



**In re Estate of the Late Angaushi Munyasi (Deceased) (Succession Cause 142 of 2016) [2023] KEHC 23774 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23774 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 142 OF 2016  
SC CHIRCHIR, J  
OCTOBER 12, 2023**

**IN THE ESTATE OF THE LATE ANGALUSHI MUNYASI (DECEASED)**

**BETWEEN**

**MILDREN MIGOLI ..... PETITIONER**

**AND**

**SILAS BENGO MUNYASA ..... OBJECTOR**

**JUDGMENT**

1. Before this court is the summons dated 30<sup>th</sup> September 2021. It seeks for the following orders:
  1. That the Grant of letters of Administration issued to Mildren Migoli on the 10<sup>th</sup> December 2016 and confirmed on 1<sup>st</sup> August 2018 revoked and/or annulled.
  2. That the resultant title to wit L.R parcel No. Idakho/Shiseso/2380, 2381, 2382, 2384 and 2385 in the names of Caroline Vihende Munyasa, Susan livisia, Mildred Migoli, Phylvine Imenza Bengo, Brigid Lusinde Simiyu and Mildred Migoli respectively their being registered as such by way of transmission be cancelled forthwith and the same be reverted back into L.R parcel no. Idakh/Shiseso/1638 in the name of the deceased Josiah Angalushi Munyasa for fresh distribution.
  3. That an order of injunction do issue restraining the respondent from interfering with the applicant's share of 1 acre in the estate of the deceased comprising of L.R parcel no. Idakho/Shiseso/1638
  4. That costs be provided for
  5. That the court be at liberty to issue any other or further orders as deems just and fit to grant.



2. The Application is supported by the Affidavit of the Applicant sworn on 30/9/2021. It is opposed by the Administrator, one Mildred Migoli, and has sworn a Replying Affidavit dated 5/5/2022 in response.
3. On 01/11/2022 the court gave directions for the Application to be heard by way viva voce.

### **The Applicant's case**

4. PW1 was the Applicant. He told the court that the deceased was his brother, and that the deceased had given him a one acre portion out of land parcel No. Idakho/Shiseso/1638 and which he has been in occupation of the said portion since 1997. He further stated that he has built 3 houses on the said portion. That the agreement was reduced into writing in the year 1997.
5. He further testified that a family meeting was held on 26<sup>th</sup> march 2016, in which it was resolved that he would continue living in the said portion of land. That the Administrator and her siblings are his nieces.
6. He further testified that the deceased was buried in parcel no. 1638; that he educated the Deceased's children; that he got a letter from the chief, dated 22/9/2021 confirming that he got the land from the deceased; that there is a boundary demarcating his portion of the land.
7. He further told the court that his late father, Zacharia Munyasa, had distributed land to his sons. He was given parcel No. Isakho/Shiseso/1640 while the deceased was given parcel No. 1638; that the deceased gave him the one acre from parcel No. 1638, in 1997 and has been residing there since then; that his first wife resides in parcel no. 1640 while the 2<sup>nd</sup> one lives with him in the one acre portion in 1638. He admits that the contents of the letter of 8/12/2003, allegedly written by the deceased is not about land but the children of the deceased. He further stated that he has an agreement showing he was given land by the deceased; and that the land was given to him as a gift in appreciation of the fact that he had educated the Deceased's children.
8. On re-examination he admitted that the agreement dated 17/5/1999 submitted by the Respondent, shows that the Deceased had given him land and that he had paid some money for it. That he withdrew the previous Application seeking annulment on the strength of Respondent's assurance that the would be allocated his portion during confirmation of Grant.
9. PW2 described herself as the daughter-in-law of the Deceased, and lives in the Lugari land. That the Applicant had given the deceased money and the Applicant was given land in return. In cross-examination she told the court that she married into the family in the year 1998. she admitted that she was not present when the Deceased gave land to the Applicant; It was her evidence the land was freely given to the Applicant freely. She admitted that she was not present when the money was given but rather that piece of information was given to her by the Deceased. She further admitted that she did not witness the development of the land by the Applicant. That the Applicant has another piece of land given to him by their father.
10. In re-examination she stated that it is her father-in-law who told her that he gave land to the Applicant.
11. DW1 was the Administrator/Respondent. She told the court that the Deceased was her father. She adopted her affidavit sworn on 5.5.22 as her evidence -in- chief. In the said affidavit, she told the court that the Applicant was her paternal uncle. She denied that her father had given a portion of parcel Idakho/Shiseso/1638 as a gift to the Applicant.



12. She further testified that her grandfather had given land parcel no. 1638 to her father while Idakho/Shiseso/1640 was given to the Applicant; that the Applicant's settlement in parcel no. 1638 was without her knowledge or consent.
13. The Respondent further asserts that the Applicant is not certain about the basis of his claim, as he has based his claim on a gift, adverse possession and sale, all at once. She further states that the Applicant was aware of the succession proceedings all along and that this knowledge is what informed his filing of the earlier Application for revocation which he later withdrew on his own volition.
14. The Respondent further insists the Applicant never constructed any house for the Deceased, save that that he was given the work of supervising the construction.
15. She further asserted that that no such gift ever took place as there is no written document on the same; there was no consent from the from land control board and that any claim under the doctrine of adverse possession is not tenable.
16. On cross-examination she admitted that the agreement dated 17/5/1998 was in respect, the sale of one-acre portion in respect of parcel No. Idakho/Shiseso/1638 and that her father was still alive then. She also confirmed that she was aware of the meeting was which was held on 26/3/2016, but she was not in attendance. She further admitted that there are developments on the land by the Applicant
17. On re-examination, she told the court that she came to know about the agreement dated 26/11/2014 in court and that the agreement talks of purchase and not a gift. She also pointed out that presently, the Applicant is basing his claim on the land having been a gift. She denied that the withdrawal of earlier summons by the Applicant was with her consent.

#### **Applicant's submissions**

18. It is the Applicant's submission that the Applicant was a liability to the Estate as the Applicant had entered into a transaction with the Deceased.
19. The Applicant further submits that his court is empowered to revoke the grant pursuant to section 76 of the *Law of Succession Act*.

#### **Respondent's submissions**

20. It is the Respondent's submission that the court has no jurisdiction to entertain this matter; that to the extent that the Applicant's claim is based on the alleged liability of the Estate to the Applicant, then it is outside the purview of the probate and Administration court
21. The Respondent accuses the Applicant of double- speak as he is basing his claim on sale and gift at the same time.
22. The Respondent further submits that by virtue of being a child of the Deceased, she had the right to administer the Estate.
23. The Respondent further argues that if the Applicant acquired the land by way of a gift during the life-time of the Deceased, then the same is not enforceable as the conditions attendant to gift *intervivos* were not complied with. The Respondent has relied on the case of the *Re Estate of Godana Songoro Guyo (Deceased)* (2020) eKLR, in this regard
24. The Respondent has also questioned why the land had not been transferred by the time of the Deceased's demise in 2004, yet the property was allegedly transferred to the Applicant in 1997.



## Determination

25. The proceedings herein relate to the Estate of the late Josiah Angalushi Munyasi (Deceased). The Applicant is the brother of the Deceased, while the Respondent is the Deceased's daughter.
26. I have considered the pleadings, the evidence tendered and parties' submissions. The following issues present themselves for determination:
  - a). Whether this court has jurisdiction to entertain this case.
  - b). Whether the Applicant was a liability to the Estate.
  - c). Whether the grant should be revoked.

### Whether this court has jurisdiction to entertain this case:

27. The basis of the Applicant's claim is that of being a liability to the Estate. His claim is that he was given the land by the deceased in the year 1997. The Deceased died in 2004. Any claim that arises during the life time of the deceased is a subject of Succession proceedings. This court would only be said to lack jurisdiction if such claim arose after the death of the Deceased. In the case of *In Re Estate of Julius Nduvi Javan (Deceased)* (2018) e KLR It was held : " where the deceased had entered into a binding transaction , or where liability had attached against him or a right had accrued upon him , the death of the deceased does not discharge him from obligations or liability or obliterate his right under those transaction. The personal representatives come in to fulfil those obligations or liabilities, or to realize any right or benefit thereof for the Estate of the deceased. That is why the law requires the personal representative to bring in all the Estate property, to pay out all liabilities and discharge all the obligations of the Deceased..... Circumstances of this case should be distinguished from a situation where the sale of land is done after the death of the deceased and before confirmation of Grant"
28. The alleged transaction is said to have taken place during the life time of the deceased and therefore it forms part of the succession proceedings and matters succession fall within the purview of the High court, not the Environment and Land court. This court therefore has the jurisdiction to determine this claim.

### Whether the Applicant was a liability to the Estate.

30. The Applicant's case is that he was given a one acre portion out of land parcel No.Idakho/ Sheseso/1638 by the Deceased prior to his demise. According to paragraph 5 of the supporting affidavit, the land was given to him in 1998. (In his oral testimony, he talked of 1997), while the Deceased herein died in January 2004.This was therefore a case of Gift intervivos.
31. Section. 42 of the *Law of succession Act* has this to say about Gift intervivos: " 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 and 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 estate finally accruing to the child, grandchild or house."
32. Gift intervivos are made and settled during the lifetime of the deceased. They are identified awarded and settled for the person to whom it has been given. It will not form part of the Estate , but when distributing the estate it will be taken into account when determining the share due to the particular beneficiary.



33. Unlike gift causa mortis, gift intervivos is made without the contemplation of death by the owner. It must also meet certain requirements for the gift to be enforceable. In the case of *Micheni Aphaxard Nyaga & 2 others vs Robert Njue & 2 others*( 2021) e KLR it was held: “ the requirement of the law for such gifts are that they may be settled by a deed or by an instrument in writing by the delivery , by way of 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”.
34. *Halsbury’s laws of England* , 4<sup>th</sup> Edition volume 20(1) at paragraph 67 states as follows: “ where a gift rests merely on 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 the right to enforce the promise.... For the gift to be valid the donor must have done something 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 so”
35. . The Applicant in this case has not shown any deed of transfer, any sale agreement, consent from the Land control Board or any document that would be said to demonstrate the deceased intention to give the alleged one parcel to the Applicant.
36. The Applicant testified that the portion was given to him in 1997, and the deceased died in January 2004. Thus, the land was purportedly given to him 6 years prior to the demise of the deceased. It is curious that the Applicant did not offer any explanation as to why the two never took any steps to regularize the transfer of the gift for the 6 years.
37. Further the Applicant in his submissions and cross- examination, laid a lot of emphasis on the fact that he purchased the property. This assertion is at variance with his pleadings. The pertinent question is, did he purchase it or given to him as a gift? The Applicant’s flip- flopping is not only telling of his own uncertainties about the basis of his claim but also dents his credibility as a witness. It is as though he has come to this court to do some gambling- “if I can prove purchase, well and good; if gift, it is still okey” The onus was on the Applicant to unambiguously set out his claim but to present evidence which are in consonant with his pleadings It is not the work of the court to read the minds of the litigants.
38. Nevertheless, it is trite law that parties are bond by their pleadings and according to his pleadings the land was given to the Applicant as a gift during the life time of the deceased. But as stated before the “gift” did not meet the legal threshold of a gift intervivos and hence unenforceable against the Administrator of the Estate.

### **Whether the Grant should be revoked**

39. The grounds upon which a Grant may be revoked are set out in section 76 of the Act. These are:
  - “(a) .....
  - (b). that the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case:
  - (c).....
  - (d).....
  - (e).....”
40. It is trite law that failure to disclose the beneficiaries constitutes concealment of a material fact. ( see *In Re Estate of Charles Ngotho Gachunga( Deceased )* 2015 e KLR)



41. It is the Applicant's case that the Respondent failed to disclose the fact that he was entitled to the one-acre piece. This court has found that the alleged gift failed the test of gift *inter vivos*. To that extent then there was no material fact that can be said that the respondent failed to disclose to warrant the revocation of grant.
42. In conclusion, am not satisfied that the Applicant has proved his claim against the Respondent. The Application dated 20<sup>th</sup> September 2021 is hereby dismissed.
43. Each party to meet their own costs.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 12<sup>TH</sup> DAY OF OCTOBER 2023**

**S. CHIRCHIR**

JUDGE.

In the presence of:

E. Zalo- Court Assistant

Ms. Luseno for Mr. Kombwayo for the Respondent

No appearance by the Applicant.

