



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 122 OF 2010

**IN THE MATTER OF THE ESTATE OF THE LATE GEDION MANTHI NZIUKA
(DECEASED)**

GEORGE NZIUKO

JOHN MUKULYA MANTHI.....PROTESTORS

VERSUS

MONICAH MWENGA

AARON MUTHIANI.....RESPONDENTS

RULING

The Summons

The Protestors and Respondents are all administrators of the estate Gideon Manthi Nzyuko (Deceased), by way of a grant of Letters of Administration intestate issued on 21st April 2010. The Administrators filed Summons for Confirmation of Grant dated 16th August 2013, wherein they sought a partial distribution of the deceased's estate in terms of an agreement by the beneficiaries dated 1st September 2010.

The 3rd Administrator, Monicah Mwenga, subsequently filed a Further Affidavit sworn on 3rd November 2014 with the authority of some of the beneficiaries. The said Administrator averred that the agreement by the beneficiaries dated 1st September 2010 was clear on the distribution of the properties of the deceased, by way of sale and equal distribution of the proceeds to all the beneficiaries, save for the property known as Syokimau farm. It was further averred that the said Syokimau farm was during the lifetime of the deceased gifted to Joyce Mathei Nziuko by the deceased, for her unwavering support and material sacrifice to both their parents, and that she has since been in occupation of the said property without interference from either of the parents, deceased or any of the beneficiaries including fencing it off and fighting off invaders and squatters.

It was further stated by the deponent that they were aware that no documents were ever signed between the deceased and Joyce Mathei Nziuko, because the parcel of land was a gift as an appreciation and the same was given in the presence of all the beneficiaries.

The Protest

On 13th November 2014, the 1st Administrator then filed an affidavit in protest to the proposed mode of distribution with the authority of the 2nd Administrator. The said Protestors deponed that there was an agreement by the beneficiaries on distribution of most of the deceased properties in Succession Cause No. 121 and 122 of 2010, and only the following properties were pending distribution:

- i. Syokimau farm
- ii. Kimathi House No. A17
- iii. Kawethei Plot No. 43
- iv. Kangundo Plot No. 141

Further, that in the said agreement it was agreed that any party in occupation of the properties in respect of this cause would be given the first priority to purchase the same, and that the proceeds be distributed equally.

It was contended by the Protestors that the allegations that the Syokimau farm was gifted to his sister Joyce Nziuko were unrealistic, as the said Joyce Nziuko was 11 years when the deceased died in 1974, and he therefore could not have gifted the property to her. Further, that if indeed she was gifted the property forty years ago, it was not logical that it was still registered in the deceased's name.

The Protesters alleged that the sole intention of their co-administrators was to defeat justice and the rights of the other beneficiaries to inherit their father's estate for the reasons, that no dates and time when the purported land was given to the said Joyce were given; no agreement has been exhibited confirming the gift, and that the Protestors and Henry Muli were not in attendance in the purported meeting that gave Joyce the Syokimau farm. The Protestors proposed that the Syokimau Farm be distributed equally to all the beneficiaries who are interested.

Henry Muli Nziuko, one of the beneficiaries, also filed an affidavit on confirmation on 3rd February 2015, wherein he stated that he is a son of the deceased and one of the beneficiaries of the estate of the deceased. He reiterated that by an agreement dated 1st September 2010, the beneficiaries agreed on a mode of distribution to the extent that all the properties of the deceased would be disposed and the proceeds thereof shared equally, with a rider that any beneficiary occupying any properties would be given priority in purchasing the property in question.

Further, that by the same agreement parties agreed that they resolve on the dispute regarding the Syokimau farm, and in default they would allow the court decide on whether or not it forms part of the estate of the deceased and the mode of distribution. However, that the beneficiaries did not agree, since one of the beneficiaries, Joyce Mathei Nziuko, claimed ownership of the property on grounds that the property was gifted to her.

The deponent further stated that he was not aware and was not present during the alleged meeting when the said property was given to Joyce Mathei Nziuko as an alleged appreciation by his late parents. He asked that the property or the proceeds of its sale be shared equally amongst all the beneficiaries, and the other properties be dealt with as stated in the agreement dated 1st September 2010.

The Submissions

The issues raised by the summons for confirmation and affidavit of protest were canvassed by way of written submissions. Mungata & Company Advocates, the Advocates for the 1st and 2nd Administrators (the Protestors) filed submissions dated 11th September 2015. It was argued therein that the alleged gift of the property known as Syokimau Farm amounted to an imperfect gift. In that regard they referred to the decisions in the **Estate of Ngetich (2003) eKLR** and **Registered Trustee Anglican Church of Kenya Mbeere Diocese Vs. David Waweru Njoroge (2007) eKLR** where the court stated that the gift to be complete it must be transferred by the donor.

The Protestors submitted that an imperfect gift cannot be perfected using the law and the title documents

still belonged to the deceased. In this regard they referred to the case in **Vekariya Investments Ltd Vs Kenya Airports Authority & 2 Others, (2014) eKLR** that a title document is conclusive proof of ownership.

It was further submitted that section 31 of the Law of Succession Act provides for gifts in contemplation of death, and that the Syokimau farm was not a donation in this regard. Further, that the conditions for establishing a gift in contemplation of death had not been met. Finally, the Protestors contended that the deceased Gedion Nziuko died on 2/12/1974, and it was not clear when the gift was passed to Joyce Mathei Nziuko by the deceased. Further, that an oral will can only pass a gift if the donor died within 3 months as per section 9 of the Law of Succession Act.

Mulyungi and Mulyungi Associates, the Advocates for the 3rd and 4th Administrators, filed submissions dated 7th May 2015. It was submitted on their part that the beneficiaries of the estate of the deceased are in support of the summons for confirmation of grant dated 6th August 2013, and that the assets of the deceased estate are Syokimau Farm, Kimathi House No. A17, Kawethei Plot No 43 and Kangundo Plot No. 141, as confirmed by the agreement of the beneficiaries dated 1st September 2010. The 3rd and 4th Administrators referred to paragraph 3 of the said agreement with regard to the distribution of the said properties, and submitted that the only disputed property is Syokimau farm which one of the beneficiaries Joyce Mathei Nziuko claims as a gift from her parents.

It was further submitted that out of the nine beneficiaries only the younger ones were disputing that the Syokimau farm was gifted to Joyce Nziuko. It was contended that the fact that Syokimau farm was gifted to Joyce Manthi Nziuko by their mother Rebecca Manthi Nziuko at a family meeting is not disputed.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Petitioner. The first issue to be decided is whether the property known as Syokimau farm forms part of the deceased estate and is available for distribution. If so, the second issue that will then need to be decided is how the said property will be distributed. It has been alleged by the 3rd and 4th Administrators and majority of the beneficiaries that the said property was gifted to Joyce Mathei Nziuko, and is not available for distribution. This allegation is denied by the 1st and 2nd Administrators and one beneficiary.

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 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 **Halsburys Laws of England 4th Edition Volume 20(1)** at paragraph 32 to 51.

In **Halsburys 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.”

Coming to the present application and protest, the Court notes that it is not stated nor was any evidence given by the 3rd Administrator as to when the said gift was made by the deceased to Joyce Mathei Nziuko. The evidence of the said gift was that it was made at a family meeting whose date is not known and which the protestors have disputed. In her submissions it is also submitted that the said gift was made by the beneficiaries mother.

It is therefore my finding that section 31 of the Law of Succession Act is inapplicable as it has not been established that the deceased made the said gift in contemplation of his death. The said gift therefore can only be treated by this Court as a gift *inter vivos*. In addition a person cannot gift that which he or she does not own, and the beneficiaries’ mother could not gift property that belonged to the deceased without any evidence to show that the same had been gifted to her, or that the deceased had instructed her to gift the property known as Syokimau farm.

Lastly, I note that in paragraph 4 of the agreement entered into by the beneficiaries dated 1st September 2010 that was attached to the summons for confirmation, it was provided that any party claiming ownership of any property of the deceased’s estate was to prove such ownership before confirmation. Joyce Mathei Nziuko did not bring any evidence of ownership of, or of the gifting of Syokimau to her by the deceased, or of perfection of the said gift by way of transfer or an instrument or trust in writing.

In the circumstances this Court has no alternative but to find that the property known a Syokimau farm forms part of the estate of the deceased Gideon Manthi Nzyuko. The only outstanding issue is the

distribution of this particular property, as the distribution of the other properties belonging to the estate of the deceased was agreed upon by the beneficiaries in their agreement dated 1st September 2010. The Court in this regard is of the view that Syokimau Farm should be equally distributed among all the beneficiaries, in accordance with the provisions of section 38 of the Law of Succession Act that requires that a deceased's estate shall be divided equally amongst the surviving children. This will also facilitate the gifting of the shares of beneficiaries who are so minded to Joyce Mathei Nziuko.

The grant Letters of Administration intestate issued on 21st April 2010 to George Nziuko, Monicah Mwenga, John Mukulya Manthi and Aaron Muthiani with respect to the estate of the deceased Gideon Manthi Nzyuko is accordingly confirmed on the terms of the following distribution of the deceased's estate:

1. Shares no 281-290 (10 shares) of 5 acres in Syokimau farm Limited to be distributed equally among all the beneficiaries.
2. Plot No 141 Kangundo Shops to be sold and the proceeds to be shared equally among all the beneficiaries. The beneficiaries in occupation of the said property to be given first priority to purchase the property by being given a notice to buy the same at a price agreed by all beneficiaries.
3. Kimathi Estate House No A17 to be sold and the proceeds to be shared equally among all the beneficiaries. The beneficiaries in occupation of the said property to be given first priority to purchase the property by being given a notice to buy the same at a price agreed by all beneficiaries.
4. Kawethei Plot 43 in Kangundo to be sold and the proceeds to be shared equally among all the beneficiaries. The beneficiaries in occupation of the said property to be given first priority to purchase the property by being given a notice to buy the same at a price agreed by all beneficiaries.

There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 25th day of November 2015.

P. NYAMWEYA

JUDGE