



**Kipkemei v Cheptalam & 6 others (Environment & Land Case 37 of 2022)  
[2023] KEELC 20499 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20499 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT & LAND CASE 37 OF 2022  
L WAITHAKA, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**MUSA KIPKEMEI ..... PLAINTIFF**

**AND**

**KIPTOO CHEPTALAM ..... 1<sup>ST</sup> DEFENDANT**

**CHRISTINE KIGEN ..... 2<sup>ND</sup> DEFENDANT**

**PATRICK MWANZI ..... 3<sup>RD</sup> DEFENDANT**

**EVANS MUKABI ..... 4<sup>TH</sup> DEFENDANT**

**GRACE KIPROP ..... 5<sup>TH</sup> DEFENDANT**

**GLADYS NGENO ..... 6<sup>TH</sup> DEFENDANT**

**RUTH CHERUIYOT ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 16<sup>th</sup> December, 2009 the plaintiff herein instituted this suit seeking judgment against the defendants for an order of eviction and an order of permanent injunction to restrain the defendants by themselves, their agents and/or servants from trespassing onto or in any other manner interfering with his ownership of plot No LR 498/999 Eldama Ravine (suit property).
2. The suit is premised on the grounds that at all times material to the suit, the plaintiff was the registered owner of the suit property; that sometimes in 1999 or thereabout, the defendants trespassed into the suit property and erected temporary structures thereon thereby occasioning him loss and prejudice. In particular, the plaintiff pleaded that the defendants had denied him the right to quietly hold the suit property and the right to develop it.



3. Lamenting that attempts to get the defendants vacate the suit property had been futile, the plaintiff instituted this suit seeking the reliefs listed herein above.
4. The 1<sup>st</sup> defendant filed a statement of Defence, dated 23<sup>rd</sup> November, 2015 contending that he is a stranger to the averments contained in the plaint and claiming that he is the legal/equitable owner of the suit property having resided therein since 1979.
5. Claiming that the plaintiff's title was obtained fraudulently, the 1<sup>st</sup> defendant prayed that the plaintiff's suit be dismissed with costs.

## **Evidence**

### **Plaintiff's Case**

6. When the suit came up for hearing, the plaintiff who testified as PW1 relied on his witness statement recorded and signed on 6th October 2022. He also relied on his list of documents filed on 15th December 2022 after they were adopted in evidence. He informed the court that on 19th April 1994, he applied to be allocated an unsurveyed industrial plot in Eldama Ravine; that he was issued with a letter of allotment for the plot on 18th October 1994 and that he was required to pay Kshs 78,000/-. He further informed the court that he met the other conditions in the letter of allotment. He made payment in respect of the allotment on diverse dates; on 19<sup>th</sup> November 1999 and on 3<sup>rd</sup> May, 2003.
7. On 20th January 2003, he received a letter from the Town Clerk, Eldama Ravine giving him authority to fence the suit property.
8. On 20th June 2009, the Town Clerk, Eldama Ravine, issued a notice to vacate on Christine Kigen because the land had become private, owned by him.
9. On 8th November 2000, he was issued with a grant, No 86601.
10. The plaintiff informed the court that when he was allocated the suit property, there was no one living on it. The plaintiff also informed the court that his letter of allotment and grant have never been cancelled.
11. The plaintiff further informed the court that he reported and took action against the defendants for trespass to land. The defendants denied his claim on the ground that they were allowed to occupy the land having been issued with letters by the County Council of Eldama Ravine.
12. Concerning the letter filed by the defendants dated 10<sup>th</sup> February 1982, addressed to Kiptoo Cheptallam, the plaintiff stated that there is no indication that the letter refers to his parcel of land (the suit property). The same position applies to the letter dated 11<sup>th</sup> February 1999, addressed to Kiptoo Cheptallam.
13. With regard to the letter dated 16<sup>th</sup> February 2012, headed appeal against eviction order-Kaptembwo squatters, the plaintiff stated that the letter does not refer to his land.
14. Concerning the letter dated 26<sup>th</sup> August 2002, headed Haron Cheserem Chebet, the plaintiff stated that it does not refer to his land.
15. The plaintiff further stated that none of the aforementioned letters has any connection with his parcel of land.
16. The plaintiff produced the following documents as exhibits in his case:- original application letter for Unsurveyed Industrial Plot and letter of allotment as Pexbt 1 and 2 respectively; receipts in support of



- payment for the allocation and cheque as Pexbt 3(a) (b) and (c) for the receipts and Pexbt 3(d) for the cheque; letter dated 20th May 2009 as Pexbt 4; notice to vacate as Pexbt 5; grant No 86601 as Pexbt 6.
17. Upon being cross examined by counsel for the defendants, the plaintiff stated that he applied to be allocated the suit property in 1994 and that there was no advertisement about the allotment. He visited the Physical Planner having identified that the land was vacant. He did not write any letter. He visited the land with the Physical Planner. The plot was vacant-there were no structures erected thereat.
  18. Subsequently, he was issued with an allotment letter, on 18th October, 1994. There was a PDP (no copy in the court file but available in the plaintiff's advocate's file). He paid for the consideration (money) he was required to pay for the allocation between 1999 and 2000. He took possession of the land and was later issued with a title deed.
  19. Sometimes later, he found the defendants had trespassed on his land. He reported the matter to the police and the Town Council of Elgeyo Marakwet. The Town Council of Elgeyo Marakwet issued a notice to vacate on 20th May 2001 (Pexbt 5).
  20. The plaintiff further informed the court that the defendants were charged but later discharged because it was found that they had been allowed to enter the land by the County Council.
  21. The plaintiff further informed the court that about six people were evicted during the pendency of the criminal case. Other persons entered the land during the Covid 19 pandemic period.
  22. In re-examination, the plaintiff maintained that he applied for the land in 1994; that he was issued with a letter of allotment in 1994; that the land was vacant; that he fulfilled the conditions in the allotment letter by paying the amount due and that the trespassers entered his land after he was issued with the allotment letter.

### **Defendant's Case**

23. DW1-Cheptoo Cheptalam, relied on his statement recorded and signed on 13<sup>th</sup> February 2023 after it was adopted as his evidence in chief.
24. He produced the documents in his list of documents filed on 13<sup>th</sup> February 2023 namely valuation report dated 1<sup>st</sup> April 2006; letter dated 10<sup>th</sup> February 1982; letter dated 11<sup>th</sup> February 1999 letter dated 16<sup>th</sup> February 2012, letter dated 28<sup>th</sup> August 2002; letter dated 11<sup>th</sup> February 1999 and the proceedings in Principal Magistrate's court file as Dexbt 1 to 7 respectively.
25. He stated that he started living in the suit property in 1982 with the permission of the County Council of Eldama Ravine; that the plaintiff found him having occupied the suit property.
26. In cross examination, he admitted not having produced any evidence to show that he lives in the suit property; that the plaintiff was issued with a title deed in 2009; that he was charged with a criminal case in 2009 and that the land belonged to the Government of Kenya.
27. He admitted that in his defence filed on 24<sup>th</sup> November 2015, he had not prayed to be declared the owner of the land.
28. In re-examination, the 1<sup>st</sup> defendant stated that he was among the squatters referred to as Sawmill Squatters in the allotment letter issued to the plaintiff (Pexbt 2). He pointed out that there is a disclaimer by Government of Kenya that the Government shall not take responsibility whatsoever in case of prior commitment but he maintained that they had been allocated the suit property before it was allocated to the plaintiff.



29. At close of hearing, parties filed submissions, which I have read and considered.

## Submissions

### Plaintiff's Submissions

30. In his submissions filed on 8<sup>th</sup> June 2023, the plaintiff submits that the main issue for determination is whether he has proved his case on a balance of probabilities.
31. Concerning that issue, the plaintiff has made reference to his oral evidence and the documentally evidence he adduced and submitted that he proved that he is the registered owner of the suit property having acquired it lawfully by way of allocation by the government of Kenya. Based on the provisions of Sections 24 and 26 of the [Land Registration Act](#) 2012, the plaintiff submits that being the bearer of a grant issued to him by the Government of Kenya in respect of the suit property, he is *prima facie* the owner of the suit property.
32. The plaintiff further submits that he has right to ownership of the suit property and that his right to ownership of the suit property is indefeasible and not subject to challenge except on the grounds provided in Section 26 of [Land Registration Act](#), 2012.
33. Based on the provisions of Section 24 and 26 of the [Land Registration Act](#), 2012 and Section 3(1) of the [Trespass to Land Act](#), Cap 294 Laws of Kenya, the plaintiff urges the court to evict the defendants from the suit property since they don't have any justification for invading it and staying thereon.
34. The plaintiff further submits that he is entitled to damages for being prevented from utilizing his land by the defendants. In this regard, the plaintiff urges the court to award him general damages of Kshs 1,000,000/- on account of the defendant's trespass to his land. Reliance is placed on the cases of [Philip Ayaya Aluchio v Chrispinus Ngaya](#) [2014] eKLR and [Nakuru Industries Ltd v SS Mehta & Sons](#) [2016] eKLR.
35. Concerning the defence offered by the defendants to the effect that they were in use and occupation of the suit property long before it was allocated to the plaintiff, it is pointed out that the defendants did not file any counterclaim and that they are not seeking to be declared owners of the suit property by virtue of having been in adverse possession thereof.
36. As to whether the defendant's have acquired any interest in the suit property by adverse possession, it is submitted that the defendants did not tender any evidence capable of proving that they are residing in the suit property and that they have become entitled to the suit property by adverse possession.
37. It pointed out that the defendants contended that the plaintiff's title was obtained by fraud but failed to specifically plead and strictly prove the alleged fraud in the registration of the suit property in the name of the plaintiff.
38. Based on the decision in the case of [Kinyanjui Kamau v George Kamau](#) [2015] eKLR and [Visay Margaria v Nansingh Madbusingh Darbar & another](#) [2007] eKLR, it is submitted that the defendants' pleading on the alleged fraud does not meet the legal threshold of pleading and proving fraud.
39. The court is urged to find that the plaintiff has proved his case on a balance of probabilities.



## Defendants Submissions

40. In their submissions filed on 20<sup>th</sup> July 2023, the defendants have given a brief overview of the cases presented by the parties and identified the following as the issues for the court's determination:-
  - i. Whether or not the allocation of the suit property to the plaintiff was legally done and in accordance with the proper procedure?
  - ii. Whether or not the defendants trespassed on the suit property; and
  - iii. What are the appropriate orders?
41. On whether the applicable law and procedures were complied with in allocation of the suit property to the plaintiff, based on the decision in the case of *Francis Obae Machoka v Telecom Kenya Limited* [2017] eKLR where the procedure for allocation of unalienated government land was laid down, it is submitted that there was no compliance with the applicable law and procedures in allocation of the suit property to the plaintiff. In that regard, it is contended that there was no advertisement of the suit property for sale as required by law. The plaintiff is said to have failed to produce a Part Development Plan (PDP) in court identifying the suit property.
42. Based on the decision in the case of *Moses Okatch Owour & another v Attorney General & another* [2017] eKLR, where it was inter alia held that it is trite law that under the repealed Government Lands Act, a PDP must be drawn and approved by the Commissioner of Lands or the Minister for Lands before any un-alienated Government Land could be allocated, it is submitted that failure by the plaintiff to produce an approved PDP to show that he was indeed allocated the suit property vitiates his case.
43. The plaintiff is also said to have paid for the allotment outside the time provided in the letter of allotment. It is pointed that no explanation was offered for the plaintiff's failure to pay for the suit property within the time provided for in the letter of offer.
44. Because the time for accepting and paying for the offer had lapsed when the plaintiff paid for the offer, it is submitted that there was no valid offer capable of acceptance by the plaintiff in 1999 when the plaintiff purportedly paid for the offer. It is also contended that no acceptance letter was produced in evidence.
45. Because as at the time the suit property was allocated to the plaintiff the defendants were already in occupation of the suit property having allegedly been given license to do so by the County Council of Baringo, it is submitted that the plaintiff's purported acquisition of the suit property was improper as the land had already been committed to another use, namely settlement of Sawmill Squatters.
46. On whether or not the defendants trespassed onto the suit property, it is submitted that they did not. In that regard, it is submitted that the defendants entered into the suit property pursuant to permission given by the County Council of Baringo in 1982.
47. Terming the defendants' occupation of the suit property to be undisputed, it is submitted that the plaintiff cannot feign ignorance of that fact.
48. Concerning the prayer for general damages, the plaintiff is said to have failed to seek general damages for trespass in his pleadings but to have sought them in his submissions.
49. As to what orders are appropriate, it is submitted that the plaintiff has not proved his case on a balance of probabilities. The court is urged to dismiss his suit with costs to the defendants.



## Order made on 17th February, 2022

50. It is pointed that vide its ruling delivered on 17<sup>th</sup> February, 2022 the court ordered that the suit be heard and determined within one year from that date failing which the suit would stand automatically dismissed at the end of the year.
51. Based on that order and the fact that the suit was not heard and determined within the time given by the court, it is submitted that pursuant to that order, the suit stood dismissed as at 31<sup>st</sup> December, 2023.

## Analysis and determination

52. From the pleadings, evidence and the submissions, I find the issues for the court's determination/consideration to be:-
- i. Whether the plaintiff has made up a case for being granted the orders sought or any of them;
  - ii. Adequacy or otherwise of the 1<sup>st</sup> defendant's case of pleaded fraud against the plaintiff in acquisition of the suit property and departure from pleadings
  - iii. What orders should the court make.
53. On whether the plaintiff has made up a case for being granted the orders sought or any of them, I begin by pointing out that the plaintiff produced evidence showing that he is the registered proprietor of the suit property (in that regard, see the grant issued to the plaintiff in respect of the suit property which the plaintiff produced as Pexbt 6). By operation of law, Section 26 of the *Land Registration Act, 2012* by virtue of being the registered proprietor of the suit property, the plaintiff is prima facie, the absolute and indefeasible owner of the suit property. His title/certificate of ownership cannot be challenged except on the grounds stated therein namely:-
- i. On ground of fraud or misrepresentation to which he is proved to be a party; or
  - ii. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
54. In the circumstances of this case, the defendants' particularly the 1<sup>st</sup> defendant challenged the title issued to the plaintiff on the ground that it was fraudulently obtained. However, he did not adequately plead the fraud urged against the plaintiff as he did not give the particulars of the pleaded fraud as by law required. Not only did the defendants fail to adequately plead the alleged fraud against the plaintiff but also failed to lead any evidence capable of proving fraud against the plaintiff.
55. In his submissions, the 1<sup>st</sup> defendant deviated from his pleaded case and tried to urge a case based on the ground contemplated under Section 26(1)(b) of the *Land Registration Act, 2012* namely that the certificate of title held by the plaintiff was acquired illegally or unprocedurally.
56. The question arising from the case urged by the 1<sup>st</sup> defendant in his submissions is whether the defendants can be allowed to depart from their pleaded case by way of submissions.
57. The answer to that question is that he cannot. That is so because the law prohibits parties to a suit from departing from their pleaded case unless by way of amendment of their pleadings. In that regard see Order 2 Rule 6 of the *Civil Procedure Rules*. Also see the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014]eKLR where it was held:

“It is now very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings,



or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

58. Having based his defence on the pleaded fraud, it was not open for the 1<sup>st</sup> defendants to shift goal posts and urge a case of failure to follow the applicable law and procedures in issuance of the certificate of title held by the plaintiff when the 1<sup>st</sup> defendant had not in his pleadings challenged the process that led to issuance of the certificate of title to the plaintiff.
59. If the 1<sup>st</sup> defendant were to be allowed to challenge the title held by the plaintiff on matters or issues not raised in the pleadings, that would amount to trial by ambush which the law does not allow.
60. Having determined that there is evidence that the plaintiff is the registered owner of the suit property and the defendants having failed to demonstrate that they have a better claim to the suit property than the plaintiff, I find and hold that the plaintiff, as the registered proprietor of the suit property is entitled to the rights of a registered proprietor of land provided for under Section 24 of the [Land Registration Act](#), 2012 and Section 24 of the [Registered Land Act](#), Cap 300 Laws of Kenya (now repealed).
61. I find the defendants’ continued use and occupation of the suit property when they do not have a better title to the suit property than the title held by the plaintiff to be inimical to the plaintiff’s rights over the suit property. That being the case, the defendants should be evicted from the suit property and upon eviction permanently restrained from trespassing into the suit property.
62. Whilst trespass to land is actionable per se (without proof of damage), I note that the plaintiff did not pray for damages in his plaint. For that reason, I agree with the defendant’s counsel that by asking for damages for trespass when he had not prayed for them in his plaint, the plaintiff has departed from his pleading. For that reason, I decline to award him damages for trespass to land.
63. Concerning the order issued by the court requiring the suit to be heard and determined by end of 2022 failing which the suit would stand dismissed, in exercise of the powers conferred on this court under Section 3A of the [Civil Procedure Rules](#) and Order 51 Rule 6 of the [Civil Procedure Rules](#) and in the interest of justice, I deem the said orders to have been overtaken by events and/or vacated.
64. The upshot of the foregoing is that the plaintiff’s suit has merit and is allowed in terms of prayer (a), (b) and (c) of the plaint dated 16<sup>th</sup> December, 2009.
65. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ITEN THIS 22ND DAY OF SEPTEMBER, 2023**

**L. N. WAITHAKA**

**JUDGE**

Judgment In the presence of:

No appearance for the plaintiff

Ms Kayeli holding brief for Mr. Samba for the defendants

Christine – Court Assistant

