



**In re Estate of Salome Kiria Mburi M’Ringera alias Salome Kariamburi (Deceased)
(Civil Appeal E171 of 2022) [2024] KEHC 1163 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E171 OF 2022**

TW CHERERE, J

FEBRUARY 8, 2024

**IN THE MATTER OF THE ESTATE OF SALOME KIRIA MBURI
M’RINGERA ALIAS SALOME KARIAMBURI (DECEASED)**

BETWEEN

SAMUEL MURIUKI MATE APPELLANT

AND

JULIUS KINOTI M’RINGERA 1ST RESPONDENT

LUCY KABAKA 2ND RESPONDENT

LUCIA GACHERI MATI 3RD RESPONDENT

SARAH NAITO KITHINJI 4TH RESPONDENT

*(Being an appeal from the judgment and decree of Hon. E.W.Ndegwa (SRM)
in Githongo Succession Cause No. 76 of 2019 dated 16th November, 2022)*

JUDGMENT

Background

1. Salome Kiria Mburi M’Ringera Alias Salome Kariamburi (Deceased) died on 20th May, 2017. His estate comprised of LR. Nkuene/Uruku/1755.
2. At the time of filing the cause, Samuel Muriuki Mate (Appellant) presented a chief’s letter dated 05th November, 2018 indicating that deceased was survived by the following:
 1. Julius Kinoto M’Ringera - Son
 2. Lucy Kabaka -Daughter



3. Lusia Gacheri Mati - Daughter
 4. Sarah Naitu Kithinji - Daughter
 5. Samwel Muriuki Mate - Grandson
3. Letters of Administration were issued to the Appellant on 03rd May, 2021. Subsequently, Appellant filed an application dated 24th November, 2021 for confirmation of the grant in which he proposed that deceased's estate be distributed to him wholly.
 4. Upon getting wind of the application for confirmation, Respondents through the 1st Respondent on 11th April, 2022 filed an affidavit of protest on the ground that Appellant was son of the 3rd Respondent and was therefore not a direct beneficiary of the estate. It was proposed that the estate be distributed equally to deceased's children Julius Kinoto M'Ringerera, Lucy Kabaka, Lusia Gacheri Mati and Sarah Naitu Kithinji.
 5. At the hearing interpartes of the application for revocation, Appellant based his claim to deceased's property on the grounds that he took care of the deceased in her old age as a result of which she gifted him her land. In support of the gift, Appellant relied on annexed to his supplementary affidavit filed on 18th February, 2022 application for consent of land control board, consent of land control board and application for transfer of LR. Nkuene/Uruku/1755 which deceased executed but died before the transfer was completed. Appellant additionally stated that he was in occupation of deceased's land to the exclusion of the Respondents and had singlehanded paid deceased's burial expenses.
 6. His evidence was disputed by the 1st, 2nd and 4th Respondents who claimed that they had a right to inherit deceased's estate in their capacity as her children.
 7. By a judgment dated 16th November, 2022, the learned trial magistrate agreed with the Respondents, and directed that the estate be distributed equally to deceased's children Julius Kinoto M'Ringerera, Lucy Kabaka, Lusia Gacheri Mati and Sarah Naitu Kithinji.

Appeal

8. Aggrieved by the finding of the trial court, Appellant filed this appeal on the following grounds;
 - a. That the Learned trial Magistrate erred in law in framing four issues that automatically shut out the appellant's case which was that of a dependant and not a beneficiary.
 - b. That had the learned trial Magistrate framed the issues correctly and comprehensively, she would have found out that from the evidence on record, the appellant was solely entitled to inherit land parcel no. NKUENE/URUKU/1755
 - c. That the Learned trial Magistrate erred in both law and fact in mechanically employing the provisions of section 38 of the *Law of Succession Act*, while casually referring to section 42 (a) of the same Act and in effect giving a wide of the bearth to the wishes of the deceased thereby divesting the appellant of his bequest.
 - d. That the Learned trial Magistrate gave scanty, skewed and biased consideration of the appellant case
 - e. That the judgement/decre is otherwise against the weight of evidence.
9. The appeal was argued by way of written submission which both parties dutifully filed.



10. The gist of the Appellant's appeal was that the learned magistrate erred in holding that LR. Nkuene/Uruku/1755 was not a gift inter vivos and that Appellant was not a beneficiary of Deceased's estate. Appellant urged the court to find that he had taken care of the Deceased single handedly after she was neglected by the Respondents who live on their father's land and was a beneficiary of her estate. It was further Appellant's case that by executing transfer documents in his favour, the Deceased's had indicated her wish to transfer her estate to him and her wishes ought to be respected. In support thereof, Appellant relied on numerous authorities among them *In re Estate of Chesimbili Sindani (Deceased)* [2021] eKLR and *re Estate of Phylis Muthoni M'Inoti (Deceased)* (2019) eKLR.
11. It was submitted for the Respondents that Appellant who is a grandchild of the deceased can only inherit deceased's estate through his mother who is alive. Reliance was placed on *In re Estate of John Musambayi Katumanga (Deceased)* [2019] eKLR and *In re Estate of M'Kaumba M'Mwirichia M'Kangunyuru (Deceased)* [2021] eKLR.

Analysis and determination

12. As a first appellate court, I am alive to the jurisdiction of this Court when dealing with an appeal is to reconsider afresh all the evidence that was presented before the trial court and analyse it in order to arrive at an independent conclusion thereon, while bearing in mind that I did not have the benefit of seeing and hearing the witnesses as they testified (See *Peters v Sunday Post Limited* [1958] EA 424, *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123, *Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270 and *Okeno v R* (1972) E.A. 32).
13. With the above principles in mind, I will now proceed to deal with the present appeal. The 1st, 2nd and 4th Respondents in their evidence conceded that they neither lived with the deceased nor on the suit land. The Appellant's evidence that he took care of his deceased grandmother singlehandedly and even buried him with the assistance of the neighbours and the church was therefore not controverted. The Respondents' arguments that Appellant took care of the deceased secretly therefore lacks merit.
14. The foregoing notwithstanding, I find that the trial court correctly arrived at the right decision that the taking care of the deceased and burying her does not in itself entitle the Appellant to deceased's estate.
15. It is trite that Section 38 of the *Law of Succession Act* provides that where an intestate as the deceased in this case has left a surviving child or children but no spouse, the net intestate estate shall, 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.
16. It is also trite as was held *In re Estate of John Musambayi Katumanga (Deceased)* (supra) and *In re Estate of M'Kaumba M'Mwirichia M'Kangunyuru (Deceased)* (supra) that grandchildren are entitled to inherit their grandparents' estate through their parents.
17. The evidence on record in this matter however presents a different scenario in that whereas the Appellant acknowledges that Respondents are Deceased's children entitled to his estate, his case is that the Deceased had set in motion the process of bequeathing the estate to him as a gift and the gift would have passed were it not for her death.
18. In support of his case, Appellant annexed to his supplementary affidavit filed on 18th February, 2022 an application for consent of land control board, consent of land control board and application for transfer of LR. NKUENE/URUKU/1755 which he stated were duly executed by the deceased and himself but deceased unfortunately died before the transfer was completed.



19. I have considered the evidence tendered by the Appellant and Respondents and their witnesses and I have noticed that the question of whether or not the transfer documents in issue were duly executed by the deceased did not arise. In fact, no question concerning the said documents was put to the Appellant in cross-examination.
20. In dismissing the transfer documents, the trial court relied on the evidence by PW4 who stated that deceased was illiterate. The witness did not however state that deceased did not execute the transfer documents and the trial magistrate's finding that deceased did not execute the transfer documents was therefore against the weight of evidence.
21. The rule of the thumb in an adversarial system which is emphasized under the *evidence Act* Cap 80 Laws of Kenya Section 107, 108 & 109 is that he who alleges must prove. The adversarial system assumes that the best way to get to the truth of a matter is through a competitive process to determine the facts and application of the law accurately.
22. The Respondents had the responsibility of demonstrating before the trial court that the transfer documents were not executed by the deceased which they failed to do.
23. By deciding on a matter that was not disputed by the witnesses, the learned trial magistrate misdirected herself in law and in fact and entered into the arena of the suit and made up a case for the Respondents thereby defying the fundamental principle that ours is an adversarial system where courts decide only those matters that have been properly laid out in evidence.
24. Having so found, I have considered the import of the transfer documents. In re Estate of Phylis Muthoni M'Inoti (Deceased) (supra), the court held that a person claiming that the deceased had made a gift inter vivos to them, but the titles were not deduced during his lifetime should show such conduct of the donor which would give the intended donee the right to enforce the gift. In that case, the court found no evidence of gifts inter vivos for there were no consents to transfer the property, duly signed by the deceased, or any evidence that the subdivision of the land by the deceased was intended to benefit the persons claiming.
25. In the present case, not only had deceased put the Appellant in possession of the subject property but also effected preliminary steps towards effectuating her promise as there is evidence that she had applied for consent to transfer the property from her name to that of the Appellant, the consent had been granted, and she had signed a transfer form to facilitate registration of the property in the name of the Appellant.
26. All what remained after the death of the deceased was mere registration of the property in the name of the Appellant and the evidence on record supports the presumption that for all intents and purposes, the deceased intended to make the gift inter vivos to the Appellant. (See In re Estate of Chesimbili Sindani (Deceased)(supra).
27. In arriving at this decision, I have considered the evidence by the Appellant that was conceded by the Respondents that they have never lived or utilized the deceased's estate in LR. Nkuene/Uruku/1755 as they live elsewhere on their father's land.
28. From the foregoing analysis, I find that this appeal is meritorious and it is hereby allowed in the following terms:
 1. The protest dated 17th March, 2022, to the summons for confirmation of grant dated 24th November, 2021 is dismissed



2. The declaration that LR. Nkuene/Uruku/1755 was not a gift inter vivos made by the deceased to the Appellant is set aside
3. The order revoking the temporary grant issued to the Petitioner on 26th April, 2021 and issuing the same to the 1st Respondent is similarly set aside
4. Appellant shall proceed to fix the summons for confirmation of grant dated 24th November, 2021 for hearing
5. 1st, 2nd and 4th Respondents shall jointly and severally bear the costs of this appeal

DATED IN MERU THIS 08th DAY OF February 2024

WAMAE.T.W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

For Appellant - Ms. Kerubo for Kiautha Arithi & Co. Advocates For Respondents - N/A for Kithinji Kirigiah & Co. Advocates

