



REPUBLIC OF KENYA



Chege (Suing in his own behalf and on behalf of the Estate of Njeri Chege) v Kagoni & 2 others (Environment and Land Appeal E076 of 2022) [2024] KEELC 4915 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4915 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E076 OF 2022**

JG KEMEI, J

JUNE 20, 2024

BETWEEN

GABRIEL NUTHUA CHEGE (SUING IN HIS OWN BEHALF AND ON BEHALF OF THE ESTATE OF NJERI CHEGE) APPELLANT

AND

JANE WAIRIMU KAGONI 1ST RESPONDENT

JULIAH WARUGURU MWANGI 2ND RESPONDENT

MADGALENE MUGOIRI CHEGE 3RD RESPONDENT

(Being an appeal against the Judgment of the Hon H M Ng'anga in CMELC No. 40 of 2021, GATUNDU delivered on 31/8/22)

JUDGMENT

1. In the trial Court, the Appellant and the Respondents were the 1st Defendant and the Plaintiffs respectively.
2. It is not in dispute that the parties to this appeal are related drawing their ancestry from their family matriarch namely Kabura Chege. Kabura Chege owned the mother title namely parcel 960. It is said that Kabura Chege had seven (7) daughters all of whom are deceased except for the 3rd Respondent. The 3rd Respondent is the aunt of the 1st and 2nd Respondents and the Appellant. The 3rd Respondent and the Appellants “mother” are sisters being daughters of the late Kabura Chege.
3. It was the Respondent’s case that they were registered owners of various properties registered as parcel Numbers 4002, 3831, 3828, 4001 (hereby described as the suit properties). That notwithstanding their ownership status, the Appellant has illegally lodged cautions on the suit lands claiming beneficial



interest which caution has denied them the right and the freedom to the titles. They sought the following orders that;

- a. The 1st Defendant be ordered to remove cautions against Land Parcel Numbers Chania / Ngorongo/4002, Chania / Ngorongo/3831, Chania / Ngorongo/3828 and Chania / Ngorongo/4001. Alternatively, the 2nd Defendant be ordered to withdraw the said cautions.
 - b. Costs of the suit be provided for.
4. The Appellant filed a Statement of Defence and a counterclaim dated the 14/2/2022 in which he denied the Respondents' claim and sought the following orders;
- a. An order cancelling the current titles to land parcels Chania / Ngorongo/4002, Chania / Ngorongo/3831, Chania / Ngorongo/3828 and Chania / Ngorongo/4001, and all subsequent entries dating back to when the suit property was registered in the names of Kabura Chege.
 - b. An order directing that the 2nd Defendant issue a title in the names of (the Estate) of Kabura Chege.
 - c. Costs of the suit.
5. The Appellant detailed the history of the suit land. That the mother title parcel 960 was owned by the estate of their grandmother Kabura Chege. That after her death in 1965, the 3rd Respondent fraudulently caused the registration of the suit land in her name in 1977 and distributed the land to the 1st and 2nd Plaintiffs and other beneficiaries including the Appellant. That as a result the Appellant, got parcel 3829, out of the mother title. That the registration and distribution of the land was carried out without succeeding the estate of Kabura Chege, the original owner of the land. Particulars of fraud were pleaded under para 15 of the counterclaim.
6. Upon hearing the suit, the trial Court delivered its Judgment in favour of the Respondents as follows;
- a. The 2nd Defendant, Land Registrar Gatundu is hereby ordered to remove caution against Land Parcel Numbers Chania / Ngorongo/4002, Chania / Ngorongo 3831, Chania / Ngorongo/3828 and Chania / Ngorongo/4001 lodged by the 1st Defendant Gabriel Muthua Chege.
 - b. The 1st Defendant's Counter-claim is hereby dismissed.
 - c. Taking into account the relationship of the parties I make no order as to costs.
7. It is this Judgement that has provoked the current appeal on the grounds as follows;
- a. That the Learned trial Magistrate erred in law and in fact in finding that the Respondents have lawfully proved that Land parcel Chania / Ngorongo/960 bequeathed/assigned to them without any written document showing that.
 - b. That the Learned trial Magistrate erred in law and in fact in finding that the Respondents adequately defended the Appellant's counter-claim of fraudulent acquisition of land registration: through their verbal averments that Kabura Chege (Deceased) transferred the suit property to the 3rd Respondent while she was still alive, without any evidence to support the allegations, and while the register did not exist in the Deceased's lifetime.
 - c. That the Learned trial Magistrate erred in law and in fact on relying on documents that had been filed just before the hearing of the matter, and after pre-trial without leave of the Court.



- d. That the Learned trial Magistrate erred in law and in fact in finding that a transfer of properties conducted ten (10) years after the demise of the transferor was regular and procedural; without documentary evidence to demonstrate how the transfer, and Land Control Board consent was procured post-humously.
- e. That the Learned trial Magistrate erred in fact and in law and in finding that the Appellant has failed to prove fraud in the registration of Land Parcel Chania / Ngorongo/960; while the Appellant supplied unchallenged documentary evidence including a Green Card showing that the transfer was procured 12 years after the death of the transferor/proprietor, and showing that at the time of death of the transferor the register to the Land Parcel mentioned was not opened.
- f. That the Learned trial Magistrate erred in law and in fact in finding that the Appellant's counter-claim is time barred: while the Appellant's counter-claim was based on intermeddling with the property of the deceased person; and while accrual of the period of limitation does not continue after death.
- g. That the Learned trial Magistrate erred in fact and in law in finding that the onus is upon the Appellant to produce transfer forms to demonstrate fraud: while the Appellant had produced a Green Card and uncontested evidence showing that the transferor was long dead.
- h. That the Learned trial Magistrate erred in fact and in law in presuming that Kabura Chege (Deceased) legally executed the transfer documents prior to her death,; and transferred the parent suit property to the 3rd Respondent.
- i. That the Learned trial Magistrate erred in fact and in law in dismissing the Appellant's counter-claim.

The written submissions

8. The Appellants submissions were filed by the law firm of Muiruri Cheserek & Co Advocates while that of the Respondents were filed by the firm of Muturi Njoroge & Co Advocates.
9. On grounds 1 & 9 of the Ground of Appeal Counsel for the Appellant submitted and faulted the trial Court for finding that the Appellant failed to proof fraud on the part of the Respondents to warrant the cancellation of the titles in the names of the Respondents. That the 3rd Respondent led evidence that Kabura Chege passed away before independence and that the title having been issued in 1977 to a deceased person, the said deceased could not have passed title to the 3rd Respondent before 1963 alongside the transfer documents as claimed by the 3rd Respondent.
10. Citing Order 4 rule 2 of the *Civil Procedure Rules*, Counsel for the Appellant submitted that the onus was on the 3rd Respondent who claimed to have been given a title that did not exist to give evidence on how the land control board issued consent to her for the transfer of the land in her names 12 years after the demise of the original owner. Further that there was no evidence that the said original owner attended the land control board meeting for the said consent.
11. On grounds Nos 2 and 8 of the Record of Appeal, Counsel for the Appellant submitted that the Respondents failed to tender any evidence to support that Kabura transferred the land in her lifetime to the 3rd Respondent. In addition that the estate of Kabura was never succeeded despite having seven (7) daughters who survived her.



12. That the 3rd Respondent having failed to show how she acquired the mother title in the absence of grant of succession in the estate of the late Kabura or evidence of transfer *inter vivos*, want of Land Control Board consent, the titles held by the Respondents are tainted with illegality and ought not be allowed to stand.
13. On grounds Nos 4, 5 and 7 of the appeal, Counsel for the Appellant submitted that according to the trial Court record there was no title at the time of the demise of the said Kabura and that the 3rd Respondent had no authority to process and collect a title on behalf of a deceased person without letters of grant of administration.
14. On ground 6 of the appeal, Counsel for the Appellant faulted the Court for holding that the Appellant's claim was time barred while the Appellants counterclaim was based on intermeddling with the property of a deceased person. Relying on Section 16 of the *Limitation of Actions Act*, the Appellant submitted that in this case Section 7 of the *Limitation of Actions Act* is not applicable as Kabura was deceased on the date of the impugned transfer in the name of the 3rd Respondent and therefore no accrual of a right of limitation against her as she bore no rights in death. That in any event no party pleaded limitation in their pleadings and the Court was faulted for determining an unpleaded issue.
15. In concluding Counsel for the Appellant submitted that the 3rd Respondent failed to adduce any agreement in writing showing that the land was given to her as a gift in exclusion of the other 6 daughters contrary to Section 3(1) of the *Law of Contract Act*.
16. Lastly, the Court was urged to allow the appeal.
17. Counsel for the Respondents submitted that the Appellant made vague and general allegations of fraud against the Respondent.
18. On the standard of proving fraud, Counsel relied on the case of *Kuria Kiarie & 2 others v Sammy Magera* (2018) eKLR where the Court stated as follows;

“The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].
19. Counsel for the Respondents submitted that the Appellant pleaded fraud and expects the Court to infer it without leading cogent evidence in support.
20. On the issue of limitation, Counsel relied on the case of *Edward Moonge Lengusuranga v James Lanaiyara & another* (2019) eKLR where the Court stated as follows;

“Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the 1st Defendant having bought the suit land in the year 1999 (as per paragraph 6 of the



plaint) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1st Defendants, but only if he did so within twelve years after the sale agreement.”

21. It was further submitted that the Appellant having filed the suit while enjoying the proprietorship of parcel 3829 which derives its root in the mother title, is testament of lack of good faith on his part.
22. In the end the Respondents urged the Court to find the appeal unmerited.
23. The key issues for determination are:-
 - a. Whether the Appellant proved fraud in the trial Court.
 - b. Whether the Appellants claim was time barred.
 - c. Costs of the Appeal
24. The background of the case is that parties are related being the daughter and grandchildren of Kabura Chege, deceased. According to the 3rd Respondent Kabura had seven (7) daughters all married with the exception of the 3rd Respondent.
25. According to the green card the suit lands are subdivisions of parcel 960. The mother title was registered under the name of Kabura on 3/9/1957 and title issued on the 28/12/1970. The suit land was transferred to the 3rd Respondent on the 9/2/1977.
26. The Respondent’s case at the trial Court was on the removal of caution lodged on various dates by the Appellant on the resultant titles.
27. The Appellant denied the case of the Respondents and sought the dismissal of the Respondents’ case and orders for cancellation of title deeds fraudulently acquired by the 3rd Respondent.
28. Jane Wairimu Kagoni testified and stated that she is the registered owner of parcel No 4002 and 3831 measuring 0.4 and 0.834 ha respectively. That she got the two parcels of land from the 3rd Respondent. That her mother Mary Wambui Chege (sister to the 3rd Respondent) died when she was only two (2) years old. She urged the Court to remove the caution lodged by the Appellant on the said titles without any justifiable cause.
29. Magdaline Mugori Chege stated that she is the registered owner of parcel 4001 measuring 0.434 ha and that the Appellant’s caution is unjustified and urged the Court to order its removal. She stated that the Appellant is the son of her late sister Monica Njeri Chege . That the 1st and 2nd Respondents are her nieces being the daughters of her sisters; Mary Wambui and Susan Wangui. That she raised the Appellant on the land and gave him one acre of land where he is settled todate. That she gave the 1st Respondent more land to cater for her care services that she continues to extend to her till her death. On how she got the title registered in her name the witness stated that her mother gave her old letters and documents after independence which she took to the headman, the chief and later to the Gatundu land board where she obtained Land Control Board consent and was asked to go to Kiambu Lands Office to collect title in her name. She stated that she was not asked to file for Succession and that at that time it may not have been applicable.
30. Julia Waruguru Mwangi testified and stated that she received parcel No 3828 measuring 0.41 ha from the 3rd Respondent as a gift.
31. Peter Kinyanjui Gatongo stated that he is the son of Hannah Muthoni, sister to the 3rd Respondent. That Kabura his grandmother left survivors being the 3rd Respondent, the Appellant and his mother Njeri Chege who are entitled to inherit the suit land that belonged to their grandmother. He accused



the 3rd Plaintiff for unlawfully distributing the suit land to the 1st and 2nd Respondents instead of the survivors set out above.

32. The Appellant led evidence and stated that he has been residing on the one acre before the demise of Kabura in 1965 to date. That he is entitled to the beneficial interest of his mother Njeri Chege who was lawfully a beneficiary of the estate of Kabura. That he learned later that the 3rd Respondent had obtained title to the mother title in 1977 without petitioning for succession on the estate. That in 2016 the 3rd Respondent subdivided the land and distributed without the consent and approval of the rightful beneficiaries of the estate of the late Kaburu. He termed the registration of the subdivisions in the names of the 1st and 2nd Respondents as fraudulent and illegal hence the lodging of the cautions to protect his interest. More particularly the witness is enraged that the 2nd Respondent who is the wife of his cousin hence not entitled to the land was given land as well.

Whether the Appellant proved fraud in the trial Court

33. The case of the Appellant was brought on behalf of the estate of her mother Njeri Chege. He contended that though he was gifted with land by the 3rd Respondent, his mother was left out and yet she was entitled to the land as a beneficiary of the estate of Kabura. He further faulted the 3rd Respondent for giving land to the 1st and 2nd Respondents who had no entitlement at all having not survived the late Kabura. According to the Appellant Kabura was survived by the 3rd Respondent, the Appellant and the late Njeri Chege, his mother.
34. Under para 15 of the counterclaim the Appellant pleaded fraud as follows;
- a. Unlawfully and un-procedurally transferring the land parcel Chania / Ngorongo/960 then the property of the Estate of Kabura Chege to herself without the consent of all the beneficiaries.
 - b. Unlawfully distributing / transferring the said land parcel to the 1st and 2nd Plaintiffs.
 - c. Distributing the suit property to the 2nd Plaintiff who is not a lawful and/or deserving beneficiary to the Estate of Kabura Chege.
35. Has the Appellant proved fraud? Section 26 of [Land Registration Act](#) provides two instances within which a Title may be challenged: first is where Title is obtained through fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of Title has been acquired illegally, unprocedurally or through a corrupt scheme
36. [Black's Law Dictionary](#), 9th Edition defines fraud as thus;
- “Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”
37. Fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. The Court cannot infer fraud from the Pleadings. It must be pleaded in a particularized manner and proven by leading evidence.



38. In the case of *Koinange & 13 others v Koinange* [1968] KLR 23 the Court of Appeal held that allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings, that is on the balance of probabilities.
39. He who asserts must prove. The Appellant argued that the 3rd Respondent acquired the land in 1977 through fraud. He annexed the copy of the green card for parcel 960 together with official searches for the resultant subdivisions being parcels 4001, 4002, 3828, 3829 and 3827 located in 2016. It was his case that the 3rd Respondent failed to provide evidence that Kabura transferred the land to her in her lifetime nor that she acquired the land through transmission/ succession in the estate of Kabura. That in the absence of these documents, the registration of the 3rd Respondent is but illegal and fraudulent and that the resultant subdivisions ought to be cancelled and the land reverted to Kabura.
40. According to the green card the mother title was registered in the name of Kabura in 1957. It is commonly agreed that Kabura died in 1965. The 3rd Respondent led evidence that her mother left with her documents for the transfer of the land to her name and armed with the said documents she visited the headman, the chief and the land control board to obtain consent and later went to the land registry in Kiambu to process the title in her name in 1977.
41. Section 108 of the *Evidence Act* states as follows;
- “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
42. In this case it is the Appellant that stood to fail if no evidence is given in support of his counterclaim. The burden to prove that the mother title was fraudulently registered in the name of the 3rd Respondent laid with the Appellant. The Appellant failed to lay documents before the Court to show that either Kabura did not transfer the land *inter vivos* or that the 3rd Respondent committed fraud or illegality in so transferring the title in her name. At the very least the documents supporting the entries on the green card ought to have been placed before the Court so that the Court can appreciate the transaction. Neither the Land Registrar was called as witness to explain how the land was transferred to the 3rd Respondent; what documents were relied to make the entries; who signed the documents and when.
43. The Court cannot infer fraud from the facts of the case. Fraud must be strictly proven. From the circumstances of this case I find that the burden of proof did not shift to the 3rd Respondent to prove how she acquired the suit land.
44. I find that the Appellant failed to prove fraud.

Time bar

45. Section 4 of *Limitation of Actions Act* provides as follows;

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

- a. actions founded on contract;
- b. actions to enforce a recognizance;
- c. actions to enforce an award;



- d. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- e. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

46. Under Section 7 of the *Limitation of Actions Act* an action to recover land must be brought within 12 years otherwise it is extinguished by affliction of time. In this case none of the parties pleaded limitation of actions. I have carefully perused the Judgement and I fail to find any conclusions that the Appellants claim was time barred.

47. It is trite that parties are bound by their pleadings. In this case there was no pleading on limitation. The exception to this rule which allows the Court to determine an unpleaded matter is found in the case of *Joseph Ndafu Njurukani & 2 others v Emily Naliaka Barasa* [2023]eKLR where the Court of Appeal stated as;

“76. It is probably prudent to unpack when the facts of a case would fit within the narrow Odd Jobs exception. In my view, it is only open for a court to base its decision and grant relief on an unpleaded issue where the following conditions are met:

- a. When the issue the court seeks to frame for relief is prominently germane in the evidence adduced by both parties and all the relevant matters respecting the issue have litigated and all the potential evidence made available to the court and the only failure was the technical one of failing to request for the specific relief in the pleadings;
- b. When the parties exhaustively addressed the issue for which the court seeks to grant a relief;
- c. When no useful purpose will be served by the matter being litigated in a different form except to unnecessarily prolong the litigation process;
- d. When the dictates of substantive justice compel that relief be granted rather than requiring that a new matter be filed, for example, where the evidence before the court shows that a party is likely to continue suffering oppression by the other party or where the new matter may be time barred;
- e. When the relief is incidental or logically consequential from the pleaded matters and the court comes to the conclusion that in spite of the deficiency in the pleadings, the parties knew the case and they proceeded to trial on the issue in question by producing evidence;



- f. When the failure to plead the relief was not a product of bad faith, tactical maneuver to give an advantage to the unpleading party. In this regard, some of the factors the court considers is whether the party was acting in person as well as the circumstances in which the matter was filed. For example, some matters are filed in an emergency mode where drafting mistakes can be made due to the pressure of time. Anne Nyathira Case, for example, was a burial dispute which began as a request for a post-mortem exam to determine the cause of death; and
- g. When neither party will suffer objective prejudice if the court grants the relief on the evidence adduced.

77. These factors are conjunctive not disjunctive: all must be present before a party can benefit from the exception ...”

- 48. I find no exceptions to the rule that parties are bound by their pleadings which is application to the circumstances of this case. Even if I were to be wrong on the above finding, my perusal of the case shows that the Appellant did not disclose when fraud came to his knowledge. He led evidence that in 2016 the 3rd Respondent subdivided the land and distributed to the 1st and 2nd Respondents including himself. If the Court were to take that the said subdivisions which were termed fraudulent was carried out in November 2016 out of which he benefited and got a title, then he ought to have filed the suit by November 2019 within the period of 3 years allowed in law. The suit in the trial Court was filed in 2022, three years out of time. It was the Appellant’s admission that he has lived on the land the whole of his life and therefore if any fraud was committed, he would have known.
- 49. The circumstances of this case is that the 3rd Respondent became registered as owner of the land in 1977 and has held the land till 2016 when she subdivided and gifted it to her sisters’ children. The Court finds that the Appellant has already benefitted from the land. There are issues of succession that have been alluded to by the Appellant which issues this Court is devoid of jurisdiction.
- 50. In the end I find there are no grounds to fault the Judgment of the trial Court.
- 51. The Appeal is unmerited. It is dismissed with costs to the Respondents.
- 52. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20TH DAY OF JUNE, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Muiruri for the Appellant

1st, 2nd and 3rd Respondents - Absent

Court Assistants – Phyllis & Oliver

