



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 106 OF 2020

TERESIAH NJERI MUNGAI.....APPELLANT

VERSUS

DANIEL J. MUTURI GATHIRWA.....RESPONDENT

(Appeal from the Ruling of the Chief Magistrates Court at Gatundu L.M. Wachira, CM dated 17th August, 2020 in the Succession Cause No. 117 of 2015)

JUDGMENT

1. Background to this appeal is that **Daniel J. Muturi Gathirwa**, the respondent, petitioned before the Gatundu Chief Magistrate's Court for Grant of Letters of Administration intestate in respect to the estate of Njoki Gathirwa deceased. The deceased was mother to both the respondent and **Teresiah Njeri Mungai**, the appellant. A grant was issued before that court on 29th September, 2016. The respondent filed the summons dated 2nd November, 2017 for confirmation of grant. The appellant filed an affidavit of protest, protesting the mode of distribution of the deceased's estate. The protest was heard by that court by affidavit and *viva voce* evidence. The Gatundu court delivered its Ruling on the protest on 17th August, 2020. It is that Ruling which is the subject of this appeal.

This is the first appellate court and accordingly, this appeal is essentially a retrial of the issues that were before the Gatundu Court. The case that comes to mind in setting out the duty of this Court is **SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS (1968) EA1** 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”

2. The afore-stated duty however has to be considered with the caution set out in the holding in of the case **RE ESTATE OF JOASH ARENDE (DECEASED) [2019] eKLR** as follows:-

“This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings.”

3. The appellant has raised the following grounds of appeal:-

GROUND OF APPEAL:

i. *That the learned magistrate erred in law and fact when she arrived at an erroneous decision.*

ii. *That the learned magistrate erred in law and fact when she misinterpreted the law in favour of the Respondent and other beneficiaries and hence arrived at a wrongful finding.*

iii. *That the learned magistrate erred in law and facts when she held that Section 38 of the Law of succession was applicable but failed to distribute the estate of the deceased equally on all properties amongst the beneficiaries including the Appellant.*

iv. That the learned trial magistrate erred in law and facts by failing to apply the law correctly.

4. These grounds are encapsulated into one issue raised by the appellant in the hearing before the Gatundu Court and in her submissions in this appeal: that is that the deceased gave her a gift *inter vivos* of her one acre of property **NGENDA/NYAMANGARA/2574** (hereinafter the property).

5. The trial court by its Ruling dated 17th August, 2020 found that the appellant failed to prove that indeed the deceased gave her the property. That court further found that the deceased transferred ½ acre of the property and only ½ acre was owned by the deceased as at her death. That court therefore applied the provisions of Section 38 of the Law of Succession Act cap 160 in distributing the estate. That Section provides as follows:-

“where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children”

6. The trial court adopted the distribution proposed by the respondent save that it omitted distribution to *Joseph Mugo Gathirwa Muturi*, another son of the deceased because he withdrew his protest to distribution of the estate and renounced his right to inherit the deceased's property.

7. I have considered the evidence adduced before the trial court and the submissions made in this matter. The appellant had the burden to prove that the deceased gave her the property. This is what Section 107 of the Evidence Act provides. That section states:-

“107. (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.”

8. The standard of proof in civil matters is on a balance of probability. That standard was discussed in a Canadian Case **R. VS. Layton 2009 SCC 36 (Can LII), (2009) 2 SCR 540** as follows:-

“... with reference to the civil standard of proof. R. D. WILSON, N. J. GARSON AND C. E. HINKSON'S CIVIL JURY INSTRUCTIONS (2nd ed. (loose-leaf)), at § 4.7.4, provides the following sample instruction for explaining balance of probabilities to a civil jury:-

“What does “proof on a balance of probabilities” mean? It does not mean proof beyond a reasonable doubt — that standard of proof applies only in criminal trials. In civil trials, such as this one, the party who has the burden of proof on an issue must convince you that what he or she asserts is more probable than not — that the balance is tipped in his or her favour. You must examine the evidence and determine whether the party who has the burden of proof on an issue is relying on evidence that is more convincing than the evidence relied on by the other side. In short, you must decide whether the existence of the contested fact is more probable than not.” (emphasis mine)

9. The appellant did not meet that standard of proof. The appellant in her evidence stated that the deceased, her mother gifted her the property in the presence of *Mary Wambui Karanja* – but that person was not called to confirm to the court that assertion of the appellant.

10. Further, such a gift, if at all, was a mere promise as discussed by the learned author *Halsbury's Law Of England 4th Edition Vol. 20(1) para 67* thus:-

“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 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.”

Gift *inter vivos* was discussed in the case **In re estate of RUTH WANJIKU KARUGU (Deceased) (2021) eKLR** as follows:-

“... the decision of Nyamweya J in the case of Re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR, the Honourable Justice gave guidance as to the requirement of law as far as a gift *inter vivos* is concerned. The learned Judge stated as follows:

“In law, gifts are of two types. There are the gifts made between living persons (gifts *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 declaration in 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: by a declaration of trust in writing. Gifts *inter vivos* must be complete the same to be valid,”

11. The appellant additionally sought the finding of this Court that her brothers obtained their share of the property when they filed a case

before Land Dispute Tribunal. The decision of the Thika Land Dispute Tribunal dated 11th February, 2008 was presented to the trial court by the respondent. What that decision reveals is that, as at February, 2008, when the Tribunal heard the dispute the property was not in the name of the deceased. It does seem that by then the property was in the name of a family member who had died. It was ancestral property. The Tribunal, by its decision, gave the deceased one acre. During the life time of the deceased half acre was registered in the name of *Joseph Mugo Gathirwa Muturi*. It follows that the deceased estate only own half an acre of the property and not one acre as claimed by the appellant.

12. The appellant faulted the trial court on the ground that it failed to abide by the provisions of **Section 38 of Cap 160** in that it failed to divide the estate equally between the children of the deceased. The appellant did not prove however how the proposed distribution was unequal or what relevant facts were not taken into account. In my view, the trial court in its Ruling well provided for all parties as per the principal of the equality in **Section 38 of Cap 160**.

13. In the end, this appeal is without merit and is dismissed. Since this matter involves family members I order each party to bear their own costs.

JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 21ST DAY OF OCTOBER, 2021.

MARY KASANGO

JUDGE

CORAM:

COURT ASSISTANT: NDEGE

TERESIAH NJERI MUNGAI (IN PERSON) PRESENT

FOR RESPONDENT: MS. MUSYOKA

COURT

JUDGMENT DELIVERED VIRTUALLY.

MARY KASANGO

JUDGE