



Ngetich v Church Commissioner for Kenya Anglican Church of Kenya & 7 others (Environment & Land Case 44 of 2021) [2023] KEELC 15838 (KLR) (23 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15838 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 44 OF 2021
MN MWANYALE, J
FEBRUARY 23, 2023
FORMERLY ELC 194 OF 2015**

BETWEEN

PRISCILLA JERUTO NGETICH PLAINTIFF

AND

**CHURCH COMMISSIONER FOR KENYA ANGLICAN CHURCH OF
KENYA 1ST DEFENDANT
NANDI COUNTRY LAND REGISTRAR 2ND DEFENDANT
THE HON. ATTORNEY GENERAL 3RD DEFENDANT
MICHAEL ROTICH 4TH DEFENDANT
KETER MOSES 5TH DEFENDANT
MARY AMUGUNE 6TH DEFENDANT
FLORENCE CHERONO MURGOR 7TH DEFENDANT
MIRIAM RUTO 8TH DEFENDANT**

JUDGMENT

1. *Vide* her plaint dated July 7, 2015, Priscilla Jeruto Ngetich the Plaintiff here in sought for Judgment against the Defendants for.
 - a. A declaration that the plaintiff is the legal owner of the land formerly known as Nandi/Kamobo/4429 and subsequently divided into two parcels known as Nandi/Kamobo/4404 and 4405.
 - b. A declaration that the subdivision of the land Tittle No Nandi/Kamobo/4029 was unlawful.



- c. An order of rectification of the land register by way of cancellation of the subdivision of the land Title No. Nandi/Kamobo/4029 and cancellation of parcel No. Nandi/Kamobo/4404 and 4405 and restoration of the land register of the land parcel No. Nandi/Kamobo/4029 in the name of the plaintiff.
 - d. A permanent injunction against the defendants restraining them by themselves, their servants and/or agents from trespassing into the plaintiff's land parcel of land formally known as Nandi/Kamobo/4404 and 4405 and the injunction so granted to subsist upon restoration land title No. Nandi/Kamobo/4029.
 - e. An order of eviction against the Defendant.
 - f. Interest and costs
2. The matter initially proceeded by Lady Justice Odeny in Eldoret, before it was transferred to this Court at Kapsabet upon its establishment.
- Thus the proceedings were typed and matter proceeded from where it had reached.
3. Two Plaintiff's witnesses had testified before the Court in Eldoret as well as one Defence witness.

Plaintiff's Case and Evidence:

4. In her plaint, the Plaintiff pleaded that she was the previously registered proprietor of land parcel number, Nandi/Kamobo/4029.
5. That the 1st and 2nd Defendants fraudulently and illegally caused the subdivisions of the parcel into two parcels; Nandi/Kamobo/4404 and Nandi/Kamobo/4405 and caused the Plaintiff and the 1st Defendant to be registered respectively.
6. Particulars of fraud and illegality were pleaded and the same were;
 - i. Subdividing the land without the consent of the Plaintiff.
 - ii. Failing to obtain the consent of the Land Control Board for subdivision and transfer.
 - iii. Failing to obtain the Plaintiff's signature for transfer
 - iv. Subdividing and transferring the land without the transfer forms having been signed by the Plaintiff.
 - v. Forgiving the Plaintiff's signature.
7. As against the 4th, 5th, 6th and 8th Defendants, the Plaintiff that the said Defendants were in occupation of Nandi/Kamobo/4405 and had been trespassing on the land parcel no. Nandi/Kamobo/4404 to her detriment. On the strength of the above, the Plaintiff sought for the prayers enumerated in paragraph 1 of this judgment.
8. The Plaintiff herself testified as PW1 it was her evidence while adopting her witness statement dated 6/6/2019, that her land was taken over by the church. She produced searches dated 9/11/2011 and 11/11/2011 as P Exhibit 1 (a) and (b). It was her evidence that she did not make any application to the Land Control Board and her signature was not on the application. She produced a letter by the chief dated 6/3/2006 as P Exhibit No. 2 as well as a copy of the application for consent to subdivide dated 6/3/2006 as P Exhibit No. 3.



9. It was her further testimony that she did not attend the Land Control Board and she produced the consent to subdivide as P Exhibit No. 4. She stated that she did not sign the consent to transfer which she produced as P Exhibit No. 5, and she produced the application for consent to transfer dated 15/6/2006 as P Exhibit No. 6, and she produced the transfer of land dated 15/1/2007 as P Exhibit No. 7. It was her further testimony that he did not give the church the land as a gift. She stated that she did not enter into any agreement.
10. It was her further testimony that the church entered her land in 2009 and she protested to the Anglican Bishop. She produced a letter dated 21/10/2009 as P Exhibit 8 she further produced demand letters dated 31/5/2010 and 10/4/2010 as Plaintiff exhibits number 9 (a) and (b) and letters from Kamau Lagat Advocates as P Exhibit 10 (a) and (b).
11. In cross – examination, she stated that her other name was Kibande, she was not a member of the ACK Church but was a Catholic. She stated that in 2002 they had not subdivided the land. She denied donating the land to the ACK church. It was her testimony that she usually thumbprints and the signature on the documents were not hers, she denied writing a letter to the Chief’s office.
12. That the Defendant took her land with impunity. The Defendants erected a fence then an injunction was issued. It was her statement that her original title deed was stolen in 2002, and that she had to take another identity card.

She wondered how the church got the title to the property as she had not signed the transfer documents at all.
13. In further cross- examination by Mr. Odongo she stated that the parcel number was 2282, in her mother’s name was not subdivided. Her mother was called Sigei Ngetich. The photo on the transfer form belonged to her mother. Her ID No. 71xxx71 was similar to the one on the transfer. She was adamant that she did not sign the transfer form and that she had reported the forgery at Kapsabet Police Station, she did not have a report from handwriting expert, but she did not sign any documents for application for subdivision.
14. In re-examination, she stated that she normally sets a thumbprint and not signature.
15. PW2, Florence Cheptolo, equally testified. It was her testimony while adopting her witness statement filed on 30/4/2018 which she adopted as part of her evidence in chief before Court. It was her testimony that she was not a secondary School Teacher. The minutes had recorded her name as Florence Cheptoo. She had never been a member of the Anglican Church and she prayed for judgment as prayed for in the plaint.
16. On cross – examination by Mr. Bett, she stated that when the church was being constructed she was at home. She never attended any of the church meetings. She did not attend a meeting on 14/3/2004. Her mother also did not attend the meeting. The church was constructed in 2009, she was not present when the surveyors came to subdivide the suit land in 2004. She did not know the person on the transfer form, that person on the transfer form was not her mother at all.
17. On cross – examination by Mr. Odongo, she stated that went to a boarding school and has been staying with her mother, it is not true that her mother donated part of the parcel and sold part of it. They recorded a report at Kapsabet Police Station, but could not remember the O.B number. They reported on encroachment but did not report on the issue of the signature as they had not been shown.
18. In re-examination, she stated that the Plaintiff had reported the matter to the police.
19. After the testimony of the two witnesses, the Plaintiff’s case was closed.



The 1st, 4th to 8th Defendants Case and Evidence

20. The 1st, 4th to 8th Defendants filed a joint defence on 30th April 2018. In their defence they denied in *toto* any wrong doing and any fraud on their part as well as the part of the 1st and 2nd Defendant in causing subdivisions of parcel number 4029, into 4404 and 4405.
21. They denied trespassing and illegal occupation of Nandi/Kamobo/4405. The Defendants reaffirmed that the Plaintiff transferred the property to the 1st Defendant by way of a gift on 1/04/2008; and she was not coerced in any way as she was a member of the St. Barnabas ACK Church.
22. The 1st, 4th to 8th Defendants, testified on their own right as Defendants and called 1 witness to support their case. The witness testified as DW5, Reverend Mark Arap Sang.
23. The 1st, 4th, 5th, 6th, 7th and 8th Defendants were all presented by Ms. Chepseba Langat DW1 Mr. Christopher Kibisu testified. It was his testimony that he had worked for the ACK and retired in 2018. He had authority from the 1st Defendant to testify on its behalf, the letter authorizing him dated 5/2/2021 was produced as D Exhibit No. 1 while a letter dated 29/5/2018 authorizing him to testify was produced as D Exhibit 2.
24. The witness adopted his witness statement dated on 16/10/2018 and stated that there was a dispute on the documents executed by the CEO of ACK. The suit property had been purchased by the local church and the local church remitted documents to the 1st Defendant for execution. He did not know the Plaintiff. But the transfer which was marked as DMFI 1 was witnessed by an Advocate. A title deed for the property was delivered to their offices, the right procedure was followed and the Plaintiff did not have a case against the 1st Defendant so he prayed that the suit be dismissed.
25. On cross-examination, he stated that he worked with the 1st Defendant as a Trust Managed Officer, to follow up documents received on behalf of the church; but he did not participate in signing of agreements. The Plaintiff had donated 0.2 points and also offered 1 ½ points for sale. The information was given to him by the vicar Mr. Mark Sang also known as Mariko Kipchwen Arap Sang. The local church are the owners. He was not sure whether Priscilla donated as the work of the 1st Defendant was to execute. He was not shown any agreement, and neither did he know how much it was and whether the vendor received money. He could not confirm who signed the documents.
26. On cross – examination by Ms. Kiptoo, he stated he had no evidence of sale of the suit land, and neither did he have evidence of the construction of the church. The CCK has an obligation to ensure that all transactions are done regularly.
27. When shown P Exhibit No. 3 application for consent to subdivide he agreed that there was no signature as there was no signature on P Exhibit No. 5, application for consent to transfer. On P Exhibit No. 7 the Plaintiff Priscilla signed the transfer, while she had thumb printed in the other documents.
28. In re-examination, he stated that the Diocese had structures to handle their issues.
29. The 4th Defendant, Michael Rotich testified as DW2, he adopted his witness statement filed on 16/10/2018 as part of his evidence in chief. It was his testimony in summary while referring to minutes of 9/8/2003, where he was present and the Plaintiff too and the agenda was to build ACK Cheplengu Church. The Plaintiff donated 2 points but additionally the Church bought 1 ½ points at a Cost of kshs 45,000/= . The money was paid to the Plaintiff by way of church offering every Sunday while the Plaintiff paid kshs 12,000 towards the purchase of the 1 ½ points.
30. On 14/3/2004, the Plaintiff was present for another meeting as well as the 5th Defendant.



On 18/2/2004, officials of ACK church Cheplungu were elected. On 1/5/2004 the church was opened in the Plaintiff's presence. On 2/5/2004, another meeting was held in the presence of the Bishop and Plaintiff was present. The Plaintiff produced the record of the minutes as D Exhibit No. 5 hence it was not true that the church officials used deceit and fraud to register the property in the name of the 1st Defendant.

31. On cross – examination by Ms. Kiptoo, the witness stated that the Plaintiff had donated 2 points to the church. She had told the witness at his home on 3/4/2003. Kshs 45,000 for the purchase was paid but had no records.

32. On D Exhibit 5, particularly the meeting dated 9/8/2003, those absent with apologies included Priscilla Jeruto.

On 14/3/2004 and 18/2/2004, he confirmed that the first recorded meeting was 14/3/2004 and then 18/2/2004. The building of the church was started in 2003 and the Plaintiff used to attend the said ACK Cheplungu church. All people who attended meetings would not sign an attendance list.

33. The witness knew Silas Tenai who was a brother to Priscilla Jeruto but was not a member of the church. It was not true that Silas

Tenai is the one who donated the property. The witness stated that he was not present when the Plaintiff signed application for consent to transfer. He neither attended the Board nor did he witness the transfer. He was not aware whether Priscilla knew how to read and write. The witness was present when the Plaintiff donated kshs 12,000 for the 1 ½ points, hence property was not taken by force.

34. On cross – examination by Mr. Letting, the witness stated that the Plaintiff was their congregant from 1995 till 2003. Between 1995 and 2003, the church did not have any property in Cheplungu.

35. On re-examination by Mrs. Lagat the witness stated that an apology is sent when someone does not attend a meeting, and that there was confusion as the dates of 18/3/2004 and 14/2/2004.

36. That Priscilla used to attend the ACK St. Barnabas church. The 2 points were donated by Priscilla and not Silas Tenai. They did not use any fraud to have the property registered to 1st Defendant. He stated that he was not present when the Plaintiff signed the documents. Before ACK Cheplungu was constructed, the witness and Plaintiff used to attend St. Barnabas ACK Church. The 4th Defendant case was thus closed after the testimony of DW2.

37. The 5th Defendant Keter Moses, testified as DW3 it was his testimony that he knew the Plaintiff and was aware he had been sued as the 5th Defendant.

38. He adopted his witness statements as part of his evidence in chief. It was his testimony that in early 2002, the Plaintiff stated at ACK St. Barnabas Church in the Presence of Rev. Mark Sang that she wanted to donate a gift to the church a property measuring 2 points. She was to show the Reverend where the property was so as to have the same blessed. At that time, the witness stated that he was the treasurer of St. Barnabas ACK Church; and he donated a Bull which was sold and fetched kshs 7,000 towards the construction of the church.

39. Thereafter Priscilla sold 1 ½ points at kshs 45,000/= but there was no written agreement, she was paid through the offering and Priscilla topped up kshs 12,000/=. The church was built where the land was. The makeshift church was later on demolished. The witness produced D Exhibit 6, a photograph of the church.

It was his further evidence that the officials did not use any deceit to transfer the property as the Plaintiff took the officials to the Land Control Board. The witness identified the minutes dated 6/4/2006



for consent to transfer as well as the minutes dated 15/6/2006 where Plaintiff transferred Nandi/Kamobo/4405 to 1st Defendant.

40. There was a mutation done pursuant to the subdivision and he produced the same as D Exhibit 7.
41. On cross – examination by Mr. Keter. He stated that the Plaintiff was a member of the ACK St. Barnabas Church, where after she moved to ACK Cheplungu. After suing the church she ceased being a member. He was not present when the blessing of the church was done, but his bull fetched kshs 7,000/= . He did not have records of the kshs 45,000/= and he did not attend the Board nor was he present at the signing of the transfer.
42. The witness for the church during the signing was Elkana Sugut. He did not have photographs of the church that was demolished. The church was demolished in 2003. The witness knew Silas Tenai the Plaintiff's brother. He was not present at the Plaintiff mother's funeral and he did not hear the Plaintiff's brother making the donation.
43. He reiterated that he did not use force or intimidation to force transfer since they were Land Control Board Minutes.
44. On cross examination by Mr. Letting the witness stated that Priscilla donated the church in about 2002, and possession by church was in 2008; but from 2003 to 2008, the property was used as a make shift church.

Priscilla did not report to police and he had not been charged in any Court, Silas Tenai is not a Defendant in the matter. The witness was not involved in subdivision and the transfer.
45. On re-examination, the witness stated that the Plaintiff ceased being a member of the ACK church after she sued, she became violent and almost cut the witness. With the testimony of DW3, the 5th Defendant's case was closed.
46. DW4 was the 6th Defendant, Mary Amugure, she adopted her witness statement. On cross – examination by Ms. Kiptoo, she started that she had settled in Kapsabet in 1985. She remembered in 2002 when the Plaintiff donated her property to the church; and as church officials they followed upon. Later the Plaintiff moved to the Catholic Church, she did not know why the plaintiff sued the Anglican Church. She started attending ACK Cheplengu since 2003 to date. She did not witness the Plaintiff sign the documents of transfer.
47. In re – examination, she started that the Plaintiff donated 2 points and sold 1 ½ points.

With her testimony the 6th Defendant case was closed.
48. DW5, Reverend Mark Kichwen Arap Sang testified, it was his testimony that he is a retired clergy and was aware of the present suit. He adopted his witness statement as part of his evidence in chief. It was his testimony that he was among the people who attended the Land Control Board together with the Plaintiff for consent to subdivide. He also attended together with the Plaintiff to the Land Control Board for purposes of transfer and the Plaintiff was there in person and her application was proved.
49. On cross – examination by Ms. Kiptoo, the witness stated that he was present when the Plaintiff donated her property as the congregants would pray at her home in Cheplungu. The donation was made by the Plaintiff in front of the whole church.
50. The witness stated that they went to the board twice at the D.O's Office but could not remember whether the Plaintiff signed the documents. There was no agreement on the purchase of the 1 ½ points. She did not know why the Plaintiff had filed suit because he proceeded on transfer.



51. On cross – examination by Mr. Letting, the witness stated that they had taken possession before the transfer. She stated that the Plaintiff went to the Board twice, because he was present. He stated that she was not telling the truth about the fraud to her property. The procedure for land acquisition including consent for transfer and subdivision were all undertaken. There was no mistake on part of the Land Registrar to have issued the title deed.
52. On re-examination the witness stated that when he went on transfer everything was in order, and the Plaintiff donated the property.
53. DW6 the 7th Defendant Florence Murgor equally testified. She adopted her witness statement. It was her testimony that she was a member of ACK Church Cheplengu.
54. On cross – examination by Ms. Kiptoo the witness state that she was not present when Priscilla made the declaration for donation.
55. She stated that the Plaintiff was a member of the ACK Church before she left, but was not aware when the Plaintiff left. She did not attend the Land Control Board meeting for subdivision and transfer; and she was not present when the transfer as well as the application for consent to subdivide and transfer were signed. She did not know why the Plaintiff got agitated and sued.
56. On cross – examination by Mr. Letting, she stated that she did not know why she was sued.
with her testimony, the 7th Defendants case was closed.
57. DW7 was the 8th Defendant Mirriam Chepkemei Ruto, who adopted her witness stated as part of her evidence in chief. She stated that she was sued in the matter but did not know why she was sued. It was her testimony that she knew the Plaintiff very well as he was among the members of the ACK Church Cheplengu. She identified the photograph D Exhibit 7 as a church building of ACK Cheplangu; and that the Plaintiff resided in the same property but had subdivided it.
58. It was her testimony that all the church functions would be hosted at the Plaintiff's home before construction of ACK Cheplungu. The witness stated that she was not involved in the transfer as she was not an official of the church.

On cross – examination by Ms. Kiptoo she stated that she was not present when the Plaintiff donated property, she did not attend the Land Control Board with Priscilla, and neither did she witness Priscilla sign the transfer the application for consent to subdivide and to transfer.
59. She was aware that Priscilla had left the church but did not know when she left and the reason she left. That marked the close of the 8th Defendants case.

The 2nd and 3rd Defedance Case and Evidence.

60. The 2nd and 3rd defendants being the Nandi County land Registrar and the Attorney General respectively, filed their joint statement of defense on 7th December 2015. They admitted that the plaintiff was the previous registered owner of Nandi/Kamobo/4029 before it's subdivision to portions resulting into parcel no. 4404 and 4405.
61. It was their further Defence that the plaintiff applied and obtained Land Control Board consent from the Kapsabet land control board to effect the subdivisions and the second defendant acted within its statutory duties.
62. The 2nd and 3rd defendants further pleaded denied any wrong doing on their part as they fully complied with the requirements set unto under law and all the due procedure was followed.



63. The 2nd 3rd defendant further pleaded in their defence that the Plaintiff had voluntarily applied for a Land Control Board consent and they denied the particulars of fraud and illegality pleaded in the plaint. By way of a further defence the 2nd and 3rd defendant pleaded the transfer to 1st defendant was by way of a gift, thus the transaction was conducted above board without collusion on their part.
64. The 2nd and 3rd defendant on account of the above denied that the 1st defendant was trespassing on land parcel No. Nandi/Kamobo /4404.
65. The 2nd and 3rd defendant were represented by Mr. Letting a senior Litigation Counsel, at the Attorney General Chambers the 2nd and 3rd Defendants called 2 witness who testified as D.W. 8 and D.W.0
66. D.W.8, the Nandi County Registrar, Judith Cherotich testified. She had the original parcel file for Nandi/Kamobo/4029. She produced a copy of the register for Nandi/Kamobo/4029 as D exhibit number 8, which revealed that the register was opened on 24/10/2001. The approximate area was 1.12 hectares and the plaintiff Pricilla Jeruto Ngetich was the first proprietor as at time of opening of the register. A title deed in respect of the property was produced issued to the registered owner on 28/10/2001. A copy of the title deed was produced as D exhibit number 9; and on the 3rd entry on the copy of register relates to closure of Title number Nandi/Kamobo 4029 and the title deed (D exhibit 9) was cancelled.
67. It was her further testimony that when entries are filled in the register, the registrar confirms the transactions made. In case of a subdivisions it is supported by mutation, application for consent and letter of consent and the old title deed.
68. All those documents must have been produced for the Land Registrar to subdivide she must have had the original mutation, the application for consent, the letter of consent as well as the old title deed. She produced a certified copy of the letter of consent as D Exhibit 10 (dated 6/4/2006) a certified copy of application for consent was produced as D exhibit number 11 (dated 6/3/2006).
69. It was her further evidence that upon confirmation that all the documents were in order, the original title deeds was cancelled and resultant title deed were issued.
70. Her office had not received any complaints on the authenticity of the documents presented to them.
71. It was her testimony that when subdivision are made payment are usually done. In that regard she had receipts dated 11/3/2008 serial number 07235a3 in name of Priscilla Jeruto for Kshs 550 for registration of mutation.
72. She had a receipt of serial number 4729067 from Olweny and Associate's surveyors for Kshs 400 for amendment of mutation. She produced the above receipts for subdivision in a bundle as D Exhibit 12.
73. The subdivision gave rise to parcel number 4404 and 4405, where 4404 measuring 0.925 Ha was registered to Priscilla Jeruto Ngetich on 19/3/2008. While 4405, registered into name of 1st April 2008, measuring 0.142 Ha.
74. She produced the certified copies of the registered titles for Nandi/Kamobo 4404 as D exhibit 13(a) and Nandi/Kamobo 4405 as D exhibit 12(b). She equally produced receipts in respect of the transfers receipt number 072405a –dated 1/4/2008 from church commissioner of Kenya for kshs 250 for payment of transfer. Receipt number 0774982, made on 9/11/2007 church commissioner of Kenya for kshs 875/= for being a transfer.
75. The first receipt made on 9/12/2007 was for a transfer which was rejected hence the resubmission the receipts were produced as D exhibit 14.



76. The witness further stated that a tax pin certification in the name of Ngetich Priscilla Jeruto was surrendered as accompanying the transfer documents. The copy of KRA pin certificate. A 0039xxxx2R name of Ngetich Priscilla Jeruto was produced as D exhibit 15.
77. The witness concluded that the documents were in order and her office was satisfied as to documentation and requested the application, thus there was no case against their office.
78. On cross-examination by Ms kiptoo for the Plaintiff the witness stated that D exhibit 2 was a chiefs letter for subdivision. The registered owner must appear before the Land Control. In reference to the application for consent P exhibit 6. There was a RHTP from the registered owner and there is no signature from the buyer since it is only the owner who applies for subdivision. In respect of the application for consent to transfer (P exhibit 5) there is no signature of purchaser and/or a thumbprint from the owner. The witness stated that she was not able to trace the original application for consent to transfer as well as the transfer documents on, P exhibit 7 she had seen a thumbprint. She stated that there were instances where some documents are signed and others by thumbprints.
79. It was her further testimony that the transfer are usually certified by documents. She was not aware whether the consent was a special consent or normal consent. She stated that it is possible to present a document and register it on the same day. She stated further that the person making the entries as well as the Registrar verify the documents, and that registration could be done in the same day.
80. On entry number 1 on the green card, she said the same was cancelled with a pen. Some entries were handwritten while others are typed. She confirmed that as a Registrar. She did not required LCB minutes to register documents unless there is doubt on the authenticity of documents.
81. When asked about the receipt by Olweny and Associates Surveyors she said that the same was for amendment of a mutation but she did not have the previously amended mutation. It was her evidence that a registered owner must appear before the board, but for presentation for registration any person could. They had been no complaint on the authenticity of documents.
82. In re-examination by Mr. Letting she stated that chiefs write to clarify an issue when an issue arises and that she was not able to trace the transfer documents in her office.
- She stated that the role of the Registrar is to verify documents and to register the documents and as the documents were verified, signed and registered, it means that documents were proper. A document is deemed to be to be registered once it has been signed. She further answered that there is no link between the date of presentation and registration.
83. DW9, the Assistant County Commissioner Kapsabet Division, who was also the acting Deputy County Commissioner and Chairperson of Kapsabet Municipality Land Control Board equally testified, it was her testimony that she had been summoned to produce minutes of 16/4/2006 and 15/6/2006 in respect of Nandi/Kamobo/4029. The minutes which had been marked as DMFI 2 dated 16/4/2006 were produced as D Exhibit 3 and minutes for 15/6/2006. DMFI 3 produced as D Exhibit No. 4.
84. It was her testimony that Priscilla Jeruto Ngetich appeared from the minutes to have appeared before the Kapsabet Municipality Land Control Board on 16/4/2006 for subdivision, she was identified by her identity card and members of the Land Control Board identified her as the owner.
- After subdivision of the property into two parcels, Priscilla Jeruto Ngetich appeared again on 15/6/2006 to obtain consent to transfer to the Church Commissioners of Kenya, which application for consent to transfer was approved by the Land Control Board. The subdivision and the transfer were



approved and the chair of the Board must have seen the transferor and transferee before the minutes were prepared.

85. On cross – examination by Ms. Keter, the witness stated that the Board ordinarily cross – examines the transferor together with family before the consent to transfer is given.

On cross – examination by Ms Kiptoo, she stated that she was not present, when the consent was given; it was her testimony that the minutes are evidence that Priscilla Jeruto Ngetich, attended the Land Control Board. In reference to D Exhibit 4 Minutes 253/06, Nandi/Kamobo/4405 an application by Priscilla Jeruto to transfer land measuring 0.142Ha to Church Commissioners for Kenya was approved.

86. In re-examination, the witness stated that the minutes reflect the siting and deliberations of the Board. The application for consent for subdivision and transfer were approved.
87. With the testimony of the 9 witnesses paraded by the defence, the defence case was closed and parties directed to file submissions.
88. Whereas the Defendants filed their submissions, the Plaintiff did not file her submissions even after her Advocate requested for an extension of time to file submissions and judgment was reserved.

Issues For Determination:

89. In their submissions, the 1st, 4th to 8th Defendants identified 3 issues for determination as here follows;
- a. Whether fraud was proved by the Plaintiff.
 - b. Whether the Plaintiff gifted the 1st Defendant the parcel of land currently registered as Nandi/Kamobo/4405
 - c. Whether the Plaintiff donated a portion of land to the 1st, 4th to 8th Defendants and if so whether such donations was valid and took effect.
90. On their part, the 2nd and 3rd Defendants framed the following as issues for determination.
- a. Whether the subdivision of parcel No. Nandi/Kamobo/4209 into Nandi/Kamobo/4404 and 4405 was legal.
91. As observed earlier in the judgment the Plaintiff did not file submissions and at the time of writing this judgment, the Court had not seen the Plaintiff's submissions.
92. From the pleadings, and the evidence on record as well as the submissions as filed, the Court frames the following as issues for determination.
- i. Whether there was fraud in the subdivision of the Nandi/Kamobo/4209
 - ii. Whether the Plaintiff gifted Nandi/Kamobo/4405 to the 1st Defendant?
 - iii. If answer to (ii) above is in the affirmative are there grounds for revocation of the gift?
 - iv. Has the Plaintiff proved her case on a balance of probabilities?
 - v. What reliefs ought to be issued?

Analysis And Determination:

93. Section 107 of the *Evidence Act* places the burden of proof on a party seeking judgment based on certain facts to prove the said facts. In the present case that party is the Plaintiff.



94. In her particulars of fraud and illegality, the Plaintiff pleaded the same as here follows.
- a. Subdividing the land without the consent of the Plaintiff.
 - b. Failing to obtain consent of the Land Control Board for subdivision and transfer
 - c. Failing to obtain the Plaintiff's signature for transfer
 - d. Subdividing and transferring the land without the transfer forms having been signed by the Plaintiff.
 - e. Forging the Plaintiff signature
95. The crux of the Plaintiffs case is thus premised on proof of the particular of fraud and illegality aforementioned
96. On issue number I, whether here was fraud in the subdivision of Nandi/Kamobo/4209; in her testimony, the Plaintiff produced two searches all indicating that the property Nandi/Kamobo/4405 was registered in the name of the 1st Defendant; while Nandi/Kamobo/4404 was registered in her name.
97. The plaintiff further produced P exhibit No.2 a letter dated 6/3/2006 from the chief to the chairman land control Board, however she disputed the contents of the letter.
98. Pexhibit 3 was an application for consent to subdivide had been thumb printed on 6/3/2006 on the side of the owner.
99. A letter of consent was also produced by the plaintiff as pexhibit No.4. The plaintiff in her testimony stated that she did not sign the application for consent and neither did she attend the land control Board.
100. In their defence the defendant state that the Plaintiff attended the Land Control Board. D.W.5 Rev Mark Sang stated that the Plaintiff attended the Land Control Board twice in his presence. The Defendants produced the minutes of the Land Control Board meeting through D.W.9 where it appeared as minute No.34/2006, in relation to the subdivision. D.W.8, the Land Registrar stated that the subdivision was done on the strength of the mutation, the letter of consent, the application for consent as well as the surrendered of the old tittle which was procedural.
101. The Court has seen the minutes of the Land Control Board showing the approval for the subdivision D Exhibit No. 3, the land application for the consent D Exhibit 11 as well as the letter of consent D Exhibit 10 and other the denial of signing the documents, the Plaintiff did not show that she had reported forgery of the documents to the police. The Land Registrar equally had not received a complaint on the authenticity of the documents; it must thus be presumed that she signed the documents, on the strength of Section 83 (2) of the *Evidence Act*.
102. Accordingly particulars (a) and (b) of the particulars of fraud against the defendants have not been proven in the view of the evidence adduced by the plaintiff herself and the testimony of DW5, DW8 and DW9 who relied on records available. The Court is not satisfied that there was fraud and the process of the subdivision of Nandi/Kamobo/4209 was therefore proper and in accordance to the laid down procedures.
103. In answers to issue numbers I, the court finds that there was no fraud in the subdivision of Nandi/Kamobo/4209 into 4404 and 4405.



104. On issue numbers 2, whether the suit property Nandi/Kamobo/4405 was gifted to the 1st defendant by the Plaintiff. P.W.1 and P.W.2 both deny that the plaintiff donated the property to the 1st defendant. D.W.5 the Reverend Mark Sang, confirmed that the Plaintiff had donated the suit property in his presence during a church service at ACK St. Barnabas Church D Exhibit 5 was a book that contained a record of meeting for held for the construction of ACK Cheplungu church. In the said book, it was recorded that the plaintiff had donated 2 points for the construction of ACK Cheplungu church, in the meeting of 9/8/2003 it was recorded that the Chairman of the church thanked the family of Priscilla Jeruto for giving 2 points for building the church on the same D exhibit 5, on 14/2/2004, the minutes indicated that the plaintiff contributed kshs 12,000 towards purchase of the church of 1 ½ points.
105. In the valuation requisition for stamp duty dated 23/6/06 and produced by D.W.8 in a bundle as D exhibit 13, the value was indicated there as a gift.
106. Two witness stated that the plaintiff had donated the suit property. In the views of the records D Exhibit 5 and D exhibit 13 and the testimony of the two witness the Court accepts that the Plaintiff had donated the suit property as this evidence outweighs the denial by PW1 and PW2. The court notes that the Plaintiff had denied being a member of ACK church yet in the records of D exhibit 3 the Plaintiff name appears severally as a member who attended the church meeting and even donated money for purchase of the church plot.
107. Having found that the plaintiff donated the suit property and that the same was made in her lifetime, the donation ought to be viewed as a gift *intervivos*.
108. The test on whether or not properly was gifted was stated in the decision. In the case of *Re Estate of the late Gedion Mantbi Nzioka (Deceased)*(2015)eKLR; which the 1st to 8th defendants have cited in their submissions. In the said case, the Learned Judge summed up, the requirements of a gift *intervivos* as follows; - “for gifts *intervivos* the requirements of the law are that the said gift may be granted by deed, an instruments in writing or by delivery, by way of declarations of trust by the donor, or by the way resulting trusts or presumptions of trust. Gifts of land must be a way of registered transfer, or if the land is not registered transfer it must be in writing or by a declaration of trust in writing. Gifts *intervivos* must be complete for the same to be valid.”
109. In the case of *Kagina v kagina and 2 others* the Court of Appeal appreciated both perfected and imperfect gifts as being gifts *intervivos* by holding that;
- “we have revisited that rival positions on the record agreed with the position taken by the Judge that a deceased person has capacity to divest himself of property during his lifetime known in law as a gift *intervivos*, in which the Judges opinion and correctly so in our view are not only protected under the Act but also sanctionable by a court of law irrespective of whether they are perfect or imperfect by perfect is meant complete meaning transfer of gift *intervivos* in favour of the beneficiary was affected or completed during the lifetime of the deceased while by imperfect is meant the transfer of gifts in favour of the recipient was incomplete as at the time of the demise of deaced as correctly observed by the Judge, lack of completion of the process of the transfer does not render the gift *intervivos* invalid. It can be perfected by the Grant holder if there is no contest over it or alternatively sanctioned by court where proven”
110. From the above decisions, it follows that the gift in the land can either be perfect or imperfect but must be in writing by a deed or transfer. This court adopted the above approach in two recent decisions in



the case of *Wilson Kiprop Sirtich v Richard Kiptarbei Rono* Kapsabet 38/2021 as well as the decisions in *Maichi Tamining Kerich v County Government of Nandi* Kapsabet ELC No. 41 of 2022.

111. Applying the above elements to the present, whereas the gift was made orally before a congregation in church, it was perfected in writing by way of registration of the transfer in favour of the 1st defendant prior to registration of the transfer an application for consent and consent to transfer were obtained and the office of the 2nd Defendant registered the transfer and the title was issued as exhibited in Court. The Court does not fault the process of the perfection of the donation made by the Plaintiff and deems the same as a gift made to the 1st Defendant. Thus in answer to issue number 2, the Court find answers the same in the affirmative. On issue number 3, are there grounds for revocation of the gift? Revocation of the same would be possible under section 26 of the *Land Registration Act*, if it is proved that the title deed was obtained illegally; through fraud, and or through a corrupt scheme.
112. In the plaint, the plaintiff particularized the illegality and fraud as summed up at paragraph 93 of the judgment, particulars (a) and (b) related to illegality of the subdivision process and the court at paragraph 103 of the judgment found that the particulars (a) and (b) not to have been proved. The Court shall consider particulars (c), (d) and (e).

The particulars relate to there been no signature of the Plaintiff on the transfer forms. The original transfer forms were said not to have been available at the lands office in accordance to the testimony of D.W.8 the Plaintiff had produced as P exhibit 7, a copy of the transfer form.
113. While cross-examining D.W.8 the Plaintiff Advocates asked why P Exhibit 7 had a signature, while the Plaintiff had thumb printed on the other documents. Thus a signature appears on P exhibit 7 no expert evidence and/or forensics report was filed by the Plaintiff who disputes the signature as hers and Plaintiff did not discharge the burden of proof under section 107 of the *Evidence Act*.
114. Accordingly the court finds particulars c, d and e of the particulars of illegality and fraud have equally not been proven. Thus no basis for revocation of the title issued to the 1st Defendant, Plaintiff having failed to prove that to same was produced illegally fraudulently or through corrupt scheme, in accordance, with section 26 of *Land Registration Act*.
115. On issue number 4, as to whether the Plaintiff has proved her case on a balance of probabilities, the Court notes that the plaintiff failed to prove the particulars of fraud, further the court found that the donation of the two points was a valid gift. That the gift intervivos cannot be revoked as it was not procure illegally, fraudulently and/ or through a corrupt scheme, the inevitable conclusion is that the plaintiff did not prove her case on the required standard of proof, on a balance of probabilities and is thus not entitled to the reliefs sought in the plaint.
116. The inescapable and inevitable conclusion is that the plaintiff suit is dismissed.
117. Each party shall bear its own costs.
118. Judgment accordingly.

DATED AT KAPSABET THIS 23RD DAY OF FEBRUARY, 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Ms. Kayeli holding brief for Mr. Kamau Lagat for the Plaintiff.

Mrs. Chepseba for 1st, 4th to 8th Defendant.



Mr. Letting for 2nd and 3rd Defendant

