



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 152 OF 2019

IN THE MATTER OF THE ESTATE OF M’KIRIGIA M’KAGWIKI (DECEASED)

CHARLES MURIUNGI M’KIRIGIA.....APPELLANT

VERSUS

REBECCA KAMBURA M’KIRIGIA ...1ST RESPONDENT

MERCY KAGWIRIA MWITI.....2ND RESPONDENT

(Being an appeal from the Judgment of the Hon. E W Ndegwa (RM)) delivered on 23/10/2019 in Githongo Succ. Cause No. 43 OF 2016)

J U D G M E N T

1. **M’Kirigia M’Kagwika** (“the deceased”) died on 27/1/1998. He was survived by **Rebecca Kambura M’Kirigia** (widow), **Charles Muriungi Kirigia** (son), **James Mwirigi Kirigia** (son), **Harriet Ngari** (daughter in law), **Mary Ncooro Kaimenyi** (daughter), **Paulina Nkatha M’Kirigia** (daughter), **Sarah Gakii** (daughter in law) and **Mercy Kagwiria Mwiti** (daughter).

2. On 16/12/2016, the respondents applied for the grant of letters of administration intestate and listed Land Parcel Numbers **Abothuguchi/Githongo/1623, 1619, 1621 and 1622** as the only assets of the deceased. The same was issued to them on 18/8/2017 and they applied for confirmation.

3. The appellant protested against the confirmation which was dismissed on 23/10/2019. Consequently, the trial Court distributed the estate as follows: -

a. Land Parcel No. Abothuguchi/Githongo/1619 - James Mwirigi Kirigia - whole

b. Land Parcel No. Abothuguchi/Githongo/1622 - Harriet Ngari to hold in trust for her children

c. Land Parcel No. Abothuguchi/Githongo/1623 – 1st petitioner to enjoy life interest. Thereafter, the parcel be distributed equally amongst Mercy Kagwiria Mwiti and Paulina Nkatha M’Kirigia.

4. The trial Court found that during his lifetime, the deceased had given **LR. No. Abothuguchi/Githongo/1620 and 1621** to Stephen M’Kirigia and **LR. No. Abothuguchi /Githongo/1624** to Charles Muriungi M’Kirigia and that the same were not free property up for distribution.

5. The appellant was aggrieved by the said decision and preferred this appeal. He set out (5) grounds which can be summarized into one, that, **the trial Court erred in finding that L. R. No. Abothuguchi/Githongo/1623 was part of the estate and not a gift inter vivos gifted to the appellant and Julius Muriuki Kirigia.**

6. The appeal was canvassed by way of written submissions. It was the appellant’s submission that the deceased distributed his assets amongst his children before he died. That **LR. No. Abothuguchi/Githongo/1623** (“*the suit land*”) was gifted to him and his late brother Julius Muriuki Kirigia prior to the death of the deceased. That the deceased had signed the Land Control Board Consent and transfer but they could not effect the transfer for lack of funds.

7. It was further submitted that the assertion that the deceased's signatures were obtained fraudulently were not ascertained by a handwriting expert as required by **the Evidence Act** neither were the allegations proved. That there was clear intention on the part of the deceased to bequeath the suit land to the appellant and his brother. The case of **Peter Ndiritu Kibui v Ann Mugure Kibui Nyeri High Court Succ Case No. 504 of 2008** was relied on in support of those submissions.

8. On the part of the respondents, it was submitted that the green card for the suit land showed that it was registered in the deceased's name and it therefore formed part of the estate. The appellant and the late Julius Muriuki Kirigia could not have been gifted the suit land as they had been given other properties.

9. It was further submitted that the appellant had failed to prove that the consent and transfer were signed and executed by the deceased. That in the circumstances, the trial Court did not err in rejecting their claims. The cases of **Patrick Munene Migwi v Simon Nyamu Migwi and John Mwinga Macharia v Geoffrey Githagui Wachira [2016] Eklr**, amongst others were cited in support of those submissions.

10. This being a first appeal, the court is obliged to re-evaluate, re-assess and re-analyze the evidence afresh and make its own independent determination having in mind that it did not have the advantage of seeing the witnesses testify. (*See: **Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123***).

11. The parties testified and called witnesses in support of their respective cases. **PW1 Charles Muriungi Kirigia** told the court that the deceased died in 1998 while his brother Julius Muriuki Kirigia ("Julius") died in 2014. The suit land was transferred to him and his brother in 1997. They attended the land control board together with the deceased and the requisite consent was granted. Upon issuance of the consent, the deceased signed the transfer which was permitted by their mother. The deceased left his sisters living peacefully with their husbands and are not living on the suit land. It was their mother who was living on the suit land.

12. **PW2 Mary Nchooro Kaimenyi**, daughter to the deceased, testified that the deceased did not give any of his daughters a share of his land. That he gave the suit land to the appellant and Julius. That the intention of the respondents was to sell the suit land to 3rd parties. That at the time of the trial, Julius' wife was living on and cultivating the suit land.

13. **PW3 Moses Kimathi** was a friend of the deceased. He told the court that before his death, the deceased had informed him that he had given his sons, the appellant and Julius, the land at Kibaranyaki. He did not however, know the parcel number or the year the deceased told him this. The deceased was only sick for one year before his death in 1998. He was not able to walk at the time he was sick.

14. **PW4 James Mwirigi Kirigia**, son to the deceased, testified that his father shared out his land and gave all the boys land. The suit land was given to the appellant and the late Julius. His sisters were not given any land but his mother inherited land in Kibaranyaki. She was living on the suit land. The appellant, Julius and his mother inherited the suit land which was subdivided into three portions, whereby the mother possessed the middle portion to that of the appellant and Julius.

15. **PW5 Justus M'Marete** told the court that the parties were members of his clan called Nyaga. His home was about half a kilometer from the parties' home. The deceased had two parcels of land one in Kibaranyaki and another in Marathi. He had sub-divided the land in two portions one for Muriuki and another for himself and his wife. That he was aware that the deceased attended a land board meeting in 1997. When the deceased started ailing in 1997, he stopped walking.

16. **RW1 Mercy Kagwiria Mwati**, daughter of the deceased, denied that the deceased obtained any consent to transfer the suit land to her brothers as contended. He also did not execute any transfer. The suit land was being utilized by her and their mother. On the suit land, there were two houses one belonging to her mother and another one to Julius who had shifted to Plot No. 1622. Julius was however, not cultivating the suit land.

17. **RW2 Rebecca M'Kigiria**, the widow, testified that all her sons had been given land by the deceased for which some had titles. She denied that the deceased obtained any consent or executed any transfer for the suit land. He was illiterate and only used to thumb print documents. She was in occupation of the property and wished that her daughters inherit the same.

18. **RW3 Paulina Nkatha Kirigia**, a daughter of the deceased reiterated the evidence of **RW2**.

19. **RW4 David Mworiba Mbogori** was the assistant chief Githongo sub- location for 22 years, from 1981 to 2003. The deceased was known to him because he was his neighbor and were from the same clan. He stated that the deceased died in 1995 and he was the one who issued his burial permit. That the deceased divided and shared his land to his sons but reserved a portion for himself.

20. The issue for determination is whether the suit land was a gift inter vivos to the appellant and Julius. In **Re Estate of the Late Gedion Manthi Nzioka (Deceased)(2015) Eklr**, the court held: -

"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 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 completed 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.

In Halsbury Laws of England 4th Edition Volume 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 intending donor, or those claiming under him, to complete and perfect it, except in circumstances where 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 comprises 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."

21. In the present case, the appellant stated that the deceased bequeathed him and his brother the suit land. He produced the application for consent of the Land Control Board, the Letter of Consent and transfer all dated in the year 1997. He told the court that he was present when the deceased appended his signature on the documents. In addition, the protestor produced a death certificate which indicated that the deceased died on 27/01/1998. All the protestor's witnesses supported that position.

22. When the respondent's filed the Cause, they submitted a death certificate dated 3/6/2016. It showed that the deceased died on 05/06/1995 aged 65 years. **RW4** who was the assistant chief during the period (1981 to 2003) told the court that the deceased died in 1995 and that it was him who issued the burial permit.

23. The appellant however, produced yet another death certificate dated 3/8/2007 which showed that the deceased died on 27/1/1998 aged 72 years. He contended that the deceased died after he had applied for and obtained the Land Control Board Consent to transfer the suit land to the appellant and the late Julius. Those are two official documents from the same government office, the Registrar of Births and Deaths with complete different information.

24. The Court has looked at the application for the Land Control Board consent. It was signed by 'J Muriuki' as the owner of the suit land. On the other hand, the transfer document was signed as 'M'kirigia'. It is he who alleges that must prove (**Section 107** of the evidence Act). The documents relied on by the appellant for his contention are self-defeating. The application for land control board consent was not by the deceased but someone else. There was no positive act by the deceased to divest himself of the suit land.

25. All the parties admitted that prior to his, death the deceased was seriously sick to the extent that he could not walk. He had been sick as such for a year. His widow testified, and it was neither challenged nor rebutted, that the deceased was illiterate and only signed his documents with a thumbprint. It was therefore doubtful that the signature of M'Kirigia appearing on the transfer was that of the deceased.

26. On the other hand, **PW1** told the court that he was present when the deceased appended his signature signed by writing his name. However, he did not know the deceased's signature neither could he see where the deceased signed because the deceased was unwell. Further, he could not recall going to the advocate's office for the transfer or whether the advocate witnessed the transfer. To compound the matters, the advocate who prepared and witnessed the alleged transfer was not called to testify.

27. In this regard, it is clear that the purported transfer of the suit land is a sham. It must have been orchestrated by the appellant to disinherit the daughters of the deceased. The appellant did not prove that the suit land had been given as a gift *inter vivos* to him and his late brother. The trial Court was right in holding that the suit land formed the free property of the deceased that was up for distribution.

28. How then should the suit land be distributed? It is obvious that the deceased's sons, particularly the appellant, do not want the widow and daughters of the deceased to inherit anything.

29. The **Constitution of Kenya** as well as the **Law of Succession Act** do not discriminate on children of deceased persons when it comes to inheritance. Male or female, married or unmarried are all equal in the eyes of the law.

30. In **Re Estate of Solomon Ngatia Kariuki (deceased) (2008) Eklr**, the court held: -

"The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family."

31. **Section 42 of the Law of Succession Act** provides that when undertaking distribution of an estate, the court should take into consideration any property settled by the deceased during his lifetime.

32. The sons of the deceased were given their portions of land by the deceased during his lifetime. The widow and daughters were not given anything. Taking into regard the advancements made to the sons, I find that the trial Court was right in how it dealt with the properties that formed the free assets of the deceased, including the suit land.

33. Accordingly, I find the appeal to be without merit and dismiss the same with costs to the respondents.

DATED and DELIVERED at Meru this 12th day of August, 2020.

A. MABEYA

JUDGE