REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

ELC APPEAL NO. E004 OF 2025

JACOB KIPTUM CHESUM ..... APPELLANT

= VERSUS =

PAUL KANDIE KIPKEU (Suing as the personal Legal Representative and Administrator of the Estate of the Estate of late Kipkeu Kipkoros-Deceased) ..... RESPONDENT

(Being Appeal from the judgment of Hon. V. Karanja Principal Magistrate delivered on 17th March, 2025 in Iten PMC ELC No.61 of 2018)

JUDGMENT

1. By a plaint dated 21st March 2018 and amended on 5th February 2024, the plaintiff, now respondent, instituted a suit in the lower court to wit Iten PMC ELC Case No. 61 of 2018 seeking judgment against the defendants named in the suit for: -

    a) A permanent injunction restraining the first defendant from entering into, dealing in anyway or interfering with the parcel of land known as

Elgeyo/Marakwet Sangurur/2373 measuring 1.14 hectares (the suit property);

b) A permanent injunction restraining the 2nd defendant from encroaching on ½ an acre in addition to the ½ an acre it was gifted by the deceased;

c) Mesne profits as per the valuation report;

d) Costs of the suit;

e) Any other relief that the Honourable Court may deem fit and just to grant.

2. The respondent's suit was premised on the grounds that the suit property belongs to the Estate of Kipkeu Kipkoros, deceased; that sometime in 1995 or thereabout, the 1st defendant trespassed into the suit property and began cultivating thereon; that in 1983 or thereabout, the 2nd defendant was gifted ½ an acre of the suit property and has since encroached on an additional ½ acre.

3. Complaining that owing to the actions of the defendants the Estate of the deceased has suffered and continues to suffer loss and prejudice, the respondent instituted the suit referred to hereinabove seeking the reliefs listed in paragraph (1) herein above.

4. The 1st defendant filed a statement of defence dated 30th October, 2019 and amended on 12th March, 2024 in which he denies the allegations levelled against him and contends that the suit property does not exist on the ground. The 1st defendant further contends that the suit discloses no reasonable cause of action against him and that it is an abuse of the process of the court.

5. The 2nd defendant did not defend the suit against it.

6. When the suit came up for hearing the plaintiff, Paul Kandie Kipkeu who testified as PW1 stated as follows: -

> **"…I am the plaintiff in this case….I know the 1st defendant. We grew together and he has refused**

to vacate my father's land. My father gave the 2nd defendant ½ acre and they have encroached on another ½ an acre….

The 1st defendant has lived on the land from 1995. He makes an annual profit of Kshs.292, 600/- as per Pexbt 9. I pray for damages.

He has not filed a counterclaim. He has not produced ownership documents."

7. In cross examination the plaintiff stated: -

"He has lived on the land since 1995. I sued him in 2018. He has encroached on my entire land. The land is registered under my late father. I wrote to the Land Registrar about the dispute… The 1761 land had not been mentioned. It touches the land in dispute…I have never utilized the land. Pexbt 6 the front measurements and the map are not corresponding. The surveyor took our allotments. Josephine pointed the land…. I did not see the defendant's documents.

The land exists. The profit by the 1st defendant is Kshs. 291,600/-. He started ploughing the land from 1995. The land belongs to my father. We grew up together. The defendant is not my cousin. We have no relationships. It was ancestral land. My father inherited the land from his mother. I do not know if my grandmother gave land to my father. My grandmother had 1 child only. My father inherited the land from my mother. ….The 1st defendant got the land from Chepkeu, Chepkeu had 3 children. My lineage is Kapsang. 1st defendant's lineage is Chepkeu. Chebuwot is a son to Chepkeu….."

8. In re-examination the plaintiff stated as follows: -

"The land exists on the ground. The report does not show the land does not exist. The land exists and I have the title deed. The 1st defendant ploughs the land. There are no homesteads on the land. It is not ancestral. Chief's letter touches

on plot 57. It had a boundary dispute. I do not know where the 1st defendant came from. The title deed is registered in my father's name. He never transferred. He is the registered owner. The 1st defendant's sons helped the land to be re-surveyed. Josphine pointed out her boundary."

9. PW2, William Kimutai Kiptuyen, the area chief, Koibarak Location, informed the court that he authored the letter dated 21st July, 2021 (**Pexbt 7**); that there was a land dispute between Josephine's family, the family of Chepkitony and Kipkoros Kipkeu. He concluded that land parcel number 2373 belongs to Kipkeu Kipkoros. He further informed the court that parcel number 57 belongs to Josephine and that the 1st defendant ploughs parcel number 2373.

10. In cross examination, PW2 stated as follows: -

"…I have never received a complaint between the family of Kipkeu Kipkoros and the 1st defendant. The plaintiff's father brought the title deed and

told me someone had encroached on his land. I have not produced any document. I was present when the survey was done….I cannot tell whether it was ancestral land."

11. The defendant, Jacob Kiptum Chesum, who testified as DW1, relied on his witness statement dated 30th June 2023 after it was adopted as his evidence in chief. He produced the documents listed in his list of documents, dated 20th October 2019 namely photograph of the suit land and cadastral map of the suit land as **Dexbt 1** and **2**.

12. In cross examination, DW1 stated as follows: -

"My advocate signed the statement for me. The signature is for the advocate. I have been farming the farm from 1960s. I have not constructed on the land I only plough the land. My parent never lived on the land. We have never lived on the land…We just farm. My parents have always ploughed the suit land. My grandparents

also ploughed the land. The suit land is No.57. It had a title deed, registered under Josephine's name. I have been utilizing the land for Josephine. It is yet to be subdivided. The plaintiff just subdivided the land. The land parcel number 2373 and 57 are adjacent to each other. Josephine's land is 57. The land had not been subdivided. The plaintiff came and subdivided the land into two. My land is within Josephine's land. I have a claim in 57. I do not occupy the land for the plaintiff. Land parcel 57 is mine. I have not occupied the plaintiff's land. I know about number 57 for Josephine. I have not filed any counterclaim. I refused to vacate the land. The chief had told me to vacate. I have always planted for many years. …I agree with your valuation report. I still utilize the land. The land belongs to my grandfather. I have not produced ownership documents before court. Title deed is proof of ownership and I have not availed it. At

the ground the shamba is mine. …The land belongs to me and Josephine. The owners know the boundary. It is the plaintiff who is problematic. Our grandparents and parents utilized the land. The plaintiff has title deed and I have my father's title deed."

13. In re-examination DW1 stated as follows-

"The land which is registered in the name of my father is No. 18. It is not part of the suit land. I farmed the land from 1960's. …57 is registered under Josephine's name. The plaintiff does not have land there. I know about 2373 belongs to the plaintiff. 57 belong to Josephine. They are adjacent to each other….Josephine has not subdivided her land which is also part of my land. Nobody ever complained except the plaintiff. It is the first time for me to be sued. We are from the same clan. Each had a grandfather. The survey was done and a report was filed. The survey process was not stopped. We met with land

owners and we confirmed he is a trespasser on 57."

14. DW2 John Lagat, testified that the defendant is utilizing land parcel number 57 and that land parcel number 2373 does not exist on the ground.

15. At close of hearing parties filed written submissions.

16. 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 consequently entered judgment in his favour in terms of prayers (a), (b), (c), and (d) of the amended plaint. That to say, she granted an order of permanent injunction restraining the first defendant from entering into, dealing in anyway or interfering with the parcel of land known as Elgeyo/Marakwet Sangurur/2373 measuring 1.14 hectares; granted a permanent injunction restraining the 2nd defendant from encroaching on ½ an acre in addition to the ½ an acre

it was gifted by the deceased; Mesne profits as per the valuation report and costs of the suit.

17. Dissatisfied with the decision of the trial magistrate, the 1st defendant, now appellant, appealed to this court on seven (7) grounds which can be reduced to three (3) as follows: -

i) That the learned trial magistrate erred in law and in fact by failing to properly evaluate the evidence tendered during trial thereby arriving at an erroneous decision in allowing the respondent's claim;

ii) That the learned trial magistrate erred in law by failing to determine that the plaintiff/respondent claim was statute barred?

iii) The learned trial magistrate considered irrelevant facts and ignored relevant facts in arriving at her decision.

18. On whether the learned trial magistrate erred in law and in fact by failing to properly evaluate the evidence tendered

during trial thereby arriving at an erroneous decision in allowing the respondent's claim, the 1st defendant/appellant submits that the totality of the evidence produced during trial and in particular the report of the surveyor that was produced in evidence as Pexbt 6, does not support the plaintiff/respondent's claim that the 1st defendant had encroached onto the suit property. According to the 1st defendant/appellant, the portion he has been in occupation of is Elgeyo Marakwet/Sangurur/57 which is distinct from the suit property.

19. The 1st defendant/appellant further submits that the plaintiff/respondent failed to identify his land on the ground during a boundary determination exercise conducted by a surveyor while the interested party, Josephine Chepkiyeng, whose land he occupies, demonstrated boundaries of her land. The appellant asserts his pleaded case that the respondent's land is none existent on the ground.

20. The appellant further submits that there are inconsistencies in the evidence of the plaintiff/respondent concerning the existence of the suit property on the ground and faults the learned trial magistrate for failing to take into account the alleged inconsistencies of the plaintiff/respondent's evidence in arriving at her decision.

21. On whether the respondent's claim is statute barred, the appellant makes reference to the cases of **Edward Moonge Lenguuranga v James Lenaiyara & Another (2019) eKLR** and the case of **Sohanlaldurgadass Rajpur & Another vs. Divisional Integrated Development Programme Coltel (2021) e KLR** and submits that from the respondent's pleadings, the cause of action arose in the year 1995 and that the suit hereto having been filed in 2018, more than 22 years from the time the cause of action against him arose, hence the suit was statute barred.

22. The appellant further submits that the learned trial magistrate acted ultra vires in entertaining a statute barred suit.

23. Terming the proceedings and the resultant judgment a nullity *ab initio*, the appellant submits that the judgment is incapable of being enforced.

24. As to whether the learned trial magistrate considered irrelevant facts and ignored relevant facts in arriving at her decision, the appellant submits that the learned trial magistrate disregarded relevant facts/issues like the appellant's long and uninterrupted occupation of the suit land; the appellant's submissions on the issue of the suit being time barred and the want of jurisdiction of the court to entertain a time barred suit.

25. In his submissions dated 9th December 2025, the respondent has identified 2 issues for the court's determination namely, whether the plaintiff/respondent proved his case in the trial

court on a balance of probability and whether the trial court can be faulted for its finding that the plaintiff respondent was entitled to the orders sought.

26. On whether the plaintiff/respondent proved his case in the trial court on a balance of probability, the respondent submits that he did and gives the following reasons for holding that position. These are: -

i) He owns the suit land;

ii) The appellant has no justifiable cause or reason to trespass on the suit land;

iii) The 1st defendant conceded that he has no title to the suit property;

iv) The 1st defendant does not reside in the suit land but merely cultivates thereon;

v) The 1st defendant has not by way of counterclaim or otherwise laid a claim to the suit land;

vi) According to the survey report that was produced in evidence, parcels No. 57 and 2373 are distinct parcels of land on the ground; and

vii) The activities of the appellant on the suit property are illegal as they amount to intermeddling with the Estate of a deceased person.

27. As to whether the trial court can be faulted for finding that the plaintiff/respondent was entitled to the orders sought, the respondent submits that the learned trial magistrate cannot be faulted because she carefully evaluated the evidence, exhibits and submissions by all parties and came up with a decision in his favour.

28. Concerning the appellant's contention that his suit was time barred, the respondent submits that **Section 7** of the Limitation of Actions Act, Cap 22 Laws of Kenya, was not applicable to his suit because he was not seeking to recover land but a permanent injunction to restrain the appellant from interfering with the suit land.

29. 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**.

30. A review of the case urged before the lower court shows that the respondent's case was based on the ground that the suit land belongs to the Estate of Kipkeu Kipkoros, which Estate he represents. To prove that fact, the respondent produced a title deed and a certificate of search in respect of the suit property as **Pexbt 1** and **4** respectively. The said documents show that the suit property belongs to Kipkeu Kipkoros having been registered as the proprietor of the parcel of land

known as Elgeyo Marakwet/Sangurur/2373 on 7th September 2011.

31. The appellant on the other hand, contended in his pleaded case and evidence that he was in occupation of land parcel number Elgeyo Marakwet/Sangurur/57 belonging to Josephine Chepkieny. The respondent also claimed/pleaded that parcel number Elgeyo Marakwet/Sangurur/2373, the suit property, existed on the registry index map only but does not exist on the ground.

32. I have considered the defendant/appellant's defence vi-a-vis the totality of the evidence adduced before the trial court, particularly the reports of the Land Surveyor and the Land Registrar which were produced in evidence by the plaintiff/respondent as **Pexbt 6** and **8**. Those reports show that the suit property exists on the ground. In the absence of any evidence adduced by the appellant capable of controverting the plaintiff/respondent's evidence showing that the suit property indeed exists on the ground and that it

belongs to the Estate of Kipkeu Kipkoros (deceased), I find the appellant's claim that the suit property does not exist on the ground to be unsupported by the evidence adduced before the lower court.

33. Although the reports by the surveyor and the Land Registrar confirm that the RIM does not correspond with the ground, the reports, nevertheless show that the suit property and plot number 57 allegedly occupied by the appellant as a beneficial owner thereof, exist on the ground as distinct plots separated by a fence.

34. I also note that in his evidence and submissions, the appellant introduced issues/claims not pleaded in his statement of defence. These are that the suit property is ancestral land and that he inherited the portion he occupies from his parents/grandparents. In his submissions, the 1st defendant/appellant also claimed/contended that the plaintiff/respondent's suit was time barred.

35. I have also considered the appellant's claim vis-à-vis the applicable law and legal principles. Namely, parties are bound by their pleadings; that the defence of limitation of action has to be specifically pleaded and the exception to the general principle that a court cannot determine an issue unless it arises from the pleadings.

36. In **Raila Amollo Odinga & Another vs Independent Electoral & Boundaries Commission & 2 others (2017) e KLR,** the Supreme Court stated/held: -

> **"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also 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. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court**

for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings."

37. In **Elizabeth O. Odhiambo v. South Nyanza Sugar Co. Ltd (2019) e KLR** the court *inter alia* held: -

"The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made

without hearing parties and leads to denial of justice."

38. In **Mohamed Abdikadir Mohammed v Sammy Kagiri & another [2016] eKLR**, **F. Gikonyo J**. stated as follows:

"…It suffices to state that, the trial magistrate adopted the wrong approach in allowing the introduction of a fundamental defence of limitation when it had not been pleaded specically by the Respondents. Thus, the trial magistrate erred in his decision to dismiss the suit on the basis of un-pleaded issue-limitation. This is not a case where the thinking in the case of Odd Jobs vs. Mubia (1970) EA 476 would apply. The exception to the general rule which allows the court to determine a case on an issue that is not pleaded, will apply where the issue is placed before the court, the parties address the issue and no party is taken by surprise or otherwise made to suffer any prejudice. See the case of

Joseph Amisi Omukanda v Independent Elections & Boundaries Commission & 2 others [2014] EKLR, where the Court of Appeal, held as follows:

> ***"There is however a well-known exception to the general rule when the court can determine an issue even though it was not pleaded. This applies where the parties have raised an un-pleaded issue and left it for the decision of the court. The exception will apply where the issue is placed before the court, the parties address the issue and no party is taken by surprise or otherwise made to suffer any prejudice. (See Odd Jobs Vs Mubia (1970) EA 476)."***

39. In applying the said principles to the circumstances of this case, I find and hold that the appellant could not rely on the alleged time bar as he had not specifically pleaded it as required by law, in particular **Order 2 Rule 4** of the Civil Procedure Rules which provides as follows: -

"A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality-

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleadings.".

40. The upshot of the foregoing is that the appeal has no merits. Consequently, I dismiss it with costs to the plaintiff/respondent.

Judgement dated, signed and delivered virtually at Busia this 28th day of April, 2026

L. N. WAITHAKA

JUDGE

In the presence of;

N/A for the Appellant

Mr Nabasenge for the respondent

Court Assistant; Tracy