



REPUBLIC OF KENYA



**In re Estate of Nkurumwa Ole Ntemel (Deceased) (Succession Cause E003 of 2021) [2024] KEHC 13805 (KLR) (4 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13805 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KILGORIS  
SUCCESSION CAUSE E003 OF 2021  
F GIKONYO, J  
NOVEMBER 4, 2024**

**BETWEEN**

**NAMARISHO NAYIOMA ..... 1<sup>ST</sup> PETITIONER**

**KINANGARE NAYIOMA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**PARAKUO NTEMEL ..... PETITIONER**

**JUDGMENT**

1. The petitioners are co-wives. The deceased is the registered owner of land parcel No. Transmara/Osinoni/60. The 1<sup>st</sup> petitioner has 7 children and the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners have 8 children each.
2. The petitioners petitioned for letters of administration but have not been able to agree on the mode of distribution of the estate.
3. The 1<sup>st</sup> and 3<sup>rd</sup> petitioners are of the opinion that the deceased had already subdivided his land before his demise and that each of the petitioners was allocated her share/portion whilst the deceased reserved one portion for himself. They, therefore, opine that the portion that the deceased had reserved for himself should be subdivided into equal shares between the three petitioners.
4. The 2<sup>nd</sup> petitioner is of the contrary opinion. She claims that the deceased had temporarily given each petitioner some portion for temporary use until when the land was permanently divided and each petitioner given her title deed for her share. She further contends that the deceased had temporarily subdivided his land into three parts and curved for himself a portion from the share of the 2<sup>nd</sup> petitioner. She alleged that the deceased wanted to curve for himself a portion from each wife but the 1<sup>st</sup> and 3<sup>rd</sup> petitioners refused. Therefore, the portion which the deceased had allocated to himself belongs to the 2<sup>nd</sup> petitioner.



## Directions of the court

5. The mode of distribution was canvassed by way of written submissions.

## The 1st and 3rd petitioners' submissions.

6. The 1<sup>st</sup> and 3<sup>rd</sup> petitioners submitted that there exists sufficient evidence on record that the deceased distributed his estate prior to his death and the court should be guided by section 42(a) of the Law of Succession Act. The 1<sup>st</sup> and 3<sup>rd</sup> petitioners relied on In the estate of the Late Morogo A. Mugun Alias Moroko Mukumu [2019] Succession Cause No. 113 of 2011.
7. The 1<sup>st</sup> and 3<sup>rd</sup> petitioners urged this court to disregard section 40 of the Law of Succession Act as it does not apply to the specific facts and circumstances of this case and be guided by section 42 of the said Act and uphold the deceased wishes during his lifetime by adopting the protestors mode of distribution which promotes the family peaceful co-existence for over 20 years since the boundaries were created in 2004.

## The 2nd petitioner's submissions.

8. The 2<sup>nd</sup> petitioner submitted that the estate be divided equally by the three petitioners or the portion owned by the deceased before his demise formed part of the 2<sup>nd</sup> petitioner's share. The 2<sup>nd</sup> petitioner relied on section 40 of the Law of Succession Act, in the matter of the estate of Nelson Kimotho Mbiti (Deceased) HSC No. 169 of 2000, and in the matter of *re estate of Benson Ndirangu Mathenge (Deceased)* Nakuru HCSC No. 231 of 1998.
9. The 2<sup>nd</sup> petitioner prayed for the costs of the cause. The 2<sup>nd</sup> petitioner relied on section 27 of the Civil Procedure Act.

## Analysis And Determination

10. Under intense dispute is the mode of distribution of the estate. The parties were unable to agree on the mode of distribution. As a result, the parties tendered two witness statements and surveyor's report dated 18/03/2024 and two affidavits dated 13/2/2024 in that regard which this court has considered.
11. This court has also considered the respective parties' written submissions together with the summons for confirmation of grant dated 14/11/2023 and affidavit of protest dated 13/02/2024.

## Issues

12. Thus, the following are the issues for determination.
  - i. Whether the deceased, an intestate had, during his lifetime, given or settled any property to or for the benefit of each of the three houses;
  - ii. How the estate should be distributed Gifts inter vivos; Wishes of the deceased?
13. The estate of the deceased comprises land parcel No. Transmara/ Osinoni/60. The deceased was survived by three wives and several children. The deceased died intestate on 09/05/2016.
14. According to Charles Saningo Soit who is a neighbor to the late Nkurumwa's family, the deceased called for a meeting in his homestead. The village elders, his neighbors; himself and James Parsaloi Shira, and all his wives and children were present. The purpose of the meeting was to subdivide his land into four portions; a portion for each wife to hold for respective children and one for himself.



15. It is not in dispute the deceased divided his parcel of land into four portions of which he settled his three wives in three portions in 2004, and reserved one portion for himself.
16. It is not also in dispute that the portion for each household portion was fenced with trees and kenawa bushes which exist to date. This position has been corroborated by two neighbors Parsaloi Shira and Saningo Soit and further by the surveyor's report.
17. The petitioners are in unanimity on one other issue; that the portion which the deceased reserved for himself was being utilized by the deceased for the benefit of the three households and after the demise of the deceased none of the households utilized the said portion.
18. Another fact not in dispute; that the three households have peacefully co-existed after each household was settled in their portion. It was claimed, however, that, this peace is now being threatened by the distribution of the portion of land that the deceased reserved for himself. The peace that has existed should be maintained through justice; equity and fairness. How will this be achieved?
19. The 1<sup>st</sup> and 3<sup>rd</sup> petitioners base their claim on section 42 of the *Law of Succession Act*; that deceased had, during his lifetime settled property to each of the houses.
20. Section 42 of the *Law of Succession Act* provides that: -  
Previous benefits to be brought into account  
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.
21. Section 42 of the *Law of Succession Act* embodies the concept of gifts inter vivos- gifts made between living persons. Making understanding of the law on gifts inter vivos the functional foundation for resolution of these claims.
22. *In re Estate of the Late Gedion Mantbi Nzioka (Deceased)* [2015] eKLR Nyamweya J (as she then was) explained gifts inter vivos as follows:

“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. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. See in this regard *Halsburys Laws of England* 4<sup>th</sup> Edition Volume 20(1) at paragraph 32 to 51.

In *Halsburys 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.'

23. Further indents. Halsbury's Laws of England, 4<sup>th</sup> edition, volume 20(1) para 70 states that: -

The subsequent acts of the donor may give the intended donee a right to enforce an incomplete gift. Thus, if a donor puts the donee into possession of a piece of land and tells him that he has given it to him so that he may build a house on it, and the donee accordingly, and with the donor's assent, expends money in building a house, the donee can call on the donor or his representatives to complete the gift.

24. Other examples; where the donor appoints the donee as executor is confirmation of the imperfect gift.

25. It is also worth noting that, in imperfect gifts inter vivos, it is important to show that, the intention to make a gift continued unchanged until the death of the donor.

26. The 2<sup>nd</sup> petitioner seems to argue that, the deceased settled the three houses in distinct portions of land but only temporarily. The 1<sup>st</sup> and 3<sup>rd</sup> petitioners claim that, the deceased settled the properties to the respective houses in accordance with section 42 of the Law of Succession Act.

27. What does the evidence say?

28. The deceased divided the land into four portions and settled each of the three houses in the three portions. Each house was shown a particular portion where they live up to now.

29. The deceased placed physical and visible demarcation of each of these portions of land. From the evidence, each house established their homesteads in their respective portions with full consent and encouragement of the deceased. Each house also utilized their respective portions.

30. The intention of the deceased to settle these three portions to each house was cemented by his decision to reserve one portion for himself which he only utilized. None of these houses utilized the portion reserved for the deceased during his lifetime or after his death. The petitioners confirmed this state of affairs. This intention continued until his death and never interrupted any house in their occupation and use of their distinct portions of land. Therefore, the claims by the 2<sup>nd</sup> petitioner that the arrangement was temporary until title deeds are deduced, is not supported by evidence.

31. The petitioners and their children were present when the deceased divided his property and all agreed to the decision. Therefore, this court considers the authorities cited by counsel for the 1<sup>st</sup> and 3<sup>rd</sup> petitioners to be quite persuasive. Whilst, those cited by counsel for the 2<sup>nd</sup> petitioner are distinguishable from the instant case in that the deceased herein had established his wishes during his lifetime at the request and with the consent of the 2<sup>nd</sup> petitioner; which is lacking in those authorities.

32. The proposed mode of distribution proposed by the 1<sup>st</sup> and 3<sup>rd</sup> petitioners that each house to get the portion the deceased settled them respects the wishes of the deceased. This court is satisfied that, the intention of the deceased was to settle the properties to and for the benefit of each of the three house, which was expressed in the apportioning of distinct portions of land to each of the three houses, placing marked boundaries to delineate them, and encouraging each of the houses to settle, reside, build and exclusively use their respective portions of land. These acts do not, however, constitute a will.



33. He put each house into possession of a particular piece of land and permitted them to build and live in those particular pieces of land with his assent, thus, each house can call on the representatives to complete the gift. The actions and subsequent acts of the deceased gives the houses a right to enforce an incomplete gift.
34. In the circumstances, this court finds these were imperfect or incomplete gifts inter vivos made by the deceased to the three houses. Accordingly, the deceased, an intestate, during his lifetime, gave or settled the three portions in issue to and for the benefit of each of his three houses.
35. Nevertheless, such property shall be brought into account in determining the share of the net intestate estate finally accruing to each of the houses in accordance with section 42 of the [Law of Succession Act](#).
36. Each house can call on the representatives of the deceased-the administrators- to complete the gifts. Completion thereof, as per the evidence adduced, is to impress in the certificate of grant that, the three portions which the deceased settled to his three houses shall be held by the respective widow for the benefit of the widow and that of the children of the house in equal shares.

**Distribution of portion reserved for deceased.**

37. The outstanding matter is in respect to the portion which the deceased reserved for himself.
38. The 2<sup>nd</sup> petitioner appears to argue that this portion was hived from her portion after the other two widows refused the deceased to hive a portion from their respective portions. There was no evidence to support this claim.
39. The evidence show that, the deceased reserved the fourth portion for himself which he solely utilized albeit for the benefit of all his family. None claimed to have ever lived or used this portion at any time. This portion was also not settled by the deceased to any person or house during his lifetime or through a will. Therefore, this is intestate portion to be distributed in accordance with the [Law of Succession Act](#).
40. The 1<sup>st</sup> petitioner has 7 children and the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners have 8 children each as per the chief's letter dated 16/06/2021.
41. From the summons for confirmation of grant dated 14/11/2023, the petitioners proposed that the estate be distributed equally among the three households.
42. The 1<sup>st</sup> and 3<sup>rd</sup> petitioners opposed the proposed mode of distribution vide affidavit of protest dated 13/02/2024. The 1<sup>st</sup> and 3<sup>rd</sup> petitioners proposed that each household should maintain their respective portions, the existing boundaries marked by trees and kenawa be maintained and the remnant portion be divided equally among the three households. This aspect has been settled.
43. The 3<sup>rd</sup> petitioner proposed that the parcel reserved for the deceased should be divided equally among the three houses.
44. According to the surveyor's report dated 18/03/2024, the acreage of the portions delineated by the deceased to each of the 3 houses and one for himself was established. The findings show acreage based on existing boundaries and occupation of the portions.
  - i. Nkrumwa Ole Ntemel- Deceased – 21.37 HA
  - ii. Namarisho Nayioma – 1<sup>ST</sup> Petitioner- 41.68 HA.
  - iii. Kinangare Nayioma- 2<sup>Nd</sup> Petitioner- 37.63 HA
  - iv. Parakuo Nayioma- 3<sup>Rd</sup> Petitioner- 20.9 HA.



45. The surveyor also noted that the ground total area was more by 25.36 ha as compared to the registered area of 96.22 HA.
46. It is the court's view that, the proposal by the 1<sup>st</sup> and 3<sup>rd</sup> petitioners that the portion which the deceased had reserved for himself be shared equally amongst the three houses, is problematic. It is tinged with selfishness and an ominous desire to thwart the principle of equality and fairness in the sharing of the estate to the dependants; which is perpetuated further in their proposal that, the court should ignore the provisions of section 40 of the *Law of Succession Act*; especially considering that their house has the biggest portion, yet it has fewer children.
47. Similarly, the proposed mode of distribution by the 2<sup>nd</sup> petitioner that the entire portion belongs to her house ignores the settlements done by the deceased during his lifetime, and the fact that he reserved the portion for himself. It is also quite selfish in respect of the portion the deceased reserved for himself, for claiming the whole of it, will make the house of the 2<sup>nd</sup> petitioner the biggest landowners in the estate of the deceased. No particular reason was given for the proposal except that it was part of their land.
48. Hitherto, the 1<sup>st</sup> house has the biggest portion of land. Unless for special, but lawful reason-which has not been shown in these proceedings- the principle of equality will not favor equal sharing of the property the deceased reserved for himself, because in law, in an intestate estate, where the deceased, during his lifetime, had given or settled any property to or for the benefit of a child, grandchild or house, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house. S.28 and 42 of the *Law of Succession Act*.
49. The property that had been settled by the deceased to each house is to be considered in determining the ultimate entitlement of each house or dependants in accordance with section 40 of the *Law of Succession Act*.

### **Disposition**

50. In the upshot, the estate of the deceased will be distributed as follows: -
  - a. Each house shall retain their respective portions of land as had been divided and demarcated by the deceased; to hold for the benefit of the widow and all the children of the house in equal shares.
  - b. In addition, the 1<sup>st</sup> house shall take one quarter of the portion the deceased had reserved for himself; and the remainder shall be divided equally between the 2<sup>nd</sup> and 3<sup>rd</sup> house; each house to hold their respective shares for the benefit of widow and all the children of the house in equal shares. This formula applies to the additional ground area which should be incorporated into the estate as here below.
  - c. The disparity between the ground total area and the registered area of the estate property be resolved or reconcile subject to and in accordance with the law. Parties to pursue this through lawful means and incorporate it into the estate property. And, upon conclusion of the process, the formula in (b) above applies. This issue needs to be resolved before the issuance of title deeds to respective households in order to avoid fragmentation of the portions.
  - d. These being members of the same family, each party shall bear own costs.
  - e. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH TEAMS APPLICATION, THIS 4<sup>TH</sup> DAY OF NOVEMBER 2024.**



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**F. GIKONYO M.**

**JUDGE**

In the Presence of:

C/A - Nyangaresi

M/s. Ndonga for 1<sup>st</sup> & 3<sup>rd</sup> Petitioners/Protestors – present

Ms. Pion for 2<sup>nd</sup> Petitioner/Respondent - present

