



**Mogere v Bosire & 4 others (Environment and Land Appeal
E006 of 2023) [2025] KEELC 1243 (KLR) (12 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1243 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E006 OF 2023**

M SILA, J

MARCH 12, 2025

BETWEEN

TOM CHARLES MOGERE APPELLANT

AND

SAMSON ORIORO BOSIRE 1ST RESPONDENT

JAMES MARUBE MOKUA 2ND RESPONDENT

PETER ONSARE MOKUA 3RD RESPONDENT

RICHARD SIMBA NYANGWACHI 4TH RESPONDENT

RICHARD MOINDI 5TH RESPONDENT

*(Being an appeal from the judgment of Hon. P.K. Mutai, Senior Resident Magistrate, in the suit
Kisii Chief Magistrates' Court Case CMCCELC No.41 of 2018 delivered on 30 January 2023)*

JUDGMENT

1. The suit herein was commenced through a plaint filed by the appellant on 10 February 2017. In the plaint, the plaintiff pleaded to be the registered owner of the land parcel Nyaribari Chache/B/B/Boburia/348. He pleaded that the defendants (the respondents herein) had trespassed into his land. He averred that he was away in Migori for 20 years and the respondents took advantage to encroach and trespass into his land. He pleaded that the 1st defendant is administrator of the land parcel Nyaribari Chache/B/B/Boburia/346 and has trespassed on the right side. That the 2nd and 3rd respondents are administrators of the land parcel Nyaribari Chache/B/B/Boburia/342 and have encroached into his land on the left upper side. That the 4th & 5th respondents are administrators of the land parcel Nyaribari Chache/B/B/Boburia/354 and have trespassed into his land from the left lower side. He pleaded that when he raised complaint the respondents blocked all footpaths leading to the suit property. He pleaded that the action of the respondents has created waste and damage onto his



land. In the plaint, he asked for orders of a permanent injunction against the respondents, costs of the suit and any other order the court may deem appropriate to give.

2. The matter initially proceeded ex parte culminating in a judgment against the respondents. There followed an application filed by the 2nd and 5th respondents to set aside the judgment, which was allowed, and the 2nd and 5th respondents filed defence on 19 February 2020. In their defence they pleaded that if the appellant is registered proprietor of the land parcel Nyaribari Chache/B/B/Boburia/368 (hereinafter simply referred to as parcel No. 368) then he obtained registration illegally since the land belongs to the estate of Nahashon Nyaemo Onsare (deceased) and that he could not obtain registration without first obtaining letters of administration. They denied trespass into the land parcel No. 348. They also pleaded that they were not administrators of the land parcels No. Nyaribari Chache/B/B/Boburia/342 or 354 (hereinafter simply referred to as parcels No. 342 or 345). They further pleaded that the appellant was in breach of a trust which existed between his father and his brothers Mokuia Onsare and Siriba Onsare (both deceased). It was particularised that out of love and affection the two brothers gave Nahashon a portion of their land which after adjudication became the land parcel No. 348. That the three brothers lived in harmony during their lifetime; and that the original boundaries were intact. They pleaded that no succession has been done in respect of the estates of their late fathers.
3. Through an application dated 22 June 2020, the appellant applied to amend the plaint partly on the basis that the 1st and 3rd defendants/respondents were deceased. That application was heard and dismissed vide a ruling delivered on 20 November 2020. On 17 October 2022, counsel for the appellant submitted in court that only the 2nd and 5th defendants/respondents were alive.
4. Hearing commenced on 30 August 2021. The appellant testified that the respondents are his cousins as their father and his father were brothers. He testified that his land is 0.6 Ha but on the ground it may be 0.4 Ha. When cross-examined, he affirmed that when he filed suit, the 1st and 3rd respondents were deceased. He testified that he wanted the court to determine the boundaries of the land parcels Nyaribari Chache/B/B/Boburia 354, 346 and 347. He testified that the land was transferred to him in 2014 at a time that his father was deceased. His father never raised any issue over the boundaries. He stated that his land should be 0.6 Ha but he did not know the size of his neighbours' land. He never complained to the Land Registrar regarding the boundary. He had nothing to show that the remainder of his land is 0.2 Ha. He affirmed that the respondents are not the registered owners of the neighbouring parcels of land that he has a problem with. Re-examined, he testified that the respondents are sons to their late fathers and they stay on the land.
5. PW – 2 was Paul Onsare Nyaega a step-brother of the appellant. He testified that the suit land used to be owned by his father and he transferred it to him to hold in trust for the family. In turn he transferred it to the appellant. Cross-examined, he testified that his father died in 2002. It was in 2014 that he transferred the land to the appellant. He stated that the land was in the same state as he had transferred it and that the respondents were living on it. Re-examined, he could not tell the extent of the trespass.
6. PW- 3 was David Lemaiyan, a Surveyor with the Ministry of Lands and Physical Planning. He produced a survey report which he said was prepared by his predecessors Meshak Magaka and Philip Wafula who were transferred. He testified that the report indicated that the suit land had been encroached by the owners of the parcels No. 347 and 354 by a margin of 0.4 Ha and that the appellant was cultivating land measuring 0.2 Ha. Cross-examined, he could see that the report was unsigned. It showed that the encroachment was by James Marube and Richard Moindi (2nd and 5th respondents). He stated further that Richard Moindi utilises the parcel No. 347 as a beneficiary and the person who



- was invited during the survey was not the registered owner. Re-examined, he testified that the persons who encroached were not the registered owners but were using the land.
7. DW – 1 was James Marube Mokua (2nd defendant/respondent). He testified that he stays on land belonging to his father, Mokua Onsare, and that his father is deceased. He stated that this land has distinct boundaries and they have never had a boundary dispute. He denied occupying the land of the appellant. He denied being invited for a survey exercise.
 8. DW-2 was Richard Moindi (5th defendant/respondent). He is son of Silvia Onsare the registered owner of the land parcel No. 354. He mentioned that she died a long time ago. He stated that this is where he lives and that he has never encroached onto the appellant's land. He averred that succession is yet to be done. He testified that they have never had issue when their parents were alive and the appellant never raised any issue.
 9. With the above evidence the defence case was closed.
 10. Counsel filed their final submissions culminating in the impugned judgment.
 11. In his judgment, the trial Magistrate distilled the claim of the appellant as one of encroachment by the proprietors of the land parcels No. 347 and 354. He found that no evidence was presented to show that the respondents own the parcels No. 347 and 354 or are the administrators. He found that the evidence presented was that these parcels of land belong to the fathers of the 2nd and 5th respondents who were deceased and no succession had been done. He did not find the case proved and he dismissed it.
 12. Aggrieved, the unsuccessful appellant has filed an appeal to this court. Inter alia it is raised that the trial Magistrate erred in addressing his mind on the issue of succession and arrived at a wrong decision.
 13. The appeal was argued through written submissions and I have taken note of the submissions filed by Mr. Bigogo, learned counsel for the appellant, and Mr. Ombachi, learned counsel for the 2nd and 5th respondents.
 14. It is trite that parties are bound by their pleadings and a court makes decision based on the nature of the pleadings before it. My starting point therefore is the plaint which set out the cause of action and gave reasons why the respondents had been sued.
 15. At the outset the plaint was hopeless in so far as it purported to sue the 1st, 3rd and 4th respondents (as the 1st, 3rd and 4th defendants in the plaint) as they were already deceased. All pleadings in the plaint touching on the 1st, 3rd and 4th respondents are therefore to be disregarded. I am even at a loss why they are named as respondents in this appeal as they are not there to respond to it.
 16. I will therefore restrict myself to the pleadings against the 2nd and 5th respondents. What was pleaded in respect of them is that the 2nd respondent is administrator (together with the deceased 3rd respondent) of the land parcel Nyaribari Chache/B/B/Boburia/342 and that he (together with the 3rd respondent) has encroached into the suit property from the left upper side. Against the 5th respondent, it was pleaded that he (together with the 4th respondent) is the administrator of LR Nyaribari Chache/B/B/ Boburia/354 and has encroached and trespassed into the suit property from the left lower side. Now clearly, it does appear that the 2nd and 5th respondents were being sued as administrators of the two parcels of land but there is no evidence that they are administrators. It follows that the appellant's case was doomed to fail ab initio. If the case of the appellant was over the respective sizes boundaries of the mentioned parcels of land, or where they start and where they end, then he could only sue the administrators thereof which did not happen in this case.



17. Be that as it may, even if we construe the case of the appellant as one of trespass against the individual persons of the 2nd & 5th respondents, then the appellant needed precise pleadings on this. He ought to have pointed out how the 2nd and 5th respondents, as individuals, have trespassed into his land and demonstrate the extent of the trespass by each respondent. I am afraid that this was never demonstrated.
18. What the appellant presented was a survey report that was unsigned. You cannot therefore even call it a report. Being unsigned, it was not worth the paper that it was written on, unless the author thereof came and owned it. Mr. Lemaiyan, who testified as PW-3, was not among those who conducted the purported survey exercise and was not the author of the report. He could not even be heard to say that he was producing a report prepared by his predecessors yet the report was not signed. It could not be termed to be a report of his predecessors and it was one to be disregarded. Without the report it could not be said that trespass was proved.
19. But even looking at what was passed off as a report, it does not show any individual encroachment by the 2nd and 5th respondents, the extent thereof, and what exactly they do on the parts allegedly encroached. That is not how one proves trespass. Thus, even if we are to ignore the pleadings insinuating that the 2nd & 5th respondents are sued as administrators, and perceive the case as one of individual trespass, there was no proof to the required standard.
20. Whichever way you look at it, the case of the appellant was hopelessly pleaded and hopelessly presented. It was one without legs to stand on and was rightfully dismissed.
21. I am not therefore persuaded to upset the judgment. The result is that this appeal has no merit and it is hereby dismissed with costs. The judgment of the trial Magistrate stands.
22. Judgment accordingly.

DATED AND DELIVERED THIS 12 DAY OF MARCH 2025.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Bigogo for the appellant

Mr. Ombachi for the 2nd & 5th respondents

Court Assistant : Roselyne Kinya

