



**Mwangi v China Road and Bridge Corporation (Civil Case E409 of 2021) [2024] KEELC 7071 (KLR) (28 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7071 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
CIVIL CASE E409 OF 2021  
JA MOGENI, J  
OCTOBER 28, 2024**

**BETWEEN**

**CATHERINE WANJIRU MWANGI ..... PLAINTIFF**

**AND**

**CHINA ROAD AND BRIDGE CORPORATION ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff moved to this court, by way of a plaint dated 5/11/2021. The salient features of the same are that the plaintiff is the owner and is entitled to possessions of the property known as Nairobi Block 117/254 since 1<sup>st</sup> September 1995. That the defendant is unlawfully enjoying, exerting and or exercising unregistered rights over the plaintiff's suit property by building sewage infrastructure to divert the flow of sewage illegally through the plaintiff's land.
2. The plaintiff has listed the particulars of trespass and damage on the part of the defendants to be the following:
  - i. Have placed culverts in a manner that directs the flow of dirty water and sewage into the plaintiff's property
  - ii. Destroying the plaintiff's stone and live fence thus leaving exposed the plaintiff and other occupants of the property
  - iii. The defendants intrusion and destruction are a nuisance to the use of the whole lands of the plaintiff
  - iv. By reason of the Defendants' unlawful actions the Plaintiff has suffered loss and damage.
3. The plaintiff has stated that there is special damage suffered which is damage of a stone and live wall surrounding land parcel Nairobi Block 117/254 assessed by the Plaintiff at Kshs 200,000.



4. As a result the plaintiff has sought judgment against the defendant for:
  - a. An order of permanent injunction restraining the defendants by themselves or their agents from further trespass and damage into the plaintiff's property by diverting the flow of sewage into the land parcel Nairobi Block 117/254
  - b. An order directing the defendants to remove the culverts that are placed in a manner to direct the flow of sewage into the suit land being Nairobi Block 117/254
  - c. Special damages as quantified above, or in the alternative, an Order of the Court for the defendants to repair the stone and live fencing on the plaintiff's parcel of lands, namely Nairobi Block 117/254
  - d. General damages for trespass and or nuisance
  - e. Costs of this suit together with interest on (a), (b), (c ) and (d) at court's rates
  - f. Any such other or further relief as this Honorable Court may deem appropriate to grant.
5. In response, the defendant filed a defence dated 2/02/2024 and denied each and every allegation in the plaint except those that describe their address for purposes of service. The defendant avers that it is a branch of China Communications Construction Company Limited having worked in Kenya since December 1984. That in that period the defendant has undertaken significant works in Kenya including the Nairobi-Mombasa Standard Gauge Railway (SGR), the Southern and Eastern Bypass in Nairobi and the Ports of Lamu and Mombasa.
6. That the defendant has supported local partners in construction, development and upgrading of feeder roads and water as well as sewage lines. Due to its experience it was contracted by Kenya Urban Road Authority (KURA) in December 2020 to construct and upgrade informal settlements in the Nairobi Metropolitan region.
7. That the work they undertook included building water and sewage lines in informal settlements including Kahawa Wendani, Kahawa Sukari and Kenyatta University areas connecting to the Northern By pass. That whereas the defendant does not dispute the ownership of the land parcel it denies building sewage infrastructure that rerouted sewage flow over the plaintiff's land in an unauthorized manner.
8. The defendant further avers that at the time of construction, the road beside the Plaintiff's land had already existing culverts and the Defendant did not in any manner place sewage infrastructures that directed sewage water into the Plaintiff's property. That KURA could not have signed off the works with open sewage lines or sewage water flowing through the streets or private property. At the same time the defendant denies that there was any stone fence during the construction of water and sewage lines in the area and also that it did not interfere with the live fence.
9. The defendant avers that any complaints that was filed by the community about noise pollution and other nuisances caused by the work during the course of construction was addressed by the local administration through stakeholder meetings that brought together, the community, KURA, the local administration and the defendant also participated. That during the said meetings the plaintiff did not raise any concerns or lodge any complaint with the local administration and therefore the allegations in the plaint are an afterthought.



## Plaintiff's Case

10. When the matter came up for hearing on 3/06/2024, the plaintiff Catherine Mwangi did not call any witness she testified and adopted her written statement and list of documents filed as her exhibits as contained from pages 10 -15 of the plaintiff's bundle. Upon cross-examination she stated she was in court for the damage done on her land after the construction of culverts on the road. That the pictures at pages 11-14 were taken after the culverts were fixed.
11. She testified that about the pictures that she produced and stated that the pictures show the road near her residence. The 2 light posts indicate there is a culvert and that her house is under the tree and there is a date showing that the picture was taken in February 2018. The road was constructed in 2021. It was her testimony that the culvert was not in place in 2018. She testified that the picture at page 12 of her bundle show a wall and that the wall was brought down by the defendant and the wall debris was carried away by the defendants. She stated that from the picture the crops seen are the ones she planted and also that it is only her wall that was destroyed.
12. She referred the court to the pictures at pages 8-10 of the defendant's bundle and stated that they show that the property of the plaintiff has a road passing by her house. Upon re-examination she told the court that her plot is the last on the block it is number 254. That the defendants never entered the suit property but that they brought down her wall and that sewage was diverted and the wall between her plot and plot 255 is the one that was demolished. With this the plaintiff closed her case.

## Defendant's Case

13. The defendant had two witnesses. DW1- Joel Muriu adopted his witness statement dated 30/05/2024 as his evidence in chief and a list of documents filed on 02/02/2024 which he produced as his exhibits. He testified that he has worked for the defendant company since June 2017. It was his testimony that when he went to the ground to put up the culvert, the plaintiff approached him to divert water flowing on her land to another place but he advised her to go to KURA office to make the report since KURA was the client they worked for.
14. On cross-examination, he stated that the property had two (2) culverts that direct sewage into the suit property. That on their part before they put up a sewage line they consult Nairobi Water Company. That in the area they were working at there was no sewer line but there was water flowing from the market.
15. He testified that the plaintiff's photograph at pages 12 and 13 shows water flowing. He told the court that at paragraph 9 of his witness statement he refers to a number of meetings held but that he never took any minutes and that he saw never the plaintiff in the said meetings. It was his testimony that whenever they get to a project and find sewage flowing they always divert it after they consult KURA. It was his testimony that it was not right for the plaintiff to have sewage flowing through her property.
16. On re-examination he told the court that the contaminated water was flowing from the market. That their assignment was to extend the road from 4 metres to 7 metres and as such they did not divert the sewage but they just worked with the flow as it were.
17. The second witness DW2- John Karanja Wanjiru testified that he is the Chief Kahawa West Location and that he has been a chief for 3 years and a resident in the area for 20 years. He adopted his witness statement dated 07/02/2024 as his evidence in chief. When he was cross-examined, he told the court that there are several development projects in the area. He testified that there is no existing culvert



across the road and that the contractor added another culvert directing water but the water flows into a valley and the contractor could not change the flow of the water.

18. It was his testimony that the defendant company was installing a sewer and the sewer line was not supposed to pass through the plaintiff's property. That in fact the water through the plaintiff's property is a stream and not a sewer line. On re-examination he stated that he was not mandated as a chief to check any structure. It was his testimony that the water passing through the plaintiff's property has been passing there since time immemorial. That the culverts cannot be removed because the road will not be there since there is water inside the culverts. He stated that he did not have minutes of the public participation meetings. With that the defendants closed its case.
19. The court directed the parties to file their submissions which they did.

### **Analysis and Determination**

20. I have carefully considered the Plaintiff and the Statement of Defence filed by the Defendant thereto, the respective exhibits, submissions and the oral evidence by the witnesses. On that account, it is this court's considered view that the following issues arise for determination: -
  - a. Whether the plaintiff has proved the cause of action before the court.
  - b. Whether the defendant is liable for the special damages as claimed by the plaintiff
  - c. Whether the plaintiff is entitled to the reliefs sought.
  - d. What is the order as to costs?

### **Whether the plaintiff has proved the cause of action before the court?**

21. The plaintiff pleaded that the defendant has trespassed on her land by placing culverts in a manner that directs the flow of dirty water and sewage into her property and which has destroyed the plaintiff's stone and live fence. On the other hand, the defendant averred that it did not dispute the ownership of the land parcel by the plaintiff but that it denied building sewage infrastructure that rerouted sewage flow over the plaintiff's land in an unauthorized manner. Further the defendant avers that at the time of construction, the road beside the plaintiff's land had already existing culverts and the defendant did not direct sewage to the plaintiff's property.
22. The definition of trespass on land is spelt out in Clerk and Lindsell on Torts (17th Edition) at paragraph 17 as: -

“An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil of land also constitutes trespass”.
23. Section 3 of the [Trespass Act](#) provides 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. (2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”



24. In the case of Eliud Njoroge Gachiri vs. Stephen Kamau Nganga ELC no. 121 of 2017 “....., a trespass consists of a series acts done on consecutive days that are of the same nature and that are renewed or continued from day to day so that the acts are aggregate form one indivisible harm.”
25. It is essential that the claimant has possessory rights over the land. In the case of Charles Ogejo Ochieng –Vs- Geoffrey Okumu (1995) eKLR the Court defined trespass as an injury to a possessory right.
26. In her testimony the plaintiff informed the Court that she sued the defendant because they constructed culverts that allowed flow of dirty water and sewage onto her property and that this act amounted to trespass. Whereas the plaintiff has a possessory right of her suit property, this right has been violated by the defendant’s action of allowing dirty water and sewage to flow through her suit property. Despite the defendant denying vehemently having diverted the dirty water and sewage it testified that there was no culvert that was on the ground and that they are the ones who installed the culverts. DW2 averred that a stream has been on the plaintiff’s suit property since time immemorial. DW1 on his part testified that there was water flowing from the market but he did not state where this water flowed to or through.
27. The defence witnesses alluded to meetings being held to address the environmental problems that resulted from the project but did not produce any minutes before the court to show who attended and what issues were addressed. On the complaints of the plaintiff DW1 testified that he referred her to KURA office but he does not state whether her issues were addressed. DW2 is a chief of the area whose testimony I must say bore no probative value to the issue at hand. He had no capacity to testify about the structural soundness of the culverts and the flow of dirty water and sewage. One wonders why the defendant did not invite their engineers to address the issue of placement of culverts and flow of water. He told the court that if the culverts are removed there would be no road but there is no evidence placed before this court to prove this allegation.
28. Whereas the defendant has tried to wiggle out of responsibility by stating that there is only a stream flowing through the plaintiff’s land, I am a bit curious since the plaintiff stated that she has been the registered proprietor since 1995. Now if she has been staying on the suit property since 1995 how come she did not take any action against KURA or any other body for that matter till 2021 when the defendant company was contracted by KURA in 2020? Was the plaintiff suffering from the flow of dirty water and sewage into her suit property and marking time to just wait for the defendant? I do not think so.
29. The right to a clean and healthy environment is embodied in our Constitution Article 42. Whereas I recognize that the country has to embrace development in all aspects including infrastructural development, this has to be done in tandem with the goals of sustainable Development. One has to consider that the fundamental principles of development focus on meeting the needs of the present without compromising the ability of future generations to meet their own needs. In so doing it combines elements such as environmental protection, economic development and social concerns. The right to a clean, healthy and sustainable environment is a fundamental human right within the Sustainable Development agenda. Indeed, it has been observed that human beings are at the centre of concerns for sustainable development and are entitled to a healthy and productive life in harmony with nature.
30. Therefore, whereas the defendant testified that they were engaged with KURA which could not have signed off the works with open sewage lines flowing through the streets or private property it has not placed before this court evidence to convince the court that they found the sewage flowing even before their assignment started. Even if this was the fact which has not been proven before this court then someone has to be responsible of ensuring that there is no open sewage flowing into private individual’s land or even public land since it is violation of the right of citizens to a clean and healthy environment.



31. Development is done so that the lives of the people are bettered but not made worse and what I see in this case is that the plaintiff's life has become a living hell due to the placement of the culverts which have made dirty water and sewage flow onto her property without consideration of her health.
32. I am convinced that the defendant slept on its job which has led to the untold suffering of the plaintiff as has been testified. The plaintiff deserves to live on her land peaceably without having the defendant interfering with her peace by diverting dirty water and sewage through her land causing possessory injury as was held in the case of Charles Ogejo Ochieng –Vs- Geoffrey Okumu (Supra). Thus I find that the plaintiff has proved that there is trespass on her suit property.

### **Whether the defendant is liable for special damages as claimed by the plaintiff**

33. The plaintiff has averred at paragraph 4 (iii) that the damage caused to her stone and live wall surrounding the suit property was assessed at Kshs 200,000 without laying before the court any documents to support this averment. Now, special loss as has been held in several cases has to be particularized. In the case of Coast Bus Services Ltd Vs Murunga Danyi & Others C.A Civil Appeal No. 192 Of 1992 stated that:

“Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars”.

34. The plaintiff in this case finds herself in the same situation described in the case of Coast Bus Services Vs Murunga (Supra). It is clear that the exact loss that the plaintiff suffered following the damage that she alleged could have been confirmed from documents filed in court but these were not tendered. They were all within her knowledge even at the time this suit was being filed. However, those claims were not specifically pleaded and therefore, notwithstanding that some documents were produced during trial to prove that plaintiff's wall was damaged and that sewage water flows through her property, there was really nothing to prove the special damage as pleaded. This Court is not certain as to which damage was caused by the construction of the culverts and which damage may be as a result of the flow of the dirty and sewage water which may require a compensation of special damages. Again special damages must be specifically pleaded. That remedy is therefore not available.
35. Whereas the plaintiff seeks to have the culverts removed, this may be a farfetched prayer owing to the fact that several people are using the road, instead I see the need to have the water re-directed not to flow into the plaintiff's suit property and therefore the defendant has to correct the flow of the dirty water and sewage by correcting the placement of the culverts in a manner to correct the flow. I think some of those recommendations such as removing the culverts would amount to over-stretching the mandate of this Court in view of the claim herein.

### **Whether the plaintiff is entitled to the reliefs sought**

36. The plaintiff succeeds in her claim in part the Principles on Injunction were established in the celebrated case of Giella vs Cassman Brown & Co. Ltd (1973) EA 358. Having considered the evidence placed before the court I am convinced that since there is trespass on her suit property then the Plaintiff



has indeed established a prima facie case and proved its case to the required threshold to warrant the grant of permanent injunctive orders sought.

37. In the case of *Duncan Nderitu Ndegwa v. KP& LC Limited & Another* (2013) eKLR where P. Nyamweya J. held 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 general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants trespass”

38. In *Halsbury Laws of England* 4<sup>th</sup> Edition, Vol 45 at para 26, 1503, it is provided as follows: -

- 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 sum as would reasonably be paid for that use.

39. The plaintiff sought general damages for trespass and or nuisance. Now on this issue of general damages for trespass, the issue that arises is: what is the measure of it? This question was answered by E. Obaga J in the case of *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR where it was held as follows:

“The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less See *Hostler – VS – Green Park Development Co.* 986 S. W 2d 500 (No. App. 1999).

40. From the evidence on record, the Plaintiff has proved trespass but there is nothing in its evidence that can be used to enable this court determine the actual damage and/or measure of the damage or loss that the plaintiff suffered for her to be compensated for the loss. However, in relying on the above case law and the principles laid out, I find the Plaintiff indeed suffered damages as a result of the defendants’ continued acts of trespass. I am persuaded to award the same as the above case law supports the payment for damages in circumstances such as this. I will proceed and award her Kshs. 100,000/= as general damages.

### **Costs**

41. Costs generally follow the event, and in this instant case, since the Plaintiff has been inconvenienced, I find that she is entitled to costs of the suit

42. Consequently, I will proceed to order as follows:

- a. That order of permanent injunction be and is hereby issued restraining the defendants either by themselves, agents, servants and /or anyone claiming under the defendants from further trespass and damage into the plaintiff’s property by diverting the flow of sewage into the land parcel Nairobi Block 117/254
- b. An order is hereby issued directing the defendants to rectify the placement of the culverts by placing them in a manner to direct the flow of sewage away from the suit land being Nairobi



Block 117/254 and or remove them altogether within 6 months of this order and file the report of the removal in court. Any party is at liberty to apply.

c. General damages of Kshs 100,000 for trespass are awarded to the plaintiff with interest at court rates from the date of this judgment until payment in full.

d. Costs of this suit is awarded to the plaintiff

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI, THIS 28<sup>TH</sup> DAY OF OCTOBER 2024**

.....

**MOGENI J**

**JUDGE**

**In the Virtual Presence of: -**

Ms. Kimiti holding brief for Mr. Kambo for Defendant

Ms. Mugo for Plaintiff

Caroline Sagina - Court Assistant.

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**MOGENI J**

**JUDGE**

