



**Ngelechei v Kipkoech & 6 others (Environment & Land Case
155 of 2013) [2025] KEELC 4184 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4184 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 155 OF 2013**

EO OBAGA, J

MAY 30, 2025

BETWEEN

JAIRUS KIBARBUCH CHEPKAREI NGELECHEI PLAINTIFF

AND

PAUL KIBET KIPKOECH 1ST DEFENDANT

DANIEL KIPTUM KATTAM 2ND DEFENDANT

**CHERUTICH KIPKAOS- DECEASED THROUGH PAUL RUTO 3RD
DEFENDANT**

**KIBEIGO ARAP MASAI-DECEASED THROUGH SILAS YEGO 4TH
DEFENDANT**

**KIPLACH ARAP KOECH - DECEASED THROUGH JULIAS
RONO 5TH DEFENDANT**

PAUL KIMELI SITIENEI 6TH DEFENDANT

**CHRISTINE JEPKURGAT TENAI - DECEASED THROUGH PHILIP KIPTOO
CHERUIYOT' 7TH DEFENDANT**

JUDGMENT

Introduction

1. By a further amended plaint dated 6th April, 2021 the Plaintiff sought the following reliefs;
 - a. An order that there is encroachment on parcel number Cheptiret/Kapkoi Block 1 (Kerita) 80, 79, 218, 77 and 76.



- b. An order that parcel number Cheptiret/Kapkoi Block 1 (Kerita) 80, 79, 218, 77 and 76 be restored back to the original position as per the map situation.
- c. Costs of the suit.
- d. Interest on (c) above
- e. Mesne profits and damages for trespass.

Background

2. The Plaintiff had filed a suit against the 1st Defendant on 21st March, 2013 while he was acting in person. He later engaged the services of a lawyer who filed an amended plaint dated 23rd April, 2015 which brought in six other Defendants making a total of seven Defendants. The plaint was further amended on 6th April, 2021. The 3rd, 4th and 5th Defendants neither entered appearance nor filed defence. It is only the 1st, 2nd, 6th and 7th Defendants who entered appearance and filed defence.

Plaintiff's Case

3. The Plaintiff testified that he is the registered owner of LR. No. Cheptiret/Kapkoi Block 1 (Kerita)/218 measuring 2.484 hectares. He stated that he purchased the land from Nicholus Kipkurgat Murgor on 20th December, 1994. He further stated that the 1st Defendant had encroached on to his land by about 2.5 acres. His efforts to have the 1st Defendant move from the encroached portion bore no fruits. He was then forced to file this case in court seeking the prayers in the further amended plaint.
4. The Plaintiff called PW2 John Mukhwana who is a surveyor at Uasin Gishu County Surveyor's office who produced a survey report showing the position of the parcels in issue on the ground.

First Defendant's Case

5. The 1st Defendant testified that he is the registered owner of LR. No. Cheptiret/Kapkoi Block 1 (Kerita)/78 measuring 1.902 Hectares. He purchased this land from Njoroge Ng'ang'a on 31st August, 1994. He stated that he has maintained the boundary features of the plot the way he found it. In 2001, the Plaintiff complained about a boundary dispute. The District Land Surveyor came to the ground and confirmed that his land on the ground conformed to the Registry Index map and what was in the title.

The Second Defendant's Case

6. The second Defendant testified that he owns LR. No. Cheptiret/Kapkoi Block 1 (Kerita)/73 and 75. He stated that he does not border the Plaintiff's land and that as far as he is concerned, he has never had any boundary dispute with anyone and that according to his knowledge, the Plaintiff's land measures 3.6 acres.

The six Defendant's Case

7. The sixth Defendant testified that he is registered owner of LR. No. Cheptiret/Kapkoi Block 1 (Kerita)/79 measuring five acres. He purchased his land from Karumba Kagundu in 1995. He has maintained the boundaries as he found them at the time of purchase. He stated that he has never had any dispute with any of his neighbours. He stated that his neighbour is the 1st Defendant.



The seventh Defendant's Case

8. The 7th Defendant's case was presented by Philip Kiptoo Cheruiyt who is the Administrator of the Estate of Christine Jepkurgat Tenai who is the registered owner of LR. Cheptiret/Kapkoi Block 1 (Kerirta)/80. He stated that his late mother purchased her land with the boundaries which were intact. Their neighbour is the 6th Defendant and that as far as he is aware, the Plaintiff's land is 3.6 acres.
9. The 1st and 6th Defendants called DW3 Joseph Kimei Sigilai who is owner of LR. No. Cheptiret/Kapkoi Block 1 (Kerita)/72 and DW4 Julius Kipkemei Rono who is registered owner of LR. No. Cheptiret/Kapkoi Block 1 (Kerita)/261 as their witnesses. While under cross examination DW3 stated that he knew that the Plaintiff's land is 3.6 acres.

Analysis and Determination

Submissions by Parties

10. The parties were directed to file written submissions upon conclusion of the hearing on 17th December, 2024. The Plaintiff filed his submissions dated 10th February, 2025. The 1st and 6th Defendants filed their submissions dated 11th March, 2025. As at 9th May, 2025 when writing this judgment, the 2nd and 7th Defendants had not filed their submissions.

Plaintiff's Submissions

11. The Plaintiff reiterated the evidence adduced by the parties herein. The Plaintiff submitted that evidence adduced including the evidence of survey reports show that the 1st Defendant had encroached on to the Plaintiff's land. The Plaintiff relied on the case of *Fathiya & Another –vs- National Oil Corporation of Kenya (2024) KEELC 13864 (KLR)* where it was held as follows:

“I find and it is not disputed that the Defendant has encroached on the Plaintiff's land since the year 2008. Both the surveyors have confirmed this and recommended re-alignment of the wall. This amounts to trespass as the Defendant has intentionally entered onto the Plaintiff's property without the legal right or consent to do so.”

12. On mesne profits, the Plaintiff submitted that he is entitled to the same evidence having shown that the 1st Defendant has been using a portion of his land. He relied on the case of *Rajan Shah T/A Rajan S. Shah & Partners –vs- Bipin B. Shah (2016) eKLR* where it was held as follows:

“In *Bramwell –vs- Bramwell*, Justice Goddard stated that

“.....mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant.” Similarly, in an Australian case, *Williams & Bradley vs Tobiasen* it was stated that these words: “Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from.”

13. On the issue of trespass the Plaintiff submitted that once trespass is established, there is no evidence required before damages can be awarded. He relied on the case of *Joseph Kipchirchir Koech –vs- Philip Cheruiyot Sang (2018) eKLR* where it was held as follows:

“I have already determined that the Defendant's actions amounted to trespass to private land. It therefore follows and I do find that the Plaintiff has suffered loss and damage, to wit:



quiet enjoyment of his property through the unwarranted interference of his property by the Defendant. No evidence is required before damages for trespass to land can be awarded.

14. On the 1st and 6th Defendant's contention that the suit is statute barred, the Plaintiff submitted that his is a claim of trespass which is continuing and the statute of limitation cannot be invoked. He relied on the case of Nguruman Limited –vs- Shompole Group Ranch & 3 others (2007) EKLR which quoted Clerk and Lindsell on Torts 16th Edition Paragraphs 23-01 where it was held as follows:

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.”

1st and 6th Defendants' Submissions

15. The 1st and 6th Defendants submitted that the boundaries in issue were general boundaries and not fixed boundaries and that surveyors could not determine the same and that this court cannot determine the same. They relied on the case of Samuel Wanjau –vs- Alex & 2 Others (2009) eKLR where it was held as follows:

“However, it is common ground that such maps (R.I.M.) are not authorities on boundaries. Both the District Land Registrar and the District Land Surveyor said as much.....it means therefore that when and where there is a dispute as to the position and location of a boundary as in this case, unless the same is a fixed boundary, one has to go beyond the R.I.M. in solving the dispute. Indeed, both PW1 and DW2 were agreeable that for one to determine a dispute in respect of general boundaries, the physical features existing on the ground are very critical. Such features include hedges, fences and roads. Because general boundaries are identifiable by using the existing physical features, and by interviewing the owners of the adjacent plots, the law requires dispute relating to such boundaries to be handled by the Land Registrar, and not surveyors or even the court.”

16. On the issue of mesne profits and general damages, the Defendants submitted that a party cannot claim both. They relied on the case of Christine Nyanchama Oanda –vs- Catholic Diocese of Homabay Registered Trustees (2020) EKLR where it was held as follows:

“It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (see: Black's Law Dictionary 9th Edition). Mesne profits must be pleaded and proved. In the case of Peter Mwangi Msuitia & Another Vs Samow Edin Osman (2014) EKLR this court held as follows:

“As regards the payment of mesne profit, we think the Applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profits and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

17. I have carefully considered the evidence adduced by the parties herein as well as the submissions and the authorities cited. The issues which emerge for determination are as follows:
- a. Whether the Plaintiff's land is 3.6 acres or 2.484 hectares.
 - b. Whether the 1st Defendant has encroached on the Plaintiff's land.



- c. Whether the Plaintiff is entitled to the reliefs in the plaint.
- d. Which order should be made on costs.

a. Whether the Plaintiff's land is 3.6 acres or 2.484 hectares

18. The Plaintiff's evidence is that his land is 2.484 hectares. On the other hand the evidence of the 1st, 2nd, 6th and 7th Defendants is that the Plaintiff's land is 3.6 acres. There is no basis upon which this court can agree with the Defendants' evidence that the Plaintiff's land is 3.6 acres. They have just stated so without any documentary evidence to prove that that is the position. On the other hand, the Plaintiff has produced a copy of his title as exhibit 2 which shows that his land is 2.484 hectares. I therefore find that the Plaintiff's land is 2.484 hectares.

b. Whether 1st Defendant has encroached on the Plaintiff's Land

19. In his evidence, the Plaintiff testified that the 1st Defendant had encroached on to his land by about 2.5 acres. His evidence is that his land according to the Registry Index map is rectangular but according to the ground, it is triangular. PW 2 John Mukhwana who is a surveyor confirmed during cross examination that the Plaintiff's land on the ground is a triangular when it is supposed to be rectangular.
20. PW2 produced a survey report dated 16th December, 2014 as exhibit 4. In this report it is clear that the 1st Defendant has encroached into Plaintiff's land by 2.367 acres which is equivalent to 0.9580 hectares. The sketch attached to the report shows that the problem started from LR. No. Cheptiret/Kapkoi Block 1 (Kerita)/80 belonging to the 7th Defendant which had encroached to parcel No. Cheptiret/Kapkoi Block 1 (Kerita)/79 by 1.220 acres which is equivalent to 0.494 hectares.
21. Parcel No. Cheptiret/Kapkoi Block 1 (Kerita)/79 in turn encroached into parcel Cheptiret/Kapkoi Block 1 (Kerita)/78 by 2.252 acres which is equivalent to 0.911 hectares. Parcel No. 78 in turn encroached on to parcel No. 79 by 0.207 acres equivalent to 0.008 hectares. Parcel 78 in turn encroached on to parcel 218 by 2.367 acres. Parcel No. 218 encroached on to parcel No. 77 by 0.361 acres which is equivalent to 0.146 hectares. Parcel 76 encroached on to parcel No. 77 by 0.361 acres equivalent to 0.146 hectares. Parcel 76 encroached on to parcel No. 77 by 0.361 which is equivalent to 0.146 hectares.
22. The issue complained of by the Plaintiff was seen as far back as 2001 when the survey office of Uasin Gishu noticed that the Plaintiff's plot on the ground did not conform to the Registry Index map. The surveyor recommended an amendment to the Registry Index map. The 1st and 6th Defendants produced two letters both dated 14th May, 2001 and another one dated 7th December, 2004 as exhibits. One of the letters of 14th May, 2001 is clear that further investigations were to be carried regarding parcel Nos. 77, 78, and 79. This is because of the complaint of the Plaintiff.
23. It is clear from the letters of 14th May, 2001 that they are the same. One is a photocopy of the other. The only difference is that a sketch has been drawn on the photocopy and this is what informed the letter of 7th December, 2004 which seemed to suggest that the Registry Index map be amended to reflect the position of the Plaintiff's land on the ground. If this recommendation was to be acted on, the Plaintiff would have lost a huge junk of his land.
24. The survey of 16th December, 2014 traced the source of the problem which emanated from parcel No. 80. I therefore find that there is encroachment on to the plaintiff's land by the owner of parcel 78.



c. Whether the Plaintiff is entitled to the reliefs in the further amended plaint

25. The survey report of 16th December, 2014 clearly shows that there is encroachment which affects parcel numbers Cheptiret/Kapkoi Block 1 (Kerita) 76, 77, 218, 78, 79 and 80. In order to bring the Plaintiff's claim to a closure, the orders sought in prayers (aa) and prayer (bb) should be granted.
26. However, on prayer (e) the Plaintiff cannot claim both mesne profits and damages for trespass. His is not allowed in law. See the case of Christine Nyanchama Oanda (Supra). The Plaintiff would have been entitled to general damages for trespass but in view of what the survey report has revealed, the encroachment began from parcel No. 80 belonging to the 7th Defendant which then affected parcel 78 and 79 which in turn affected the Plaintiff's land. The Plaintiff has also encroached on the parcel No. 77. The owner of parcel 76 has also encroached on to parcel 77.
27. Were it not because of the intervention of the court which on its own motion ordered that the 2nd to 7th Defendants be enjoined as Defendants, it would not have been easy for the dispute herein to be resolved. There is therefore no basis upon which the court can order the 1st Defendant to pay general damages. The 7th Defendant purchased her land in the 1970's. The 1st Defendant purchased his land on 19th August, 1994. The 6th Defendant purchased his land in 1995. The Plaintiff purchased his land on 20th December, 1994.

Disposition

28. From the above analysis, I find that the Plaintiff has partially succeeded in his claim. I enter judgment in his favour in the following terms:
 1. A declaration that there is encroachment affecting parcel numbers Cheptiret/Kapkoi Block 1 (Kerita)/80, 79, 78, 218, 77 and 76.
 2. An order that the boundaries of parcel numbers Cheptiret/Kapkoi Block 1 (Kerita)/80, 79, 78, 218, 77 and 76 be restored back on the ground as per the position on the Registry Index Map as was identified in the survey report of 16th December, 2014.
 3. The costs of the restoration shall be shared equally amongst the owners of the affected parcels in (2) hereinabove.
 4. In view of the fact that the 2nd to 7th Defendants were added as Defendants on the court's own motion and given that the 1st Defendant was not the sole cause of encroachment, each party shall bear their own costs.

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HON. E. O. OBAGA

JUDGE

JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF MAY, 2025.

In the presence of:

Mr. Osewe for Plaintiff.

Mr. Mogambi for 1st and 6th Defendant.

Court assistant – Steve Musyoki

