



**Cheptalam v Cheptalam & another (Environment and Land Case 10 of 2023) [2024] KEELC 4191 (KLR) (20 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4191 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KABARNET  
ENVIRONMENT AND LAND CASE 10 OF 2023**

**L WAITHAKA, J**

**MAY 20, 2024**

**BETWEEN**

**KIMECHWA CHEPTALAM ..... PLAINTIFF**

**AND**

**MUSA CHEPTALAM ..... 1<sup>ST</sup> DEFENDANT**

**WALTER CHERUTICH CHEPTALAM ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The plaintiff instituted this suit seeking judgment against the defendant for a declaration that he (the plaintiff) is the lawful owner of the parcel of land known as LR. Baringo/Kasisit/87 (hereinafter referred to as the suit property); an order of specific performance compelling the defendant to transfer the suit property to him (plaintiff) and in default, the Deputy Registrar of this court to effect the transfer; the court do enlarge time within which the requisite consent of the Land Control Board to transfer the suit property ought to have been obtained; costs of the suit.
2. The suit is premised on the grounds that sometime in 1972, the plaintiff entered into an agreement for exchange of the suit property with the defendants' father, the late Musa Kiptalam; that the plaintiff was given the suit property by the deceased in exchange of plot No. 7 in LR. Saimoi/Tirimionin (hereinafter referred to as plot No.7) which belonged to the plaintiff and that following the exchange of the suit property with plot No.7, plot No.7 was amalgamated with LR No. Saimo/Tirimionin/36 which was adjacent to plot No.7.
3. It is the plaintiff's case that the defendants' deceased father, undertook to transfer the suit property to him but passed on before he could do that (the defendants' father died in 2007); that the defendants' deceased father and he took possession of their respective parcels of land in 1973 and that he had been in exclusive use of the suit property since that time.



4. The plaintiff laments that in 2008, the defendants by themselves and/or through their agents, entered the suit property and uprooted all the crops and trees he had grown therein in a bid to evict him.
5. Terming the actions of the defendants complained of illegal/trespass to land, the plaintiff instituted the instant suit seeking the reliefs listed herein above.
6. The defendants filed a joint statement of defence, dated 4<sup>th</sup> October 2023, denying the allegations made against them and contending that they are strangers to the alleged exchange of land between the plaintiff and their father.
7. Contending that they are the absolute and indefeasible owners of the parcels of land known as Saimo/Kasisit/375 and 376 (The parcels are subdivisions of the suit property), the defendants' have averred that there is no privity of contract between the plaintiff and them.

## **Evidence**

### **Plaintiff's Case**

8. When the case came up for hearing, Kimechwa Cheptalam ( PW.1) reiterated his pleaded case that his father and the defendants' father exchanged land; that is to say that land parcel No. 7 was exchanged with the suit property.
9. In cross examination, PW.1 stated that the suit property is occupied by the 1<sup>st</sup> defendant; that plot No.7 initially belonged to his father; that he has no title deed or registration records showing that plot No.7 belonged to his father and that by the time the defendants' father passed on, the suit property was registered in the defendants' father.
10. PW.1 acknowledged that plot No. 7 is registered in the name of Joshua Kemboi (his brother, deceased) and that it is currently occupied by his brother's children. He stated that that only a small portion of plot No.7 was excised and amalgamated with plot No.36.
11. PW.2, Elijah Nyakweli, informed the court that he had information from the plaintiff's father that he, the plaintiff's father, had exchanged land with the defendant's father but could not tell which parcel; that the plaintiff's father and he erected a fence between the suit property (land parcel No.87) and land parcel No.86; that there was no objection to the plaintiff's use and occupation of the suit property until 2005 when the defendants invaded it.
12. In cross examination, PW.2 stated that there is coffee planted in the portion of the suit property occupied by the 1<sup>st</sup> defendant; that the 2<sup>nd</sup> defendant has planted maize on his portion of the suit property and that he is aware the plaintiff's father had land in Tirimonin where the plaintiff and his family live.
13. In re-examination, he stated that both the plaintiff and the defendants' father had land in Tiriominin.

### **Defendants Case**

14. Musa Kamuren Chetalam, DW.1, informed the court that the plaintiff is part of their family; that the suit property (plot No.87) does not exist as it was subdivided into 375 and 376 registered in his name and the name of his brother (2<sup>nd</sup> defendant respectively); that they are the ones in use and occupation of the suit property (they have planted crops-coffee, maize and trees therein); that the suit property was registered in the name of their father who passed on in 2007; that upon death of their father, they applied for and obtained letters of administration through a succession cause; that the plaintiff did



not raise any objection to administration of their father's estate and that upon being granted letters of administration they subdivided the suit property between themselves and others.

15. He maintained that he is not aware of any exchange of land between the plaintiff's father and their father.
16. DW.1 informed the court that according to certificate of official search in respect of plot No.7, Dexbt 6(a), plot No.7 is registered in the name of Joshua Kiplelgo and not the plaintiff's father; that he does not know who is in occupation of plot No.7; that that according to certificate of official search in respect of plot No.36, Dexbt 3(a), plot No. 36 belongs to Cherutich Katya who is not related to them and that he does not know who currently occupies or utilizes plot No.36.
17. DW.1 acknowledged that there was a land dispute before the land disputes tribunal over land parcel number 36 in Tiriomin section but stated that they were not involved in the case. He maintained that he does not know anything about plot No.7.
18. At close of hearing parties filed submissions, which I have read and considered.
19. From the pleadings, evidence and the submissions, the sole issue for the court's determination is whether the plaintiff has made up a case for being granted the orders sought.

### **Analysis and Determination**

20. Concerning that issue, as pointed out herein above, the plaintiff's case is premised on an alleged contract of exchange of the suit property (plot No.87) with plot No.7 situated in Tiriomin.
21. By dint of the provisions of Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya, the plaintiff being the one who asserted that the suit property was exchanged with plot No.7 in Tiriomin had the burden of proof of that fact.
22. In his evidence, PW.1 acknowledged that the suit property is registered in the name of his brother and is currently being utilized by his brother. That notwithstanding, the plaintiff attempted to depart from his pleaded case by stating that only a small portion of plot No.7 was exchanged for the suit property; a fact that is not borne out or contemplated by his pleadings/plaint.
23. By dint of the provisions of Order 2 Rule 6(1) of the *Civil Procedure Rules 2010*, it is not allowable for parties to depart from their pleaded case unless by way of amendment of their pleadings. In that regard, see the said provision of the law which provides as follows:-

“No party may in any pleading make any allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.”

24. In the case of *Raila Amollo Odinga & Another vs Independent Electoral & Boundaries Commission & 2 others* (2017) e KLR the Supreme Court stated:-

“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.”



25. Having pleaded that the suit property was exchanged with plot No.7 and not a portion of plot No.7, the plaintiff cannot be heard to claim that only a small portion of plot No.7 was exchanged with the suit property. If that were the case, the plaintiff would have explicitly stated that fact in his pleadings. Moreover, the evidence adduced did not prove, to the required standard of proof, the pleaded exchange of the suit property with plot No.7 or any portion thereof as claimed by the plaintiff.
26. Having pleaded that the suit property was exchanged with plot No.7 which fact he was unable to prove, I find the plaintiff's case to be lacking in merit and I dismiss it with costs to the defendants.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KABARNET THIS 20<sup>TH</sup> DAY OF MAY, 2024.**

**L. N. WAITHAKA**

**JUDGE**

Judgment delivered electronically in the presence of:-

Mr. Kibii for the Plaintiff

N/A for the Defendant

Court Assistant.

