



**Ouko ((Suing as the Administratrix (ad litem) of the Estate of Ouko Angolo alias Grison Ouko Angolo)) v Full Gospel Churches of Kenya (Environment and Land Appeal 2 of 2021) [2023] KEELC 513 (KLR) (7 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 513 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 2 OF 2021  
GMA ONGONDO, J  
FEBRUARY 7, 2023  
(FORMERLY MIGORI ELC APPEAL NO. 11 OF 2020)**

**BETWEEN**

**HELIDA ACHIENG OUKO (SUING AS THE ADMINISTRATRIX (AD LITEM) OF THE ESTATE OF OUKO ANGOLO ALIAS GRISON OUKO ANGOLO) ..... APPELLANT**

**(SUING AS THE ADMINISTRATRIX (AD LITEM) OF THE ESTATE OF OUKO ANGOLO ALIAS GRISON OUKO ANGOLO)**

**AND**

**FULL GOSPEL CHURCHES OF KENYA ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. J. P. Nandi, Senior Resident Magistrate, delivered on 13th December 2019 in Oyugis Principal Magistrate’s Court Environment and Land Case No. 7 of 2019)*

**JUDGMENT**

1. This is an appeal that arises from the trial court’s judgment delivered on the December 13, 2019 by the Honourable J. P. Nandi, Senior Resident Magistrate, in Oyugis Principal Magistrate’s Court Environment and Land Case No. 7 of 2019 where he held, inter alia;

“The upshot of the above is that I find that the plaintiff has not proved her case and dismiss her suit with costs to the defendant.”

2. The appellant namely Helida Achieng Ouko through the firm of Nyauke and Company Advocates mounted the appeal by way of a memorandum of appeal dated March 3, 2020 and filed herein on



March 4, 2020. The Appeal is anchored on grounds 1 to 6 as set out on the face thereof and the same include:

- a. That the court below erred in law by failing to appreciate that the plaintiff had proved her case on a balance of probabilities as by law required.
  - b. That the subordinate court failed to appreciate the statutory provision regarding the limitation of period within which a claim of land can be made.
  - c. That the honourable subordinate court did address itself to the issues raised in the pleadings and more so that there was no counter claim upon which it could rely to make a finding that the land was indeed donated.
3. Wherefore, the appellant has sought the order that the instant appeal be allowed and the judgment of the learned trial magistrate be quashed and/or set aside, with costs to the appellant.
  4. The appeal was transferred to this court for hearing and determination from Migori Environment and Land Court on October 25, 2021.
  5. The appeal was heard by way of written submissions pursuant to this court's directions of August 19, 2021.
  6. Accordingly, the appellant's counsel filed submissions dated February 11, 2022 on February 14, 2022. Counsel framed three issues for determination thus:
    - a. Whether the appellant proved her case on a balance of probability in the court below.
    - b. Whether the alleged donation of suit land (L. R. No. WK/WAG1/44) met the threshold of gift inter vivos.
    - c. Whether the appeal has merit.
  7. In discussing the issues, learned counsel submitted, inter alia, that there is no documentation to show that the suit land had been donated to the respondent. That the appellant proved her case at the trial court on a balance of probability. That therefore, the appeal has merit and should be upheld. Counsel cited two authorities, to wit, *Abmed Mohammed Noor –vs- Abdi Aziz Osman* (2019) eKLR and *In re Estate of Chepkwony Arap Rotich (Joel Kipngeno Chepkwony and another –vs- Wesley Lelei Chepkwony)* (2018) eKLR, to buttress his submissions.
  8. Learned counsel for the respondent filed submissions dated October 3, 2022 on October 4, 2022 and identified three issues for determination thus: whether the respondent trespassed onto the suit land, whether the appellant's suit is driven by ill motive and whether the appeal is merited.
  9. Counsel submitted that the suit land was donated to the respondent by Grison Ouko Angolo (the deceased herein), a member of the respondent, in 1980 before he married the appellant. That the respondent has occupied that parcel of land continuously and uninterrupted after the donation to date. That the appellant is a donor by virtue of the doctrine of equitable estoppel of the promissory nature.
  10. Also, counsel submitted that the suit against the respondent is brought in bad faith and driven by ill motive as the appellant intends to evict the respondent and give her new found church the premises developed by the respondent on the suit land. Thus, counsel urged the court to dismiss the appeal with costs. Counsel relied on the following authorities: *David Waweru Mbugua v William Adero Googa & 5 others* (2018) eKLR, *Twalib Hatayan & another v Said Saggat Ahmed Al-Heidy & 5 others* (2015) eKLR and *Peter Migosi Migosi v Diocese of Kisii* (2015) eKLR, to fortify the submissions.



11. Further, counsel for the respondent filed supplementary submissions dated November 7, 2022 on November 14, 2022 to the effect that the conduct of the deceased and the appellant herein perfected the donation of the suit land to the respondent. Also, that the claim is statute barred. Thus, counsel prayed that the respondent's award of costs in the trial court be sustained and that the costs of this appeal be awarded to the respondent. Counsel relied on various authorities including the case of *In re Estate of M'Raiji Kithiano (Deceased)* (2017) eKLR, to reinforce the submissions.
12. In the foregone, the issues for determination are as captured in the grounds of appeal and compressed to whether the appellant:
  - a. Has demonstrated that this appeal is tenable and
  - b. Is entitled to the orders sought in the memorandum of appeal.
13. It must be noted that the instant appeal being the first one from the trial court in the matter, I am obliged to review the record of the trial court, evaluate it and arrive at its own conclusions in this appeal; see *Mwanasokoni v Kenya Bus Services Ltd* (1982-88) 1KAR 278 applied in the case of *Titus Ong'ang'a Nyachico v Martin Okioma Nyauma and 3 others* (2017) eKLR.
14. At the trial court, the suit was commenced by way of a plaint dated January 23, 2019 mounted by the plaintiff against the defendant seeking the following orders:
  - a. An injunction restraining the defendants, their agents, representatives, assigns or any person acting or deriving authority from the defendant from ever trespassing or making any claim over any portion or property on the suit land.
  - b. Costs of the suit and interest thereof at the rate of 12% per annum as from the date of filing the suit until payment in full.
15. PW1, Helida Achieng Ouko (the appellant herein), testified on August 28, 2019 and adopted her witness statement dated January 23, 2019 as part of her evidence. She stated that together with her husband (the deceased), they gave a portion of the suit land to the respondent to use and put up a church. That the respondent was to use the land only for a limited period of time. That in 2011, there arose differences in the church and two factions emerged. That her faction of the church was forced to vacate the church, even though they are the ones who built it. She produced in evidence a copy of limited grant to the estate of the deceased dated January 25, 2019 and a copy of official search certificate for the suit land (PE Exhibits 1 and 2 respectively).
16. In cross-examination, PW1 stated that she got married to the deceased in 1975 and did not know whether the deceased and his first wife donated the suit land to the defendant. That the deceased was a pastor in the defendant church. She also stated that there was a dispute between them and the defendant, during the lifetime of the deceased.
17. PW2, Curshon Obel Adik, testified that the plaintiff and the deceased are the owners of the suit land, on which the respondent church is constructed. That the defendant church was not given the suit land permanently.
18. PW3, Lazaro Okimo Nyamongo, also testified that the defendant was given the suit land in 1980 by the deceased for a short period. That members of the church constructed the church thereon. During cross-examination, PW2 stated that the deceased did not specify the period the defendant church was to be on the suit land. That the defendant has been in occupation of the suit land from 1980 to date. He also stated that the defendant evicted the plaintiff and her guests from the church which was constructed in 2011.



19. PW4, Bena Ogony Atieno, testified that the wrangles in the respondent church started after some worshippers, including the plaintiff, joined Full Gospel Church Glow. That the suit land was donated by the plaintiff to the defendant in 2011. That the defendant did not trespass on to the suit land.
20. In the statement of defence dated 13<sup>th</sup> February 2019, the defendant denied the claim and sought that the suit be dismissed with costs.
21. DW1, Vitalis Mbago, (a pastor and overseer of the defendant) adopted his witness statement dated February 13, 2019 as part of his evidence. He stated that the deceased and his first wife donated the suit land to the church. That the deceased died in 2008 but plaintiff continued to worship in the defendant church until 2019 when they she joined Full Gospel Glow Church. That the plaintiff now wants to use the church building for her new church. He denied that the suit land was donated to the respondent church on a temporary basis. He averred that the respondent church was not constructed by the plaintiff and her guests from the church. He produced in evidence harambee cards and a history of the church (DExhibits 1 and 2 respectively).
22. In cross-examination, DW1 admitted that he did not have any documents to show that the suit land was given to the church permanently.
23. In arriving at the impugned judgment, the learned trial magistrate held at page 10 of the judgment thus:
 

“...The plaintiff fully participated in the developments of the church. The defendant acted upon the promise of the deceased that the suit portion will be used for construction of a church which they indeed constructed. I find that the plaintiff on her behalf and on behalf of the deceased estate cannot resile from the promise which the defendant acted upon....”
24. On whether or not the respondent was a trespasser on the suit land, the trial court noted that the respondent only came into possession of the suit land on the invite of the deceased. This was confirmed by testimonies of both the plaintiff and defence witnesses, including that of PW1. That the respondent’s church activities were and are being carried out with the consent of the deceased and the plaintiff hence, the respondent is not a trespasser on the suit land.
25. It is important to note that the learned trial magistrate stated the parties’ respective cases, framed twin issues for determination, analysed them and arrived at the impugned judgment based on reasons. So, the judgment complied with Order 21 Rule 4 of the [Civil Procedure Rules](#), 2010.
26. The appellant contends that there was no counter claim upon which the honourable trial court could rely to make a finding that the suit land was indeed donated. However, it was the appellant and her witnesses, who stated that indeed, the suit land was given to the respondent by the deceased albeit for a short period, which period has since expired.
27. In [Micheni Aphaxard Nyaga & 2 others v Robert Njue & 2 others](#) [2021] eKLR, the honourable court cited, with approval, [Halsburys Laws of England](#) 4th Edition Volume 20(1) at paragraph 67 with respect to incomplete gifts as follows:
 

“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.” (Emphasis added)

28. The court also cited *Odunga’s Digest on Civil Case Law and Procedure* Vol (III) Page 2417 at paragraph 5484 (d) e – 1 thus:

“Generally speaking the moment in time when the gift takes effect is dependent on the nature of the gift; the statutory provisions governing the steps taken by the donor to effectuate the gift. (See *in Re Fry Deceased* {1946} CH 312 *Rose*; and *Trustee Company Ltd v Rose* {1949} CL 78 *Re: Rose v Inland Revenue Commissioners* {1952} CH 499 *Pennington v Walve* {2002} 1WLR 2075 *Maledo v Beatrice Stround* {1922} AC 330 Equity will not come to the aid of volunteer and therefore, if a donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee need no assistance from equity and the gift is complete. It is on that principle that in equity it held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, complete his title. Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise, a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor. (See *Shell’s Equity* 29ED Page 122 paragraph 3)” (Emphasis added).

29. In the instant case, I note that the donor, the deceased, did not take any steps to transfer the suit land to the respondent church herein. It is therefore, this court’s considered view that the donation did not meet the threshold for a gift inter vivos as noted hereinabove.

30. This court is alive to the fact that the respondent church has been in occupation of the suit land continuously and uninterrupted since 1980 to date. The respondent contends that the appellant is a donor by virtue of the doctrine of equitable estoppel of the promissory nature.

31. The doctrine of equitable estoppel prevents a party from acting inconsistently with a promise the party has made if that promise or representation had the effect of inducing another party to reasonably rely on it to that other party’s detriment. In *Combe v. Combe* [1951] 2 K.B. 215, 219, Lord Denning remarked that equitable estoppel:

“does not create new causes of action where none existed before. It only prevents a party from insisting on his strict legal rights when it would be un-just to allow him to enforce them.”

32. The respondent’s counsel submitted that the conduct of the deceased and the appellant herein perfected the donation of the suit land to the respondent. Also, that the claim is statute barred. Indeed, the appellant and her witnesses confirmed that they participated in the construction of the church together with other church members. It would therefore, be unjust to allow a new church, to wit, Full Gospel Glow Church to take over the premises of the respondent.

33. The appellant contends that the suit land was given to the respondent by the deceased albeit for a short period, which period has since expired. That the respondent did not adduce any documentary evidence as proof that the suit land was given to them permanently. However, the burden of proof was rested on the appellant.



34. This court is guided by section 107 of the *Evidence Act*, chapter 80 Laws of Kenya which provides as follows:
- i. 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.
  - ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
35. I thus, endorse the learned trial magistrate's considered finding that the respondent is not a trespasser on the suit land. Further, that the appellant instituted the suit with an ulterior motive to evict the defendant and install herself and her splinter group in the respondent church.
36. Bearing in mind the entire evidence on record in this case, and applying the facts of the case as well as legal principles stated above, it is clear that the appellant who was the plaintiff before the trial court failed to prove that the respondent is a trespasser on the suit land. As a consequence, an injunctive order restraining the defendants, their agents, representatives, assigns or any person acting or deriving authority from the defendant from accessing the suit land, could not issue.
37. In conclusion, it is the finding of this court that the learned trial magistrate's judgment is faultless at law. I proceed to uphold the same.
38. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated March 3, 2020 and duly filed on March 4, 2020 is hereby dismissed with costs to the respondent.
39. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 7<sup>TH</sup> DAY OF FEBRUARY 2023.**

**G.M.A ONG'ONDO**

**JUDGE**

**Present**

1. Mr. Aluoch Odera, Learned Counsel for the appellant
2. Mr. O. Odhiambo holding brief for Mutembei, Learned Counsel for the respondent

**3. Okello, Court Assistant**

