



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chumo v Murei (Environment and Land Appeal 4 of 2022)  
[2023] KEELC 15894 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15894 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT AND LAND APPEAL 4 OF 2022  
MN MWANYALE, J  
FEBRUARY 28, 2023**

**BETWEEN**

**KIBOCH CHUMO ..... PLAINTIFF**

**AND**

**PHILIPH KIPSUM MUREI ..... DEFENDANT**

**JUDGMENT**

1. Vide his memorandum of appeal dated July 29, 2021, the appellant Kiboch Chumo penned down 16 grounds of appeal, in dissatisfaction with the judgment and decree of honourable J A Orwa senior principal magistrate in Kapsabet SPMCC No 110 of 2016 delivered on July 16, 2021.
2. The grounds of appeal were that:-
  - i. The learned magistrate erred in law by granting the orders sought in the suit by the respondent without any or any sufficient grounds in law.
  - ii. The learned magistrate erred in law and in fact in holding that the appellant had no locus standi to pray for an order that the sit parcel be reverted to the name of his father Chumo Arap Bett on account of lack of letters of administration yet the land in issue was no longer in the name of the deceased.
  - iii. The learned magistrate erred in law and in fact by failing to appreciate the fact that the prayer for reversion of the title to the name of the deceased was an alternative prayer in case the main prayer was disallowed and thereby arriving at a wrong decision.
  - iv. The learned magistrate erred in law and in fact by holding that the appellant had admitted having filed a case against the respondent whose details were not set out where it was allegedly ruled in favour of the latter yet no case has ever been filed by the appellant.



- v. The learned magistrate erred in law and in fact by holding that the deceased transferred the land parcel known as Nandi/chemuswa/463 and Nandi/chemuswa/464 in his lifetime to the appellant and respondent despite glaring evidence to the contrary in particular that he only caused a subdivision via mutation of the original parcel Nandi/chemuswa/47 into two portions but retained both the resultant titles in his name.
  - vi. The learned magistrate erred in law and in fact by failing to take into account the fact that the appellant had been issued with title deeds for both parcels on June 5, 2000 which had led the respondent to file a case being Eldoret High Court Civil case No 20 of 2004 against the Appellant.
  - vii. The learned magistrate erred in law and in fact by failing to take into account the two certificates of official search issued on July 7, 2015 produced as defence exhibit 7 and 8 which clearly indicated that the two titles had reverted to the name of the deceased Chumo Arap Bett thereby arriving at an erroneous and irregular decision.
  - viii. The learned magistrate erred in law and in fact by relying on the alleged letter of consent dated May 11, 1989 in holding that the deceased had transferred his land parcel of title to his name yet the process of transfer of title to his name was not concluded in the lifetime of the deceased thereby making succession proceedings inevitable.
  - ix. The learned magistrate erred in fact by holding that the deceased was aged 103 years yet is clear at paragraph 6 of the appellants defence that he was aged 108 years.
  - x. The learned magistrate erred in law by failing to hold that the land registrar had no power or authority to issue title that is in the name of a deceased person to a third party in this case the respondent without succession proceedings being undertaken in the first instance.
  - xi. The learned magistrate erred in law and in fact by holding that there was no evidence that the deceased was sickly and mentally unstable due to his advanced age, yet his death certificate was produced as defence exhibit 6 showing that he was aged 113 years as at 1993 when he died hence 108 years in 1988, a fact of which the court ought to have taken judicial notice.
  - xii. The learned magistrate erred in law in holding that there was no evidence of fraud against the respondent despite glaring documentary evidence to that effect.
  - xiii. The learned magistrate erred in law by upholding technicalities at the expense of substantive justice in clear breach of article 159 (2) (d) of the *Constitution (2010)*.
  - xiv. The learned magistrate erred in law and in fact by failing to exercise her discretion judiciously.
  - xv. The learned magistrate erred in law in arriving at a wrong decision against the weight of the evidence and submissions on record.
  - xvi. The learned magistrate erred in law by failing to act fairly and thereby occasioning a miscarriage of justice.
3. On the strength of the above grounds of appeal, the appellant prayed that;
- a. Judgment and decree issued by the learned magistrate be set aside and in its place there be an order dismissing the respondent's suit therein and allowing the pleadings counterclaim in its entirety.
  - b. Costs of this appeal and the lower court case be borne by the respondent.



**Pleadings before the subordinate court: -**

4. The appellant was the defendant in the lower court, while the respondent was the plaintiff. The appellant had filed a defence and counterclaim.
5. It was the plaintiff's case before the lower court that;
  - i. He was the registered proprietor of all that parcel of land known as Nandi/chesumwa/464 while the defendant was the proprietor of all that parcel of land known as Nandi/chemuswa/463; and there existed a clear boundary between the two parcels.
  - ii. The plaintiff had attempted to establish the boundary between the two parcels but the defendant has been hostile and prevent the county land registrar Nandi and county surveyor from conducting a survey to establish the boundary.
6. The plaintiff thus sought orders to restrain the defendant, his agents, heirs and other representatives from hindering the lawful demarcation of the boundary.
7. The defendant now appellant in his defence and counterclaim pleaded that he was the lawful proprietor of those parcels of land known as Nandi/chemuswa/463 and Nandi/chemuswa 464 which were subdivision of Nandi/chemuswa 1217, that belonged to him, but had being registered in the name of his father Chumo Arap Bett in trust for the defendant as he way away when adjudication was undertaken.
8. A panel of elders resolved the matter of the ownership thereof on June 6, 1988 in the defendants favour which decision had been upheld by the district officer Kabiyeet during the lifetime of the said Chumo arap Bett, the defendant further pleaded.
9. The defendant further pleaded that he had made an application to the registrar vide a letter dated October 7, 1999 to be registered as the owner of the said parcels which was granted and he was registered as proprietor on the two parcels and issued with title deeds in his name on November 16, 1999, which titles were still in his custody.
10. The defendant further avers that if any subdivision was done in Nandi/chemuswa/47 then the same was done fraudulently as the late Chumo Arap Bett was then aged 10.8 years and too old to understand the implication of his actions.
11. It was the defendant's further case that Chumo Arap Bett was registered as trustee for him and upon his death the property ought to have reverted to the defendant.
12. The defendant further pleading that on July 7, 2015, the property reverted to name of Chumo arap Bett who had died in 1993, albeit unprocedurally as the defendant was not notified of the said action and no succession proceedings over the same had been undertaken to enable the plaintiff have the name registered in his name. Thus the registration of the parcel number Nandi/chemuswa/464 in plaintiff name in year 2016 was a nullity, the defendant avers.
13. It is the defendants further defence that no survey or demarcation was done on the ground to give rise to the two parcels of land hence the resultant titles have no legal basis.
14. By way of further averments, the defendant pleaded, that since no survey or demarcation had been done on the property, in the process of mutation, the intended action by the plaintiff was thus in bad faith as it intended to sanitise an illegality and would amount to an abuse of the court process.

There was pending before the High Court at Eldoret Civil suit 20 of 2004 before the parties.



15. In his counterclaim, the defendant pleaded that in view of the illegal subdivision of his property known as Nandi/chemuswa/47 giving rise to the parcels known as Nandi/chemuswa/463 and Nandi/chemuswa/464. The resultant titles ought to be revoked and the title do revert to the original number in the name of the defendant.

16. In an alternative prayer, the defendant prayed that said parcels ought to be in the name of the deceased and be subjected to succession.

The plaintiff in the counterclaim thus sought for a declaration that Nandi/chemuswa/463 and 464 legally and exclusively belonged to him.

17. That orders of mandatory injunction to issue directing Nandi County Land Registrar to cancel titles to Nandi/chemuswa 463 and Nandi/chemuswa/464 and reissue the same in the original number Nandi/chemuswa/47 in the name of the defendant alternatively the same to revert to original parcel be reverted to the name of Chumo Arap Bett and be subjected to the succession.

Parties were directed to file submissions on the appeal.

**Appellant's submissions: -**

18. The appellant submits that the duty of this court as a first appellate court is captured by section 78 of the Civil Procedure Act which espouses the role of the court; as to re-evaluate re assess and reanalyse the extracts of the record and draw its conclusions.

19. To further buttress the said role, the appellant has cited the decision in the case of Selle and another v Associated Motor Boat Company Limited and 2 others; as well as the decision in Peter M Kariuki vs Attorney General where in both decisions the courts emphasized to duty the reconsider the evidence adduced at the trial court and re-evaluate it to draw out own independent conclusions and to satisfy the courts that the conclusions reached by the trial judge are consistent with the evidence.

20. The appellant has penned 10 issues for determination and submitted on the said issues;

21. The issues for determination identified by the appellant are as follows;

i. Whether land parcel Nandi/chemuswa/47 originally belonged to the appellant and that the deceased Chumo Arap Bett only held in trust for him.

ii. If (i) above is in the affirmative, whether the deceased had the power or authority to effect subdivision and transfer thereof to third parties.

iii. Whether the deceased Chumo Arap Bett effected subdivision of the said parcel into two and the subsequent transfer of the resultant titles in his lifetime and whether he had mental capacity to do so.

iv. Whether a consent to transfer allegedly issued in 1989 can form the basis of a transfer 27 years later.

v. Whether any instrument purported executed or obtained by the deceased and not registered in his lifetime can be validly acted upon 23 years after his demise without going through succession process.

vi. Whether a land registrar has the power or authority suo moto to revoke a title deed validly issued to a party.

vii. Whether non-joinder of the land registrar was fatal to the appellant's counterclaim



- viii. Whether the respondents suit had merit and was property allowed.
  - ix. Whether the appellants defence and counterclaim had merit and ought to have been allowed.
  - x. Who will bear the costs of the suit and appeal herein.
22. The court has taken note of the submissions made in respect of each of the issue for determination as raised by the appellant.

**Respondent's submission: -**

23. On his part the respondent has framed 4 issues of determination as follows;
- a. Whether the respondent is the bonafide registered proprietor of land parcel number Nandi/chemuswa/464 and the appellant entitled the Nandi/chemuswa/463.
  - b. Whether the findings in Eldoret High Court ELC No 237 'A' of 2012, formerly Eldoret High Court Civil Case No 20 of 2004 Philip Kipsum Murei vs Kiboch Chumo are binding to this court.

When, how and by whom was Nandi/chemuswa/47 subdivided into Nandi/chemuswa 463 and 464 and whether orders can be issued against a person who is not a party to a suit.

Is the respondent entitled to the prayers sought?

**Issues For Determination: -**

24. The court has perused, the record of appeal in totality and frames the following as issues for determination in this appeal.
- i. Whether the issues before the lower court and by extension this appeal had been dealt with in Eldoret ELC No 237 A of 2012 formerly Eldoret High Case No 20 of 2004 between Philip Kipsum Murei and Kiboch Chumo.
  - ii. Whether the appeal is merited?
  - iii. What reliefs ought to issue?

**Analysis And Determination: -**

25. In his plaint before the lower court, the plaintiff did not plead the fact that he had been filed case number Eldoret High Court Civil Suit No 20 of 2004 which later Eldoret ELC 237 A of 2012.
26. At paragraph 11 of the defence, it is the defendant now appellant who pleaded the existence of Eldoret High Court Civil Suit No 20 of 2004 which was still pending determination at the time the suit before the lower court was filed.
27. In the reply to defence and defence to counterclaim, the plaintiff now respondent, at paragraph 5 thereof pleaded that Eldoret High Court Civil Suit No 20 of 2004 had nothing within picking and ascertaining boundary as had been prayed for in this suit.
28. In the course of the proceedings, another reference to (Eldoret ELC 237 A of 2012 formerly Eldoret High Court civil case No 20 of 2004) appears in the cross examination of the defendant now appellant appearing on page 57 of the record of appeal, where it is recorded that the defendant now appellant was aware of the matter in the Eldoret Environment and Land Court case. It was his answer that the Court had ruled that parcel No 463 belonged to him (appellant) and parcel No 464 belonged to his brother.



29. The proceedings and judgment in Eldoret ELC 237 A of 2012 formerly Eldoret High Court Civil case No 20 of 2004) here not produced before the trial Court as per the record.
30. In her judgment the learned magistrate at page 62 of the record of appeal equally mentioned Eldoret ELC 237 A of 2012 (formerly Eldoret High Court Civil case No 20 of 2004), and the findings made therein.
31. In the said judgment among the case law analysed by the learned magistrate as appearing at page 63 of the record of appeal was Eldoret ELC 237 A of 2012 (formerly Eldoret High Court 20/2004). Which must have been the same case alluded to in the proceedings and the pleadings.
32. The court on realisation that the judgment in Eldoret 237 'A' of 2012 formerly civil suit No 20 of 2004 though referred to by the learned magistrate in the impugned judgment as indicated in paragraph 29 above, directed the respondent who had substantively submitted on it reproducing extract therefrom to file a supplementary record of appeal and the appellant was granted leave to file supplementary submissions with respect to the judgment, as issue number 1 and framed by the court, related to the judgment to wit, whether the issues before the lower court and this appeal had been dealt within Eldoret ELC case No 237 'A' of 2012 formerly Eldoret High Court case No 20 of 2004.
33. The appellant however did not file the supplementary submissions as he had applied yet leave was granted.
34. The court has considered the judgment in Eldoret 237 'A' of 2012 (formerly Eldoret High Court Civil case No 20/2004) and the issue of ownership of Nandi/chemuswa/464 was dealt therein and it could not be therefore dealt with before the suit at Kapsabet case No 110 of 2016 subject of this appeal and in this appeal too.
35. Accordingly, in so far as the issue of ownership had been settled it was not open for the appellant to plead and rely the same in the counterclaim and issues numbers 1 to 6 as framed by the appellant in his submissions are thus *resjudicata*, as they raised issued of ownership of Nandi/chemuswa/464.
36. The court finds in answer to issue number 1 that the issues before the learned magistrate and in this appeal in relation to ownership of Nandi/chemuswa/464 were dealt with in Eldoret Environment and Land Case No 237 'A' of 2012, and the learned magistrate was right not to reopen the issues, thus grounds 1 to 12 of the grounds of appeal cannot be reopened in this appeal as the issue of ownership of Nandi/chemuswa/464 was already settled, in Eldoret ELC No 237 'A' of 2012.
37. On issue number 2, as to whether the appeal has merit or not, having found that grounds number 1 to 12 of the appeal are related to ownership of Nandi/chemuswa/464 and were settled in Eldoret Case Number 237 'A' of 2012, the court shall now examine the merits in the remaining grounds.
38. Grounds 13, 14 and 16 all accuse the learned magistrate of not acting judiciously and causing a miscarriage of justice. Grounds 15 accuses the learned magistrate of reaching a wrong decision. Yet the ownership of Nandi/chemuswa/464 having been determined in Eldoret 237 'A' of 2012, the learned magistrate could not depart from the findings of the superior court and i thus find no merit in the said grounds of appeal and the entire appeal and uphold the judgment of the lower court.
39. Consequently the entire appeal lacks merit and it is hereby dismissed with costs of this appeal and the lower court case to be borne by the appellant.
40. Judgment accordingly.

**DATED AT KAPSABET THIS 28TH DAY OF FEBRUARY, 2023.**



**HON. M. N. MWANYALE,**

**JUDGE**

**In the presence of;**

Mr. Magut for the Appellant

