



REPUBLIC OF KENYA



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**Makanga v Gichobi (Civil Appeal 42 of 2018)
[2023] KEHC 3382 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3382 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 42 OF 2018**

**FR OLEL, J
APRIL 25, 2023**

BETWEEN

GODFREY K. MAKANGA APPELLANT

AND

T. JIMMY MAKANGA GICHOBİ RESPONDENT

(Being an appeal against the ruling and orders of the Hon. Resident Magistrate G.K. Odhiambo (ESQ) dated 13th July 2019 in Gichugu SRM succession cause no. 376 of 2016)

JUDGMENT

1. This appeal arises from the Ruling of Honourable GK Odhiambo (RM) dated July 13, 2018 where he dismissed an objection/protest filed by the appellant dated April 10, 2018. The Honourable trial Magistrate further directed that in the spirit of equal distribution as contemplated in Section 35, 38 and 40 of the *Law of Succession Act*, Land parcel No Ngariama/Kabare/416 should go to Francis Njogu, land parcel Ngariama/Kabare/419 to go to James Gachoki and land parcel Ngariama/Kabare/421 to go to the Respondent herein T Jimmy Makanga Gichobi.
2. Being wholly dissatisfied by the said Ruling/Order dated July 13, 2018 the Appellant herein, who was the Protestor filed his Memorandum of Appeal, where he raised seven (7) grounds of appeal namely;
 - a. That the Learned trial Magistrate erred in law and in fact by holding that the Petitioner was the son of the deceased contrary to the evidence tendered in Court. A miscarriage of justice was thereby occasioned.
 - b. That the Learned trial Magistrate erred in law and in fact by Holding that the deceased intended to give land parcel number Ngariama/Kabare/421 to the Petitioner when it was clear that the said land had been given to the protestor and took possession of the same. A miscarriage of justice was occasioned thereby.



- c. That the Learned trial Magistrate erred in law and fact by failing to appreciate that the Appellant has been utilizing land parcel No Ngariama/Kabare/421 since 1993 when he was given the same land by the deceased and which showed that those were the wishes of the deceased. A miscarriage of Justice was thereby occasioned.
 - d. That the Learned trial Magistrate erred in law and fact by failing to take into account that the petitioner never utilized or entered the said parcel of land number Ngariama/Kabare/421 and that he got his own land at Embu County. A miscarriage of Justice was thereby occasioned.
 - e. That the Learned trial Magistrate erred in law and fact by failing to consider the developments which had been done by the protestor on land parcel number Ngariama/Kabare/421. A miscarriage of Justice was thereby occasioned.
 - f. That the Learned trial Magistrate erred in law and fact by misinterpreting the Law Of Succession Act and particularly the sections dealing with distribution of the estate of the deceased. A miscarriage of justice was thereby occasioned.
 - g. That the decision and ruling of the Learned trial Magistrate is not only flawed by error on the record but total misunderstanding of the legal principles involved in Law of Succession Act which deals with distribution of the estate of the deceased.
3. The appellant therefore prayed that his appeal be allowed, the Ruling of the subordinate court be set aside and distribution of the estate be done in accordance with the protestor/appellant proposal in the protest.

Brief Facts

4. The Respondent herein T Jimmy Makanga applied for letters of administration for the estate of the late Ndiga Njagi who died intestate on February 17, 2009 through a petition filed in Court on February 10, 2016. He applied on the basis that he was a son of the deceased and named other beneficiaries as
- Joseph Mbutu Makanga - Son
 - James Gachoki Makanga - Son
 - Mugo Makanga - Son
 - Emmaculate Wangigi Makanga - Daughter
 - Geoffrey Karubo Makanga - Son
 - Francis Njogu Makanga - Son
5. Form 38, consent to the making of letter of administration of a person of equal or less priority was not signed by all the beneficiaries as at the time of filing the petition.
6. The Respondent herein had earlier filed a citation at the High Court in Kerugoya dated February 22, 2016 (Kerugoya High Court Succession Cause No 48 of 2016) and those cited were Joseph Mbutu, Mugo Makanga and Emmaculate W Makanga and Godfrey Karubo Makanga. The respondent had sought to compel them to take up letter of administration of the Estate of the late Ndiga Njagi. When the matter came up for hearing on July 13, 2016, the High Court did order that it be transferred to Gichugu law Court for disposal. The citation was placed before Honourable Nasimiyu on March 8, 2017 and she directed that since the citee's had failed to file for letters of administration, the same should be taken out by the Petitioner/Respondent herein.



7. The Respondent did proceed and applied for letters of administration and the same were issued to him on July 12, 2017. On February 28, 2018, the Respondent sought for confirmation of grant issued on July 12, 2017. Aggrieved by the proposed mode of distribution the Appellant filed an affidavit of protest dated April 10, 2018. In the said affidavit the Appellant strongly opposed the mode of distribution as proposed by the petitioner and stated that he is the person who has been utilizing land parcel number LR Ngariama/Kabare/421 and had extensively developed the same by planting tea bushes. He had also obtained restraining orders against James Gachoki Makanga from trespassing thereon.
8. The Appellant proposed that the deceased property be shared as follows;
 - a. LR Ngariama/Kabare/416 - Francis Njogu Makanga
 - b. LR Ngaiama/Kabare/319 - James Gachoki Makanga
 - c. LR Ngariama/Kabare/421 - Godfrey K Makanga

He further stated that the Respondent herein had got his land parcel in Embu where he resides with his family. The parties took direction on mode of hearing of the protest May 23, 2018 and it was agreed to dispose off the protest by way of oral evidence.

9. The Appellant testified before the trial court and stated that Ndiga Njagi (the deceased) was his father and he had land parcel Ngariama/Kabare/416, 419 and 421. The deceased had one wife Monicah Kanini Ndiga who died on November 21, 2015. He had five children namely; Macalata Wambui, Joseph Mbuta, Mugo Makanga, Godfrey K Makanga and Francis Njogu Makanga. He further alleged that the Respondent herein Jimmy Makanga Gichobi was his uncle and not a son of the deceased Ndiga Njagi. The Respondent father was Gichobi Njagi and his mother was Kamori Mutero. He resided in Embu on his father's land and had not utilized any part of the deceased estate during his lifetime.
10. On the mode of distribution he proposed that the parcel be distributed as follows ;

Ngariama/Kabere/416 - Francis Njogu
Ngariama/Kabere/419 - James Gachoki
Ngariama/Kabere/421 - Godfrey Karongo

He justified the same by stating that he had full use and control of land parcel Ngariama/Kabare/421, where he had planted nappier grass and coffee. He also had a court order restraining his brother, James Gachoki from trespassing thereon. He was of the opinion that the Respondent should not inherit any land of the estate. On cross examination he reiterated that the Respondent was his uncle and had falsified the birth certificate. He confirmed that the deceased Ndiga Njagi had sub-divided his land in 1993 to create parcels LR Ngariama/Kabere/415- 421.
11. The Appellant further confirmed that the said parcel of land had been transferred to various family members during the life time of the deceased Ndiga Njagi and only LR No Ngariama/Kabere/421 remained in the name of the deceased Ndiga Njagi. The Appellant's further testified that the said land parcel Ngariama/Kabere/421 was later given to him and reiterated that the Respondent changed his birth certificate as his names were different from the other siblings. His identity card showed that he was born in Gatari and his father was Gichobi Njagi.
12. The Respondent testified that the deceased Ndiga Njagi was his father, while her mother was Kanini Mbuta. He was born in Mucagara, Baragwe location, Gichugu division and later moved to Thumaita Village. The deceased owned/was given LR Ngariama/Kabare/135, which was approximately seven (7) acres where he settled his family in 1961. The Respondent further testified that he went to Muragara



Primary School and did his CPE in 1965. He then proceeded to Kianyaga High School in 1966 and after completing his secondary school, went to work at Government Printers in 1970. He produced his birth certificate as an exhibit to prove that indeed he was a son of the late Ndiga Njagi.

13. In 1981 he went to Embu and bought land from a friend called Charles Ndwiga where his immediate family resides. He would occasionally visit his parents and other brothers would also visit him in Nairobi. In the year 1993 the deceased Ndiga Njagi, sub-divided his land into seven (7) parcels to create Ngariama/Kabare 415-421. He called all his children and showed them where they would utilize. The land was sub-divided accordingly to Kikuyu customs.

LR Ngariama/kabere/415 - Deceased Homestead.

LR ngariama/kabere/416 - Was Given To Francis Njogu

LR ngariama/kabere/418 -was Given To Godfrey Kamotho

LR ngariama/kabere/419 -was Given To Mugo Makanga

LR ngariama/kabere/420 -was Given To James M. Makanga

LR Ngariama/kabere/421 -was Given To Jimmy Makanga

Later LR ngariama/kabere /415 Was Later Given To Their Sister Macalata.

14. The Respondent further testified that since he was based in Nairobi he did not utilize the land and left it to his father to utilize by growing tea and coffee. The deceased later requested him to employ a shamba boy to take care of it or allow one of his brother to utilize it. They decided to allow the protestor to utilize it so that it does not go to waste. He stated that he were a member of the family of the late Ndiga Njagi and that is why even the protestor did not object to him filing the succession cause. The Appellant's allegations that he was not a blood relative had no basis and urged the court to distribute the estate as per his proposal.

15. In cross examination he affirmed that he was a son of Ndiga Njagi and his Identity card reads T Jimmy Makanga Gichobi. He used Makanga Gichobi as his father's name and this was due to a mistake done when registering his names in his school certificate. The suit parcel was sub-divided in 1993 while he was in Nairobi and other parcels were transferred to his siblings. He employed the protestor and paid him Kshs 10 for every kilogram of tea taken to KTDA.

16. Due to the fact that he had settled in Embu, he allowed his father to utilize the land. When their father became unwell, his brother Mugo would take him to hospital, while he would visit to check on him. The Respondent stated that he was only interested in one acre and other sibling had accepted their one acre and not complained about the same, even the last born had one acre.

17. The Respondent further stated that if the Appellant was dissatisfied with the distribution effected, he should have proceeded to buy his land. Currently the Appellant was forcefully using LR No Ngariama/Kabere/421 which he was not entitled too. His birth certificate was issued in 1976 and therein the entry of his father was indicated as Ndiga Njagi. His sister Maculate was also known Immaculate, Wangige or Wambui.

18. The respondent's second witness was PW2 James Gachoki Maknga. He confirm that they were born seven (7) children six brothers and one daughter. Their father sub-divided land his land into seven portions and thereafter equally sub divided it , amongst his children. Each sibling was to get one acre each. In cross examination he confirmed that the Respondent was his brother and they even looked alike. He confirmed that the Respondent at one point utilized the land the land LR Ngariama/Kabere/421, but had last used it in 2006. He later allowed the Respondent to go harvest tea. The



appellant had further got a restraining order against him. He also stated his father never had any loan attach to his land.

19. PW 3 Mugo Makanga also confirmed that the Respondent was his elder brother and that their father had sub-divided his land into seven (7) portions. The deceased Ndiga Njagi, had thereafter called all his children and allotted them/showed them their portion in accordance to Kikuyu customs. The land was sub-divided in a sequence from the eldest to the youngest and they stayed thereon in that manner. Their father thereafter gave them liberty to transfer their portion to themselves and that explains why some of them already had title deeds, while others did not have. Those with title deeds was himself, Mugo Makanga, Godfrey Makanga, Joseph Mbutu Makanga and Maculata.
20. In cross examination he confirms that the respondent was his brother and not his cousin. The respondent was then first born son in their family, while Maculata was the overall first born child. Parcel LR No Ngariama/Kabare/415 was given to Maculata. The Respondent had previously build on parcel 197 before it was sub-divided, but had not used land parcel Ngariama/Kabare/421, which their father was utilizing, but currently was used by the Appellant. The land Ngariama/Kabare/421 was developed by the deceased Ndiga Njagi who planted tea thereon. He reiterated that the Respondent was their brother and not cousin.
21. The trial Court did consider the evidence adduced and submission filed and ruled in favour of the Respondent hence this Appeal.

Appellant Submissions

22. The Appellant filed his submission on August 16, 2022 and faulted the trial Magistrate for finding that the Respondent was a son of the deceased, when the birth certificate produced was not authenticated before arriving at that conclusion. The Respondent's father was called Gichobi and the Respondent was unable to explain why he did not have the name Ndiga or Njagi, yet all the other six children had the name Njagi. The trial Court was thus wrong in the findings.
23. The second ground of appeal raised was on utilization of the suit parcel. The Respondent had confirmed that he resided in Embu and had never utilized parcel Ngariama/Kabere/421. It was clear from the evidence adduced that it was the Appellant who had been utilizing the said parcel of land by planting tea and coffee. The deceased had given his other children other parcels of land to built on and his wishes were that Appellant should take LR No Ngariama/Kabare/421 That is why he settled the Appellant therein. If any other beneficiary was disenchanted by this arrangement they would have taken it up with the deceased during his lifetime which they did not.
24. By settling Appellant on LR Ngariama/Kabare/421 from 1993 and given that the appellant's possession was long and undisputed, the trial Court ought not to have interfered with that arrangement as the decision by the deceased was made willfully, knowingly and consciously. The Appellant prayed that this parcel of land be awarded to him during distributed of the Estate.
25. The final issue raised by the Appellant in his submission was that the trial magistrate misinterpreted the law as regards distribution of the estate and that it was wrong to distribute it equally. The Appellant submitted that section 35 of the *Law of Succession Act* was not applicable since the deceased wife had died and there was no surviving spouse. Section 38 of the *Law Of Succession Act*, was applicable as it provided for the estate to be divided equally amongst surviving children. The Learned magistrate did not sub-divide the estate equally since he bequeathed the land parcels that were in the names of the deceased to some children and left out others.



26. Since the Respondent did not question the deceased when he gave out and sub-divided his parcel of land and since the Appellant had utilized LR NO NGARIAMA/KABARE/421 for along uninterrupted period, (Since 1993) based on the deceased direct consent for him to use the said parcel of land, It amounted to gift inter vivos. The Appellant relied on *RE Estate of Nabashon Arimba Ndiira (deceased)(2019) eKLR* and *Martha Wanjiku Waweru-Vrs- Mary Wambui Waweru (2007) eKLR*.
27. The Appellant also submitted that the Respondent owned seven (7) acres of land in Embu and still wanted more which would be unfair, discriminatory and unjust to other beneficiaries. The Respondent never asked for land during the lifetime of the deceased, and did not deserve any portion of the deceased estate. The Court should allow this appeal and bequeath LR Ngariama/ Kabare/421 to the Appellant.

Respondent Submission

28. The Respondent did file his submission on September 14, 2022 and opposed this appeal on the basis that it lacked merit, was incompetent, misconceived and lack merit. The judgment delivered us well considered, balanced and addressed all issues extensively. He urged this Court to uphold the said judgment.
29. On the ground of appeal raised the Respondent averred that there was no evidence to support the issues raised and his birth certificate conclusively proof that he was a son of the deceased. The appellant had failed to prove otherwise and therefore could not be heard to say that the Respondent was not a dependant of the Estate.
30. On the issue of distribution, the Respondent submitted that the deceased Ndiga Njagi intentionally sub-divided his land into several equal portions and equally distributed the same amongst his surviving children during his lifetime with each child getting one acre each. The Appellant during his lifetime had been bequeathed LR Ngariama/Kabere/417 and the parcels of land bequeathed but not transferred were Ngariama/Kabare/416, 419 and 421. The three siblings who had not transferred their one acre share were Francis Njogu, James Gachoki and the Respondent. The Court therefore rightly awarded them their portion.

Francis Njogu - Ngariama/Kabere/416

James Gachoki - Ngariama/Kabere/419

T. Jimmy Makanga - Ngariama/Kabere/421

31. As regards the final ground of appeal raised (Ground 3 – 6) the Respondent submitted that the trial Court rightly found that the fact that he owned land in Embu was not sufficient ground to deny him of his share of the estate. Secondly the appellant if granted his desire would end up with 2 acres of land which would have been unequitable as each beneficiary was to get one acre each and that would also mean that the Respondent would not get any share of his father's estate. Finally since it was not proven that the said parcel LR Ngariama/Kabere/421 was given to the Appellant as gift. It was still registered in the name of the deceased and thus subject to distribution as provided for under the *Law of Succession Act*.

The Respondent prayed that this appeal be dismissed with costs.



Analysis and Determination

32. I have considered the pleading evidence presented and submissions of both parties. In this appeal, this Court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

33. As held in *Selle & Ano – Vrs-Associated Motor Boat Co Ltd & Others (1968) EA 123*

' I accept counsel for the Respondent's proposition that this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court from the trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions through it should always bear in mind that it neither saw or heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's finding of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case Generally (Also see Abdul Hammed Saif-Vrs- Mohammed Sholan(1955 22 EA CA 270)

34. In *Cogblan Vs Cumberland (1898) 1Ch 704* the Court of Appeal of England stated as follows;

' Even where, as in this case, the appeal turns on a question of fact, the Court of appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the material before the judge with such other material as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it and not shrinking from overruling it if on full consideration the Court comes to the conclusions that the judgment is wrong when the question arises which witness is to be believed rather than the other end that question turns on manner and demeanor the Court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstances quite apart from manner and demeanour which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen.

35. Therefore, this Court has a solemn duty to delve at some length into factual details, and revisit the evidence presented at the trial Court, analyze the same, evaluate it and arrive at its own Independent conclusion, but always remembering and giving allowance for it, that the trial court have the advantage of hearing the parties.

A. The Learned magistrate erred in law and in fact in holding that the Petitioner was as son to the deceased.

36. The Appellant submitted that the trial court erred in holding that the Respondent was a son of the deceased Ndiga Njagi and further that the Court ought to have authenticated the birth certificate before arriving at that conclusion. The appellant also submitted that the Respondent was not able to explain why he did not have the name Ndiga or Njagi as his surname but instead his surname but instead his surname was Gichobi.



The legal burden of proof

37. The legal burden of proof is provided for Under Section 107 of the [Evidence Act](#) Cap 80 Laws of Kenya. The said section provides that;
- i) 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.
 - ii) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The Evidence burden of proof

38. The party as the case maybe on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any allegation made in the plaint, petition or counterclaim. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation (s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court, then it becomes the burden of the Defendant/Respondent(s) to adduce evidence rebutting the allegations and to demonstrate otherwise. At this point the burden is said to shift to the Respondents. This is the evidential burden of proof.
39. The majority decision of the Supreme Court in [Presidential Election Petition No 1 of 2017 between Raila Amolo Odinga & Anor-Vrs- IEBC & 2 Others \(2017\)eKLR](#). Had the following to say on the evidence burden of proof at paragraph 132 and 133 thereof;
- (132) Though the legal and evidential burden of establishment facts and connections which will support a party's cases is static and 'remains constant through a trial with the plaintiff, however, 'depending on the effectiveness with which he or she discharges this, the evidential burden keeps on shifting and its position at anytime is determined by answering the question as to who would lose if nor further evidence were introduced.
- (133) It follows therefore that once a Court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not contraverted then the evidentiary burden shift to the Respondent, in most cases the electoral body to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the Petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegation of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law.
40. In the case of *Mbuthia Macharia –Vrs- Annah Mutua & Anor 2012 eKLR* the Court of appeal discussed the burden of proof and stated that;
- ' The legal burden is discharged by way of evidence, with the opposite party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of the trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence'.
41. The Appellant alleged that the Respondent was not a son of the deceased Ndiga Njagi. The Respondent produced his birth certificate (Exhibit 1) issued in 1976 where Ndiga Njagi was



acknowledged as his father. Secondly both of the Respondents witnesses PW2 James Gachoki Makanga and PW3 Mugo Makanga confirmed that the Respondent was their elder brother (1st born amongst sons and immediate follower of Maculata Wambui the overall first born). PW2 James Gachoki Makanga further stated that 'Jimmy is my brother we even looked alike. He is not my cousin'.

42. The Respondent evidence was corroborate by evidence of PW2 and PW3 that he was their blood brother. This particular piece of evidence was not controverted in any manner. In this appeal the appellants faulted Court for accepting certificate of birth as proof that he was the son of Ndiga Njagi without authenticating it.
43. Courts do not enter the arena of conflict and it was not the duty of court to 'authenticate the birth certificate'. If the appellants so wished, he would have insisted on calling for additional evidence to challenge the same. He had an opportunity to do so but failed. The evidence burden shifted to him and it was him who was bound to fail should no further evidence be availed. Indeed he failed and this ground of appeal lack merit.

B. The Appellant was gifted the suit parcel Inter vivos by the deceased and utilized and develop the suit parcel.(Grounds 2, 3, 4 and 5 of the Memorandum of Appeal)

44. The Appellant submitted that the Respondent confirmed that he resides on his land in Embu and had been there from 1981. It was thus clear that the appellants never at any point utilized the suit parcel LR Ngariama/Kabare/421. This fact supported the appellants contention that it was the appellants who had been using the suit parcel all along ever since he was given possession by the deceased Ndiga Njagi. He had developed it by planting tea and coffee and none of his siblings had interfered with his possession since 1993.
45. By settling the Appellant on the suit parcel, the deceased wishes were that the appellants gets this land after his demise and it amounted to a gift inter vivos. Finally the appellants submitted that the trial court erred in distributing the properties of the estate based on Section 38 of the Law of Succession Act. The court did not equally sub-divide estate property to all children.
46. The appellants began his cause of action/protest by filing an affidavit of protest on April 10, 2013. In the said protest he did not plead and/or mention that he was gifted parcel Ngariama/Kabare/421 by his father Inter vivos during his lifetime. He only alleged that he is the person who utilized the said parcel of land and extensively developed it by planting tea bushes and further averred that the Respondent had his land in Embu where he resided.
47. Similarly in his evidence in chief, he alleged that the Respondent was not entitled to any part of the estate as 'his father had land in Embu'. The Respondent was not utilizing any of 'our father's land.' He reaffirmed that he was using land Ngariama/Kabare/421 and had planted nappier grass and coffee. Again nowhere in his evidence in chief did he allege being bequeathed the said parcel of land as a gift inter vivos. He only alleged as much in cross examination where he stated that, 'Parcel 421 was later given to me'.
48. Gift inter vivos is a latin term commonly translated to mean 'a gift between the living' or 'a transfer or gift made during the grantors life'

The three key elements of inter vivos gift are;

- a) Present donative intent (the donors clear intent to pass title/interest to the property to the recipient).



- b. Delivery (a surrender of all or some dominion and control by the donor and allowing the donee to have possession.
- c) Acceptance of the Gift by the donee

Finally there must be donative intent. The donor must intend to presently transfer title from himself or herself to the donee. Intent to transfer possession of the property is not sufficient.

49. The determination as to the manner in which a property was to be distributed depended on the answer as to whether the deceased had distributed some of his properties to some of the beneficiaries inter vivos or gift causa mortis and if the same is proven, then the Court will be compelled to honour the deceased wishes.

Section 42 of the Law of Succession provides that;

(42) 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;
- b. Or property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, taken he had not predeceased the intestate.

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

50. What are the requirements in law as far as gift inter vivos is concerned. *In Re Estate of The Late Gedion Manthi Nzioka (2015) eKLR*, had this to say

' In law, gifts are of two types. There are gifts made between living persons (gift inter vivos) and gifts made in contemplation of death (gifts mortis causa) Section 31 of the *Law of Succession Act* provides as follows with respect to gifts made in contemplation of death;

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 a resulting trust 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 declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid'.

51. In *Halsbury's Law of England 4th Edition Volume 20 (1)* at paragraph 67 it was stated as follows with respect to incomplete gifts.

' Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the Court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.'

52. Thus the concept of gifts is divided into two categories. For gifts inter vivos the owner of the property or assets donates it to another person, without expectation of death. In any event the person who



makes such a gift must have the capacity to competency to gift the property and the gift must be perfected. The gift must also go into immediate and absolute effect. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gift. Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the donee.

53. Secondly for the test of a gift causa mortis, such a gift is made in contemplation of death. The donor causes the property or goods in his possession to be delivered to another. The general distinction between gift causa mortis and a gift inter vivos is that it's revocable by the donor and the capacity of the donor must meet the requirement under section 11 of the *Law of Succession Act* in the making of a will.
54. The Appellant first and foremost failed to plead and prove that indeed LR Ngariama/Kabare/421 was gifted to him inter vivos during the lifetime of his father. It was not proved that the deceased effected any instrument in writing or made a declaration by way of trust in favour of the appellant and finally since it was registered land, no registered transfer was effected in the appellants favour for gift inter vivos to be completed and be valid.
55. From the emerging facts the contrary was established. The deceased Ndiga Njagi gifted his children land in expectation of death (gift causa mortis). He had seven children and sub-divided his land in seven equal portion of one acre each for each child. He then proceeded to transfer some of the titles during his lifetime. The appellant, Joseph Mbuta Makanga, James Gachoki Makanga and Maculate transferred their portion during their father's lifetime, while Francis Njogu, James Gachoki and T Jimmy Makanga had not transferred their portion. Finally if indeed the deceased Ndiga Njogu had intended to gift the appellant LR Ngariama/kabare/421, question that would arise is why he did not transferred the same to him, when he was effecting transfer of LR Ngariama/kabare /417 to the appellant. Nothing would have been easier than to effect both transfers simultaneously for the gift to be complete.

C) Did the trial magistrate err in law and misunderstand the legal principles involve in *Law Of Succession act* which deals with distribution of the estate of the deceased

56. The appellant submitted that the trial magistrate misapplied provision of Section 35 38 and 40 of the *Law of Succession Act* while effecting distribution of the estate, and thus misinterpreting the law. Further he submitted that since the suit property LR Ngariama/Kabare/421 had been gifted to him and all other sibling had never questioned his unhindered use of the same from 1993 to date. Section 38 of the *Law Of Succession Act* was thus not applicable. Physical possession given to the Appellant was clear intention of the fact that deceased wanted the applicant to be given the said parcel of land.
57. The appellant had in his affidavit of protest pleaded that he was utilizing LR Ngariama/Kabare/412; and extensively developed the same by planting tea bushes. While giving his evidence in chief, the appellant stated that he had planted nappier grass and coffee on the said parcel of land and restricted James Gachoki from trespassing therein. It should be noted that the appellant did not testify that he has had exclusive possession of the said parcel of land from 1993. That was never specified anywhere in his affidavit of protest and/or oral evidence.
58. The Respondent on the other hand testified that in 1993 the deceased Ndiga Njagi sub-divided his land into seven portions and called all his children and showed them where each will utilize. Since he was based in Nairobi. He left his father to utilize his portion of land bequeathed to him and they later allowed the applicant to use it so that it doesn't got to waste. PW2 James Gachoki Makanga and PW3 Mugo Makanga supported the Respondent's contention. They testified that it is their father who initially used the suit parcel and planted tea, before later allowing the appellant to use it.



59. The evidence on record does not in any manner support the appellant content that he had had exclusive and unhindered use of the land from 1993 and was therefore entitled to the same. The evidence to the contrary holds true that he was allowed to utilize the said parcel by his later father and the appellant. Further having found that this property was not given to the appellant as a gift inter vivos, he has no basis of claiming the same.
60. As regards the law, the trial magistrate did not error to use provision of section 38 to ensure that each child of the deceased got their equal share of the estate property. The said section 38 in the context of this appeal must be read together with provision of section 42 of *Law Of Succession act*, which allowed previous benefits to be brought into account. The trial court did not err in anyway by giving effect to the deceased intention to create gift cause mortis and distributing the suit parcel to the Respondent and his two other brothers who had not transferred their rightful share of the estate to themselves.

Disposition

61. Having considered and reviewed all the evidence and the ground of appeal raised I do find that this appeal has no merit. The same is dismissed with costs to the Respondent.
62. That costs are hereby assessed at Kshs 150,000/=
63. It is so ordered.
- Right to Appeal 14 days.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF APRIL 2023.

RAYOLA FRANCIS

JUDGE

Delivered on the virtual platform, Teams this 25th day of April, 2023.

In the presence of;

.....for the Applicant

.....for Respondent

.....**Court Assistant**

