



**Lomul v Samati & another (Environment and Land Appeal  
1 of 2023) [2024] KEELC 5175 (KLR) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 5175 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KABARNET  
ENVIRONMENT AND LAND APPEAL 1 OF 2023**

**L WAITHAKA, J**

**JUNE 24, 2024**

**BETWEEN**

**PAUL KIPTUI LOMUL ..... APPELLANT**

**AND**

**BONIFACE KIPEMBOI SAMATI ..... 1<sup>ST</sup> RESPONDENT**

**GRACE CHEPKURUI CHESANG ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the judgment of Hon. P.C Biwott, Senior  
Principal Magistrate in Kabarnet SPMC ELC Case No. 16 of 2020)*

**JUDGMENT**

**Introduction**

1. By a plaint dated 22<sup>nd</sup> May 2020 and amended on 18<sup>th</sup> August 2020. the plaintiff (now appellant) instituted a suit in the lower court to wit Iten Kabarnet ELC Case No. 16 of 2020 seeking judgment against the defendants (now respondents) for a declaration that he (the plaintiff) is the legal/registered owner of land parcel Marigat/Maji Ndege B/1141 measuring approximately 1.79 ha (hereinafter referred to as the suit property); cancellation of the 2<sup>nd</sup> defendant's title deed for Marigat/Maji Ndege B/569 (hereinafter referred to as plot No.569); a permanent injunction restraining the defendants, their agents and/or servants from clearing, entering, leasing, selling, constructing and/or setting up any structure on the suit property; costs, interest and damages from the date of filing the suit.
2. The appellant's suit was premised on the grounds that he is the registered owner of the suit property; that the 2<sup>nd</sup> defendant who is the owner of plot No.569, which is adjacent to his parcel of land, hived off part of his land and registered it as part of her parcel of land plot No.569, and that upon realizing that the 2<sup>nd</sup> defendant had hived off part of his land, he complained to her (2<sup>nd</sup> defendant) leading to erecting of a temporary boundary between his parcel of land and that of the 2<sup>nd</sup> defendant.



3. The plaintiff complained that the 2<sup>nd</sup> defendant demarcated and annexed part of his land knowing very well of the existing temporary boundaries.
4. The Plaintiff also averred that on 21<sup>st</sup> May 2020, the the 1<sup>st</sup> defendant, without any colour of right, invaded his property, the suit property.
5. Terming the actions of the defendants complained of trespass to his land, the plaintiff pleaded that he has suffered physical, psychological and financial loss.
6. The plaintiff gave particulars of illegality urged against the defendants as follows:-

Particulars of Trespass by the 1<sup>st</sup> Defendant

- a. Illegally and without any authority invading into his (plaintiff's) land and fencing it off;
- b. Wrongly clearing and fencing off his (the plaintiff's) land;
- c. Illegally and fraudulently trying to forcefully occupy and obtain his land (the plaintiff's land).

Particulars of Illegality by the 2<sup>nd</sup> Defendant

- a. Illegally hiving off part of the Plaintiff's land and annexing it to hers knowing well of the existing boundary;
- b. Non disclosure of all material facts during demarcation;
- c. Secretly carrying out demarcation in the absence of the original owner.

7. The 1<sup>st</sup> defendant filed a statement of defence, dated 18<sup>th</sup> September 2020, denying the allegations levelled against him. The 1<sup>st</sup> defendant averred that he purchased a portion of Plot No. 569 belonging to the 2<sup>nd</sup> defendant; that he bought the portion, through his wife, Monica Jerop Kiptoo, from Julius K. Chepsoi, who had been gifted a portion of plot No. 569 by the 2<sup>nd</sup> defendant; that the 2<sup>nd</sup> defendant was aware of the transaction (sale) and had no objection to it and that after the sale, he (1<sup>st</sup> defendant) took all necessary steps to legally and lawfully acquire the portion he bought.
8. Maintaining that he did not encroach on the plaintiff's land, the 1<sup>st</sup> defendant contended that his parcel of land and that of the plaintiff are separated by a 15 metres wide road.
9. The 2<sup>nd</sup> defendant filed a statement of defence and counterclaim dated 16<sup>th</sup> September 2020, denying the allegations levelled against her. She inter alia contended that her parcel of land plot No. 569, is not adjacent to the suit property but opposite it.
10. Terming the plaintiff a trespasser to her parcel of land, the 2<sup>nd</sup> defendant averred that she had lived and continues living in her parcel of land plot No. 569, for a long period of time; that she carries out farming in her parcel of land and that she has built a residential house therein.
11. Maintaining that the plaintiff had encroached on her land and illegally and unlawfully erected structures therein, the 2<sup>nd</sup> defendant, by way of counterclaim, sought judgment against the plaintiff for a declaration that the plaintiff by himself, his servants and/or agents or any other person claiming through him has no proprietary interest in plot No. 569 hence should vacate the same failing which he be forcefully evicted therefrom; a permanent injunction to restrain the plaintiff by himself or through any other person from cutting trees, erecting, constructing, putting up structure or any building or improvements of whatever nature or damaging, committing acts of waste or in any other manner whatsoever interfering with her user and occupation of plot No. 659; general damages for trespass and disturbances; interest and costs of the suit; any other relief that the court may deem fit and just to grant.



12. The plaintiff filed a reply to defence and defence to counterclaim, dated 12<sup>th</sup> November 2020 denying the averments contained in the 2<sup>nd</sup> defendant's statement of defence and counterclaim and reiterating the averments contained in his plaint.

### Evidence

13. When the case came up for hearing, parties adduced evidence to the effect that the plaintiff bought the suit property from Chepsoi Kipsamart (P.W.2) sometime in early 2002 or thereabout; that the plaintiff bought the whole of P.W.2's land comprised in plot No.1141 and that both P.W.2 and the 2<sup>nd</sup> defendant, owner of Plot No. 569, got their parcels of land during land adjudication. Further, that there was no dispute during land adjudication or thereafter between P.W.2 and the 2<sup>nd</sup> defendant over ownership of plot No. 569; that P.W.2 and the 2<sup>nd</sup> defendant are relatives; that the 2<sup>nd</sup> defendant ceded a portion of her land comprised in Plot No. 569, measuring 1 acre to P.W.2; that part of the portion of land, measuring ½ an acre which the 2<sup>nd</sup> defendant ceded to P.W.2 was sold to the 1<sup>st</sup> defendant's wife (Monicah Jerop Kiptoo) with knowledge and approval of the 2<sup>nd</sup> defendant by one of P.W.2's sons (Julius Chepsoi) and that P.W.2 was not only aware of the sale agreement entered into between the 1<sup>st</sup> defendant's wife and his son, but also participated in the sale transaction as a witness.
14. The evidence adduced in the lower court, further shows that the plaintiff's witnesses, P.W.2 and his son P.W.3, could not tell the size of land sold to the plaintiff.
15. There is evidence that long before she obtained a title deed for her parcel of land, in particular sometime in 2010, the 2<sup>nd</sup> defendant lodged a complaint before the area chief complaining that the plaintiff had encroached on her parcel of land. There is no evidence of that dispute having been resolved in favour of the plaintiff.
16. The 2<sup>nd</sup> defendant obtained her title deed in 2015 while the plaintiff obtained his, by way of transfer from P.W.2, in 2020.
17. During hearing of the case, the plaintiff acknowledged that the 2<sup>nd</sup> defendant is the registered owner of parcel number 569 but contended that what is captured in the titles and map is not a true representation of his entitlement to the suit property. The plaintiff claimed that he is entitled to a ¼ acre of land comprised in the 2<sup>nd</sup> defendant's land.
18. The evidence adduced in the lower court further shows that the plaintiff's parcel of land and that of the 2<sup>nd</sup> defendant are separated by a 15m wide road (see report of the Surveyor-Dexbt 7). The evidence, Dexbt 7, also shows that the fence erected by the 1<sup>st</sup> defendant is on the 2<sup>nd</sup> defendant's parcel of land, plot No.569, and not on the plaintiff's parcel of land, Plot No. 1141.
19. Upon considering the cases urged before him, the learned trial magistrate observed/held:-

“...It is not in dispute that the Plaintiff is the registered and legal owner of parcel No. Marigat/Maji-Ndege B/1141. I make a declaration as such. An injunction shall thus issue against Defendants from interfering with Plaintiff's parcel of land.

The 2<sup>nd</sup> Defendant is the registered owner of Parcel No. Marigat/Maji Ndege B/569. I make a declaration as such accordingly. She however ceded land (portion) to Chepsoi Kipsarmat and a portion of 1 acre orally to Chepsoi Kipsarmat to give to his sons for fees. They put a blue line. This ceded land should be curved out from her title. For this reason, I order the 2<sup>nd</sup> Defendant to surrender her title deed to the Land Registrar, Baringo county, for the purpose of curving out the portion ceded out to Chepsoi Kipsarmat who in turn gave



the portion to the Plaintiff. After Kipsarmat gets title, he may go ahead and give it to the Plaintiff as he wishes. The 2<sup>nd</sup> Defendant is aware that the 1<sup>st</sup> Defendant paid money for the ½ acre she consented to be sold by Julius, son of Chepsoi Kipsarmat. The 1<sup>st</sup> Defendant was an innocent purchaser. The County Land Registrar should move to the ground and show parties boundaries accordingly so that the Plaintiff does not exceed boundaries of Parcel No. 1141 as he awaits the portion ceded by the 2<sup>nd</sup> Defendant to Chepsoi Kipsarmat to be carved out officially.

The 2<sup>nd</sup> Defendant does not deserve damages for trespass from the Plaintiff since the Plaintiff was put there by Chepsoi Kipsarmat whom she ceded land to orally. Her counterclaim succeeds only up to declaration that she is the registered owner of land parcel number 569 but has to release the portion she ceded to Chepsoi Kipsarmat and the portion bought by 1<sup>st</sup> Defendant. She is ordered to transfer the portion she agreed to give to Chepsoi Kipsarmat and the portion bought by the 1<sup>st</sup> Defendant forthwith. The remainder shall remain her portion...”

## Appeal

20. Dissatisfied with the decision of the trial court, the plaintiff appealed to this court on the grounds that the learned trial magistrate erred by:-
  1. Finding that the 1<sup>st</sup> respondent was an innocent purchaser for value of that portion of land ceded from land parcel Marigat/Maji Ndege B/569 registered in the 2<sup>nd</sup> respondent's name;
  2. Finding that Julius Chepsoi son of Chepsoi Kipsarmat (P.W.2) had the capacity to sell his father's land to the 1<sup>st</sup> respondent;
  3. Finding that the portion to be ceded to the 1<sup>st</sup> respondent belonged to the 2<sup>nd</sup> respondent;
  4. Failing to find that the portion ceded by the 2<sup>nd</sup> respondent to P.W.2 forms part of that parcel of land already bought by the appellant from P.W.2;
  5. Failing to find that the land purchased by the 1<sup>st</sup> respondent was the appellant's parcel of land when there was evidence that it formed part of the appellant's parcel of land;
  6. Failing to find that neither the appellant, P.W.1, nor the 2<sup>nd</sup> respondent had given consent to P.W.2's son to sell the Appellant's portion of land to the 1<sup>st</sup> respondent.
  7. Failing to find that the 1<sup>st</sup> respondent bought a parcel of land that had not been ascertained as to its position since there was no mutation and beaconing at the time of purchase, therefore, could either fall on the appellant's land parcel No. Marigat/Maji Ndege B/1141 or the 2<sup>nd</sup> respondent's parcel No. Marigat/Maji Ndege B/569;
  8. Ignoring the fact that the 2<sup>nd</sup> respondent admitted to have demarcated land parcel Marigat/Maji Ndege B/569 beyond the known boundaries and thus land parcel No. Marigat No. Marigat/Maji Ndege B/1141 was the property of the appellant.
21. The appellant urges this court to allow the appeal by partially setting aside the judgment of the lower court to the extent of ceding ½ an acre of land which was declared to be the 1<sup>st</sup> respondent's parcel which is now part of land parcel Marigat/Maji Ndege B/1141 and registering it in the name of the 1<sup>st</sup> respondent.



22. The appellant also urges this court to declare the ½ acre portion ceded from land parcel Marigat/Maji Ndege B/569 to the 1<sup>st</sup> respondent which is now Marigat/Maji Ndege B/1141 his parcel of land and to award him the costs of the appeal and the case in the lower court.
23. Pursuant to directions given on 30<sup>th</sup> November 2023, the appeal was disposed off by way of written submissions.
24. The appellant and 2<sup>nd</sup> respondent did not file submissions and/ or if they did, the submissions were not placed in the court file.

### **1st Respondent's Submissions**

25. In his submissions filed on 20<sup>th</sup> May 2024, the 1<sup>st</sup> respondent has framed one issue for the court's determination, that is, whether he is an innocent purchaser for value without notice.
26. Concerning that issue, the 1<sup>st</sup> respondent has made reference to the case of Weston Gitonga & 10 Others v. Peter Rugu Gikanga & another (2017)e KLR where in distilling who an innocent purchaser for value without notice is, the Court of Appeal relied on the Ugandan case of Katende vs. Haridar & Company limited (2008) 2 E.A. 173.
27. Based on the decision in the case of Katende supra, the 1<sup>st</sup> respondent submits that the learned trial magistrate did not error by holding that he was an innocent purchaser for value without notice because the evidence adduced before him warranted such a determination.

### **Analysis and determination**

28. In exercise of the duty vested in this court as a first appellate court, I have reevaluated 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.
29. From the pleadings, filed before the lower court, the evidence adduced in respect thereof; the judgment and the grounds of appeal, the sole issue for the court's determination is whether the appellant has made up a case for interference with the decision of the trial court.
30. In that regard, whereas the plaintiff/appellant had based his claim on alleged illegality in the adjudication of the suit property, committed by the 2<sup>nd</sup> defendant, he did not adduce evidence capable of proving his pleaded case. The evidence adduced shows that there was no dispute between P.W.2, the predecessor in entitlement to the suit property, and the 2<sup>nd</sup> defendant either during land adjudication or thereafter; that the only dispute was between the plaintiff and the 2<sup>nd</sup> defendant and that the dispute was raised by the 2<sup>nd</sup> defendant who claimed that the plaintiff had encroached into her parcel of land.
31. The evidence adduced before the lower court further shows that the 2<sup>nd</sup> defendant had, on her own motion given a portion of her land, Plot No. 569, measuring 1 acre, to P.W.2 to assist him in paying fees for his children; that P.W.2 sold a portion of the donated parcel to the plaintiff; that the 2<sup>nd</sup> defendant was not party or made aware of the transaction between the plaintiff and P.W.2 and that it is not clear from the evidence how much of the donated parcel was sold to the plaintiff.



32. That lack of knowledge, in my view, explains the dispute between the plaintiff and the 2<sup>nd</sup> defendant concerning the 2<sup>nd</sup> defendant's allegation that the plaintiff had encroached on her parcel of land.
33. The evidence further shows that the 2<sup>nd</sup> defendant was approached by the family of P.W.2, particularly, a son of P.W.2, Julius Kipsoi, to grant him permission to sell a portion of the parcel she had donated to their father, to the 1<sup>st</sup> defendant's wife. The 2<sup>nd</sup> defendant acceded to that request leading to the 1<sup>st</sup> defendant being sold a portion of the parcel of land she had donated to P.W.2 for the benefit of his children, Julius Kipsoi being one of the beneficiaries, to the 1<sup>st</sup> defendant's wife.
34. The evidence adduced before the lower court also shows that P.W.2 was aware of the sale agreement executed between his son and 1<sup>st</sup> defendant's wife-he witnessed the agreement.
35. As pointed out herein above, the 2<sup>nd</sup> defendant was not aware or did not participate in the agreement between the plaintiff and P.W.2.
36. Being the registered owner of plot No.569 and a trustee of the portion she ceded to P.W.2 for the benefit of his children, the 2<sup>nd</sup> defendant was justified in conceding to the request of P.W.2's family to allow one of his son's, Julius Kipsoi, to sell a portion of parcel of land she had given to his father, P.W.2, for his benefit.
37. In the circumstances, the plaintiff cannot be heard to claim that P.W.2's son had no capacity to sell the portion of plot No.569 which the 2<sup>nd</sup> defendant had ceded to P.W.2 for the benefit of P.W.2's children.
38. Given that the Plaintiff had not raised the issue of want of capacity/authority of P.W.2's son to sell the portion of plot No. 569 which 2<sup>nd</sup> defendant had ceded for the benefit of P.W.2, I find the plaintiff contention that the learned trial magistrate erred by failing to find that the portion that was sold to 1<sup>st</sup> defendant belonged to him and/or that P.W.2's son, Julius Kipsoi, had no capacity to sell his father's portion comprised in plot No. 659 to be not in tandem with his pleaded case and/or a departure from his pleaded case.
39. Since parties are bound by their pleadings, I find and hold that the decision of the learned trial magistrate cannot be faulted on matters not arising from the parties pleadings, like the contention that Julius Kipsoi had no capacity or authority to sell his father's parcel of land comprised in plot No. 569.
40. Having carefully analyzed the totality of the evidence adduced in the lower court, I find and hold that the learned trial magistrate properly directed himself on the issues of law and fact that were before him.
41. The upshot of the foregoing is that the appeal has no merit. Consequently, I dismiss it with costs to the Respondents.
42. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KABARNET THIS 24<sup>TH</sup> DAY OF JUNE, 2024.**

**L. N. WAITHAKA**

**JUDGE**

Judgment delivered electronically in the absence of:-

N/A for the appellant

N/A for the respondents

Court Assistant: Ian

