



Kanyanya & another v Mbithuka & 2 others (Environment & Land Case 345 of 2017) [2024] KEELC 13475 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13475 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 345 OF 2017
TW MURIGI, J
NOVEMBER 20, 2024**

BETWEEN

HELLEN MBATHA KANYANYA 1ST PLAINTIFF

ZIPPORAH NDUNGE KANYANYA 2ND PLAINTIFF

AND

RHODA MUVENGI MBITHUKA 1ST DEFENDANT

JAMES MUSYOKI KANYANYA 2ND DEFENDANT

KILONZO KANYANYA 3RD DEFENDANT

JUDGMENT

1. The Plaintiffs commenced this suit against the Defendants vide a Plaint dated 3rd October, 2017, seeking the following orders: -
 - a. A permanent injunction restraining the Defendants, their servants, workmen and agents from entering on and/or from erecting or causing to be erected thereon any structures or from in any way interfering with the Plaintiffs' use and enjoyment of the Plaintiffs' said property being Title No. Nzai/Nziu/907.
 - b. A declaration by the Honourable Court that the suit property herein was legally bequeathed to the Plaintiffs by Mary Nthia Kanyanya (now deceased) and thus making the Plaintiffs the bona fide and legal owners of the suit property herein being Title No. Nzai/Nziu/907.
 - c. An order of eviction from the said premises.
 - d. Damages.
 - e. Interest thereon.



- f. Costs of the suit.
 - g. Any other relief the court deems fit to grant.
2. The Defendants filed a Defence and Counterclaim on 2nd November, 2017 in which they denied the Plaintiffs' claim. In the counterclaim, the Defendants seek the following orders:-
- a. That a declaration does issue that the transfer of the land from the deceased, Mary Nthia Kanyanya to the Plaintiffs was illegal, fraudulent and null and void.
 - b. That the consents, transfers to, and title deed issued to the Plaintiffs be cancelled and the land registrar does re-issue title in the name of the deceased, Mary Nthia Kanyanya.
 - c. In the alternative, the Defendants be and are hereby declared the owners by prescription through adverse possession of all that parcel of land known as Nzai/Nziu/907 and be issued with a title deed by the Land Registrar.
 - d. Costs of both the suit and counterclaim.
3. The Plaintiffs filed a Reply to defence and Defence to counterclaim on 20th March, 2019 in which they urged the court to dismiss the defence and counterclaim with costs and enter judgment as sought in the plaint.

The Plaintiffs Case

4. The first Plaintiff, Hellen Mbatha Kanyanya, testified as PW1. She adopted her witness statement dated 03/10/2021 as her evidence in chief. She also produced the list of documents dated 13th August, 2019 as (PEX 1-15) and further list of documents dated 3rd July 2018 (PEX 16-19) in support of their case.
5. PW1 informed the court that she is the daughter of the late Mary Nthia Kanyanya. She stated that the 1st Defendant is her late mother's wife while the 2nd and 3rd Defendants are her brothers.
6. She told the court that together with her sister PW2, they acquired the suit property from their late mother in the year 2008 who thereafter instructed her to construct her home and settle thereon. That after she constructed her house on the suit property, the 1st Defendant and her family reported her mother to the Area Chief. It was her testimony that their mother gave them the suit property because they were unmarried and they had children.
7. She further testified that her late mother (hereinafter referred to as the deceased) purchased the suit property from Julius Kyenze Kimilu. That she had initially given the suit property to the 1st Defendant and her children and ordered them to vacate the land in Nduuni which originally belonged to the family. That later after one year, the 1st Defendant and her family wrote a letter in which they stated that they would not move to the suit property.
8. She went on to state that the deceased wrote a letter dated 24/3/2009 in which she took back the suit property from the 1st Defendant and her family and gave it to her and her sister, PW2 who was unmarried. She further stated that the 2nd Defendant had built his house on the suit property and that he refused to move to the land in Nduuni as directed by the deceased.
9. That thereafter, the Defendants informed the Chief that they wanted the suit property and he told them to request the deceased to withdraw her letter which took away from them the suit property.
10. It was her testimony that they attended the Land Control Board where the deceased obtained consent to transfer the suit property. She further testified that the deceased signed the transfer forms before she



- died and that they were thereafter issued with a title deed for the suit property. She told the court that the Defendants were cultivating on the land in Nduuni, Thome and on the suit property.
11. She denied the allegations that she obtained the title for the suit property fraudulently.
 12. On cross-examination by Mr. Muthiani, she testified that the 2nd Defendant was cultivating on the suit property before her mother gave them the land. She testified that the Defendants have constructed their homes on the suit property though she could not recall the year when they entered the land.
 13. She further testified that the deceased died on 2/6/2015 and confirmed that they had not instituted succession proceedings in respect of her estate. She further confirmed that they were registered as proprietors of the suit property on 19/8/2015 and added that they did not inform the Land Registrar that their mother had passed away when they were registering the suit property in their names. She testified that although the application for consent was undated, she reiterated that the deceased attended and obtained consent from the Land Control Board to transfer the suit property.
 14. She went on to state that the signature of the deceased and that of the 2nd Plaintiff were not appended in the application for consent while the letter of consent does not indicate the date when they attended the Land Control Board. She further stated that the deceased gave everyone a copy of the letter dated 24/3/2009.
 15. In re-examination, she testified that the transfer process was completed before the death of the deceased save for the issuance of the title deed. She further testified that the deceased gave them the suit property after the Defendants refused to relocate from the land in Nduuni to the suit property.
 16. The second Plaintiff Zipporah Ndunge Kanyanya testified as PW2. She adopted her witness statement dated 18/6/2013 as her evidence in chief. She echoed the evidence of PW1.
 17. In cross-examination, PW2 testified that she could not recall the actual date when they attended the Land Control Board. She admitted that the deceased did not sign the application for consent to transfer the suit property.
 18. She went on to state that they paid the stamp duty on 18/8/2015 and that the title deed was issued on 19/8/2015. She further testified that she was present when the transfer forms were presented to the lands office for registration and confirmed that they did not inform the Land Registrar that their mother had passed away.
 19. She admitted that they had not commenced succession proceedings in respect of the estate of the deceased. She further testified that PW1 and the 1st Defendant's family have constructed their homes on the suit property though she could not recall when they constructed their homes.
 20. PW2 explained to the court that the deceased initially gave the suit property to the 1st Defendant and her family and added that she did not witness the deceased writing the letter dated 24/3/2009. She insisted that her sister did not obtain registration of the suit property fraudulently.
 21. In re-examination, she testified that they accompanied the deceased to the Land Control Board. She further testified that the 1st Defendant rejected the suit property because she wanted a registered parcel of land.
 22. PW3, Grace Mwikali Munyao, adopted her witness statement dated 31/5/2021 as her evidence in chief. It was her testimony that the deceased initially gave the suit property to the 1st Defendant who refused to move to the land. She went on to state that the deceased summoned them to her home where she instructed Alice Mutuku read for them a letter dated 24/3/2009 addressed to the 1st Defendant and her family. That the letter stated that the deceased would give the suit property to her two unmarried



- daughters since the 1st Defendant had refused the same. She went on to state that a copy of the letter was served upon the 1st Plaintiff, the 1st Defendant, the Chief Peter K. Masai, and their clan.
23. She further testified that they accompanied the deceased to the Land Control Board where she informed the committee members that she wanted to transfer the suit property to the Plaintiffs and signed the transfer documents. PW3 informed the court that the deceased was mentally stable as at the time when she obtained consent from the Land Control Board and signed the transfer documents.
 24. She further testified that the deceased did not invite the 1st Defendant to the Land Control Board because they did not have a cordial relationship.
 25. On cross-examination by Mr. Muumbi, she testified that the 1st Defendant and her family were not present when the letter dated 24/3/2009 was read out to them. She admitted that the 2nd Defendant was the first person to have construct his home on the suit property and added that the other houses were built after the death of the deceased.
 26. She further stated that the suit property was currently being utilized by 1st and 2nd Defendants as well as the 1st Plaintiff.

The Defence Case

27. DW1, John Nzioka Masika, adopted his witness statement dated 12/1/2018 as his evidence in chief. He informed the court that he is the Chairman of Anziu Kiloil Clan. He testified that the deceased purchased the suit property from one Julius Kyenze Kimilu. It was his testimony that on 16th October, 2006, he was present at the chief's office in Nziu together with other clan officials when the deceased gave the suit property to the 1st Defendant and a parcel of land in Nduuni to the Plaintiffs who was unmarried by then.
28. He further testified that the 1st Defendant began cultivating on the suit property on or about the year 1987 and later started residing therein in the year 1995. It was his testimony that the Plaintiffs fraudulently transferred the suit property to themselves as the transfer was effected on 19/8/2015 after the death of the deceased. It was his further testimony that the deceased could not have given consent to transfer the suit property because she was extremely sick and almost senile due to old age.
29. He further testified that the Plaintiffs fraudulently obtained consent from the Land Control Board as they did not inform the deceased and the other family members. He further testified that the Plaintiffs misled the Land Registrar to transfer the suit property to themselves by presenting forged documents. He testified that the 1st Defendant has been utilising the suit property openly and without any interruption for approximately 22 years.
30. On cross-examination by Mr. Munyasya, he denied having received a copy of the letter dated 24/3/2009 and insisted that the registration of the suit property in favour of the Plaintiffs was effected fraudulently.
31. In re-examination, he testified that the 1st Defendant and her children reside in the suit property.
32. DW2, John Mwanja Muthungu adopted his witness statement dated 12/1/2018 as his evidence in chief. He testified that he is the Treasurer of Anziu Kiloil Clan and echoed the evidence of DW1.
33. In cross-examination, he testified that the deceased summoned them to the Chief's office because she wanted to distribute her property. He further testified that the deceased gave Zipporah land because she was unmarried. He stated that he did not know how the suit property was transferred to the Plaintiffs.



- He testified that he saw the letter by the deceased dated 24/3/2018 in their file instructing the clan to subdivide her property and added that they did not make a decision on it as the deceased was very sick.
34. DW3, Joseph Mbuli Mutaki, adopted his witness statement dated 12/1/2018 as his evidence in chief. He testified that he is the Vice-Chairman of Anziu Kiloï Clan. He further testified that on or about 16/10/2006 he was present at the Chief's office in Nziu when the deceased gave the suit property to the 1st Defendant. He stated that it was the deceased wish that the Plaintiffs would settle in the parcel of land in Nduuni since they were unmarried.
 35. He asserted that the transfer of the suit property to the Plaintiffs was effected fraudulently since it was done after the death of the deceased. That according to the clan, the suit property belongs to the 1st Defendant and hence the title issued to the Plaintiffs ought to be cancelled.
 36. In cross-examination, he testified that the deceased could not comprehend anything in the year 2009 due to her advanced age and poor health. He insisted that the document dated 16/10/2006 illustrates how the deceased distributed her parcels of land and denied having seen the letter dated 24/3/2009. He denied the Plaintiffs allegations that the 1st Defendant had refused to relocate to the suit property.
 37. The 1st Defendant Rhoda Muvengi testified as DW4. She adopted her witness statement dated 12/1/2018 as her evidence in chief. She also produced the list of documents dated 26/3/2018 as DEX 1 – 4 and the supplementary list of documents dated 6/7/2018 as DEX 5 – 14 in support of their case.
 38. DW4 informed the court that she was married to the deceased under the Kamba customary law as an 'Iweto'. That in the year 1987, the deceased allowed her to cultivate on the suit property where she later constructed a permanent house in and started residing with her family in the year 1995. That on or about 16/10/2006, the deceased wilfully gave her the suit property in the presence of the Area Chief, Nziu Location and the officials of Anziu Kiloï Clan.
 39. She further testified that it was the wish of the deceased that the Plaintiffs would settle in the parcel of land in Nduuni since they were both unmarried. That despite being given land in Nduuni, the Plaintiffs were claiming the suit property which was allocated to her. According to DW4, the Plaintiffs fraudulently transferred the suit property to themselves as the transfer was effected after the death of the deceased.
 40. That prior to her death, the deceased was very sick and old to have given consent to transfer the suit property to the Plaintiffs. She urged the court to dismiss the Plaintiffs suit with costs and allow the counterclaim as prayed.
 41. In cross-examination, she insisted that the deceased gave her the suit property and denied the allegations that she had refused to move to the land that she was allocated.
 42. She testified that the 1st Plaintiff refused to relocate to the land in Nduuni. She further testified that she is currently in occupation of the suit property and the land in Nduuni together with her children. She denied having received the letter dated 24/3/2009 indicating how the deceased wanted her properties to be distributed. She insisted that the 1st Plaintiff should vacate from the suit property.
 43. In re-examination, she testified that the 2nd and 3rd Defendants cultivate on the suit property where she has also settled. She further testified that no one has settled in the land in Nduuni and it is only the 3rd Defendant who cultivates that land. She further testified that she was given a portion of the land in Nduuni because the 1st Plaintiff had constructed her home on the suit property. DW4 stated that she had no problem with the Plaintiffs getting the land in Nduuni and insisted that they should vacate the suit property.



44. The 2nd Defendant James Musyoki Kanyanya testified as DW5. He adopted his witness statement dated 9/2/2021 as his evidence in chief. He informed the court that the Plaintiffs are his aunts while the 1st Defendant who is his mother, was married to the deceased as an 'Iweto'. It was his testimony that the suit property initially belonged to the deceased who died on 2/6/2015.
45. He testified that the deceased purchased the suit property from Julius Kyenze Kimulu in the year 1986. That he settled in the suit property and completed constructing his house in the year 1995.
46. That in the year 2006, the deceased summoned the clan to the chief's office because she wanted to distribute her property. That she gave the suit property to the 1st Defendant and her children and retained the land in Nduuni for herself and her daughters. He further testified that the deceased instructed the 1st Plaintiff to move out of the suit property but she refused and instead constructed her house thereon.
47. He insisted that the transfer of the suit property to the Plaintiffs was effected fraudulently as it was done after the death of the deceased. He further testified that the deceased could not have given consent to transfer the suit property because she was very sick and senile due to old age.
48. In cross-examination, he denied the allegations that they were directed to vacate from the suit property.
49. The 3rd Defendant Fredrick Kilonzo Kanyanya, testified as DW6. He adopted his witness statement dated 9/2/2021 as his evidence in chief. It was his testimony that the deceased purchased the suit property in the year 1986. That immediately thereafter, Rhoda Muvengi, Paul Mbithuka, Hellen Mbatha and himself started cultivating on different portions of the suit property.
50. That sometimes in the year 1990, the deceased instructed Paul Mbithuka and Rhoda Muvengi to show the 2nd Defendant where he could construct his house on the suit property. That the 2nd Defendant constructed his house on the suit property and move in the year 1995.
51. That in the year 2006, the deceased subdivided her land in the presence of the Area Chief, Nziu Location and the officials of the Anziu Kiloil Clan where she gave the suit property to the 1st Defendant and retained the land in Nduuni for herself and her daughters. It was his testimony that he settled on the suit property during the deceased lifetime.
52. He maintained that the transfer of the suit property to the Plaintiffs was fraudulent as it was effected after the death of the deceased. He insisted that the deceased was incapable of giving consent to transfer the suit property because she was very sick and senile due to old age. He urged the court to dismiss the Plaintiffs suit and allow the counterclaim as prayed.
53. After the close of the hearing, the parties agreed to file and exchange their written submissions.

The Plaintiffs Submissions

54. The Plaintiffs' filed their submissions dated 19th January, 2024. On their behalf, Counsel relied on the provisions of Section 26 of the [Land Registration Act](#) to submit that a certificate of title is prima facie evidence of absolute and indefeasible ownership of land. Counsel submitted that the Plaintiffs are the registered proprietors of the suit property as evidenced by the certificate of title. Counsel contended that the Defendants failed to establish any overriding interest on the suit property.
55. Counsel further submitted that the deceased gave the suit property to the Plaintiffs after the 1st Defendant and her children refused to relocate to the land. Counsel further submitted that the deceased was in perfect health when she obtained consent and executed the transfer documents with



regards to the suit property. Counsel argued that although there were minor omissions, the Defendants did not adduce any evidence to prove the allegations of forgery on the part of the Plaintiffs.

56. Counsel further submitted that the Defendants failed to specifically plead and prove fraud on the part of the Plaintiffs as required by law. Counsel argued that the Defendants did not substantiate their allegations as they did not report the alleged fraud to the relevant authorities.
57. Counsel submitted that the Defendants did not prove their claim for adverse possession. Counsel contended that the Plaintiffs' have proved their claim on a balance of probabilities and urged the court to grant the orders sought in the plaint. Concluding his submissions Counsel contended that the Defendants have failed to prove their case and urged the court to dismiss the counterclaim with costs. To buttress his submissions, Counsel relied on the case of Joseph Macharia Kairu vs Kenneth Kimani Muiruri (2021) eKLR.

The Defendants Submissions

58. The Defendants' filed their submissions dated 29th April, 2024. On their behalf, Counsel identified the following issues for the court's determination: -
 - i. Whether the Plaintiffs were given the land by the deceased;
 - ii. When the proprietor died and whether succession was conducted;
 - iii. Whether transfer was illegal, null and void; and
 - iv. Whether the counterclaim should be allowed.
59. On the first issue, Counsel submitted that the Plaintiffs did not avail a will or any document to prove that the suit property was allocated to them by their late mother. Counsel submitted that the Defendants were given the land by the deceased where they are residing to date.
60. On the second issue, Counsel submitted that there was common agreement that the deceased died on 2/6/2015 and that no succession proceedings have been instituted in respect of her estate.
61. On the third issue, Counsel submitted that the transfer of the suit property to the Plaintiffs was fraudulent for the following reasons: -
 - i. Nthia Kanyanya died on 2/6/2015.
 - ii. The transfer of land forms shows that the presentation on the book was done on 3/8/2015 and were received on 19/8/2015 long after Nthia Kanyanya's death.
 - iii. The application for transfer and registration was done on 18/8/2015 long after the death of the deceased.
 - iv. Receipt for registration and title was issued on 12/8/2015 long after the death of the deceased.
 - v. The transfer of land and registration form produced by the Plaintiffs has no date, no names, no parcel number to be transferred etc.
 - vi. The Application for consent to transfer to Plaintiffs has no date and is not signed by the deceased and neither is it accompanied by passports as required.
 - vii. The stamp declaration form is dated 17/8/2015 and signed on 18/8/2015 by the 1st Plaintiff.
 - viii. Stamp duty was paid on 18/8/2015.



- ix. The title deed was issued to the 1st Plaintiff on 19/8/2015.
 - x. The search shows that the name of the 1st Plaintiff was entered in the register on 19/9/2015 and the title issued on the same date.
 - xi. The transfer forms are not signed by the deceased.
62. Counsel submitted that the Plaintiffs' actions of transferring the suit property amounts to intermeddling with the property of a deceased person. Counsel contended that the transfer to the Plaintiffs is an illegality and as such, it should be cancelled and that the title should revert to the deceased so that the issue of gift inter vivos can be litigated in the succession court.
63. On the fourth issue, Counsel submitted that the 1st Defendant has been in occupation of the suit property since 1987. Counsel argued that the Defendants claim for adverse possession has not been rebutted and added that the Plaintiffs moved into suit property in an attempt to dispossess them. Counsel further submitted that the Defendants' occupation of the suit property has been peaceful until the Plaintiffs moved in. Counsel further submitted that the Defendants bundle of photographs shows the developments that have been undertaken on the suit property.
64. Counsel argued that the Defendants have established their claim over the suit property by way of adverse possession. Counsel urged the court to dismiss the Plaintiffs' suit with costs and allow the counterclaim as prayed. None of the authorities cited by Counsel were availed for the court's perusal.

Analysis And Determination

65. Having considered the pleadings, the evidence on record and the respective submissions, the following issues fall for determination: -
- i. Whether the Plaintiffs are entitled to the orders sought in the plaint;
 - ii. Whether the Defendants are entitled to the orders sought in the counterclaim;
 - iii. What are the appropriate orders.
66. From the pleadings and the evidence on record, the following facts are not in dispute: -
- i. Nthia Kanyanya Ngau died on 2/6/2015.
 - ii. 1st Defendant was married to Nthia Kanyanya Ngau under the Kamba customary law as an Iweto.
 - iii. The suit property was initially registered in the name of Nthia Kanyanya Ngau.
 - iv. The suit property is currently registered in the names of Hellen Mbatha Kanyanya and Zipporah Ndunge Kanyanya, the Title deed having been issued on 19/8/2015.
 - v. The Application for consent to transfer the suit property to the Plaintiffs is undated and unsigned by the 2nd transferee and the transferor.
 - vi. The letter of consent was issued by the Land Control Board on 25/9/2014.
 - vii. The stamp duty assessment form and payment receipt are both dated 18/8/2015.
 - viii. The transfer form for the suit property in favour of the Plaintiffs was presented to the Land Registrar for registration on 19/8/2015.



67. The Plaintiffs are seeking for a permanent injunction restraining the Defendants from entering, erecting any structure or in any way interfering with the suit property. It is the Plaintiffs case that they are the absolute proprietors of the suit property having acquired the same as a gift from their deceased mother. They urged the court to grant an order of eviction against the Defendants from the suit property.
68. It is not in dispute that the deceased purchased the suit property from Julius Kyenze Kimilu in the year 1986. The Plaintiffs produced the sale agreement between the deceased and Julius Kyenze Kimilu (PEX-1), application for consent dated 12/08/2008(PEX-2), Letter of consent(PEX-3), Stamp duty declaration, assessment and pay in slips for transfer of land from Julius K. Kimilu to Nthia K.Ngau (PEX-4). Title deed for title No Nzai/Nziu/907 issued on 15/01/2008(PEX-5) From the foregoing, it is crystal clear that the deceased purchased the suit property and as such it does not form part of the ancestral land.
69. The Plaintiffs contended that the deceased initially gave the suit property to the 1st Defendant and her family. The Plaintiffs produced a family land agreement dated 16/10/2006(PEX-10) between the 1st Defendant and the deceased. The agreement was in respect of the ruling by the sub branch, locational and divisional Executive Committee on the above mentioned land. According to the agreement, The land in Masunguni (the suit property herein) was given to 1st Defendant and her two sons; The land at Uni was given to Mbithuka Kanyanaya and his wife Peninnah Mbithuka; The land in Nduuni (Kyanda) was given to the 1st Defendant; The land in Nduuni was given to the deceased and her unmarried daughters; The land in Thome was subdivided between Mrs Peninnah Mbithuka and the 1st Defendant.
70. That after the 1st Defendant and her family refused to relocate from the land in Nduuni to the suit property, the deceased withdrew and took back her land and gifted it to the Plaintiffs vide the letter dated 24/03/2009.
71. The letter by the deceased dated 24/03/2009(PEX-12) is addressed to the 1st Defendant informing her of her decision to give the Plaintiffs the suit property. It is the Plaintiffs case that a copy of the letter was served upon the 1st Defendant, the chief and the clan officials. Although the Defendants denied having seen the letter, DW2 testified that they were in receipt of the letter which was contained in their file. He further testified that they did not make a decision on the letter as the deceased was very sick. The court can safely conclude that the clan received the letter dated 24/03/2009 and was aware of the contents therein.
72. The Defendants on the other hand denied the allegations that the deceased gave the suit property to the Plaintiffs. It was their testimony that the deceased gave them the suit property on 16/10/2019 at the chief's office in the presence of Anziu clan officials. According to the Defendants, the Plaintiffs fraudulently transferred the suit property to themselves as the transfer was effected after the death of deceased. The Defendants contended that the deceased did not have mental capacity to gift the suit property to the Plaintiffs because she was very sick and senile due to old age.
73. Both parties are claiming ownership over the suit property on the grounds that the deceased gave each of them the property during her lifetime. The Defendants contended that the deceased was very sick and senile due to old age to have given consent to transfer the suit property to the Plaintiffs.
74. At this juncture this court is called upon to determine whether the deceased had capacity to gift or transfer the suit property to the Plaintiffs.



75. Gift inter vivos are made between living persons. Black's Law Dictionary defines a gift as the voluntary transfer of property to another without compensation. It stipulates the essentials to make a gift as follows:-

The donor must have capacity to make the gift; he must have an intention to make it; his intention must be to make it; his intention must be to make it now and not in the future; he must deliver, either actually or constructively; there must be acceptance by the donee; it must be irrevocable unless the consent of both the donor and donee is first obtained; it must be without valuable consideration however small for the transaction it is a contract.

76. In the case of *Dan Ouya Kodwar v Samuel Otieno Odwar and another* (2016) eKLR the court held that:

“For gift 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 declaration of trust or the presumption. Gifts of land must be in writing or declaration of a trust in writing, gift inter vivos must be completed for the same to be valid”.

77. From the above definition it is clear that the person who makes the gift must have capacity to gift the property and the gift must be perfected. In the case of gift inter vivos, the gift must be completed during the lifetime of the donor.

78. On capacity of the donor to gift the suit property to the Plaintiffs, the burden was on the Defendants to prove that at the time the deceased transferred the suit property to the Plaintiffs she did not have the requisite mental capacity. The Defendants did not produce any medical records to show that the deceased lacked mental capacity to transfer the suit property to the Plaintiffs. They merely stated that the deceased lacked capacity to transfer the suit property to the Plaintiffs as she was old and senile. The fact that the deceased was advanced in age is not sufficient proof that she lacked mental capacity. The requirement is that mental incapacity must be proved by way of evidence and not by mere statements as in the present case. No evidence was adduced to show that the deceased was mentally incapacitated to make the gift to the Plaintiffs. I therefore find that the deceased had mental capacity to gift/transfer the suit property.

79. The Plaintiffs testified that the deceased transferred to them the suit property during her lifetime. In this regard, the Plaintiffs produced a certified copy of the application for consent(PEX-16), certified letter of consent(PEX-18) and the certified copy of the transfer(PEX-19) in support of their evidence. The letter of consent and transfer form, indicates that the consideration for the transfer as a gift.

80. The letter of consent dated 25/09/2014 shows that the deceased was granted consent to transfer the suit property to the Plaintiffs as a gift pursuant to the application made on 24/09/2014. The application for consent of Land Control Board is not dated or signed by the deceased and the 2nd Plaintiff. However, the letter of consent is signed by the Chairman, Wote Land Control Board. The transfer form shows that it was executed by the deceased and the Plaintiffs herein on 18th September 2013 in the presence of Faith Katunga Advocate. The transfer form clearly shows the intention of the deceased to transfer the suit property as a gift to the Plaintiffs herein.

81. It is clear that the transfer was received and registered on 19/8/2015 by which time the transferor was deceased. The Plaintiffs confirmed in their evidence that they did not inform the Land Registrar that the transferor had died as at the time they were registering the transfer. The gift should have culminated in the delivery of the gift. The gift must go to the donee during the lifetime of the donor. The gift being land, the final act would have been delivery of the transfer documents or registration of a transfer in



favour of the Plaintiffs during the lifetime of the deceased. From the foregoing it clear that the gift was not perfected as the registration and subsequent transfer was not done during the lifetime of the donor.

82. The Defendants are also claiming that they were given the suit property by the deceased in the presence of the chief and clan officials who corroborated their evidence. The Defendants did not adduce any evidence to show that the deceased took any step to deliver and perfect the gift to the 1st Defendant and her family during her lifetime.
83. Since the transfer was not registered during the lifetime of the deceased, the Plaintiffs were at that time dealing with the estate of the deceased. In the circumstances, the Plaintiffs ought to have made their claim against the estate of the deceased through succession proceedings and not by registering the transfer. From the foregoing, I find that the Plaintiffs have not proved their case on a balance of probabilities as is required.
84. The Defendants are seeking for a declaration that the transfer of the suit property to the Plaintiffs was illegal, fraudulent, null and void. It is trite law that allegations of fraud must be specifically pleaded and proved. In the case of *Vijay Morjaria vs Nansing Madhusingh Darbar & Others [2000] eKLR (Civil Appeal No 106 of 2000)* Tunoi JA as follows:-
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
85. Similarly, in the case of *Kinyanjui Kamau Vs George Kamau [2015] eKLR* the Court of Appeal held that:-
- “...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo [2008]1 KLR (G & F) 742* wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...”
86. Although the standard of proof is not beyond reasonable doubt it is higher than proof on a balance of probabilities.
87. In Civil cases, the standard of proof is on a balance of probabilities. Section 107 (1) and (2) of the *Evidence Act* provides as follows:-
- 107(1) 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 exists.
- (2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
88. It is clear from the above provisions that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe.



89. To prove fraud, the Defendants relied on the particulars of fraud set out in the counter claim as follows:-
- a. Forging signatures and/thumbprint for Mary Nthia Kanyanya.
 - b. Obtaining fraudulent land control consent without informing the said Mary Nthia Kanyanay and her family members.
 - c. Misleading the land registrar to transfer the land using forged documents without an appointed administrator.
 - d. Misleading government officials that the land was available for transfer to them as a gift well aware it was false.
 - e. Dealing with land of a deceased owner without grant of letters of administration.
90. The Defendants also produced the transfer of land form executed by the deceased and the Plaintiffs (DEX-1). The form shows that the deceased appended her thumb print in the presence of Faith Katunga Advocate. The Defendants alleged that the Plaintiffs forged the thumb print belonging to the deceased. No evidence was led to show or demonstrate that the thumb print belonging to the deceased was forged by the Plaintiffs or that it is a forgery.
91. The Defendants alleged that the Plaintiffs obtained consent from the Land Control Board fraudulently without the informing the deceased. It is the Plaintiffs case that they accompanied the deceased to the Land Control Board where she obtained consent to transfer the suit property to the Plaintiffs.
92. It is not in dispute that the deceased and the 2nd Plaintiff did not sign the application for consent (DEX-3). The Defendants did not adduce any evidence to show that the deceased did not obtain consent from the Land Control Board to transfer the suit property or that the consent and documents presented to the Land Registrar in support of the transfer were forgeries.
93. In a nut shell, the Defendants did not adduce any evidence to demonstrate their allegation of fraud on the part of the Plaintiffs. The Defendants are seeking for the cancellation of the consents, transfer on the grounds that they were obtained fraudulently. Having failed to demonstrate fraud on the part of the Plaintiffs, I find that the Defendants are not entitled to the order sought.
94. The Defendants are seeking for a declaration that they have acquired the suit property by way of adverse possession. The doctrine of adverse possession is embodied in Section 7 of the [Limitation of Actions Act](#) which stipulates that:-
- An action may not be brought by any person to recover land after the end of 12years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person”.
95. Further section 13 provides that:-
- 1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this act referred to as adverse possession), and, where under section 9,10,11 and 12 of this act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
 - 2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued



and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land

- 3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.
96. The law on adverse possession is well settled. The ingredients that one has to meet in order to succeed in an application for adverse possession were discussed by the Court of Appeal in the case of *Mtana Lewa v Kahindi Ngala Mwangandi* (2005) eKLR where it was held that:-
- “Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period in Kenya 12 years. The process springs into action essentially by default or inaction by the owner. The essential perquisites being that the possession of the adverse possessor is neither by force or stealth or under licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner”.
97. The well-settled principles are that a party claiming adverse possession ought to prove that his possession was peaceful, open and continuous.
98. For the Defendants to be entitled to the suit property by virtue of adverse possession, they must demonstrate that they have been in continuous, uninterrupted occupation for a period of not less than 12 years. In the case of *Mombasa Teachers Co-operative Savings and Credit Society Limited v Robert Muhambi Katana & 15 Others* the Court stated that:-
- “Likewise, it is settled that a person seeking to acquire title to land by adverse possession must prove non permissive or non-consensual, actual, open, notorious, exclusive and adverse use/ occupation of the land in question for an interrupted period of 12 years as espoused in the latin maxim *nec vi nec clam nec precario*”.
99. It is not in dispute that the Plaintiffs are the registered proprietors of the suit property. The Defendants contended that they have been in open and uninterrupted occupation of the suit property for a period of over 22 years.
100. The Court of Appeal in the case of *Titus Kigoro Munyi vs Peter Mburu Kimani* (2015) e KLR held that the limitation period for purposes of adverse possessions starts running after the registration of the land in the name of the Plaintiffs. In the present case, the time can only be computed from 19/08/2015 when the Plaintiffs were registered as the proprietors of the suit property. It is evident that twelve years have not elapsed since the Plaintiffs were registered as the proprietors of the suit property.
101. I find that the Defendants have not met the threshold for the grant of orders of ownership of the suit property by virtue of adverse possession.
102. The law is protective of title and provides for instances when a title may be impeached. Section 26 of the [Land Registration Act](#) provides as follows:-

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; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.’

103. It is not in dispute that the Plaintiffs are the registered proprietors of the suit property. Having found that the Plaintiffs were registered on the after the death of the deceased, it is the finding of this court that the title was acquired unprocedurally.

104. Section 80 of the *Land Registration Act* gives the court power to order for rectification of the register. Section 80(1) provides as follows: -

Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

105. The Plaintiffs claim lies against the estate of the deceased. In the circumstances, the Plaintiffs title is hereby cancelled to accord the parties an opportunity to present their claims against the estate of the deceased in a succession court.

106. In the end I find that the Plaintiffs have not proved their case against the Defendants on a balance of probabilities as required. Similarly, I also find that the Defendants have not proved their case against the Plaintiffs on a balance of probabilities against the Plaintiffs.

107. The upshot of the foregoing is that the Plaintiffs’ suit as well as the Defendants’ counterclaim are hereby dismissed. Each party to bear its own costs.

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HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 20TH DAY OF NOVEMBER, 2024.

IN THE PRESENCE OF:

Munyasya for the Plaintiffs

Ms. Mutua for the Defendants.

