County Government of Meru v Mathiu (Environment and Land Appeal E011 of 2024) [2024] KEELC 7321 (KLR) (23 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7321 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E011 OF 2024

CK NZILI, J

OCTOBER 23, 2024

BETWEEN

COUNTY GOVERNMENT OF MERU ..... APPELLANT

AND

STANLEY KIOGORA MATHIU ..... RESPONDENT

(Being an appeal from the judgment of Hon. C.W Nyambu - CM in Meru CMCC No. 107 of 2018 delivered on 30.1.2024)

JUDGMENT

1. The appellant, as the 1st defendant, together with its County Administrator Nyaki West, as the 2nd defendant, had been sued by the respondent the through a plaint dated 22.8.2017. The complaint was that on 26.8.2017, a tractor belonging to the appellant, driven by a county employee under the supervision of the County Administrator Nyaki West, purporting to expand Mpakone Lower Road, encroached into the respondent's land parcel LR. No. Ntima/Igoki/7267, maliciously destroying his trees, barbed wire fence, crops and converted a portion of the land, approximately 0.14 ha, into public land.

2. Following the encroachment, the respondent averred that the earth near his plot was so eroded that drainage and stormwater were directed towards his land, causing more damage and destruction through erosion. The respondent prayed for general damages for trespass and special damages for the destruction at Kshs. 1,513,900/= loss of grade cow valued at Kshs.80,000/= and Kshs.3,400,000/=, for the unlawful conversion of the portion of his land.

3. The appellant opposed the suit through an amended statement of defense dated 11.10.2019. It was averred that the respondent had encroached public road, thus unlawfully alienating public land to his private use; hence, his claim for compensation of the portion of land allegedly acquired by the appellant was untenable in law.

4. The appellant averred that:

   a. It had not made any request to the National Land Commission to acquire the respondent's portion of land under Section 107 of the *Land Act*.

   b. The National Land Commission has never certified in writing that the plaintiff's alleged portion of land was required for a public purpose in accordance with Section 110 of the *Land Act*.

   c. There has been neither any inquiry to compensate nor publication of any notice in the Kenya gazette as required under Section 112 of the *Land Act* in regard to the purported acquisition of the respondent's portion of land.

   d. Sections 112 and 113 of the *Land Act* obligate the National Land Commission to issue a written award and offer for compensation upon the respondent, which procedure had not been complied with.

   e. The National Land Commission has never done the final survey of the purported respondent's portion of land.

   f. The respondent has never surrendered the original title deed to the land registrar for cancellation as required under Section 121 of the *Land Act*.

5. The appellant averred that the respondent could not be compensated from public fund for land, which was still registered under his name. Further, the appellant averred that unqualified persons had prepared the survey and agricultural assessment reports. Additionally, the appellant averred that a valuer did not do the valuation report submitted, and therefore, the respondent was guessing the value of the alleged damage. Lastly, the appellant denied receiving a demand letter before the suit was filed.

6. Through a reply to the defense dated 26.11.2019, the respondent averred that the suit land was absolutely registered under his name, which had defined boundaries surrounded by a fence, clearly demarcating the same from the road. The respondent averred that his claim was based on a breach of his proprietary rights through illegal trespass on his land that occasioned damages to his developments and amounted to conversion of his land into a public road, contrary to the law; hence, the appellant was liable for the loss, injury and damage suffered.

7. At the trial, Stanley Kiogora Mathiu testified as PW 1. He told the c7ourt that he was the registered owner of L.R No. Ntima/Igoki/267 situated at Kiirua Kaaga area as per a copy of the title produced as P. Exh No. (1). PW 1 testified that on 26.8.2016, a Meru County bulldozer was brought to the area under the supervision of Dennis Kiragu, the ward administrator, with instructions to widen the access road, claimed that his fence was on a road reserve and proceeded to remove his hedge, trees and barbed wire fence altogether.

8. PW 1 said that this was done without any notice or survey measurements hence affecting 0.14 acre out of his 1acre land size. He produced copies of photographs showing the damage as P. Exh No. (2). PW 1 told the court that he engaged a land surveyor and an agricultural officer who generated expert reports marked as P. M.F.I. 2 & 4. PW 1 said that after the fence was removed entirely, his house was left exposed, causing theft of his grade cow as per O.B. No. 21/25/11/16 at Meru Police Station which cow was worth Kshs.80,000/=. He produced the same as P. Exh No. (5).

9. PW 1 told the court that he eventually notified the appellant through the County Ward Administrator, who visited the suit land and observed the damage. He said that the appellant refused to stop the road

expansion; hence, the access road was still in existence. He produced a copy of a demand letter dated 30.6.2017 as P. Exh No. (6).

10. In cross-examination, PW 1 stated that he inherited the land from his grandfather and that there was no road on his side as per Sheet No. 19 and not Sheet No. (6) otherwise, whatever was on his side was a mere footpath, which he doubted, if it had been surveyed on his land. PW 1 said that the neighbor had been encroaching on the footpath; otherwise he was not aware if the footpath was on a road reserve. PW 1 said that the appellant only encroached on the land on his side and not that of his neighbor, as confirmed by the land surveyor in his report.

11. More so, PW 1 stated that he had never requested a land registrar to create an access road for him. Further, PW 1 denied that there public participation involving the residents who demanded an access road. PW 1 told the ourt that his private surveyor did not mention, measure, or establish any mark of road reserve both on the map and on the ground. He denied the existence of a road reserved on the map. PW 1 told the court that after the road was constructed, he went to his land surveyor who never advised him on the existence of a road reserve on his land.

12. PW 1 said that the appellant had never sought through a letter to acquire any part of his land for a public road of access. Again, PW 1 testified that on the portion that was taken up by the road, he had established a zero grazing unit and Kei apple and chain link fence, which, after it was removed, his cow was stolen at night. He blamed the appellant for encroaching onto his land, causing immense damage, and exposing his home to intruders.

13. Erick Muthomi Kiogora testified as PW 2. He associated his evidence with that of his father, PW 1, on the events of 26.8.2016, as confirmed in his witness statement dated 8.8.2016.

14. PW 2 admitted that there was only a footpath near the boundary to the land, which the appellant's tractor expanded by removing the fence.

15. Gerald Nyamu Nkabu testified as PW 3. He told the Court that PW 1 sought his survey services regarding L.R No. Ntima/Igoki/7267, which had been encroached into by the appellant. PW 3 said that he determined the area of encroachment as 0.14 ha, which was equivalent to 0.034 acres as a result of widening up an access road. PW 3 said that the road expansion occurred on privately owned land, converting it into public land, contrary to the law on acquisition of land for public purpose. He produced P.M.F.I. PW 3 as P. Exh No. (3). He equally produced the report of Prudential Valuers who had determined the value of the encroached land at Kshs.2.4 million. PW 3 said that he was familiar with the issues raised in the report and the signature of the maker, Mr. Matumbi, who was elderly, retired, and residing in Nairobi. P.M.F.I No. 4 was therefore produced as P. Exh. No. (4).

16. In cross-examination, PW 3 told the Court that he was a qualified and registered land surveyor, holding a valid license as per a copy of his certificate before the court. PW 3 stated the court that he did not attach a copy of the R.I.M. to his report showing that the road was expanded to cover a width of 6 meters, though the encroachment was not regular through. PW 3 said that the Kei apple fence was the one marking the original boundary before the encroachment.

17. Further, PW 3 added that he referred to the government survey records before preparing his report, which unfortunately was not attached to his report. PW 3 said that the Kei apple hedge was meant for the boundary and contained the beacons at the corner points of the suit land, which were all destroyed during the road excavation. Similarly, PW 3 stated that his report was silent on the distance of the beacons from the excavation. PW 3 said that the portion destroyed had no developments. He said that the market value of the neighboring properties in the vicinity guided the valuation report. He termed

the report as conclusive since it had considered the electricity, piped water system, sewerage system accessibility and population size.

18. PW 3 said that the suit land was connected to water electricity and a private septic tank. Save for trees, PW 3 said the area encroached was approximately 1.5 meters from each side, making a total of 0.14 ha.

19. Nicholas Gitonga Muteru testified as PW 4. He told the court that he was an agricultural assistant currently retired from the Ministry of Agriculture after working for 36 years. He added that after he was engaged by the respondent, who was a farmer at Kaaga area, he visited the farm, which was under crops, and assessed the damage assessed by the appellant's tractor at Kshs.1,513,900/=.

20. In cross-examination, PW 4 said that after retirement, he had been an agricultural consultant. According to PW 4, some of the items destroyed included nappier grass, trees, bananas macadamia, fencing poles, fence and avocado trees. PW 4 said that he valued the crops as per the Ministry of Agriculture guidelines on values for various crop species. Unfortunately, PW 4 said that he did not attach the ministry's guidelines to his report.

21. Daniel Murithi, a neighbor to the respondent and area manager, testified as DW1. He relied on his witness statement dated 30.7.2019. He told the court that after a series of meetings held by the locals regarding a road expansion, the appellant unanimously agreed to expand the narrow road. He did not have the minutes. DW1 said that the last meeting was presided over by a county ward administrator who offered to reach out to the appellant. DW1 aslo stated that it was the respondent who showed him the boundary to his land before the tractor came.

22. Additionally, DW 1 said that though aware, PW 1 refused to attend the meetings, nevertheless he gave him a verbal notice to remove the trees encroaching on the road reserve. He admitted that the access road had not been measured or beaconed by an expert before the excavation. DW 1 said that because of the bad road network in the area, locals were not being adequately served with public services such as water and electricity. DW 1 admitted that the respondent's trees, stumps and a fence were cut, uprooted, and removed by the appellant's tractor during the exercise in the presence of PW 1, since they were on a road reserve.

23. Stephen Kieti Njogu testified as DW2. Relying on a witness statement dated 30.7.2022 as his evidence-in-chief, DW 2 told the court that his shamba adjoined that of access road running near it and the land belonging to the respondent DW 2 said that the footpath used to be impassable, hence the reasons that locals save for the respondent, had agreed to have it not only expanded but also graded.

24. In cross-examination, DW2 confirmed that as a chairman of the Nyumba Kumi, he was present during all the villagers' meetings at Rose Centre, some of which were attended by the respondent as well as his father. He could not tell if the road reserve had beacons or whether an expert was hired to establish the beacons of the access road, before it was expanded and graded. Nevertheless, DW2 said that he cut down 24 trees on his land to pave the way for the access road.

25. Gitobu Dennis Kiragu, the 2nd defendant and a former Ward Administrator Nyaki West in July 2016, testified as DW3. Relying on his witness statement dated 25.6.2019 as his evidence-in-chief. DW3 told the court that in 2019, the appellant was rolling out a program to open up access roads in the ward. In this case, DW 3 said that the locals of the Runogone location held barazas and gave out authority to prioritize road opening in the area.

26. In addition, DW 3 stated that he connected the residents with the area chief, whose land was also affected. DW3 also testified his duties involved the smooth running of the project ensuring the grader had fuel and resolution of any local conflicts as and when they arose. He said that there was adequate public participation before the exercise was launched, and no compliant were received by his office

other than compliments of appreciation during and after the project was completed. He produced the list of attendees in the meetings who approved the project as D. Exh No. (1).

27. DW3 said that he only became aware of this claim in August 2017; otherwise, before the exercise started, locals during the public participation meeting had resolved to clear all their developments on the road reserve, prior to the road expansion exercise. DW3 confirmed that for these people who could not remove the trees on the road reserve, the grader was used to remove them.

28. In cross-examination, DW3 told the court that his role was merely to oversee the exercise; otherwise, there was a land surveyor on-site during the upgrading of the footpath into an access road with the assistance of DW1 He denied that there was an encroachment on any private land during the road works. DW3 said that he was not aware of any document from the physical planner or land surveyor showing how the project was to be undertaken. Similarly, DW3 said that he did not see any beacons directing the grader operator on the extent of the access road.

29. Further, DW3 told the court that the destruction of trees on the access road, was not just restricted to the respondent's land. DW3 said that it was the duty of the County Government of Meru to confirm the extent of the access road.

30. Raphael Kimanthi Kinoti testified as DW4. As a Physical Planning Officer, he told the court that following by-laws enacted by the appellant, some select roads were to be expanded to standard nine meters from six meters. In this particular case, DW4 added that he was instructed to carry out the exercise on an access road which hitherto was six meters wide on the ground. Again, DW4 stated that they expanded the access road by excising 1 ½ meters of land from each side of the road to ensure that there was equity. DW4 said that the excised land affected all parcels of land along the access road since the local community had consented to the expansion of the road.

31. More so, DW4 confirmed that after putting marks on the extent of the access road, the grader came in and demolished all that was encroaching on the road reserve. DW4 said that he prepared a report pertaining to the exercise containing Map Sheet No. 6, a sketch map and the report which he produced as D. Exh No. 2 (a) & 2 (b). He said that the exercise was undertaken across the county.

32. DW4 said that there was no dispute resolution mechanism set for those with complaints over the exercise. He denied that there was massive destruction of private property during the exercise. DW4 clarified that contrary to the evidence of DW3, he erected a beacon on the extent of the access road to guide the grader. He denied that the respondent's land was grossly encroached upon and destroyed by the bulldozer. DW4 said that he never compiled another report after the completion of the project. He insisted that there was equity in the road expansion. DW4 faulted the report by Mr. Makumbi, denying there was massive trespass and destruction of the respondent's land. He said his report was not about the encroachment but on the exercise of road expansion, which he supervised following an initial public participation exercise spearheaded by then Member of County Assembly, alongside the area chief.

33. At the close of the defense case, the trial court allowed the claim. The appellant has approached this court through a memorandum of appeal dated 23.2.2024. The grounds are that the trial court erred in law and, in fact, in:

    i. Holding that it had jurisdiction to hear and determine the dispute that was essentially a boundary dispute between the respondent's parcel of land and a public road.

    ii. Awarding special damage of Kshs.1,513,900/= despite finding that the appellant did not enter the respondent's land and, therefore, could not have caused damage to the suit land.

iii. Misleading itself that the appellant damaged the respondent's property despite finding and concluding that the appellant did not enter, trespass or encroach on the respondent's land.

iv. Relying upon the evidence of N. Gitonga Martin to award special damages, who alleged to be an expert in agricultural assessment, though he did to produce any evidence to support his purported academic qualification.

v. Failing to consider that the appellant conducted proper public participation before the expansion of the Mpakone Lower Road, where all property owners were informed and agreed to remove structures along the said road.

vi. For failing to consider the mandatory requirements for reasonable distance in anticipation of road expansion, which in this case was 1.5 meters along the said Mpakone Lower Road.

34. This appeal was directed to be canvassed by way of written submissions. The appellant relied on written submissions dated 7.10.2024. It was submitted that there were inconsistencies in the trial court's judgment in awarding of special damages without trespass and the conclusion of damage, which is legally and factually unsound and contradictory. It was submitted that there was no dispute that there was, with effect from 12.8.2016, a road expansion exercise, which was presided over with public participation on 25.7.2016, in furtherance of the appellant's constitutional obligation.

35. The appellant submitted that out of the public participation exercise resolution, any party who had encroached onto the road reserve should remove all their structures before the commencement of the road expansion exercise. In this case, the respondents failed to necessitate the removal by the appellant in the exercise of its legal and constitutional mandate.

36. Further, the appellant submitted that the entire dispute in question was that of land boundaries where the respondents had alleged encroachment on a road reserve or refusal to keep a reasonable distance in anticipation of road expansion as expounded in law. Jurisdiction is everything and the trial court failed to ascertain if it had jurisdiction in the matter and instead assumed jurisdiction over a boundary dispute which by virtue of Section 78 of the *Land Registration Act* falls under a land registrar to determine the boundaries of the respondent's piece of land in relation to the road reserve before any court proceedings could be initiated.

37. The appellant submitted that by so doing, the trial court acted ultra vires, rendering the proceedings void ab initio. Reliance was placed on Reuben Kioko Mutyaene vs Hellen Kiunga Miriti & others (2021) KEELC 3268 (K.L.R.), and Speaker of National Assembly vs Karume (1992) K.L.R. 21.

38. Similarly, the appellant submitted that the trial court failed to take into account, the public participation forums set under Article 10 of the *Constitution* involving the local community in general and, in particular, the respondent who agreed to remove any structures considered to have been obstructing the development project. In this particular case, it was submitted that the public participation in road expansion was in line with Section 49 of the *Kenya Roads Act* 2007, in regard to issuing a notice to persons who have erected structures on the road reserve.

39. The appellant submitted that the trial court gave less weight to the crucial role played by public participation, which, if conducted in line with the law, the resultant decisions must be upheld unless there is proof of procedural irregularities or unfairness.

40. Consequently, the appellant submitted that by ignoring the role of the public participation exercise, it committed to a miscarriage of justice.

41. As to whether the respondent should have kept a reasonable distance of 1.5 meters for the expansion of the road along Mpakone Lower Road, the appellant submitted that the laws and regulations governing road infrastructure and public land set clear guidelines regarding reservation of space for future expansion of public road as set out in *Kenya Roads Act*, the Public Roads and Roads of Access and Regulations made thereunder, which appellant submitted that the land surveyors report had cited which trial court failed to consider.

42. The appellant submitted that the 1.5 meters clearance as a reasonable distance could not have been private land; otherwise, under Section 91 of the *Traffic Act* was within the confines of the law for road authorities to remove anything that is placed or erected on a road reserve. Reliance was placed on Stephen Njuguna Kiragu & another vs Kenya National Highways Authority (2018) KEELC (430) K.L.R.

43. On special damages, the appellant submitted that special damages should be pleaded and strictly proved, and in this case, there is no evidence of entry by the appellant into the suit land; it logically couldn't have caused any damage to the suit land as trespass once proved is actionable per se.

44. Given that the trial court made a finding that there was no trespass, the appellant submitted that the corresponding finding should have been that no damage occurred due to the appellant's action. The appellant, therefore, submitted that the award of special damages was unsustainable in law and was an error as per Sections 107-109 of the *Evidence Act*.

45. Subsequently, the respondent submitted that the maker of the assessment report did not substantiate his qualifications to be able to prepare such an alleged expert report for the court to rely on. In the absence of such validation of expertise, the appellant submitted that the trial court should have exercised caution over the expert status of the witness, concluding that special damages were not substantiated through credible and reliable evidence. Reliance was placed on Sakwa & others vs. National Housing Corporation & others (2022) KEELC 14930 (K.L.R.).

46. The respondent relied on written submissions dated 2.10.2024. It was submitted that the claim before the trial court was based on the tort of trespass as opposed to a boundary dispute. As to the destruction of property, the respondent submitted that the evidence that the tendered was enough to prove encroachment loss and damage attributed to the appellant. Reliance was placed on R.EH & others (minors) (1969) and Miller vs Minister of Pension (1947) ALLER 373.

47. Again, the respondent submitted that where there was a right, there must be a remedy, as held in Asby vs White (1703) 92 ER 126. In this case, the respondent submitted that his right to land was violated by the appellant and the trial court was in order to find the appellant liable.

48. The mandate of this Court is to review the evidence in order to determine whether the conclusion initially reached upon that evidence should stand. In doing so, the Court must draw its conclusions on matters of fact and law, bearing in mind that the trial court had the advantage of seeing and hearing the witnesses firsthand. See Peters vs Sunday Post Ltd (1958) E.A 424.

49. In Kazungu & another vs Omar (Civil Appeal E042 of 2021 (2024) KECA 412 (K.L.R.) (26th April 2024) (Judgment), the Court cited Ng'ati Farmers' Cooperative Society Ltd vs. Ledidi & others (2009) eKLR, that an appeal is like a retrial by reconsidering the evidence and evaluating it. Similarly, the court cited Kenya Ports Authority vs Kuston (K) Ltd (2009) 2 E. A 212, that the responsibility of the court of the first instance in an appeal is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.

50. In exercising the appellate authority, the appellate court relies on the memorandum of appeal as the only pleading. See Uhuru Highway Development Ltd vs Central Bank of Keny. 1 E.A 314. In Kenya Hotels Ltd vs Oriental Commercial Bank Ltd (2018) eKLR, the court cited with approval Thomas Openda vs Peter Martin Ann (1982) eKLR and Nyagau vs Nyakwara (1986) KLR 172, that grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial.

51. It is trite law that parties are bound by their pleadings, and issues for court determination must flow from the pleadings. See Independent Electoral and Boundaries Commission & others vs Stephen Mutinda Mule (2014) eKLR. Having perused the record of the lower court and bearing in mind the mandate of this court, the issues flowing for my determination are:

    i. If the trial court had jurisdiction to hear and determine the suit.

    ii. Whether the respondent pleaded and proved encroachment onto his land and conversion of part of his parcel of land to public land.

    iii. If the appellant was justified to expand a road of access to cover the respondent's parcel of land without compliance with the law.

    iv. If the concept of public participation and surrender of private land and public interest can be used to justify encroachment and conversion of private land.

    v. Whether the respondent pleaded and proved special damages.

    vi. If the appellant was liable for the encroachment loss and damage suffered by the respondent.

    vii. Whether the appeal has merits.

    viii. What is the orders as to costs?

52. The primary pleadings before the trial court were the plaint dated 22.8.2017, the amended statement of defense dated 17.10.2019, and a reply to the defense dated 26.11.2019. The respondent had pleaded trespass, encroachment, destruction of property, and conversion of 0.14 ha of his L.R No. Ntima/Igoki/7267 private land, into public land by the appellant to expand and develop Mpakone Lower Road. In a statement of defense amended on 11.10.2019, the appellant pleaded that the respondent had encroachment onto a public road reserve and thus unlawfully alienated public land, turning it into private land without following the law; hence, he was not liable to compensation. At paragraph 7 of the amended statement of defence the appellant admitted the jurisdiction of the court.

53. In reply to the amended defense, the respondent averred in paragraph *3* that his claim was based on a breach of his proprietary right on account of trespass, malicious damage, and conversion of private into public land, without any support by statute law, making the appellant liable to the loss and damage.

54. Jurisdiction is everything and has to be raised at the earliest opportunity possible. In this appeal, the issue of jurisdiction was not pleaded or argued in limine. It was first introduced through written submissions dated 25.11.2022. The appellant had not pleaded that the trial court was bereft of jurisdiction. Trespass refers to unjustified entry into private land and the commission of acts of destruction. See section 3 (1) of the *Trespass Act*. Kenya Power & Lighting Company vs Ringera (2022) KECA 104 (KLR).

55. Encroachment in Black's Law Dictionary 11th edition, page 667 is defined as an infringement of other rights, interference with or intrusion to another's property. Further, at page 1810-1811; trespass is

defined as a wrongful entry on another's land which way take the form of continuing, innocent or permanent nature. See Josephat Mburugu vs Silas Mwiti Mugwika (2022) eKLR.

56. The *Traffic Act* provides that whoever has encroached on a public road or damaged an access road, he has to be served with notice. Evidence that this was a boundary dispute and not trespass was not tendered at all. My finding is that the issue of jurisdiction is a new issue that was not pleaded and proved before the trial court. Written submissions are not pleadings and cannot amount to evidence. See Daniel Toroitich Moi vs Murithi Stephen (2014) eKLR.

57. The next issue is whether the respondent pleaded and proved trespass and or encroachment on his private land. Section 107 of the *Evidence Act* places the burden of proof on whoever desires the court to give judgment on any legal right or liability depending on the existence of specific facts. In Anthony Francis Wareham t/a AF Wareham and others vs Kenya post office savings Bank (2004) eKLR the court observed that in an adversarial system, cases are tried on the basis of the issues of fact or law as framed by the parties, and the degree of the burden is on a balance of probabilities on the existence or non-existence of facts in issue or facts relevant to the facts in issue and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.

58. In this appeal, the respondent produced a title deed and a property assessment report and called a land surveyor who visited his land. Section 152A of the *Land Act* prohibits unlawful occupation of private, community and or public land. The respondent had pleaded that the appellant came into his land, placed beacons, destroyed and annexed 0.14 ha of his private land into public land.

59. In KPLC vs Ringera (supra), the court cited Eliud Njoroge Gachiri vs Stephen Kamau Naanga (2018) eKLR, that continuing trespass consists of a series of acts done on consecutive days that are of the same nature and are repeated. Further, the court cited John Kiragu Kimani vs R.E.A. (2018) eKLR that a party is guilty of trespass if he fails to obtain consent, authority and or permission of the owner.

60. In Fleetwood Enterprises Ltd vs Kenya Power & Lighting Company (2015) eKLR, the court said that where trespass is proved the affected party need not prove that it suffered damages or loss. In Duncan Nderitu Ndegwa vs Kenya Power & Lighting Company (2013) eKLR, the court observed that trespass to land was actionable per se, and indeed, proof of damage was not necessary for the court to award damages. In Halsbury's Laws of England 3rd edition Vol. 38 page 739, paragraph 1205-1300, it provides that any form of possession so long as it is explicit, exclusive and exercised with the intention to possess is sufficient to support an action of trespass against a wrongdoer.

61. Section 143 of the *Evidence Act* provides that there is no particular number of witnesses to prove facts, and therefore, a single witness, if believed, is sufficient to establish any fact. In Vadivelu Thevar vs the State of Madras (1957) the court said evidence had to be weighed and not counted. The respondent proved ownership of the suit land by producing a title deed and his occupation before the alleged trespass. See David Ogutu Onda vs Walter Ndede Owino (2014) eKLR.

62. The respondent tendered evidence that the entry was wrongful; part of his property was annexed and has since been developed as a public road, he has been expelled from use and possession, beacons were fixed on his land, there was pulling down and destroying anything on the portion. In Miller vs. Minister of Pension (supra), the court observed that a draw is not enough and the party bearing the burden of proof will show where both party's explanations are equal and therefore, if the evidence is such that the tribunal can say; we think it is more probable than not the burden is discharged.

63. It is not in dispute that the holder of a title deed has rights under Sections 24, 25, 26, and 27 of the *Land Registration Act* as read together with Article 40 of the *Constitution*. Article 40 (6) of the *Constitution* safeguards against compulsory acquisition of land for public purposes without prompt compensation

and access to a court of law. See Willy K. Morogo vs Albert K. Morogo (2017) eKLR and Simon Kiprono Mutai vs Hillary Rotich & another (2018) eKLR.

64. Whereas the appellant does not deny encroachment, the justification is that there was an encroachment on, public road, public participation occurred prior to the project being undertaken, adequate notice to vacate the public right of way had been given, and the respondent had consented to the ceding of his land for an expansion of an access road. In Clarkson Onyango Bolo vs James Asala & others (2021) eKLR, the Court reiterated that the owner of a property is entitled to complain, however trivial the encroachment is. In Telkom (K) Ltd vs County Government of Muranga County Government of Muranga (2019) eKLR, the court affirmed that trespass was actionable per se. In Section 9 of the Public Roads and Road of Access Act provides two ways of creating an access road.

65. Article 40 (3) of the *Constitution* provides that any alienation of land for public use must adhere to the law and the *Constitution*. In Amarcherry Ltd vs AG (2014) eKLR, the court observed that a forceful takeover of personal property without due compensation would be constitutional. See also *Patrick Musimba vs National Land Commission & others Petition No. 613 of 2014*.

66. In James Shikwati Shikuku vs County Government of Kakamega and others; Isaac Shivachi Mutoka & others Kakamega ELC Pet No.8 of 2016, the court held that the acts to deprive the applicant's property trespass and willful damage purporting to commence construction of a road and were done in contravention of the petitioner's right to equal protection and enjoyment of the legal right to acquire and own private property right, to fair administrative action and the right to fair hearing. The court said that since the respondents had not disputed that, indeed an access road was opened and it continued to serve the public, it was tantamount to a case of compulsory acquisition of land.

67. In Virendra Ramji Gudka & others vs Attorney General (2014) eKLR, the court held that Sections 107-133 of the *Land Act* related to the compulsory acquisition of land for public purposes. In Republic vs Cabinet Secretary, Ministry of Transport and Infrastructure and others exparte Francis Nakioboro & others (2015) eKLR; the court cited Satrose Ayum & other registered trustees of Kenya Railway Staff Retirement Benefits Scheme Petition No. 5 of 2010 on lack of legislative framework on forceful eviction and the need to have human evictions with adequate notice. The Court cited Susan Waithera Kariuki & others vs Town Clerk Nairobi City Council and others (2013) K.L.R. and Ibrahim Sangor Osman vs Minister of State for Provincial Administration and Internal Security & 3 others (20110 eKLR, on the concept of genuine consultation with affected persons or groups of eviction in plans by state organs on development projects. In George Hope vs Director of a Survey and Others (2020) eKLR, the court said that under Article 40 (1) (6) of the *Constitution*, the sanctity of property does not extend to property illegally acquired.

68. In this appeal, the appellant pleaded that the respondent was the one who had encroached onto and converted public land for his private use. The power to acquire land for public use is reposed with the National Land Commission. Section 107 of the *Land Act* provides for the publishing of a preliminary notice of acquisition. Section 113 (4) thereof provides the manner of taking possession and payment of just compensation by the national and or county governments. There must be a gazette notice. See Virendra Ramji Gudka & others vs AG (supra).

69. In Mistry Premji Ganji Investments Ltd vs Kenya National Housing Authority (2021) eKLR, the court observed that since it was the defendant's evidence that the entrenched portion was approximately 0.05 ha, the burden then shifted on the defendant to show by what authority 0.03 ha was bestowed on it. The court held that since the defendant had no foundation to apply the provisions of Section 49 of the *Kenya Roads Act* when it proceeded to demolish the plaintiff's wall and attendant developments. The court found the demolition of the wall was uncalled for, illegal and against the rights of the plaintiff

as the proprietor of the land. As to notice under Section 49 of the Kenya Road Act, the Court found that serving such a notice did not confer any right.

70. In Muthomi Mungania, Nkatha Mungania & others vs Meru County Government and others (2022) eKLR, the Court observed that an access road in issue fell under the jurisdiction of the 1st defendant in line with Schedule 4 Part 2 as read together with Articles 185 (2), 186 (1) and 187 (2) of the *Constitution*.

71. In Coastal Properties Ltd vs. County, Government of Kwale Director of Surveys (2022) KELC (15337) K.L.R. (28th November 2022) (Judgment,) at issue was a demarcation of a footpath as a road reserve in total disregard of the petitioner's contention that the footpath was not a road reserve and proceeded to create a wide motorable access road through the suit property taking away part of the petitioners land and also destroying the caretaker's house, contrary to Articles 40 and 47 of the *Constitution* as he was never given an opportunity to be heard.

72. The respondent's position was that it was a boundary dispute under sections 18 & 19 (1) (2) of the *Land Registration Act* and 30 of the *Survey Act*. The court held that to the extent that there was an ownership issue where land was taken away by the expansion of the fort path into a road, the Court had jurisdiction to hear the matter. The Court, based on a joint survey report, held that there was no access road in the suit property, and therefore, the action of the respondent entering into, paving and creating the road cutting through the petitioner's property violated Articles 40 & 47 of the *Constitution*.

73. Guided by the preceding case law, I find the trial court had jurisdiction to hear and determine the matter. It was not a boundary dispute. The appellant had not pleaded that the dispute had been referred to the land registrar to determine the boundary. The appellant did not involve the land registrar or land surveyor to ascertain the boundary. The letter sent to them was not followed up at all before the suit was filed. The suit, as framed, covered trespass, encroachment, conversion of private to public land, and malicious destruction of private property. Such matters fall beyond the limited jurisdiction of the land registrar under Sections 18 and 19 of the *Land Registration Act*.

74. The appellant submitted that they acted within the confines of the law and that the respondent was irregularly on the road reserve for not keeping the reasonable distance of 1.5 meters, which is a standard distance per the *Kenya Roads Act*, *Public Roads and Roads of Access Act* and related guidelines from Kenya Rural Road, Kenya National Highways Authority, the *Traffic Act* and the Guidelines made thereunder. Reliance was placed on Stephen Njuguna Kiragu and another vs Kenya National Highways Authority (supra).

75. In his evidence, PW 1 produced a copy of his title deed and an official search for L.R No. Ntima/Igoki/7267, measuring 1 acre falling under Registry Map Sheet No. 6. His evidence was supported by the evidence of PW 3, a land surveyor who produced his report. In the said report, PW 3 indicated that he conducted a background check from both the physical land survey and compared it with the survey office registry index map, to determine the extent of the encroachment of the road to the individual land holding. His findings were that the access road had encroached on the respondent's land by 0.14 ha.

76. In essence, PW 3 made findings that the access road was shifted from its actual position referenced in the Registry Index Map Sheet No. 6 for Registry Index Map Ntima/Igoki, to a new position inside L.R No. Ntima/Igoki/7267 by taking the individual property onto the public road, without any form of compensation.

77. PW 3, in his report, indicated that on the ground, there existed well-defined boundary marks consisting of Kei-apple hedge mixed with mature tree stumps, which indicated very conspicuous and

undisputable marks that constituted the original boundaries of the area that formed the historical former boundaries between the communities that border each other from time immemorial.

78. PW 3 told the trial court that he formed an opinion that the widening or expansion of the road on individual private property and converting it into public property, is contrary to the *Land Registration Act*. The report was accompanied by a sketch map indicating the manner and extent of the encroachment. He equally produced the report by the valuer dated 29.8.2017 as P. Exh No. (4). In the valuer's report, the maker indicated that he equally compared the ground with Registry Map Sheet No. 6. The maker of the report was a registered valuer and estate agent as per his attached Certificate No. 0003017 and 1543 dated 10.1.2017 and 4.1.2017, respectively, for the year 2017 and a Kenya gazette, all which formed part of the valuation report.

79. PW 3, after laying the basis under the law, produced these documents. The report indicated that initially, L.R No. Ntima/Igoki/7267 was 1 hectare but was reduced by 0.14 ha, after the encroachment, taken up by the earthen access road. PW3 indicated that the portion had never been set aside for public utility, located on a road reserve or prohibited land. He gave the circumstances of arriving at its value at Kshs.2,400,000/= due to its agricultural values, namely volcanic soil, locality, accessibility to piped water electricity, telephony, and public amenities. Regarding P. Exh 4, PW3 produced the agricultural crop assessment report as P. Exh No. (4) totaling to Kshs.1,513,950/=.

80. The appellant has attacked expert reports for lack of qualifications or credentials of the said experts that were not substantiated. Reliance was placed on Sakwa and others vs NHC & others (supra). In Shah & another vs. Shah & others (2003) 1 EA 290, the court observed that the opinion of an expert is not binding on the court and must be considered together with other relevant factors in reaching a final decision in the case and with good reasons the court may not be bound to accept the said expert evidence.

81. In Parvin Singh Dhalay vs Republic (1997) eKLR, it was held that if there were a proper and cogent basis for rejecting an expert opinion, a court would perfectly to entitled to do so. In Kandie vs Joseph Chesire Chemuna t/a Avenue Butchery (appeal E009 of 2023 (2024) KEELC 5344 (K.L.R.) (18th July 2024) (Judgment), the court rejected the surveyors report since it had not provided the basis for determining that the mast was erected on the defendant's land. See also Kimatu Mbuvi t/a Kimatu Mbuvi and Bros vs Augustine Munyao Kioko Civil Appeal No.203 of 2001 (2007) 1 EA 139 Mutonyi vs Republic (1982) KLR 203.

82. An expert witness who hopes to carry weight in a court of law must, before giving his expert opinion,

    i. Establish by evidence that he is specially skilled in his science or not.

    ii. Direct the court on the criteria of his science or art so that the Court can test the accuracy of his opinion and also form his own independent opinion by applying these criteria to the facts proven.

    iii. Give evidence of the facts on which may be ascertained by him or facts reported to him by another witness. See Wamungi Stationers and Booksellers Ltd vs Wachira (Civil case E006 of 2022 (2024) KEHC 5316 (K.L.R.) (16th May 2024) (Judgment).

83. Sections 48 – 54 of the *Evidence Act* governs the law on the opinion of an expert witness. In Kagina vs Kagina & others (Civil Appeal 21 of 2017 (2021) KECA 242 eKLR the court observed that, as a general rule, witnesses should always be qualified in court before giving their evidence, and this is done by asking questions to determine and failure to properly qualify an expert may result in his testimony

being excluded. The Court said that if there is a conflict of expert opinion the Court has to resolve the same.

84. In *Micro-City Computers Ltd & another vs National Social Security Fund and another (Civil Appeal 49 and 59 of 2020* (consolidated) (2024) KECA 444 (K.L.R.) (12th April 2024 (Judgement), the court held that the trial court should have analyzed the relevance, reliability and credibility of the findings in the report and evidence was sufficient to make a reasonable assumption or inference as regards the income and the expenses thereof.

85. The appellant contended that the respondent was occupying a road reserve and, hence was justified to expand the access road. To sustain the defense, the appellant called DW1, 2, 3, and lastly, a physical planning officer. DW4 said that the access road was expanded following the county assembly by-laws from the existing 6-meter to 9-meter standard access road. He said that the existing road was 6 meters, and he was instructed to go and carry the exercise by taking away private land of 1½ meters on each side of the road to ensure equity.

86. DW4 said that the exercise touched on several land parcels whose owners had also accepted that road expansion should not be closed. He produced a report dated 18.2.2020 annexing Registry Index Map Sheet No. 6 and a sketch map as D. Exh No. 2 (a) and (b). He discounted the evidence by PW 3 further he said that enough public participation had been done before the road works commenced. D. Exh No. 2 (a) & (b) was not dated. The maker did not give a basis for why he formed the opinion that the respondent's land was encroaching on a road reserve. The by-laws were not attached to the report. The date of their gazettement and coming into effect was not indicated. The manner of operationalizing them vis a vis the existing road network of six meters and the impact of expansion to nine meters onto private parcels of land was not clarified by DW 1 – 4. The sketch map had no scale or key.

87. The report and evidence of DW4 did not refer to the registry index map as indicative of the size of the road before 24.10.2019.

88. In order to determine how much weight to attach to an expert witness, the expert is expected to explain how he arrived at his decision and his methodology. For the court to determine how much weight to attach to an expert report, it has to consider the circumstances of each case, the standing of the expert, the skill and experience of the expert, care, how he approached the question on which he was expressing his opinion and the extent to which the expert used aids to advance his skill. See H.A Charles Perera vs M.L Motha 65 NLR 294 as cited in *Kiplimo & others vs Amdany and another (civil appeal E004 of 2020*) (2024) KEHC 496 (K.L.R.) (25th January 2024) (Judgment).

89. A Registry Index Map in law may only be amended with the input of a land registrar and a land surveyor. DW4 failed to produce a report, recommendation, and or published survey maps to show where the access road was on the map, different from what PW 3 said was the historical boundary before the alleged encroachment by the respondent. The appellant did not show before the trial court any report from the road and public works department or from the land surveyor or land registrar that the access road had been designated as nine meters during the land registration, as a basis that the respondent had encroached on a road reserve.

90. A report from the land registrar and land surveyor would have clarified why the title deed issued to the respondent was one ha, yet as per PW 3, it was reduced by 0.14 ha to pave the way for a road expansion by the appellant. P. Exh No. (1) was issued on 7.9.2010. D. Exh No. 2 (a) & (b) were not published maps by the Director of Surveys. They had a rider that "this map is not an authority on boundaries". The two had no reference numbers, date of publication, signature and official stamps.

91. To challenge a title deed on account of Sections 24, 25 & 26 of the *Land Registration Act*, the appellant had to bring cogent and tangible evidence that the acreage, size, boundaries, and locality on Registry Sheet Map 6, vis a vis the title deed and the ground position was, different, irregular, oversized, illegal and irregularly annexed as part of a road reserve. The protection given to the respondent as per the title deed has to be protected unless there is evidence that the land abutting the respondent's parcels of land was more extensive than what was included in the title deed.

92. In Cycad Properties Ltd and another vs. A.G. & others (2013) eKLR, the court held that the burden was on the petitioners to demonstrate a violation of their constitutional rights and that they were entitled to the 20-meter road reserve. In this appeal, it was the appellant who was alleging that the respondent was occupying a road reserve. Material evidence from the custodians of the survey maps, registry index maps, and input from the roads department was critical to sustain the appellant's defense.

93. The respondent had discharged his burden of proof by producing the title deed, certificate of search, and evidence by PW 3, who produced two expert reports based on the registry index maps, showing that there was encroachment. DW 4 did not tender evidence on whether he liaised with the Director of the Surveys, the Land Registrar and the Land Surveyor to establish the locality, size, extent and nature of the access road before he visited the ground to effect the county government by-laws.

94. To my mind, DW 4, unlike PW 3 and 4, gave their academic professional expertise and experience in the field that they were giving expert evidence. DW 4 produced no PDP and relied on no registry index map or expert report as the primary source of his opinion that there was encroachment of the road reserve by the respondent. He who alleges must prove. The appellant had averred that there was adequate public participation involving the local community and the respondent who agreed, acquiesced and or failed to remove his offensive developments on a road reserve. the *Constitution* under Articles 60-64 and the land laws do not envisage solely public participation to convert and acquire private land for public use. The National Land Commission is the constitutional body that can alienate land for and on behalf of the county and national governments in line with the *Land Act*. Evidence that the appellant sought for the National Land Commission to issue a notice to vacate the encroached land by the respondent was not tendered, before the trial court as provided under the Land laws.

95. An access road has to be on the map held by the Director of Surveys. Proof of encroachment had to be based on a published survey map and not a report of a physical planner. A notice to vacate a road reserve was a condition precedent under Section 152 (1) (a) of the *Land Act*. The National Land Commission is mandated to grant adequate notice to anyone occupying or who has erected any structures on any public land. My finding is that the appellant failed to justify its actions to invade private land, remove and annex the land as a road reserve.

96. As to whether the respondent pleaded and proved damages for trespass, encroachment and destruction of his property, special damages must be pleaded and proved to the required standard. PW 4 produced P. Exh No. (4). The report lacks the methodology and basis used to arrive at the figures.

97. Special damages must be proved with a degree of certainty and particularity. See Richard Okuku Oloo vs South Nyanza Sugar vs South Nyanza Sugar Co. Ltd (2013) eKLR. The agricultural report was not based on any published crop damage assessment guidelines for the year 2017. It was a mere prediction and an estimation. See Masheti vs County Government of Kakamega Ministry of Transport Infrastructure Public Works & Energy (2024) KEELC 1727 (K.L.R.) (11th April 2024) (Judgment). Therefore, the claim for Kshs.1,513,900/= was not scientifically made and proved.

98. Trespass is actionable per se. Once proved, a court may grant damages, for there can be no right without a remedy. As to general damages in Gusal Sandeep Singh Ragbir vs Ministry of Public Works Road

and Transport county Government of Kajiado & another (2018) eKLR, the court had found no given ample notice had been given before the county government demolished the plaintiff's structures on the premises alleged to be a road reserve. The Court proceeded to grant Kshs.1,000,000/= and exemplary damages of Kshs.9,000,000/=, based on the fact that the defendant had defied a court order stopping the demolition.

99. On Peter Mwangi Mbuthia & another vs Samow Edin Osman (2014) eKLR, the court held that a party has to demonstrate how the amount claimed for mesne profits was arrived at. Again, in Kenya Hotels Properties Ltd vs Willesden Investments Ltd (2009) eKLR, the court held that the court was not justified in awarding mesne profits and a further Kshs.10,000/= for trespass since both meant the same.

100. In this appeal, the appellant unlawfully took up the suit land and converted it into an access road. The trespass is continuing. The appellant failed to consult the relevant land officers to regularize the process in line with Section 9 of the Public Roads and Road of Access Act. The respondent has denied accepting that his land forms part of the access road through the alleged public participation. Even if that were the case, still the registry index map for the suit land had to be regularized and amended as per the *Survey Act*.

101. There was no evidence tendered that there was a gazette or designated access road cutting through the respondent's land in line of the Physical Land Use Planning Act 2019 or under Section 14 (d) of the repealed Physical Planning Act. The attendance list and the notice dated 25.9.2010 did not elicit any response from the land registrar. There is no evidence that the appellant, before embarking on the demolition and the graveling, sought and obtained authorization from the land registrar to determine the extent of encroachment.

102. The guiding principles to determine how much to award as damages have been subject to case law. In Philip Ayaya Aluchio vs Crispinus Ngayo (2014) eKLR, the Court said the measure of damage for trespass is the differences in the value of the plaintiff's property immediately after the trespass or the costs of restoration, whichever is less. In Duncan Nderitu Ndegwa vs Kenya Power & Lighting Company (2013) eKLR, the court said that once trespass is proved, it is actionable per se, and no proof of damage was necessary for the court to award damages.

103. In Wangondu vs Nderitu (2024) KEELC 4289 (K.L.R.) 23rd May 2024 (judgment), the court cited Kenya Power & Lighting Company & others vs Ringera (2022) KECA (104) (K.L.R.) (4th February 2022) Judgment when the court found a continuing trespass which had gone on for five years.

104. Taking into account the size of the property, the length of the trespass, and the facts that the appellant has not regularized the same, I think a sum of Kshs.2,400,000/= be adequate general damages for conversion. Given that the suit land is already under use by the members of the public I direct that upon payment of Kshs. 2,400,000/= with interest at court rates from the date of entry, the appellant shall, through the National Land Commission, regularize the registry index map for the surrender of the 0.14 ha of the suit land as public land within 6 months. The appeal is dismissed save for the above amendments.

105. Costs to the respondent.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 23RD DAY OF OCTOBER, 2024.

In presence of

C.A Kananu/Mukami

Kaumbi for respondent

HON. C K NZILI

JUDGE