those cases as it accords with the law.

Furthermore, the protection accorded by law in the event of fraud, is to a “*bona fide* purchaser without notice” and even then, only against equitable interests...”

39. Further in the strikingly similar case of *Christopher Mwangi Kioi vs. Chief Land Registrar & 2 Others* [2017] eKLR this Court held that:

“...Here was a case where the appellant, who readily admitted never having met the 2nd or 3rd respondents at all before the alleged sale agreement and before the suit was filed, alleging that he had dealt with advocates who purported to have instructions to transact on the suit land...

The 2nd and 3rd respondents had acquired title to the suit land earlier in time and they had no obligation at all to assist the appellant to find out how an obvious fraud had been committed against him. The 2nd and 3rd respondents were, indeed, entitled to the protection of law and the learned trial Judge was right so to find.”



40. By parity of reasoning, we find that the trial court erred in finding that the respondents were innocent purchasers for value without notice when such a defence had not been set up by the respondents in their pleadings.
41. On the question whether the learned Judge erred in failing to award the appellant general damages for trespass; the appellant testified that he became aware of the respondents' trespass sometime in the year 2013; and that they have put up permanent perimeter wall around the suit property and structures in it, and that they are in occupation up to date, a fact which was not denied by the respondents.
42. It is trite law that trespass to land is actionable per se. Once it is proved the appellant is under no duty to prove that he suffered any specific damage or loss. In other words, where trespass is proved as in this case, the affected party such as the appellant need not prove that he suffered any damage or loss as a result so as to be awarded damages. The court under the circumstances is bound to award damages depending on the facts of each case. See *Simiyu vs Sinino*. [1985] eKLR.
43. The award of damages is an exercise in discretion of the trial court to which an appellate court should pay respect. It was the appellant's evidence that he was unable to carry out any developments on the suit property which is located in Nyali, a prime area within Mombasa County. It was his further evidence that he intended to put up commercial residential premises that would earn him a monthly income of about Kshs 300,000.00. In the instant appeal the trial court did not award damages as it found that the appellant failed to effectively challenge the respondents' documents as provided under Section 26 of the *Land Registration Act* and is therefore not entitled to damages for trespass.
44. Having found that the learned Judge erred in failing to find that the appellant proved that he was the beneficial owner of the suit property, we find that the appellant was entitled to damages for trespass. This Court in *Christine Nyanbama Oanda v Catholic Diocese of Homa Bay Registered Trustees* [2020] eKLR stated as follows:

“In tort damages are awarded as a way to compensate a party for the loss he or she had incurred due to a wrongful action on the part of the other party. The damages so awarded are intended to return the party back to the position he or she was in before the wrongful act was committed. *Halsbury's Laws of England* 4th Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action for trespass:

- a. If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss;
- b. If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss;
- c. Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use;
- d. Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded; and
- e. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased”
Emphasis ours.



Similarly, in the case of *Duncan Ndegwa v Kenya Pipeline Limited* HCC No. 2577 OF 1990 the court held that:

“The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm.” [Emphasis supplied].

45. In light of the totality of the above assessment and reasoning on the rival positions on this issue, we find merit in the appellant’s complaint that the learned trial Judge failed to award him general damages for trespass. It was the appellant’s claim that he suffered loss of Kshs 300,000/= per month from 2012 as he was unable to access the suit property where he intended to build rental houses. He prayed for general damages of Kshs 15 million. The appellant did not however lay a basis for this claim and we decline to award the amount of Kshs 15 million as general damages for trespass.

46. In *Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited* [2017] eKLR, this Court stated:

“It is trite law and as correctly submitted by counsel for the respondent that trespass to land is an actionable tort per se and proof of damage is not necessary or required. In other words, where trespass is proved as in this case, the affected party such as the respondent need not prove that it suffered any damage or loss as a result so as to be awarded damages. The court is under the circumstances bound to award damages, of course depending on the facts of each case. See *Simiyu v Sinino* [1985] eKLR and *Obadiah K. Macharia v Kenya Power and Lighting Company Limited*.”

47. *Halsburys Laws of England* 4th Edition Vol. 45 at paragraph 26 page 1503 provides guidelines that guide the court when assessing and awarding damages for trespass, namely that, where there is no proof of actual damage, the aggrieved party is entitled to recover nominal damages.

48. In the circumstances, we find that general damages of Kshs. 150,000/= will adequately compensate the appellant for the wrongful entry to his land.

49. The upshot is that we find merit in this appeal and we allow it. The cross- appeal fails and is dismissed. We proceed to make orders as follows:-

- a. We award general damages for trespass to the appellant in the sum of Kshs. 150,000/=.
- b. The respondents to pay costs of the suit in the High Court, costs of the appeal and the cross-appeal in this Court.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF FEBRUARY, 2023.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL JAMILA MOHAMMED

.....



JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

