



REPUBLIC OF KENYA



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**Shera v Kirami (Environment and Land Appeal 82 of 2021)
[2023] KEELC 21052 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21052 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 82 OF 2021
LL NAIKUNI, J
OCTOBER 17, 2023**

BETWEEN

ALI SAID SHERA APPELLANT

AND

SAID ABDILLAH KIRAMI RESPONDENT

JUDGMENT

Preliminaries

1. The Judgment by this Honorable Court pertains to the Appeal lodged by Mr. Ali Said Shera, the Appellant herein against the Respondent herein. The was instituted before this Court appeal through a Memorandum of Appeal dated 21st December, 2021 and filed on 22nd December, 2021. The appeal was from the Judgment and the Decree of the Lower Court by the Honourable C. N. Ndegwa – Senior Principal Magistrate at Mombasa CM/ELC No. 13 of 2018 delivered on 16th December, 2021. Additionally, the Appellant filed a 163 pages Record of Appeal dated 30th March, 2022 and filed on 31st March 2022 and a 15 pages Supplementary Record dated 7th October, 2022. The said pleadings were served upon the Respondent.
2. On 19th July, 2022 the appeal was admitted and direction taken under the provisions of Section 79 B and G of the *Civil Procedure Act* Cap 21 and Order 42 Rules 11 and 13 of the Civil Procedure Rules, 2010. Parties were directed to dispose off the Appeal through filing of written submissions within stipulated time frame and which parties fully complied accordingly. Indeed, on 18th October, 2022, the Learned Counsels were granted ample opportunity to highlight their written submissions and whereby Mr. Ondieki Advocate and Mr. Nyongesa Advocate effectively executed their duties accordingly.



II. The Appellant's Case

3. From the Memorandum of Appeal the Appellant being dissatisfied and/or aggrieved with the Judgment of the lower court raised the following seven (7) grounds.
 - a. That the Learned Magistrate erred in Law and in fact by dismissing the Appellant's Counter Claim.
 - b. That the Learned Magistrate erred in Law and in fact by allowing the Plaintiff/Respondent's Plaint as prayed.
 - c. That the Learned Magistrate erred in law and in fact by not deciding and/or touching on the aspect of the Appellant being gifted the land.
 - d. That the Learned Magistrate erred in law and in fact by finding that the Respondent's title was valid and by virtue of the title he was the owner of the land.
 - e. That the Learned Magistrate erred in law and in fact by failing to judiciously analyze the Appellants evidence and submissions on record that he was gifted the suit land and had been in possession of the land since 1994 to date.
 - f. That the Learned Magistrate erred in law and fact by awarding the Respondent damages for trespass of Kenya Shillings One Hundred Thousand (Kshs. 100,000/=).
 - g. That the Learned Magistrate erred in law and in fact in failing to find the Appellant as the owner of the land having been gifted the same and took possession of it by building his home on the land.

Reasons whereof the Appellant prayed:-

- i. the Appellant's appeal be allowed in whole with costs to the Appellants.
- ii. The Judgment of the Learned Honorable Magistrate be set aside.
- iii. This Honorable Court do proceed to find the Appellant as the owner of the land having been gifted and build on the said land since 1994.
- iv. The Respondent's claim be dismissed with costs and the Appellant's Counter Claim be allowed with costs.
- v. The Honorable Court be at liberty to grant any other order (s) it may deem fit in the circumstances.
- vi. Costs of this Appeal be provided cor.

III. Submissions

4. As indicated above the parties were directed to canvass the Appeal by way of filing submissions which they all obliged accordingly.

A. The Written Submissions by the Appellant

5. On 11th October, 2022 the Learned Counsel for the Appellant the Law firm of Messrs. Marende Necheza & Company Advocate & Company Advocates filed their written submissions dated 7th October, 2022. Mr. Ondieki Advocate commenced his submissions by providing the Honorable Court with a brief background of the matter. He informed court that vide a filed Pliant dated 10th April,



2018 the Respondent (as the Plaintiff in the CM/ELC No. 31 of 2018) instituted the suit against the Appellant (as the Defendant). He averred that he was the legal owner of all that parcel of land known as Mombasa/Mwembelegeza/1136 measuring 0.04 HA is claim was for permanent injunction against the Appellant and his eviction from the suit land.

6. The Learned Counsel averred that in his response the Appellant filed his Defence and Counter Claim dated 24th May, 2018. In his Defence and Counter Claim the Defendant/Appellant denied the Plaintiff's allegations of trespass and stated that he was gifted/given the said parcel by the owner who was his grandmother one Mwanadie Ali Mwachutu. In the Counter Claim the Appellant prayed for Judgment against the Respondent for revocation of the title which he held was irregularly issued to the Respondent and a proper one issued to the Defendant/Appellant, permanent injunction against the Respondent from trespass plus general damages and costs of the suit.
7. To support his appeal, the Learned Counsel submitted along the following four (4) grounds for the Court's determination.

Firstly, that the Learned Magistrate erred in law and in fact by dismissing the Appellant's Counter Claim. He held that the lower court in its decision only dwelt on fraud which had not been an issue at all and ignored to pronounce itself on the main contention issues such as the suit property having been a gift to the Appellant from his grandmother. He asserted that the ground of gift was specifically pleaded in the Counter Claim by the Appellant at Paragraphs 12 to 15 of the Defence and Counter Claim and his evidence from the witness summoned who all corroborated this fact. According to the Learned Counsel the issue of gift could not be a subject of succession nor inheritance as claimed by the Respondent in the Plaintiff. To him it was a main issue for determination by court and thought the parties submitted on the said issue but the trial court ignored it all together and hence miscarriage of justice. On this part he relied on the decision of "Ahmed Mohammed Noor – Versus- Abdi Aziz Osman (2019) eKLR Civil Appeal No. 156 of 2018 (Migori).

8. Secondly, the Learned Counsel argued that this Court sitting as a first appellate court – he urged it re-evaluate the evidence of both the Appellant and Respondent as per the Record of Appeal and submissions to make an Independent finding. To support his point herein the counsel cited the cases of Bwire –versus- Wayo & Sailoki (Civil Appeal 032 of 2021) (2022) KEHC 7 KLR. To the Learned Counsel, although the Respondent claimed to be the legal owner of the property and produced a Certificate of Title deed issued to him on 30th May 2017 but he failed to explain how he got the said Certificate of title registered in his name. Paradoxically, the Learned Counsel wondered how this would have happened as as when the land adjudication was taking place he was 10 years old and not in a position to have land registered in his name and whether the due process of transmission and transfer was followed at the Land's offices.
9. On the other hand the Appellant in his testimony and evidence stated that he had in his possession all the original allotment letters and payment receipts made at the Land Offices and were produced as Exhibit No. 2. He stated he was awaiting for the title deed to be issued and follow up on the registration and transmission of the title from his grandmother to himself. According to the counsel this never happened as he never got the title issued in their grandmother's name but was served with the suit and noticed that the title was in the Respondent's name who is his younger brother. However, the Appellant showed that he was in possession and open occupation and use of the land by building his



house on the plot in 1994 in which he housed his grandmother. The whole family lived there and there had never been any objection.

The Learned Counsel held that the Respondent recalled his mother PW-2 who produced Kadhi Court orders which were full of fraudulent dealings, she held that she was not the only child of her mother. She had other siblings and that the land had some development prior to the transfer. The Respondent failed to show whether he had paid for the Land's requirements such as stamp duty during the transfer and how the title was transferred from Mwanadie the original allottee to Aisha Sidi. The counsel urged court to undertake investigations on the title was obtained as envisaged under the Provisions of Section 13 (2) (a), (d) and (e) of the Environment and Land Act, No. 19 of 2011.

The Appellant on his part testified and gave evidence. He even called their uncle who gave evidence in support that the suit land was indeed gifted to the Appellant by their grandmother and there existed the Defendants house on the said plot and the family.

10. Thirdly, the Learned Counsel submitted whether the Appellant was gifted and the Gift of Land was valid and/or made good by his grandmother after which he lived with her and also the Respondent up until their grandmother's demise. The Appellant was gifted the land and he took possession and developed it accordingly. Hence it no longer consisted of the estate of their grandmother after her death as ownership had already passed to the Appellant by conduct.

The Learned Counsel cited the doctrine of Gift. Inter Vivos as well articulated in the cases of the Estate of M'Raiji Kithiainoi (Deceased) eKLR Meru HCC Succession Cause No. 419 of 2004 court held:-

“A gift inter vivos should be complete in order to be valid. Ordinarily a gift in land should be effected through a written memoranda or transfer on a declaration of trust in writing showing that the land was gifted. But, if a gift rests merely in promise whether written or oral or unfulfilled intention, it is incomplete and imperfect and the court will not compel the intending donor or those claiming under him to complete and perfect it except in the circumstances where the donor's subsequent conduct gives the done a right to enforce the promise.

He further referred court to the case of

“Evans Onguso & 2 Others –Versus- Peter Mbugua & 4 Others (2020) eKLR Kisii ELC. No. 97 of 2007 where court elaborated the point as follows: -

“From the above expectation of the Law on gifts it is evidence where there is an imperfect gift having regard to the requirement of the necessity for the same to be way of written Memorandum registered transfer and/or declaration of trust in writing the gift may nonetheless be perfected by the conduct of the parties.”

In the instant case, although the gift inter vivos was never registered it was made good by the conduct of the parties herein as the Appellant took possession of the land and built his home and no party ever raised any objection and had been living in harmony and peace since 1994.

11. Finally, the Learned Counsel was of the view that the lower court erred in awarding damages of Kshs. One Hundred Thousand (Kshs. 100,000/=) to the Respondent for trespass. He argued that the Appellant was not a trespasser but an owner of land having been gifted and had been occupying it for 28 years from 1994. The Respondent only got title in the year 2017 well 13 years after the Appellant had already build his house and staying on the land with the owner – their grandmother who died in



the year 2014. Hence the award of damages was erroneous and hence should be overturned. He further relied in the case of “Daniel Ekirapa Orodi –Versus- Pius Enarachi Marago (2019) eKLR Busia.

12. In conclusion the Appellant urged court should allow the Appeal with costs..

B. The Written Submissions by the Respondent

13. On 12th October, 2022,. The Learned Counsel for Messrs. Sebastian and Nyongesa Advocates file their written submissions dated 12th October, 2022. Mr. Nyongesa Advocates commenced the submissions by providing a detailed background of the appeal from the case before the lower court upto the appeal itself before this Honorable Court. The Learned Counsel proceeded to combine all the seven (7) grounds of Appeal raised by the Appellant into three (3) segments namely:-

Firstly, he combined the 1st and 2nd grounds of appeal, and properly so, into one component. He argued that the Court was correct in dismissing the Counter Claim on the following reasoning that the Appellant accused his mother of malice owing to unexplained vendetta that his mother had towards him. The Respondent filed the suit as he was the holder of the undisputed title to land. Further, the Appellant was 51 years but never knew his father. This was due to the fact that the mother failed to disclose to him who the father was. To the counsel this was not to be an issued for determination by the ELC. Court. Addition the Appellant raised non-issues e.g. he claimed to have been raised by the grandmother but it was a non-issue to be raised before court – he was allocated Plot No. 1138 and gifted Plot No. 1136 by the grandmother but without any cogent evidence – he never took any steps to perfect his gift in hand which he admitted was gifted orally yet the law in Kenya never recognize oral gifts of land.

14. The Learned Counsel argued that the Appellant’s Counter Claim was mostly directed at the family court and not the Environment and Land Court. The land aspect was never proved by the Appellant offending the Provisions of Section 24 and 26 (1) of the [Land Registration Act](#) 2012 and hence the trial court had no option but to allow the Respondent’s claim.
15. Secondly, the Learned Counsel asserted that DW - 1 in his evidence in chief informed the Honorable Court that he never had any evidence that the subject title was acquired through fraud, misrepresentation, un-procedurally and illegally acquired. Hence due to lack of this evidence the lower court was justified in dismissing the Counter Claim.
16. Thirdly, the Learned Counsel averred that with regard to the gift “inter vivos”. He asserted that Appellant explained to Court that the manner of acquisition of the present land was through a gift ‘inter vivos’ by his grandmother on unstated date making reference to the cases of “Estate of M’Raifi Kithiano (Deceased) (2017) eKLR and ELC No. 97 of 2007 – Evans Onguso & 2 Others (Supra) held that the Appellant admitted that a gift inter vivos could not be made orally and must be complete to be recognized by the court. Hence the trial court had no motion as there was no prove in writing of the said gift to the Appellant making the appeal unnecessary. Further, as from the facts it was not possible that the grandmother could give land to her grandson without informing her children.

The Learned Counsel distinguished the cited cases by the Respondent of “Daniel Ekirapa Orodi (Supra) to the effect the Defendant had secretly and fraudulently obtained title to land. In the instant case the Appellant land constructed his house on Plot No. 1137 and not Plot No. 1136 and hence the authority was not applicable in the given circumstances. Further the Defendant never took any step to justify that the gifted land and mere occupation was not enough. Plot NO. 1136 did not belong to the Appellant but Plot No.



1138 but the family had not constructed on it. Further, the Appellant stated that he had paid for the title but without exhibiting the receipts and even a single transfer documents.

17. Finally, the Learned Counsel submitted that the Respondent was the legal owner to the suit land. He had a valid title deed which he produced in court as evidence. On the legal validity of the title deed, he relied on the provisions of the Sections 24 and 26 (1) (a) of the [Land Registration Act](#) 2012. He held that the Appellant failed to tender evidence that the said title was acquired through fraud or misrepresentation or that it was acquired illegally and un-procedurally. The Learned Counsel argued that the suit property belonged to the Plaintiff and Defendants grandmother – Mwanadie Ali Hamisi. Her only remaining daughter – the mother of the Plaintiff and Defendant herein approached the Chief Kadhi. Court as the sole heir to her mother’s land. She provided relevant documents and being the sole heir, the property was transferred to the Plaintiff’s mother and issued with a title on page 77 of the Record of Appeal – on 26th October, 2016 – the order by the Chief Kadhi of 28th July, 2016 had never been set aside by the Defendant. Thereafter, their mother decided to transfer the plot No. 1136 to the Respondent as the Appellant had numerous other plots from the family. He reiterated that the Appellant had never constructed his home on the property as his home was no Plot No. 1137. Hence he was not in possession of it as alleged. The court was justified in awarding the Plaintiff/Respondent damages for a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/=). He misled court to state he had original documents – original Letter of Allotment and payment receipts made at the Land’s offices. The land was registered in the names of Mwanadie Ali and if he had had the original documents in his name why would be gifted by the grandmother.

The Counsel relying on the decisions of: “Estate of M’Raifi Kithiano (Deceased) (Supra) and the Estate of Gedion Manthi Nzioka (Deceased) HC. Succession No. 122 of 2010 to buttress his case, he urged court to dismiss the Appeal with costs to the Respondent.

IV. Analysis and Determination

18. I have keenly considered all the filed pleadings – being the Memorandum of Appeal dated 21st December, 2021, the 163 pages Record of Appeal the written submissions and the myriad of authorities cited by all the parties herein, the relevant provisions of [the Constitution](#) of Kenya, 2010 and the statutes.
19. In order for the court to arrive at an informed, reasonable fair and just decision the Honorable Court has condensed the three (3) issues for its consideration as follows: -
- a. Whether the appeal filed by the Appellant through the Memorandum of Appeal dated 21st December, 2021 and the 163 pages Record of Appeal by the Appellant against a Judgement delivered by the Lower Court on 16th December, 2021 meets the threshold and has merit.
 - b. Whether the parties herein are entitled to the reliefs sought from the filed Appeal from the judgment of the trial court delivered on 16th December, 2021?
 - c. Who will bear the costs of the Appeal?

Issue No. (a) Whether the appeal filed by the Appellant through the Memorandum of Appeal dated 21st December, 2021 and the 163 pages Record of Appeal by the Appellant against a Judgement delivered on 16th December, 2021 by the Lower Court meets the threshold and has merit.

20. Before embarking on the issues under this sub-heading, it’s imperative that the Honorable Court extrapolates on the brief facts of this case. In doing the Honorable Court is informed from the several



decisions of this court being an Appellate court on its legal mandate to re-evaluate and re-analyze the facts and proceedings of the lower court. This was aptly provided in the case of “Selle & Another – Versus - Associated Motor Boat Co. Ltd. & Others (1968) EA 123 in the following terms:

“I accept Counsel for the Respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif – Versus - Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

21. While in the from the case of: “Abok James Odera (Supra) to the effect that: -

“This being a first appeal we are reminded of our primary role as a first Appellate Court namely to re-evaluate, re-assess and re-analyze the extracts on the record and then determination whether the conclusion reached by the Learned Trial Judge are to stand or not and give reason either way”.

22. Similarly, in the case of “Peter –Versus - Sunday Post Limited 1958 E.A. 424” Sir Kenneth O’Connor P. rendered the applicable principles as follows:-

“It is a strong thing for an appellate court to differ from the finding on a question of facts, of the judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a Jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion....”

23. From the filed pleadings the suit land Plot No. 1136 was originally allocated to the grandmother of the Appellate and Respondent herein one Mwanadie Ali Mwhutu during the land adjudication process. The Appellate and Respondent are half-brothers – whereby their mother one Asha Said Athman, but different fathers. The father to the Respondent – one Mr. Abdillahi Kiranu Mwinyi was allocated Plot No. 1139. It is stated that the Appellant was brought up by the grandmother as his mother left him and got remarried to the father of the Respondent.

However, the main issue is on the legal ownership of the suit property while the Respondent strongly hold that the suit property was allocated to their mother Asha Said Athman, being the sole survivor of their grandmother, and whereby the Chief Kadhi through an order of 21st July, 2016 issued her as the Legal heir of the deceased the suit plot, subsequently, the legal heir was on 26th October, 2016 The certificate of title deed was issued in the names of Asha Said Athman; - See pages 77 of the record of Appeal. The Respondent holds that the property was transferred to him and on 30th May, 2017 a Certificate of title deed issued in his name. he claimed that the Appellant was allocated the adjacent plot. However, before



he could commence construction the Appellant invaded the plot and stopped him from undertaking any development.

24. He strongly holds that the Appellant's plots was No. 1138 and not 1136 and that he had never occupied nor taken possession of it. He further replies he was given as a gift by their grandmother as clearly no documents or instruments to this effect was ever produced the same having been done orally which was not recognized by law. He denied the Appellant had cause any construction or development on the land as there was ever any evidence to the effect. It's for these reasons that he decided to institute the suit before the lower court.
25. On the other hand the Appellant 51 years old who filed a Defence and Counter Claim, claimed to be the legal owner to the suit property. He held that he was allocated the suit by their grandmother the original allottee who brought him up after their mother got remarried to the Respondents father. Thus he was given the plot as gift inter vivos, by the grandmother. He stated that he had invested time, energy and money to develop the parcel and build a permanent residential house there since the year 1994. He had all the original documents pertaining to the plot including the original letters of allotment, and payment receipts made at the land's office – Defendant Exhibits 2 and 6 (Pages 47, 48, 52 and 53 of the Records of Appeal and stated he had only been waiting to be issued with a Certificate of title deed until he was served with the pleadings and title deed in the names of the Respondent. He wonders how the Respondent who was 10 years old and hence had no capacity to purchase property would have acquired the title deed. According to him the title deed held by the Respondent was irregular, illegal and one acquired through fraudulent means and hence ought to be revoked and the same re-issued to him. Further, he argued that there was no evidence on the process of the transfer, acquisition of the land, the payment of Stamp Duty and how it was transferred from Mwanadie Ali Hassan to Asha Sidi. He thus urged court to allow his prayers made out in the Counter Claim. That is adequate on the facts of the case.
26. Now turning to the issues under this sub-heading from the very onset I must admit that the issues before me are not straightforward at all but rather complex and convoluted. A large part of the dispute pertains to the facts of the case and which I dare say the lower court ought to have expended more time by keenly assessing and interrogating in order to have effectively arrived at an informed decision. I am afraid that does not seem to have happened at all. Be that as it may, to determine the validity and efficacy of this appeal, court will break down the issues under the sub-heading into further legal sub-issues herein below.
27. But before indulging into the able framed issues, the Honourable Court wishes underscores the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising. Under the provision of Article 61 of *the Constitution* of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya.
28. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories. The Provisions of Section 7 of the *Land Act* No. 6 of 2012 provides the said methods as follows:
S. 7 Title to land may be acquired through:-
 - i. Allocations;
 - ii. Land Adjudication process;
 - iii. Compulsory acquisition;



- iv. Prescription;
- v. Settlement programs;
- vi. Transmissions;
- vii. Transfers;
- viii. Long term leases exceeding Twenty one years created out private land; or
- ix. Any other manner prescribed in the Act of Parliament.

29. I have noted that the Certificate of Title Deed for the suit land here was issue in the year 2014 under the Registered Land Act, Cap. 300 (Now Repealed). I find this rather strange and which the trial Court will need to interrogate further as by then this legislation had already been repealed in the year 2012. The relevant provisions being Sections 27, 28 and 143 of the RLA.

Section 27(a) “Subject to this Act(a) the registration of a person as the proprietor of land shall be vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

Section 28 of the Act provides that:-

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...”

Section 143 (1) of the Act provides thus:

“Subject to Sub Section (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake

(2) The register shall not be rectified so as to affect the title of a particular who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default”

30. Nonetheless, based on the savings and transitional provisions of Section 107 the Land Registration Act, No. 3 of 2012, the Act is applicable to this case. The effect of the Registration of Lands is founded in the provisions of Section 24 of “The Land Registration Act” which provides as follows:-

“Subject to this Act – The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenances thereto and;

31. To advance on this legal preposition, the efficacy, legitimacy and legality of the rights of the legal land proprietor is created through registration. The Certificate of Title and in this case Lease is deemed to be the “prima facie” evidence of the stated registration. The Certificate of Lease held by the land owner



is protected under the Provisions of Law- Sections 25 (1) of “The Land Registration Act” No. 3 of 2012 provides as follows:-

“The right of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interest and claims whatsoever.....”

Section 26 (1) provides:-

That the Certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as “prima facie” evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except:-

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the Certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

32. These legal position were strengthened further by the following decisions - “ELC (Nku) No. 272 of 2015 (OS) – Masek Ole Timukoi & 3 others –Versus- Kenya Grain Growers Ltd & 2 others and “ELC (Chuka) No. 110 of 2017 – M’Mbaoni M’Thaara – Versus- James Mbaka. And in Civil Appeal 60 of 1992 – ‘Dr. Joseph M. K. Arap Ngok –Versus- Justice Moijo Ole Keiwua’ where courts has held that:-

‘It is trite law that land property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to Provisions in the Act under the property is held.’

33. Now turning to the issues of this appeal. As indicated, above, for ease of appreciation, I wish to further bread down these issues as follows.

- a. Whether the land legally and properly transferred from the original owner, Mwanadie Ali Mwachuti to Asha Said Athman and subsequently to Said Abdillahi, the Respondent?
- b. Whether Mr. Ali Said Shera, the Appellant was granted/allocated the plot by the grandmother as a gift ‘inter vivos’ and when was that and its effect in law.
- c. What is the basis of the filed appeal in the given circumstances?

34. From the facts of the instant case, the Appellant holds to have acquired the plot through a gift, inter vivos from the grandmother who brought him up in the year 1994 and thereafter took possession by constructing a permanent house on it. He claimed to be in possession of all the original documents pertaining to the Plot. To buttress his point, he relied on very fundamental authorities to that effect. According to the case cited by both the Appellant and Respondent, the Estate of M’Raiji Kithiana (Deceased) (2017) eKLR

“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) 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



trust 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. In this regard it is not 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.

Based on the above the ingredients of a gift are well stated. They are:-

- a. There are two types of gifts –inter vivos and Mortis Causa
- b. Gifts have to be documents through an instrument.
- c. All gifts on land have to be in writing.
- d. Gifts have to be perfect and complete.

Indeed, according to Halsbury Laws of England 4th Edition Volume 20 (1) at Paragraph 67 it states as follows with respect to incomplete gifts:-

Where a gift rests merely in promise, whether written or oral or unfulfilled intention it is incomplete and imperfect and the court will not compel the intending donor or those claiming under him to complete and perfect it Except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprises to be done by him in order to transfer the property and which it was in his power to do”

35. However, as discussed in the case of *Evans Onguso and 2 others (Supra)* the case exceptions of circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. The court in this decision holds

“from the above the exposition of the law on gifts it is evident where there is an imperfect gift having regard to the requirements of the necessity for the same to be by way of written Memorandum registered transferred or declaration of trust in writing perfected by the conduct of the parties.”

36. In the instant case, there is no dispute that the gift inter vivos was never registered nor there exist no written declaration to this effect. It was given orally and hence clearly it's a case of imperfect gift. To justify it the Appellant argues that it was made good by the conduct of the parties herein as the Appellant took possession of the land and build his home and no party ever raised any objection and he had been living in it in harmony since the year 1994 and even housed the grandmother there upto her demise.
37. It's from this point that the court has difficulties. Upon assessing the record, it has not come across any empirical documentary evidence in form of land valuation report, land ground report to ascertain that indeed the Appellant has caused any development on the Plot No. 1136 and not elsewhere, nor photographs to that effect.
38. Thus, for lack of all these proof, the court is unable to make any inroads into the matter. For these reasons, the court is compelled to refer the matter back to the trial court for re-trial in form of causing a site visit, direct for the preparation of ground and valuation land report accordingly within a stipulated period and the same to be filed in court.



39. Secondly, with regard to the other angle of the matter, on ownership – the court while guided by the provisions of Section 24 (1) 25 and 26 (1) of Land Registration No. 3 of 2011, its imperative that the Respondent is able to demonstrate as follows: -
- i. When was the land Adjudication process commenced to have allocated land to the original owner Mwanadie Ali Mwachutu.
 - ii. When and how did Mwanadie Ali Mwachutu transfer the land to Asha Said Athman – proof of the consents, transfer forms, the Stamp Duty paid.
 - iii. When and how did Asha Said Athman transfer the land to the Respondent – in terms of the consents, agreements, Transfer Forms, Stamp Duty. Further there is need to have a copy of the National Identity Card for the Respondent to ascertain his actual date of birth and the capacity to be engaged in the land transactions.
40. For all these reasons and the surrounding circumstances, I strongly hold that that the appeal has merit and should partially succeed.

Issue No. (b) Whether the parties herein are entitled to the reliefs sought from the filed Appeal from the judgment of the trial court delivered on 16th December, 2021?

41. Under this sub-heading and arising from the analysis conducted herein, it's this court's finding that none of the parties herein are entitled to the reliefs sought. Clearly, it appears that the trial court over looked a number of extremely fundamental aspects of the suit. Hence, it's critical that the said court proceeds on to conduct a re-trial of this matter once against a fresh.

Issue No. (c):- Who will bear the costs of the Appeal?

42. It is now trite law that costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of any legal action and/or proceedings. The Proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By the event it means the results or outcome of the said legal action.
43. In the instant case, although the Appellant has partially succeeded in prosecuting the appeal, taking that this matter is to commence a fresh before the trial Lower Court, its just fair, reasonable and equitable that each party bear their own costs.

V. Conclusion and finding

44. In the long run after conducting such an elaborate analysis of the framed issues herein, the Honorable Court arrives at a conclusion based on the preponderance of probabilities as follows:-
- a. That the appeal instituted by the Appellant through the Memorandum of Appeal dated 21st December, 2022 against the Respondent partially succeeds.
 - b. That the matter be referred back before the trial Chief Magistrate Court, (Civil Division) for re - trial and specifically to do the following:-
 - i. Conduct an intensive Site visit (“Locus in Quo”) under the provision of Order 18 Rule 11 of the Civil Procedure Rules 2010 and prepare a site visit report.
 - ii. Direct that parties prepare – independent land survey reports, ground and valuation reports of the suit land.



- iii. Establish how and when the original land owner Mwanadie Ali Mwahutu acquired all the suit land (Land reference Numbers Mombasa/Mwembelegeza/1136) during the Land Adjudication process.
 - iv. Establish when and how the original owner transferred the suit land to M/s. Asha Said Athman through production of empirical documentary evidence such as agreements, consents, transfer documents, stamp duty valuation & payments and so forth.
 - v. Establish how and when M/s. Asha Ali Athman and Ali Said Shera became co-owners to the suit property under the Registered Land Act, Cap. 300 (Repealed) in the year 2014 or thereabout after the impugned Act had already been repealed in the year 2012 and was replaced by the current Land Registration Act, No. 3 of 2012
 - vi. Establish how and when M/s. Asha Ali Athman & Ali Said Shera became co-owners to the suit property and subsequently jointly or transferred it to Said Abdillahi Kirimi, the Respondents – agreements consent, transfer documents, stamp duty e.t.c. and the proof of birth – National identity card, or baptism card or school leaving certificate for the Co – owner Respondents to be provided.
- c. That this matter to be mentioned before the Chief Magistrate Court Civil Division on 7th November, 2023 for allocation to an appropriate court and to be heard – retrial within the next 90 days of the delivery of the Judgement hereof.
 - d. That the Judgment by the Chief Magistrate to be placed before this court thereafter for its final directions.
 - e. That in order to preserve the suit land, there be an order for the land registrar to register an inhibition under Section 68 of the Land Registration Act and Regulation 69(1) of the Land Act Regulation and guided by the doctrine of Les Pentes.
 - f. That each party to bear their own costs.

It is so ordered accordingly

JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 17TH DAY OF OCTOBER 2023

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HON. JUSTICE L. L. NAIKUNI, (MR.)

ENVIRONMENT & LAND COURT

MOMBASA

Judgement delivered in the presence of:-

- a. M/s. Yumnah, the Court Assistant.
- b. Mr. Ondieki Advocate for the Appellant.
- c. No appearance for the Respondent.

