



REPUBLIC OF KENYA



**Marita & 3 others v Kibagendi & 6 others (Environment & Land Case  
224 of 2016) [2023] KEELC 848 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 848 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 224 OF 2016  
JM ONYANGO, J  
FEBRUARY 16, 2023**

**BETWEEN**

**JOSEPH ONSOMU MARITA ..... 1<sup>ST</sup> PLAINTIFF  
PETER OBARA ..... 2<sup>ND</sup> PLAINTIFF  
JEREMIAH MUOKO ONYIEGO ..... 3<sup>RD</sup> PLAINTIFF  
COUNTY GOVERNMENT OF KISII ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**GIDEON MOKAYA KIBAGENDI ..... 1<sup>ST</sup> DEFENDANT  
NAFTALI RICHARD KIBAGENDI ..... 2<sup>ND</sup> DEFENDANT  
JOHN KIBAGENDI ..... 3<sup>RD</sup> DEFENDANT  
DICKSON KIBAGENDI ..... 4<sup>TH</sup> DEFENDANT  
EVANS KIBAGENDI ..... 5<sup>TH</sup> DEFENDANT  
RICHARD NYAKUNDI KIBAGENDI ..... 6<sup>TH</sup> DEFENDANT  
JAMES KIBAGENDI ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs commenced this suit by way of a Complaint dated 29<sup>th</sup> July, 2016 and amended on 11<sup>th</sup> March 2022. In the Amended Complaint, the Plaintiffs claim that they together with 13 others are the owners of 16 plots at Rioma Market measuring 25feet by 100feet per plot. They further claim that on 20<sup>th</sup> June, 2016 the Defendants, their agents and/or servants violently trespassed onto portions of the plaintiffs' plots measuring 8 feet by 25feet of each of the 16 plots and uprooted boundaries demarcating the said plots and the Defendants' land parcel number West Kitutu/Mwamonari/1454. The defendants then



erected a barbed wire fence across all the plots and effectively rendered inaccessible each of the latrines belonging to the plaintiffs' plots. The plaintiffs sought the following reliefs:

- a. A declaration that the Defendants' violent and unilateral trespass onto the plaintiffs' portion of each of the 16 plots in Rioma Market is illegal, malicious and baseless.
  - b. An order evicting the defendants, their agents and/or servants from each of the portions of the 16 plots which the defendants have trespassed onto and are illegally retaining to date.
  - c. Damages for loss of user and the inconvenience caused to date.
  - d. Costs of this suit.
  - e. Interest on (c) and (d) above.
  - f. Any other relief as the court may deem fit to grant.
2. The Defendants filed a Further Amended Defence and Counterclaim on 27<sup>th</sup> July, 2022 denying the plaintiffs' claim and stated that the said plots belong to the 4<sup>th</sup> Plaintiff and that the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs are occupants of the plots who are licensed to operate the same. The Defendants deny that they trespassed onto the plaintiffs' plots and assert that they have respected the boundary indicated in the aerial map of 1960 but the 4<sup>th</sup> Plaintiff has not respected the said boundary.
3. In their Counterclaim, the defendants aver that they are the joint owners of land parcel number measuring approximately 20.5 hectares while the 4<sup>th</sup> plaintiff is the registered owner of land parcel number west Kitutu/Mwamonari/1433. The two parcels share a common boundary.
4. The defendants further allege that following a survey exercise conducted by a Surveyor based at the County Government in the presence of the parties on 22<sup>nd</sup> January 2016, the defendants erected a barbed wire fence on the identified boundary in order to protect their property. The plaintiffs requested that the survey exercise be repeated but before this could happen the Plaintiffs filed this suit. Subsequently on 9<sup>th</sup> August 2016, the 4<sup>th</sup> Plaintiff's agents proceeded to the defendants' land parcel number West Kitutu/Mwamonari/1454, destroyed the fence and unlawfully constructed a 300-metre road connecting Rioma market to the Oyugis road.
5. The defendants allege that after a second survey exercise that had been directed by the court, the 4<sup>th</sup> Plaintiffs' agents once again trespassed onto the defendants' land on 24<sup>th</sup> July 2019 and destroyed the fence.
6. The defendants therefore seek the following reliefs against the 4<sup>th</sup> Plaintiff:
- i. A declaration that the invasion or encroachment on the suit property West Kitutu/Mwamonari/1454 by the 4<sup>th</sup> plaintiffs' agents, employees or servants and creating a public road thereon was illegal, unlawful hence the defendant is entitled to compensation for loss of the area the road occupies with interest on special and general damages from 1<sup>st</sup> February 2016 to date.
  - ii. The Honourable court to issue an order against the 4<sup>th</sup> Defendant to compensate the Defendants for the value of the suit property West Kitutu/Mwamonari/1454 of Kshs. 8,000,000/=
  - iii. In the alternative, the Honourable court to issue an order against the 4<sup>th</sup> plaintiff to block off the illegally dug road across the defendants' land at its own cost as well as compensate the plaintiffs for general damages for loss of user since 1<sup>st</sup> February 2016 at the court's rate.



- iv. General damages for illegal construction of a road on the defendants' land
  - v. General damages for trespass for the destruction of the fence on the 24<sup>th</sup> July 2019.
  - vi. Mesne profits at court rates.
  - vii. Interest on (a), (b) (c) (d) (e) and (f) above
  - viii. Costs and interest of the suit.
  - ix. Any other and further relief as this Honourable Court may deem fit to grant in the circumstances.
7. The 4<sup>th</sup> Plaintiff did not file any Defence to the Counterclaim. The matter was set down for hearing and despite the 4<sup>th</sup> plaintiff being accorded ample time to call its witnesses, it did not call any witnesses. The defendants withdrew their counterclaim against the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> plaintiffs and only proceeded with their case against the 4<sup>th</sup> plaintiff. The defendants called two witnesses.

### **Defendants' Case**

8. Evans Mika Onyiego Kibagendi (5<sup>th</sup> Defendant) testified as the first witness for the Defendants. He informed the court that he had authority to testify on his own behalf and on behalf of all the other defendants. It was his testimony that land parcel number West Kitutu/Mwamonari/1454 (suit property) was registered in the name of his late father Zacharia Kibagendi Nyangau. He produced an Ad Litem grant in respect of his late father's estate together with the title deed and Certificate of Official search in respect of the suit property. He explained that their land borders land parcel number West Kitutu/Mwamonari/1433 which belongs to the County Government of Kisii. The said parcel of land was donated to the County Council of Gusii by his late father for purposes of setting up a market which is currently known as Rioma Market. The market land is divided into 19 market plots which have been allocated to individual traders and the Defendants' family has four (4) such plots.
9. He testified that for many years, the owners of the market plots had been encroaching on the Defendants' parcel of land. In order to try to resolve the dispute, the defendants referred the matter to the sub-county administrator who called a meeting between the market plot owners and the defendants and it was agreed that a survey be carried out to establish the boundary between the market plots and the defendants' land. The survey was conducted and it emerged that some of the market plot owners had encroached on the defendants' land and constructed toilets thereon. After the survey the defendants erected a fence round their land but the said fence was destroyed by the County askaris. He produced photographs showing the extent of damage to their fence.
10. Evans further testified that following the destruction of the fence the County Government's agents trespassed onto the defendants' land and created a road measuring 9 feet from Rioma Market to the main Oyugis road without their consent. The defendants sought the court's intervention and the court directed that a fresh survey be conducted. After the survey was conducted by the County surveyor, the defendants fenced their land but the County Government's agents once again destroyed their fence. The plaintiff named some of the County government workers who were involved in the destruction of the fence and produced the photographs depicting the destruction. He complained that his family had incurred great loss as a result of the destruction occasioned by the County Government's agents. He produced a valuation report in respect of the suit property and prayed that the defendants be compensated for the loss and damage they had suffered.
11. Upon cross-examination, DW1 stated that they had not been able to use their land economically since the illegal road was created on it. He informed the court that before the illegal road was created on their



land there was a road which enabled people to access the market and therefore closing the said road would not render the market inaccessible.

12. In re-examination he clarified that there was no official road on their land and that what was created was a backstreet. He stated that their land was valued at about Kshs.200 million and that they had not been able to utilize it economically since 2016.
13. Douglas Ocharo Bosire testified as DW2. He told the court that he was employed by the defendants as a caretaker on the suit property. It was his testimony that he was present when the employees of the County Government of Kisii went to the suit property on two occasions, threatened them and destroyed the fence. He testified that he was also present when the employees or agents of the County Government of Kisii went to the suit property and created a road thereon. He stated that on both occasions he reported the matter to Rioma Police Station and he was issued with O.B Numbers which he produced as exhibits. He corroborated DW1's evidence that the defendants had not been able to utilize their land economically since the County Government created a road on it as the road was accessible to the public.
14. Upon cross-examination, he stated that he was aware that the case involved the illegal construction of road on the defendants' land. He confirmed that when they repaired the fence, they did not interfere with the toilets on the market plots.
15. In re-examination, he confirmed that the road that had been created on the defendants' land had made it difficult for them to carry on farming activities as the land was exposed to animals and members of the public.
16. At the end of the defendants' testimony counsel for the defendants made an oral application to amend prayer (vii) in Counterclaim by striking it out and replacing it with prayer (vii)A with the following prayers:
17. Exemplary, punitive and aggravated damages. Since the application was conceded by counsel for the 4<sup>th</sup> Plaintiff, the amendment was allowed.
18. The 4<sup>th</sup> Plaintiff and Defendant in the Counterclaim did not offer any evidence and its case was duly closed. The plaintiffs and 4<sup>th</sup> plaintiff subsequently filed their final submissions with respect to the suit and Counterclaim.

### **Defendants Submissions**

19. Learned counsel for the defendants submitted that the plaintiffs had the onus to prove their case against the defendants but since they did not adduce any evidence, they had failed to discharge the burden of proof and therefore their suit should be dismissed.
20. Regarding the Defendants' Counterclaim, counsel submitted that DW1 and DW2 had adduced elaborate evidence to prove their counterclaim. He relied on the evidence of the said witnesses which set out in great detail the events leading up to the filing of the Defendants' Counterclaim. He highlighted the 3 main acts of trespass as recounted by DW1 which are as follows; On the 9<sup>th</sup> day of August 2016 officers from the 4<sup>th</sup> Plaintiff's office entered into the Defendants' land and destroyed the perimeter fence. On the 1<sup>st</sup> day of February 2017, officers from the 4<sup>th</sup> Plaintiff's office illegally entered into the defendants' land and dug out a road through the said land without their consent. On the 24<sup>th</sup> day of July 2019 officers from the 4<sup>th</sup> Plaintiff's office entered into the Defendant's land and destroyed their perimeter fence for the second time.



21. He submitted that the defendant's had adduced overwhelming evidence to prove that that the 4<sup>th</sup> plaintiff's agents had committed grave acts of trespass on the defendant's land parcel number West Kitutu/Mwamonari/1433. He submitted that as a result of the said acts of trespass, the Defendants have suffered serious anguish loss and damage. In particular, he submitted that the creation of a public road on the defendants' land has exposed the said land to the general public and rendered it economically unviable as the defendants can no longer carry out farming activities on the said land. He further submitted that some of the market plot owners have constructed pit latrines on portions of the defendants' land and turned portions of it into areas for waste disposal.
22. On the *quantum* of damages for the said acts of trespass, counsel submitted that since the three acts of trespass were separate and distinct tortious acts committed by the employees of the 4<sup>th</sup> Plaintiff, each at of trespass merits an award of general, exemplary, aggravated and punitive damages.
23. For the trespass committed on the 9<sup>th</sup> day of August 2016 whereby the employees of the 4<sup>th</sup> Plaintiff entered the defendants and destroyed the perimeter fence, counsel submitted that the defendants had produced photographs, a surveyor's report minutes of a meeting held to resolve the issue and other relevant documents. It was his submission that since the suit property measures 20.5 hectares and is valued at Kshs. 205,000,000/=, general damages should be awarded in the sum of Kshs. 10,000,000/=.
24. With regard to exemplary, punitive and aggravated damages, he placed reliance on the case of [\*Mike Maina Kamau v Attorney General\*](#) (2014) eKLR where the court observed that the basis for awarding exemplary damages is to punish the defendant for its conduct. The court further observed that a wrong doer must not be allowed to benefit from his conduct. Counsel proposed that the defendants be awarded a sum of Kshs. 25,000,000/= under this head.
25. The second act of trespass which involved the construction of illegal road on the defendants' land on the 1<sup>st</sup> day February 2017. Counsel contended that the act amounted to aggravated trespass which was continuous in nature. It was his contention that the said act of trespass had caused the defendants grave anguish as it had created unnecessary conflict between the defendants and their neighbours in Homa Bay as the Defendants' land sits along the border between Kisii and Homa Bay counties. He emphasized the economic loss suffered by the defendants as they are no longer able to carry out farming activities on their land as before. He proposed as sum of Kshs. 10,000,000/= as general damages and Kshs. 15,000,000/= as exemplary, punitive and aggravated damages.
26. Regarding the third act of trespass whereby the 4<sup>th</sup> plaintiff's officers entered into the defendants' land and destroyed the fence for the second time, counsel submitted, that same should attract higher aggravated damages. He relied on the case of [\*Godfrey Julius Ndumba Mbogori & Another v Nairobi City Council\*](#) (2018) eKLR where the court expounded on the principles for awarding exemplary damages as follows:

“... Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Bernard* (1964) AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded, which are:

- i. In cases of oppressive, arbitrary or unconstitutional action by the servants of the government.



- ii. Cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
  - iii. Where exemplary damages are expressly authorized by statute.
27. He further cited the case of *Stelco Properties Limited & Another v Njugi Ventures Limited & Another* (2021) eKLR where the plaintiff was awarded damages on two limbs, both general and exemplary damages for trespass to land. He urged the court to award Kshs. 10,000,000/= as general damages and Kshs. 25,000,000/= as exemplary damages.

### **Plaintiff's Submissions On The Counterclaim**

28. Learned counsel for the Plaintiff summarized the pleadings and zeroed in on the issue of damages for trespass. He contended that since the alleged acts of trespass arise from the same transaction or a series of transactions, and raise similar questions of fact and law, the court should deal with them together. With regard to general damages for trespass he relied on the case of *Nakuru Industries Limited v S.S Mehta & Sons* (2016) eKLR where the court held that the measure of general 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 .....
29. The court further observed that the plaintiff had not proved the exact value of the land before and after the trespass and proceeded to award a sum of Kshs. 500,000 as general damages.
30. It was his submission that the Defendants' claim for Kshs. 10,000,000 had similarly not been proved. He therefore proposed a figure of Kshs. 2,000,000/= as general damages.
31. On the question of exemplary, punitive and aggravated damages, he submitted that Kshs. 2,000,000/= would suffice as opposed to the figures of Kshs. 25,000,000/=, Kshs. 23,000,000/= and Kshs. 25,000,000/= proposed by the Defendants. He was of the view that in the instant case, the 4<sup>th</sup> Plaintiff had not acted maliciously towards the Defendants.

### **Issues for Determination**

32. Having considered the pleadings, evidence on record and the submissions of both parties as well as the authorities cited by the parties the following issues fall for determination:
- i. Whether the plaintiffs have proved their case against the defendants.
  - ii. Whether the defendants proved their Counterclaim against the 4<sup>th</sup> Plaintiff.
  - iii. Whether the plaintiffs are entitled to the reliefs sought in the Plaint.
  - iv. Whether the defendants are entitled to the reliefs sought in the Counterclaim.
33. Although the plaintiffs filed suit against the defendants seeking various reliefs, they did not tender any evidence in support of their case. The *Evidence Act* is very clear regarding the burden of proof. Sections 107,108 and 109 are pertinent on this issue and they provide as follows:S.107 Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.S.108. The burden of proof in a suit or proceedings lies on that person who would fail if no evidence were given at all on either side.S. 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.



34. The plaintiffs having failed to adduce any evidence to prove their allegations against the defendants, their suit must fail.
35. I will now move on to determine whether the defendants proved their Counterclaim against the plaintiffs. On 8.7.22 the defendants withdrew their Counterclaim against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs as they felt that their interests would be catered for by the 4<sup>th</sup> Plaintiff. In support of their Counterclaim against the 4<sup>th</sup> Plaintiff, the defendants called two witnesses. Evans Mika Onyiego Kibagendi (5<sup>th</sup> Defendant) testified on his own behalf and on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants who are his brothers. He relied on his detailed witness statement dated 13<sup>th</sup> April 2022 and expounded on the facts therein. He also produced the documents listed in the Defendants' List of documents of even date and the same were marked as Defendants' exhibits 1 to 27.
36. Since the defendants' evidence is uncontroverted, I need not repeat it here. It is common ground that the land parcel number West Kitutu/Mwamonari/1454 belongs to the defendants while land parcel number West Kitutu/Mwamonari/1433 is registered in the name of the 4<sup>th</sup> Defendant. The two parcels share a boundary as parcel 1433 was donated to the defunct Gusii County Council by the defendants' late father. The question I must determine is whether the 4<sup>th</sup> Plaintiff trespassed onto the defendants' land. In order to answer this question it is important to appreciate what constitutes trespass.

In *Clerk & Lindell on Torts* (17<sup>th</sup> Edition) para 17-01 Trespass is defined 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”

37. What stands out from the defendants' evidence is that the 4<sup>th</sup> Plaintiff's employees or agents entered the defendants' land parcel number West Kitutu/Mwamonari/1454 without their consent on the following dates; On the 9<sup>th</sup> day of August 2016 officers from the 4<sup>th</sup> Plaintiff's office entered into the Defendants' land and destroyed the perimeter fence. On the 1<sup>st</sup> day of February 2017, officers from the 4<sup>th</sup> Plaintiff's office illegally entered into the defendants' land and dug out a road through the said land without their consent. On the 24<sup>th</sup> day of July 2019 officers from the 4<sup>th</sup> Plaintiff's office entered into the Defendant's land and destroyed their perimeter fence for the second time.
38. No evidence was tendered by the 4<sup>th</sup> Plaintiff to explain the actions of their agents on the defendants' land. It is therefore my finding that the actions of the 4<sup>th</sup> plaintiffs' agents of entering the defendant's property without their consent, destroying their fence on two occasions and constructing a public road on their land constituted egregious acts of trespass by a public body.
39. The next question I must address is whether the defendants are entitled to damages and if so what type of damages. In their counterclaim the defendants sought various reliefs including general damages and mesne profits. Following an amendment to prayer (vii) of the Counterclaim, they also prayed for exemplary, punitive and aggravated damages.
40. It is trite law that trespass is actionable per se. In the case of *Nakuru Industries v S.S Mehta & Sons* (2016) eKLR the court discussed the principles governing the award of damages in the event of trespass and observed as follows:

*Halsbury's* 4<sup>th</sup> edition, Vol 45, at para 26, 1503 provides as follows on computation of damages in an action of trespass:

- (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 a sum as would reasonably be paid for that use.
- (d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights or the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
- (e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

In the case of *Duncan Ndegwa -vs- Kenya Pipeline* HCC No 2577 of 1990 it was held that:

“The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm”

41. With regards to general damages, counsel for the 4<sup>th</sup> plaintiff contended that the alleged acts of trespass form one cause of action since they arise from the same act or transaction or a series of acts and transactions and raise similar questions of law and facts and should therefore be dealt with together. He relied on the case of *Stumberg & Another v Potgeiter* (1970) E.A 323.
42. On the quantum of damages, he argued that the defendants did not provide a valuation report to show the value of the suit property before and after the trespass and proposed an award of Kshs. 2,000,000/=. He relied on the case of *Nakuru Industries v S.S Mehta & Sons* (2016) eKLR where the court was faced with a similar situation where the plaintiff did not provide the value of the property before and after the trespass. The court however found as a fact that the defendant had trespassed on the plaintiff's land and conducted some excavation and awarded the plaintiff Kshs. 500,000/=. On the other hand, counsel for the Defendants argued that each act of trespass should attract both general and punitive damages.
43. There is no doubt that the agents of the 4<sup>th</sup> plaintiff acted with impunity and subjected the defendants to great anguish, loss and damage. The fact they went as far as creating an unlawful public road on the defendants' land was a gross violation of the defendants' property rights. Article 40 of the *Constitution* guarantees the property rights of every person and provides under Article 40(3) that:
 

no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property.
44. In the instant case, the acts of trespass were deliberate, brazen and repeated. The road that was created on the defendants' land has exposed their land to members of the public and animals rendering it economically unviable. The defendants' efforts to mitigate their losses and secure their land were frustrated when their fence was brought down a second time. In the circumstances, I am of the view that the said acts of trespass should be considered as separate and distinct. I therefore award a sum of Kshs. 2,000,000/= as general damages for each act of trespass making a total of Kshs. 6,000,000/ =.



45. With regard to punitive damages, I am guided by the case of *Stelco Properties Limited & Another v Njugo Ventures Limited & Another* (2021) eKLR where the court relied on the case of *Godfrey Julius Ndumba Mbogori & Another v Nairobi City County* (2018) eKLR which set out the principles that should guide the court in awarding exemplary and punitive damages as follows:

...” Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Bernard* (1964) AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded, which are:

- a. In cases of oppressive, arbitrary or unconstitutional action by the servants of the government.
- b. Cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
- c. Where exemplary damages are expressly authorized by statute.

46. In the instant case, it is my finding that the 4<sup>th</sup> plaintiffs’ employees who are servants of the County Government of Kisii acted in an oppressive, arbitrary and unconstitutional manner. As a result of the 4<sup>th</sup> Plaintiff’s conduct, the defendants’ testified that they have not been able to carry out any farming activities for a period of six years. Consequently, the defendants are entitled to exemplary damages in the sum of Kshs. 15,000,000/=

47. Although the defendants prayed for special damages in the sum of Kshs. 8,000,000/= being the value of the portion that was hived off to create the illegal public road, this figure was not supported by any document. The valuation report they produced by the defendants merely gives the current market value of the entire parcel of land measuring 20.5 hectares which is stated as Kshs. 205,000,000/=. It is trite law that special damages must be pleaded and specifically proved. I am therefore unable to award special damages in the absence of proof.

48. As an alternative to the prayer for special damages, the defendants, prayed that an order be issued for the said road to be closed or blocked off at the 4<sup>th</sup> Plaintiff’s expense. Considering that the road has been in use for the past six years or so, this may present practical challenges. In the circumstances, a valuation should be conducted by a government valuer to ascertain the current market value of the portion occupied by the road after which the 4<sup>th</sup> plaintiff shall compensate the defendants based on the valuation report.

49. In the final analysis, the plaintiffs have failed to prove their case and the same is dismissed with costs. On the other hand, the defendants have proved their counterclaim on a balance of probabilities. Consequently, I enter judgment for the defendants on the counterclaim against the 4<sup>th</sup> plaintiff and make the following final orders:

- a. A declaration is hereby made that the invasion or encroachment on the suit property Kitutu/Mwamonari/1454 by the 4<sup>th</sup> Plaintiff’s agents, employees and/or servants and creation of a public road thereon was illegal and unlawful.
- b. An order is hereby issued that a valuation be conducted by a government valuer to establish the value of the portion occupied by the road created by the 4<sup>th</sup> Plaintiff on land parcel number Kitutu/Mwamonari/1454 within 90 days as a basis for compensating the defendants for the said portion.



- c. Kshs. 6,000,000/= general damages for trespass payable by the 4<sup>th</sup> plaintiff
- d. Kshs. 15,000,000/= exemplary damages payable by the 4<sup>th</sup> plaintiff.
- e. Interest on (b), (c) and (d) above at court rates until payment in full.
- f. The costs of the suit and the Counterclaim shall be paid by the 4<sup>th</sup> plaintiff.

**DATED SIGNED AND DELIVERED VIRTUALLY VIA MS TEAMS PLATFORM THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023.**

**J.M ONYANGO**

**JUDGE**

In the presence of;

Mr. Kanyoko for the Defendants

No appearance for the 4<sup>th</sup> Plaintiff

