



REPUBLIC OF KENYA



Nyaga v Kangeri (Civil Appeal 19 of 2020) [2023] KEHC 21054 (KLR) (31 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21054 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 19 OF 2020
RM MWONGO, J
JULY 31, 2023**

BETWEEN

HELLENA WAGUTHII NYAGA APPELLANT

AND

WACHIRA KANGERI RESPONDENT

*(Being an Appeal against the Judgment and decree delivered on
30th April 2020 by Hon. E. Wambo in CM Succ. No 262 of 2018)*

JUDGMENT

1. The deceased Kangeri Mbunya died on June 20, 1995. His wife Peris Njoki Kangeri died on August 20, 2008. The sole intestate property was land parcel No Mutira/Kathare/128, measuring six (6) acres. Letters of administration to the late Kangeri Mbunya's estate were applied for on November 1, 2018, by the appellant and the respondent.
2. According to the petition, the deceased was survived by Wachira Kangeri; James Muriuki Kangeri, Hellena Waguthii Nyaga, Jecida Micere Njuraita and Mary Wakanyei Kangeri.
3. In the lower court, the learned trial magistrate ordered distribution of the land as follows:
 1. That land parcel No Mutira/Kathare/128 be distributed as per affidavit of protest dated May 29, 2019 in that:
Wachira Kangeri gets 2.5 acres, James Muriuki Kangeri gets 2.5 acres and the remaining 1 acre to be jointly and equally registered in the names of Hellen Waguthi, Jecida Micere Njuraita and Mary Wakanyei Kangeri
 2. That there shall be no order as to costs"
4. Dissatisfied with the determination of the lower court, the appellant filed an appeal on the following grounds:



1. That the learned magistrate erred in law and in fact in delivering judgment against the weight of evidence adduced by the petitioner.
 2. That the learned magistrate erred in law and in fact in holding that the deceased had executed subdivision of land parcel Mutira/Kathare/128 on the ground but left completion to be done by his wife Peris Njoki Kang'eri while no such evidence was adduced.
 3. That the learned magistrate erred in law and in fact in holding that the deceased participated in subdividing the land while it is clear survey fees was paid on November 21, 1997 and the deceased died on June 20, 1995, hence the land was subdivided 2 years after the deceased's demise.
 4. That the learned magistrate erred in law and in fact in holding that the protestors had been given land as gift inter-vivos whereas no evidence was adduced to that effect.
 5. That the learned magistrate erred in law and in fact by failing to hold that the deceased's estate namely land parcel Mutira/Kathare/128 ought to have been distributed equally among all the beneficiaries of the deceased as he died intestate.
 6. That the learned magistrate erred in law and in fact in deciding the matter on extraneous evidence contrary to what had been adduced in court.
 7. That the learned magistrate erred in law and in fact by discriminating against the daughters by awarding bigger portions to the sons.
5. Parties filed written submissions as directed by the court.
 6. The appellant submitted along the lines of the grounds of appeal. She asserts that the land should be divided equally among all the five siblings. According to her the allegations of the respondents that their father had subdivided the land and that their mother had been left to complete the process was not supported by any evidence as the survey transactions were clearly done in 1997 and 2018 whilst the deceased had died on June 20, 1995. The learned magistrate had thus erred in finding that there had been an intervivos gift by the deceased. She argues that there was no valid will nor an intervivos gift as defined by law.
 7. The appellant argues that to the extent that the trial court had distributed the property giving more acreage to the deceased's two sons (at 2.5 acres each) and giving only one acre to be shared by the three sisters, that amounted to discrimination. She cited the case of *In Re Estate of Francis Mwangi Mbaria(deceased)* [2018] eKLR in which the learned judge placed reliance on the case of *In Re Estate of Solomon Ngatia Kariuki(deceased)* [2018] eKLR where it was held:

“The *Law of Succession Act* does not discriminate between female and male children or married and unmarried daughters of the deceased person when it comes to distribution of his estate”
 8. Reliance was also placed on the case of *Stephen Gitonga M'Muriithi v Faith Gira Muriithi* [2015]eKLR which similarly held that section 38 of the *Law of Succession Act*:

“...enshrines the principal of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried.....



Therefore a son will not have priority over a daughter of the deceased simply because he is male, all male and female siblings are equal before the law and are entitled to equal protection of the law”

9. In his brief submissions the respondent argues that the trial magistrate was correct in distributing the land as he did. He states that the distribution was in accordance with the wishes of the deceased, which wishes were finally complied with by the deceased’s late wife. He asserted that the deceased had gifted the land to the children and that it was proper for the trial court to invoke section 42 of the LSA
10. The respondent relied on the case of *Michael Arphaxard Nyaga & 2 others v Robert Njue & 2 ors* [2021] where the trial judge defined *inter vivos* gift.

Issues For Determination

11. The gravamen of the appeal is that the trial court was factually mistaken in finding that the deceased had any role in subdividing the land as alleged, and in making *inter vivos* gifts. Accordingly, that the land should therefore be divided equally between all the children of the deceased.
12. On whether there was an *inter vivos* gift and the land was sub-divided, I have carefully perused the record of proceedings. This evidence was given by the respondent’s brother, James Kangeri both in chief and in cross examination. He admitted that there was nothing written to show the gift, Further, in cross examination he admitted that the land was still in his father’s name. PW 2 was the respondent he repeated the evidence of PW1, but also admitted that the land was still in his father’s name.
13. The respondent gave evidence for the daughters. She said the titles were still in her father’s name meaning there was no gift. She added that there were no subdivisions of the land during her father’s lifetime, but admitted that her mother had done subdivisions.
14. The learned trial magistrate noted that it was on the proposal of James Muriuki Kangeri’s sketch plan that the land was proposed to be distributed. He concluded that:

“It appears that there had been some sort of sub-division on the ground...
...the deceased executed her (sic) sub-division on the ground but left the completion to be done by the mother, Peris Njoki Kangeri, which she did.’ to be
15. He further stated that:

“To this court in the absence of evidence to the contrary there appears to be a clear gift *inter vivos*”
16. The trial magistrate then invoked section 42 of the *Law of Succession Act* and distributed the property as if previously settled by *inter vivos* gift, giving 2.5 acres to each of the sons and 1 acre to be shared between the daughters.
17. A gift *inter vivos*, is a gift between the living. This is the latin phraseology, and is the legal term that refers to a transfer or gift made during the grantor’s life. In reality, where a gift has been given *inter vivos*, it ceases to be part of the free property of the deceased, and is incapable of being inter-mixed with the free estate of the deceased.



18. Section 2 of the LSA defines free property of the deceased as:
- “the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death”
19. In my view, where the intended gift has not vested in the beneficiary by way of transfer prior to or at the time of the deceased’s death, it remains an incomplete gift, and the property remains free property of the deceased of which he could have otherwise freely disposed of.
20. Evidence that a gift has not taken effect or vested include, as in this case, the fact that, in the least, there was no subdivision or mutation signed by the deceased with transfer forms duly signed and lodged but not effected. Such actions together with fencing by the deceased and physical handover of partitions to the beneficiaries before his death, would make a good case to support the existence of a gift *intervivos*.
21. In this case all the elements of a gift are missing. The survey and payments thereof were done long after the deceased passed on, the handing over appears to have been done by the deceased’s wife, and the title remained in the name of the deceased up to the time of trial.
22. The case of *Micheni Arphaxad* (supra) relied upon by the respondents supports the position that there was no gift *intervivos* where Gitari J describes a gift *inter vivos* as follows:
- “The characteristics of the gifts *inter vivos* are that they are made and settled during the lifetime of the deceased and have been identified, awarded and settled for the person to whom it has been given. It is a gift made to a beneficiary when the deceased was alive and is considered when distributing the net intestate estate so that person who received it may be considered as having received his share and may reduce or diminish any entitlement to the net intestate estate. The gift which is transferred and settled for the beneficiary during the life-time of the deceased, will not form part of his estate but it will be taken into account in determining the share of the net intestate estate finally accruing to that beneficiary.
- The concept of gifts is divided into two categories. First gifts *intervivos* and gifts *causa mortis*. Gifts *intervivos* as contemplated in the Law of Succession are such that the owner of the property or asset donates it to another without expectation of death.
- In any event the person who makes such a gift must have the capacity and competency to gift the property and the gift must be perfected. In the case of *inter vivos* the gift must go to the donee absolutely during the lifetime of the donor. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts.”
23. I am in full agreement with and adopt the sentiments above.
24. In the present case, the alleged gifts were not given by the deceased to the two sons as alleged, nor settled, since the alleged gifts were not crystallized or consummated to the benefit of the two brothers. Indeed, the appellant acknowledged this fact not only because he admitted that the title was still in the deceased’s name at the time of trial, but also because as a co-administrator, he introduced a sketch plan of the alleged sub-division which was not signed by the deceased and alleged to have been made in 1997 two years after the death of the deceased.
25. I am therefore unable to agree with the respondent that there was any gift *inter vivos* and the appeal fails on that ground.



26. In light of the foregoing finding, there could be only one mode of distribution and that is the mode found under section 38 of the [Law of Succession Act](#), which provides for equal distribution among the surviving children of the deceased.
27. To the extent that the learned trial magistrate purported to find that there was a gift *inter vivos* and thus distributed the property with larger portions favouring the two sons, the distribution was discriminatory to the daughters of the deceased.
28. The appeal therefore succeeds. The decision of the trial court is therefore set aside and is substituted with a decision hereby distributing the deceased's land parcel No Mutira/Kathare/128 equally between all the children of the deceased. Further, in such sub-division, any portions required for road reserves shall be deducted equally from the portions allocable to each child.
29. There is no order made as to costs, this being a family matter.
30. Orders accordingly.

DATED THIS 31ST DAY OF JULY 2023

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R. MWONGO

JUDGE

In presence of:

1. Hellena Waguthii Nyaga
2. Wachira Kangeri
3. Mr. Igati holding brief for Wanjiru for Appellant
4. Court Assistant, Mr. Murage

