

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT KILGORIS**  
**ELC (LA) E008 OF 2025**

**RICHARD LERINA KIPTEK.....**  
**.....APPELLANT**

**VERSUS**

**DAVID MOI KIPIRIR.....**  
**RESPONDENT**

**JUDGMENT**

1. Vide the Memorandum of Appeal dated 14<sup>th</sup> February 2025, the Appellant Mr. Richard Lerina Kiptek being aggrieved by the whole judgment and decree of Hon. W.C. Waswa delivered on 31<sup>st</sup> of January 2025 penned 4 grounds of Appeal and sought the following reliefs;
  - (a) That the Appeal be allowed.
  - (b) That the judgment and the decree of Hon. W. C Waswa (S.R.M) delivered on 31<sup>st</sup> January 2025 at Kilgoris Law Court in ELC No. E098/2023 be set aside and substituted with orders dismissing the Respondent's counter-claim with costs.
  - (c) That in the alternative the court do make such orders as it deems just to grant.
2. The grounds of Appeal penned by the Appellant were as follows; -
  - (i) That the Learned Trial Magistrate erred in law and in fact by dismissing the evidence of PW1 and PW2 as the existence of an Agreement for sale of a portion of land parcel number Transmara/Oloiborsoito/183 measuring 50 feet by 100 feet.
  - (ii) That the Learned Trial Magistrate erred in law and in fact by failing to find that the Defendant claim over a portion of land

parcel number Transmara/Oloiborsoito/183 measuring 50 by 100 feet was extinguished by operation of the law.

(iii) That the Learned Trial Magistrate erred in law and in fact by holding that the plaintiff's suit lacks merit and dismissed the plaintiff's suit with costs.

(iv) That the Learned Trial Magistrate erred in law and in fact allowing the Defendant's counter claim with costs.

3. On the strength of the above grounds of Appeal the Appellant sought for the reliefs set out at paragraph 1 of this judgment.
4. Upon admission of the Appeal, the court directed that the same be canvassed by way of written submissions which the parties filed and the court summarizes as herebelow.

### **Appellant's Submission**

5. The Appellant on one issue for determination, to wit, whether the Appeal was merited, but submitted generally on the grounds of Appeal.
6. On ground 1, it is the Appellant's submission that there was no evidence availed despite the uncontroverted testimony of PW1 and PW2 which confirm that there was a sale unfortunately the Agreement was lost and reported to the police way back in 2021, and a police abstract therefore was produced in evidence.
7. The purchase was supported by the Appellant's peaceful possession of the disputed portion, hence the Learned Magistrate erred in the facts in finding that there was no Agreement for sale for the portion.
8. On ground 2, the Appellant submits that the Learned Trial Magistrate erred in law and fact as there was evidence on occupation by Appellant by him by way of photographs of developments there and the Land Registrar's report dated 20<sup>th</sup> January 2025, thus there was sufficient evidence to prove purchase and occupation contrary to the findings by the trial court.

9. The Appellant submits that the Respondent failed to demonstrate action he had taken towards recovery of the suit land from 2000 to 2023, and that the counter-claim filed after lapse of 23 years was time barred by virtue of section 7 of the limitation of Actions Act.
10. On ground 3, the Appellant submits that his suit having partially succeeded, the trial court erred in holding that the suit lacked merit and dismissing the same.

### **Respondent's Submissions**

11. The Respondent framed and submitted on 4 issues for determination:
12. Issue number on whether the Appellant proved alleged sale and transfer of the 50x100 feet portion in compliance with section 3(3) of the law of contract Act, under which head the Respondent submitted that the requirements of section 3(3) of the law of contract Act were not proven, as no written Agreement for sale was produced in support of this position the Respondent placed reliance on the decision in the case of Nelson Kivuvani Vs. Yuda Komora and Another C.A No. 103 of 1997.
13. On issue number 2, the Respondent submitted that the trial court properly found that it had no jurisdiction to hear and determine adverse possession claims as was held in the Sugawara Vs. Kiruti (2024) eKLR decision.
14. On issue number 3, the Respondent submitted that the counter-claim was properly framed and merited.
15. The Respondent in respect of issue number 4 submitted that the decision by the trial court was thus proper in law and there is no basis to interfere with the same as the Appeal is not merited.
16. On the strength of the above, the Respondent argued the court to dismiss the Appeal.

### **Issues for Determination**

17. Having analyzed the Record of Appeal, the rival submissions and considered the law, the court frames the following as issues for determination: -
- (i) Whether or not the Appeal is merited, and in doing so, the court shall consider which between the plaintiff suit or the Defendant's counter-claim was merited?
  - (ii) What reliefs ought to issue?
  - (iii) Who bears the costs of the Appeal?

### **Analysis and Determination**

18. It is the duty of this court as a first Appellate court "***reconsider the evidence, evaluate it and draw its own conclusion***", as was held in the decision in the case of Selle and Another Vs. Associated Motor Boat Limited and 3 Others.
19. In his Amended Pleat before the trial court the Appellant as the plaintiff thereat pleaded purchase of a portion of land measuring 50x100ft in Transmara/Oloiborsto/183 in 2000 from a Mr. Daudi Kipirir who had bought from David Moi Kipirir, and purchased a 2<sup>nd</sup> portion from David Moi Kipirir measuring 25 by 100 ft and he occupied the same.
20. That in 2023 the Defendant laid claim to the 2 portions and refused to transfer.
21. The plaintiff pleaded adverse possession of the entire 75ft by 100ft having lived thereon for 23 years and sought declaration as to ownership of the 2 portions and the same be transferred to him.
22. Vide the Amended defence and counter-claim Amended dated 26<sup>th</sup> July 2024, the Defendant denied the allegations and counter-claimed for the parcel occupied by the plaintiff.

23. In the impugned judgment provoking this appeal, at paragraph 47 thereof the Learned Trial Magistrate observed as follows ***“From the foregoing, the portion in contention in this suit is the one measuring 50ft by 100ft. There is no dispute with regards to the portion measuring 25ft by 100ft.”***
24. The court also found rightly that it had no jurisdiction to deal with the issue of adverse possession as pleaded by the plaintiff.
25. The trial court equally found that no Agreements of sale had been adduced contrary to section 3(3) of the law of contract Act and therefore no sale was proven and accordingly dismissed the plaintiff’s case. The Land Registrar’s report was captured at paragraph 61 of the judgment indicating that the plaintiff was in occupation of the 2 portions of land, measuring 75ft by 100ft within Transmara/Oloiborsoito/183.
26. The question arising is, did the plaintiff prove his case on balance of probability?
27. To answer the issue whether the plaintiff proved his case on a balance of probability, the court shall embark on the pleadings and evidence before the trial court.
28. At paragraph 5 of the Amended statement of Defence and counter-claim, the Defendant pleaded as follows; -  
***“The content of paragraph 4 of the Amended Plaintiff is admitted to the extent that the Defendant had sold a portion of land from parcel No. Transmara/Oloiborsoito/183 measuring 50ft by 100ft to Daudi Moi Ole Kipirir. However, the Defendant is a total stranger to the existence of any sale Agreement between the plaintiff and the said Daudi Moi Ole Kipirir.”***
29. The import of the paragraph 47 of the impugned judgment is that the trial court found that the contention was in respect of the portion measuring 50ft by 100ft as there was no dispute regarding the

portion measuring 25ft by 100ft that the Defendant admitted having sold to the plaintiff.

30. The admission to the sell of the 25ft by 100ft is captured at page 112 of the record of Appeal, where the Defendant gave testimony of selling 25ft by 100ft to the plaintiff, who started using the said portion but he never transferred the said portion to him.

31. The Learned Magistrate was right in finding at paragraph 47 of the impugned judgment that there is no contention as to the sale of the 25ft by 100ft to the plaintiff but erred in not entering judgment to the plaintiff in that regard.

32. In this regard the court agrees with the submission of the Appellant that the Learned Magistrate ought to have granted the portion measuring 25ft by 100ft to the Appellant as there was not dispute over the same.

33. That leaves the only dispute before the trial court to be whether there was a sale of the 50ft by 100ft by the plaintiff to Daudi Moi Kipirir, and from Daudi Moi Kipirir to the plaintiff.

34. The court has reproduced paragraph 5 of the Amended Defence, at paragraph 28 of this Judgment and counter-claim, where the Defendant pleaded having sold that portion measuring 50ft by 100ft to Daudi Moi Kipirir and because of that the Defendant at paragraph 22 of his Defence and counter-claim pleaded that he did not deny selling the same.

35. Paragraph 22 of the counter-claim reads; ***“22. In the premises, the counter-claimer seeks for an order of eviction and permanent injunction restraining the Defendant to the counter-claim either by himself, agents, servants and/or anyone claiming under the Defendant to the counter-claim from entering upon trespassing onto, re-entering, building on, cultivating, alienating, selling and/or otherwise interfering with Narok/Transmara/Oloiborsoito/183 whatsoever and/or***

**howsoever. Except for the portion measuring 50ft by 100ft which the counter-claimer does not deny selling.”**

36. The import of the above averment read together with paragraph 5 of the Amended plaint is that the Defendant effectively admits having sold 50 ft to 100ft thus divesting himself on any interest therein.

37. It is trite law that parties are bound by their pleadings as stated in **IEBC and another vs Stephen Mutinda Mule and 3 others Civil Appeal No. 219 of 2013 (2014 eKLR)** where the court held *inter alia* ***“It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in other way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”***

38. It follows that from the pleadings and evidence before the trial court, the Defendant had no claim to the 25ft by 100ft having admitted the sale of the same to the plaintiff and had no interest in the 50ft by 100ft having sold the same to Daudi Moi Kipirir.

39. Was there a sale between Daudi Moi Kipirir and the Plaintiff?

40. The plaintiff testified that he bought the 50ft by 100ft from Daudi Moi Kipirir in the year 2000. The above sale was corroborated by PW2.

41. The trial court found at paragraph 48 and 49 of the impugned judgment that the said sale was not proven as it contravened sections 3(3) of the Law of Contract Act as well as Section 38 of Lands Act.

42. The alleged sale between the plaintiff and Daudi Moi Kipirir was pleaded to have occurred in 2000. This is significant because the Amendment to the Law of Contract Act which introduced section 3(3) was made in 2003, while section 38 of the lands Act enacted 2012. Could not act retrospectively to a transaction made in 2000. Section 3(7) of the law of contract Act excepted oral agreements that had been

entered prior hence there was no legal requirement for proof of the sale by way of Written Agreement for sale.

43. The sale could thus be proven, by way of part performance by taking possession thereof, which the plaintiff pleaded having taken possession and the survey report dated 20.01.2025 ordered by the court confirmed the same, as captured at paragraph 60 of the impugned judgment.

44. Consequently, there was proof of sale between Daudi Ole Kipirir and the plaintiff herein.

45. In arriving at the above conclusion, I am guided by the Court of Appeal decision in the case of Peter Mbiru Michuki Vs. Samuel Mugo Michuki (2014), eKLR; where the court held *inter alia* ***“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 of the law of contract Act applies in this case and we hold that the sale agreement between the Appellant and Plaintiff did not violate or offend the provisions of the law of contract Act.”***

46. In view of the above guidance, I find that the trial court erred in holding that there was a violation of section 3(3) of the law of contract Act and further section 38 of the Land Act having come into force in 2012 was not violated by parity of reasoning of the Peter Mbiru Michuki Vs. Samuel Mugo Michuki decision cited above.

47. It thus follows that there was a valid sale of the two portions measuring 50ft by 100ft, and 25ft by 10ft which the plaintiff purchased and occupied and which the Defendant conceded had not transferred to the plaintiff.

48. In Macharia Maina Mwangi Vs. David Mwangi Kagiri (2017) eKLR, the court inferred Constructive Trust where a vendor had received full purchase price and put in possession, the purchaser as was the case herein.
49. In respect of the claim of adverse possession the trial court was right that it had no jurisdiction to handle the claim, but erred in not finding that the counter-claim as drawn was time barred and at paragraph 22 of the counter-claim, the Defendant had equally conceded to the sale of 50ft by 100ft to Daudi Moi Kipirir and had no interest in the same, and had conceded to selling to the Appellant 25ft by 100ft, hence there was no defence to the Plaintiff's claim
50. The court thus finds that the plaintiff's claim before the trial court was merited and that the defence and counter-claimed were not merited, thus in answer to issue No. 1 the court finds merit in this Appeal.
51. On what reliefs ought to issue, the court having found that the plaintiff's claim before the trial court was merited, hereby wholly sets aside the decision of the trial court as it allows this Appeal in terms of the prayers set out in the Amended Plaint dated 16<sup>th</sup> of April, 2024.
52. Costs of the Appeal and costs of the Lower court are awarded to the Appellant.

Dated at Kilgoris this 29<sup>th</sup> day of January 2026

Hon. M.N. Mwanyale  
Judge.

**In the presence of:**

CA - Sylvia/Sandra/Clara

Mr. Lenkai for the Appellant

Mr. Borongo for the Respondent