



**In re Estate of Musungu Obulalo (Deceased) (Succession Cause
380 of 2013) [2023] KEHC 2958 (KLR) (3 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2958 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 380 OF 2013
PJO OTIENO, J
MARCH 3, 2023**

BETWEEN

HENRY OMUSENJERI MUSUNGU RESPONDENT

AND

REUBEN ANGACHI OKOYANA APPLICANT

JUDGMENT

1. When the Administrator filed the Summons for Confirmation of Grant dated September 25, 2015, the Protestor was not pleased and therefore filed an Affidavit of Protest sworn on January 11, 2016.
2. The gist of the protest is that he was given a portion of the estate land measuring about 1 $\frac{3}{4}$ acres and in exchange the Protestor built a house for the deceased and paid school fees for his children yet the Administrator had obtained the grant and excluded him from the list of beneficiaries. He then asserts having acquired the land by the doctrine of adverse possession yet the Petitioner had since 2013 attempted to forcefully evict him from the land which had become his home adding that the administrator had brought prospective Purchasers to buy the said portion.
3. There are not clear directions given on how to have the protest prosecuted but it would appear from the notes of January 25, 2016 that parties were granted leave to file and serve additional Affidavit. However, it would further appear that no further Affidavits were filed but witness statements and list of documents were filed. I have seen a witness statements by Christopher Omumasi and John Shibia dated December 21, 2018, witness statement by the Petitioner dated August 13, 2021 and a list of witnesses by the Petitioner's Counsel.
4. The proceedings on record show that the matter proceeded by *viva voce* evidence where the Protestor gave evidence as the only witness on his side while the Petitioner gave evidence and called one other witness to support his case.



Evidence led

5. The evidence led in support of the protest was a reiteration of the Affidavit of Protest and the documents exhibited by that Affidavit which were produced as exhibits. The protestor told the Court that the portion of the estate land was gifted to him by the deceased and he took possession and after the death of the deceased he continued to occupy and use the land and then built a house for the widow and paid school fees for the children. He produced document for building materials brought, bank withdrawal slip and school fees receipts adding that he had been on the land for more than four (4) years peacefully till 2013 when the Petitioner tried to evict him forcefully by burning the sugarcane growing on the land and cutting trees and selling same for timber. As a result of such aggression the Petitioner was arrested and charged with the offence of setting fire on crops or cultivated produce, was tried but acquitted. He produced the charge sheet, crop assessment report, photographs of the land and damaged property and fence on the same allegedly by a buyer.
6. On being cross examined he told the Court that he never gave to the deceased anything who also did not give him the parcel number. He added that he volunteered to build the house because the deceased had a grass thatched house. He went on to say that no survey had been conducted to establish if the house was on Parcel No 621 which belongs to the deceased or if it is on 622 which belonged to the Protestor's father. When shown the receipts for building materials, he conceded that the same could not be related to a building allegedly on the deceased parcel of land or did the receipts for school fees disclose the name of the schools just like the bank withdrawal slip did not indicate the use to which the money was put to.
7. He equally admitted that there was nothing in writing to prove the gift of the land, that he had built the house on the land belonging to the deceased but had it demolished and built on his father's land after two of his children died. He added that the house he built for the widow in 1994 was demolished by the Petitioner.
8. For the Petitioner, the evidence was that the deceased left behind a spouse and six children including himself and land parcel No Butsotso/Esumeyia/621 where the family continues to live. He identified the Protestor as a cousin who has a share on land parcel No. Butsotso/Esumeyia/622. He adopted his witness statement as evidence in chief and produced the documents filed as exhibits adding that he was indeed charged as asserted by the Protestor but later acquitted.
9. On being cross-examined by the Protestor's Counsel, the witness told the Court that the deceased did lease the portion of the estate land to the Protestor but did not sell or gift him a portion measuring 2 ½ acres, where the Protestor would grow sugar cane. He denied that there was a gift to the Protestor insisting that even before he died, the deceased had asked the Protestor to vacate the land but he died before going to Court and that the land had since been sold to one Francis Itololo by his mother while this matter was pending. He said the mother died in 2018 but after lodging an objection against the Protestor's use of the land with the Chief but not in Court.
10. On being re-examined, the witness reiterated that the land was leased and not gifted to the Protestor and that the mother died before recording a witness statement in these proceedings.
11. PW2, George Shibia Wesa, also adopted his witness statement file as evidence in chief and identified both Petitioner and Protestor as his nephews and denied that the deceased ever gave to the Protestor the subject portion of land as a gift. All he knew and knows was that the Protestor was leasing the land to cultivate sugarcane.



12. On being cross-examined, he reiterated that the land was leased but he was not aware of the consideration and that the fact that he used the land meant he was leasing it. He then denounced his statement which had showed the land was given to the Protestor on condition that he helps the deceased but admitted that by 1995 the widow to the deceased had demanded that the Protestor stops using the land.
13. After both side closed their respective cases, both filed written submissions. The Protestors submissions were filed on July 25, 2022 while those by the Petitioner were filed on September 16, 2022. In the submissions, the Protestor identify two substantive issues for determination being; whether the deceased gifted the Protestor a portion of land measuring $1\frac{1}{3}$ and if the Protestor is entitled to the land thus. In the submissions, reliance is placed upon Section 31 of the Law of Succession Act to support a gift inter vivos even where the transfer was never completed and cited the decision in Micheni Aphaxard Nyaga vs Robert Njue [2021] eKLR, without pointing out what part of the decision supported his case and in what manner.
14. For the Petitioner the submissions isolate three issues for determination to be; whether there was a gift to the Protestor within the meaning of the Law of Succession Act; whether the portion was purchased by the Protestor and lastly if the Protestor had acquired that portion of land by way of adverse possession. To this Court only the first issue is available for its determination because the other two are questions over acquisition, purchase and title to land which are outside the mandate of Succession Court and are by constitution an exclusive jurisdiction of the Environment and Land Court. The Court declines to venture outside its mandate and shall not address the two issues.
15. Whether or not the gift was made and settled, the submissions rely on Section 31 of the Law of Succession Act and the thresholds to be met. The decision in Abmed Godana Songoro vs Helen Safoo Godana was cited for the proposition of the law that a gift should not rest purely on a promise or incomplete intention then the same cannot be enforced against the donor or those claiming under his title. The decision also enunciates that occupation of estate property, *ipso facto*, does not in itself amount to a gift unless the deceased gives to the occupier exclusive rights of entitlement.
16. Having read and taken due consideration of all the material availed in Affidavits, Statements and submissions filed, the Court discerns the issue for determination to be whether the Objector has established a gift *inter vivos* so as to be entitled to a share of the estate. As said before whether there was a sale for valuable consideration or if the Protestor has acquired an interest in the estate by adverse possession are not within the jurisdiction of the Court. The claim by the Protestor vaguely takes the face of an oral will, gift intervivos or a gift made in anticipation of death. In both cases the Applicant asserting so much demonstrate that the intention of the deceased was to pass over the title in the property to the donee absolutely. For an oral will to be valid, the law requires that it be made in the presence of at least two competent witness and the deceased dies within three (3) months from the date of making the will. Here the will is alleged to have been made in 1990 but the deceased lived till 1993 when he passed on. He lived for three years well beyond the statutory limited time. That alone disqualifies the transaction or conduct of the deceased towards the Protestor as disclosing an oral will. What is more, in his evidence, the Protestor never sought to avail any evidence whether there were any competent witness when the deceased made the wish to gift him the land. It is therefore the holding of the Court that no oral will was ever proved by the Protestor as to enable the Court conclude that he is entitled to the land claim.
17. The next question is whether there was a gift by the deceased in anticipation of death.
18. As stipulated by section 31 of the Act, one contemplating death, may gift away his property, but such a gift may only be valid and enforceable if; made while contemplating dying from a present ailment



or imminent danger, he gives a movable property which he had the capacity to dispose by will and delivers the possession thereof or the documents or evidence of title to the donee with intension that the gift reverts in the event he survives the illness or danger; does not so survive but dies and predeceases the donee. Here, the property being immovable does not qualify to pass as a gift in contemplation of death. According, there could not have been a gift by the deceased in contemplation of his death. The claim by the protester does not qualify for a gift in under section 31 of the Act.

19. That leaves the court with the question whether there was a gift *inter vivos*. For one to succeed on a claim for a gift *inter vivos* so that the property is excluded from the scheme of distribution of an intestate's estate, he must demonstrate to the satisfaction of the court that the gift was made and property settled during the lifetime of the deceased and was identified, awarded and settled for the donee.
20. In the spirit and letter of section 42 of the Act, the law anticipates that the donee be a dependant of the estate whose share is deemed to be an advancement and taken into account in the scheme of distribution. The expression, taking into account under the *law of succession act* simply means that the gift is reckoned with so that the principal of equality in distribution is achieved and not distorted. It also underscored the need to respect and fulfill the wishes of the deceased.
21. To this court, gift *inter vivos* being provided for under PART V of the Act, a part devoted exclusively to intestacy, is by implication, intended to be applicable only to beneficiaries of the estate or dependants of the deceased and not none members of the family. This view is informed by the position of the law that intestate succession is limited to those persons enumerated under section 29 of the Act unlike in testacy where the deceased has a right to dispose his property even to strangers by a will, subject to the rules on validity.
22. When put into the context of this matter, the protester while alleging to have received the portion of land as a gift, did concede in cross examination that he was never given title (number) to the land. In addition, he said that being a nephew to the deceased, his father's land borders that of the deceased with no demarcation to differentiate either. He also admitted not being a dependant of the deceased. The court therefore finds that there was never a definition of the property intended as a gift as much as there was no full settlement by transfer. In addition, having not been a dependant, he was not qualified for a gift *inter vivos*. It is therefore the finding of the court that there is no evidence that the deceased had any intention to gift to the protester any part of the estate as alleged. The effect is that the protest lacks merit, was otherwise misconceived and is therefore dismissed.
23. Being the only contestation to the request for confirmation and proposal on distribution, the application dated September 25, 2015, remain unopposed and is thus allowed as prayed. The grant is thus confirmed and the estate be distributed as follows: -

Lr No Butsotso/esumeyia/621

- I. Roselinda Sakwa Musungu
- ii. Henry Omusenjeri Musungu
- iii. Wycliffe Olutende Musungu
- Iv. Shadrack Vunyinda Malenge
- V. Francis Itolondo Musonye

24. Let the certificate of confirmation of grant issue forthwith to enable the administrator have the estate transmitted to the beneficiaries within 90 days from today. For a voidance of doubt, the restriction registered against the estate property on June 29, 2015, as shown on the certificate of official search



dated October 13, 2015, is ordered removed to facilitate the implementation of the certificate of confirmation of grant.

25. On costs, it is directed that each party shall bear own costs.

26. Grant confirmed. Petitioner has ninety (90) days to transmit the estate. Mention on June 22, 2023.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 3RD DAY OF MARCH 2023.

PATRICK J O OTIENO

JUDGE

In the presence of:

Ms Kegechi for Petitioner/Respondent

No appearance for Nandwa for the Protestor

Court Assistant: Polycap

