



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ELC NO. 4 OF 2021 (O.S)**

**CHARLES GITAHI KAMAU.....PLAINTIFF**

**VERSUS**

**DISTRICT LAND REGISTRAR NAKURU.....DEFENDANT**

**AND**

**PRISCILLA WANJIKU THUMBI.....1<sup>ST</sup> INTERESTED PARTY**

**CHRISTOPHER KARIUKI KAMAU.....2<sup>ND</sup> INTERESTED PARTY**

**CHRISTOPHER KARIUKI KAMAU.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

1. What is before me for determination is the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents/interested parties preliminary objection dated 26<sup>th</sup> June, 2021 and filed on 28<sup>th</sup> June, 2021. The preliminary objection is based on only one ground: -

*1. That the suit was filed is defective for non-existence of a register for title No.NAKURU/PIAVE/3489 which is alleged to be an excision from the title No. NAKURU/PIAVE/571 which remains intact.*

2. The preliminary objection was canvassed by way of written submissions. All the parties filed and exchanged their submissions.

3. The plaintiff submitted that the preliminary objection lacked any merit. He contended that the preliminary objection was not based on any point of law but rather introduced disputed facts which can only be considered at the trial. He further argued that the issue as to whether or not the deceased initiated the process of subdivision of the suit land and transfer of the resultant portions was a substantive issue which was not capable of disposal by a preliminary objection. He further submitted that the preliminary objection could only be said to be a result of misapprehension of the facts of the suit and the prayers sought in the pleadings and ought to be dismissed.

4. The plaintiff further argued that the preliminary objection was filed in bad faith with the aim of slowing down and frustrating the hearing and determination of the main suit. He further contended that the preliminary objection was wholly based on facts that were yet to be proved or disproved and thus was an abuse of the court process and urged the court to dismiss the same with costs.

5. The interested parties/respondents in support of the preliminary objection submitted that NAKURU/PIAVE/571 the suit property herein was still registered in the name of Monica Waithira Kamau having been allocated by the government through the Settlement Fund Trustees and that the title is still intact pending subdivision into the six portions the plaintiff alleges were done.

6. The respondents further submitted that the deceased had settled all her children in equal portions in the suit land including the plaintiff and that there was no subdivision done to give the plaintiff a bigger portion from the rest. The interested parties/respondents contended that the thumb prints on the mutation form and the transfer form were different signifying that the same could not be from the same person.

7. The Respondents further submitted that the alleged gift *inter vivos* in favour of the plaintiff was never a gift for want of completeness and that the suit property was free property their deceased mother and therefore available for distribution among the beneficiaries. The respondent placed reliance on the case of **Malindi Succession Cause 15 of 2018** where the court held that gift *inter vivos* must be complete from the donor to donee and where done requires the input of a 3<sup>rd</sup> party to complete the gift *intervivos*, the same cannot legally be described as a gift *intervivos*.

8. The Respondents finally submitted that since there was no title known as NAKURU/PIAVE/3489, the suit should be struck out to allow parties litigate the matter in Nakuru CM Succession Cause No. 233 of 2021. The Respondents further submitted the plaintiff/applicant's case is based upon an alleged gift *intervivos* by one Monica Waithira Kamau ( deceased) who was the registered proprietor of title number Nakuru/Piave/571 which had not taken effect and/or completed before she died.

9. In the suit before the court it is not disputed that Monica Waithira Kamau (now deceased) was the registered proprietor of Title No.Nakuru/Piave/571. The plaintiff asserts that before her death she gifted him a portion measuring 0.6 Ha that was to be excised from the parcel of land and that the portion was actually excised as Title No. Nakuru/Piave/3489 but the transfer in his favour was not registered. The interested parties/Respondents deny there was such a gift *intervivos* by the deceased in favour of the plaintiff and claim the plaintiff had hatched plan to manipulate their aged mother and to fraudulently cause the parcel of land to be subdivided and for him to get a larger portion of land to their prejudice as the legal beneficiaries of their later mother's estate. Hence there is a dispute as to whether there was a valid gift *intervivos* in favour of the plaintiff, and in case there was such a gift whether it was completed before the deceased death.

10. The interested parties/Respondents have pleaded that there is pending succession proceedings vide Nakuru CMCC Succ. Cause No.233 of 2021 relating to the estate of Monicah Waithira Kamau (deceased) where land title Nakuru/Piave/571 is shown as one of the assets of the deceased liable or distribution to the beneficiaries and the plaintiff is one of the named beneficiaries.

11. The plaintiff has contended that the preliminary objection taken by the respondents is not sustainable as it is not on a pure point of law and does not satisfy the threshold of what constitutes a preliminary objection as established in the case ***Mukisa Biscuit Co Ltd -vs- West End Distributors Ltd (1969) EA 696***.The respondent's preliminary objection challenges the competency of the plaintiff's suit. The respondent asserts the suit is defective on the basis that a register for land parcel Nakuru/Piave/3439 does not exist as land parcel Nakuru/Piave/571 is intact and has not been subdivided as alleged.

12. Whether or not a suit is defective and/or competent is a legal issue and in my view can be raised as a preliminary as it is a point of law. To determine whether a suit is defective or competent a court would need to review the pleadings and the evidence placed before the court by the parties.

13. As stated earlier in the ruling, the plaintiff claims to have been gifted a portion of land parcel measuring 0.6 Ha out of land parcel Nakuru/Piave/571 by his late mother which he states was excised and given a number Nakuru/Piave/3489 but had not been transferred by the time his mother died. The respondents dispute that and contend the plaintiff had contrived to have the land transferred fraudulently to himself. It is evident and the plaintiff admits the portion of 0.6 Ha had not been transferred to him as at the time his mother died on 6<sup>th</sup> October 2012 and that prompted him to file the instant suit seeking an order that the deceased had gifted him the said land and for the Land Registrar to effect the registration of subdivision and remove the caution registered against the suit land. The abstract of title (green card exhibited by the defendant (Land Registrar) issued on 3<sup>rd</sup> June 2021 shows that land title Nakuru/Piave/571 was registered in the name of Monica Waithira Kamau on 31<sup>st</sup> August 1993 and on 21<sup>st</sup> September 1999 a caution was registered under entry 4 by the Respondents beneficiary interest. The caution has never been removed and the land as per the record has not been subdivided.

14. The plaintiff exhibited a copy of letter of consent to subdivide dated 2<sup>nd</sup> February 2012, copy of mutation form dated 5<sup>th</sup> June 2012 and copy of transfer purportedly signed by the deceased on 2<sup>nd</sup> February 2002. It is note worth that other than the consent for transfer has been exhibited and hence the transfer executed on 2<sup>nd</sup> February 2012 is not supported by any consent from the Land Control Board. The caution lodged by the respondents on 21<sup>st</sup> September 1999 was to prohibit any transactions affecting the title

without reference to the cautioners.

15. In the premises to the extent that as at the time of her death, the deceased had not transferred the portion of the land to the plaintiff the suit land Nakuru/Paive/571 became part of the deceased estate and fell to be administered and distributed in accordance with the law of succession. If it is the plaintiff's position that he was gifted any portion of the land by the deceased before she died, he would have to prove that before the succession court. The determination whether or not there was an inter vivos gift made by the deceased to the plaintiff, that would be for the succession court to determine and this court lacks the jurisdiction to determine the issue.

16. In the case of *In re Estate of Chesimbili Sindani (deceased) 2021 eKLR* Musyoka J dealt with the issue of gift inter vivos. The judge in paragraphs 29, 30 and 31 which I reproduce hereunder expressed himself as follows:-

29. *In In re Estate of Nyachieo Osindi (Deceased) [2019] eKLR (Ougo J), the court found that there was sufficient proof of a gift inter vivos, where the deceased had given possession of a piece of land to another, and signed a transfer form in his favour, but died before the transfer was registered. In In re Estate of Muchai Gachuika (Deceased) [2019] eKLR (Gikonyo J), it was established that the deceased had registered three assets in the names of some of his sons during his lifetime, and it was held that those gifts were complete and the assets in question did not form part of the estate of the deceased. It was said, in In re Estate of Phylis Muthoni M'Inoti (Deceased) (2019) eKLR (Gikonyo J), that a person claiming that the deceased had made a gift inter vivos to them, but the titles were not deduced during his lifetime, should show such conduct of the donor which would give the intended donee the right to enforce the gift. On the facts of that case, the court found no evidence of gifts inter vivos, for there were no consents to transfer the property, duly signed by the deceased, or any evidence that the subdivision of the land by the deceased was intended to benefit the persons claiming. The court further found that none of the alleged beneficiaries had claimed to have had been put in possession of the subject property by the deceased, nor to build or built on the subject property.*

30. *The principles relating to inter vivos gifts have been stated in very many cases, which include, but not limited to In re Estate of Godana Songoro Guyo (Deceased) [2020] eKLR (Nyakundi J), William M'Arimi M'tuambae vs. Rosemary Karamuta for estate of George Gatimi [2017] eKLR (Gikonyo J), In re Estate of Monicah Wambui Nguthiru (Deceased) [2020] eKLR (Ongeri J), In re Estate of Osoro Motari (Deceased) [2020] eKLR (Ougo J), In re Estate of M'Raiji Kithiano (Deceased) [2017] eKLR (Gikonyo J), Evans Onguso & 2 others vs. Peter Mbuga & 4 others [2020] eKLR (JM Mutungi J), Margaret Mumbi Kihuto vs. Peter Ngure Kihuto & another [2017] eKLR (OnyiegoJ), In re Matabo Sabora (Deceased) [2019] eKLR (Mrima J), Naomi Wanjiru Njoroge & 2 others vs. Winston Benson Thiru [2018] eKLR (Muigai J) and In re Estate of Japhet M'tuamwari M'ikandi (Deceased) [2019] eKLR (Gikonyo J).*

31. *From the case law above, the principle that emerges is that any gift inter vivos should be backed by some memorandum in writing, and the gift would be complete once title to the subject property is transferred to the name of the beneficiary of the gift. Difficulties arise where transfer is not effected to the beneficiaries before the death of the deceased, in which case such property would remain the free property of the deceased, available for distribution at confirmation, the argument being that such gift was founded on a mere promise which the deceased did not carry through prior to his death. Where some preliminary steps were taken towards effectuating his promise, so that all what remained after the death of the deceased was mere registration of the property in the name of the beneficiary, it would be presumed that that the deceased intended to make a gift inter vivos. That would be the case where the deceased has complied with the Land Control Act, Cap 302, Laws of Kenya, where the land is subject to that law, by applying for consent to transfer the property from the name of the deceased to that of the beneficiary, the consent had been granted, and he had signed a transfer form to facilitate registration of the property in the name of the beneficiary. That would mean practically everything had been done to perfect or complete the gift were it not for the demise of the deceased. The mere fact of being shown a piece of land and given permission to occupy and use it, without more, is not adequate proof for a gift inter vivos. The deceased, as registered proprietor of the land in question, would have the right to licence a person to occupy the land and use it. A child who has been shown a piece of land to build on and to till, is not in the shoes of an owner, but a mere licensee. The death of the deceased would not upgrade the licence to ownership, if anything the death of the proprietor could mean that the license comes to an end, and the licensee continues to occupy and work the land at the mercy of the administrator.*

17. In the present case the deceased land parcel Nakuru/Piave/517 is subject of succession proceedings in Nakuru CMCC No,233 of 2021 and that would be appropriate court to deal with the question whether or not the gift allegedly made to the plaintiff crystallized and if so to have the same enforced.

18. The instant suit is defective not because land was not subdivided as claimed by the plaintiff but because the deceased died before

effectuating the inter vivos gift in favour of the plaintiff, in case there was one. Since there was no transfer effected to the plaintiff during the lifetime of the deceased, the deceased property fell to be administered in accordance with the Succession Act, Cap 160 Laws of Kenya. This court has no jurisdiction to deal with succession.

19. In the premises I sustain the respondents preliminary objection that the suit is defective and/or incompetent on the ground that this court has no jurisdiction to deal with the same. I accordingly strike out the suit and order that each party bears their own costs.

20. Orders accordingly.

**RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 23<sup>RD</sup> DAY OF NOVEMBER 2021.**

**J M MUTUNGI**

**JUDGE**



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