REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

SUCCESSION CAUSE NO. 123 OF 2005

In the Matter of the Estate of M'iriabi Twirandu (deceased)

JOHN MUTEA.....PETITIONER

Versus

JANET NKATHA NKURARU.....PROTESTOR

JUDGMENT

Protest and confirmation of grant

[1] Before me is a Summons for Confirmation of Grant dated 7TH August 2006 seeking confirmation of grant issued to John Mutea.

[2] The application is premised upon grounds set out in the supporting affidavit of John Mutea. According to the summons, the dependants of the deceased are:-

a. Nkuraru Miriabi- son (deceased)

b. Margaret Kauna – daughter (deceased)

c. Turubena Nkatha- daughter (married)

d. John Mutea- son and

e. Tabitha Kamenwa- daughter (married)

[3] And the estate property is:-

a. LR. NO. NYAKI/THUURA/870

[4] Initially, the petitioner proposed the estate property to be shared equally amongst his children. The petitioner filed two witness statements in support of his claim- one by him and the other by Laban Kirongo M'Ringera. The witnesses stated that the estate property is No. 870 which was given to the deceased by the clan. The petitioner urged that LE. NO. NYAKI/THUURA/969 was given to him by the clam and never belonged to the deceased. He also stated that his late brother Nkuraru was given LR. NO. NYAKI/THUURA/1103 and was registered in his name. It was his further argument that his late brother was also given LR. NO. NYAKI/THUURA/128 which he subdivided into two portions namely, No.1868 and 1869. He sold 1868 and retained 1869 where his family resides to-date. He alleged trust on this land, but his brother refused to give him his share. He also filed submissions in support of hi stand point. .

[5] John Thuranira M'Nkuraru was of a different opinion. He filed a protest on 3rd October, 2006 in his capacity as the grandson of the deceased. The deceased was therefore his grandfather. He stated that the deceased had two sons namely; (1) Nkuraru Miriabi (his father) and (2) John Mutea, the Petitioner. He stated that the estate comprises in two properties namely;

(1) LR. NO. NYAKI/THUURA/870 and

(2) LR. NO. NYAKI/THUURA/969

[6] According to him, the deceased died before the second property could be registered into his name. However, during his lifetime the

deceased had shared No 870 and 869 to his two sons Nkuraru and Mutea respectively. But, the petitioner sold his said property to one Elijah Mwongo. The family of Nkuraru resides in the said No 870. As such the petitioner has no beneficial interest on No 870 and that the said land should be shared only to the family of Nkuraru equally.

[7] The protestor filed witness statements by five witnesses namely; (1) Johnson Mwita; (2) Tabitha Kamenwa; (3) Janet Nkatha; (4) Robert Maitima Nkuraru; and (5) Jason Kinoti who supported his case. He also filed submissions stating that LR. NO. 870 was a gift inter vivos to his father and it should be declared. Consequently, he asked the court to distribute it to the family of Nkuraru Miriabu

ANALYSIS AND DETERMINATION

[8] The law of succession Act has recognized the value of good order and demands that a court of law should ascertain the estate property, the identity of the rightful beneficiaries and their respective before distribution of the estate. Parties have created a dark cloud as to the whether NYAKI/THUURA/870 is gift *inter vivos* to the late Nkuraru or the estate property. But evidence will unravel the issue.

Gift inter vivos

[9] The protestor has claimed the property herein was a gift *inter vivos* to his father and should go to his estate. He claimed that the deceased also gifted the petitioner LR. NO. NYAKI/THUURA/869. The petitioner stated that this land was given to him directly during adjudication. The evidence provided and both parties agree on this, show that No. 869 was registered in the name of the petitioner. It was never registered in the name of the deceased. The other lands No. 128 and 1103 were also registered initially to Nkuraru. Therefore, the petitioner is correct in stating that they got these lands directly during adjudication process. These lands were never registered to the deceased. The claim that NO. 869 was gift to the petitioner is therefore not supported by evidence. The protestor was using the claim of gift inter vivos of No. 869 to justify that his father was given No. 870 as gift inter vivos by the deceased. But is there any other evidence of gift inter vivos of No. 870 to his father?

[10] The claim by the protestor is of an incomplete or imperfect gift *inter vivos*, as the said alleged gift, being of land, was not granted by deed, or an instrument in writing or by way of registered transfer.. For such claim based on incomplete to succeed, it is necessary for the donee to show**:**

> ***''...circumstances where the donor's subsequent conduct gives the done a right to enforce the promise…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." See Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67***

[11] 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. In this case, the protestor claimed that deceased put his father into possession of and that the family of Nkuraro lives on No. 870. But, the evidence coming through show that they live in No. 1869 – one of two subdivision of No. 28. They do not live in 870. Therefore, the claim that the deceased put them into possession and that they live in No. 870 is not supported by evidence. The protestor does not satisfy the threshold of law as to amke the court to compel the administrators of the estate of the alleged donor to complete the imperfect gift. I reject the claim.

[12] Following the conclusion above, NYAKI/THUURA/870 belongs to the deceased and is the estate property.

Distribution

[13] Where intestate has left a surviving child or children but no spouse, section 38 of the Law of Succession Act applies. The section states as follows:

> ***38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.***

[14] The following are the children of the deceased:-

a. Nkuraru Miriabi- son (deceased)

b. Margaret Kauna – daughter (deceased)

c. Turubena Nkatha- daughter (married)

d. John Mutea- son and

e. Tabitha Kamenwa- daughter (married)

[15] Tabitha Kamenwa expressly told the court that she is not claiming any interest in the estate. Even in her statement filed in court she made it clear that the entire estate land should go to the family of her brother. The children of Janet Nkatha are said not to have shown interest in the estate but that is not equal to renunciation of right as in the case for Tabitha. Nothing was said of Margaret Kauna (deceased) or her children if any. For that reason, I will exclude her. Accordingly, the estate shall be share equally by the following:-

a. Nkuraru Miriabi- son (deceased)- his family will take his share in equal shares

b. Janet Nkatha (deceased)- her children will take her share in equal shares

c. John Mutea- son.

[16] The grant herein is confirmed on the foregoing terms.

Dated, signed and delivered in open court at Meru this 6th day of December, 2018

F. GIKONYO

JUDGE

In presence of -:

Athieno for Petitioner

M/s Mbijwe for objector

F. GIKONYO

JUDGE