



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 422 OF 2004

IN THE MATTER OF THE ESTATE OF MARETE

GATIRITHIA alias M'MARETE M'ITIRITHIA (DECEASED)

AIDAH KARIMI MURIUNGI.....1ST PETITIONER

JANE MURITHI.....2ND PETITIONER

VERSUS

ZIPPORAH GACHERI MUGUNA.....1ST OBJECTOR

FAITH MUTHONI MWABO.....2ND OBJECTOR

J U D G M E N T

1. **M'MARETE M'ITIRITHIA (deceased)** died interstate on 22nd January, 2002. He left behind two widows **Zipporah Gaceri Marete and Faith Muthoni (the objectors)** and 9 children. He also left two properties, **Abogeta/U-Kithangari/544 and Abogeta/U-Kithangari/613** as forming his estate.

2. On 17th September, 2004, **Aidah Karimi Muriungi and Janet Marete** petitioned for grant of letters of administration intestate which were granted to them on 2nd March 2005. On 8th June, 2006, the objectors filed an objection to the petition contending that they were the lawful widows of the deceased and they ranked in priority to the petitioners in petitioning for the grant. On 13th November, the earlier grant was revoked and both the petitioners and the objectors were appointed as joint administrators.

3. Thereafter, the objectors filed their separate preferred mode of distribution. Their protest was ordered to be determined by way of viva voce evidence. The parties and their respective witnesses filed their affidavit evidence on which they were cross-examined.

4. **OW1 Zipporah Gacheri Muguna** stated that the petitioners were children of the deceased from two other women apart from the objectors. That she and the 2nd objector were the wives of the deceased. That the petitioners had left their marriages and settled on **LR NO. ABOGETA/U-KITHAGARI/613**. That she and her co-objector had their home on **Abogeta/U-Kithangari/544**. She admitted that when the deceased died, he left the petitioners on **LR No. Abogeta/U-Kithangari/613**.

5. **PW1 Aidah Karimi Muriungi** told the court that the deceased had given her and her co-petitioner **LR. No. Abogeta/U-Kithangari/613** which they had greatly developed. That since she and her co-petitioner were from two other different mothers from the objectors, the deceased intended that they occupy a different property from the families of the objectors.

6. **PW2 Janet Marete** supported the evidence of **PW1**. She testified that as at 30/9/2008, the account at Meru Central Farmers Union had Kshs. 95,689.33 and shares amounting to 13959 from KTDA. That there was no will and no transfer of **LR. No. Abogeta/U-Kithangari** had been to them because the father was too sick to do it. That the deceased told her and other people that **plot 613** was hers and **PW1**.

7. **PW3 Alice Ncuri Mburugu** stated that she was a sister to the deceased. That during the lifetime of the deceased, he shared **LR. No. Abogeta/U-Kithangari/613** to the petitioners plot 613 to the exclusion of the other dependants and he himself stopped using that property.

8. **PW4 Angelica Muthoni Gabriel**, a sister of the deceased, told the court that the deceased used to farm on his both properties. That he had give **plot 613** to **PW1 and PW2** during his lifetime.

9. Having considered the evidence on record, the issues for determination are; *i) whether LR. No. Abogeta/U-Kithangari/ 613 was a gift inter vivos to the petitioners, and ii) how should the estate of the deceased be distributed?*

10. On the first issue, **PW1** told the court that the deceased shared out **LR. No. Abogeta/U-Kithangari/613** to herself and **PW2** where they have settled. **PW3 and PW4** supported them. When questioned whether there was any will or why the deceased did not transfer that property to them, they contended that the deceased fell sick and was too sick to do either. I should state here that it came out in the testimonies of **PW3 and PW4** that they held a deep grudge against the objectors. Their evidence would therefore be taken with a lot of circumspection.

11. If allowing the petitioners to enter and cultivate **LR. No. Abogeta/U-Kithangari/613** amounted to a gift *inter vivos* as contended by the petitioner, then it was an incomplete one. Under **section 31 of the Law of Succession Act, Cap 160 of the Laws of Kenya**, the donor must do something more to complete such a gift.

12. **In the Matter of the Estate of M'Emuchu M'Akwalu alias George Kaburu (deceased)** Gikonyo J cited with approval *Halsbury's laws of England, 4th edition Volume 20(1) at paragraph 67* wherein it is stated:-

“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 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”

13. **In re Estate of the late Gedion Manthi Nzioka (deceased) [2015]** Nyamweya J held:-

“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”.

14. The above test was not met in the present case. There was nothing in writing to show that the deceased had gifted the petitioners **LR. No. Abogeta/U-Kithangari/613**. The two having been his children, there was nothing wrong to permit them to move in and use what was his own during his lifetime. That did not amount to a sharing of that property to them. If it was his intention that he shares that property to them absolutely, nothing would have stopped him from executing a transfer in respect thereof or leaving a will.

15. The petitioners relied on the case of **In The Estate Of The Late Gichunge M'itweradu Alias Gichunge M'Nthiiri (Deceased)** and urged the court to uphold their claim. That case is inapplicable here because, in that case, the deceased had demarcated the land and had it transferred to his four sons. The four sons had continued to occupy and use it during the lifetime of the deceased. In that case, the court found that there was no evidence that the deceased intended it to revert back to him. In the present case, the deceased had neither transferred nor executed any documents of transfer of the subject property to the petitioners.

16. Similarly, the case of **In The Matter Of The Estate Of Misheck Nyingi Gathiore** is not applicable as in that case, there was evidence in writing of the deceased's intention. That is not the case before the court.

17. On the issue of distribution, since the deceased was a polygamist, the provisions of **section 40 of the law of succession Act** will apply. That section decrees that the estate be distributed equally to all the children each child constituting a unit. If there is any surviving widow, she constitutes a separate independent unit. In the present case, there is only one widow surviving and 9 children. The **Plot No. 613 and 544** measure a total of 9.15 ha. That translates to **0.915 ha** each per unit.

18. It was alleged that there was a plot in Kionyo market. **OW1** testified that she was the one who had acquired it that evidence was contradicted nor seriously challenged. There was no evidence that the same was in the name of the deceased. On a balance of probability. I hold that it belongs to **OW1** and does not form part of the estate.

19. The shares at KTDA and the money that was hitherto in the bank was moveable property. It must have been used for the upkeep of the widows and the children who are said to have been very young at the time the deceased passed on.

20. Since one of the widows who was a joint administrator passed on during the pendency of these proceedings, I make the following orders: -

a) the earlier grant is hereby revoked. A fresh grant issues forth with to Aidah Karimi Muriungi, Janet Marete and Zipporah Gaceri Marete.

(b) the estate of the deceased will be distributed as follows:-

A. L.R. NO. Abogeta/U-Kithangari/544 (5.4 Ha)

i) Zipporah Gaceri Marete - 0.915 ha

- ii) Jackim Kimathi Marete - 0.915 ha
- iii) Patrick Mwiti Marete - 0.915 ha
- iv) Antony Mutwiri Marete - 0.915 ha
- v) Purity Kinya Marete - 0.915 ha
- vi) Martha Mukiri Marete - 0.825 ha

B. L.R. NO. Abogeta/U-Kithangari/613

- i) Martha Mukiri Marete - 0.09 ha
- ii) Florence Gatwiri Marete - 0.915 ha
- iii) Fridah Ngugi Marete - 0.915 ha
- iv) Aidah Karimi Muriungi - 0.915 ha
- v) Janet Marete - 0.915 ha

C. Plot at Kionyo Market

Zipporah Gaceri Marete - Whole

D. Shares at KTDA

Zipporah Gaceri Marete - Whole

21. This having been a family matter, I will not make any orders as to costs.

SIGNED at Meru by me: -

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 6th day of December, 2018.

F.K. GIKONYO

JUDGE