



**Bosire v Orindo & another (Environment & Land Case 533 of 1992)
[2023] KEELC 22077 (KLR) (5 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22077 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 533 OF 1992**

M SILA, J

DECEMBER 5, 2023

BETWEEN

MASITA BOSIRE PLAINTIFF

AND

KERONGO ORINDO 1ST DEFENDANT

MORIANO OMBUKI 2ND DEFENDANT

(Suit by plaintiff alleging trespass by defendants over two parcels of land; plaintiff not demonstrating ownership of any of the land parcels; one parcel registered in name of a different person and plaintiff not showing that he has any right to sue over it; for the second parcel, plaintiff claiming to own it but producing no evidence of ownership; one cannot sue for trespass over land that he does not own or demonstrate a right to its exclusive possession; in any event no evidence of trespass produced; plaintiff's suit dismissed)

JUDGMENT

1. In his plaint filed on 19 March 2018, the plaintiff avers that he filed the case HCCC No. 533 of 1992 but the file disappeared, and through a ruling of the court issued in Miscellaneous Case No. 1 of 2018, he obtained leave to file this suit. He pleaded that he is the registered owner of the land parcel Central Kitutu/Ikuruma/724 and the beneficiary of the land parcel Central Kitutu/Ikuruma/723 which he pleaded is registered in the name of his mother Nyakerario Bosire. He pleaded that the defendants are neighbours who have trespassed and carved out a piece measuring approximately 15 X 30 feet that they have been cultivating for some time. In the plaint, he seeks the following orders which I copy *verbatim* :-
 - i. That orders do issue to the Land Registrar Kisii County together with the surveyor to visit the disputed property and determine the boundaries and eviction of the defendants from the suit property if found culpable.



- ii. Costs of the suit together with interest at court rates and any relief the honourable court may deem fit and just to grant.
2. On the same day that he filed the plaint, the plaintiff filed an application for an order to issue to the Land Registrar and County Surveyor, Kisii, to visit the disputed land, determine the boundaries and file a report. On 13 November 2018, the court (Mutungi J) issued an order for the two officers to visit the land parcels Central Kitutu/Ikuruma 723 and 724, delineate their boundaries and file a report in 120 days. No report was ever presented and on 27 February 2023, when the matter came up for mention, I was not persuaded that the plaintiff had made any sufficient effort to ensure that the report was prepared. I observed that it was him who brought the case and it was his duty to prove it one way or another, and I listed it for hearing on 16 October 2023.
3. The defendants did not enter appearance nor file defence.
4. In his evidence, the plaintiff testified that the 1st defendant, Kerongo Orindo, died in April 2022. He claimed that the 2nd defendant, Moriango Ombuki has built on his land. He alleged that he owns the land parcel No. 724 and that the 2nd defendant has disturbed his possession of the land. He claimed that he (2nd defendant) has built two houses made of mabati and he now wants to build a permanent structure. He disclosed that the said Moriango Ombuki is his step-brother and he claimed that his land was on the lower side. He was aware that the land parcel No. 723 belongs to one Nyakerario Bosire, who is deceased. With the above evidence, the plaintiff closed his case.
5. Mr. Sagwe, learned counsel for the plaintiff, filed written submissions which I have considered before arriving at my disposition.
6. In his pleadings, the plaintiff alleges trespass by the defendants into the land parcels Central Kitutu/Ikuruma/723 and 724. He claims to own the former and to be a beneficial owner of the latter. Before I go too far, there can no longer be a sustainable case against the 1st defendant, who was said to have died in April 2022. More than one year has lapsed since he died and there has been no substitution. It follows that the case against him has abated and I cannot therefore make any orders against the 1st defendant. I will thus only assess this case as against the 2nd defendant.
7. In his pleadings, the plaintiff alleges trespass. One can only sustain a case of trespass if he demonstrates ownership of the land in dispute, or some other recognizable right to possess the land to the exclusion of the alleged trespasser. In this case, the plaintiff produced no exhibit of who owns the parcels Central Kitutu/Ikuruma/723 or 724. I have pored through the file and within the application filed together with the plaint, I have seen a copy of search to the parcel Central Kitutu/Ikuruma/723 which shows registration in the name of Nyakerario Bosire. There is absolutely nothing in the file regarding the land parcel Central Kitutu/Ikuruma/724. Without demonstrating any proprietorship of the land parcel Central Kitutu/Ikuruma/724, the plaintiff cannot sustain any case for trespass over this land parcel. Regarding the land parcel Central Kitutu/Ikuruma/723, this land is in the name of Nyakerario Bosire and not the name of the plaintiff. The plaintiff has not demonstrated in what capacity he is suing over this land since the same is not registered in his name. He has brought no power of attorney or anything from the registered proprietor, and in the event that the registered proprietor is deceased (God forbid) no grant of letters of administration. The plaintiff cannot thus contend to have any capacity to present this case over either land parcel Central Ikuruma/723 and 724, and on that account alone, this case must fail.
8. Apart from the above, the plaintiff has also not demonstrated any proof of trespass. He presented nothing to support the allegation that the defendants trespassed in the land in issue.



9. Whatever angle you look at the plaintiff's case, the same has no substance and the only medicine it deserves is a dismissal.
10. For the above reasons, this suit is hereby dismissed, but since the defendants did not bother to file any appearance or defence, I make no orders as to costs.
11. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 5 DAY OF DECEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

In the presence of: -

Mr. Sagwe for the plaintiff

Defendants – Absent

