In re Estate of M'Arimi M'Ibari alias M'Remi M'Imbari (Deceased) (Family Appeal E011 of 2024) [2025] KEHC 10651 (KLR) (16 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10651 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

FAMILY APPEAL E011 OF 2024

SM GITHINJI, J

JULY 16, 2025

BETWEEN

RUSALIA TIRINDI M'ARIMI ..... APPELLANT

AND

EDWARD MUTHAURA ..... RESPONDENT

(An appeal from the Judgment of Hon. T. A. Sitati (S.P.M) in Githongo Succession Cause No. E143 of 2022 delivered on 29/5/2024)

JUDGMENT

1. This Appeal arises from the judgment of the learned Senior Principal Magistrate Hon. T.A. Sitati delivered on 29.5.2024 in Githongo Succession Cause No. E143 of 2022.
2. Aggrieved by the said Judgment, the Appellant set forth the following grounds in the Memorandum of appeal dated 21st June, 2024;
    1. The honorable Senior Principal Magistrate erred in law by holding that the respondent was a direct beneficiary of the deceased estate, by upholding his objection, when the respondent was a grandson, and was bound by the deceased decision to his late father.
    2. The learned magistrate further erred, misapprehended and mis-construed the principle of "Gift Intervivos" and arrived at a wrong decision absolutely.
    3. The learned Senior Principal Magistrate erred in law and fact by failing to consider the appellant's evidence on record.
    4. The learned Senior Principal Magistrate relied on evidence that wasn't produced in court and subsequently arrived at a wrong unjustified decision.

5. The learned Senior Principal Magistrate failed to consider the legal principles under the *Law of Succession Act* and arrived at a wrong decision.

6. The learned Senior Principal Magistrate ignored the wishes of the deceased on how he wanted the property distributed hence arriving at a wrong mode of distribution.

7. The learned Senior Principal Magistrate's court decision went against principles of the law of Succession, equity and fairness.

Evidence at Trial

3. Protestor's Witness 1 Edward Muthaura M'arimi told the court that his father was Charles [now deceased] and he was given the right to construct a house in the homestead by his grandfather. He had connected water and electricity on the said portion and he prayed that he be allowed to remain in occupation thereof.

4. Petitioner's Witness 1 William Murithi M'Arimi testified that the deceased herein had distributed his land to his 6 children prior to his demise, where he gave 5 acres of L.R No. Abothuguchi/Upper Kaongo/35 to him and Francis and the remainder of 2[1]/8 acres to Paskwelina and Joyce Naitore, while L.R No. Abothuguchi/Upper Kaongo/169 was to be shared equally by David and Charles [deceased]. He admitted that the Respondent was granted permission by his grandmother to construct a temporary structure on the land before he could relocate to his father's land.

5. Petitioner's Witness 2 Joyce Naitore testified that after subdivision of Abothuguchi/Upper Kaongo/169 in 1993, everyone was satisfied. David demolished his house from the parent's homestead and relocated to occupy his 2¼ share while Charles remained on the homestead because he was unwell. The deceased authorized the Respondent to construct the house in 2008 and during his lifetime, they did not object to the Respondent residing within the homestead.

6. Petitioner's Witness 3 Rusalia Tirindi M'Arimi and the Appellant herein told the court that she resided at Kaongo where she grew crops and the deceased was her husband. One parcel of land was meant for the daughters while the other was for the sons, and after the deceased subdivided the land, the Respondent was supposed to inherit his father's 2¼ acres of Abothuguchi/Upper Kaongo/169. The Respondent constructed a house on the homestead with the permission of his grandfather, but he was expected to move out later.

Submissions

7. The Appellant through the firm of Leonard K. Onderi Advocates filed submissions dated 27/11/2024. Counsel denied that the portion of land in dispute was bequeathed to the Respondent at all by the deceased, as a gift intervivos, and cited Micheni Alphaxard Nyaga & 2 Others v Robert Njue & 2 Others [2021] eKLR. Counsel submitted that the Respondent's father, who was a direct beneficiary of the estate had been bequeathed another land elsewhere and before his demise, he was ready to move there. Counsel submitted that a son or a grandson cannot dictate to a grandfather or a father how to distribute his property, and cited Oganga & another v Orangi & 3 others [Environment & Land Case 466 of 2015] [2023] KEELC 16348 [KLR] [22 March 2023] [Judgment] and In re Estate of the Late Siwanyang Ngilotochi [Deceased] [2021] eKLR. Counsel faulted the trial court for ignoring the evidence led by the Appellant on how the deceased wished his property to be distributed and urged the court to allow the appeal.

8. The Respondent through the firm of Thuranira Atheru & Co. Advocates filed submissions dated 10/2/2025 insisting that the Respondent had proved that he was a grandson to the deceased who

he was maintaining immediately prior to his death to the extent that he gave him a piece of land to construct his home. Counsel lamented that it would be against the wishes of the deceased to relocate the Respondent from the portion of L.R No. Abothuguchi/Upper Kaongo/35, where he constructed his homestead.

Analysis and Determination

9. This being a first appeal, the court is obligated to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions.

10. In Selle & another v Associated Motor Boat Co. Ltd [1968] EA, the court held as follows: "This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

11. I have considered the appeal herein, the trial court's judgment which is the subject of this appeal as well as the submissions by counsel.

12. From the grounds of appeal, the issue for determination is whether the trial court's judgment was grounded on law and supported by the evidence on record.

13. The Appellant, the widow to the deceased herein, was issued with a grant of letters of administration intestate on 24/4/2023. The parties herein are in concession that the Respondent herein was a grandson to the deceased and the son to Charles Mukuyu [now deceased]. There is no much disputation on the distribution of L.R No. ABOTHUGUCHI/UPPER KAONGO/169, which is said to be sloppy and therefore unsuitable for human habitation. The gravamen in this appeal is how L.R No. ABOTHUGUCHI/UPPER KAONGO/35 [hereinafter referred to as the disputed property] was distributed.

14. Whilst the Appellant and her witnesses testified that the disputed property was reserved for the daughters of the deceased, the trial court, during the site visit conducted on 26/3/2024 established that Paskwelina Kagwiria Andrew, Charles Mukuyu [deceased] and the Respondent herein had constructed stone bungalows thereon where they resided. The trial court further observed that; "1. The grand parents' house is made of timber and iron sheets. It was a temporary structure. lt has no electrical connection 2. The house built and occupied by Edward is a 3 bedroomed stone build bungalow. lt has glass window and is connected to electricity. 4. At the back of the stone bungalow is a timber house previously occupied by Charles as per Paskwelina's and Edward's explanations."

15. Petitioner's Witness 1 acknowledged that; "You came home as a young boy. You grew up and got circumcised. You were granted permission to construct a temporary structure pending majority age. Your grandmother who is my mother permitted you to do a temporary house pending your move into your father's portion of 2 ½ acres." His testimony was corroborated by the Appellant who admitted in her testimony that; "Yes, you constructed a house. You did so with permission of your grandfather. Yes, I allowed you to marry while still in the homestead. Yes, you connected electricity. You refused to move out when I asked you."

16. The Appellant maintained that the deceased had distributed his properties to his children during his lifetime, and the Respondent should relocate to the share given to Charles Mukuyu, his deceased father in L.R No. Abothuguchi/Upper Kaongo/169. In vehemently denying those contentions, the Respondent asserted that he was a grandson of the deceased and thus his dependent.

17. Section 29 [b] of the *Law of Succession Act* provides that; "For the purposes of this Part, "dependant" means — [b] such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death."

18. I find that the Respondent was a dependent of the deceased within the meaning of section 29 of the *Law of Succession Act*.

19. Section 42 of the *Law of Succession Act* provides as follows; "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] property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house."

20. In Re Estate of the Late Gedion Manthu Nzioka [deceased] [2015] eKLR, the court [P. Nyamweya J, as she then was] stated as follows: "In Law, gifts are of two types [gift inter-vivos and gifts made in contemplation of death [gifts Mortis Causa]. 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 a way of a declaration of a 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 a trust in writing. Gift's inter- vivos must be complete for the same to be valid."

21. In Re Estate of Godana Songoro Guyo [Deceased] [2020] eKLR, the court [R. Nyakundi J] espoused that; "When someone makes a gift to another with the intention of vesting it wholly on that other person and will not be expected to revert back to himself, then such disposition arising there to ought to be validated. Notwithstanding the evidence by the applicants attempt to persuade this Court to admit such evidence on gift intervivos or gift causa mortis there is no such gift over this disputed title in the legal sense."

22. In Munyole v Munyole [Civil Appeal 21 of 2017] [2022] KECA 373 [KLR] [18 February 2022] [Judgment], the Court of Appeal held that, in order for the court to conclude that a deceased person had made a gift inter vivos to a beneficiary, evidence must be led to this effect.

23. The Respondent's occupation of ¼ of the disputed property is a material fact which cannot be disregarded. While such occupation may not, in itself amount to a gift inter vivos, it nonetheless bears some legal significance. It would be a grave injustice to expect the Respondent to move from his only known abode under the guise of distribution of the estate in accordance with the alleged wishes of the deceased, yet he was admittedly put in such occupation by the deceased himself.

24. In underscoring the import of a beneficiary's residence or settlement by the deceased, the court [Luka Kimaru J, as he then was] in Re Joseph Sigilai Mutai, Maria Chepkemoi Lelei & Tapsabei Chepkemoi Lelei v Philip Kipyegon Lelei [2006] eKLR, stated as follows; "I am satisfied that the petitioners have established on a balance of probabilities that the deceased had settled his wives in their respective portions of land. The 1st wife was settled at Kericho while the three other wives of the deceased were settled at Transmara. The three wives and their children recognized this fact when they subdivided the Transmara parcel of land among themselves to the exclusion of the 1st wife and her children. I therefore hold that none of the children of the three wives who reside at Transmara, including the objector, are entitled to the parcel of land occupied by the 1st wife and her children at Kericho namely Kericho/Kapkatet/1226."

25. For the foregoing reasons, I find that the appeal is in want of merit and it is hereby dismissed.

26. Each party to bear own costs of this appeal.

DATED AND DELIVERED AT MERU THIS 16TH JULY, 2025.

S.M. GITHINJI

JUDGE

Appearances:-

Mr. Atheru for the Respondent.

Mr. Onderi for the Appellant [absent].