



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND

AT MALINDI

ELC NO. 226 OF 2018

AGNES RIMANDO LEMOMO.....PLAINTIFF

VERSUS

ANN WANJIKU LEMOMO.....1ST DEFENDANT

LEONARD LEMOMO LEMEMPASA.....2ND DEFENDANT

SIMON MTUKEI SILILI LEMOMO.....3RD DEFENDANT

JUDGMENT

By a plaint dated 13th December 2018 the plaintiff herein sued the defendants jointly and severally seeking the following orders:

- a. For an order of eviction be issued against the defendants or any person claiming under them, being their agent, servant or employee from that mansion standing on that parcel of land known as KILIFI/MTWAPA/1410 measuring one (1) Acre.**
- b. An order of permanent injunction to restrain the defendants, anybody claiming under them, their servants and or agents from entering, occupying or doing any act on that parcel of land known as KILIFI/MTWAPA/1410.**
- c. Costs of this case be awarded to the Plaintiff.**
- d. Any other relief the court may deem fit and grant.**

The defendants responded by filing a defence and counterclaim dated 19th December 2018 where they averred that the Plaintiff purchased the suit land but later gave the 3rd Defendant as a gift. That the 3rd Defendant then proceeded to construct a mansion from his resources. The Defendants sought the following orders:

- a. A declaration that the gift of one (1) acre of land on plot No. KILIFI/MTWAPA/1410 is absolute.**
- b. A declaration that the 3rd Defendant is the absolute and beneficial owner of the one (1) acre of land on plot No. KILIFI/MTWAPA/1410.**
- c. In the alternative a valuation and refund of all the developments done on one (1) acre of land on plot No. KILIFI/MTWAPA/1410 by the 3rd Defendants.**
- d. Costs of this counterclaim.**
- e. Interest at court rate.**
- f. Any other or further relief this Honourable Court may deem (fit) to grant in the circumstances.**

PLAINTIFF'S CASE

PW1 adopted her statement and stated that she purchased the suit land KILIFI/MTWAPA/1410 vide a sale agreement dated 18th April 2007 from one Arthur Munyori Mwangi and Margaret Njeri Mwangi.

It was PW1's evidence that she paid a consideration of Kshs 960,000/= and proceeded to build thereon a five-bedroom mansion (the mansion) and furnished the same upon completion. She also testified that while the construction was ongoing, she invited her brother, the 3rd Defendant to assist supervise the works since she lived in the United States of America but she financed the entire construction.

PW1 stated that later on the same year, she discovered that the 3rd Defendant had invited the 1st and 2nd Defendants into the mansion together with the 3rd Defendant's family. PW1 further stated that in 2018 the Defendants chased her from the suit land and have since refused to let her enjoy exclusive possession.

PW1 relied on the list of documents dated 28th August 2019 and denied ever gifting the suit land to the 3rd Defendant and that the 3rd Defendant could not have built the mansion since he has never had any known form of employment or source of income.

PW1 produced certified transaction Records from Western Union and other money transfer platforms on how she financed the construction and furnished of the house. She further gave an account as to how she put up the house and that she would travel to the country once a year to pay for construction materials from Kanamai Timber Hardware Limited. That the materials supplier would transport the materials purchased to site as and whenever it would be required.

It was PW1's evidence that she is a biological daughter to the 1st Defendant, step daughter to the 2nd Defendant and step sister to the 3rd Defendant with a family home and a large chunk of land in Loitoktok where they reside.

PW1's case was closed upon her testimony and there being no evidence from the defendants their case was also marked as closed.

PLAINTIFF'S SUBMISSIONS

Counsel reiterated the evidence of the plaintiff and stated that the plaintiff has proved that she is the rightful owner of the suit land and that there was no evidence to prove that she had gifted the suit land and the mansion to the 3rd defendant.

Counsel further submitted that the Defendants' claim lacks both factual and legal basis as envisaged under section 3 of the Law of Contract Act, Cap 23 Laws of Kenya which provides as follows:

No suit shall be brought upon a contract for disposition of an interest in land unless:

i. Is in writing.

ii. Is signed by all the parties thereto: and

iii. The signatures of each party signing has been attested by a witness who is present when the contract was signed by such party.

Further that a disposition is defined under Sec 3(5) of the Act to include a transfer and a devise bequest or appointment of property contained in a will.

Counsel also cited the case of **RE ESTATE OF GEDION MANTHI NZIOKA (DECEASED) (2015) eKLR** where Nyamweya J. stated that

“Gifts of land must by way of registered transfer, or if the land is not registered it must be writing”.

Counsel also submitted that no person, authority or court can compel a donor to perfect or complete a gift and relied on HALSBURY'S LAWS OF ENGLAND 4th Edition vol. 20(1) paragraphs 32 to 51. It states that:

“Where a gift rests merely in promise whether written, or oral 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, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed....., binding event 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 compromised 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”.

Counsel therefore urged the court to find that the plaintiff has proved her case on a balance of probabilities and that the defendants' failure to prosecute their counterclaim was a clear indication that they have no case against the Plaintiff.

ANALYSIS AND DETERMINATION

I have considered the pleadings, the evidence and the submissions by counsel and the issues that arise are as follows:

- a. **Whether the plaintiff is the rightful owner of the suit land together with the mansion built thereon.**
- b. **Whether the 3rd Defendant acquired interest over the suit land by way of a gift from the Plaintiff.**

On the issue whether the plaintiff is the rightful owner of the suit land, the plaintiff gave evidence in support of her case and produced a sale agreement and receipts of transfer of money via Western Union for the construction of the 5 bed roomed house. This evidence was uncontroverted by the defendants.

The defendant did not give evidence and as such the defence filed remains an allegation which has not been tested vide cross-examinations. In the case of **Janet Kaphphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007** Ali-Aroni, J. citing the decision in **Edward Muriga Through Stanley Muriga v Nathaniel D. Schultzer Civil Appeal No. 23 of 1997** held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

The 3rd defendant’s allegation that the plaintiff had gifted the land and the mansion to him was not proven and therefore it remains as such. In the case of **Annah Muthoni Ireri v William Njeru Mbogo [2020] eKLR**, Angima J held that a gift of a parcel of land is valid upon compliance with the necessary registration formalities. There is also a mandatory procedure for a disposition of an interest in land prescribed in the Land Registration Act, 2012. Section 36 reads:

36. Dispositions and dealings affecting land.

(1) A lease, charge or interest in land shall not be disposed of or dealt with except in accordance with this Act, and any attempt to dispose of any lease, charge or interest in land otherwise than in accordance with this Act or any other law, shall not, extinguish, transfer, vary or affect any right or interest in that land, or in the land, lease or charge.

(2) Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract.

The Court of Appeal in **Registered Trustees Anglican Church of Kenya Mbeere Diocese v David Waweru Njoroge [2007] eKLR** while dealing with a similar issue, cited the case of **Pennington vs. Waive [2002] 1 WLR 2075** where Arden L.J explained as follows regarding gifts:

“...The basic principle underlying all the cases is that equity will not come to the aid of a volunteer. 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 needs no assistance from equity and the gift is complete. It is on that principle which is laid down in (Rose vs. Inland Revenue Comrs [1952] Ch 499) that in equity it is held that a gift is complete as soon as the settler or 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, the donee to complete his title”.

The court went further to quote *SNELL’S EQUITY 29th Edition page 122 paragraph (3)*:

“..... where however 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. Thus, in Re Rose, Midland Bank Executor & Trustee Co. Ltd. Vs. Rose [1949] Ch. 78 the donor executed a transfer of shares in a private company and handed it with share certificate to the donee who died before it had been registered. Although the donee’s legal title would not be perfected until the company had passed the transfer for registration or at least until the donee had an unconditional right to be registered, it was held that the gift was good because the donor had done all that was necessary on his part. 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 proprietor.” (Emphasis ours).

It is important to note that the hearing of the suit commenced on 22nd October 2019. Counsel for the plaintiff informed the court that she was ready to proceed but counsel for the defendant applied for adjournment which was declined by the court. The matter was slated for hearing 11.30 am but at that time neither the defendants nor their counsel was present therefore the matter proceeded.

The Defendants filed an application dated 21st November 2019 to reinstate their defence and counterclaim which was allowed vide a ruling delivered on 30th April 2021 but they never took advantage to prosecute their defence and counterclaim. They did not file any submissions.

I find that the plaintiff is entitled to the orders as prayed as she has proved her case against the defendants and grant the following specific orders:

- a. A declaration that the Plaintiff is the rightful owner of the whole suit land KILIFI/MTWAPA/1410 and the mansion.
- b. The defendants or any person claiming under them as agents, servants or employees to give vacant possession of the mansion standing on that parcel of land known as KILIFI/MTWAPA/1410 measuring one (1) Acre within 30 days failure to which eviction to issue.
- c. An order of permanent injunction is hereby issued to restrain the defendants, anybody claiming under them, their servants and or agents from entering, occupying or doing any act on that parcel of land known as KILIFI/MTWAPA/1410.
- d. Defendants to pay costs of the suit to the plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF NOVEMBER, 2021

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M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.