



**In re Estate of Kabithi Kiriri (Deceased) (Probate & Administration
E009 of 2021) [2024] KEHC 13751 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13751 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
PROBATE & ADMINISTRATION E009 OF 2021
CW GITHUA, J
OCTOBER 30, 2024**

IN THE MATTER OF THE ESTATE OF KABITHI KIRIRI (DECEASED)

BETWEEN

RENISON IRUNGU KARANJA 1ST APPELLANT

ROBERT MAINA R. KARANJA 2ND APPELLANT

AND

MUKAMI MWANGI RESPONDENT

JUDGMENT

1. This appeal arises from the ruling delivered on 21st September 2021 by Hon. E.M. Nyagah (S.P.M.) in Murang'a Succession Cause No.158 of 2011 in which the Estate of Kabithi Kiriri who died intestate on 16th April 1976 was distributed.
2. The background to the appeal as can be ascertained from the court record is that the appellants are the biological sons of the deceased while the respondent is his daughter in law. She is the wife of one of the deceased's sons, one Mwangi Kibithi who is also deceased. Upon death of the deceased (Kabithi Kiriri), since his widow was also deceased, the respondent petitioned for letters of administration to his Estate.
3. The appellants filed an objection to the issuance of grant of representation to the respondent as the sole administrator. The objection was terminated by consent of the parties on the basis of which the court appointed the respondent and the 1st appellant Renison Irungu Karanja as joint administrators to the deceased's Estate.
3. The record further shows that on 23rd June, 2020, the 1st appellant filed a summons for confirmation of grant. Like in the petition filed by the respondent for grant of representation to the deceased's Estate, land parcel No. Loc.11/Maragi/1193/31B (hereinafter the suit property) was identified as the sole asset



comprising the Estate. In the summons, the 1st appellant proposed that the suit property be shared equally between the two appellants and the respondent.

4. The respondent filed an affidavit of protest claiming that she had not agreed with the 1st Appellant on the mode of distribution of the deceased's Estate. She averred that she was the only one entitled to inherit the suit property exclusively; that the appellants should not be given a share of the suit property as they had never utilized any part thereof.
5. The protest was heard by way of viva-voce evidence. The appellants and the respondent testified in support of their respective cases and after conclusion of the hearing, the learned trial magistrate delivered the ruling subject of this appeal.
6. In the ruling, the learned trial magistrate upheld the protest and made a finding of fact that the deceased in his life time had given the suit land to his son the late Mwangi Kabithi, the respondent's deceased husband; that the appellants had been given another property namely, LR No. LOC.11/MARAGI/972 which though not registered in the deceased's name had been registered in his late wife's name in trust for him; that the parties had been occupying the parcels of land they had been gifted by the deceased for a long time; that by giving out the above properties to his sons, the deceased had in his lifetime made his intentions known. On the basis of the above findings, the learned trial magistrate distributed the deceased's estate by allocating the suit land to the respondent exclusively.
6. The appellants were aggrieved by the trial court's decision. They preferred an appeal to this court through the memorandum of appeal dated 4th October 2021. In their eight grounds of appeal, the appellants mainly complained that the learned trial magistrate erred in law and fact by: confirming distribution of the suit property to the respondent only thereby disinheriting them yet they were biological sons of the deceased; finding that the respondent's deceased husband had been gifted with the suit property by the deceased in his lifetime without any evidence to that effect; and, failing to find that the appellants had not been given any property by the deceased.
7. The appellants also faulted the learned trial magistrate for making a decision that was against the weight of the evidence adduced before it and for making a determination of the dispute between the parties on the basis of a customary trust which had not been pleaded.
8. The appeal was prosecuted by way of written submissions which both parties duly filed through their advocates on record. The appellants' submissions were filed on 15th December 2023 by L. M. Kinuthia & Associates while those of the respondents were filed by Waiganjo Gichuki & Co. Advocates on 9th February 2024.
8. This being a first appeal to this Court, I am cognizant of my duty as the first appellate court which as succinctly stated by the Court of Appeal in *Abok James Odera T/A A. J. Odera & Associates V John Patrick Machira T/A Machira & Co. Advocates*, [2013] eKLR is to "..... re-evaluate, re-assess the extracts on the record and determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"
9. Having in mind my aforesaid duty, I have carefully considered the grounds of appeal, the evidence that was placed before the trial court and the oral written submissions filed by the parties. I have also read the impugned ruling. Having done so, it is my finding that the key issue that arises for my determination is whether the trial court erred in distributing the deceased's Estate by ordering that the respondent should solely inherit the suit land in exclusion of the appellants.



10. I wish to start my analysis by noting that in the petition for grant of representation to the deceased's Estate and in the summons for confirmation of grant, both the appellants and the respondent were in agreement that the suit land was the only asset that constituted the deceased's Estate.
11. In the affidavit of protest dated 9th October 2020, the respondent also admitted this fact but opposed the 1st appellant's proposal that the estate should be shared equally by the three beneficiaries. In her evidence during hearing of the protest, the respondent adopted her witness statement dated 20th November 2020 in which she claimed that the reason she was entitled to inherit the suit land in entirety was because the deceased in his lifetime had gifted the land to her late husband since 1970 and the appellants had also been given another property namely, land parcel No. LOC.11/MARAGI/972 which they had shared amongst themselves without giving her late husband a share; that they were not therefore entitled to share in the suit land. Further, she claimed that the property given to the appellants belonged to the deceased though it had been registered in his wife's name.
12. The above claims were denied by the appellants who testified that the respondent and her late husband had been living on the suit land as rent paying tenants and not because the land had been gifted to her late husband by the deceased in his life time; that when their late brother died, the respondent continued to live in the land but refused to continue paying rent.
13. They further testified that the suit land was the only asset in the deceased's Estate and they were therefore entitled to a share of the same being biological sons of the deceased. They denied that their late mother had been registered as owner of the land allegedly given to them as a trustee for the deceased. They asserted that the land belonged to their late mother having received it as a gift from their maternal grandfather; that their mother later transferred the land to the 2nd appellant.
13. Given the above evidence, it is my finding that the learned trial Magistrate erred by finding that the respondent should solely inherit the suit land in the light of undisputed evidence that it was the only asset in the deceased Estate and that the deceased was also survived by other beneficiaries, namely the appellants. This is more so considering that the respondent's claim that the appellants had benefitted from another property which was a gift given to them by the deceased in his lifetime (gift inter vivos) was not proved or substantiated by any evidence.
14. The term gift inter vivos was defined in re Estate of the late Gideon Manthi Nzioka (deceased) 2015 eKLR as a gift made between the living. The law is that for such gifts to be valid and effective, they must be complete. This position has been reiterated in several authorities. In the case of re Estate of late Gideon Manthi Nzioka (supra), the court expressed itself as follows;

“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. 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 trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee.”
15. Further, Musyoka J when discussing the same subject in re Estate of Etete Masakhalia (Deceased) (2021) KEHC 8337 (KLR) stated as follows;

“Principally any gift inter vivos should be backed by some memorandum in writing, and the gift is complete once title to the subject property is transferred to the name of the beneficiary of the gift. Problems arise where such transfer is not effected prior to the death of the



deceased. The ideal situation is that such property would remain the free property of the deceased, available for distribution at confirmation. The argument would be that such gift was founded on a mere promise which the deceased did not carry through prior to his death. If, however, he had taken preliminary steps towards effectuating his promise, so that all what remained after his death was mere registration of the property in the name of the beneficiary, then it would be presumed that that was a gift inter vivos. That would be the case where the deceased had 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.”

16. Given the above legal position, it is clear that the respondent failed to discharge her burden of proving by credible evidence that the appellants had benefitted from a gift inter vivos which ought to have been taken into account during distribution under Section 42 of the Law of Succession Act thus entitling her to be allocated the suit land exclusively.
17. The fact that the respondent and her family had been in occupation of the land since the 1970's is not by itself, evidence that the deceased had gifted her late husband the suit land during his life time. The deceased may have simply allowed or licenced them to remain in the property for his own reasons. The fact that the 1st appellant continued to pay land rates for the property after the deceased's demise is also inconsistent with the respondent's claim- See payment receipts in the Objectors list of documents from page 64 to 66 of the record.
18. The learned trial Magistrate also erred by purporting to determine ownership of land parcel No. LOC.11/MARAGI/972 which at the time was registered land. The land had initially been registered in the appellant's mother's name, one Waigure Kabithi who later transferred it to the 2nd appellant. The learned trial Magistrate made a finding that the said land was being held in trust by the deceased's wife and belonged to the deceased who had also given it to the appellants as a gift in his lifetime. In my view, this was a serious misdirection on the part of the learned trial Magistrate. The learned trial Magistrate sitting as a probate court did not have jurisdiction to deal with issues of ownership relating to registered land.
19. It is trite that the mandate of a Probate Court is limited to distribution of assets belonging to a deceased's Estate. A deceased's Estate is defined in Section 2 of the Law of Succession Act as “the free property of a deceased person”. Where an issue of ownership of registered land arose between an Estate and other persons whether or not they were beneficiaries to the Estate, such issue cannot be the subject of determination by a succession court.

The court with jurisdiction to determine disputes over title to land and trusts over land is either a subordinate Court of competent jurisdiction or the Environment and Land Court established under Article 162 (2) of the Constitution.
20. Since there was no evidence before the trial court to prove that the deceased owned any asset other than the suit land which he could have gifted to the appellants during his lifetime, I agree with the appellants that the learned trial Magistrate erred when he failed to find that as biological sons of the deceased, they were entitled to a share of the suit land.
21. For all the foregoing reasons, I find merit in this appeal and it is hereby allowed. Consequently, the ruling of the lower court is hereby set aside. It is substituted by an order of this court that the deceased's



Estate shall be distributed as proposed by the 1st appellant in the summons for confirmation of grant, that is to say, that land Parcel No. LOC.11/MARAGI/1193/31 B shall be distributed to the appellants and the Respondent in equal shares.

20. On costs, since this is a family matter, each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 30TH DAY OF OCTOBER, 2024.

HON. C. W. GITHUA

JUDGE

In the presence of:

Mr. Kinuthia for the appellants

N/A for the Respondents

Ms. Susan Waiganjo Court Assistant

