



**Iburu v Naivasha Water and Sanitation Co Ltd (Civil Appeal
E127 of 2024) [2025] KEHC 9456 (KLR) (27 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9456 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E127 OF 2024
GL NZIOKA, J
JUNE 27, 2025**

BETWEEN

JOEL KIANDO IBURU APPELLANT

AND

NAIVASHA WATER AND SANITATION CO LTD RESPONDENT

*(Being an appeal from the decision of Hon. Nathan Shiundu Lutta (CM)
in Naivasha CMCC No. E069 of 2022 delivered on 25th September, 2024)*

JUDGMENT

1. By a plaint dated 10th February, 2022, the plaintiff (herein ‘the appellant’) sued the defendant (herein ‘the respondent’) seeking for judgment against the respondent for;
 - a. General damages for trespass, nuisance, damage to the building, loss of trees and building material.
 - b. Any other relief this court deems just and expedient to grant.
 - c. Costs of this suit
2. The appellant’s case is that, he was constructing a building comprising of several rental units on his parcel of land known as Naivasha/Maraigushu/ Block 2/740 and that the building was at an advanced stage of roofing. That in the month of April, 2021, the respondent’s workers or agents acting with the respondent’s authority, trespassed into the building intending to lay water supply pipe therein.
3. That the respondent’s workers carried out the construction works negligently and in a nuisance manner and caused the appellant’s building to develop cracks and partially crumble, whereof the appellant suffered loss and damage.



4. The appellant tabulate the particulars of negligence and nuisance attributed to the respondent at paragraph 6 of the plaint as follows;
 - a. Entering into the plaintiff's property without the plaintiff's authority.
 - b. Digging a deep trench along the plaintiff's building wall knowing it would weaken the building.
 - c. Allowing or channeling storm water through the aforesaid trench.
 - d. Allowing storm water to gather in the trench at the plaintiff's building.
 - e. Constructing and installing the defendant's water supply pipe in the plaintiff's property without authority.
5. The appellant further averred that the respondent's agents or workers uprooted and damaged trees that were at the rear of the subject building and destroyed the building materials at the site causing him to suffer loss and damage.
6. That upon serving the respondents with a demand letter, the respondent merely relocated the water pipe and covered the trench with loose soil but has refused or neglected to provide a remedy for the loss hence the suit herein.
7. However, by a statement of defence dated 3rd March, 2022, the respondent denied liability of the appellant's claim and averred that its representatives and/or agents were not negligent in performance of their duties and in the circumstance cannot be blamed for faults on the plaintiff's property under construction or the damage to the building materials.
8. That further in the alternative and without prejudice to the denial of the claim, if damage occurred to the building as pleaded, then the said damage is solely attributed to the negligent acts of the appellant.
9. The respondent tabulated the particulars of negligence attributed to the appellant at paragraph 5 of the defence as follows;
 - a. Failure to get building approvals from the National Construction Authority, County Government and other government agencies.
 - b. Failure to employ licensed engineers and architects to oversee and approve the construction.
 - c. Use of sub-standard building materials.
 - d. Use of poor and unqualified workmanship in the construction of the property.
10. At the close of the pleadings, the case proceeded to full hearing. The appellant's case was supported by the evidence of the appellant and PW2 Joseph Kuria Thiongo. The appellant in a nutshell reiterated the averments in the plaint. In cross-examination, he conceded that he had not produced any approval documents for the construction works. Further that he did not produce the architect's statement and neither has he pleaded the exact amount of money that he lost.
11. PW2 Joseph Kuria adopted his statement to the effect that he was contracted by the appellant to construct the rental units and commenced works in August, 2021. That the respondent's employees commenced construction works for water supply line and dug a deep trench running across the wall of the building beyond the depth of the building foundation.
12. That after the storm water settled into the trench, the wall support was removed and the wall developed cracks, as the water sipped into the wall and part of the wall stumbled. That the respondent's employees



- returned to refill the trench with loose soil but the damage had already been done. That the damage was irreparable and that the entire building needs to be reconstructed afresh on the account of the damage.
13. The respondent's case was supported by the evidence of Felix Marema a technical service Manager with the respondent's company. He stated that the respondent did not lay pipes in the area in question. That when carrying out its work, the respondent used road reserve and if private property is to be used, then the respondent enters into an agreement with the owner. That the respondent is not the only supplier of water and sanitation services in Naivasha as there are other privately-owned companies. In cross-examination, he stated that there was an existing water network that the respondent needed to revive but stated that the line was along the main road.
 14. In considering the afore evidence and submissions filed by the parties, the trial court arrived at the decision that the appellant had not proved his claim and dismissed the entire suit with costs to the respondent.
 15. However, the appellant is aggrieved by the decision of the trial court and appealed against it on the following grounds: -
 - a. The learned trial magistrate erred in law and fact by basing his whole judgment solely on testimony of the defendant and disregarding the plaintiff's evidence on record.
 - b. The learned trial magistrate erred in law and fact by failing to draw the necessary inference and circumstantial evidence arising from the activities carried out at the defendant's damaged property after the defendant received a demand letter from the plaintiff.
 - c. The learned trial magistrate erred in law and fact by relying on extraneous matters and circumstances which were not supported by the evidence on record hence arriving at wrong findings that there was no evidence proving the defendant's agents and or employees were the trespassers.
 - d. The learned trial magistrate erred in law by requiring the plaintiff to prove his case beyond any reasonable doubt rather than the standard applicable to civil cases.
 - e. The learned trial magistrate erred in law and fact by dismissing the plaintiff's direct evidence of the defendant's acts of trespass without assigning any or reasons sufficient reasons.
 - f. The learned trial magistrate's judgment was unjust, against the weight of evidence and based on misguided principles of law and has occasioned a grave miscarriage of justice.
 - g. The learned trial magistrate erred in law in rendering incomplete judgment by failing to determine the damages that would have been awarded in the event liability was established to the plaintiff.
 - h. The learned trial magistrate erred in law and fact in failing to consider the precedent pleaded by the appellant.
 16. The appeal was disposed of by filing of submissions. The appellant in submissions dated 22nd May 2025 argued that, while the trial court correctly found that there was sufficient evidence of the trespass, nuisance and damage to his building materials, it erred in disregarding his oral evidence that the trespassers were employees and/or agents of the respondent while calling for photographic evidence and as a consequence holding that the appellant did not prove his case.
 17. The appellant submitted that, the trial court disregarded the oral evidence of PW2 Joseph Kuria Thiongo that the trespassers wore aprons bearing the respondent's name and drove to scene in a vehicle branded with the respondent's name, which evidence was not challenged or contradicted by the



- respondent. Furthermore, the respondent's witness admitted that the respondent was carrying water works in the appellant's area at the time thus placing them at the scene.
18. The appellant faulted the trial court for relying on extraneous matters by failing to consider the oral evidence on the basis that he did not take photographs of the trespassers, which issue of photographs was never raised during trial. That the oral evidence was direct evidence which has been used by courts to determine incidents of such nature.
 19. The appellant relied on the case of *Waraga Hussein Jidhaye & 6 others v Attorney General & 2 others* [2016] eKLR where the High Court stated that: -

“However, proof of an incident can be done in court proceedings perfectly by oral evidence of sight and hearing, without necessarily calling any documentary or audio visual evidence - See sections 62 and 63 of the *Evidence Act* (Cap.80).”
 20. The appellant further submitted that, the trial Court disregarded the circumstantial evidence that, after he sent a demand letter to the respondent, people wearing the respondent's uniform returned to the plot, removed the water pipe and covered the trench with loose soil. He argued that the reaction to the demand letter clearly pointed to the respondent as the party responsible for the works.
 21. The appellant submitted that based on the afore he had amply proved his claim that the respondent was responsible for the damages to his property and is therefore liable to pay damages.
 22. On the issue of damage the appellant proposed damages of Kshs. 3,000,000 as fair compensation for the inconvenience, trespass and nuisance. He relied on the case of, *Tim Mwai & 2 others v Extra Mile Limited* [2018] eKLR where the defendant without authority diverted an existing storm water drainage system from its land across the plaintiffs' gate, continuing along the plaintiffs' perimeter water into the nearby County Government Way Leave and, in the process, disrupting the plaintiffs' access to their home and quiet enjoyment of their properties without their notice. That the High Court awarded the plaintiff modest general damages of Kshs. 1,500,000.
 23. Further reliance was placed on the case of, *M'ithilai v County Government of Meru & another* [2022] KEELC 14956 (KLR) where the 1st respondent constructed a murrum road without conducting an Environmental Impact Assessment, trespassed into the petitioner's land and put up a culvert which directed water to the petitioner's land and during the rainy season destroyed his developments. The High Court awarded the petitioner general damages of Kshs. 2,500,000.
 24. However, the respondent in submissions dated 27th May 2025, argued that the appellant did not prove his case to the required standard which is on a balance of probabilities as set out in the case of *Miller v Minister of Pensions* [1947] that the degree of proof must carry a degree of probability but not as high as required in a criminal case.
 25. That further, under section 107 (1) of the *Evidence Act* (Cap 80) Laws of Kenya it is trite that whoever alleges must prove. That the appellant did not produce any building approvals or a statement from the architect to prove his claims. Furthermore, in cross-examination he admitted that there were other water services companies within Naivasha that could have dug the trench.
 26. The respondent cited section 3 (1) of the *Trespass Act* (Cap 294) Laws of Kenya which provides the offence of trespass on private land and submitted that the major ingredients are; whether there was entry, and whether consent, permission and/or authority of the property nor was sought before entry.



27. The respondent argued that the ingredients of trespass were not proved as the respondent never entered into the appellant's property proved through the map that showed the areas the respondent's Kayole water pipeline traversed.
28. On the issue of damages, the respondent submitted that special damages require to be specifically pleaded and proved and the onus lay with the appellant. That the appellant did not specifically plead the exact amount of damages to the trees, building materials and the building which could be quantified by way of an assessment/valuation report and receipts.
29. In considering this appeal I note that the role of the first appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.
30. The Court of Appeal thus observed: -

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

31. Pursuant to the aforesaid, I note that the main reason advanced why the appellants suit was dismissed captured at paragraph 16 and 17 of the judgment as follows;

“16. It is evident that the land in question belongs to the plaintiff as per the title deed produced. There is also no doubt that there were trenches that were dug alongside his house as evidenced through the photos produced. The major question is whether this was occasioned by the defendant and/or their servants. The only nexus relied upon by the plaintiff was that the person who dug the trench were wearing aprons bearing the defendant's name. However, the plaintiff did not produce any pictures to assist the court confirm those averments.

17. In light of the foregoing, I find that the plaintiff has not made out a case to warrant grant of the orders sought. I agree with the defendant that there are other private companies that supply water within Naivasha and the plaintiff had a duty to prove that indeed it was the defendant company that caused the damage.”

32. Pursuant to the afore, the very question is whether the appellant adduced adequate evidence that it is the respondent who dug the trenches in issue. The appellant did not lead any evidence to the effect that he saw the respondent's agents or employees dig the trenches. However, the appellant testified that he sent the respondent a demand letter and they responded by relocating the pipes and covering the trench with loose soil. Apparently, the respondent did not deny this evidence. The question is, if



- the respondent was not involved in the digging of the trench and laying of pipes, would it relocate the same and cover the trench? Would it do that if another private company was responsible.
33. Furthermore, PW2 Joseph Kuria Thiongo corroborated the appellant's evidence to the effect that the respondent employees dug the trench and later covered it later after removing the water pipes therein.
34. Furthermore, the statement of defence filed by the respondent states at paragraph 4 that:
- “The defendant avers that, its representatives/agents were not negligent in performance of their duties and in the circumstances cannot be blamed for faults on the property under construction and/or damage to building materials.”
35. If indeed the respondent was never at the appellant's land, the respondent cannot plead as afore stated. In the same vein, if the respondent is total strangers to the claim, the plea in the alternative and/or without prejudice basis, attributing particulars of negligence to the appellant will not arise.
36. Furthermore, the issue of the appellant not having approval documents to construct the building raised by the respondent will not arise if they have nothing to do with the claim.
37. Based on the aforesaid an/or finding, I find that the trial court erred in holding that the appellant's claim was solely based on the identification of respondent's agents by alleged uniforms with their name. I therefore set aside the order dismissing the appellant's claim.
38. On the claim of general damages, I note that the trial court did not assess the same, had the appeal been successful. It is always proper to evaluate the damages, had the claim survived. It enables the appellant court deal with it, in case, as herein, the trial court's order dismissing the suit is set aside. The difficult this court finds itself in is that, to assess the claim on damages at this stage may be prejudicial to the parties as the court will be exercising original jurisdiction it is not clothed with.
39. In that regard, I direct that the appellant suit be and is hereby reinstated. However, having made substantive findings on liability, it is remitted to the Chief Magistrate's Court to be canvassed purely on the issues of quantum. Each party to meet its own costs as the matter is not finalized.
40. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 27TH DAY OF JUNE, 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Mwaura for the appellant

Mr. Kabena for the respondent

Ms Hannah: court assistant

