



**Chebii v Kipkosgei & 10 others (Environment & Land Case 4 of 2022)  
[2023] KEELC 21763 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21763 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT & LAND CASE 4 OF 2022  
L WAITHAKA, J  
NOVEMBER 22, 2023  
FORMERLY ELDORET ELC NO. 358 OF 2016**

**BETWEEN**

**MARY JEPKEMOI CHEBII ..... PLAINTIFF**

**AND**

**DICKSON KIPKOSGEI & 10 OTHERS & 10 OTHERS & 10 OTHERS & 10 OTHERS ..... RESPONDENT**

**JUDGMENT**

1. By a plaint dated 28<sup>th</sup> November 2016, the plaintiff instituted this suit seeking an eviction order to remove the defendants from land reference Irong/Mutei/450 (suit property) and a permanent injunction to restrain the defendants from re-entering the suit property.
2. The suit is premised on the grounds that the plaintiff is the registered owner of the suit property, measuring 1.05 hectares (2 ½ acres); that the defendants without any colour of right trespassed into the suit property and have, despite having being required to vacate the suit property, refused to vacate rendering the suit necessary.
3. The defendants filed statements of defence and counter-claim denying the plaintiff's contention that they trespassed into the suit property and explaining that they are purchasers of portions of the suit property from the plaintiff's father, Joseph Chelelgo Cherono (deceased) or from persons who bought portions thereof from the plaintiff's father.
4. The defendants acknowledge that the plaintiff is the registered owner of the suit property but contend that the plaintiff is not entitled to the reliefs sought because her action is tainted by fraud in that she ignored their interest in the suit property when she caused herself to be registered as the proprietor of the suit property and circumvented their interest in the suit property despite having stayed thereon for a long period of time.



5. The plaintiff filed a reply to defence and defence to Counter-claim reiterating her pleaded case and denying the defendants' defence and counterclaim.

## Evidence

### The Plaintiff's Case

6. When the case came up for hearing the plaintiff who testified as P.W.1, informed the court that she is the registered owner of the suit property. She got registered as proprietor of the suit property in 2016 following succession proceedings of the estate of her father. She obtained letters of administration to allow her inherit the suit property.
7. Explaining that she legally obtained title to the suit property, the plaintiff asked the court to grant her the reliefs sought. In support of her case, the plaintiff produced a certificate of search and title deed showing that she is the registered proprietor of the suit property as Pexbt 1. She also produced the demand letter issued to the defendants before action as Pexbt 2.
8. In cross examination, the plaintiff admitted that the 3<sup>rd</sup> and 6<sup>th</sup> defendant were in occupation of the suit property when she transferred it to herself and acknowledged that she was aware that there were people in occupation of the suit property when she did the succession cause. She further admitted that the 5<sup>th</sup> defendant had good relationship with her father.
9. The foregoing notwithstanding, she stated that she does not know how the defendants got into the suit land.
10. She processed the title deed as the daughter of the deceased.
11. She further stated that she does not know the 9<sup>th</sup> and 10<sup>th</sup> defendant.
12. In re-examination, the plaintiff informed the court that the defendants were not part of the succession cause.

### The Defendant's Case

13. DW1 informed the court that he bought a portion of the suit land, measuring 50 by 100 feet in 2011. He bought the portion at Kshs 60,000/- from Andrew Kibet who had bought it from Julius Kibet. Julius Kibet had bought the portion from the plaintiff's father.
14. DW 1 further informed the court that he built a house in the portion of the suit property he bought and has been living thereon. He produced the sale agreement as Dexbt 1 and urged the court to enter judgment in his favour as sought in the counter-claim. In the alternative, he urged the court to order the plaintiff to refund the purchase price and cost of development to him.
15. DW 1 acknowledged that he has no agreement with the plaintiff's father and that the vendor did not show him any document from court allowing him to sell the land. He also acknowledged that the agreement he produced in evidence does not state the land reference number. He explained that the agreement was done at home and was signed by him and witnesses.
16. He further acknowledged that he bought a portion of the suit land from Andrew after the deceased had passed on and that he has not filed a valuation report to show the development on the land.
17. In re-examination, DW 1 told the court that he was allowed to stay on the suit land after purchase in 2011; that the plaintiff came to the suit land in 2016 and that the plot is worth Kshs300,000/-.



18. He argued that the plaintiff, being the administrator of her father's estate, is liable to pay him.
19. DW2, Pius Kiprop Kimitei, relied on his statement dated 4<sup>th</sup> July 2018 after it was adopted as his evidence-in-chief. He informed the court that he bought a portion of the suit property measuring 50 x 100 feet in 1998 from Joseph Cheron (plaintiff's father). He paid 12,000/=. He has been in occupation of the portion of the suit property he bought since 1998-he had been in occupation of the portion he bought for 9 years before the plaintiff's father died.
20. He informed the court that the Plaintiff came to the suit property after her father passed on. In 1915, she called them for a meeting and asked them to pay more money for the land. They refused.
21. He knew the plaintiff in 2005. They gave the sale agreements to her but and she never returned them to them. Maintaing that he purchased a portion of the suit property from the plaintiff's father, DW 2 told the court that he is not a trespasser. He urged the court to dismiss the plaintiff's case and allow his counter-claim. Though he had no valuation for the portion he claims, he stated that its value is Kshs 300,000/=.
22. In cross examination, he stated that he did not report to the police station about the lost agreement. He did not state in his statement that the plaintiff took the agreement. He did not make application for production of the agreement by the plaintiff. He acknowledged that he does not have any document to show that he bought a portion of the suit property. He had no valuation report or photographs of the developments.
23. In re-examination, he stated that the plaintiff who is the administrator of the estate of his deceased father's estate should pay them.
24. DW3, Monica Koech (6th Defendant), relied on her statement dated 4.7.2018 after it was adopted as her evidence- in-chief. She knows the plaintiff as the administrator of the estate of Joseph Cheron. She bought a portion of the suit property from Joseph Kiplangat who bought it from Joseph Cheron. She bought it in 2002.
25. DW 4, Julius Kangongo relied on his statement recorded on 4th July 2018 after it was adopted as his evidence-in-chief.
26. He informed the court that he bought a portion of the suit property, 1/8 of an acre, from the plaintiff's father Joseph Cheron on 6<sup>th</sup> September 1997. He produced the sale agreement executed between himself and the plaintiff's father as Dexbt 2.
27. He took possession of the portion of the suit property he bought in 1998 and has been living thereat since that time.
28. He acknowledged that the plaintiff got registered as the proprietor of the suit property through succession proceedings of the estate of her father but stated that the plaintiff did involve him in the proceedings.
29. Explaining that the plaintiff's father did not transfer the portion of the suit property he bought to him because he fell ill before going to the Land Control Board to transfer his portion to him, he urged the court to compel the plaintiff to transfer his portion to him.
30. In cross examination, he admitted that the suit property is agricultural land and that they neither obtained land control board consent to enter into the transaction or obtained an extension for obtaining the consent.



31. In re-examination, he maintained that he is not a trespasser as he purchased the portion of the suit property from the plaintiff's deceased father.
32. DW 5, Barnaba Kemboi, relied on his witness statement recorded on 6<sup>th</sup> July 2018 after it was adopted as his evidence-in-chief.
33. He informed the court that he bought the a portion of the suit property, measuring 0.15 acres from the plaintiff's father.
34. It is his testimony that he first bought a portion measuring 0.1 acres at Kshs 20,000/- which he paid in instalments. Later on, he bought an additional 0.05 acres at 10,000/- which he also paid in instalments.
35. He produced the agreements executed between himself and the plaintiff's father as Dexbt 3 and 4.
36. He acknowledged that there is no plot number indicated in the sale agreements.
37. He further informed the court that he has lived in the suit property since 2006 and has made development thereat.
38. He acknowledged that they did not obtain the consent of the land control board for the transaction and explained that the process of obtaining the consent had began when the seller fell ill and died.
39. Lamenting that the plaintiff did not involve them in the succession proceedings for the estate of her father, he urged the court to order the plaintiff to transfer the portion he bought to him.
40. In cross examination, he stated that the agreement executed between him and the plaintiff's father was authored by the area sub chief.
41. While acknowledging that the sale agreement does not show the plot number of the land he was buying, he stated that the seller told him that it was plot No. 450.
42. After buying the land, the deceased allowed him to take possession.
43. In re-examination, he stated that he entered the suit property as a purchaser and with the permission of the seller.

## Submissions

### The Plaintiff's Submissions

44. In the plaintiff's submissions filed on 14<sup>th</sup> July 2022, an overview of the cases urged by the plaintiff and the defendants is given and submitted that the plaintiff has proved her case on a balance of probabilities; that the Defendants did not successfully challenge the plaintiff's case and that the Defendants were unable to demonstrate that they have a tenable claim on the suit property.
45. Reliance made on the the following cases:-*Trans mara Sugar Co. Ltd v Ben Kangwaya Ayiamba & Another* (2020)eKLR; *Root Capital Incorporated v. Takangu Farmers Cooperative Society Ltd & Another* (2016)e KLR; *In re-estate of Benson Maingi Mulwa (Deceased) (2019) e KLR*; *In re-estate of Kimutai Tiony (Deceased)* (2019) e KLR in support of the contention that the agreement relied on by the 1<sup>st</sup> Defendant is illegal and the cases of *John K. Koeh v Peter Chepkwony* (2019)eKLR; *Rhoda S. Kiilu v. Jiangxi Water and Hydropower Construction Kenya Limited* (2019) eKLR in support of the contention that the plaintiff has proved her case on a balance of probabilities.
46. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants did not file submissions.



## The 5<sup>th</sup> and 9<sup>th</sup> Defendants' Submissions

47. In the 5<sup>th</sup> and 9<sup>th</sup> defendants submissions filed on 14<sup>th</sup> August 2023, an overview of the cases urged by the 5<sup>th</sup> and 9<sup>th</sup> defendants is given and submitted that the defendants bought their respective portions of the suit property from the plaintiff's father, Joseph Cheronno Chelelgo, the initial registered owner of the suit property and they have been in actual and physical occupation and have made substantive developments in their respective parcels.
48. They submit that they are protected under Sections 26, 27, 28, 3(g) and 126(1) of the repealed *Registered Land Act* and that the plaintiff has created an implied or constructive trust in their favour. It is their contention that they are protected under Section 25 and 28 of the *Land Registration Act* (2012).
49. They relied on the following cases:- Nyeri Civil Appeal No. 6 of 2011 consolidated with Civil Appeal No. 26 of 27 of 2011, *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* (2014 eKLR, ELC Case No. 37 of 2013, *Willy Kimutai Kitilit v Michael Kibet* (2015) eKLR, Civil Appeal No. 51 of 2015, *Willy Kimutai Kitilit v Michael Kibet* (2018) eKLR, and Nairobi ELC Suit No. 71 of 2011 *Joseph Mwangi Recho and Anthony Francis Gichiri Ndua & 2 others* (2020) eKLR in support of the contention that there exists a constructive trust between the plaintiff's father, the plaintiff and the 5<sup>th</sup> and 9<sup>th</sup> defendants and that the plaintiff is holding the 5<sup>th</sup> and 9<sup>th</sup> defendants portion of suit property in trust for them.

## Analysis and determination

50. From the pleadings filed in this case, the evidence and the submissions, the sole issue for determination is whether the plaintiff has made up a case for being granted the orders sought or any of them.
51. With regard to that issue, it is common ground that the plaintiff is the registered proprietor of the suit property; that the plaintiff acquired title to the suit property through succession proceedings in respect of the estate of her father, Joseph Cheronno; that at the time the plaintiff filed the succession proceeding in respect of the estate of her father, the defendants were in use and occupation of the suit property and that the defendants were not parties to the succession proceedings.
52. Whilst the evidence adduced suggest that the defendants were put in possession of the portions they are in use and possession of, by either the plaintiff's deceased father or persons who had bought portions of the suit land from the plaintiff's father, the evidence adduced by the defendants, particularly DW1, DW2 and DW3 fell short of the legal threshold of proving an interest in land in that no sale agreement or agreement executed between the defendants and the plaintiff's father were adduced in evidence to proof the alleged transaction between the defendants and the plaintiff's father (deceased). It is noteworthy that the same position may not hold for the case urged against the 5<sup>th</sup> and 9<sup>th</sup> Defendant as the two produced evidence showing that they bought portion of the suit property from the plaintiff's deceased father and that they were put in possession of the portions they bought by the plaintiff's deceased father.
53. Although the defendants have urged a case of fraud against the plaintiff, whom they accuse of having administered the estate of her father without regard to their interest therein, they failed to adduce evidence capable of proving the pleaded fraud against the plaintiff. In my view, if the defendants were aggrieved by the grant obtained by the plaintiff, which grant enabled her to administer the estate of her father, the defendants ought to have moved the succession court to set aside or revoke the grant issued in the plaintiff's favour. alternatively, they could also have urged a case of trust or adverse possession against her.



54. In the absence of any order setting aside or revoking the grant issued to the plaintiff, this court has no basis of determining that the plaintiff obtained title to the suit land by fraud.
55. Under Section 24 of the *Land Registration Act*, 2012 (the Act) the registration of the plaintiff as proprietor of the suit land vested in her absolute ownership of the suit land with all rights and privileges belonging or appurtenant to the suit land.
56. Under Section 25 of the Act, the rights conferred on the plaintiff upon registration as the proprietor of the suit land are not liable to be defeated except as provided under the Act and is held free from all other interests and claims whatsoever but subject to the exemption under that section namely:-
  - a. Leases, charges and other encumbrances and to conditions and restrictions, if any, shown in the register; and
  - b. Such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.
57. Under Subsection 2 of Section 25, registration of a proprietor may also be subject of trust.
58. In the circumstances of this case, other 5<sup>th</sup> and 9<sup>th</sup> defendants who were able to proof that they bought the suit property from the plaintiff's deceased father, the other defendants did not proof that registration of the plaintiff is subject of any of the exemption contemplated under Section 25 of *the Act*.
59. Concerning the defendants plea for an order compelling the plaintiff to compensate them on account of the loss and damage occasioned to them by the plaintiff's administration of the estate of her father without their involvement, I reiterate my finding that this court is unable to impute any wrongdoing on the plaintiff on account of the alleged fraudulent administration of the estate of her father. If the defendants were aggrieved by the actions of the plaintiff concerning administration of her father's estate, they ought to have challenged those proceedings in the appropriate forum, a Succession Court.
60. I hasten to point out that the defendants may have themselves to blame for buying land without availing themselves of any legal protection. Since the defendants, particularly DW 1, DW 2 and DW 3, were buying registered land, they ought to have ensured that they dealt with the registered owner and/or his legal representative. Even where they dealt with the registered owner, it was important to ensure proper description of the property being bought. It's only a buyer who bought land in strict adherence with the law who can avail himself of legal protection. In that regard see Section 3(3) of the *Law of Contract Act* which provides as follows:-

“No suit shall be brought upon a contract for disposition of an interest in land unless-

- a. The contract upon which the suit is founded-
  - i. Is in writing
  - ii. Is signed by all parties thereto; and
- b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this section shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”



61. In view of the foregoing, I find and hold that the plaintiff has made up a case for being granted the orders sought against the defendants except the 5<sup>th</sup> and the 9<sup>th</sup> Defendants who proved that they bought their respective portions of the suit property from the plaintiff's deceased father and that they were put in possession of those portions by the plaintiff's deceased father. In the circumstances, it is the view of this court that it would be inequitable and unjust to treat the 5<sup>th</sup> and the 9<sup>th</sup> Defendants as trespassers in the suit property.
62. Current developments in law negate disentanglement of purchasers of land from their lawfully acquired land merely on the ground that they did not obtain the consent of the land control board to enter into the impugned transaction. In that regard see the case of *Aliaza v. Saul* (Civil Appeal No.134 of 2017) (2022)KECA 583 (KLR) 24 June 2022 (judgment) where it was inter alia held:-

“... under the new constitutional dispensation and in light of the provisions of section 7 of the sixth to *the constitution*, the *Land Control Act* must be read in a manner that does not give succour to a party, such as the respondent, who wishes to renege on his contractual obligations in order to steal a march on the purchaser.....

In my view, from the time the appellant entered the first of the two parcels of the suit land in 2002 and into subsequent portion that he purchased in 2004, a constructive trust in his favour was created in respect of the land. Such trust, as was found by the court in *Macharia Mwangi Maina*, became an overriding interest over the suit land. The failure on the part of the respondent to obtain the necessary consent from the Land Control Board within the required period of six (6) months to enable the appellant transfer the suit land into his name does not render the transaction void. Equity and fairness, the guiding principles in Article 10 of *the Constitution*, require that the *Land Control Act* is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the appellant.”

63. The upshot of the foregoing is that the plaintiff's case succeeds against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants. The plaintiff's claim against the 5<sup>th</sup> and the 9<sup>th</sup> defendant is dismissed with costs to the 5<sup>th</sup> and the 9<sup>th</sup> defendants on the ground that the portions sold by the plaintiff's deceased father did not form part of the free estate of the plaintiff's father which the plaintiff could administer as she purported to do.
64. To give effect to this judgment, the plaintiff is ordered to transfer to the 5<sup>th</sup> and 9<sup>th</sup> defendants the portions of the suit property they bought from her deceased father, failing which the Deputy Registrar of this court shall execute the transfer forms.
65. I award the plaintiff the costs of the suit.
66. To give the defendants time to vacate the suit property, I stay execution of the judgment and any decree ensuing therefrom for a period of 90 days.
67. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ITEN THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2023**

**L. N. WAITHAKA**

**JUDGE**

Judgement delivered virtually in the presence of:-

Mr. Momanyi for the plaintiff



No appearance for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants

Ms Lelei holding brief for Mr. Kibii for the 5<sup>th</sup> and 9<sup>th</sup> defendants

