



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CASE NO. E016 OF 2023

IN THE MATTER OF THE ESTATE OF

M'MUNGANIA M'MWAMBA alias MUNGANIA MWAMBA

GEOFFREY MURIUNGI1ST

APPELLANT

JOYCE KINANU KAUNGANIA 2ND

APPELLANT

-VERSUS-

PELINA KAREGI JOSEPH

RESPONDENT

***(Being an appeal from the ruling and order of the learned
Senior Principal Magistrate Hon. S. Ndegwa dated 7th day
of August 2023)***

JUDGMENT

Background:

1. The respondent herein moved the lower court for a grant of letters intestate. In her petition filed on 25th January 2019, she described herself as a daughter of the deceased. She listed the following persons as having survived the deceased:

- i. Angelica Kaburo M’Mungania Widow
(deceased)**
- ii. Magdaline Kiara Mwiti daughter**
- iii. Pielina Karegi Josephdaughter**
- iv. Esther Kanugu Mutuadaughter**
- v. Margaret Kathambi Johndaughter**
- vi. Gladys Nchabira Mworiradaughter**
- vii. Susan Ruguru Kaunganiadaughter**
- viii. Andelina Mwari daughter -
deceased**
- ix. Joyce Kinanu Kaunganiadaughter**
- x. Domisiano Gatara Mungania son -
deceased**

2. Subsequently, a grant of letters of administration was issued on 8th April 2019. The respondent then filed summons for confirmation of a grant dated 10th May 2020.
3. The 1st appellant then filed an affidavit of protest sworn on 3rd February 2022.
4. The lower court gave directions that the summons for confirmation and the protest to be canvassed by *viva voce* evidence. The hearing took place and on 24th August 2023, the court delivered a ruling in which it issued the following orders:-
 - a) That the affidavit of protest sworn on 7th February 2022 is hereby dismissed.
 - b) The summons for confirmation and grant dated 15th May 2020 be and is hereby allowed as per paragraph 5 of the petitioner's affidavit save to add that 2.1 acres to go to Hellen Ngiri Domisiano to hold in trust for herself and her children.
5. Aggrieved by the said ruling, the appellants filed an undated Memorandum of appeal which raised the following grounds:

- a) The learned trial magistrate erred in law and fact in finding that the 1st appellant did not tender any evidence to prove his case that he was indeed given 2 acres of land by his grandfather.
 - b) That the learned trial magistrate erred in law and fact by failing to find that the deceased had given the 1st appellant 2 acres of land despite the evidence which was tendered in court by the 1st appellant and his witnesses.
 - c) The learned trial magistrate further erred in law and fact by finding that the petitioner's mode of distribution was quotable when the same was discriminatory in nature and the same favoured one beneficiary.
 - d) The learned trial magistrate erred in law and fact by failing to find the 1st appellant had extensively developed and was in occupation to his portion measuring 2 acres.
6. The appeal was canvassed by way of written submissions, which I will not rehash. It suffices to state that I have considered them and will refer to them where necessary.

Analysis and determination

7. Being a first appeal, this court's duty is as was set out in of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123**. It was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own independent conclusion in the matter.
8. The issues for determination are;
 - a) Whether there were sufficient grounds to revoke the grant issued to the Respondent.
 - b) Whether the trial court was in error when it dismissed the protest and allowed the summons for confirmation of the grant.
9. The respondent is a child of the deceased. The 1st appellant is a grandson of the deceased, being the son of Magdaline Mwari Paul, a child of the deceased. Joyce Kinanu, the 2nd appellant is a child of the deceased.
10. The trial court was right in finding that the respondent was under a duty to seek the consent of all the beneficiaries, including the appellants, when applying for the grant.

11. The court record shows that the 2nd appellant duly signed the consent dated 12th November 2018. The 1st appellant, or his siblings, if any, did not sign the consent.
12. In a nutshell, the law is that the children of the deceased who dies intestate are entitled to share the estate equally. That if a child of a deceased's child is deceased, then the children of that deceased child step into his/her shoes and inherit the estate directly.
13. The above position was spelt out by the Court of Appeal in **Christine Wangari Gachenge vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR** where it stated that:

“Although Section 35 and 38 of the Law of Succession Act is silent on the fate of surviving grandchildren whose parents predeceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The law is on section 41. If a child of the intestate has predeceased the intestate, then that child's issue alive or en ventre sa mere on

that date of the intestate's death will take in equal share per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate take between them the share their parents would have taken had the parent been alive at the intestate's death."

14. In **Re Estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR**, on the same issue, it was held that:

"Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the

children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents."

15. As such, the 1st appellant was, as a matter of right, entitled to be made aware of the cause filed before the lower court. In failing to notify him, and any other person entitled, the grant was liable for revocation.
16. The trial court having found that there were sufficient grounds to revoke the grant, opted not to, since it was already seized of the protest filed and was bound to consider the same. I think that this was the right thing to do in the circumstances.
17. Indeed, it is not in all situations that a grant obtained without the necessary consents will be revoked. The court has to weigh the circumstances and if it finds that there was an intention to conceal some facts, for perpetrating a fraud or so on then the grant will be revoked.

18. In other cases, even if a party succeeds in establishing a case for revocation, as in this matter, the court may, in lieu of revoking the grant, make any other orders that are appropriate to the circumstances.
19. **In the Matter of the Estate of Thareki Wangunyu aka Thareka Wangunyo (Nairobi High Court Succession Cause No. 1996 of 1999)**, where a widow obtained a grant without disclosing one of her step-children and some of her own children as beneficiaries, the court held that although the matter merited revocation of the grant, it instead ordered that the stepchild left out be included in the list of beneficiaries without interfering with the grant.
20. I therefore uphold the decision of the trial court in not revoking the grant issued to the respondent.
21. The 1st appellant's case was that the deceased had during his lifetime given him two (2) acres of land in land parcel No. Abothuguchi/Mariene/623 and that he had extensively developed the said land. That none of the other beneficiaries had utilized the said parcel of land as they were aware of the deceased's wishes. His fear was that if the grant was

confirmed as proposed by the respondent, he stood to suffer. He asked the trial court to visit the suit land to establish the occupation on the ground.

22. The 2nd appellant supported the 1st appellant and urged the court to distribute the land as his father had wanted. She also claimed 1 acre from the said parcel.
23. The respondent's case was that the deceased never gave any land to the 1st appellant. She described him and the 2nd appellant as people driven by greed.
24. The trial court aptly laid down the law regarding how:
 - a) An intestate estate is to be distributed, where some of the children/beneficiaries are deceased.
 - b) A gift *inter vivos* is to be given effect by a court.
25. I have already dwelt with the first instance hereinabove.
26. Gifts *inter vivos* are provided for are provided for under section 42 Laws of Succession Act. It states as follows:

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.

27. The appellants faulted the trial for failing to make a finding that the 1st appellant had received 2 acres of land from the deceased and that he had extensively developed his portion of land.
28. In my view, the learned magistrate was spot on in her interpretation of the law on gifts *inter vivos* and any gift that had not been perfected during the deceased's lifetime. The said gift remains as part of the deceased's estate and is subject to distribution.
29. If on the other hand a gift *inter vivos* had been perfected by a legal document, such as a transfer, then that gift is excluded from the estate, but is to be taken into account when distributing the estate.

30. In the case of Micheni **Aphaxard Nyaga & 2 others v Robert Njue & 2 others [2021] eKLR**, the Court explained the concept of a *gift vivos*. It held as follows:

“The characteristics of the gifts inter vivos are that they are made and settled during the lifetime of the deceased and have been identified, awarded and settled for the person to whom it has been given. It is a gift made to a beneficiary when the deceased was alive and is considered when distributing the net intestate estate so that person who received it may be considered as having received his share and may reduce or diminish any entitlement to the net intestate estate. The gift which is transferred and settled for the beneficiary during the lifetime of the deceased, will not form part of his estate but it will be taken into account in determining the share of the net intestate estate finally accruing to that beneficiary. The concept of gifts is divided into two categories. First gifts

inter vivos and gifts causa mortis. Gifts inter vivos as contemplated in the Law of Succession are such that the owner of the property or asset donates it to another without expectation of death. In any event the person who makes such a gift must have the capacity and competency to gift the property and the gift must be perfected. In the case of inter vivos the gift must go to the done absolutely during the lifetime of the donor. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts.”

31. The 1st appellant bore the burden to prove the above allegation on a balance of probabilities. Section 107(1) & (2) of the Evidence Act **provides** that: -

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

32. The 1st appellant did not prove that the above land was a gift *inter vivos* or that the same was given to him by the deceased to the exclusion of all the other beneficiaries. If the deceased intended to do so he would have registered the said parcel in the name of the said appellant.
33. Now there are situations where a deceased person is said to have settled his children, grandchildren during his lifetime. So how is the court to treat such settlement? In my view that settlement is not to be deemed or treated as a gift *inter vivos*, but where the same does not unduly prejudice the other beneficiaries, the court may accept the same and distribute the estate accordingly.
34. I note from the court record that the 1st appellant had sought to have two (2) acres from the deceased's estate. The 2nd appellant also wanted one (1) acre of the same land.
35. From the material before me, it is evident that the entire land parcel No. Abothoguchi/Marieni/623 measures

approximately 2.23 Hectares which translates to approximately 5.51 acres.

36. If the appellants were to have their way, then the two of them would gobble up 3 acres, then leave the other beneficiaries, numbering seven (7) to share the remaining 2.51 acres between themselves.
37. Further, it is not in dispute that the 1st appellant is a grandchild of the deceased. He does not state whether the portion that he has laid claim to will be his share alone or will be for him and his siblings, but going by his evidence, the former appears to be the position that he took. That means that his other siblings, if any, will be sharing with the other beneficiaries the 2.51 acres left.
38. In my view, the trial court was right to dismiss the protest as it had no foundation in law and even if it was considered, it was grossly unfair to the other beneficiaries who are entitled to equal shares on the estate.
39. From the foregoing reasons, I find that the appeal is devoid of merit and it is dismissed.

40. Being a family matter, I order that each party bears his/her costs.

Final disposition:

- a) The lower court file is to be returned to the said court for the implementation of the grant.**
- b) To avoid incidents of violence, the trial court is to ensure that the proposed distribution of the estate does not result in demolition of buildings/structures.**
- c) The trial court to ensure that the proposed subdivision of the estate is only acted upon once it gives authority to do so.**

41. It is so ordered.

Dated, signed and delivered at Meru this 13th day of February 2026.

**H. M. NYAGA
JUDGE**