Gachingiri v Gachingiri & 3 others (Probate & Administration Appeal 3 of 2020) [2023] KEHC 20660 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20660 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

PROBATE & ADMINISTRATION APPEAL 3 OF 2020

LM NJUGUNA, J

JULY 21, 2023

BETWEEN

JOSEPH GIKUNJU GACHINGIRI ..... APPELLANT

AND

FRANCIS MUGWE GACHINGIRI ..... 1ST RESPONDENT

MAITHAKA GACHINGIRI ..... 2ND RESPONDENT

DANIEL GACHERU GACHINGIRI ..... 3RD RESPONDENT

SIMON MUCHEMI GACHINGIRI ..... 4TH RESPONDENT

JUDGMENT

1. The appeal herein was instituted by way of a memorandum of appeal dated June 12, 2020 and filed in court on June 15, 2020 and wherein the appellant challenged the judgment and/ or decree of the trial court delivered by Hon EN Angima SRM on May 28, 2020 in Mukurwe-ini PM's Succession Cause No 67 of 2017. In the trial court, the respondents filed an affidavit of protest challenging the appellant's summons of confirmation of grant in relation to their father's estate (Gachingiri Mugwe Waikuna). The protest was heard by way of viva vorce evidence and the court after considering the evidence before it upheld the protest and held that the appellant had benefited inter vivos and thus LR Githi/ Igana/1291 ought to be shared amongst the parties herein equally.

2. It is this decision which necessitated the instant appeal.

3. In the memorandum of appeal filed on the date earlier mentioned, the appellant raised nine (9) grounds of appeal. However, the appellant filed together with the record of appeal an amended memorandum of appeal and wherein he added three more grounds. I will discuss these grounds elsewhere in this judgment but in a nutshell, the appellant essentially faulted the trial court's judgment for failing to uphold the deceased's distribution of the estate amongst the 5 sons; failing to find that the land parcels

given to the respondents had a 20-feet wide access road; and also the trial court's finding in respect of LR Githi/ Igana/786. The appellant as such prayed that the appeal be allowed and in so doing the judgment of the trial court be set aside and the affidavit of protest by the 1st respondent be struck out and his summons for confirmation of grant be allowed.

4. Directions were taken that the appeal be canvassed by way of written submissions.

5. The appellant basically submitted that the respondents misled the trial court into finding that they did not have access road yet there was one provided for in the mutation form and which was to link the respondents to the main road. Further that the deceased's step father i.e Warui Waikuna s/o Waikuna s/o Karime gifted the appellant LR Githi/ Igana/786 and that the same was not a gift inter vivos and as thus section 42 of the *Law of Succession Act* was not applicable. That the trial court ought to have shared the 5 land portions amongst the parties herein as per the wishes of the deceased in accordance with section 38 but it disinherited the appellant in its decision. Further that the trial court had no jurisdiction to touch on LR Githi/ Igana/786 as its distribution had been concluded in the Nyeri High Court Succession Cause No 5 of 1995 and where the respondents didn't bother to participate.

6. The respondents in opposing the appeal basically submitted that LR Githi/ Igana/786 belonged to the late Warui s/o Waikuna and that the appellant was not given the land by one Warui s/o Waikuna when he was alive but by the deceased herein upon himself having been registered with the same and upon which registration the land formed part of his estate. That the same was then transferred to the appellant after the registration and thus the same qualified to be gift intervivos by virtue of section 42 of the *Law of Succession Act*, the gift of the said land ought to be considered in distributing the estate so as to ensure equity. Further that there was no evidence that LR Githi/ Igana/1291 which was the homestead for the parents was reserved for anyone. As thus the court was right to have dealt with the property as it did and applying section 38 of the *Act*. The respondents as thus prayed that the appeal be disallowed with appropriate orders.

7. It is now well settled that the role of this court, as a first appellate court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle &ANo v Associated Motor Boat Co. Ltd* [1968] EA .123). However, this court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings {See *Mwanasokoni v Kenya Bus Service Ltd*. [1982-88] 1 KAR 278 and *Kiruga –versus- Kiruga& Another* [1988] KLR 348)}.

8. I have certainly perused the memorandum of appeal filed herein, the rival submissions and the trial court record and it is my finding that the main issue for determination is whether the appeal has merits.

9. In the proceedings culminating to the impugned judgment, the appellant, 1st respondent and 4th respondent were appointed as joint administrators of their father's estate and a grant made to them. However the appellant herein proceeded to apply for confirmation of the said grant indicating the proposed mode of distribution in the affidavit in support of the said summons. In his mode of distribution, he proposed that LR Githi/Igana/1291 would go to himself, LR Githi/ Igana/1292 to 4th respondent, LR Githi/ Igana/1293 to 3rd respondent, LR Githi/ Igana/1294 to 2nd respondent and LR Githi/ Igana/1295 to 1st respondent. Plot No 7 Giathugu was proposed to be shared between appellant and 1st respondent jointly.

10. The 1st respondent filed an affidavit of protest on his own behalf and on behalf of all the other respondents opposing the proposed mode of distribution on the grounds that the appellant had failed to disclose all the assets of the deceased and further failed to disclose that he had got land through the

deceased inter vivos being LR Githi/ Igana/786 and as thus, he ought not to benefit from the other land parcels (he ought not to get LR Githi/ Igana/1291).

11. The protest was heard by way of viva vorce evidence and this was after the parties filed their respective pre-trial documents. The 1st respondent herein testified as Protestor Witness 1 and after adopting his witness statements and producing his exhibits, he testified basically that their father had a meeting and wherein he stated that the appellant ought to remain on 786 which belonged to the deceased's uncle and which was later given to the deceased. In cross examination, he testified that the appellant herein was given 786 and that he ought not to benefit from the other potions. That he only left a small house on 1291 but he had never been in occupation of the same as he occupies 786.

12. The appellant (applicant before the trial court) adopted his witness statement and adopted his exhibits and testified that the deceased subdivided his land and showed each of them his own portion and that on 1291 stands their deceased' father's house and it was the portion he was shown and when he became of age he married while on the said land and which he has developed and he has lived thereon for over 30 years. In relation to 786, he testified that the same was given to him by Warui Waikuna in appreciation of his taking care of him and he did so before he died and that the deceased filed the succession cause in relation to the said estate and distributed the land to him (appellant) in honour of the wishes of Warui Waikuna and which transfer was done immediately after succession. In cross examination, his evidence was that they all grew up in 1291 but he had developed a lot and their father showed him the portion. That the land parcels were never transferred to them as none approached their father to transfer the same to them.

13. The court visited the locus in quo and thereafter the parties filed submissions in support of their rival positions. The court then retired to do the judgment/ ruling and wherein it upheld the protest and held that the appellant had benefited inter vivos and thus LR Githi/ Igana/1291 ought to be shared amongst the parties herein equally.

14. I have considered and analyzed the evidence which was tendered in the trial court by both the appellant and the respondent (in compliance with the duty of this court as required of it. I have also perused through and indeed considered the grounds in the memorandum of appeal and the rival written submissions filed herein. What I note is that the parties are content with the mode of distribution as allowed by the trial court and entered into consent on distribution of other properties which had earlier been left out by the appellant. However, the issue which the parties could not agree on, is whether LR Githi/ Iguna/786 formed part of the estate of the deceased such that transfer of the same to the appellant ought to have been considered in distributing the five portions which were subject of the cause before the trial court. This appears to be the main issue as can be seen on the memorandum of appeal. It is my view therefore that the main issues for determination are;-

    a. Whether LR Githi/ Iguna/786 was a gift intervivos and whether the same belonged to the deceased

    b. Whether the gifting of the same ought to be taken into account in distributing the estate

    c. What ought to be mode of distribution of the estate herein

    d. Whether the appeal is merited.

Whether LR Githi/ Iguna/786 was a gift intervivos and whether the same belonged to the deceased

15. I have perused the documents which were produced before the trial court by the protestors. Amongst the said documents was the green card for LR Githi/ Iguna/786. A perusal of the same indicates that the said land was owned by Warui s/o Waikuna and land certificate issued on August 21, 1974. Further

that on February 9, 2000 the said land parcel was transferred to Gachingiri Mugwe Waikuna and a title deed issued on February 10, 2000. The said transfer was pursuant to transmission out of Nyeri HC Succession No 5 of 1995. The said land parcel was subsequently transferred to the appellant herein on May 4, 2000 and the records indicate that the same was a gift. It is therefore clear that the said land parcel moved not from the said Warui s/o Waikuna direct to the appellant but was transferred by the deceased as a gift. The deceased died on December 11, 2016 and thus the gift was given during the lifetime of the deceased.

16. Based on the above, I don't agree with the appellant that the said land parcel was given to him by Warui s/o Waikuna. It might be that the said uncle had stated that the appellant would get the said land and for whatever reasons (as he claimed that he took care of the said Warui s/o Waikuna), but nonetheless the appellant did not tender any evidence before the trial court in support of the same. What is clear is that the land was given to him by the deceased before his demise. Further, if at all the land was given to him by Warui s/o Waikuna during his lifetime and that the deceased herein was just but a trustee, the land ought to have gone to him directly through transmission. Registering the same in the names of the deceased before transfer to the appellant is prima facie evidence that the same was transferred to him by the deceased unless otherwise was proved. The appellant did not tender any evidence before the trial court to prove the contrary. It is a rule that he who alleges must prove. He bore the burden to prove that the same was not a direct gift from the deceased but that it was a gift from Warui s/o Waikuna but through the deceased.

17. The said transfer having been completed during the lifetime of the deceased, fits the description of a gift inter vivos. It is trite that 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. In the persuasive decision of *Re Estate of the Late Gedion Manthi Nzioka (Deceased)* [2015] eKLR Nyamweya J (as she then was) held that;-

> " ...For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid."

18. The transfer of the said LR Githi/ Iguna/786 to the appellant fits gift inter vivos and I so hold. The same formed part of the estate of the deceased herein. I thus agree with the trial court to that extent. As thus grounds 4 and 5 of the memorandums of appeal fails.

Whether the gifting of the same ought to be taken into account in distributing the estate

19. Section 42 of the *Law of Succession Act* provides that:

> 42. Where-
>
> a. an intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate. That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child grandchild or house.

20. The effect of this section is that a gift made to a beneficiary when the deceased was alive ought to be considered when distributing the net intestate estate to 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. The said gift ought to be taken into account in determining the share of the net intestate estate finally accruing to that beneficiary. The trial court as thus cannot be faulted for having taken the said gift into consideration in distributing the estate amongst the beneficiaries herein.

21. I thus don't agree with the appellant to the effect that this gift should not be taken into consideration while distributing the estate.

What ought to be mode of distribution of the estate herein

22. As I have already noted, the appellant had benefitted from the deceased during his lifetime from land parcel Githi/Iguna/786. The copy of records in relation to the said land parcel indicates that the size of the same is 0.20Ha. The certificates of official search annexed to the petition and further the measurements as per the mutation form which was produced before the trial court indicates that LR Githi/Iguna/1291 measures 0.318Ha while LR Githi/Iguna/1292- 1295 measures 0.388Ha each. It is not disputed that the respondents herein are in occupation of the other sub-divisions. As such, it means that they already have 0.388Ha benefit from the estate vis a viz the appellant who has benefitted with 0.20Ha. As such the mode of distribution as was allowed by the trial court was not proper as some of the beneficiaries benefitted more than the others. Ordering each of the beneficiaries herein to get equal share with direct access to the main road means that 0.0636Ha and adding the same to the shares they already had, the appellant was indeed given a lesser share (0.2636Ha) as opposed to each of the respondents who got 0.4516Ha. I thus agree with the appellant that the trial court disinherited him of his rightful share from the estate as was raised in ground No 9 of the grounds of appeal. The trial court indeed erred in sharing the said land parcel equally.

23. However, I don't agree that he ought to get the whole of LR Githi/ Iguna/1291 as doing so would lead to him benefiting more than his brothers.

24. In my view and I so find, the best mode of distribution was for the appellant to be given a bigger share out of LR Githi/ Iguna/1291. Simple arithmetic indicates that for the appellant to get 0.388 (equal portion with the respondents), he needs 0.118Ha. The same ought to be hived out of 1291. This will ensure that each of the 5 brothers have benefited with 0.388Ha. A balance of 0.180Ha which is left out of 0.318Ha of LR Githi/ Iguna/1291 then ought to be shared equally amongst the five beneficiaries each getting 0.036Ha. It therefore means that LR Githi/ Iguna/1291 ought to be distributed in the manner that the appellant gets 0.138Ha being the equalization share and a further 0.036Ha being his equal share of the balance making the total share 0.174Ha. Each of the respondents ought to get 0.036Ha out of the same. This will make the total benefit of each of the beneficiary and out of the net estate of the deceased to be 0.374Ha.

25. The trial court visited the scene and it was noted and it is indeed not disputed that 1291 is where the deceased's house stood. During the visit in quo, the protestor informed the court that the electricity was connected from 786 underground as the land did not belong to the petitioner (appellant herein). I note that there is a mutation already in place and which shows the sub-divisions and which was prepared on September 5, 2002. The trial court also noted that the said parcel ought to have been sub-divided so that each of the beneficiaries can get a portion with direct access to the main road. The trial court having visited the scene was able to see the best way possible and I order that the sub-division of also LR Githi/ Iguna/LR 1291 ought to take into consideration the same and also take into consideration the fact that the appellant's portion is adjacent to his previous gift being LR Githi/ Iguna/LR 786.

26. As such, I find that LR Githi/ Iguna/LR 1291 ought to be sub-divided as follows; -

    i. Joseph Gikunju Gachingiri to get 0.174Ha

ii. Francis Mugwe Gachingiri to get 0.174Ha

iii. Maithaka Gachingiri to get 0.174Ha

iv. Daniel Gacheru Gachingiri to get 0.174Ha

v. Simon Muchemi Gachingiri to get 0.174Ha

The sub-divisions to be done so as to ensure as far as possible that each respondent's portion has direct access to the main road and further that, the appellant's portion is near his previous gift namely LR Githi/ Iguna/LR 786.

27. I order that the certificate of confirmation of grant be amended to take into account the above mode of distribution and an amended one do issue.

28. The dispute being a succession matter involving siblings, I will not award costs to any party but order that each party to bear his or her own costs.

29. It's so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents