



**Gathumbi v Sheikh & 4 others (Environment & Land Case
1085 of 2016) [2023] KEELC 17022 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 17022 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1085 OF 2016
EK WABWOTO, J
MARCH 28, 2023**

BETWEEN

JOHN NGUGI GATHUMBI PLAINTIFF

AND

ABDUL WAHEED SHEIKH 1ST DEFENDANT

ABDUL HAMEED SHEIKH 2ND DEFENDANT

AVIC INTERNATIONAL REAL ESTATE (KENYA) LIMITED . 3RD DEFENDANT

PRINCIPLE REGISTRAR OF GOVERNMENT LAND 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

1. This suit was instituted vide a plaint dated 6th September 2016 wherein the Plaintiff seeks the following orders against the defendants: -
 - a. A declaration that LR 209/73/6 Nairobi belongs to the Plaintiff.
 - b. A permanent injunction restraining the defendants by themselves, their servants, agents, employees, contractors or workmen and/or anyone who purchases from them or otherwise howsoever from transferring, selling, excavating, digging and or constructing or in any way dealing and/or interfering with parcel LR No 209/73/6 Nairobi.
 - c. Costs of the suit.
 - d. Any other relief this court deems fit and just to grant.
2. The suit was contested by the Defendants. The 1st and 2nd Defendants filed a statement of defence dated 19th December 2016. The two denied the Plaintiff's claim of title to the property by way of a gift and



transfer. The 1st and 2nd Defendants traced the root of title to the property by the trust, demonstrating entitlement to deal with it on behalf of the trust as they did in the sale and transfer to the 3rd Defendant.

3. The 3rd Defendant filed a statement of defence dated 9th December 2016. It denied the contents of the plaint and averred being the registered owner of the suit property LR No 209/73/6 Nairobi and a bonafide purchaser of the said property from the 1st and 2nd Defendants in their capacity as trustees of Sheikh Fazal Ilahi Noor Din Charitable Trust.

The Plaintiff's case.

4. It was the Plaintiff's case that he was employed by one Mr. Abdul Raof Sheikh (now deceased) the original owner of parcel LR No 209/73/6, Nairobi. On 21st January 1981 while in employment, the Plaintiff suffered a Road Traffic Accident along Juja Road, which incapacitated him confining him to wheel chair todate.
5. It was also his case that vide a letter dated 25th January 1982, Mr. Abdul Raof Sheikh, in compensation of the Plaintiff's incapacitation and out of sheer goodwill gave and or transferred to the Plaintiff parcel LR No 209/73/6, Nairobi, which letter, the trial court in Criminal Case No 295 of 2005 was held to be admissible by the trial court thus making it an authentic document. That the court issued the Plaintiff with a Decree dated 3rd August 2000 in HCCC Civil Suit No 3812 of 2000 John Ngugi Gathumbi v Abdul Waheed Sheikh & 3 others that the Plaintiff is the rightful owner of land parcel LR No 209/73/6, Nairobi.
6. That vide the court decree, the Plaintiff was subsequently issued with a vesting order dated 23rd November 2002 in respect of the suit premises. On or about 25th March 2003, the Plaintiff received a letter of allotment from the department of lands in respect of the suit premises. Subsequently, he was issued with a certificate of title.
7. It was also his case, that he has since been paying all land rent and rates charges on the suit property diligently until or about the 10th February 2004 when he was charged with offence of forgery in Criminal case No 275 of 2005 Republic v John Gathumbi but the High Court in Criminal Appeal No 311 of 2009 John Gathumbi v Republic quashed his conviction and set aside the sentence.
8. The Plaintiff further averred to have suffered may atrocities in the hands of the 1st and 2nd defendant as follows: -
 - a. Placing a *Caveat Emptor* on the Newspaper with National circulation on the suit land, yet the Plaintiff is the legal, beneficial and registered owner of the suit property.
 - b. Instituting criminal proceedings being criminal Case No 275 of 2005, R v John Ngugi Gathumbi, against him on the strength that he uttered a false document to the Land Registrar, to which the Plaintiff was convicted for six years, but later set free in Criminal Appeal No 311 of 2009.
 - c. The 1st and 2nd Defendants sold the property to the 3rd defendant who demolished the Plaintiff's structures and constructed a storey building on the suit premises despite there being an order stopping the construction.
9. At trial, the Plaintiff (PW1) adopted his witness statement and bundle of documents dated 6th September 2016 as his evidence in chief.
10. On cross-examination by Counsel for the 1st and 2nd Defendants he conceded that he did not have an employment letter to confirm his previous employment but maintained that he had been employed



by Abdul Raof Sheikh. He also stated that he had worked for about 3 years before the accident and he used to earn Kshs 1,200/- per month. He did not have the necessary documentation to confirm the said payment or earnings.

11. He stated that he had been listed as a beneficiary to the property of the deceased. When asked about the decree relating to HCCC No 3812 of 2000 John Ngugi Gathumbi v Waheed Sheikh & 2 others he stated that the said case existed. He also stated that he was given a vesting order which was changed by John Mwangi Thuita. He also stated that the defendants forged his title.
12. When cross-examined by Counsel for the 3rd Defendant, he stated that he could not exactly remember when he filed HCCC 3812 of 2000. He also stated that he did not have the pleadings of that case since his documents were stolen in the year 2000 when his house was broken into.

The case of the 1st and 2nd Defendants.

13. The 1st and 2nd Defendants filed a statement of defence dated 19th December 2016. They denied the Plaintiff's claim of title to the property by way of gift and or transfer.
14. It was their case that the property was registered on 4th July 1946 in the name of Sheikh Fazal Ilahi Noor Din Charitable Trust. On 6th April 1976, Abdul Sheikh and the 1st Defendant were appointed as Trustees of the Trust. On 9th January 1985, the 2nd defendant was appointed as Trustee of the Trust. On 19th October 1988, the 4th Defendant approved the Trusts request for extension of the lease of the property. The terms of extension were accepted by the Trust on 20th November 1998. Thereafter on 23rd June 2004, the Trust was issued with a letter of Allotment for the renewed lease over the property. Subsequently on 27th September 2005, the Trust was issued with a Grant for the property upon renewal of the lease.
15. It was pleaded by the 1st and 2nd defendants that the Plaintiff fraudulently procured a Grant of Letters of Administration for the Estate of Abdul Raof Sheikh in H.C. Succession Cause No 1089 of 1997, naming him as the administrator.
16. It was also pleaded that the Plaintiff fraudulently procured the certificate of confirmation of the Grant of Letters of Administration for the Estate of Abdul Raof Sheikh. The 1st and 2nd Defendants also pleaded that the Plaintiff fraudulently procured a Decree in HC Civil Suit No 3812 of 2000 vesting the property in his name and they also accused the Plaintiff of fraudulently procuring the execution and registration of a Deed of Assignment of the property declaring him as the owner of the same.
17. In respect to the alleged fraudulent actions of the Plaintiff, five other pleas were made by the 1st and 2nd defendants. One that Abdul Raof Sheikh could not have and did not bequeath and/or transfer the property to the Plaintiff as he was not the registered owner of the same, secondly that the setting aside of the conviction of the Plaintiff in Criminal Appeal No 311 of 2009 did not determine the dispute of ownership of the property in the Plaintiff's favour. Thirdly, that on 9th October 2008, the 4th Defendant cancelled the entries on the register of the property registered at the behest of the Plaintiff. Fourthly, on 24th March 2011 and 21st April 2011, the Registrar of the High Court confirmed that there existed no High court case No 3812 of 2000 and that the Decree claimed to have been issued in the case on 31st August 2008 as well as the deed of assignment indicated to have been executed by the Deputy Registrar on 25th June 2001 were not authentic. Lastly, that on 25th July 2016, the High Court delivered a Judgment in HC Misc Application No 10 of 2013 dismissing the Plaintiff's claim to quash the 4th Defendants decision on 9th October 2008, cancelling the entries registered on the register of the property at the behest of the Plaintiff.



18. During trial, Abdul Hameed Sheikh testified as DW1. He adopted his witness statement and list of documents on record as his evidence in chief.
19. On cross-examination by the Plaintiff, he stated that the title to the suit property was genuine. He also stated that the Criminal cases were different and they had nothing to do with this case.
20. He also stated that they were given the land in the 1940's and they have all the documentation to prove the same. He also stated that he was issued with the letter of allotment and title deed. He further stated that he had reported to the police that the Plaintiff was trying to take possession of the property but did not have the O.B. number of the same.
21. On cross-examination by Counsel for the 3rd Defendant, he stated that they sold the property to the 3rd Defendant and he had authority to sale the same. He also stated that the property had been registered in their names as trustees not he had no information that his title was withdrawn at some point. He also stated that there was no court order directing the cancellation of the title.

The case of the 3rd Defendant.

22. The 3rd defendant filed its statement of defence dated 9th December 2016. It was its case that it is the registered owner of the suit property being a bonafide purchaser for value of the same from the 1st and 2nd Defendants. It was also pleaded that parties have previously litigated in J.R. No 10 of 2013. It was also averred that HCCC No 3812 of 2000 is nonexistent and the Plaintiff cannot claim to rely on the same.
23. It was also pleaded that the initial judgment in Misc Suit No 10 of 2013 where the Plaintiff herein was the Exparte Plaintiff was set aside and/or vacated on 17th December 2014.
24. Yimenghan Liu, a General Management Department Manager testified on behalf of the 3rd defendant during trial. He adopted his witness statement and bundle of documents dated 28th February 2022 as his evidence in chief.
25. When cross-examined by the Plaintiff, he stated that he joined the 3rd Defendant sometimes in 2018. He also stated that the company followed all the due process when purchasing the land. He further stated that he was not aware of any cancellation in respect to the title by the Ministry of Lands. It was his testimony that he was not aware of any current injunction directing the company not to undertake any activity on the suit property.
26. When asked about the authenticity of the letter of allotment, he stated that all the documents in the custody of the 3rd defendant were genuine since they followed the due process when purchasing the property.
27. On cross-examination by Counsel for the 4th and 5th Defendant, he stated that the letter dated 5th June 2014 addressed to the Plaintiff was confirming the registration of the suit property in someone else name. He also stated that from the said letter, the Plaintiff had already been advised to obtain an order from the High Court for cancellation of the title. He also stated that he was not aware of any order in existence that prevented them from acquiring the title or directing the land registrar from dealing with the title.
28. Upon cross-examination by Counsel for the 3rd Defendant, he stated that he was not a party to the previous court cases.



The case of the 4th and 5th Defendants.

29. The 4th and 5th Defendants did not call witness during trial but in their submissions they submitted to having filed a statement of defence dated 14th November 2016. However, this court upon perusing the entire court record failed to have sight of the said defence. This notwithstanding they were allowed to participate during trial and cross-examination of the parties witnesses.

The Plaintiff's submissions.

30. The Plaintiff filed written submissions dated 7th November 2022. In the said submissions, the following issues were outlined for consideration by the court: -
- i. Whether the Plaintiff is entitled to proprietorship of suit land.
 - ii. Whether the 4th Defendants acts of cancelling the Plaintiff's title was unlawful and irregular and more so without according the Plaintiff a hearing.
 - iii. Whether the allegation of forgery as alleged by the defendants have been proved.
 - iv. Whether the Plaintiff is entitled to the prayers sought.
31. The Plaintiff submitted on his first issue by stating that he is entitled to the proprietorship of the suit property. He also submitted that he was gifted/bequeathed the said property through a letter dated 25th January 1982 which letter was held to be admissible by the trial court in Criminal case No 295 of 2005 thus making the said letter authentic.
32. It was also submitted that the Plaintiff has enjoyed quiet possession of the suit property for over 12 years since 1982 until 2005 when the 1st and 2nd Defendants charged him with forgery.
33. On his second issue, he submitted that the Land Registrar's action of cancelling his title was unlawful and irregular. The said cancellation was made on the 9th October 2008 pending the determination of Criminal Case No 275 of 2005. It was submitted that the 4th Defendant could only have cancelled the same through a court order. The following cases were cited in buttressing this argument; *Republic v Registrar of Titles, Mombasa & 2 others Ex parte Emfil Limited* [2012] eKLR and *Supa Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti Corruption Commission & 2 others* [2018] eKLR.
34. On whether the forgery allegations had been proven as alleged by the 1st and 2nd Defendants, it was submitted that the burden lied with the 1st and 2nd Defendant to prove the same. It was further stated that while the 1st and 2nd Defendants produced a letter dated 24th March 2022 whose contents denied the existence of HCCC No 3812 of 2000, and that the Decree issued therein on 3rd August 2008 and Deed of Assignment made on 25th June 2001 to have been executed by the Registrar of the High Court are forgeries, the 1st and 2nd Defendants had failed to avail the Registrar High Court to be cross examined on the said allegations of fraud.
35. The Plaintiff concluded his written submissions by urging the court to grant him the prayers sought in his Plaint dated 6th September 2016.

The submissions of the 1st and 2nd Defendants

36. The 1st and 2nd Defendants filed written submissions dated 16th January 2023. Counsel submitted on the following thematic areas; Gift and transfer of the property to the Plaintiff, Administration of the



- Estate of vesting the property in the name of the Plaintiff and Sale and transfer of the property to the 3rd Defendant.
37. It was submitted that the property could not have been given to the Plaintiff as a gift for the reasons that the property did not belong to Abdul Raof Sheikh since the property belonged to the Sheikh Fazal Ilahi Noor Din Charitable Trust. This was evidenced by the Indenture dated 4th July 1946 and hence therefore Adul Raof Sheikh did not have capacity to gift the property. The case of *Micheni Aphxard & 2 others v Robert Njue* [2021] eKLR where the court held that a person who makes a gift must have the capacity and competency to gift the property.
 38. It was also submitted that a gift of land *inter vivos* can only be done by way of a registered transfer, or if land is not registered it must be in writing or be a declaration of trust in writing. The case of *Re Estate of the Late Gedion Mantbi Nzioka (Deceased)* [2015] eKLR was cited in support.
 39. Counsel also submitted that the gift must be given and the donation completed during the lifetime of the donor. In the instant case, Abdul Raaf Sheikh died on 22nd March 1988 six years after the alleged date of the gift yet all actions towards the registration of the property of the property in the name of the Plaintiff were undertaken after the death of Abdul Raaf Sheikh.
 40. In respect to administration of the Estate of Abdul Raof Sheikh and the property, Counsel submitted on two questions; whether the property was part of the Estate of Abdul Raof Sheikh and whether the Plaintiff was the administrator of the Estate. The 1st and 2nd Defendants contended that, a search on the property as at 24th November 1998 confirms its ownership by the Trust. In an order made on 24th November 1998 confirms ownership by Trust. In an order made on 26th March 1976, Abdul Raof Sheikh and the 1st Defendant were appointed Trustees of the Trust. The property was listed as Trust property in the schedule of properties subject of the order of 26th March 1976. By a deed of Appointment dated 9th January 1985, that the property was not part of the Estate of Abdul Raof Sheikh.
 41. It was also submitted that an employee does not qualify to be a beneficiary of his employer's estate. Besides, there could be no legal justification for the Plaintiff to seek administration of the Estate of Abdul Raof Sheikh if his only interest was the property. The said property was not part of the estate of Abdul Raof Sheikh for purposes of its administration. Reliance was made to the case of the *Estate of the late Gideon Mantbi Nzioka (supra)*. Counsel also added that the certificate of confirmation purportedly made to the Plaintiff on 22nd August 1997 and 23rd August 1997 in H.C. Succession Cause 1089 of 1997 were obtained fraudulently.
 42. On the aspect of the decree and deed of assignment vesting the property in the name of the Plaintiff, it was submitted that the Registrar of the High Court had responded vide a letter dated 24th March 2011 denying the existence of High Court Civil Suit No 3812 of 2000 and another letter dated 21st April 2011 by C.K. Njai, Deputy Registrar High Court had also denied having been signed by the said registrar and further in a letter dated 23rd September 2021, the Deputy Registrar had also confirmed that parties to the said case were non existent.
 43. On the aspect of the sale and transfer of the property to the 3rd Defendant, it was submitted that at the time of sale and transfer of the property, there was no restriction on the same. The 1st and 2nd Defendant's derived the right to sell and transfer the property as Trustees from the order of 26th March 1976 and deed of Appointment dated 9th January 1985 on the basis upon which they were appointed trustees of the Sheikh Fazal Ilahi Nood Din Charitable Trust. The cases of *Arthi Highway Developers Ltd v West End Butchery Ltd & 6 others* (2015) eKLR and *Richard Ngigi v Francis Maina Gakuu* (2021) eKLR were cited in support.



44. The 1st and 2nd Defendants concluded their submissions by urging the court to dismiss the suit with costs.

The 3rd Defendant's submissions.

45. The 3rd Defendant filed written submissions dated 23rd January 2023. Counsel submitted on the following thematic areas; The Plaintiff's Employment and Gifting, High Court Civil Case No 3812 of 2000 and the vesting order, legal arguments (Innocent purchasers for value and *nemo dat quod habet*)

46. It was argued that the following facts render the Plaintiff's case suspicious;

- a. No document or witness was called to collaborate the existence of a relationship between the Plaintiff and deceased (Abdul Raoof Sheikh)
- b. The Plaintiff did not adduce any document as evidence of the existence of the relationship between himself and the deceased. When he was cross-examined he indicated that he did not even file documents that would have demonstrated that he was paid some dues by the deceased.
- c. The Plaintiff relies on a letter allegedly bequeathing him the property. In the letter the deceased says that he is the owner of the property which is inaccurate other than the letter the Plaintiff was not handed a title or an executed transfer.
- d. After the letter the Plaintiff only resurfaced in the year 2000 when he alleges to have filed a civil suit against the deceased's children and the Charitable Trust that owned the property. No explanation was made as to what transpired on what the Plaintiff was doing regarding the alleged right to property for close to two decades between January 1981 and the year 2000.

47. In respect to Civil Case No 3812 of 2000 and the vesting order it was submitted that the same was non existence pursuant to the letter dated 24th March 2011 and the Plaintiff had declined to make any comment on the letter when he was on the witness stand.

48. Citing the case of *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others*, Nairobi Civil Appeal No 146 of 2014 where the Court of Appeal cited with approval the case of *Katende v Harider & Co. Ltd* (2008) 2 EA 173, the 3rd Defendant contended that it meets the threshold for innocent purchaser for value.

49. Citing the principle of *nemo dat quod non habet*, it was submitted that it is uncontroverted that the property was always registered in the name of the Sheikh Fazal Ihahi Noor Din Charitable Trust until it was transferred to the 3rd Defendant and Abdul Raoof Sheikh did not have capacity to gift the property to the Plaintiff. The court was urged to dismiss the suit with costs.

The 4th and 5th Defendants submissions.

50. The 4th and 5th Defendants submissions are dated 24th January 2023. Counsel outlined two issues for consideration by the court;

- i. Whether the Plaintiff has pleaded and proved any forgery against the 4th Defendant.
- ii. Whether the Plaintiff is entitled to costs as against to 4th and 5th Defendants.

51. Counsel submitted that the Plaintiff has not provided any evidence to prove the allegations of forgery against the 4th Defendant. It was also submitted that the Plaintiff is not entitled to costs since he did not provide evidence of issuance of the mandatory statutory notice of intention to sue Government as required by Section 13 A of the *Government Proceeding Act*. The cases of *Lawrence Ogaro Onyiego*



Ɖ another v Samuel Minika Ɖ another (2017) eKLR and *Kenya Bus Service Ltd Ɖ another v Minister for Transport Ɖ 2 others* (2012) eKLR were cited in support.

Analysis and determination.

52. I have considered the cases put forward by the parties, the submissions filed, authorities cited together with evidence adduced herein. Parties did not agree on a common set of issues falling for determination, however, based on the pleadings, evidence and submissions presented to the court, the following are the key issues falling for determination;-
- i. Whether the Plaintiff has proved any proprietorship interest in respect to the suit property.
 - ii. Whether the allegations of forgery have been proved herein.
 - iii. Whether the 3rd Defendant was an innocent purchaser for value.
 - iv. Whether the Plaintiff is entitled to the reliefs sought.

Issue No i - Whether the Plaintiff has demonstrated proprietorship interest to the suit property.

53. It was the Plaintiff's case that he is entitled to the proprietorship of the suit property after being gifted of the same by his late employer Abdul Raof Sheikh though a letter dated 25th January 1982. The 1st and 2nd Defendants countered this position by stating that the deceased did not have any capacity to gift the property since it belonged to the Sheikh Fazal Noor Din Charitable Trust at the alleged date when the gift was made.
54. In the case of *In re Estate of Chesimbili Sindani (deceased)* 2021 eKLR Musyoka J. dealt with the issue of gift *inter vivos*. The learned judge in paragraphs 29, 30 and 31 of the said judgment which I reproduce hereunder expressed himself as follows:-
29. In *In re Estate of Nyachieo Osindi (Deceased)* [2019] eKLR (Ougo J), the court found that there was sufficient proof of a gift *inter vivos*, where the deceased had given possession of a piece of land to another, and signed a transfer form in his favour, but died before the transfer was registered. In *In re Estate of Muchai Gachuika (Deceased)* [2019] eKLR (Gikonyo J), it was established that the deceased had registered three assets in the names of some of his sons during his lifetime, and it was held that those gifts were complete and the assets in question did not form part of the estate of the deceased. It was said, in *In re Estate of Phylis Muthoni M'Inoti (Deceased)* (2019) eKLR (Gikonyo J), that a person claiming that the deceased had made a gift *inter vivos* to them, but the titles were not deduced during his lifetime, should show such conduct of the donor which would give the intended donee the right to enforce the gift. On the facts of that case, the court found no evidence of gifts *inter vivos*, for there were no consents to transfer the property, duly signed by the deceased, or any evidence that the subdivision of the land by the deceased was intended to benefit the persons claiming. The court further found that none of the alleged beneficiaries had claimed to have had been put in possession of the subject property by the deceased, nor to build or built on the subject property.
 30. The principles relating to *inter vivos* gifts have been stated in very many cases, which include, but not limited to *In re Estate of Godana Songoro Guyo (Deceased)* [2020] eKLR (Nyakundi J), *William M'Arimi M'tuambae v Rosemary Karamuta for estate of George Gatimi* [2017] eKLR (Gikonyo J),



In re Estate of Monicah Wambui Nguthiru (Deceased) [2020] eKLR (Ongeri J), *In re Estate of Osoro Motari (Deceased)* [2020] eKLR (Ougo J), *In re Estate of M'Raiji Kithiano (Deceased)* [2017] eKLR (Gikonyo J), *Evans Onguso & 2 others v Peter Mbuga & 4 others* [2020] eKLR (JM Mutungi J), *Margaret Mumbi Kihuto v Peter Ngure Kihuto & another* [2017] eKLR (OnyiegoJ), *In re Matabo Sabora (Deceased)* [2019] eKLR (Mrima J), *Naomi Wanjiru Njoroge & 2 others v Winston Benson Thiru* [2018] eKLR (Muigai J) and *In re Estate of Japhet M'tuamwari M'ikandi (Deceased)* [2019] eKLR (Gikonyo J).

From the case law above, the principle that emerges is that any gift *inter vivos* should be backed by some memorandum in writing, and the gift would be complete once title to the subject property is transferred to the name of the beneficiary of the gift. Difficulties arise where transfer is not effected to the beneficiaries before the death of the deceased, in which case such property would remain the free property of the deceased, available for distribution at confirmation, the argument being that such gift was founded on a mere promise which the deceased did not carry through prior to his death. Where some preliminary steps were taken towards effectuating his promise, so that all what remained after the death of the deceased was mere registration of the property in the name of the beneficiary, it would be presumed that that the deceased intended to make a gift *inter vivos*. That would be the case where the deceased has complied with the *Land Control Act*, Cap 302, Laws of Kenya, where the land is subject to that law, by applying for consent to transfer the property from the name of the deceased to that of the beneficiary, the consent had been granted, and he had signed a transfer form to facilitate registration of the property in the name of the beneficiary. That would mean practically everything had been done to perfect or complete the gift were it not for the demise of the deceased. The mere fact of being shown a piece of land and given permission to occupy and use it, without more, is not adequate proof for a gift *inter vivos*. The deceased, as registered proprietor of the land in question, would have the right to licence a person to occupy the land and use it. A child who has been shown a piece of land to build on and to till, is not in the shoes of an owner, but a mere licensee. The death of the deceased would not upgrade the licence to ownership, if anything the death of the proprietor could mean that the license comes to an end, and the licensee continues to occupy and work the land at the mercy of the administrator.”

55. The Plaintiff's claim herein is in the genre of gifts *inter vivos*; these are gifts made between living persons. Gift *inter vivos* may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor or by way of resulting trusts. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts *inter vivos* must be complete in order to be valid. It is not, however, necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee.
56. In the present case, the Plaintiff alleges to have been gifted the suit property vide a letter dated 25th January 1982 by Adul Raoof Sheik who passed away on 22nd March 1988. During trial no evidence was tendered by the Plaintiff to demonstrate that the said property was ever transferred to him during the lifetime of the deceased. According to the Plaintiff in his own testimony he stated that the he obtained a decree in HCCC 3812 of 2000 John Ngugi Gathumbi v Waheed Sheikh & 2 others upon which a



vesting order dated 23rd November 2002 was issued and was subsequently issued with an allotment letter on 25th March 2003. The Defendants also tendered evidence to the effect that the suit property was at no time ever registered in the names of Abdul Raof Sheikh. The 1st and 2nd Defendants were also able to successfully prove and demonstrate that the property did not belong to Abdul Raof Sheikh since from the evidence adduced during trial, the property belonged to Sheikh Fazal Ilahi Noor Din Charitable trust and this was evidenced by the Indenture dated 4th July 1946 which was produced in evidence.

57. Having considered the aforementioned position, it is clear that the law on gift inter vivos is settled. The Court agrees with the submissions made by the 1st, 2nd and 3rd Defendants that indeed the gift and donation alleged to have been issued to the Plaintiff was never completed during the lifetime of the donor the late Abdul Raof Sheikh and further the same was never registered in the names of the deceased and thus the deceased could not gift what he did not own and in the circumstances the Plaintiff could not have acquired any proprietorship interests in respect to the suit property.

Issue No ii - Whether the allegations of forgery have been proven herein

58. In their statement of defence stated 19th December 2016, the 1st and 2nd Defendants pleaded particulars of fraud at paragraph 17. The following were particularized; On 22nd day of August 1997 the Plaintiff fraudulently procured a Grant of Letters of Administration for the Estate of the late Abdul Raof Sheikh in H.C Succession Cause No 1089 of 1997, naming the Plaintiff as the administrator therein; On 23rd day of August 1997 the Plaintiff fraudulently procured a Certificate of Confirmation of the Grant of Letters of Administration for the Estate of the late Abdul Raof Sheikh in H.C Succession Cause No 1089 of 1997 naming the Plaintiff as the administrator therein; On 3rd day of August 2000 the Plaintiff fraudulently procured a Decree HCCC No 3812 of 2000, declaring him as the owner of the property; On the 25th day of June 2001 the Plaintiff fraudulently procured the registration of the fraudulent Deed of Assignment against the register of the property declaring him as the owner and that on the 27th November 2001 the Plaintiff fraudulently procured the registration of the fraudulent Deed of Assignment against the register of the property declaring him as the owner.
59. A party alleging fraud must specifically plead the particulars of fraud and specifically lead evidence to prove the allegations of fraud. There are steps that must be taken to prove fraud.
60. In the instant case, the 1st and 2nd Defendants in their submissions dated 16th January 2023 submitted that the suit property was not part of the property of the Estate of Abdul Raof Sheikh for the purposes of its administration and that the Grant of Letters of Administration and the Certificate of confirmation thereof purportedly made to the Plaintiff on 22nd August 1997 and 23rd August 1997 in H.C. Succession Cause No 1089 of 1997 were obtained fraudulently. The 1st and 2nd Defendant also submitted that the vide a letter dated 23rd September 2021 and 24th March 2011 that indeed there was no case recorded in court going HCCC No 3812 of 2000 since the court did not register 3000 cases and also the then Deputy Registrar C.K. Njagi (deceased) had denied executing the said decree. There is no better person who can confirm the authenticity of the court pleadings and decrees other than the Registrar High Court and the Deputy Registrar. The Plaintiff did not controvert this evidence during trial and as such it is the finding of this court that the 1st and 2nd Defendants have proved the particulars of fraud as pleaded in their statement of defense as against the Plaintiff.

Issue No iii - Whether the 3rd Defendant was an innocent purchaser for value.

61. It was the 3rd Defendant's case that the suit property was acquired lawfully after doing due diligence and that the 3rd Defendant was an innocent purchaser for value without notice. The evidence on record



shows that the 3rd Defendant acquired the suit property from the 1st and 2nd Defendant pursuant to deed of variation for the sale agreement dated 10th May 2014 for a consideration USD 7,508,260.00. A transfer dated 21st June 2014 was also produced in evidence. The 3rd Defendant's witness Yimenghan Liu who testified and stated how the 3rd Defendant conducted due diligence before the same was purchased.

62. The definition of a *bona fide* purchaser is one who genuinely intends to purchase the property offered for sale and does not intend to acquire it wrongly. A *bona fide* purchaser may successfully rely on the *bona fide* doctrine if he proves that:
- i. He holds a certificate of Title.
 - ii. He purchased the Property in good faith;
 - iii. He had no knowledge of the fraud;
 - iv. The vendors had apparent valid title;
 - v. He purchased without notice of any fraud;
 - vi. He was not party to any fraud.
63. For a party to successfully plead and claim to have been an innocent purchaser for value, he or she must demonstrate the aforementioned factors. In the instance case, the 3rd Defendant was able to demonstrate the foregoing and the 3rd Defendant's title cannot be invalidated in the circumstances since there is no allegation of fraud on the part of the previous vendor which would have been required to be proved.

Issue No iv - Whether the Plaintiff is entitled to the remedies sought.

64. The Plaintiff sought for several prayers as was pleaded in his Pleint. However, this court having made a finding that the Plaintiff did not acquire any proprietary interest to the suit property, his claim against the Defendants fails and as such the reliefs sought cannot be granted since there is no basis in granting the same.
65. On the issue of costs, although costs of an action or proceedings are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the [Civil Procedure Act](#) (Cap. 21). However, considering the circumstances of this case, I direct that each party bears own costs of these proceedings.
66. In conclusion, the court after carefully considering the evidence adduced herein and subsequently addressing itself on the issues raised by the parties, finds that the Plaintiff has failed to prove his case to the required standard. The Plaintiff's suit is hereby dismissed with no orders as costs.

DATED, SIGNED AND DELIVERED IN NAIROBI AND IN OPEN COURT THIS 28TH DAY OF MARCH 2023.

E.K. WABWOTO

JUDGE

In the presence of:-

Mr. John Ngugi Plaintiff acting in Person.

Ms. Akoth h/b for Mr. Havi for 1st and 2nd Defendants.



Ms. Aden h/b for Mr. Angwenyi for the 3rd Defendant.

N/A for the 4th and 5th Defendant.

