



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 99 OF 2006

IN THE MATTER OF THE ESTATE OF GAICHUKIGETA GITEGIA (DECEASED)

CHARLES NJERU GAICHU.....PETITIONER

Versus

ROBINA MATI GAICHU.....OBJECTOR

JUDGMENT

[1] These proceedings relate to the Estate of **Gaichu Kigeta Gitegia (Deceased)**. The widow, Regina Ntono Mutegi is also deceased. The children of the deceased are:

1. **Charles NjeruGaichu;**
2. **Silas Mutegi;**
3. **KareaGaichu;**
4. **Mechalina Ciamuru; and**
5. **Robin Mati**

[2] The estate comprises **LR. NO. N. THARAKA/542 measuring approximately 21.67Ha** and another land at Mokothima.

[3] In the Summons for Confirmation of Grant, the Petitioner proposed to have the entire estate distributed solely to him. See paragraph 6 of the affidavit in support dated 2008. The Protestor, Robina MatiGaichu, a daughter of the deceased filed a protest to the confirmation of grant which was heard upon *viva voce* evidence of the parties. From the evidence recorded, the Protestor is a daughter of the deceased; and not married but has 4 children. She stated that the deceased had four pieces of land at Mukothima, Marimanti, South Tharaka/Marimanti/533 and S. Tharaka/542. She proposes that:

1. **LR. NO 542 be shared between her and the petitioner only because they were settled on that land by the deceased; and**
2. **LR. NO 533 should be shared among four persons namely, (1) Charles Njeru; (2) Cecilia Gatiiria; (Regina Ntono; and (4)) RobinaMati.**

She claimed that the other sisters do not have any claim on the estate and should not be provided for as proposed by the petitioner. Silas GitongaMachieki testified as OW2. He knew the deceased as well as his family well. He told the court that the deceased had 3 pieces of land at Mokothima, Gitigimio (542) and NithiNguni now 533. The land at Mukothima has no title but the widow used to reside there. The Petitioner and protestor live in 542. The late Gatiiria also has a portion in 542. But he does not know who uses it now. The deceased shared No 533 into four portions in his presence, the chief and others and the petitioner agreed with it. However, the petitioner registered the land into his name fraudulently- something that caused the deceased to sue him in Chuka court.

[4] OW3, one Regina Mutegi was the widow of Silas Mutegi, late son of the deceased. She stated that the deceased had 3 pieces of land No. 333. Another at Mokothima and another one at Marimanti. She said that they all lived in 542 but she left for No 333 where she lives alone. Plot No 333 is also known as Nthiguru and no one lives there save it is cultivated by her, the petitioner and the protestor. The deceased placed her and the others in their respective lands. She proposed that she gets the entire land at Mokothima (3 acres)for she lives there alone; Number 542 be shared between the petitioner and the protestor as both live there; and No 533 (30 acres) be shared amongst her, the protestor and the petitioner; She and Robinato get each 6 acres and the balance to go to the petitioner. The land is about 50 acres. She said that the deceased said the land be shared among the three and did not express wish to give land to his other daughters as they were married.

And as such, they claim nothing and so they should not get anything. She stated in cross-examination that she has planted peas and cow peas on No 533. She claimed that she was told by the deceased that the protestor was like a son for she was not married and should get her share on that basis. She told the court that the deceased shared No 542 to them during his lifetime and also placed Miura posts to mark the boundaries. Those boundaries are still there and no one has interfered with them.

Petitioner's case

[5] The Petitioner testified and departed from his proposal in the affidavit in support of the Summons for Confirmation of Grant. Instead, he proposed No 542 to be shared equally amongst all the children of the deceased but he gets back No. 533 which belongs to him. He stated that he had given 6 acres to the protestor, 6 acres to the wife of his late brother Silas Mutegi, 6 acres to Gatiina Gichu and balance to himself in No 533 because the deceased had asked him to provide for them and in return he gets No 542. He said that he did not buy the land but he is the registered owner of 533.

[6] The petitioner called Mikelina Ciamuru as a witness. She stated that she is aware of only one property of the deceased, i.e. No 542 which is occupied by the petitioner and the protestor. She however stated that there is another one at Mokothima which is occupied by Regina wife of Silas. Her father left Regina on the said land. She stated that she was with the deceased from Monday to Wednesday before he passed on Thursday. She stated that she heard her father saying that the petitioner should share his properties to them equally. She confirmed that 542 is occupied by the protestor and the petitioner. She stated that the petitioner was in standard four when he started to cultivate land parcel number 533.

DETERMINATION

[7] The scope of the estate property is in dispute in this case. I should ascertain that aspect first. On the one hand, the petitioner says that the estate comprises of two properties; the land at Mokothima and number 542. He stated that parcel number 533 belongs to him and he has its title. The official search produced show that he is the registered proprietor of No. 533 as at 1997. On the other hand, the protestor and her witnesses claim that parcel number 533 belonged to the deceased and he had even filed suit against the petitioner claiming the property back. The case was however withdrawn. What does the evidence say? The evidence by the Petitioner was that he did not buy land parcel number 533. He also stated that it was given to him. He did not provide details of the acquisition of this land. But one thing is clear; that he was a child when he was given this land. I find another startling; he testified that he surveyed No 533 and gave 6 acres to the protestor, 6 acres to his mother, 6 acres to Regina Mutegi and the balance to himself. He even obtained consent to this subdivision from the relevant land control board on 27th September 2004. The reason he gave for these provisions was that his father had told him to provide for them and in return he will get parcel number 542 in exchange. The evidence on record show that the protestor and Regina Mutegi cultivate this land even at the time of their evidence in court. In spite the fact that the case filed by the deceased and Regina against the petitioner over parcel number 533 was withdrawn, the cumulative effect of the evidence adduced was that parcel number 533 was once land of the deceased but he may have given it to the petitioner. I should nonetheless be quick to add that the said land is in the name of the petitioner and that completes the gift. Any ownership or trust issues arising therefrom cannot be settled in these proceedings, but in a separate suit before Environment and Land Court (ELC). The best this court can do on the evidence available and within its jurisdiction as probate court is to treat the acquisition of parcel number 533 as gift *inter vivos* by the deceased to the petitioner; and take it into account under section 42 of the law of succession Act in determining his ultimate entitlement in the net intestate. In the premises, the estate property is parcel number 542 and the one at Mokothima.

[8] Now I move to distribution. There is no surviving spouse. Therefore I will apply section 38 of the Law of Succession Act. The law on inheritance, (the Law of Succession Act and the Constitution) does not make any differentiation between children of the deceased on the basis of on gender or status. Any attempt to disinherit the daughters on the basis of gender or because they are married is prohibited discrimination and therefore unconstitutional. All the children of the deceased have equal entitlement in the estate of the deceased.

[9] However, situations arise such as the one at hand where the gift *inter vivos* far exceeds the entitlement that each of the other beneficiaries will receive from the net estate of the deceased. Invariably, the beneficiaries will not be said to take equal portions of the estate. In such case, equity is what court strive for. And I understand what Omollo JA, meant when he stated in the case of **RONO vs. RONO [2005] 1 KLR 568** at 553 that:

I had the advantage of reading in draft form the judgment prepared by Waki JA, and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned judge to be laying any principle of law that the law of Succession Act, Cao 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such a deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr. Gicheru. I can find no such provision in the Act."

[10] Under section 28(d) of the Law of Succession Act, one of the circumstances to be taken into account by court in making order or in considering whether any order should be made, is whether the deceased had made any advancement or other gift to the dependant during his lifetime and the general circumstances of the case. Gift *inter vivos* is specifically provided for in Section 42 of the law of Succession Act as follows:

42. 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.

[11] Accordingly, after taking into account the gift inter vivos to the petitioner, it will be most unfair and a case of double-portion to allow the petitioner to partake in the net estate herein. Ultimately, the two parcels of land; one at Mokothima and N. THARAKA/542 shall be shared equally among the following:-

- 1. Regina Mutegi to hold the share of Silas Mutegi for her benefit and that of her children ;**
- 2. Karea Gaichu;**
- 3. MechalinaCiamuru; and**
- 4. Robin Mati**

[12] This being a succession cause, each party shall bear own costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 2nd day of July 2018

F. GIKONYO

JUDGE

In the presence of

Mburugu for petitioner

M/s Materi for objector

F. GIKONYO

JUDGE