



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 225 OF 2000

In the Matter of the Estate of the Muchai Gachiuka (Deceased)

MURITHII MITAMBO

(Suing as the legal representative of the estate of

M'MITAMBO MUCHAI (deceased).....RESPONDENT

Versus

MARETE MUCHAI.....PETITIONER

RULING

Case of prior bequest

[1] These proceedings relate to the estate of Muchai Guchiuka (deceased). The estate property is **L. R NO.ABOGETA/U-KIUNGONE/405 measuring approximately 3.2Ha**. Murithii Mitambo and Marete Muchui are the joint administrators of the estate having been so appointed by the court in its ruling of 4th April 2018. The two administrators were also directed to apply for confirmation in 14 days and file the mode of distribution. The proposed distributions are quite disparate. What do each party say?

Petitioner: others received gifts inter vivos

[2] The Petitioner argued that he is the only person entitled to receive the whole estate for it was his share as the beneficiary of the estate of the deceased. He argued that the deceased had during his lifetime subdivided and transferred land to all the other dependants as follows:

- a) M'ithinji Muchai (son) – **LR ABOGETA/U-KIUNGONE/1361**
- b) Mitambo Muchai (son) – **LR ABOGETA/U-KIUNGONE/1362**
- c) Paul David (Grandson to the deceased & son to Mr. Paul son to the deceased) – **LR ABOGETA/ U-KIUGONE/1363**
- d) Nkanata Muchai (son) – **LR ABOGETA/U-KIUNGONE/747**
- e) Njau Gachianga – **LR ABOGETA/U-KIUNGONE/1381**

[3] The only property that remained was **LR/ABOGETA/U-KIUNGONE/405** which the Respondent was supposed to inherit. He accused the Respondent of having fraudulently caused this succession to be filed secretly and purportedly in the name of the Petitioner.

[4] The Respondent is the grandson of the deceased for he is the son of late Mitambo Muchai, son of the deceased. The Respondent wonders why the Petitioner obtained orders barring Kionyo Tea Factory from compensating him in relation to **LR ABOGETA/U/KIUNGONE/3778** which belongs to him as was his father's land.

DETERMINATION

Issues

[5] From the arguments presented, three issues emerge, to wit:

1. Whether the deceased made gifts inter vivos to some beneficiaries. And if so, whether those gifts should be taken into account in determining the ultimate entitlement of the beneficiaries in this cause.

2. How the estate should be distributed.

Principle of equality

[6] Principle of equality in the sharing of the estate of the deceased is usually tempered with equity especially where gifts *inter vivos* to some beneficiaries has been pleaded. I need not overemphasize the law on gift inter vivos except to state that such gifts are taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild who or house which received the gift. But it be understood well that the gift does not form part of the estate property for distribution to other beneficiaries, for, it is no longer the free property of the deceased. See section 3 of the Law of Succession Act:-

“estate” means the free property of a deceased person; “executor” means a person to whom the execution of the last will of a deceased person is, by the testator’s appointment, confided;

And...

“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;

[6] See also Section 28 of the Law of Succession Act which provides that:

“In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

...

(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;

...”

And Section 42 of the Law of Succession Act which specifically states that:

“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 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

[7] The provisions in sections 29 and 42 of the Law of Succession Act embrace elegant principles of equity, equality and fairness in the distribution of the estate of the deceased to beneficiaries; it avoids double-portion syndrome and reins on greed of beneficiaries.

Gift must be proved

[8] Importantly, gift *inter vivos* must be established by evidence. See the case of **In re Estate of The Late Gedion Manthi Nzioka (Deceased)[2015] eKLR** where it 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. 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 4th Edition Volume 20(1) at paragraph 32 to 51.

In Halsburys Laws of England 4th 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 done 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.”

The missing link

[9] Based on the foregoing, I cannot help to state that there is a missing link in this case. The sons of the deceased who are alleged to have been given the gifts *inter vivos* have not been participating in these proceedings. They bear the key to the truth. Again, the Respondent is the only person who seems to claim his father’s share. The court has not been told whether the late Mitambo had other children. Needless to state that the court is concerned with fairness and justice in the distribution of the estate. Accordingly, I direct:-

- 1. That all the sons of the deceased who are living and the families of those who have departed shall appear before this court on a date to be fixed for hearing on distribution.*
- 2. Further, the Petitioner shall file land registry record showing the original land parcel number and proprietorship details thereto which he alleged was subdivided and given to his brothers by the deceased.*
- 3. Prohibition orders issued earlier shall remain until this case is finalized.*

Dated, signed and delivered in open court at Meru this 9th day of July 2018

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F. GIKONYO

JUDGE

In the presence of:

Mr. Wamache advocate for petitioner

Mr. Carl Peters for Mr. Nyenyire for Respondent

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F. GIKONYO

JUDGE