



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**

**Civil Appeal 108 of 2002**

**THE REGISTERED TRUSTEES ANGLICAN**

**CHURCH OF KENYA MBEERE DIOCESE .....**  
**APPELLANT**

**AND**

**THE REV. DAVID WAWERU NJOROGE .....**  
**RESPONDENT**

**(Appeal from the judgment and decree of the High Court of Kenya at Embu (Juma J) dated 4<sup>th</sup> February, 2002**

**in**

**H.C.C.C. NO. 19 OF 2001)**

**\*\*\*\*\***

**JUDGMENT OF COURT**

This is an appeal against the judgment and decree of the superior court sitting at Embu (Juma J) dated 4<sup>th</sup> February, 2002 whereby the superior court entered judgment in favour of the respondent for the return of documents relating to land title No. NTHAWA/GITIBURI/2614 and in addition granted an order of eviction and permanent injunction against the appellant and its followers.

The respondent **Rev. Canon David Waweru Njoro** was ordained as clergyman in Anglican Church of Kenya (CPK) Mbeere Diocese and was at one time in charge of St. Peter's Cathedral Siakago – the Diocesan Cathedral. Sometime in 1995, he bought land title No. NTHAWA/ GITIBURI/1537 comprising of 34 acres from GILBERT KIURA MATHOROKO (Kiura) at a consideration which was not disclosed at the trial. There was already a temporary church on a portion of the land when the respondent bought it but a permanent one was subsequently constructed on the portion where the temporary church was located. The newly constructed church was consecrated on 25<sup>th</sup> April, 1999 and named "**ST. MARY'S CHURCH KAVINGORI**".

The respondent also constructed a private secondary school – **ST. PHILLIP'S HIGH SCHOOL** on a separate portion of the same land. On 30<sup>th</sup> July, 1998 the respondent made an application for the consent of the local Land Control Board for sub-division of the land into three portions which consent was granted on 5<sup>th</sup> August, 1998. The land was subsequently sub-divided into three portions one of which was Title No. NTHAWA/GITIBURI/2614 comprising of 1.5 (0.61 HA) acres which was registered in the name of the respondent on 12<sup>th</sup> February, 1999. That is the land on which the church was constructed. It

is the land now in dispute in this case (the suit land). In September, 1999 the respondent made another application to the Land Control Board for consent to transfer the suit land to CHURCH COMMISSIONERS FOR KENYA as a gift. The consent was given on 6<sup>th</sup> October, 1999 and on 28<sup>th</sup> October, 2000 the respondent executed a transfer of the suit land in favour of THE CHURCH COMMISSIONERS FOR KENYA as a gift.

The transfer was lodged at Embu District Land Registry for registration but it was not registered because KAMAU STEPHEN WAWERU, a son of the respondent, had lodged a caution on 10<sup>th</sup> August, 2000 claiming “*LICENCEE INTEREST*”. It is common ground that the respondent resigned from the service of the church sometime in May, 2000 following demotion from the post of a Provost to Acting Minister and by a letter dated 7<sup>th</sup> July, 2000, the Bishop of the Diocese of Mbeere informed the respondent that his licence to officiate at the ACK Mbeere Diocese had been withdrawn and that he was no longer allowed to preach in any Anglican Church in the Diocese from date of the letter.

The respondent was not happy with the turn of events and by a letter dated 12<sup>th</sup> August, 2000 replied in part:

***“In the circumstances, I shall abide with your prohibition except with St. Mary’s Church Kavingori a property that does NOT belong to the ACK. Our intended offer to give it to the ACK has now been withdrawn and you and your Vicar must now keep off it”.***

By a subsequent demand letter dated 11<sup>th</sup> January, 2001 the respondent’s advocates informed the appellant that the gift of the land to the church was “*unreservedly withdrawn*” and the respondent demanded the return of the transfer, the consent of the Land Control Board, the title deed and all other relevant documents held by the appellant and he advised them to “*keep off*” from the property. After this the respondent joined NEEMA CHRISTIAN CHURCH and sometime in March, 2001, he filed a suit seeking the following reliefs:

- (a) An order requiring the defendants to return the plaintiffs documents relating to NTHAWA/GITIBURI/2614.
- (b) An order requiring the defendants themselves and their members and followers to remove themselves from the plaintiff’s said plot.
- (c) A permanent injunction restraining the defendants by themselves, their members and followers from entering or remaining upon the plaintiff’s property.
- (d) Costs of the suit.
- (e) Such further or other relief.

The cause of action was based on the fact of the revocation of the gift of land and the subsequent refusal by the appellant to surrender the documents and vacate the premises. The appellant averred in the defence, among other things, that the land in dispute had already been donated by KIURA to the church and excluded from the portion sold to the respondent; that the transfer was binding on the respondent and that the appellant single handedly and at his own costs and expenses constructed a church building on the land.

The learned Judge allowed the respondent’s claim for three reasons, namely; that the documentary evidence by Kiura that he had donated a portion of one acre to the church sometime in 1986 and which was not part of the land sold to the respondent was unsatisfactory; that the agreement between Kiura and the church was not in any case binding on the respondent as he was not a party to it and lastly, that, the agreement between the appellant and the respondent for transfer of the land (which was not tendered in evidence) was unenforceable as it was not in writing and in breach of **Section 3 (3)** of the Law of Contract Act (Cap 23). The learned Judge did not make a finding as to how the construction of the

church in the suit land was funded.

There are six grounds of appeal. This being a first appeal it is our duty to reconsider the evidence, re-evaluate it and come to our own independent findings remembering that we have neither seen nor heard the witnesses and giving due allowance for that handicap.

The learned Judge framed one factual issue for determination, namely; whether at the time the respondent bought the land from Gilbert Kiura the suit land was already owned by the appellant.

Gilbert Kiura Mathoroko gave evidence at the trial that in 1984 he gave ACK a portion of one acre from original land L.R. No. 1537 to build a church and that when he subsequently sold the land to the respondent in 1993 he asked the respondent to transfer the one acre of the portion to the church. He produced the agreement between him and the church and explained that he did not transfer the land to the church because the title deed was not in his name.

Rev. Lazaro Ngari (DW1) a pastor; Marclus Ireri (DW3) a church member, supported the evidence of Kiura that he had donated the land to the church. There was also evidence from Rev. Lazaro Ngari, Marclus Ireri and Asnath Mbusu Mareco, that a temporary church was built on the donated land in 1984 and that St. Mary's church was erected on the land over a period of time. There was vivid evidence from these witnesses, that the church was constructed through money raised by the Christians individually and through fund raising meetings. The respondent admitted that there was a temporary structure on the land when he bought it and that, the main church was built between 1998 and 1999. He however claimed that he contributed about 70% to the cost of the construction of the church while the balance was raised by members of the public.

On our part, we believe the evidence that Kiura donated a portion of one acre being part of the suit land to the church and a temporary church was constructed thereon long before the respondent bought the land in 1995. This gift was not however completely constituted in order to give any interest in the land to the appellants. It seems from the agreement dated 17<sup>th</sup> August, 1986 and which was produced in the superior court as evidence, that, when Gilbert Kiura donated a portion of his land to the church his land was already registered as title No. NTHAWA/GITIBURI/1537 under the Registered Land Act (RLA).

There is an elaborate and mandatory procedure for a disposition of an interest in land prescribed in the RLA.

By **Section 38 (1)** of the RLA:

***“No land lease or charge shall be capable of being disposed of except in accordance with this Act, and every attempt to dispose such land, lease or charge otherwise than in accordance with this Act shall be ineffectual to create, extinguish, vary or effect any estate or interest in land, lease or charge***

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

There was no evidence and it is not contended that Gilbert Kiura followed the prescribed statutory formalities to transfer the portion of one acre to the appellant. Indeed, the transaction was a controlled transaction under the Land Control Act (Cap 302) and the agreement referred to became null and void under **Section 6 (1)** of that Act when no application for consent of the Land Control Board was made within the prescribed time nor the consent obtained.

It follows that there was in law no gift of land by Gilbert Kiura to the appellant and the appellant's claim that the land was a gift has no legal foundation. The appellant can only claim the land as a gift directly from the respondent.

The evidence, nonetheless, sufficiently shows that St. Mary's Church standing on the suit land was constructed from donations from Christians including the respondent and from members of the public at

large in fund raising meetings. The respondent's claim that he single handedly raised a substantial part of the cost of construction is neither credible nor probable. If the church was built as a chapel for St. Philip's High School as the respondent claimed, he could not have allowed the church to be consecrated as a property of ACK. The respondent only laid claim to the church after his licence as minister of ACK was withdrawn, thus rendering his claim unbelievable.

The correct factual position in this case is as stated by the respondent that, the respondent as registered proprietor of the suit land made a voluntary transfer of the land to the appellant. The respondent, however, pleaded in paragraph 5 and 6 the plaintiff that the gift was not completed by registration and that he revoked the gift by a letter dated 11<sup>th</sup> January, 2001 (i.e. demand letter) The issue which arises is whether the gift of land in this case is revocable in law.

Mr. Njagi learned counsel for the respondent submitted in the superior court that a transfer of land is not completed until registration by the Land Registrar and that the transferee cannot acquire a right as a proprietor under **Section 27** of the RLA until such registration. He submitted before us that an incomplete gift can be revoked at any time. He relied on paragraph 755 of *Halsbury's Law of England*, 3<sup>rd</sup> Edition, Volume 18 at page 396, 397 which states in part:-

***“where a gift rest merely in promise (written or verbal) or unfulfilled intention it is incompetent and imperfect and the court will not compel the intending donor, or those claiming under him, to complete and perfect it.***

.....  
.....

***An incomplete gift can be revoked at any time. No question of conscience enters into the matter for there is no consideration and there is nothing dishonest on the part of an intending donor who chooses to change his mind at any time before the gift is complete”.***

The appellant pleaded regarding that issue in paragraph 5 of the Defence thus:-

***“The defendant further avers that the plaintiff executed the transfer forms to transfer NTHAWAI/GITIBURI/2614 and did everything which was necessary to be done in order to transfer the property and this rendered the transfer binding upon him”.***

Mr. Mukunya, learned counsel for the appellant, on the other hand, submitted before us that the gift was complete as the sub-division, the obtaining of the consent of the Land Control Board and the execution of the transfer passes the property. He contended that the registration of the transfer is merely ministerial.

The learned Judge did not deal with the legal issue raised. Rather the learned Judge decided the case on the basis of the unenforceability of the “oral agreement” between the parties.

For a gift of an agricultural land as in this case to be completely constituted the donor must comply with both the substantive law and statutory procedure relating to the transfer of agricultural land. For instance, the consent of the Land Control Board must be applied for and obtained as required by the Land Control Act. Thereafter, the disposition must be effected by a transfer in the prescribed form (**Section 108 (1)** of the RLA) and executed, stamped and lodged for registration as prescribed in the RLA. As **Section 85 (2)** of the RLA, provides:

***“The transfer shall be completed by registration of the transferee as proprietor of the land lease, or charge and by filing the instrument”.***

The respondent admitted in his evidence in the superior court, among other things, that he made the application for the consent of the Land Control Board, and attended its meeting; that consent to transfer

was given and that he signed the transfer.

It was not contested that an application for the registration of transfer was lodged at the Embu District Land Registry and all the required formalities completed. It is not also contested that the only reason why the transfer was not registered is because a son of the respondent had lodged a caution against the registration of any instrument against the title of the suit land. The Land Registrar did not, however, reject the documents.

Generally speaking, the moment in time when a gift takes effects is dependent on the nature of the gift; the statutory provisions governing the type of the gift and the steps taken by the donor to effectuate the gift. There are leading English cases dealing with the gift of shares and the applicable law such as ***In Re Fry deceased*** [1946] Ch 312; In ***Re Rose: Midland Bank Executor and Trustee Co. Ltd vs. Rose*** [1949] Ch 78 and ***In re Rose; Rose v Inland Revenue Commissioners*** [1952] Ch 499. Most of relevant decisions were considered in the recent English case of ***Pennington vs. Waine*** [2002] 1 WLR 2075. However, we can only find very few cases dealing with the gift of registered land.

In ***Macedo vs. Beatrice Stroud*** [1922] AC 330, a father, three months before his death executed, among other documents, a memorandum of transfer purporting to transfer certain properties to his daughter on consideration of his affection for her. The properties dealt with by the memorandum were registered under the Real Property Ordinance No. 6 of Trinidad which provided in section 46:

***“No instrument until registered in a manner herein before prescribed shall be effectual to pass any estate or interest in any land under the provisions of this Ordinance”.***

The donor after executing the memorandum of transfer delivered it to his solicitor telling him to keep and not to register it. The memorandum remained with the solicitor until the donor died. The donor continued to receive rent from the properties. There were concurrent findings that the instrument was intended to operate as an immediate and unconditional gift to the daughter. The Privy Council held that memorandum of transfer was an imperfect gift of the properties saying at page 337 last paragraph and page 338:

***“The memorandum of transfer, however, stands on a different footing. It was never made the subject of registration, nor did Ribeiro (donor) present it or hand it to the transferee for that purpose. It therefore, having regard to the terms of the Ordinance, transferred no estate or interest either at law or in equity. At most it amounted to an incomplete instrument which was not binding for want of consideration”.***

In ***Mascall vs. Mascall*** [1984] 50 P & CR 119, a father gave a gift of land to his son. He handed over the transfer and the land certificate to him. The son was left to have the transfer stamped and title in the land register altered. On our part, we are unable to get the full report of the case, however, the case is referred to in the judgment of Arden L.J. in ***Pennington vs. Waine*** (supra) at page 2083, paragraph 30 thus:

***“In Mascall vs. Mascall 50 P & CR 119, the question was whether a Gift of land was completely constituted by delivery of the land certificate and a form of transfer. Brown Wilkinson L.J. held at page 126:***

*‘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’.*

*In SNELL'S EQUITY 29<sup>th</sup> Edition, the authors, state at 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).*

The case of Mascall vs. Mascall (supra) is cited in support of the italicized statement of the law.

It is true as Mr. Njagi submitted that the transfer of land registered under RLA is not completed until registration by the Land Registrar. **Section 85 (2)** of RLA so provides. Indeed, as provided by **section 27** RLA, it is the registration of a person as proprietor which vests in the person absolute ownership of the land.

However, an unregistered transfer can operate as a contract between the parties (**section 38 (2)** RLA) with the result that beneficial interest in the property as opposed to legal title is passed to the transferee. The Macedo's case (supra) can be distinguished from this case. In that case, there was a mere execution of transfer which the donor did not hand over to the donee and which he instructed his solicitors not to register. In the instant case, something more than in Mascall's case (supra) has been done. The application for registration of the transfer was executed and the transfer and accompanying documents lodged at the District Lands Registry for registration. In this case, therefore, the respondent has done all in his power to divest himself of and transfer to the church trustees all his legal and equitable interest in the land. There is nothing that remains to be done by the appellant to complete the transaction. The registration of the land is not within the power of the appellant and the transferee does not need any assistance from the court. The transferee of course has a right to take any appropriate action against third parties, including the son of the appellant who has lodged a caution, to facilitate the registration of the transfer. Although the land is still registered in the name of the respondent, he is in the circumstances of this case, a bare trustee for the transferee having transferred the whole of his beneficial interest in the land. The documents relating to the land which the appellant was ordered to return to the respondent were lodged at the Land Registry and accepted by the Land Registrar. They are in the custody of the Land Registrar by virtue of **section 112 (1)** of the RLA. The order for return of the documents directed at the appellant is, thus, ineffectual.

It follows from the foregoing, that the gift of the land in this case was completely constituted and cannot be recalled or revoked in law.

Regarding the agreement for the transfer of the land between the parties, the learned Judge found that it was not enforceable because it was not in writing. The first thing to say about this issue is that the appellant did not bring any suit to recover the land upon an oral agreement. Rather it is the respondent who filed the suit. The appellants has not counter-claimed for the transfer of the land. They could not do not do so because the respondent had executed every required instrument and complied with statutory formalities for the transfer of the land to the appellant.

Secondly, the respondent was relying on the provisions of **section 3 (3)** of the Law of Contract Act introduced by **STATUTE LAW (MISCELLANEOUS AMENDMENTS) (NO. 2) ACT 1990**. **Section 3** of that Act stated that the amendments to the law of contract Act would come in operation on a date to be appointed in the Gazette by the Attorney General. By Legal Notice No. 189 of 2002, the Attorney General appointed the commencement date of the 1990 amendments in the law of contract Act as 1<sup>st</sup> June, 2003. That was long after the transaction in dispute took place. Moreover, the amendments introduced in **section 3 (3)** of the Law of Contract Act by the 1990 Act is not the current law. The current

**section 3 (3)** of the Law of Contract Act was introduced by **STATUTE LAW (MISCELLANEOUS AMENDMENTS) ACT NO. 2 of 2002** which became operative vide **LEGAL NOTICE NO. 188 of 2002** on 1<sup>st</sup> June, 2003.

*Section 3 (3)* provides:

**(3) No suit shall be brought upon a contract for the disposition of an interest in land unless –**

**(a) the contract upon which the suit is founded –**

**(i) is in writing;**

**(ii) is signed by all the parties thereto; and**

**(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:**

***Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act nor shall anything in it affect the creation of a resulting trust, implied or constructive trust”.***

That subsection abolishes or rather excludes the doctrine of part performance which was applicable, as Mr. Mukunya correctly stated, at the time the transaction in this case took place.

In the light of the foregoing, we do not consider it necessary to deal with other subsidiary grounds of appeal.

In the result, the appeal is allowed and the judgment and decree of the superior court is set aside. The costs of this appeal and in the court below are awarded to the appellant.

**Dated and delivered at Nyeri this 9<sup>th</sup> day of February, 2007.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

DEPUTY REGISTRAR