



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**SUCCESSION CAUSE NO 14 OF 1997**

**IN THE MATTER OF THE ESTATE OF ZACHARIA CHEGE GIKOMU (DECEASED)**

**BETWEEN**

**JOHN WAITHAKA CHEGE.....APPLICANT**

**VERSUS**

**PETER KURIA CHEGE & 9 OTHERS ..... RESPONDENTS**

**RULING**

By an application dated 6<sup>th</sup> May 2020 and an affidavit sworn by the **applicant (JOHN WAITHAKA CHEGE)**, he seeks that:

a) Pending the hearing and determination of this summons the 10<sup>th</sup> Respondent be restrained by orders of injunction from further demolishing the fence, removing, using, selling, leasing and/or in any other way dealing with the bush stones removed from the fence erected on those parcels of land known as **ELDORET MUNICIPALITY BLOCK 11/1118, 11/1119, 11/1120, 11/1121, 11/1122, 11/1123** and pending the hearing and determination of this cause.

a) The Respondent be compelled to return the bush stones and erect back the fence he demolished from those parcels of land known as **ELDORET MUNICIPALITY BLOCK 11/1118, 11/1119, 11/1120**, The Respondents to account for the rent collected from rental houses situated in that parcels of lands known as **ELDORET MUNICIPALITY BLOCK 11/642** from the date of the consent dated 17<sup>th</sup> May, 2010 to date and the same be deposited in court.

b) The 2<sup>nd</sup>- 6<sup>th</sup> and 10<sup>th</sup> Respondents be restrained from inter-meddling with the house erected on that parcel of land known as **ELDORET MUNICIPALITY/BLOCK 19/502** and be ordered to restore back the lock they broke at their own costs.

c) **ELIZABETH MUTHONI MAKUMI** (the 5<sup>th</sup> Respondent) be ordered to deposit in court the original title documents/allotment letter in respect of land parcel number **ONGATA RONGAI/191** as per the consent order of 16<sup>th</sup> September, 2010.

d) **ELIZABETH MUTHONI MAKUMI** do give accurate accounts of the total rent she been collecting in the rental houses with respect to land parcel number **ONGATA RONGAI/191** since 17<sup>th</sup> May, 2010 and the said money be deposited in court pending the determination of this cause.

e) The matter be set down for hearing for the determination of ownership of those parcels of land known as **ELDORET MUNICIPALITY BLOCK 11/642** having Six Plots and **ELDORET MUNICIPALITY BLOCK 23/KINGONGO/832** as per the consent order of 17<sup>th</sup> May, 2010.

The application is premised on grounds that:

i. The Applicant has a prima facie case with probability of success.

ii. The Estate of **ZACHARIA CHEGE GIKOMI** will suffer irreparable loss and damages

unless this summons is allowed.

iii. the balance of convenience tilts in favour of granting the orders sought of.

- iv. That this matter has been pending for the last 23 years hence causing an injustice and acrimony among the siblings.
- v. That some of the Respondents have invaded the estate by breaking doors and changing locks, with the ill motive, and with sole purpose of wasting the Estate to the disadvantage of the other beneficiaries.

The applicant insists that he is the owner purported parcels which form part of the estate and alludes to a consent which was entered into, but which left several issues for determination by the court, chief among them being the question of ownership of the contested parcels.

In opposing the application, the respondents filed affidavits in which they contend that the Application herein is res judicata, the same having been heard earlier and requisite orders given and the Applicant is accused of attempting to have a second bite on the cherry. It is pointed out that through the application by the 1<sup>st</sup> Respondent (**PETER KURIA CHEGE**) dated 28/11/2012 the 1<sup>st</sup> Respondent made an application which resulted in issuing orders of restriction over land parcel numbers **Eldoret Municipality Block 11/1118, 11/1119, 11/1120, 11/1121, 11/1122 and 11/1123**. Further, that the Applicant illegally breached these orders by charging the said parcels and the said orders resulting in the orders of justice Githinji made in the application dated 21/11/2019 as per the record.

They reiterate that the orders sought were substantially the same as the orders sought then and the grounds raised herein ought to have been raised in the former applications which have since been fully determined. It is also drawn to this court's attention that at the commencement of this case, the court issued consent orders on 30/11/2019 to allow parties to utilize their portions as they had been doing which has been complied with for the last 11 years peacefully.

That the parties are in occupation of their respective shares and utilizing the same per the consent of 30/11/2019 which was only varied slightly to take cognizance of further developments arising from the consent of 17/5/2010.9. It is contended that the same was concretized in the schedule dated 20/1/2013 which was merely reflecting the status on the ground, which status has not changed for a period over 12 years (as per annexure marked FNC 1).

That the Property herein being Eldoret **Municipality Block 11/64 (Sub-divisions 11/1118, 11/1119, 11/1120, 11/1121, 11/1122 & 11/1123)** belongs to the estate and has been in use by beneficiaries since time immemorial as per the consent of 30/11/2009.

b) That the Applicant used plot **No. Eldoret Municipality Block 11/1118** exclusively, a fact he has not disclosed to the court but has since sold the same.

c) That the 3<sup>rd</sup> Respondent and 1<sup>st</sup> respondent use plot **No. Eldoret Municipality Block 11/1119** since then.

d) That the 1<sup>st</sup> and 5<sup>th</sup> Respondents use Plot **No. Eldoret Municipality Block 11/1120** but only the 3<sup>rd</sup> Respondent collects rent as she claims that the 5<sup>th</sup> Respondent uses **her Ongata/Rongai/191**.

e) That the 6<sup>th</sup> Respondent and the children of the late **Agnes Wanjiku Maina**, use plot **No. Eldoret Municipality Block 11/1119**.

f) That the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> Respondents and the 3<sup>rd</sup> Respondent use Plot **No. Eldoret Municipality Block 11/1122**.

g) That plot **No Eldoret Municipality Block 11/1123 is undeveloped** and as such it has not been in use for the last 30 or so years, although the deceased had put a fence which has now been destroyed partly by varies of weather.

The respondents argue that as a result, there has been no reason for deposit of rent in court which rent has been utilized as per the consent orders in force. They maintain that the Applicant is lying to the court as he attempted to sell all parcels while the respondents were in occupation (See annexure marked FNC 3), and as far as they are concerned the estate is fully administered except for the only remaining issues, as per the consent of 17/5/2020.14. It is their contention that land parcel **No. Eldoret Municipality Block 19/502** was specifically set aside to be sold for purposes of paying legal fees and conveyance charges, and the same is fully settled as per the consent of **13/3/2017**.

The respondents state that in any event, if the advocates have not sold the same, it is not the administrators 'problem or the concern of this court as the court cannot micro-manage properties that have already been given to beneficiaries without setting aside the partial confirmation of 17/5/2010. THAT in any case, plot **No. Eldoret Municipality Block 11/642** is non-existent having been sub-divided and occupied according to the schedule referred to

It is also pointed out that the Applicant made a similar application dated **8/5/2013** which was dealt with fully and the court ordered compliance of the orders of 30/11/2019 (See annexures FNC 2(a) & (b).

It is the respondents position that some blocks were stolen by unknown persons after the fence fell down due to vagaries of weather, the fence having stood unattended and incomplete from the late 1990s. That as a result, the Applicant filed suit and was compensated a sum of over **Ksh. 900,000/-** being judgment and **Kshs. 433,760.25/-** costs and interest, but to date he has not remitted the money or repaired the wall as such cannot blame the Respondents (See annexed grant marked FNC4).

The respondents view the Application as being made to circumvent orders that Githinji (J) gave over the 1<sup>st</sup> Respondent's Application (being the last order in the file) on 21/11/2019. It is also pointed out that the 1<sup>st</sup> and 6<sup>th</sup> Respondent are co-administrators of the estate of the deceased who is their late father and they have a right to administer any part of the estate (See annexure grant marked FNC) and the Applicant being one of the administrators, has no superior right over other administrators. They argue that they have as much a right to continue preserving the house on **Eldoret Municipality Block 19/502** until it is sold by the five firms of advocates as per the last clause of the consent dated 17/5/2010.

It is pointed out that the letters of allotment of **Ongata/Rongai/191** were surrendered and deposited in court by the firm of M/s Yego Law offices and the same were confirmed before Mwilu(J) (as then she was) as having been deposited in court so there is nothing more to deposit. That, further land **parcel No. Ongata/Rongai/191** was fully administered and is not one of the pending parcels hence this court cannot delve into its management without setting aside the consent over the said parcel, and there is nothing to be accounted for as the administrators are satisfied.

It is emphasized that there was a consent on rent collection and use by the beneficiaries who were using the same before the consent of 17/5/2020 in that: -

- a) **Elizabeth Muthoni Chege alias Elizabeth Muthoni Makumi** was to collect and use the rent till further orders and the same is not a lot of money being about **Ksh. 17,000/-** less KRA remission), and she has done so to date.
- b) The 1<sup>st</sup> Respondent is collecting rent from **Eldoret Municipality Block 11/1119** but has not remitted to the 5<sup>th</sup> Respondent and those orders have never been set aside and as such there can be no orders which contradict the consent order of 30/11/2009 which is still in situ.

The grounds are described as baseless and have been brought over 10 years since the consents were filed, and this court does not need to issue an order to set a matter down for hearing through an application but it is the parties to set the matter down for hearing as and when Covid-19 subsides. Further, that the matter has always been fixed for hearing when new applications, these are brought to derail the hearing this being almost the 20<sup>th</sup> Application to be filed in the file.

It is also pointed out that the matter was slated for hearing, when covid-19 came and as such there has been no directions on how to proceed in court without issue of social distancing been guaranteed and some of the beneficiaries are in self-isolation, lockdown or affected by cessation of movement hence the matter cannot be heard without normalization. It is also pointed out that although the matter has been in court since 1997, it is the Applicant who was using the same to defraud the estate and it started being active in 2009, and there are 6 pending applications and the court ought to give directions on how to proceed.

### **Analysis and Determination**

The respondents insist that plot **No. Eldoret Municipality Block 11/642 and it's subdivision together with Eldoret Municipality Block (King'ong'o) 832** form part of the deceased's estate. The applicant maintains that he owns the subdivisions as he holds the mother title and as such this court can only make substantive orders upon hearing the parties fully. I take note that this the matter has been active for all these years albeit with a multiplicity of applications, but the main cause which is the summons for revocation and the unsettled issues which were reserved for the court's determination have never been settled. Indeed, as pointed out there have been more than 10 applications in this matter which has been handled by more than 12 Judges so far.

The Application herein is faulted as being res judicata, the same having been heard earlier application and requisite orders given and as such the Applicant is attempting to have a second bite on the cherry. I take note that some of the arguments raised bear an uncanny resemblance to what the courts have dealt with in the past in a host of applications!

Indeed at the commencement of this case, consent orders of 30/11/2009 were to allow parties to utilize their portions and it is argued that the parties have as they have complied for the last 11 years peacefully and are in occupation of their respective shares and utilizing the same per the consent of 30/11/2009 which was only varied slightly to take cognizance of further developments arising from the consent of 17/5/2010 which gave out over 90% of the estate to beneficiaries.

There are Issues as to whether the occupation was concretized in the schedule dated 20/1/2013 which was merely reflecting the status on the ground, which status has not changed for a period over 13 years. And also issues as to who owns what and whether at this point restraining orders should issue, and whether that would in effect be setting aside the consent order that parties had recorded is in my view taking a very winding path, which will only prolong this matter. So I will not even go into the analysis of principles of granting an injunction.

From the pleadings and the court record, undoubtedly there was a consent order which has not been set aside, and I am persuaded that to get the chicken to roost, it is critical to fully hear this matter and determine whether indeed the estate is fully administered save for the remaining issues, as per the consent of 17/5/2010.

It is pointed out that the only remaining issue is over land parcel **No Eldoret Municipality Block 11/642, Eldoret Municipality Block 11/1118, Eldoret Municipality Block 11/1119, Eldoret Municipality Block 11/1120, Eldoret Municipality Block 11/1121, Eldoret Municipality Block 11/1122, Eldoret Municipality Block 11/123 and Eldoret Municipality Block 23 (King'ong'o) 832** and properties bought after the demise of the deceased

I take note of the sentiments expressed as to why the matters could not move during the uncertain time of the C19 pandemic and which are due for hearing as soon as Covid –19 pandemic eases. It seems that there was a consent in as regards the rent collection and use by the beneficiaries who were using the same before the consent of 17/5/2020, yet now that is also contested on the basis that the individual collecting the rent is not one of the administrators.

I think the only way out of this maze is to set the matter down for hearing, instead of attempting to dissect and determine what the parties had in mind, whether the contested properties form part of the deceased's estate or whether they belong to the applicant. I am in agreement with the suggestion that that issues in raised here, and all the issues raised in the other pending applications be collapsed and be heard together within the main application for revocation filed by Peter Kuria Chege and the co-administrator.

I thus decline to grant any prayers sought and direct that now with the C19 curve taking a dip, the matter be listed for hearing of the main application upon parties filing and exchanging witness statements and any other documents they shall be relying on within 30 days hereof

Hearing 1<sup>st</sup> 2<sup>nd</sup>, and 3<sup>rd</sup> March 2021

**Each party shall bear its own costs.**

**E-Delivered and dated this 24<sup>th</sup> day of September 2020 at Eldoret**

**H. A. OMONDI**

**JUDGE**