



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 826 OF 2015

In the Matter of the Estate of M' Emenchu M' Akwalu alias George Kaburu (Deceased)

WINFRED KABURU.....1ST PETITIONER

CATHRINE MUTHONI.....2ND PETITIONER

JUDGMENT

Gift inter vivos

[1] By Summons for Confirmation of Grant dated 24th October 2016, the 1st Petitioner sought to distribute the estate of the deceased as follows;

a) **Plot No. 33 Maua Municipality**

Wholly to Winfred Kaburu for she constructed the plot after it was donated to her by the deceased as gift *inter vivos* and had been utilizing it for over 10 years during the lifetime of the deceased.

b) **Kiegoi/Kinyanka/1593**

To be shared equally among John Kaberia Kaburu, Samson Miriti Kaburu and Catherine Kaburu.

c) **Kinyanka/Itumi/378**

To be shared equally among John Kaberia Kaburu, Samson Miriti Kaburu and Catherine Muthoni Kaburu

d) All other residue properties including parcels of land at Arhiru Ruujine in Meru County to be equally shared among John Kaberia Kburu, Samson Miriti Kaburu and Catherine Muthoni Kburu.

[2] The 2nd Petitioner could not agree with the above distribution proposed by the 1st Petitioner. She proposed to distribute the estate of the deceased as follows;

a) **Plot No. 33 Maua Municipality**

To be registered in the joint names of the beneficiaries and the rent collected to be shared equally among the beneficiaries. That; 1% of the rent collected to be used for renovations and paying of land rates. The said estate be managed by Winfred Kaburu, Catherine Muthoni and John Kaberia

b) **Kiegoi/Kinyanka/1953**

To be shared equally among John Kaberia Kaburu, Samson Mwit Kaburu, Catherine Muthoni Kaburu and Roy Gitonga Kaburu.

c) **Kinyanka/Itumi/378**

To be shared equally among John Kaberia Kaburu, Samson Miriti Kaburu, Catherine Muthoni Kaburu and Roy Gitonga

Kaburu.

Submissions by 1st Petitioner

[3] When the matter came up for hearing on 18th July 2018, the court directed the parties to file affidavits and submissions on distribution. Briefly, it was submitted for the 1st Petitioner that that the most contentious property was Maua Plot No. 33, but, it should solely go to her *inter alia* for reasons that;

- a. By a document in writing by the deceased dated 1st July 2015 and addressed to Equity Bank of Kenya and all the beneficiaries herein, the deceased confirmed giving her Maua Plot No. 33; and
- b. That she single handedly developed the said premises after which she let it to Equity Bank among other tenants and continued to collect and enjoy rent from the said premises for over 10 years without interruptions or objections by any beneficiary of the deceased estate.

[4] The 1st Petitioner relied on the provisions of Section 31 of the Law of Succession Act and contended that she had been gifted this property by the deceased during his lifetime (gift *inter vivos*) which was confirmed in writing by the deceased. She explained that there was no way that she could have spent over 10 million to develop a property that would be shared thereof. Consequently she urged the court to grant the prayers sought in her application for Confirmation and dismiss the objections thereof.

Submissions by 2nd Petitioner

[5] The 2nd Petitioner submitted that Plot No. 33 Maua Municipality should be shared equally among all beneficiaries. She took issue with the 1st Petitioner's proposal to have the said plot on the basis that she constructed the premises thereon and that claim was not backed by any evidence. She claimed that there was also no evidence that the said plot was passed to her as gift *inter vivos* as she only managed and leased it under a power of attorney from the deceased but which lapsed upon death of the deceased. With regard to Kiegoi/Kinyanka/1593 and Kinyanka/Itumi/378, the 2nd Petitioner contended that it was evident that the 1st Petitioner was not interested in these properties and consequently urged the court should distribute them equally to John Kaberia Kaburu, Samson Miriti Kaburu and Catherine Muthoni Kaburu. The 2nd Petitioner further contended that her proposal was in accordance with the law based on equal distribution of the estate and that she was only interested in the prime property namely; Plot No. 33 Maua Municipality which formed part of the deceased estate and had never been transferred to the 1st Petitioner.

ANALYSIS AND DETERMINATION

[5] Profound issues have arisen in this case. But, let me tackle the straight-forward issue first. The deceased left the following surviving him;

- a). **Winfred Kaburu**
- b). **John Kaburu**
- c). **Samson Miriti**
- d). **Catherine Kaburu**

[6] The properties which are agreed to form part of the estate are;

- a). **Kiegoi/Kinyanka/1593 and**
- c). **Kinyanka/Itumi/378**

[6] The elephant in the room is plot **Plot No. 33 Maua Municipality**. On the one hand, the 1st Petitioner claims this was a gift *inter vivos* to her; she constructed the premises thereon single-handedly and has had exclusive benefit of the rent there from. On the other hand, the 2nd Petitioner claims that the 1st Petitioner merely managed the said property under a power of attorney that lapsed with the death of the deceased. She says it is part of the estate property. The question becomes; is this property a gift *inter vivos* or estate property?

Gift *inter vivos*

[7] Sadly this dispute pits a blood sister against blood sister. Plot No. 33 Maua Municipality is the main point of contention. I will examine the claim of gift *inter vivos* by the 1st Petitioner.

The Law

[8] The claim by the 1st Petitioner is based on an incomplete gift since the property is not registered in her name. I will cite **Halsbury's Laws of England, 4th Edition Volume 20(1) at paragraph 67** where 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.”

[9] The subsequent acts of the donor may give right to the donee to enforce an imperfect gift. See what same author (ibid) states at paragraph 70 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.

[10] Other examples; of subsequent acts of the donor which may give right of enforcement of imperfect gift include where he appoints donee as executor, or donee is made administrator. But the intention to make a gift must continue unchanged until his death.

[11] Case law is also apt. For instance, **in re Estate of The Late Gedion Manthi Nzioka (Deceased) [2015] Eklr.** Nyamweya J stated 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 4th Edition Volume 20(1) at paragraph 32 to 51.

[12] What facts emerge in this case? The 1st Petitioner stated that pursuant to a document in writing dated 1st July 2005, addressed to Equity Bank and all the beneficiaries herein, the deceased confirmed giving her full authority to construct premises on Maua Plot No. 33 and that upon that expression in writing, the 1st Petitioner single handedly expended money and developed the premises on the plot in issue. The deceased expressly stated in the said letter that the instructions therein cancels any other instructions purported to have been given by them either verbally or in writing. I have carefully perused and considered the content and purport of the said letter dated 1st July 2005. Doubtless, in the letter, the deceased indicated that the building was being fully financed and constructed by the 1st Petitioner and gave her a further mandate to build, renovate, negotiate for lease and rent the premises as she deems fit. It was further indicated that all leases and payments were to be in her names or company as per her instructions. The 2nd Petitioner did not challenge the authenticity or content and purport of this document. The 2nd Petitioner merely stated in her submissions that the 1st Petitioner was only managing and leased the said premises under a power of attorney from the deceased which lapsed upon the death of the deceased. She did not produce the alleged power of attorney. The 1st Petitioner contended that she had spent over Kshs 10,000,000 to construct the said building on Maua Plot No. 33 at Maua Municipality without any assistance from the deceased or any of the beneficiaries. Contrary to the submissions by the 2nd Petitioner, these claims by the 1st Petitioner were backed by sufficient oral as well as documentary evidence. The depositions by the 2nd Petitioner in her further supporting affidavit sworn on 30th July 2018 that the deceased had substantially constructed on Plot No. 33 Maua Municipality in 1950 and the 1st Petitioner only contributed in renovations of the building are not intended to reveal the truth of the matter, but contrived to deny her sister of this gift which the deceased made to the 1st Petitioner. The soil is really cursed that things of this world and which are absolutely temporal could make a sibling conceal the truth just to obtain a benefit. Vanity, vanity, vanity, all is vanity; I hope someone will heed to this divine proclamation. Behold, help comes from very unlikely quarters! The averment by Samson Miriti in his affidavit sworn on 30th July 2018- albeit intended to support the 2nd Petitioner’s case- supported the claim by the 1st Petitioner instead, when he stated at paragraph 4 thereof as follows;

“That our father put up a small structure in the 1950’s and we were all brought up there till 2005 when our father together with our sister Winnie Kabure decided to renovate the building.”

[13] The foregoing averments support the fact that the 1st Petitioner substantially or wholly contributed to the development of the building on the plot in issue. It negates the averment by the 2nd Petitioner that the deceased had substantially constructed plot No 33 in 1950 was untrue. Other important pieces of evidence include; that after developing the suit property, the 1st Petitioner entered into an agreement of lease with Equity Bank and for an interrupted period of close to 10 years she was the one person collecting and utilizing rent from the said premises. The 2nd Petitioner or other persons beneficially entitled in the estate never challenged this evidence. My finding therefore is that the deceased gave the plot to the 1st petitioner,, he also asked and permitted her to expend money in building the premises in question. Therefore, all the actions by the 1st Petitioner were expressly sanctioned by the deceased during his lifetime. No objections were raised thereto.

[14] From the foregoing, the 1st Petitioner has been able to demonstrate on a balance of probability that she was given Plot No 33 by the deceased; the deceased expressly permitted her to build the premises on it, to lease it out and to receive rents. She also proved that she substantially or wholly developed the premises on Plot No. 33 Maua Municipality with the permission of the deceased. She also proved that she was in full control, use and management of the said plot during the lifetime of the deceased for about 10 years. These acts of the deceased give right to the 1st petitioner to ask for enforcement of the imperfect gift herein of plot No 33. I declare plot No 33, Maua Municipality is a gift *inter vivos* by the deceased to the 1st Petitioner. Such property is not part of the estate except it should be taken into account under

section 28 and 42 of the Law of Succession Act in determining the ultimate share of the donee. See these sections below:

28. Circumstances to be taken into account by court in making order

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

- (a) the nature and amount of the deceased's property;*
- (b) any past, present or future capital or income from any source of the dependant;*
- (c) the existing and future means and needs of the dependant;*
- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime; [underlining mine for emphasis]*
- (e) the conduct of the dependant in relation to the deceased;*
- (f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;*
- (g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.*

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.*

Distribution

[15] In light of the foregoing, **Plot No. 33 Maua Municipality** goes to the 1st Petitioner as gift inter vivos. The property shall be transferred to her. And pursuant to the provisions of section 28 and 42 of the Law of Succession Act, she will not take any other property in the estate. Accordingly, the estate of the deceased shall be shared as follows:-

a) **Kiegoi/Kinyanka/1593:**

Shall be shared equally among John Kaberia Kaburu, Samson Miriti Kaburu and Catherine Kaburu.

b) **Kinyanka/Itumi/378**

Shall be shared equally among John Kaberia Kaburu, Samson Miriti Kaburu and Catherine Muthoni Kaburu

c) All other residue properties including parcels of land at Arhiru Ruujine in Meru County shall be equally shared among John Kaberia Kaburu, Samson Miriti Kaburu and Catherine Muthoni Kaburu.

In the upshot, I confirm the grant herein in the above terms. .

[16] This being a succession matter involving close family members, I order each party to bear own costs.

Dated, signed and delivered in open court at Meru this 3rd day of October 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. Kuranku advocate for 1st petitioner

Mr. Masinde holding brief for Igweta advocate

F. GIKONYO

JUDGE