



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 1942 OF 2005

IN THE MATTER OF THE ESTATE OF BENJAMIN KIHUTO NGURE (DECEASED)

MARGARET MUMBI KIHUTO.....APPLICANT/PETITIONER

VERSUS

PETER NGURE KIHUTO.....1ST RESPONDENT/OBJECTOR

JOHN KARIITHI KIHUTO.....2ND RESPONDENT/OBJECTOR

JUDGMENT

INTRODUCTION

1. Benjamin Kihuto Ngure the deceased to whose estate the proceedings herein relate died intestate on 26th March, 2003 leaving behind the following survivors:

- a. Margaret Mumbi Kihuto (widow)
- b. Peter Ngure Kihuto (son)
- c. Charles Kinyua Kihuto (son)
- d. John Kariuki Kihuto (son)
- e. Joyce Wanjiku Kihuto (daughter married)
- f. Anne Wanjiru Kihuto (daughter married)
- g. Veronicah Wanja Kihuto (daughter married)

2. The deceased left several assets and shares comprising the estate as follows:

Assets

- a. L.R. No. Konyu/Baricho/647
- b. L.R. No. Konyu/Baricho/1745 – 1758
- c. Plot No. 28102/172
- d. Plot No. Konyu/Baricho/700/3 – Mathaiti Market

Shares in

- a. **Kenya Power**
- b. **Athi River Mining**
- c. **National Bank**
- d. **Kenya Commercial Bank**
- e. **Chartered Bank**
- f. **Tourism Promotion Shares Ltd.**
- g. **Kenya Airways**
- h. **Barclays Bank**

Bank Accounts

- i. **Co-operative Bank Account No.[particulars withheld] Karatina**
- j. **Equity Bank Account No. [particulars withheld]**

3. On 7th July, 2003, Margaret Mumbi Kihuto a widow to the deceased (hereinafter referred to as the petitioner) petitioned Karatina Senior Resident Magistrate's court for a grant of letters of administration intestate which was issued on 12th November, 2003.

4. On 25th August, 2003, Peter Ngure Kihuto and John Kariithi Kihuto, both sons to the deceased filed objection to making of a grant under P and A rule 17(1) of the Law of Succession alleging that their mother had failed to disclose some material facts in that she had hidden some documents and that their father had died leaving a Will. The two objectors then proceeded to file a petition by way of answer and cross petition alleging that their father left a written Will although he did not appoint any executor hence claiming that they were the right people to administer the estate. It is however not clear from the court record how the grant of letters of administration intestate was issued on 12th November, 2003 before determination of the said objection.

5. Nevertheless, vide Misc. application No. 55/2004 high court Nairobi, an order transferring this succession file from Karatina Law Courts was made following the trial court's declaration that it had no pecuniary jurisdiction to entertain the matter pursuant to objector's application dated 5th March, 2004.

6. After the file was transferred to Nairobi, the petitioner herein through Chamber Summons dated 11th February, 2006 sought for confirmation of grant supported by an affidavit deposed the same day by the petitioner. Aggrieved by the proposed mode of distribution, John Kariithi Kihuto (hereinafter referred to as the 2nd protestor) filed a protest on 6th October, 2006 claiming that before his father died, he had given him Plot No. 28102/172 Nairobi as a gift and that his mother was biased in the manner in which she had proposed the distribution amongst her children.

7. Equally, Peter Ngure Kihuto (herein referred to as the 1st protestor) filed affidavit of protest on 8th January, 2007 accusing his mother of non-disclosure of material facts including the sizes of the estate and discrimination of some of the children in terms of distribution.

8. Following negotiations between the petitioner and protestor, a consent order was recorded culminating to a partial confirmation of grant made in respect of distribution of all the deceased's assets except three properties listed herein below:

- a. **Konyu/Baricho/647**
- b. Konyu/Baricho/700/3 and
- c. **Plot No. 28102/172 Nairobi**

9. On 28th March, 2017, the 2nd protestor sought to abandon his protest against the distribution of two of the three properties L.R. Konyu/Baricho/647 and Konyu/Baricho/700/3. His application was allowed hence leaving the proposed mode of distribution made by the petitioner unchallenged. Effectively, the 2nd protestor maintained his protest in respect of Plot No. 28102/172/ Nairobi only.

10. It is however worth noting that, the 1st objector Peter Ngure did file an affidavit on 24th March, 2017 stating that he had no objection to the distribution of the estate according to the proposal made in the summons for confirmation of grant dated 12th November, 2003. It therefore follows that he had abandoned his protest in favour of his mother's application for confirmation.

11. In the circumstances, I am left with the protest by the 2nd protestor John Kihuto in respect of Plot No. 28102/172 which he is claiming as the absolute beneficiary on grounds of being a gift given to him by his father during his lifetime (gift intervivos).

The Second Protestor's Case

12. In his affidavit of protest which is not dated but filed in court on 6th October, 2006 and further affidavit sworn on 7th July, 2008 and filed on 8th July, 2008, the second protestor sought to be made a co-administrator of the estate and that his father had expressed his wishes on how he wanted his estate shared out. He further averred that, the petitioner had shown out right discrimination in the manner in which she proposed to distribute the estate and that L.R. 28102/172 was his property.

13. In his testimony, the 2nd protestor told the court that, sometime in 1991, his father (deceased) gave him Plot No. 28102/172 Nairobi as a gift a fact he claims was well within the knowledge of the petitioner and other beneficiaries. That he has all along been staying in that plot and at no time was he asked to pay rent. That after his father's death, the petitioner started harassing him thereby demanding for payment of rent a fact he resisted since he had assumed ownership of the same as his personal property.

14. It is the protestor's contention that, he has been staying in the said premises for over 30 years and that he has improved the two bed roomed and one bed roomed extension premises by constructing two more one bed room extensions hence improving on its value.

15. The protestor sought to rely on the affidavit sworn by his aunt Loise Wanjiru (sister to deceased) filed on 8th July, 2008 in support of his claim. In a nut shell, the protestor entirely reiterated his averments contained in the affidavit in support.

Petitioners'/Respondents' Case

16. According to the petitioner, her husband died intestate leaving no Will and that the property in question should be held by her in trust for the benefit of all her children. She denied the claim by the 2nd protestor that the deceased had given the disputed property as a gift to him.

17. The petitioner further claimed that the 2nd protestor has not done any improvement on the said property and that he has been staying in the said premises forcefully thereby collecting rent from the extensions which rent he has refused to account for. She urged the court to distribute the property as proposed in her application for confirmation and affidavit in support.

SUBMISSIONS

(a) 2nd Protestor's Submissions

18. The firm of Ndambiri and Co. Advocates appearing for the protestors filed their submissions on 20th April, 2017 reiterating the averments of the 2nd protestor's affidavit of protest and further affidavit aforementioned. Counsel submitted that, the protestor is absolutely entitled to the disputed property as the same was given to him as a gift intervivos.

19. Learned counsel referred the court to **Halsbury's Laws of England 4th Edition Volume 20 (1) at Paragraph 67 (as quoted in the estate of the late Gideon Manthi Nzioka (deceased) (2015)eKLR** where it was stated that:

“where gifts 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”.

20. It is the counsel's submission that the protestor having accepted the gift by occupying the same, he is entitled to absolute ownership despite the fact that the gift was incomplete and imperfect considering that it had not been transferred. Mr. Ndambiri maintained that there was no discrimination, bias nor illegality committed in gifting the protestor. Counsel made reference to the case of **Martha Wanjiku Waweru vs Margaret Wambui Waweru as quoted by Mativo in Joseph Wairunga Migwi vs Miknelina Ngina Munga (2016) eKLR**

b. Submissions by Counsel for the Petitioner

21. The firm of Ngugi Mwaniki, appearing for the petitioner filed their submissions on 19th April, 2017 thereby submitting that there was no proof or evidence tendered to establish that the protestor was given the subject property as a gift and that the requisite requirement for a written or oral Will have not been met. Counsel urged the court to be guided by Section 35 of the Law of Succession to distribute the estate.

ANALYSIS AND DETERMINATION

22. I have considered the application for confirmation, affidavit in support, affidavit of protest, further affidavit, testimony by both parties, submissions by counsels and case law quoted thereof.

23. There is no dispute that the deceased herein died intestate leaving Plot No. 28102/172 Nairobi among other assets registered in his name. Both parties have conceded that the purported written Will did not conform with the law governing execution of oral or written Will. The court will therefore disregard the same and proceed to distribution the estate as an intestate estate a fact agreeable to both parties.

24. According to the petitioner (widow), the said property ought to be registered in her name for the benefit of all children while she holds life interest thereon. She claimed that the disputed property was never given to her son (the protestor) as a gift hence a sole beneficiary.

25. The issue for determination is, was Plot No. 28102/172 Nairobi given to the 2nd protestor as a gift during the lifetime of the deceased.

26. The Law of Succession recognizes and indeed provides for two types of gifts. These are; gifts given during the lifetime of the deceased (gift intervivos) and secondly, gifts made in contemplation of death (gifts mortis causa).

27. With regard to gifts in contemplation of death, Section 31 of the Law of Succession provides as follows:-

“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 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 beneficiaries of possession of the property or of the document or other evidence of title thereof 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.

28. The second protestor is not claiming a gift in contemplation of death. Instead, he is claiming a gift intervivos. According to him, the deceased's wishes were made verbally before the petitioner and other beneficiaries. The petitioner being his mother denied that assertion. None of the beneficiaries ever gave evidence in support of that claim. Essentially, there was no written expression giving the said property to the protestor by the deceased nor was any transfer of the gifted property executed. There is no proof of any written or oral Will.

29. For a gift intervivos to be complete, there has to be delivery by the donor and the acceptance by the donee. In this case, there was no delivery during the lifetime of the deceased.

In Halsburys Laws of England dealing with incomplete gifts, it is stated in 4th edition volume 20 (1) at Paragraph 64 as follows:

“.....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”.

30. According to the testimony of the petitioner, she used to stay with her husband and children in the disputed house. That all her children including the protestor were staying with them in the said house and that when her husband died she relocated to her rural home. She went further to state that, her son John got stuck in the said home and later warned her not to step in the said house. She told the court that, the protestor does not stay in the said house and that he never made any improvement, development or any other extensions as claimed.

31. It is trite law that, he who alleges must prove. The onus to prove the alleged facts lies on the protestor squarely. Whoever desires a favourable decision by a court, he must first discharge his legal right, duty or liability, dependent on the existence of facts alleged. **(See Nairobi HCC No. 3953/1989 (OS) Mary Njoki Karuga vs Charles Karuga Koinange) and Banks vs Good Fellow (1870) LR 5QS Pg. 549)**

32. In this case, the protestor has not proved to the satisfaction of the court that, his father intended and actually gave him the property in question. The fact that he stayed with his parents in the said house and thereafter forcefully continued staying in it thus defying and resisting persistent attempts to have him surrender the rent collected does not confer rightful ownership over

the same property. If the father ever intended to give the said property as a gift from 1991, he would have done so by transferring the same.

33. The father could not give the same property in which he was staying to his son. If he ever intended, he would have transferred the same. The allegation that he has been staying in that property for 30 years uninterrupted is not true. This is because, if he was given the property as a gift in the year 1991 and the father died 2003 and the dispute started the same year, that cannot be 30 years. An extension done for convenience of the protestor while staying with the parents cannot be a ground to convert the entire property into his possession to the exclusion of other beneficiaries.

34. However, in an affidavit filed in court on 1st March, 2004 deponed on 27th February, 2004 by the petitioner, she admitted that, during the lifetime of the deceased, the 2nd protestor was allowed by the father to put up two extensions made of two bed seaters where he was staying while working in Nairobi. Can this be taken to be a gift over the entire property? I do not think so. The entire property is free property available for disposal by the deceased if he were alive hence must be distributed in accordance with Section 35 of the Law of Succession which provides as follows:-

“35(1) – subject to the provisions of Section 40, where an intestate has left one surviving spouse and a child or children the surviving spouse shall be entitled to

b. The personal and household effects of the deceased absolutely and;

b. A life interest in the whole residue of that intestate estate.

35. Having held as above, it is my finding that the contested property was not gifted to any of the children and further considering that the petitioner has been given substantial share in all the other properties including shares, this court finds that, the said property is available for distribution to all beneficiaries (children) in equal share in accordance with Section 35 (5) of the Law of Succession with the petitioner being registered as the owner in trust for the said beneficiaries with life interest thereon.

36. Taking into account the developments done by the 2nd protestor, the said additional developments shall be valued by jointly agreed valuer for purposes of refund to the 2nd protestor in default the property be sold and the proceeds be shared amongst the beneficiaries (children) in equal share less the cost of improvements done by the protestor.

37. Accordingly, the protest herein filed by the 2nd protestor fails and the same be and is hereby dismissed and the partial certificate of confirmation of grant issued on 14th May, 2013, amended and or rectified so as to reflect the proposal in the application for confirmation as follows:-

(a) Konyu/Baricho/647 to be registered in the name of Margaret Mumbi Kihuto to hold in trust for herself and on behalf of her children in equal share.

(b) Plot No. Konyu/Baricho/700/3 to be registered in the name of Margaret Mumbi Kihuto to hold in trust for herself and on behalf of her children in equal share.

(c) Plot No. 28102/172 Nairobi to be registered in the name of Margaret Mumbi Kihuto to hold in trust for herself and on behalf of her children subject to a refund of the equivalent to two additional bed seaters done by John Kariithi Kihuto after a joint valuation report.

(d) In the alternative to order (c), Plot No. 28102/172 Nairobi be sold and proceeds less the additional developments done by John Kariithi Kihuto of two additional bed seaters be shared out equally amongst all beneficiaries (children of the deceased).

(e) In taking into account the developments made and valuation done, the 2nd protestor should first account for the rent collected from the main house since the year 2003 when the father died within three months from the date of delivery of this judgment in default the property be registered in the name of the petitioner as per order c above without any refund to the 2nd protestor (John Kariithi Kihuto) or be sold and proceeds shared equally amongst beneficiaries without subtracting any development cost by the 2nd protestor.

(f) This being a family matter, each party shall bear his or her own costs.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2017.

J.N. ONYIEGO (JUDGE)

In the presence of

.....Counsel for the Applicant

..... Counsel for the Respondent