Gitari (As legal representative of the Late Jediel Gitari Mwathani) v Ciankui (Civil Appeal E015 of 2023) [2024] KEHC 13848 (KLR) (6 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13848 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CIVIL APPEAL E015 OF 2023

LW GITARI, J

NOVEMBER 6, 2024

BETWEEN

LUCYLINE KANGAI GITARI (AS LEGAL REPRESENTATIVE OF THE LATE JEDIEL GITARI MWATHANI) ..... APPELLANT

AND

JULIET CIANKUI ..... RESPONDENT

JUDGMENT

1. This appeal arises from the ruling delivered in the Chief Magistrate's Court at Chuka in Succession Cause No.53/2017 in the matter of the Estate of Mwathani Njeru (Deceased).

The Appellant:

2. The brief background is that the Succession Cause relates to the estate of the late Mwathani Njeru (deceased) who died intestate on 11/6/2015. A grant of letters of administration was issued to Jediel Gitari Mwathani on 27/2/2018 in his capacity as the son of the deceased. The administrator then moved the court vide a summons dated 30/8/2018 for the confirmation of the said grant. The summons was supported by the affidavit of the said Jediel Gitari Mwathani sworn on 30/8/2018 and he had proposed the mode of distribution of the estate of the deceased as follows:-

    1. LR. Karingani/Ndagani/2356 to go to Jediel Gitari Mwathani as decreed in Chuka L.D.T No. 2/2010 and the deceased voluntary transfer executed on 12/4/2009.

    2. L.R. Karingani/Mugirirwa /2357, Juliet Ciankui to get the whole share and to hold in trust for herself and for the benefit of her sons. Dennis Mwenda Mwathani, David Gitonga Mwathani, Phenuel Kirimi Mwathani, Peter Kinyua Mwathani and Mwendi Mwathani.

3. Before the grant could be confirmed, a protest was filed by Juliet Ciankui contending that the mode of distribution was not equitable and that it was discriminatory. She also averred that the mode of

distribution would disinherit many of the children of the deceased and the administrator had allocated to himself a large share of the estate. She proposed a mode of distribution which would ensure that all the beneficiaries got an equal share and made provisions for the daughters of the deceased. The protest was heard and determined before the learned trial magistrate who delivered her considered ruling on 29/6/2023. She allowed the protest as the proposal in the protest guaranteed equality to all the children as envisaged under Section 40 of the *Law of Succession Act*. The ruling did not go well with the appellant and he proceeded to file this appeal based on the following grounds in the Memorandum of Appeal dated 27/7/2023.

4. The grounds are as follows:-

    1. That the learned trial Magistrate erred in law and fact in disregarding the evidence on record supporting the fact that the Appellant's husband, Jedieal Gitari Mwathani and his family had been gifted one (1) acre by the Appellant's deceased husband's father (deceased) as gift intervivo and in particular.

        a. The appellant and her family are in total and exclusive occupation of one (1) acre being land parcel No.Karingani/Mugirirwa/2356 and extensively developed the same as gifted by the deceased, Mwathani Njeru.

        b. If the order of distribution appealed against was left to lie, the Appellant and her family will be evicted from their developments and suffer prejudice and irreparable loss.

    2. The learned trial magistrate erred in law and fact in failing to provide for Selina Ciamati Mwathani, a daughter of the deceased who was disinherited and not provided for.

    3. That the learned trial magistrate erred in law and fact in actually allocating the Respondent's house lion's share of the estate against the Appellant's house at the rate of ½ :1/2 in respect of Land Parcel No. Karingani/Mugirirwa/2356 and wholly to the Respondent's house in respect of L.R Karingani/Murigirirwa/2357 in that the Appellant's house consists of:

        a. Lucyline Kangai Gitari (jediel Gitari MwathanI) while the Respondent's house consists of:-

        b. Juliet Ciankui

        c. Caroline Wanja

        d. Denis Muendi

        e. Morris Mugambi Mwathani

        f. Ephanuel Kirimi

        g. Elias Mutembei Mwathani

        h. Denis Mwenda Mwathani

        i. David Gitonga Mwathani

    4. The learned trial magistrate erred in law in holding that there was no gift intervivos because the transfer of L.R Karingani/Mugirirwa /2356 was not completed yet the deceased had not only put the Appellant's husband in possession of the same but also applied to the Meru South Land Control Board for consent to transfer the same to the Appellant's deceased husband, obtained the requisite consent and executed the transfer forms but which transfer could not be effected because of caution of the Respondent.

5. The learned trial magistrate further erred in law and fact in failing to find and hold that the Appellant was entitled to land parcel No.Karingani/Mugiririwa/2356 as a matter of right and law regard being had to in land Disputes Tribunal award and subsequent Decree in Chuka PMC (L.D.T) 2 of 2010) which decreed that Land Parcel N0. Karingani/Mugirirwa/2356 belongs to Jediel Gitari Mwathani (deceased) and now represented by the Appellant.

6. The Judgment is otherwise against the weight of evidence.

5. The appellant prays that the Judgment and decree of the learned trial magistrate be set aside and the court to order that he gets one acre, being Karingani/Mugirirwa/2356 and the rest of the beneficiaries to share LR NO. Karingani/Mugirirwa/2357 measuring 0.82 Ha equally.

6. The appeal was disposed off by way of written submissions.

Appellant's submissions:-

7. The appellant's raised four issues for determination as follows:-

1. Whether the learned magistrate erred in law and fact in disregarding the evidence on record supporting the fact that the appellant's husband Jediel Gitari Mwathani and his family had been gifted one acre by the deceased as gift invervivos.

8. The appellant submits that gift is defined as a voluntary transfer from the true possessor to another person with the full intention that the gift shall not return to the donor and with the full intention on the part of the receiver to retain the thing entirely as this own without returning it to the giver – Halslbury Law of England, 3rd Edition Vol.18.

9. He further relies on Re Estate of Ruth Nyakanini Rukwaro (deceased) Succession cause No.52/2010 2016) eKLR where the court held that for a gift intervivos to be valid there must be proof that the person making the transfer actively intends to make a gift, that the donee accepts and that there is delivery of the property by the transfer by the draw to the drawee. He submits the deceased intended to transfer and attended Land Control Board and actually obtained the consent and put the appellant's husband in possession. That the appellant's family is in exclusive in occupation of one (1) acre and has extensively developed it. He urges the court to consider Section 35 of the *Law of Succession Act* and urges the court to allow the appeal.

2. Whether the learned magistrate erred by failing to provide for a daughter of the deceased Selina Ciamati Mwathani.

10. The appellant relies on Section 40 of the *Law of Succession Act* and submits that Celina Ciamati Mwathani who is a daughter of the deceased should not be disinherited.

3. Whether the learned trial magistrate erred in law and in fact in actually allocating the respondent's house the lion's share of the estate against the appellant's house.

11. He relies on Section 42 of the *Law of Succession Act* and submits that the appellant is entitled to Land Parcel No. Karingani/Mugiririrwa/2356 as a matter of right and law, regard being had to the Land Disputes Tribunal award and subsequent decree in Chuka P.M.C (LDT) 2 of 2010.

12. The appellant prays that the ruling by the learned trial magistrate be set aside and the appellant be given one acre being Karingani/Murigirirwa/2356 and the rest of the beneficiaries including Selina Ciamati Mwathani.

Respondent's Submissions:

13. The respondent has raised a legal issue, that is Locus Standi and submits that the applicant Lucyline Kangai Gitari (the legal representative of the late Jediel Gitari Mwathani) lacks locus in the dispute as she had not obtained a limited grant or a full grant of letters of administration in the estate of Jediel Gitari under whose title she is litigating. He relies on Alfred Njau –v- City Council of Nairobi (1983) 1 KLR 625 where it was held that 'locus standi' is the right to appear or to be heard in court or other proceedings. He also relies on Julian Adoyo Ogunga –v Francis Kiberenge Abana Civil Appeal No.119/2015 H.C Migori (un-reported) where it was held that, " the issue of Locus Standi is so cardinal in a civil matter since it runs through the heart of the case. Simply put a party without locus standi in a civil suit lacks the right to institute and/or even where a valid cause of action subsists. Locus Standi relates mainly to the legal capacity of a party."

> ..... that issue of Locus Standi becomes such a serious one where the matter involves the estate of deceased person since in most cases the estate involves several other beneficiaries or intended parties."

14. He submits that the appellants lacks Locus Standi to prosecute the appeal and it should therefore be dismissed.

    1. On the issue of gift inter-vivos the respondent submits that the transfer never crystalized during the lifetime of the deceased a fact which Jadiel admitted. It is further submitted that the alleged consent of the Land Control Board to transfer the land to Jediel as well as the alleged caution were not produced in court. That the none existent document do not in any-way show there was a gift intervivos. The respondent submits that there were contradictions as to whether the petitioner Jediel was given piece of land by an oral will, see evidence of Gabriel Nthigai, or a fit intervivos and the divergence in the view by the witness and Jediel lead to the inescapable conclusion that there is no gift inter-vivos that will lead to the application of Section 42 of the Act.

15. The respondent has urged the court to consider the evidence of the respondent that deceased had sub-divided his land into nine equal potions intended for his children and find that the issue of gift inter-vivos does not arise. That there is evidence that the appellant Jediel Gitari had stolen a title deed and had the land sub-divided with intention to get a bigger portion.

16. The respondent submit that the gift intervivos under Section 42 of the Law of Succession is supposed to be settled during the deceased lifetime and will be taken into account when distributing the net intestate estate, relies on Re Estate of the late Gedion Manthi Nzioka (deceased) 2015 eKLR at page 4& 5. He also relies on Halsbury's Laws of England 4th Edition Volume 20(1) at 67, In Re-Estate of M'Raiji Kithiano, (deceased)

17. The respondent urges the court to find that there was no gift intervivos between the deceased and Jediel. On distribution of the estate the respondent submits that the respondent was polygamous and equal distribution to all beneficiaries and the surviving spouse is what is envisaged under Section 40 of the Act. He submits that the learned trial magistrate based her ruling on the Law and evidence and the same should be upheld.

Analysis and Determination:

18. I have considered the proceedings before the learned magistrate, the ruling and all the submissions by the parties. The issues which arises for determination are:

1. Whether the appellant has locus standi.

2. Gift intervivos

3. Distribution of the Estate.

4. Whether the appeal has merits.

19. This is the 1st appellate court. The duties of this court have been laid down in various authorities of this court and the Court of Appeal. This court has a duty to analyze the evidence which was adduce before the lower court, re-evaluate it and come up with its own independent findings while bearing in mind that unlike the trial court it had no opportunity to see the witnesses when they testified and leave room for that. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the Judgment and arrive at its own independent Judgment on whether or not to allow the appeal. See, Selle & Another –v- Associated Motor- Boat Company Ltd 1968 E.A 123 and Peters –v- Sunday Post Limited

20. I will proceed to analyze the evidence the proceedings in the lower court starts from page 93-98 which are proceedings before J.M. Njoroge, CM. The impugned ruling by J.M. Gandani Chief Magistrate starts from page 99 to page 104 of the record. The proceedings before J. Gandani are missing from the record. I will proceed to consider the issues for determination.

Whether the appellant has locus standi

21. The locus standi is the right of a party in suit to appear in Judicial Proceedings, present her/his case and a determination of his case to follow. A person who has no locus standi has not right to appear in court and be heard in the proceedings where he purports to appear. A party appearing in court without locus standi will render the proceedings as a nullity ab intial.

See Julian Odoyo Ogunga –v- Francis Kiberenge Abano (supra) where the doctrine was expounded.

22. In succession matters, a person obtains the locust standi to represent a deceased person's estate if he has obtained a grant of letters of administration issued by the court for that purpose. The grant may be limited for a particular purpose which will be disclosed in the grant or a full grant which gives the administrator the power to administer the estate and distribute it to his lawful beneficiaries. In this case the record shows that appellant was issued a limited grant on 19/7/2021. The grant appears at page 44 of the record and states that Lucyline Kangai Gitari was issued a limited grant of Letters of Administration in the estate of Jediel Gitari Mwathani who died while domiciled in Kenya on 21/3/2021. The appellant has been enabled by this grant to represent the deceased in this matter. The issue of her not having locus standi should therefore not arise.

2. Gift Inter vivos:

Section 42 of the *Law of Succession Act* provides as follows:-

(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."

23. The fact that the Section provides that the gift shall be taken into account in determining the share accruing to the child or grandchild must be construed to mean that the gift in question must have been given and settled for that particular beneficiary during the life time of the deceased.

24. The characteristics of the gift inter vivos is that it must have been given during the lifetime of the deceased. The gift should have been settled for the beneficiary either in writing, delivery or by trust during the lifetime of the donor to the donee.

25. The gift once settled will not form part of the estate of the deceased but will be taken into account when distribution of the net intestate estate is being considered. Thus where the gift rests merely in a promise whether written or oral, the gift is incomplete and imperfect and will not be enforced against the estate of the deceased. See Halsburys Laws of England (supra) 4th Edition Vol 20(1) paragraph 67 when it is stated as follows within respect to incomplete gifts.

> whether the gift merely rests in a promise, whether written or oral or unfulfilled intention, it is incomplete, 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 donors subsequent conduct gives the done a right to enforce the promise. A promise made by deceased 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 to in which it was his power to do."

26. Thus in inter vivos the gift must go to the done absolutely during the lifetime of the donor and short of that the gift is not to be considered as having passed to the done and the property forms part of the estate of the deceased. The test be in the definition and 'estate' which is,

> See Odunga's digest on Civil Case Law and Procedure (Vol) (III) page 2417 where it stated that, "Generally speaking, the moment in time when the gift takes effect is dependent on the nature of gift, the statutory steps taken by donor to effectuate the gift--------- Equity will not come to the aid of a volunteer, and therefore if a donee needs to get an order from a court of equity in 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 equity, then the gift is complete," "That it is on that principle that in equity, it is held that a gift is complete as soon as the done has done everything that he 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. Likewise, a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the done has not been registered as a proprietor."

27. If the property was under the control of the donor in his life time and could use it in the manner he wished, upon his death, it forms part of the estate.

28. In this case the land in dispute was not transferred to the appellant by the deceased during his lifetime. The deceased did not intend to make the gift to the appellant voluntarily. Jediel Gitari Mwathani in his affidavit sworn on 10/7/2019 deposes that the deceased refused to sign the necessary documents to facilitate the transfer and he was forced to file LDT case No.3/2010 against him. This shows that it is the appellant who was forcing the deceased to give him the land. The deceased never executed the transfer. It is clear that the property was not given to the appellant by the deceased willingly during

his lifetime. The gift was incomplete and imperfect and this court cannot compel the administrator to complete it. The Land Parcel formed part of the estate of the deceased.

29. The appellant contends that he had a decree which was issued in LDT case No.2/2010 dated 6/5/2010. No reason is given as to why the appellant did not execute the decree during the lifetime of the deceased. Section 4 (4) of *Limitation of Actions Act* provides that;

> an action may not be brought upon Judgment after the end of twelve years from the date on which the Judgment was delivered."

30. By 29/6/2024 when the learned magistrate delivered the Ruling the decree in LDT case No. 2/2010 had expired and was barred by the Limitations of Actions Act.

31. The learned magistrate did not in any- way err by failing to recognize the decree. The ground must fail.

Distribution of the Estate:

32. The law of Succession envisages the equal distribution of the Estate of the deceased to all his lawful beneficiary. Section 38 of the *Law of Succession Act* provides that:

> Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children."

33. On the other hand Section 40(1) of the *Law of Succession Act* provides as follows:-

> (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children."

34. In Rono –v- Rono Civil Appeal No.66 of 2002, Court of Appeal Waki J.A stated:-

> "More importantly Section 40 of the Act which applies to the estate makes provisions for distribution of the net estate to the houses according to the number of children in each house but also adding any wife surviving the deceased as an additional unit to the number of children." A 'house ' in a polygamous setting is defined in Section 3 of the Act as a family unit comprising a wife and children of that wife.

35. In Re Estate of Benson Ndirangu Mathenge (deceased) the Judge treated the wife and children in one house as units and the wife and children in the second house as units and had the estate distributed equally according to the number of units in each house.

36. In Re Esate of Nelso Kimotho Mbiti Koome J (as she then was) directed the estate of a polygamist to be distributed under Section 40 of the Act in accordance with the number of children in each house with widows being added as additional units.

37. It is well settled following the line of the above authorities that the distribution of the estate of a polygamous man who dies and leaves behind children the estate is supposed to be distributed under Section 40 of the Act treating each child as a unit irrespective of the house (s) and the wife or wives as additional unit.

38. These provisions are as old as the *Law of Succession Act*. The notion of equal distribution of the estate of the deceased has always been recognized by the *Law of Succession Act*. It is not a creation of the

Constitution of Kenya 2010. The Constitution of Kenya 2010 outlaws discrimination. As such sons and daughters have the right to get equal shares of the estate. So I must state that the appellant and his step-brothers and sister are entitled to share the estate equally and the surviving spouse, the protestor is treated s a unit and is entitled to a share of the estate. In the end I find that the appeal is without merits. Selina Ciamati Mwathani is undisputed daughter who was not given a share. The administrator should make provisions for her as she is entitled to a share of the estate just like any other child of the deceased.

39. For these reasons I find that the appeal is without merits. The decision of the learned magistrate is upheld.

In conclusion:

40. The appeal lacks merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 6TH DAY OF NOVEMBER 2024.

L.W. GITARI

JUDGE

6/11/2024

The Judgment has been read out in open court.