



Kabui v Njenga (Civil Appeal 288 of 2022) [2024] KEHC 8446 (KLR) (10 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 288 OF 2022**

AM MUTETI, J

JULY 10, 2024

BETWEEN

MARY WAMBUI KABUI APPELLANT

AND

PETER NJOROGE NJENGA RESPONDENT

(Being an appeal against the ruling of the principal magistrate's court at Gatundu by the honourable magistrate H.M NG'ANG'A dated the 26th January 2022 in succession cause No. 38 of 2010 dismissing the appellant's application dated 5th January 2022 and allowing respondent's application dated 14th February 2020)

JUDGMENT

1. The record of appeal in this matter was filed on 11th May 2023. The appellant raises 21 grounds of appeal. A look at the grounds reveals that the appellants case revolves around two main legal issues:-
 1. Whether the learned honourable magistrate properly directed herself in arriving at the decision that the appellant was the beneficiary of a gift from her deceased father during his lifetime. The gift being land title number Kiganjo/ Gachika/2703.
 2. Whether the decision by the learned honourable magistrate was supported by evidence.
 3. Whether the said gift could pass the test of a gift inter vivos.
2. The appellant contents that she was not a beneficiary of any gift whatsoever and that the land that the respondent christened as having been given to her by the deceased was actually property her husband bought from their deceased father.
3. The appellant through counsel filed submissions which are dated 6th July 2023. I have closely studied the same and noted that the crux of the appellant's argument is that land Title No. Kiganjo/ Gathika/2703 was not part of the estate of the deceased and it was equally not a gift inter vivos granted to the appellant during her deceased father's life time.



4. The respondents on the other hand have maintained that the appellant is driven by greed and is simply a dissatisfied litigant out to sustain the life of succession cause for the longest by filing numerous unmeritorious applications. The respondent strongly urges this court to uphold the principle there must be an end to litigation and places reliance on the locus classicus case of *Lakhamshi & another Limited -vs- Raja & Sons* [1966] EA313.
5. Counsel for the respondent basically urges the doctrine of finality. The duty of this court as a first appellate court is well settled in the case of *Selle & another -vs- Associated motor boat Company limited* [1968] EA123. The court is bound to re-evaluate the evidence on record and draw its own conclusions remembering that it did not see nor hear the witnesses.
6. In the record of appeal, the appellant is shown to have testified as PW1/2nd Administrator (Applicant) at page 106 of the record. In her testimony, she admitted that land parcel number 1157 belonged to their father and it measured 6 acres. She testified further that the father was a trustee of his mother's 2 acres, his brother 2 and himself 2 acres. It is the land that the appellant informed the trial court was divided into 2 equal shares by her late father:-
 1. Kiganjo/Githika/2703
 2. Kiganjo/Githika/2704
7. The appellant went further to inform the trial court that her late father sold land parcel number Kiganjo/Githika/2703 to her husband.
8. The appellant however admitted she had no documents to prove that there was indeed a sale that took place between her father and her husband. She insisted that the father sold to her husband the portion he held in trust for her mother and his brother. It is this evidence that the appellant is now strongly urging this court to find that the learned honourable magistrate disregarded and wrongly arrived at the finding that the parcel of land was a gift from her deceased father.
9. In order to appreciate the matter further, I have evaluated the evidence of one PETER NJOROGE NJENGA a co-administrator in this matter. He is the appellant's brother. In his evidence NJOROGE states (see page 121 of the record of appeal) that a parcel of land measuring 3 acres was hived off by his late father from parcel No. Kiganjo/Githika/1157 and the parcel went to JOHN KABURE MBUGUA husband to the appellant. According to him the land was a gift to Mary Wambui from their father. He went further to state that the father gifted her before he could die to avoid problems upon his demise.
10. The two administrators therefore gave evidence that left no doubt property moved from the deceased father of the two to the appellant's husband. The appellant having alleged that the property was sold to them by their father, it was upon her to prove that indeed she bought the land together with the husband. She was unable to do so.
11. The available evidence does not contain any evidence of Mary Wambui or her husband giving any form of consideration to the father for the parcel of land. I am inclined to believe the testimony of Peter Njoroge Njenga brother to the appellant that indeed the appellant received a gift from their father and the gift was registered in the name of her husband.
12. She admits in her evidence when the father, her brother and her husband went to the land control board she was not there. I have no doubt in the truth of the evidence tendered by Peter Njoroge Njenga and truly this is a case of one child of the deceased wanting to reap the maximum from her late father's properties without caring about the rest of the family. The courts must intervene in appropriate cases such as this to stem insatiable desire for property. My review of this file and all the documents



filed therein leaves me convinced that had the appellant and the husband did not buy the property in question, she certainly would have had some sort of evidence to support the claim.

13. She strikes me as a litigant who would not leave out any little aspect of her case in order to assert her position. The gift in my view meets the test set out in the *Re estate of the late Gideon Mantbi Nzioka (deceased)* [2015]eKLR.
14. The gift was delivered to the appellant and her husband during the lifetime of her father.
15. The transfer of land was registered in her husband's name. The law does not bar the gifting of spouses such as the appellant and her husband. The deceased must have been a foresighted man and probably as Peter Njoroge Njenga stated in his evidence, he wanted to avoid trouble in his family over property long after demise. Sadly, the deceased's wish appears not to have made much sense to some of his children and the family is now before this court in search of justice on a rather straightforward matter that the family could have easily resolved.
16. The fact that the land in issue was not registered in the name of the appellant cannot be a basis to hold that she did not receive the gift from her deceased father. The appellant ought to have discharged the burden of proof to show that the land in question was purchased by her jointly with the husband. Having failed to do so, this court finds she received the land together with her husband as a gift inter vivos.
17. It is therefore my finding that the decision by the learned honourable magistrate was merited and should be allowed to stand. The appeal is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF JULY 2024.

HON. A.M MUTETI

JUDGE

In the presence of

Kiptoo: Court Assistant

No appearance for the Respondent

Miss Kagucia for the Appellant

