



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 533 OF 2006

IN THE MATTER OF THE ESTATE OF JAMES KAMAU KAGIRI

(DECEASED)

SIMON JENGA KAMAU1ST PETITIONER

DOUGLAS WAINAINA KAMAU2ND PETITIONER

JANE WANJIRU KAMAU..... 3RD PETITIONER

VERSUS

STEPHEN KUNG'U KAMAU1ST PROTESTOR

ELIZABETH NYAMBURA KAMAU2ND PROTESTOR

JUDGMENT

1. James Kamau Kagiri died on the 10/9/2004. He was survived by;

1st House

Widow (deceased)

- i. Simon Njenga Kamau – 1st Administrator
- ii. Douglas Wainaina Kamau – 2nd Administrator
- iii. Lawrence Kagiri Kamau
- iv. Ann Wamboi Kamau
- v. Elizabeth Nyambura Kamau – 2nd Protestor
- vi. Stephen Kung'u Kamau – 1st Protestor

2nd House

- i. Jane Wanjiru Kamau (widow) – 3rd Administrator
- ii. Stephen Kagiri Kamau
- iii. Robinson Kamau – 29 years

iv. Martha Wanjiru Kamau – 27 years

2. The deceased left behind the following known properties;

1. Nakuru Municipality/Block 1/Langa Langa/618

(Valued in 2012 at 4,000,000/=)

2. Nakuru Municipality/Block 27/324

(Valued in 2012 at 6,500,000/=)

3. Plot No. 386 – Pangani Estate

(Valued in 2012 at 8,000,000/=)

4. Nakuru Municipality/Block 1/660

(Valued in 2012 at 9,500,000/=)

These properties were all valued pursuant to orders of this court.

3. This matter is before the court for determination of the mode of distribution of the property of the deceased to his ascertained beneficiaries.

4. Stephen Kungu Kamau (hereinafter Stephen) has laid claim to properties Nakuru Municipality Block 1/618 (Langalanga), Nakuru Municipality Block 1/385, 30% shares in Coco Savana Bar and Restaurant and motor vehicle Reg No. KAJ 970R. It is Stephen's case that the said properties were gifted to him by the deceased during his lifetime. This is disputed by the administrators.

5. In his testimony, Stephen told the court that by a declaration made on 16/2/2004 before a notary public, the deceased gifted him properties Nakuru Municipality Block 1/385, Block 1/618, 30% of his (deceased's) shares in Coco Savanna Bar and Restaurant and motor vehicle Reg No. KAJ 970 R. Prior to this, Stephen had sworn an affidavit committing to donate a kidney to the deceased who required a kidney transplant.

6. The declaration alluded to in paragraph 5 above included a clause stating that under no circumstances would the deceased demand back the said properties from the donor.

7. On cross examination, Stephen acknowledged that the declaration he produced in court was a photocopy and that he did not produce evidence of an air ticket or his passport as evidence of travel.

8. Cross examined further in regard to properties he stated had been gifted to other beneficiaries by the deceased, Stephen stated that property Nakuru Municipality Block 26/245 is registered in the names of the 3rd administrator. The title was issued on 20/12/2006. The said property had never been in the names of the deceased.

9. Further on, he stated that Ndundori land was given to the 1st administrator by the deceased. He added that the deceased built a lodging and restaurant for the 2nd administrator. He acknowledged however that he had no evidence of this only stating that the 2nd administrator was running a matatu and hence could not pay for the same.

10. Challenged on his proposal for distribution at paragraph 13 of his affidavit, Stephen confirms that as per his proposal, majority of the property was to go to him. He added that the only properties for distribution were Nakuru Municipality Block 27/324 and Block 27/726.

11. Elizabeth Nyambura Kamau testified that she was present in India when the declaration was done. She did not produce her passport to confirm travel. She confirmed that the intended transplant was not done and the kidney to be donated by Stephen was thus not donated.

12. Douglas Wainaina, the 2nd administrator is of the position that he is not aware of any declaration by the deceased giving land to anyone.

13. The following issues stand out for determination;

- i. Whether the deceased had made gifts of land to Stephen Kung'u Kamau and/or to any other beneficiary during his lifetime.
- ii. What mode of distribution is applicable in the circumstances of the case.
- iii. Who is to bear the costs of this case.

14. On issue (i) above, the Law relating to gifts *inter vivos* and gifts made in contemplation of death is now well settled.

15. In re Estate of Gedion Manthi Nzioki (deceased) Nyamweya J correctly summed up the law applicable. At page 3 of the Judgment she stated;

“... In law, gifts are of two types. There are the gifts made between living persons (gifts *inter vivos*), and gifts made in contemplation of death (gifts *mortis causa*). Section 31 of the Law of Succession Act provides as follows with respect to gifts made in contemplation of death:

“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 illness or danger; and
- f. the intended beneficiary survives the person who made the gift to him:

Provided that-

- i. no gift made in contemplation of death shall be valid if the death is caused by suicide;
- ii. The person making the gift may, at any time before his death, lawfully request its return.”

The court is obliged to take cognizance of the gifts given by a deceased in contemplation of death if the conditions in section 31(a) to (f) are present. It must also be noted that the said conditions are cumulative and must all exist for such a gift to be valid, and that in such circumstances the gift need not be perfected. It must be noted that this gift only arise where the death of the donor is contemplated, and will be retained only in the event of the donors death.

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 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 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 *Halsbury 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 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.”

16. To begin with, Stephen has not clearly indicated through evidence whether the gift he alleges was a gift *inter vivos* or a gift in contemplation of death.

17. However even then, applying the principles set out hereinabove, whichever way one looks at it, whether a gift *inter vivos* or a gift in contemplation of death, the 1st protestor fails to achieve the threshold of a gift either *inter vivos* or in contemplation of death.

18. The most the 1st protestor has been able to demonstrate is the existence of a trade off, where he was to get land to be a donor of a kidney. That is clearly demonstrated by the Clause (v) in the alleged declaration which states;

“(V) That under no circumstances shall I demand back the said properties from the donor whether the transplant shall be successful or not.”

19. One wonders why this clause was necessary and the only logical inference is that the whole arrangement was not about a gift. It was a trade off.

20. It is instructive to note that the contents of the said declaration are not verifiable. The document produced is a copy. There is no explanation why the original was not available and neither is there an explanation of why the maker could not be made to testify to clarify the document. There is no evidence tendered to show that the deceased and the 1st protestor were in Mumbai, India.

21. Even assuming the document could have been proved to have been made, the submission by counsel for the 3rd administrator that this was an agreement for exchange of body parts for land which cannot be good for our society readily resonates with my considered view of the matter.

22. On whether the deceased had distributed some of his properties to some of his beneficiaries inter vivos, no evidence was laid before court to show that the deceased had gifted properties Dundori Mugwathi Block 2/221 to the 1st administrator or Nakuru Municipality Block 27/324 to the 2nd protestor and one Anne Wambui Kamau.

23. Before I venture into the actual distribution of the estate, I find it necessary to address the propriety of a consent that was entered into by the parties and filed in court.

24. From the conduct of this matter, it appears to my mind that the issue of the consent appears to have been abandoned by the parties and they chose to canvass the issues through this hearing.

25. If the contrary was true, the issue of whether the consent was valid and binding would have formed an independent matter in controversy that would have needed to be canvassed independently before any further proceedings. This is informed by the fact that, if the matter had been canvassed and the consent found valid, there would not have been a need for the proceedings now taken before this court.

26. Other than the submissions by counsel for the 1st and 2nd petitioner which address, the issue of the consent, other parties are silent on the same. Having not sought to dispose of the issue of whether the consent was valid and binding before these proceedings, my view is that it is not open to any of the parties to raise that issue now. Indeed, this is a wakeup call on parties to be certain at directions stage on the trajectory they desire a matter to take.

27. As to distribution, the deceased was in a polygamous setting. The applicable Law is found in **Section 40** of the **Law of Succession Act**. That section provides;

“S 40 (1) 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.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

28. The deceased left behind two houses. The 1st house has 6 children. The 2nd house has one surviving widow and 3 children. In total, (including the widow) the 2nd house has 4 units and the 1st house has 6 units.

29. The properties listed in the P & A 5 are;

a. Nakuru Municipality Block 1/660

b. Nakuru Municipality Block 1/618

c. Nakuru Municipality Block 27/324

d. Nakuru Municipality Block 1/386

e. Nakuru Municipality Block 27/726

f. Motor vehicle Registration No. KAJ 970R Peugeot 504 Saloon

g. Motor vehicle Registration No. KAK 088 Peugeot 405 Saloon

h. Motor vehicle Registration No. KAM 426L 1200 Saloon

i. Standard Chartered Bank Nakuru Branch Account No. 0150159381000

j. Family Finance Building Society Nakuru Branch Account No. 185881 (102)

k. Coco Savana Club

l. Motor vehicle KAM 426J Nissan Pick-up

30. Of these properties only properties (a) to (d) having been shown by way of evidence to exist. These are thus the properties available for distribution.

31. By the very nature of properties as can be discerned from the valuation reports filed, the properties are not divisible by way of acreage or other known measure. All the properties consist of blocks of residential buildings. The properties were valued and it is based on these values that I will endeavour to distribute the said properties between the two houses in the ratio of 6:4. As much as possible, beneficiaries will retain any properties from where they are currently collecting rent.

32. With the result that I confirm the grant herein and make an order for the distribution of the estate as per the schedule below;

Property

Who to inherit

1. Plot No. 386 Pangani Estate 1.Simon Njenga Kamau

2. Douglas Wainaina Kamau

3. Lawrence Kagiri Kamau

4. Ann Wamboi Kamau

5. Elizabeth Nyambura Kamau

6. Stephen Kung'u Kamau

(In equal shares)

2. Nakuru Municipality Block 1/660 1.Simon Njenga Kamau

2. Douglas Wainaina Kamau

3. Lawrence Kagiri Kamau

4. Ann Wamboi Kamau

5. Elizabeth Nyambura Kamau

6. Stephen Kung'u Kamau

(In equal shares)

3. Nakuru Municipality Block 1/618 1. Jane Wanjiru Kamau

2. Stephen Kagiri Kamau

3. Robinson Kamau

4. Martha Wanjiru Kamau

(In equal shares)

4. Nakuru Municipality Block 27/324 1. Jane Wanjiru Kamau

2. Stephen Kagiri Kamau

3. Robinson Kamau

4. Martha Wanjiru Kamau

(In equal shares)

33. Each party to bear its own costs.

Dated and Signed at Kisii this 20th day of November 2019.

A.K NDUNG’U

JUDGE

Delivered this 27th day of November 2019.

R. NGETICH

JUDGE