



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 174 OF 2014

IN THE MATTER OF THE ESTATE OF MAGAMBO GITUNGA (DECEASED)

JOSEPH KIBITI MAGAMBO ADMINISTRATOR

VERSUS

ROSE NGUTIKU MAGAMBO 1ST PROTESTOR

EUNICE NGUTIKU MAGAMBO 2ND PROTESTOR

J U D G M E N T

1. **MAGAMBO GITUNGA** ('the deceased') died on 30th May 1985. He was survived by his 14 children, seven sons and seven daughters. The only asset forming his estate was listed as **Kibirichia/Kibirichia/391** measuring 3.72 ha.
2. The deceased's sons **M'Mbori M'Magambo and Joseph Kibiti Magambo**, petitioned for the grant letters of administration which was issued to them on 3rd November, 2014. The petitioners sought to have the grant confirmed vide an application dated 11th August, 2015.
3. However, this was met by a protest by **Rose Ngutiku Magambo and Eunice Ngutiku Magambo**. They contended that they are wives of the late **Ngutiku Magambo**, a son of the deceased. That the petitioner had lodged the present succession without their knowledge and consent. That it had been agreed that the estate be distributed equally.
4. In his supplementary affidavit sworn on 23rd January 2019, **Joseph Kibiti Magambo** contended that in or about April 1981, the deceased had shared his land amongst his seven sons and one daughter. As for his other 6 daughters, they were to share 1.28 acres jointly. After the distribution some of his sons sold their respective shares to relatives and that is why he was proposing to distribute the estate as follows:

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1. Joseph Kibiti Magambo - 1.60 Acres
2. Gatobu M'Ringera Magambo - 0.80 Acres
3. Joseph Kinoti M'Mbogori - 1.60 Acres
4. Nancy Kanana Magambo - 0.50 Acres
5. Joshua M'Mbijiwe Magambo - 2.40 Acres
6. D. Kinyua Mbogori - 0.80 Acres
7. Lucy Gachigo Magambo
8. Paul Kingaru Mbui - To share
9. Saliba Rigiri Magambo - 1.28 Acres
10. Margaret Ncurubi Magambo - jointly

11. Jennifer Nkuene M'Rintari

12. Evangeline Kanugu Magambo

5. His mode of distribution was supported by the grandchildren of the deceased namely: Paul Kingaru Mbui, Nkatha Mbaya, D. Kinyua Mbogori, Moses Mwirigi, Joseph Kinoti M'Mbogori and Paul Kingaru Mbui vide their affidavits sworn on 23rd January, 2018.

6. The parties agreed that the Counsels do submit on the evidence on record as the same was largely not in dispute. The 1st and 2nd protestors submitted that the administrator's allegations were baseless and that their only claim was 0.80 acres being their husband's share. That whether or not their husband sold his share it did not matter as that was illegal and unlawful as the parcel was at the time in the name of the deceased.

7. That the remedy of **Joseph Kinoti M'Mbogori** as purchaser was in the Environment and Land Court which is constitutionally mandated to determine such matters. Besides, the provisions of **Section 45 of the Law and Succession Act** provides that if their husband sold the portion the same it amounts to intermeddling.

8. On the other hand, the administrator submitted that the protestors had not challenged his averments. That the estate should be distributed as he had proposed.

9. The issues for determination are ***whether the protestors were notified and gave consent to the filing of this Cause and, how should the estate of the deceased should be distributed.***

10. All the other beneficiaries were agreeable to the proposed mode of distribution except the protestors. The protestors alleged that they were not aware of these proceedings and that they did not give their consent. On record there is a consent dated 3rd April 2014. It is shown to have been signed by amongst others, the protestors. The protestors did not deny that the signatures appearing on that consent were theirs. They did not disclaim that consent. In this regard, their allegation of not having been notified of this cause is rejected.

11. On distribution, the evidence on record shows that, in or about 1981, the deceased divided his land amongst his children as follows:-

a) M'Mbori Magambo (deceased) - 0.80 acres

b) Shadrack Matiri Magambo (deceased)- 0.80 acres

c) Ngutiku Magambo (deceased) - 0.80 acres

d) M'Ikiara Magambo (deceased) - 0.80 acres

e) Gatobu M'Ringera Magambo - 0.80 acres

f) Mbaya Mbijiwe Magambo - 1.60 acres

(presumed dead)

g) Joseph Kibiti Magambo - 1.60 acres

h) Nancy Kanana Magambo - 0.50 acres

i) Elizabeth Karamburi Magambo *(deceased)*

Jenniffer Nkuene M'Rintari

Margaret Ncurubi Magambo 1.28

Lucy Gachigo Magambo acres

Saliba Rigiri Magambo jointly

Jennifer Nkuene M'Rintari

12. None of the beneficiaries, the protestors included, disputed this fact. Indeed it is on the basis of the foregoing that the protestors were claiming 0.80 acres as the share due to their husband, the late **Ngutiku Magambo**.

13. According to the administrator, after the deceased had divided his said land to his children as aforesaid, some of his children sold their shares to others. **M'Mbori Magambo** gave his share to his son **D. Kinyua Mbogori**. **Shadrack Matiri and Ngutiku Magambo** sold their shares to their nephew **Joseph Kinoti**. While **M'Kiara Magambo's** son **Moses Mwirigi** sold his father's share to **Mbaya Mbijiwe**.

14. It was deposed and not denied that, **Joseph Kinoti** purchased the share of the late **Ngutiku Magambo** at the instance of the deceased because the deceased did not want any portion of his property to be sold to an “outsider”. **Joseph Kinoti**, being a grandson of the deceased, and therefore an “insider”, purchased the aforesaid shares, took possession thereof and has developed the same extensively. He has been in possession thereof for over 30 years.

15. It was further stated, and not denied, that these sales took place during the lifetime of the deceased. That at his sanction, the late **Ngutiku Magambo** asked **Joseph Kinoti** to help relocate him, **Ngutiku Magambo** and his family to his 17 acre farm at Marurui in Kibirichia.

16. Without denying the foregoing, the protestors submitted that whether or not their late husband sold his portion, it was unlawful and amounted to intermeddling under **section 45 of the Law of Succession Act**.

17. **Section 45** aforesaid provides: -

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

18. **Section 3(1) of CAP 160** defines free property as:

“free property”, in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death;”

19. It is clear from the uncontroverted evidence on record that the deceased had already gifted the late **Ngutiku** and all his children their respective portions. All that he had not yet done was to transfer the titles thereof to each one of them. In **Joseph Wairuga Migwi v Mikielina Ngina Munga [2016] eKLR** the court held that: -

“While it is possible for a person to distribute his properties during his/her lifetime, there are certain elements which must be demonstrated as prove that indeed the deceased gave out a gift inter vivos. This brings into play the provisions of Section 42 of the Law of Succession Act which provides:-

“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.”

In my view this section of the law seeks to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustration. They are to be honored and effected.”

20. In view of the foregoing, I am of the view that after having divided his property as aforesaid, the deceased divested himself of the ownership thereof. That is why he was approving the sales of the respective shares amongst his children and relations. He had surrendered the ownership thereof to the respective children despite of the gift being incomplete for lack of transfer. **Ngutiku** sold his share to **Joseph Kinoti** during the lifetime of the deceased.

21. That cannot be said to have been intermeddling. The deceased himself approved of it as it was sold to his grandson. These facts having not been denied, they remain to be the truth. **(See Mohammed & Another vs. Haidara [1972] E.A 166 at page 168).**

22. In view of the foregoing, I am satisfied that the protest has no merit and the same is dismissed. The grant of letters of administration intestate issued to **Joseph Kibiti Magambo** on 5th June, 2018 be and is hereby confirmed as proposed by the administrator.

It is so decreed.

DATED and DELIVERED at Meru this 6th day of June, 2019.

A. MABEYA

JUDGE