



**Bartocho v Cheruiyot & another (Environment and Land Appeal  
E002 of 2024) [2025] KEELC 5447 (KLR) (9 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5447 (KLR)

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

**L WAITHAKA, J**

**JULY 9, 2025**

**BETWEEN**

**JOSHUA LIMO BARTOCHO ..... APPELLANT**

**AND**

**DANIEL CHERUIYOT ..... 1<sup>ST</sup> RESPONDENT**

**LOICE J. CHEBOS ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgement and decree of Hon. V Karanja  
delivered on 22nd April 2024 in Iten SPM ELC No. 29 of 2020)*

**JUDGMENT**

**Introduction**

1. By a plaint dated 4<sup>th</sup> September 2020, the plaintiff, now appellant, instituted a suit in the lower court to wit Iten CMC ELC Case No.29 of 2020 seeking judgment against the defendant (now 1<sup>st</sup> respondent) for a permanent injunction restraining the defendant, his agents and/or servants from entering, trespassing, encroaching, ploughing, planting or dealing in any manner with the parcel of land known as Mosop/Kapchorwa/1121 (hereinafter referred to as the suit property); an eviction order; Mesne profits; Costs of the suit; Interest; Any other relief that the court may deem just and fit to grant.
2. The suit was premised on the grounds that at all times material to the suit, the plaintiff was the registered owner of the suit property; that on or about July 2020, the defendant without any colour of right encroached onto the suit property by forcefully fencing it and planting trees therein thereby depriving the plaintiff of his right to utilize it.
3. The plaintiff further pleaded that there was no and there had never been any privity of contract whatsoever between him and the defendant and lamented that because of the activities of the defendant



complained of (trespass and encroachment onto the suit property), he had suffered and continued to suffer damage and loss.

4. The defendant filed a statement of defence, dated June 2021, in which he acknowledged that there was no privity of contract between him and the plaintiff but explained /contended that he had been in use and possession of 2 acres comprised in the parcel of land known as Mosop/Kapchorwa/202 registered in the name of Chebos Rutto (deceased); that his possession of the said parcel of land was pursuant to a contract entered into between Loice Cheboss alias Loice Kibiwot in which he purchased the two acres comprised in the parcel of land known as Mosop/Kapchorwa/202.
5. The defendant further pleaded that he is a stranger to the plaintiff's claim that he is the one having proprietary rights over the suit property; that the plaintiff caused land parcel Mosop/Kapchorwa/202 to be apportioned to him through fraud and misrepresentation in the manner in which Eldoret Probate and Administration Cause No.133 of 2012 in respect of the estate of Chebos Rutto, deceased, was conducted.
6. The plaintiff filed a reply to defence dated, 23rd June 2021, in which he denied the allegations levelled against him and put the defendant to strict proof thereof. The plaintiff urged the court to dismiss the defendant's defence and enter judgment in his favour as prayed for in the plaint.

## **Evidence**

### Plaintiff's case

7. When the case came up for hearing, the plaintiff who testified as P.W.1 relied on his witness statement dated 4th September 2020, which is basically a restatement of the averments contained in his plaint. He produced the documents contained in his list of documents dated 4th September 2020 as his exhibits. These are:-
  - i. Copy of title deed for Mosop/Kapchorwa/202;
  - ii. Consent to rectification of grant dated 10th October 2017;
  - iii. Amended certificate of confirmation of grant dated 25th March 2019;
  - iv. Application for partition of land parcel Mosop/Kapchorwa/202;
  - v. Application for Land Control Board;
  - vi. Mutation form registered on 17th October 2019;
  - vii. Copy of title deed for Mosop/Kapchorwa/1121;
  - viii. Certificate of search dated 24th February 2020;
  - ix. Certificate of search dated 31st August 2020;
  - x. Copies of OB (missing in the court file).
8. In cross examination, the plaintiff informed the court that the dispute giving rise to the suit started in 2012; that he never went to Birir advocate; that he bought the suit property and recorded an agreement at the chief's office and that the chief is one of his witnesses. He could not recall the year he bought the suit property.
9. On further cross examination, he stated that he bought the suit property on the date in the title deed, that is 2019.



10. Concerning the defendant's claim/contention that he had been in the suit property since 2012, the plaintiff stated that he never dealt with the defendant before 2020 when he came and fenced off the suit property. He maintained that the defendant came to the suit property after he acquired his title thereto, planted trees therein and fenced it off.
11. Upon being asked whether he was aware that the defendant has a sale agreement, he stated he was not aware. Maintaining that he bought the suit property from Loice, the plaintiff told the court that the seller assured him that the land, comprising 14 ½ acres was hers.
12. On whether he was aware that the seller denies having sold the land to him, the plaintiff stated that he would be surprised if that is the case/is true. He asserted that he was not aware that the defendant was in possession of the suit property and stated that the seller should be called to shed light on those issues.
13. On whether he has any relationship with the seller, he stated he has no relationship with her.
14. As to whether he participated in the Succession Cause, the plaintiff stated that he did not.
15. In re examination, the plaintiff stated that Loice sold the land to him; that Loice is the one who pointed out the land to the defendant; that the sale agreement is for land parcel number 202 and that the dispute before court involves land parcel number 1121.
16. He admitted/acknowledged that the entire parcel was 14 ½ acres and that his parcel is 3 acres.
17. He maintained that the defendant occupied his parcel after he acquired his title.
18. He sued the defendant when the defendant came and planted trees on his land.

#### **The Defendant's case**

19. The defendant who testified as D.W.1, relied on his witness statement dated 18th June 2021 which is basically a restatement of the averments contained in his statement of defence. He produced the documents contained in his list of documents, dated 18th June 2022. These are:-
  - i. Purchase agreement dated 11th January 2009;
  - ii. Purchase agreement dated 11th May 2010;
  - iii. (a) Notice of revocation of agreement dated 25th October 2012;  
(b) Notice of revocation of agreement dated 25<sup>th</sup> October 2012;
  - iv. Photographic images of fence marking the boundary and trees grown 8 years ago;
  - v. Affidavit sworn on 5<sup>th</sup> October 2020 by the seller.
20. The defendant informed the court that the suit property was initially registered under Chebos Ruto; the father of Loice Chebos Ruto (the seller); that he is not related to the plaintiff and that he was not aware that the plaintiff had bought the suit property from Loice Ruto. He further informed the court that he was the first to purchase the land (2acres) in 2010 and that he is aware that the plaintiff has a title deed issued to him in 2020 when he was on the land.
21. Explaining that he was not present when the land was subdivided, the defendant informed the court that the plaintiff is claiming the portion where he has fenced and resides.
22. As to whether he had objection to being moved elsewhere within the 14 acres of the large parcel of land, the defendant stated that his prayer was that the owner gives him another parcel of land.



23. In cross examination, the defendant admitted that the land in dispute is not in his name and that it is registered in the plaintiff's name. He could not tell how the plaintiff acquired the title deed for the suit property.
24. Upon being referred to Pexbt 5, he stated that the court subdivided the land into 11.5 acres and 3.0 acres. Loice was given 11.5 acres while the plaintiff was given 3 acres.
25. He admitted that he neither sued Loice nor filed objection proceedings in the succession matter.
26. He maintained that he planted the trees in the suit property in 2010 and not 2020.
27. He acknowledged that the photographs he produced in evidence are undated and do not have any indication that they are in respect of the suit property.
28. Regarding Dexbt 3(b), he stated that he was to be refunded the principal amount. He could not tell why the seller wanted to refund the purchase price to him.
29. Concerning proof of payment of the purchase price indicated in his sale agreements, he stated that he has documents showing that he paid the entire purchase price.
30. D.W.1 admitted/acknowledged that the plaintiff never sold land to him but maintained that he had done development on the suit property. As to whether he had valuation in respect of the developments, the defendant stated that he did not have it.
31. In re-examination, the defendant asserted that he bought his land before the original parcel, 202, was subdivided to 11.5 acres and 3 acres. The seller, Loice, showed him his land and he had no dispute with her. He informed the court that the seller is his neighbour.
32. Concerning Dexbt 5, the defendant told the court that it shows Loice had acknowledged selling the land to him.
33. With regard to Dexbt 3(a) and (b), DW1 stated that they settled that the money (purchase price) should not be refunded and he remains on the land.
34. Concerning payment of the purchase price, he (DW1) stated that the seller, Loice, acknowledged that he paid the full price.
35. Maintaining that he was the first to purchase the suit property and contending that the plaintiff can be given another parcel of land by the seller, the defendant urged the court to dismiss the plaintiff's suit with costs to him.
36. At close of hearing, parties filed submissions.
37. It is on the basis of the above pleadings, evidence and the submissions filed by the parties, that the learned trial magistrate determined that the plaintiff had not proved his case on a balance of probabilities and dismissed it with costs to the defendant.
38. In dismissing the suit, the learned trial magistrate inter alia stated/held:-  
  
“...from the evidence adduced, the plaintiff stated that he is the registered owner of parcel number Mosop/Kapchorwa/1121. He produced a title deed to that effect showing him as the registered owner. He stated that the Interested Party had listed him as a creditor in the Succession Cause, Eldoret P & A 133 of 2012 and when the grant was confirmed he was given 3 acres of Mosop/Kapchorwa/1121.



The defendant in his evidence stated that he had bought the land from the Interested Party and he has been in occupation of the suit land until 2020 when he realized that the plaintiff had acquired 3 acres of the suit property.

The Interested Party filed an application in Eldoret P & A 133 of 2012 to have the grant issued on 19/4/2012 set aside and the matter is still ongoing. The Interested Party never testified in this case though she had made application to recall the plaintiff for purpose of cross examination.

In this case, both the plaintiff and the defendant are claiming 3 acres and 2 acres respectively from the Interested Party and each claims to have bought from her.

I have perused Form P & A 5 and noted that the plaintiff is not listed as a creditor as indicated in the submissions. In all the succession documents on record, he does not appear save for certificate of confirmation showing he was given 3 acres and now subject of proceedings which seeks to set the grant aside.

In his statement, he does not shade light as to how he had acquired the property and in cross examination, he clearly indicated he did not participate in the succession matter and he was not aware that the defendant had acquired the suit property and he was in possession since 2012.

The defendant offered a plausible and believable explanation of how he acquired the suit property.

In as much as he had the title deed for Mosop /Kapchorwa/1121 registered in his name, I find the manner in which he acquired it suspect pursuant to Section 26(1)(b) of the [Land Registration Act](#).

It is now trite law that where a title is challenged the holder or owner thereof must explain the root of the title-Daniel Kiptugen vs. Commissioner of Lands & 4 others (2015)e KLR.

In this case the plaintiff failed to explain the root of his title deed and in the circumstances, I find that he has failed to prove his case on a balance of probabilities and I proceed to dismiss his case with costs to the defendant.”

## **The Appeal**

39. Dissatisfied with the decision of the trial court, the plaintiff appealed to this court on grounds that the learned trial magistrate erred by:-
1. Failing to appreciate and find that he (the plaintiff/appellant) had proven his case on a balance of probabilities;
  2. Failing to find that the evidence on record shows that the appellant was truly the owner of the suit property (1121) and had in fact acquired registration;
  3. Failing to find that the respondent was supposed to pursue the Interested Party having purchased 2 acres out of 202 and not to cling on the appellant’s parcel;
  4. Failing to find that the appellant acquired ownership rightly having been issued with a title for 3 acres as per the consent for rectification and amended certificate of confirmation of grant;
  5. Failing to make a finding that the appellant had proved his case on a balance of probabilities and that the scales of justice tilted in favour of granting the reliefs sought in his plaint;



6. Failing to consider the evidence and submissions of the appellant;
  7. Holding that the suit parcel was fraudulently acquired by the appellant without sufficient proof by the respondent on the same contrary to Section 26(1)(a) of the [Land Registration Act](#).
40. The appellant prays that the appeal be allowed, the judgment/decision of the lower court appealed from be set aside in its entirety and judgment be entered in favour of the plaintiff/appellant as prayed in the plaintiff /appellant's plaint dated 4th September 2020. The appellant also prays that he be granted costs of the appeal and the case in the lower court.
41. Pursuant to directions given on 25th February 2025, to the effect that the appeal shall be disposed off by way of written submissions, the appellant and 1st respondent filed submissions.

### **Submissions**

#### **Appellant's submissions**

42. In the appellants submissions dated 5th May 2025 and filed on an even date, a background of the case is given and two issues framed for determination. These are:-
- a. Whether the trial magistrate erred in fact and in law in holding that the appellant failed to explain the root of his title deed thus failed to prove his case on a balance of probabilities;
  - b. Whether the pleadings filed by the 2nd respondent ought to be considered considering she failed to give her testimony in court.
43. The appellant submitted that although the 2nd respondent was enjoined in the proceedings and filed a witness statement, she did not participate in the hearing. It is the appellant's contention that the trial magistrate was wrong in relying on the 2nd respondents documentation in making her verdict. He submitted that a party who fails to call evidence in support of its case, the party's pleadings are not to be taken as evidence as they remain mere statements of fact which are of no probative value as held in the following cases:- Trust bank Limited v Universal Bank Limited & 2 Others (2009) Eklr, Rono V Lomsons Enterprises (Civil Case 5 of 2019) (2024) KEHC 6249 (KLR) and Bryson Mangla Agot & Another V Joshua Mutulili (2022) eKLR
44. He further submitted that having acquired the suit property through succession, the trial Magistrate erred in holding that the manner in which he acquired the land was suspect pursuant to Section 26 of the [Land Registration Act](#). He submitted that the 2nd respondent having failed to plead and adduce evidence on the fraudulent acts of the appellant as she purported, was sufficient to hold that the appellant legally acquired the suit property. It was his contention that fraud must be pleaded with the necessary particulars and proved to a standard beyond a balance of probabilities as held in the case of Vijay Morjaria v Nansigh Madhusingh Darber & Another (2000)Eklr.

#### **Respondent's submissions**

45. In the respondents submissions dated 30<sup>th</sup> May 2025 and filed on 9th June 2025, the respondent also gave a background of the case and submitted that the appellant was required to prove his case at the trial stage. He was required to furnish the court with evidence showing how he acquired the land. It is the respondents contention that the appellant failed to produce a sale agreement as per Section 3(3) of the Law of Contract. Having failed to prove his acquisition of the suit property, his case was dead at inception. He relied on the case of Peter Mbiri Michuki v Samuel Mugo Michuki Civil Appeal Number 22 of 2013 [2014] Eklr.



## Analysis and determination

46. 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 *Selle & another vs. Associated Motor Boat Co. Ltd* (1968)E.A 123 and *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988)KLR 348.
47. As pointed out herein above, the plaintiff instituted the suit which gave rise to the instant appeal seeking judgment against the defendant, now respondent, on the grounds listed herein above.
48. During hearing, it emerged that both the plaintiff and the defendant had purchased portions of the parcel of land known as Mosop/Kapchorwa/202 from the 2<sup>nd</sup> respondent. The plaintiff bought 3 acres while the 1<sup>st</sup> defendant bought two acres. The defendant was the first one to purchase his portion, having purchased it in 2010. The plaintiff was unable to offer an account on exactly when and how he got his interest in the suit property. That notwithstanding, from the totality of evidence adduced before the lower court, it is clear that the defendant acquired his interest in the suit property, a portion of it, first.
49. Upon subdivision of the original parcel number 202, yielding the suit property, the two acres the defendant bought were registered as part of the suit property.
50. Whilst the plaintiff is the registered proprietor of the suit property, his registration is clearly subject to an overriding interest in favour of the defendant who had already acquired interest in it. In that regard, see Section 28 of the *Land Registration Act*, 2012 which provides as follows:-
- “Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsists and affect the same, without their being noted on the register-
- .....
- j. rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law.”
51. Whilst the evidence adduced may not suffice for purpose of proving fraud against the plaintiff, it nevertheless, suffices for purpose of proving that the defendant had acquired interest in 2 acres comprised in the suit property long before the plaintiff acquired his interest in the suit property.
52. The defendant’s possession and use of the suit property having been on account of the interest he had acquired therein long before the plaintiff acquired his interest in the suit property, the plaintiff could not sustain his pleaded case against the defendant to the effect that the defendant was a trespasser in the suit property.
53. It was not demonstrated and could not be demonstrated /proven that occupation of the suit property by the defendant was unlawful and without any colour of right. The impugned occupation was pursuant to a contractual agreement between the defendant and the Interested Party from whom the plaintiff purportedly acquired his right/interest in the suit property. The case presented before the trial court was a case of two equities, of which the defendant’s equity was the first in time.



54. There is also the question of the process that led to acquisition of the plaintiff's interest in the suit property which is still active in the Succession court. In the circumstances, the learned trial magistrate cannot reasonably be faulted for determining that the plaintiff had not made up a case for being granted the reliefs sought.
55. The upshot of the foregoing is that the appeal is found to be lacking in merits and is dismissed with costs to the respondent.
56. Orders Accordingly

**DATED, SIGNED AND DELIVERED AT ITEN THIS 9<sup>TH</sup> DAY OF JULY, 2025.**

**L. N. WAITHAKA**

**JUDGE**

Judgement delivered virtually in the presence of:-

Ms. Kibet h/b for Mr. Kibii for the Appellant

N/A for the Respondents

Court Assistant: Christine

