



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 292 OF 2006

In The Matter Of The Estate Of M'angichia Muiyo(Deceased)

GEORGE KABERIA.....PETITIONER

-VERSUS-

DAVID KAMENCHU.....1ST OBJECTOR

JUDGMENT

[1] The deceased Herein *Mangichia Muiyo* died on 28th February 1978. He was domiciled in Ntunene Location prior to his death. According to the letter of the Area Chief dated 16th August 2000 the deceased left behind the following dependents; *George Kaberia, Ntonjira M'Angicia, Karuma M'Aangicia, David Kimeneu, Douglas Mbaabu(deceased), Mungathia M'Angicia, Gitonga M'Angicia, Mwothiru M' Angicia, Kathoni M'Angicia and Mwaria M' Angicia*

[2] The petitioner filed for letters of Administration on 11th September 2006 listing the two widows of the deceased, sons of the deceased and Francis K. Kiruba (purchaser). He listed the assets of the deceased as; *L.r.Ithima/ Ntunene/205*.

[3] Grant for Letters of Administration were issued on 19th February 2008. The petitioner filed Summons for confirmation of grant dated 25th May 2008 and proposed to distribute the estate of the deceased to the sons of the deceased, one Ibrahim Kobia and Francis K.Kiruba. An objection to making of the grant dated 27th June 2008 and protests dated 19th March 2010 and 4th March 2010 were filed. All claimed that the petitioner has included strangers into the grant i.e. Gituma Maingi, Francis Kirubia and Ibrahim Kobia. They also averred that the petitioner had left out P/No. Ithima/ Ntunene/72. The petitioner later filed a further Summons for confirmation of grant dated 10th April 2015 and a further affidavit dated 15th March 2017 wherein he divided the estate of the deceased equally amongst the sons of the deceased. He also averred that P/No. Ithima Ntunene/72 does not belong to the deceased but to his late brother Imwea Angichia who acquired it through the Process of gathering and consolidation leading to the subsequent registration in the year 1976.

ANALYSIS AND DETERMINATION

[4] I am able to discern from the Affidavits and the statements filed the issues for determination to be;

i. Whether P/No. Ithima/Ntunene/72 forms part of the estate of the deceased and

II. Distribution of the estate of the deceased.

Of P/No. Ithima/Ntunene/72

[5] According to the objector (in his written statements);

a. The deceased gave the 1st House L.R. No. Ithima/ Ntunene/72 and the 2nd House L.R. Ithima/Ntunene/205;

B. The petitioner and M'Imwae Angichia reside in L.R. Ithima/Ntunene/72 but it is only M' Imwae Angichia who has established a home in the aforesaid premises.

C. The 1st wife also cultivated the land prior to her demise.

[6] The Objectors testimony was supported by that of Henry M'Amuuru who averred that they are from the same clan (Murutwu Clan) as the deceased. That the 1st wife of the deceased died when expecting the 2nd Child i.e. M' Imwae Angachia. That the land in Ithima/Ntunene/72

was awarded to the deceased by the Njuri Ncheke and was given to the 1st House. That when M' Imwae got married he established a home at the said premises but the petitioner has never sought to establish a home thereon.

[7] The petitioner argued that the land belongs to this brother which he acquired after it was consolidated in the year 1976. He has annexed a Copy of the Green Card that shows that the Land was granted to I'Mwae Angichia on 10.03.76 and Certificate issued on 18.8.76. There was a change of name to M'Imwae M'Angichia on 12.11.2009 the same was vide Gazette Notice No. 7980 dated 6.10.2006 and title was issued on 15.1.2010.

[8] The objectors claim is in the nature of gift inter vivos by the deceased. Therefore, the law on gifts inter vivos becomes pivotal in this decision. According to *Halsburys Laws of England* 4th Edition Volume 20(1) at paragraph 32 to 51, a person claiming gift *inter vivos* must show that the said gift was 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 thereof. Gifts of land must be by 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 complete to be valid. However, 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.

[9] For incomplete gift inter vivos see Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67:

“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.”

[10] See more instances of the donor’s subsequent conduct which gives the donee a right to enforce a promise as stated in Halsbury’s Laws of England, 4th edition, volume 20(1) para 70 that:

The subsequent acts of the donor may give the intended donee a right to enforce an incomplete gift. Thus, if a donor puts the donee into possession of a piece of land and tells him that he has given it to him so that he may build a house on it, and the donee accordingly, and with the donor’s assent, expends money in building a house, the donee can call on the donor or his representatives to complete the gift.

[11] Other examples are; where he appoints the donee as executor is confirmation of the imperfect gift, or donee is made administrator. Note however that; any prior communication to third party of change of intention cannot revoke a confirmation of the gift in a will. But the intention to make a gift must continue unchanged until his death.

[12] I have set out the legal parameters on gift inter vivos. Applying the test, the objectors relied on their witness statements but did not provide any documentary or cogent evidence to corroborate their testimonies. Henry M' Amuuru did not establish the authority of the Njuri Ncheke to transfer land to the deceased or how the deceased transferred the land to the 1st House or made a gift to M'Imwae Angichia. The petitioner adduced credible evidence particularly the green card which shows that the land belonged to M' Imwae Angichia even during the lifetime of the deceased. The land registry record produced shows that the Land was granted to I'Mwae Angichia on 10.03.76 and Certificate issued on 18.8.76. The change of name to M'Imwae M'Angichia on 12.11.2009 vide Gazette Notice No. 7980 dated 6.10.2006 does not change the ownership of the land. Similarly, issuance of title in the new name on 15.1.2010 does not also change the ownership of the land since 1976.

[13] I should not be misunderstood to have usurped the jurisdiction of the Environment and Land Court. The foregoing is important only for purposes of determining whether the land was a gift inter vivos for purposes of section 28 and 42 of the Law of Succession Act. Section 42 is stated below:

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, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

[14] In the circumstances, I find and hold that the Objectors did not prove that the deceased made a gift inter vivos to Angichia of Land in Ithima/Ntunene/72.

Distribution of the estate of the deceased

[15] Be that as it may, I will now distribute the estate of the deceased as per the law. The latest mode of distribution by the petitioner dated 15th March 2017 sought to distribute the estate of the deceased equally among the sons and daughters of the deceased. The objector has disclaimed the interest granted to Mukongai M'Imwea (wife of M' Imwea Angichia- now deceased). The objectors averments are however still premised on the averment that the petitioner and M' Imwea Angichia already benefited from L.R.No. Ithima/Ntunene/72 which I have so far determined was not a gift inter vivos. Therefore, it cannot be taken into account in determining the ultimate share of these two in the net intestate estate.

[16] Given that the deceased was Polygamous during and left behind sons and daughters, distribution of this estate should be in accordance with section 40 and 38 of the Law of Succession Act. The principle of equity and equality is enshrined in section 38 as follows;

38. 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 be equally divided among the surviving children.

[17] Accordingly, I agree with the petitioner that the estate of the deceased ought to be distributed equally among the children of the deceased. In light thereof, the estate of the deceased, to wit, **L.R. NO. ITHIMA/NTUNENE/205 (2.2 Ha.)** shall be divided equally amongst the following beneficiaries:-

- 1. George Kaberia**
- 2. Mukongai M’Imwea M’Angichia on behalf of the estate of M’ Imwea Angichia**
- 3. Karuma M’Aangicia**
- 4. David Kimencu**
- 5. Douglas Mbaabu (deceased)**
- 6. Mungathia M’Angicia**
- 7. Gitonga M’Angicia**
- 8. Mwothiru M’ Angicia**
- 9. Kathoni M’Angicia**
- 10. Mwaaria M’ Angicia**

[18] The grant herein is confirmed in the foregoing terms. This being a succession case involving close family members, I order each party to bear own costs.

Dated signed and delivered in open court at Meru this 28th day of February, 2019

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F.GIKONYO

JUDGE

In presence of

Muriuki for petitioner

Meenye for objector- absent

Objector – present

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F.GIKONYO

JUDGE