



Kamau v Deliverance Church Registered Trustees & another (Environment and Land Case Civil Suit 12 of 2011) [2022] KEELC 15526 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15526 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 12 OF 2011
LC KOMINGOI, J
NOVEMBER 24, 2022**

BETWEEN

MARION WAKANYI KAMAU PLAINTIFF

AND

DELIVERANCE CHURCH REGISTERED TRUSTEES 1ST DEFENDANT

GEOFFREY KAMAU NJUGUNA 2ND DEFENDANT

JUDGMENT

1. By the plaint dated 6th January 2011 and amended on 4th November 2019, the Plaintiff prays for judgement against the Defendant jointly and severally for orders;
 - a. The Honourable court be pleased to make a declaration that the Plaintiff is the bonafide registered proprietor of all that undivided parcel of land comprised in the Grant no IR 40809 containing by measurement approximately 2.916 Hectares with dimensions, abutments and boundaries thereof delineated on land survey plan no 126617 and known as LR no 209/9938 Nairobi.
 - b. This court be pleased to make a declaration that the purported subdivision of the parcel of land known as LR no 209/9938, Nairobi into 2 portions being LR no 209/9938/1 and LR no 209/9938/2 is incomplete and therefore null and void.
 - c. This Honourable court be pleased to make a declaration that the proposed exchange of a portion of LR no 209/9938 containing by measurement approximately 0.61 hectares with a parcel of land known as LR no 209/9743, Nairobi is null, legally ineffectual and of no consequence to the Plaintiff's ownership of LR no 209/9938 Nairobi.
 - d. The Defendants be ordered to vacate and deliver vacant possession of all that property portion of land containing by measurement approximately 0.61 Hectares occupied by the 2nd



Defendant on the property known as LR no 209/9938 to the Plaintiff within 30 days of the entry of judgement.

- e. In the alternative, orders do issue for the eviction of the Defendants, their immovable and movable property together with all their agents, officers, employees, servants, visitors, or other persons from all that property known as LR no 209/9938.
 - f. Mesne Profits at the rate of annual rent of ksh 335, 000/= escalated by 10% per annum from 1st January 2009 until date of entry of judgement in favour of the Plaintiff.
 - g. Costs of and incidental to the suit.
 - h. Interest on (f) and (g) above from the date of entry of judgement until payment in full.
2. It is the Plaintiff's case that she is the registered proprietor as lessee from the Government of Kenya of all that parcel of land comprised in the Grant no I.R 40809 containing by measurement approximately 2.916 Hectares with dimensions, abutments and boundaries thereof delineated on land survey plan no 126617 and known as LR no 209/9938 Nairobi. Situated along Lang'ata Road, Nairobi.
 3. It is also her case that between November 1992 and February 1993, at the request and instance of the Defendants by their letter to her dated 20th November 1992 and culminating in their letter dated 12th February 1993 forwarding initial rent to her, the parties created a tenancy agreement evidenced by way of exchange of letters over a portion of the suit land measuring 0.61 hectares at an agreed monthly rent of ksh .2,000/= from 12th February 1992 and that by mutual agreement, the rent was increased to ksh .3000 from the year 2000 but the Defendants ceased to pay rent in July 2007.
 4. It is also her case that on or around August 1996, the 2nd Defendant on behalf of and for the benefit of the Defendants jointly and severally proposed to the Plaintiff an exchange of the portion of the Plaintiff's land occupied by the Defendant with the property known as LR 209/9743 which was represented to be owned by the 1st Defendant and the said verbal representations between the parties were reduced in writing vide a letter dated 7th August 1996.
 5. She accused the 2nd Defendant on behalf of the other Defendants of falsely representing to her that the 1st Defendant owned the land known as LR no 209/9743 intending her to rely on the false representation, in accepting the proposed land exchange which she did in good faith and to her detriment. She accepted the Defendants' proposal *vide* a letter dated 23rd August 1996 and in order to facilitate the exchange, she accepted and authorized the subdivision of LR no 209/9938 into two plots. She added that the Defendants accepted the said letter without reservations but her conditions contained in the said letter were not met. She pointed out that the Defendants failed to undertake the complete subdivision of the suit property to cause an excision of their portion and also failed to obtain change of user for the parcel of land known as LR no 209/9743 to an approved user appropriate to her purposes.
 6. It is the Plaintiff's case that by reason of the Defendants joint and several non-performance of the agreement for the proposed land exchange, by letters dated 27th September 2004, 30th September 2004 and 15th February 2005, she terminated the said agreement. She further contended that subsequent to the termination, the Defendants engaged her to complete the exchange agreement and through their then Advocates, they proposed that the parties enter into a deed of Exchange, the draft of which was forwarded to her then Advocates vide a letter dated 7th November 2005 .She averred that through her Advocates' letter dated 28th November 2005, she set pre-conditions to the execution of the proposed deed of exchange but the Defendants failed to meet them causing non-execution of the proposed deed of exchange.



7. It is her case that the purported deed of exchange allegedly executed between her and the 2nd Defendant on 8th October 2008 is a forgery. She added that there was another attempt to enter into a new agreement to conclude the land exchange but the Defendants breached it causing her to issue a 14 days termination notice vide a letter dated 17th October 2008 and at the lapse of the notice period, her Advocates wrote a letter dated 15th December 2008 repudiating the exchange agreement and requiring the Defendants to vacate the premises. She averred that by the Defendants' refusal to grant her vacant possession, she has suffered substantial loss and therefore claims mesne profits calculated at annual rent of ksh .335,000/= escalated by 10% per annum from January 2009.
8. The Plaintiff also averred that the Defendants erected unauthorized permanent structures on the suit land without her authority and in January 2010, enforcement notices were issued by the then City Council of Nairobi under the Physical planning Act requiring her as proprietor to demolish them. She further averred that a suit filed by the Defendant church being Milimani CMCC 10578 of 2006 was dismissed on 9th May 2017 for want of prosecution.

The 1st and 2nd Defendants' Case.

9. The 1st and 2nd Defendants filed a joint statement of defence dated 17th February 2011. They also filed the amended defence and counterclaim dated 15th August 2012 without the leave of the court. They denied allegations contained in the plaint. They contended that the Plaintiff was at all times aware of the status of the property known as LR no 209/9743 from 1996 and that they have title to the said property issued in 2005 even before the Plaintiff executed the deed of exchange agreement in 2008.
10. They also contended that they executed a deed of exchange with the Plaintiff in 2008 which grants both parties possession of the others property free from all claims thus the Plaintiff is not entitled to any rent. They added that that they have at all times acted expeditiously to complete the exchange agreement. They pointed out that if there has been any delay, the cause of such delay has been the loss of relevant files at the lands office including the Plaintiff's file which is beyond their control.
11. They contended that all the structures erected on the suit land were erected with full knowledge and/or authorization of the Plaintiff, the City Council of Nairobi and all relevant Government Departments. They also averred that Milimani CMCC 10578 of 2006 is still pending before the Chief Magistrate's Court and that there is an injunction issued in that matter restraining the Plaintiff from evicting the Defendant which order has not been vacated.
12. The Plaintiff filed the reply to the Defendant's amended defence and defence to the Defendant's counterclaim dated 24th August 2012.

Evidence of the Plaintiff.

13. PW1, Marion Wakanyi Kamau, the Plaintiff testified on 23rd May 2013 and 9th December 2020. Her witness statement dated 24th August 2012 was adopted as part of her evidence in chief. Documents in her bundle of documents of even date were admitted as exhibits. She stated that initially, the 2nd Defendant and an alleged church elder Jonah Gitonga visited her office at High ridge primary school where she was the headmistress in 1992 and informed her that they were aware that she owned LR no 209/9938 along Lang'ata Road and requested her to allow them to pitch a tent on a portion of the said land to be used for worship purposes as they developed their land within the neighborhood.
14. She further stated that after a series of meetings, she pointed out to them 1½ acres of the suit land nearer Lang'ata Road so that they would pitch their tent. She added that they took up occupation in January 1993 and that their occupation was for the purpose of worship only at agreed monthly rent



- of about ksh .2,000/= which would increase as the church grew. She added that they entered the land under terms of a verbal tenancy agreement due to the very temporary nature of their need. She stated that the 2nd Defendant used to make the rent payments through cheques and thereafter through bank standing orders which were in place until the year 2008 when they were unilaterally stopped and at that time, they were paying ksh 3, 000/=.
15. She stated that the 2nd Defendant approached her sometimes in 1996 and informed her that the Board of Trustees of Deliverance Church Lang'ata Road Branch had mooted the idea that they could exchange 1 ½ acres of a portion of her land being Land Reference no 209/9938 for the Defendants alleged portion known as LR no 209/9743 measuring 2.2 acres and that it is at that stage that the 1st Defendant increased the size of the Plaintiff's land that it occupies to be 1.5 acres from the initial portion. She further stated that they continued paying the same rent despite her protest given the increase in size and growth in the church in terms of membership. She added that she asked them to put their request in writing which they did and she communicated her positive response to the proposal agreement and informed them that they would bear all expenses to the transaction. She added that the Defendant's proposal was untrue as she later found out that the Defendant's had misrepresented their position as their alleged portion did not exist.
 16. She stated that the 2nd Defendant took advantage of her Christian faith and belief to attempt to steal her land and even signed the deed plans for the suit land in 2004 without her authority and constructed on her land without her consent.
 17. She also stated that she never executed and/or entered into the alleged Deed of Exchange of her parcel of land with the 1st Defendant's parcel being LR no 209/9743. She added that she issued formal demand, repudiation, rescission and/or revocation letters dated 29th June 2006, 2nd September 2006, 17th October 2008 and 15th December 2008 to terminate the agreement due to the Defendant's breach of the exchange agreement and requested for her portion of land to be restored to her in the condition it was.
 18. PW1 also stated that her payment of ksh 400,000/= was not for rates over LR no 209/9743 but rather stamp duty which the Defendants duped, misled and fraudulently caused her to pay in manifest odium on the false misrepresentation that they would also pay for her land which they never did.
 19. She further stated that the exchange agreement is distinct from the deed of exchange which she never consented to nor participated in its creation or execution. She added that the deed of exchange is fraudulent, ineffectual, invalid, void and a nullity and incapable of creating or transferring any interests of any proprietorship in law or equity due to the inordinate time lapse and that neither she nor her then Advocates Lumumba Mumma and Kaluma Advocates signed it.
 20. She stated that in 2006, the Defendants filed Milimani CMCC no 10578 of 2006 whilst they were still paying rent and that at that stage, she indicated to them that she would forcefully eject them from the portion of her land unless they paid her ksh 25million for the portion in lieu of the exchange or they pay her ksh .3 million in addition to their land if the exchange agreement was to continue.
 21. When referred the letter dated 23rd August 1996 which she addressed to the 2nd Defendant, she told the court that she gave the Defendants three (3) conditions which she needed them to comply with before executing the deed of exchange of plot agreement between them but she cannot confirm that the said conditions were accepted since the Defendants did not write back to confirm compliance.
 22. When referred to her letter dated 27th September 2004 addressed to the Board and Pastor Deliverance Church Lang'ata, she stated that she addressed it to terminate the discussion about exchange of parcels because the 1st Defendant failed to comply with the conditions she gave them.



23. When referred to her letter dated 15th October 2004 addressed to the Defendants' then Advocates, she stated in the said letter, she was complaining about the long time that the Church was taking to actualize the exchange.
24. When referred to the letter dated 7th November 2005 addressed by her Advocates to the Defendants' then Advocates, she stated that her lawyers forwarded a draft deed of exchange to the Defendants' then lawyers but that deed of exchange was not finalized as she did not sign it. When referred to the deed of exchange between her and the 1st Defendant dated 24th August 2012, she stated that she has never seen the original, only a copy of it was brought to her by Bishop W.K Tuimising. She added that she did not sign it and the signature appearing there is not hers and that Lilian Njuguna was not her lawyer at that time.
25. When referred to the witness statement by Lilian Njuguna (Mrs) dated 21st January 2021, she stated that she did not sign any final documents in the presence of Mrs. Omenta. She added that she was not present when the trustees of deliverance church signed the deed of exchange and that she does not know Bishop J.B Masinde and that he does not know her either.
26. When referred to the letter dated 28th November 2005 from Lilian Njuguna & Company Advocates addressed to the Defendants' then Advocates, she stated that her lawyers requested that she be shown the plot that they were to exchange with the church since as at October 2008, those issues had not been resolved. When referred to the letter dated 15th December 2008, addressed to the 1st Defendant by Lumumba Mumma & Kaluma Advocates, she stated that the letter terminated further discussions on exchange and the church was to vacate her land.
27. When cross-examined, she stated that she knows Rev. Dr. Njuguna and Bishop Tuimising but she does not know Bishop J.B Masinde. She further stated that deliverance church started meeting under a tent and they had an agreement to pay her ksh .2,000/= per month but now there is a church building erected therein but she could not recall when it was constructed.
28. She further stated that she saw the construction and tried to stop it by writing a letter. She stated that in 1996, she visited the church and she was given an opportunity to give a testimony on how she acquired the suit property. Referred to her letter dated 23rd August 1996, she stated that she gave the 1st Defendant 3 conditions, one of them being that the suit parcel of land be used for church purposes forever but now, she regrets and she is not happy that the church has been erected.
29. When referred to the deed of exchange dated 8th August 2008, she stated that the passport photograph used is not hers and that Lilian Njuguna was not her advocate at the time yet the document is attested by her. She added that she called her and protested and her lawyer P. Kaluma also wrote to protest on her instructions though she has not taken any steps against her. She stated that forgery is a criminal act and she tried to have the signature verified.
30. She stated that her parcel of land is LR no 209/9938 and that it was to be subdivided but it was not and she holds title in her name. When referred to the Deed Plan dated 9th July 2004, her letter dated 2nd September 2006 referenced intention to repossess LR no 209/9938/02, the amended plaint which makes reference to LR no 209/9938/1 and LR no 209/9938/2 and her prayer that the Defendants vacate LR no 9938/2, she stated that the church is in possession of LR no 9938/2. She also stated that she wrote some letters to the Commissioner of Lands regarding the exchange of plots and the letter dated 8th April 1997 from the Commissioner of lands approving the swap was copied to her.



31. When referred to the letter dated 17th September 2004 to senior Pastor Njuguna, she stated that she was paid ksh 75,000/= on 16th March 2005, ksh .40, 0432/= on 23rd October 2004 and that she gave a breakdown of how the money was spent.
32. She stated that while there was a lot of engagement between her and the church, she does not know why the church constructed a building. When referred to the letter dated 24th June 1999 addressed to her and the church by the Commissioner of lands, she stated that it refers to change of user of LR 209/9743 from religious to residential and LR 9938 from education to religious. She added that LR no 209/9938/1 has a school on it and that she was to construct a residential house on 209/9743 after exchange. She added that most of the approvals were gotten at the effort of the 2nd Defendant and herself.
33. When put to task on the three conditions that she gave the 1st Defendant, she stated that one of the conditions was that the church would facilitate the subdivision of 0.61 hectares from the rest of her land, that the church would process change of user from religious use that would be beneficial to her and that 0.62 ha was to be used for religious purposes only. She added that none of the 3 conditions was fulfilled.
34. She stated that she was not involved in the preparation of the deed of exchange dated 8th October 2008 ,that she did not sign it and that Kamotho Waiganjo was not her Advocate and that he got the document through Lilian Njuguna who was her advocate at the beginning but not at that time.
35. She stated that Mrs. Omenta, Advocate went to her office three times to effect corrections on the deed of exchange but it was never finalized. She added that it is not signed by the 2nd Defendant but he did not sue him wrongfully. She further stated that she does not recall paying stamp duty of ksh .400,000/= on 7th August 2008 and stated that what she paid for was the sub-division on advise of the church and the Ministry of lands.
36. When she was re-examined, she stated that she paid ksh .400,000/= on 7th August 2008 because she was advised by the church and the Ministry of lands that it was for sub-division. She added that the deed of exchange is dated 8th October 2008 thus she could not pay stamp duty for a document which had not been executed. She also stated that she was not present when Bishop W.K Tuimising and J.B Masinde signed the deed of exchange and that she never got the original copy. She added that she did not see Mrs. Omenta affixing her photograph and copy of identity card on the deed of exchange and she now regrets that there is a church on her land as she was lied to and that there are no Christians in that church.
37. She also stated that at the time the Deed of Exchange was signed, Lilian Njuguna was not her Advocate thus she could not have been in her presence to sign it. She added that the church never fulfilled her three conditions.

Evidence of the Defendants

38. DW1, William Tuimising, the Bishop Emeritus of Deliverance church who served from 1978 to 2000 testified on 10th November 2021. He stated that he is a trustee of the church from 1975 to date alongside Bishop Dr. Mark Kariuki and Bishop J. B. Masinde. His witness statement was adopted as part of his evidence in chief.
39. He told the Court that Deliverance church Lang'ata was founded in 1993 and he is one of the founders. He testified that in 1993, they were looking for a plot to pitch a tent and they found the plot belonging to the Plaintiff agreed that the church would use it and they have been there since 1993.



40. It was his testimony that they later put up a building that can seat 1500 members and that he has been ministering in that church from the beginning. He stated that the church was later allocated a plot nearby and they approached the Plaintiff to exchange her plot with theirs. He added that she allowed them and signed the deed of exchange dated 8th October 2008 where his photograph and signature appears alongside those of Bishop JB Masinde. He stated that the Plaintiff also signed the agreement, that her photos appear there and it is witnessed by Mrs. Lilian Njuguna and approved by the Commissioner of lands.
41. He stated that there is a video recorded of 17th March 1996 when he was the one ministering in church where the Plaintiff thanked God for allowing her to give the plot to the church.
42. When he was cross-examined, he stated that he has known the Plaintiff for 28 years and he has known JB Masinde who is their Secretary General of the Church since the church was started. He added that they exchanged their two plots since theirs was far from the road and they needed one that was close to the road. He added that he participated in the discussions and that the Plaintiff was approached by the 2nd Defendant to give them the plot and she was agreeable to their proposal and that he did the right thing.
43. He stated that when they approached the Plaintiff, they already had their plot and that they did not tell the Plaintiff that they had commenced construction on their plot. When referred to the letter dated 20th November 1992 addressed by Deliverance Church Lang'ata to the Plaintiff stating that the church had started working on its plot and requesting to use the Plaintiff's plot temporarily, he stated that the church had not constructed.
44. He also stated that he is not aware that the church was paying rent of the plot where the tent had been pitched. He stated that he was not with the Plaintiff when she executed the deed of exchange and that he signed it in the Advocates office and does not recall if the Plaintiff had executed her part. He added that their lawyer inserted the date and that the Plaintiff executed it but he is not aware that she was not given a copy of the original deed but the 2nd Defendant had the original deed of exchange.
45. He stated that he never got a letter from the Plaintiff complaining that the conditions that she set had not been met. When referred to the letter dated 11th March 2005 addressed to him by the Plaintiff regarding the issue of exchange of plots, he stated that though it is addressed to him, it ought to have been raised by the pastor in the church to respond. He added that he informed the church of the Plaintiff's concerns raised in that letter and the Pastor said that he would respond. When referred to the letter dated 8th April 2005 addressed to him by the Plaintiff seeking direction on the matter of exchange of plots, he stated that the plaintiff repeated her concerns raised in her letter dated 11th March 2005 and reiterated that it ought to have been brought to the Pastor's attention.
46. When referred to annexure GKN annexed to the 2nd Defendant's replying affidavit sworn on 31st October 2008, he stated that it is the title IR no 98821 LR no 209/9743 issued to Deliverance Church and that special condition 4 of the lease provides that it should be used for religious purposes and as a resident for pastor/father in charge but DW2 would be better placed to address the issue.
47. When he was re-examined, he stated that the church entered the suit land and it was not paying rent.
48. DW2, Lilian Muthoni Njuguna, an Advocate of the High Court of Kenya testified on 10th November 2021. She adopted her witness statement dated 21st January 2021 as part of her evidence in chief. She told the Court that the Plaintiff has been her client from 1996 thus they have an Advocate –client relationship. It was her testimony signature appended on the deed of exchange dated 8th October 2008 was the Plaintiffs' as well as the photograph.



49. She told the court that the deed was brought to her office by Mrs. Omenta, Advocate who was sent by the Plaintiff and who had drawn it and had saved it in a flash disk for perusal, amendment and/or approval. She added that the Plaintiff called her to ask her to confirm the contents of the deed for typographical changes.
50. She further stated that she perused it and having made some changes jointly with Mrs. Omenta, she called her then client (the Plaintiff) discussed the said document and changes made and the Plaintiff confirmed that the document was in order and they agreed that Mrs. Omenta would take the amended document to her office for signature after which Mrs. Omenta would return it to her to witness her signature.
51. It was her testimony that Mrs. Omenta thereafter returned the document duly signed by the Plaintiff which she attested by stamping and appending her signature and handed over the documents to Mrs. Omenta for further action.
52. When cross-examined by Mrs. Omenta, she stated that the Plaintiff called her to inform her that she was sending her with the document .She further stated that she knew the Plaintiffs photographs and signature and can confirm the deed of exchange is the document they went through.
53. When referred to her letter dated 25th November 2015 addressed to M/S Kamotho Maiyo & Mbatia Advocates enclosing a draft deed of exchange, she stated that the Plaintiff had asked her to draw the deed of exchange. She further stated that there is no official communication as regards the deed of exchange between her and Mrs. Omenta as she went personally to her office. She added that they did not have the grant to the suit land when they did the corrections that is why Grant number is blank.
54. She also stated that the Plaintiff did not sign the deed in her presence and that she does not know who inserted the Plaintiff's ID and Pin no but she took instructions on phone and certified it going by the Plaintiff's signature and since the Plaintiff is her client of many years and she trusted her and had told her that she was handling the matter with Mrs. Omenta.
55. She stated that there were three deeds of exchange and that she did not retain any of them since Mrs. Omenta went with all of them but the Plaintiff called her to say that she had received her copy. She added that she did not include a false certificate and that she did not see Mrs. Omenta after that ,she never saw her again and she does not know if she ha filed any witness statement.
56. When re-examined, she stated that nothing prevents an Advocate from taking instructions and that the certification has not been challenged and neither has she been charged /accused of forging the deed of exchange.
57. DW3, Zachary Njugi Mungai, an electronic media practitioner told the court that he worked with the 1st Defendant since its inception. He stated in March 1996,he was called to record anniversary celebrations at Deliverance Church Lang'ata.He played the said recording.
58. He told the court that he could recognize Reverend Geoffrey Njuguna who was in charge of the church, Bishop W. Tuimsing who was the presiding Bishop of Deliverance Church and the Plaintiff who is seen giving her testimony in the recording in the presence of other people. He produced the said recording.
59. When cross-examined, he stated that he is a member of Deliverance church and he was instructed by the Pastor in charge-Geoffrey Njuguna. He further stated that the Plaintiff was a member of businessmen fellowship which met in Boulevard Hotel. He was also a member of that fellowship thus they interacted and he was able to identify her in court. He also stated that while he recorded the video clip, he was not involved in the business between Pastor Njuguna and the Plaintiff.



60. PW1 was recalled to react to the evidence of DW3. She stated that she stands by what she said that what was to be done on the land was to bring Glory to God. She further stated that she still stands by what she said in the video. She however stated that what is going on with the Deliverance Church does not bring glory to God since they ended up putting her through a lot of pain .She stated that the Church is not interested in glorifying God but are now land grabbers and land cheats.
61. When cross-examined, she stated that at the time she testified in church in 1996, Bishop Tuimising was the head of the church, Pastor Njuguna was present and what she meant by “...mountain in front of us...” is that she had started feeling uncomfortable with the relationship with the church.
62. She further stated that she filed the case after a lot of misunderstanding with the church spanning a period of fifteen (15) years but in March 1996, her relationship with the church was good therefore she did not foresee that she would be filing this suit. She added that the 1st Defendant is on the suit property forcefully. She also stated that the actions of the 1st Defendant are not honest as in 2006, when she asked them to vacate her land, they took her to court and they put up a building without her knowledge and consent.
63. DW4 Bishop Geoffrey Kamau Njuguna, the 2nd Defendant and the senior Pastor of Deliverance Church Lang’ata Parish since March 1993, testified on 21st February 2022. He told the court that he was a good friend to the Plaintiff and they would even visit each other’s homes but this case has strained their relationship. When referred to the letter dated 17th September 2004 addressed to him by the Plaintiff, he stated that the Plaintiff informed them that the three titles were ready thus he refunded her ksh .64,000/= which is part of the money she used to in the process and which she requested for.
64. He told the court that at one time, Bishops Tuimising, Mark Kariuki and the late Gakuo tried to resolve the matter. He added that he is improperly enjoined in this suit as all he did was on behalf of the trustees of the church. He prayed allegations by the Plaintiff be dismissed and the Plaintiff takes the Plot the Church gave her in exchange of the suit plot as it is still there.
65. When cross-examined and referred to the Deed of Exchange, he stated that it is executed by Bishop W Tuimising and JB Masinde (General Secretary/trustee) and that Mrs. L.M Njuguna witnessed for the Plaintiff. He further stated that he did not sign the deed of exchange as he is not a trustee of Deliverance Church and the church is owned by Deliverance Church Board of Trustees.
66. He stated that after the deed of exchange was registered, the Defendant ceased being a tenant of the Plaintiff. When referred to his letter dated 7th August 1996 addressed to the Plaintiff and the Plaintiff’s reply thereto vide her letter dated 23rd August 1996, he stated that the Plaintiff’s intention was that there should be a church on the suit plot. He further stated that there is a permanent building on the plot which was constructed after they submitted their plans which were approved by the City Planning Department. He added that the Plaintiff contributed for its construction and in 2007, it was dedicated.
67. He stated that the Deed of Exchange was approved by the Commissioner of lands and the Plaintiff has not challenged the decision by the Lands registry to approve the exchange.
68. When referred to the video clip produced herein, he stated that he was present when it was recorded and that his understanding of “mountains” which the Plaintiff spoke were the processes like subdivision, change of user, e.t.c but there was no misunderstanding between the Plaintiff and the Church. He stated that the church owns the other plot which they were to exchange as it has title issued on 30th August 2005 and the same was transferred to the Plaintiff.
69. He also stated that there was no problem with the process of putting up the church building since the Plaintiff was aware all along and they took all steps to comply with the Plaintiff’s conditions. He added



that LR no 209/9938 was owned by the Plaintiff but he could not confirm if it is still the case but there has not been a transfer from the Plaintiff to anyone else. He added that special condition 4 of the Plaintiff's lease provides that the user is for Educational and accommodation for staff.

70. He stated that the Plaintiff did not surrender the original title to him and that all the titles were surrendered to the lands registry between 1995-2000. When referred to the letter dated 20th November 1992 addressed to the Plaintiff by Deliverance Church requesting temporary use of a portion of her plot, he stated that it was authored by one Jonah Gitonga who was a member of the church and that it was written on the authority of the church at the time. However, he could not confirm whether by 1992, the church had started developing its land as insinuated in the said letter. He added that it was written before they started negotiations on exchange of land.
71. DW4 also stated that they never got instructions to stop construction on the suit land which was started in 1998 He added that the church submitted all the applications for approval and they were approved. He further stated that the issue of approval plans never arose and that they have submitted in evidence a receipt dated 18th September 1998 as evidence in relation to the building plans approval. He added that they have a certificate of occupation issued by Nairobi City Council but they did not file it.
72. He stated that the application for change of user was made by the church assisted by Mwamolo Estate, registered surveyors but they did not have a copy of the drawing of the approved plan in court. He stated that the Plaintiff denied that she signed the deed of exchange and also denied that she had been given the original deed but she must have been given a copy. He further stated that the Plaintiff's property has been subdivided into two portions being LR no 209/9938/2 and 1 .
73. When he was re-examined, he stated that the church has no issue with the City Council of Nairobi as they have the approved plan for change of user and subdivision. He added they have a letter dated 24th June 1999 from the Director Physical Planning showing they sought approval on change of user. DW4 stated that the trustees of the church run the affairs of the church while he only did administrative work.
74. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiff's Submissions

75. They are dated 6th April 2022. They addressed the following issues;
 - a. The parties' contract in correspondence for a tenancy arrangement, breached by the Defendants;
 - b. The parties' failed contract in correspondence for a proposed exchange of land;
 - c. The illegal and invalid subdivision of LR no 209/9938 into the purported subplots LR no 209/9938/1 and LR no 209/9938/2 in pursuance of the failed contract in correspondence for the proposed exchange of land;
 - d. The illegal and invalid change of use of LR no 209/9743 in pursuance of the contract in correspondence for the proposed exchange of land;
 - e. The illegal and invalid change of use of the purported subplot LR no 209/9938/2 in pursuance of the failed contract in correspondence for the proposed exchange of land;
 - f. The illegal and invalid transfer of the purported LR no 209/9938/2 from the Plaintiff to the 1st Defendant, and of LR no 209/9743 from the 1st Defendant to the Plaintiff, in pursuance of the failed contract in correspondence for the proposed exchange of land;



- g. The illegal construction by the Defendants of permanent Church buildings by the Defendants on the Plaintiff's LR no 209/9938; and
- h. The legally invalid and unenforceable deed of exchange dated 8th October 2008.
76. On the issue that the Plaintiff and the Defendants' agreement was contained in correspondences between the parties, Counsel for the Plaintiff relied on the case of *Mumias Sugar co Ltd v Freight Forwarders (K) Ltd*, [2005] eKLR to submit that an agreement for disposition of an interest in land would be contained in correspondence. He added that the Court held that such contract is sufficient memorandum for purposes of Cap. 23, and can form the basis of a suit. He further submitted that the Plaintiff further gave the Defendants' conditions vide correspondences which were accepted but they were not complied with.
77. On the issues of the purported subdivision of LR no 209/9938 into LR no 209/9938/1 and LR no 209/9938/2, and change of use of LR no 209/9938/2 Counsel submitted that there was no consent given by the Plaintiff as registered owner of LR no 209/9938 to the making of the application for subdivision of her land in violation of Section 31 of the repealed Cap. 286 as read with the Fourth Schedule.
78. He added that while the proposed development required a subdivision of LR no 209/9938, there was no land use plan prepared by a registered Physical Planner to support the application, in violation of Section 41 (2) of the repealed Cap. 286; and that there was no publication of the application to invite public participation, in violation of Section 41(3) and (4) of the repealed Cap. 286 and Regulation 5(2) of the Physical Planning (Subdivision) Regulations, 1998.
79. On the issue of the illegal transfer of LR no 209/9743 (Deliverance Church to (Marion Wakanyi Kamau; and of purported subplot LR no 209/9938/2 (Marion Wakanyi Kamau to Deliverance Church), he submitted that transfer instruments may have been prepared or worded to, *inter alia*, reflect a "sale" between Deliverance Church and the Plaintiff in respect of LR no 209/9743, and on that basis initial stamp duty was assessed and paid thereon. Hence, the demand dated 20th July 2007 for "payment of additional stamp duty of ksh 400,000/= on transfer on sale of LR no 209/9743 from Deliverance Church Lang'ata to Marion Wakanyi Kamau",.
80. On the issue of illegal construction on the Plaintiff's land, Counsel submitted that construction of permanent Church buildings on the Plaintiff's LR no 209/9938 are null. He pointed out the construction of permanent buildings is a land use or development that is regulated by law and the 1st Defendant was bound to comply with Section 29,30,36 & 49 of the *Physical Planning Act Cap* 286. He further submitted that Defendants did not produced any evidence at all of the Plaintiff's authorization to erect permanent buildings on her land, or any valid building approvals and permits issued by the City Council of Nairobi, or any valid Certificate of Occupation issued by the City Council of Nairobi upon completion of the construction. He added that there is evidence of an Enforcement notice dated 21st January 2010 issued to the Owner/Developer (Deliverance Church) LR no 209/9938/2 along Lang'ata Road which was issued because the construction of the Church buildings contravened Section 30(1) of the *Physical Planning Act Cap* 286.
81. On the impugned deed of exchange dated 8th October 2008, Counsel submitted that deed of exchange is illegal and unenforceable, for contravening Section 3(3) of the *Law of Contract Act* (Cap 23), as amended vide Act no 2 of 2002. He cited case of *Silverbird Kenya Limited v Junction Limited & 3 Others*, [2013] eKLR



82. Counsel also relied on the case of *Mbutia Macharia v Annah Mutua Ndwiga & Another*, [2017] eKLR as well as the case of *Stanley Mombo Amuti v Kenya Anti-Corruption Commission*, [2019] eKLR to submit that the Plaintiff failed to discharge her evidentiary burden.
83. He cited the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others*, [2014] eKLR and the case of *Chalicha Farmers Co-operative Society Limited v George Odhiambo & 9 others*, [1987] eKLR to submit that the Plaintiff's prayers for eviction and vacant delivery of her land ought to be granted in accordance with the law and not an order to compensate the Plaintiff.

The Defendants' Submissions

84. They are dated 7th July 2022. Counsel for the Defendant submitted that the Plaintiff changed heart 7 years after signing the deed of exchange between her and the 1st Defendant during which period the 1st Defendant had developed the suit land based on the constructive trust created between them.
85. He relied on the case of *Lyods Bank PLC Rosset* (1991) 1 AC 107,103 and the case of *Steadman v Steadman* [1976] ACT 536,540 to submit that there was a common intention between the Plaintiff and the Defendants in relation to the suit property and nothing prevents the Defendants from relying upon the doctrine of constructive trust created by the facts of the case.
86. He submitted that the fact that correspondences from the Ministry of Lands & Ministry of Planning bearing Government reference Numbers & making reference to the exchange, change of user, acknowledgement of payments and surrender of title for purposes of sub-division leaves no doubt as to the fact and there was actualization or very ardent step was taken towards actualization of the exchange.
87. Relying on the case of *Miller v Minister of Pensions* (1947) 2 ALLER 372 he submitted that the Defendants proved their case to the required standard. It was also counsel's submission that the video evidence which was not objected to by Plaintiff and documentary evidence produced demonstrates that parties entered into a deed of exchange dated 8th October 2008. He pointed out that the Plaintiff did not deny that the affixed Photograph on the deed of exchange was hers. He further submitted that she did not deny that she appended her signature nor deny that her lawyer (Lilian Njuguna) did attest to the document.
88. He relied on the case of *Hardware Trading stores Ltd v Christopher Orina* cited in *Re H(minors)* [1996]AC 563 to submit that the Plaintiff made an assurance, promise and /or agreement to the Defendants concerning the exchange of a portion of LR no 209/9938 with their parcel of land known as LR no 209/9743 in her letter dated 3rd August 1996 and that on the basis of that promise, the Defendant spent ,money on the property in terms of fulling conditions laid by the Plaintiff and also went ahead to construct a huge church building worth millions of shillings. He submitted that the expectation created in the Defendants' minds on the exchange of their parcels of land created proprietary estoppel.
89. The Plaintiff file submissions in reply to the Defendants' submissions. They are dated 29th July 2022 .The Plaintiff reiterated her submissions and averments. She also submitted that the Defendants' introduced the issue of constructive trusts and proprietary estoppel in their submissions yet those issues were not pleaded in their defence.
90. I have considered the pleadings and the evidence on record. I have also considered the written submissions and the authorities cited. The issues for determination are:-



- i. Whether the Plaintiff and the 1st Defendant entered into the Deed of Exchange Agreement dated 8th October 2008.
 - ii. Whether there was any breach of the said Deed of Exchange Agreement.
 - iii. Is the Plaintiff entitled to the reliefs sought?
 - iv. Is the 1st Defendant entitled to the reliefs in the counterclaim?
 - v. Who should bear costs of this suit?
91. It is the Plaintiff's case that she owned the property known as LR no 209/9938. She led evidence that vide the letter dated 20th November 1992, the 1st Defendant requested to use a portion of the said land to pitch a tent and use it for its church services. According to her, they orally agreed that rent would be ksh .2000/= which would be increased as the church grew. Vide the letter dated 12th February 1993, the 1st Defendant forwarded the Plaintiff ksh .6000/= as rent. It forwarded another payment vide its letter dated 30th April 1993.
 92. In my view, since the oral tenancy agreement was entered into in 1992 before the amendment to the Law of Contract, and there was part performance of the agreement as the 1st Defendant paid rent and was in possession of the suit land, I find the said oral tenancy agreement as valid. I also deem it to have ended on 8th October 2008 for reasons explained hereunder.
 93. The Plaintiff's case is that in 1996, the 2nd Defendant led a delegation of the 1st Defendant who visited her and offered her the 1st Defendant's land known as LR 209/9743 in exchange of a portion of her land known as LR 209/9938 .She led evidence that *vide* the letter dated 23rd August 1996, she agreed to the Defendants' proposal on condition that that they would facilitate the subdivision exercise, process a change of user of their land to suit a more possible user for her purpose and ensure that her portion of land would remain for use for worship purposes .
 94. There was a back and forth between the parties between the year 2001 and 2005 as the process of actualizing their oral agreement had not been completed. *Vide* the letter dated 15th February 2005, the Plaintiff rescinded the oral agreement on grounds that the matter was not being concluded by the Defendants on their part. However, she changed her mind and gave the 1st Defendant more time to complete. She wrote to the Commissioner of Land *vide* a letter dated 12th September 2015 requesting him to issue the 1st Defendant with title to LR 209/9938/2. However, vide the letter dated 2nd September 2006, she rescinded their agreement a second time.
 95. The agreement would be revived again in 2008. The Defendants contended that following their oral agreement of exchange of land, the 1st Defendant and the Plaintiff executed a Deed of Exchange agreement dated 8th October 2008, formally exchanging the 1st Defendant's property known as LR no 209/9743 with the Plaintiff's property known as LR no 209/9938/2. By the time of the agreement, the Plaintiff's title known as LR 209/9938 had been subdivided into two plots, one of them being the one she exchanged with the 1st Defendant.
 96. DW2 Lilian Muthoni Njuguna told the court she was the Plaintiff's advocate for many years, including the year 2008 when the Deed of Exchange was executed. She further stated that she discussed with the Plaintiff the changes made and the Plaintiff confirmed the document was in order. She told the court:-

“We agreed that Mrs. Omenta would take the amended document to her (Plaintiff) office for signature after which Mrs. Omenta would return to me to witness her signature”.



97. DW2, also stated that the Plaintiff called her informing her to expect Mrs Omenta who was to bring the document. It was her testimony that she knew the Plaintiff's photograph and the signature as she had been her client for many years. She stated that she was on phone with the Plaintiff who confirmed the contents of the Deed of Exchange.
98. It was her testimony that the Deed of Exchange was prepared with the input of the Plaintiff and she understood the contents. She told the court that she witnessed the Deed of Exchange as she had no doubt that the Plaintiff's photograph and signature on it. She told the court that the Plaintiff gave her verbal instructions.
99. In my view, nothing prevents an advocate from taking instructions on phone. I also find that the certification by L. M. Njuguna cannot be challenged as she was well known to the Plaintiff.
100. The Plaintiff contended that the deed of exchange dated 8th October 2008 was a forgery. The Defendant called DW2 who told the court that the Plaintiff who was her client of many years instructed her to act for her in that transaction. It was her testimony that the said deed was brought to her by Mrs. Omenta, Advocate, who was instructed by the Plaintiff. During PW1's cross-examination, she admitted that Mrs. Omenta had been to her office three times and that they were fine-tuning the Deed of Exchange dated 8th October 2008. The Plaintiff does not contest that her size photograph appears on the Deed of Exchange. In my view, the Plaintiff did not prove that the deed of exchange was a forgery but rather confirmed to the court that she actively took part in its drafting.
101. DW3, Zachary Njugi Mungai told the court that he recorded proceedings of the 1st Defendant in March 1996. They were anniversary celebrations. The video was played in court. DW1 and DW4 Bishop and Pastor of the 1st Defendant, respectively are seen in the video. The Plaintiff is also present. She appears to be giving a testimony of what God had done. He produced the video as an exhibit in this case. When the Plaintiff was asked to comment on the said video recording she stated that she no longer feels the same.
102. There are correspondences between the parties confirming that the 1st Defendant's intention was to facilitate a transfer and change of user of LR no 209/9743 in favour of the Plaintiff. It appears there are some of the processes which were beyond the control of the 1st Defendant. The Plaintiff admitted on cross examination that most of the approvals in respect of the exchange of two plots were obtained through her efforts and those of the 2nd Defendant.
103. In *Storer v Manchester City Council* [1974] 1 W.L.R 1403, cited by the Court of Appeal in [Peter Kimani Kairu t/a Kimani Kairu & Company Advocates v Anna Marie Cassiede & another](#) [2019] eKLR, the court stated:-
- “In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: “I did not intend to contract” if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough.”
104. Further, in *Mumias Sugar Company v Freight Forwarders (K) Ltd* [2005] eKLR (*Supra*) a contract was deduced from correspondence exchanged between the parties which did not make reference to any other existing document but only referred to a contract which was to follow for execution.



105. Section 97(1) of the *Evidence Act* provides;

“when the terms of a contract, or a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under provisions of this Act.”

106. Section 98 of the *Evidence Act* provides;

“When the terms of any contract or grants or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to Section 97, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms.”

107. In my view, once parties captured their intentions in the Deed of Exchange dated 8th October 2008, then all other conditions that are not captured therein cannot contradict the said Deed of Exchange. I point out that the Plaintiff's contention that the 1st Defendant misrepresented to her that it had title when it had none cannot stand in the circumstances. At the time of signing the Deed of Exchange, the 1st Defendant had title to their land. Further, other oral pre-conditions that the Plaintiff claims were not met did not make it to the written agreement, thus there would be no basis to rescind the deed agreement on their basis. Upon signing the deed, the Plaintiff and the 1st Defendant's tenancy relationship ended as the deed took effect. Therefore, the Plaintiff is entitled to rent upto the time of signing the deed. In any case, courts have held that a court cannot rewrite an agreement between the parties.

108. The Defendants led evidence that *vide* the letter dated 2nd March 2001 addressed by the Ministry of Lands to the Plaintiff, exchange of plot LR no 209/9938/2 with LR no 209/9743 and change of user of LR no 209/9743 from religious to residential user was approved subject to certain conditions. The said conditions included payment of annual rent in respect of LR no 209/9743, submission of an informal transfer by the Church and payment of ksh .5,000/= being change of user approval. *Vide* the letter dated 16th July 2001, the Plaintiff paid ksh .5000/= in compliance with the conditions. She also paid annual rent in respect of LR no 209/9743.

109. By the letter dated 17th October 2008, the Plaintiff through her Advocates gave the Defendants' a 14 days completion notice. In my view, while the exchange of plot had begun in 1996, this was insufficient time as the parties had only formalized their agreement on 8th October 2008, 10 days before the notice was issued. Further, the deed of exchange had no provision for completion date. It did not provide when each of them would execute the respective transfers. In my view, rescission is not a remedy for the Plaintiff given the circumstances of this case. In guided by the Court of Appeal's decision in *Mwangi v Kiiru* [1987] eKLR

110. I agree with the Defendants' submission that there was a common intention between the Plaintiff and the 1st Defendant on the exchange of the two plots and the 1st Defendant relied on the intention to put up a permanent sanctuary on the suit property.

111. The correspondence from the Ministry of Lands and Director of City Planning in regard to the exchange, change of user, acknowledgement of payments and surrender of title for purposes of sub-



division leaves no doubt as to the fact and there was actualization or steps taken to ensure the actualization of the exchange. In the case of *Machira Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] the Court of Appeal observed that:-

“a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. nothing in the *Land Control Act* prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property.

The court further observed thus:-

“...Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in *Steadman v Steadman* (1976) AC 536, 540,

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable”.

112. In the case of *Kabosa Makupe Yawa & John Mwamuye Makupe (suing as the legal proprietors of the Estate of Makupe Yawa Mwalungo (deceased) and Omar Tsuma Baya & Another* [2022] K ECA 395 KLR the Court of Appeal stated:-

Also, in *William Kipsoi Sigei v Kipkoech Arusei* [2019] eKLR, this Court pronounced itself thus:

“Taking into account the Macharia Mwangi Maina decision and the Willy Kimutai Kitilit decision alongside the circumstances of this case, we are of the view that the fact that the appellant herein, received the full purchase price for the property, allowed the 1st respondent to take possession, and for a period of at least fourteen years, let him remain on the property undisturbed, a constructive trust had been created. We agree with the English decision *Yaxley v Gotts & Another*, (2000) Ch 162, where it was held that an oral agreement for sale of property, created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. This was also the approach taken in Macharia Mwangi Maina decision where the court observed that the appellant had put the respondent into possession of the suit property with the intention that he was to transfer the properties purchased to them and as such, a constructive trust had been created and the appellant could not renege.

21. We come to the conclusion that the in the circumstances of this case the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable in regard to land subject to the *Land Control Act*.”

113. From the foregoing, I find that the Plaintiff and the 2nd Defendant entered into a Deed of Exchange Agreement dated 8th October 2008. I find that there was no breach of the said Deed of Exchange of



Agreement by the 1st Defendant. As things stand the 1st Defendant has constructed a sanctuary and multipurpose hall in the suit property.

114. The same are already in use by the church faithful. It was stated that over ksh 100 million have been expended in the above project.
115. The suit property LR no 209/9743 has always been at the disposal of the Plaintiff. The Plaintiff cannot after all these years renege on the Deed of Exchange Agreement. The 1st Defendant is encouraged to ensure that the Plaintiff is able to utilize LR no 209/9743.
116. I find that the Plaintiff has failed to prove her case as against the Defendants on a balance of probabilities. The suit is hereby dismissed.
117. Consequently, I find that the Defendants succeed in their counterclaim and I enter judgment in terms of the counterclaim. I have considered the circumstances of this case and I order each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

.....

L. KOMINGOI

JUDGE

In the presence of:-

no appearance for the Plaintiff

Mr. Simiyu for Mr. Bosek for the 1st Defendant present

no appearance for the 2nd Defendant

Mutisya- Court Assistant

