



**Chirchir v Chairman BOM Kiptalal Primary School Joshua Rono & another (Civil Miscellaneous Application 8 of 2017) [2022] KEELC 2365 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2365 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
CIVIL MISCELLANEOUS APPLICATION 8 OF 2017**

**MC OUNDO, J**

**JUNE 30, 2022**

**BETWEEN**

**RASTO CHIRCHIR ..... PLAINTIFF**

**AND**

**CHAIRMAN BOM KIPTALAL PRIMARY SCHOOL JOSHUA**

**RONO ..... 1<sup>ST</sup> DEFENDANT**

**SECRETARY KIPTALAL PRIMARY SCHOOL ANDREW TERER .... 2<sup>ND</sup>  
DEFENDANT**

**JUDGMENT**

1. This matter proceeded in a Miscellaneous file, wherein an application dated the 13<sup>th</sup> March 2017 had been filed by the Plaintiff/Applicant, seeking orders to reconstruct his file, the original court file Kericho High Court Civil Suit No. 72 of 2005 having gone missing in the court registry.
2. In his suit, filed on 28<sup>th</sup> June 2005, vide a Plaint dated the 30<sup>th</sup> May 2005, the Plaintiff had sought for judgment to be entered against the Defendants jointly and severally for orders that the 1<sup>st</sup> Defendant was a trespasser on 1.3 acre portion of land in Kericho/Sosiot/768 and should vacate forthwith and in default, an eviction order to issue. The Plaintiff further sought for Mesne profits from the date of occupation and/or damages for trespass as well as for costs of the suit, with interest.
3. In response to the said Plaint, whereas the 1<sup>st</sup> Defendant filed no statement of defence, the 2<sup>nd</sup> Defendant herein filed their statement of Defence on the 25<sup>th</sup> January 2006, wherein they denied the allegations contained in the Plaintiff's Plaint and sought for the suit to be dismissed for being statutory barred by virtue of *Public Authorities Limitation Act* Cap 40.
4. On the 25<sup>th</sup> May 2017, the State Counsel appearing on behalf of the Defendants sought for the defence filed on 25<sup>th</sup> January 2006 to be deemed as the defence for both the Defendants. The court directed



for parties to comply with the provisions of Order 11 of the [Civil Procedure Rules](#) so that the matter could be set down for hearing.

5. There were several applications for an adjournment by the Defendants wherein on the 8<sup>th</sup> March 2018, the court granted them a last adjournment and on the 21<sup>st</sup> May 2018, the matter proceeded for hearing of the Plaintiffs case where the Plaintiff, Kimagut Arap Ng'eny, whom the court noted was very old and had a hearing problem testified as PW1 to the effect that he was a farmer and that Chebutich Arap Ngeny was his late brother although he could not remember when he died. That he remembered affixing his thumb print on a statement in his advocate's office.
6. His evidence was that his late brother and himself donated one acre each to Kiptaltal Primary School wherein they were supposed to be paid by the Government of Kenya. That he was given Kshs. 800/= and after the said donation, he was left with 1.3 acres which was registered in his late brother's name. He testified that the Plaintiff was his nephew and that the school took the remaining 1.3 acres in addition to the 2 acres they had donated. That his nephew was claiming the 1.3 acres and that he did not remember any agreement made in the year 1969.
7. When he was cross-examined, he confirmed that he had donated his land measuring one acre to the school. That he as a member of the school committee, there had been a meeting where they had just agreed to donate the land because at that time, the school was very far. That the whole village knew that they donated their land and that the official committee members including Matayo were present though most of them had since died.
8. He acknowledged that he knew David Kiptoo Arap Bii, who was his relative and that he too was involved as he was a village elder. He however stated that he did not know Isaiah Kimutai Arap Musik and that David Kiptoo was the Secretary of the Committee. That he was paid Kshs. 800/= by Arap Bii which money was for one acre.
9. His evidence was that when he was young, he could write but he did not remember signing any document. He proceeded to testify that he could not remember the year when he donated the land and that he had not had any problem with the school since he donated his land to them. He testified further that he had a parcel of land in Chepkechei which he had bought a long time ago from the proceeds of his cattle. That there had been no meeting to resolve the dispute and that once he gave the school his land, the school started using it.
10. On being re-examined, the witness responded that he and his late brother had each donated one acre. That there had been no problem between himself and the school and that his nephew had no problem with the school.
11. Rasto R. Chirchir the Plaintiff testified as PW2 wherein he stated that he was a farmer who came from Kiptandan, Sotik in Kericho County. That he had no relationship with the two Defendants and that he had filed the suit on behalf of his late father, Chebutit Arap Ngeny who died in the year 2003. He proceeded to produce the death certificate as Pf exh 1. He proceeded to testify that he had a Limited Grant of Letters of Administration in respect of his late father's estate and produced the same as Pf exh 2. He stated that his late father was the registered owner of land parcel No. Kericho/Sosiot/768 as per the title deed herein produced as Pf exh 3. He explained that his claim against the Defendants was that his late father sold one acre to Kiptalta Primary School in the year 1968 but the said school had gone ahead and grabbed an extra 1.3 acres.
12. The witness testified further that the land belonging to the school was No. Kericho/Sosiot/769 and that he had a copy of the map which he produced as Pf exh 4. He proceeded to testify that the Defendants were in occupation of the disputed portion of land as seen in the photographs which he



- produced as Pf exh 5(a) (b) and (c). That it had not been true that his late father had sold 2 acres of land to the school. That according to the minutes of the meeting held on 28<sup>th</sup> November, 2011, there had been no resolution to the boundary dispute between parcel No. 768 and 769. He produced the said Minutes as Pf exh 6.
13. His evidence was that his late father used to graze his cattle on the suit land. He sought that the Defendants be ordered to return the 1.3 acres to him. That the Defendants had him arrested and remanded in custody on 2 occasions wherein he was charged in CM CR Case No. 992/2017 where he had eventually been acquitted. That the Defendants had stopped him from using the suit land for grazing whereby they were currently using the suit property as a children's playground. He also prayed that the Defendants pay him damages for the use of his land as well as the costs of the suit.
  14. On cross-examination, he stated that his brothers authorized him to be the administrator of their late father's estate, that the estate had not yet been distributed and that the dispute arose immediately after his father's death. He testified further that his late father used to complain about the Defendant's use of his land. He proceeded to testify that his late father sold the land to the Defendants in the year 1968 and that the dispute arose around the year 2002. That he was not aware that his late had father sold 2 acres and that he was paid Kshs. 1600/=. He acknowledged that he had no document to prove the sale as he was not there when the land was sold. He insisted that the school had trespassed on 1.3 acres of their land though he had not had the acreage confirmed by the surveyor.
  15. His further evidence was that the school occupied about 4 acres in total that his uncle also sold a portion of land to the school though the said uncle had not complained against the school. He stated that the meeting held on 28<sup>th</sup> November, 2011 was attended by family members and a pastor. That the trees on the suit land were planted by the school and that the school had occupied the suit land since the year 1968. He testified that his children did not attend the said school and that there had been no attempts to settle the dispute out of court.
  16. Upon being re-examined, he reiterated that he was the only administrator of his late father's estate who was pursuing the suit. That he had six siblings who had authorized him to file the case. He confirmed that there was a dispute even before his father died but reiterated that his late father had only sold one acre to the school for Kshs. 800/=. His evidence was that he was not present during the transaction and that the additional portion occupied by the Defendants was about 1.3 acres. He confirmed that his uncle had also sold one acre of his own land to the school and that the trees on the suit land were planted by the school. That the school officials had never called him for a meeting to resolve the dispute.
  17. Alice Chepkemoi Koros testified as PW3 to the effect that she was a farmer, that she lived in Kiptalal and that the Plaintiff was her younger brother. She confirmed that she was not related to the Defendants. Her evidence was that her father had sold a parcel of land measuring one acre to the school which had taken 2 acres instead. That as a family, all they had wanted was for the school to return the one acre that it had taken without their consent. That before her brother filed the case in court, their family had complained about the school's occupation of their land.
  18. On cross examination, she testified that she was born in the year 1952 and that she was a young girl when her father sold the land. The school had been using the land since they bought it from her late father in the year 1967 or thereabouts. She reiterated that before her father died, he had only sold one acre to the school and that he used to complain but the school officials had been abusive towards him. She also confirmed that her late father had sold to the school the one acre of land for Kshs. 800/= and that there was a boundary between their land and the school land. That there were trees on the boundary and the school had occupied the portion beyond the boundary. Her evidence was that



her late father did not identify the portion that he had sold to the school and she did not attend the Defendant school and that none of her children were attending the said school.

19. In re-examination, the witness reiterated that there was a dispute before her father died. That despite there being a boundary between their land and the school land, yet the school had planted trees on the said boundary. She proceeded to testify that the school had extended beyond the boundary. She ended her evidence by seeking that the land be surveyed.
20. At the close of the plaintiff's case, by consent parties agreed to have the defence testify on a later date wherein counsel for the Plaintiff informed the court that whereas the suit herein had been originally filed as HCCC 72/2005, that it had been subsequently transferred to the lower court and given a new number being No. CMCC 3/2015. That the file had then gone missing for some time but it had since been traced. He sought for orders that the said file to be transferred to this court to replace the miscellaneous file that had been in use. Orders were given to that effect but the file was never forwarded. I shall therefore not hold parties to the suit responsible for proceeding with this matter in a Miscellaneous file.
21. Thereafter, the matter was not prosecuted until the 18<sup>th</sup> November 2021, when the court issued a Notice to Show Cause why the same should not be dismissed for want of prosecution. The said Notice was lifted on the 6<sup>th</sup> December 2021 wherein the court ordered for the defence case to proceed on the 1<sup>st</sup> March 2022. On the said date there was no appearance by either by the Defendants or their Counsel despite there having been evidence that they had been served with the hearing Notice. The Court then ordered the Defence case closed pursuant to an application made by the Plaintiffs' Counsel. Parties were directed to file their written submissions. There was compliance and I shall proceed to give a summary of the said submissions as herein under.

### **Plaintiff's submissions**

22. The Plaintiff's submissions dated 11<sup>th</sup> April 2022 and filed on 27<sup>th</sup> April 2022 gave a brief history of the case wherein they submitted that despite service upon the Defendants and the entry of their Memorandum of Appearance and Defense, they had failed to prosecute their defence wherein their case had been closed.
23. That the Defendants had trespassed onto the Plaintiff's piece of land known as LR No. Kericho/Sosiot/768 measuring 1.3 acres as was supported by the documents and oral evidence adduced in court. That the Plaintiff's case had been proved on a balance of probability and the same was not challenged.
24. The Plaintiff framed his issues for determination as follows;
  - i. Whether the Plaintiff's parcel of land LR No. Kericho/Sosiot/768 measuring 1.3 acres had been encroached into by the Defendants.
  - ii. Whether the Defendants are trespassers in the suit property LR No. Kericho/Sosiot/768.
  - iii. Who should bear the costs of the suit.
25. On the first issue for determination, it was the Plaintiffs submission that it was undisputed that the Plaintiffs father was the registered owner of LR No. Kericho/Sosiot/768. That the fact that the Plaintiff had obtained the Limited Grant of Letters of Administration to the estate of his late father before filing suit was not disputed. The Plaintiff relied on the provisions of Section 26(1) of the [Land Registration Act](#) to submit that they had established ownership of the suit land.



26. That despite the Plaintiff's father being the owner of the suit land, the 1<sup>st</sup> Defendant had constructed a toilet on the same and had been using parts of the suit land as a children's playing ground. This evidence was not challenged.
27. On the second issue for determination, it was the Plaintiff's submission and while relying on the definition of trespass as per the '10<sup>th</sup> edition of the Black's Law Dictionary' that they had discharged the onus of proof that indeed the Defendants had invaded on his land without any justifiable reason.
28. That the action of trespass by the Defendants after they had destroyed a boundary fence had caused the Plaintiff to suffer loss, the act of trespass, they submitted, was actionable and the Defendants were liable. That since they had proved their case to the required standard, costs ought to follow the event.

#### **The Defendants' submissions.**

29. The Defendants, although having not defended their case, filed their submissions dated 4<sup>th</sup> April 2022 on the 14<sup>th</sup> April 2022, to the effect that they had bought the suit land from the Plaintiff's father (now deceased.) wherein they had been in possession of the same for 31 years prior to the filing of the suit. That they had been in peaceful possession of the said land until after the demise of the Plaintiff's father when the dispute arose between them and the Plaintiff.
30. That the Defendant, which is a public school, had been in open and uninterrupted possession and use of the suit land for over 47 years. That indeed the Defendants had filed their defence, witness statements and documents but had inadvertently not participated in the hearing. The Defendants relied on the case of *Hosea vs Njiru & Others* 1974(EA) as cited in the case of *Sisto Wambungu vs Kamau Njuguna* (supra) (sic) to submit that once payment of the last installment of the purchase price was made to the purchasers, possession became adverse. That the Defendants' had acquired adverse possession over the suit land.
31. That the Plaintiff lacked the locus standi to file suit as the suit land was registered to one Chebutich Arap Ngenyi and therefore this claim must fail. That public interest overrode the private interest of the Plaintiff and the suit ought to be dismissed with costs.

#### **Determination.**

32. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law. It is not in dispute that the suit land herein being LR No. Kericho/Sosiot/768 measuring 2.8 hectares was registered to one Chebutich Arap Ngenyi, as per Pf exh 3. It is also not in dispute that the Plaintiff herein is the son of the proprietor of the suit land (who died on 23<sup>rd</sup> October 2003) as well as his legal representative as per the Letters of Administration ad Litem issued by the Kericho High Court on 24<sup>th</sup> April 2005 herein produced as the Pf exh 2.
33. It is further not in dispute that the Plaintiff's father and his brother Kimagut arap Ng'eny who testified as PW1 each sold one acre of their respective parcels of land to Kiptalta Primary School, the Defendant herein.
34. It is still not in contention that the Defendant herein is the registered proprietor of parcel LR No. Kericho/Sosiot/769 which borders the Plaintiff's suit land, and that the two parcels of land have a distinct boundary between them.
35. Lastly, it was not disputed that after the purchase of one acre from the Plaintiff's father, the school had planted trees on the boundary between the two parcels of land wherein they had extended beyond the boundary and trespassed onto the Plaintiff's land by 1.3 acre.



36. I have duly considered the evidence adduced before court by the Plaintiff and find that the same was believable as it was backed by genuine documents. This evidence was not contested as the Defendants only entered appearance, filed their defence, witness statements and documents but did not turn up to participate in the hearing of the Plaintiff's case or defend themselves although they subsequently filed their submissions.

37. It is trite that averments in pleadings are not evidence and a court cannot be guided by pleadings since pleadings are not evidence and they remain as mere allegations. In this respect, where a Defendant does not adduce evidence, the Plaintiff's evidence is to be believed as the pleadings filed by defence is not evidence and therefore remains allegations. In *CMC Aviation Ltd. v Cruisair Ltd.* (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

38. What are the consequences of a party failing to adduce evidence? In the case of *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi* (Milimani) HCCC No. 834 of 2002, Lesiit, J citing the case of *Autar Singh Bahra and Another vs. Raju Govindji*, HCCC No. 548 of 1998 appreciated that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.

39. The defence decided not to participate in the trial and instead filed their submissions. Mwera, J (as he then was) in *Erastus Wade Opande v Kenya Revenue Authority & Another Kisumu* HCCA No. 46 of 2007 held that:

“Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided.”

40. In *Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993 the court expressed itself as follows:

“Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”



41. Having regard to the fact that the Defendants did not adduce any evidence and further in relation to the above captioned authorities, I find that the suit herein is undefended. However, even if this is the position, the Plaintiff still had the duty to formally prove his case on the balance of probabilities as required by law.
42. From the evidence adduced in Court, the following issues arise for my determination.
- i. Whether the Plaintiff has proved his case.
  - ii. Whether the Defendant is a trespasser on 1.3 acre portion contained in LR No. Kericho/Sosiot/768
  - iii. Whether the Defendant should vacate forthwith from LR No. Kericho/Sosiot/768 and in default eviction orders to issue.
  - iv. Whether the Defendants are liable to pay damages for trespass and costs for the suit.
43. The law is very clear on the position of a holder of a title deed in respect of land. Indeed Section 26(1) of the [Land Registration Act](#) provides as follows:
- “the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –
- a. On the ground of fraud or misrepresentation to which the person is proved to be a party
  - b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme”
44. It will be seen from the above, that title to land is protected, and since there is no evidence that was adduced to the effect that the Plaintiff’s father had acquired the suit land through fraud or misrepresentation or that the certificate of title had been acquired illegally, un-procedurally or through a corrupt scheme, the Plaintiff’s father who was registered as its proprietor had become vested with the absolute ownership together with all rights and privileges belonging or appurtenant thereto.
45. The Plaintiff’s case is that the Defendants had trespassed on a further 1.3 acre portion contained in LR No. Kericho/Sosiot/768 after his deceased father sold to them only one (1) acre of the said land. The court having found that the Plaintiff’s case stood unchallenged, and that the pleadings filed therein by the Defendants remained mere allegations, I further find that the Defendant has no claim on the suit land and therefore it goes without saying that they are trespassers.
46. Trespass has been defined by the 10<sup>th</sup> *Edition of Black’s Law Dictionary* as;
- “an unlawful act committed against the person or property of another; especially wrongful entry on another’s real property.”



47. Section 3 (1) of the *Trespass Act*, also defines trespass as follows;

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”(Emphasis mine)

48. The Court, in *John Kiragu Kimani vs Rural Electrification Authority* [2018] eKLR relied on Clark & Lindsell on Torts, 18<sup>th</sup> Edition on page 923 to define trespass as;

“any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason”

49. It is trite law that trespass to land is actionable per se (without proof of any damage). See the case of *Park Towers Ltd v. John Mithamo Njika & 7 others* (2014) eKLR where J.M Mutungi J., stated:-

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ...’

50. In the case of *Duncan Nderitu Ndegwa v. KP& LC Limited & Another* (2013) eKLR P. Nyamweya J. held:-

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant s’ trespass”

51. The Plaintiff testified that due to the trespass committed by the Defendants on his father’s land, the Defendants had had him arrested and remanded in custody on 2 occasions wherein he was charged in CM CR Case No. 992/2017 and was eventually acquitted. That secondly the invasion of the land by the Defendants had deprived him grazing grounds. Since an act of trespass to a suit land is actionable per se, the net result is that I find and hold the Plaintiff’s suit has been proved on a balance of probabilities. I accordingly enter judgment in his favor in the following terms:

- i. The 1<sup>st</sup> Defendant is a trespasser on 1.3 acre portion in LR No. Kericho/Sosiot/768.
- ii. The 1<sup>st</sup> Defendant should vacate forthwith from the 1.3 acre portion consisting in LR No. Kericho/Sosiot/768 within 30 days and default eviction orders to issue.
- iii. General damages of Kshs.100,000/= shall be paid within 30 days of delivery of this judgment by the Defendants to the Plaintiff, to compensate him for the wrongful entry onto his Land
- iv. Costs of the suit and interests shall apply at a lower rate since the same was undefended.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 30<sup>TH</sup> DAY OF JUNE 2022.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

