



**Koimbori & another v Kamau & 4 others (Environment & Land Case 254 of 2018) [2025] KEELC 412 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 412 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 254 OF 2018  
OA ANGOTE, J  
FEBRUARY 6, 2025**

**BETWEEN**

**TABITHA WANGARI KOIMBORI ..... 1<sup>ST</sup> PLAINTIFF**

**ESTHER RUGURU GITAU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**GEORGE KAGO KAMAU ..... 1<sup>ST</sup> DEFENDANT**

**JEFFERSON WAWERU THIONG'O ..... 2<sup>ND</sup> DEFENDANT**

**MINISTRY OF LANDS & PHYSICAL PLANNING ..... 3<sup>RD</sup> DEFENDANT**

**NICHOLAS KAMAU WAWERU ..... 4<sup>TH</sup> DEFENDANT**

**CHRISTOPHER THIONG'O WAWERU ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Vide a Complaint dated 29<sup>th</sup> May 2018, the Plaintiffs have sought the following reliefs:
  - a. A declaration that the Plaintiffs are the lawful and beneficial owners of the suit property.
  - b. A permanent injunction restraining the Defendants, their agents, servants and/or assigns from interfering with the suit property.
  - c. A revocation of the most recent title deed held by the Defendants for the suit property.
  - d. Costs of this suit and interest thereon; and
  - e. Any other or further relief as this court may deem fit.
2. The Plaintiffs' case is that they are the legitimate owners of the suit property parcel number Dagoretti/Kangemi/1863, whose legitimate registered owner was their mother Rachel Wairimu Waweru. They



assert that their parents were blessed with nine children and each child was allocated specific parcels of land save for the two of them, who were in 2016 allocated the suit property pursuant to family deliberations.

3. They averred that on 1<sup>st</sup> November 2016, their mother made an application for consent to subdivide the suit property, which was issued on 9<sup>th</sup> November 2016; that they proceeded to appoint and instruct a surveyor to commence the sub-division process, and that when they accompanied the surveyor to the suit property, they were confronted and later chased away by the agents or servants of some of their siblings (Catherine Wanjiru, Nicholus Kamanu and Christopher Thiong'o).
4. The Plaintiffs stated that the Assistant County Commissioner- Kangemi Ward, under the instruction of the Westlands Sub-County Deputy County Commissioner, convened a family meeting that was attended by all the surviving siblings and their mother and that in the meeting, it was mutually agreed that the suit property would be subdivided and allocated to them as previously resolved.
5. According to the Plaintiffs, the county surveyor later undertook a survey but was unable to proceed and finalise with the sub-division since the original title that was in possession of one of their brothers, Nicholus Kamanu Waweru, was withheld and never released.
6. It was averred that after they reached a mutual agreement with all family members to allot them the suit property, they assumed actual possession of the suit property; that they later learnt that the land had been transferred from their elderly mother, which they confirmed when they undertook an official search and that they thereafter placed a caution on the suit property.
7. In their Statement of Defence dated 16<sup>th</sup> October 2018, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants opposed the Plaintiffs' suit and asserted that the suit property was rightfully and legally transferred to them by Rachel Wairimu Waweru. They averred that the Plaintiffs' mother was at the time the rightful and legal owner of the suit property and she had the right to manage the property in whichever way she deemed fit.
8. The Defendants asserted that none of the Plaintiffs have ever taken possession of the suit property, be it actual or otherwise and that a search of the property does not reflect a caution over the suit property.

### **Hearing and evidence**

9. The 2<sup>nd</sup> Plaintiff, PW1, relied on her statement dated 29<sup>th</sup> May 2018. She stated that their mother allocated each one of them a portion of land that was to be severed from the suit property; that their mother obtained consent to subdivide the suit property which consent was issued on 9<sup>th</sup> November 2016; and that although they hired a surveyor to commence the subdivision process, they were chased away from the suit property by agents or proxies of their other siblings.
10. PW1 averred that they sought the intervention of the Westlands Sub-County Commissioner who instructed the Assistant County Commissioner-Kangemi Ward to convene a family meeting for deliberations; that the Assistant County Commissioner convened a meeting on 7<sup>th</sup> February 2017, where it was agreed that they (the Plaintiffs) would be allocated an eighth each, severed from the suit property and that they were to cater for the surveyor and subdivision fees.
11. PW1 informed the court that they thereafter withdrew the caution to facilitate the subdivision and subsequent transfer of the suit property and that the county surveyor then undertook the survey works, placed the beacons and proceeded to commence the paper work to finalise the subdivision, but their brother Nicholas Kamanu Waweru declined to release the original title deed for the suit property to the surveyor.



12. PW1 stated that after the physical beacons had been placed, they assumed physical possession and begun to erect a fence and to deposit construction materials, but they were later informed that the property had changed ownership which assertions they ascertained by conducting a search on 24<sup>th</sup> May 2018.
13. PW1 averred that the illegal transfer of the suit property to her nephews was done with malicious intent to deny them the right to the suit property despite mutual agreement of the entire family; that it is suspect that the illegal transfer was done without the revocation of the existing consent to subdivide the suit property and that the withdrawal of the caution was done in bad faith to facilitate the illegal transfer of the suit property to their children.
14. During cross-examination, PW1 asserted that their mother was alive when the land was transferred to the Defendants. She denied that their mother signed the transfer, and stated that she did not know about the transfer. It was her evidence that she came to learn about the transfer after her mother died. According to PW1, the two Defendants are her nephews; that the suit property was ancestral land, and that her brother has since filed a succession cause.
15. PW1 testified that she sued her mother when she was alive; that her mother used to sign using a pen but in the transfer, she signed using a thumb print; that the Defendants have fraudulently transferred the suit property to their names and that when she found out about the transfer, she asked her mother, who denied having transferred the land.
16. In re-examination, she stated that they went to the Land Control Board which allowed them to subdivide the land; that the whole land was to be sub-divided and allocated to all the siblings and that her brother was however not happy with the division of the land.
17. The 2<sup>nd</sup> Defendant, DW1, testified that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the legal and beneficial owners of the suit property; that the previous registered owner is their grandmother who transferred the land to them as a gift and that while their grandmother swore an affidavit in which she wanted to vest ownership of the land on the Plaintiffs, she subsequently changed her mind.
18. DW1 stated that the Plaintiffs had been very cruel to her and she resolved to revoke the said affidavit; that she thereafter resolved to transfer the whole property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as a gift; and that the allegations of fraud are unsubstantiated and not factual.
19. DW1 further asserted that the Plaintiffs are actually trespassers who have continued to frustrate their grandmother with abusive words and ill treatment even in old age and that the Plaintiffs have on various occasions gone to the suit property and destroyed their grandmother's crops and demolished her rental houses which she had been erected on the suit property.
20. In cross-examination, DW1 testified that they have never had a deed of gift; that all the documents, including the signed transfer, were lodged by the advocate; that he did not know if the consent of the Board was obtained before the transfer was effected and had no valuations of the suit property and that they paid stamp duty.
21. DW1 asserted that the deceased handled everything including the issue of stamp duty. He also asserted that there is an affidavit showing that the deceased impressed her thumbprint on the transfer document.
22. In re-examination, he argued that while the Plaintiffs assert that the suit property was fraudulently obtained, there is no evidence from the land registry of any fraud that they committed. He asserted that the gift was perfected when their grandmother was alive.



## Submissions

23. The Plaintiffs' Counsel submitted that the suit property comprised ancestral land which was destined to be bequeathed to the Plaintiffs before it was allegedly re-gifted to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and that the Plaintiffs proved their interest in the land during trial through their testimony and documentary evidence, including letters drawn by the Westlands County Commissioner and Kangemi Ward Assistant County Commissioner.
24. Counsel submitted that although the suit property was registered in Rachel Wairimu Waweru's name, she held it in trust for the Plaintiffs, as the other 7 out of the 9 siblings had received their fair share of the ancestral land. They assert they still retain an overriding interest in the suit property in the form of a customary trust.
25. Counsel sought to rely on Section 28 of the [Land Registration Act](#) which provides that trusts, including customary trusts comprise, inter alia, overriding interests in land that need not be noted in the register. They also relied on the determination of the Supreme Court in *Isack M'Inanga Kiebia vs Isaaya Theuri M'lintari & Another* [2018] eKLR in which it prescribed the test to apply to prove a customary trust.
26. Counsel additionally submitted that the Plaintiffs' mother's resolve to subdivide and transfer the suit property to both Plaintiffs was evinced by the existence of a letter of consent to subdivide the land; that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants only presented a title deed of the suit property and an impugned transfer, and that the Defendants failed to avail a deed of gift, an application for consent to transfer, a letter of consent, a valuation report, stamp duty payment receipts or a request and approval for exemption of stamp duty, and an accompanying fingerprint certificate.
27. Counsel's submission was that the absence of the Deed of Gift in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants runs contrary to the statutory provisions of Section 3(3) of the Contracts Act, which behooves parties in land transactions to formalize such dealings in writing. He asserts that it is not possible to confirm based on the Defendants' word that the suit property was gifted to them.
28. Counsel submitted that the Defendants did not provide any evidence or demonstrate a special advantage that they had over the other grandchildren and children. It was his submission that the title held falls short of the sanctity demanded of a good title and warrants of revocation.
29. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed written submissions dated 26<sup>th</sup> September 2024. He submitted that the suit property was owned by Rachel Wairimu Waweru, the late mother of both the Plaintiffs and the 4<sup>th</sup> and 5<sup>th</sup> Defendants and that while the Plaintiffs claim that the property was held in trust for them and their siblings, the Defendants assert that Rachel Wairimu Waweru had full ownership and the right to decide its disposition.
30. Counsel submitted that Rachel Wairimu Waweru made a gift inter vivos to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants; that the gift was perfected in her lifetime; that the Plaintiffs' mother was a named Defendant in this suit until her death and that there is no contest that she was of sound mind and the resultant title cannot be revoked because the Plaintiffs disagree with her decision.
31. The Defendants' Counsel submitted that the Plaintiffs did not provide evidence to show that the land was trust land; that the suit property is a quarter acre piece of land in Nairobi which is an urban centre and is commercial in nature; that the Plaintiffs did not prove that they have ever had possession of the land or that there was a promise that the land was to be held for them in trust; that the suit property was not held as family or clan land; and that the Plaintiffs have not demonstrated any entitlement to be registered as the owners.



32. Counsel relied on the case of *Juletabi African Adventure Limited & Another vs Christopher Michael Lockley* [2017] eKLR and *Patrick Mbaso vs Meshack Odhiambo & Another* [2020] eKLR.
33. They asserted that the Plaintiffs want the court to revoke the intentions of their late mother yet in another section claim that their case is based on an overriding interest and that a title deed is conclusive evidence of ownership. They relied on Section 26(1) of the *Land Registration Act*.

### **Analysis and Determination**

34. Having considered the pleadings and submissions filed by the parties, the following issues arise for determination by this court:
  - a. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants lawfully gained title to the suit property
  - b. Whether the Plaintiffs have an interest in the suit property
  - c. The orders to issue.
35. This suit concerns a dispute over the ownership of parcel of land known as Dagoretti/Kangemi/1863, (the suit property) between family members. It is not disputed that the suit property was previously registered in the name of the late Rachel Wairimu Waweru, who was the mother of the Plaintiffs and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, and grandmother to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Late Rachel Wairimu Waweru was alive when this suit was filed but died before its conclusion.
36. The Plaintiffs assert that pursuant to an agreement by the family in 2016, it was agreed that the suit property would be subdivided and the two plots issued to the Plaintiffs. The Plaintiffs assert that their late mother obtained consent from the Dagoretti Land Control Board which resulted into a letter of consent dated 9<sup>th</sup> November 2016.
37. They further assert that although they endeavored to subdivide the suit property, they were physically prevented from accessing the suit property for survey by their siblings. It is the Plaintiffs' case that they later learnt that the suit property had been transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
38. The Plaintiffs have challenged the title held by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and assert that it was obtained unlawfully and fraudulently, and that the suit property was ancestral land to which they had an interest in. They further assert that the suit property is ancestral land which their mother held in their favor and that it is consequently subject to a customary trust.
39. On the other hand, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' case is that their grandmother lawfully donated the suit property to them as a gift inter vivos. They denied that the suit property was ancestral land and maintained that their grandmother, the donor, transferred the suit property and perfected the gift inter vivos in her lifetime.
40. Under Section 26 of the *Land Registration Act*, a certificate of title can be challenged on the grounds of fraud or misrepresentation or if it was acquired illegally or through a corrupt scheme:

“(1)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.”

41. The Plaintiffs have contended that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants illegally obtained title to the suit property. Under evidentiary law, the burden of proof to establish these facts was upon the Plaintiffs. This is provided for under Sections 107, 108 and 109 of the Evidence Act, which provide as follows:

“ 107

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that shall lie on any particular person.”

42. It is also trite that fraud must be specifically pleaded and proved. The Court of Appeal in *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

43. Further, in *Kinyanjui Kamau vs George Kamau* [2015] eKLR, the court expressed itself as follows:-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

44. According to the Plaintiffs, the transfer of the suit property to their nephews was illegal and was done with malicious intent to deny them the right to the suit property despite the mutual agreement of the entire family. They testified that the illegal transfer was done without the revocation of the existing consent to subdivide the suit property; that her mother used to sign using a pen but in the transfer, she signed using a thumb print and that the withdrawal of the caution was done in bad faith to facilitate the illegal transfer of the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.



45. As stated by the Court of Appeal in *Kinyanjui Kamau vs George Kamau* [2015] eKLR, fraud must be proved to the required standard of proof, which is higher than on a balance of probabilities, but not beyond a reasonable doubt.
46. The Plaintiffs have adduced several documents in their bundle of documents. These include the title deed to the suit property; application for consent to subdivide the land dated 1<sup>st</sup> November 2016 and the letter of consent for sub-division dated 9<sup>th</sup> November 2016 and application for registration of a caution dated 8<sup>th</sup> December 2016 and accompanying documents; application to withdraw the caution dated 14<sup>th</sup> June 2017, amongst others.
47. While the Plaintiffs asserted that it was suspect that their late mother signed the transfer with a thumbprint rather than a pen, in the proposed subdivision of the suit property produced by the 2<sup>nd</sup> Plaintiff, Rachel Wairimu Waweru has signed the document using her thumbprint. Further, the Defendants have adduced two affidavits which the late Rachel Wairimu Waweru signed by way of impressing her thumbprint.
48. In the first affidavit sworn on 16<sup>th</sup> June 2017, the late Rachel Wairimu Waweru deponed that she had subdivided the suit property into two portions. She stated that the intention was to give one portion to the 2<sup>nd</sup> Defendant, and the other portion to her grandsons, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly in equal shares.
49. In the second affidavit dated 11<sup>th</sup> April 2018, the Plaintiffs' mother deponed that she swore the affidavit dated 16<sup>th</sup> June 2017 under duress, coercion and threats from her daughters, Esther Ruguru Gitau, Alice Wangari Koimbori, Edith Waringa Waweru, Grace Wandia Waweru and Keziah Wanja Waweru and forthwith renounced the affidavit dated 16<sup>th</sup> June 2017 as it was not made of her own free will and conscience.
50. The Plaintiffs have not impugned the above affidavits nor the proposed subdivision of the suit property. These documents rebut the Plaintiffs' assertion that her mother never signed documents using her thumbprint. Moreover, the Plaintiffs have not claimed or brought any expert analysis or any evidence to establish that the thumbprint in the transfer was forged and was not in fact that of their late mother.
51. As asserted by the Plaintiffs, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have only presented the transfer of land and the title to the suit property registered in their names as proof that their grandmother gave them the suit property as a gift inter vivos. Is this enough to establish that the property was lawfully gifted to them by their grandmother?
52. The court in *Re Estate of the Late Gedion Manthi Nzioka (Deceased)* [2015] eKLR, articulated the requirements of law for a valid gift inter vivos. It held that:

“For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. 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.”
53. In the above decision, the court stipulated that there are several avenues through which a gift inter vivos can be made, including through an instrument in writing or by way of delivery. What is non-negotiable



is that gifts of land must be by way of registered transfer and the gift inter vivos must be completed in the lifetime of the donor. A similar finding was made by the court in *Lucia Karimi Mwamba vs Chomba Mwamba* [2020] eKLR as follows:

“There must be evidence in gift inter vivos that the gift was granted by deed, payment or by executing a transfer. The gift inter vivos must be complete during the life of the deceased.”

54. These essentials were also restated in *Re Estate of the Late Sawe Maina* [2023] KEHC 3743 (KLR) as follows:

- “a) It may be granted by deed, an instrument in writing, by delivery, by declaration of trust by the donor or by way of resulting trusts or presumption of.
- b) If it is a gift of land it must be by way of registered transfer, or declaration of trust in writing if the land is unregistered.
- c) It must be complete.
- d) It is not necessary for express acceptance from the donee.”

55. In *Re Estate of Godana Songoro Guyo (Deceased)*[2020] eKLR, Nyakundi J stated as follows regarding gifts inter vivos:

“...In any event, the person who makes such a gift must have the capacity and competency to gift the property and the gift must be perfected. In the case of inter vivos, the gift must go into immediate and absolute effect. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gift. Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the donee.”

56. Guided by the above decisions, the failure to present a deed of gift or any of the other documents asserted by the Plaintiffs does not render the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ title null and void. A gift inter vivos can be effected by way of delivery of the suit property to the donee. What is critical is that the transfer of the land was effected in the lifetime of Rachel Wairimu Waweru, and that she had the competence and capacity to transfer the land.

57. On the preponderance of the evidence by both the Plaintiffs and Defendants, this court finds that the late Rachel Wairimu Waweru lawfully gifted the suit property to her grandsons, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants through gift inter vivos, which was perfected and completed in her lifetime.

58. While the 2<sup>nd</sup> Plaintiff initially denied that such transfer was in the lifetime of Rachel Wairimu Waweru, she later testified that she approached her mother concerning the transfer, who purportedly denied the same. Furthermore, the Plaintiffs did not present any evidence to show that Rachel Wairimu Waweru protested the gift inter vivos in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, neither have the Plaintiffs pleaded nor proved that their mother lacked the capacity to transfer the land to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

59. Further still, while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not provide receipts as proof of payment of stamp duty, the transfer between themselves and the late Rachel Wairimu Waweru is duly stamped for duty.

60. The Plaintiffs have accordingly failed to prove that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants illegally or fraudulently obtained title to the suit property. The Defendants’ title has on this basis, not been successfully impeached.



61. The Plaintiffs asserted in their Plaint that they gained an interest in the suit property pursuant to an agreement by the family, made in the presence of the Assistant Commissioner- Kangemi Ward. They have pleaded that in pursuance of this agreement, their mother obtained consent to subdivide the suit property from the Dagoretti Land Control Board. PW1 stated that the land was ancestral, which their mother held in trust for them.
62. The Plaintiffs herein contend that their mother had undertaken to transfer the title to the suit property in her lifetime to them. Considering that there is no written evidence of any agreement or deed to transfer the land, the purported agreement to subdivide and transfer the land to the Plaintiffs is based on an oral promise. In Halsburys Laws of England 4<sup>th</sup> Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:
- “Where a gift rests merely in promise, whether written or oral, or in 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 comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”
63. In *Re Estate of Godana Songoro Guyo (Deceased)* [2020] KEHC 3970 (KLR) the court stated that a gift based on a promise may be enforced if the subsequent conduct of the donor gives the donee a right to enforce. It stated as follows:
- “Generally, a gift in form of a parcel of land ought to be effected by way of a written memo or a transfer or declaration of trust in writing showing that the land was gifted to the sons of the deceased inter vivos or causa mortis. But, if a gift rests purely in promise, whether written or oral, or in 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.”
64. From the facts herein, Rachel Wairimu Waweru initially took steps to subdivide the suit property. According to the affidavit dated 16<sup>th</sup> June 2017, the subdivision was to be in favour of the 2<sup>nd</sup> Plaintiff on one part, and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the other part. What then followed was that on 27<sup>th</sup> June 2017, the 2<sup>nd</sup> Plaintiff wrote to her mother indicating that she intends to build houses on her plot and demanded that her mother’s tenants vacate the suit property and that she remove her crops from the land immediately.
65. From this point in time, the conduct of the late Rachel Wairimu Waweru pivoted. She failed to take the critical step of executing a transfer in favor of the Plaintiffs, and thereafter transferred the title of the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Moreover, through a subsequent affidavit dated 11<sup>th</sup> April 2018, she revoked her earlier depositions in which she had stated that a portion of the land be transferred to the 2<sup>nd</sup> Plaintiff.
66. It can then only be concluded that the Plaintiffs had an acrimonious relationship with their mother and that their mother was unwilling and reluctant to transfer the suit property to them. That being so, the Plaintiffs have no basis to enforce the earlier promise which was subsequently cancelled.



67. The Plaintiffs however did not argue that the suit property was a promised gift, but rather assert that it was ancestral land which is subject to customary trust.
68. Under Section 28 of the [Land Registration Act](#), a customary trust is recognized as an overriding interest, to which registered land shall be subject to. A customary trust is a trust created under customary law which requires an investigation into the registration of the subject matter land in order to determine whether there was any intention, at the point of registration, that the land be held under a customary trust. It therefore specifically considers the circumstances of the first registration of a plot of land.
69. The Supreme Court in the case of *Kiebia vs M’lintari & Another* [2018] KESC 22 (KLR) stipulated some of the elements that would qualify a claimant as a trustee under the customary trust doctrine as follows:
- “Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:
1. The land in question was before registration, family, clan or group land
  2. The claimant belongs to such family, clan, or group
  3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
  4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
  5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”
70. The Plaintiffs had a duty to prove that there was an intention to create customary trust to the suit property for their benefit. The Plaintiffs evidence however falls far short of the required standard.
71. I say this because the Plaintiffs did not adduce any evidence to show that the suit property was ancestral land before it was registered in the name of their mother. The Plaintiffs did not present any evidence as to the process that was undertaken by Rachel Wairimu Waweru to obtain title to the suit property.
72. In the absence of these facts, this court has no basis to evaluate whether there was any intention, or whether the circumstances of registration of the suit property gave rise to a customary trust or which category of trust subsists as to bind the registered proprietor of the suit property.
73. The Plaintiffs have further not indicated that they would have been entitled to be registered as proprietors of the suit property during the first registration of the land.
74. Indeed, as the daughters of Rachel Wairimu Waweru, the Plaintiffs have a right to inherit from her estate. Equally, Section 24 of the [Land Registration Act](#) vests a proprietor with the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Such absolute ownership includes the rights to deal with property as they deem fit, and to divest their interest in the land.



75. Had the Plaintiffs proved the subsistence of a customary trust to the required standard, it would have behooved this court to find that the title held by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is subject to their customary interest in the land. However, the Plaintiffs failed to establish that a customary trust subsisted over the suit property in their favor.

76. From the foregoing analysis, I find that the Plaintiffs' suit lacks merit. This suit is therefore dismissed. As costs follow the event, the Plaintiffs shall bear the costs of this suit.

**DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Emikendu for Ms Murimi for Plaintiffs

Mr. Oduor for Gitonga for 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Ms Balozi for 3<sup>rd</sup> Defendant

Court Assistant: Tracy

