



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERUGOYA
SUCCESSION CAUSE NO. 1004 OF 2013
(FORMERLY H. SUCC. NO. 250 OF 2008 (FORMERLY NAIROBI 738/05))
IN THE MATTER OF THE ESTATE OF THE LATE MWANIKI MIRAMA (DECEASED)

MUUCIIMI MWANIKI..... 1ST APPLICANT

MUTHUKU MWANIKI..... 2ND APPLICANT

NJINE KANG'ARA MWANIKI.....3RD APPLICANT

CECILY ..WANJIKU MWANIKI.....4TH APPLICANT

VERSUS

JOSPHINE WAGACIGI NJIRU.....RESPONDENT

JUDGMENT

1. This matter relates to the estate of **Mwaniki Mirama (deceased)** who had two wives namely Wangichi Mwaniki and Betha Mwaniki. The deceased passed away on 15th April, 1992. The Succession cause was filed at Resident Magistrate's court at **Kerugoya Succession cause No. 107 of 1999**.

2. A grant of letters of administration was issued to Muthuku Mwaniki the grant was confirmed on 11th of October, 2005 and land parcel Gichugu/ Settlement Scheme /309 was distributed to;

- Josephine Wagacigi and Cicily Wanjiku Mwaniki.

3. This gave the entire estate of the deceased to the 2nd household and resulted in disinheriting the 1st household. An appeal was filed in the High Court and on 14th February, 2007 the Court ordered that the Grant be revoked and a fresh grant be issued to the following;

- **Muthuku Mwaniki**
- **Njine Kang'ara Mwaniki**
- **Josephine Wagacigi Njiru**
- **Cicily Wanjiku Mwaniki**

4. The estate of the deceased comprised in land parcel number **Gichugu/ Settlement scheme/309** measuring 15.3 acres.

5. A summon for confirmation of grant of letters of administration was filed by Njine Kang'ara, Muthuku Mwaniki and Cicily Wanjiku Mwaniki dated 4th July, 2007.

6. A supporting affidavit was sworn by Njine Kang'ara Mwaniki sworn on 4th July, 2007 and he depones that Wangechi Mwaniki who was the 1st wife of the deceased had the following children;

- a. Muthuku Mwaniki - Son - Joint administrator
- b. Njine Kang'ara - Son - Joint administrator
- c. Wakathima Mwaniki - Married daughter
- d. Wamuyu Mwaniki - unmarried daughter
- e. Muciimi Mwaniki - son
- f. Wandama Mwaniki - married daughter

7. The children of the 2nd house of Muthoni Mwaniki (were as follows)

- a. Wambura Mwaniki - married daughter - deceased
- b. Eunice Wagichugu - married daughter
- c. Mabuti Mwaniki - married daughter
- d. Wakathaiya Mwaniki a.k.a Cicily Mwaniki -unmarried daughter; Joint administrator
- e. Charles Njiru - now deceased - replaced by his wife - Josephine Wagachigi Njiru - (Joint administrator)
- f. Muringo Mwaniki - married daughter

8. He depones that the sons and unmarried daughters' were utilizing the land during the lifetime of the deceased who had shown them each a portion which they were utilizing.

9. That after the death of the deceased on 15th April, 1992 they continued utilizing the suit premises as the late father had given them and have been utilizing the land to date.

10. That Josephine Wagachigi who is the 2nd respondent and joint administrator harbored a desire to take over the entire suit premises and use it all alone in complete disregard for other family members.

11. He further depones that it is the desire of all other family members from the 2 families that the two premises be distributed as set out hereunder and the children have signed a consent on the said distribution

That is;

- a. Muciimi Mwaniki - Gichugu settlement scheme/309 - 2.3 acres
- b. Njine Kangara - " 3 acres
- c. Wamuyu Mwaniki a.k.a "
 - Faith Muthoni Mwaniki 2.0 acres
- d. Josphine Wagichigi Njiru " 3.0 acres
- e. Cicily Wanjiku Mwaniki " 2.0 acres
- f. Muthuku Mwaniki " 3.0 acres

12. He depones that this mode of distribution reflects the manner the above families have been using the land and the manner in which their late father divided and distributed the land.

13. That two other joint administrators Muthuku Mwaniki and Cicily Mwaniki have sworn an affidavit in support of the above mode of distribution and he prays that the GRANT be confirmed in those terms.

14. An affidavit of Protest was filed by Josephine Wagachigi Njiru one of the Co-administratix sworn on 2nd August, 2007. She depones that the deceased had given Land Parcel No. **Gichugu/ Settlement Scheme/309** as a gift **inter vivos** to her deceased husband Charles Njiru Mwaniki and all the family members were aware including the applicant, Consent of the Land Control Board to transfer was sought and obtained and transfer form duly signed by the deceased in favour of her deceased husband.

However, a caution by Muthuku Mwaniki, Njine Mwaniki and Muciimi Mwaniki was lodged after the deceased died thus making it impossible to register the transfer forms.

15. That the purported consent dated 4th July, 2007 signed by some of the children of the deceased is a forgery, and she depones that the whole Estate of the deceased that is; **LR. No. Gichugu/ Settlement Scheme/309** should devolve upon her.

16. A further affidavit of protest was filed by Margaret Muthoni Murage alias Mabuti Mwaniki sworn on 2nd August, 2007 and she depones that she has been shown the consent to confirmation of grant dated 4th July, 2007 which she allegedly signed, she denies ever signing the document and her purported signature is a forgery as she does not know how to read or write and signs by way of thumb print. She depones that Josephine Wagichigi Njiru should get the whole **LR No. Gichugu/ Settlement Scheme /309** as that was the wish of the deceased.

17. An affidavit in support of the summons for confirmation of Grant was filed by **Cicily Wanijiku Mwaniki a.k.a Wakathaiya Mwaniki** one of the Co-administrators of the Estate of the deceased. Her contention is that she is the only unmarried daughter who has been using the suit premises together with her step – brothers’ and step-sisters who are unmarried and her sister in law Josephine Wagichigi Njiru. That all her sisters are married and are not interested in the suit premises, and that she is desirous that the suit premises be distributed in the manner set out in the affidavit of Njine Kang’ara Mwaniki and she supports the summons for confirmation of GRANT as prayed. Muthuku Mwaniki one of the Co-administrators of the Estate and supports the mode of distribution proposed by Njine Kang’ara Mwaniki.

18. Further **Muthuku Mwaniki** has sworn a replying affidavit sworn on 14th May, 2015 which is in addition to this affidavit sworn on 4th July, 2007. He depones that **Land PARCEL No. Baragwi/ Kariru/ 672** was never owned by the deceased in this case. That the deceased only owned Land parcel No. **Gichugu/ Settlement scheme/ 309**. He further depones that in the year 1959 during the time of Land demarcation he was allocated Land Parcel No. Baragwi /Kariru/ 672 measuring 5 acres. By then his name was **Muthuku Kang’ara, as Kang’ara** was the other name of his father. Later in 1978 when new National Identity cards were introduced, he was registered in the name Muthuku Mwaniki which was reflected on the Title deed. The land measures 5 acres. It is his contention that he was registered as the Sole proprietor of that Land and was not holding the land in Trust for his brothers or his sisters. He further depones that the deceased was allocated land parcel number **Murinduko/ Mwea Area** measuring 15.3 acres Parcel No. 309 where the deceased moved with his entire Family in 1960 and he lived there up to the time of his death. He further depones that at the time the deceased moved to the land his 1st wife had already died, and her three children as well as those of the 2nd wife moved with the deceased and has never lived on the parcel which is registered in his name.

19. That the deceased sub-divided his land into two. One for the house of the 1st wife, and the other for the 2nd wife. He further depones on 25th December, 1990 the deceased called all his children and informed him that all his sons were to share his land once he is gone and they should take care of the daughters’ who would be unmarried or divorced. In particular said that he had his blessings to share the land in Mwea with his brothers.

20. That the deceased made them swear an oath that they would share the land as he directed and anybody going contrary to that would die. The brothers who were present took a photograph which he has annexed to his affidavit.

21. That it is then that the deceased instructed him in front of everyone to take charge of the subdivision of the land to all his sons with Provisions to be given to the unmarried/ divorced daughters.

22. That after the deceased died, his step - mother in cohorts with her son Njiru Mwaniki and the wife of her son Josephine Wagichigi Njiru came up with a conspiracy to lock out the children of the 1st wife from the land. He moved to court and filed **Kerugoya Succession cause no. 107 of 1999**, in which the court disregarded their claim and gave all their property to the children of the 2nd wife and moved to this court and filed an Appeal.

23. That is utterly untrue that the deceased had transferred his property to the husband of the protestor as he was bedridden after suffering a stroke and was largely in a coma until his death.

24. That the purported Land Control Board consent issued was a forgery by his step brother and the 2nd respondent. That transfer was never effected because it was found to be fraudulent. The 2nd respondent (The Protestor) had attempted to sell the land. That they obtained restraining orders.

ANALYSIS AND DETERMINATION

The court directed that the protest be heard by way of oral evidence.

The parties adduced evidence and also filed submissions at the close of the case.

I have considered all the evidence adduced and the submissions.

THERE ARE TWO ISSUES WHICH ARISE FOR DETERMINATION

1. What constitutes the estate of the deceased

2. Distribution of the Estate.

1 (a) Section 3 of The Laws of Succession Act (Cap 60) of the Laws of Kenya (to be referred to as the 'ACT'). Defines estate as follows;

“means the free property of a deceased person”. Free estate of the deceased is the only property that is available for distribution to his dependants. Turning to the submissions by the Protessor, he has stated that; one of the issues for determination is whether Muthuku Mwaniki obtained land parcel **number Baragwi / Kariru/672** through his own efforts or it was given to the deceased or it was registered in the name of the 1st born son Muthuku Mwaniki.

25. In view of the definition of what constitutes the estate of a deceased person, Land Parcel number **Baragwi Kariru/672** which is not registered in the name of the deceased cannot be the subject of the dispute before this court.

26. The deceased was allocated Land Parcel number; **Gichugu/ Settlement scheme/ 309** and evidence tendered before this court proves that he was registered as the proprietor of **Gichugu/ Settlement scheme/ 309** that is the only property that is lawfully the subject of the dispute before this month.

27. Land Parcel no. **Baragwi /Kariru/672** is excluded from the dispute before this court. Muthuku Mwaniki adduced evidence that this land was given to him as he was an adult during the time of the Land demarcation and when time came his deceased father moved to the land allocated to him with his entire family including the children of his deceased 1st wife. There is no evidence that Land parcel **Baragwi /Kariru/672** was given to Muthuku Mwaniki by the deceased.

28. The evidence presented before this court is that the property of Muthuku Mwaniki who is the 1st son of the deceased was owned by him absolutely but not in Trust for any person.

29. The Protessor Josephine Wagachigi Njiru (DW1) in her testimony in court has stated that Land Parcel no. **Baragwi Kariru/672** belonged to the deceased. However, this allegation is not supported by any evidence. The green card for land parcel **Baragwi /Kariru/672** was registered on 13th January, 1959 in the name of Muthuku Kang'ara. On 23rd May, 1978 there was a change of name to read Muthuku Mwaniki and the green card shows that it was a correction of names and there is no indication that the deceased ever used the name Muthuku Kang'ara, again with a look at the green card for **Gichugu / Settlement scheme/309** the deceased was registered on 6th October, 1958 and on 30th March, 1981 the name was changed to read Mwaniki Mirama and his identity card number indicated and the comment is the **'Con'** which can be interpreted to read **'Change of Name.'**

30. There is no evidence that Muthuku Mwaniki changed the title from the name of the deceased to his name and I find that; There is no evidence to prove that the said Muthuku Mwaniki was registered in Trust on behalf of the children of the 1st house and this because there is undisputed evidence that the children of the 1st wife lived on Land parcel No. **Gichugu/Settlement scheme/309** during the lifetime of the deceased and left them on his land where they are living to date.

31. The dispute in this court touches on Probate & Administration and the dispute can only relate to the estate of a deceased. Muthuku Mwaniki is registered on a first registration as the proprietor of Land Parcel No. **Baragwi /Kariru/672** and as such this does not constitute the Estate of the deceased. A first registration is indefeasible.

32. During cross-examination Muthuku Mwaniki testified that he was born in 1940 and as such by 1959 he was an adult and could be given land of his own during the land demarcation and therefore the Estate of the deceased is comprised in Land Parcel No. **Gichugu/ Settlement scheme/309**.

1(b) The Protessor Josephine Wagachigi Njiru (Dw1) has claimed that the deceased wanted the children of the 1st wife to stay at Gichugu and those of the 2nd to stay at Mwea. Her deceased husband was given the land at Mwea and the deceased had applied for the consent of the Land Control Board and signed a transfer. This was alleged to have been done in 1990 when the deceased was still alive. However, the transfer was not effected and the land was not transferred in the name of her deceased husband.

33. During cross-examination she was challenged to explain why the transfer was not effected. When she was challenged she stated that they had a problem of money, however at paragraph 5 of her affidavit of protest she depones that there was a caution which prevented the registration of the transfer and she admitted that what she had told the court, that failure to transfer because of the problem of money was not true.

34. The witness was therefore not truthful. The evidence which was tendered showed that the caution on land parcel number; **Gichugu/Settlement scheme/309** was placed on the land in 1992. During the hearing the respondent showed the court some alleged consent of the land control board and some alleged transfer form allegedly signed by the deceased and Njiru Mwaniki, The transfer document is dated 9th February, 1990 while the Land Control Board consent to transfer was allegedly contained obtained on 7th March, 1990. This was clearly an attempt to transfer the land of the deceased through fraud. The transfer is been signed before the consent of the Land Control Board was given.

35. At the time the protessor gave evidence she testified that the deceased annexed his thumb print to the transfer and the application for consent to transfer. No evidence was tendered to prove that the thumb print was indeed put by the deceased. He who alleges must prove. The protessor had the legal and evidential burden to prove that the deceased had signed the transfer and the consent of the Land Control Board. **Under Section 107, 108 and 109 of the Evidence Act** it is provided that;

Evidence Act.

Burden of proof

(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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Incidence of burden

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

In case of: Miller-vs- Minister of Pensions (1947) 2ALL. ER 372 it was stated as follows:

“ That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a Criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not.’ Thus, proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

36. The protestor has not discharged his burden, she had the burden of proof as the person who would lose if the allegation was not proved.

37. The protestor did not give a plausible reason why land was not transferred during the lifetime of the deceased and yet according to the documents, the documents had been signed long before he died.

38. I find that there is no proof that the deceased had appended his signature (thumbprint) on the consent of the alleged consent of the land control Board and the alleged transfer.

39. There was a calculated attempt by the protestor to deny other Lawful beneficiaries through fraudulent and illegal means their share of the Estate of the deceased.

40. The contention by the protestor that the deceased had transferred the land does not meet the threshold of a gift *inter vivos*.

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.”

41. The law requires that for a gift *inter vivos* to be established it must have been settled to the dependant during the lifetime of the deceased. The word ‘settled’ must be interpreted to mean that the property in question is paid, given to the dependant and in case of registered land it must be established by way of registered transfer.

The gift *inter vivos* will be valid where it is completed during the lifetime of the deceased.

42. The protestor have alleged that the land was transferred to her deceased husband and has relied the decision of this court in the Case of: Rose Ruguru Nguu & another -vs- Margaret Wambui Kiura & 2 others. Succession Cause No. 374 of 2015. She has also relied on the Court of Appeal decision In Nyeri Appeal No. 108 of 2002 between The Registered Trustees of The Anglican Church of Kenya Mbeere Diocese & The Rev. David Waweru Njoroge at Page 13, where the Court stated;

43. What I consider to be the Law with regard to registration of registered land. The court stated;

“However, an unregistered transfer can operate as a contract between the parties (Section 38 (2) RLA) with the result that the beneficial interest in the property as opposed to legal title is passed to the transferee. The Macedo’s case (supra) can be distinguished from this case. In that case, there were a mere execution of transfer which the donor did not hand over to the donee and which he instructed his solicitors not to register. In the instant case, something more than in Mascall’s case (supra) has been done. The application for registration of the transfer was executed and the transfer and accompanying documents lodged at the District Land’s Registry for registration. In this case therefore, the respondent has done all in his power to divest himself of and transfer to the Church trustees all his legal and equitable interest in the land. There is nothing that remains to be done by the appellant and the transferee does not need any assistance from the court. The transferee of course has a right to take any appropriate action against third parties, including the son of the appellant who has lodged a caution, to facilitate the registration of the transfer.

Although the land is still registered in the name of the respondent, he is in the circumstances of this case, a bare trustee for the transferee having transferred the whole of his beneficial interest in the land.

....it follows from the foregoing, that the gift of the land in this case was completely constituted and cannot be recalled or revoked in law”

44. It is the registration of a person as proprietor which vests in a person absolute ownership of land. The protestors husband was not registered as proprietor.

45. The emphasis is that gift inter vivos must be completed for the same to be valid and this authority does not aid the protestors for the reason that;

i. The transfer was not registered in the lands office before the deceased died. The transaction in any was not completed during the lifetime of the deceased.

ii. There is no proof that the consent of The land control board and the transfer were executed by the deceased.

iii. It is not proved on a balance of probabilities that the deceased had signed the transfer form and the consent of the land control board.

46. In Halsburys Laws of England Fourth Edition Vol. 20 (1) at paragraph 67 it is stated as follows with respect to incomplete gifts:-

“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 impending donor or those claiming under whom to complete and perfect it, except in circumstances where donors 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 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.”

47. The protestor has failed to prove the contention that the Estate of the deceased was transferred to her deceased husband during the lifetime of the deceased. There was no proof of a gift inter vivos to the protestor.

48. Distribution of The Estate:

The deceased had two wives who are now deceased. Section 40 (1) of The Act Provides;

“where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children”

49. The parties herein are children of the deceased, they are dependants as defined under Section 29 of the Act which provides;

Section 29 of the Law of Succession Act. Defines the meaning of a dependant.

“For the purposes of this Part, dependant means-

a. The wife or wives or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death.

b. Such of the deceased’s parents, step parents, grand parents, grandchildren, step children, children whom the deceased had taken into his family as his own, brothers and sisters and half brothers and half sisters as were being maintained by the deceased immediately prior to his death and

c. Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

- A party claiming dependency must prove that he or she is a dependant as defined Under this Section of the Act.

50. There is no dispute that the applicants and the protestor are dependents of the estate of the deceased. The protestor did not propose the mode of distribution and has also relied on the Case of; **Rose Kithii Weru -vs- Mercy Koina Civil Appeal No. 257 of 2013 High Court Embu.**

51. For the proposal that Muthuku Mwaniki should not get a share of the Estate as he was given a share during the lifetime of the deceased. This decision is persuasive and the facts of the case are different from the present case.

52. That the applicants had proposed a mode of distribution and all the applicants had consented to that mode of distribution and filed their respective affidavits.

53. The proposed mode of distribution is not in line with **Section 40 of the Act** which provides that; the net estate shall be distributed equally among the houses according to the number of children in each house.

54. However, although some of the beneficiaries are not getting equal shares they have signed a consent and have agreed to the mode of distribution, and it is therefore not a question of the beneficiaries getting a smaller portion than the rest and some of the beneficiaries have decided to forfeit their shares. Muthuku Mwaniki is entitled to a share of the Estate, the fact that a dependant owns a property of his own does not dis-entitle him from getting his rightful share from the estate of his deceased parent.

In conclusion

I find that the protest is without merits and I order that the estate of the deceased be distributed as proposed at paragraph 17 of the Affidavit of Njine Kangara Mwaniki sworn on 4th July, 2007 that is to say;

That is;

<u>NAMES</u>	<u>PROPERTY</u>	<u>SHARING</u>
a. Muciimi Mwaniki -	Gichugu settlement scheme/309 -	2.3 acres
b. Njine Kangara -	”	3 acres
c. Wamuyu Mwaniki a.k.a	”	
Faith Muthoni Mwaniki		2.0 acres
d. Josphine Wagichigi Njiru	”	3.0 acres
e. Cicily Wanjiku Mwaniki	”	2.0 acres
f. Muthuku Mwaniki	”	<u>3.0 acres</u>

15.3. Acres

The grant of letters of administration in the estate of the deceased shall be confirmed and a certificate of confirmation be issued.

Each party to bear its own cost.

Dated, signed at Kerugoya this 29th day of May 2020

L.W. GITARI

JUDGE