



**Kenya Power & Lighting Company Ltd v Ringera & 2 others (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 104 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E247 & E248 OF 2020 (CONSOLIDATED)  
RN NAMBUYE, MSA MAKHANDIA & J MOHAMMED, JJA  
FEBRUARY 4, 2022**

**BETWEEN**

**KENYA POWER & LIGHTING COMPANY LTD ..... APPELLANT**

**AND**

**EUNICE RINGERA ..... RESPONDENT**

**AS CONSOLIDATED WITH  
CIVIL APPEAL E248 OF 2020**

**BETWEEN**

**KENYA POWER & LIGHTING COMPANY LTD ..... APPELLANT**

**AND**

**GEORGE JOSEPH KANGETHE ..... 1<sup>ST</sup> RESPONDENT**

**ELLAH KARWITHA KANGETHE ..... 2<sup>ND</sup> RESPONDENT**

*(Appeals from the judgments and decrees of the Environment and Land Court (Christine Ochieng, J.) dated 27th July, 2020 in Kajiado ELC No. 869 & 797 of 2017)*

**JUDGMENT**

**1. Introduction;**

This Judgment is in respect of two appeals. The earlier in time is Civil Appeal No. E247 of 2020: Kenya Power Ltd vs. Eunice Nkirote Ringera. The latter in time is Civil Appeal No. E248 of 2020: Kenya Power Ltd vs. George Joseph Kangethe and Ellah Karwitha Kangethe. Both appeals were consolidated and heard together when they came up for plenary hearing before us on 20th September, 2021 via



Go-To-Meeting platform. They were canvassed through written submissions and legal authorities fully adopted and relied upon by the respective parties in support of their opposing positions, in the presence of learned counsel for the respective parties with oral highlighting. Learned counsel, Mr. Eddie Omondi appeared for the appellant in both appeals while learned counsel, Mr. George Kangethe, likewise appeared for the respondents in both appeals. The consolidation order was endorsed in E247 of 2020 as the lead file.

**Background;**

2. Civil Appeal No. E247 of 2020 arises from the judgment of C. Ochieng, J. dated, signed and delivered via email on 27th July, 2020 in respect of a claim filed by Eunice Nkirote Ringera (Eunice) against the appellant in Environment and Land Court at Kajiado in ELC No. 869 of 2017 while Civil Appeal No. E248 of 2020 also arises from the judgment of C. Ochieng, J. separately dated, signed and similarly delivered via email on the same date of 27th July, 2020 in respect of a claim filed by George Joseph Kangethe and Ellah Karwitha Kangethe (“George and Ellah”) against the appellant in Environment and Land Court at Kajiado in ELC No. 797 of 2017.

**Respective Parties Pleadings;**

3. In their respective complaints, the respondents variously averred that they were separately registered as proprietors of land parcels title numbers Ngong/Ngong/15676 comprising 0.81hectares in favour of Eunice, 15678 comprising 1.21 hectares in favour of George and lastly, 15677 comprising 0.40hectares in favour of Ellah (hereinafter referred to as the 1st, 2nd and 3rd suit properties).
4. Their complaints against the appellant cumulatively were that on or about June, 2013, the appellant without their consent, permission or authority intentionally, knowingly and/or voluntarily and without lawful justification trespassed on their respective suit properties and carried out the impugned activities causing permanent and irreparable damage as more particularly set out in their respective complaints, in respect of which Eunice sought reliefs in ELC 869 of 2017 as follows: a declaration that the appellant had trespassed on the suit property without her consent and caused permanent and irreparable damage thereto; an injunction compelling the appellant, its servants, agents or employees, to cease the trespass and remove all of the concrete poles with heavy duty electric cables from the first suit property; general damages; compensatory damages; and, costs of the suit; interest on [c], [d], and [e], while George and Ellah in ELC No. 797 of 2017 sought reliefs as follows: a declaration that the appellant had trespassed on the 2nd and 3rd suit properties without their consent and caused permanent and irreparable damages thereto; an injunction compelling the appellant, its servants, agents or employees, to cease the trespass and remove all of the concrete poles with heavy duty electric cables from the suit properties; general damages; compensatory damages; costs of the suit; interest on (c), (d) and (e) above; and, any other relief this court may deem fit and just to grant.

**Appellant’s Defence:**

5. In rebuttal of the aforementioned claims, the appellant filed a defence dated 16th October, 2017 in ELC No. 869 of 2017 and another one dated 25th July, 2017 in ELC Case No. 797 of 2017 both almost similar in all material particulars. Cumulatively the appellant denied each and every wrong doing attributed to it by Eunice, George and Ellah in their respective complaints and put them to strict proof and also prayed for those suits to be dismissed with costs to them.

**Evidence;**

6. Since liability is admitted at 100% by the appellant, we find it prudent not to delve into an in-depth analysis of the facts. These will only be highlighted and or addressed in so far as they are relevant to the issue of damages which is the core issue in contention in this appeal.



### **The Trial Court's Rendition:**

7. At the conclusion of the separate trials, the learned Judge cumulatively analyzed the records in both causes separately but identified common issues for determination in each namely whether: the appellant had trespassed on the respondents' respective suit properties; and whether the respondents were entitled to the reliefs sought by them in their respective causes, and made findings thereon, inter alia, that the respondents were the registered proprietors of their respective suit properties, on which the appellant had trespassed and carried out the impugned activities without their consent causing both irreparable loss and damages for which they had sought relief from court as more particularly set out in their respective causes and against which the appellant had tendered no evidence in rebuttal.
8. The Judge then construed sections 171 and 173 of the *Energy Act*, as read with section 3 of the *Trespass Act*, and applying the threshold therein to the rival positions before her in both causes, ruled separately that from the photographs that were produced in evidence by the respondents in support of their respective separate claims, there was sufficient un rebutted proof that there were indeed high voltage power lines erected by the appellant traversing the suit properties; that the law required the appellant to seek the consent of the respondents as the owners of the suit properties before using the affected portions of land as way leaves. In the learned Judge's opinion, the appellant's failure to seek the respondents consent as the owners of the suit properties before erecting thereon their poles and wires contravened the provisions of sections 171 and 173 of the *Energy Act*, as read with section 3 of the *Trespass Act*. The learned Judge therefore concluded that the appellant's actions complained of above by the respondents amounted to not only trespass but continuous trespass as defined in Black's Law Dictionary 8th Edition as "a trespass in the nature of a permanent invasion on another's property".
9. The learned Judge also relied on the case of *Eliud Njoroge Gachiri vs. Stephen Kamau Nganga* [2018] eKLR for the holding, inter alia, that continuing trespass consists of a series of acts done on consecutive days that are of the same nature and are repeated or continue from day to day so that the acts are aggregated forming indivisible harm; and lastly, the case of *John Kiragu Kimani vs. Rural Electrification Authority* (2018) eKLR in which the court found the offending party guilty of trespass for the offending party's failure to obtain consent, authority and or permission of the owner of the suit property therein or even fore warn him/her of the impending project as contemplated by section 46 of the *Energy Act*, 2006.
10. Turning to appropriate reliefs to be awarded to the respondents, the learned Judge took into consideration the tabulations of losses suffered by each respondent as more particularly set out in their respective schedules of losses and damages tendered in evidence as exhibits without any objection from the appellant; holdings/proposition from decisions both binding and those of courts of coordinate jurisdiction. Among these was the case of *Fleetwood Enterprises Ltd vs. Kenya Power & Lighting Co. Ltd* [2015] eKLR, for the holding/proposition that the award of damages for trespass is discretionary in nature but which discretion should however be exercised by the Court judiciously after taking into consideration all relevant factors. Second, that the value of the land and the nature and extent of developments that would have been carried out thereon had the trespass not occurred are also a determining factor. The Court of Appeal decision in the case of *Kenya Power & Lighting Company Limited vs. Fleetwood Enterprises Limited* [2017] eKLR in which the decision in *Fleetwood Enterprises Ltd vs. Kenya Power & Lighting Co. Ltd* [supra] was affirmed for the holding, inter alia, that where trespass is proven the affected party need not prove that it suffered damages or loss as a result of the trespass so as to be awarded damages because once the trespass is proved, the court is bound to assess and award damages on a case to case basis. The case of *Duncan Nderitu Ndegwa vs. KP& LC Limited & Another* (2013) eKLR for the holding, inter alia, that once a trespass to land is established it is actionable per se and indeed no proof of damage is necessary for the court to award damages.



11. Guided by the enunciations in the above referred to case law the learned Judge awarded kshs. 2,000,000.00 to Eunice, and kshs. 4,000,000.00 to George and Ellah respectively as damages for the continuing trespass.
12. Turning to compensatory damages, the learned Judge took into consideration the decision in the case of *Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited* [2016] eKLR, in which the court approved the holding in a decision of this Court in the case of *Ryce Motors Ltd & Another vs. Muchoki* (1995-98) 2 E. A 363 that it is not sufficient for a party to wave a piece of paper with figures on it and ask the court to award the amount as special damages, which the law requires not only to be pleaded but also to be specifically proved. The case of *SJ vs. Francesco Di Nello & Another* [2015] eKLR on the distinction between damages between claims for loss of earnings and loss of earning capacity and awarded Eunice Kshs.12,000,000.00 for the loss of use of one acre, and Kshs. 24,000,000.00 to George and Ellah for the loss of use of two acres of their land. Both awards were based on the valuation reports tendered in evidence by the respondents without any objection from the appellant. It was also the Court's observation that the appellant did not find it prudent to tender in evidence it's own valuation reports to counter those tendered by the respondents.
13. Based on the totality of the above assessment and reasoning, the learned Judge granted reliefs in ELC Case No. 869 of 2017 giving rise to Civil Appeal E247 of 2020 as follows: a declaration be and is hereby issued that the Defendant has trespassed on the suit property without the Plaintiff's consent and caused permanent and irreparable damages thereto; general damages for the continuous trespass be and is hereby awarded at Kshs. 2 million; compensatory damages be and is hereby awarded at Kshs. 12 million; costs of the suit is awarded to the Plaintiff; and, interest on (ii), (iii) and (iv) above until payment in full, while those for ELC Cause No. 797 of 2017 giving rise to Civil Appeal No. E248 of 2020 were as follows: a declaration be and is hereby issued that the Defendant has trespassed on the suit properties without the Plaintiffs' consent and caused permanent and irreparable damages thereto; general damages for continuous trespass is awarded at Kshs. 4 million; compensatory damages is awarded at Kshs. 36 million; costs of the suit is awarded to the Plaintiffs; and, interest on (ii), (iii) and (iv) above until payment in full.

**The Appeal:**

14. The appellant was aggrieved and filed the separate appeals raising seven grounds of appeal in each appeal almost similar in all material particulars. These were subsequently condensed into two thematic issues namely;
  - i. Excessiveness of the award;
  - ii. Failure to consider the *Energy Act*, 2006

**Notice of grounds for affirming the decision of the trial court;**

15. In response to the appeal, the respondents filed in each appeal a notice of grounds for affirming the decision of the court pursuant to Rule 94 of the *Court of Appeal Rules, 2010* basically similar in all material particulars touching on both liability and quantum. Since liability is conceded, we find it prudent to highlight albeit in a rephrased form only those that touch on quantum. It is the respondents' position that the acts committed by the appellant upon the respondents' parcels of land amounted to continuing trespass. The respondents are therefore entitled to general and compensatory damages as awarded by the learned Lady Justice based on the facts and evidence presented during the trial, the said trespass upon the respondents' property is still continuing and constitutes a continuing liability equal to expropriation of the respondents' property without just compensation in line with



the Constitution, 2010; the said trespass also constitutes a very serious continuing danger to the lives of the respondents as the electric cables carry very high voltage; the general and compensatory damages awarded by the Superior Court are justified on the substantial ground that the price of land in issue has continued to rise and will continue to rise in obedience to the law of the land economics; the Judge correctly relied on the *Energy Act*, 2019, since the common law principles relating to long and continuing trespass would similarly apply in similar measure especially when according to them, the previous *Energy Act* is consistent with the current *Energy Act* to the extent relied upon by the Superior Court and cannot be said to have resulted in an unjust determination of the issues against the appellant; the principles of law are very clear that every continuing trespass is a fresh trespass in respect of which a new cause of action arises from day to day as long as the trespass continues and as such the *Energy Act*, 2019 is still applicable in this case; and, lastly, that the general and compensatory damages was within the court's inherent discretion and were exercised judicially and within the parameters of the principles permitted by the demands of justice especially when the learned Judge confined herself to pertinent issues and not matters outside the purview of the suit.

### **Submissions in Support of the Appeal:**

16. Supporting thematic issue number 1, the appellant relies on the case of *Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai Estate of & 4 Others* [2013] eKLR for the proposition that: “adherence to precedent should be the rule and not the exception”, and faults the trial Judge for erroneously awarding both compensatory and general damages that were not only excessive in the circumstances but also went against the common law principle of stare decisis.
17. According to the appellant, the respondents in their respective complaints laid out claims which fall under the province of the tort of trespass to land in respect of which they each outlined particulars of trespass as more particularly set out in their said respective complaints. According to the appellant, trespass law in Kenya is guided by the *Trespass Act*, whose section 5(1) thereof stipulates explicitly that any person who enters into or upon property in the possession or occupation of another with intent to commit an offence or to intimidate; insult or annoy any person lawfully in possession or occupation of such property commits a Tort of Trespass.
18. The appellant therefore asserts that the above being the correct position in law, the correct approach the trial court ought to have taken to vindicate the respondents as against the alleged appellant's trespass on their respective suit properties and which this Court should employ in addressing these issues in these consolidated appeals is that taken by this Court in the case of *M'Mukanya vs. M'Mbijiwe* [1984] KLR 761 in which this Court citing with approval the case of *Municipal Council of Eldoret vs. Titus Gatitu Njau* [2020] eKLR expressed itself, *inter alia*, that:

“Trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership.”
19. The appellant therefore faults the reasoning of the trial Judge vide which the learned Judge took into consideration the market value of the subject matter as the basis for assessing damages terming that reasoning as erroneous especially, firstly, when there was no evidence tendered before the learned Judge demonstrating the exact size of the portion of the land the learned Judge said was in use by the respondents.
20. The learned Judge is also faulted for the failure to properly appreciate the evidence tendered by the respective respondents herein vis a vis the contents of the valuation reports which the appellant has termed both irregular and biased.



21. In respect to the claim of Eunice the appellant asserts that the learned Judge failed to consider and appreciate that whereas the trespass allegedly occurred in 2013, Eunice used the same property as collateral vide two charge instruments executed in favour of Family Bank of Kenya, “Family Bank” in 2015 and 2016 respectively. In the appellant’s opinion, this uncontroverted evidence was sufficient demonstration that it was not true as contended by Eunice that the presence of the power lines had rendered her land totally useless and could neither be sold or leased out. If that had been the correct position as put by Eunice, the appellant doubts if Family Bank of Kenya Limited would have perfected and executed those charge instruments for the benefit of Eunice.
22. Turning to the claim of George and Ellah, the learned Judge is faulted for the failure to appreciate the testimonies of these two respondents to the effect that whereas the trespass occurred in the year 2013 when the land was solely being utilized for agricultural purposes, as at the time of the trial, George and Ellah had constructed two bungalows which developments in the appellant’s opinion could not have been carried out if the land on which they were subsequently constructed was useless.
23. Turning to the applicable law, the appellant relies on *Halsburys Laws of England 4th Edition Vol. 45* at para 26 page 1503 on the guidelines that guide the court when assessing and awarding damages for trespass, namely, where there is no proof of actual damage, the aggrieved party is entitled to recover nominal damages; where the trespass has caused the aggrieved party actual damage, he is entitled to receive such amount as will compensate him for his loss; where the trespasser has made use of the aggrieved party’s land, the aggrieved party is entitled to recover by way of damages such sums as would reasonably be paid for that use; where there is an oppressive, arbitrary or unconstitutional trespass by the trespasser or where the trespasser cynically disregards the rights of the aggrieved party on the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded; and lastly, if the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.
24. On case law, the appellant invites the Court to be guided by the decision in the case of *Duncan Nderitu Ndegwa vs. Kenya Pipeline Company Limited & Another* [2013] eKLR for the holding, inter alia, that 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, with the overriding principle being to put the claimant in the position he was in prior to the infliction of the harm; the case of *Philip Ayaya Aluchio vs. Crispinus Ngayo* [2014] eKLR for the holding, inter alia, that the measure of damages for trespass is the difference in the value of the plaintiff’s property immediately before and immediately after the trespass or the cost of restoration, whichever is less; and lastly, the case of *Ephantus Mwangi & Another vs. Duncan Mwangi* [1982 – 1988] I KAR 278 for the holding, inter alia, that 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 the issue in controversy in the case.”
25. Turning to the second thematic issue the appellant has urged this Court to fault the learned Judge for the failure to apply sections 46(1) – 50(1) of the *Energy Act*, as basis for resolving the issue in controversy between them, which according to the appellant was the correct mode of seeking redress by the respondents for the trespass committed against them by the appellant.
26. In rebuttal, the respondents identified their own issues for determination by this Court, namely, whether or not the appeals before this Court have merit, the trial Judge exercised her discretion judiciously, and lastly, whether or not there are other reasons warranting dismissal of both appeals in their entirety.



27. In support of the first issue, the respondents submit that, by the appellant conceding liability, in essence accepted that it is in occupation and expropriation of the respondents' suit properties without any colour of right, in flagrant and wanton disregard of the [Constitution of Kenya, 2010](#), the [Land Act \(2012\)](#), the National Environment Management Authority Act, the [Health Act \(2017\)](#), and the [Energy Act, 2019](#) and all other sacrosanct principles of justice and equity.
28. Justification for the position taken above by the respondents was given as: appellant arrogantly ignoring the compelling duty of tendering evidence at the trial in rebuttal of the respondents' claims. They should not therefore be allowed to introduce any evidence at the appellate stage as that would amount to resuscitating the suit on appeal, the occupation and trespass upon the respondents suit properties by the appellant is still continuing to date, a clear case for application of the doctrine of res ipsa loquitur, the learned Judges decision was based on unchallenged oral and documentary evidence tendered through their witnesses, the learned Judge exercised her discretion judiciously to arrive at the award of general damages which should not be disturbed by this Court as there is no basis laid for such disturbance, the appellant has not proffered any proof to show that the learned Judge's exercise of her discretion in arriving at the conclusions reached was injudicious as in their opinion the learned Judge's decision on the award of damages arrived at was based on the accepted principles and doctrines of common law, the Constitution and the relevant case law cited to the Court in support of the respective parties opposing positions.
29. To buttress the above submissions, the respondents rely on the following authorities, namely, the case of [Kiambaa Dairy Farmers Co-operative Society Limited vs. Rhoda Njeri & 3 Others](#) [2018] eKLR for the holding, inter alia, that the extent 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; [Peter M. Kariuki vs. Attorney General](#) [2014] eKLR for the holding inter alia, that the principles that guide an appellate court in this country on an appeal for an award of damages are now well settled; [Kemfro Africa Limited vs. Lubia & Another \(No. 2\)](#) [1987] KLR 30, on the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court namely, that 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 that short of this, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages payable; [Johnson Evans Gicheru vs. Andrew Morton & Another](#) [2005] eKLR for the holding, inter alia, that this Court (appellate court) will be disinclined to disturb the finding of a trial Judge as to the amount of damages awarded by the trial court merely because if they had tried the case in the first instance they would have awarded a higher sum.
30. Also relied on by the respondents is the case of [Ephantus Mwangi vs. Duncan Mwangi Wambugu](#) [1984] eKLR for the holding, inter alia, that 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; [Farah Awad vs. CMC Motors Group Limited](#) [2018] eKLR, on the mandate of the first appellate court, namely, to reappraise, reassess and reanalyze the evidence on the record and arrive at own conclusions on the matter and give reason either way, [Sumaria & Another vs. Allied Industries Limited](#) [2007] 2 KLR 1 for the holding inter alia, that 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 shown demonstrably to have acted on a wrong principle in reaching the finding he/she did.
31. In light of the principles enunciated in the above case law, the respondents reiterate and urge this Court to affirm the award of damages arrived at by the trial court because according to them, the general



damages awarded were within the trial court's inherent discretion exercised judiciously, within the parameters of the principles permitted by the demands of justice in the peculiar circumstances of this appeal, there was no error in principle as the award was based upon critical consideration of loss of user, loss of opportunity to deal in and develop the suit properties and resultant denial and deprivation of usage of the suit properties by the appellant; the court relied on professional evidence of qualified and registered valuers in reaching its decision; absence of rebuttal of evidence tendered by the respondents was in itself sufficient to demonstrate the correctness of the trial court's analysis and conclusions in the exercise of its discretion. The amount of the award is reasonable in all the circumstances of the appeal; the learned Judge confined herself to the pertinent issues raised by the respective parties herein. There is no evidence that any extraneous matters outside the purview of the suit were taken into consideration by the learned Judge. Neither did the Judge ignore any material facts pertinent to the issues in controversy to the prejudice of the appellant.

32. The trial Judge was also well guided by the common law principles as reflected in her detailed elaboration of the said principles in arriving at the decision. The learned Judge did not therefore misdirect herself in law or in fact. They therefore urge this Court to find that both records of appeal are without merit, mere delaying tactic meant to frustrate the respondents from the realization of the fruits of the Superior Court's judgment and dismiss both appeals in their entirety.
33. Turning to the alleged Judge's failure to apply the *Energy Act*, 2006 to the issue in controversy, it is the respondents position that the principles applied by the learned Judge in arriving at the award in favour of the respondents are the same as those underpinning the *Energy Act*, 2006 and urged the Court to affirm the trial court's award.
34. This is a first appeal arising from the trial court's exercise of its judicial discretion in awarding the impugned damages in favour of the respondents against the appellant to proven trespass committed against the respondents by the appellant in respect of which the learned Judge found the appellant 100% liable and which trespass is still continuing. The parameters for exercise of our mandate in the discharge of our above mandate in an appeal of this nature have now been delineated by enunciations both by the predecessor of this Court and this Court itself.
35. We take it from *United India Insurance Company Limited vs. East African Underwriters Kenya Ltd* [1985] KLR 898 where this Court was explicit that interference with exercise of judicial discretion only arises where there is clear demonstration of misdirection in law, misapprehension of the facts, taking into consideration factors the trial court ought not to have taken into consideration or failure to take into consideration factors that ought to have been taken into consideration or looking at the decision generally, the only plausible conclusion reached is that the decision albeit a discretionary one, is plainly wrong.
36. We have considered the above mandate in light of the totality of the record assessed above with regard to the trial Judge's assessment and conclusion reached in the impugned decision and the rival submissions, all highlighted above. The issues that fall for our consideration in the discharge of the said mandate are as follows:
  - 1) Whether the learned Judge erroneously and excessively awarded general and compensatory damages for continuing trespass to the respondents by failing to take into account relevant factors to the detriment of the appellant.
  - 2) Whether the learned Judge fell into error when she failed to consider and apply the specified provisions of the *Energy Act*, 2006 in the discharge of her mandate in assessing damages in favour of the respondents as against the appellant.



- 3) In light of the court's findings with regard to issue number 1 and 2 above what are the appropriate orders to be made herein in the disposal of these consolidated appeals.

37. Starting with issue number I, it is common ground that liability at 100% in favour of the respondents and against the appellant is not disputed. What is in contest is the quantum of damages awarded by the trial Judge in favour of the respondents against the appellant both for continuing trespass and compensatory. The appellant's contention is that these are not only extremely excessive but also unconscionable for reasons given in their submissions. This Court is therefore urged to interfere with the trial court's exercise of its judicial discretion terming it erroneous, injudicious and or wrong. The respondents on the other hand have urged this Court to affirm the exercise of that discretion terming it proper, judiciously undertaken with reasoning both sound and proper as the same is allegedly based on the facts of the record properly appraised and appreciated by the trial Judge and should therefore be affirmed based on their grounds set out in the notice to affirm the decision of the trial Judge also already highlighted above.

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 distill and replicate as hereunder:

- i) Harlsburys 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 extent 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
  - b) 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.
- vii) *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.

39. We have applied the above parameters to the rival position herein with regard to issue number 1. It is our position that it is evident from the record and as we have already pointed out above that liability for the alleged trespass by the appellant on the respondents' suit parcels is not in dispute. It is also common ground that the trespass is still continuing. The trespass involved erection of power lines for the supply of electricity to the appellant's customers for the benefit of the appellant to the exclusion of the respondents.
40. The record is also explicit that when determining quantum of damages, the learned Judge took into consideration want of the appellant's evidence in rebuttal of the respondents' assertions, principles of case law highlighted above when dealing with the learned Judge's assessments, reasoning, and conclusions drawn at the trial, and awarded the respondents Kshs.2Million and Kshs.4Million respectively as general damages for the continuous trespass.
41. As we have already highlighted above, the onset of the trespass was in 2013. It is still continuing to the present day and solely for the benefit of the appellant. We find no error in the manner the learned Judge arrived at the award of damages under this head. We therefore agree with the respondents' assertion in their notice to affirm the decision of the trial court on this award that the damages awarded under this item are commensurate to the loss suffered by the respondents from the appellant's continuing trespass on the suit properties and for the sole benefit of the appellant and accordingly affirm the said award.
42. Turning to compensatory damages, the learned Judge also took into consideration principles of case law highlighted above in the assessment and opined that the respondents gave no proof as to how they arrived at their proposed figures in their schedules of loss and damages which were produced as exhibits in court and in addition that they also failed to support their claim for mesne profits as was indicated in their submissions.
43. The above holding notwithstanding, the learned Judge proceeded and awarded each respondent compensation for the value of the land based on the valuation reports tendered in evidence in support of the respondents' assertions that their respective suit properties had been rendered useless for economic purposes by virtue of the continued presence of the appellant's power lines on the said suit parcels. The learned Judge also took into consideration the fact that the appellant filed no valuation report to controvert those relied upon by the respondents.
44. It is the application by the learned Judge of the above as the basis for awarding compensatory damages that the appellant has heavily attacked terming the entire exercise of discretion by the learned Judge in arriving at the above award of compensatory damages not only erroneous but also misconceived and based on the facts on the record that had not been properly appreciated by the learned Judge.
45. It is the appellant's argument that the impugned acts forming the appellant's trespass on the suit properties were committed way back in 2013 and despite their presence on the suit properties Eunice used her title as collateral for a financial benefit from Family Bank, while George and Ellah constructed two bungalows on their parcels, which activities according to the appellant the respondents would not have undertaken had the land been rendered useless as a result of its continued trespass. Secondly, that if the suit properties had been rendered valueless as purportedly portrayed by the respondents, the learned Judge would not have rejected their claims for mesne profits. Thirdly, that the mere fact of the appellant's failure to adduce evidence in



rebuttal of the respondents claim against it was not sufficient basis for the learned Judge to fail to exercise her discretion judiciously so as to award compensatory damages that were commensurate to the loss of use suffered by the respondents and in accordance with the laid down guiding principles on calculation of appropriate damages for a continuing trespass.

46. This Court was in the circumstances invited to find and hold that the compensatory damages awarded to the respondents by the learned Judge amounted to an unjust enrichment to the respondents, interfere with the same, set these aside and assess commensurate awards that are just and fair in the interests of justice to both contending parties.
47. The respondents' response as we have already highlighted above is that the learned Judge exercised her discretion judiciously, arrived at the correct award in the circumstances which should be affirmed.
48. There was no rebuttal on behalf of Eunice on the appellant's assertion that she had used title to her suit property twice as collateral for a financial benefit from Family Bank which benefit according to the appellant could not have been accorded by Family Bank if Eunice's land had been rendered useless by its trespass activities thereon. As for George and Ellah, there is concession that indeed two bungalows were constructed on their suit properties after the onset of the appellant's continuing trespass thereon but were neither rentable nor sellable.
49. We have given due consideration to the above rival positions, our take thereon is that in the absence of any rebuttal on behalf of Eunice, we agree with the appellant's assertion that if indeed its trespass on her parcel had rendered it useless, the same could not have been used as collateral for a financial facility from Family Bank.
50. As for George and Ellah, the trial court having rejected their plea for compensation for loss of mesne profits against which no cross-appeal was laid, there is nothing to suggest that the bungalows constructed on their suit parcels after the onset of the appellant's continued trespass were either unrentable or unsellable.
51. In light of the totality of the above assessment and reasoning on the rival position on this issue, we find merit in the appellant's complaint that the trial Judge failed to properly appraise and appreciate the extent of loss of use suffered by the respondents as a result of the appellant's continued trespass to the suit properties hence erroneously basing compensatory damages on the value of the suit properties rendering the ultimate award arrived at excessive in the circumstances and therefore warrants interference by this Court which we hereby do and scale down to Kshs.6,000,000.00 for Eunice and Kshs.12,000,000.00 for George and Ellah as an appropriate award for compensatory damages.
52. Turning to the 2nd issue, we have revisited the subject sections of the *Energy Act* 2006, forming the appellant's complaint on this issue and construed them on our own. Our take thereon is that these relate to the out of court procedures the respondents were at liberty to invoke and seek compensation for the appellant's conduct of trespassing on the suit properties by laying electricity supply posts and cables without their consent, authority or knowledge through the dispute resolution compensatory mechanism inbuilt in those provisions which the respondents elected not to avail themselves of. We find nothing therein to bar a party aggrieved by the appellant's trespass conduct to seek redress from court as the respondents did instead of resorting to the inbuilt out of court dispute resolution, compensatory mechanism inbuilt in the said provision. Secondly, we also find these formed the basis of two preliminary objections the appellant filed separately in each cause.
53. The one in ELC No. 869 of 2017 was dated 27th February, 2018 while that in ELC No. 797 of 2017 was dated 5th March, 2018, both similar in all material particulars basically touching on the issue of want of jurisdiction in the court to entertain and determine both causes allegedly in view of the provisions



of the Energy Act, 2006 as read together with the Energy (Complaints and Disputes Resolution) Regulations, 2012. Both were heard jointly on their merits and dismissed in a ruling delivered by the learned Judge on 2nd May, 2019. This issue is therefore an attempt to argue the appeal against the trial court's rejection of the preliminary objections through the back door as no appeal against it was filed. It is accordingly rejected.

54. The upshot of the totality of the above assessment and reasoning is that the appeal partially succeeds. We proceed to make orders thereon as follows:

- i) Liability in favour of the respondents at 100% is affirmed.
- ii) The award of damages for continuous trespass allowed by the trial court at Kshs.2,000,000.00 for Eunice and Kshs.4,000,000.00 for George and Ellah is confirmed.
- iii) The award of compensatory damages awarded to the respondents by the trial court is set aside and substituted with an award of Kshs.6,000,000.00 for Eunice and Kshs.12,000,000.00 for George and Ellah.
- iv) For the reasons that the trespass is still continuing and for the benefit of the appellant, there will be no award of costs to the appellant for the appeal partially allowed.

**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.**

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

