



REPUBLIC OF KENYA



**Kitur & another (Suing on behalf of the Estate of Stephen Kitur) v Kitur & another
(Environment & Land Case 68 of 2021) [2023] KEELC 78 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 78 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 68 OF 2021**

**MN MWANYALE, J
JANUARY 19, 2023**

BETWEEN

CHARLES KITUR 1ST PLAINTIFF

ELIZABETH CHELAGAT 2ND PLAINTIFF

SUING ON BEHALF OF THE ESTATE OF STEPHEN KITUR

AND

CHARLES KITUR 1ST DEFENDANT

HILLARY KITUR 2ND DEFENDANT

(Formerly Eldoret ELC CASE NO. 231 OF 2021)

JUDGMENT

1. A brief background of this matter is important as shall be explained in the paragraphs below, so that we understand how the original Defendants (Charles Kitur and Elizabeth Chelagat) are now Plaintiffs, and the original Plaintiff Hillary Kitur is now the Defendant.
2. The original Plaintiff's Charles Kitur and Elizabeth Chelagat vide their Complaint dated June 9, 2017, sued the Defendant Hillary Kitur, stating that sometimes in 1975, their late father sold their family property and entrusted the proceeds thereof to Hillary Kitur who purchased Nandi/Keben/93, measuring 8.26Ha but Hillary Kitur registered the said parcel unto himself as the proprietor thereof.
3. Later in 1995, the original Defendant Hillary Kitur caused subdivision of the suit property into Nandi/Keben/180, 181, 227, 228, 229, 230, 231 and 232.
4. The original Plaintiffs plead that *vide* a decision of the Land Disputes Tribunal sitting at Kilibwoni in case No. LDT/3/2000 a decision was made that the original parcel of land being Nandi/Keben/93 be subdivided as follows;



Hillary Kitur 8.2 acres

Charles Kitur 8.2 acres

Stephen Kitur 8.2 acres

5. The original Defendant Hillary Kitur filed his defence dated July 27, 2017 denying the allegation against him put forth by the original Plaintiffs in their Plaintiffs in their plaint.
6. Hillary Kitur took out a Notice of Motion dated 6/12/2018, seeking to restrain both original Plaintiffs in respect of Nandi/Keber/227 and an order of maintenance of the then prevailing *status quo* was made. The *status quo* defined then as Hillary Kitur being in possession, occupation and utilisation of the suit land was made on March 7, 2019.
7. Thereafter an application for contempt of Court was filed on 10/6/2017 where the original Defendants, Hillary Kitur sought to have the original Plaintiff's committed to Civil jail, however the application was found not to have merit and vide a ruling dated December 20, 2019, the application was dismissed.
8. Later on *vide* his application dated 5/11/2020, Hillary Kitur sought to amend the defence dated 27/7/2017 and plead a counterclaim.
9. This application to amend the defenced dated 5/11/2020 was allowed on November 26, 2020, hence Hillary Kitur now has amended defence and counterclaim.
10. The record shows that on 7/4/2021, Charles Kitur and Elizabeth Chelagat indicated their withdrawal of the suit (plaint dated 9/6/2017) *vide* a notice of withdraw dated 26/3/2021.
11. From November 26, 2020 when the application to amend the defence was allowed the original Plaintiffs did not file a reply to defence and defence to counterclaim as were required.
12. When the suit was transferred to Kapsabet ELC for hearing and determination it was brought to the Courts attention that the parties were close relatives and this Court referred the matter to the Court annexed mediation. The intended mediation.
13. On 28/3/2022 when the matter was mentioned upon the mediation failing Mr Bitok learned Counsel for the Original Plaintiffs sought time to file a defence to the counterclaim and was granted 14 days.
14. Having not complied with the above time frames, Mr. Bitok on the 10/6/2022 filed an application under certificate of urgency seeking extension of time to file the reply to defence and defence to counterclaim, and parties were directed to file submissions on the said application and a ruling in respect of that application was delivered on July 19, 2022.
15. Thus the original Plaintiffs Charles Kitur and Elizabeth Chelagat are now Defendants in this suit since they withdrew their plaint (suit) and Hillary Kitur, the original Defendant is now the Plaintiff (Courtesy of his Amended Defence and Counterclaim) being the primary pleadings now being considered by the Court.
16. Hillary Kitur shall now be referred to as the 'Plaintiff in the counterclaim' and the Charles Kitur and Elizabeth Chelagat shall now be referred to as 'Defendants in the Counterclaim.'



Defence And Counterclaim:-

17. As indicated at paragraph 15 of this judgment, the amended defence and counterclaim are the primary pleadings been considered by the Court, the plaint having been withdrawn and there been no reply to defence and defence to counterclaim.
18. In the counterclaim the Plaintiff pleads he has been in occupation of Nandi/Keben/227, since birth to date and has been utilising, occupying the same *Nec vi, nec precario*.
19. At paragraphs 4 and 5 of the counterclaim, the Plaintiff pleads that Nandi/Keben/227 is his ancestral land together with their family, brothers sisters and parents, and further pleads that the Defendants claim is time barred by virtue of Limitation of Action Act and prays at paragraphs 5 to be declared the owner thereof by adverse possession.
20. The Plaintiff thus prayed for declaration that he is the absolute owner of the suit land parcel number Nandi/Keben/227 and sought for a permanent injunction to restrain the Defendants from occupation of the property.

Plaintiff's Evidence:

21. Only the Plaintiff testified in support of his case. He adopted his witness statement; in his statement the witness stated that he had bought the property in 1971, being Nandi/Keben/93 at a consideration of 14,000 from Joseph Chumo. He later subdivided the property into LR 180, 181, 227, 228, 229, 230, 231 and 232.
22. It was the Plaintiff's further testimony as contained in his witness statement that between 2002 and 2016, through a meeting with the Senior Chief and family members, it was resolved that I give 5 acres to each family member.
23. It was the Plaintiff's testimony that the now withdrawn suit was an attempt to grab his property since he had already given them a portion of the property and they still had land, in Nandi/Baraton/1502, and he sought that the suit be dismissed.
24. The witness statement adopted by the Plaintiff in the counterclaim was dated December 18, 2018, before the amendment and the subsequent withdrawal of the suit by the original Plaintiffs.
25. Having adapted his statement, the Plaintiff in cross – examination that the 1st Defendant was his younger brother, while Stephen Kitur another of his younger brother had passed on; it was his testimony that they all lived in Baraton before moving to Keben.
26. He was the registered owner of the property having brought in by making payments to Lessos settlement scheme. He stated that he remembers the LDT Tribunal had decreed that the property was to be subdivided as follows Hillary 8.2 acres, Charles 8.2 acres and Stephen 8.2 acres. The property was his and did not belong to his late father.
27. The decision by the LDT was not quashed by the High Court, it was only stayed through Miscellaneous Application No 162/2000 which was eventual dismissed.
28. The Plaintiff in the counterclaim closed his case, and since the Defendants in the counterclaim did not file defence to the counterclaim, they did not adduce evidence and their case was equally closed. Parties were directed to file submissions, only the Plaintiff filed his submissions.



Plaintiff's Submissions:

29. The Plaintiff filed submissions on December 13, 2022. Judgement had initially been reserved for delivery on December 20, 2022 but was deferred, and delivered on January 19, 2023.
30. The Plaintiff identified two issues for determination, to wit,
 - a) Whether the Plaintiff has proved his counterclaim on a balance of probability?
 - b) If the above is in the affirmative, whether the orders sought in the counterclaim should be granted.
 - c) Who is to pay the cost of the original suit and the counterclaim?
31. It is the Plaintiff's submission that he had been in lawful possession, occupation and utilisation of the suit land since birth to date. The Plaintiff further submits that he is the registered proprietor of the suit land and is the indefeasible owner against the whole world. To fortify his claim the Plaintiff relies on Section 26 of the [Land Registration Act](#).
32. The Plaintiff further relies on Section 107 of the [Evidence Act](#), submitting that he has proved proprietorship in his defence and counterclaim, his witness statement, testimony in Court and thus prayed for judgment to be entered in his favour.
33. The Defendants in the counterclaim did not file a defence nor submissions, in the case, although their counsel had opportunity to cross – examine the Plaintiff in the counterclaim testifying as PW1.

Issues For Determination:

34. In his submissions, the Plaintiff in the counterclaim has identified 3 issues for determination, upon analysis of the pleadings, and evidence on record, the Court frames the following as issues for determination.
 - i) Whether the Plaintiff in the counterclaim has proven his case.
 - ii) If (i) above is in the affirmative, whether the Plaintiff is entitled to the reliefs sought in the counterclaim.
 - iii) Whether the Court should implement the decree in the LDT NO 3 of 2000.
 - iv) Whether the series of meetings held between 2002 and 2016 in the presence of the area chief and family members constitute traditional dispute resolution mechanism.
 - v) If (iv) above is in the affirmative, whether the Court should recognise the settlement arrived at in the traditional dispute resolution mechanism and implement the same.
 - vi) Who bears the costs of this suit?

Analysis And Determination:

35. In his testimony before Court, after adopting his witness statement, the Plaintiff produced six exhibits which were listed in his further list of documents the exhibits were as follows.
 - Exhibit 1. Letter dated November 27, 1969
 - Exhibit 2. Letter dated May 25, 1970
 - Exhibit 3. Letter dated October 27, 1970



Exhibit 4. Letter to settlement Fund Trustee on loan payment dated 3/10/1972.

Exhibit 5. Copies of Tinderet Land Control Board meeting held on April 19, 1973.

Exhibit 6. A copy of letter dated 18th November, 19981.

36. The above exhibits were produced by the Plaintiff in support of the counterclaim. No copy of title was produced in evidence by the Plaintiff. P Exhibit 5 corroborates the Plaintiff testimony that he bought the property from Joseph Kimwogoi Chumo. P Exhibit 5 – is an entry in respect of Keben Settlement Scheme No 93 – relating to consent for sale of the property measuring approximately 26.6 acres for a consideration of kshs 14,000 which was captured under minute 31/1773 where consent was given.
37. Other than the correspondences leading to purchase of Nandi/Keben/93 as it were the copy of the title to Nandi/Keben/227 was not produced in evidence and the reliance by the Plaintiff on Section 26 of the Land Registration Act seems to have no foundation, in absence of a copy of certificate of title being adduced in evidence.
38. The Court understood the Plaintiffs in the counterclaim's claim to be founded on the doctrine of adverse possession. This was expressly pleaded at paragraphs 3, 4 and 5 of the counterclaim.
39. Whereas on the one hand the Plaintiff in the counterclaim submits that he is the registered owner of Nandi/Keben/227 on the other hand, he claims Nandi/Keben/227, which he already owns, under adverse possession.
40. The two causes of action cannot exist together, since a party seeks adverse possession against another registered owner other than himself. The Plaintiff in the counterclaim in this case is claiming adverse possession against himself. This cannot be the case, and the counterclaim as pleaded is not only a paradox but also equally defeats the known principles upon which a claim of adverse possession can lay and the counterclaim is this unsuitable and the extent that the Plaintiff in the counterclaim seeks adverse possession against himself, the Courts finds the counterclaim has not been proven and it is hereby dismissed.
41. The above findings thus answer issues numbers 1 and 2 as framed by the Court at paragraph 34 of this judgment.
42. As noted earlier, the original suit was withdrawn, the counterclaim has also been dismissed and if the Court was to pen off at this point, it would lead to a pyrrhic justice, with no resolution of the dispute before Court.
43. With the foregoing in mind, the Court shall now consider issues number iii, iv and v as framed by the Court.
Issue number 3, whether the Court should implement the decree in LDT No 3/2000.
44. In the Course of cross – examination of PW1, it emerged that the dispute herein had been determined by the Kilibwoni Lands Dispute Tribunal vide LDT No 3/2000 where it was determined that the suit property (Nandi/Keben/93) as it existed was to be subdivided into 3 portions as follows;
Hillary Kitur 8 ½ acres
Charles Kitur 8 ½ acres
Stephen Kitur 8 ½ acres
45. The decision of the LDT Tribunal was thereafter challenged vide Eldoret, High Court Misc. Application. It follows therefrom that the LDT decision must have been delivered in the year 2000,



and under the Repealed Land Tribunal Act, the decisions thereof were to be adopted under section 7 (2) of the *Lands Dispute Act* as orders/judgments of the Court.

46. Hence in so far as the LDT decree in LDT case No 3/2000 was to be adopted as an order/judgment, of the Court for implementation, the same would now be time barred under Section 4 (4) of the *Limitation of Action Act*, which was pleaded at paragraph 12 of the Defence and paragraphs 5 of the counterclaim, hence the decree cannot be implemented by this Court on that account and since the decree formed the basis of the withdrawn suit, there would be no basis for its implementation in any event. Thus the answer to issue number 3 is that the decree in LDT 3 of 2000 being time barred cannot be implemented.
47. In his witness statement, the Plaintiff in the counterclaim, stated that he had subdivided Nandi/Kebe/93 into Nandi/Kebe/180, 181, 227, 228, 229, 230, 231 and 232 and that he had sold 181, 229, 230, 231 and 232 to Hellen Lagat, Tom Tanui, Pascalia Too, Sammy Koech and Titus Ngarngar who are not party to this case and he stated that he exclusively uses Nandi/Kebe/227.
48. It was his further evidence that a series of meetings on diverse dates from 2002 to 2016, resolved that the 2 Defendants in the counterclaim be given 5 acres each and a Surveyor was called to effect the subdivision but the Defendants upon being summoned on January 29, 2016 to attend a Land Control Board so as to effect the resolution reached failed to turn up, which brings the Court to issue number 4, as to whether the series of the meetings held between 2002 and 2016 constitute traditional dispute resolution mechanism.
49. In his testimony before Court, PW1 stated in his witness statement that he adopted, that the meetings took place in the presence of the area chief and family members and a resolution was made and that the Defendants in the counterclaim were each given 5 acres which they are already in occupation and are utilising the same.
50. The Court finds the series of meetings, held on diverse dates between 2002 and 2016 held in the presence of family members and the area chief to constitute part of traditional dispute resolution mechanisms.
51. Under Article 159 (2) (c) of the *Constitution*, this Court is required to recognise and promote Alternative Justice System and the traditional dispute resolution mechanisms fall under the Alternative Justice System.
52. Having made a finding that the series of meetings held between 2002 and 2016, constitute traditional dispute resolution mechanism and noting that the resolution reached thereof of settling the Defendants on 5 acres each, where they have settled is not repugnant to justice and morality, under Section 20 of the *Environment and Land Court Act*, this Court on its own motion can adopt and implement the alternative dispute resolution which includes the traditional dispute resolution mechanisms.
53. This Court under the provisions of Section 20, of the *Environment and Land Court Act*, having recognised the series of meetings held by area chief and family members and noting that the plaint herein was withdrawn and the counterclaim dismissed, and to promote substantive justice, as opposed to the pyrrhic justice of the withdrawal and dismissal of the counterclaim hereby adopts the decision of the traditional dispute resolution mechanism in the form of the series of meetings held between 2002 and 2016 and proceeds to implement the same as a judgment of this Court in terms hereunder.
 - a. Hillary Kitur, the Plaintiff in the counterclaim shall subdivide and donate 5 acres each to Charles Kitur and Elizabeth Chelagat as the Administratrix of the estate of Late Stephen Kitur.



- b. The 5 acres in (a) above are the ones that were already identified in the traditional dispute resolution in mechanism and are currently occupied by Charles Kitur and his family as well as Elizabeth Chelagat as Administratrix of the Estate of Stephen Kitur and her family.
- c. The 1st and 2nd Defendants in the counterclaim shall bear the costs of the subdivisions and transfers, and shall attend to the Land Control Boards as and when required for purposes of obtaining the necessary consents, which Hillary Kitur shall execute the necessary documents to effect the subdivisions and the transfer, in default the Deputy Registrar of this Court shall execute the same.
- d. Since the areas occupied by the 1st and 2nd Defendants are distinct from the area in occupation of Hillary Kitur, the 1st and 2nd Defendants are hereby restricted to use only the areas which shall not be more than the 5 acres each already in occupation by them and shall not trespass on the property belonging to Hillary Kitur.
- e. In view of the fact that the parties herein are related, each party shall bear its own cost.

DATED AND DELIVERED AT KAPSABET THIS 19TH DAY OF JANUARY 2023.

HON. M. N. MWANYALE,

JUDGE.

In the presence of

Mr. Omusundi for the Defendant/Plaintiff in the counterclaim.

Mr. Bittok for Plaintiff/Defendant in counterclaim.

