In re Estate of Daniel Kanzi Mulati alias Daniel Kani Mwalabu (Deceased) (Succession Appeal E150 of 2021) [2023] KEHC 21642 (KLR) (9 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21642 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

SUCCESSION APPEAL E150 OF 2021

G MUTAI, J

AUGUST 9, 2023

BETWEEN

MARY NDUNGE KOMU ..... APPELLANT

AND

IDAH NTHENYA MAINGI ..... RESPONDENT

(This judgment is an Appeal against the Ruling of Hon. D Orimba, SPM, in Kangundo Succession cause No. 90 of 2019 delivered on 18{{^th}} August 2021.)

JUDGMENT

1. This judgment is an appeal against the ruling of Hon D Orimba, SPM, in Kangundo succession cause No 90 of 2019 delivered on August 18, 2021.

2. The appeal arose from decades of hate and promise, love and frustration. From the protest there appears to be other persons who qualify to be dependants.

3. The matter was concluded between these two protagonists without settling the issue of the disappearance of the third son. There is also no mention of daughters and other dependants. They are mentioned in passing in the protest.

4. Section 42 of the *Law of Succession Act* provides as follows: -

> " Previous benefits to be brought into account 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
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> (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken

into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

The Appellant's Submissions

5. The appellant filed submissions on January 21, 2022. They are of the view that land parcel number Kangundo /Matetani/1328 was distributed in 1996. This was 3 years before the deceased's demise.

6. They also state that the respondent sold land parcel number Kangundo /Matetani/1328 which resulted in a land case, that is kangundo civil suit number 284/2018. There is also settlement of other members of the extended family, that is Nicholas Muthama, Joseph Ndeto, David Mutunga, Nicholas Mutie, Gideon Mwanzia, Priscillar Ndulu, Beth Munywa and Joseph Kyalo.

Respondent's Written Submissions.

7. The respondent raised issue whether this was a gift in contemplation of death or beneficiaries distributed this among themselves. They rely on the authority of *In re Estate of The Late Gedion Manthi Nzioka (Deceased)*[2015]eKLR,

> " 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. See in this regard *Halsburys Laws of England* 4th Edition Volume 20(1) at paragraph 32 to 51.
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> In *Halsburys Laws of England* 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:
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> '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 done a right to enforce the promise. A promise made by deed is 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."

8. Their view is that the property in dispute is in the deceased's name. they also rely on the authority of *In re Estate of Godana Songoro Guyo (Deceased)*[2020] eKLR: -

> " When someone made a gift to another with the intention of vesting it wholly on that other person and would not be expected to revert back to himself, then such disposition arising there ought to be validated. Notwithstanding the evidence by the applicants attempt to persuade the court to admit such evidence on gift inter vivos or gift causa mortis there was no such gift over that disputed title in the legal sense."

9. They also rely on the English decision of *Cain v Moon* 1896(1896) 2QB 282. They also deal with post with other aspects not on the proceedings. I will analyze the rest in my judgment.

Analysis

10. The only issue in this matter is whether, the court got the formula for distribution right.

11. The issue was not who the dependants were or the property of the estate, but the shares. Some parties maintaining the estate was distributed before the demise of the deceased or it is undistributed. The court took an unorthodox step of proceeding on basis of evidence without directions.

12. There were claims by other parties including customary claims. These are not idle claims. It is necessary, in contested estates, that the court takes actual *viva voce* evidence. The other claims must be settled before a net estate is established.

13. The places where parties have settled is also important. Distribution should be taken into consideration. In *re Joseph Sigilai Mutai, Maria Chepkemoi Lelei & Tapsabei Chepkemoi Lelei v Philip Kipyegon Lelei* [2006] eKLR, Justice Luka Kimaru stated as follows: -

> "I am satisfied that the petitioners have established on a balance of probabilities that the deceased had settled his wives in their respective portions of land. The 1st wife was settled at Kericho while the other three wives of the deceased were settled at Transmara. The three wives and their children recognized this fact when they subdivided the Transmara parcel of land among themselves to the exclusion of the 1st wife and her children. I therefore hold that none of the children of the three wives who reside at Transmara, including the objector, are entitled to the parcel of land occupied by the 1st wife and her children at Kericho namely title No Kericho/Kapkatet/1226."

14. Therefore, it is clear that where parties reside is important. It may not be a gift *inter vivos* or even an oral will. Courts are not to disturb the decisions by the deceased. The court must also clear the customary claims or claims by other people settled on the land.

15. In the case of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, the Supreme Court held as follows: -

> "In pronouncing the extinction of customary land rights, Bennett J, made a declaration to the effect that, "had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could have been easier than for it to say so". This statement, has in a cruel twist of irony, become a judicial mantra, and repeated with abandon, even by courts in the post 2010 era! Nyarangi J.A, would, years later, in *Kanyi v Muthiora*, turn the Bennett proclamation on its head by stating that "had the legislature intended that customary law rights were to be excluded, nothing would have been easier than for it to say so."
>
> Suffice it to say, that legislative intent cannot, always be attributable to what it (the legislature) says through statute. To assume that what parliament doesn't say, in the final legislative edict, was never meant to be, is to tread the dangerous path of judicial cynicism. Parliament cannot legislate for every exigency of human existence. Indeed, there is nothing easy when the legislature sits to make laws; just as there is never a straight-forward or clear-cut route when a court of law embarks on the interpretation of a written law."

16. There was evidence that parties were settled in various parts before the demise of the deceased. The settlement has been for several decades. Therefor disturbing the situation on the ground with redistribution is untenable. It is creating animosity among family members. The effect of such claims is

that they ought to have been dealt with specifically and either allowed or dismissed. The court cannot simply ignore prior settlement and other claims and proceed to distribute the gross estate.

17. The court was only entitled to distribute only the net estate. In doing so, the court must have regard to the dependants and others who are settled. Each side has to stay on the land that it was settled on, unless there is evidence to the contrary.

18. Upon settlement, the only parcel that can be hived from the other's side is a portion to equalize the shares. However, the court shall remember it is equitable distribution that is crucial not mathematical equalization.

19. Regard has to be had of section 38 of the *Law of Succession Act* provides as follows: -

> " 38. Where intestate has left a surviving child or children but no spouse Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."

20. It is therefore necessary that the matter be heard viva voce and a final judgment given in the matter. The matter that the court disposed of by way of affidavit evidence is too weighty. It is clear that the parties have already settled in specific parcel and built permanent houses.

21. The place of their burial is sacrosanct. In the case of E*sther Jepkomoi Sang v Selly Jemtai*, the court recognized places where the grave is settlement as to be reconnected with. I therefore find there is merit in the appeal. I set aside judgment of the court and order that the matter be heard de novo. The court hearing the matter shall endeavor not to disturb the settlement as much as possible. The parties must vindicate their clams in a court and a judgment be given.

22. In the judgment whichever way parties are sharing settlement areas and grounds should be taken into consideration. The court must also make a definite finding on other beneficiaries and dependants.

Determination

a. The upshot shot of the foregoing is that I allow the appeal, remit the entire case to the subordinate court, to be heard by a magistrate other than Hon D Orimba.

b. In distributing the estate all beneficiaries and dependants be accounted for

c. While distributing current settlement and graves should be reckoned with.

d. The matter shall in the first instance be referred to court annexed mediation by the first court. In the unlikely that of a disagreement the matter shall be heard by way of *viva voce* evidence.

e. Given that this is a family matter each party to bear its costs.

f. I have noted from this in dispute, there is, a possibility that this matter is outside the pecuniary of the jurisdiction of the subordinate court Nevertheless, there is no evidence to that effect. This question be determined at the first instance and if need be a necessary application to transfer to the high court be made.

g. This file is closed.

DELIVERED, DATED and SIGNED at MOMBASA on this 9th day of August 2023. Judgment delivered through Microsoft Teams Online Platform.

GREGORY MUTAI

JUDGE

In the presence of:

..... for The Appellant

..... the Respondent.

Court Assistant – Arthur Ranyondo