REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 157 OF 2019

ELIJAH MATUMBI M'NKANATA.....APPELLANT

VERSUS

DAVID MUTUMA M'NKANATA.....RESPONDENT

(An appeal from the judgment in Meru CMC Succession Cause No. 309 of 2016

delivered on the 7th November 2019 by Hon. E. A. Mbicha (SRM))

JUDGMENT

Introduction

[1] This is an appeal from the decision of the Meru CM's Court in Succession Cause No. 309 of 2016 in which the court (Hon. E. A. Mbicha, SRM) in the judgment delivered on the 7th November 2019 made an order distributing the estate of the Deceased upon an application for confirmation of Grant filed by the Respondent. The appellant is a brother of the respondent and one of the heirs to the estate as son of the deceased together with his three living brothers, a sister and a sister-in-law widow of his deceased brother. In its decision, the trial court declined to uphold as a will minutes taken on a meeting called by the deceased on the 15/5/2010 allegedly to give his assets to his children and held that one of the assets of the deceased, parcel of land Timau/Timau Block 3/130, to have been a gift *inter vivos* by the deceased to the appellant and, therefore, took it into account while distributing the estate as an advancement to the appellant.

Memorandum of Appeal

[2] The appellant was aggrieved by the decision of the trial court and he filed an appeal setting out his grounds of appeal in the Memorandum of Appeal dated 5th December 2019 and filed by M/S Thangicia M. David & Co advocates for the appellant, as follows:

> *"1. THAT the learned trial magistrate erred in law and facts in disregarding and/or dismissing the appellant's evidence and the mode of distribution set out in his protest sworn on 10.07.2018 hence arriving at an erroneous decision.*
>
> *2. THAT the trial magistrate manifested clear biasness against the appellant's case by further allowing the unfair mode of distribution suggested by the respondent without considering the evidence adduced.*
>
> *3. THAT the learned trial magistrate erred in law and facts in depriving the appellant his share of the estate in KIBIRICHIA/NTUMBURI/254 which share was given to him and other beneficiaries way back in 1990s and has extensively developed despite there being evidence to that extent hence materially affecting the appellant's developments and way of life.*
>
> *4. THAT the learned trial magistrate erred in law and facts in completely failing to consider the Appellant's and respondent's evidence to the fact that no one knows where the land parcel SEGERA/SEGERA BLK 2/1877 is situated but due to bias ness distributed the unknown property to the appellant in essence depriving the appellant inheritance.*
>
> *5. THAT the learned trial magistrate considered and was weighed down by extraneous issues in arriving at the impugned decision instead of applying substantial justice as provided by the constitution.*
>
> *6. THAT the learned trial magistrate erred in law and in fact in holding that the property in TIMAUITIMAU BLOCK 3/130 is a gift inter vivos against the weight of evidence adduced.*

7. THAT the learned trial magistrate erred in law and in fact by disregarding the evidence of - e elders and the minutes under which the deceased had discussed the mode of distribution of the estate and the fact that the Timau property belonged to the appellant.

8. THAT the learned trial magistrate misdirected his mind on the principles of the applicable law on matters succession, particularly on gift inter vivos and the dying wish of the deceased.

9. THA T the learned trial magistrate erred in law and in fact in upholding the Respondent's evidence despite the glaring contradictions and misrepresentation of evidence.

10. THAT the learned trial magistrate erred in failing to find that the Respondent had not shifted the burden of proof on a balance of probability as far as the evidence on the dying wish of the deceased was concerned."

[3] Based on these grounds the appellant prayed for relief as follows:

*"**REASONS WHEREFORE** the Appellants prays for this Honourable court to:*

1. set aside the judgment dated 07.1l.2019 in MERU CMCSUCC. CAUSE NO. 309 OF 2019 and allow the appellant's mode of distribution set out in the affidavit dated 10.07.2018; or

2. redistribute the estate of the deceased to the extent that the appellant's share in KIBIRICffiAINTUMBURV254 remains as the deceased had shared among the sons(equally) and the other properties be shared appropriately;

3. In the alternative, the appellant's equal share (5.83Acres) III KIBIRICIA/NTUMBURI/254 remains and the other sons can have the whole of SEGERA/SEGERA/BLOCK2/11877 with costs to the Appellant herein and court below."

Submissions

[4] The appellant urged that the deceased had called a meeting of 15th May 2010 to distribute his estate and the minutes thereof taken by the respondent own son were a ***dying wish*** or will of the deceased called by the deceased and the asset Timau/ Timau Block 3/130 was not part of the deceased's estate as he the appellant had bought the land, as set out in the appellant's written submissions dated 13th October 2020 filed by M/S Thangicia M. David & Co. Advocates for the appellant, as follows:

"Your Lordship, the evidence is crystal clear on what the wish or the will of the deceased was. The respondent, his witnesses and the trial court twisted it just to draw a conclusion in the nature of the impugned Judgment. We urge your lordship to set aside the holding that PINO. 130 was a gift inter vivos and hold that it was a property of the Appellant and does not form part of the estate….

We submit that as per the minutes and the meeting of 15.05.2010 the dying wish and the will of the deceased was unequivocal and well known by all the beneficiaries and witnesses and therefore the trial magistrate erred in law and in facts by refusing to acknowledge that fact, hence subverting the will of the deceased in favour of the respondent. The appellant prays for the impugned judgment to be set aside and the estate be redistributed as per his affidavit of protest set out at page 80 &81 of the record of appeal.

IN THE ALTERNATIVE and without prejudice to the foregoing, the appellant asserts that he be granted his full share of 5.83 Acres in KIBIRICHIA/NTUMBURl/254 and his brothers to take the whole of SEGERA SEGERS/1877 to share equally among themselves. This is because the appellant has been in possession, occupation and has extensively developed his share in P/NO. 254 since 1980s.That if the Appellant loses his share in P/NO. 254 he and his family stands to suffer harshly."

[5] For the respondent, it was urged that the meeting of 15th May 2010 did not result in a will as no agreement thereon was reached and the meeting had ended in a disarray with those who had attended walking out when he deceased made a proposal to give certain parcels to the appellant on the ground that the latter had assisted him in securing the titles to the land; and in any event, the minutes of the said meeting had not been signed by the deceased. The central arguments of the respondent was set out in the written submissions of the Respondent dated 6th December 2020 and filed by M/S Gichunge Muthuri & Co. Advocates for the Respondent as follows:

"1. The deceased died intestate Your Lordship the deceased did not leave any written will behind. It was clear during the proceedings that the deceased did not sign the minutes the appellant attempted to pass off as a will and neither was the author of the said minutes called during trial to give evidence on their authenticity. The failure by the deceased to execute the same shakes its credibility and the same cannot be termed a will or a dying wish for all intents and purposes. This being the position your Lordship, we submit that there was no will left by the deceased and administration of his estate can only be guided by the provisions on the law of succession Act Cap 160 on the Law of intestacy as provided by Section 34 of the said Act.

2. The whole of the estate of the deceased was known prior and after the death of the deceased. The appellant takes the position in his appeal and the submissions that he was given by the court the unknown property in SEGERA/SEGERA BLOCKH/1877 hence he was dumped. Your Lordship it should be noted that in his mode of distribution in page 80-81 of his record of appeal, he lists this property as one of the properties of the deceased and for him to say that there was no evidence in support of existence of this property as part of the deceased estate is misleading the court

3. The doctrine of advancement applied in distribution of the estate of the deceased Le the appellant was gifted parcel LR NO. TIMAU/TIMAU BLOCK3/130 by the deceased and the trial court was right in considering the provision in computing distribution.

The appellant in his record of appeal at page 84, he has put in there a copy of green card for land parcel TIMAU/TIMAU BLOCK 3/130 which expressly indicates that the deceased transferred this parcel to the appellant as a gift. Therefore, he should be estopped from denying the principle of gift inter vivos in this matter. The court was right in regarding the property as part of the estate advanced to the appellant and taking the same into account in distribution."

Issues for determination by the court

[6] The issues for determination by the court in this appeal are –

a. Whether the deceased died intestate or there was in existence a valid will capable of disposing the estate;

b. Whether the succession law of Kenya recognise a dying wish or will of the deceased outside the provisions of the Law of Succession Act; and

c. Whether there was a gift *inter vivos* in respect of plot No. Timau/ Timau Bloc 3 /130 and, if so, the effect of section 42 of the Law of Succession Act on the distribution in this Cause.

Principles for consideration of the appeal

Duty of the appellate Court

[7] The role of the appellate court to rehear and consider the evidence before the trial court is set out in the decision of the Court of Appeal for Eastern Africa in ***Peters v. Sunday Post Limited*** (1958) EA 424 is entitled to review the evidence before the trial court as follows:

"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial court should stand, this jurisdiction is exercised with caution; ***if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decided.*** *Watt v. Thomas, (1947) 1 ALL ER 582; [1947] A.C. 484, applied."*

[8] See also ***Selle & Anor. v. Automobile Associated Motor Boat Company Ltd***. (1968) EA 123 where the successor Court of Appeal for East Africa held that

"An appeal from the High Court is by way of re-trial and the court of appeal is not bound to follow the trial court judge's findings of fact if it appears either that he failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.".

The Evidence

[9] The Minutes of the Deceased's meeting of 15th May 2010 were as follows:

"Translated Minutes of 15/5/2010 from Kimeru to English Language

15/5/2010

Present

1. *M'Inoti M'Nkanata*
2. *Ayub MNkanata*
3. *Henry Muriungi*
4. *Elijah Matumbi*
5. *David Mutuma*
6. *Julius Mbaabu*
7. *Moses Bundi*
8. *David Mwiti*
9. *Geoffrey Kiruki*

Prayers were conducted by Henry Muriungi

1.1 M'Inoti has called his people to give them land and to see whether they will agree to be given.

1.2 M'inoti has called then twice and they have not been agreeing but only made complains.

1.3 M'Inoti said that he has five boys and three girls.

1.4 M'Inoti said that his children are of one wife and all his daughters are married to their husbands.

1.5 M'Inoti said that his uncle gave his daughters land he is not the first to do so.

1.6 M' inoti asked his sons whether they will allow their sisters to be given land as they get their share.

1.7 His sons have agreed them(daughters) to get a share

1.8 M'Inoti has asked whether they have agreed and Moses Bundi said yes with Elijah Matumbi, Henry Muriungi said he does not oppose, Julius Mbaabu and David Mutuma agreed to.

1.9 M'inoti said he has land at Demsi, Kangaita and Mbugio-ngai. He further said the one at Demsi was 3acres and nothing remaining. He said that at Kangaita were 4 acres but they are remaining 2 acres

1.10 M'inoti said the one at Demsi Matumbi was following about it and the one at Kangaita. Matumbi invested and he is requesting 2000 now. M Inoti Said they all belong to Matumbi.

1.11 Muriungi said they have never been asked about the money with Mbaabu and Mutuma. Moses Bundi asked whether Matumbi was helping M'inoti to pay the lands but M'rnoti said that time Matumbi followed up on them since it became a burden to him.

1.12 Matumbi was asked by Ayub whether they had agreed with M'inoti to help to pay the land that it may not lost Matumbi said he was save the land the father gave him

1.13 M'inoti said that the land belong to Matumbi. M'inoti said that Matumbi also bought cows from him, the cows at Kinjo and the same belong to his namesake (grad father) who is at Kinjo(2 cows and a calf) 1.14 M'Inoti said that his land that is at Kinjo should not be subdivided. That he need his five sons to go to the land with a measuring feet and share for purposes of cultivating and each to utilize his portion separately. The same to remain as family land. Matumbi to take care of that land. The five sons to share.

1.15 M'inoti said that he will leave a land for his daughters for cultivation purposes from the land at Ntumburi, after that they can go back where they are married.

1.16 M'inoti said his five sons to subdivide the land at Kiamuinya(CR) into five pieces and build commercial premises to be fetching money from them.

1.17 The land which is at Mbugia-ngai M'inoti said is being discussed this 15/5/2010 and after the discussion he will be updated and that it is his properties.

1.18 He said he does not know the actual size of the land at Ntumburi but he will share it to them. Then Ayub said his sons to take him to the land offices to ascertain the acreage of the land to enable them subdivide amongst themselves and they should also acquire the title deed to the land forthwith.

1.19 losing prayer was led by Henry Muriungi."

[10] According to the Minutes and the testimony of the appellant's witnesses, the deceased wished to distribute his property equally among his children including his female children save for the property which he gave to the appellant. The reason for the deceased's allocation of the Timau land to the appellant is severally recalled by his witnesses PW1, PW2 and PW3 as he "gave money for getting the land", according to PW1; as he "had used his money to get the title to the land" (according to PW2): with PW3, the appellant's and respondent's brother David Mwiti testifying that-

"*There was some parcel of land in Timau which he said was for Matumbi since it was Matumbi who pursued and used his money to get the land."*

[11] No where is it asserted that the appellant bought the land or paid for its purchase from the Society. It was also never stated that the appellant had bought the land from the deceased as the appellant alleged testifying as PW5 in cross-examination that-

"*I gave my father money in Timau/ Timau Block 3/130 for him to give me the particular parcel of land."*

[12] The appellant contradicted himself when on re-examination he suggested that he had paid for the land to the vendor of the land saying *"I paid the land when my father failed to follow up and buy the subject land. The title came in my father's name and he did a transfer for me."*

[13] It would appear that the evidence of PW1, PW2 and PW3 that it was a case of expenditure in the pursuit of the issuance of title to the land, which is not equivalent to the purchase of land. Even if he had spent the money in the pursuit of the title to land, the gifting of the land on that ground would still not be a purchase but a gift in consideration of his help.

[14] The respondent's evidence largely supported the occurrence of he meeting of 15/5/2010 but denied the conclusion of an agreed distribution of the deceased's property and vehemently denied any form of will was made thereon by the deceased. Testifying as AW1 the respondent admitted there was a meeting on 15/5/2010 saying on cross-examination:

> *"Before my father passed away, teher was a meeting I was told he purported to call but I do not know about that meeting…. Mbaabu told me Mzee was calling the meeting to give Matumbi all the wealth . The deceased was stating Matumbi is the one who bought the land. That is what Mbaabu told me. Mzee, the deceased stated it is Matumbi who bought the subject parcels of land. Mbaabu stated the meeting became chaotic when it was being said the land was bought by Matumbi whereas it were my father's."*

[15] The appellant AW1 accepted that eth appellant lived on plot 254 and had been living with and taking care of their deceased father while he appellant would visit from Embu where he lived. On examination and rexamination by his counsel PW1 asserted that he had used his "wisdom to divide the subject land " but that he had consulted his brother Mbaabu and that they had told Mary and Murungi's wife who were in agreement with his proposed distribution of the Estate as prayed in the application for Confirmation of Grant.

[16] The sister AW2, Mary gacheri indicated that she had no interst in the Ntumbiri land and was satisfied with the Mariene plot. She agreed with he distribution proposed by the respondent. She denied knowledge of a family meeting called by her father to divide his property.

[17] AW3, the deceased's daughter in law widow of Henry Muriungi, the deceased's son agreed with the distribution proposed and set out by the respondent David Mutuma and denied any knowledge of the meeting of 15/5/2010.

[18] AW4, Julius Mbaabu, the deceased's son who the Respondent cites as his source of information as to the meeting of 15/5/2010 supported David Mutuma's distribution, which he said they wrote together, but he sought that the land be divided equally. On cross-examination while confirming the meeting said:

> *"Our father had told us and I was there that we divided everything equally. No one should take more than the other…"*

The witness confirmed the occurrence of the meeting of 15/5/2010 and only disagreed with what the deceased had said.

Minutes of the Meeting of 15/5/2010

[19] At best the Minutes of the Meeting of 15/5/2010 might have amounted to an oral will because by all accounts of the appellant's witnesses PW1, PW2, PW3, PW4 and PW5 the deceased did not sign the Minutes and only stated what his wishes were and others recorded it. However, athough the Minutes met the time-lines for oral will the meeting having been held on 15/5/2010 within three months of the deceased's death on 8/8/2010, the true content of the Minutes is only a record of proceedings of a preparatory meeting towards the making of a disposition of his property, which the deceased never did because here were certain matters including the concurrence of the children which did not happen as he had sought.

[20] The minutes of the meeting of 15th May 2010 disclose a preparatory meeting in he continuing effort of the deceased to seek a consensus on the distribution of his estate among his children. According to the evidence of persons who attended the meeting, no agreement was reached and none was alleged or exhibited. The appellant's claim is that the meeting amounted to a will or dying wish. The respondent's case was that the meeting did not result in any agreement.

[21] The preparatory nature of the meeting of the 15th May 2010 is established by the preamble of the Minutes at paragraphs 1.1 and 1.2 that:

> ***"1.1 M'Inoti has called his people to give them land <u>and to see whether they will agree to be given.</u>***
>
> ***1.2 <u>M'inoti has called then twice and they have not been agreeing but only made complains.</u>***"

[22] The meeting was a herald to a final disposition of the property upon the children of the deceased agreeing to be given the land. Of course, it is trite that children cannot force their father as registered proprietor of his land to gift them in a particular way. see ***MARY WAHITO MBUGUA vs PETER MBUGUA NJUHIGU*** & 5 others [1995] eKLR.

[23] In this case, however, it was clear that the deceased wanted to achieve some consensus within his household before he could concluded a disposition by will or gift *inter vivos* of his property.

[24] The inconclusive nature of the meeting is highlighted by the terms of its very Minutes at paragraphs 1.17 and 1.18 as follows:

> *"1.17. The land which is at Mbugia-ngai **<u>M'inoti said is being discussed this 15/5/2010 and after the discussion he will be updated</u>** and that it is his properties.*
>
> *1.18. **<u>He said he does not know the actual size of the land at Ntumburi but he will share it to them. Then Ayub said his sons to</u>***

take him to the land offices to ascertain the acreage of the land to enable them subdivide amongst themselves *and they should also acquire the title deed to the land forthwith."*

DETERMINATION

Whether there is a valid will

"Dying wish" of the Deceased

[25] A "will" is defined under section 3 (1) of the Law of Succession Act as –

> *"'will" means the* ***legal declaration*** *by a person of his wishes or intentions regarding the disposition of his property after his death,* **duly made and executed according to the provisions of Part II**, *and includes a codicil"*

[26] I think it is clear that once intestate the provisions of the Act on intestate succession applies and there are no half measures on account of a *dying wish* whether such wish is expressed to a multitude but without the formal requirements of a written or oral will. A ***dying wish*** would only become enforceable if it is crystallized into a legal declaration of a deceased's intention to dispose of his assets, within the meaning of section 3(1) of the Law of succession Act by complying with the formal requirements for the making of a will, written or oral under Part II of the Act. Otherwise, the ***dying wish*** remains only a wish.

[27] Sections of the Law of Succession Act on testate disposition of property are clear that property is disposed by will as follows:

> ***"Formalities***
>
> ***8. Form of wills***
>
> *A will may be made either orally or in writing.*
>
> ***9. Oral wills***
>
> *(1) No oral will shall be valid unless—*
>
> *(a) it is made before two or more competent witnesses; and*
>
> *(b) the testator dies within a period of three months from the date of making the will:*
>
> *Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.*
>
> *(2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by sections 18 and 19.*
>
> ***10. Proof of oral wills***
>
> *If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness.*
>
> ***11. Written wills***
>
> *No written will shall be valid unless— (a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;*
>
> *(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;*
>
> *(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."*

[28] The question before the court is really not whether a family meeting occurred where the deceased according to the appellant "shared his estate". The issue for determination is the effect of the outcome of such meeting in law. Did the meeting result in a will, written or oral?

[29] Having considered the evidence, I find that the meeting did not amount to a will in law. The minutes of eh meeting were not signed by

the deceit remains a general guide which could not override the provisions of the law of succession. If the dying wish of the deceased is patently contrary to law, the court must ignore it and give effect to the statutory provisions. This does not curtail the testamentary freedom of the deceased; it only holds that the dying wish of the deceased was not so expressed as to became a valid legal declaration of his intention to dispose of his property in the legally accepted manner of testamentary disposition. As with the trial court, I am unable to find that the Minutes of the Meeting of 15th May 2010 amounted to a will under the Law of Succession.

Gift inter vivos

[30] By balance of probabilities, the evidence before the court established that parcel of land Timau/Timau Block 3/130 was part of the estate given to the appellant by the deceased. The appellant did not show any evidence f outright purchase of the property either from the deceased from the Mwichwiri Farmers' Cooperative Limited who are shown on the green card as the original owners before transfer to the deceased and subsequently to the appellant. The appellant might have paid some money to the Society or used his money to pursue the issuance of the title as said by the deceased in the Minutes but there was no evidence of such payments, and the court must accept what the register of the parcel of land (Green Card) states - that the transfer to the appellant by the deceased was as a **"gift".**

Plot Number Ontulili 349

[31] It appeared that this was the other parcel that the deceased suggested the appellant had been involved in pursuing title but there was no evidence of expenditure thereon, and unlike in plot Timau/ Timau Block 3/130 no transfer had been done. As the statement of the deceased did not amount to a will, the parcel of land remained part of the deceased's estate and it falls to be distributed in accordance with the law of succession among the deceased's heirs.

Distribution of the estate

[32] Section 34 of the Law of succession Act provides for distribution of estates in cases of intestacy as follows:

> ***"34. Meaning of intestacy***
>
> *A person is deemed to die intestate in respect of* ***all his free property of which he has not made a will which is capable of taking effect****."*

[33] Having found that there was no valid will, oral or written, and therefore no oral will capable of taking effect, within the meaning of section 34 of the Law of Succession Act, the estate of the deceased herein then falls to be distributed in accordance with the provisions of intestate succession under the Act. Section 38 of the Act in such circumstances appropriate to the present case provides for equal distribution among the children of the deceased who have survived him, 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."*

[34] Section 42 of the Act is relevant in this case. It provides that-

> ***"42. 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*
>
> *(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."***

[35] Taking into account that the appellant as a child of the deceased was gifted by the deceased parcel of land Timau/Timau Block 130 measuring about 2.1 acres (0.8742 ha x 2.47 acres = 2.159 acres) the "***the share of the net intestate estate finally accruing to the child***" will be reduced by the equivalent of that property which the intestate deceased herein has, during his lifetime given to him.

[36] The Timau land Timau/ Timau Block 3/130 measuring about 2.1 acres was alleged by the respondent to be most prime asset of the estate. It is desirable that valuation be done in cases of varied property situate at different locales where the value of land may vary so as to inform the fair distribution between the heirs. **In the absence of valuation reports and other evidence of relative value, the court must do its best to distribute the estate taking into consideration the only unit of comparison by way of the size in acreage of the parcels of land to be distributed.**

CONCLUSION

[37] Upon considering the appeal on its merits on the basis of the evidence presented before the trial court, this court makes the following determination:

1. As the Minutes of 15/5/2010 were not signed by the deceased, they did not become his formal will for purposes of the Law of

Succession Act, section 9 whereof requires execution of a will by the testator.

2. The Preamble and the concluding paragraphs of the Minutes of 15/5/2010 indicate that the intention of the meeting was not to concluded a will, written or oral, but to marshal the concurrence of the deceased's children to agree to his intended disposition of his property among them. That object of the meeting was not achieved as no agreement was concluded on the evidence. The deceased had clearly not called the meeting of 15/5/2010 to declare or set out his will and although the deceased died within 3 months from the date of meeting as required by section 11 of the law of Succession Act, the nature of the meeting was only preparatory and antecedent to the making of a solemn disposition by will, written or oral, within the provisions of the Law of Succession Act. Accordingly, there was no oral will intoned with such intention as to make a bequeathal of the estate to any person. The deceased only managed to express his wish as to the distribution of his estate which wish did not crystallize in law to a will.

3. There is no such thing in succession law of Kenya as a "dying wish" as urged by the appellant. A deceased person's testamentary disposition of his property must be clear and within the formal requirements of a will, written oral under sections 9-11 of the Law of Succession Act. A dying wish is not a will and it is incapable of disposition of property under the law.

4. There was no evidence before the court that eth appellant had acquired by purchase from the deceased or the original registered proprietor Mwichwiri Farmers Cooperative Limited of parcel number Timau/ Timau Block 3/130. It was clearly a gift inter vivos within the meaning of section 42 of eh Law of Succession Act.

5. In the intestate distribution of estates, there is considerable merit in the proposition that regard should be had of the respective area or parcels or other property of the estate that various heirs may have over time with allocation by the deceased, been in possession although such possession is not perfected into title and where such heirs have developed such portions of the estate property during the period of their occupation, unless the size of the estate and scheme of sharing does not permit the heirs to retain all or part of such portion of the estate. In the absence of such or other compelling reason the portion held by the respective beneficiaries in the estate assets should be upheld so that there is minimal disruption of the long occupation of the beneficiaries. The trial court failed to uphold this principle in its sharing of the estate.

6. All the children of the deceased, female or male, married or unmarried are entitled to inherit their deceased parent under the succession regime of the Law of Succession Act coming into force on the 1st July 1981, and such succession is in equal shares among the said children.

7. However, where as in this case, the female child or indeed any child, indicates their consent to the other children taking the entire estate or certain larger parts thereof, and they waive their right wholly or partially over the estate or any asset thereof, the court should give effect to such consent. In this case the female heir of the estate has indicated by her evidence before the court that she had no interest in the other properties save Abothugchi/Mariene/183 and shares in Capital Sacco and that she agreed with the distribution proposed by the Respondent.

8. While it desirable that proponents of distribution of estate should make available to court valuation reports on the estates assets to aid in making equitable distribution thereof among the heirs, none was availed in this case and the court has to do its best with the comparable size in acreage of the assets of the estate.

[38] Consequently, the court affirms the trial court finding that there was no will written or oral disposing of the estate of the deceased and that the deceased's transfer of the parcel of land Timau/Timau Block 3/130 amounts to a **gift** given by the deceased by way of gift *inter vivos* to the appellant which in terms of section 42 of the Law of succession Act shall be taking into account in reckoning of the appellant's the final share in the estate. The trial court, however, erred in not maintaining, subject to his equal share in the particular estate asset, the areas of the estate's parcel of land Kibirichia/ Ntumbiri/254 on which the appellant in his long occupation had developed and built upon over the years.

[39] Having been gifted a plot of two (2) acres in parcel Timau/Timau Block 3/130 the appellant shall forfeit his share of equivalent acreage in the estate. As his one fifth (1/5) share (the sister Mary Gacheri waiving her interest in the parcels of land) in parcels of land Abothuguchi/1629 (measuring 3.3 acres), Segera Block 2/1877 (measuring 3 acres and Ontulili/ Ontulili Block 1/349 (measuring 2 acres) is equivalent to 1.6 acres, the accounts on the final share accruing to him would even out if the appellant is kept out of the distribution in the three parcels of land and the shares in the Capital Sacco in exchange and in consideration of his two (2) acres of Timau/Timau Block 3/130.

[40] The main asset of the estate plot Kibirichia/Ntumbiri/254 shall as the female child has consented, in consideration to her taking parcel of land Mariene/183, be equally between the 5 sons of he deceased regard being had of eh area long occupied by the appellant and developed by him butonly to the extent of his equal share with the rest of the sons of the deceased, the share of the late Murungi being represented by Paskwalina Nduru.

[41] Parcels of land Nos Abothuguchi/Katheri/1629, Segera/ Segera Block 2/1877 and Ontulili/Ontulili Block 1 -Katheri/349 shall be distributed in equal shares to the 4 sons of the deceased excepting the appellant.

[42] Plot No. Abothuguchi/Mariene/ 183 is distributed to Mary Gacheri in whole share.

[43] The shares in Capital Sacco will be distributed to the four sons of the deceased excepting the appellant and the sister Mary Gacheri in equal shares.

[44] Plot No. Timau/Timau Block 3/130 is distributed to the appellant in whole share.

Orders

[45] Accordingly, for the reasons set out above, the court distributes the estate property as follows:

L.R. KIBIRICHIA/NTUBURI/254

a. ELIJAH MATUMBI NKANATHA)

b. JULIUS MBAABU NKANATHA)

c. MOSES BUNDI MKANATHA) **Equal shares**

d. DAVID MUTUMA MKANATHA)

e. PASKWILA NDURU KUNGANIA)

ABOTHUGUCHI/KATHERI/1629

a. PASKWILA NDURU KUNGANIA)

b. DAVID MUTUMA MKANATA)

c. JULIUS MBAABU NKANATA) E**qual shares**

d. MOSES BUNDI NKANATHA)

ABOTHUGUCHI/MARIENE/183

a. MARY GACHERI **- Whole share**

TIMAU/TIMAU BLOCK 3/130

a. ELIJAH MATUMBI NKANATHA **- Whole share**

SEGERA/SEGERA BLOCK 2/1877

a. PASKWILA NDURU KUNGANIA)

b. DAVID MUTUMA M'KANATHA)

c. JULIUS MBAABU NKANATHA) E**qual shares**

d. MOSES BUNDI NKANATHA)

ONTULILI/ONTULILI BLOCK/KATHERI/349

a. DAVID MUTUMA M'KANATHA)

b. JULIUS MBAABU NKANATHA)

c. MOSES BUNDI NKANATHA)

d. PASWKALINA NDURU KUNGANIA) **Equal shares**

CAPITAL SACCO LTD. ACCOUNT NO 1140434

a. DAVID MUTUMA M'KANATHA)

b. JULIUS MBAABU NKANATHA)

c. MOSES BUNDI NKANATHA)

d. PASWKALINA NDURU KUNGANIA)

e. MARY GACHERI) **Equal shares**

CAPITAL SACCO LTD. ACCOUNT NO, 1183837

a. DAVID MUTUMA M'KANATHA)

b. JULIUS MBAABU NKANATHA)

c. MOSES BUNDI NKANATHA)

d. PASKWALINA NDURU KUNGANIA)

e. MARY GACHERI) **Equal Shares**

Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF JANUARY 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Thangicia for the Appellant.

Mr. Materi H/B for Mr. Gichunge.