



Kerich v Nandi County Government (Environment & Land Case 41 of 2021) [2023] KEELC 885 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEELC 885 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 41 OF 2021
MN MWANYALE, J
FEBRUARY 16, 2023**

BETWEEN

MAICHII TAMINING KERICH PLAINTIFF

AND

NANDI COUNTY GOVERNMENT DEFENDANT

JUDGMENT

1. The Original Plaintiff Maichii Tamining Kerich (now deceased) vide her plaint dated 17th December 2015, sued the Defendant the County Government of Nandi seeking judgment for;
 - a. Cancellation of the title L.R. Nandi/lolkeringet/34 registered in the name of the Defendant.
 - b. The Plaintiff be declared as the sole legal owner of Land Title L.R. Nandi/lolkeringet/34 and the Defendant has no legal or any claim over the said land.
 - c. The Defendant its agents, servants, servant be issued with permanent orders, restraining them from entering upon or developing the suit land or interfering with the Plaintiff's peaceful and quiet possession of the said land.
 - d. The purported surrender of land L.R. NO. Nandi/lolkeringet 34 be declared fraudulent, illegal null and void.
 - e. Costs and interest of this suit.
 - f. Any other or further reliefs that the Honorable Court may deem fit to grant.
2. The original Plaintiff testified and afterwards passed on, necessitating substitution and amendment of the plaint whereat Philip Kirwa Metto became the new Plaintiff.



3. Nothing significant was amended in the Amended Plaintiff dated 31st May 2022 save for substitution of the new Plaintiff. Consequently the reliefs sought in the Original Plaintiff by and large remained unchanged as were the averments.
4. The matter partly proceeded before the Eldoret ELC Court and upon establishment of this Court, it was transferred here the amendment made and the remaining witness testified as the proceedings had been typed.

Plaintiffs Case and Evidence:

5. It was the Plaintiff's case as per the Amended Plaintiff that he was the son of the late Kimeto Kerich Chepsiror who was the registered owner of title L.R. No. Nandi/lolkeringet 34 and was the administrator of the deceased estates.
6. That upon demise of Kimeto Arap Chepsiror his estate was distributed amongst his beneficiaries and L.R. NO. Nandi/lolkeringet/34 was bequeathed to the late Jelimo Kerich.
7. The Plaintiff further case was that there was no agreement, transfer or surrender of land LR No. Nandi/lolkeringet/34 since there was no consent between beneficiaries and the transferor and neither was there any consideration for the said transfer/surrender.
8. It is Plaintiff further claim that the surrender of land of L.R. Nandi/lolkeringet/34 to trustees/agents of the Defendant is invalid for want of property execution as the surrender agreement indicates Land registration Nandi/lolkeringet/35 and not Nandi/lolkeringet/34.
9. The Plaintiff pleaded particulars of illegality, fraud and/or unreasonableness on the part of the Defendants and sought for the prayers at paragraph 1 of this judgment.
10. Maichii Tamining Kerich the original Plaintiff testified as PW1 and the only witness for the Plaintiffs. It was her testimony that her late husband did not sale the suit property as her son Jerikin was the one using the suit property.
11. On cross – examination, the witness indicated that she was the 2nd wife of the late Kimetto Arap Kerich. She indicated that a women group had been given the land to use as they looked for their own land. She stated that her husband did not sign any document surrendering the title to be suit property. She stated that she did not know that the suit property had been given to Kapkoros Women Group.
12. She stated that she cultivated on the suit property but does not stay on it as she lived nearby.
13. She was not aware that her husband had gone to the LCB after being shown the minutes of 25/1/1990; entry No. 66, she did not know whether her husband had changed name from Kimeto Arap Chepsiror. She stated that her husband used the name Kimeto arap Kerich Chepsum.
14. She was not aware that the suit land had been transferred to the benefit of Kungurget Primary School with the 1st Defendant as a custodian. Each wife had her own home; and she was staying at Mateket near Kaiboi Centre.
15. She further stated that they were staying on the same farm but each person had her own home.
16. In re-examination, she stated that the suit property was a bit far from where they were staying. She did not attend the Land Control Board and nobody had come to claim the land. Her neighbors knew that the land belonged to her, and the primary school was next to the suit land.



17. After the testimony of the Plaintiff the Plaintiffs Advocate sought time to file additional witness statements and call additional witnesses but did not do so and the Plaintiff's case was closed on 9/10/2018.

Defendants Case and Evidence:

18. Vide its defence dated 3rd February 2016, the Defendant denied all the allegations in the plaint and pleaded that is the correct legitimate and/or rightful registered owner of the said title no. Nandi/lolkeringet/34 having inherited the same from the defunct County Council of Nandi upon devolution.
19. The Defendant further denied that they obtained the registration of Nandi/lolkeringet/34 fraudulently, since there was no consent between the beneficiaries and the transfer or thereby denying in toto the particulars of illegality, fraud and/or unreasonableness on its part and/or its agents.
20. The Defendant thus sought for the dismissal of the suit.
21. DW1, Jonathan Busienei Cheruwa, testified. It was his testimony that he knew the Plaintiff who was the wife of late Kimeto Kerich.
22. He further stated that he was the assistant chief of Lolkeringet Sub location, where he was an ex-officio member of the Land Control Board. It was his evidence that he was present when the meeting of the Land Control Board took place. Initially Kimeto did not get a consent to transfer as the names were not tallying hence minute 66/90 Kimetto corrected his name from Kimeto Arap Kerich to Kimeto Kimeli Chepsiror and the Land Control Board thus allowed him through Min. 67/90 to transfer the land to Kungurukot Primary School which was under sponsorship of the S.D.A Church since Kimetto was in AIC Church, he later changed to Kapkoros Primary School as he had not known that Kungorumot was sponsored by S.D.A.
23. The witness stated that he accompanied Kimetto to the Land Registrar who confirmed that it would be possible to transfer the land from Kungurmet to Kapkoros Primary School.
24. The property had initially been gifted to Kapkoros Women Group in 1985, but Kimetto stated he wanted to give it to the public. It was his further testimony that the Plaintiff had not lived on the suit property that the suit property given to the school by Kerich was Nandi/lolkeringet/34 and not Nandi/lolkeringet/35.
25. On cross – examination by Mr. Songok, the witness stated that the deceased gave the suit property to Kapkoros Primary School. There was no transfer to Kapkoros Primary School in the minutes, the transfer did not include the same. The surrender was for plot 34, there was an alteration from 35 to 34, the late Kimetto had put his thumbs print on the alteration.
26. In re-examination, the witnesses stated that he was not involved in the surrender documents, but had advised the late Kerich to go to the Land Control Board for the transactions the surrender was for plot number 34 and he represented the chief in the meeting, that is why he was referred to as acting chief.
27. DW2, was Isaac Wanyonyi Sabuni, a Land Registrar Nandi County, testified. It was his testimony that Nandi/lolkeringet/34 was registered on 14th March 1990 as a transfer to County Council of Nandi from Kimeto Kerich Chepsiror Alias Kimeto Arap Kerich as a gift.
28. The witness was stood down to bring the original parcel file and another Registrar Sheila Mwei DW3 testified, she produced D Exhibit 1, the copy of the green card, she produced the Original transfer, original consents as well as the application for consent as D Exhibit 2, 3 and 4 respectively.



29. The witness equally produced the original green card for Nandi/lolkeringet No. 35 which belonged to Kongolei Arap Cherwon issued on 12/9/1962 which was subdivided and resultant titles were Nandi/lolkeringet/250 and 251. She produced a certified copy of the green card as D Exhibit No. 5.
30. It was her testimony that plot no. 250 belonged to Kinyolei Cherwon and land certificate was issued on 26/1/1979, plot number 251, belonged to Kirongo A Barno issued on 22/9/1966 but Kapkoros primary School was built thereon.
31. On cross – examination by Mr. Songok. The witness stated that plot number no. 34 was originally owned by Kimetto Arap Kerich the 2nd entry on the green card was correction of name on 8/2/1990. The entry of County Council of Nandi was done on 14/3/1990. There were no minutes supporting the change from Kongorwet to Kapkorors Primary School. The changes have no dates.
32. She further stated that Kongurwet Primary School was the transferee in the application for consent, there is a thumb print. The clerk to County Council of Nandi signed on behalf of the transferee. She did not know whether Kapkorors Primary School was public or private; but public schools are registered in their own names with the CS for education.
33. Apart from the consent and application for consent, there is no other document signed by the transferor and transferee. The stamp duty is nominal in case of a gift. No value is indicate. There were copies of the receipt for registration and stamp duty. The document is franked.
34. In re-examination, she stated that Land Registrars have no power to effect forms Jonathan Busienei was witnessing the transfer. The County Registrar signed the corrections, at the time, public schools did not have titles in their names.
35. DW4, Maureen Atyang Otubongos the Assistant County Commissioner Kabiyeet Division testified. It was her testimony that she had been summoned to proceed minutes for Land Control Board held on 25th January 1990, showing the transfer of land from Kimeto Kerich Chepsiror by way of gift to Kurugnwet Primary School for 1 acre captures on minute 67 of that day. Before transfer of Land, he applied for a consent to correct his name from Kimetto Arap Kerich to Kimeto Kerich Chepsiror as per the identity card and it was minuted 66. The minutes were produced as D Exhibit 8.
36. In cross – examination by Mr. Songok, it was her answer that in D Exhibit 1 (green card) the land was reserved to 1 Kapkoros Primary School, yet in minutes D Exhibit 8, it indicate gift to Kungurmet. On D Exhibit 9, search shows the property was reserved for Kapkoros Primary School. It was her testimony that minutes ordinarily shows the people present, however the name of Kerich is missing. Minute 66 shows consent given that Kerich to change names. The people who attended Land Control Boards have to appear in the minutes.
37. In re-examination, she confirmed that the minutes produced were for 25/1/1990. The people recorded on the minutes are Board members. Minute 65 showed consent was given and does not indicate whether the person was there, but the fact was that the consent was given; it means that the person was present. Consent was given for transfer to Kungurmet by Kimetto Kerich Chepsiror.
38. After the testimony of 4 defence witnesses and closure of the defence case the parties were directed to file their written submissions.

Plaintff’s Submissions:

39. The Plaintiff identified five issues for determination and submitted on the said issues. The issues were;
 - i. Whether the Plaintiff has the requisite locus standi to prosecute this matter?



- ii. Whether the Defendant is the bonafide owner of the suit property.
 - iii. Whether the Plaintiff has interest on the suit land.
 - iv. Whether the Plaintiff is entitled to the remedies sought.
40. On locus standi, the Plaintiff submits that she is the administrator in the Estate of Kimeto Kerich. The Original Plaintiff was substituted upon temporary grant or letters of administration being granted and on application for substitution having been heard in Court.
 41. Thus the Plaintiff submits he has the requisite legal authority to institute suit and to safeguard the interest of the deceased estate as per Section 83 of the Law of the Succession Act.
 42. On issue number 11; the Plaintiff submits that the suit property belonged to the late Leah Jelimo Kerich pursuant to succession cause. The Plaintiff submits that her testimony as to the relationship to the deceased and occupation was not attached.
 43. The Plaintiff submits that on a balance of probabilities, she proved that the deceased was the initial legal owner of the suit property, the Plaintiff is one of the administrator and heir of the deceased estate, the Plaintiff has no knowledge of disposal of the suit land in whatever manner, the Plaintiff is and has always been in possession and occupation of the suit land.
 44. The Plaintiff submits that the consent to transfer was for suit to be transferred to a school known as Kurngurwet Primary School and not Kapkoros Primary School. The transfer is indicated to be for Kurnguwet Primary School.
 45. The Defendants provided a deed of gift for land parcel No. Nandi/lolkeringet/35 which did not belong to the Plaintiff.

Nandi/lolkeringet 35 was subdivided to 250 and 251. Plot 251 belongs to Kirongo A. Barno but Kapkoros Primary School was built thereon.
 46. The Plaintiff submits that the question of which land has been donated and by whom has not been satisfactorily answered by the defence.
 47. The Plaintiff further submits that DW3 admitted that title deeds for public schools are registered on their own names with the Cabinet Secretary for education.
 48. The Plaintiff further submits that it is doubtful that Kimetto Arap Kerich attended the Land Control Board meetings, as he was not indicated to have attended, hence pointing out the fraud.
 49. The Plaintiff further submits placing reliance, on the decision in *Dyno Holdings Limited vs National Land Commission and Another* (2018) eKLR that the sanctity of title was never intended to be a vehicle of fraud and illegalities or an a venue for unjust enrichment at public expense.
 50. On whether the Plaintiff is entitled to the reliefs sought, the Plaintiff submits that the Defendant has not produced any deed of gift in Court and the one filed in Court was meant for a wrong property.
 51. The Plaintiff submits that the minutes exhibited in Court are faulty for failure of the information therein to tally with the ones contained on the register.
 52. The Plaintiff further submits that the record is not clear why the Land was reserved for Kapkoros Primary School when the documents produced indicate Kungurwet Primary School.
 53. The Plaintiff submits that the gift was thus invalid and relies on the *Halsburys Law of England 4th Edition Volume 20 (1)* at paragraph 67.



54. On the strength of the above submissions, the Plaintiff prays that judgment to be entered for him in this matter.

Defendant's Submissions:

55. The Defendant identified 3 issues for determination, namely;
- i. Whether the deceased gifted the public the parcel of land to build a school or not.
 - ii. Whether the gift was valid
 - iii. Whether there any illegality in the transfer of land.
56. On issue number 1, the Defendant submit that the testimony of DW1 explains the circumstance of the change from Kungurwet to Kapkoros Primary School, being that Kungurwet Primary School was a school sponsored by the SDA while the donor was a congregant in AIC which he desired to sponsor Kapkoros, Primary School hence the change.
57. The Defendant while relying on P Exhibit 4 (a) submit that the suit property had already been gifted to Kapkoros Women Group to hold in trust to the County Council; hence there was intention to gift the property.
58. On issue number 2, the Defendant while relying on the decision in the case Nyeri Succession Cause No. 504/2008; in the matter of the Estate of Gerald Kabue Gatimu submits that it was the intention of the donor to transfer the gift as he had attended the Land Control Board and obtained to transfer as he further signed the transfer form of the transfer.
59. On issue number 3, as to whether there was fraud or misrepresentation, in the transfer of the land.
60. The Defendant submits that the process was above aboard as there was no illegality as of fraud, misrepresentation or the tile being acquired illegally, unprocedurally or through a corrupt scheme.
61. The Defendant submits that the process started way back in 1985 when the suit property was surrendered to Kapkoros women Group to hold in trust for the County Council of Nandi.
62. The Defendant submits that the deceased had applied for a change of name and thereafter sought for consent to transfer the property as a gift.
63. The Defendant thus submits, that the process was above board and prays the Plaintiff suit be dismissed with costs.

Issues for Determination:

64. From the analysis of the pleadings, the evidence before Court as well as submissions by Counsels of the respective parties, the Court frames the following as issues;
- i. Whether or not Nandi/lolkeringet/34 formed part of the Estate of the late Kerich arap Kimetto, as claimed by the Plaintiff or
 - ii. Whether or not Nandi/lolkeringet/34 was gifted to the Defendant by the late Kerich Arap Kimetto.
 - iii. Whether the Plaintiff has proved his case on the balance of probabilities and is deserving of the reliefs sought in the plaint.
 - iv. Who bears the costs of the suit?



Analysis and Determination:

65. It is the Plaintiff's claim as pleaded in paragraphs 3 and 5 of the plaint; that Nandi/lolkeringet 34 formed part of the Estate of the late Mr. Kimetto Kerich Chepsiror and had been distributed among the beneficiaries and was allocated to the late Leah Jelimo Kerich.
66. In her testimony before Court as captured in her witness statement the Plaintiff stated that her husband had died in the year 1997 and letters of administration were issued in the year 2002.
67. Thus for the suit property to have formed part of the Estate of the deceased it must have been registered in the name of the deceased at the time of his death in 1997.
68. The Court record reflects that a list of documents dated 15th December 2016 consisting of 4 documents namely;

Letter dated 2/12/2015

Letter dated 4/12/2015

Copy of certificate of confirmation of grant

Letter dated 10th May 1985

Were filed in Court, however the Plaintiff did not produce the documents in evidence or refer to the documents, or the list at all.

69. There was therefore no evidence tendered by the Plaintiff to support the fact that Nandi/lolkeringet/34 formed part of the Estate of the deceased at the time of his death in 1997. On the contrary, DW3, the Land Registrar produced a copy of the green card of Nandi/lolkeringet/34 as D Exhibit 1 upon perusal of D Exhibit1, entry no. 1 made on 12/9/1962 as the property having been registered to Kimetto Arap Kerich.

Entry 2 thereof made on 8/2/1990 shows a correction of name from Kimetto Arap Kerich to Kimetto Kerich Chepsiror while entry number 3, shade on 14/3/1990, showed the County Council of Nandi as the registered owner.

70. From the above, it follows that suit property was registered to County Council of Nandi; on 14/3/1990 and by the time of the demise of the late Kerich Arap Kimetto in 1997, the property no longer belonged to him and could not have formed part of his Estate at his demise. The inclusion of Nandi/lolkeringet 34, as part of the estate of late Kerich Arap Kimetto in the succession cause filed in 2002 must be deemed to have been made error, and the answer is found in the cross examination of the Plaintiff when she stated that she did not know whether she got a search while suing in the succession cause.

71. Thus in answer to issue number 1, the Court finds that Nandi/lolkeringet/34 did not form part of the Estate of the late Kerich Arap Kimetto.

72. With regard to issue number 2, on whether Nandi/lolkeringet/34 was a gift; to the Defendant.

73. In order to answer this, the Court will review the law regarding gifts *in vivos*. The elements which must be satisfied for a property to be deemed as a gift *in vivos*, were stated in the decision in the case of *Re Estate of the late Gedion Mantbi Nzioka (deceased)* 2016 eKLR where the Court stated "for gifts *in vivos*, the requirements of the law the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor by way of resulting truces or the presumption



of gifts of land must be by way of registered transfer; of if the land is not registered if must be writing or by a declaration of trust in writing gifts intervivos must be valid.”

74. In the case of *Kagina vs Kagina and 2 others* the Court of Appeal appreciated both perfected and imperfect gifts as being gifts, by holding that “We have revisited that rival position on the record and agree with the position taken by the judge that a deceased person has capacity to duest himself of property during his lifetime known in law as gift intervivos in which the judge opinion and correctly so in our view are not only protected under the Act but are also actionable by a Court of law irrespective of whether, they are perfect or impact..... By perfect is meant complete, meaning transfer of the gift intervivos in favour of the beneficiary, was effected and completed during the lifetime of the deceased. While by imperfect is meant the transfer the gift in favour of the recipient was incomplete at the time of the demise of the deceased. As correctly observed by the Judge – lack of completion of the process of transfer does not itself render the gift intervivos invalid. It can be perfected by the grant holder, if there is no contest over it or alternatively sanctioned by a Court where proven.”
75. From the above decisions, as quoted in the recent decision by this Court in the case of *Wilson Kiproop Sirtich Vs Richard Kiptarbei Another* Case No. 38/2021 (Kapsabet). It follows that gifts intervivos must be in writing either by way of a deed or a transfer, and can either be perfect or imperfect gifts.
76. In the instant suit, the Defendant did produce as an exhibit the transfer forms, the application for consent and the consent, all executed by the deceased in favour of the County Council of Nandi; on behalf of Korngurwet Primary School which was latter changed to Kapkoros Primary School.
77. The Plaintiff in its submission wondered how the change was effected from Korgurwet Primary School to Kapkoros Primary school, and the answer is found in the testimony of DW1 the retired assistant chief, who testified that he was present in the Land Control Board meeting, and indeed his name was captured in the minutes produced as D exhibit 8, that the deceased having learnt that Kapgorwet Primary School was sponsored by the SDA Church changed the gift to be effected to Kapkoros Primary School sponsored by his Church AIC.
78. It is the Courts finding that the gift intervivos was made in writing by way of a transfer, produced in Court as D Exhibit 2 and that the gift was perfected by way of registration of the transfer as was confirmed by D Exhibit 1, the green card of Nandi/lolkeringet/34; during the lifetime of the deceased, which was effected on 8/2/1990 as entry 2, while the deceased passed on in 1997.
79. The Court finds that Nandi/lolkeringet/34 was thus a gift made in the lifetime of the deceased thus issue number 2 is answered in the affirmative.
80. Issue number 3, on whether the Plaintiff proved his case on the required standard of proof. It is trite law as provided Section 107 of the *Evidence Act*, “that 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.”
81. In the instant suit, the Plaintiff did not adduce any evidence as the list of documents was not produced neither did the Plaintiff call any witness to corroborate her evidence. Other than the allegations made and the particulars of fraud which none was proved, the Plaintiff in his submissions expected the Defendant to offer explanations as to particulars of fraud that he pleaded.
82. Having failed to prove that Nandi/lolkeringet/34 formed part of the Estate of the deceased and that the signatures of the deceased were procured fraudulently, the Court finds that the Plaintiff has on a balance of probabilities failed to prove his case and is thus not deserving of the reliefs sought.



83. The Court having found that Nandi/lolkeringet/34 was gifted to the County Council of Nandi as predecessor of the Defendant for public use in construction of Kapkoros Primary School, thus dismisses the Plaintiff's suit with costs.

84. Judgment accordingly.

DATED AT KAPSABET THIS 16TH DAY OF FEBRUARY, 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Mr. Songok J. K.

