



**Cheboi & 3 others (Suing on their behalf and on behalf of Kaptul Clan) v Kanda & 4 others  
(Environment & Land Case 7 of 2022) [2023] KEELC 17520 (KLR) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17520 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT & LAND CASE 7 OF 2022**

**L WAITHAKA, J  
MAY 24, 2023**

**BETWEEN**

**SAMUEL CHESANG CHEBOI ..... 1<sup>ST</sup> PLAINTIFF  
JOHNSTONE CHEPTOO ..... 2<sup>ND</sup> PLAINTIFF  
RICHARD KIBOR ..... 3<sup>RD</sup> PLAINTIFF  
PAUL KOMEN ..... 4<sup>TH</sup> PLAINTIFF  
SUING ON THEIR BEHALF AND ON BEHALF OF KAPTUL CLAN**

**AND**

**PAUL KANDA ..... 1<sup>ST</sup> DEFENDANT  
VINCENT KANDA ..... 2<sup>ND</sup> DEFENDANT  
PAUL KIMAIYO ..... 3<sup>RD</sup> DEFENDANT  
EDWIN KIPCHUMBA ..... 4<sup>TH</sup> DEFENDANT  
STEPHEN CHEMWENO YEGO ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The plaintiffs herein who have described themselves as members of Kaptul-Kipsaiya clan residing in Elgeyo Marakwet County instituted this suit seeking judgment against the defendants, jointly and severally, for a declaration that the suit land belongs to their clan; an order of permanent injunction to restrain the defendants by themselves, their agents and/or servants from interfering with their peaceful occupation and utilization of the suit land; an order of eviction, demolition and/or removal of the defendants, their servants, agents and/or assigns from the suit land; costs of the suit and interest; any other order the court may deem fit and just to grant.



2. As can be discerned from the plaint, dated 15<sup>th</sup> July 2019, the plaintiffs' case is premised on the grounds that they are the original owners of the suit land; that they inherited the suit land from their great grandparents and that they had been living peacefully in the suit land until 2015 when the defendants started laying claim to their land.
3. Explaining that the dispute which arose between them and the defendants was resolved by a neutral council of elders (Asis), in their favour, the plaintiffs lament that the defendants refused to heed and/or ignored the decision of the elders and began threatening to trespass into their land.
4. Contending that the defendants' threats are without any lawful justification and a violation of their rights to property under Article 40 of *the Constitution*, the plaintiffs aver that it became necessary to bring this suit.
5. Upon being served with the suit papers, the defendants filed a statement of defence and counterclaim, dated 15<sup>th</sup> October 2019. Through the statement of defence, the defendants have denied all the allegations levelled against them.
6. Through the counterclaim, the defendants contend that they have been and are in occupation of their own land, owned by Kapkoimur clan; that their land is distinct from that of the plaintiffs and that they have been residing in their land for decades.
7. By way of counterclaim, the defendants pray that the plaintiffs suit be dismissed and an order of permanent injunction be issued to restrain the plaintiffs, their agents and/or servants or in any other manner whatsoever from laying claim or interfering with their land, Kapkoimur land.

## **Evidence**

### **The Plaintiff's Case.**

8. When the matter came up for hearing, the plaintiffs availed three witnesses namely Johnstone Cheptoo (P.W.1); Richard Kibor (P.W.2) and Paul Komen (P.W.3). The three witnesses adopted the witness statement of Samuel Chesang Cheboi (deceased) recorded on 15<sup>th</sup> July, 2019 as their evidence-in-chief.
9. The three witnesses basically reiterated the averments in the plaint to the effect that the suit land is their ancestral land; that they had lived in the suit land peacefully until sometime in 2015 when the defendants started laying a claim to the suit land and that the dispute that arose between them in 2015 was arbitrated over by a neutral council of elders who determined that the suit land belongs to their clan. They produced minutes of the various meetings to resolve the dispute between them and the defendants as Pexbt 1, 2 and 3.
10. The minutes show that elders found that the suit land originally belonged to the plaintiffs' clan but acknowledged that the defendants had lived in the suit land for a long period of time. For that reason, the elders resolved that the plaintiff's give part of their land to the defendants and maintain their relation for peaceful co-existence as they used to from the beginning.

### **The Defendant's Case**

11. The defendants availed three witnesses namely Stephen Chemwono (D.W.1), Edwin Kipchumba (D.W.2) and Vincent Kanda (D.W.3) all of whom reiterated the averments contained in their statement of defence and counterclaim to the effect that they are in use and occupation of their own land.



## Submissions

12. At close of hearing parties filed submissions, which I have read and considered.
13. From the pleadings, evidence adduced and the submissions, the sole issue for the court determination is found to be whether either of the parties have made a case for being granted the orders sought. Tied to this issue is, what order or orders should the court make?

## The Plaintiff's Submissions

14. On whether either party has made up a case for being granted the orders sought, on behalf of the plaintiffs an overview of the cases urged by the parties is given and submitted that there is overwhelming evidence to show that the land in question belongs to the plaintiffs' clan; that the elders resolved the land belonged to the plaintiffs' clan; that no evidence was given by the defendants to challenge the evidence offered by the plaintiffs and that the defendants witnesses conceded that the plaintiffs were given the suit land in the meetings held on 25<sup>th</sup> May 2015, 23<sup>rd</sup> March, 2016 and 31<sup>st</sup> August, 2018.
15. It is further submitted that the decision of the neutral elders is recognized as an alternative means of dispute resolution under Article 159(2) of *the constitution* of Kenya. In that regard, reliance is placed on the case of Joseph Kalenyan Cheboi & Others Vs. William Suter and another (2014) eKLR where the court stated:-

“As stated above, there is no guiding law on how the court should approach a matter such as this. However, since the land is held by communities, principally under customary law, traditional dispute settlement mechanisms have great utility. That's why I thought of involving the Osis, a recognized traditional panel of elders, to assist in deciding this dispute. The court is of course not bound by their opinion but the same must be given considerable weight.”

16. It is pointed out that the plaintiffs gave evidence to the effect that they had been peacefully living on the suit land until 2015 when their quiet possession of the suit land was disturbed by the defendants without any colour of right and without their permission and reiterated that the dispute between the plaintiffs and the defendants was referred to neutral elders who resolved that the suit land belongs to the plaintiffs' clan.
17. Based on the decision of the elders, it is submitted that the defendants are trespassers in the plaintiffs' clan land.
18. With regard to the defendants' defence and counterclaim, it is reiterated that no evidence was led in support of the counterclaim to warrant grant of the reliefs sought in the counterclaim.
19. Arising from the determination of the elders that the suit land belongs to the plaintiffs' clan and the alleged refusal of the defendants to vacate the suit land, it is submitted that the plaintiffs have made up a case for being granted the orders sought in the plaint.

## The Defendants Submissions

20. On their part, the defendants have submitted that the plaintiffs case falls short of the standard of proof required in civil cases. In that regard, it is submitted that there is no confirmed ownership of the portion claimed by the plaintiffs and that there is no evidence as to time of illegal entry.



21. It is pointed out that the cause of action is said to have arisen in 2015 and submitted that the evidence adduced shows that the defendants have been in occupation of the portion of the suit land they occupy from time immemorial.
22. It is reiterated that the plaintiffs did not own the portion claimed and occupied by the defendants and submitted that it is not safe to evict the defendants from land they have occupied for many years.
23. It is further submitted that injunction orders must specifically refer to a particular parcel of land and not an open ended order as prayed for by the plaintiffs.
24. It is further submitted that the capacity in which the defendants were sued as representatives of the defendants' clan is questionable as the plaintiffs did not lay out the criteria used in selecting the defendants on behalf of the entire clan.
25. In view of the foregoing, it is submitted that the plaintiffs have not made up a case for being granted the orders sought. The court is urged to dismiss the plaintiffs' case and enter judgment in favour of the defendants as sought for in the counterclaim.

### **Analysis and determination**

26. As pointed out herein above, the plaintiffs brought this suit seeking to be declared the owners of the suit land.
27. During hearing, it emerged that the suit land is held communally and has neither been mapped nor adjudicated.
28. Whilst in their plaint the plaintiffs' pleaded that the dispute among them arose in 2015 when the defendants began laying a claim to their land; during hearing it emerged that the plaintiffs and the defendants occupy distinct portions of the suit land and that they had lived in their respective portions of land for a very long period of time (from time immemorial).

### **Departure from pleadings**

29. Despite having pleaded that the defendants started claiming their land and threatening to trespass into their land in 2015, the plaintiffs, in their evidence, departed from their pleaded case of alleged threat to encroach on their land and urged a totally different case to wit, the land the defendants had been in use and occupation, admittedly for a long period of time, belonged to their clan; that the defendants had been given a small portion of the land belonging to their clan for grazing and cultivation as workers of their great grandfather and that the defendants, without their permission occupied more land than were given by their great grandfather.
30. Despite being unable to tell the location and acreage of the suit land the defendants were allowed to occupy; the plaintiffs argue that, on the basis of the determination by the neutral council of elders that the suit land belonged to their clan; they have a right to evict the defendants from the portion of land they occupy beyond what they were allowed to occupy by their great grandfather.
31. As pointed out hereinabove, the plaintiffs' departed from their pleading by urging a case based on the history of ownership of the suit land as opposed to their pleaded case of threatened encroachment



of the suit land by the defendants. By so doing the plaintiffs violated Order 2 Rule 6(1) of the Civil Procedure Rules which provides as follows:-

“No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.”

32. In the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) e KLR, the Supreme Court of Kenya quoted with approval the decision of the Supreme Court of India in Arikala Narasa Reddy vs. Venkata Ram Reddy Reddygari & Another, Civil Appeal Nos. 5710-5711 of 2012 (2014)2 S.C.R thus:-

“In absence of pleadings, evidence if produced by the parties, cannot be considered. It is also a settled proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have opportunity of placing the relevant evidence before court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising from the pleadings...”

33. The plaintiffs’ pleaded that the defendants threatened to encroach on the land they occupy but failed to produce evidence capable of proving the alleged threatened encroachment of the land they occupy. Instead, they produced evidence showing that the parties to this suit lived peacefully in the portions of the suit land they occupy until 2015 when they, the plaintiffs, began claiming that the portion of the suit land occupied by the defendants belongs to their clan. That fact is made bare by the plaintiffs’ oral evidence and the documentary evidence they produced as Pexbt 1, 2 and 3.
34. Whilst it is true that the neutral elders found that the land occupied by the defendants originally belonged to the plaintiffs’ clan, the neutral council of elders acknowledged that the defendants’ clan had stayed in the portion they were occupying for a long period of time and urged the plaintiff’s clan to share their land with the defendants.
35. It is noted that contrary to the plaintiffs’ claim that they are entitled to evict the defendants from the suit land, the neutral elders did not make that recommendation; instead they urged the parties to live as they lived before the plaintiffs’ began claiming that they were entitled to evict the defendants from the portion of the suit property they occupied. In that regard, see the minutes of the meeting held on 31<sup>st</sup> August 2018 (Pexbt 3) which at the relevant part provide as follows:-

“It was noted that the land in question belongs to Kaptul Kipsaiya, whose grandparents gave their “Chebe-lakwa” son-in-law-Kapkoimur, which they stayed to date.

The elders (Asiswo) resolved that they will adopt the previous resolution that Kaptul Kipsaiya to give part of their land to Kapkoimur (their son-in-law) and maintain their relationship for peaceful co-existence as it used to be from the beginning.”

36. It is clear from the above determination, that despite having determined that the land occupied by defendants’ clan originally belonged to the plaintiffs’ clan, they did not determine that the plaintiffs’ should evict the defendants from the land they occupy, and which land the elders found that they were given by the plaintiffs’ great grandfather.



37. Whereas the plaintiffs' claimed that the defendants were given a small portion and they encroached on land that they were not given, they were unable to provide evidence capable of identifying the small area allegedly given to the defendants.
38. One thing was clear from the evidence; the plaintiffs' clan and the defendants' clan occupy distinct portions of the suit land and had been occupying those portions peacefully before 2015 when the plaintiffs' began claiming that the land occupied by the defendants' clan belongs to their clan.
39. From the totality of the evidence adduced in this case, I am not persuaded that the plaintiffs have made up a case for being declared the owners of the portion of the suit land occupied by the defendants. To the contrary, the evidence adduced show that the defendants had been in occupation of the portion they occupy as of right for a long period of time.
40. Since the land is neither mapped nor adjudicated, the plaintiffs' claim for ownership of the suit land is unmaintainable. Consequently, I dismiss it with costs to the defendants.
41. Having determined that the portion of the suit land occupied by the defendants' clan is separate and distinct from the land occupied by the plaintiffs', I find and hold that the defendants' have made up a case for issuance of an order restraining the plaintiffs' from laying a claim to the portion of the suit land they occupy unless they are found to have no claim to it when the area is subjected to the process of adjudication contemplated under the *Land Adjudication Act*, Cap 284 Laws of Kenya.
42. The upshot of the foregoing is that the defendants' Counterclaim is found to be merited and allowed to the extent contemplated in this judgment.
43. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED, AT ITEN THIS 24<sup>TH</sup> DAY OF MAY, 2023.**

**L. N. WAITHAKA**

**JUDGE**

Judgment delivered virtually in the presence of:-

Ms. Odwa for the Plaintiffs

Mr. Musoi for the Defendants

Court Asst.: Christine

