



REPUBLIC OF KENYA



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**In re Estate of Michael Rufus Migue (Deceased) (Succession Cause 218 of 2010)
[2024] KEHC 10140 (KLR) (Family) (14 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 218 OF 2010
MA ODERO, J
AUGUST 14, 2024
IN THE MATTER OF THE ESTATE OF MICHAEL RUFUS MIGUE - (DECEASED)**

JUDGMENT

1. Patricia Njeri Odhiambo one of the joint Administrators of the estate of the late Michael Rufus Migue filed in court a Summons for confirmation of Grant dated 14th July 2017. Annexed to that Summons was a schedule indicating the proposed mode of distribution of the estate.
2. The Protestor Everlyn Wairimu Njoroge who is a Co-Administrator of the estate, filed a Replying Affidavit dated 27th September 2017 in which she objected to the proposed mode of distribution of the estate.
3. Hearing of the matter proceeded by way of Vive Voce evidence. Hon. Lady Justice Achode (as she then was) heard the Protestors case. Upon the elevation of the trial Judge to the Court of Appeal I took over the matter and heard the evidence of the Administrators.

Background

4. This Succession Cause relates to the estate of the late Dr. Michael Rufus Migue (hereinafter the Deceased') who died intestate on 2nd April, 2009. A copy of the Death Certificate Serial Number 172243 is annexed to the petition for Grant of letters of Administration Intestate dated 9th July 2010.
5. The Deceased was survived by the following persons:-
 1. Jane Wairimu Migue - Daughter
 2. Clare Ngonyo Migue - Daughter (Deceased)
 3. Patricia Njeri Odhiambo - Daughter
 4. Spereranza Wangari Migue - Daughter



5. Yvonne Warya Dusabe - Daughter
6. Ivy Wanjiku Migue - Daughter
7. Everlyn Wairimu Njoroge Migue - Widow
6. The estate of the Deceased was said to comprise the following assets;-
 - a. LR No. 195/196 Karen measuring 1.283 Hectare
 - b. Dagoretti/Ruthimithu/575 measuring 2.5 Hectares
 - c. Kwale/Chuini/106 measuring 11-32 Hectares
 - d. Kwale/Mabokoni/923 measuring 3.6 Hectares
 - e. Kwale/Majorini/517 measuring 4.0 Hectares
 - f. Pension Benefits from Ministry of Health
 - g. Money in Account No. 04601XXXXXX46 Equity Bank

Total Value - 10,000,000

Liabilities - Nil
7. Following the demise of the Deceased Grant of Letters of Administration intestate was on 21st September, 2016 made jointly to Everlyne Wairimu Njoroge, Patricia Njeri Odhiambo and Jane Wairimu Migue.
8. Thereafter one of the joint Administrators Patricia Njeri Odhiambo filed a Summons for Confirmation of Grant. Annexed to the Summons for Confirmation was a Schedule of Distribution dated 14th July, 2017 with the proposed mode of distribution of the estate.
9. It would appear that no beneficiary save for the widow Everylyne Wairimu Njoroge had any objection to the confirmation of the Grant or to the proposed mode of distribution of the estate. Indeed Yvonne Leah Warya Dusabe signed a consent dated 6th November 2017 whilst Speranza Wangari Migue signed a consent dated 21st November, 2017.
10. The Protestor however objected to the proposed mode of distribution of the estate. She insisted that the property known as LR No. Dagoretti/Ruthimithi/575 (hereinafter ‘the Dagoretti Property’) did not form part of the estate of the Deceased and was not available for distribution. According to the protestor the Deceased had gifted this Dagoretti property to the Society of St Pius Fathers, an order of the Catholic Church of which the Deceased was a staunch adherent.

The Evidence

11. PW1 Edwin Munoko Wafula is a Land Registrar based at Ardhi House in Nairobi. The witness produced a Search Certificate in respect of LR No Dagoretti/Ruthimithu/575 which indicated that the registered proprietor of the said property was one Michael Rufus Kigwe (the Deceased herein). The witness produced a copy of the said search certificate as an exhibit Pexh 1.
12. PW2 Everlyn Wairimu Njoroge was the protestor. She told the court that she got married to the Deceased in August 2000 and produces a copy of their marriage certificate Serial Number 29XXX0 as proof of the marriage PExh 2.



13. The Protestor told the court that she came into the marriage with a 10 year old daughter whilst the Deceased also had adult children with his first wife who had passed away.
14. The protestor testified that the couple initially resided in the property known as LR No, 195/196 Karen (hereinafter the 'Karen Property'). That during the period they resided in the Karen Property they resided in the main house whilst the priests of St. Pius 10th Catholic Order (previously known as Joseph Sarto Company Ltd) were permitted by the Deceased to occupy a wooden house on the same property.
15. Later due to disagreements with the Children of the Deceased who also resided on that property, the couple moved and went to live in a rented property on Lenana Road. That the priests of St Pius Order also moved out of the Karen Property in November 2005 when they acquired a property of their own.
16. The Protestor insists that the Deceased donated the Dagoretti property to the St Pius Fathers to enable them build a Seminary there. That the Deceased informed her that he had attended a Land control/ Board meeting where the transaction was approved. The Protestor stated that the transfer of the property to the St Pius Fathers was handled by OT Ngwiri Advocate who has since passed away.
17. According to the Protestor the children of the Deceased were not in support of their Father gifting the land to the church. The Protestors asserts that the Dagoretti Property was transferred to the St. Pius Fathers, that the same does not belong to the Deceased, does not form part of his estate and is not available for distribution. This is the reason why she opposes the mode of distribution proposed by her co-administrators as the same includes the Dagoretti property as an asset available for distribution.
18. PW3 Pierre Champroue is the Priest in charge of St Pius 10th Order. He stated that he was aware that the Deceased was desirous of giving his Property LR. Dagoretti/Ruthimithu/575 to the church which was initially known as Joseph Sarto & Company Ltd.
19. PW3 told the court that his predecessor Father Belly signed the requisite transfer forms and paid an unspecified amount of money to OT Ngwiri Advocates to cover legal work. PW3 produces letters dated 12th January 2004, 4th November, 2004 and 8th April, 2005 indicating the wishes of the Deceased.
20. According to PW3 the transfer would have taken place save that the Commissioner of Taxes had placed a caveat on the property due to some tax arrears which the Kenya Revenue Authority were claiming, from the Deceased.
21. The witness states that the intention and desire of the Deceased to transfer the Dagoretti Property to the church was very clear. That the Deceased wrote a letter dated 26th November, 2008 to the Director Legal Affairs confirming that the said property belonged to the church.
22. PW1 Patricia Njeri Odhiambo is one of the daughters of the Deceased and a Co-Administrator of the estate. DW1 told the court that her biological mother passed away on 26th July 1999 after which in August 2000 the Deceased married the Protestor.
23. DW1 confirms that she filed a Summons for confirmation of Grant to which she annexed a proposed mode of distribution of the estate
24. DW1 categorically denies that the Dagoretti Property was gifted by the Deceased to the church. She asserts that the said property still belonged to the Deceased at the time of his demise. DW1 produces as an exhibit a copy of the Title Document for LR Dagoretti/Ruthimithu/575 which title indicates that the property is still registered in the name of the Deceased.



25. In the circumstances DW1 contends that this Dagoretti property forms part of the estate of the Deceased and as such is available for distribution to the beneficiaries. The witness prays that this protest be dismissed in its entirety and that the Grant be confirmed as prayed.
26. Upon conclusion of oral evidence the parties were invited to file their written submissions. The protestor filed the written submissions dated 30th March, 2023, whilst the Administrators relied upon their written submissions dated 16th May, 2023.

Analysis and Determination

27. I have considered the protest filed in this matter, the evidence adduced by the witnesses as well as the written submissions filed by the parties.
28. It is common ground that the Deceased, the subject of this succession cause passed away on 2nd April 2009. It is also not in dispute that the Deceased was survived by one widow (his second wife) and four (4) children. The protestor mentioned that her biological daughter with whom she came into the marriage was not included as a beneficiary of the estate. However the protestor indicated that she did not wish to pursue that issue.
29. Following the demise of the Deceased Grant of Letters of Administration Intestate was made jointly to two of his daughters and the widow. The point of divergence arose regarding the mode of distribution of the estate.
30. In response to the Summon for confirmation of Grant the Protestor filed the Replying Affidavit dated 27th September, 2017. The Protestor objected to the fact that she was not to be given a share of the Karen Property which she described as the Matrimonial home. She avers that she only left that property to move into a rented house due to hostility from her step children.
31. The protestor asserts that she paid the rent in the house in Lenana and states that she had to leave her well-paying job in order to take care of the Deceased when he fell ill. As such the protestor contends that she is entitled to a share of the Karen Property and prays that in the alternative the Karen Property be sold and the proceeds divided equitably between all the beneficiaries including herself.
32. It must be remembered that this is a succession cause. This is not a cause for division of matrimonial property. The protestors contention that the Karen Property was the matrimonial home and her claim to a share in the same cannot be prosecuted and/or determined under this succession cause.
33. The main bone of contention involves the distribution of the property known as LR No. Dagoretti/Ruthimitu/575 which according to the Protestor had been gifted by the Deceased to the church and therefore did not form part of the estate of the Deceased.
34. The main issues which therefore arise for determination are the following:-
 - i. Did the Deceased gift the property known as LR No Dagoretti/Rithimitu/575 to the St Pius 10th Order of the Catholic Church
 - ii. Does LR No. Dagoretti/Ruthimitu/575 form part of the estate of the Deceased.
 - iii. How should the estate be distributed.



35. It is trite law that ‘he who alleges must prove.’ In law the burden of proof lies upon the party who asserts the existence of a fact or set of facts. Section 107 of the Evidence Act Cap 80, Law of Kenya provides as follows;

“Burden of Proof

- 107 Whoever desires any court to give judgment as to any legal or liability
(1) dependent on the existence of facts which he asserts must prove that those facts exist.
- (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.”

36. The Protestor asserts that the Dagoretti Property does not form part of the estate of the Deceased because the said property was gifted by the Deceased to St. Pius 10th Order.

37. The Protestor stated that the Deceased informed her of his intention to gift this parcel of land to the church and further that the Deceased told her that he had attended a Land Control Board, meeting at which the transfer was approved. However no minutes of the said land Control Board meeting showing approval to transfer the said property to the church were produced in Court as an exhibit.

38. This was a purported gift of registered land. It was a gift ‘inter vivos’ which is a gift between a living donor and a living donee. This refers to a gift made during the lifetime of the donor. There is no evidence of a transfer executed by the Deceased, and no evidence of consent from the Land Control Board. The church has never taken up possession of this Dagoretti property to date. In the circumstances the gift cannot be said to have been perfected.

39. In Estate of Godana Songoro Guyo Malindi Succ Cause No. 15 of 2018 the Court referred to Odunga’s Digest on Civil, Law and Procedure Vol (iii) Page 2417 and 5484 (d) where it is Stated that:-

“Equity will not come to the aid of volunteer and therefore, if a donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee need no assistance from equity and the gift is complete. It is on that principle that in equity it held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the donee has within his control at those things necessary to enable him, complete his title. Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor.”

[own emphasis] (see Shell’s Equity 29ED Page 122 paragraph 3)

40. PW3 the Priest in charge of St. Pius 10th Order told the court that the Deceased intended to give the Dagoretti, Land to the Church for them to build a Seminary. PW3 told the court that he was not involved in the transaction as the matter was handled by his predecessors.

41. PW3 exhibited in court a series of emails and letters between the Deceased, the church and the lawyer Mr. OT Ngwiri. The witness told the court that the Deceased intimated to his predecessor Father



Esposito that he wished to donate a piece of land to the church. That the Deceased took Father Esposito and showed him the land in Dagoretti.

42. PW3 told the court that the church made payments for transfer of the land to itself. However no receipts for such payments were ever produced in court. Indeed PW2 under cross-examination concedes that

‘I do not have any document to confirm that [the church] paid any money towards the expenses of the transfer.’

43. PW2 further asserted in cross-examination that the Dagoretti land was transferred to the church during the lifetime of the Deceased. However the witness immediately goes on to admit that he has never personally bothered to find out in whose name the Dagoretti land is registered. He says “I would not be surprised if the land is still in Dr. Migwi’s names because the process was not completed.”

44. PW2 explained to court that the Dagoretti Property could not be transferred due to an existing caution placed on the Title. She stated that the Deceased’s Lawyer severally urged the Deceased to have the caution removed but he failed to act. This is not the behaviour of a man who wanted to have the property transferred to a third party.

45. If the church (the donee) had within its possession and control all the documentation required to complete their title to the Dagoretti Land then I have no doubt they would have facilitated the transfer of this land themselves. There is no transfer document signed by the Deceased produced as an exhibit. Neither has the witness shown any entry in the Title document indicating that the Dagoretti property had been transferred to the church.

46. I have no doubt that as testified by the protestor and PW1 that the Deceased was a staunch catholic. It may well be that he desired to have the Dagoretti Property transferred to the church. However this court can only give effect to what has occurred not to what the Deceased ‘intended’ to do. The Deceased did not write a will bequeathing the Dagoretti Property to the church. Therefore whatever Intentions the Deceased may have had in the absence of proof that said intentions were actualized this court cannot give effect to said intention. Under cross-examination PW2 states

“We [the church] have never occupied the land when the Deceased was alive or even after his death.”

47. *In Re Estate Of Gideon Mantbi Nzioka (Deceased)* [2015] eKLR Hon. Lady Justice Nyamweya (as she then was stated that “gifts inter vivos must be complete for them to be valid”.

The Honourable judge went on to state as follows;-

“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’

48. It is noteworthy that in applying for Grant of Representation to estate the Protestor admits that she included LR Dagoretti/Rithimitu/575 as one of the assets left behind by the Deceased.

If the Protestor truly believed that this property belonged to the church then why did she list that property as one of the assets belonging to the estate.

49. PW1 who was the Land Registrar told the court that a search of the Dagoretti Property revealed that the said property was still registered in the name of the Deceased. It has not been transferred to the church or to any other party for that matter.



50. Likewise a copy of the Title Deed for LR Dagoretti/Ruthimitu/575 which is annexed in the Administrators list of Documents dated 19th July 2019 shows that that parcel of land is registered in the name of Michael Rufus Migue who is the Deceased in this matter. Title was issued on 4th February 1980 and re-issued on 10th March 1991.

There is no indication that the Dagoretti Property has ever been transferred to any third party.

51. Based on the evidence availed to this court I find and hold that the property known as LR Dagoretti/Ruthimitu/575 was still registered in the name of the Deceased at the time of his death. As such the said property belonged to the deceased and forms part of the estate and is therefore available for distribution to the beneficiaries.

52. The Protestor objected to the proposed mode of distribution of the estate on the grounds that Dagoretti Property did not form part of the estate of the Deceased. This court has now found that the said property does in fact form part of the estate of the Deceased.

53. I have perused the proposed mode of distribution of the estate as contained in the schedule to the Summons for confirmation of Grant dated 14th July, 2017 I note that the Protestor has been included in the distribution of the estate. As stated earlier the objector conceded that her daughter was not one of the beneficiaries of the estate thus this is not an issue for determination.

54. Although the Protestor has not been included in the distribution of the Karen Property she did concede that this property was acquired and developed by the Deceased and his first wife. That although the Protestor and Deceased resided in Karen for a period of time, she later moved out to a rented property on Lenana Road. The Deceased followed her to that rented property and that is where he eventually passed away. As stated earlier the question of whether this Karen Property constituted matrimonial property and the question of what share of said property the protestor is entitled to cannot be determined in a Probate cause. Given that this Karen Property was acquired by the Deceased and his first wife it is only fair that the children of the first wife inherit that property.

55. The Protestor has not been excluded from the estate. She has been allocated as share of the properties and the other assets including the Dagoretti Land.

56. All in all I am satisfied that the mode of distribution proposed in the summons for confirmation of Grant is both fair and equitable. I therefore direct that the Grant be confirmed and that the estate be distributed in accordance with the schedule annexed thereto.

57. This being a family matter, I make no orders on costs.

DATED IN NAIROBI THIS 14TH DAY OF AUGUST 2024.

MAUREEN A. ODERO

JUDGE

