Maeti v Nyaga (Family Appeal E002 of 2024)
[2025] KEHC 4623 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4623 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

FAMILY APPEAL E002 OF 2024

LW GITARI, J

MARCH 7, 2025

BETWEEN

DOROTHY KANYAMU MAETI ..... APPELLANT

AND

SACILIA MUKWANJIRU NYAGA ..... RESPONDENT

JUDGMENT

1 This appeal arises from the proceedings in the Chief Magistrate's Court at Chuka Succession Cause No.322/2016 in the estate of the late Mugwika Mugwongo (deceased) who died intestate on 21/4/1997. A grant of Letters of Administration in the Estate was issued to Sacilia Mukwanjiru Nyaga on 17/1/2017. She proceeded to apply for the summons for confirmation of grant vide a summons dated 11/2/2019. However before the rant was confirmed, the appellant Dorothy Kanyamu Maeti filed an affidavit of protest against the confirmation of grant and the proposed mode of distribution of the estate. The gist of her protest was that the deceased had given her son Boniface Njagi Mugwika the late husband of the appellant, land parcel No. Muthambi/Kandungu/896 which was one of the properties forming the estate of the deceased. The other properties comprising the estate of the deceased are:- Muthambi/Kandungu/574Muthambi/Kandungu/353Muthambi/Kandungu/1388

2 It was the contention of the appellant that her late husband had been in occupation of Land Parcel No.Muthambi/Kandungu/896 in total exclusion of the Petitioner whose interest lies on and is entitled to other land parcels No. Muthambi/Kandungu/354, 514 and 1388. It was the contention of the appellant that the family of the deceased was in agreement that Land Parcel No. Muthambi/ Kandungu/896 be distributed to her during confirmation and not to the two sons of the respondent. The respondent opposed the claim by the appellant and contended that the appellant had no valid claim to the estate of the deceased as her husband had already inherited land parcel No. Muthambi/ Kandungu/1352, 1355 and 1356 for which she produced certificates of official search showing that they are registered in the name of Boniface Njagi Mugwika. The respondent further contended that the appellant was only allowed to cultivate the land parcel No. Muthambi/Kandungu/896 during the life-

time of the deceased but the land was never given to her late husband. It was also the contention of the respondent that the deceased's original land was divided into two equal portions of 5.85 acres which were given to Boniface Njagi (on behalf of his first wife) to share with his siblings and the other portion to Benjamin Kirunja (on behalf of the 2nd wife) to share with his siblings. The petitioner who was the 3d wife was not given anything and her share and that of her children remained in the name of the deceased which were to be distributed to the Petitioner and her children when they became of age. The Petitioner further denied that the family had agreed that land Parcel No.Muthambi/Kiandungu/896 should be distributed to the appellant.

3 The learned magistrate gave directions that the appeal be heard by way of oral evidence in court. Both parties testified and did not call witnesses.

4 The learned magistrate in her Ruling delivered on 31/1/2024 held that the alleged gift inter vivos by the appellant was not complete, was not binding and was imperfect. She dismissed the protest with costs. The appellant was dissatisfied with the ruling and filed this appeal based on the following grounds:-

1. That the learned trial magistrate erred both in law and fact when she found without sufficient evidence that the protestor (now appellant) was not entitled to inherit land parcel No. Muthambi/Kandungu/896.

2. That the learned trial magistrate erred both in law and fact when she found that the Petitioner (now respondent was entitled to inherit the entire deceased's estate comprising land parcels Nos. Muthambi/Kandungu/574, Muthambi/Kandungu/353, Muthambi/Kandungu/1388, & Muthambi/Kandungu/896

3. That the learned trial magistrate erred both in law and fact by disregarding the fct that the deceased Mugwika Mugwongo had during his lifetime gifted land parcel No. Muthambi/ Kandungu/896 to the appellant's late husband Bondifce Njagi Mugwika and the fact that the protestor (now appellant) had been in exclusive occupation and use of land parcel No.Muthambi/Kandungu/896 for over 40 years without any interruption.

4. That the learned trial magistrate erred both in law and fact by finding that the protestor (now appellant) was mandated by law to prove by way of documentary evidence or executed transfer that the deceased had bequeathed land parcel No. Muthambi/Kandungu/896 to the appellant's husband during deceased's lifetime without any legal basis.

5. That the learned trial magistrate grossly erred in law in misapprehending the interpretation of Section 42 *Laws of Succession Act* in respect of intervivos gifts and its interpretation to the facts and evidence adduced in the matter before the trial court.

6. That the learned trial magistrate erred both in law and fact by disinheriting the appellant f her lawfully gifted inheritance from the deceased's estate by the deceased himself before he died on 21/4/1997.

7. That the learned trial magistrate erred both in law and fact by arriving a decision in favour of the respondent against the weight of the evidence adduced.

8. That the learned trial magistrate erred both in law and fact by totally disregarding the evidence adduced by appellant and totally disregarding the written submissions and authorities submitted on her behalf by counsel and without giving sufficient reasons.

5 Based on these grounds, the appellant prays that the appeal be allowed, the Ruling by the learned magistrate be set aside and be substituted with an order that the appellant is entitled to inherit Land Parcel No. Muthambi/Kandungu/896. That she be awarded the costs of the appeal.

6 The respondent opposed the appeal and filed written submissions. She has raised the following issues in her appeal:-

i. Whether trial court erred by disregarding the fact that Boniface Njagi Mugwika (deceased had been in occupation of the land for over forty years without interruption.

ii. Whether the trial court misinterpreted the law by misapplying the provisions of Section 42 of the *Law of Succession Act*.

7 The respondent submits that the appellant did not prove that she had been in occupation of the land for over forty years. The respondent submits that the learned magistrate did not misinterpret the law on gift intervivos and relies on, *Re Estate of the Late Gedion Mauthi Nzioka (Deceased)* (2015) eKLR where the court held that the Gift intervivos must be complete for it to be valid.

8 That the appellant did not produce a signed transfer signifying that the land had been bequeathed to her husband Boniface Njagi Mugwika. She submits that the determination by the trial court was sound and complied with the provisions of law. She prays that the appeal be dismissed with costs.

9 The appellants on his part argued the eight grounds collectively. It is her submissions that the learned magistrate erred by holding that the appellant should have availed documentary proof to show that the deceased completely intended to give his land parcel completely to the appellant's husband. The appellant relies on Section 42 of the *Law of Succession Act* and submits the learned magistrate erred by holding that there should be documentary proof or some other evidence that the deceased intended to completely give the land parcel No. Muthambi/Kandungu/896 to the appellant's husband. That the learned magistrate disregarded the undisputed fact the appellant and her late husband had been allowed by the deceased to actually occupy and utilize land parcel Muthambi/Kandungu/896 exclusively for over forty (40) years without any interruption. That this was sufficient proof of complete gift intervivos under Section 42(a) of the *Law of Succession Act*. That by taking possession the appellant and her late husband demonstrated that the donee had accepted the gift from the deceased. That the learned magistrate disregarded evidence adduced by the appellant, the submissions and authorities without giving sufficient. The appellant prays that the appeal be allowed.

Analysis and Determination:

10 I have considered the appeal, the decision by the learned magistrate and the submissions. The issue which arises for determination is whether the learned magistrate erred by holding that the gift to the protestor's husband was not a complete gift inter-vivos. This is the first appellate court and its duties are well laid down under Section 78 of the *Civil Procedure Act* and the authorities of this court and the Court of Appeal. Section 78 of the *Civil Procedure Act* (Cap21 Laws of Kenya) provides as follows:-

"(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."

11 In *Selle & Another v Associated Motor Boat Company Limited* (1968) EA 123 and in *Peters v Sunday Post Limited* (1958) EA, it was held that a first appellate court is mandated to re-evaluate the evidence before the trial court as well as the Judgment and arrive at its own independent Judgment on whether or not to allow the appeal. This court, as a first appellate court, is thus empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, but bear in mind that it did not have the opportunity of seeing and hearing the witnesses when they testified, then leave room for that.

Section 42 of the *Law of Succession Act* provides:-

Previous benefits to be brought into account:

"Where –

a. An intestate has during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

b. The property has been appointed or awarded to any child or grandchild under the provision of Section 26 or Section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house."

12 The courts have interpreted this section to determine what should be considered as a gift which is settled in the lifetime of a deceased person. The case cited by the protestor in the Lower Court, *In Re-Estate of Gocharia Songoro Guyo (Deceased)* 2020 eKLR Succession Cause No.15/2018. The Judge, Nyakundi J state that-

"The constraints which exist on the exercise of discretionary power as I understand the facts of this case is the norm which fashions equity:

See *Rose Re* (1952) *Pelington & Another v Waine & Other*s (2002) All E.R. In Lubberts Estate Re (2014) ABCA 216 the Court Emphasized that

"An 'intervivos' gift exists if the donor, while alive, intends to transfer unconditionally legal title to property and either transfers possessions of the property to the donee or some other document evidencing an intention to make a gift and the done accepts the gift."

13 The onus was on the applicant's to prove on a balance of probabilities that the gift of the subject parcel of land was intended by the deceased to be transferred to the two of them for their gain and not the rest of the siblings."

14 I have perused the authority and the Judge held such a gist ought to be validated, the Judge state, "notwithstanding the evidence of the applicants and attempt to persuade the court to admit such evidence on gift intervivos, there was no such gift in the legal sense....."

> " It was essential to its validity that the donor had actual and irrevocably divested himself or herself of the property conveyed as a gift. Generally, a gift in form of a parcel of land ought to be effected by way of a written memo or a transfer of declaration of trust in writing showing that the land was gifted to the sons of the deceased 'inter vivos' or 'causa mortis."

15 However, a gift that purely rested on promise, whether written or oral or in an unfulfilled intention, it was incomplete and imperfect." Emphasis mine. This was the holding by the Judge in the case of Re-Estate of Godana Ngoro Guiyo (deceased) cited by the appellant before the trial court. The Judge in the case further stated that-

> " The fact that two of the deceased's sons were residing on the unregistered land, did not make the gift complete."

16 The appellant relied on the contention that she had been given the land by the deceased in his lifetime and had been using the land for over forty years. She did nto prove the one key ingredient of a gift 'intervivos' which is that the land was settled for her husband by way of deed or a transferred signed and concluded by the deceased during his lifetime. In the matter of the Estate Gideon Manthi Nzioka (Deceased) it was held that-

> " For gifts inter vivos, the requirements of the 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 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 nor by a declaration of trust in writing."

17 It is clear from Section 42 of the *Law of Succession Act*, 'Inter vivos' gift should be given or settled by the donor during his lifetime. The fit must be complete for it to be valid. The intention by the Donor to part with the property in favour of the done should be clear and the Donee to give express acceptance. In *Halsbury's Laws of England* 4th Edition Volume 20(1) paragraph 67 it stated as follows:-

> " Where a gift merely rests in a 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 donors subsequent conduct gives the done a right to enforce the promise. A promise made by a 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 if the property comprised in the gift, was necessary to be done by him in order to transfer the property and what it was in his power to do."

18 For a gift to be complete it must be transferred to the donee. Short of that the gift is imperfect and cannot be perfected using the law. The property in this matter remained registered in the name of the deceased after his death. The mere fact that the appellant was in occupation of the estate property did not of itself amount to a gift inter-vivos or give the person in occupation any or exclusive right to entitlement to the particular property. Property owned by the deceased as the absolute proprietor at the time of his death, forms his estate which is available for distribution to his lawful beneficiaries. This

is in line with the definition of the deceased's estate under the *Law of Succession Act* (*supra*) At Section 3 which defines estate as –

> " means the free property of a deceased person."

and 'free property' is defined as, in relation to a deceased person,

> " means the property which that person was legally competent freely to dispose during his lifetime, and in respect of his interest has not been terminated by his death."

A certificate of official search shows that the land in dispute was registered in the name of the deceased at the time of his death. The said land parcel of land Muthambi/Kandungu/896 formed the estate of the deceased at the time of his death. In the absence of a transfer of the property to the appellant's husband at the time of the death of the deceased there is no proof that he had intention to give the land to appellant's husband. There was no evidence that the deceased intended to give or to transfer the land to the appellant's husband as a gift 'inter vivos'.

19 The evidence by the respondent is that the land was meant for her and her children. The family meeting which the appellant refused to participate is as shown in the minutes, though she has denied that meeting dated 19/10/2019, supports the respondents contention that the land in dispute was meant for her and her children. The appellant was not truthful as she could not tell how she got the other three parcels of land and more so, why she did not include the suit property as part of the estate of her husband when she filed the succession in his estate for which he was the administrator and remains the administrator todate. She admitted that she conducted succession for the estate of her husband and got three titles of land he inherited from her father- in-law (deceased herein). This clearly shows that the claim that she was entitled to the land in dispute is an afterthought as she never claimed it when she filed succession in her husband's estate. I find that the finding by the learned magistrate was proper and well founded as provided under Section 42 of the *Law of Succession Act*. She was well guided by the authority cited by the appellant and the respondent which were binding to her under the doctrine of 'Stare decisis.'

Conclusion:

20 For the reasons stated above, I find that the appellant did not prove that the land parcel No. Muthambi/Kandungu/896 had been given to her husband as a gift inter vivos or at all. She had not valid claim to the property as it was not settled for her by the deceased in his lifetime. The appellant succeeded that estate of her husband and acquired what she was legally entitled to.

In the end I find that this appeal is without merits.

Order:

1. The appeal is dismissed
2. Costs of the appeal to the respondent.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 7TH DAY OF MARCH, 2025.

L.W. GITARI

JUDGE