



REPUBLIC OF KENYA



KENYA LAW
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**Njeru & 9 others v Wamururia (Civil Appeal E020 of 2023)
[2024] KEHC 8837 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8837 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E020 OF 2023**

LM NJUGUNA, J

JULY 18, 2024

IN THE MATTER OF THE ESTATE OF NJERU KARANGA (DECEASED)

BETWEEN

**EPHANTUS NJOGU NJERU 1ST APPELLANT
BONIFACE MBOGO MATUNDA 2ND APPELLANT
GEORGE KARIUKI DISHON 3RD APPELLANT
BEN LEAKEY NJERU 4TH APPELLANT
BEATRICE WANDIRI MUCHIRA 5TH APPELLANT
ANN VIOLET NJERU 6TH APPELLANT
LUCY WAMBETI NJERU 7TH APPELLANT
MARY WANJIRU NJERU 8TH APPELLANT
PETER MUCHANGI NJERU 9TH APPELLANT
DENNIS MUTURI NJERU 10TH APPELLANT**

AND

JANE RWAMBA WAMURURIA RESPONDENT

(Being an appeal arising from the decision of Hon. J. Otieno SRM in Embu Chief Magistrate's Court Succession Cause No. 307 of 2018 delivered on 17th May 2023)



JUDGMENT

1. The appellants have filed a memorandum of appeal dated 30th May 2023 through which they seek for an order that the appeal be allowed and the decision by the trial court be set aside. The appeal is premised on grounds that the learned trial magistrate erred in law and fact:
 1. When she made a finding that the deceased had not distributed land parcel number Ngandori/Kirigi/3268 during his lifetime;
 2. By failing to appreciate that the circumstances and facts obtaining with respect to the subject parcel herein were such as to fall within the exception to the general rule that gifts *inter vivos* must be perfected;
 3. When she failed to consider the totality of the appellants' averments and evidence; and
 4. By failing to appreciate that Peter Muchangi Njeru had been adopted by the deceased and thus a beneficiary of the deceased's estate.

2. The 1st appellant and the respondent petitioned for letters of administration in the estate of the deceased. The petition was accompanied by the relevant documents including a supporting affidavit naming 13 beneficiaries to the estate of the deceased which comprised of parcel number Ngandori/Kirigi/3268. A grant of letters of administration was issued to the petitioners and they proceeded to file summons for confirmation of the grant. In the affidavit in support of the summons for confirmation of grant, the petitioners proposed that the property be distributed amongst the beneficiaries as follows:
 1. Mary Wanjiru Njeru 0.6246Ha
 2. Jane Rwamba Wamururia 0.6246Ha
 3. George Kariuki Dishon 0.6246Ha
 4. Lucy Wambeti Njeru 0.6246Ha
 5. Beatrice Wandiri Ileri
 6. Dennis Mugendi Muchira

 7. Morris Murimi Muchira 0.6246Ha
 8. Michael Kithinji Muchira
 9. Brian Mutugi Muchira
 10. Peninah M. Njeru 0.6246Ha
 11. Beatrice Njeru Karanga 0.6246Ha
 12. Ephantus Njogu Njeru 0.6246Ha



13. Boniface Mbogo Matunda 0.6246Ha
 14. Grace Njeri Njeru 0.6246Ha
 15. Ann Violet Wanyaga Njeru 0.6246Ha
 16. Ben Leakey Muriithi 0.6246Ha
 17. Molly Bridget Njue 0.6246Ha
3. The 2nd, 3rd, 4th, 6th, 7th, 8th, 9th and 10th appellants herein filed a protest to the summons for confirmation stating that the deceased had 2 wives namely Cecilia Muthanje Njeru and Eunice Marigu Njeru (both deceased). That the first wife had no children while the second wife had 13 children. That the deceased had adopted 2 grandchildren who are his dependants namely the 9th and 10th appellants herein. That the deceased subdivided the 19.4Ha land into 9 portions: 6 portions each measuring 2.8Ha, 2 portions measuring 2.0Ha and one portion measuring 0.10Ha. That after the said subdivision, he gave the portions to the beneficiaries who took possession and developed the same. After the death of the deceased, the petitioners were appointed as administrators but the 1st petitioner failed to involve the protestors and the rest of the beneficiaries. That the 1st petitioner's proposed mode of distribution of the estate alters the mode of distribution proposed by the deceased and it will displace the beneficiaries who are already occupying the land.
 4. The 1st appellant opposed the protest through a replying affidavit in which he stated that the protest is bad in law and that the petitioners should lay claim on the land owned by their spouses. At the hearing of the protest, PW1 was the 1st appellant who relied on the averments made in his replying affidavit. On cross-examination, he stated that the deceased left an oral will indicating that his sons should get equal shares of the land while the 8 daughters would be given 3 acres of the land to hold jointly.
 5. PW2 was the 2nd appellant who stated that the deceased subdivided his land and gave it to his children who occupied it before he died. That he built his matrimonial home on the land he received from his father. That some of his siblings are married and they should benefit from their own matrimonial properties. He stated that the deceased did not leave a will. PW3 was the 6th appellant who stated that some of her siblings already built matrimonial homes on the land they received from the deceased and that the proposed mode of distribution disregards the wishes of the deceased. She stated that there was a long delay in petitioning for letters of administration, an indication of the petitioners' ill intentions.
 6. PW4 was Margery Rwamba Njeru who stated that the deceased was her father-in-law's friend. She stated that she knew the deceased who donated a portion of land to ACK St. Barnabas Nthambo Church. That the deceased owned a large parcel of land currently with homes and other developments and the various portions of land are marked by beacons. That she sometimes attend family functions at the homes of the children of the deceased who have settled on the said land. That some of the children of the deceased settled on the land and built their homes before the death of the deceased. On cross-examination, she stated that she does not know whether the deceased left a written or an oral will.
 7. PW5 was John Mwangi Kiminda who stated that the deceased's land has several homesteads on it and some of them were developed before his death. That the homesteads belong to the children of the deceased, save for the ones who are married or who are away in school. That after subdivision, the protestors did not raise the issues raised in the protest but they waited until the death of the deceased. He stated that it was absurd that the issues are being raised 17 years after the death of the deceased. On cross-examination, he stated that he lives on the portion given to him by his father although the same was not transferred to him before the death of the deceased. He said that he did not know whether his father left a will.



8. PW6, Jard Giture Ndwiga stated that it is not uncommon for the sons to build houses on their fathers' land. He also did not know whether the deceased left a will and whether the children of the deceased had titles for the properties they were occupying. PW7, Bedan Njoka, stated that he knew the deceased and his children. That the deceased subdivided his land and beacons were placed on the subdivided land. That he has visited the homes of the children of the deceased who have built their homes on the subdivided portions. That the deceased left a big portion of land for his children who were not present when he was distributing the land. On cross-examination, he stated that he did not know whether the deceased left a will.
9. PW8 was Lucy Wambeti Njeru who stated that the deceased, before his death, engaged the services of a surveyor to help in subdividing the land and beacons were placed. That once the land was subdivided, he distributed the land amongst his children who were present at the time and a large portion of land was left for the children who were not immediately present. That the children of the deceased have co-existed peacefully since that time. That the family filed succession proceedings 17 years after the death of the deceased because none of them was interested in doing so earlier. That the petitioners have recently faced matrimonial challenges and they are seeking to have the estate of the deceased distributed equally even though this interest did not exist before. On cross-examination, she stated that the mother of the 2 grandsons is the one who was given the land occupied by them.
10. DW1 was the respondent, who stated that the 9th and 10th appellants are grandsons of the deceased but they are not his dependants since their parents are alive. That it is not sensible to say that the deceased adopted the 9th and 10th appellants yet there were other grandchildren as well. It was her position that the estate of the deceased should be distributed equally amongst all the children of the deceased but her brothers are not willing to do so. Both DW2 Beatrice Njeri Karanga, DW3, Grace Njeri Njeru and DW4, Beatrice Njeru stated that they support the testimony of DW1. Upon cross-examination, DW3 stated that the 2nd and 3rd appellants constructed on the land when the deceased was still alive but the 9th and 10th appellants who are the grandchildren of the deceased built after his death.
11. The trial magistrate relied on the cases of *Re Estate of Gedion Manthi Nzioka (deceased)* (2015) eKLR, *Re Estate of Phyllis Muthoni M'Inoti (deceased)* (2018) eKLR and *Re Estate of Godana Songoro Guyo (deceased)* (2020) eKLR and found that the deceased did not give the land as gifts *inter vivos*. The court further relied on sections 38 and 41 of the *Law of Succession Act* and Article 27 of the *Constitution of Kenya* 2010 and proceeded to dismiss the protest and distributed the estate of the deceased according to the mode proposed in the affidavit in support of the summons for confirmation of grant.
12. The court directed the parties in this appeal to file their written submissions but only the respondent complied.
13. In her written submissions, the respondent has contested the process of subdivision of the suit land by the deceased and she states that the subdivision plans do not include her portion. That whatever the case, even if the deceased bequeathed the land to the beneficiaries before he died, the gifts were not perfected as the case should be and they cannot be held as gifts *inter vivos*. She applauded the trial court on its application of the provisions of the *Law of Succession Act*. It was her argument that the grandchildren had no direct share in the estate of the deceased since the property was not passed as a gift *inter vivos*. She suggested that the court upholds the distribution of the estate as held by the trial court since it was fair. She urged the court to dismiss the appeal.
14. The issues for determination are as follows:
 - a. Whether the trial court erred in finding that the deceased did not give his property as gifts *inter vivos*; and



- b. Whether the distribution of the estate is fair and just.
15. From the evidence, the appellants' common contention was that the deceased subdivided his land and gave them their portions to settle thereon before his death. They urged the court to treat this as gifts *inter vivos*, a question that the trial court delved deeply into in its Judgment. It was the trial court's finding that the land was not given to the appellants by the deceased as gifts *inter vivos* because the process was not completed or the gift was not perfected and so the property should be subjected to the intestate distribution.
16. During the lifetime of the deceased, he had the power to deal with his property howsoever he pleased. PW1-PW8 consistently stated that the deceased subdivided his property using the services of a surveyor and gave his children who were available their portions and for those who were away at the time of this distribution, they were given a large portion of land to hold together. It was their testimony that some of the children of the deceased built homes on the said properties and planted perennial crops. None of the appellants has title documents to the portions they received from the deceased. PW5 stated that those who received land from the deceased developed the land only after the deceased's death and that the properties were never transferred to them.
17. Under section 42 of the *Law of Succession Act*, a gift given by the deceased prior to his death will be taken into account in determining the net estate of the deceased, even though the same may not form part of the estate. In essence, a gift *inter vivos* ought to completely pass to the intended beneficiary such that when the net estate is being ascertained, it can be proved that the deceased intentionally and completely passed the gift to the beneficiary before his death. In this case, the beneficiaries who claim to have received the gifts *inter vivos* ought to have proved that the same were passed completely through deeds and that they hold title documents for the land.
18. In the case of *Re Estate of Godana Songoro Guyo (Deceased)*(2020) eKLR the court referred to the following text;
- “In *Halsburys Laws of England* 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:
- “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 the donor's subsequent conduct gives the donee 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 comprised 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.”
19. The court went on to state:
- “In the case of *inter vivos* the gift must go into immediate and absolute effect. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts. Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the donee.”



20. The trial court correctly relied on this argument as well as the sentiments of the court in the case of Re Estate of Phyllis Muthoni M'Inoti (deceased) (2018) eKLR. In that regard, the trial court did not err in its determination that the properties given to the appellants were not gifts *inter vivos*.

21. On the second issue, the trial court distributed the estate according to the mode proposed in the supporting affidavit to the summons for confirmation of grant. The learned magistrate also determined the question of whether the 9th and 10th appellants were rightful beneficiaries since they are grandchildren of the deceased and whose parents are still alive. The court correctly held that their shares in the estate derive from their parents. In the case of In re Estate of Florence Mukami Kinyua (Deceased) [2018] eKLR, the court held thus:

“A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parent’s share in the estate of the grandparents. This was stated in *Re Estate of Wabome Njoki Wakagoto* (2013) eKLR where it was held:-

“Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

a. The proposed mode of distribution also factored in the provisions of Article 27(3) of the Constitution which provides that:

“Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”

22. The appellants decried the proposed mode of distribution because they have already settled on the land and that it would be unfair to displace them. Having determined that there were no gifts *inter vivos*, this court is bound to protect the rights of all parties to the estate as accorded by Article 27(3) the Constitution. The proposed mode of distribution is equitable and just in the eyes of the Constitution and the Law of Succession Act since it serves justice to all the parties. The findings of the trial magistrate to this end are sound and should be upheld, and this court so does.

23. In the upshot, I find that the appeal lacks merit and the same is hereby dismissed with no orders as to costs.

24. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF JULY, 2024.

L. NJUGUNA

JUDGE

..... for the 1st Appellant



..... for the 2nd Appellant
..... for the 3rd Appellant
..... for the 4th Appellant
..... for the 5th Appellant
..... for the 6th Appellant
..... for the 7th Appellant
..... for the 8th Appellant
..... for the 9th Appellant
..... for the 10th Appellant
..... for the Respondent

