



**Duba v Duba a.k.a Mushilimu Duba (Sued as the Administratrix of the Estate of Duba Ali)
(Environment & Land Case 580 of 2016) [2023] KEELC 16991 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16991 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 580 OF 2016**

**A OMBWAYO, J
APRIL 28, 2023**

BETWEEN

GODANA UCHU DUBA PLAINTIFF

AND

**MUSHILIMU ALI DUBA A.K.A MUSHILIMU DUBA (SUED AS THE
ADMINISTRATRIX OF THE ESTATE OF DUBA ALI) DEFENDANT**

JUDGMENT

1. The Plaintiff commenced this suit vide a plaint dated December 14, 2016 and stated that the 1.5 acres of the plot 370 Lenginet the suit property was given to him by his brother Ali Duba (deceased). He averred that the said property was a gift to him since he took care of the deceased's property while the deceased was in prison. The Plaintiff sought for judgment to be entered against the Defendant as follows:
 - a. A declaration that he is the lawful owner of the 1/2 acre of plot no. 370 Lenginet.
 - b. An order of transfer of the 1½ acres of Plot No. 370 Lenginet by the Defendant to the Plaintiff.
 - c. An order of permanent injunction restraining the Defendant, by herself, her servants, Agents, Employees, children and/or any one working for her from interfering with the plaintiff's peaceful and quiet possession and use of the plot no. 370 Lenginet.
 - d. Cost of this suit.
2. The Defendant herein entered appearance and filed her defence and counterclaim dated March 6, 2019 where she alleged fraud on the part of the Plaintiff. She claimed that he falsified documents to acquire title over the suit property. The Defendant further denied having entered into an agreement with the Plaintiff over the suit land. The Defendant urged the court to dismiss the Plaintiff's case and prayed for the following orders:



- a. The court be pleased to declare the Defendant (now Plaintiff) is the legal proprietor of the suit land.
- b. This Honourable Court be pleased to order the Defendant to the counterclaim to vacate the suit land forthwith and a permanent injunction be issued to restrain the Plaintiff (now the Defendant) by himself and/or his servants, assigns, tenants and all who claim under as through him from entering, disposing off, using, cultivating, entering, introducing third parties to the suit land the and/or in any other manner interfering with the Defendant (now Plaintiff) quiet possession all 7.5 acres of the parcel of land known as Plot Nakuru/lenginet/370. (herein known as the suit land).
- c. Costs of this suit and counterclaim.
- d. Any other orders as this court may deem fit to grant.

Plaintiff's Case

3. Godana Uchu Duba the Plaintiff herein testified as PW1 where he produced his statement filed on September 14, 2020 and bundle of documents as per the list dated 3rd August, 2020 was admitted as his evidence and marked PEX 1-17. PW1 stated that the deceased was his brother and he wanted the court to grant him 1 ½ acres of the suit property since he took care of it while his deceased brother was in prison. He testified that he has since peacefully resided on the 1 ½ acres portion and that there was an agreement between them and witnessed by the elders and local administrators after his brother was released from prison. He further testified that he took care of his brother's property and even increased the cow that was given by the government from 1 to 8. It was his testimony that the Defendant's father wanted the suit land for his daughter alone. He added that the agreement between his late brother and himself was made on 30th January, 2001. He testified that he stayed on the land until the Defendant at some point had wanted to sell his portion but he reported to the police. He further testified that he filed a reference at the Lands Tribunal which ruled that he takes the 1 ½ acres of the suit property.
4. He stated that he had applied for revocation of grant that had been issued to his late brother's estate. He added that the Defendant had also appealed the tribunal's ruling and judgment was issued. He testified that he has since constructed his house on the said portion of 1 ½ acres.
5. On cross examination, he admitted that he did not know how to read and write and added that it is the Defendant who wants him removed from the suit land. He further confirmed that the Defendant was present when the agreement was made on 6th June, 1993. He confirmed that the land had no title in 1993 and added that the Defendant now has a title. He admitted to having occupied the land and has never moved out since.
6. On re examination, he stated that the agreement dated June 6, 1993 bore his thumbprint and added that he resides with his son on the land.
7. Lawrence Langat PW2 adopted his statement dated 3rd August, 2020 as evidence in chief where he stated that the deceased while in prison had requested his brother the Plaintiff herein to represent him when his land became available. He testified that the land was part of settlement fund Trustees where he was the chairman of Lenginet Farmers Cooperative Society where the deceased was a member and had bought 2 ½ acres of the said land. He explained that they issued members with charge documents from SFT were they would pay some money to the government. He testified that the money in regard to the deceased's plot was paid by the Plaintiff and that the SFT later increased the allotment by 5 acre hence every member got a total of 7 ½ acres.



8. It was his testimony that when the deceased left prison in 1985, he found his land was 7.5 acres and he stayed with the Plaintiff peacefully until the deceased married the Defendant. He testified that the Defendant did not want the Plaintiff staying in the suit land and she joined with the deceased her husband who requested the Plaintiff to vacate the suit land. He testified that the Plaintiff reported the matter to the chief and later escalated to the D.O where together with the elders decided that the Plaintiff be given 1 ½ acres. He further testified that on June 6, 1993 the Plaintiff and the deceased signed an agreement to that effect. He testified that the Defendant does not reside on the said land as they had initially stayed on the balance of the suit land before she relocated to Eldoret with her deceased husband. He testified that the Plaintiff is entitled to the portion of 1 ½ acres.
9. On cross examination he admitted that he knew the deceased after he left prison and confirmed that the deceased was literate and could sign. He confirmed that the Plaintiff was given the 1 ½ acres as a gift by the deceased and he has been using the land when the deceased was in prison. He confirmed that the Plaintiff resides with his family on the 1 ½ acres portion.
10. Upon re examination he stated that the committee meeting was as a result of a dispute regarding the deceased wanting the Plaintiff to vacate the land. He added that the deceased willingly signed the agreement.
11. Guyo Wako Sora testified as PW3 where he adopted his witness statement as evidence. He testified that when the deceased left prison and later got married to the Defendant, he wanted the Plaintiff vacate the land. He further testified that the deceased called them to deliberate on the issue when he agreed to give the 1 ½ acres to the Plaintiff. The tribunal also ruled that the Plaintiff be given the 1 ½ acres and the Provincial appeals committee also appealed the tribunal's decision. On cross examination, he confirmed that the deceased and Plaintiff belonged to one clan. He further confirmed that as a family they agreed that the deceased give the Plaintiff 1.5 acres as he had taken care of the deceased's land for a long period. On re examination he stated that the deceased was never pressured and he willingly gave the 1 ½ acres to the Plaintiff.
12. Patrick Owegi Muhando the Plaintiff's neighbour testified as PW4. He adopted his statement as his evidence in chief. He stated that he had thought the land belonged to the Plaintiff as he had peacefully resided on the land from 1987 to 1993. He reiterated PW2's testimony and added that the parties signed the agreement as he was the person writing it.
13. On cross examination he confirmed that the Plaintiff was using the land before he was asked to vacate. He added that he continues to use the land. Upon re examination, he stated that the Plaintiff did subsistence farming. On re-examination the witness confirmed that the Land Registrar usually signs the lease after the Commissioner of Land has signed.
14. Awa Godana testified as PW5 where she adopted her witness statement as evidence. She testified that the Plaintiff is her father while the Defendant is her aunt and that the deceased is her uncle. She further testified that the Plaintiff resides on plot 370 where she was also born and has since resided. It was her testimony that the Defendant was married in 1987 and that they peacefully lived together. She testified that she witnessed the wazees congregating at the farm and that his father informed her that his brother agreed to give him 1.5 acres and also showed him the said portion. She added that the titled for the scheme were not ready at that time. PW5 reiterated PW2's evidence and added that her stepfather was buried in Eldoret.
15. On cross examination she admitted that her father the Plaintiff did not have any other land. She also agreed that there was nothing that prevented him from obtaining land elsewhere. Upon re examination she stated the Plaintiff had informed her that his brother told him to take care of the land at Lengenet.



This marked the close of the Plaintiff's case.

Defendant's Case

16. Mushilimu Ali Duba, the Defendant herein relied on her statement dated March 6, 2019 and filed on May 27, 2019. The same was adopted by the court as her evidence in chief. She also produced a certificate of confirmation of grant and title deed as her evidence. The same was marked as PEX1 and PEX2.
17. On cross examination, she confirmed that her husband was the owner of the land but added that she did not know how he had acquired it. She further confirmed that she got married in 1987 and when she went to live on the land, she found the Plaintiff already living there. She added that her deceased husband told her that the Plaintiff was his friend. The Defendant admitted that she did not know for how long her husband was in prison. She confirmed that her husband died on 4th September, 1993 while at home.
18. She further confirmed that she was not aware of any agreement between the Plaintiff and her deceased husband as she was never involved in the transaction. She confirmed that she had filed a succession cause but never involved anyone. She also admitted that she does not reside on the land and she didn't know who paid the rates and rent in 1975. The Defendant confirmed that in 1982, her deceased husband was still in prison. She denied knowing how the Plaintiff also obtained the land but objected to the said acquisition by the Plaintiff. She also added that the house as in the produced pictures belongs to her.

That marked the close of the Defendant's case

Plaintiff's Submissions

19. The Plaintiff filed his submissions dated 20th March, 2023 on 24th March, 2023 where he gave a summary of both the Plaintiff and Defendant's evidence and identified one main issue for determination, whether the Plaintiff is entitled to the prayers sought. He submitted that he should be declared as the lawful owner of the 1 ½ acres of plot 370 Lenginet. He relied on section 107 of the *Evidence Act* and a number of authorities including the Court of Appeal case of *Ann Wambui Nderitu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA. He submitted that the deceased being his brother gifted him the said plot as a sign of appreciation since the Plaintiff took care of his land while he was in prison.
20. He submitted that he took care of the deceased's property for over fourteen years (14) and confirmed that at the time the property did not have a title. He argued that the title deed in the Defendant's list of Documents was issued on March 9, 2011 while the deceased died in the year 1993. He added that the certificate of confirmation of grant confirmed that the land had been bequeathed to the Defendant before summons for revocation had been filed.
21. The Plaintiff argued that the deceased had reduced his intention to gift the Plaintiff the said land in writing vide an agreement dated 6th June, 1993 and the deceased allowed him to construct his matrimonial home on the suit land. He relied on the case of *In Re Estate of M'raiji Kithiano (Deceased)* [2017] eKLR.
22. The Plaintiff submitted that the deceased gave him the right to enforce the said gift and further argued that the Defendant failed to address her concerns on the said property with the deceased but only waited until his demise to come and bring havoc to the Plaintiff and his family. He urged the court to declare him as the lawful owner of the said portion and order cancellation of the title deed issued in favour of the Defendant to the deceased's name upon appointment of each party's share.



23. The Plaintiff relied on the Court of Appeal case of *National Bank of Kenya Limited V Pipe Plastic Samkolit (K) Ltd* [2002] 2 E.A 503 (2011) eKLR and submitted that it is trite that a court cannot re-write a contract and/or agreement for the parties involved. He submitted that the Defendant's allegation that the two agreements were fraudulently entered into were never backed up by concrete evidence as the elements of fraud were never particularized. He urged the court to find that the terms of the agreements dated June 6, 1993 and January 30, 2001 are binding on the parties. He submitted that he is entitled to an order compelling the Defendant to transfer the 1 ½ acres of plot no, 370 to him.
24. The Plaintiff submitted that he has demonstrated to the required legal threshold that his late brother gifted him the 1 ½ acres and therefore he acquired proprietary interests and rights over it thus establishing a prima facie case. He submitted that he stands to suffer irreparable harm in the event the injunction is not granted. He explained that the Defendant is hell bent on evicting him from the land in order to sell it to third parties yet he has been in physical possession and occupation. He confirmed that he has constructed his matrimonial home and resides with his children and grandchildren. He argued that in light of the evidence tendered, it is evident that the balance of convenience tilts in his favour and therefore urged the court to grant him the prayers as sought.
25. In conclusion, he relied on section 27 of the [Civil Procedure Act](#) and urged the court to grant him costs of the suit.

Defendant's Submissions

26. The Defendant did not file her submissions.

Analysis and Determination

27. I have considered the pleadings, the evidence on record and the submissions by the parties and I am of the view that the following issues need to be determined:
- a. Whether Plot No. 307 Lengenet was transferred to the Plaintiff as gift inter vivos.
 - b. Whether the Plaintiff is entitled to the reliefs sought.
 - c. Who should bear the costs of this suit?
28. On the first issue, in the case of [Re Estate of the Late Gedion Mantbi Nzioka \(Deceased\)](#) [2015] eKLR Nyamweya J stated as follows:
- “In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the [Law of Succession Act](#) provides as follows with respect to gifts made in contemplation of death:
- ...For gifts inter vivos, the requirements of law are that the said gift 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 or the presumption of 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 for the same to be valid.”
29. In the instant case, the Plaintiff has provided documentary evidence vide an agreement between him and the deceased dated 6th June, 1993. The said agreement confirmed that the deceased agreed to give 1 ½ acres of his property to the Plaintiff. This was corroborated by PW2, PW3 and PW4's evidence who confirmed that the Plaintiff was given the 1 ½ acres by his deceased brother Ali Duba. It was the Plaintiff's testimony that the deceased willfully gifted him the said property as form of appreciation



since he took care of his property for more than 14 years while the deceased was in prison. It is not in dispute that the Plaintiff has been residing on the said property to date. The Defendant confirmed this in her testimony where she stated that when she got married to the deceased and moved to the suit property, the Plaintiff was already living there.

30. It is also not in dispute that the Plaintiff constructed his matrimonial home and lives with his children. The Defendant testified that she was never involved in the transaction between her late husband and the Plaintiff. Despite denying any form of agreement between her late husband and the Plaintiff on the said land, she did not adduce any evidence disproving the same. She merely denied the said claims which this court does not consider sufficient enough for this court to go by.
31. This court has looked at the agreement dated June 6, 1993 and is of the view that indeed the deceased Ali Duba agreed to transfer 1 ½ acres of his property to the Plaintiff. The same was to be excised from the suit property. From the evidence presented before this court, it is not in dispute that the Plaintiff, the deceased Ali Duba and the Defendant peacefully lived together on the suit property until when the Defendant and deceased left to settle in Eldoret. I note that at the time they relocated the deceased never asked the Plaintiff to vacate the suit property. I also find that the deceased's acts give the Plaintiff the right to ask for enforcement of the gift herein being 1 ½ acres of plot 370 Lenginet.
32. From the foregoing, I find that the Plaintiff has demonstrated on a balance of probabilities that he was indeed gifted plot 370 Lenginet by the deceased Ali Duba.
33. Having established that Plot 370 Lenginet is a gift inter vivos by the deceased Ali Duba to the Plaintiff, the Plaintiff is therefore the lawful owner of the same having acquired it as gift inter vivos. He is thus entitled to the prayer of a permanent injunction as sought in his Plaint.
34. I therefore find and hold that the Plaintiff has proved his case against the Defendant on a balance of probabilities.
35. The upshot of the foregoing is that the Plaintiff's suit against the Defendant succeeds and the Defendant's Counter claim is dismissed with costs to the Plaintiff. Consequently, I grant orders as follows:
 - a. The Plaintiff is the lawful owner of the 1 ½ acre of plot no. 370 Lenginet.
 - b. The Defendant to transfer 1½ acres of Plot No. 370 Lenginet to the Plaintiff.
 - c. A permanent injunction is hereby granted restraining the Defendant from interfering with the Plaintiff's peaceful and quiet possession and use of the plot no. 370 Lenginet.
 - d. The Defendant's counter claim is dismissed with costs.
 - e. The Plaintiff shall have costs of this suit.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 28TH DAY OF APRIL 2023

A.O. OMBWAYO

JUDGE

