

KENYA / JUDGMENT

Chepyego & another v Tobose (Substituted with Ziporah Tabosei) [2026] KEELC 5472 (KLR)

[2026] KEELC 5472 (KLR)**COURT**

Environment and Land Court

CASE / FILE NUMBER

Environment and Land Appeal E004 of 2023

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REPUBLIC OF KENYA IN THE ENVIRONMENT AND LAND COURT AT KABARNET ELCLA NO.
E004 OF 2023 SAMUEL CHEPYEGO 1ST APPELLANT SIMION
CHEBOTIBIN 2ND APPELLANT VERSUS JOHANA CHEPSONGOL
TOBOSE (Substituted with ZIPORAH TABOSEI RESPONDENT

JUDGMENT

(Being an appeal from the Judgment of HON. P. C. BIWOTT (SENIOR PRINCIPAL MAGISTRATE) delivered on 24th January 2023 in KABARNET MAGISTRATE'S COURT ELC CASE NO. 16 of 2018).

1. JOHANA CHEBSONGOL TOBOSEI (the Respondent herein) filed a suit originally at the ELDORET ENVIRONMENT AND LAND COURT before OMBWAYO J transferred it to the Subordinate Court at KABARNET. KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 1 of 21
2. By his plaint dated 20th February 2017, the Respondent sought Judgment against SAMUEL CHEPYEGON and SIMION CHEBOTIBIN (the 1st and 2nd Appellants respectively) in the following terms with respect to the land parcel known as plot NO. 2240 KAPLUK ADJUDICATION SECTION (the suit plot).

1. A perpetual injunction restraining the Appellants from entering, destroying the Respondent's fence and trees or interfering in any way with the Respondents parcel of land known as plot NO. 2240 KAPLUK ADJUDICATION SECTION.
2. A declaration that plot NO. 2240 of which the Respondent has been in occupation since 1994 belongs to the Respondent and the same be registered in the Respondent's name.
3. Costs and interest of the suit. 3. The basis of the Respondents case (he has since 29th August 2025 been substituted with ZIPORAH TABOSEI) was that he had purchased the suit plot in 1994 from the 1st Appellant and immediately took possession, fenced it and planted trees and has been utilizing the same having done developments on the same. That the 1st Appellant is his son in law and their relationship had been cordial until recently when the 1st KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 2 of 21 Appellant secretly

purported to have sold the suit plot to the 2nd Appellant who had been intending to forcefully enter it and evict the Respondent therefrom. When the Respondent approached the 1st Appellant he (1st Appellant) said he had only leased the suit plot from the Respondent. It was the Respondent's case that the 1st Appellant had been troubling him by reporting to the police and at times entering the suit plot and destroying the Respondents fence with the help of the 2nd Appellant. That in October 2016, the 1st Appellant entered the suit plot and destroyed the Respondent's trees. That necessitated the filing of the suit in the subordinate court. 4. The Appellants filed a joint defence dated 4th April 2017. 5. The 1st Appellant pleaded that he is the bona fide owner of the suit plot but denied having sold it to the Respondent. The Appellants admitted that the Respondent is the father in-law to the 1st Appellant. The 1st Appellant added that he had leased the suit plot to the Respondent from 2005 to 2009 at an annual fee of Kshs. 2,000 of which he paid Kshs. 4,700 leaving a balance of Kshs. 300. The Appellants however denied all the averments of the Respondent adding that this suit was filed in violation of Section 30 of the Land Adjudication Act and the Court therefore had no Jurisdiction to determine the suit which was incurably defective, incompetent, bad in law and did not disclose any reasonable cause of action. The 2nd Respondent KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 3 of 21 averred further that he had purchased the suit plot from the 1st Appellant and was in the process of finalizing the transfer process. The Appellants added that prayer No. 2 of the plaint was a claim for adverse possession which should have been filed through Originating Summons. They sought the dismissal of the Respondent's suit with costs. 6. The suit was heard by HON. P. C. BIWOTT (SENIOR PRINCIPAL MAGISTRATE) who, vide a Judgment delivered on 24th January 2023 on his behalf by HON. J. WANJALA (CHIEF MAGISTRATE) found in favour of the Respondent and entered Judgment for him as sought in his plaint. 7. Aggrieved by that Judgment, the Appellants have moved to this court vide their Memorandum of Appeal dated 21st February 2023 and filed on 22nd February 2023. They seek to set aside the said Judgment by dismissing the Respondents suit with costs. 8. The following nine (9) grounds of appeal have been preferred:

1. The learned Magistrate erred in law and fact in holding that the Respondent had proved his case on a balance of probabilities. KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 4 of 21
2. The learned Magistrate erred in law and in fact in not considering the evidence tendered in Court by the Appellants.
3. The learned Magistrate failed to take into consideration vital evidence tendered by the Appellants' witnesses pointing to the fact that the parcel of land NO. 2240 KAPLUK ADJUDICATION SECTION was leased to the Respondent by the 1st Appellant and not sold to him.
4. The learned Magistrate erred in law and in fact in taking into consideration extraneous evidence and

issues.

5. The learned Magistrate erred in law and in fact in not considering that the evidence of the 1st Appellant was corroborated by a written agreement between him and the 2nd Appellant while that of the Respondent was mere allegations because the agreement on sale of land was made orally.
6. The learned Magistrate erred in law and in fact in relying on PW2's evidence that there was consideration on sale of land parcel NO. 2240 KAPLUK ADJUDICATION SECTION and that the 1st Appellant had tried to recall it in a meeting arbitrated by elders. KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 5 of 21
7. The learned Magistrate erred in law and in fact in finding that there was mutual trust between the Respondent and the 1st Appellant which could legitimize an oral agreement and therefore sanctioning the said agreement which position was not tenable in law and could not be proved by evidence to have existed.
8. The learned Magistrate erred in law and in fact by holding that the 1st Appellant cannot hide behind Section 3(3) of the Law of Contract Act and the provisions of the Land Control Board requiring consent to be obtained by the Respondent within six
(6) months.
9. The learned Magistrate gave a Judgment which was biased against the Appellants and not based on fact and evidence tendered before the Honourable Court. 9. The appeal has been canvassed by way of written submissions. The same have been filed by MS. CHESARO instructed by the firm of J. J. CHESARO & COMPANY ADVOCATES for the Appellants and by MR. KIPLAGAT instructed by the firm of J. K. KIPLAGAT & COMPANY ADVOCATES for the Respondent. 10. I have considered the record of appeal and the submissions by counsel. KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 6 of 21 11. This being a first appeal, I am guided by the principles that a first appellate court will not ordinarily interfere with the findings of fact by the trial court unless they were based on no evidence at all or were based on a misapprehension of the evidence or unless it is demonstrated that the trial court acted on wrong principles in reaching its findings – SELLE & ANOTHER V. ASSOCIATED MOTOR BOAT CO. LTD 1968 E.A 123, MWANASOKONI V KENYA BUS SERVICE LTD 1982 – 88 KAR, KIRAGU V KIRAGU & ANOTHER 1988 KLR 348 among other cases. 12. In the case of KENYA PORTS AUTHORITY V KUSTON (KENYA) LTD 2009 2EA 212, the Court of Appeal rendered itself as follows: “On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.” KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 7 of 21 13. The same principles no doubt guide this Court handling an appeal from the Magistrates Court. I have warned myself accordingly as I consider this appeal. 14. The thrust of the Respondent's case

was that in 1994, he purchased the suit plot from the 1st Appellant who is his son in-law, took possession and proceeded to develop it. In his testimony during the trial on 17th October 2019, he confirmed that the purchase price was Kshs. 3,000/- which he paid in full. The suit plot became water logged so he could not construct on it but planted trees. Later, the 1st Appellant started asking him to take a refund which he refused and the dispute was heard by elders. 15. The Appellants' defence was that the 1st Appellant had only leased the suit plot to the Respondent from 2005 to 2009 at an annual fee of Kshs. 2,000 of which Kshs. 4,700 was paid leaving a balance of Kshs. 5,300. That the 1st Appellant is the bona fide owner of the suit plot and had not allowed the Respondent to enter nor plant trees thereon. They denied that the Respondent has been on the suit land since 1994. 16. I shall consider grounds No. 1, 2 and 3 together. In those grounds, the trial magistrate is faulted for having erred in law and in fact by holding that the Respondent had proved his case, by not considering the Appellants' evidence to the effect KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 8 of 21 that the Respondent had not purchased the suit land but rather, that the same had been leased to him. 17. During the trial on 17th October 2019, the Respondent denied that he had leased the suit plot. He insisted that he had purchased it in 1994 for Kshs. 3,000 and that his son had even added the 1st Appellant Ksh 6,000. The 1st Appellant denied all the above when he rectified on 20th May 2021. Although he admitted having received money from the Respondent, he clarified that all that money was for leasing the suit plot but not for purchasing it. There was no written sale agreement between the Respondent and the 1st Appellant. Their agreement was oral and it is the Respondent's case that being relatives, he and the 1st Appellant acted in trust. The record shows that although the Respondent had filed an application seeking to injunct the Appellants from interfering with his peaceful occupation of the suit plot, that Motion appears not to have been canvased or if it was, no ruling is on the record. What is on the record is an order by OMBWAYO J that the status quo be maintained. 18. The above issues were considered by the trial Magistrate at pages 42 to 43 of the impugned judgment. After setting out the evidence by the parties and the submissions by Counsel, the trial Magistrate addressed himself as follows; KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 9 of 21 "From the evidence given, the Plaintiff and 1st Defendant are related. The 1st Defendant married the Plaintiff's step daughter. The Plaintiff maintains that he purchased the land in 1994 whereas the 1st Defendant claims he leased it. The parties claim that everything was done orally. Because parties were related, mutual trust existed. At the elders sitting, 1st Defendant offered to refund plaintiff but Plaintiff declined it. When the 1st Defendant had fee problem for his kids, Plaintiff's family gave him additional money. I am satisfied by PW2's evidence that the 1st Defendant offered to refund Plaintiff but Plaintiff refused. This brings it to conclusion that the 1st Defendant received consideration from Plaintiff. He can't turn around and choose refund now that the portion of land has appreciated. During cross examination, the defence did not introduce parcel No. 2339 Kapluk Adjudication Section. The Plaintiff was clear that he bought

2240. The 1st Defendant confirmed that he owned this 2240 through letter from Land Adjudication Offices. Therefore, in my view, 1st Defendant had property in that land he passed it to Plaintiff in the oral agreement. This is the just position in my view.” KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 10 of 21 19. The record shows that the dispute between the Respondent and the 1st Appellant was first heard by the elders. It was presided over by the area Chief Kabitei Location and during those proceedings, the Respondent told the panel of elders how in 2014, the 1st Appellant had offered to return the purchase price which offer the Respondent rejected. I agree with the trial Magistrate that if the relationship between the Respondent and the 1st Appellant over the suit plot was simply that of a leaser and a lessee rather than that of vendor and purchaser, then the 1st Appellant would not be asking for a refund of the amount already received. 20. It is also common knowledge that the Respondent remains in occupation and possession of the suit plot. His application dated 20th February 2017 seeking to restrain the Appellants from interfering with his occupation and possession of the suit land was compromised through a consent order in which the status quo was maintained. The record also shows that the Respondent had been charged at the CHIEF MAGISTRATE’S COURT KABARNET with the offence of creating disturbance by threatening to cut the 1st Appellant using a panga between 6th and 8th April 2015 when the 1st Appellant had gone to the land in dispute and asked the Respondent to leave. The Respondent refused saying he had purchased the land. KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 11 of 21 21. It must be remembered that the agreements between the Respondent and the 1st Appellant were oral. The trial Magistrate heard and saw the parties as they testified before him and were cross-examined. He observed their demeanour and was at liberty to decide who spoke the truth and who did not. I have no reasons to fault his findings that the Respondent proved his case on a balance of probability that he had purchased the suit plot. I am also guided by the court of Appeal’s observations in the case of MUNYU MAINA V. HIRAM GATHIHA MAINA C. A CIVIL APPEAL NO. 239 OF 2009 [2013 KECA 94KLR where at paragraph 19 of its Judgment, the court said: “Likewise, Section 116 of the Evidence Act stipulate that where the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. The appellant is in possession of a portion of the suit property. Section 116 of the Evidence Act requires the respondent to prove that the appellant has no interest in the sit property.” 22. The Appellants did not meet the above requirements with regard to the suit plot. KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 12 of 21 23. I see no merits in grounds No, 1, 2 and 3 of this appeal. I dismiss them. 24. With regard to grounds No. 4 and 9, the Appellant’s case is that the trial Magistrate took into account extraneous evidence and was also biased against the Appellants, it has not been demonstrated how the trial Magistrate was biased or took into account extraneous evidence. Counsel for the Appellants made the following submission at page 6: “Your Lordship, we have demonstrated from the above that the Appellant and the family of the Respondent have never settled/lived in the suit property but it is the 2nd Appellant who has obtained ownership through lawful procedure and paid consideration. To prefer an un-

procedural oral agreement and/or allegation over a valid written contract agreement for sale was erroneous and contrary to the provisions provided by law. The trial Magistrate did not conduct or order a site visit to confirm whether the Respondent was truly living in the suit property, but instead accepted the Respondent's allegations KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 13 of 21 as the gospel truth, thereby being biased in his findings." 25. In his oral testimony at the trial, the Respondent testified how no construction could be done on the suit plot because it was water logged. Occupation and possession of land need not be by living on it only. The Respondent's case as per paragraphs 4 and 5 of his plaint was that he did development on the suit land by planting trees and has been utilizing it to date. The trial magistrate was not in doubt and it was not fatal that he did not conduct a site visit. The criminal proceedings in KABARNET CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 271 OF 2015 R. V. JOHANA TOBOSE demonstrated beyond doubt that the Respondent was in occupation and possession of the suit plot. 26. It is true that there was a sale agreement between the 1st and 2nd Appellant with respect to the suit plot. However, that sale agreement was executed on 10th July 2014 some 20 years after the Respondent had taken possession of the suit plot following an oral agreement. An oral land sale agreement, as will soon become clear, is recognized in law. I also do not see how the trial magistrate erred in law or in fact with regard to those findings. 27. I dismiss grounds 4 and 9. KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 14 of 21 28. With regard to grounds 5, 6, 7 and 8, the Appellants' complaint is that while the evidence of the 1st Appellant was corroborated by a written agreement between him and the 2nd Appellant, that of the Respondent was mere allegations of an oral land sale agreement and that the trial magistrate also erred in law and in fact in relying on the evidence of PW2 that the 1st Appellant tried to recall the consideration in a meeting with the elders. Further, that the trial magistrate erred in law and in fact in making a finding that there was trust between the 1st Appellant and the Respondent which could legitimize an oral agreement for the sale of land in contravention of Section 3 of the Law of Contract Act. 29. I shall shortly be considering the validity of an oral land sale agreement in law. With regard to the issue of mutual trust between the 1st Appellant and the Respondent, the evidence of their relationship was an important consideration which the trial magistrate was entitled to take into account. And that was also demonstrated by the fact that their transactions were all oral. With regard to the complaint that the trial magistrate relied on the evidence of PW2 that the 1st Appellant tried to recall he consideration in a meeting with the elders, that is not borne out in the recorded evidence. When he testified on 17th October 2019, the Respondent said: KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 15 of 21 "The court allowed me to be in possession of the parcel. The seller did not trouble save only that he removed closing metals at gate. My trees were grown. He cut 150 trees in one section and removed my structure. I refused refund money before the elders. That I leased the land is not true. If I had leased it, he would not have offered to refund me. The village elders brought refund money. Benjamin Cherop was one of them. I refused refund." 30. On his part SAMUEL MINGWO KANDIE (PW2) said the following when cross-examined by MR. MWAITA then Counsel for the Appellants on 21st November 2019. "The

Plaintiff (PW1) found me on my land. He told me he bought land from 1st Defendant (Chepyegon). I didn't witness sale. Plaintiff's son, Daniel came to erect grass thatched house on that land at first. Later, Plaintiff brought iron sheets to the son. The iron sheet house is now water-logged. It is deserted. The Plaintiff used the land from 1994 to 2014 when problems started. I attended chief's meeting. That is when I heard 1st Defendant claim that he leased land to Plaintiff. Elders noted that 1st KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 16 of 21 Defendant had sold the land to Plaintiff. He changed mind when prices went up. By 1994, prices could not be less than Kshs. 130,000/- for that area. The 1st Defendant in 2014 resold the parcel to 2nd Defendant. The plaintiff did not tell me how much he had paid 1st defendant. I don't know what 2nd defendant paid I heard about 50,000/- as a rumour. Plaintiff lives about 1.5km from my home. This matter was listened to by elders. They resolved that plaintiff be refunded. Plaintiff declined to take refund." 31. Similarly, JOSEPH KULEI (DW2) a village elder, said the following in his evidence in chief on 24th September 2020; "The land was for Samuel. Yohana said bought (sic). Samuel removed him. He denied selling it to Yohana. That is why he removed (sic). Case came before us for trial. Yohana said paid by instalments. He had no document. Samuel had number of the land. Yohana said never knew Samuel will reject him. We asked them to reconcile. Elders agreed that Yohana be refunded 16,000/-. Elders were to refund it. Johana declined refund. The land was for KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 17 of 21 Samuel. Johana was to receive refund. Area chief listened to case. He referred parties to Court." 32. It cannot therefore be correct, as the Appellants' have suggested in their appeal, that the trial magistrate only relied on the evidence of SAMUEL MINGWO KANDIE (PW2) that there was a consideration for the purchase of the suit plot and which the 1st Appellant tried to recall. Such testimony was also adduced by other witnesses. 33. As to whether there can be a valid oral contract for the sale of land, the transaction between the 1st Appellant was made in

1994. Prior to the amendment of the Section 3(3) of the Law of Contract Act in 2003, that provision read: "No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or not thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it; provided that such a suit shall not be prevented by reason only of the absence of writing; where an intending purchaser or lessee who has KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 18 of 21 performed or is willing to perform his part of a contract; (1) Has in part performance of the contract taken possession of the property or any part thereof;
- (2) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract". 34. Following the amendment in 2023 through the Legal Notice No. 221 of 2023, that provision now reads: "No suit shall be brought upon a contract for the disposition of an interest to land unless- (a) the contract upon which the suit is founded – (i) is in writing; (ii) is signed by all the parties thereto; and (b) the signature of each party signing has been attested by a witness who is present when

the contract was signed by each party; KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 19 of 21 provided that his subsection shall not apply to a contract made in the cause of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap 526) nor shall anything in it affect the creation of a resulting, implied or constructive trust.” 35. In the case of WILLY KIMUTAI KITILIT V. MICHAEL KIBET C. A CIVIL APPEAL NO. 51 OF 2015 [2018 KECA 573 KLR], the court of Appeal was dealing with a case where the agreement for sale of land was null and void and for which no consent of the Land Control Board had not been obtained as required within 6 months. The court, while applying the doctrines of equity stated the following in paragraph 18 of it’s Judgment; “The doctrines of equity are part of our laws although Section 3 of the Judicature Act subordinates common law and the doctrines of equity to the Constitution and written law in that order. Section 3(3) of the Law of Contract Act and Section 38(2) of the Land Act as amended clearly stipulate that the requirement that contracts for disposition at an interest in land should be in writing does not attract the creation or operation of a resulting, implied or constructive trust. The equity of proprietary KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 20 of 21 estoppel is omitted but as the decision in Yaxley V. Gotts 2000 ch 162 (Yaxley’s Case) on which the Court in Macharia Mwangi Maina decision relied amongst others, shows that the doctrine of constructive trust and proprietary estoppel overlaps and both are concerned with equity’s intervention to provide relief against unconscionable conduct.” 36. Although the trial Magistrate did not make any reference to any case law on the issue of constructive trust, he nonetheless made a fleeting remark albeit in not so many words when at page 43 of the impugned Judgment and which I have already cited above, he said; “The parties claim that everything was done orally. Because parties were related, mutual trust existed.” 37. The trial Magistrate could obviously have done better. However, as a first appellate court and having re-evaluated and re-considered the evidence which was before the trial Court, I have no reason to fault the trial court’s assessment of the evidence before it and the decision which it arrived at in favour of the Respondent. 38. The trial Magistrate also made the following important findings at page 43 of the impugned Judgment; KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 21 of 21 “The 1st Defendant cannot hide in the Law of Contract and the Land Control Act. That he resold the land to the 2nd Defendant in 2014 was wrong. The same parcel could not be sold twice. The 2nd Defendant may seek refund from the 1st Defendant in my view.” 39. Then at page 44, the trial magistrate proceeded to add that: “Therefore having said the above, I conclude that I find Plaintiff to have paid consideration to the 1st Defendant in 1994. He has been in possession of the suit land till 2014. The 1st Defendant cannot purport to resell the same property 20 years down the line. I find merit in the plaintiff’s suit. I dismiss the defence by the 1st Defendant and his co-defendant.” 40. The trial magistrate was no doubt referring to the 1st Appellant’s “un-conscionable conduct” which, as was reiterated in the case of WILLY KIMUTAI KITILIT V. MICHAEL KIBET (Supra) a court of equity will not countenance. 41. The up-shot of all the above is that having considered this appeal, this court makes the following disposal orders:

1. The appeal is dismissed. KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 22 of 21

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2. The Appellants shall meet the Respondents costs both here and in the court below. BOAZ N. OLAO JUDGE 18 TH SEPTEMBER 2026 Judgment dated, signed and delivered by way of electronic mail on this 18th day of September 2026 with notice to the parties. Right of appeal. BOAZ N. OLAO JUDGE 18 TH SEPTEMBER 2026 Explanatory notes; This Judgment was due on 28th July 2026. However, it was not ready due to pressure of work. The delay is regretted. BOAZ N. OLAO JUDGE 18 TH SEPTEMBER 2026 KABARNET ELCLA NO. E004 OF 2023 (JUDGMENT) Page 23 of 21
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