



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 117 OF 2015**

**IN THE MATTER OF THE ESTATE OF PHYLILIS MUTHONI MÍNOTI (DECEASED)**

**JOSEPHINE MPAKA M'INOTI.....APPLICANT**

**JEDIEL MWIRIGI M'INOTI.....APPLICANT**

**-Versus-**

**LUCIA KABURA M'INOTI.....PETITIONER**

**JUDGMENT**

Redistribution of estate

[1] I have before me two applications. One is dated 24<sup>th</sup> January 2017; it seeks; (1) amalgamation of Ngusishi Settlement Scheme/1188, 1189, 1190 and 1191; and (2) the amalgamated property to be shared equally among all the beneficiaries. The other application is dated 13<sup>th</sup> January, 2017 and is asking the court to empower the Deputy Registrar to sign mutation forms and transfer instruments.

[2] For obvious reasons which will be apparent soon, I will begin with the application dated 24<sup>th</sup> January 2017. The application is titled "Summons for Rectification of Grant". But the orders sought therein are; amalgamation and re-distribution of the estate property herein. Such assignment cannot be undertaken within the limited scope of rectification of grant in section 74 of the Law of Succession Act. However, despite the misleading title of the application, the prayers sought will entail revocation of the earlier confirmation; redistribute the estate and issue confirmation of grant thereto. I believe sufficient reason must be shown in the sense of section 78 of the Law of Succession Act for this application to succeed. The grant herein was confirmed on 14<sup>th</sup> December, 2016 and distribution of the estate was in accordance with paragraph 5 of the affidavit in support of Summons for Confirmation. The Petitioner seeks redistribution of the estate on the basis that the family of the late daughter of the deceased called Faith Nkuene was not provided for in the distribution of the estate. I have perused the record and I see an affidavit filed on 2<sup>nd</sup> March 2016 which proposed equal sharing of the estate amongst the 4 children of the deceased including faith Nkuene who is deceased. I also note the 4 children of the deceased namely; (1) Jediel Mwirigi M'Inoti; (2) Lucia Kaburo Francis; (3) Joseph Mpaka Inoti; and (3) Faith Nkuene (deceased) were listed in the petition. However, the family of Faith Nkuene was completely omitted in the distribution of the estate. That is a material omission which violates the law on the principle of representation. Again, I note that only **NGUSISHI SETTLEMENT SCHEME/1189** was listed in Form P & A 5 as the only asset of the deceased. This is a substantial omission. Accordingly, there is sufficient reason to revoke the confirmation herein. I accordingly set aside the confirmation of grant made on 14<sup>th</sup> December 2016.

[3] What is the fairest distribution of this estate? Some parties argued that the deceased subdivided her land **NGUSISHI SETTLEMENT SCHEME/16** into 4 portions namely **NGUSISHI SETTLEMENT SCHEME/1188** **NGUSISHI SETTLEMENT SCHEME/1189** **NGUSISHI SETTLEMENT SCHEME/1190** and **NGUSISHI SETTLEMENT SCHEME/1191** and shared to Jospine Mpaka, Jediel Mwirigi, Lucia Kaburo and for herself respectively. According to her, the deceased together with elders marked each of the portions allocated. The claim seems to be in the genre of gifts *inter vivos*; these are gifts made between living persons. Gift *inter vivos* 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 in order to be valid. It is not, however, 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 *Halsburys Laws of England*, 4<sup>th</sup> Edition Volume 20(1) at paragraph 32 to 51. As for incomplete gifts, see *Halsburys Laws of England* 4<sup>th</sup> 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."***

[4] Jospine Mpaka stated that she had annexed copies of land registers; none was annexed. What is annexed are minutes of some meeting held on 21<sup>st</sup> July 20016 (sic). The meeting thereto took place after the death of the deceased and the probative value of those minutes is nil unless backed by some cogent and tangible evidence on the wishes and conduct of the deceased in making the alleged gifts *inter vivos*. It was also stated that the subdivision was done and each person was given his or her land except that title were not yet out by the time she died. Is this a case of imperfect gift which the court should enforce?

#### **Imperfect gift**

[5] The person claiming that the deceased made a gift *inter vivos* only that titles were not deduced during her lifetime should show such conduct of the donee which give intended donee right to enforce the gift herein. See Halsbury's Laws of England, 4<sup>th</sup> 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.***

[6] There was no evidence of matters such as consent to transfer or any signed transfer or anything with evidentiary value that these subdivisions by the deceased were intended for the persons claiming them. None has claimed that he or she was put into possession of and was told to build and built on any of the portions of land. In addition, all the portions were in her name. I find absolutely no evidence to support the claim that the deceased made gift *inter vivos* to any of the persons claiming as such. Therefore, I find that the deceased made no gift *inter vivos* to any person. The 4 portions of land herein constitute the estate property.

[7] Now, I will fall back to the law on distribution. Ideally, children of the deceased should get equal shares in the estate. And as no surviving spouse except children, I will invoke section 38 of the Law of Succession Act which provides as follows:-

#### **38. Where intestate has left a surviving child or children but no spouse**

***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 shall be equally divided among the surviving children.***

[8] Section 41 of the Law of Succession Act embeds the principle of representation that:-

***...all or any of the issue of any child of the intestate who predecease him...in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.***

[9] Applying the law, the 4 children of the deceased shall share the estate property in equal shares. The share of the late Faith Nkuene shall devolve upon all her children in equal shares. To achieve this, these lands must be and I hereby order that **NGUSISHI SETTLEMENT SCHEME/1188 NGUSISHI SETTLEMENT SCHEME/1189 NGUSISHI SETTLEMENT SCHEME/1190 and NGUSISHI SETTLEMENT SCHEME/1191** shall be consolidated into one parcel of land for purposes of being shared in accordance with this order. As this is a matter involving close family members, I order each party to bear own costs. It is so ordered.

**Dated, signed and delivered in open court this 28<sup>th</sup> day May 2018**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

**Mr. Muthomi advocate for protestors**

**Petitioner in person**

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**F. GIKONYO**

**JUDGE**