



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

ELCA NO. E 015 OF 2024

JACKSON KIBET

KIPLAGAT.....APPELLANT

VS

**RONALD KIPCHUMBA MUTAI.....1ST
RESPONDENT**

**NIMROD KIPTOO KIMUTAI.....2ND
RESPONDENT**

**HILLARY KIPROTICH KIMUTAI.....3RD
RESPONDENT**

JUDGMENT

***(Being an appeal from the Judgement of Hon. V
Karanja PM delivered on 16th September, 2024 in
Iten MCELC No. E001 of 2022)***

Introduction

1. By a plaint dated 9th May 2022 and filed on 12th May 2022, the plaintiff, now appellant, instituted a suit in the lower court to wit Iten SPMCC No. E001 of 2022 seeking judgment against the defendants, now respondents, for: -

- a) A temporary order of injunction restraining the defendant by himself, his agents or servants from entering, remaining, cultivating, subdividing, selling or in any way interfering with his quiet enjoyment of the parcel of land known as Kabiemit/Flax Block 1 (Chepkorio)142 measuring approximately 1.860 ha (hereinafter referred to as the suit property);**
- b) A mandatory order of injunction restraining the defendant by himself, his agents or servants from entering, remaining, cultivating, subdividing, selling or in any way interfering with his quiet enjoyment of the suit property;**
- c) Costs of the suit;**
- d) Any other relief that the honourable court may deem fit and just to grant.**

-
2. The appellant's claim was premised on the grounds that he is the registered proprietor of the suit property; that he purchased/bought the suit property from Edward Limo Chebor (hereinafter referred to as "the seller"); that the suit property was legally transferred to him and that the defendants/respondents had interfered with his rights over the suit property by threatening him with dire consequences should he set foot on the suit property.
 3. Lamenting that his efforts to get the respondents stop the actions complained of had been futile and terming the actions of the respondents complained of trespass to land, the appellant filed the suit hereto seeking the reliefs listed herein above.
 4. The defendants/respondents filed a statement of defence and counterclaim, dated 29th September 2023 in which they deny the allegations levelled against them and aver that their father, Andrew Kimutai Chepyator (now deceased) bought one acre of land from the seller; that the 1 acre bought by their father

was to be hived from the suit property; that their father bought the one acre way before the seller sold the suit property to the appellant; that they had been in continuous use of the suit property from 2003 and that the appellant purchased the suit property knowing very well of their existence and their overriding interest in the suit property.

5. Terming the action of the plaintiff of buying the suit property while knowing about their overriding interest in the suit property a fraudulent action calculated at defrauding them, the respondents contended that the seller held the suit property in trust for them and that the seller had no capacity to sell the suit property to the appellant.
6. The defendants/respondents averred and contended that on account of their possession of the suit property for a period exceeding 12 years, they had acquired the suit property by way of adverse possession.
7. By way of counterclaim, the defendants/respondents sought judgment against the appellant for: -

-
- i) A declaration that the 2nd defendant in the counterclaim (Edward Limo Chebor) held 1 acre of the suit property in trust for their father, Andrew Kimutai Chepyator;
 - ii) A declaration that the 2nd defendant in the counterclaim, Edward Limo Chebor, had no capacity to sale the 1 acre of the suit property held in trust of the estate of Andrew Kimutai Chepyator;
 - iii) A declaration that the defendants in the counterclaim conspired to defraud the estate of Andrew Kimutai Chepyator of his 1 acre of the suit property;
 - iv) A court order directing the 1st defendant (the plaintiff in the main suit) to effect transfer of one acre to the estate of Andrew Kimutai Chepyator for the benefit of his dependants, failure to which the court executive officer to sign the transfer forms in place of the estate of the deceased;
 - v) A declaration that the plaintiffs in the counterclaim have acquired the 1 acre by adverse possession;
 - vi) Costs of the suit and interest at court rates.

-
8. The appellant filed a reply to defence and a defence to counterclaim denying the allegations contained therein and reiterating his pleaded case.
9. When the suit came up for hearing, parties led evidence in support of their pleaded cases and, at close of hearing, filed submissions in support of their respective cases.
10. Upon considering the cases urged by the parties before her, the learned trial magistrate *inter alia* stated/held: -
“...In this case the plaintiff is registered owner of the suit land...as per the copy of title deed Pexbt 1. The defendants stated that their deceased father, Andrew Limo, had purchased 1 acre of the suit land and have been in occupation for over 20 years...

The defendants in the counterclaim claimed fraud on the plaintiff and Edward Limo. They stated that Edward Limo sold the land to the late Andrew Limo and his children DW3 and DW4 confirmed to have witnessed their father receiving Kshs. 130,000/- from the late Andrew

Limo and he wanted to refund the money with interest and wrote a cheque of Kshs. 260,000/- which he declined. He had sold the entire land to the plaintiff including the one acre already sold to the late Andrew Limo. This is a clear case of fraud on the part of the 2nd defendant (Edward Limo) in the counterclaim...

Having established fraud on the part of the 2nd defendant in the Counterclaim, it therefore follows that the title held by the plaintiff is challengeable under section 26(1)(b) of the Act. I therefore find the plaintiff has not proved his case on a balance of probabilities and the orders sought cannot issue. I dismiss his suit with costs to the defendants.

On the counterclaim by the defendants, plaintiffs in the counterclaim, the plaintiff stated that the defendants do not have locus to institute the suit as the grant *ad litem* only allowed them to prosecute MCELC 369 of 2012 (Dexbt 10). I have perused the grant *ad litem* and a reading of Section 54 and 55 of the Law of Succession Act

provides for such grant to institute suits and it would be absurd for the defendants to apply for another grant to represent the same estate of the deceased. Article 159(2)(d) of the constitution cures the technicality raised by the plaintiff. I hold that they do have locus to prosecute this suit...

In this case the defendants (plaintiffs in the counterclaim) stated that they fenced off the land and planted trees on the suit property having paid the full purchase price over 20 years ago...From the foregoing I find that the defendant (plaintiff in the counterclaim) have proved adverse possession for the 1 acre piece of the suit land. The upshot of the above is that the defendants (plaintiffs in the counterclaim have proved their counterclaim on a balance of probabilities and I do enter judgment in their favour as against the plaintiffs (defendants in the Counterclaim) and grant them orders (a), (b), (d), (e), (f) of the counterclaim."

-
11. Dissatisfied with the judgment/decision of the trial court, the plaintiff appealed to this court on the grounds that the learned trial magistrate erred by: -
- i) Inferring and/or purporting there was a sale agreement in respect of the suit property ignoring glaring evidence that no formal agreement for sale was produced;
 - ii) Inferring a sale agreement and admitting insufficient evidence to corroborate the insinuation;
 - iii) Holding that the 2nd defendant/respondent held 1-acre of Kabiemit/Flax Block 1/Chepkorio/142 in trust for the estate of Andrew Kimutai Chepyator;
 - iv) Ignoring evidence that the 1 acre in the suit was only but a security to the loan advanced which the respondent declined settlement;
 - v) Finding that Edward Limo had no capacity or right to sell the suit property against his constitutionally protected right to property;
 - vi) Purporting to pronounce judgment in Eldoret Case Number MCCC E369/2021 in favour of the estate of Andrew Kimutai Chepyator despite the fact that

the respondents failed to prosecute the matter
which was eventually dismissed;

- vii) Referring to a nonexistent case MCELC E369/2021 at paragraph 11 and 12 of the judgment;
- viii) Referring to a none existent party to the suit called Andrew Limo;
- ix) Finding that the appellant conspired to defraud the estate of Andrew Kimutai Chepyator;
- x) Finding or alleging there were developments, dwellings or anything else in the suit property without doing a site visit and or ignoring fact that there was in fact no trees in the suit property. The respondents produced pictures of trees planted on the road reserves. The learned court ignored evidence that the trees that were planted on the road reserves were in fact planted after the appellant, a bona fide purchaser for value, had purchased the suit property. The trees are barely two years old and the fence is very new;
- xi) Finding that the respondents had proven adverse possession and ignoring the fact that the vendor to the appellant did in fact consent to use of the land

by Andrew Kimutai Chepyator as security for the loan but never had intention to sell off 1 acre;

- xii) Finding that the respondents only cultivated the suit property with permission of previous owner, Mr. Edward Chebor;
- xiii) Finding that a purported meeting was conducted by the respondents to discuss and write down minutes regarding a property without the presence of the owner of the property,
- xiv) Edward Chebor. The purported minutes do not mention members from the family of the Andrew Kimutai Chepyator;
- xv) Ignoring the fact that the respondents had no *locus* to represent the estate having not been granted letters of administration *ad litem* to defend the suit.

12. The appellant prays that the appeal be allowed; that an order of stay of execution be granted to the orders and judgment by Hon. Karanja Virginia PM on 16th September 2024 at the Chief Magistrate's court at Iten; that the orders and judgment issued by Hon. Karanja Virginia PM on 16th September 2024 at the Chief

Magistrate's court at Iten be set aside and that the cost of the appeal be awarded to him.

13. Pursuant to directions given on 5th June 2025 the appeal was disposed of by way of written submissions.

SUBMISSIONS

Appellant submissions

14. The appellant filed submissions on 4th June, 2025 and identified four issues for determination. These are; -
- a) Whether 1 acre of the suit property, Kabiemit Flax Block 1 (Chepkorio) 142, was sold to the late Andrew Kimutai Chepyator;
 - b) Whether fraud was proved or not;
 - c) Whether adverse possession was proved or not.
 - d) Whether the Magistrate Court had jurisdiction to determine the matters relating to the doctrine of adverse possession.
15. On whether one acre of the suit property was sold to Andrew Chepyator, he submitted that money was exchanged between Andrew Chepyator and Edward

Chebor but the money was a loan and the one acre was used as collateral. He relied on **Section 3(3)** of the law of Contract Act and the cases of **Mbucho (acting on his own behalf and as the personal representative of the estate of Teresiah Munji Mbucho-deceased) & 2 others v Muhia & ano. Environment and Land Appeal E040 of 2021 [2023]** and **Said v Shume & 2 Others [2024]**.

16. On whether fraud was proved, the appellant denied any involvement in fraud and relied on the cases of **John Getao v Simon Mokare & 4 others [2017] eklr** and **Saad Otieno v James Muga Ogoda [2021]**
17. On whether adverse possession was proved, he faulted the trial court for holding that the one acre could be adversely possessed by the respondents who had gained possession after being allowed by the original owner. He submitted that adverse possession can only arise out of non-permissive possession and relied on the cases of **Lewa v Mwangandi (2015) eklr** and **Mbui v Maranya (1993) eklr**.

18. On whether the Magistrate Court had jurisdiction to determine the matters relating to the doctrine of adverse possession, he submitted that the Magistrate Court has no jurisdiction and placed reliance on the case of **Sugawara v Kiruti & 3 others Civil Appeal E141 OF 2022 [2024]**.

Respondents' submissions

19. In their submissions filed on 7th July, 2025 the respondents identified the following as the issues for determination.

1. Whether the one-acre parcel suit was sold to Andrew Kimutai Chepyator (deceased) and if so;
2. Was the suit property held in trust for the benefit of the estate of Andrew Kimutai Chepyator (deceased) and
3. Who should pay costs.

20. The respondents relied on the cases of **Heartbeat Limited v Ngambwa Heartbeat Community Children's Home & Rescue Centre [2018] e KLR,**

Gatimu Kinguru v Muya Gathangi [1976] KLR 253, Section 27 of the Civil Procedure Act the case of **Party of the Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR**, **quoted** the case of **Levben Products v Alexander Films (SA) (PTY Ltd 1957 (4) SA 225 (SR)**.

Analysis and determination

21. 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**.

22. From the grounds taken up in support of the appeal
—and the submissions by the parties, I have identified
the following as the issues for determination by this
court: -

- i) Whether the respondents proved that their father, Andrew Kimutai Chepyator, bought one acre from the parcel of land known as Kabiemit Flax Block 1 (Chepkorio)/142 from its owner, Edward Limo, way before the appellant bought the whole of the suit property;
- ii) Subject to the outcome of (i) above, whether the sale was vitiated by lack of a written agreement between the buyer and the seller?
- iii) Subject to the outcome of (ii) above, whether upon sell of the one acre comprised in the suit property, the seller held the sold portion in trust for the buyer, Andrew Kimutai Chepyator;
- iv) Subject to outcome of (iii) above, whether the seller committed fraud by selling the one acre he had sold to the appellant?
- v) What orders should the court make.

23. On whether the respondents proved that their father, Andrew Kimutai Chepyator, bought one acre from the parcel of land known as Kabiemit Flax Block 1 (Chepkorio)/142 from its owner, Edward Limo, way before the appellant bought the whole of the suit property, the appellant submits as follows: -

“...the evidence of the respondents centered on hearsay. From the evidence that was presented to the trial court, the respondents together with the four witnesses confirmed non-existence of a sale agreement attested between Mr. Edward Chebor and the respondent’s father Andrew Chepyator (deceased) relating to the suit property...none of the wives of Mr. Edward Chebor and the wife to the late Andrew Chepyator contested the sale and transfer to the appellant....

Notably, while the defendant, respondent herein, alleged that the money exchanged was purchase price for the said part measuring 1 acre of the suit property, they failed to produce any other documentation such as official search, sketch map demarcating the property boundary or sale

agreement to support the purported sale, which is vehemently denied by the original owner of the suit property, and as such wants to suggest that the land can be sold in a similar manner vegetables are sold...

In view of the above fact that no sale agreement was presented before the trial court, the honourable court erred in law and fact to assert PW2 had no capacity to sell the suit property registered solely in his name as an absolute owner and that he was holding the land in trust of the estate of the deceased. We submit that in the absence of a written sale agreement between the respondents deceased father and PW2, no trust was created constructed or otherwise.”

24. On that issue, the respondents have submitted as follows:

“...the respondents’ witnesses DW3 and DW4 testified that they witnessed Edward Limo Chebor received Kshs. 130,000/- from Andrew

Limo (deceased). It was also their testimony that the said Kshs. 130,000/- was part payment for purchase price of the suit parcel....it is not in dispute that there was exchange of money between the late Andrew Kimutai Chepyator and the original owner of the suit land, Edward Limo Chebor...PW2 maintained that the money was a loan advanced with the said portion measuring 1 acre. The said PW2 went ahead to produce before this court a letter dated 28/7/2021 (found on page 136 of the record of appeal) and the letter was cancellation of a sale agreement touching the suit property. That alone...is clear proof that there was an existing sale agreement transaction involving Edward Limo Chebor and the late Andrew Kimutai Chepyator. To add to the letter mentioned above is a cheque of Kshs 260,000 dated 26/7/2021 at pages 114-115 of the record of appeal is nothing but confirmation that PW2 after receiving proceeds of sale he decided to arm twist the respondent who was already in possession of the 1 acre for more than 20 years. It is good to note that the appellant purported

sale agreement is dated 4th March 2021....DW2 and DW4 are son and daughter of PW2 (Edward Limo Chebor) who testified that they witnessed the sale and subsequently there was a family meeting where it was resolved that the appellant be given the suit parcel measuring 1 acre (see page 130 of the record of appeal....”

25. I have reviewed the above submissions vis-a vis the oral and documentary evidence adduced in the lower court in respect thereof. Whilst no sale agreement was produced before the lower court, there is ample evidence that there was indeed a sale agreement between Edward Limo Chebor (P.W.2) and the respondents’ father, Andrew Kimutai Chepyator. That fact is borne out in the testimony of PW2, upon cross-examination in that he stated: -

“Kshs. 260,000/- was for refund. He had failed to complete the balance of the 5 acres. I refunded the money to him and decided to sell the land to someone else.”

-
26. The testimony of PW2, when read alongside the letter dated 19th April 2021, **Dexbt 7** and the letter dated 12th March 2021-**Dexbt 8**, clearly shows that there was an agreement for sale of the suit property to the respondent's father.
27. The only issue that arises from that evidence is whether the agreement was for sale of the entire parcel measuring 6 acres or for sale of 1 acre as contended by the respondents. Be that as it may, I find the nature of transaction entered into between PW2 and the respondent's deceased father to have been a sale of land transaction as opposed to a lease agreement or money renting agreement as claimed by the appellant. Consequently, I return a positive verdict to the issue as to whether the respondents proved that their father, Andrew Kimutai Chepyator, bought one acre from the parcel of land known as Kabiemit Flax Block 1 (Chepkorio)/142 from its owner, Edward Limo, way before the appellant bought the whole of the suit property.

28. As to whether the sale was vitiated by lack of a written agreement between the buyer and the seller, based on the provisions of **Section 3(3)** of the Law of Contract Act and the decision in the case of **Mbucho (acting on his own behalf and as the personal representative of the estate of Teresiah Munji Mbucho-deceased) & 2 others v Muhia & another (Environment and Land Appeal E040 of 2021) (2023)KEELC 20940 (KLR)**, the appellant submits that in the absence of a written sale agreement the learned honourable court erred in law and fact to assert that PW2 had no capacity to sell the suit property registered in his name as the absolute owner and that he was holding land in trust of the estate of the deceased.

29. The evidence adduced in this case comprised in letters produced in evidence by the respondents shows that the sale agreement entered into between the respondent's father and PW2 was entered into way before the Law of Contract Act was amended in 2003 to introduce the formalities the appellant seeks to rely on. Before then, even an oral contract for sale of land

backed by evidence capable of proving existence of the agreement sufficed. In that regard see the case of **Peter Mbiri Michuki vs. Samuel Mugo Michuki (2014)e KLR** where the Court of Appeal stated/ held:-

“We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the plaintiff/respondent had to satisfy the trial court that he either took possession of the suit property in part-performance of the said oral contract or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-evaluated the evidence, we concur with the finding of the learned judge that the plaintiff/respondent proved that he had actual possession of the suit property since 1964 and the possession was open, uninterrupted and continuous till the filing of originating summons by the plaintiff in 1991. It is our view that section 3(7) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part-performance.

We find that section 3(3) of the Law of Contract Act came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3(3) of the Act came into force. The proviso to Section 3(3) of the Law of Contract Act applies in the case and we hold that the sale agreement between the appellant and the plaintiff did not violate or offend the provisions of the Law of Contract Act.”

30. In the circumstances of this case, where the sale agreement was entered into before the Law of Contract Act came into force, the appellant cannot rely on that section of law to defeat the respondents’ claim to the suit property.
31. On whether upon sale of the one acre comprised in the suit property, the seller (PW2) held the sold portion in trust for the buyer, I adopt the decision in the case of **Kabui v Kabui (Civil Appeal 415 of 2018) (2024) KECA 1396 (KLR) (11 October 2024) (Judgment)** where it was stated/held: -

“...Ultimately, we find that indeed upon settlement of the purchase price, the respondent held a constructive trust in favour of the appellant. It was therefore imperative upon her to secure the interests of the appellant when she obtained a title deed on 15th December 1997.”

32. The court adopted the pronouncements of the Supreme Court of Kenya in **Shah & 7 others vs. Mombasa Bricks & Tiles Limited & 5 others (2023) KESC 106 (KLR)** where the Court stated/held: -

“While sections 25, 26 and 28 of the Land Registration Act recognized that rights of a registered proprietor of land were absolute and indefeasible, those were only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests included trusts. In the absence of any limitation as to trusts, that included constructive trusts. Applying the provisions of Article 24 of the constitution therefore, the limitation of the right to property was provided under law, and included a constructive trust. Section 28 of the

Land Registration Act provided that registration was subject to overriding interests. One of the overriding interests was a trust, which included constructive trust...Constructive trust could arise in various circumstances, including in land sale agreements. A trust was an equitable remedy which was an intervention against unconscionable conduct. Where the circumstances of the case were such that it would demand that equity treated the legal owner as a trustee, the law would impose a trust..."

33. As to whether the seller committed fraud by selling the one acre he had sold to the appellant, the evidence adduced before the lower court shows that the seller sold the suit property knowing very well that he had sold it to the defendant's father. There is no indication that he informed the defendant's father that he intended to sell the whole of the suit property on account of his alleged failure to complete payment of the purchase price. By selling the suit property without involving the defendant's father, when he knew of the

defendant father's interest in it, the seller acted fraudulently.

34. In law, fraud is defined as intentional deception to deprive a victim of a legal right or to gain from a victim unlawfully or unfairly.
35. In view of the foregoing, I find and hold that the seller acted fraudulently when he sold the suit property to the plaintiff/appellant against the interest of the defendants'/ respondents father's interest therein.
36. The upshot of the foregoing is that this appeal lacks merit and is for dismissal. Consequently, I dismiss it with costs to the respondents.
37. Orders accordingly.

Dated, signed and delivered virtually at Iten this 24th day of September, 2025.

**L. N. WAITHAKA
JUDGE**

Judgment delivered virtually in the presence of:-

Mr. Mulama for the appellant

Ms. Mutai for the respondents

Court Assistant: Christine