In re Estate of Jackson Obulemire Toboso (Deceased) (Succession Appeal E016 of 2022) [2024] KEHC 629 (KLR) (19 January 2024) (Judgment)

Neutral citation: [2024] KEHC 629 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION APPEAL E016 OF 2022

PJO OTIENO, J

JANUARY 19, 2024

IN THE MATTER OF THE ESTATE OF JACKSON OBULEMIRE TOBOSO (DECEASED)

BETWEEN

LIVINGSTONE ORONJE OBULEMIRE ..... APPELLANT

AND

WYCLIFFE TOBOSO OCHOLA ..... RESPONDENT

(Being an appeal against the ruling of Hon. G. Ollimo (SRM) in SPMC Butere Succession Cause No. 29 of 2018)

JUDGMENT

1. This appeal arises from the decision of the trial court on an application for confirmation of grant delivered on the October 13, 2022. According to the affidavit in support of the summons for confirmation of grant dated the May 2, 2022 sworn by the appellant, Jackson Obulemire Toboso ("deceased") died on August 4, 1982 and was survived by three dependants being; Livingstone Oronje Obulemire- Son, Jenipher Atundo-Daughter and Josephat Ochola Obulemire-Son, who died later and was himself survived by Wycliffe Toboso Ochola.

2. The application was resisted by the respondent on the basis that the property of the estate had been bequeathed entirely to his deceased father and that the respondent ought not get any share because he had been given a gift inter-vivos by the deceased. That position was supported by the only daughter of the deceased who repeated that the land was a bequest to the respondent's father because the appellant had been given a distinct parcel by the deceased.

3. The matter proceeded by way of *viva-voce* evidence during which the two sides called two witnesses each.

4. From the evidence, it is common ground between the appellant and the respondent, that the estate of the deceased comprised of a single property known as Marama/Shianda/797 measuring 0.97 Ha. It was also conceded that the appellant had his own parcel being No Marama/Shianda/708.

5. In a ruling of the trial court delivered on October 13, 2022, the trial court noted that the daughter to the deceased had relinquished her interest in the estate of the deceased, the appellant had been given parcel of land known as Marama/Shianda/807 measuring 3 acres by the deceased during his lifetime and thus allocated Marama/Shianda/797 in its entirety to the respondent.

6. It is this ruling that gives rise to this appeal which according to the memorandum of appeal dated October 18, 2022 is premised on the grounds that;

   a. The learned trial magistrate erred in fact and in law by failing to fully analyze and evaluate the evidence presented by the 2nd administrator as required by the law.

   b. The learned trial magistrate erred and/or misdirected herself in law and fact by finding that the appellant had been adequately provided for under section 28 of the *Law of Succession Act*.

   c. The learned trial magistrate erred in fact and in law by failing to appreciate the evidence tendered by the appellant and his witnesses with regard to ownership, occupation and use of the deceased's estate.

   d. That the learned trial magistrate erred and/or misdirected herself in law and fact by finding that LP No Maranda/Shianda/807 constituted the estate of the deceased without sufficient evidence and taking the same into account on distribution of the deceased's estate.

   e. That the learned trial magistrate erred and/or misdirected herself in law and fact by finding that the appellant ought to have claimed an equal share of the estate and not a nominal share as he did in his summons for confirmation.

7. The appellant is thus praying that the ruling of the trial court be set aside with costs.

8. The appeal has been canvassed by way of written submissions. For the appellant, it is his submitted that he was the deceased's son and thus entitled to the estate of the deceased. He claims that the trial court disinherited him by applying its discretion under section 28 of the *Law of Succession Act* which only makes reference to dependants yet he was a beneficiary and not a dependant thus making an erroneous decision. He argues that LP No Marama/Shianda/807 was registered in the name of the appellant on 30/10/1964 and that it was never registered in the name of the deceased and thus did not form part of the deceased's estate and places reliance in the case of in *re Estate of Chepkwony Arap Rotich* (2018) eKLR in that regard in which the court observed as follows: -

> " ...a person cannot gift that which he or she does not own. It appears to me that the deceased in this case, not being the registered owner of the lands at issue, was not in a position to give them as gifts to his children from the 1st house. The correct positions seem to me to be as presented by the petitioners-that the deceased gave out the names of his sons from the 1st house when the government was allocating land to residents of the area. This did not emerge from the evidence but it may well be that the sons from the 2nd house were not yet born.
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> 22. The green cards produced by the protestor bear out this position. The sons of the deceased from the 1st house are the first registered owners of the properties, and there is nothing to indicate that the land ever belonged to the deceased. He was therefore not in a position to make a gift of it *inter vivos*. That being the

case, in my view, and as recognized by the protestor, all the beneficiaries of the deceased are entitled to a share in Kericho/Ngomwet/144."

9. The appellant argues that it then follows that the estate of the deceased ought to have been distributed equally among its survivors though he only lays claim on 0.27Ha of the deceased estate which he says covers his homestead.

10. For the respondent, it is submitted that parcel of land known as Marama/Shianda/807 belonged to the deceased's father and was to go to the deceased but instead the deceased opted that the appellant gets the same as he was of age at the time.

Issues, Analysis and determination

11. The court has studied and analyzed the record of appeal and the submissions filed by the parties and it identifies the issue for determination to be whether the deceased, during his lifetime, gave the appellant that property known as Marama/Shianda/807.

12. Section 28 and 42 of the *Law of Succession Act* requires that in distributing the estate of a deceased person, the court has to consider any property given by a deceased to a child or grandchild during the life of the deceased. It provides thus;

> Section 28;
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> "Circumstances to be taken into account by court in making order
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> In considering whether any order should be made under this Part, and if so what order, the court shall have regard to-
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> .....
>
> (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;
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> Section 42;
>
> "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) property has been appointed or awarded to any child or grandchild under the provisions 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."

13. The respondent argues that Marama/Shianda/807 was their grandfather's property which was transferred to the appellant in the place of the deceased since he had attained the age of majority. This evidence was buttressed by PW2, Jenipher Atundo who further testified that it was the deceased's wishes that the respondent would inherit Marama/Shianda/797.

14. Characteristics of a gift made by a deceased during his or her lifetime was explained by the court in the case of *Dan Ouya Kodwar vs. Samuel Otieno Odwar & another [2016]* eKLR as follows:

> " There are only two types of gifts in law. There are those gifts made between living persons (gifts inter vivos) and those gifts made in contemplation of death (gifts mortis causa). The application of the two gifts were ably and exhaustively dealt with by Her Ladyship Nyamweya, P. in *Re Estate of the Late Gedion Manthi Nzioka (Deceased) (2015)* eKLR when she expressed herself as follows:
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> > 'For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing of by delivery, by way of a declaration of trust by the donor, or by way resulting trusts or the presumption of. Gifts of land must be 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 completed 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 Halsbury's Laws of England 4th Edition Volume 20(1) at paragraph 32 to 51.
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> In *Halsbury Laws of England 4th Edition* Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:
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> > "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 donor's subsequent conduct gives the done 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 comprises 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."
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> 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 beneficiary's mother.
>
> It is therefore my findings that section 31 of the Laws 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 have 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.'"

15. According to the green card for property known as Marama/Shianda/807, the property was previously owned by Oronje Obulemire before being transferred to the appellant. At no point was it owned by the deceased. The deceased was thus incapable of gifting the appellant property which belonged to another.

16. Even though no evidence was tendered to show that the transfer of Marama/Shianda/807 by the grandfather to the appellant was an interest of the deceased, the evidence offered on behalf of the respondent was itself wholly untrue. Him and his witness were adamant that the registration in his favour was out of first registration when it was never. It would be different if the position taken by the respondent was that the land was a gift from the grandfather. I therefore find as the trial court did, that it is more probable that the land was an entitlement of the deceased which he directed to go to his son directly. To that extent, the court considers it an advancement which the law mandates be taken into account in distribution. Taking into account however does not mean that the person so advanced is wholly removed from the table of distribution. It merely means that the property is reckoned with so that fairness in inheritance is maintained.

17. In the context of this matter, the appellant is not seeking equal sharing but only a token share he says to constitute where his home stands. The court considers and takes the view that even the appellant appreciates that what he owns and what is to be shared are all ancestral land and that it would be unjust to seek equal share. He puts the area to be 0.27 ha but no survey report has been exhibited. The absence of such a report at this juncture does not restrain the court from doing what is fair in the circumstances for the area is still ascertainable. It is therefore the finding by the court that, even though the appellant has more land for himself but has settled and established a home on the estate land that justly should go to the respondent in whole, that home needs not be destroyed as a price for fairness. The court thus tinkers with the decision of the trial court to the very limited extent that the appellant gets a share of the estate land extending to the portion on which his homestead stand.

18. Let there be conducted a survey at the cost of the appellant but in the presence of the respondent and area chief to establish what are is occupied by the homestead. That be done within 60 days from today.

19. Accordingly, and for the reasons set out above, I find this appeal merited and direct that the estate of the deceased comprising of property known as Marama/Shianda/797 shall be distributed between the appellant and the respondent in which the appellant getting the area on which his homestead stands while the respondent gets the rest of the land.

20. This matter shall be mentioned on the 27.3.2024 to receive the survey report and for further direction.

21. This being a family matter between brothers, I make no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF JANUARY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for Mr. Wangatia for the Appellant

Ms. Omar for the Respondent

Court Assistant: Polycap