

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**NAKURU**  
**ELC CASE NO. 14B OF 2023 (O.S)**

**CHIRCHIR KOIMA & 34 OTHERS.....**  
**.....PLAINTIFF**

**VERSUS**

**EDWARD MUGUTHELI.....1<sup>ST</sup> DEFENDANT**

**COUNTY COUNCIL OF KOIBATEK.....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL..... 3<sup>RD</sup> DEFENDANT**

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

**JUDGMENT**

1. By Originating Summons dated 11<sup>th</sup> March, 1999, the Plaintiffs herein sued the Defendants seeking the following orders:

- a) *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 2nd 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.*
- b) *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.*
- c) *That the 2nd and 3rd Defendants has a Constitutional and Statutory duty to ensure that the aforesaid Trust Land Vested*

*in the 2nd 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.*

*d) That costs of this suit be granted to the Plaintiffs.*

2. It should be noted that this case was fully heard by the High Court but did not make a determination. The court directed that this matter having been filed in 1999, before the creation of the Environment and Land Court which came into operation in October 2012, be transferred for determination.
3. This court gave directions that counsel highlight the submissions that they had filed together with supplementary submissions to assist the court in coming up to speed with the proceedings. This being an old matter, which had been in the court corridors since 1999, which is a period of more than 26 years, it would not have been prudent to start the hearing *de novo*. The court would rely on the affidavits, the submissions and the evidence on record to make a determination.

#### **PLAINTIFFS' CASE**

4. 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. He deponed that the land is trust land 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 who 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. It was his averment that the land has never been the Defendants' property.

5. The deponent also stated that the land is at Kipkuyan Village between Mae, Emsewes and Poibokipto areas and is approximately 200 acres, which the Defendants have encroached upon.
6. PW1 Chirchir Koima, the chairman of the Chebir clan, adopted his supporting affidavit and gave evidence on behalf of the Plaintiffs. He stated that many members of his clan were born on the suit land. Further that he resides on the suit land with his children but 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 urged the court to declare that the same belongs to the Chebir Clan.
7. PW2, Chepet Chepyegor, a grandchild of PW1, testified that all the plaintiffs are members of the Chebir clan and that the land they are claiming borders the forest hence not government land.

#### **DEFENDANTS' CASE**

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, where he deponed 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. He further averred that it is a 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. He also stated that the plaintiffs have never been residents of Kipkuyan Village and the land they are claiming is purely a government land.
10. 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, and deponed that the 2<sup>nd</sup> defendant was created in 1996 under Legal Notice No. 25 of 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. He also stated that the suit land in question is a government gazetted forest, and the 2<sup>nd</sup> Defendant has no power over its alienation and or its management.
11. 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 and that the Plaintiffs' application is incompetent as they have no identifiable interest recognized in law over the suit land. 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.

12. The deponent further averred that the remedy sought against the defendants cannot be availed to the Plaintiffs as the plaintiffs' suit lacks sub-stratum in law and urged the court to dismiss the Plaintiffs' suit with costs.
13. The 3<sup>rd</sup> Defendant filed grounds of opposition dated 26<sup>th</sup> March, 1999 in opposition to the application premised on the grounds that the plaintiffs have not set out a *prima facie* case with possibility of success and that they have not shown the irreparable damage and/or loss they stand to suffer.
14. The 3<sup>rd</sup> Defendant, through Ezekiel Kiprono Korir, a Forest Conservator, swore a replying affidavit in opposition to the summons on 18<sup>th</sup> May, 1999, and 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.
15. He deponed that, as per the information of the District Forest Officer, the plaintiffs have never settled in the area in question and further 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 3<sup>rd</sup> Defendant.

### **INTERESTED PARTIES' CASE**

16. The Interested Parties also filed grounds of opposition dated 31<sup>st</sup> March,1999, on grounds that the suit and the Application is misconceived, incompetent and bad in law, that the Plaintiffs have no *locus standi* in the suit and the same ought to be struck out with costs, that 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 quiet enjoyment of their contract and finally that the Plaintiffs have no *prima facie* case with a probability of success.
17. 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 and deponed that he is a resident of Kewangoi village neighboring Kipkuyan village and knows many residents of Kipkuyan and that the plaintiffs are not residents thereof. He further, asserted that even if the plaintiffs are residents 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. He urged the court to dismiss the Plaintiffs' case, as the land does not belong to them.
18. The Defendants and the Interested Parties did not give oral evidence therefore the court closed their respective cases on 22<sup>nd</sup> May, 2023.

### **PLAINTIFFS'SUBMISSIONS**

19. Counsel for the Plaintiffs filed submissions dated 26<sup>th</sup> June 2023, and relied on 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.**

20. Counsel also filed Supplementary Submissions dated 18<sup>th</sup> November 2025 and identified the issues for determination as:

*a) Whether the suit land is ancestral land held in trust for the Plaintiffs?*

*b) Whether the eviction of the Plaintiffs from the suit land was illegal?*

*c) Whether this Honourable court should make orders in favour of the Plaintiffs?*

21. On the first issue, whether the suit land is ancestral land, counsel reiterated the Plaintiffs' evidence and stated that they used to live on the suit land as a community but they were evicted when the government claimed that the land was a gazetted forest hence, government land.

22. Counsel further relied on Articles 114 and 115 (1) of the repealed Constitution on the definition of trust land and submitted that the suit land fell under the said provisions. Further that Plaintiffs' rights were pre-existing and affirmed through recognition and that the County council of Koibatek held the land in trust

23. Mr. Kibet also cited the cases of **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR** and **James N. Kiarie v. Geoffrey Kinuthia & Another (2012) eKLR**, and submitted that the Plaintiffs have an interest in the land as the same was held in trust for their benefit.

24. On the 2<sup>nd</sup> issue whether the eviction was illegal, counsel submitted that the Plaintiffs are only claiming 200 acres of the land which is not part of the gazetted forest and relied on Article 117 of the repealed constitution and the **African Commission case of Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council V Kenya**. Counsel submitted that the Plaintiffs have suffered an injustice as they have been denied ownership of their ancestral land contrary to their right to property. Counsel urged the court to grant the orders as prayed in the Originating Summons.

#### **ANALYSIS AND DETERMINATION**

25. As earlier stated, this suit was filed in the High Court in 1999, before the establishment of the Environment and Land Court pursuant to the Constitution 2010. The court heard the matter but later transferred it to this court for writing a judgment in respect of the orders sought in the Originating Summons.

26. The issues for determination arising from the pleadings and submissions are:

- a) Whether all that piece of land in Kipkuyan village between Mae and Ensewes and Poibokipto, consisting of approximately 200 acres is trust, land vested in the 2<sup>nd</sup> Defendant for the benefit the Chebir Clan.*
- b) Whether the suit land is a gazetted forest and is therefore public land.*

**c) Whether the Plaintiffs are entitled to the orders sought in the Originating Summons.**

27. The Plaintiffs claimed that the suit land is ancestral land, which is held in trust for their benefit. They stated that their parents, grandparents and great-grandparents lived and recognized the suit land as their home, wherein they undertook agricultural activities including livestock grazing amongst other activities for over a century.
28. In the case of **Henry Wambega & 733 others v Attorney General & 9 others [2020] KEELC 824 (KLR)** the court held that:

*“The argument of the petitioners is that because their forefathers lived on the suit lands, and were dispossessed during the colonial period, or shortly thereafter, then they have a right to these parcels of land. Straight from the blocks, the respondents have attacked this claim, asserting that there is no evidence to prove such allegations. On this point, I must agree with the respondents. I am afraid that there is absolutely no evidence that any of the forefathers of the petitioners ever resided on the suit lands and I say this after having carefully gone through the evidence tendered by the petitioners. One cannot tell with precision and finality, which forefather of which petitioner resided in which land, and what sort of occupation such person had. Indeed, as pointed out by the respondents, some of the petitioners appear to have roots in Kwale and not within the site of the disputed land. There is a claim of dispossession, but absolutely no evidence of who dispossessed whom, and when exactly this occurred.”*

29. The above analysis is similar to the Plaintiffs' case who claimed that their parents, grandparents and great-grandparents have resided on the suit land for over a century but they have not put forth any proof of such occupation. It would have been easy to show such occupation as they had claimed in their evidence. What was the nature of occupation? Was it physical or passive possession? The court is cognizant of the fact that to prove a trust in land one need not be in in actual physical possession and occupation of the land as was held in the case of **Isack M'Inanga Kiebla vs Isaaya Theuri M'Ilintari & another [2018]**.
30. Mere mention that the land is ancestral land is not enough to entitle you to ownership of the land. The Plaintiffs admitted that they were evicted from the forest, which confirms that the suit land was part of a forest. Why would the government evict people from private land? The other question is where the plaintiffs are residing now, after the eviction. It was their evidence that the land was gazetted as a forest without their consent and knowledge.
31. The Plaintiffs based their claim on many grounds, namely, ancestral land, trust land, gross violation of property rights pegged on ancestral land, and community land. For a party to claim that his/her right to property has been violated, such a party must establish the nature of his/her property right and his/her right to enjoy it. In **Halsbury's Laws of England, 4<sup>th</sup> Edition (Re-issue) Vol. 8(2)** at paragraph 165:

***“The protection under the Constitution of the right to property does not obtain until it is possible to lay claim in the property concerned.....an applicant must establish the nature of his property right and his right to enjoy it as a matter of domestic law.”***

32. The right to property cannot be protected constitutionally until a valid claim can be established within the national legal framework. The Plaintiffs need to prove that they have a right to the suit land, which they claim to be ancestral land before claiming that such a right has been violated. There was no evidence that they are entitled to the suit land either in trust as ancestral land or otherwise.
33. The Constitution of Kenya 2010 reclassified land as public, community and private. Article 62 of the Constitution defines public land to include unalienated government land, land occupied by a State organ, forests, national parks, water catchment areas, roads, rivers, the territorial sea, and any land with no identifiable owner or heir. The suit land has been identified as a gazzetted forest which falls within the category of public land as provided for under Article 62 of the Constitution.
34. Public land vests in and is held by the national or county government in trust for the people of Kenya, and is administered by the National Land Commission (NLC). It cannot be of except through an Act of Parliament. There are elaborate procedures of conversion or compulsory acquisition of land for a public purpose especially private with due compensation. There was no evidence that this land was converted from public land to private following the due process for the settlement of the Plaintiffs. It follows that the forest land was not available for alienation to the Plaintiffs.
35. In the case of **Letuya & 21 others v Attorney General & 5 others (Environment and Land Case Civil Suit 821 of 2012) [2014] KEELC 683 (KLR) (17 March 2014) (Judgment)** the court held that:

***“I find that I must agree with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents’ arguments. The process of conferring legal and equitable property rights in land under Kenyan law is settled, and is dependent upon formal processes of allocation or transfer and consequent registration of title, or of certain transactions that confer beneficial interests in land in the absence of a legal title of ownership. The process of allocation of forest land is further governed by the Forest Act that requires a process of excision of forest land before such land can be allocated. The Applicants did not bring evidence of such processes of allocation of title to land located in the Mau Forest and solely relied on their long occupation of the same. In addition under law, forest land being government land, cannot be subject to prescriptive rights arising from adverse possession. This court cannot therefore in the circumstances find that they have accrued any property rights in the Mau Forest that can be the subject of the application of section 75 of the old Constitution or Article 40 of the current Constitution.”***

36. I agree with the above analysis that the process of conferring legal and equitable property rights is well settled in Kenya and the same has to be adhered to culminate in legal ownership. The Plaintiffs have not adduced any evidence that they followed or were in the process of complying with these processes.
37. Similarly Article 63 of the Constitution provides for the community land and defines community land to include: land held by groups under the Land (Group Representatives) Act; land lawfully transferred to a specific community by any process of law; land that is lawfully held, managed or used by specific

communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; and land that is lawfully held as trust land by the county governments. Community land is vested in and is held by the communities themselves. It is managed according to legislation enacted by Parliament, Community Land Act, 2016, and relevant customary law, and cannot be disposed of without following specific legal procedures.

38. The Community Land Act provides for the management of community land through the National Land Commission, the Ministry of Land and Physical Planning, and the county governments. The law also provides for communities to manage their land directly through Community Assemblies and Community Land Management Committees whose members are elected to manage the administration process. The Plaintiffs also alluded to the land being community land, which has procedures for recognition, protection and registration of community land rights under Part II, Sections 4 to 11 of the Act. The Plaintiffs have not complied with these provisions.
39. Having found that the suit land is unalienated government land, it follows that the Plaintiffs' eviction from the forest was lawful, and therefore not entitled to the declaratory orders sought that the land is ancestral land.
40. I have considered the Originating Summons, the affidavits, the evidence adduced and the relevant authorities, and find that the suit land being public land cannot be declared ancestral land being held in trust for the Plaintiffs. The Plaintiffs have therefore not proved that they are entitled to the suit land, and consequently their claim is dismissed with each party bearing their own costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 14<sup>TH</sup> DAY OF  
JANUARY 2026.**

**M. A. ODENY  
JUDGE**