



Kenei & another v Chepngeno & 5 others (Environment and Land Appeal E002 of 2024) [2025] KEELC 506 (KLR) (4 February 2025) (Judgment)

Neutral citation: [2025] KEELC 506 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
ENVIRONMENT AND LAND APPEAL E002 OF 2024**

L WAITHAKA, J

FEBRUARY 4, 2025

BETWEEN

PERIS KABON KENEI 1ST APPELLANT

SAMMY KIPCHUMBA KENEI 2ND APPELLANT

AND

CHARLES KIPRUTO CHEPNGENO 1ST RESPONDENT

KIPROP ARAP CHEMWENO 2ND RESPONDENT

CHERUIYOT CHEPNGENO SAMSON 3RD RESPONDENT

CHEPYEGON CHEPNGENO 4TH RESPONDENT

TARGOK TUITOEK 5TH RESPONDENT

TARGOK CHERUIYOT 6TH RESPONDENT

*(Being an appeal from the judgment of Hon. P. Koskey SPM,
delivered on 25th January in Kabarnet CM ELC Case No. 32 of 2020)*

JUDGMENT

(Being an appeal from the judgment of Hon. P. Koskey SPM, delivered on 25th January in Kabarnet CM ELC Case No. 32 of 2020)

Introduction

1. By a plaint dated 2nd September 2020, the appellants herein, instituted a suit in the lower court to wit Kabarnet ELC Case No. 32 of 2020 seeking judgment against the defendants, now respondents, for: -



- a. An order of permanent injunction restraining the defendants their servants, agents and any person claiming under them from encroaching or trespassing into the suit land, alienating, disposing off or in any manner whatsoever dealing with the suit land and/or estate of the deceased.
 - b. Costs of the suit and interest;
 - c. Any other relief that the court may deem fit and just to grant.
2. As can be discerned from the plaint, the suit was premised on the ground that the plaintiffs are the legal administrators of the estate of Kipkenei Chepngeno alias Kipkenei Arap Chepngeno (deceased) comprised in the parcel of land known as Baringo/Perkerra/101/377 (hereinafter referred to as the suit land).
 3. The plaintiffs complained/pleaded that on 7th June 2020, the defendants unlawfully and without any colour of right encroached on the suit land with the intention of ploughing and planting thereon.
 4. Terming the actions of the defendants complained of interference/intermeddling with the estate of the deceased comprised in the suit land by the defendants yet they are not beneficiaries of the estate, the plaintiffs instituted the suit hereto seeking the reliefs listed herein above.
 5. The defendants filed a statement of defence dated 24th September 2020, in which they denied the allegations levelled against them and contended that they have been living in the suit land with the plaintiffs and their children for over 20 years and that the suit land is family land (is a sub-division of Baringo/Perkerra/101/127) which belonged to their deceased father hence family land.
 6. Asserting that they are beneficiaries of the suit land hence entitled to continue occupying it, the defendants contended that the plaintiffs are not entitled to the reliefs sought. The defendants further pleaded that there were other suits pending in court between the plaintiffs and themselves over the suit land. In particular, the defendants flagged Kabarnet SPM Succession Cause Nos. 22 and 23 of 2020 as the cases pending in court.
 7. The 1st defendant contended that he is the legal representative of the estate of Chepngeno Cheruiyot, deceased, comprised in Baringo/Perkerra/101/127.

Evidence

Plaintiffs case

8. When the case came up for hearing, the 2nd defendant who testified as PW1, relied on his witness statement recorded on 22nd April 2022 after it was adopted as his evidence in chief.
9. In cross examination, he stated that land parcel numbers 377 to 381 are in the name of his deceased father; that the parcels are as a result of subdivision of parcel number 101/127 which also belonged to his father; that parcel number 101/127 was 22 acres before it was subdivided and that he had no idea how land parcel 101/127 came about.
10. The further stated that the 1st to the 5th defendants who are his uncles (brothers to his father), live in some of the resultant portions of land parcel number 101/127. These are parcel numbers 378 to 381. In aggregate the parcels measure 5acres.
11. He stated that he lives in parcel number 377 which measures 17 acres. He acknowledged that all the parcels of land occupied by the defendants are all registered in his father's name.



12. He denied the defendants' claim that his father was given the original parcel 562, to hold in trust for them.
13. In re-examination, he asserted that plot number 377 belongs to his father.
14. The 1st plaintiff Peris Kenei, who testified as P.W.2, relied on her witness statement dated 22nd April 2022 after it was adopted as her evidence in chief and produced the title deed for parcel number 101/377 as Pexbt 4
15. She informed the court that the suit land, plot number 377, belongs to her deceased husband, Kipkenei Chemwono; that her father-in-law and the defendants who are her brothers-in-law were given land by her husband because they had no land. She could not remember when her husband gave land to her father-in-law and to his brothers.
16. Regarding when they began living in the suit land, she stated that they began living there in 1989. She further stated that the defendants lived on land given to them by her husband which measured 22 acres before her husband gave 5 acres to his father and his brothers.
17. She informed the court that the dispute between her and the defendants began after her husband and her father-in-law died. Her husband died in 2000 while her father-in-law died in 2001.
18. She stated that she was not using the suit land because the defendants stopped her from using it. She urged the court to declare her the rightful owner of the suit land.
19. In cross examination, she contradicted her evidence in chief by stating that she started living in the suit land in 1966.
20. She admitted/acknowledged that her father-in-law and her husband were living in the forest before they came to the land in dispute. She also acknowledged/admitted that the original plot number from which the suit land was derived is 562.
21. She further admitted/acknowledged that plot number 562 changed to plot number 101/127.
22. She informed the court that the original parcel 562 was bought by her husband and that it is her husband who gave his father 5 acres out of the original parcel; that her father-in-law gave part of the land he was given by her husband to the defendants.
23. She denied the defendants' claim that the family used to give money to her husband to pay for the land. She also denied the defendants' contention that her husband obtained title to the suit land fraudulently.
24. In re-examination, she maintained that the original parcel, 562, belonged to her husband and that it is her husband who gave the defendants 5 acres out of the original parcel of land.
25. She stated that although all the parcels arising from subdivision parcel number 101/127 are registered in the name of her deceased husband, her claim is limited to parcel number 377.

Defendants case

26. Charles Kipruto Chepngeno (D.W.1), led evidence to the effect that the suit land is a sub-division of parcel number 562 which belonged to his father. They (the defendants) have lived in the suit land since they were born. The land was given to their father and not the 1st plaintiff's husband. They paid for the land through their elder brother, the 1st plaintiff's husband.



27. After the loan was fully paid, his father obtained a title deed for the suit land in his own name but later transferred it to the 1st plaintiff's husband's name. To prove that fact, he produced as Dexbt 1 a transfer document executed between his father and the 1st plaintiff's husband.
28. He informed the court that plot number 562 changed to number 101/127.
29. Upon getting the land registered in his name, the 1st plaintiff's husband subdivided it into 5 parcels-377 to 381, all of which he transferred to himself.
30. He further informed the court that parcel number 377 measures 17 acres while the other parcels, 378 to 381 in aggregate measure 5 acres.
31. As to whether they live in parcel number 377, he stated that they don't live there but graze their cattle thereon.
32. He admitted that they chased away the people who the 1st plaintiff had leased the land to.
33. He informed the court that they learnt from the lands office that their brother had registered the land in dispute in his name. They established that the subdivision of the land was not proper because the original title was not surrendered.
34. In cross examination, D.W.1 stated that they were all born in the suit land and that the suit land was subject of a trust in their favour. He urged the court to help them get and divide the land equally.
35. In re-examination, D.W.1 stated that some of them were born in the land in dispute, 562, while others were born in the forest.
36. He maintained that land parcel number 562 belonged to their father and that they paid for it through the 1st plaintiff's husband.
37. He further informed the court that they were living in the land before subdivision. Maintaining that the land belonged to their father and that it is their father who gave it to them, he told the court that they want parcel number 377 to be divided equally amongst them.
38. D.W.2, Chepyegon Chepngeno, informed the court that they were all born in the forest. They moved to the suit land in 1964. The land was given to their father. They paid for the land through Kipkenei, their eldest brother. Kipkenei subdivided the land while they were still on the land. The entire land belongs to their father.
39. It is on the basis of the foregoing evidence that the learned trial magistrate determined that the plaintiffs had not proved their case on a balance of probabilities and proceeded to dismiss it. In dismissing the plaintiffs' case, the learned trial magistrate stated/held: -

“Upon considering the pleadings, the evidence led and learned counsel's written submissions, it is not in dispute that the 1st plaintiff's husband and the defendants are brothers. The issues for determination are as follows: -

- i. Whether the plaintiffs legitimately acquired the suit land
- ii. Whether the defendants have any rightful claim to the suit land
- iii. Remedies available to the parties.

Issue 1 and 2 are intertwined and will therefore be addressed together. PW1's evidence is that the suit land Baringo/Perkerra 101/377 was owned by her deceased husband Kipkenei Arap



Chepngeno while the defendant's case is that the suit land belonged to their father Chepngeno Cheruiyot and they are therefore entitled to it.

In cross examination PW1, stated that his grandparents were in occupation of parcel 381 which he later admitted was registered in the name of his father. He told the court that all parcels 377 to 381 are registered in his father's name. It is not in dispute that the defendants have been in occupation of these parcels for a long time. The 1st plaintiff's husband registered all the parcels in his name despite this occupation. No reasonable explanation was offered for this.

PW1 further stated that parcels 377-381 were all registered under one title Baringo-Perkerra 101/127 before it was subdivided to those parcels. He could not tell the history of parcel 101/127. He told the court that the defendants are his father's brothers who were in occupation of the resultant subdivisions of parcel 101/127. The 1st defendant occupied parcel 380, the 2nd defendant parcel 378, the 3rd defendant parcel 381, the 4th defendant parcel 379. He did state about the 5th and 6th defendants but further stated that each of the parcels from 378 to 381 measured 5 acres in aggregate while the suit land, 377, measures 17 acres. He denied that his father as the eldest brother had been entrusted the land on behalf of his younger brothers.

further stated that his father worked at the land tribunal and he could not tell how his father acquired the land or if he bought it.

on the other hand, told the court that her husband bought the land from the settlement scheme and disputed that it was her father in law who had bought it. She stated that her father in law had moved to their land in 1989. That her husband started occupying the land in 1967. She told the court that the land dispute started in 2001 after the death of her father in law while DW1 and DW2 told the court that the dispute started when their father discovered that their eldest brother had instead registered the land in his name and was allegedly cursed and died in 2000.

In cross examination, P.W 2 told the court that the land was bought in 1965 before she got married. She was then taken to the land which was at the time 22 acres. She further stated that her husband was brought up on that land. She further stated that her husband used to live at Chebere forest before they were asked to leave the forest. If they were asked to leave the forest then it's not logical that it was at this point that her husband bought the land as the evidence of the defendants is that they were moved to a settlement scheme. It is also not logical that the plaintiff's husband moved out the forest alone in 1967 to be joined by his father and brothers later in 1989 yet they had all been asked to leave the forest.

PW2 further stated in cross examination that the land parcel was parcel number 562 which was in the name of her husband Kipkinei Chepngeno who paid via the settlement scheme. She gave the sequence of the parcel numbers from parcel 562 to parcel Baringo/Perkerra 127 that resulted to the suit land and other subdivisions from 377 to 381.

I have considered this evidence alongside D Exhibit 1 which is a settlement fund trustees' statement of account dated 31/12/89. The account number listed there is 1010 562. The same is addressed to Chepngeno C. Chepngeno C is certainly not Kipkinei Arap Chepngeno who is the 1st plaintiff's husband. From the history of that statement which is for parcel 562 which is the mother title, it is apparent that the land was historically allotted to Chepngeno C the father in law of the 2nd plaintiff and the defendants' father.

The plaintiff did not tender any evidence to show how the suit land was acquired. There were statements produced to show that indeed Kipkinei Arap Chepngeno is the one who was initially allocated parcel 562 by the settlement scheme and he was the one paying the



instalments. This is important especially in the face of D exhibit 1 and PW2's evidence that the original parcel was known as parcel number 562 which is captured in the statement to belong to Chepngeno C...

It was therefore imperative upon the plaintiffs as the acquisition of the land by her husband who is a brother to the defendants was challenged, to go beyond the instrument of title deed and establish how her husband acquired the titles and demonstrate it was done legally and procedurally and was free from any encumbrances to include interests in this context, her in law's (the defendants) interest on the land.

It is common knowledge that during the demarcation period, land was given to the head of the family who is the father and, in his absence, it was given to the eldest son to hold it in trust for the family. It is therefore not plausible that in the year 1960's as P.W2 wants the court to believe that both her husband who is the eldest son and her father-in-law were both given land. That was not the practice as was held in the case of *Jecklia Rwamba Kuringia v Mugo Kinyothi (2016) e KLR*.

I find that the plaintiffs have not established how the suit land was acquired by the deceased Kipkeni Arap Chepngeno and find that the registration of the land in his name was illegal, null and void

In any case, the registration of the land in the name of the deceased can only be held to have been made in trust for himself and others including the defendants. The *Land Registration Act 2012* makes it very clear in section 28 that unless the contrary is expressed in the register, all registered land shall be subject to various overriding interests without their being noted on the register and one such interest is a trust including customary trust. That customary trust needs not be registered as was held in the case of *Jason Gitimu Wangara v Martin Munene Wangara & others (2013)e KLR*

The suit land Baringo/Perkerra-101/377 is therefore part of the estate of the deceased Chepngeno Cheruiyot and ought to be distributed under his estate to his beneficiaries. It is upon the succession court to determine the rights of every beneficiary in the distribution of the Estate.

In conclusion and on the remedies available, I proceed to give the following orders:-

- a. A declaration that the deceased Kipkeni Chepngeno alias Kipkeni arap Chepngeno held the suit land Baringo/Perkerra 101/377 in trust for himself and others including the defendants;
- b. It is hereby declared that the registration of the suit land known as Baringo/Perkerra 101/377 to Kipkeni Chepngeno alias Kipkeni arap Chepngeno (deceased) was illegal, null and void;
- c. The Land Registrar Baringo county is hereby ordered to cancel the title of the suit land Baringo/Perkerra 101/377 issued to Kipkeni Chepngeno alia Kipkeni arap Chepngeno and have the suit land Baringo Perkerra 101/377 revert to the name of their deceased father Chepngeno Cheruiyot awaiting the succession of his estate and/or inclusion in the succession proceedings of his estate;
- d. The end result is that the plaintiff's suit is hereby dismissed."

40. Aggrieved by the decision of the trial court, the plaintiffs (now appellants) appealed to this court on grounds that the learned trial magistrate erred by: -



1. Failing to find that the appellants established a prima facie case;
 2. Holding that the deceased's acquisition of the suit land was challenged by the respondents thereby requiring the plaintiffs to prove legality of its acquisition;
 3. Holding that the deceased's acquisition of the suit land was illegal, null and void;
 4. Considering extraneous matters and issues and giving strange orders;
 5. Giving alien orders not pleaded by the parties in the suit;
 6. Failing to take into account the evidence on record hence arriving at the wrong decision;
 7. Over relying on the evidence of the respondents;
 8. Overly relying on the submissions by the respondents;
 9. Failing to give due regard to the authorities by the appellants;
 10. Disregarding the submissions and the authorities of the appellants.
41. The appeal was disposed of by way of written submissions.

Submissions

Appellants' submissions

42. Concerning grounds 1, 2, 3, 6, 7 and 8 of the Memorandum of Appeal, the appellants point out that the appellants produced the title deed for the suit property showing that the 1st plaintiff's deceased husband is the registered proprietor of the suit property, parcel number Baringo/Perkerra-101/377 and based on the provisions of Section 26(1) of the [Land Registration Act, 2012](#) and the decision in the case of *Esther Ndegi Njiru & another vs. Leonard Gatel (2014)e KLR*, submitted that there being no evidence adduced by the respondents that challenged the deceased's acquisition of the suit land or proving that the deceased illegally acquired the suit land, the appellant had no obligation to prove the legality of acquisition of the suit land.
43. According to the appellants, the learned trial magistrate merely inferred illegality on the acquisition of the suit land and proceeded to give judgment in favour of the respondents.
44. The learned trial magistrate is also said to have failed to take into account the evidence of D.W.1, after he was recalled, which shows that if any transfer of the suit land was done from the defendants' father to the 1st plaintiff's deceased husband, it was done with the blessings of the 1st plaintiff's husbands father.
45. It is further submitted that no customary trust on the land was pleaded and that no orders for a declaration of trust should have been made on the suit land or any orders for cancellation of the title to the suit land to warrant judgment by the court for a declaration that the deceased held the suit land for himself and the respondents. Based on the decision in the case of *Mathew Kariuki Amos v. Joseph Kariuki Njiru & 3 others (2019) e KLR*, the learned trial magistrate is faulted for having given a judgment not aligned with the parties' pleadings.
46. With regard to grounds 4 and 5 of the Memorandum of Appeal, the appellants submit that the learned trial magistrate veered off the dispute the parties framed and went on to pronounce judgment on matters that were not properly before her.



47. Arguing that there is no mention of any of the reliefs that the court issued save for the appellants' suit to be dismissed, the appellants submit that by framing new issues not pleaded or responded to by parties, the learned trial magistrate abandoned her role as an independent and impartial adjudicator and descended into the arena of conflict. Based on the decisions in *Malawi Railways Ltd v. Nyasulu* (1998) MWSC 3; *Libyan Arab Uganda Bank for Foreign Trade and Development & another v. Adam Vassiliadis* (1986) UG CA6; and *Independent Electoral and Boundaries Commission & another v. Mule & 3 others* (Civil Appeal 219 of 2013) (2014) KECA 890 (KLR), the appellants have submitted that the learned trial magistrate erred by giving reliefs that were not sought by the defendants in their statement of defence.

Respondents' submissions

48. In their submissions dated 31st January 2025, the respondents have submitted that the appeal lacks merits because the evidence adduced by the appellants in relation to acquisition of the suit land does not satisfy the provisions of Section 7 of the *Land Act* on details and ways of acquisition of land legally.
49. The respondents urge the court to find that the court properly directed itself on the evidence available and to dismiss the appeal with costs to them.

Analysis and determination

50. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see the cases of *Selle & Another vs. Associated Motor Boat Co. Ltd* (1968) E.A 123, *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988) KLR 348.
51. From the grounds of appeal and the submissions by the parties, I find the issues for determination to be as follows:-
- i. Whether the learned trial magistrate departed from the parties' pleadings;
 - ii. Whether the learned trial magistrate committed an error of fact or law warranting interference with her decision by this court.
 - iii. Whether the learned trial magistrate erred by dismissing the appellants' suit;
 - iv. What orders should the court make?
52. On whether the learned trial magistrate departed from the parties' pleadings; a review of the parties pleaded cases shows that the plaintiff's case was that the defendants' had without any colour of right encroached/trespassed on the suit land, which land belongs to the 1st plaintiff's deceased husband. The respondents had on their part, denied encroachment on the suit land and pleaded that the suit land was family land hence they were beneficiaries of the suit land.
53. Although the defendants had not expressly pleaded that the registration of the 1st plaintiff's husband as the owner of the suit land is subject to a trust in their favour, they had implied that the suit land is subject of a customary trust in their favour by pleading that the suit land is family land and that they are beneficiaries thereof. It is noteworthy that the plaintiffs had also pleaded that the defendants were not beneficiaries of the suit land.



54. When the case came up for hearing, the parties led evidence that shows that the suit land is a resultant portion of parcel number 562, which changed to parcel number 101/127 before it was subdivided by the 1st plaintiff's husband into 5 portions, the suit land included, all registered in the name of the 1st plaintiff's husband.
55. The totality of the evidence adduced before the lower court shows that plot number 562 (the original plot) belonged the defendants' father and not the 1st plaintiff's husband. To that extent, the defendants' claim that the suit land was family land was proven in that the defendants were able to prove that it is a resultant portion of parcel number 562.
56. Whilst there is evidence suggesting that the original parcel was transferred to the 1st plaintiff's husband by his father, the totality of the evidence does not show or even suggest that the transferor had the intention of making the transferee the absolute owner of the land. If that was the intention, then after subdividing it, and allegedly giving his father 5 acres therefrom, he would not have retained the subdivisions in his name. The subdivisions would have come in the name of the actual beneficiaries; the defendants' father and the defendants.
57. Arising from the foregoing, it is the considered view of this court that the learned trial magistrate properly directed herself on the question as to whether the suit property was subject of a trust in favour of the defendants. She also properly directed herself by dismissing the plaintiffs' suit. However, she misdirected herself by issuing orders that did not directly arise or flow from the parties pleaded case. Such orders were: -
- a. Declaring that the deceased Kipkeni Chepngeno alia Kipnei Arap Chepngeno held the suit land Baringo /Perkerra-101/377 in trust for himself and others including the defendants;
 - b. Declaring that registration of title of the suit land known as Baringo/Perkerra-101/377 to Kipkeni Chepngeno alias Kipkeni Arap Chepngeno (deceased) was illegal, null and void;
 - c. Ordering the Land Registrar Baringo County to cancel the title of the suit land Baringo/Perkerra-101/377 issued to Kipkeni Chepngeno alias Kipkeni Arap Chepngeno and have the suit land Baringo/Perkerra-101/377 revert to name of the parties deceased father Chepngeno Cheruiyot awaiting the succession of his Estate and/or inclusion in the succession proceedings of his estate.
58. Whilst arising from the court's determination that the suit land is subject to a trust in favour of the defendants may appear necessary and well founded, they nevertheless offend the principles undergirding pleadings, particularly the principle that parties as well as the court are bound by pleadings. In that regard, see the case of;
- Daniel Otieno Migore v. South Nyanza Sugar Co. Ltd (2018) e KLR where the court quoted the decision of the Supreme Court of Kenya in Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) e KLR thus: -
- “In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also settled legal 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 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 the 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 on the pleadings...”



59. The learned trial magistrate erred by cancelling the title to the suit land when the defendants had not sought for cancelling of the title. In that regard, see the case of Karin Annechallis vs. Attorney General & 6 others (2002) e KLR where it was held that it is a cardinal principle of the court that it will only grant reliefs sought by a party. The court further held: -

“Indeed where a court has proceeded to grant a relief not contained in prayers in the pleadings or not regularly sought by a party expressly or impliedly, the appellate courts have no hesitation in annulling or overturning orders granting such reliefs and that “using the same principle, I do hold that in this case, where a party requires a cancellation or rectification or an amendment of a title such a party must specifically plead such relief before a court of law can grant it”.

60. The upshot of the foregoing is that the appeal partially succeeds in that the declaratory orders issued by the trial court and the order cancelling the suit property and reverting it to the estate of the parties deceased father are set aside.

61. The order dismissing the plaintiff’s suit is upheld.

62. The dispute herein being one that involves family members, parties shall bear their costs of appeal and the costs of the suit before the lower court.

JUDGMENT DATED, SIGNED AND DELIVERED AT KABARNET THIS 4TH DAY OF FEBRUARY, 2025.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Ms. Lugwe holding brief for Mr. Chepkonga for the appellants

Mr. Chepkilot for the respondents

Court Assistant: Christine

