



**Kibor & 2 others (Suing on their own behalf and on behalf of Kaptul Clan as their representatives) v Cheboi & 2 others (Being sued on their personal capacities and as representatives of Kaptobon clan) (Environment & Land Case 51 of 2022) [2023] KEELC 16036 (KLR) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 16036 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT & LAND CASE 51 OF 2022  
L WAITHAKA, J  
FEBRUARY 27, 2023  
FORMERLY ELDORET ELC CASE NO.5 OF 2014**

**BETWEEN**

**RICHARD KIBOR ..... 1<sup>ST</sup> PLAINTIFF  
JOHNSTONE CHEPTOO ..... 2<sup>ND</sup> PLAINTIFF  
ELISHA MAIYO CHEROP ..... 3<sup>RD</sup> PLAINTIFF  
SUING ON THEIR OWN BEHALF AND ON BEHALF OF KAPTUL CLAN AS  
THEIR REPRESENTATIVES**

**AND**

**DANSON CHEBOI ..... 1<sup>ST</sup> DEFENDANT  
SAMUEL CHEMWONO ..... 2<sup>ND</sup> DEFENDANT  
SIMON CHESANG ..... 3<sup>RD</sup> DEFENDANT  
BEING SUED ON THEIR PERSONAL CAPACITIES AND AS  
REPRESENTATIVES OF KAPTOBON CLAN**

**JUDGMENT**

**Introduction**

1. By a plaint dated January 6, 2014 and filed on January 8, 2014, the plaintiff who have described themselves as members of Kaptul clan and as the original owners of Kokuob Porowo land situate in Kapsowar, Keiyo Marakwet county, instituted the instant suit claiming that the defendants who are members of Kaptobon clan had without any colour of right attempted to take possession of their land.



2. It is the plaintiffs' case that they had lived peacefully in the suit land until sometime in 2013 or thereabout, when a dispute arose between their clan and the defendant's clan over ownership of a portion of land measuring 15 acres or thereabout situated in Kapsowar, Keiyo Marakwet county; that they lodged a claim before the area Assistant Chief, who with the help of elders, decided that the suit land belonged to their clan, Kaptul clan.
3. The decision of the area Assistant Chief/elders was challenged by the defendants leading to further discussions/deliberations concerning ownership of the suit land led by officers of the office of president. The dispute between the two clans was not resolved as the plaintiff's clan brought the instant suit, claiming that it was apprehensive that it may not get justice out of the process.
4. The plaintiffs contended that the action of the area District Commissioner of calling for a meeting to discuss the dispute when the same had been settled in their favour was actuated by malice and bad faith.
5. Claiming that the defendant's clan/its members had no right to claim ownership to the suit land because the dispute concerning ownership of the suit land had previously been decided in their favour, the plaintiffs instituted this suit complaining that the defendants were claiming ownership of the suit land and had sought adjustment of the boundary of the suit land and threatened to take possession of the suit land.
6. The plaintiffs sought the following reliefs against the defendants:-
  - a. An order of permanent injunction to restrain the defendants, their agents, servants and/or assigns from interfering with their peaceful occupation and utilization of the suit land;
  - b. An order of eviction to remove the defendants, their agents and/or servants from the suit land;
  - c. A declaration that the suit land, Kukuob Porowo land, belongs to Kaptul clan and that the original boundaries defined by elders be observed and maintained;
  - d. Costs of the suit.
7. The defendants, through the statement of defence and counterclaim filed on February 6, 2014, denied all allegations leveled against them in the plaint and contended that their land is distinct from that of the plaintiff's clan, that the plaintiff's case of February 13, 1989 had nothing to do with them and that their boundary was marked in a case they had with Kapchemwei clan in 2003.
8. In their counterclaim, the defendants seek to be declared the owners of the land described by their local names as Nguryo, Sirya, Sokotwo, Boyotwo among other local names, from Tereu to Tumborelwo along the stone marked beacons (stones) planted by their ancestors.

## **Evidence**

### **The plaintiff's case**

9. When the case came up for hearing, Richard Kibor (PW1) relied on minutes of April 12, 2013. He informed the court that the defendants are their neighbours and that the defendants do not have boundary features different from theirs.
10. PW1 Further informed the court that the defendants' land borders their land; that the defendants have encroached on a small portion of their land, measuring 15 acres and that Nguryo, Sirya, Sosotwo, Boyotwo, Tereu and Tumberelwo are boundary marks of their land.



11. Concerning the Minutes of a meeting held on February 13, 1989, he informed the court that they were authored by John Kwambai.
12. PW1 further informed the court that he is aware of the meeting held on January 9, 2014 chaired by the area District Officer. He stated that they did not attend the meeting because they had filed this suit. He stated he is also aware of the meeting of June 8, 2013.
13. Concerning the report by Highland Valuers, he stated that the valuation exercise was attended by representatives of both clans. Both parties showed their boundaries but did not participate in writing the report.
14. He further stated that Kaptul clan was not party to the meeting of August 20, 2013; that their clans' boundary is marked by trees and not stones and that other than the meeting of 2013 no other meeting determined the ownership of the suit land.
15. PW2, Johnstone Kiptanui Cheptoo, informed the court the suit land is the same land that was in dispute in 1989; that during resolution of the dispute of 1989 between Kaptul clan and Shaban clan, it is the elders of Kaptobon clan who showed the boundary between them and Shaban; that at that time, there was no dispute between Kaptul and Kaptobon clans.
16. PW2 further informed the court that he attended the meeting of January 9, 2014 but did not participate because they had filed a case at that time.
17. Concerning the dispute of 2003, he stated that the dispute was between Kaptobon clan and Shaban clan which they had a case with in 1989. Like PW1, he stated that other than the meeting of April 2, 2013 no other meeting determined ownership of suit land between the plaintiffs and the defendants. He clarified that the meeting of August 20, 2003 was in relation to a different parcel of land.

#### **The defendant's case**

18. D.W.1, Danson K. Chebon, informed the court that no decision was made in the meeting of January 9, 2014; that on January 16, 2014 the area District Officer wrote to this court giving the status of the dispute between Kaptul and Kaptobon clans and that the dispute of 2003 concerned the boundary of Kaptobon and Kapchemwel clans.
19. He further stated that the meeting of January 28, 2013 was convened by the area Assistant Chief and was attended by members of both clans, Kaptul and Kaptobon; that there was another meeting scheduled for August 30, 2013 which did not take place because they were served with court summons issued in this case and that a private surveyor visited the suit land and with the help of representatives from both clans and was shown their traditional boundaries.
20. D.W.1 further stated that they never had any meeting to address the dispute between them and that their area District Commissioner was to visit the suit land to confirm the boundaries between them but the exercise did not take place because they were served with court summons issued in this case.
21. D.W.1 denied the plaintiff's contention that they have trespassed into the plaintiff's land and stated that attempts to mediate the dispute between them were futile as Kaptul clan did not attend the mediation sessions. He could not tell why the plaintiffs are claiming their land.
22. In cross examination, he acknowledged that elders from their clan, Kaptobon clan, attended the meeting of 1989 between Kaptul and Shaban clan and stated that few members of their clan attended the meeting of April 2, 2013.



23. With regard to the plaintiff's contention that the meeting of 2<sup>nd</sup> April 2013 resolved that the suit land belonged to Kaptul clan, he stated that he is not aware of that fact. Nevertheless, he acknowledged that no decision was reached in the meeting of June 28, 2013 concerning the ownership of the suit land and that no decision or resolutions were made in the meeting of January 9, 2014.
24. In re-examination, he stated that Pexbt 1 has no relevance to this suit as it does not relate to the suit property.
25. He acknowledged that he attended the meeting of April 2, 2013 and that no ownership decision was made in the meeting of June 28, 2013.
26. D.W.2, Thomas Cheboswony, a resident of Kablamet village, informed the court that Kaptul and Kaptabon clans are his neighbours.
27. He stated that he attended the meetings of June 28, 2013 and that the meeting of 1989 is not relevant to the current proceedings as the land in dispute was different from the instant case. He stated that he does not know the outcome of the meetings of 1989, 2003, April 2, 2013 and June 28, 2013.
28. D.W.3, Daniel Kiptala Chemelil, produced the valuation report prepared by his firm, Highland Valuers Ltd. The report was prepared pursuant to a court order of court issued on January 2, 2014.
29. He informed the court that they visited the site on January 4, 2014 in the company of members of the two clans.
30. During site visit, they witnessed a number of homesteads plus ruins of homesteads. He further stated that they were shown burial sites and graves of the persons captured in page 6 of their report.
31. He informed the court that their findings are captured on page 7 of the report. Concerning the findings, he told the court that the land was found to be 15 acres with several dwelling units. He produced the report as Dexbt 3.
32. In cross examination, he stated that their terms of reference were as per the order of the court issued on January 27, 2014. The size of the land was verified by the District Surveyor.
33. He informed the court that he did not visit the land but Simon Kibiso of their office visited it therefore, his evidence is based on the report by the office.
34. At close of hearing, parties filed submissions, which I have read and considered.

### **Analysis and determination**

35. From the pleadings, evidence and submissions, I find the sole issue for determination to be whether either of the parties have made up a case for being granted the orders sought. Tied to that issue, is the issue of what order(s) should the court make.
36. On whether either party has made up a case for being granted the orders sought, from the totality of the evidence adduced in this case, I gather that the dispute that forms the subject matter of this suit first arose in 2013. When the dispute arose, the plaintiffs lodged a claim before the area assistant chief, Peris J. Cheboi, who upon hearing the dispute determined that the suit land belonged to the plaintiffs. The plaintiff's produced the minutes/deliberations of the meeting of April 2, 2013 containing the decision of the assistant chief, as PEXBT 2. Based on that decision and the oral testimonies of PW1 and PW2, on behalf of the plaintiffs, it is submitted that the plaintiffs proved, on a balance of probabilities that the suit property belongs to their clan, Kaptul clan.



- 37. There is evidence that other meetings were called by officers of the office of president, arising out of the decision of the area Assistant Chief. These include the meetings held on June 28, 2013 and on January 8, 2014. No decision or resolution was made in those meetings as the plaintiffs had instituted this suit.
- 38. Whilst it is true that the Area Assistant Chief, with the assistance of elders, determined that the suit property belongs to the plaintiffs, on account of evidence showing that there were further deliberations concerning that dispute, it cannot be said with finality that the dispute was arbitrated in favour of the plaintiff's.
- 39. Pursuant to an order of the court given on January 27, 2014 Highland Valuers Limited visited the suit land and filed a report to this court. The report was produced by D.W.3, Daniel Kiptala Chemelil, as Pexbt 5. The report in page 6 thereof, is as follows:-

“The disputed portion has several other ruins of homesteads as witnessed by remains of fireplaces.

During our inspection we noted that there were ruins of homesteads pointed out by Kaptobon clan together with ancestral burial sites and graves with the following names given for owners.

- i. Chebet Chemonjei (Deceased)-Kaptobon clan
- ii. Chemalil Arap Cheriny (Deceased)-Kaptobon clan
- iii. Yapo Cheserek a.k.a Chebo Tamungu-Kaptobon clan.

.....”

- 40. Whereas the report by D.W.3 is challenged by the plaintiffs on the grounds that DW3 was at pains to explain what was contained in the report because he never visited the site nor prepared the report; the survey was done by the District Surveyor whose input on what he found on the ground was not incorporated in the report and the qualifications of Simon Kimuso who visited the site and prepared the report were not ascertained, given the evidence of PW1 to the effect that both parties were represented during site visit, I am of the considered view that the report is reliable for assisting the court form an opinion of the dispute.
- 41. Contrary to the plaintiff's contention that the defendants encroached on the suit land in 2013, the report shows that members of the defendants' clan had been in occupation of the suit land for a long period of time. That fact is laid bare by graves of members of that clan.
- 42. In view of the foregoing, I find and hold that the plaintiffs have not made up a case for being granted the orders sought.
- 43. As to whether the defendants have proved their counterclaim, despite having determined that the plaintiff have not proved their case, I am equally not persuaded that the defendants have made up a case for determination of the boundary dispute between them and the plaintiffs.
- 44. Whilst the plaintiff claimed that they were apprehensive that they may not get justice out of the alternative dispute resolution process that was being undertaken, no evidence whatsoever was adduced in support of that apprehension. The decision to institute this suit before conclusion of the alternative dispute resolution process before the officers of Provincial Administration was, in my considered view premature and ill-advised.



45. In accordance with the provisions of section 39 of the *Community Land Act* No 27 of 2016, this court encourages the parties to pursue the alternative dispute resolution process they were pursuing before this suit was filed.
46. To encourage the parties to pursue an out of court settlement of the issues in dispute, particularly, on the issue of the boundary of the two clans, I encourage the parties, with the guidance of officers of National Government, to pursue out of court settlement of the boundary dispute. In the meantime, the status quo obtaining at the time of delivery of this judgment should be maintained. That is to say, the members of the defendant's clan will continue occupying the portion of the suit property they are currently in possession of.
47. The upshot of the foregoing is that the suit is dismissed with no orders as to costs.

**JUDGMENT READ, DELIVERED, DATED AND SIGNED AT ITEN THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**L. N. WAITHAKA**

**JUDGE**

Judgment delivered through Microsoft vide conferencing plat form video In the presence of:-

Ms. Koskei holding brief for Ms. Odwa of the plaintiff

Mr. Cheptarus for the Defendant – Absent

Christine Towett – Court Assistant

**L. N. WAITHAKA**

**JUDGE**

**27.2.2023**

