



REPUBLIC OF KENYA



**In re Estate of Fanuel Alubiri Aburiri (Deceased) (Succession Appeal
11 of 2022) [2025] KEHC 3103 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3103 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL 11 OF 2022
SC CHIRCHIR, J
MARCH 13, 2025**

IN THE MATTER OF THE ESTATE OF FANUEL ALUBIRI ABURIRI (DECEASED)

BETWEEN

JASON ASWANI ALUBIRI APPELLANT

AND

DAVID ABURIRI ALUBIRI 1ST RESPONDENT

RICHARD ONYANGO ALUBIRI 2ND RESPONDENT

JUDGMENT

1. On 11/12/2018, the Respondents herein filed an application for revocation of grant before the trial court. The grant had been issued to the appellant. The proceedings relate to the Estate of Fanuel Alubiri Aburini alias Fanuel Alubiri (deceased).
2. On 27/12/2018, the parties entered a consent in respect of the Application, the effect of which was to revoke the Grant issued on 1/9/2014 to the appellant and the a new one issued to the appellant and the 1st respondent herein.
3. The 1st Respondent was then directed to file summons for confirmation of grant. I have perused the record but I did not see any fresh application for Confirmation of Grant. What the 1st respondent filed instead was a mode of distribution of the Assets of the estate.
4. In response, the Appellant filed a protest to the proposed mode of distribution. The hearing on the distribution proceeded by way of viva voce evidence.
5. At the close of the hearing, the trial court delivered judgment in which the court ordered that the two asserts of estate namely parcel No. Marama/Shiatsala/1007 (parcel No. 1007) and Marama/Shiatsala/1(Parcel No. 1) be divided equally between the beneficiaries in accordance with the proposal by the Respondent.



Memorandum of Appeal

6. The appellant was aggrieved, and consequently filed this Appeal. He has set out the following grounds:
 1. That the Learned Magistrate erred in fact and in law in distributing land Parcel No. Maram/Shiatsala/1 that does not form part of the deceased's estate.
 2. That the Learned Magistrate erred in fact and in law in adopting a mode of distribution based on the 1st respondent's affidavit while disregarding the Appellant's arguments that he vehemently challenged.
 3. That the Learned Magistrate erred in fact and in law in failing to acknowledge that, the disputed land parcel had been awarded to the Appellant herein by his uncle as a gift.
 4. That the Learned Magistrate erred in fact and in law in disregarding the Appellant's evidence on record and thereby arriving at a misguided judgement.
 5. That the Learned trial Magistrate erred in fact and law in failing to find that, the deceased herein only had one parcel of land that is to be distributed amongst his heirs.
7. The appeal pursued by way of written submissions.

Appellant's submissions

8. The appellant chose to address two issues in his submissions namely;
 1. Whether parcel No. 1 formed part of the deceased's estate.
 2. Who should bear the costs of these proceedings.
9. On the 1st issue, the Appellant submits that parcel No. 1 initially belonged to one Palscal Amasongole Waburini(Palscal), a younger brother to the deceased who pre-deceased the deceased; that Pascal had no children of his own and he is the one who took care of him; that for that reason, pascal gave him parcel No. 1 as a gift. He stated that when Pascal died, the deceased herein commenced succession proceedings in respect of his estate, but the deceased died before the succession process was completed. He further stated that consequently deceased's name was registered against the Title, as an Administrator, in line with the provisions of Section 61 of the *land registration act*. He states that the deceased had not registered the transfer and hence, he was yet to acquire property rights over parcel No. 1 at the time of demise.
10. The Appellant further submits that the gift of parcel No. 1 to him satisfied all the requirements of a gift *Mortis causa* provided for under section 31 (9) of the *law of succession act* (The Act)
11. The Appellant has relied on a number of authorities which I have perused.

Respondent's submissions

12. It is the respondent's submissions that the two land parcels were registered in the name of the deceased and that the appellant did not submit any tangible evidence to demonstrate that the deceased was holding any of the properties in trust for any other person.
13. It is further submitted that there was no tangible evidence that parcel No. 1 was given to the appellant as a gift. It is further submitted if indeed the land had been given to the Applicant as a gift, there was no valid reason given as to why that said parcel had not been transferred to the appellant during the lifetime of his uncle, considering that the Applicant was 35 years old when pascal died. The respondent



argues that in the circumstances, the trial court rightfully distributed the property in accordance to Section 38 of the Act.

The Evidence

14. The 1st witness was the 1st Respondent. He told the court that the deceased owned the 2 parcels of land. He produced a copy of the register (green card) for each parcel , showing that both parcels were registered in the name of the deceased. That he and 3 other brothers occupy parcel No. 1070 while the appellant occupies Parcel No. 1; that parcel No. 1 was 10.4 acres. He stated that parcel No. 1 initially belonged to his late uncle Amasongole; and that the deceased had inherited his land.
15. He further told the court the Appellant was merely taking care of the parcel; he denied that pascal had given the land to the Appellant as a gift.
16. On cross -examination, he stated that the Appellant occupied parcel No. 1 in 1988 upon the demise of his uncle, Pascal; that the 2 parcels of land are in different locations. He admitted that the deceased was registered as an Administrator and that the deceased had procured a Grant in respect of pascal's estate when he was alive.
17. On re-examination, he stated that his uncle did not have a wife or children and hence the deceased inherited his uncle's land in his capacity as the next of kin of pascal.
18. The defence witness was the appellant herein. He told the court that parcel No. 1 belonged to Pascal Aburini and the said pascal had given it to him as a gift; that he began occupying the land prior to Pascal's death; that one of his brothers had ever occupied the said land. He further stated that the deceased undertook succession in respect of his Pascal's land with an intention to transfer the land to him, but the deceased died before completing the process.
19. On cross- examination, he told the court that he was 30 years old when he started living with pascal and was 35 years old at the time that pascal died. Questioned on why he did not file succession proceedings on behalf of his uncle 's estate, he did not answer.
20. He further sated that one Otaga Opuka and the Assistant Chief , were present when his uncle pascal gave the land to him.
21. On re-examination he stated that the registration of his father's name against parcel No. 1 was purely as an Administrator

Analysis and Determination

22. I have considered the Memorandum of Appeal the parties submissions and authorities relied on. This is a first Appeal and the mandate of this court is to review the evidence presented ,evaluate the said evidence and arrive at its own conclusion(Ref: Selle & Anor Vs Association Motor Board co Ltd- (1968) E.A 123).
23. In my view the following issues arise for determination:
 1. Whether parcel No. 1 was given to the Appellant as gift.
 2. Whether the parcel No. 1 forms part of the estate.
 3. How should the deceased property be distributed.



Whether parcel No. 1 was given to the Appellant as a gift.

24. The *Law of Succession Act* recognizes 2 types of gifts – Intervivos of gift Martis causa. Gift Intervivos are gifts made between living persons while gifts mortis causa are gifts made in contemplation of death.
25. The 1st Respondent admitted that parcel No. 1 initially belonged to his uncle Pascal, the deceased's younger brother. Thus, there is no dispute as to who initially owned the land. The Appellant has stated that he used to take care of Pascal; that prior to his demise which took place in 1988, Pascal had given him parcel No.1 as a gift; that the gift was given in the presence of the Area Sub-Chief and Assistant chief was Otaga Opuko.
26. However, the Appellant has failed to tell the court what kind of a gift was it. Indeed he made no reference at all whether the land was given to him in contemplation of death or when pascal was still healthy. He stated that pascal was sick but it was not indicated whether he was contemplating death. Indeed, the appellant did not make any effort to show how long did his uncle lived after giving him the land . In the absence of such evidence it is not possible for the court to determine what kind of gift was pascal contemplating. There was no document at all to back up his claims.
27. Further even though the appellant stated that the gifting was done in the presence of two administrations officers he did not call anyone of them as his witnesses.
28. Finally, if indeed the land had been given to him, and his uncle died when the appellant was 35 years, it beats logic that his own father would apply for administration of Pascal's estate. The appellant should have been the one applying considering that he was of age. Indeed he had no answer when the transfer was put to him.
29. The Appellant has failed to prove that the land was given to him either as a gift intervivos or gift mortis causa. In this regard therefore, I am in agreement with the findings of the trial court.

Whether parcel No. 1 was part of the Deceased's Assets

30. It emerged from the testimony of the appellant, and which testimony was not rebutted that the deceased name was registered against parcel No. 1 as an Administrator of the Pascal's estate. The appellant told the court that the deceased herein died before he could complete the transmission process. A perusal of the green card for this parcel (PEXB 1) showed that the registration was done pursuant to succession case No. 45 of 1989. There was no indication as to whether the Grant to Pascal 's Estate was confirmed to facilitate distribution. Indeed the registration of the grant is the last entry in the Register. Further the appellant's testimony to the effect that the deceased intended to transfer to him was indicative of the fact that the Pascal's property was yet to be distributed , and thus the administration of his estate was yet to be concluded.
31. The imperative question is;- what rights did the deceased have over the property of Pascal's estate at the time? Did he have proprietary interest over Pascal's property? In other words did pascal's property part of the deceased's free property?
32. From the Grant it is evident that the Grant over Pascal's Estate was issued on 23/9/1993 . He died intestate. Section 79 of the Act provides as follows; "The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of the grant and subject to any limitation imposed by the grant all property of the deceased shall vest in him as personal representative".



33. The powers of a personal representative are set out under Section 82 of the Act. The section gives the power to the personal representative to inter alia sell the assets. The limitation however comes in under Section 82 (b) (ii) where the personal representative is barred from selling any immovable property before the confirmation of grant.
34. Addressing the above stated limitation, Justice Musyoka in Re estate of Agwany Wasino (deceased) (2020) KEHC 8362 eKLR stated as follows;
- “.....The grant holder is not absolute owner of the property in question. The property does not belong to him but to the estate, and he holds it as a personal representative of the deceased. He holds the property for the purpose of administration and management only with the ultimate objective of the same being distributed to the person beneficially entitled to it under the law of inheritance depending on whether the deceased died testate or intestate. His power over the property are therefore limited”
35. I am persuaded by the decision of Justice Musyoka. A vesting order, within the context of Section 79 of and 82 of the *law of succession Act* does not confer ownership rights similar to that of a registered owner. To the extent that a personal representative is barred from selling deceased's immovable property prior to confirmation of grant it follows that he cannot transmit the property to himself even if he was the intended beneficiary before the confirmation of grant.
36. In this case it follows that, vesting of pascal's property on the deceased herein did not give him the right of an absolute registered owner. It follows too, that parcel No. 1 was not part of the deceased's free property estate. The *law of succession Act* defines free property as follows; “In relation to a deceased person, means that the property of which that person was legally competent, freely to dispose during his time and in respect of which his interest has not been terminated by his death” (Section 2 of the Act).
37. In view of the foregoing, it is my finding therefore that parcel No. 1 was not a property of the deceased and hence was not available for distribution as part of the deceased's estate.
38. I should digress and mention that if the Administration process of pascal's Estate never went beyond the registration of the vesting order in parcel No. 1 of or on any other immovables, if any, then the Administration of his estate is not complete, and anyone dealing with it, otherwise would be guilty of intermeddling with his estate.

Distribution of the Deceased's Property

39. There is common ground that the deceased was a polygamous Man of 2 wives. The affidavit by the Appellant and 1st Respondent are each silent on their mothers. I would therefore take it that the deceased died leaving only his children behind. The mode of distribution is therefore governed by Section 38 of the Act. The section provides as follows; “Where an intestate has left a surviving child of children, but no spouse, the estate shall be, 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”
40. The 1st Respondent has listed 9 children on paragraph 4 of his Affidavit. He however proposes that the property be distributed between 6 sons. His proposal is silent on what happens to the daughters. The Act is blind to the gender, economic or marital status of deceased's children. It only recognizes children.
41. In any event, a distribution that locks out female children runs afoul of Article 27 of *the constitution* which forbids discrimination on any ground and accords both men and woman the right to equal treatment, including the right to equal opportunities in political economic, cultural and social spheres.



(Article 27 (3). Further there was no evidence presented showing the deceased's daughters had denounced their right to inheritance.

42. Parcel No. 1 was not part of the deceased's property as aforesaid and is therefore excluded for purposes of distribution. The only property remaining for distribution is Marama/shiatsala/1007. A copy of register in this parcel show that it is approximately 3.5, this will therefore, be shared equally between the deceased heirs.

43. I have considered the judgment of the trial court. Whereas I cannot fault the trial court or the principle governing distribution, I notice that the court did not address itself to the question of whether Parcel No. 1 was part of the free property of the deceased.

And failure to address this issue is what led the court to distribute both properties.

44. In the end, the Appeal succeeds and I hereby proceed to make orders as follows;

- a. The confirmation made on 28/7/2022 is hereby set aside.
- b. The whole of the property, being title No. Marama/Shiatsala/1007 shall be distributed to the following heirs in equal portions;
 - i. Richard Onyango Alubiri – 0.38 Acres
 - ii. Aggred Odongo Alubiri – 0.38 Acres
 - iii. Jason Aswani Alubiri – 0.38 Acres
 - iv. Malika Alubiri – 0.38 Acres
 - v. Mary Omuyaka Alubiri – 0.38 Acres
 - vi. David Aburini Alubiri – 0.38 Acres
 - vii. Michael Oluchiri Alubiri – 0.38 Acres
 - viii. Joseph Andalo Alubiri – 0.38 Acres
 - ix. Oundo Alubiri – 0.38 Acres
- c. In the event that any of the heirs stated in (b) above is deceased, the property shall go to their respective Estates.
- d. The Grant issued on 14/2/2019 is hereby confirmed on the foregoing terms.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ISIOLO THIS 13 TH DAY OF MARCH, 2025.

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin Luyundi- Court Assistant.

Mr. Ligare for the Appellant.

