



Sirtich (Suing as personal and legal representative of the Estate of the late Michael Kiptum Sirtich Deceased) v Rono (Environment & Land Case 38 of 2021) [2023] KEELC 714 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEELC 714 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 38 OF 2021
MN MWANYALE, J
FEBRUARY 9, 2023**

BETWEEN

WILSON KIPROP SIRTICH (SUING AS PERSONAL AND LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE MICHAEL KIPTUM SIRTICH DECEASED) PLAINTIFF

AND

RICHARD KIPTARBEI RONO DEFENDANT

JUDGMENT

1. This matter has taken inordinately long in the corridors of justice, but with the delivery of this judgment a huge burden is being lifted off the litigants shoulders.
2. The suit was filed before the High Court in Eldoret in 2000 vide a plaint dated 25th September 2000. Which sought for eviction and permanent injunction against the Defendant as well damages for trespass and costs of the suit.
3. An injunction application was filed by way of a chamber summons dated 25th January 2001 was filed. In the said Supporting Affidavit to the chamber summons, it was deponed that the Defendant had trespassed on the Plaintiff's property on or about the 2nd January 2001.
4. A defence and counterclaim dated 19th October 2000 was filed in the suit.
5. A reply to defence and defence to counterclaim was filed on 28th November 2000.
6. The matter initially partly proceed before Justice M. Ibrahim on 26/7/2006. Thereafter no activity took place in the file before it was placed before Lady Justice Mshilla on 19/9/2012 thereafter it was placed before S. Munyao J. on 28/11/2012, where he noted that since the matter was a part heard it ought to proceed in the High Court.



7. The Advocates in the matter recorded a consent on 21/1/2015 here the matter was transferred to the Environment and Land Court Eldoret and given case No. 43/2015.
8. The Plaintiff and 2 witnesses were heard by Odeny L. J. on 25/9/2017 and matter was adjourned for hearing on 2/10/1997 when it did not proceed but proceeded on 18/12/2007 when the another Plaintiff witness testified. The last Plaintiff witness the executive officer Kapsabet Law Courts was to testify on 7/6/2018 when he was not available and his summons were extended to 30/10/2018, when again the executive officer did not testify.
9. On two other occasions, the Plaintiff's last witness was not available to testify, and the Plaintiff's case was thus closed and matter was ordered to proceed for defence hearing.
10. The file was then transferred to Kapsabet Environment and Land Court upon establishment of the Court, where proceedings were typed and the matter proceeded.
11. On 16/12/2021, the Plaintiff's Advocate informed the Court of the demise of his client and sought substitution of the Plaintiff and parties took directions to proceed from where it had reached.
12. An application to substitute the Plaintiff was filed and allowed and on amended plaint was filed on 14th June 2022.
13. The nature of the Amendment was basically to substitute the original Plaintiff Michael Kiptum Sirtich with Wilson Kiprop Sirtich.
14. The Defendant filed an Amended Statement of Defence on 21/7/2022. In the amended statement of defence the Defendant abandoned the counterclaim.

Plaintiff's Case And Evidence:

15. It is the Plaintiff's case that he is the registered owner and thus entitled to possession of all that parcel of land known as Nandi/Kokwet/353 measuring 3.5 acre of thereabouts.
16. That the Defendant had without any colour of right and without the Plaintiff's consent entered the parcels of land and took possession of it, leased out the same and has erected some structures thereon. The Plaintiff pleads that as a result of the aforementioned the Plaintiff suffered loss and damage and by dint of deprivation of the use and enjoyment of the suit property.
17. The Plaintiff thus sought for an eviction order and a permanent injunction restraining the Defendants, himself, his sercants and/or agents.
18. PW1 was the original Plaintiff, Michael Kiptum Sirtich testified, it was his evidence that the suit land belonged to him as it was given to his father by his grandfather and after the demise of his father he filed succession cause 8 being Kapsabet Succession Cause No. 84/93 and he later got the title to the property.
19. It was his testimony that he knew the Defendant who had filed an objection in the said succession cause which was dismissed. The Plaintiff then produced the proceedings of the succession cause as P Exhibit 2, having produced the original title as P Exhibit 1.
20. He further testified that there was no appeal against the succession (Kapsabet Succession Cause No. 84 of 1993) proceedings but the Defendant occupied his property in the year 2001, yet he was not a beneficiary. He prayed that the Defendant be evicted on the suit property as the Defendant had his own property which he had sub divided and sold.



21. On cross – examination, the witness stated that he is the registered owner of Nandi/Kokwet/353 measuring 3.5 acres. They are adjacent plot 358, plot No. 318 was for his grandfather who gave it to his son. His grandfather had subdivided the land to each son and gave them title deeds. The Plaintiff's father got his title and the Defendant succeeded his father upon the father's demise. The suit property was to be registered in Trust for his 5 brothers and 4 sisters who have all been staying on 318.
22. In re-examination, he stated that he had not subdivided the property since there was a case pending in Court and an order for status quo had been issued.
23. PW2, Mr. Ernest Kiptum Sugut, the Assistant Chief from 1976 to 1981 when he became chief equally testified. It was his testimony that he knew Johana Tuwei who had plot No. 353 and 318 and the Plaintiff was the sons of the late Johana Kiprotich Tuwei. The Defendant was a Cousin to the Plaintiff.
24. It was his testimony that the Plaintiff had gone to his office for purposes of a letter to file succession cause in respect of plots numbers 318 and 353; he testified that the Defendant was cultivating the land and he had never received a complaint from the Defendant over the suit land.
25. In cross – examination, he stated that he had been a chief from 1976 to 2003. He did not know anyone by the name Agenga, the late Johana had died in 1981, and a succession cause in respect of all his Estate had been filed.
26. PW3 Kiplagat Arap Kebenei also testified. He stated that he knew the late Johana Kiprotich who was the father of the Plaintiff. It was his testimony that he knew the Defendant's father who was known as Kiprono Arap Sisei.
27. The Plaintiff's father and the Defendant's father were sons of a Mr. Kabasenge, and he knew them since they were his neighbours and he had subdivided the property to his children.
28. In cross – examination he stated that he lived at the late Johana's place before he got married. He did not know the plot number that he subdivided for the sons.
29. PW4 Sylvester Kemboi Sirtich, testified that he was a brother to the Plaintiff and stated that they had agreed as brothers for Michael the Plaintiff to testify on their behalf.
30. In cross – examination, he stated that their late father had given them plot number 353, and as a family they had agreed that Michael was to file the case on their behalf. He stated that the Defendant was occupying the suit land he had built with iron sheets.
31. In re-examination, he stated that they had no objection with the Plaintiff being registered on their behalf. PW4 David Kiprotich Asenga testified that the Plaintiff was his brother. In cross – examination, he stated that the Plaintiff was his brother and the Defendant was his cousin. They had initially lived with the Defendant on plot number 353 from 1979 to 1986. They had agreed that the Plaintiff was to file case on their behalf.
32. On re-examination he stated they were staying on parcel No. 358. PW6 Wilson Kiprop Sirtich equally testified, he stated that the Plaintiff was his brother and the Defendant his cousin. He had been instructed by the Plaintiff to take materials to suit property where they found the Defendant who threw the materials away.
33. In cross – examination, he stated that the suit property was in his father's name.
34. PW7, the Land Registrar at Nandi Sheila Murei, testified. It was her testimony that she had received summons so as to testify and give evidence in respect of L.R. No. Nandi/Kokwet/353 and produce



- a certified copy in the green card; which she produced as D Exhibit 3. The records showed that the property was registered in the name of Michael Kiptum Sirtich.
35. On cross examination, he stated that they are more than 2 entries in the green card after 1999; Succession Cause No. Kapsabet PMCC P & A 84/93; last entry was a ruling in favour of Plaintiff. Entry No. 6 does not state whose favour it is. The entry do not caption the case numbers; transmission was done on 7/9/1999. The entries were based on order issued by the Court.
 36. In re-examination, she stated that she was served with the ruling of the Court but not able to report the whole ruling on the green card.
 37. The Plaintiff sought to call the Executive Officer Kapsabet Law Courts who after severally adjournments was not able to testify and the Plaintiff case was closed.

Defendant's Case:

38. In the Amended Defence filed on 21st July 2022, the Defendant basically denied the contents of the Amended Plaint save for prayer 12 where the Defendant pleaded that the prayers sought could not be issued, thus rendering the suit defective and a non-starter.
39. In the original defence the Defendant had pleaded a counterclaim which was abandoned by way of the amendment made to the defence.
40. The Defendant Richard Kiptarbei Rono was DW1 He adopted his witness statement as part of his evidence in chief. He prayed that he be given the property since he had lived thereon since in 1978; it was hi evidence that he had gifted the Plaintiff Nandi/Kokwet/318 and he was gifted Nandi/Kokwet/353 by the Plaintiff's father Kipsirtich Ara Sisei; who later on died in 1991.
41. On cross examination, the Defendant stated that his grandfather owner Nandi/Kokwet/318, while the Plaintiffs father Kipsirtich Arap Sisei owned number 353 and he owned Nandi/Kokwet/358. He did not evict the Plaintiff. He was not aware of the suit which was formerly Eldoret Case No. 227/2000.
42. He had filed objection against the Kapsabet P & A 84/1993, he did not remember filing High Court Misc. Application No. 87/2007 challenging the Grant issued to the Plaintiff. He did not have any orders revoking the Grant issued to the Plaintiff. He did not have a counterclaim against the Plaintiff.
43. In re-examination, he stated that Nandi/Kokwet/353 was registered in the name of Kipsiritich Arap Sisei also known as Johana Tuwei on death of Kipsiritich Arap Sisei his children undertook succession.
44. Dw2, William Kiprotich Maritim a retired teacher and neighbor testified. It was his testimony that the Defendant had moved to his current abode about in 1978. The property then belonged to Johana Seretich. He knew that Richard had been given NANDI/KOKWET/353, and that the late Johana had not disputed the occupation by the Defendant. That the dispute was only between the Plaintiff and the Defendant.
45. On cross examination, the witness confirmed that his witness statement was based on what he had been told by the Defendant. He was not aware of the succession cause, he had not seen entry number 2 on the green card in respect of Nandi/Kokwet/353. He was not aware of the Grant that had been given to the Plaintiff. He stated that the father of the Plaintiff had gifted the Defendant.
46. DW3, Mr. Simeon Kiptabut Bor, testified and adopted his witness statement as part of his evidence in chief. He stated that he knew the Defendant as his neighbor from childhood.
47. In cross – examination, he stated that Nandi/Kokwet was registered in the name of Johana Tuwei also known as Kipsiritich Arap Sisei.



48. He was aware that Nandi/Kokwet/358 was registered in the name of the Defendant who subdivided the property and sold. He was not aware of the succession cause.
49. In re-examination, the witness stated he had been no dispute between the Plaintiff's father and the Defendant.
50. After the testimony of the three defence witnesses, the defence case was closed.
51. Parties were directed to file submissions on the case; the Plaintiff filed his submissions on 19th December 2022 while the Defendant was supposed to file his submissions by 18th January, 2023 with the judgment reserved for 9th February 2023.
52. While the Plaintiff filed his submissions, the Defendant had not filed his submissions by the date he was required to and by the time of writing this judgment.

Issues For Determination:

53. From the pleadings, evidence and submission by the Plaintiff on record the Court frames the following as issue for determination.
 - i) Whether the Defendant was gifted Nandi/Kokwet/353 in by the Plaintiff's father in his lifetime.
 - ii) Whether Nandi/Kokwet/353 formed part of the Estate of John Kipseretich Tuwei, the Original Plaintiff's father
 - iii) Whether in view of the grant issued in Kapsabet PMCC P & A No. 84/1993, the Defendant can still claim Nandi/Kokwet/353 as a gift.
 - iv) Whether Plaintiff's have proved his case on balance of probabilities and if so is he entitled to the reliefs sought?
 - v) Whether the Defendant's defence should be upheld?
 - vi) Who bears the costs of this case?

Analysis And Determination:

54. The Defendant and his witnesses DW2 and DW3 all testified that the Defendant had been gifted Nandi/Kokwet/353 by the Plaintiff's father in his lifetime; the Defendant being a nephew to the Plaintiff's father and a cousin to the Plaintiff.
55. In answer to issue number, any gift given to the Defendant in the lifetime of the Plaintiff's father would qualify to be a gift *inter vivos*.
56. The test as to whether the property, like Nandi/Kokwet/353 was, a gift *inter vivo* was laid down in the decision in the case of *Re Estate of the Late Gedieon Manthi Nzioka (deceased)* [2015] eKLR where he Court held

“for gifts *inter vivos*, the requirements of the 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 valid...”



57. In *Kagina vs Kagina and 2 others*, the Court of Appeal appreciated both perfected and imperfect gifts as being gifts inter vivos by holding that

“we have revisited that rival position on the record and agree with the position taken by the Judge that a deceased person has capacity to divest himself of property during his lifetime known in law as gifts intervivos in which the Judges opinion and correctly so in our view are not only protected under the Act but are also sanctionable by a court of law irrespective of whether they are perfect or imperfect. By perfect is meant complete, meaning transfer of the gift inter vivos in favour of the beneficiary, was effected and completed during the lifetime of the deceased while by imperfect is meant the transfer of the gift I favour of the recipient was incomplete as at time of the demise of the deceased. As correctly observed by the Judge, lack of completion of the process of transfer does not itself render the gift inter vivos invalid. It can be perfected by the grant holder if there is no contest over it or alternatively sanctioned by a Court where proven.”

58. The Plaintiff's Advocates have cited the decisions in the cases of *Re Estate of late Gedieon Manthi Nzioka*, as well as the *Re Estate of Kiptoo Melgut (2019) ECLR* and *Re Estate of Godnana Sangoro Gayo*; all which indicated how a gift intervivos is made.

59. The Defendant did not file any submissions on this issue.

60. From the above decisions, it follows that for a gift intervivos to be recognized, it must have been made in writing by way of a deed or a transfer and either completed during the lifetime of the donor or if not completed it can be perfected by the Grant holder, if there is no contest over it or sanctioned by a Court where proven.

Applying the above test to over current case, whereas the Defendant and his witnesses pleaded and testified that Nandi/Kokwet/353 has been gifted to the Defendant, they did not adduce evidence of a written deed or transfer made by the Plaintiff's father in favour of the Defendant.

Moreover the gift herein is contested by the holder of the grant and the objection proceedings filed by the Defendant in *Kapsabet PMCC P & A No. 84/1993* whose proceedings were produced as P Exhibit 2, the objection having been dismissed, the inevitable conclusion is that there gift in favour of the Defendant has not been proven.

Thus in answer to issue number 1 the Court finds no evidence of a gift intervivos in favour of the Defendant made in the lifetime of the Plaintiff's father.

61. The Court shall now answer issue number 2, as to whether the Nandi/Kokwet/353 formed part of the Estate of the late John Kipsertich Tuwei, the Plaintiff's father.

62. It was PW1 evidence as well as DW1 evidence that the property initially belonged to the Plaintiffs father John Kipsritich Tuwei. This evidence was confirmed by the green card P Exhibit 3 which showed at entry 1 that the property indeed belonged initially to John Kipsertich Tuwei having being registered to him on 4/9/1968. It follows therefrom that upon his demise, the property formed part of his Estate and it was eligible for distribution in a succession cause to his beneficiaries. The Defendant in his evidence indeed confirmed that a succession cause had been filed by the Plaintiff and a grant issued to him, that he did not challenge the Grant but he had filed objection proceedings which was dismissed.

63. Accordingly, the Court makes a finding that Nandi/Kokwet/353, formed part of the Estate of Johana Tuwei and was rightly distributed vide *Kapsabet PMCC P & A No. 84/1993*, and there be no appeal to the issuance of the Grant, the Plaintiff obtained the ownership of Nandi/Kokwet/353 by transmission



albeit as a trustee for his siblings. The occupation by the Defendant was therefore without any legal basis, having not proved the gift *inter vivos* to him and it thus amounted to trespass.

64. In arriving at the said finding, I am guided by the Court of Appeal decision in the case of *Munyole v Munyole* Civil Appeal 21/2017 2022 (KECA) 37 KCR 18/2/2022. Where the Court observed and held that

“having considered the affidavit evidence presented before the trial Court, we find no basis to fault the conclusion that it arrived at aside from the Appellant averments that the deceased purchased Bokoli/Chwele/1065 and settled her house on it as there was hostility between her house and that of her co-wife, no evidence was tendered to show that this property was gifted to her and her house by the deceased. In his lifetime. Both the deceased properties, therefore were available for distribution between his beneficiaries from both houses in accordance with the provisions of Section 40 of the *Law of Succession Act*.”

65. This was the position taken by the Environment and Land Court in the decision in *Charles Gitahi Kamau v District Land Registrar Nakuru*. Where the Court observed at paragraph 15

“in the premises to the extent that as at the time of her death, the deceased had not transferred the portion of the land to the Plaintiff the suit land Nakuru/Paive/571 become part of the deceased estate and fell to be administered and distributed in accordance with the law of succession.”

The Court thus answers issue No. 2 in the affirmative.

66. Issue number 3, will be answered in the negative, in view of the findings in issue numbers 1 and 2 above, hence the Court finds that the Defendant having not proven a gift and Nandi/Kokwet/353 having been distributed in Succession Cause No. 84 of 1993, the Defendant cannot claim the same as a gift.

67. The Plaintiff testified and called witnesses, all who corroborated his testimony that the suit property belonged to his father and had obtained ownership thereof by way of transmission through a Grant in Succession Cause No. 84 of 1993, the original title deed in respect of Nandi/Kokwet/353 was produced in Court, and there having been no allegations of fraud and/or illegality proven by the Defendant, it is the Courts view that the Plaintiff has proven ownership of Nandi/Kokwet/353 and his property interests must be protected under Section 24, 25 and 26 of the *Land Registration Act*.

68. On a balance of probabilities the Plaintiff has proven his case, and is deserving of the orders sought in the plaint. The Defendant sold his parcel of land Nandi/Kokwet/358 and settled ostensibly on a promise of a gift on the Plaintiff's property has no one but himself to blame in the circumstances; as his defence fails in its entries.

Disposition

69. The Court thus enters judgment in favour of the Plaintiff for eviction of the Defendant and a permanent injunction restraining the Defendant whether by himself his servants and/or agents from entering or using or interfering with the Plaintiff's quiet possession of the said parcel of land.

70. The Plaintiff did not submit on the prayer of mesne profits and General Damages for trespass, hence the Court does not make any award on General Damages for trespass.

71. The Plaintiff shall pursuant to this judgment issue a 60 day eviction notice to the Defendant.

72. The costs of the suit are awarded to the Plaintiff in any event.



DATED AT KAPSABET THIS 9TH DAY OF FEBRUARY, 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Ms Otuma holding brief for Mr. Omusundi for the Defendant

Ms Bonareri holding brief for Mr. Isiji for Plaintiff.

