



Mati v Mulyungi (Suing as the Legal Representative of the Estate of Samuel Mulyungi Ndungu - Deceased) (Environment and Land Appeal E001 of 2023) [2024] KEELC 1394 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1394 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL E001 OF 2023
LG KIMANI, J
MARCH 7, 2024**

BETWEEN

LYDIA MWALALE MATI APPELLANT

AND

SABINA SAMUEL MUYUNGI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SAMUEL MUYUNGI NDUNGU - DECEASED) RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. M. K. Mwangi Chief Magistrate at Mwingi in MC ELC Case No.16 of 2019)

JUDGMENT

1. This is an appeal from the Judgment of Hon. M. K. Mwangi Chief Magistrate at Mwingi in MC ELC Case No.16 of 2019. The Memorandum of Appeal sets forth several grounds of appeal which are in summary: that the learned trial magistrate erred in law and fact in holding that the respondent had proved her case to a required degree of proof, in holding that the appellant was liable to pay and compensate the respondent the sum of Kshs.478,600/= that was not proved and was excessive in the circumstances. That the trial court erred in holding that there was a valid sale agreement between the appellant's late husband and the respondent's late husband.
2. Further, the Appellant stated that the trial magistrate erred in law in finding that there was no direct evidence to show that the land adjudication regarding land parcel number Mwingi/Kiomo/1170 was opaque, in holding that the Appellant only relied on viva voce evidence of relatives and neighbours which could not be used to vary documentary evidence.
3. The Appellant finds fault with the trial Court judgement for disregarding his claim for adverse possession and not finding that the Respondent's claim was fabricated, not genuine and not based on



any land agreement, in the court's reliance on the assessment report by the Ministry of Agriculture, livestock and Irrigation and on the extension Officer which report was not specific on the particular damage and therefore suspect and unreliable. The Appellant's case is that the findings of the learned magistrate are against the weight of evidence on record.

4. The Appellant prays that the judgment of the trial court be set aside and substituted with an order dismissing the respondent's case. She also seeks that judgment be entered in her favour against the respondent as prayed in the counter-claim and costs in the trial court and the superior court be awarded to her.
5. The suit before the trial court was instituted vide the Complaint dated 2nd August 2019 where the Plaintiff filed suit as administrator of the estate of Samuel Mulyungi Ndun'gu her deceased husband in whose name land parcel No. Mwingi/Kiomo/1170 is registered. She claims that the defendant through herself and her servants/agents/employees trespassed on the suit land on diverse dates from 2015 to the time of filing suit and caused damage through acts of waste by grazing on vegetation and mass deforestation. On 31st May 2019, the damage was assessed at Kshs.453,600/= Further, she incurred a sum of Kshs.25,000 in obtaining the limited grant of letters of administration.
6. The Plaintiff prayed for a permanent injunction restraining the Defendant from trespassing or interfering with the suit land Mwingi/kiomo/1170, the sum of Kshs.478,600/= with costs of the suit and interests.
7. The Defendant on the other hand filed a defence dated 6th November 2019 and amended on 14th October 2020 where she denied the claim, countering that she has been in use and possession of the land from 1960 up to the date of filing suit. She claimed that she was the legal owner of the land by inheritance from her late husband Mati Ndungu Munuve. She denied that the plaintiff has ever been in occupation of the said land. She filed a counter-claim against the Plaintiff claiming that the title deed to the suit property is fraudulent and was obtained by concealing material facts. She prayed for dismissal of the Plaintiff's suit, revocation of the title deed and an order to re-transfer the suit land to her.

Summary of the proceedings before the trial court

8. Hearing of the suit began with PW 1, Ngala Musyoka who testified that he is a technical officer with the Ministry of Agriculture, Livestock, Water and Irrigation based in Mwingi. He produced in evidence an assessment report on land damage dated 31st May 2019 which was made at the request of the Ward Administrator, Kyome. In the report, he stated that he visited land parcel Mwingi/Kyome/1170 and assessed trees that had been cut down by a neighbour and valued the total damage caused at a sum of Ksh.453,600/=
9. PW 2 Joseph Kinyanjui testified that he is a Land Registrar in Mwingi. He produced in evidence a copy of the adjudication record for land parcel No. Mwingi/Kiomo/1170 measuring approximately 0.80 HA registered in the name of Samuel Mulyungi Ndungu, official certificate of search and a copy of the title deed to the suit land.
10. Upon cross-examination, PW 2 stated that adjudication is a public process and that if anyone has any objection, they are accorded the chance to do so that the title is a fresh registration, is genuine and that there is no evidence of any alteration. He was unaware that the title holder was deceased.
11. PW 3, the Plaintiff Sabina Samuel Mulyungi testified stating that she is a business lady by occupation. She adopted her witness statement in which she stated that her husband Samuel Mulyungi Ndungu (Deceased) is the registered proprietor of land parcel Mwingi/Kiomo/1170 and that the defendant's parcel of land borders hers on the southwest side. She stated that her late husband bought the piece



- of land from Mati Ndungu (Deceased) and they were utilizing the land until January 2015 when the defendant started claiming ownership and trespassing thereon by grazing her livestock. The matter was escalated to the Chief's office but the defendant continued to destroy the suit land by making bricks, cutting trees for firewood and burning charcoal.
12. The Plaintiff reported the matter to Mwingi Police Station and to the Ward administrator of Kiomo/Kyethani ward in Mwingi West sub-county who authorized the damage assessment report produced before the court that assessed total damage caused by the Defendants at Ksh.453,600/= She also stated that she petitioned for a grant of letters ad litem to bring this case at a cost of Kshs.25,000/= and therefore prayed for judgment for the total sum of Kshs.478,600/= She also adopted her bundle of documents as evidence before the court.
 13. The Plaintiff closed her case and the defence called DW 1 Lydia Mwalale Mati to testify. She adopted her witness statement in which she stated that she got married in the disputed parcel of land and raised her 7 children without any complaints from the plaintiff until the year 2015 when the plaintiff sent some people to graze livestock on her land and then reported to the chief when she was chased away.
 14. She denied that her late husband sold the suit property to Samuel Mulyungi Ndungu and denied that the plaintiff has ever been in occupation of the suit land.
 15. Upon cross-examination, the defendant stated that the surveyors colluded with the Plaintiff and her husband to defraud her of her land. She also stated that she had filed a counterclaim and that wanted her land back. She also stated that when the survey was done her late husband was alive and that is the time he gave the land to her.
 16. DW 2 Monica Kalai Mulyungi testified that she knows both parties and also adopted her witness statement in which she stated that the defendant is her sister-in-law. She denied that the plaintiff's husband bought land from Mati Ndungu Munuve (Deceased) stating that the land belongs to the defendant who acquired it as an inheritance from her late husband.
 17. DW 3 David Mungiti Mati testified that the plaintiff is his daughter-in-law the defendant is his sister-in-law and that the suit land belongs to the defendant through inheritance. On cross-examination, he stated that his mother and his family have been using the land and that the agreement presented before the court by the Plaintiff is forged.
 18. DW 4 Wambua Ndungu Munuve also relied on his witness statement, where he confirmed that the Defendant is his sister-in-law. He denied that her late husband sold the suit land, which is land that he inherited from his grandfather. He stated the registration of Samuel Mulyungi Ndungu was fraudulent.
 19. DW 5 Samuel Mulyungi adopted his witness statement where he stated that he knew both the plaintiff and the defendant and the secretary of the family that he did not witness any selling of the suit property and that the agreement was forged to include his name that was indicated as a witness because he was not present.
 20. DW 6 Julius Muthui Ndungu testified that he is the brother-in-law of the defendant and that the suit land in question belongs to the Defendant and denied ever being told that his brother Mati the deceased ever sold his land.

Appellant's written submissions

21. Counsel summarized the grounds of appeal stating that issues for determination by the Court were whether the trial court considered the evidence produced in court by the Appellant while arriving at its



decision. He claimed that the court did not consider that the Appellant has been in occupation of the suit property since 1960 where she lived with her late husband and that the Appellant had inherited the said land from her late husband. The Appellant also submitted that the trial court erred in holding that she failed to prove her case since she proved she was the legal owner of the land on inheritance. The Respondent has never been in occupation of the suit property and no documents were produced to show the sale of the property.

22. Counsel relied on several authorities on the role of an appellate court including the cases of *Selle & another vs Associated Motor Boat Co. Ltd & others* (1968) E. A 123, *Peters vs Sunday Post Ltd* (1958)EA 424 and *Watt vs Thomas*(1947)A.C 424.
23. The Appellant's position is that they adduced evidence through witnesses who told the court that the Respondent has never been in occupation of the suit property and only started claiming ownership after the demise of the Appellant's husband.
24. Counsel submitted on the sum of Kshs.478,600/= awarded stating that since the Respondent has never been in occupation of the suit property, she could not have made developments thereon capable of being destroyed by the Appellant. The Appellant's counsel finally submitted that the Respondent did not prove her case on a balance of probabilities hence the decision of the trial court ought to be set aside.

The Respondent's submissions

25. Counsel for the Respondent submitted that registration of the land in the deceased's name was a first registration and there is no basis for the Appellant to pray for the land to be re-transferred to her in the counter-claim when it has never been registered in her name. Counsel submitted that the defendant did not produce a grant of letters of administration or probate to her late husband's estate.
26. Counsel relied on Section 26 of the *Land Registration Act* 2012 which provides that a certificate of title is conclusive as evidence of proprietorship which cannot be challenged save on specific grounds. They also cited the decision by the Court of Appeal in the case of *Elijah Makeri Nyangw'ara vs. Stephen Mungai Njuguna & Another* (2015) eKLR.
27. It was also submitted that there was no proof that the adjudication process was opaque and neither did the Appellant prove fraud stating that the appellant's husband was alive throughout the adjudication process. It was also highlighted that the Appellant raised 4 grounds of fraud in paragraph 15 of her amended counter-claim, which were not proven and only countered by oral testimonies of relatives and neighbours who could only state that they did not know about the sale of the suit property.
28. With regards to the claim to adverse possession over the suit property, it is submitted that the trial magistrate cannot be faulted for not considering a claim that was not before him since it was not pleaded in the counter-claim as they cited the case of *Nyangau-vs Nyakwara* (1985) eKLR.
29. On the claim for compensation, the Respondent submits that the claim for damages spanned between 2015 to the date of the assessment report and that the Appellant is bound to compensate the Respondent for the illegal occupation of the land and the destruction caused therein, noting that the Appellant did not challenge the assessment report in any material way. The Respondent submits that the appeal is without merit and urges the court to dismiss it with costs to the Respondent.



Analysis and Determination

30. The duty of the first appellate court was summarized by the Court of Appeal in *Selle & Another V Associated Motor Boat Company & Others*, [1968] EA 123 where the Court stated that its duty;
- “... is to reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
31. On the mandate of an appellate court, the court proceeded to state as follows:
- “... In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally.”
32. The Court has considered the grounds of appeal, record of appeal, and Counsel’s submission and proposes to consolidate the grounds of appeal and deal with them as issues for determination as follows;
1. Grounds 1, 5, 11 and 12: Whether the trial court erred in finding that the Respondent proved her claim on a balance of probabilities.
 2. Grounds 2, 7, 8 & 10: Whether the trial court erred in relying on the evidence of the Agricultural Extension Officer and in awarding the sum of Kshs. 478,600.00
 3. Ground 4: Whether the trial court erred in failing to find the Land Adjudication process opaque.
 4. Grounds 6 & 9: Whether the trial court erred in disregarding the claim for adverse possession.

1. Whether the trial court erred in finding that the Respondent proved her claim on a balance of probabilities.

33. The suit before the trial court was a claim by the Respondent who accused the Appellant of trespassing onto the suit land Mwingi/Kiomo/1170 and causing damage to the land. The Respondent produced a copy of the certificate of title registered in the name of Samuel Mulyungi Ndungu as well as a certificate of official search in the same name. She also attached a limited grant of letters of administration ad litem where she was given the right to sue as a personal representative to the estate of Samuel Mulyungi Ndungu (Deceased) in Mwingi Probate and Administration Cause No. 31 of 2019.
34. On the other hand, the defendant opposed the claim and filed an amended defence and counterclaim claiming that she has been in use and possession of the suit land parcel from 1960 up to date and that she legally owns the land by inheritance from her late husband Mati Ndungu Munuve. She denied that the plaintiff has ever been in occupation of the said land. She further claims that the title deed to the suit property is fraudulent and was obtained by concealing material facts. She prayed for revocation of the title, an order to re-transfer the suit land to her as well as costs. She called several witnesses to testify.
35. Section 3 (1) of the *Trespass Act* CAP 294 Laws of Kenya provides for trespass upon private land and states that;
1. 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 shall be guilty of an offence.



36. Trespass has been defined by the 10th Edition of Black's Law Dictionary as;
- “an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.”
37. The Court in *John Kiragu Kimani vs Rural Electrification Authority* [2018] eKLR also in defining trespass relied on *Clark & Lindsell on Torts*, 18th Edition on page 923 which defines trespass as;
- 'any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason.
38. From the foregoing, in a claim for trespass, the plaintiff must prove (1) He is the owner of the land (2) The defendant has entered the premises (3) That the defendant had no permission from the plaintiff or had no justifiable reason to do so (4) That as a result he has suffered and/or continued to suffer damages.
39. Section 26 of the [Land Registration Act](#) No. 3 of 2012 provides that a Certificate of title is to be held as prima facie evidence of absolute and indefeasible proprietorship. It states that:
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
40. The Appellant contends that the certificate of title produced in court in the name of the deceased Samuel Mulyungi Ndungu was obtained through fraud and she listed several particulars of fraud. The particulars of fraud as pleaded were that the Respondent's late husband misled the Demarcation & Adjudication Officer that he was the owner of the land and that the Respondent's late husband concealed material facts to the Demarcation & Adjudication Officer of the existence of ancestral ownership by the Defendant of the suit land. The Respondent was also accused of fraud by acquiring title to the suit land which was occupied by the Appellant and by acquiring a title deed that was not clear, good and devoid of overriding interests.
41. The question then is whether, in the face of the certificate of title, the particulars of fraud were proved. The Respondent adduced the evidence of PW2 the land Registrar, Mwingi who produced in evidence the adjudication record for the suit parcel of land, the title deed and a copy of search which he stated according to his records were genuine. This therefore proved a prima facie the suit land is the property of the deceased. In the court's view, no evidence was adduced to controvert this evidence. The Land Registrar confirmed that the title deed in the name of the deceased was genuine and there was no fraud in the adjudication process. The court has considered the evidence of the defence witness to the effect that the Appellant's husband did not sell the suit land to the Respondent's husband and that the land belonged to the Appellant. The said testimony is not supported by evidence since the



- Appellant's husband was said to have been alive during the adjudication process and it was confirmed that no objection was raised to registration of the Respondent's husband as owner of the suit land.
42. Looking at the judgement of the trial court, this court is satisfied that the evidence of the defence witnesses was considered when the court stated that the said evidence of relatives and neighbours could not vary clear documentary evidence. The trial court further made clear findings that the Respondent had failed to show that the deceased obtained the title fraudulently since there was no evidence. The court went on to give examples of proof of fraud which would have been complaints to the adjudication officer or police and production of the forged documents. In the court's view, the trial court ably weighed the evidence of the two (2) parties and his decision was based on the said weight of evidence. The Respondent proved that her deceased husband was the owner of the suit land and the title deed was not obtained in contravention of the law.
43. In the Court's view the Appellant did not prove the particulars of fraud and did not discharge the burden of proof as per section 107 (1) of the *Evidence Act* which section 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.”
- Sub-section (2) provides that
- “When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
44. Courts have held that allegations of fraud are subject to a higher standard of proof. In *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR* the court held that:
- “Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above the balance of probabilities. No evidence was tendered to this end by the appellants. They did not call any witness from the land office to verify their allegations.”
45. *Eunice Grace Njambi Kamau & another v Attorney General & 5 others [2013] eKLR* held that:
- “In the present petition, no evidence of fraud or any misrepresentation has been tendered to link the petitioners with any fraud or misrepresentation in regard to the acquisition of the subject title. Equally, no evidence has been put forward to suggest that the acquisition of the title was illegally procured. It is my view that the Respondents would need to demonstrate and establish the acts by the petitioners that would constitute illegality in the acquisition of the title. The petitioners claim they are bonafide purchasers of the suit property without any notice of any defect in title.”
46. The Appellant faulted the trial court concerning the Agreement for the sale of the suit land by Mati Ndungu (Deceased) to Samuel Mulyungi Ndungu (Deceased) stating that the same was not produced as evidence and does not constitute a part of the record. In the court's view, the challenge to the sale ought to have been raised during the adjudication process and not at this stage.
47. Further, the Appellant filed the defence and counter-claim stating that the suit land belongs to her as a result of inheritance from her husband Mati Ndungu (Deceased). She also prayed that the suit land be re-transferred to her name. However, she did not file the counter-claim as a personal representative



of the estate of Mati Ndungu (Deceased), therefore she lacked the capacity or locus standi to bring a suit on behalf of his estate.

48. The Court of Appeal in the case of *Trouistik Union International & another v Jane Mbeyu & another* [1993] eKLR held as follows concerning who can file a suit on behalf of the estate of a deceased person:

“To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82 (a) of the *Law of Succession Act*. That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, section 3, the interpretative section, provides an all-inclusive answer. It says "personal representative means executor or administrator of a deceased person". It is common ground that the deceased in this case died intestate. Therefore, the only person who can answer the description of a personal representative is the administrator of the estate of the deceased.”

- 2) Grounds 2, 7, 8 & 10 Whether the trial court erred in relying on the evidence of the Agricultural Extension Officer and in awarding the sum of Kshs. 478,600.00

49. The Appellant objected to the trial court’s reliance on the assessment report dated 31st May 2019 and produced by PW 1, Ngala Musyoka, the Agricultural extension officer, Migwani working for the Ministry of Agriculture, Livestock, Water and Irrigation. The said report was prepared pursuant to a request by the Ward Administrator, Kyome. The report assessed damage for destruction by grazing indigenous grass at a total value of Ksh.400,000/= and the deforestation of 40 fully mature trees at the rate of Ksh.800 per tree, totalling Ksh.453,600/=. The Plaintiff also produced cheques of payments made to her advocate to obtain a grant of letters of administration ad litem totaling to Kshs. 25,000/=

50. The report produced in court was clear on the period of destruction covered, the type of grass and trees destroyed and the value of the said trees and grass. The Appellant confirmed that during the time in question, she was in occupation of the suit land. She did not deny grazing on the suit land and cutting down trees. What she said in submission by Counsel was that she could not be accused of cutting down her own trees.

51. The Appellant did not counter or challenge the validity of the assessment report as PW 1 during cross-examination aside from clarifying the period of deforestation and the type of trees destroyed. The Appellant failed to prove that there was an error with the expert evidence in the case of *Christopher Ndaru Kagina Vs Esther Mbandi Kagina & Another* (2016) eKLR, the Court stated the duty of an expert report as: -

“...The duty of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise. This is a duty that is owed to the court and overrides any obligation to the party from whom the expert is receiving instructions.”

52. The Court of Appeal in *Kenya Power & Lighting Company Ltd v Ringera & 2 others* (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment) set out the guiding principles when considering whether to make an award of damages in case of trespass to land by examining prior decisions of courts and stated as follows:

38. The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distil and replicate as hereunder:



- i. Harlburys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner's land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.
- ii. Duncan Nderitu Ndegwa vs. Kenya Pipeline Company Limited & Another [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.
- iii. Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.
- iv. Ephantus Mwangi & Another vs. Duncan Mwangi [1981 – 1988] I KAR 278, - an appellate court is not bound to accept and act on the trial court's findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence.
 - (b) a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.
- v) Kiambu Dairy, Farmers Co-operative Society Limited vs. Rhoda Njeri & 30 Others [2018] eKLR, - the extend of an award of compensatory damages lies in the discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and well-settled principles.
- vi) Kemfro Africa Limited vs. Lubia & Another [No. 2] [1987] KLR 30 as approved in Peter M. Kariuki vs. Attorney General [2014] eKLR, - before interference with the quantum of damages awarded by a trial court the appellate court must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or short of the above, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages payable.
- vii) Johnson Evans Gicheru vs. Andrew Martin & Another [2005] eKLR, - this Court on appeal will be disinclined to disturb the finding of the trial Judge as to the amount of damages awarded by the trial court merely because if it had tried the case itself in the first instance, it would have awarded either a higher or lesser sum) justification for reversing a trial Judge on an award of damages only applies where the court is convinced either that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very low as to make it an entirely erroneous estimate of the damage to which the aggrieved party is entitled.



- Viii) Sumaria & Another vs. Allied Industries Limited [2007] 2 KLR I, - an appellate court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence or based on a misapprehension of the evidence or that the Judge had been seen demonstrably to have acted on a wrong principle in reaching the finding he/she did.
- Ix) Butt vs. Khan [1981] KLR 349, - an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate
 - x) it must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.
- Xii) Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited vs. Janevans Limited [2015] eKLR, - whether the claim is in contract or tort, the only damages to which an aggrieved party is entitled to is the pecuniary loss;
 - (b) the accruing awardable damages is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference. In other words, in the position it/he/she was in with regard to the object trespassed upon before the onset of such a trespass;
 - (c) it is meant to cushion the aggrieved party against the expenses caused as a result of the trespass and loss of benefit over the period of the duration of the trespass.”

52. Following the above principles, the court finds that the trial court's reliance on the report by PW 1, Ngala Musyoka, the Agricultural extension officer, Migwani working for the Ministry of Agriculture, Livestock, Water and Irrigation was not erroneous and neither was the award of damages as per the said report. The Respondent was entitled, as the owner of the land, to damages as she was able to show that there was actual damage occasioned by the trespass. Further, the damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm. In the present case the court is of the view that the damage and loss report was a fair expression of the principles set out by the Court of Appeal.

Ground 4 Whether the Trial court erred in failing to find the Land Adjudication process opaque.

- 53. The Appellant faulted the trial court for failing to find that the adjudication process was opaque and that the deceased Samuel Mulyungi Ndungu lied to the demarcation and adjudication officers that he was the owner of the suit land.
- 54. An assessment of the evidence before the trial court does not show any proof of the allegations made. In the court's view, the Appellant's deceased husband and/or the Appellant ought to have lodged a claim under the *Land Adjudication Act* Section 13 and if there was any disagreement on ownership of the land, the dispute resolution mechanism under that Act was available to any of the parties claiming ownership of the suit land.
- 54. According to the evidence before the trial court, no dispute was registered either to the Land Adjudication Committee under section 19 (2), of the Arbitration Board under Section 21 (2) or the *Land Adjudication Act* by the Appellant or her deceased husband. Further, no objection was made to



the register under Section 26 and no appeal to the Minister under Section 29 of the [Land Adjudication Act](#).

55. PW2 Joseph Kinyanjui, the Land Registrar Mwingi confirmed that the title deed to the suit land was issued on 28th November 2014 after the process of adjudication was completed on 5th April 2001 and documents were forwarded for issuance of the said title deed. He confirmed there was no fraud.

56. In the Court's view there was no proof from the Appellant that the process of land adjudication that gave rise to the title deed to the suit land was opaque or that it in any way contravened the [Land Adjudication Act](#).

Ground 6 & 9 Whether the trial court erred in disregarding the claim for adverse possession.

57. The Appellant faulted the trial magistrate for disregarding her claim for adverse possession. A plain look at the defence and counter-claim reveals that there was no such claim for adverse possession. Further, the prayers in the counterclaim did not seek a declaration that the Appellant was in adverse possession of the suit land and were entitled to the suit land on that basis. Further, the court finds that no evidence of adverse possession was adduced since the Appellant claimed that she was in possession as the legal owner of the suit land.

58. It is trite in law that parties are bound by their pleadings as was held in the case of Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR where it was held that:

“It is now very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

59. From the foregoing, the court finds that the appeal herein lacks merit and the same is hereby dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 7TH DAY OF MARCH, 2024.

HON. LADY JUSTICE L. G. KIMANI

ENVIRONMENT & LAND COURT

The Judgement is read virtually and in open court in the presence of-

J. Musyoki Court Assistant

Muvindye holding brief for Mbaluka for the Appellant

Muigai for the Respondent.

