



LEGAL ALERT

GIFTS INTER VIVOS IN KENYA: LEGAL VALIDITY AND IMPACT ON SUCCESSION

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Introduction

Administering a deceased person's estate involves not only identifying assets and liabilities but also determining each beneficiary's entitlement. One key consideration is how lifetime gifts by the deceased affect the distribution of property, especially in cases of intestacy where such transfers can significantly alter shares. Kenyan law recognizes two types of gifts: gifts inter vivos and gifts in contemplation of death, the latter commonly known as donatio mortis causa (DMC). A gift inter vivos is a transfer made during the donor's lifetime with immediate and irrevocable effect, while a DMC is conditional upon the donor's anticipated death. (Section 31 of the Law of Succession Act sets out the conditions for a valid DMC). Both gifts fall outside the formal probate process but significantly influence how courts allocate property among beneficiaries. Sections 28 and 42 of the Law of Succession Act guide equitable distribution and require previous benefits received by dependants or heirs to be considered. This article examines the legal framework governing gifts inter vivos in Kenya, their validity, and the process of transferring such gifts.

LEGAL REQUIREMENTS OF GIFTS INTER VIVOS

A gift inter vivos refers to the transfer of property from a living donor to a donee during the donor's lifetime. For such a gift to be valid, it must take immediate and absolute effect, and the donor must have the requisite legal capacity to make it. To be valid, the gift must be **complete**, meaning the donor must divest themselves of all interest in the property through an instrument of transfer. As stated in **Halsbury's Laws of England (4th Edition, Volume 20(1), paragraphs 32 to 51)**:

"For gifts 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 a declaration of trust by the donor, or by way of resulting trusts or the presumption of such. Gifts of land must be by way of registered transfer, or if the land is not registered, then it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. It is not necessary for the donee to give express acceptance, and acceptance is presumed unless dissent is expressly signified."

Although the Law of Succession Act (Cap 160) does not expressly define gifts inter vivos, it recognizes them under **Section 42**, which provides that:

"Where—

a. an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

b. property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35;

***That property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house."*



This principle, known as **hotchpot**, ensures that any property given during the deceased's lifetime is considered when distributing the estate under intestacy. However, only valid and complete gifts are excluded from the estate. Kenyan courts have taken a strict approach: a mere promise to give property, whether oral or written, is incomplete and unenforceable. Courts will not perfect an imperfect gift.

This strict position was affirmed in **Khalifa Abdalla Khamis v Mohamed Abdalla Khamis [2021] eKLR**, where Nyakundi J., discussing the standard for proving gifts, cited with approval the reasoning of **Nyamweya J. (as she then was) in Re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR**. Nyakundi J. observed: *"It is a cardinal rule in our jurisprudence that the right to dispose of property by will or gift is exacting in its requirement,"*

and proceeded to quote Nyamweya J. as follows:

"In law, gifts are of two types (gift inter vivos and gifts made in contemplation of death (gifts mortis causa). For gifts 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 a declaration of a trust by the donor, or by way of resulting trusts or the presumption of gifts. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of a trust in writing. Gift inter vivos must be complete for the same to be valid."

In that case, Joyce claimed that her father had given her the land as a gift during a family gathering. However, the court, while trying to determine whether the gift was inter vivos or a DMC, found that the gift inter vivos failed due to the lack of documentation, and the disputed family meeting meant Joyce could not prove ownership.

The principle was further crystallized in **Munyole v Munyole (Civil Appeal 21 of 2017) [2022] KECA 373 (KLR) (18 February 2022) (Judgment)**, where the High Court agreed with the trial court and concluded that the deceased had not gifted any of his two properties to any of the beneficiaries during his lifetime, as no evidence had been placed before it to show that he had done so. When the appellant averred that the deceased purchased Bokoli/Chwele/1065 and settled her house on it as there was hostility between her house and that of her co-wife, no evidence was tendered to show that this property was gifted to her and her house by the deceased in his lifetime. Hence, the court held:

"Both of the deceased's properties were therefore available for distribution to all his beneficiaries in accordance with section 40 of the Law of Succession Act."

These decisions illustrate the importance of clear intention, proper documentation, and actual delivery when claiming a gift inter vivos. Without such evidence, courts are unwilling to presume the existence of a valid gift, particularly in the context of intestate succession where equal distribution principles apply.

PROCESS OF TRANSFER OF GIFT INTERVIVOS

1. Intention to Gift

The donor must have a **clear and unequivocal intention** to make the gift.

The intention must be **immediate** (not conditional upon death or a future event).



This can be expressed orally, in writing, or inferred from conduct, but **written evidence is strongly advised**, especially for land.

2. Identification and Description of Property

The **exact property** to be gifted must be clearly identified (e.g. land parcel number, vehicle registration number, etc.). For **land**, it must be identifiable by its registered title or parcel number.

3. Acceptance by the Donee

The donee must **accept** the gift.

In most cases, acceptance is **presumed**, unless the donee expressly rejects the gift.

Acceptance can be **written or implied** through conduct.

4. Preparation of Transfer Documents

Depending on the property type:

If the gift is land (immovable property):

A **Transfer Form (Form LRA 1 or LRA 4)** is prepared under the Land Registration Act, 2012.

A **gift declaration** may be included in the transfer instrument.

The **land must be free of encumbrances**, or the donee must agree to accept it subject to such encumbrances.

If the gift is movable property (e.g., car):

Prepare a **Transfer of Ownership form** through NTSA (for motor vehicles).

Execute a **gift declaration or affidavit** stating the donor's intention and donee's acceptance.

5. Stamp Duty Exemption Application

Gifts inter vivos (to family members) may qualify for stamp duty exemption under the **Stamp Duty Act**, provided it's between **close relatives** (e.g., parent to child, spouse to spouse).

An application is made to the **Commissioner of Domestic Taxes** via KRA for exemption **under paragraph 7 of the Schedule to the Stamp Duty Act**.

If granted, you will **receive a stamp duty exemption certificate**.

6. Valuation of Property

The property is valued by a **government valuer** (especially for land or buildings).

Even if the transfer is a gift, a **valuation report** is required to assess potential tax implications.

7. Execution and Attestation of Documents

The transfer documents must be signed by both donor and donee.

Execution must be witnessed especially important for land, where a licensed advocate must attest the donor's signature (Land Registration Act, s.45).

8. Registration with Relevant Authority

Submit the executed documents to the relevant registration authority:

For land:

File with the **Ministry of Lands** at the local Land Registry

- Original Title Deed
- Transfer Forms (LRA 1 or LRA 4)
- Stamp Duty Exemption Certificate (or stamp duty payment receipt)



- Valuation report
- ID copies, KRA PINs, passport photos
- Land rent and rates clearance certificate

For vehicles:

- File online via **NTSA's TIMS portal**.
- Provide the logbook, transfer form, and ID documents.

9. Issuance of New Title or Ownership Document

- Upon successful registration, the donee receives:
 - A **certificate of title** (for land)
 - A **new logbook** (for a vehicle)

KEY TAKEAWAY

Gifts inter vivos play a critical role in estate planning and succession, but their enforceability depends on strict compliance with legal requirements. Kenyan courts have consistently held that intention alone is not enough; proper documentation, delivery, and completion of the transfer are essential. Without these elements, such gifts risk being treated as incomplete, leaving the property to form part of the intestate estate and potentially upsetting the donor's wishes.

Should you have any questions on this legal alert, please do not hesitate to contact us,



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