



**Thuo v Kahenya (Environment & Land Case 160 of 2012)
[2025] KEELC 3706 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3706 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 160 OF 2012**

A OMBWAYO, J

MAY 9, 2025

BETWEEN

JOSEPHAT MWAURA THUO PLAINTIFF

AND

LOISE WAMBUI KAHENYA DEFENDANT

JUDGMENT

Introduction

1. The Plaintiffs commenced this suit vide a Further Further Amended Plaint dated 8th November, 2024 against the Defendant seeking the following orders:
 1.
 - a. Vacant possession in respect to all those parcels of land known as Nakuru/Bahati/Settlement Scheme/217 and Nakuru/Bahati/329 and or orders of eviction therefrom of the Defendants, their children, agents and or servants.
 - aa) An order for removal of the cautions registered against Title No. Nakuru/Bahati/Settlement Scheme/217 and Title No Nakuru Bahati/329. aaa) The Officer Commanding Police Station Bahati to supervise the eviction of the Defendants from all those parcels of land known as Title No. Nakuru/Bahati/Settlement Scheme/217 and Title No Nakuru Bahati/329
 2.
 - b. Orders of Permanent injunction restraining the Defendants either by themselves, children, servants and agents from in any manner whatsoever interfering with the Plaintiff's quiet enjoyment of all those parcels of land known as Nakuru/Bahati



Settlement Scheme/217 and Nakuru/Bahati/329 or dealing with the same in any manner detrimental to her interest.

bb) Costs of the suit

3.

c. Interest on bb) and c) above.

4.

d. Any such other further and other relief this Honourable Court deems fit to grant.

Plaintiff's case

2. Waithera Gatiba testified as PW1 where her witness statement dated 16th February, 2018 was adopted as her evidence in chief. It was her testimony that together with Duncan Kamau Mwangi, they were joint administrators of the estate of Josephat Mwaura Thuo (deceased). She testified that the deceased and her father were working together for a settler. She further testified that the deceased resided in Bahati. She testified that the Defendant was the deceased's last-born daughter. She went on to testify that before his death, the deceased briefed her about his assets. She testified that on land parcel 329, it had the deceased house while parcel 217 had been willed to the eldest daughter of the deceased. She further testified that the eldest daughter was gifted parcel 217 since she had looked after him. She added that land parcel 329 was given to Dorothy Mukami who took care of both the mother and the father. She testified that the deceased and the Defendant had a disagreement since the Defendant had not supported him. She further testified that there was a day when the Defendant and the deceased went to Nakuru where the deceased claimed that he was made to sign some documents which he never understood. She testified that the deceased stated that he had been asked to vacate the land. She testified that Duncan Kamau Mwangi his coadministrator was employed by the deceased where he assisted him when the deceased wife passed away.
3. Upon cross examination by Orege, PW1 stated that she learnt that the deceased had appointed her as an executor of his will after his death. She further stated that she was informed of the same by the deceased daughter, Dorothy Mukami. She explained that when she was shown the will, she read the contents. She stated that Salome Njeri one of the deceased's daughter had passed on. She added that Dorothy was given a parcel of land as per the will. She confirmed that the deceased's children had not signed a consent for him to be the administrator. She stated that the children did not agree with each other and that together with Duncan, they obtained ad litem grant and proceeded with the case the deceased had filed.
4. PW1 was referred to the witness statement where she stated that the deceased told her about the Kshs. 2,000,000/= which the Defendant, Loise Wambui was to pay for his upkeep and medication. She stated that the Defendant had not consented to her being the administrator of her father's estate. She stated that the deceased had no mental capacity up to the time of his death.
5. Upon re-examination, she stated that she had not instituted the instant case.
6. Duncan Kamau Mwangi testified as PW2 where his witness statement filed on 19th March, 2019 was adopted as his evidence I chief. He testified that he knew Joseph Thuo (deceased) since he lived with him as his worker from 2003. He further testified that he knew Ann Waithera Gatiba as she was a friend to the deceased. He stated that Dorothy Nyokabi Kimani was the deceased's daughter. He also testified that he knew Loice Wambui Kahaya. He went on to testify that the present case was between the late Josephat Mwaura and Loice Wambui Keheya. He added that Josephat Mwaura Thuo was the father



- to Loice Wambui. The dispute between the two was that before the late died, the daughter came and stayed there for a few days. He testified that during the stay they were called by Mzee and introduced them to the daughter. He further testified that the daughter informed them that she would pay their dues. He further testified that she told them to prepare (mzee) for father Josephat Mwaura Thuo who was to come to town. He testified that the Defendant came with her son where they took mzee to town and later came back to the house in the evening.
7. He explained that on the following day the Defendant and her son left and never came back. He further explained that after 2 months mzee called a meeting and told them that since Loice had not fulfilled what she had promised he could not manage to pay. He testified that he kept lamenting about the daughter conning him. He testified that he had land number Nakuru Bahati 329 and Nakuru/Bahati /217. He testified that the two parcels of land were kept for himself. He testified that mzee told him that they had agreed with Loice Nathan Kahenya that the daughter would give him 2 million in exchange for the 2 parcels of land. He testified that on 24th January, 2013 he realised that Loise had already transferred the land into her name. He further testified that he lived with mzee and that in 2013 he was still in the homestead. He added that the house was situated at Bahati being Nakuru/Bahati/329 and 217. He testified that the land had house, structures, garage and cow shed. He further testified that the structures were there in 2009. It was his testimony that mzee, himself and Dorothy lived in the said structures. PW2 testified that he was given a portion of land by mzee. He also testified that the Defendant stayed in America and has never lived in the land. He added that he had not seen Loice at mzee's funeral.
 8. Upon cross examination by Orege, he confirmed that he had never seen Loise when mzee was sick.
 9. He denied that Dorothy the deceased's daughter was his wife. He stated that Veronica Waithera Mungai was his wife and his mother in law is Mercy Wanjiru Mungai. He confirmed that the deceased was the last born of Josephat Mwaura Thuo. He stated that he had only met 2 daughters of the deceased. He further stated that Ann Waithera Gatiba, the 1st Plaintiff was not related to mzee by blood. He confirmed that he came to the case through a limited grant. He also confirmed that none of the children signed the authority. He stated that he was not involved in any succession cause. He further stated that mzee never complained about the other children other than the Defendant. He stated that mzee used to pay him Kshs. 3,000/= salary. He added that the Defendant never paid them their salaries despite having promised to do so. He stated that mzee had cows and crops he used to pay salaries. He added that when the Defendant was to pay the 2 million and that the cows and crops were still intact. He confirmed that he had been given one quarter of an acre from the 2 parcels of land. He added that the ¼ acre was from 329 and 217. He stated that his parcel number was Bahati 331. He confirmed that when mzee appeared with the Defendant, he looked okay. He stated that they were 7 of them who met and added that he was not present when mzee gave the Defendant the land. He further stated that that Dorothy and the Defendant were sisters. He admitted that he never knew how they related to each other. He stated that mzee made the claim that he takes over the case after he died. He added that mzee made him the administrator and no one has challenged their appointment as administrators.
 10. Dorothy Nyokabi Kimani testified as PW3 where her statement dated 16th February, 2018 was adopted as her evidence in chief. She testified that she lives in Bahati scheme land number 329. She further testified that Joseph Mwaura Thuo was her father and the Defendant is her sister. It was her testimony that the case revolved around land that belonged to my father. She testified that the suit land was transferred from her father to the Defendant in one day in June 2007. She further testified that Ann Duncan had been appointed by her father to take care of the property. She testified that the parcels of land were Nakuru/Bahati/329 and Nakuru/Bahati/217. He also testified that mzee died on 24th January, 2013 and had been staying in 329. PW3 testified that they stayed on the land with Duncan



- Munyi. She added that she had been staying with mzee before he died. She went on to testify that when her mother died, Duncan came in 2005 as an employee.
11. She testified that the land was currently in the Defendant's name. She also testified that she was not present when they changed the titles. She testified that her father was old and sickly and that in his will he gave her and the Defendant his property. She testified that in 329, there was a house which she lived with her son having occupied the same in 1996. It was her testimony that parcel number 329 was approximately 3½ acres. She went on to testify that 217 was approximately 3 acres given to Sybelle Wanjiku Gitiha. She further testified that the transfer was illegal.
 12. Upon cross examination, she stated that she last saw the Defendant in 2013 when she came to bury the father. PW3 was referred to the will where she confirmed that she was given Bahati settlement/213. She also confirmed that they all had their titles. She further confirmed that before 1996, she lived in mother's parcel of land which she later sold and lived with her father. She admitted that when the will was done, 329 and 217 were in the Plaintiff's name. She stated that she was not aware that 217 was in her name since 2003. She stated that she saw the documents at home since her late father had them. She confirmed that the title deed for 329 was given on 13th May, 2008 while that for 217 was given on 8th October, 2003. She stated that she was given the title deed for 213 in 2003. She also stated that they were all given their title deeds in 2003. She admitted that she never paid for title deed. We did not buy land from our father. She stated that in 2008, mzee was of sound mind. She added that the administrator ad litem was not their relatives. She added that they took the will to Ann Waitherera with Sybella. She also stated that Prisca signed on behalf of Kisila. He stated that on 11th January, 2013 their father was of very sound mind before he died on 24th January, 2013. She confirmed that the will had a thumbprint since he could not write. She stated that her sister was to pay 2 million for medicine and workers and not for land. She further stated that Salome (deceased) was given the land by her late father. She added that her father gave Duncan and Ann permission to take over the matter. She stated that Jedida had also passed on. She also stated that she never harassed the Defendant.
 13. Upon re-examination, she stated that the suit was filed by their late father. She stated that their late father made the will and that the case was taken over by Waithera and Duncan. She added that no one opposed to the administrator ad litem. She stated that her father did the will.
 14. Sybella Wanjiku testified as PW4 where her statement dated 19th November, 2019 was adopted as her evidence in chief. I stay in Kiambu Githunguri. I was a teacher but now a retired leader. She testified that she knew Ann Waithera Kahenya and Duncan Kamau Mwangi as well as the Defendant.
 15. It was her testimony that Duncan Kamau Mwangi used to work for their late father Josephat Mwaura. She testified that she was the 1st born while the Defendant was last born. She further testified that their father had 11 children all of whom he left them with 11 parcels of land. She testified that their father remained with 2 parcels of land for himself and for their late mother being parcels no. 217 and 329. She went on to testify that her mother died and that Dorothy used to stay with her father. She also testified that their father stated on his death bed that Dorothy was to take over the house. PW4 testified that the Defendant went with their late father where they met the advocate and had the land transferred to her on condition that Loise was to give his father Kshs. 2,000,000. She testified that the land was exchanged and that the Defendant did not give their father the money. She added that their father got annoyed over the same and filed the present case. She also testified that their father decided to write the will. She further testified that their father stated that parcel number 329 was for Dorothy whereas 217 was hers. She added that the land was not to be sold but to be given out freely. She testified that 329 was occupied by Dorothy.



16. Upon cross examination by Orege, she stated that she retired as a teacher in 1995. She also stated that they were all given land by their father but that she could not recall the time. She confirmed that Salome Gichungu (deceased) was their sister and she was given land. She confirmed that their father showed them his will when he was still strong. She added that he went with the Defendant who lied to him. She further confirmed that the will was done after the land had already been transferred to the Defendant. She stated that their father never sold any land. She also stated that nobody asked for money from the Defendant. She went on to state that the Defendant lied to their father that she would give him money. She admitted that they had no problem with the Defendant. She stated that the parcel of land was given by their father. She also stated that the Defendant was more important than the land and that it was bad to case with one's dead father. PW4 confirmed that if the Defendant had not given the 2 million, the land could still not have been land for her. She stated that the 2 million shillings was to be used to pay workers and machines. She added that their father had not told them how to share the land. She confirmed that the land was curved and that mzee had reserved land for her.
17. Upon re-examination, PW4 stated that the present case had been filed by their father. That marked the close of the Plaintiffs case.

Submissions

18. Counsel for the Plaintiff filed his submissions dated 13th March, 2025 where he identified two issues for determination. The first issue is whether or not the transfer of the two parcels from Josphat Mwaura Thuo (deceased) to Loise Wambui Kahenya (Defendant in ELC 160 of 2012) was lawful. While submitting in the negative, counsel argues that the sale agreement dated 12th May, 2008 was under protest by the Plaintiffs for the reason that it was fraudulently obtained. It was his submission that the Josphat Mwaura Thuo (deceased) was misled into signing a different document after being made to believe that he signed was what he had bargained for only to realize after the transfer had already been done.
19. He further submits that the deceased was about 100 years at the time he signed the agreement and therefore he could not read but only rely on what the Defendant told him. He submits that the Defendant took advantage of the deceased old age and ailing condition and therefore the agreement is not enforceable. He submits that this is evident from the deceased's ID and medical card. It was his submission that the deceased's believed that he was to get Kshs. 2 Million for transfer of the said parcels. He further submits that although parties are bound by the documents they signed, the exception to that rule is that when a party is misrepresented or fraudulently made to sign a deed which he had not intended to sign. He relied on the case of Lord Wilberforce in Saunders V Anglia Building Society [1970] 3All ER 961 cited with approval the case in Josephine Mwikali Kikenye V Omar Abdalla Kombo & Another [2018] eKLR. It was his submission that the Plaintiffs have established the conditions to the applicability of the doctrine and as such the agreement is not enforceable. He added that the transfer was fraudulently obtained thus null and void. He submits that the allegation by the Defendant that the suit property was given to her as a gift by the deceased was false. He cited the case of the Estate of Ruthe Nyakanini Rukwaro (deceased) Succession Cause No. 52/2010 (2016) eKLR. He submits that if at all they were to consider it as gift inter-vivos, it was conditional on a promise to pay 2 Million and take care of the donor's medical expenses. He submits that the transfer was unlawful and thus should be cancelled.
20. The second issue was whether the allegation of trespass by Loise Wambui Kahenya (Plaintiff in ELC No. 85 of 2014) is merited. He submits that having already established that the transfer was unlawful, the Defendant is not the legal owner of the parcels thus not entitled to the eviction and injunction orders sought. He argued that when one alleges trespass, he/she ought to prove immediate and exclusive



- possession of the property in question. He relied on the case of Municipal Council of Eldoret V Titus Gatitu Njau [2020] eKLR. He submits that the Plaintiff does not allege trespass on account of immediate possession but on account of ownership. He submits that the allegation of trespass does not hold thus the Defendant is not entitled to the orders sought. In conclusion, he urged the court to allow the Plaintiff's case and dismiss the case in ELC No. 85 of 2014.
21. Counsel for the Defendant filed a his submissions dated 16th June, 2023. He gave a summary of the evidence and submits that consolidation of the suits was joint handiwork of PW3 and PW4 who took advantage of the fact that DW1 resided in USA and the deceased's health and age. It was his submission that DW1 showed how the deceased willingly initiated the idea of giving her the parcel of land as a gift which process he freely participated in leading to the transfer of the two parcels in her favour. He added that DW2 confirmed that the relationship between DW1 and the deceased was very cordial. He further submits that the document did not amount to a will as envisaged under the Law of Succession Act. He submits that the document bore a thumb print with no nexus to the deceased who as it was confirmed in court used to append his signature on documents prior to 11th January, 2013. It was his submission that the said document was made 13 days to his demise thus the deceased lacked the capacity to make a will. He added that the source of the document was not clear as it was alleged to have been prepared by an advocate but there was no evidence in support of the same. He also submits that the contents of the document was also inconsistent as there were both typed and handwritten with no date. Counsel also submits that the document had not referred to the fact that the deceased had willingly transferred the suit property in favour of DW1. It was further his submission that the purported will and administrators to the estate were total strangers to the deceased family given the fact that none of the beneficiaries had consented to them being authorized. He relied on Section 26 of the Land Registration Act and submits that the Plaintiff had not satisfied any of the exceptions to the above provisions in proof of their misplaced claim. He further relied on Section 107(1) of the Evidence Act and submit that the Plaintiff failed to discharge the burden proving any suggestion that DW1's registration as the owner of the suit land fell under the exceptions to Section 26 aforesaid.
22. He also filed a supplementary submission dated 26th February, 2025. He identified one issue for determination being the credibility and effectiveness of the document dated 13th January, 2013 alleged by Ann Waithera Gatiba and Duncan Kamau Mwangi to be the will of the late Josephat Mwaura Thuo dated 13th January, 2013 and the capacity of the deceased to make a valid will that time. He submits that the will indicated that the deceased had bequeathed title No. Nakuru/Bahati/217 to Sybella Wanjiku Githia and title No. Nakuru/Bahati/329 to Dorothy Nyokabi Kimani. He submits that there was no proof that the Nakuru/Bahati/217 existed. He submits that the title registered in the Defendant's name as produced in court was Nakuru/Bahati/Settlement Scheme/217 and No. 329. He submits that the Plaintiff never demonstrated the existence of any grant of probate with will annexed that was confirmed by the court. He further submits that if the grant was in existence, Dorothy Nyokabi Kimani would have filed a Counterclaim against the Defendant in ELC 85 of 2014 but that was not the case. Counsel also submits that the deceased lacked the capacity to freely make a will as at 13th January, 2013 sue to his health conditions and advanced age. He relied on Section 51 (3) of the Law of Succession Act and submits that the said provisions were not demonstrated by the Plaintiff.
23. It was his submission that the 2nd Defendant in ELC No. 85 of 2014 did not oppose the claim by Loise Wambui Kahenya. He further submits that on 19th February, 2025 when the matter came up for hearing of the 2nd Defendant's case he had not entered appearance or filed defence thus the matter was dismissed. He urged the court to dismiss the Plaintiff's claim against the Defendant with costs. He also urged the court to dismiss the 1st and 2nd Defendant's case in ELC 85 of 2014 for failure to enter appearance.



Defence case

24. Loise Wambui Kahenya DW1 testified that she resided in California, USA. It was her testimony that she was aware of the present suit where Anne Waithira Gatiba and Duncan Kamau Mwangi sought to have her titles, Nakuru Bahati/329 and 217 cancelled. She testified that she was not related to Ann Waithira Gatiba and Duncan Kamau Mwangi but that they were the Plaintiffs in ELC 160 of 2012. She further testified that in ELC No. 85/2014 she had sued her sister Dorothy Nyokabi Kimani who invaded the property she had been gifted. She went on to testify that Ann Waithira Gatiba and Duncan Kamau Mwangi were the administrators of her late father's estate. She relied on her statements filed in the two matters and a supplementary bundle filed on 17th September, 2018 and a supplementary list filed on 9th October, 2018.
25. It was her testimony that her father gifted her the two titles in May 2008. She exhibited the copy of the agreement dated 12th May, 2008 and the deed of gift. She testified that she was taken to the office of Mirugi Kariuki & Co advocates by her sister Dorothy and that her father was present as well. She testified that she had supported her father financially until when he passed on in February, 2013. She further testified that she got to know about the instant case in 2014. It was her testimony that her sister Dorothy used to inform her of her father's health status. She denied that she was to pay Kshs. 2,000,000/= towards the land it was a gift. She further testified that their deceased father gifted each of them land in 2003. She was referred to the last will and testament of Joseph Mwaura Thuo exhibited by the Plaintiffs and testified that under paragraph 2 all her siblings were given land. She added that as per the document she had been given land parcel 212. She testified that her sister Salome Njeri she was married to one Samuel Gichuru of KPLC then and she was given 2 parcels.
26. She further testified that as per the documents Sybella Wanjiku Githiha was supposed to get parcel 217 and that parcel 329 was supposed to be given to Dorothy Nyokabi Kimani. She testified that the documents did not indicate that any beneficiary was to pay any money.
27. It was her testimony that Dorothy Nyokabi in her witness statement stated that Kshs 2.0 million was to be deposited for the 2 properties gifted by her father. She denied any discussion on the issue of payment of any money with her late father. She further testified that parcels 212, 217 and 329 were all in her name and that her father had been buried in parcel 217. She added that the family home was on parcel 329 measuring 2.18 ha, 217 was 1.37ha and 212 was about 0.5ha. She further testified that parcels 329 had been transferred to her in 2008 while parcels 217 was gifted to her and not her sister Sybell Wanjiku.
28. She testified that the document headlined the last will of her father was not signed by her late father. She further testified that the document was dated 11th January 2013 and was thumb printed by an unknown person. She added that her father used to sign his signature. She also testified that she did not know the persons who signed the document as witnesses. She also testified that her mother had passed on in 2000 before her father. She went on to testify that her sister Dorothy occupied her plot No.217. She urged the court to dismiss the suit that sought for cancellation of her titles and that she be granted the orders she sought for in ELC No. 85 of 2014
29. Upon clarification by the court, she stated that she came to Kenya the previous week and that she was staying in Nairobi with her son. She confirmed that she agreed with the contents of paragraph 2 of the documents headlined last will of her late father. She confirmed that all the persons, named therein were her siblings. She further confirmed that some of the siblings resided within the homestead (plots neighbouring plot 329). She stated that she was apprehensive of her sister Dorothy and her children. She also confirmed that all her brothers were deceased.



30. She stated that no one had threatened her in 2013. She added that she went home in 2014 but I did not reach home. She admitted that as per the documents in ELC 160/2012, the same was commenced by her father. She added that she got to know of ELC 160/2012 in 2014 when her advocate informed her. She stated that she could not recall having initiated a process of removal of caveat at the Lands office.
31. She was referred to the objection proceedings to removal of caution before the Land Registrar where she stated that she was never aware of the same. She also stated that she never knew the advocate by the name Mwangi who purportedly represented her before the Land Registrar. She stated that she only got to know of the registration of a caution from her sister Sybella. She also confirmed that she attended her father's burial in 2013 after which she then sought to lease her plot 329. She confirmed that she used to check on her father when he was ill. She stated that Michael Njuguna Mbugua was to lease her land parcels 212 and 239. She added that she could not recall having signed any lease. She also stated that she could not recall her late father's caregivers. She admitted that her sister Dorothy was staying at their home on her parcel 329.
32. She stated that her father initiated the gift giving in 2003 and since she was away, he waited until she came in 2008 to complete the gift. She admitted that she had not filed any copies of transfer and letter of consent in court. She also admitted that they were with her late father and sister Dorothy at Mr. Kahiga's office. She stated that an agreement was prepared that allowed her father to live on the land for as long as he lived. She went on to state that she was surprised her father would file a suit that sought for cancellation of titles he had voluntarily transferred to her. She stated that her late father was coerced to file suit. She further stated that the suit was initiated in March 2009 and added that when she came to Kenya in 2010, her late father never mentioned anything about any suit. She also confirmed that she had not raised any issue regarding the administrators of her father's estate to any of my siblings. She stated that she never knew any one of them.
33. She denied that her sister Dorothy took care of her father. She stated that it was her sister Jedidiah and house workers who took care of her late father. She further denied having took advantage of her elderly father. She added that her father had willingly gifted the two parcels to her but that her other siblings were opposed. She also stated that her father executed all the necessary documents to give effect to the gift. She was referred to grant in in Succession cause 179 of 2013 – ad litem which substituted the father.
34. Kahiga Waitindi testified as DW2 where he produced his statement dated 21st July, 2022 which was adopted as his evidence in chief. It was his testimony that he was an advocate of the High Court of Kenya and practiced as a partner in the firm of Mirugi Kariuki & Co. Advocates. He testified that he was aware of the documents annexed to his witness statement being a gift and an agreement. He testified that the documents were prepared at their office and he attested the signatures of the parties. He confirmed that he was present when the parties to the documents executed them. Upon cross examination by Kisilah, he confirmed that he drew the gift instrument and the agreement both dated 12th May, 2008. He also confirmed that the parties had appeared before him and that the donor was an old person in his 90s. He confirmed that he spoke to the donor in Kikuyu and English. He added he donor was proficient in English. He stated that the donee was a daughter. He further stated that others members of the family accompanied mzee and the daughter. He stated that there were two other siblings of the donee. He added that he met the mzee and the daughter one day before they signed the agreement and the gift. He stated that he acted for a lessee who had leased the gifted property from the Defendant. He admitted that he had never met mzee after he had gifted and signed the agreement. He stated that the land gifted was subsequently transferred to the Defendant but admitted that his firm was never involved in the transaction. He further stated that he only made a gift in respect of only one land parcel, Bahati/329. He stated that the agreement implied that the Defendant was the registered



proprietor. He stated that as per the title, land parcel Bahati 329 was transferred to the Defendant by the donor on 13th May, 2008. He admitted that he only dealt with only the property mentioned in the gift.

35. Upon re-examination, he stated that as per the deed of gift, the donor was to transfer the land to the donee as per clause 2.
36. That marked the close of the Defendant's case in the present suit as well as the Plaintiffs case in ELC 85 of 2014.

Analysis and Determination

37. I have considered the pleadings, evidence on record and submissions and I am of the view that the following issues arise for determination:
 - a. Whether the Defendant lawfully acquired the suit property.
 - b. Whether the Plaintiff is entitled to the prayers sought
 - c. Who should bear the costs of the suit.
38. It was the Plaintiffs case that the Defendant being the deceased's daughter, took advantage of her father's ill health and old age and acquired the suit properties Nakuru/Bahati/Settlement Scheme/217 and Title No Nakuru Bahati/329 in her name. They contend that the deceased had bequeathed the suit properties to her other daughters Sybella Wanjiki Githia and Dorothy Nyokabi Kimani in cognizance of the ongoing case between himself and the Defendant. PW3 confirmed that their late father gave all her daughters land which they were all issued with the titles in 2003. She also confirmed that at no point did the deceased sell land to any of the daughters. She admitted that the 2 Million the Defendant was to pay was for the deceased medical bills and not to purchase land. The Plaintiffs' also admitted that by the time the will was done, the title for the suit properties were already in the Defendant's name. PW1 and PW2 admitted that the beneficiaries had not consented to them being the administrators to the deceased's estate
39. The Defendant on the other hand admitted that the deceased never sold the suit properties to her but instead received them as a gift from her father. She produced the deed of gift and the agreement in support of the same. It was her contention that the siblings were opposed to the same. It was further her case that the alleged will dated 11th January, 2013 did not amount to a valid will.
31. Section 107 of the *Evidence Act*, Cap 80, states:

“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.” Further, Section 108 of the Act states:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
32. It is this court's view that the onus was on the Plaintiffs to prove that the Defendant had not lawfully acquired the suit properties.
33. I have keenly perused the court records and it is not in contention that the alleged will is dated 11th January, 2013. This was allegedly done after the title for the suit properties had already been issued in the Defendant's name. It is my view that the Plaintiffs' evidence greatly focused into the contents



and validity of the alleged will instead of how the Defendant acquired the suit lands prior to making of the alleged will.

34. In the case of *Ogwara V Mangera & 4 others* (Civil Appeal 18 of 2017) [2021] KECA 117 (KLR) the court held that:

“It is trite law 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. 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.”

35. Further, in the case of *Gathumbi V Sheikh & 4 others* [2023] KEELC 17022 (KLR) the court held as follows:

“The Plaintiff’s claim herein is in the genre of gifts inter vivos; these are gifts made between living persons. Gift inter vivos 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. 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 in order to be valid. It is not, however, 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.”

36. I have also perused through the deed of gift dated 12th May, 2008 and it is a fact that the deceased gifted the Defendant parcel number Nakuru/Bahati/329. It is also a fact that the Defendant’s title for the said suit property was issued on 13th May, 2008. I have also taken the liberty to peruse the green card (PEX1) and it is not in dispute that under entry number 4, the title for the said suit property was indeed issued to the Defendant.

37. Section 24(a) of the *Land Registration Act* provides that:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

38. Section 26(1) of the *Land Registration Act* further provides that:

“...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
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

39. Going to the other suit property being Nakuru/Bahati/217 it is evident that the green card shows the consideration as a gift of Kshs. 550,000/= and the title subsequently issued on 8th October, 2003. It was the Defendant’s claim that the same was a gift. The question begs as to what was the essence of the consideration when the property was gifted? It is my opinion that with consideration, it dislodges the



Defendant's evidence that the said property was gifted to her by the deceased. In addition, there was no evidence of deed of gift adduced for the parcel Nakuru/Bahati/217. It is this court's view that by virtue of there being no evidence of deed of gift or transfer of Nakuru/Bahati/217, it therefore meant that the said property was never gifted to the Defendant. I thus find that the Defendant to be the legally registered proprietor of the suit property. The plaintiffs are therefore not entitled to the prayers sought. The suit is dismissed with no orders as to costs.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

THE JUDICIARY OF KENYA.

NAKURU ENVIRONMENT AND LAND COURT

ENVIRONMENT AND LAND COURT DATE: 2025-05-09 16:26:26

