



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 213 OF 2001**

**GILBERT KIMANI ..... 1<sup>ST</sup> APPELLANT**

**PRESBYTERIAN FOUNDATION (PCEA) NDARAGWA PARISH ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**THE COMMITTEE KIMANI PRE-PRIMARY SCHOOL .....1<sup>ST</sup> RESPONDENT**

**NYANDARUA COUNTY COUNCIL ..... 2<sup>ND</sup> RESPONDENT**

[Being an appeal against the judgment of the Nyahururu's Senior Resident Magistrates Court  
Civil Case No. 169 of 1992 (Hon. W.N. Nyarima)]

**BETWEEN**

**THE COMMITTEE KIMANI PRE-PRIMARY SCHOOL .....1<sup>ST</sup> PLAINTIFF**

**NYANDARUA COUNTY COUNCIL ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**GILBERT KIMANI .....1<sup>ST</sup> DEFENDANT**

**PRESBYTERIAN FOUNDATION (PCEA) NDARAGWA PARISH ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Respondents in this appeal instituted a civil suit against the Appellants in the subordinate court seeking an order for transfer of plot number Nyandarua/Ndaragwa/228 (hereinafter referred as “**the suit land**”) in their favour and a perpetual injunction against the Appellants. In the alternative, payment for the value of improvements on the aforesaid plot of land. They also sought for costs of the suit and interest thereon.
2. The basis of the Respondents' claim was an Agreement in which the 1<sup>st</sup> Appellant agreed to transfer by way of gift to the 1<sup>st</sup> Respondent, three- quarters of an acre out of Plot Number 42 Ndaragwa Scheme. It was further agreed that the plot be registered in the name of the 2<sup>nd</sup> Respondent to hold in trust by the 2<sup>nd</sup> Respondent, for and on behalf of the 1<sup>st</sup> Respondent. Plot Number 42 was subsequently surveyed and numbered as Nyandarua/Ndaragwa/228. Sometime in

1991 the Respondents became aware that the 1<sup>st</sup> Appellant had unlawfully and without consent transferred the suit land to the 2<sup>nd</sup> Appellant. They commenced a suit against the Appellants seeking the aforesaid orders.

- i. That Plot No. Nyandarua/Ndaragwa/228 be transferred to the Plaintiffs (Respondents) jointly and/or severally or payment of the sum hereinafter pleaded and a perpetual injunction to restrain the Defendants (Appellants) and each of them from interfering with the Plaintiffs' (Respondents) quiet enjoyment of the said plot.
- ii. That alternatively, the Defendants (Appellants) jointly and/or severally be ordered to pay Kshs.124,760 as follows:

a) Value of improvements of the said plot –  
Kshs.119,500.00

b) Survey fees paid –Kshs.5,260.00

Total - **Kshs.124,760.00**

3. The Appellants denied the Respondents claim and in their Statement of Defence dated 29<sup>th</sup> May, 1992 put the Respondents to strict proof of all the allegations made in their Plaint.
4. At the hearing thereof, five witnesses testified in support of the Respondents claim. On the other hand the 1<sup>st</sup> Appellant gave evidence and called one witness. Based on the evidence on record, the learned magistrate held that the Respondents had proved their claim on a balance of probabilities. The orders sought in the Plaint were granted.
5. Being dissatisfied with the subordinate court's decision, the Appellant appealed to this court and in the Amended Memorandum of Appeal dated 10<sup>th</sup> December, 2001 the Appellant faulted the judgment on the following summarized grounds *inter alia*:
  - i. **That the learned magistrate erred in law and fact in finding that the gift had been made either to the first or second Plaintiffs or any of them or at all.**
  - ii. **The learned trial magistrate erred in law and fact in finding that the first Plaintiff had legal capacity to own land as as the time of the purported gift.**
  - iii. **That the learned magistrate erred in law in making an order for transfer of Nyandarua/Ndaragwa/228 to the Plaintiffs or either of them which in fact that was not the piece of land subject matter of the intended gift;**
  - iv. **That the learned magistrate erred in law and fact in making an order of specific performance in a matter of unperfected gift which amounted to interfering with the right and freedom of the first Defendant to make gifts/gift as he wished/wishes;**
  - v. **That the learned magistrate erred in law in finding that the plaintiffs had proved their case to the required standards taking into account the evidence on record;**
  - vi. **All in all the learned magistrate misapprehended or misconceived the law relating to gifts.**
  - vii. **That the magistrate erred in law and fact in delivering or causing to be delivered judgment out of time rendering it a nullity and unenforceable in law.**
  - viii. **The magistrate erred in law and in fact in allowing and/or directing the Counsels to submit by way of "written submissions" a procedure which is not provided by the law.**
6. At the hearing of the appeal the 2<sup>nd</sup> Appellant abandoned the Grounds of Appeal numbered as (2), (7) and (8) and asked this court to allow its appeal on the other grounds and that the judgment of the subordinate court be quashed and set aside. Further that the Respondents be condemned to meet the costs of the appeal and of the trial in the subordinate court.
7. The parties were represented by the learned counsel, **Mr. Chege Gakuhi** for the Appellants and **Mr. Kariuki Mwangi** for the Respondents.
8. On 20<sup>th</sup> June, 2014 parties took directions to the effect that the appeal be disposed of by way of

written submissions. The appeal by the 1<sup>st</sup> Appellant was marked as abated following his demise.

9. On 12<sup>th</sup> September, 2014 the 2<sup>nd</sup> Appellants' Counsel filed Written Submissions in support of the appeal.
10. Counsel contends that the genesis of the dispute between the parties is an agreement dated 31<sup>st</sup> December, 1980 by which the 1<sup>st</sup> Appellant agreed to transfer by way of gift, three-quarters of an acre to the 1<sup>st</sup> Respondent. The Appellant however changed his mind when he realized that the land was to be transferred to the 2<sup>nd</sup> Respondent. The suit land was instead transferred by the 1<sup>st</sup> Appellant in favour of the 2<sup>nd</sup> Appellant.
11. Counsel submitted that the 2<sup>nd</sup> Respondent had no locus standi because execution of the Agreement between the parties preceded the registration to the 1<sup>st</sup> Respondent. Further counsel contended that under section 3 (3) of the Law of Contract Act, the intended beneficiaries of the suit land could not assign the land to the 2<sup>nd</sup> Respondent without further written agreement with the 1<sup>st</sup> Appellant.
12. Further Counsel submitted that the judgment of the lower court is against the intention of the parties in the Agreement as it confers the suit land measuring one acre to the 1<sup>st</sup> Respondent contrary to the agreement which confers only three-quarters of an acre. According to Counsel it will occasion an injustice to the Appellants. He relied on the decision in **Jiwaji & Another V. Jiwaji & Another**, (1968) E.A. 547 where the court held that its duty is give effect to the intention of the parties rather than to make contracts.
13. In further submissions, Counsel contended that at the time the appellant changed his mind, the gift was incomplete and incapable of completion. The lower court could not purport to complete the same by issuing an order of specific performance. He relied on the decision of the Court of Appeal in **Malcolm Bell V. Hon. Daniel Toroitich Arap Moi & Board of Governors, Moi High School Kabarak**, (2012) eKLR.
14. Counsel for the Respondents in his submission opposed the appeal. He submitted that the appellate court cannot interfere with a finding of fact by the trial court unless it is based on evidence, or on a misapprehension of the evidence or that the trial court acted on wrong principles. According to Counsel the Appellants had not demonstrated that the trial magistrate failed to consider or misapprehended the facts before him in reaching his findings.
15. Counsel contended that the conduct of the parties and in particular the 1<sup>st</sup> Appellant is proof of the intention of the parties. They contracted in writing for the transfer of the suit land in favour of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Appellant obtained consent from the Land Control Board in the name of the 2<sup>nd</sup> Respondent who was to hold the land in trust for the 1<sup>st</sup> Respondent. Further he allowed the 1<sup>st</sup> Respondent to develop, occupy and use the land immediately. Counsel submitted that it was therefore just, fair and in the public interest to uphold the judgment of the subordinate court. He however requested the court to vary the said order to the extent that it confers an acre instead of three-quarters of an acre as per the agreement.
16. Further counsel submitted that there was a valid contract for the transfer of the suit land to the 2<sup>nd</sup> Respondent to hold it in trust for the 1<sup>st</sup> Respondent. There is no requirement that a trust has to be in writing and the 1<sup>st</sup> appellant was in order in acquiescing to the arrangement whereby he agreed to transfer the gift to the 2<sup>nd</sup> Respondent.
17. Counsel submitted that the 1<sup>st</sup> Appellant had never revoked the gift in writing or otherwise. He therefore could not purport to transfer the suit land to the 2<sup>nd</sup> Appellant before revoking the gift to the 1<sup>st</sup> Respondent.
18. Further counsel submitted that where there are two competing equities, the first in time shall prevail. In this case, it is the gift agreement between the 1<sup>st</sup> Appellant and the 1<sup>st</sup> Respondent. Counsel submitted that the trial magistrate was therefore correct in granting the order of specific performance. He relied on the decision in **Eunice Wairimu Muturi & Another V. Mavji Ramji Patel**, (2013) eKLR.

#### **ISSUES FOR DETERMINATION**

19. After taking into consideration the rival oral submissions of both Counsels and upon reading the Record of Appeal this court has framed the following issues for determination;

- a) Whether the learned magistrate erred in law and fact in finding that a gift had been made either to the 1<sup>st</sup> or 2<sup>nd</sup> Respondents;
- b) Whether the parcel of land known as Nyandarua/Ndaragwa/228 was the subject matter of the intended gift;
- c) Whether the learned magistrate erred in law in making an order for the transfer of the whole portion of Nyandarua/Ndaragwa/228 to the Respondents.
- d) Whether the learned magistrate misapprehended or misconceived the law relating to gifts;
- e) Whether the learned magistrate erred in law and fact in making an order of specific performance in a matter of an unperfected gift;
- f) Costs.

### **ANALYSIS**

20. This being the first appellate court it is incumbent upon it to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Refer to the case of **Selle and another V. Associated Motor Boat Co. Ltd and Others**, (1968) EA 123.
21. This court reiterates the fact that the Agreement dated the 31st December, 1980 is the genesis of the dispute and this court has to look at its contents *vis a vis* the evidence on record so as to make a determination on the intentions of the 1st Appellant.
22. Upon perusal of the agreement this court notes that it was entered as between Kimani Nursery (sic) School and the 1<sup>st</sup> Appellant (now deceased). The Agreement is dated as 31/12/80 and is signed by the Chairman, Secretary and Treasurer for and on behalf of the school and is also signed by the 1<sup>st</sup> Appellant and it was witnessed by four persons therein named. The property is also ascertainable in the agreement and is described therein as a portion of  $\frac{3}{4}$  of an acre from Plot No.42 Ndaragwa Scheme. The consideration was a gift for education purposes.
23. According to the testimony of PW2 the parents of the Nursery School had a previous experience of a Donor reneging on a gift and the parents were apprehensive that it would happen again and therefore requested that the offer be reduced into writing. It can be likened to a case of once bitten twice shy.
24. The contract upon which the suit was founded; was in writing; it was signed by all the parties thereto; the document bears the signature of each of the parties and has been attested by witnesses who were present when the contract was signed.
25. This court has perused the evidence on record of **Isaac Wanderi Munyiri (PW1)** who states that he was a parent and Committee member and of the 1<sup>st</sup> Respondent and his evidence was that the land was gifted to the parents by the 1<sup>st</sup> Appellant. This evidence is corroborated by **George Gichau PW2** who was the Chairman of the 2<sup>nd</sup> Respondent and he confirmed in his evidence that the 1<sup>st</sup> Appellant offered to gift part of the land to the nursery which was a public school and owned and constructed by the parents. His evidence also confirmed that the 1<sup>st</sup> Respondent had a previous hiccup that they did not want to experience again and opted for the gift Agreement to be reduced into writing.
26. There is sufficient documentary evidence on record that demonstrates that the 1st Appellant gifted part of his land to the parents of the school; and that the Committee constituted by parents from the school executed the Agreement for and on behalf of the school;
27. From the evidence tendered, and also corroborated by the witnesses this court is satisfied that there was a valid and legally binding written contract for the disposition of an interest in land

- made as between the 1<sup>st</sup> Appellant and 1<sup>st</sup> Respondent.
28. The next issue that I shall address is the 2<sup>nd</sup> Respondent's *locus standi* and its capacity to enforce the Agreement. Even though the 2<sup>nd</sup> Appellant abandoned this ground of appeal relating to the Respondent's legal capacity in its submissions the Appellant's Counsel went to great lengths to address this issue. It is therefore the duty of this court to address this issue so as ascertain the *locus standi* of the 2<sup>nd</sup> Respondent as it was also the 2<sup>nd</sup> Appellants argument that the 2<sup>nd</sup> Respondent could not enforce an Agreement entered into between the 1<sup>st</sup> Appellant and the 1<sup>st</sup> Respondent.
29. The evidence of PW1 and PW2 on capacity was that the 1<sup>st</sup> Respondent lacked the capacity to own land and the Committee therefore approached and requested the 2<sup>nd</sup> Respondent to come on board and act as the school's trustee.
30. The Appellant's submissions were that the 1<sup>st</sup> Appellant was unhappy with this assignment of the subject land to the 2<sup>nd</sup> Respondent as he thought it should have been the duty of the 2<sup>nd</sup> Respondent and that it ought to have donated land to the school and not the other way round. The 1<sup>st</sup> Appellant contends that being unhappy with the assignment of the gift he decided to recant on his original decision and then gifted the land to the 2<sup>nd</sup> Appellant.
31. This court notes that there is no documentary evidence tendered to support this relationship as between the Respondents but from the evidence tendered it is noted that the 1<sup>st</sup> Appellant signed the Application Form for Consent to the Land Control Board. The Application Form for Consent and the Letter of Consent were both tendered into court as exhibits.
32. Indeed upon perusing the court record this court notes that an application was made to the Land Control Board; that the 1<sup>st</sup> Appellant attended the Land Board meeting; Consent to Transfer was granted and that the names appearing on both these documents are that of the 1<sup>st</sup> Appellant and the 2<sup>nd</sup> Respondent.
33. The Appellant's case is that there never was any Transfer signed by the 1<sup>st</sup> Appellant to either of the Respondents therefore the gift was not perfected and in its incomplete form the gift was not enforceable by a court of law by any of the Respondents.
34. The most pertinent issue is that the 1<sup>st</sup> Appellant knew of the relationship as between the Respondents and that he appended his signature to the Land Board Forms and attended the Land Board meeting to seek for Consent to Transfer. No evidence is adduced by the 1<sup>st</sup> Appellant to support coercion or fraud therefore it can be inferred that he signed the documents voluntarily and ratified the existence of the trust. I am also guided by the Court of Appeal decision in the case of where JJAs held that;

**“...The absence of any reference of the existence of a trust in the title documents does not affect the enforceability of the trust since the reference to a trustee under Section 126(1) of the Registered Land Act is merely permissive and not mandatory....”**

35. This court is guided by the above decision and by the documents produced in evidence and is satisfied that the Respondents established that there was privity of contract as between the 1<sup>st</sup> Appellant and the 1<sup>st</sup> Respondent. There were requisite documents that were signed by the 1<sup>st</sup> Appellant and delivered to the Respondents the 1<sup>st</sup> Appellant. There was also delivery of possession of the property to the 1<sup>st</sup> Respondent by the 1<sup>st</sup> Appellant. The Respondents took physical possession and occupation and put up constructions thereon.
36. It is my considered view that whether or not the documents signed by the 1<sup>st</sup> Appellant made no reference to the trust it does not in any way make the Agreement unenforceable.
37. This court concurs with the trial magistrate's findings that by signing the application form for consent and by attending the land board meeting the 1<sup>st</sup> Appellant acquiesced and ratified the arrangement and the relationship as between the Respondents and accepted the 2<sup>nd</sup> Respondent as a transferee.
38. This then leads to the issue of the withdrawal of the gift and whether the trial magistrate misapprehended the law on an unperfected gift and erred in law in granting an order for specific

- performance.
39. I have noted from the Appellants submission that they were categorical in stating that the 1<sup>st</sup> Appellant never bequeathed the subject land to either of the Respondents as a gift. Therefore the Law of the Law of Succession Act (Cap 160) Laws of Kenya at Section 31 is not applicable. This Section allows for a gift to be made in anticipation of death and the proviso to the Section 31(1) allows the donor making the gift to revoke it at any time before his death and **lawfully request** for its return. *Emphasis mine.*
40. I shall then rely on the Law of Contract as opposed to the Law of Succession as to the intention of the 1<sup>st</sup> Appellant which was not to bequeath the subject property to the 1<sup>st</sup> Respondent in anticipation of death.
41. Earlier this court made a finding on the validity of the Gift Agreement which then means that the Respondents interest is valid and enforceable as a contract. This court reiterates that it was the 1<sup>st</sup> Appellant who put the 1<sup>st</sup> Respondent into possession with a clear intention to dispose of his interest in the subject property. The consideration even though not in monetary terms, was clearly pointed out by the Appellants' Counsel that it was the 1<sup>st</sup> Appellant's intention to donate land for education purposes. This court is satisfied that the consideration was adequate and appropriate. The Consent to Transfer from the Land Control Board is found to have been obtained in time and establishes the legality of the gift agreement.
42. It is trite law that whether under the law relating to contract and/or succession that revocation has to be done lawfully and procedurally and this court finds no evidence on record that shows the legal procedure adopted by the 1<sup>st</sup> Appellant when he chose to revoke the Gift, in fact the evidence shows that he did it secretly and never informed the Respondents.
43. This court finds that the trial magistrate correctly applied his mind and took into consideration that the Respondents were put in possession and occupation of the subject land prior to the registration of title to the 2<sup>nd</sup> Appellant.
44. It is the courts view that the 1<sup>st</sup> Appellant having put the 1<sup>st</sup> Respondent in possession of the subject land in fact created an overriding interest in favour of the Respondents and their interests are protected by law and enforceable in law.
45. The court finds no merit in the grounds of appeal relating to the capacity of the Respondent and misapprehension of the law on unperfected gift agreements and the same are hereby dismissed.
46. The Appellant states that the land transferred to the 2<sup>nd</sup> Appellant was not the subject land. It is this court's considered view that when the 1<sup>st</sup> Appellant gifted the land it was the known as Plot No. 42 and the 1<sup>st</sup> Respondent was put into possession thereof. It is not in dispute that it was the 1<sup>st</sup> Appellant who caused the nature and the title of the subject property to change and that the Title Plot No. 42 is no longer in existence. Whilst causing the change to title, the Appellant all along knew that the 1<sup>st</sup> Respondent was in occupation and possession and was also carrying out construction thereon.
47. The 1<sup>st</sup> Appellant who was responsible for causing change in the nature and character of the subject property cannot plead the change as a defence to an action particularly when it is of his own making and he also knew of the existing claims. Refer to the Court of Appeal case (supra).
48. I am guided by this decision which states that;

**“..... tracing is an equitable remedy and equity shall**

**trace the suit property for the ends of justice to be**

**served.....”**

49. Indeed in this instance the suit property can be traced to being a portion within Nyandarua/Ndaragua/228 which is presently registered in the name of the 2<sup>nd</sup> Appellant.
50. This ground of appeal is found to lack merit and is hereby dismissed.
51. The only issue the trial magistrate erred in was in determining the share of the Respondents portion. The Gift Agreement, the Application Form for Consent from the Land Control Board and the Consent letter clearly ascertain the Respondents share as being  $\frac{3}{4}$  of Plot No 42. The

Respondent was also put in to possession of a like portion by the 1<sup>st</sup> Appellant.  
52. On costs unfortunately the 1<sup>st</sup> Appellant who was responsible for causing the situation is deceased otherwise he would have been made to bear the full burden of the costs of the appeal herein. So as not to burden the Appellant as the litigation was not of its own making I shall order each party to bear its own costs of the appeal.

### **FINDINGS**

53. For reasons stated above this court makes the following findings;
54. This court finds that the trial magistrate did not err in fact and law in finding that the 1<sup>st</sup> Appellant had made a gift to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
55. This court finds that the parcel number changed upon subdivision and for the avoidance of doubt the parcel Nyandarua/Ndaragua/228 (formally plot No.42) was the subject matter of the intended gift.
56. This court finds that the trial magistrate erred in awarding the whole parcel of land whereas the subject land gifted measured  $\frac{3}{4}$  of an acre.
57. The court finds that the trial court properly apprehended the requirements of a valid Gift Agreement under the Law of Contract whether perfected or non-perfected.
58. The order made for specific performance is found to be in order as the 1<sup>st</sup> Appellant was correctly found to have unilaterally revoked the Gift Agreement without due notice to the Respondents.

### **FINDING AND DETERMINATION**

59. Save for the issue of the size of the subject land gifted the appeal is found lacking in merit in its entirety and is hereby dismissed.
60. The judgment of the subordinate court relating to the portion transferred is hereby set aside and substituted with three quarters  $\frac{3}{4}$  of the parcel now known as Nyandarua/Ndaragua/228. This court directs that the portion where the 1<sup>st</sup> Respondent has its school shall be excised from this parcel and be registered in the name of the 1<sup>st</sup> Respondent and the remainder shall remain the property of the 2<sup>nd</sup> Appellant.
61. Each party shall bear its/their own cost of the appeal and other related expenses to obtain separate titles.
62. Orders Accordingly.

**Dated Signed and Delivered at Nakuru this 9th day of February, 2015.**

**A. MSHILA**

**JUDGE**