



REPUBLIC OF KENYA



**KENYA LAW**  
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**Koima & 34 others v Mugutheli & 2 others; Wendott & 205 others (Interested Party)  
(Civil Case 102 of 1999) [2023] KEHC 23046 (KLR) (4 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23046 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE 102 OF 1999  
HM NYAGA, J  
OCTOBER 4, 2023  
IN THE MATTER OF TRUST LAND UNDER SECTION 114 AND  
SECTION 115 OF THE CONSTITUTION OF KENYA  
AND  
IN THE MATTER OF THE ANCESTRAL LAND FOR THE CHEBIR  
CLAN OF LEMBUS SUB TRIBE OF THE TUGEN**

**BETWEEN**

**CHIRCHIR KOIMA ..... 1<sup>ST</sup> PLAINTIFF  
CHEBET CHEPYEGON ..... 2<sup>ND</sup> PLAINTIFF  
KOMEN CHEPTOO ..... 3<sup>RD</sup> PLAINTIFF  
DAVID K. CHEPTOO ..... 4<sup>TH</sup> PLAINTIFF  
KIPKORIR CHEPTOO ..... 5<sup>TH</sup> PLAINTIFF  
CHIPKEITANY CHEPTOO ..... 6<sup>TH</sup> PLAINTIFF  
DAVID K. CHIRCHIR ..... 7<sup>TH</sup> PLAINTIFF  
WILSON K. YEGON ..... 8<sup>TH</sup> PLAINTIFF  
CHARLES CHEBET ..... 9<sup>TH</sup> PLAINTIFF  
DAVID BET KIBBIWOTT ..... 10<sup>TH</sup> PLAINTIFF  
CHEBURET CHEPYEGON ..... 11<sup>TH</sup> PLAINTIFF  
DANIEL C. KERIDAGOR ..... 12<sup>TH</sup> PLAINTIFF  
DAVID C. CHEBET ..... 13<sup>TH</sup> PLAINTIFF  
JOSEPH CHERONO ..... 14<sup>TH</sup> PLAINTIFF**



TALAI CHIRCHIR .....	15 <sup>TH</sup> PLAINTIFF
TALAI CHESEREM .....	16 <sup>TH</sup> PLAINTIFF
TORKOK CHEBET .....	17 <sup>TH</sup> PLAINTIFF
ALICE KIPTUI .....	18 <sup>TH</sup> PLAINTIFF
CHRISTINA KIPKORIR .....	19 <sup>TH</sup> PLAINTIFF
MILIKA KIMOSOP .....	20 <sup>TH</sup> PLAINTIFF
SAMUEL KIPKONG CHEBET .....	21 <sup>ST</sup> PLAINTIFF
JOHN CHIRCHIR .....	22 <sup>ND</sup> PLAINTIFF
BERCILA CHERONO .....	23 <sup>RD</sup> PLAINTIFF
KIMOI CHERONO .....	24 <sup>TH</sup> PLAINTIFF
KIPNGOK CHEBURET .....	25 <sup>TH</sup> PLAINTIFF
STEPHEN CHEBURET .....	26 <sup>TH</sup> PLAINTIFF
KABON KIPNGOK .....	27 <sup>TH</sup> PLAINTIFF
KABON CHEPTOO .....	28 <sup>TH</sup> PLAINTIFF
TORKOK KIPKOSGEI .....	29 <sup>TH</sup> PLAINTIFF
SIPORA CHEBURET .....	30 <sup>TH</sup> PLAINTIFF
CHRISTINA KIPTUI .....	31 <sup>ST</sup> PLAINTIFF
POULINA KIPKOSGEI CHEPTOO .....	32 <sup>ND</sup> PLAINTIFF
SUSAN KIPTUI .....	33 <sup>RD</sup> PLAINTIFF
ALICE YATOR .....	34 <sup>TH</sup> PLAINTIFF
KIPKOECH CHELANGAT .....	35 <sup>TH</sup> PLAINTIFF

**AND**

EDWARD MUGUTHELI .....	1 <sup>ST</sup> DEFENDANT
COUNTY COUNCIL OF KOIBATEK .....	2 <sup>ND</sup> DEFENDANT
ATTORNEY GENERAL .....	3 <sup>RD</sup> DEFENDANT

**AND**

**ABRAHAM WENDOTT & 205 OTHERS ..... INTERESTED PARTY**

### JUDGMENT

1. The Plaintiffs filed this suit via Originating Summons dated 11<sup>th</sup> March,1999 against the Defendants and sought the following orders: -



- I. That an order of declaration that all that piece of land in Kipkuyan Village between Mae and Emsewes and Poibokipto consisting of approximately 200 acres is Trust Land vested to the 2<sup>nd</sup> Defendant for the benefit of the persons who are ordinary resident there, namely the plaintiff otherwise known as Chebir Clan Lembus Sub-tribe of the Tugen Tribe.
  - II. That an Order of Declaration that the defendants have no right to alienate the aforesaid Land to any strangers outside the plaintiffs and their relatives the Chebir Clan unless with the consent of the aforesaid Chebir Clan
  - III. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants has a Constitutional and Statutory duty to ensure that the aforesaid Trust Land Vested in the 2<sup>nd</sup> Defendant is for the sole benefit of the plaintiffs and that they are enjoined to give effect to such rights, interests or other benefits in respect of the land under the Lembus Customary Law for the time being in force and applicable thereto, be vested in the plaintiffs and the Chebir Clan.
  - IV. That costs of this suit be granted to the Plaintiffs.
2. The Originating summons is supported by an affidavit sworn by the 1<sup>st</sup> Plaintiff, Chirchir Koima, the chairman of Chebir Clan of Lembus Sub tribe on the even date on his behalf and on behalf of his co-plaintiffs.
  3. He deposed that the land is trust vested in Koibatek County Council to be managed for the benefit of Chebir Clan and that the 1<sup>st</sup> Defendant is a government employee and a forester at Chemogon Forest Koibatek District started cultivating their ancestral land and brought in other settlers ostensibly on authority of the 2<sup>nd</sup> defendant and the Government of Kenya.
  4. He averred that the land has never been the Defendants' property.
  5. It was his averment that their land is approximately 200 acres and it is at Kipkuyan Village between Mae, Emsewes and of Poibokipto areas.
  6. He contended that despite demand to the defendants not to encroach on their ancestral land they have refused and or neglected to heed the warning.
  7. He averred that statutory notice to sue was issued to the 3<sup>rd</sup> defendant.
  8. The 1<sup>st</sup> defendant, Edward Vodohi Mugutheli, opposed the summons via his replying affidavit sworn on 19<sup>th</sup> May, 1999. He deposed that he is a forester in charge of Chemorgok Forest station and that Chemorgok Forest Station is made up of 6,030 hectares and is part of Lembus forest.
  9. The 1<sup>st</sup> defendant further averred that it is government policy to establish 'no residential cultivation schemes', this being a scheme whereby residents living around the forests are given plots in the forest to cultivate at a fee payable as revenue to the government, then residents assist the government with the weeding of trees.
  10. He averred that the plaintiffs have never been residents of Kipkuyang Village and the land they are claiming is purely a Government land.
  11. Kiplagat Kipkosegei Tingos, the Acting clerk of the 2<sup>nd</sup> defendant swore a replying affidavit in opposition to summons on 29<sup>th</sup> March, 1999.
  12. He averred the 2<sup>nd</sup> defendant was created in 1996 under Legal Notice No. 25 of the 8<sup>th</sup> March, 1996 and was mandated to manage and administer under the local Government Act (Cap 265 Law of Kenya) the areas designated under its jurisdiction.



13. It was further averred that the suit land in question is a Government Gazetted Forest and the 2<sup>nd</sup> Defendant has got no power over its alienation and or its management.
14. He contended that the rightful defendant that the plaintiffs ought to have sued is the Government of Kenya and not the 2<sup>nd</sup> defendant
15. He further asserted that the plaintiffs' application is incompetent for reasons that the plaintiffs have no identifiable interest recognized in law over the suit land for the reason that once the suit area was gazetted as a forest ,the plaintiffs' ancestral claims (if ever they existed) were extinguished and were no longer recognized in law. He also states the plaintiffs have sued the wrong party in this suit as they ought to have sued the Attorney General alone and not include the 2<sup>nd</sup> defendant which does not have proprietary interest in the suit land claimed. It was also averred that no statutory notice as required by the law was issued before the plaintiff instituted the suit. Lastly it is averred that the remedy sought against the defendants cannot be availed to the plaintiffs as the plaintiffs suit lacks sub-stratum in law. He also stated that the 2<sup>nd</sup> defendant would raise a preliminary objection before the hearing hereof on the issues raised above. He prayed that the plaintiffs' suit be dismissed with costs.
16. The third defendant raised a grounds of opposition dated 26<sup>th</sup> March,1999 in opposition of the application premised on the following grounds: -
  - i. The plaintiffs have not set out a prima facie case with possibility of success.
  - ii. That the plaintiffs have not shown the irreparable damage and/or loss they stand to suffer.
17. The third defendant, through Ezekiel Kiprono Korir, a forest conservator, swore a replying affidavit in opposition on 18<sup>th</sup> May, 1999. He averred that the suit land falls within Chemongok Forest Reserve and that the same was gazetted as Government Land Vide Proclamation Notice No.15 of 1949, and thus the land is Government land and the issue of ancestral land does not arise.
18. He deposed that as per the information of the District Forestry Officer, the plaintiffs have never settled in the area in question.
19. He contended that the originating summons is time barred under the Public Authorities *Limitation of Actions Act* Cap 39, incompetent and the orders sought do not lie against the third defendant.
20. The interested parties also filed grounds of opposition dated 31<sup>st</sup> March,1999 on grounds that: -
  - i. The suit and the Application is misconceived, incompetent and bad in law.
  - ii. The plaintiffs have no locus standi in the suit and the same ought to be struck out with costs.
  - iii. The 4<sup>th</sup> to 205<sup>th</sup> defendants have a contract between themselves and the government of Kenya and the plaintiffs ought not to be permitted to interfere with the quite enjoyment of their contract.
  - iv. The plaintiffs have no prima facie case with a probability of success.
21. The interested parties also filed a preliminary objection dated 31.3.1999 on grounds that: -
  - i. The suit herein discloses no or no reasonable cause of action and is misconceived, incompetent and bad in law and the same ought to be struck out with costs.
  - ii. That the plaintiffs have no locus standi to institute the suit.



22. Joseph Chebutuk, the 164<sup>th</sup> interested party swore a replying affidavit in opposition to summons on 31<sup>st</sup> March, 1999 on his behalf and on behalf of other interested parties.
23. He averred that he is a resident of Kewangoi village neighboring Kipkuyan village and he knows many residents of Kipkuyan and that the plaintiffs are not residents thereof.
24. Further, he asserted that even if the plaintiffs are resident of Kipkuyan village as claimed, they are not within the forest land where they are cultivating as the same has been a natural forest, vacant for many years.
25. He deposed that the suit land does not belong to the plaintiffs and he has never seen any one of them on the suit land.
26. He prayed that the plaintiffs' suit be dismissed.

### **Evidence**

27. Two witnesses only testified on behalf of the plaintiffs. PW1, was Chirchir Koima, the chairman of Chebir clan. He said many members of his clan were born in the suit land. He stated that he resides in the suit land with his children and that they were not consulted when other people were brought to the suit land. It was his testimony that the disputed land is not part of the forest and he prayed that this court declares that the same belongs to Chebir Clan.
28. PW2 was Chepet Chepyegor, grandchild of PW1. It was her testimony that all the plaintiffs are members of Chebir clan and that the land they are claiming borders the forest. She said the land they are claiming is not government land and equally prayed that this court declares the land belong to Chebir Clan.
29. The Defendants and the Interested parties did not prosecute their respective cases and this court, on 22<sup>nd</sup> May, 2023 closed their respective cases.

### **Submissions**

30. Only the plaintiffs filed their submissions. In support of their case they referred this court to the provisions of Section 4(3) and 5 of the *Community Land Act* and the case of Bahola Mkalindi Rhigo & 9 others v Michael Seth Kaseme & 3 others [2016] eKLR.

### **Analysis & Determination**

31. This suit was filed way back in 1999. The Plaintiffs have asked this court to declare that the land in dispute belong to Chebir Clan.
32. Even without going into the merits of the case the main issue that arises for determination is if this court still has the jurisdiction to determine whether the suit land belongs to the Plaintiffs.
33. To me this is an issue which falls outside the jurisdiction of this court. The right court to determine the same is the Environment and Lands Court (ELC).
34. Jurisdiction is defined in Halsbury's Laws of England (4<sup>th</sup> Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."
35. Black's Law Dictionary, 9<sup>th</sup> Edition, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.



36. The Supreme Court of Kenya in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR stated as follows: -

“ A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

37. The jurisdiction of the High Court is set out under Article 163(3) which states that the High Court shall among others, have; a) Unlimited original jurisdiction in criminal and civil matters.

38. On the other hand, the jurisdiction of the ELC Court is limited by Article 162(2) and (3) of *the Constitution* of Kenya and Section 13(2) of the ELC Act No. 19 of 2011.

39. Article 162(2)(b) states that ELC Court has the mandate to hear and determine disputes relating to use and occupation and title to land.

40. In particular, the provisions of Article 162 of *the Constitution* of Kenya 2012 provide as follows: -

- “(1) The superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts mentioned in clause (2).
- (2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to—
  - (a) .....; and
  - (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2)”.

Section 13 of the *Environment and Land Court Act* provides as follows;

“ 13. Jurisdiction of the Court

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes—
  - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  - (b) relating to compulsory acquisition of land;
  - (c) relating to land administration and management;



- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land.”

41. It follows therefore that the High Court's jurisdiction does not extend to matters relating to disputes falling Under Section 13(2) of the *Environment and Land Court Act*. In fact Article 165 (5) (c) expressly bars this court from exercising jurisdiction in matters vested in the exclusive jurisdiction of the Environment and Land Court and the Employment(ELC) and the Labour Relations Court(ELRC)
42. Land is defined under Article 260 of *the Constitution*. It includes the surface thereof, everything above and below it.
43. Black's Law Dictionary, 9<sup>th</sup> Edn; defines the word 'use' as being:-

‘the application or employment of something; esp. a long continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession or employment that is merely temporary or occasional.’ Emphasis added.
44. In *Co-operative Bank of Kenya vs Patrick Kangethe Njuguna & 5 Others* [2017] eKLR the Court of Appeal stated that for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. Therefore, land use entails the application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted.
45. No party challenged the jurisdiction of this court to determine this matter. This is mainly because the suit was filed before the promulgation of *the Constitution* in 2010 and the subsequent establishment of the two courts with equal status as that of the High Court.
46. Even when the issue of jurisdiction is not raised by the parties, the court must always satisfy itself that it has the jurisdiction in any matter before it. I have suo moto done so herein.
47. In *Anaclet Kalia Musau vs Attorney General & 2 Others* [2020] eKLR, Civil Appeal 111 of 2017, the Court of Appeal, in determining a jurisdictional issue which was never raised by the parties to the suit, stated as follows:

“The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute-barred a court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of *Nasra Ibrahim Ibren V. Independent Electoral and Boundaries Commission & 2 others*, Supreme Court Petition No. 19 of 2018, where that court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo motu. It said:

“A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent



in Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 stated thus:

“ What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...” (Emphasis supplied)

48. I fortify that view by quoting yet another passage from the East African Court of Appeal in The matter of Iga vs Makerere University (1972) E.A 62, where it was stated that;

“ The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief..... The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected.” (Our emphasis). The learned Judge in this appeal, no doubt did not err when she determined whether, by operation of the law, she had to down tools for want of jurisdiction.”

49. Jurisdiction is so central in any judicial proceedings. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. In this regard, Nyarangi, JA, in Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1 uttered these famous words;

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...”

50. As already observed above, for this court to issue the orders sought, it has to ascertain whether the disputed land belongs to the plaintiffs or the Government. This, in my view is clearly a land issue. It is a dispute relating to use and occupation and title to land which falls squarely within the ambit of Article 162(2) (b) of *the Constitution*.

51. So what happens next? Ordinarily if the court was to find that it has no jurisdiction, the next logical step would be to strike out the suit. But in this case the circumstances are different.

52. The matter was filed in 1999 before the creation of the Environment and Land Court, which came into operation in October 2012. It would thus be unjust to strike out the suit. The fairest way to handle the matter is to have the matter determined by that court.

53. Therefore, I hereby direct that this file be transferred to the ELC, Nakuru for hearing and determination. The matter to be placed before the Deputy Registrar, ELC on a date that I shall give shortly.

54. All subsequent orders shall be determined by that court.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 4<sup>TH</sup> DAY OF OCTOBER, 2023.**

**H. M. NYAGA**

**JUDGE**

In the presence of;

C/A Jeniffer



N/A for parties

