



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muiruri v Muiruri (Civil Appeal 192 of 2019)  
[2023] KEHC 2284 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2284 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 192 OF 2019**

**JM CHIGITI, J**

**MARCH 2, 2023**

**BETWEEN**

**SIMON NGIGI MUIRURI ..... APPELLANT**

**AND**

**JOHN NGANGA MUIRURI ..... RESPONDENT**

*(Being an appeal from the Ruling of the Chief Magistrate's Court at Thika (Hon. M.W WANJALA SRM) delivered on 7/11/2019 in Thika CMSUCC No. 54 of 2003)*

**JUDGMENT**

**Brief Background**

1. The appeal has its roots in the judgment of the Thika Chief Magistrate Succession Case No 54 of 2003 in respect to the Estate of Muiru Kinuthia who died on May 28, 1987.
2. The deceased left behind three widows namely;
  - A. Njeri Muiruri
  - B. Kigio Muiruri(Deceased)
  - C. Wambui Muiruri.
3. At the time of death, the deceased owned the following properties:
  - a. Ngenda/Mangu 1687.
  - b. Thika Municipality Block 33 (Runyua) 72.
  - c. Shares in Ngenda Location Ranching Co LTD.



4. The matter proceeded through inter partes hearing after which the Court distributed the entire Estate of the deceased among the 3 houses with the first house getting 3/13, the second house 1/13, and the third house 9/13.
5. The Appellant was aggrieved by the mode of distribution as a result of which he filed the instant Appeal.
6. The Appellant set out 5 grounds of appeal in the Memorandum of Appeal filed on December 6, 2019 being:
  1. That the Learned Honourable Magistrate erred in Law and in facts by failing to consider in totality all the evidence adduced before reaching his decision.
  2. That the Learned Honorable Magistrate erred in Law and Facts in failing to appreciate that the estate, the subject matter was family land and that the deceased had shared out the same amongst his three (3) widows into three portions that were of unequal size and thus arrived at the wrong decision.
  3. That the Learned Honourable Magistrate erred in Law and in facts when he failed to appreciate that upon the deceased having distributed his estate during his life time, the widows had occupied and developed their positions for more than fifty (50) years and hence there was no need to interfere with the status quo.
  4. That the Learned Honourable Magistrate erred in Law and in facts when he failed to appreciate the fact that while the deceased was polygamous, each of the widow had a right to share out her share of the estate to whoever she desired including the 2<sup>nd</sup> widow who had no children, and thus arrived at the wrong decision.
  5. That the Learned Honourable Magistrate erred in Law and in facts in deciding against the weight of evidence given the succession cause.
7. Based on these grounds, the Appellant prays that: -
  - i. That this Appeal be allowed.
  - ii. That the Judgement of the Magistrate in Thika CMC Cause No 54 of 2003 be set aside.
  - iii. That the Respondents be ordered to pay costs of this Appeal.

**Analysis and determination:**

8. This being the first appeal, this court, is obligated to re-evaluate the evidence on record as guided by principles in the case of *Selle & another V Associated Motor Boat Co Limited & others (1986) EA 123* in the following terms:

' I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or



probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.'

9. The protestors wanted the Estate to be distributed per the Will which was not before the court.
10. In his submissions, the Petitioner urged the court to distribute per the deceased's wishes.
11. Simon Ngugi Muiruri testified and confirmed that the deceased had 3 wives, had property that he gave to his wives while alive and that the widows used the land as assigned and that he wants the court to distribute the property as is.
12. The three Protestors allege that the Petitioner forcefully and illegally demarcated his portion on Ngenda/Mangu/1687 amidst protest from their father.
13. On his part, Maxwell Kinuthia Ngigi testified that he was adopted by the 2<sup>nd</sup> wife. He gave his account of how the deceased distributed his property. However, he did not tender any tangible evidence to prove that there was a Will as alleged.
14. He claims that he was given 0.3140 Acres on Ngenda/Mangu/1687 and 0.33 Acres on Thika Municipality block (Runyua)/92 by his mother the widow of the deceased through a will.
15. The said property had not been transferred to her by the deceased.
16. The 2<sup>nd</sup> Protestor testified to the effect that at the time of his demise the deceased had only shown the widows their part but not subdivided his property.
17. He testified that the administrator simply placed beacons on the land in a purported subdivision. That the Administrator allocated to himself the plot in Mwea. The matter was reported to the Assistant Chief.
18. He testified that the coffee bushes had not been subdivided.
19. That the father died before the title for Runyua had been issued.
20. Further that the administrator subdivided Runyua land well over ten years ago and that the titles to the portions have been issued and each is using their respective portions.
21. John Gathuru Mburu the first witness of the 2<sup>nd</sup> Protestor Peter Kamuru Muiruri confirmed that the deceased had land as set out in the petition.
22. That the deceased had shown his wives where to stay and cultivate. He also confirmed that they had issues that they only started cultivating after Muiruri Kinuthia's death.
23. John Warui Kagwathi in his testimony confirmed that there was no good relationship between the deceased and the 2<sup>nd</sup> protestor's 1<sup>st</sup> witness.
24. He denied erecting beacons. He said that the first wife got a bigger share. He said there was a title.
25. He further testified that T Ngenda where the deceased's wife tilled was allocated to her wife in 1978. He confirmed that as at the time of the deceased's death, the title to Ronyua had not been issued.
26. He confirmed that the company refused to subdivide Ronyua into 3 and that the shares in Ngenda Ranching had not been issued. Further that the said subdivision cannot be effected without the confirmed letters of administration certificate.



27. He informed court that there were 270 coffee bushes. He confirmed that there was a dispute around the ownership of the coffee stems. Just like the other witnesses, he confirmed that there were boundary issues. He had no documents of ownership.
28. The purported gift inter vivos if any is incomplete and of no legal value since there was no proof that the deceased completed the requisite land transaction.
29. Gift inter vivos are provided for under Section 42 of the [Law of Succession Act](#) as follows;
  - ' Where-
    - (a) An intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
    - (b) Property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.'
30. The characteristics of the gifts inter vivos are that they are made and settled during the lifetime of the deceased and have been identified, awarded and settled for the person to whom it has been given. It is a gift made to a beneficiary when the deceased was alive and is considered when distributing the net intestate estate so that person who received it may be considered as having received his share and may reduce or diminish any entitlement to the net intestate estate.
31. The gift which is transferred and settled for the beneficiary during the life-time of the deceased, will not form part of his estate but it will be taken into account in determining the share of the net intestate estate finally accruing to that beneficiary.
32. The concept of gifts is divided into two categories. First gifts intervivos and gifts causa mortis. Gifts intervivos as contemplated in the Law of Succession are such that the owner of the property or asset donates it to another without expectation of death.
33. In any event the person who makes such a gift must have the capacity and competency to gift the property and the gift must be perfected. In the case of inter vivos the gift must go to the donee absolutely during the lifetime of the donor. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts.
34. 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.
35. The test on a gift causa mortis is defined as a gift made in expectation of death. The donor causes the property or goods in his possession to be delivered to another. The general distinction between a gift causa mortis and a gift intervivos is that it's revocable by the donor and his capacity must meet the requirements under Section 11 of the Law of Succession in the making of a Will.
36. The requirement of the law for such gifts are that they may be settled by a deed or an instrument in writing by delivery, by way of a declaration of trust by the donor or by a resulting trust or transfer and registration. In other words, the gift must have passed from the deceased to the recipient for it to be valid. This means that the gift is no longer the property of the deceased but for the purpose of distribution of the estate to the dependants it will be traced and taken into account when distributing the estate with respect to the beneficiary who received the gift.



37. In *Halsbury's Laws of England 4<sup>th</sup> 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.'

38. Adherence to the rule based-model on transfer of immovable property involves an inquiry on the Law of gifts inter vivos or causa mortis featuring in Odunga J's *Digest on Civil Case Law and Procedure Vol (III)* Page 2417 at paragraph 5484 (d) e – 1 thus:

' Generally speaking, the moment in time when the gift takes effect is dependent on the nature of the gift; the statutory provisions governing the steps taken by the donor to effectuate the gift. (See in Re Fry Deceased {1946} CH 312 Rose: and Trustee Company Ltd v Rose {1949} CL 78 Re: Rose v Inland Revenue Commissioners {1952} CH 499 Pennington v Walve {2002} 1WLR 2075 Maledo v Beatrice Stround {1922} AC 330 Equity will not come to the aid of volunteer and therefore, if a donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee need no assistance from equity and the gift is complete.

'It is on that principle that in equity it held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, complete his title.

'Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise, a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor. (See Shell's Equity 29ED Page 122 paragraph 3)'

39. It is evident that where there is an imperfect gift having regard to the requirements, of the necessity for the same must be by way of written memorandum, registered transfer and/or declaration of trust in writing, the gift may nonetheless be perfected by the conduct of the parties.

40. This court notes that allocation of land and the fixing of beacons is a weighty matter that cannot be done arbitrarily by an administrator who has no authority flowing from the law.

41. It can be gleaned from the chief and cross examination of the witnesses that there is a serious family dispute in the way the land is owned and occupied.

42. The trial magistrate cannot be faulted for the way he brought closure to the mess through the Judgment.

43. There is no Will that was produced in court.



**Disposition:**

44. It is my finding that the deceased died intestate as a result of which Section 40 of The Law of Succession is the right procedure to be followed in the intestate distribution of the Estate of the Deceased.
45. The honourable court followed the law in ensuring that the Administration is effected within the legal framework under Section 40 of Cap 160.

**ORDER:**

The appeal lacks merit and the same is dismissed with costs.

**DATED AND DELIVERED AT KIAMBU THIS 2<sup>ND</sup> DAY OF MARCH, 2023.**

**J. CHIGITI (SC)**

**JUDGE**

