



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCC. CAUSE NO. 22 OF 1995

IN THE MATTER OF THE ESTATE OF M'MUGAMBI M'RIMBERIA (DECEASED)

DANIEL KIOGORA MUGAMBI.....PETITIONER

VERSUS

SESARY GATOBU M'MUGABI.....APPLICANT

JUDGMENT

[1] **M'MUGAMBI M'RIMBERIA** died intestate 6th May 1984. On 19th January 1995. Daniel Kiogora Mugambi petitioned for grant of letters of administration. He listed **ABOTHUGUCHI/ U- KAONGO/358** and **ABOTHUGUCHI/ U-KAONGO/ 580** to be the assets of the deceased. He also listed the following to be the dependants of the deceased;

- I. Veronica GatiriaM'Mugambi - wife
- II. Charles KinyuaMugambi - son
- III. Daniel KiogoraMugambi - son
- IV. Luciano KirukiMugambi - son
- V. Zachary MuthioraMugmabi - son
- VI. NaftaryGitongaMugambi - son

[2] Daniel proposed that the estate assets be distributed as follows;

ABOTHUGUCHI/ U- KAONGO/1050

- Charles Kinyua Mugambi -
- Daniel Kiogora Mugambi -
- Lusiano kiruki Mugambi - equal shares
- Zakary Muthoria Mugambi -
- Naftary Gitonga Mugambi - 1 acre

ABOTHUGUCHI/ U-KAONGO/ 580

- Charles kinyuaMugambi -
- Daniel KiogoraMugambi -
- LusianokirukiMugambi - equal share

Zakary MuthoriaMugambi -

Naftary Gitonga Mugambi - 2. 15 acres

[3] On 23rd may 2007 Seseary Gatobu M'Mugambi applied for revocation/ annulment of grant on the grounds that there was no consent to the application, there was concealment of facts when the petitioner in his affidavit sworn on 19th January 1995 replaced the name of the applicant with the applicants son Naftaly Gitonga Mugambi. She also alleged that the petitioner mis-administered 1050 and subdivided it into several portion registered as no. 1620 to 1624; the said land was specifically left to be inherited by the applicant. The petitioner also failed to distribute land parcel no. U-KAONGO/580 which was specifically left for subdivision to all other sons of the deceased.

[4] In a further affidavit dated 22nd February 2010 the applicant added that the petitioner sub divided U-KAONGO/1050 into 5 parcels and divided it as follows;

ABOTHUGUCHI/ U-KAONGO/1620- 0.85 ha- Daniel KiogoraMugambi

ABOTHUGUCHI/ U-KAONGO/1621- 0.405 ha-Luciano KariukiMugambi

ABOTHUGUCHI/ U-KAONGO/1622- 0.405- Daniel Kiogora

ABOTHUGUCHI/ U-KAONGO/1623-0.405- Zachary Muthiora

ABOTHUGUCHI/ U-KAONGO/1624- 0.405- Daniel Kigora

[5] In a ruling made on 7th May 2010 by Kasango J., the court revoked the grant issued herein and ordered a fresh grant to be issued to Sasari Gatobu M'Mugambi and notices to be served upon Samuel Kiogora Mugambi owner of ABOTHUGUCHI/ U-KAONGO/621 and Zacharia Muthiora ABOTHUGUCHI/ U-KAONGO/1623 for them to show cause why the titles issued to them should not be cancelled.

Confirmation

[6] In an affidavit in support for confirmation of grant Sesary Gatobu M'Mugambi suggested that the assets be divided as follows;

1) ABOTHUGUCHI/ U-KAONGO/1050- Seasary Gatobu M'Mugambi

2) ABOTHUGUCHI/U-KAONGO/ 580

a) Daniel KiogoraM'Mugambi- 1.3 ha

b) Laureria Kabugi M'Rinkanaya (trustee for kelvin Mugambi s/o Kinyua and Roy Nthurima) minor -1.5 ha

c) Luciano Kiruki M'Mugambi-1.3 ha

d) Zachary Muthiora - 1.3 ha

[7] Oral evidence was also adduced. **OW1 SESARY GATOBU** testified and told the court that he is a son of the deceased. The deceased had only five sons; Himself, Charles Kinyua, Daniel Kiogora, Luciano Kariuki and Zachary Muthiora. The deceased left two parcels of land ABOTHUGUCHI/ U-KAONGO/1050 and ABOTHUGUCHI/ U-KAONGO/580.

[8] He stated that the deceased told them that the ABOTHUGUCHI/ U-KAONGO/580 will be shared by Daniel Kiogora, Luciano Kiruki, Charles Kinyua and Zachary Muthiora. The deceased left him ABOTHUGUCHI/ U-KAONGO/1050. According to him, the deceased communicated this to his brothers by asking them to live on ABOTHUGUCHI/ U-KAONGO/580. The deceased went with them to plot 580 and lived there from 1973 to 1984 when he died. His brothers therefore constructed their houses on ABOTHUGUCHI/ U-KAONGO/580 and lived there.

[9] **OW2 RAURERIA KABUGI KINYUA** testified and told the court that she is the wife to Charles Kinyua who was a son to the deceased. They had three children namely Josline Karimi, Kelvin Mugambi and Roy Nthurima. That her husband died in 2011 and she was left on ABOTHUGUCHI/ U-KAONGO/580 and Applicant was living on ABOTHUGUCHI/ U-KAONGO/1050. All the other brothers were living on ABOTHUGUCHI/ U-KAONGO/580. They allocated her husband land on ABOTHUGUCHI/ U-KAONGO/1050 and wanted him to cut down the applicants coffee but however refused to take the land as that was contrary to what their father wished. They were denied title by the court and they started leasing the land to other people. She asked the court to give ABOTHUGUCHI/ U-KAONGO/580 to be shared amongst the four brothers.

[10] **OW2** added that when her husband was sick he wrote a letter and during this time this case was in court (marked exhibit 1 B) which said that the deceased had directed that Gatobu should stay on ABOTHUGUCHI/ U-KAONGO/1050 and directed that all the other sons stay on ABOTHUGUCHI/ U-KAONGO/580.

[11] **OW3 ADRIANO MIRITI** testified and told the court that he knew the deceased as they lived in the same village. In 1973 they had a

meeting at his home, their grandfather M'Ibari was there, his wife and his four sons. During this meeting he gave his land to Gatobu and aired out his intention to move to his land at mathaga, ABOTHUGUCHI/ U-KAONGO/580. The deceased relocated with his sons and the applicant remained behind. The applicant was at the time married with children.

ANALYSIS AND DETERMINATION

Issues

[12] From the record, evidence and submissions by the parties, issues that emerge for determination by the court are:

- a) *Whether the deceased provided for Sesary Gatobu in his lifetime by giving him Land parcel number 1050;*
- b) *Whether Naftary Gitonga Mugambi is entitled to a share of the estate of the deceased; and*
- c) *How should the estate be distributed?*

Gift inter vivos

[13] The claim by the Applicant is based on an incomplete gift since the property is not registered in her name. On this, I am content to cite **Halsbury's Laws of England, 4th Edition Volume 20(1) at paragraph 67** where 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.”

[13] The subsequent acts of the donor may give right to the donee to enforce an imperfect gift. See what same author (ibid) states at paragraph 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.”

[14] In this case the deceased used to live on **ABOTHUGUCHI/ U-KAONGO/1050** however he moved to **ABOTHUGUCHI/ U-KAONGO/580** with his other sons and left the applicant in **ABOTHUGUCHI/ U-KAONGO/1050**. Evidence shows that he told him that he should build his home there. Accordingly, the deceased put the applicant into possession of his land and permitted him to build a house on it which the applicant did. Therefore I find that the applicant has a right to apply for the personal representative of the deceased to be compelled to enforce the imperfect gift. Accordingly, I find that **ABOTHUGUCHI/ U-KAONGO/1050** is gift inter vivos given to Sasery and it shall be registered to his name. I also find that the actions of the petitioner of misdirecting this court and subdividing **ABOTHUGUCHI/ U-KAONGO/1050** and awarding himself the lion's share was fraudulent and therefore order the cancellation of Titles **ABOTHUGUCHI/ U-KAONGO/1620, 1621,1622 and 1624**. The said land shall revert to its original number **ABOTHUGUCHI/ U-KAONGO/1050** and be registered in the name of Seasary Gatobu M'Mugambi.

Dependant

[16] Section 29 of the Law of Succession Act provides:

“For the purposes of this Part, “dependant” means –

- (a) *The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*
- (b) *Such of the deceased's parents, step-parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;....”*

[17] Under **Section 29** and the order of priority in Part V of the Law of Succession Act, the spouses and children of the deceased have priority in inheriting the estate of the deceased. The grandchildren and others can inherit only if they were being maintained by the deceased prior to her death. In persuasive decision by Musyoka J. in the case of **Estate of Veronica NjokiWakagoto (deceased) (2013) eKLR** it was stated:

“.....grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grand children inherit from the parents. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grand children step into the shoes of

their parents and take directly the share that ought to have gone to the said parents.”

[18] In this case Naftary Gitonga is the son to the applicant who is still alive and therefore he does not have priority over his father in relation to the estate of the deceased. He has not right of direct inheritance from the deceased. His father does. I so find.

Distribution

[19] In this case, distribution of the estate shall be guided by Section 38 of the Law of Succession Act which provides

“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.”

[20] From my finding on gift inter vivos, the estate property is therefore **ABOTHUGUCHI/U-KAONGO/ 580**. All the other children of the deceased were settled on this estate property. Accordingly, it shall be shared equally amongst the following sons of the deceased, namely:

- a) Charles Kinyua Mugambi (deceased)
- b) Daniel KiogoraMugambi
- c) Luciano KirukiMugambi
- d) Zachary MuthioraMugmabi

[21] The share of the late Charles Kinyua Mugambi shall devolve to his wife **RAURERIA KABUGI KINYUA** who shall hold it for her own benefit and in trust for all the children of Charles in equal shares.

Dated, signed and delivered in open court at Meru this 17th day of December, 2018

F. GIKONYO

JUDGE

In presence of

Mutuma for Kaumbi for 1st petitioner

Zakary, Luciano and wife of Kinyua - Present

F. GIKONYO

JUDGE