



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2689 OF 2015

IN THE MATTER OF THE ESTATE OF MARY NYAWIRA KABARU (DECEASED)

GRACE WANJIKU NDURU.....1ST ADMINISTRATOR/APPLICANT

AGNES WANJIRU KABIARU.....2ND ADMINISTRATOR/APPLICANT

VERSUS

SIMON KAMAU KABIARU.....RESPONDENT

JUDGMENT

1. The deceased Mary Nyawira Kabiari died intestate on 26th March 1996. Her estate comprised land parcel Kabete/Gikuni/T.15 measuring 0.22 acres. She was survived by the applicants Grace Wanjiku Nduru and Agnes Wanjiru Kabiari, the respondent Simon Kamau Kabiari and her late children Peter Kabungu Kabiari and Anne Wanjiku. Her late children left children (the deceased's grandchildren) Texas Njuguna, Sydney Njoki and Paris Nyawira. On the parcel of land are 18 rental rooms. The respondent resides on the parcel and collects and uses the rent.
2. The grant of letters of administration was issued to the applicants on 15th January 2016. They filed an application dated 29th May 2017 seeking to confirm the grant. They proposed that the estate be sold and the proceeds shared equally to all the beneficiaries. The respondent opposed the application. His case was that the deceased had during her lifetime gifted the property to him. This was because he was the one who took care of her during her illness. There is no dispute that the 1st applicant is married and her home is about 3 KM from the disputed property. The deceased was staying on the property with the respondent and the 2nd applicant.
3. The 1st applicant and the respondent gave evidence in support of their respective cases.
4. The deceased's husband Kabiari Kabiangu died in July 2012. Following his death the family met with elders to share his property. The respondent produced a document showing that it was agreed that the parcel in dispute should go to him. The applicants signed the document. The respondent stated that this was evidence that it was always known that the property had been left to him by the deceased. The 1st applicant stated that she signed the document because of coercion. Secondly, that this was not, in any case, the deceased's estate the family was distributing. They were distributing their late father's estate. The respondent always kept the title deed to the disputed property. He stated that it was given to him by the deceased, and that this was further evidence that she was gifting the property to him.
5. It was the 1st applicant's undisputed evidence that the property was given to the deceased by her father in 1959. As for the evidence that the respondent was the one given the title deed by the deceased, her evidence was that this was because he was staying with the deceased and managing the rental houses.
6. As to who built the rental houses, the respondent testified that he did it. The 1st applicant stated that the deceased built the rooms. The respondent was born in 1963, and testified that he built the rooms in 1991 and 1992. I note that in 1991 he was only 18. He did not show how he would have made the money to build the rooms. I find the rooms were built by the deceased, but have been managed all the time by the respondent.
7. The respondent may have taken care of the deceased during her sickness. However, this was expected of him as the deceased was his

mother who had constructed rental rooms whose rent he was the one managing.

8. Under **section 2** of the **Law of Succession Act (cap 160)** the deceased's estate is governed by the **Act**. Under **section 38** of the **Act**, the estate is supposed to be shared equally among the beneficiaries.

9. This was an intestate succession. However, the respondent contends that he was gifted the estate by the deceased before she died. **In Re Estate of Gedion Manthi Nzioka (deceased) [2015]eKLR**, it was stated that, for gifts *intervivos*, the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of a trust by the donor, or by way of resulting trust or by 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 *intervivos* must be completed for the same to be valid.

10. It is clear that the land in question was not transferred to the respondent, and neither was there a written expression that the land was being given to him.

11. It is also material that a person cannot disinherit people who would ordinarily be expected to inherit from him/her (**Elizabeth Kamene Ndolo –v- George Matata Ndolo [1996]eKLR**).

12. I have considered the evidence and the written submissions by Mr. Nyanyuki for the applicants and M/s Mungai for the respondent. I do not find that the deceased left any Will, or that she gifted the property to the respondent while she was alive. Consequently, the estate of the deceased shall devolve to the beneficiaries in accordance with **section 38** of the **Act**. I allow the application by the applicants and dismiss the protest by the respondent. Land parcel Kabete/Gikuni/T.15 and all its development shall be sold and the proceeds shared equally among Simon Kamau Kabiari, Grace Wanjiku Nduru, Agnes Wanjiru Kabiari and the estates of Alice Wanjiku and Peter Kabungu Kabiari. The grant issued to the applicants on 15th January 2016 shall be confirmed in those terms. I have considered that for protecting and managing the estate the respondent paid himself by receiving and using the rent for all the years since the deceased died.

13. This was a family dispute. I make no orders as to costs.

DATED and DELIVERED at NAIROBI this 23RD day of SEPTEMBER, 2019.

A.O. MUCHELULE

JUDGE