



**In re Estate of Kezia Njahira Kigwe (Deceased) (Family Appeal
10 of 2023) [2024] KEHC 1572 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1572 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL 10 OF 2023
FN MUCHEMI, J
FEBRUARY 15, 2024**

IN THE MATTER OF THE ESTATE OF KEZIA NJAHIRA KIGWE (DECEASED)

PETTY WANJIKU KIGWE.....APPELLANT

VERSUS

GRACE NYAMBURA KIARIE.....1ST RESPONDENT

LUCY WANJIRU KIGWE.....2ND RESPONDENT

CELINE WAMBUI KIGWE.....3RD RESPONDENT

VIOLET WACUKA.....4TH RESPONDENT

VIRGINIA WANJIKU MUNGAI.....5TH RESPONDENT

*(Being an Appeal from the Ruling of Hon. M. W. Wanjala (SRM) delivered
on 2nd September 2021 in Thika CM Succession Cause No. 508 of 2011)*

JUDGMENT

Brief facts

1. This appeal arises from the ruling of Thika CM Succession Cause No 508 of 2011 where the court in hearing a protest by the appellant against summons for confirmation of grant by the 1st respondent found that Kiganjo/Kiamwangi/1196 and Kiganjo/Gachika/1578 are the properties comprising the estate of the deceased. The said land parcels were shared amongst the eleven children of the deceased as per the Magistrate’s ruling delivered on 2nd day of September 2021.
2. Dissatisfied with the court’s decision, the appellant lodged this appeal citing 5 grounds of appeal condensed as follows:-
 - a. The learned trial magistrate erred in law and in fact in finding that the deceased had died intestate;



- b. The learned trial magistrate erred in law and in fact in dismissing the appellant's claim that the deceased had shared out her properties during her lifetime;
 - c. The learned trial magistrate erred in law and in fact in distributing LR No Kiganjo/Gachika/1578 which did not form part of the estate of the deceased.
3. The court directed the parties to put in written submissions for disposal of the appeal.

Appellant's Submissions

4. The appellant submits that she petitioned for letters of administration intestate for the deceased in her capacity as daughter in law. The appellant further submits that she was issued with Grant of letters of administration intestate on 28th November 2011 and certificate of confirmation of grant in January 2013. Pursuant to the certificate of confirmation of grant, the appellant proceeded to have LR No Kiganjo/Kiamwangi/1196 subdivided and the resultant titles issued to some of the beneficiaries being Kiganjo/Kiamwangi/2137, 2138, 2139, 2140 and 2141. Upon application by the 1st respondent on 23/1/2019, the grant was revoked and a new grant was issued on 28/1/2021 to the appellant, 1st, 2nd & 5th respondents as administrators of the estate.
5. The appellant contends that the deceased shared out her property LR No Kiganjo/Kiamwangi/1196 measuring 21.25 hectares into five portions as follows:- Paul Gatheca Kigwe (deceased) – 10.5 acres; David Waiganjo Kigwe – 10.5 acres; John Muritu Kigwe – 10.5 acres; Francis Kariuki Kigwe – 10.5 acres. The daughters of the deceased namely Lucy Wanjiru Kigwe, Jackline Njahira, Grace Nyambura Kiarie, Violet Wachuka, Seline Wambui Kigwe & Virginia Wanjiku Muigai were to share only 10.5 acres being L.R. No Kiganjo/Kiamwangi/2141.
6. The appellant further contends that the deceased approached the firm of Gatome & Associates, licenced surveyors, vide letters dated 15th February 1996 and 26th September 2005 to aid in the sub division of the land. The deceased on 12/8/2003 applied to the Gatundu South Land Control Board for consent to subdivide the said land parcel. Thus, the appellant argues that the deceased made the preliminary steps towards effectuating her wish to give her land Kiganjo/Kiamwangi/1196 to the beneficiaries. As such what remained at the time of her death was the mere registration of the properties in the names of the beneficiaries. Relying on the case of *In Re Estate of Gedion Manthi Nzioka (Deceased)* [2015] eKLR the appellant submits that she adduced evidence that the deceased took steps towards completing the inter vivos gifts by moving the Gatundu South land control board for consent to subdivide the said land amongst the intended beneficiaries.
7. The appellant submits that LR No Kiganjo/Gachika/1578 is not free property and does not form part of the deceased's estate as it was transferred to the deceased's son Christopher Kangethe Kigwe who later disposed of the said property.

The 1st Respondent's Submissions

8. The 1st respondent submits that the estate of the deceased comprised of LR No Kiganjo/Kiamwangi/1196 and Kiganjo/Gachika/1578 and that evidence was produced by the respondents to prove that the said properties belonged to the deceased. Further, the deceased held a life interest in respect of LR No Kiganjo/Gachika/1578 as she bequeathed the said parcel from the estate of Charles Kigwe Gatheca. Thus, the deceased held the said parcel in trust for all the children and their heirs and did not have the mandate to transfer the same to one of her sons to the exclusion of the others. To support her case, the 1st respondent relies on the case of *Mary Wanjiku Kamonde v Daniel Muriithi Kamonde* [2-16] eKLR and submits that the deceased held life interest over LR No Kiganjo/



Gachika/1578 and therefore the property did not pass to her absolutely. As such, the deceased could not acquire the title of the said land as the absolute owner. The position in law was that she held and other heirs during her lifetime.

9. The 1st respondent further submits that the appellant did not adduce any evidence to prove that the deceased had expressed her wishes on how LR No Kiganjo/Kiamwangi/1196 should be divided. The 1st respondent contends that the appellant only produced documents which showed that the deceased wanted to subdivide the said land and further the documents did not indicate who would get what portion of the land. Moreover, the 1st respondent argues that the said alleged wishes if at all they existed would not be fair to all the beneficiaries: The 1st respondent further argued that such wishes gave some of the beneficiaries bigger shares compared to others. 1st respondent concludes that the wishes are discriminatory and ought not to be upheld. He relied on the case of [*In Re Estate of Silas Njuki Weru alias Cyrus Njuki Weru alias Njuki Weru \(Deceased\)*](#) [2018] eKLR.

The 5th Respondent's Submissions

10. The 5th respondent submits that the appellant in his petition applied for grant of letters of administration intestate and described herself as a daughter which was untrue. The appellant further lied in her petition that the deceased was survived by only three beneficiaries. The 5th respondent argues that the entire petition was based on falsehoods, as the appellant is a daughter-in-law of the deceased and not a daughter as she claimed. The Correct position was that the deceased was survived by eleven children and not three as the appellant indicated in her petition.
11. The 5th respondent contends that the appellant's allegations that the deceased died testate are false as at the time of filing the petition, the appellant indicated that the deceased died intestate. The 5th respondent further argues that the appellant did not adduce any evidence in form of a will to show that the estate of the deceased was testate. Consequently, the 5th respondent argues that the deceased died intestate and succession of her estate ought to be distributed in accordance with Part V of the [*Law of Succession Act*](#).
12. The 5th respondent further submits that pursuant to Section 37 of the [*Law of Succession Act*](#), the deceased was only a life tenant of the assets attaching to her estate. Upon her demise, the land could only be vested in the beneficiaries of the deceased herein for whom she held it in trust. The 5th respondent further submits that at the time of her demise, the deceased was the registered owner of LR No Kiganjo/Gachika/1578 and she held the asset as a life tenant and not absolutely. Thus she did not have the capacity to deal with the said parcel of land as alluded to by the appellant.
13. Moreover, the 5th respondent contends that the alleged gift inter vivos was not perfected at the time of death of the deceased and as such no title or property in the assets had passed to any of the envisaged persons.
14. The 5th respondent submits that a cursory look at the alleged subdivision of LR No Kiganjo/Kiamwangi/1196 reveals that the said sub division was done in 2016 under the hand and instructions of the appellant. This was after about eleven (11) years after the death of the deceased.
15. Pursuant to Section 38 of the [*Law of Succession Act*](#), the 5th respondent submits that the trial court did not err in distributing the estate equally amongst the beneficiaries as they were all the children of the deceased and thus the estate ought to have been divided equally amongst them.

Issue for determination

16. The main issue for determination is whether the appeal has merit.



The Law

17. Being a first Appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

“.....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. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

18. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High 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.

19. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

20. The deceased died on 16th December 2005 and left the following survivors:-

- a. Paul Gatheca Kigwe – deceased son represented by the appellant;
- b. Margaret Wanjiku Kigwe – deceased daughter represented by Jackline Njahira (daughter)
- c. John Muritu Kigwe – deceased son represented by Susan Wanjiru Muritu
- d. David Waiganjo Kigwe – son
- e. Virginia Wanjiku Kimani – daughter
- f. Violette Bernadette Wachuka Ngugi –daughter
- g. Francis Kariuki Kigwe – son
- h. Christopher Kangethe Kigwe – son
- i. Celine Wambui Kigwe – daughter
- j. Jacinta Njeri Kiarie – deceased daughter represented by Grace Nyambura Kiarie (daughter)
- k. Lucy Wanjiru Kigwe – daughter



21. The appellant applied for letters of administration intestate on 22nd September 2011, in her capacity as daughter of the deceased and listed the beneficiaries of the estate as herself, David Waiganjo Kigwe and John Muritu Kigwe. The appellant listed the only property as forming the estate of the deceased as LR No Kiganjo/Kiamwangi/1196. The letters of administration intestate were issued to the appellant on 28th November 2011 after which she proceeded to apply for confirmation of grant on 19th November 2012. In her summons, she listed herself, David Waiganjo and John Muritu as the sole beneficiaries. However, in paragraph 6 of her supporting affidavit, she introduced one Francis Kariuki Kigwe and the 5 respondents herein, their sister Jackline Njahira, as two of the five beneficiaries to whom LR No Kiganjo/Kiamwangi/1196 was to be distributed in equal shares. It was the appellant's proposal that the said parcel be divided into five parts of 10.5 acres to each beneficiary save the 5 respondents and their sister Jackline Njahira who were to share the 10.5 acres amongst themselves. The consent to the making of the grant and the distribution of the estate was only signed by two beneficiaries namely David Waiganjo Kigwe and John Muritu Kigwe. The summons for confirmation of grant was allowed and a certificate of confirmation of grant was issued on 19th December 2012.
22. Pursuant to the certificate of confirmation of grant, the appellant proceeded with the transmission and subdivided LR No Kiganjo/Kiamwangi/1196 into LR Nos. Kiganjo/Kiamwangi/2137, 2138, 2139, 2140 and 2141.
23. The 1st respondent filed summons on 1st October 2018 compelling the appellant to avail all the requisite documents to transfer to her a portion of 1.75 acres out of LR No 2140 that she was to share with the other beneficiaries. The appellant responded vide replying affidavit dated 13th November 2018 and advised the 1st respondent to visit Gatome & Associates, the concerned surveyors to facilitate the sub division that she required.
24. On 23rd January 2019, the 1st respondent filed Summons for Revocation of grant whereas the 2nd respondent filed Summons seeking injunctive orders on 22nd February 2019. The second application was overtaken by events as the parties consented to having the Summons for Revocation of grant be disposed of first. The grant was revoked on 19th September 2019 and the court appointed the appellant, 1st, 2nd and 5th respondents as the administrators. The court issued a fresh grant in the four names on 28th January, 2021. The 1st respondent applied for confirmation of grant that was opposed by the appellant. The trial court heard the parties who relied on their affidavits and made a determination that the estate of the deceased would be shared equally between all the beneficiaries of the estate. This judgment of the honourable magistrate gave rise to this appeal.
25. The appellant argues that the deceased shared out her estate during her lifetime and relied on two letters dated 15th February 1996 and 26th September 2005 to support her case. I have perused the court record and noted that initially, the appellant filed a petition for grant of letters of administration intestate on 22nd September 2011 in her capacity as daughter of the deceased. At that time, the appellant did not indicate that the deceased had left any will, either written or oral. The appellant further listed only three beneficiaries as survivors of the deceased and proceeded to confirm the grant by introducing seven other children in the distribution of the estate. The appellant is a daughter in-law of the deceased but she is not a daughter as she had indicated in her petition. It is noted that the appellant failed to include all the eleven children of the deceased who were rightful beneficiaries. It is at the confirmation of grant stage that the appellant introduced seven other beneficiaries. The appellant thus abandoned her earlier position that the deceased was survived by only three beneficiaries. This lack of transparency and accountability as the petitioner portrays casts doubt on the appellant as dishonest person who was out to meet her own selfish ends to the disadvantage of some of the beneficiaries.



26. It is imperative to note that had the deceased died testate, the appellant would have so indicated during the filing of the succession proceedings. In fact, the appellant ought to have filed a testate succession cause and not an intestate one as she did. It can be correctly deduced from these facts that the claim of existence of a will, was not real but an after-thought on part of the appellant. Furthermore, the letters dated 15th February 1996 and 26th September 2005 to Gatome & Associates only indicate the deceased's desires to sub divide her land.
27. I have perused the letters produced in evidence by the appellants and the only thing the deceased stated was that she wanted to subdivide her land. Nowhere in the said letters does the deceased indicate that she wished to give the resultant parcels of land to any particular beneficiary. This position rules out the existence of any wishes of the deceased.
28. Even if the court were to consider that the deceased shared out her estate during her lifetime, the wishes as alleged by the appellant would be unfair, discriminatory to some of the beneficiaries and cannot be upheld in a court of law. The daughters of the deceased. This kind of scenario would have been seriously disadvantaged if such wishes were to be followed. This was portrayed by Makhandia J (as he then was) in *Paul Kirubi Nyingi & another v Francis Wanjobi Nyingi* [2009] eKLR :-
- “Unless it can be demonstrated that those wishes of the deceased as captured in the black book were illegal, unfair, discriminatory and unjust to the beneficiaries or some of them, such wishes ought to be respected in my view. Nothing has been brought to my attention that remotely suggests that the deceased's was biased, unfair and/or discriminatory against any of the beneficiaries in the manner he wanted his estate shared out of his demise. In any event, it would appear that some of the beneficiaries were aware of the contents of the black book during the deceased's lifetime. If they were despatched with the distribution they should have taken it up with him.”
29. It is trite law that for a gift inter vivos to materialize, the same has to be completed to be considered valid. This principle was enunciated in the case of *Re Estate of the late Gedion Manthi Nzioka (Deceased)* (2015) eKLR a gift *inter vivos* may be granted by deed, an instrument in writing or be delivery, by way of declaration of trust by the donor or by way of resulting trust 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. Therefore, it is evident that the appellant has not established that the deceased distributed LR No Kiganjo/Kiamwangi/1196 during her lifetime.
30. The appellant further alleges that the trial magistrate erred in refusing her to adduce viva voce evidence in support of her claim to the effect that the deceased died testate. Upon perusal of the court record it is noted that documentary evidence from the parties affidavits and the documents attached was comprehensive and sufficient to facilitate the court to make a sound and informed judgement. The court was possessed of the discretion to give directions on hearing of the Summons for confirmation and the protest dated 23/03/2021 and 21/07/2021 respectively. If the appellant had any additional evidence that was not contained in her affidavit and documents, she ought to have applied for leave to file. She was represented by an advocate and legal advice was at her disposal. I am of the considered view that the directions given by the court on hearing of the protest/opposition to the Summons for confirmation were proper and that both parties were given the right of fair hearing.
31. The appellant further argues that LR No Kiganjo/Gachika/1578 did not form part of the estate of the deceased as it was not registered in her name. I have perused the court record and noted that the green card indicates that LR No Kiganjo/Gachika/1578 was registered in the name of the deceased.



The certificate of title was issued to her on 23rd September and remained valid even at the demise of the deceased in 1994. On further perusal of the court record, it is noted that the deceased acquired the said land through transmission in her late husband's estate in Nairobi HC. Succession Cause No 256 of 1980 In the Estate of Charles Gathecha Kigwe alias Charles Kigwe Gathecha. The said land parcel was bequeathed to her and her two co-wives each on life interest.

32. The appellant has further argued that the said land Kiganjo/Gachika 1578 was bequeathed to one Christopher Kangethe Kigwe, a son of the deceased who disposed of the said property. The 1st and 5th respondents argue that pursuant to Section 37 of the *Law of Succession Act*, the deceased had no legal capacity to deal with the said land parcel as alleged by the appellant.
33. Section 37 of the *Law of Succession Act* provides:-

A surviving spouse entitled to a life interest under the provisions of Section 35 or 36, with the consent of all co-trustees and all children of full age, or with the consent of the court, may during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance; Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.
34. Evidently, the appellant has not demonstrated by way of evidence that the said land parcel was disposed of or bequeathed to one Christopher Kigwe. Furthermore, the said Christopher Kigwe has not alluded to the said contentions and he has not adduced any evidence to support the case of the appellant. Moreover, Section 37 of the Act is very clear that the deceased upon acquiring life interest could only dispose of the property with the consent of all her co-trustees and her children or with the consent of the court. There was no consent from the deceased's children or an order of the court that was produced by the appellant. As such, it is my considered view that LR No Kiganjo/Gachika/1578 is registered in the name of the deceased and thus forms part of her estate.
35. The Magistrate in her ruling ordered cancellation of the registration of the two assets of the deceased as sub-divided or otherwise distributed under the grant obtained by the appellant in her favour. This was on the basis that the law had not been followed in acquiring ownership or in the transmission of the respective shares to some of the beneficiary. The court in its ruling delivered on 2nd September 2020, took into account all the children of the deceased in the distribution of the estate and treated them equally according to the provisions of Section 38 of the Succession Act.
36. In my considered view, the appellant has failed to establish any of the grounds of appeal. As such, this appeal must fail.
37. In conclusion, the ruling of Hon. M. Wanjala delivered on 2nd September, 2021 is hereby upheld.
38. This appeal is hereby dismissed.
39. Each party will meet their own costs of this appeal.
40. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 15TH DAY OF FEBRUARY 2024.

F. MUCHEMI
JUDGE

