



In re Estate of M’mbui M’imanyara (Deceased) (Succession Cause 454 of 2008) [2023] KEHC 2112 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2112 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 454 OF 2008
EM MURIITHI, J
MARCH 16, 2023**

IN THE MATTER OF THE ESTATE OF M’MBUI M’IMANYARA (DECEASED)

BETWEEN

STANLEY GITONGA MBIJIWE PETITIONER

AND

SILAS MUTHURI 1ST RESPONDENT

CHARLES MBIJIWE 2ND RESPONDENT

GEOFFREY MIRITI MBOGORI 3RD RESPONDENT

RULING

1. On 20/5/2021, the 1st petitioner/applicant filed an application under certificate of urgency dated 18/5/2021 seeking committal of the respondents to civil jail for a period not exceeding 6 months for contempt of court. That application was however dismissed by the court (Otieno J) on 30/9/2021 for want of attendance. The matter then proceeded on 23/2/2022 when the 2nd petitioner was recalled for cross examination.

Evidence

2. PW1 Charles M’Mbijwe M’Mbui, testified that, “I gave evidence before and I am here for cross examination. Abothuguchi/Kibirone/241 belonged to M’Mbui M’Imanyara who was my father. Stanley Gitonga is my son and a grandchild to the deceased. The deceased had sold 4 acres to David Murungi with my knowledge. I was told by Geoffrey Miriti who is my cousin. I came home and I lodged a caution over the land and David Murungi sued me to have the caution removed. He sued me together with Geoffrey Miriti in HCC No 20 of 1996. In the case a counter claim was filed. I have the pleadings. Plaint PEXH 1, Defence PEXH 2. The case was delivered in 2017 and the land was reverted to my father. I wish to produce judgment EXH P3.”



3. On cross examination, he stated that,

“The land Abothuguchi/241 belonged to the deceased. There was a time Stanley Gitonga was charged with damage to property and I gave evidence in CR Case 2784/1993 Meru Rep v Stanley Gitonga Mbijiwe. I can see the proceedings in which I gave evidence. In it I said Zipora and Geoffrey were not given any portion of the land. When giving evidence in this matter on October 18, 2018 I said that the petitioner (2nd) was not given any land.”

4. On re-examination, he stated that,

“In the criminal case Gitonga was charged with the offence of damage to property. At that time the land still belonged to David Murungi but Gitonga and Miriti were ploughing the land. When I gave the evidence in that case the civil case had not ended.”

5. OW1 Stanley Gitonga Mbijiwe testified that,

“I am a farmer. M’Mbui M’Imanyara was my grandfather. I do remember I was charged with the offence of malicious damage to property. I still stay on the same land. My father gave evidence in that case. I wish to produce the proceedings as DEX 1. Since 1973 I was given the land by my grandfather when it was being sold to David Murungi. The matter went to the board and a civil case ensued before the title could be issued. After the 4 acres were sold the balance of about 5 acres was to remain for me. We obtained consent to subdivide the land. I can see the consent of the land control Board dated 13.9.73 which I wish to produce as exhibit EXH. P2. I pray to court to give me what my grandfather gave to me.”

6. On cross examination, he stated that,

“The consent show that the land was to go to me and David Gitonga. I know the deceased sued David Gitonga for improper dealings and the case was ended in his favour. My grandfather agreed with David that he would give him a different piece of land. The civil case ended that the land reverts to my grandfather. My father gave me the title for the land in 1995 in the presence of my father and other elders. Today my father has lied to court.”

7. On re-examination, he stated that,

“There were many elders when my grandfather was giving the land in the presence of my father. In the criminal case my father said that him and Miriti were given the land.”

8. When he was questioned by the court, he stated that,

“Petitioner is my blood father but I lived more with my grandfather. David Murungi was deprived of the land because he had taken the land improperly. My grandfather died in the year 1998. I have no written document about the gift but there are elders who know.”

Submissions

9. The applicant filed submissions on 18/1/2023 urging that he was given land parcel No Abothuguchi/Kithirune/1595, which is a resultant subdivision of land parcel No Abothuguchi/Kithirune/241, by the deceased herein, and relies on *Lubberts Estate Re* (2014) ABCA 216. He urges that the deceased had bequeathed the disputed land to him and was in the process of transferring it to him as expressly stated in the application made to the Land Control Board for its subdivision.



10. The 2nd petitioner urges that the applicant has not met the legal threshold of gift inter-vivos, since there was no attempt by the deceased to transfer the land to the applicant, and cites *Re Estate of the late Gedion Mantbi Nzioka (Deceased)* (2015) eKLR and *Lubberts Estate Re* (2014) ABCA 216. He urges that the disputed land is currently occupied by other beneficiaries of the deceased which further proves that the deceased had no intention of gifting it to the applicant. He urges that in the absence of an instrument in writing or by delivery, or by way of a declaration of trust by the donor, the applicant's claim to LR No Abothuguchi/Kithirune/241 as a gift inter-vivos must fail.

Analysis and determination

11. The issue for determination is how Land Parcel No IR 89043 and Abothuguchi/Kithirune/241, which are the estate properties should be distributed.
12. The applicant claims that the disputed land was bequeathed to him by the deceased during his lifetime.
13. The disputed land had earlier been distributed by the court vide its judgment of 21/2/2019 and the applicant filed an application dated October 30, 2019 seeking to have the same set aside and leave to cross examine the 2nd petitioner herein. The court vide its ruling of 13/2/2020 set aside the judgment of 21/2/2019 and granted the applicant leave to cross examine the 2nd petitioner.
14. In his testimony, the applicant stated that his grandfather gave him the title to the disputed land in 1995 in the presence of his father, the 2nd petitioner herein and other elders. However, he did not call any of the said elders to testify in court. He further stated that he did not have any document to prove that the disputed land was given to him by the deceased herein as a gift inter-vivos.
15. This court finds that the applicant has not adduced any evidence to support his claim that the disputed land was bequeathed to him by the deceased during his lifetime.
16. The undisputed facts in this case are that the deceased herein was survived by Charles Mbijiwe M'Mbui, Evangeline Kaburo, Monicah Regeria and Margaret Mwari. The applicant admitted in his testimony that the 2nd petitioner is his father while the deceased herein was his grandfather.
17. There is no doubt that section 29 of the *Law of Succession Act* gives priority to the children of the deceased to inherit first as opposed to grandchildren. I respectfully agree with the decision in *Veronica Njoki Wakagoto (Deceased)* (2013) eKLR, where the court (W.M Musyoka J) held that:-

“... grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grandchildren inherit from the parents. 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. In this case, the applicant's mother survived the deceased. She is the one entitled under Part V to inherit her mother, the applicant's deceased grandmother. The applicant clearly has no claim under Part V so long as his mother survived the deceased.”
18. In his further affidavit in support of the summons for confirmation of grant, the 2nd petitioner proposed that the disputed land be shared among himself, Geoffrey G. Mbogori, East African Pentecostal Church, and his 3 sons namely, Stanley Gitonga, Bernard Gatobu and Stephen Gikunda.



Orders

19. Accordingly, for the reasons set out above, the applicant's claim to the disputed land as a *gift inter vivos* fails.
20. The court proceeds to confirm the grant issued to the Petitioners on February 1, 2017 as proposed by the 2nd Petitioner at paragraph 6 of his further affidavit in support of the Summons for Confirmation of Grant.
 - a. Land Parcel No IR 89043
 - i. Evangeline Kaburo -15 acres
 - ii. Monicah Regeria - 20 acres
 - iii. Margaret Mwari – 15 acres
 - iv. Charles Mbijiwe – Balance
 - b. Land Parcel No Abothuguci/Kithirune/241
 - i. Geoffrey Mbogori - 2 acres
 - ii. Stanlery Gitonga – 1 acre
 - iii. Bernard Gatobu – 1 acre
 - iv. Stephen Gikunda – 1 acre
 - v. East African Pentecostal Church - ¼ acre
 - vi. Charles Mbijiwe M'Mbui - Balance
21. There shall be no order as to costs.
Order accordingly.

DATED AND DELIVERED ON THIS 16TH DAY OF MARCH, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Muchomba Law Advocates for the 1st Petitioner/ Applicant.

M/S Kaumbi & Co Advocates for the 2nd Petitioner/ Respondent.

