



REPUBLIC OF KENYA



**Kiplagat v Chepkong'a (Environment and Land Appeal E005 of 2023)  
[2024] KEELC 1448 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1448 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KABARNET  
ENVIRONMENT AND LAND APPEAL E005 OF 2023**

**L WAITHAKA, J  
MARCH 15, 2024**

**BETWEEN**

**DAVID KOMEN KIPLAGAT ..... APPELLANT**

**AND**

**JOSHUA KIPKOECH CHEPKONG'A ..... RESPONDENT**

*(Being an Appeal from the Judgement by Hon P Biwott SPM in  
Kabarnet ELC No. 18 of 2020 delivered on 24th January, 2023)*

**JUDGMENT**

**Background**

1. By a plaint dated 3<sup>rd</sup> June 2020, the plaintiff herein instituted a suit in the lower court to wit Kabarnet SPMC E&L case No 18 of 2020 seeking judgement against the defendant (now respondent) that;
  - a. A permanent injunction be issued against the defendant, his agents and or servants from entering, leasing, selling, constructing and or selling up any structure on the parcel Sacho/ Kabasis/597 measuring approximately 7 acres
  - b. An order do issue upon the defendant to remove the caution lodged on 18.12.2001
  - c. Costs and damages plus interest from the date of filing this suit.
2. As can be discerned from the plaint, the appellant's suit was premised on the grounds that the suit land, Sacho/Kabasis/597, measuring approximately 7 acres, belongs to his father Chelagat Chebii (deceased); that in May 2020 or thereabout, the defendant/respondent invaded the suit land and began tilling it in readiness to plant crops; that in 2010/2011, the defendant /respondent attempted to forcefully enter into the suit land which attempt was repulsed by plaintiff /appellant and the other beneficiaries of the estate of Chelagat Chebii, deceased.



3. On his part, the defendant, through his statement of defence and counterclaim, pleaded that a portion of the suit land measuring 0.4 hectares belongs to him; that he inherited the portion from his mother, Tarkok Chepkong'a (deceased); that between 1965 and 1966 (before demarcation), a road was constructed through his mother's land cutting it into two portions; that during demarcation a portion of his mother's land measuring 0.4 hectares was registered as part of the suit land, 597.
4. The defendant further pleaded that there was an error in the registration of the suit land in the name of the plaintiff's father in that a portion of his mother's land measuring 0.4 hectares or thereabout forming part of land parcel number 616 was erroneously registered as part of 597; that he had been in possession and use of the portion in dispute for over 30 years.

## **EVIDENCE**

### **Plaintiff's case**

5. When the suit came for hearing, a total of seven (7) witnesses testified in support of the appellant's pleaded case. The testimonies of the plaintiff/appellant's witnesses can be summarized as follows:-
  - i. That the portion of the suit land in dispute was occupied and used by the defendant's mother, Tarkok Chepkonga, before land adjudication;
  - ii. That the portion of the suit land was exchanged with another portion;
  - iii. That no written agreement was recorded concerning the exchange of the portion of the suit land;
  - iv. That after demarcation, the defendant's mother ceased using the suit land;
  - v. That no objection was raised concerning the alleged error in demarcation and registration of the suit land;
  - vi. That a dispute arose between the plaintiff's family and the defendant in 2001 or thereabout concerning the defendant's claim to a portion of the suit land;
  - vii. That the dispute was arbitrated by the local administration (area chief) and later referred to the Land Disputes Tribunal but no resolution was made;
  - viii. That at the time the suit hereto was filed, the portion of the suit land in dispute was being used by the defendant and that the defendant had been in use and occupation of the suit land for a long period of time, since 2001 or thereabout;
  - ix. That the portion of the suit land claimed by the defendant is fenced;
  - x. That there are mature trees in the portion of the suit land claimed by the defendant planted by the defendant.

### **Defendant's case**

6. Like the plaintiff, the defendant who testified as DW1, reiterated his pleaded case that the portion of the suit land in dispute belonged to his mother, Tarkok Chepkonga; that in 1965, a road was constructed in the area cutting his mother's parcel of land (which on demarcation became 616) into two portions; that a portion of his mother's land measuring 0.4 hectares or thereabout was included in the defendant's land (597) by mistake; that his mother complained; that the plaintiff's father promised to rectify the mistake but died before the error could be rectified; that his mother continued using the portion of



the suit land in dispute until 1979 when she passed on; that after his mother passed on, his brothers kept the land for him until 1991 when he took over; that all along, the portion of the suit land in dispute was used by his family; that the dispute between him and the plaintiff first arose in 2000 or thereabout when he moved the plaintiff's family for rectification of the error; that the plaintiff wanted to buy off his interest in the suit property but they did not agree on the purchase price; that the dispute was referred to the area chief who was unable to resolve it; that he also referred the dispute to the Land Disputes Tribunal but the same was not heard and determined as the Land Disputes Tribunals were disbanded before the dispute could be heard and determined.

7. Asserting that the portion of the suit land measures 0.4 hectares or thereabout belonged to him, the defendant informed the court that he fenced the portion in 1996 and planted trees therein in 1998.
8. The defendant/respondent denied the plaintiff's contention that the portion was exchanged with another portion and maintained that he entered the suit land in 1991.
9. D.W.2, Silah Cherungeri, informed the court that the portion of land in dispute was being used by the defendant's mother, Tarkok, before demarcation.
10. D.W.2 further informed the court that the portion in dispute was never exchanged with any other parcel of land and that it had been occupied by the defendant all along.
11. Like D.W.2, D.W.3, Francis Kiprono Ngetich, informed the court that the portion of land in dispute was being used by the defendant's mother before demarcation and that it is being used by the defendant after he inherited it from his mother.
12. D.W.3 informed the court that he has never heard that the portion was exchanged with another parcel of land.
13. D.W.4, James Cheronon Chepkonga, informed the court that the portion of the suit land in dispute belongs to them; that it was wrongly demarcated for the plaintiff's family; that the error was to be corrected by the descendants of Chelagat Chebii and that the portion in dispute is about 1 acre.
14. It was on the basis of the foregoing pleadings and evidence that the learned trial magistrate dismissed the plaintiff's case and partially allowed the defendant's counterclaim in the following terms:-

“The portion across the stream held by the defendant should be ceded to the defendant. I will thus order the land Registrar to carve out the portion in  $\frac{1}{2}$  to  $\frac{3}{4}$  acre held by the defendant and transfer it to the defendant. The defendant thereafter shall be restrained from crossing the stream for the plaintiff's suit partially succeeds. The defendant's counterclaim succeeds to the size of the portion held by his mother and him later which he fenced to be verified by the lands Surveyor and the Registrar. The portion disputed is given to the defendant on the ground that the plaintiff did not prove exchange of land. the lands Registrar, Baringo county, is thus hereby ordered to move under Section 80(1) of the [Land Registration Act No.3 of 2011](#) to make necessary rectification and amendment of the registration of the suit land for mistake noted. There was mistake in registration that gave the defendant's land to the plaintiff's father. The mistake was not blamed on any party herein. As the Registrar makes the correction, I order each party to bear own costs of this suit.”

15. Dissatisfied with the decision of the trial court, the plaintiff (now appellant) appealed to this court on eleven (11) grounds. These are that the learned trial magistrate erred by:-
  1. Holding that the respondent is the owner of the disputed portion on the ground that the plaintiff did not prove his case;



2. Making a decision disguised as adverse possession when no such case was pleaded and when it lacked jurisdiction to determine such a case;
  3. Misrepresenting the provisions of Section 80 of the [Land Registration Act](#) No.3 of 2011 which he relied upon to make the impugned decision;
  4. Ordering rectification of the title on account of 1<sup>st</sup> registration without any proof of fraud or misrepresentation or illegality or if it was acquired unprocedurally or through corrupt means;
  5. Ordering the Land Registrar to effect corrections on the land register yet he was not a party to the counterclaim or the proceedings which resulted to the impugned decision;
  6. Holding that there was misrepresentation of the said portion into the plaintiff's side thereby incorporating an unpleaded boundary issue which it had no jurisdiction to canvass on account of Section 18 of the [Land Registration Act](#);
  7. Failing to analyze the plaintiff's evidence as presented and with utter bias ruling in favour of the respondent;
  8. Holding that the suit portion belongs to the respondent without any legal basis or principles;
  9. Re-opening a claim that was adequately handled through the adjudication process way back in 1968;
  10. Wrongly interpreting the law and misguiding himself on the provisions of Section 7 of the [Limitation of Actions Act](#) by agreeing with the respondent's counterclaim when the same was time barred;
  11. Relying on wild stories and hearsays coupled with extraneous evidence in holding that the disputed portion belongs to the respondent.
16. The appellant urges the court to allow the appeal with costs to him.
17. Pursuant to directions given on 25<sup>th</sup> October 2023, the Appeal was disposed of by written submissions.

## **Submissions**

### **Appellant's Submissions**

18. In the appellant's submissions filed on 24<sup>th</sup> November 2023, an overview of the parties pleaded case is given and two (2) issues identified for the court's determination. These are:-
  - a. Whether the learned trial magistrate erred by making the impugned decision; and
  - b. Whether the learned trial magistrate erred by making a decision disguised as adverse possession not pleaded in the respondent's counterclaim.
19. On whether learned trial magistrate erred in law and fact in making the impugned decision, based on the testimony of the appellant who testified as P.W.1, it is acknowledged that the respondent's mother was cultivating the suit land sometime between 1965 and 1967 and claimed that she stopped doing so immediately after demarcation and adjudication was done. The learned trial magistrate is said to have failed to appreciate that fact when he held that the portion of the suit land in dispute belongs to the defendant on the ground that the plaintiff did not prove exchange of land.
20. Maintaining that the appellant proved the pleaded exchange, the appellant refers to the procedure provided for under [Land Adjudication Act](#) for addressing any issues arising from land adjudication



- and submits that no complaint was raised concerning the process that led to registration of the suit property in his father's name.
21. According to the appellant, in the absence of any objection or even an appeal to the minister under the *Land Adjudication Act*, it is impossible to go back to a process that was legally concluded over 50 years ago and try to reopen the same without substantive reasons.
  22. It is contended that the respondent could not clarify whether the suit land forms part of parcel No. 616 or is an independent portion.
  23. The respondent is said to have contradicted himself when he stated that he entered the suit land in 1991.
  24. The respondent is said to have merely pleaded that the appellant's father was knowingly and wrongly registered as the owner of the portion in dispute without explaining how the error was carried out.
  25. Pointing out that the title deed to the suit land was issued in 1973, the appellant faults the learned trial magistrate for holding that there was misrepresentation of the suit portion into the appellant's land when there was no evidence capable of proving that fact.
  26. On whether the learned trial magistrate erred by making a decision disguised as adverse possession not pleaded in the respondent's counterclaim, reference is made to the prayers sought in the respondent's counterclaim and the decision of the learned trial magistrate to the effect that the respondent's counterclaim succeeds on the size of portion held by his mother and him later which he fenced to be verified by the land Surveyor and Registrar and submitted that the decision of the learned trial magistrate is a disguised statement of adverse possession yet the reliefs sought in the counterclaim do not contain any prayer for adverse possession.
  27. Based on the principle that parties are bound by their pleadings espoused in the case of Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others (2014) e KLR and restated by the Supreme Court in the case of Raila Amolo Odinga vs. IEBC & 2 Others (2017) e KLR, the appellant submits that the decision of the trial court to change the narrative of the suit without affording the parties opportunity to cross examine on the same is not only unfair but also extremely prejudicial to the appellant as he was never afforded opportunity to cross examine on the same.
  28. It is lamented that the learned trial magistrate carved the counterclaim to favour the respondent to enable him decide unfairly and discreetly against the appellant.
  29. Reference is made to the cases of Haro Yonda Juaje vs. Sadaka Dzengo Mbauro (2014) e KLR; Samuel Miki Waweru vs. Jane Richu, Civil Appeal No.122 of 2001 (unreported) for the proposition that a claim for adverse possession cannot be maintained where the adverse possessor does not believe that the person sued is the owner of the land or where entry to the suit land was with the permission of the owner and reiterated that the respondent's pleaded case did not meet the legal threshold for pleading and proving a case for adverse possession.
  30. The appellant urges the court to allow the appeal with costs.

### **Respondent's Submissions**

31. In the respondent's submissions filed on 11<sup>th</sup> June 2023, an overview of the parties pleaded case and evidence is given and submitted as follows; that the appellant and his witnesses alluded to a land exchange agreement between the appellant and the respondent's father yet nothing was demonstrated showing that such an agreement was ever made; it is contended that even if such an agreement existed,



it would be unenforceable for failure to conform to the provisions of Section 3(3) of the [Law of Contract Act](#).

32. Concerning the appellant's contention that the learned trial magistrate erred by ordering rectification of the suit land under section 80(1) of the [Land Registration Act](#), reference is made to the section and the cases of Equity Bank of Kenya & another vs. Chief Land Registrar & another (2018)e KLR; Esther Ngegi Njiru & another vs. Leonard Gatei (2014)e KLR; Mary Ruguru Njoroge v. Samuel Gachuma Mbugua & 4 others (2014) e KLR and submitted that the court did not err by ordering rectification of the suit property by the land Registrar under section 80(1) of the [Land Registration Act](#).
33. Based on the decision in the case of Mwangi vs. Wambugu (1984) KLR 453, where it was held that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or misapprehension of the evidence or where the court has on some material point failed to take into account circumstances or probabilities material to estimate the evidence and raised on the case of Mbogo & Another v Ahah (1968) EA, where factors/principles an appellate court considers before it can interfere with the exercise of the discretionary power of a trial court were espoused, it is submitted that the appellant has not discharged the duty imposed on him of demonstrating that the trial magistrate failed to apply or misapplied specific provisions of the law.
34. It is the respondent's case that the appeal is flawed and an abuse of the court process.
35. The respondent urges the court to dismiss the appeal with costs to him.

#### **Analysis and determination**

36. In exercise of the duty vested in this court as the first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own independent conclusion on it. I have also 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.
37. From the grounds on which the appeal is hinged on and the submissions by the parties, I find the sole issue for the court's determination to be whether the plaintiff/appellant has made up a case for interference with the decision of the lower court.
38. With regard to that issue, a review of the parties pleaded cases and evidence shows that it is the defendant who had all along been in use and occupation of the suit land. whereas in his pleaded case, the plaintiff claimed that the defendant invaded the suit land in 2020 or thereabout, the evidence adduced in court shows that the defendant was in use and occupation of the suit land as early as 2001. The evidence further showed that there was an unresolved dispute between the plaintiff and the defendant over the suit land which dispute arose as early as the year 2000.
39. That factual situation renders the plaintiff's claim that the defendant invaded the suit land as unproven. It also paints the plaintiff as an untruthful person.
40. It is noted that in his evidence, the plaintiff claimed that the suit land was exchanged for another parcel of land. That claim did not form part of his pleaded case and was not proven.



41. By claiming that the portion in dispute was exchanged with another, which claim he failed to prove to the satisfaction of the court, the plaintiff impliedly admitted or acknowledged that the portion in dispute belonged to the defendant's family.
42. As pointed herein above, the defendant led evidence that showed that the portion in dispute has all along been used by his family.
43. Having reviewed the totality of the evidence adduced in the lower court, which evidence includes the conduct of the parties and/or their predecessors in entitlement to the portion of the suit land, I have no doubt that the portion in dispute belongs to the defendant's family.
44. As pointed out by the learned trial magistrate, there was an error in registration of a portion of the suit land in the name of the plaintiff's father which error was occasioned by construction of a road across the defendant's land cutting it into two portions. Despite that error, the defendant and his family continued using the portion of the suit land uninterrupted for a long period of time.
45. In the circumstances, I agree with the learned trial magistrate that the defendant proved a case for rectification of the error that occurred during demarcation and registration of the suit land.
46. The upshot of the foregoing is that the appellant has not made up a case for interference with the decision of the lower court. Consequently, I find the appeal to be lacking in merits and dismiss it with costs to the appellant.
47. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 15<sup>TH</sup> DAY OF MARCH, 2024.**

**L. N. WAITHAKA**

**JUDGE**

**Judgment delivered virtually in the presence of:-**

Mr. Chepkilot holding brief for Mr. Kiptoo for the appellant

Ms. Cherop holding brief for Mr. Kigen for the respondent

Court Asst.: Daisy

