



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**SUCCESSION CAUSE NO. 504 OF 2008**

**IN THE MATTER OF THE ESTATE OF GERALD KIBUE GATUMA alias JERALD KIBUI GATAMA alias JERARD KIBUI GATAMA alias JERARDO KIBUI GATAMA-DECEASED**

**PETER NDIRITU KIBUI.....PETITIONER**

**VERSUS**

**ANN MUGURE KIBUI.....PROTESTOR**

**JUDGEMENT**

**Gerald Kibue Gatuma** alias **Jerald Kibui Gatama** alias **Jerard Kibui Gatama** alias **Jerardo kibui** (herein after referred to as the deceased) died intestate on 25<sup>th</sup> April 2005 at the prime age of 85 years.

On 22<sup>nd</sup> day of October 2008, **Peter Ndiritu Kibui**, a son to the deceased (herein after referred to as the Petitioner) took out citations and served **Caroline Mugure Gichuru** and **Pasqueline Wanjiru Kagotho** who filed an entry of appearance to citation on 28<sup>th</sup> October 2008.

On 31<sup>st</sup> October 2008, the Petitioner herein filed a petitioned for letters of administration intestate to the deceased's estate. The petitioner named the following persons as persons surviving the deceased:-

- i. *Pasqueline Wanjiru Kagotho*-----*Daughter.*
- ii. *Teressa Wakarima Kimondo*-----*Daughter*
- iii. *Mary Wamucii Mungai*-----*Daughter.*
- iv. *Caroline Mugure Guchure*-----*Daughter*
- v. *Susan Wangech Njuka*-----*Daughter*
- vi. *Felista Mumbi Kibui*-----*Daughter*
- vii. *Peter Ndiritu Kibui*-----*Son*

Annexed to the citations referred to above is a letter from the local chief dated 21<sup>st</sup> July 2008 naming the same persons as survivors of the deceased.

There is a consent pursuant to Rule 26 (2) of the Probate an Administration Rules shown to have been signed by all the above beneficiaries except *Pasqueline Wanjiru Kagotho* and *Caroline Mugure Guchure*. The only property listed in the affidavit in support of the petition is **Nyeri/Island Farms/889**.

The petition was gazetted on 9.4.2009 and the grant was issued on 11<sup>th</sup> May 2009 and on 23<sup>rd</sup> March 2010 the petitioner herein applied for confirmation of the said grant and proposed that the above property be distributed as follows:-

- i. *Peter Ndiritu Kibui*-----1/4 acre
- ii. *Peter Kinyua Wanjau*-----1 acre
- iii. *Mary Wamucii Nganga*-----11/4 in trust for

*Pasqueline Wanjiru Kagotho, Ann Mugure Kibui, Teresa Wakarima Kimondo, Susan Wangech Njuki, Felista Mumbi Kibui & Peter Ndiritu Kibui.*

On 14<sup>th</sup> May 2010 **Ann Mugure Kibui** (herein after referred to the protestor) filed an affidavit of protest in which she averred as follows:-

- i. *That she opposes the intended distribution because the land in question is not available for distribution having been transferred inter vivos by the deceased to the protestor.*
- ii. *That the deceased also gave land inter vivos to other beneficiaries of the deceased as follows; (a) Peter Nderitu-- Nyeri/Island Farms/888, (b) Susan Wangechi-- Nyeri/Island Farms/886 and (c) Felista Mumbi Kibui-- Nyeri/Island Farms/887.*

Hearing commenced before me on 16<sup>th</sup> December 2015. The protestor's evidence was the deceased was her father, that they were 11 siblings and 7 of them are alive today. She testified that the deceased died in 2006, and that he owned title number 46. That prior to his death, he divided his land among her brothers *Peter Kibui*, the late *Cosmas Njuki* but the land is under his wife a one *Susan Wangechi*. The deceased also gave her sister *Felistus Mumbi Kibui* and the others. She insisted that the deceased had offered to give the remaining portion to her, that there is a written document to that effect, that they went to the Land Control Board and obtained consent. They also went to a lawyer's office. She insisted that the deceased signed a transfer document before an advocate dated 26<sup>th</sup> January 2005. The protestor insisted that she proceeded to have the valuation done but she did not register the transfer because she was unwell and had no money. Unfortunately, the deceased died before the transfer could be registered. The protestor produced search certificates for *Nyeri/ Highlands/370* in the name of *Susan Wangechi, No. 887* in the name of *Felistas Mumbi* and *No. 888* in the name of *Peter Nderitu*.

The protestor insisted that her brother is not entitled to claim the land in question because the deceased had given it to her and that the deceased distributed his properties as aforesaid before he died. She concluded by stating that there are other siblings but none is claiming her land except her brother.

On cross-examination she admitted that she has a mentally sick bother by the name of *S M* who lives with the petitioner but he was not given any land but denied that the said land was preserved for him.

The petitioner, *Peter Nderitu Kibui* testified that he has proposed how no. 889 should be shared in paragraph 5 because his brother had no identity card and that he is not of sound mind. He explained that he gave *Peter Wanjau* one acre because he paid a hospital bill, and that the said person bought the land from the deceased. He also proposes 1 and a 1/4 acres to be registered in trust for others. He admitted that the titles in the various searched were transferred by their father, but the deceased never transferred land to the protestor. He insisted that the consent produced by the protestor was procured at a time when the deceased was senile, that the protestor would lie that she was taking the deceased to the clinic but would instead take him to a lawyer and the Land Control Board. He also testified that the purchaser *Peter Kinyua* lives on the land. He asked the court to give the land as per his proposal.

On cross-examination he insisted that the deceased reserved land for him and that is the land now in dispute. He also admitted he issued citations to the protestor, though he referred to her as *Caroline*.

Parties filed written submissions. *Mr. Nderi*, Advocate for the protestor submitted that the deceased gifted the protestor *inter vivos*, hence there is no estate to distribute, and that the property had already passed to the protestor. Counsel also questioned why the other siblings have not come forward to claim their share in the land.

*Wagita Theuri* advocate for the petitioner submitted that the deceased never intended to bequeath any land to the protestor, that the court cannot ignore the rights of a mentally sick sibling and that his rights

need to be protected and that none of the other siblings objected to the mode of distribution.

The issues for determination are:-

- i. *Whether the deceased distributed land to his children during his life time and if so, whether Land Parcel Number **Nyeri/Island Farms/889** was given to the protestor.*

The protestors evidence is that the deceased distributed his land among his children before he died and she produced search certificates in support of the said position. This evidence was not contested. She was given title number **Nyeri/Island Farms/889** but she was not able to register the transfer because she was unwell and also she had no money. She produced copies of application for consent of Land Control Forms, a copy of the letter of consent and a duly signed transfer instrument drawn in her favour and duly executed by the deceased in the presence of an advocate. Unfortunately, her father died before she could register the said transfer.

The petitioner does not dispute all were given land by the father. But he denies that the protestor was given the above land. He insists that the land ought to be distributed as per his proposal. None of the other siblings came to court to lay a claim on the above land or even support the petitioners proposal.

Confronted with the sharply opposing versions of evidence by both parties, this court finds the protestors testimony to be more probable because there is evidence that the deceased shared out his land among his children long before he died and that all the parcels were originally one title but the land was subdivided and given out as herein above explained. No reason was offered as to why or how the deceased gave all the children and failed to give the protestor. The failure or inability by the protestors to transfer her title cannot be taken as an excuse to deprive her share. Her explanation that she was sick and had no money to complete the process is in my view a valid reason.

The above position brings into play the provisions of Section **42** of the Law of Succession Act which provides:-

*“42. Where-*

*(a) an intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate.*

*That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child grandchild or house.”*

In my view this Section of the law seeks to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustration. They are to honoured and effected.

**Section 42** provides that during the distribution of the estate, previous benefits or gifts *inter vivos* be taken into consideration when determining the share of each child. My understanding of this provision is that whatever property belonged to the deceased, and which had not yet been transferred to the individual children during the deceased’s lifetime, had to be subject to the provisions of this **Act** and the court would then take cognizance of the gifts given during the deceased’s lifetime. If indeed the deceased had already given the other beneficiaries their share, then that would be taken into account at the time of distribution.

*Halsburys Laws of England* dealing with incomplete gifts, states 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.”*

Three conditions must be met for a gift *inter vivos* to be valid. **(a)** *The first one is that the individual making the transfer actually intends to make a gift; it must be demonstrated that the donor's objective was to make a gift when he or she transferred the property.* There is nothing in the evidence to contradict this position.

**(b)** *The second condition is that the donee accepts the gift made to him or her; the donee must agree to the transfer of property that the donor made in his or her favour.* There is nothing to show that the protestor never accepted the gift *inter vivos*. Acceptance is confirmed by the fact that the parties went to the Land Control Board and obtained the consent and a transfer instrument was drawn and signed in favour of the protestor by the deceased. In general, such acceptance is presumed once the third condition is met, **(c)** that is to say the delivery of the property that is the subject-matter of the transfer by the donor to the donee.

The donor has to divest him or herself of the property; he or she has to place it in the possession of the donee. To me, the obtaining of the Land Control consent and execution of transfer instruments was meant to divest the property from the deceased, an act that satisfies this requirement. This confirmed the deceased's intent to make the gift. It has not been shown that the action was not voluntary. The donor's intent in transferring title to the donee must be immediate, unequivocal and irrevocable, even if the donee can only benefit from it at a later date.

In the instant case, the deceased expressed his intention in a very clear manner. He gave each child a piece of land and transferred. He attended the Land Control Board with the protestor and obtained the consent. He signed the requisite transfer. I find nothing in the petitioners evidence to negate this clear intention. The allegation that he was senile at the time he transferred was not proved nor has it been shown why it can't apply to the other transfers he did.

The explanation by the protestor as to why she was not able to register the transfer prior to the demise of the deceased is in my view reasonable. It may be a failure on her part but it cannot be used as an excuse to deprive her what her father gave to her. I am strengthened in this view by the fact that none of the other siblings came up to support the petitioner in his claim.

The allegation by the petitioner that the deceased sold part of the land to a one **Peter Kinyua Wanjau** is not supported by any tangible evidence. No sale agreement was produced to support the alleged sale. No evidence of payment was tendered. No witness was called to attest to the alleged agreement. There is nothing to show that the deceased sold the said land as alleged.

In my view, the petitioners assertion that he is acting in the interests of a mentally sick brother is merely an excuse to justify the action of distributing the protestors land. It has not been shown that he has the legal capacity to act as the guardian *ad litem* or *next of kin* of the alleged mentally ill brother. This raises doubt as to whether or not the "desire" to secure the land for the alleged "*mentally sick brother*" is in good faith or is a scheme to access the land for other purposes. While it is clear the deceased gave each one of the children land, no evidence was tendered to show that the deceased's wishes were to give the alleged mentally sick person the portion he gave out to the petitioner or why the said mentally sick person was not considered or why he cannot benefit from any of the other siblings land.

I find the protest has merits. I accordingly I allow the protest and order as follows:-

- a. ***That*** the a certificate of confirmation of Grant of letters of Administration to the deceased's estate be issued jointly to **Peter Ndiritu Kibui & Ann Mugure Kibui.**
- b. ***That*** the Protestor **Ann Mugure Kibui** is the lawful beneficiary of all that parcel of land number **Nyeri/Island Farms/889.**
- c. ***That*** the petitioner **Peter Nderitu Kibui** be and is hereby ordered to sign such documents as may be necessary to transfer title number **Nyeri/Island Farms/889** to the protestor herein **Ann Mugure Kibui.**

d. ***That*** in the event the said **Peter Nderitu Kibui** fails or refuses to sign the said transfer documents as herein above ordered **within 14 days from the date of this order**, then the Land Registrar, Nyeri be and is hereby ordered to transfer the said land number **Nyeri/Island Farms/889** to the protestor herein **Ann Mugure Kibui** and issue a title deed for the said number in the name of **Ann Mugure Kibui**.

e. *No orders as to costs.*

Right of appeal 30 days

**Dated at Nyeri this 24<sup>th</sup> day February of 2016**

**John M. Mativo**

**Judge**

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