Ngigi & another v Kihara & another (Civil Appeal E021 of 2022)
[2023] KEHC 25945 (KLR) (29 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25945 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E021 OF 2022

PM MULWA, J

NOVEMBER 29, 2023

BETWEEN

GRACE NJERI NGIGI ..... 1ST APPELLANT

JANE WANJIRU GICHINGA ..... 2ND APPELLANT

AND

MARY WACHEKE KIHARA ..... 1ST RESPONDENT

JOSEPH MWAURA GICHINGA ..... 2ND RESPONDENT

JUDGMENT

1. This appeal arises from the ruling of Hon. S. Atambo delivered on 7th February 2022 on the objection notice dated 6th September 2019 objecting to the mode of distribution of the estate of Gichinga Kariuki (deceased).

2. The background to this appeal is that Grace Njeri Ngigi, Jane Wanjiru Gichinga and Joseph Mwaura Gichinga petitioned the Kiambu Chief Magistrate's Court for the grant of Letters of Administration with respect to the estate of Gichinga Kariuki (deceased). The estate was in respect of their father. According to the petition, the estate of the deceased comprised of the following landed properties; Ndumberi/Riabai 3949, Ndumberi/ Riabai 2943 and Ndumberi/Riabai 2340.

3. A grant of representation was issued on 30th August 2016. The Appellants filed a summons for confirmation of the grant on 30th May 2019 in which they suggested that the deceased property be sold and the proceeds be divided amongst the beneficiaries. Dissatisfied by the mode of distribution the 1st Respondent acting on behalf of the 2nd Respondent filed an objection on 6th September 2019, objecting to the sale of the property on the grounds that the deceased did not wish to have his estate sold.

4. The protest was heard by the court through viva voce evidence and the court delivered its ruling on the protest on 7th February 2022. It is that ruling that is the subject of this appeal. The Appellant raises 7 grounds of appeal as follows:

    i. The learned magistrate erred in law and in fact in arriving at a decision which was against the weight of evidence.

    ii. The learned magistrate erred in law and in fact in distributing the deceased estate oppressively, unfairly, inequitably and contrary to the dictate of the *Law of Succession Act* as pertains to the rules of intestacy by allocating parcel No. Ndumberi/Riabai/2943 to seven (7) people while allowing the Respondents to retain two prime properties known as Ndumberi/Riabai 3949 and Ndumberi/Riabai 2340.

    iii. The learned magistrate erred in law and in fact in holding that parcel numbers Ndumberi/Riabai 3949 and Ndumberi/Riabai 2340 were gifted inter vivos and hence not available for distribution.

    iv. The learned magistrate erred in law and in fact in holding that property Nos. Ndumberi/Riabai 3949 and Ndumberi/Riabai 2340 were the respondent inheritance by way of gift when indeed no tangible evidence was adduced to support such gifts and/or transfer to the Respondent.

    v. The learned magistrate erred in law and in fact in failing to properly appreciate the law relating to gift inter vivos.

    vi. The learned magistrate erred in law and in facts in failing to consider the Appellant's proposed mode of distribution which was fair, equitable and supported by all the beneficiaries except the Respondents herein.

    vii. The learned magistrate erred in law and in fact by considering irrelevant factors in arriving at her decision.

5. The appellants urged the court to allow the appeal, set aside the order of the trial court dated 7th February 2022, dismiss the respondent's objection in the trial court and allow the property to be distributed in accordance with the law and/or Appellant's mode of distribution.

6. The appeal was heard by way of written submission. Both parties filed written submissions. The court notes the submissions filed by the respondent were in respect to the application on status quo and not on the issues raised in the appeal and thus not useful in determining the instant appeal.

Appellant's submissions

7. Counsel averred that grounds 1, 2, 3, 4 and 5 of the appeal are intertwined and thus consolidated in the petition. Counsel argues that the finding of the trial court that property Nos. Ndumberi/Riabai 3949 and Ndumberi/Riabai 2340 were a gift inter vivos was not backed up by any evidence. The Respondent failed to discharge their duty under Section 107 of the *Evidence Act* to proof the properties were gift inter vivos. He relied on the case in *Teresiah Njeri Mungai v Daniel J. Muturi Gathirwa* (2021) eKLR where the court held:

> the appellant had the burden to prove that the deceased gave her the property. This is what section 107 of the *Evidence Act* provides...the standard of proof in civil matters is on a balance of probability...the appellant did not meet the standard of proof. The Appellant in her evidence stated that the deceased mother gifted her property in the presence of Mary

Wambui Karanja but that person was not called to confirm to the court that assertion of the appellant."

8. Counsel avers the houses in the property Nos. Ndumberi/Riabai 3949 and Ndumberi/Riabai 2340 were built by the deceased Gichinga and therefore the trial court erred in finding that they were gift inter vivos. It is argued that the trial magistrate erred in relying on submissions which brought the arguments that property Nos. Ndumberi/Riabai 3949 and Ndumberi/Riabai 2340 were gift inter vivos.

9. On the second issue counsel submits the trial magistrate failed to properly appreciate the law governing gift inter vivos and relied on speculative and unsupported evidence by holding "the deceased may not have transferred the contested properties that is Ndumberi/Riabai 3949 and Ndumberi/Riabai 2340", he however delivered the said property to his sons, the objectors herein and even had them put up their homes

10. Counsel argues that of the three (3) parcels of land; 2 plots measuring 40 by 80 feet and one measuring 100 by 80 feet were not feasible for equal sharing of the property as some plots were prime and due to their small in size not possible to be subdivided equally, hence the proposal for sale and sharing the proceeds equally amongst the beneficiaries, and in instances where any beneficiary wished to retain the property would buy out other beneficiaries and retain the property. She urged the court to allow the appeal as filed.

Analysis and determination

11. This is the first appellate court and accordingly this appeal is essentially a retrial of the issues that were before the trial court. The duty of this Court as the first appellate court is set out in *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA where the court stated as follows: -

> "An appeal to this Court from a 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 conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take 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 on the case generally".

12. In due consideration of the record of appeal, the submissions and the applicable law, the only issue for determination is whether the appeal is merited.

13. Section 42 of the *Law of Succession Act* provides: "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

    b. Property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house."

14. Gift inter vivos must be made and settled during the lifetime of the deceased to the person to whom it was made. They are put into consideration during the distribution of the deceased's estate, delivery of the gift of the beneficiary is necessary to consummate the gift.

15. It is not disputed that the parties herein are all beneficiaries of the deceased estate, what is in dispute is the manner in which the property will be equitably shared amongst all beneficiaries. The appellants and 2nd respondent are daughters and son of the deceased while the 1st respondent is the daughter-in-law of the deceased.

16. I am in agreement with counsel for the appellant that indeed the Respondent had the duty to prove that the deceased gifted them the properties Ndumberi/Riabai 3949 and Ndumberi/Riabai2340 as required by Section 107 of the *Evidence Act*, which provides:

    (1) 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 exist."

17. From the record there was no evidence that was adduced in support of the respondent's assertion only the 1st respondent testified her assertions were not supported by evidence of the 2nd respondent who is a son to the deceased. The respondent avers in her submissions that the deceased bequeathed his sons the two properties to build and live before his demise which amounted to a gift. However, no evidence has been adduced to support the same as in cross-examination she contends the buildings thereon were constructed by the deceased. I also note the respondents failed to file an affidavit in support of the averments.

18. The trial court found that allowing the respondent to build and live in the said property amounted to delivery of the 2 properties to his sons. I am not convinced that indeed the respondent proved on a balance of probability the existence of a gift inter vivos created by the deceased. I do not find there was a complete lifetime gift of the land to the sons, nor did the deceased take any necessary steps to have the land registered in the names of his two sons.

19. In *Re Estate of Chesimbili Sindani (Deceased)* [2021] eKLR, the High Court held:

> "...There was no gift inter vivos to any of the children of the deceased and, therefore, the entire estate of the deceased comprises of free property available for distribution by the court in these confirmation proceedings. I am persuaded that the deceased had only licensed the sons to utilize certain assets, and as a result they had put up structures on those assets, any distribution of the assets ought to take into account those assets, and ensure that the particular sons are allocated shares in the parcels of land where they have put up structures."

20. I do associate myself with the findings of the above case and find that at the time of the deceased death, the property did not belong to the Respondent but was the deceased free property, notwithstanding the utilization and occupation by the sons.

21. In the circumstances, this court finds that the trial court erred in holding that Ndumberi/ Riabai 3949 and Ndumberi/ Riabai 2340 were gifts inter vivos. Be as it may the court finds the two properties fall within the ambit of free property belonging to the deceased and is available for distribution among the beneficiaries.

22. The court has not been called to distribute the deceased estate. I do note at this time of distribution the deceased is survived only by his children. I will then proceed to distribute the property under section 38 of the *Law of Succession Act* which provides:

> " 38. "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."

23. The Appellants argue that the three properties are small in size and not capable of being shared amongst all beneficiaries and the proposal is to have the same sold and the proceeds divided equally among all beneficiaries with any beneficiary willing to retain any property to buy it out.

24. Based on the above arguments, I find and hold that the probable equal mode of sharing would be that proposed by the appellants.

25. The upshot is that the appeal herein is merited and the same is allowed. The Ruling of trial magistrate court delivered on 7th February 2020 is set aside. This being a family matter the order that commends itself is that each party bears its own costs.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU

THIS 29TH DAY OF NOVEMBER 2023

.....

P. MULWA

JUDGE

In the presence of:

Duale Kinyua – Court assistants

Ms. Wangeci h/b for Mr. Njuguna - for the Appellants

N/A - for the Respondents