



**In re Estate of Makanya Kubutha (Deceased) (Civil Appeal
E075 of 2024) [2025] KEHC 13646 (KLR) (1 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 13646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E075 OF 2024
RM MWONGO, J
OCTOBER 1, 2025**

IN THE MATTER OF THE ESTATE OF MAKANYA KUBUTHA (DECEASED)

BETWEEN

**DAVID NYAGA NJIRU 1ST APPELLANT
JUSTINE KITHINJI NJIRU 2ND APPELLANT
JOHN MUCHIRI NJIRU 3RD APPELLANT
JOSPHAT MURIITHI NJIRU 4TH APPELLANT**

AND

THOMAS NTHIGA RESPONDENT

*(Being an appeal arising from the decision of Hon. R. Njoki Kabara in Siakago
Magistrate's Court Succession Cause No. 252 of 2019 delivered on 10th July 2024)*

JUDGMENT

Memorandum of Appeal

1. In their memorandum of appeal dated 15th August 2024, the appellants seek the following orders:
 1. That the appeal be allowed;
 2. That the judgment of the trial court be quashed and/or set aside;
 3. That the said judgment be substituted with an order allowing the appellant's protest and/or claim as per the protest sworn on 16th July 2021; and
 4. That the appellants be awarded costs of this appeal.
2. The appeal is premised on grounds that the learned trial magistrate erred as follows in law and fact:



1. In finding that LR Mbeere/Mbita/1302 constituted a gift inter vivos;
2. In holding that the deceased gifted the appellants' mother land parcel number LR Mbeere/Mbita/1302 yet the deceased had no registered interest to allegedly transfer land that was under adjudication;
3. In failing to consider that the appellants had been in occupation of the estate of the deceased being Mbeere/Mbita/1302 since birth;
4. In ruling that the protest had no merit yet the appellants are entitled to a share of the estate of the deceased through their deceased father who was a son of the deceased; and
5. In proceeding to confirm that grant thus violating Rule 41 of the Probate and Administration Rules.

Background and protest

3. Following the death of the deceased on 24th August 1994, the respondent petitioned the lower Court on 16th December, 2019, for a grant of letters of administration in the estate, in his capacity as a son of the deceased. The grant was issued to the respondent on 21st September 2020. He went on to file summons for confirmation of grant which was accompanied by an affidavit in which he stated that the deceased was survived by 4 sons being Njeru Makanya, Peter Ndaru Namu, Thomas Nthiga and the late Njiru Makanya. He deposed that the estate of the deceased comprised of parcel numbers Mbeere/Mbita/1130 which he proposed be inherited by himself and Mbeti/Gachoka/1131 which he proposed be inherited by Peter Ndaru Namu.
4. The appellants on 30th July, 2021 filed a joint affidavit of protest in which they stated that the deceased herein is their grandfather and that their father Njiru Namu Makanya who died in 2006 was a brother to the Petitioner. They stated that their father died at home and his body was taken to Siakago Hospital mortuary before he was buried in Mavuria. They have never seen their father's death certificate as the same was in the custody of their uncles. They learned about the respondent's plan to disinherit them yet they already live on parcel number Mbeere/Mbita/1130 where they have always been forbidden from doing permanent development. They proposed that the estate of the deceased be distributed in equal shares amongst the 4 sons of the deceased and the share of the deceased son be taken up by the appellants herein, his sons.
5. In his response to the protest, the respondent referred to the introductory letter from the chief which indicates that the deceased had 4 sons and 3 daughters. That the 3 daughters appeared in court and relinquished their interest in the estate of the deceased; That they wished that the 4 sons share the estate equally among themselves. He stated that before his death, the deceased had started distributing his land and the appellants' father, the late Njiru Makanya was already given the land on which he died. The other son of the deceased named Njeru Makanya was also given his land by the deceased and he is not claiming anything more. That is why 2 brothers have not been allocated any land in the succession proceedings.
6. According to him, the land given to the appellants' father was bigger than any other land the deceased owned. He stated that when his late brother was given land by their father, he gave it to his first wife and children but gave nothing to the second wife who is the mother of the appellants herein. This bothered the deceased herein and so he gave parcel number Mbeere/Mbita/1302 to the late Njiru Makanya's second wife Josephine Muthoni Njiru who is the appellants' mother. These facts had not been disclosed to the court by the appellants.



7. In his further affidavit, the respondent stated that the deceased died in 1999, and that land parcel number Mbeere/Mbita/1302 directly was registered in the name of the appellants' mother as captioned in the land adjudication register.

The Hearing in the lower Court

8. The Protest was heard viva voce.
9. PW1 was the 2nd appellant. He stated that he did not know that his late father was given land by the deceased. That when the succession proceedings were initiated, the appellants were not informed even though their father was named as a beneficiary of the deceased's estate. On cross-examination, he stated that he did not know whether the deceased gave his late father land which he gave to his first wife. He asserted that his mother bought land parcel number Mbeere/Mbita/1302 from his grandfather and it was registered in her name.
10. Thomas Nthiga the respondent, testified as RW1. He relied on his replying affidavit as his evidence. He also stated that the deceased appellants' father, was his elder brother and son of the deceased herein. He was given land but he denied his 2nd wife, the appellants' mother, access to it. That is why the deceased herein then gave that 2nd wife another piece of land which is about 15 acres and was registered in her name in 2000.
11. In cross-examination, he stated that the appellants' mother did not buy land parcel number Mbeere/Mbita/1302 from the deceased, but that it was given to her. That the appellants do not reside on parcel numbers Mbeere/Mbita/1130 and Mbeti/Gachoka/1131. That parcel number Mbeere/Mbita/1302 was given to the appellants' mother because her husband had given land only to his 1st wife alone. He produced a copy of the adjudication register for the parcel number Mbeere/Mbita/1302 as evidence.

The Decision of the Trial Court

12. The trial court found that the evidence proved that the appellants' mother was indeed given land parcel number Mbeere/Mbita/1302 as a gift inter vivos by the deceased herein. This gift was considered according to section 28(d) of the *Law of Succession Act*. The trial court noted that, cumulatively, the appellants' parents were given much more property than the rest of the children of the deceased. The court thus distributed the remaining estate in accordance with the mode proposed in the summons for confirmation of grant.

Written Submissions on the appeal

13. The court directed that the parties file their written submissions but only the respondent complied.
14. In his submissions, the respondent stated that the trial court's finding was sound; and that the appellants' mother was given parcel number Mbeere/Mbita/1302 as a gift inter vivos; and that the said gift was considered before distribution of the remaining estate. He referred to the land adjudication register where the name of the deceased was crossed out and replaced with the name of the appellants' mother. He stated that the appellants did not bring this information to the court's attention. He urged the court to dismiss the appeal.

Issue for Determination

15. The issue for determination is whether the appeal has merit.



Analysis and Determination

16. The appellant's protest is premised on their argument that the respondent who is their uncle is disinheriting them by failing to include them in the distribution of parcel numbers Mbeere/Mbita/1130 and Beti/Gachoka/1131. It is not disputed that the appellants are grandchildren of the deceased whose father died in 2006. The respondent stated that the deceased gave parcel number Mbeere/Mbita/1302 to the appellants' mother because the appellant's father did not give any land to them or their mother. It appeared that he gave that land to her out of compassion given that his son had mistreated his second wife and children.
17. In his testimony as PW1, the 2nd appellant, stated that he did not know that the deceased had given land to his mother. He stated that he and his siblings did not know about the succession proceedings, and that his mother had been buried on parcel number Mbeere/Mbita/1130. He sought inheritance for all the appellants in place of their deceased father as a beneficiary.
18. The respondent stated that the land was registered to the appellant's mother in 2000, after the death of the deceased in 1999. According to the copy of greencard annexed to the replying affidavit, parcel number Mbeere/Mbita/1302 was registered to Josephine Muthoni Njiru on 14th January 2000. In 2012, the said land was subdivided.
19. Under section 42 of the *Law of Succession Act*, a gift given by a deceased person to his death will be taken into account in determining the net estate of the deceased, even though the same may not form part of the estate. In essence, a gift inter vivos ought to completely pass to the intended beneficiary such that when the net estate is being ascertained, it can be proved that the deceased intentionally and completely passed the gift to the beneficiary before his death.
20. The respondent produced a copy of the land adjudication records showing that parcel number Mbeere/Mbita/1302 was given to the appellants' mother. There is also a copy of the green card indicating that the appellant took up the land as proprietor. This evidence is not controverted and it appears that the transfer of land was perfected. It also means that the gift was in fact a gift inter vivos which was perfected. The fact that the appellant did not know that the land was given to their mother as a gift does not negate the passing of the gift.
21. PW1 testified that their mother bought parcel number Mbeere/Mbita/1302 from the deceased. However, there is no evidence for that position. On a balance of probabilities, therefore, the respondent was able to prove that the land was given to the appellant's mother as a gift inter vivos. More importantly, the gift was given by the deceased for the purpose of benefiting his deceased's son's second family. As such, the appellants should claim their share of that land from their mother.
22. In the case of *Re Estate of Godana Songoro Guyo (Deceased) (2020) eKLR* the court referred to the following text;

“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 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.”

23. The court went on to state in the Godana Songoro case as follows:

“In the case of inter vivos the gift must go into immediate and absolute effect. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts. Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the donee.” [Emphasis added]

24. After determining that issue, the trial court found clarity as to what should constitute the net estate of the deceased and how to distribute it. The gift inter vivos was considered and taken into account, then the court found it favourable to distribute according to the mode proposed in the summons for confirmation. Once a court has determined a protest and there is no other pending issue, it is only in the interest of justice that the summons for confirmation be determined immediately.

25. The lower Court’s decision is what is appealed against herein. As already stated, there was no evidence by the appellants that property number Mbeere/Mbita/1302 was purchased, by their mother, as alleged. Further, there was evidence that the deceased gave the said land inter vivos to the appellants’ mother.

26. In the circumstances, the trial court cannot be faulted for confirming the grant, because the estate had to be administered some way or the other. From the evidence adduced, the appellants could not inherit from the remaining estate of the deceased directly because they are grandchildren of the deceased. The court properly found that the properties that had been given to the appellant’s father and mother cumulatively were way bigger than those that had remained in the net estate for distribution.

Conclusion and Disposition

27. Accordingly, it would be unfair to include the appellants’ deceased father in the list of beneficiaries since he had already received sufficient gifts inter vivos. If the gifts had not been given to the appellants’ parents, they would have had a chance to inherit as grandchildren under rule 7(1)(e)(iii) and rule 4 of the Second Schedule to the Probate and Administration Rules.

28. The mode of distribution proposed by the respondent was found to be most equitable in the circumstances and it was applied. This position does not need to be displaced.

29. In light of the foregoing, the appeal is hereby dismissed with no order as to costs.

30. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 1ST DAY OF OCTOBER, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Muraguri for Respondent

Githinji holding brief for Ms. Maina for Appellants



