



REPUBLIC OF KENYA



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**Chege v Maina & 3 others (Environment & Land Case 759 of 2012)  
[2023] KEELC 267 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 267 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 759 OF 2012**

**EO OBAGA, J  
JANUARY 26, 2023**

**BETWEEN**

**JOHN WAITHAKA CHEGE ..... PLAINTIFF**

**AND**

**JAMES CHEGE MAINA ..... 1<sup>ST</sup> DEFENDANT**

**HARUN MWEGA MAINA ..... 2<sup>ND</sup> DEFENDANT**

**CYRUS GACUKI NJAU ..... 3<sup>RD</sup> DEFENDANT**

**FRANCIS NJUGUNA MAINA ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By 'an amended plaint' dated April 28, 2017, the Plaintiff claimed the following reliefs against the Defendants: -
  - a) A declaration that the Defendants are holding land parcel number Eldoret Municipality Block 1/28/1 in trust for the Plaintiff and the court should order the District Land Registrar Uasin Gishu to rectify the register for the said parcel of land by deleting the Defendants name from the register and in its place substitute the Plaintiff's name as the registered proprietor thereof.
  - b) An order directing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to refund to the Plaintiff the sum of Kenya Shillings Nine Hundred Thousand (Kshs 900,000.00) plus interest on account of refund of the purchase price for land parcel number Eldoret Municipality Block 1/28/1.
  - c) Mesne profits on the suit land since February 27, 2012 to date.
  - d) Costs of this suit.
  - e) Any other relief as the court may be pleased to grant.



## **Background;**

2. The Plaintiff is son of Zacharia Chege Gikomi (Deceased) who died on May 7, 1995. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are sons of Robert Maina Chege who was a brother to the Plaintiff. The death of Robert Maina Chege and his wife Agnes Wanjiku Maina preceded that of the Deceased. The deceased was the initial registered owner of LR No Eldoret Municipality Block 1/28/1 (suit property).
3. Before the deceased died, he had expressed his wish that the suit property was to go to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as per a written document dated March 11, 1995. The Deceased was a man who had many properties in Uasin Gishu County and Nakuru County.
4. A plot to snatch the suit property from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants began when Eldoret High Court Succession cause No 14 of 1997 was filed in respect of the Estate of the Deceased. Though the application for grant of letters of administration was made in the name of Peter Kuria Chege, one of the sons of the Deceased, the forgery was traced to the Plaintiff and a warrant for his arrest was issued. There were two forged certificates of confirmation of grants obtained. One was obtained on July 3, 1998 and another on June 6, 2007.
5. The forged grant of July 3, 1998 which was signed by a Deputy Registrar contrary to the law was used to register the Plaintiff as owner of the suit property on January 6, 2003. Despite the Plaintiff being aware that the suit property was registered in his name through a fraudulent grant, he purported to purchase the same from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on August 5, 2008.
6. When the fraudulent grants were discovered, two sons of the Deceased applied for annulment of the fraudulent grants. This led to the filing of consents by the Advocates involved. A consent dated November 30, 2009 revoked all transfers which were based on the fraudulent grants. All properties which had been transferred based on those fraudulent grants reverted back to the Estate of the Deceased. In this consent four administrators of the Estate of the Deceased were appointed. The four included the Plaintiff.
7. On May 17, 2010 another consent was recorded which gave the suit property to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. On September 16, 2010 another consent was recorded giving effect to the one of May 17, 2010. It is pursuant to the consents of May 17, 2010 and September 16, 2010 that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were registered as owners of the suit property on August 30, 2011. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants then sold the suit property to the 4<sup>th</sup> Defendants vide sale agreement dated February 27, 2012. This is what triggered the filing of this suit.

## **Plaintiffs case:**

8. It is the Plaintiff's case that he purchased the suit property from the 1<sup>st</sup> to 3<sup>rd</sup> Defendants on August 5, 2008 at a consideration of Kshs 900,000/= which was fully paid. He took possession and started collecting rent from the property until August 2011 when the 1<sup>st</sup> to 3<sup>rd</sup> Defendants forcefully took over the property.
9. The Plaintiff further states that on August 30, 2011, he discovered that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants had had themselves registered as owners of the suit property without any transfer from him and further later in 2012 discovered that they had sold the suit property to the 4<sup>th</sup> Defendant without refunding him the amount he paid for the purchase.
10. The Plaintiff further testified that he had entered into an undertaking with the 1<sup>st</sup> to 3<sup>rd</sup> Defendants and that despite this, the 1<sup>st</sup> to 3<sup>rd</sup> Defendants went ahead to sell the suit property to the 4<sup>th</sup> Defendants



who proceeded to have the land registered in his name despite there being a caution placed by him which caution was removed without his consent.

#### **First and second Defendants' case**

11. The 2<sup>nd</sup> Defendant testified on behalf of his brother the 1<sup>st</sup> Defendant. He stated that when the Deceased died, the Plaintiff misled them to believe that the intentions of the deceased which had been expressed in a written document were to be read out when all his siblings had reached the age of 18 years. When the will was finally read on July 23, 2008, they discovered that the suit property had been bequeathed to them.
12. They had instructed the firm of Ngigi Mbugua & Co Advocates to do a search to ascertain the status of the suit property. It was discovered that the suit property had been registered in the name of the Plaintiff on January 6, 2003 based on a fraudulent grant. The Plaintiff had gone on to charge the suit property to Equity Bank Limited to secure a sum of Kshs 1,000,000/= and a further sum of 600,000/= on October 1, 2007 and November 24, 2008 respectively.
13. The two Defendants further state that the Plaintiff duped them into signing an agreement in which he claimed that he was asking for a refund of Kshs 300,000/= each from the 1<sup>st</sup> to 3<sup>rd</sup> Defendants on account of the rates which he had incurred in return of the suit property to them. They later discovered to their horror that they were selling their property without being paid a cent. They deny that they ever received any money from the Plaintiff as alleged.

#### **Third Defendant's case:**

14. Though the 3<sup>rd</sup> Defendant had filed a joint statement of defence with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he later filed a notice of intention to act in person but never filed a separate defence. He also did not participate in the hearing.

#### **Fourth Defendant's case:**

15. The 4<sup>th</sup> Defendant testified that he purchased the suit property from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on February 27, 2012 after he did due diligence and found that there were no third party claims. The property was purchased through financing from Commercial Bank of Africa and that he is still servicing the loan. He denies that Plaintiff's claims that he connived with the 1<sup>st</sup> to 3<sup>rd</sup> Defendants to defeat his interest in the suit property. He states that he took possession and has been utilizing the suit property and that no one has gone to claim the same. He only came to learn of the Plaintiff's claim after he was joined in these proceedings at the instance of the Plaintiff.

#### **Analysis and determination;**

16. The parties were directed to file written submissions. The Plaintiff filed his submissions on November 21, 2022. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not file any submissions and if any were filed then they are not in the file. The 4<sup>th</sup> Defendant filed his submissions on December 1, 2022. I have carefully gone through the evidence and submissions by the parties herein. The issues which emerge for determination are firstly, was there a valid sale agreement entered into between the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Secondly, was there a valid sale agreement between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on the one part and the 4<sup>th</sup> Defendant on the other part. Thirdly, is the Plaintiff entitled to the reliefs in the 'amended plaint' dated April 28, 2017. Lastly, which order is to be made on costs.



17. Before I start analyzing the evidence adduced herein, I have to make some comments on the 'amended plaint' dated April 28, 2017. On May 2, 2017, the Plaintiff filed a notice of motion dated April 28, 2017 in which he sought the following orders:-
- a) This application be certified as urgent and service thereof be dispensed with in the first instance.
  - b) The Plaintiff/Applicant be granted leave to amend the plaint to include the intended 4<sup>th</sup> Defendant, Cyrus Gacuki Njau.
  - c) Costs of this application be borne by the Respondents.
18. On October 11, 2017, the application dated April 28, 2017 came up for hearing when justice Ombwayo allowed it in the following terms:-
- ' By consent, Cyrus Gachoki Njau is hereby enjoined as 4<sup>th</sup> Defendant. The 4<sup>th</sup> Defendant to file defence within 14 days. Mention on December 11, 2017.'
19. There was no amended plaint filed and this is why I have put the 'amended plaint' dated April 28, 2017 in quotes. A plaint cannot be amended before leave to amend is granted. There was not even a prayer to deem the annexed draft defence as having been duly filed upon payment of the same. This being the case, there is actually no amended plaint on record and the only plaint validly on record is the one filed on September 30, 2011. However, be that as it may, I will determine the case based on the 'amended plaint' dated April 28, 2017.
20. On the first issue, the evidence on record is that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants were orphaned at a very tender age. As at the time the Deceased who was their grandfather died, the 1<sup>st</sup> Defendant was 14 years, the 2<sup>nd</sup> Defendant 12 years and the 3<sup>rd</sup> Defendant 10 years. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants testified that the Plaintiff who was their uncle duped them that the will left by the Deceased was to be read when they were all 18 years old. There is evidence that the will was read out on July 23, 2008.
21. The agreement of August 5, 2008 was entered into when the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were 27, 25 and 23 years old respectively. It is the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' testimony that the Plaintiff duped them that the Kshs 300,000/= he was asking from each of them was for refund of the rates he had incurred so that he could return the suit property to them. They later learnt that they were actually selling their own land. I have no reason to doubt their evidence because as at the time of the purported sale agreement, the suit property was already registered in the name of the Plaintiff.
22. The Plaintiff could not purport to purchase what was already registered in his name as early as January 6, 2003. He had already taken a loan of Kshs 1,000,000/= on October 1, 2007 based on the title which was in his name as security. Even after the purported purchase, he went on to take an additional loan of Kshs 600,000/= on November 24, 2008. How can one purport to purchase what was already his? The title in his name had not been nullified.
23. There was no consideration which passed. The Plaintiff purported to give three postdated cheques totaling to Kshs 900,000/=. There was no evidence given that the said postdated cheques were ever banked or that they were cleared by the banks where they were banked if any. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants dared the Plaintiff in their witness statements to provide evidence that the cheques were banked and cleared but the Plaintiff did not produce any evidence of such payment. Had he wanted the court to believe in his evidence, nothing would have been easier than providing his bank statements to show debits to his account.



24. The acknowledgment of July 6, 2010 produced as exhibit 3 cannot help the agreement of August 5, 2008 which was a nullity for want of consideration and vitiated by misrepresentation. There was therefore no valid sale agreement between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on the one part and the Plaintiff on the other part. The acknowledgement of July 6, 2010 in favour of the Plaintiff purported to overturn the consent filed in High Court Succession Cause No 14 of 1997 which was itself illegal in so far as it purported to recognize a void agreement and purporting to overlook a lawful consent entered before court.
25. On the second issue, as to whether there was a valid sale agreement between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on the one part and the 4<sup>th</sup> Defendant on the other part, when it was discovered that the title to the suit property had been registered in the Plaintiff's name based on a fraudulent grant, a consent was recorded revoking all the grants and all the properties including the suit property that had been transferred based on those grants reverted back to the Estate of the Deceased. This was vide consent dated November 30, 2009. A subsequent consent of May 17, 2010 gave the suit property to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The consent of September 16, 2010 supplemented the one of May 17, 2010. Pursuant to the consents filed, the suit property was transmitted to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and were registered as owners on August 30, 2011.
26. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants then sold the suit property vide a sale agreement dated February 27, 2012. As at this time, the Plaintiff had no legitimate interest in the suit property, his interest having been extinguished when the title in his name was revoked. He could therefore not hang on either the ill-advised caution he had registered against the title claiming purchaser's interest or the unfounded acknowledgement of July 6, 2010.
27. There was no fraud committed on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants which would have called upon the 4<sup>th</sup> Defendant to demonstrate that he was an innocent purchaser for value without notice. It is in fact the Plaintiff who had committed a fraud by having himself registered as owner of a property which he knew very well that there was no valid grant which would have resulted in the suit property being given to him and more so given the fact that he was privy to the will of the Deceased which had bequeathed the suit property to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
28. The suit property had been transmitted to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by operation of law and they had full authority to sell it notwithstanding the pendency of the suit or the ill-advised caution put by the Plaintiff who knew that there was no valid sale between him and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. I therefore find that there was a valid sale agreement between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on the one part and the 4<sup>th</sup> Defendant on the other.
29. On the third issue, the Plaintiff is seeking a declaration that the Defendants are holding title to the suit property in trust for him and that the District Land Registrar Uasin Gishu should be directed to rectify the register by deleting the Defendants names and in place thereof substitute his name. The evidence on record is that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have already sold the suit property to the 4<sup>th</sup> Defendant who obtained title on June 4, 2012. The court having found that the sale between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and the 4<sup>th</sup> Defendant was lawful, there is no way the title of the 4<sup>th</sup> Defendant can be cancelled.
30. The Plaintiff is seeking in the alternative refund of the Kshs 900,000/= he allegedly paid. The court has already found that there was no evidence of payment of Kshs 900,000/= adduced. In the absence of evidence of payment, the Plaintiff's claim for refund of Kshs 900,000/= fails.



31. The Plaintiff is claiming mesne profits since February 27, 2012. Section 2 of the [Civil Procedure Act](#) defines mesne profits as follows:-

' Mesne profits', in relation to property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.'

32. It is therefore clear from the above definition that mesne profits can only be paid by a person who is in wrongful possession. I have already found hereinabove that the 4<sup>th</sup> Defendant lawfully purchased the suit property from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He is therefore not in wrongful occupation and cannot be asked to pay mesne profits.

**Disposition;**

33. From the above analysis, it is clear that the Plaintiff's case cannot succeed. The Plaintiff's case is dismissed with costs to the Defendants.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**E. O. OBAGA**

**JUDGE**

**In the virtual presence of;**

**Ms. Kimeli for Mr. Tororei for 1<sup>st</sup> and 2<sup>nd</sup> Defendants.**

**Court Assistant – Akidor**

**E. O. OBAGA**

**JUDGE**

**26<sup>TH</sup> JANUARY, 2023**

