



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO. 121 OF 1996**

**IN THE MATTER OF THE ESTATE OF NGUTHARI MBOGORI (DECEASED)**

**CHRISTINE KAJUJU MWENDA.....PETITIONER**

**Versus**

**GERVASIO M'RUKUNGA.....OBJECTOR**

**JUDGMENT**

[1] Following the orders issued by the court on 2<sup>nd</sup> October 2017, the objector filed summons for confirmation of grant letters of administration intestate pursuant to **Section 71 of the Law of Succession Act CAP 160**. He seeks the confirmation of the grant of letters of administration made to Charles Kithinji on 16<sup>th</sup> December 2009.

[2] The application is grounded on the affidavit of Charles Kithinji sworn on 26<sup>th</sup> January 2018 in which it is deposed that grant of letters of administration was made to him on 16<sup>th</sup> December 2009. The estate property is LR NO. NYAKI/MULATHANKARI/551 measuring 0.04 Ha. The deceased was survived by Gervasio M'Rukunga (deceased) and him. Thus, the estate ought to be distributed to him wholly.

[3] The petitioner filed affidavit of protest sworn on 6<sup>th</sup> March 2018. She asserted that the Suit Land was given to her late father John Mwenda by the deceased. Hence, it should be distributed to her wholly.

[4] On 24<sup>th</sup> July 2018, it was ordered that the matter be canvassed on affidavit evidence and submissions. The petitioner filed four affidavits to support her claim; the affidavits were sworn on 14<sup>th</sup> October 2018 by **Christine Kajuju, Zaberio Muthiora, Raphael Botania M'Twamwari and John Mwobobia**. It was asserted that the petitioner's father, John Mwenda, used to live and take care of the deceased until his death. Before he died, in the presence of Raphael Botania who was the assistant chief, Julius Mathenge and a relative the deceased told them that he wanted to give John the Suit Land which John in their presence accepted and was blessed. John thereafter gave the petitioner the Suit Land which she started harvesting. But, Festus Gitonga, brother to the petitioner's father, started claiming the Suit Land and they had several cases before the family clans, assistant chief, clan members who all affirmed that the land belongs to her. The objector used to be her witness in the said cases but when she initiated this cause and sold the Suit Land to Githinji he objected.

[5] The objector failed to submit his affidavit evidence and submissions. None of them filed submissions. Nonetheless, the court will determine the case on merit and the law.

**ANALYSIS AND DETERMINATION**

**Gifts**

[6] In law, gifts are said to be of two types: that is gifts made between living persons (gifts *inter vivos*) and gifts made in contemplation of death (gifts *mortis causa*). From the arguments advanced, a gift *mortis causa* has been alleged. **Section 31 of the Law of Succession Act CAP 160** stipulates that:

***“A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if—***

***(a) the person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and***

***(b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and***

*(c) there is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title thereto; and*

*(d) a person makes a gift in such circumstances as to show that he intended it to revert to him should he survive that illness or danger; and*

*(e) the person making that gift dies from any cause without having survived that same illness or danger; and*

*(f) the intended beneficiary survives the person who made the gift to him:*

1. *Provided that—*

*(g) no gift made in contemplation of death shall be valid if the death is caused by suicide;*

1. *(ii) the person making the gift may, at any time before his death, lawfully request its return.”*

[7] Hence, for gifts given by a deceased in contemplation of death the conditions spelt out in **Section 31** must be present for such a gift to be valid. Raphael Botania, who was present when the deceased gifted the said John Mwenda stated that the deceased wanted to give John the Suit Land because he was the one who was taking care of him at his old age and he was feeling that he was getting weak. If a person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger that gift will be a gift *mortis causa*. In this case, the deceased gifted John Mwenda the Suit Land having in mind his old age and feeling weak- this fact has not been controverted. Again, evidence herein shows that the deceased gifted John Mwenda this property. Evidence thereto is overwhelming.

[8] From the foregoing, I find that the protest has merit as it has been proved that the Suit Land was a gift to John Mwenda, the petitioner's father. I so declare. Therefore, the Suit Land cannot form part of the estate and is not free property of the deceased under CAP 160. Hence, the suit property goes to the Petitioner. In view of that finding, I revoke the earlier grant and a fresh one shall be issued to the petitioner. And, the new grant is confirmed in the foregoing terms. No order as to costs.

**Dated, signed and delivered in open court at Meru this 22<sup>nd</sup> day of January, 2019**

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**F. GIKONYO**

**JUDGE**

**IN PRESENCE OF**

**M/s Rimita for Mutegi for objector**

**MRS Kaume for petitioner – absent**

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**F. GIKONYO**

**JUDGE**