



REPUBLIC OF KENYA



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**Cheboswony & another v Kiplimo (Environment and Land Appeal
E004 of 2025) [2025] KEELC 18543 (KLR) (18 December 2025) (Judgment)**

Neutral citation: [2025] KEELC 18543 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
ENVIRONMENT AND LAND APPEAL E004 OF 2025**

**L WAITHAKA, J
DECEMBER 18, 2025**

BETWEEN

KIMOI CHEBOSWONY 1ST APPELLANT

SAMUEL CHEBOSWONY 2ND APPELLANT

AND

DANIEL KIBET KIPLIMO RESPONDENT

*(Being an Appeal from the Judgement of Hon. Kosgey SPM delivered
on 6th December 2024 in Kabarnet CMC ELC No. 2 of 2020)*

JUDGMENT

Introduction

1. By a plaint dated 6th February, 2020, the plaintiff (now respondent) instituted a suit in the lower court to wit Kabarnet PMC ELC Case No. 2 of 2020 seeking judgment against the defendants, now appellants, for an order of permanent injunction restraining the defendants, their servants, representatives and/or agents or otherwise howsoever from entering and/or trespassing upon and/or in any manner whatsoever dealing with the land parcel known as Chapchap/Kaptarakwa/553 (the suit property). In alternative the respondent sought an order of eviction.
2. The respondent's pleaded case was that at all material times to the suit, he was the registered proprietor of the suit property; that on or about 2009, the appellants unlawfully invaded, trespassed and/or encroached on to the suit property and violently evicted him therefrom.
3. Terming the actions of the appellants complained of unlawful and without any colour of right, the respondent averred that he had suffered loss and damage (he was unable to access or develop the suit property).



4. The respondents filed a statement of defence and counterclaim dated 15th May 2023, in which they denied the allegations levelled against them and averred/ contended that they had been living in the suit property peacefully for over 40 years; that the suit property belongs to them (was held in trust for them) and that the plaintiff's suit was statute barred. By way of counterclaim, the appellants sought judgment against the respondent for:-
 - a. A declaration that the suit property belongs to the Estate of the late Cheboswony Chepkangor which estate they represent;
 - b. An order for cancellation of the title deed that was issued to the plaintiff in respect of the suit property;
 - c. An n order for issuance of a new title deed for the suit property in favour of the 1st appellant;
 - d. Costs of the suit and interest.
5. The respondent filed a reply to defence and defence to counterclaim dated 29th June, 2023 (not in the record of appeal) in which he reiterates the averments in his plaint and denies the appellants' claim/contention that the suit property was purchased by the late Cheboswony Chepkangor from Chebotibin Morogo; that they had been residing in the suit property for over 40 years and that his grandfather held the suit property in trust for them. The respondent further denied the appellants' claim and/or contention that the suit was statute barred and contended that the appellants' trespass is not subject to *Limitation of Actions Act* as it is continuous.

Evidence

Plaintiff's case

6. When the case came up for hearing, the plaintiff who testified as PW1, led evidence to the effect that the appellants entered the suit property in 2002 with the permission of his father and that he had never lived in the suit property. It is noteworthy that the testimony of the plaintiff is a total departure from his pleaded case that the appellants unlawfully entered the suit property in 2009 and that the appellants forcefully evicted him from the suit property. I will revisit this issue of departure from pleadings later.
7. Chepkeitany Tiwira (PW2) corroborated the evidence of PW1 to the effect that the appellants entered the suit property in 2002 with the permission of the respondent's father.
8. Philip Chesaina Chepchieng (PW3) informed the court that the 1st respondent entered the suit property in 1992 and that in 2007, elders resolved that Cheboswony bought land from someone with no land in the area, Chebotibin Morogo. He could not tell whether there was any transaction between Chebotibin Morogo and Chepkangor. He further informed the court that the elders told Morogo's family to compensate Cheboswony's family as their father sold none-existing land.

Defendant's case

9. DW1 Donald Sammy Cheboswony, informed the court that the suit property belongs to his father; that he was born and bred on the suit property and no one else other than his family has lived on the suit property including the respondent; that the respondent's father and/or his brothers never complained about their use and occupation of the suit property. DW1 further informed the court that his father informed them that he bought the land from Chebotibin Morogo.



10. DW2 Kimoi Chepkangor, informed the court that the suit property belongs to her husband; that she had lived in the suit property for over 60 years and that her husband bought the suit property from Chebotibin Morogo. Like DW1, she stated that the respondent had never lived in the suit property.
11. DW3 Toyoy Cheboswony, corroborated the testimony of DW1 and DW2 to the effect that they had lived in the suit property for a long period of time and that their occupation is based on a claim of right arising from alleged sale of the suit property to their husband/father by Chebotibin Morogo.
12. DW4 Kiplagat Chererem, led evidence to the effect that the suit property was bought by Cheboswony Chepkangor from Chebotibin Morogo in 1967 way before land adjudication and that the suit property was registered in the name of Chelimo (respondent's grandfather) because Cheboswony was away during Land Adjudication. In effect, his testimony is that the respondent's grandfather held the suit property in trust for the appellants.
13. At close of hearing parties filed submissions.
14. Upon considering the case urged before her, the learned trial magistrate determined that the plaintiff/respondent had proved his case on a balance of probabilities and entered judgment in his favour. He also found the appellants' defence and counterclaim to be lacking in merits and dismissed it.
15. Dissatisfied with the decision of the trial court, the appellants appealed to this court on the grounds that the learned trial magistrate erred by:-
 - i. Finding that the plaintiff had proved his case on a balance of probability and finding that the defendants counterclaim was unmerited and therefore dismissed;
 - ii. Failing to consider the appellants' statement of defence, written submissions and more critically the counterclaim which would have adduced the elements of customary trust and adverse possession as the considerable grounds for the defendant's claim to title;
 - iii. Failing to identify that the plaintiff had pleaded being violently evicted from the suit land yet in cross examination he contradictorily admitted to have never lived in the land thus a fact collaborating the defendants' case that the plaintiff and/or his grandfather had not been in occupation of the suit land since 1981 or any time at all;
 - iv. Basing her findings entirely on the plaintiff's registration as the proprietor as an indefeasible ownership yet it is established law, registered title can be legitimately overridden by particular recognizable interest such as customary trust and adverse possession which are manifesting from defendants' facts of the case;
 - v. Decreeing that the plaintiff is the rightful and registered proprietor of the suit land yet there are arguable and compelling evidence challenging the root of title as required by plaintiff's grandfather whom he purports to inherit from;
 - vi. Failing to ascertain the regularity of the grant of letters of administration leading to the plaintiff being registered as the proprietor of the suit land yet the record of succession shows no other dependant of the plaintiff's grandfather being involved other than the plaintiff yet there are other dependants legitimately beholden and having tendered no renunciation to their share of the estate and others even distancing themselves from the kin's, plaintiff, claim on the suit land;
 - vii. Failing to take cognizance of the plaintiff's relatives refusing to take up the stand nor back the claims of the plaintiff as they are aware of the defendants' interest in land, a matter testified by witnesses brought before court.



- viii. Concluding that the defendants moved out of the land after the landslide yet no sufficient evidence to attain and tilt balance of probability was presented by the plaintiff;
- ix. Failing to sanction a ground visit to best establish the assertions of the defendants that the adjacent land, which is alleged to have been affected by landslide and also alleged to have been inhabited by the defendants was sloppy and not habitable.
- x. By surmising PW1, PW2 and PW3 all testified uniformly to the 1st defendant moving to the suit land in 2002 due to a land slide yet it was only PW2 who stated so, as PW3 asserted that the 1st defendant entered the land in 1992 while the evidence on record shows no assertion to that effect by PW1 on the matter;
- xi. Failing to conclusively assess the evidence on record on when did the defendants and the late Cheboswony Chepkangor take occupation and possession of the land given the contradicting position of the parties;
- xii. Failing to consider the testimony of PW3 and PW4 who were witnesses in the alleged sale agreement thus denying the court opportunity to interrogate and consider the veracity of the land sale agreement and consideration paid to Chebotibin Morogo yet it was fundamental matter in asserting customary argument for the defendants;
- xiii. Only analyzing the assertion of the plaintiff and disregarding the contentions brought by the defendants' facts that align and potentially suffice as customary trust and adverse possession doctrines properly overriding the registered title of the plaintiff;
- xiv. Misconstruing that only brothers can hold property in trust for each other yet there is no known basis in law; in fact; the prevailing law interprets that a purveyor of customary trust requires just a proximal and not so remote relationship even cousins like the 2nd defendant's father and the plaintiff's father who were agemates suffice;
- xv. Going into extraneous evaluation and conclusion of matters not relevant to the case by asserting that the 2nd defendant's father ought to have objected or complained of the suit land adjudication to the plaintiff's grandfather;
- xvi. By requiring the 2nd defendant's father to have objected the adjudication to the plaintiff's father yet the basis of customary trust is trust and comradeship bereft of suspicion and agreement to act fiduciary in behalf of another hence no need for objection where no ill motive is anticipated;
- xvii. Failing to appreciate that customary trust premised on one person holding land on behalf of another was a common practice worth taking of judicial notice thus there was no cause of alarm and objection to have the 2nd defendant's land be registered in the name of the plaintiff's father;
- xviii. Presuming more so a statutory limit prerequisite, where none exists, for time bound, urgent and prompt registration of land held under customary trust to require the 2nd defendant's father to statutorily register the land in his name within a certain period;
- xix. Finding that the land belonged to the family of the plaintiff through a resolution dated 27th april 2009 by the assistant chief and a resolution by the elders in 2007, processes strange and alien to any known kenya laws as no such jurisdictional competence lies on the chief or elders to conclude such matters of ownership and any other interests in land;



- xx. Unjustifiably finding that the plaintiff's father was adjudicated the land in opposition to Chebotibin Morogo yet no premise and path of how she arrived at such finding is persuasively enumerated in the impugned judgment;
 - xxi. Appearing to lay unnecessary and misconstrued credence that the 1st defendant's sons had not built on the suit land yet the 1st defendant, being the mother of the 2nd defendant, lived on that land and raised her children therein and has tangible claim over the land as a dependant/beneficiary of her late husband's Estate.
16. The appeal was disposed of by way of written submissions.

Submissions

Appellant's submissions

17. In their submissions filed on 9th October 2025, the appellants have submitted that the title held by the respondent is impeachable under section 26 of the *Land Registration Act*, 2012 because it was obtained by fraud. In that regard, the appellants' point out that the respondent filed succession proceedings for the estate of his deceased grandfather without involving the other beneficiaries of the Estate, his siblings and parents; that registration of the respondent's grandfather as the proprietor of the suit property was subject of a customary trust in their favour and that they had acquired the suit property on account of having been in use and occupation of the suit property peacefully and without the permission of the owner for a period exceeding 12 years.

Respondent's submissions

18. In his submissions filed on 12th November, 2025 the respondent has submitted that he established that his late grandfather was the lawful owner of the suit property; that he lawfully obtained the suit property through succession proceedings and that he demonstrated that the presence of the appellants on the suit property was pursuant to permission granted to them by his late father. Further, that the contention by the appellant that the suit property was bought by their father/husband was unfounded and an afterthought.
19. Concerning the appellant's claim or contention that he acquired title to the suit property, the respondent submits that the appellants have not proved that allegation.
20. Maintaining that the appellants' presence on the suit property was on account of permission granted to them by his father, the respondent submits that the appellants' claim that the suit property was held by his grandfather in trust for them is untenable and unfounded. The respondent further submits that the appellants did not prove that the suit property was bought by their father/husband.
21. It is the respondent's case that no reasonable grounds/reasons were given as to why the suit property was not recorded in the name of the appellant's father/husband if indeed he had acquired interest in it before land adjudication.
22. The respondent further submits that the case of fraud urged against him was neither properly pleaded nor proved to the required standard of proof.
23. The respondent further submits that the appellants' claim to entitlement of the suit property is unmaintainable because they had not pleaded that they are entitled to the suit property on account of having been in adverse possession thereof and that the lower court lacked jurisdiction to hear and determine a claim to entitlement of land arising out of adverse possession.



24. In conclusion, the respondent submits that the learned trial magistrate addressed herself substantively on the issues raised by the parties and came to the correct conclusion that the respondent was the lawful owner of the suit property. He urges this court to uphold the lower court judgment and dismiss the appeal with costs.

Analysis and determination

25. 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.
26. From the pleadings filed in the lower court, the evidence, the judgment of the lower court the memorandum of appeal and the submissions by the parties to the appeal, I find the issue for the court's determination to be whether either of the parties proved their pleaded case to the required standard.
27. Concerning that issue, as pointed out herein above, the respondent's pleaded case was that sometime in 2009 or thereabouts, the appellants without any colour of right unlawfully invaded, trespassed and/or encroached into the suit property and violently evicted him therefrom thereby occasioning him loss and damage.
28. During hearing, it emerged that the appellants had been in use and occupation of the suit property long before the alleged invasion or trespass into the suit property. According to the respondent's testimony, which testimony is a departure from his pleaded case, the appellants were in use and occupation of the suit property since 2002.
29. Although in his pleadings the respondent did not plead that the occupation and possession of the suit property by the appellants' was on account of permission granted to them by his father, during hearing, the respondent admitted and/or acknowledged that the appellants had been in use and occupation of the suit property for a long period of time. In that regard, the respondent testimony/ evidence is that the appellants entered the suit property in 2002. That testimony/account was supported by PW2.
30. The evidence/testimony by PW1, PW2 and PW3 to the effect that the appellants entered the suit property in 2002 (as per PW1 and PW2's testimony) and in 1992 (as per PW3's testimony), is at variance with the respondent's pleaded case that the appellants unlawfully entered the suit property in 2009 or thereabout. It is also noteworthy that the respondent resiled from his pleaded case that the appellants violently evicted him from the suit property by stating that he never lived in the suit property.
31. It is trite law that parties are bound by their pleadings and that evidence adduced that is not aligned to the pleadings cannot be considered and/or ought to be disregarded. In that regard, see the case of *Raila Amolo Odinga vs. IEBC & 2 others* (2017) e KLR where it was stated/held:-

“In absence of pleadings, evidence if any, produced by the parties cannot be considered, it is also a 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 the case set up by them...it is neither desirable nor permissible for a court to frame an issue not arising from the pleadings...”



32. As pointed out herein above, in the case hereto, the respondent resiled from his pleaded case and adduced evidence at variance with his pleaded case which was that the appellants unlawfully entered the suit property in 2009 and that the appellants violently evicted him from the suit property.
33. The totality of the evidence adduced before the lower court shows that the appellants entered into the suit property long before the time the respondent claimed they entered or encroached into the suit property. The totality of the evidence also shows that the entry of the appellants to the suit property was on account of a claim of entitlement to the suit property arising out of alleged existence of a customary trust in their favour and/or a claim of entitlement to the suit property on account of having been in adverse possession of the suit property.
34. Having carefully considered the pleadings filed in the lower court, the evidence led by the parties and the submissions filed by the parties, I have come to the inescapable conclusion that the respondent did not prove his pleaded case to warrant being granted the orders sought in his plaint. Equally, the appellants did not prove that the registration of the respondent was tainted by fraud or misrepresentation of facts. However, the appellants did prove that their presence on the suit property was on account of alleged claim of right arising from existing customary trust and/or adverse possession.
35. Whilst the lower court had no jurisdiction to hear and determine the appellants' claim to entitlement of the suit property based on adverse possession, it nevertheless, had jurisdiction to take into account that claim and in accordance with the provisions of Section 28 of the *Land Registration Act, 2012* determine that the use and occupation of the suit property by the appellants was an overriding interest on the title held by the respondent.
36. The totality of the evidence led by the appellants coupled with the conduct of the appellants and the persons who had interest in the suit property, who include but are not limited to the respondent, show that before the suit property was registered in the name of the respondent, the appellants had an interest in the suit property, which interest the respondent and the other persons had not challenged and/or interfered with. The conduct of the respondent and/or the other persons who had an interest in the suit property before it was registered in the name of the respondent of not taking any action against the appellants despite knowing that the suit property was registered in the name of their kin, gives credence to the appellants' claim that the suit property was held by the respondent's grandfather in trust for them.
37. From the totality of the evidence adduced before the lower court, the claim that the registration of the appellant's grandfather as the proprietor of the suit property was subject to a trust in favour of the appellants, is not far-fetched as the totality of the evidence discloses some relationship between the respondent's grandfather and the appellants on which the claim for existence of a customary trust can hinge.
38. Despite being the registered owner of the suit property, the registration of the respondent as owner of the suit property is subject to a trust in favour of the appellants. The existence of the pleaded and proved customary trust is an overriding interest to the title held by the respondent. In that regard, see the provisions of 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 affect the same without being noted in the register-

- a. ...
- b. trusts including customary trusts;



- c.
- d.
- e.
- f.
- g.
- h. Rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription
- i. ...
- j.”

39. The upshot of the foregoing is that the respondent did not prove his pleaded case on a balance of probability. The appellants on the other hand proved that they had interest in the suit property arising from alleged existence of a customary trust and adverse possession, which claim they proved on a balance of probability.

40. Consequently, I find the appeal has merit and I allow it as prayed.

41. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED ELECTRONICALLY AT KABARNET THIS 18TH DAY OF DECEMBER, 2025.

L. N. WAITHAKA

JUDGE

In the presence of: -

Mr. Kimurgor for the appellant

Mr. Chebii for the respondent

Court Assistant: Ian

