Cheptoo v Rono (Environment and Land Appeal E006 of 2025)
[2026] KEELC 2068 (KLR) (17 April 2026) (Judgment)

Neutral citation: [2026] KEELC 2068 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KABARNET

ENVIRONMENT AND LAND APPEAL E006 OF 2025

BN OLAO, J

APRIL 17, 2026

BETWEEN

SAMWEL BARCHAR CHEPTOO ..... APPELLANT

AND

JAMES ROTICH ARAP RONO ..... RESPONDENT

(Being an appeal from the Judgment of Hon. C.R.T. Ateya, Principal Magistrate delivered on 4th April 2025 in KABARNET PRINCIPAL'S MAGISTRATE'S COURT CMELC CASE NO. 21 of 2021)

JUDGMENT

1. James Rotich Arap Rono (the Respondent herein) was the Plaintiff in Kabarnet Principal Magistrates Court CMELC case No. 21 of 2021 in which he impleaded Samwel Barchar Cheptoo (the Appellant) And The Land Registrar Kabarnet (who did not participate in the proceedings in the trial court and therefore is not a party in this appeal). The dispute centered around the ownership of the land parcel No. Koibatek/Chebaran/1 measuring approximately 30.29 Hectares (the suit land).

2. It was the Respondent's case that at all material times, he was the registered proprietor of the suit land having been so registered since 17th October 2012. However, the Appellant had illegally trespassed thereon and was cultivating it to the detriment of the Respondent causing him loss and damage and had also lodged a caution on the suit land.

3. That the Land Registrar Kabarnet who was impleaded as the 2nd Defendant had without any notice from the Respondent proceeded to register a restriction on the suit land and refused to release to him the title deed.

4. He pleaded further that the sale agreement dated 7th March 2004 by which the Appellant had purchased a portion of land measuring one (1) acre from him out of the suit land was null and void for failure to obtain the consent at the Land Control Board within six (6) months as required in law.

5. The Respondent therefore sought judgment against the Appellant vide an amended plaint in the following terms:-

    1. The Respondent is the legal owner of the suit land.

    2. The Appellant is a trespasser thereon and should give vacant possession to the Respondent.

    3. An order of permanent injunction to restrain the Appellant by himself, his servants, brothers and sister, agents or whoever from trespassing or cultivating on the suit land.

    4. An order of mandatory injunction directing the Land Registrar to remove the restriction on the suit land.

    5. An order directing the Land Registrar to release the original title deed of the suit land to the Respondent.

    6. Costs.

6. The Appellant filed a defence to the amended plaint and denied having illegally trespassed onto the suit land and having occasioned the Respondent any loss and damage.

7. He pleaded further that he is a stranger to the allegation that the land sale agreement was null and void and put the Respondent to strict proof therefore.

8. The appellant also filed a counter-claim in which he averred, inter alia, that he had purchased one (1) acre out of the suit land from the Respondent vide an agreement dated 17th March 2004 before the area chief and had paid for it in full. That the Respondent had even agreed before the chief that he was holding the one (1) acre in trust for the Appellant but after securing the title deed to the suit land, the Respondent decided to deprive him of his right to the suit land which he has already fenced and developed the one (1) acre where he has been residing with his family from the date of the purchase.

9. The Appellant sought by way of counter-claim the following remedies against the Respondent.

    1. A declaration that the Respondent holds one (1) acre out of the suit land in trust for him.

    2. A declaration that the Appellant has acquired one (1) acre out of the suit land by adverse possession.

    3. Costs and interest.

10. The case was heard by Hon. C.r.t. Ateya, Principal Magistrate who vide a judgement delivered on 4th April 2025 found in favour of the Respondent. She ordered as follows:-

    1. The Respondent is declared the registered owner of the suit land.

    2. The Appellant has trespassed onto the suit land and is hereby ordered to surrender vacant possession of the portion on which he has trespassed and is in possession.

    3. An order of permanent injunction is hereby issued restraining the Appellant by himself, his servants, brothers, sisters and/or agents from trespassing, cultivating, erecting on, transferring or interfering with the Respondent's quiet possession and enjoyment of the suit land.

    4. A mandatory order is issued directing the Land Registrar Kabarnet to remove the restriction and caution registered on the suit land by the Appellant.

    5. The title deed to the suit land be issued to the Respondent by the Land Registrar upon compliance with the above order.

6. The Appellant's counter claim be dismissed for want of jurisdiction.

11. Aggrieved by that judgement, the Appellant filed this appeal on 22nd April 2025 seeking that this court sets aside the impugned judgment and enters the same in favour of the Appellant as prayed in his defence and counter-claim together with costs.

12. The Appellant has raised the following 14 grounds of appeal:-

1. That the learned trial magistrate erred in law and in fact in that she gave undue weight to the Respondent's case and least weight to the Appellant's case.

2. That the learned trial magistrate erred in law and in fact in totally disregarding the Appellant's case.

3. That the learned trial magistrate erred in law and in fact in disregarding evidence that both the Appellant and the Respondent had entered into a sale agreement on 17th March 2004 under which all its terms were met.

4. That the learned trial magistrate erred in law and in fact in failing to give due regard to the testimonies of the Appellant's 4 witnesses that the Respondent held one (1) acre out of his land parcel No. Koibatek/Chebaran/1 in trust having sold it to the Appellant and witnessed by them.

5. That the learned trial magistrate erred in law and in fact in failing to give due regard to his testimonies of the witnesses that the Appellant had acquired proprietary rights after paying all consideration and developed the one (1) acre out of the land parcel No. Koibatek/Chebaran/1.

6. That the learned trial magistrate erred in law in failing to give weight to the testimonies of the witnesses to the fact that the Appellant after purchasing one (1) acre he was given immediate possession which he enjoys to the present day.

7. That the learned trial magistrate erred in law and in fact in failing to appreciate that the Respondent acknowledged the agreement dated 17th March 2004 before this court and was witnessed by his wife Pauline Toyoi Rotich a fact which was not challenged in court.

8. That the learned trial magistrate erred in law and in fact in failing to appreciate uncontroverted evidence that the 3rd defence witness constructed the Appellant's dwelling home which is in existence from 2004 to-date.

9. That the learned trial magistrate erred in law and in fact in disregarding evidence by all the Appellant's witnesses.

10. That the learned trial magistrate erred in law and in fact in misapplying the doctrine of adverse possession to oust the court's jurisdiction against the trust concept specifically pleaded by the Appellant in his counter-claim.

11. That the learned trial magistrate erred in law and in fact in failing to appreciate that the Respondent had an obligation to transfer the (one) 1 acre to the Appellant after he had received all his consideration in full.

12. That the learned trial magistrate erred in law in totally disregarding the pleadings of the Appellant and putting more weight on the Respondent's statement.

13. That the learned trial magistrate erred in law and in fact in totally disregarding the Appellant's submissions filed by his Advocate on record.

14. That the learned trial magistrate erred in law and in fact by failing to consider the evidence by the Appellant that the had fenced the parcel of land after constructing his matrimonial home.

13. The appeal has been canvassed by way of written submissions. The same have been filed by Ms Cheruiyot instructed by the firm of T. Cheruiyot & Company Advocates For The Appellant And By Mr Mongeri Instructed By The Firm Of Mongeri & Company Advocates for the Appellant.

14. I have considered the appeal, the record and the submissions by counsel.

15. I must start by clarifying that although the memorandum of appeal lists the Land Registrar Kabarnet as a 2nd Appellant, the only parties in this appeal are Samwel Barchar Cheptoo As The Appellant And James Rotich Arap Rono as the Respondent and which record I have set out at the commencement of this Judgment. Therefore, any reference of 1st Appellant in the Memorandum of appeal is an error and must be treated as such. There is only one Appellant.

16. This being a first appeal, my duty is to reconsider and re-evaluate the evidence and draw my own conclusions on whether or not to confirm the findings and decision of the trial court. In so doing, I must always bear in mind that I neither saw nor heard the witnesses testify and should make due allowance in that respect - Selle & Another V. Associated Motor Boat Company Ltd & Others 1968 E.A 123. A first appellate Court is the final court of fact ordinarily and therefore, the parties are entitled to a full, fair and independent consideration of the evidence. This is because a first appeal is to be decided on both the facts and the law and the parties are entitled to an extensive and full consideration of both. In the case of OKENO V. R 1972 E.A 32, the then East African Court of Appeal set out the duty of a first appellate court as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and extensive examination (Padya V. R 1957 E A336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and drawn is own conclusions (Shantilal M. Buwale V. R 1957 E.A 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness. See Peters V. Sunday Post 1958 E.A 424."

17. See also the cases of Abok James Odera & Associates V John Patrick Machira T/a Machira & Company Advocates 2013 Keca 208 Klr, Kenya Ports Authority V. Kuston (kenya) Ltd 2009 2e.a 212 And Also Mwanasokoni V. Kenya Bus Services 1985 KLR 931 among others.

18. I have gone through the 14 grounds of appeal and notice that some of them are merely repetitive. I refer counsel to the guidelines issued by the Court of Appeal in the case of Kenya Ports Authority V. Threeways Shipping Services K) Ltd 2019 eKLR where it observed:

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the court."

19. And in the case of William Koross V. Hezekiah Kiptoo Kimue & 4 Others C.a Civil Appeal No. 223 of 2013 [2016 KECA 826 KLR], the same court said:

> " The Memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that Memorandum of appeal need to be most carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

20. The law, of course, does not set out how many grounds of appeal shall be contained in the memorandum of appeal. But order 42 Rule 2 of the Civil Procedure Rules provides that:

2) "The Memorandum of appeal shall set forthwith concisely and under distinct heads the grounds of objection to the decree or order appealed against without any argument or narrative, and such grounds shall be numbered consecutively." Emphasis mine.

21. All will really depend on the circumstances of each case but as is clear from the above precedents and the law, brevity, clarity and conciseness are encouraged in drafting a memorandum of appeal while repetitiveness verbosity and obscurity are to be avoided. In the circumstances of this appeal where the impugned judgment is a mere 20 paragraphs contained in 7 pages (only 4 pages in the record of appeal), this 14 pages in memorandum of appeal, as will soon be clear, is not only verbose but repetitive. I shall therefore condense the grounds which in my view will suffice to determine this appeal.

22. Before I do so, however, I must also address one issue which should guide the trial magistrate in future cases where a party has also made a claim to land by way of adverse possession. In paragraph 18 of his defence and counter-claim, the Appellant pleaded that:

> " The plaintiff avers that he has been in peaceful, uninterrupted quiet possession of the suit property from 2004 to-date."

23. Then in paragraph 20 (b), the Appellant sought the order that he has "acquired the 1 acre by adverse possession". The trial magistrate was alive to the fact that she had no jurisdiction to grant any orders in adverse possession as is now settled by superior courts. She therefore addressed that issue as follows in paragraph 18 of the impugned judgment:

18: "Having considered the evidence as above, I find that on a balance of probability, the plaintiff has proved his case as against the defendant. The claim by the Defendant is further ousted as the curt has no jurisdiction to determine the same."

24. And when the trial magistrate drafted the final disposal orders in the impugned judgement, she stated in paragraph 20 (f) as follows in respect to the Appellants claim to the one (1) acre out of the suit land by way of adverse possession:

(f) "The defendants counter-claim is hereby dismissed for want of jurisdiction."

25. The moment the Appellant sought, as part of the remedies in his counter-claim, an order that he had acquired one (1) acre out of the suit land by way of adverse possession, the trial magistrate should have advised counsel to either amend the defence and counter claim by deleting the claim on adverse possession or if the Appellant still wanted to pursue it, then the only option would have been to apply for the transfer of the suit to this court. Otherwise, as long as the Appellant's counter claim retained the remedy of adverse possession, then the trial magistrate ought to have downed her tools because, as was held in Owners Of The Motor Vessel "lilian" S V. Caltex Oil (kenya Ltd C.a Civil Appeal No. 50 of 1989 [1989 KECA 48 KLR], once a court has no jurisdiction in a matter, it must down its tools

as it has "no power to move one step." In this case, the trial magistrate having rightly found that her jurisdiction to entertain the Appellants counter-claim hinged on adverse possession had been "ousted" by binding precedents, she nonetheless proceeded to hold that:

> " The defendants counter-claim is hereby dismissed for want of jurisdiction."

26. That was an error because having found that she had no jurisdiction to determine the prayer for adverse possession, the trial magistrate should not have heard the suit and dismissed the counter-claim. Having said so, however, nothing turns on that as ultimately, the Appellant's counter-claim which was also hinged on trust, was dismissed.

27. Having said so, the Respondent's claim in the trial court was that whereas he is the registered proprietor of the suit land since 17th October 2012, the Appellant had illegally trespassed thereon by cultivating it and even lodged a caution on the title which the Land Registrar had refused to remove and had instead placed a restriction on the same. And while he concedes that he had sold one (1) acre out of the suit land, he has poured cold water on the sale agreement dated 7th March 2024 on the ground that it is null and void because no consent of the Land Control Board was obtained.

28. The Appellant on his part pleaded in his defence and counter-claim that having sold one (1) acre to him, the Respondent was holding it in trust. This is how he pleaded in paragraph 16 of his defence and counter-claim:

> 16 "The plaintiff who was the defendant claims that the Defendant is holding 1 acre of Koibatek/Chebaran/1 in trust for him having entered into agreement and paid him in full."

29. And in paragraph 20 (a) the Appellant sought the following orders:

> a. "A declaration that the defendant holds 1 acre of Koibatek/Chebaran/1 in trust of the Plaintiff."

30. In my view, this appeal can be determined on grounds 1, 2, 5, 10, 11 and 13. Those grounds raise issues that the trial magistrate gave undue weight to the Respondent's rather than the Appellant's case which she gave less weight and totally disregarded the fact of the sale agreement between the parties dated 17th March 2004, that she failed to consider that the Appellant had acquired proprietary rights to the one (1) acre after paying the purchase price and developing it, that she ignored the claim of trust which the Appellant had specifically pleaded having paid the purchase price and which obligated the Respondent to transfer the one (1) acre to him and also that the trial magistrate disregarded the submissions of the Appellant's counsel.

31. It is not in dispute that at all material times, the suit land was registered in the name of the Respondent. After summarising the evidence of the parties, the trial magistrate said as follows in paragraphs 15 and 16 of the impugned judgment after citing the definition of trespass from Black's Law Dictionary 10Th Edition:

> 15: "The title of the suit land is in the name of the Plaintiff. The defendant has no title. He had a sale agreement which the plaintiff denies. The defendant having submitted that he is in occupation of a portion of the plaintiff's land without the consent of the plaintiff, it can safely be concluded that the defendant has trespassed onto the plaintiff's land."
>
> 16: "The defendant contends that thought he is in occupation of the portion of the plaintiff's land, he has now acquired rights over the same by virtue of the doctrine of adverse possession."

32. The trial magistrate then proceeds to cite at length from paragraph 17 the various precedents which have held that the magistrates court has no jurisdiction to determine claims to land by way of adverse possession and on the basis of that, she proceeds at paragraph 18 to dismiss the Appellants claim on adverse possession and in paragraph 20 (a) to (e), she grants the Respondent the orders sought in his amended plaint and finally in paragraph 20 (f) she dismissed the Appellant's counter claim based on adverse possession for want of jurisdiction.

33. As is clear from the impugned judgment, although the Appellant had also pleaded in his counter-claim that the Respondent holds the suit land "in trust" for him and specifically the one (1) acre which he had purchased vide a sale agreement dated 17th March 2004, no mention was made by the trial magistrate on whether or not that "trust" had been proved. The trial magistrate confined herself to the issue of adverse possession. Yet part of the Appellant's case was that since the Respondent had sold him one (1) acre out of the suit land and for which he fully paid the purchase price, the Respondent was trying to avoid the sale agreement.

34. When he was testifying on 28th February 2024, the Respondent said:

> " I want the caution to be lifted from my land. I haven't used my land since. I also pray for costs. I never sold Samwel the land. I gave him a place to stay; we have no sale agreement."

35. But in paragraph 6 (a) of his amended plaint, he pleaded that:

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(a) "The Plaintiff avers that the sale agreement dated 7th March 2004 is null and void for lack of Land Control Board consent within 6 months from the date of the agreement."

36. The sale agreement dated 17th March 2004 (not 7th March 2004) by which the Appellant purchased one (1) acre out of the suit land from the Respondents was part of the documents produced during the trial. The Respondent was therefore being rather economical with the truth when in his oral testimony he denied having sold one (1) acre of the suit land to the Appellant and at the same time, plead that in fact the said agreement was null and void. He cannot approbate and reprobate at the same time and the trial magistrate should have found that the Respondent was being dishonest and treated his testimony as un-reliable.

37. The trial magistrate was of course correct to make the finding that the suit land is registered in the name of the Respondent and he is therefore the owner. That was in keeping with the provisions of section 24 (a) of the *Land Registration Act* which provides that:

a. "The registration of a person as the proprietor of land shall vest in land period the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto..."

38. There is also section 25 (1) of the same Act which reads:

1. "The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

a. –

b. - "

39. There is however a provisal in Sub-section (2) that:

2. "Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee."

40. Finally, there is section 28 (b) of the same Act which provides that:

28 "Unless the contrary is expressed in this register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without their being noted on the register –

a. –

b. trust including customary trusts"

41. It is clear from the above that the registered proprietor of land acquires absolute ownership of the same and enjoys all the privileges of such registration including the rights to evict trespasses therefrom. That is the main remedy which the Respondent sought against the Appellant. But as is also clear from the above provisions of sections 25 (2) and 28 (b) of the *Land Registration Act*, all registered land is subject to the overriding interests such as trusts and which need not but noted on the register. And that was the thrust of the Appellant's counter-claim.

42. From a perusal of the impugned judgment, it is clear that the trial magistrate placed a lot of premium on the fact that the Respondent is the registered proprietor of the suit land. However, she did not consider the claim of the Appellant hinged on trust and which had been specifically pleaded in paragraphs 16 of the defence and counter-claim and which I have already cited above. In addition to those pleadings, counsel for the Appellant made elaborate submissions on the issue of trust at pages 65 and 66 of the record of appeal and cited various authorities being William Kipsoi Ngetich V Kipkoskei Arusei & Another 2019 Eklr, Willy Kitilit V Michael Kibet 2018 Eklr And Macharia Mwangi Maina & Others V Davidson Mwangi Kigiri 2014 eKLR. The trial magistrate made no reference to those cases. The thread that runs through those cases is that even if the consent of the Land Control Board is not obtained in a sale of land transaction, the vendor will be obliged to keep his part of the bargain on the basis of the equitable doctrine of a constructive trust. In the case of Willy Kimutai Kitilit V Michael Kibet (supra), the facts were not too dissimilar from those obtaining in this case in that the vendor, having sold land to the purchaser and put him in possession, later turned around and tried to renege on the sale agreement citing, inter alia, the lack of consent of the Land Control Board. That is the same argument which the Respondent took in the trial court subject of this appeal where he started off by denying execution of the sale agreement but later went on to add that he had in fact only allowed the Appellant to live on the suit land. In the Willy Kimutai Kitilit V. Michael Kibet Case (supra), the Court of Appeal had no hesitation in finding that the vendor was a constructive trustee of the purchaser. In this case, even though the Appellant did not plead a constructive trust, such a trust, as was held in the case of Twalib Hathyan Twalin Hatayan & Another V Said Saggar Ahmed Al-heidu & Others 2015 eKLR:

> "....is an equitable remedy imposed by the court against one who has acquired property by wrong doing ..... A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit." Emphasis mine

43. The Respondent having received full purchase price of one (1) acre of land from the Appellant who then took possession of the same out of the suit land, it would be inequitable for him to renege from that arrangement and seek to evict the Appellant. That is why the doctrines of equity will not allow him to unjustly enrich himself. And the mechanism of doing so is by "imposing" a constructive trust as is clear from the above binding precedents some of which the trial magistrate was referred to but

did not apply and thereby erred both in law and in fact. This court must therefore intervene and allow this appeal.

44. Ultimately therefore and having considered this appeal, this court makes the following disposal orders:

    1. This appeal is allowed.

    2. The Judgment of the trial court is set aside.

    3. Judgement is entered for the Appellant against the Respondent as per his counter-claim as follows:

        a. The Respondent holds one (1) acre out the land parcel No. Koibatek/Chebaran/1 in trust for the Appellant.

        b. The Land Registrar and Surveyor Kabarnet shall demarcate and register a portion measuring one (1) acre out of the land parcel No. Koibatek/Chebaran/1 in the name of the Appellant.

        c. The Appellant shall have costs of the appeal and in the court below

BOAZ N. OLAO

JUDGE

17 TH APRIL 2026

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL AT KABARNET ON THIS 17TH DAY OF APRIL 2026 AS WAS NOTIFIED TO THE PARTIES ON 19TH MARCH 2026

BOAZ N. OLAO

JUDGE

17 TH APRIL 2026