



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chepkwony v Boit (Environment and Land Appeal E021 of 2023)  
[2025] KEELC 6278 (KLR) (24 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6278 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E021 OF 2023  
MAO ODENY, J  
SEPTEMBER 24, 2025**

**BETWEEN**

**CLEOPHAS CHEPKWONY ..... APPELLANT**

**AND**

**WILSON KIPSANG BOIT ..... RESPONDENT**

*(Being an Appeal from a Judgment delivered by Hon Z.J Nyakundi  
Resident Magistrate on 15th June 2023 in Molo CM ELC No E044 of 2023)*

**JUDGMENT**

1. This appeal arises from the Judgment dated 15<sup>th</sup> June, 2023, by Hon Z.J Nyakundi, Resident Magistrate, delivered in Molo CM ELC No E044 of 2023. The Appellant herein being aggrieved by the judgment lodged a Memorandum of Appeal dated 20<sup>th</sup> September, 2023, and listed the following grounds:
  1. The Learned Trial Magistrate’s decision is contradictory, misconceived and contrary to the rule of law of natural justice and should be set aside.
  2. The Learned Trial Magistrate erred in law and facts by basing his decision/ judgement on false, flawed and misconceived assertions from the respondent.
  3. The Learned Trial Magistrate erred in law and facts in failing to give the Appellant witness a chance to testify.
  4. The Learned Trial Magistrate erred in law and facts in failing to consider the Applicant’s Counter claim. (sic)



5. The Learned Trial Magistrate erred in law and facts by failing to consider that the Applicant has been in actual possession and undisturbed on the subject land for more than 12 years. (sic)
2. The Appellant prayed that the appeal be allowed and the following orders be granted:
  - a. The Judgment of the Trial Magistrate be set aside and/or varied.
  - b. The Applicants Counter Claim in Molo E.M.C.C No E044 of 2021 be allowed.
  - c. That the Cost be in Cause.
3. The Respondent had sued the Appellant in the lower court vide a Plaint dated 22<sup>nd</sup> June, 2021, and sought the following orders:
  - a. An order that the Defendant is a trespasser as the Plaintiff is the registered owner with a Valid Title Deed.
  - b. An Order of eviction do issue against the Defendant, his agents, servants, employees and or any other person by whatsoever name claiming through the Defendant.
  - c. Costs of this suit.
  - d. Any other relief that this court may deem fit and just to grant.
4. The Appellant filed a Defence and Counter-Claim dated 28<sup>th</sup> February, 2022, in the lower court seeking the following orders:
  - a. The Plaintiff's suit be dismissed with costs together with interest thereon.
  - b. Judgment be entered for the Defendant now the Plaintiff against the Plaintiff now the Defendant for:
  - c. The Defendant now the Plaintiff be registered as the registered owner of that parcel of land known a Nakuru/Baraget Settlement Scheme/1612 which was formerly Nakuru/Baraget Settlement Scheme/304 B measuring 5 acres by virtue of adverse possession. (sic)
5. The suit was heard and determined and a Judgment was delivered on 15<sup>th</sup> June, 2023, where the court entered judgment for the Respondent against the Appellant and issued the following orders:
  - a. That the defendant is a trespasser on land parcel Nakuru/Baraget Settlement Scheme/1612 and that the plaintiff is the registered owner.
  - b. That an order of eviction do issue against the defendant, his agents, servants, employees and or any other person whatsoever name claiming through the defendant.
  - c. That the defendant do pay costs of the suit.

### **Appellant's Submissions**

6. Counsel for the Appellant filed submissions dated 26<sup>th</sup> June, 2025 and identified the following issues for determination:
  - a. Whether the Appellant's occupation satisfies the threshold of adverse possession?



- b. Whether the Respondent's title was valid in light of unresolved restrictions?
  - c. Whether the court erred by ignoring key legal procedures and evidence?
  - d. Whether due process and fair hearing were denied?
7. On the first issue, counsel submitted that the Appellant has resided on and developed the land continuously for over twelve years prior to the filing of any suit and his possession was adverse to Chumo's and later Boit. Counsel relied on Section 7 of the [Limitation of Actions Act](#) and the cases of *Wambugu vs Njuguna* [1983] KLR 172 and *Mbira vs Gachuhi* [2002] 1 EALR 137.
  8. On the second issue, counsel submitted that the restriction in Nairobi HC Misc 635/97 suspended all dealings in the settlement scheme including, the issuance of titles. It was counsel's further submission that the Respondent did not prove that the restriction was lifted and relied on Section 28 of the [Land Registration Act](#) and the case of *Daudi Kiptugen vs Commissioner of Lands & 4 others* [2015] eKLR.
  9. On the third and fourth issues, it was counsel's submission that the Appellant's counsel was present virtually and his witnesses were in open court but the court declined to hear the witness or allow virtual representation and relied on Article 50 (1) of [the Constitution](#) of Kenya and the case of *Kigera vs Kimani* [1988] eKLR.
  10. Counsel submitted that it was a gross miscarriage of justice to ignore the decree in Molo Land Case No 46 of 2016 which had not been appealed or set aside and relied on Section 60 (1a) of the [Evidence Act](#).

### **Respondent's Submissions**

11. Counsel for the Respondent filed submissions dated 1<sup>st</sup> July, 2025, and identified the following issues for determination:
  - a. Whether the Defendant/Appellant has acquired the subject property by way of adverse possession?
  - b. Whether the Plaintiff/Respondent has proved its case against the Defendant on a balance of probability to warrant the prayers sought?
  - c. Who pays the costs of the case?
12. On the first issue, counsel submitted that a claim of adverse possession cannot stand, as the Respondent has no interest in the Appellant's land known as Nakuru/Baraget Settlement Scheme/304 and there is no evidence that the same was changed to Nakuru/Baraget Settlement Scheme/1612. Counsel submitted that though the Appellant has been in actual occupation and use of the Plaintiff's land, it has never been peaceful and uninterrupted, as there have been several proceedings between the parties.
13. On the second issue, counsel submitted that the Respondent gave evidence and produced the title deed to the disputed property which was never impeached by the Appellant. Counsel relied on Section 23 (1), 24 and 26 of the [Land Registration Act](#), Section 107 (1) of the [Evidence Act](#) and the case of *Samuel Ambasa & 3 others vs Stella Ingasia* (2022) eKLR, and urged the court to dismiss the appeal with costs to the Respondent.

### **Analysis and Determination**

14. The Appellant listed five grounds in the Memorandum of Appeal, which essentially can be condensed into two grounds, namely, whether the Trial Magistrate failed to consider the Appellant's counterclaim



and whether the Appellant had acquired the suit land by way of adverse possession as claimed in the counterclaim.

15. The facts of the case are as captured in the evidence and the submissions by the parties. Based on the plaint dated 22<sup>nd</sup> June 2021 filed in the lower, court, it is the Respondent's case that sometimes in the year 2000, the Appellant unlawfully trespassed onto the suit land known as Nakuru/Baraget Settlement Scheme/1612 and put up temporary structures, cut down trees and cultivated on the suit land. It is the Respondents case that he is the registered owner with a valid title deed in respect of the suit land.
16. The Appellant, in his counterclaim dated 28<sup>th</sup> February, 2022, claimed that he is in actual possession of the suit land undisturbed by the Respondent and urged the court to register him as the proprietor of the same by virtue of adverse possession.
17. The Respondent in the trial court produced a copy of the title deed for Nakuru/Baraget Settlement Scheme/1612, a copy of an official search dated 21<sup>st</sup> January, 2013, and a copy of an assessment on environmental destruction by the Defendant. It is the Appellant's contention that the Learned Trial Magistrate erred in law and fact in failing to consider his Counterclaim. The trial court in its judgment pronounced as follows:

“The defendant in his defence informed the court that he had been in possession of the suit land up to 2012 when the plaintiff stated claiming possession. He did not adduce any evidence to prove that he had been in exclusive possession of the suit property, actual possession of the same, continuous use of the same and open possession.” (sic)

18. This excerpt of the judgment shows that the Trial Magistrate considered the counterclaim, which was a claim for adverse possession. The Appellant hinged the claim for adverse possession on fraud. Counsel submitted that Respondent obtained the title deed to the suit land in the year 2005 fraudulently, as there was a restriction vide a court order issued in 1997 which order had not been lifted. Counsel further submitted that the Respondent colluded with the Surveyor to change the parcel No. from 304 B to 1612.
19. In a claim for adverse possession, a party must acknowledge the ownership by the person of whom they claim to have acquired the land through adverse possession. You cannot be heard to assert that the land was acquired illegally or fraudulently and in the same breath as the court to grant you orders that you have acquired the same by way of adverse possession. The claim would suggest that the root of the title is tainted therefore you cannot benefit from a tainted title.
20. In the case of Haro Yonda Juaje v Sadaka Dzenge Mbauro & Kenya Commercial Bank (2014) eKLR, the Court held that:

“One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered *Land Act* and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.”



21. The Appellant falls in the category of a claimant who wants the court to declare that he has acquired the suit land vide the doctrine of adverse possession without acknowledging that the Respondent is the registered owner of the suit land. Once you have alleged fraud, then the claim of adverse possession cannot be tenable, as the law does not allow a party to benefit from a tainted title. The allegation of fraud must also be proved and not merely mentioned that there was fraud. It must be specifically pleaded also.
22. It therefore, follows that the Appellant's claim cannot succeed. The Trial Magistrate considered all the issues before him and came to the right conclusion that the Respondent was the rightful owner of the suit land hence the Appellant was a trespasser.
23. The upshot is that the Appeal lacks merit and is therefore dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**M. A. ODENY**

**JUDGE**

