



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. E092 OF 2024

ABEL MPUTHIA M'RINKANYA

JEDIEL MURIUNGI M'RINKANYA

FLORENCE KATHURE M'RINKANYA

GODFREY MURANGIRI M'RINKANYA

DAVID MUNGIRIA M'RINKANYA.....

APPELLANTS

VERSUS

DAVID MUTWIRI NKANATA.....1ST

RESPONDENT

PHARIS MUGIIRA MBOGORI.....2ND

RESPONDENT

JULIUS MWENDA NKANATA.....3RD

RESPONDENT

***(Being an Appeal from the Judgement delivered by Hon. T.A.Sitati
(SPM) on 12th June,2024 in Githongo Succession Cause No. 30 of
2020)***

JUDGEMENT

1. This appeal arises from the judgment of Githongo Senior Principal Magistrate in CM Succession Cause No. 30 of 2020 where the court allowed the protest of the respondents on grounds that that their respective purchases of portions of the estate's land were lawful and protected by law. The court then distributed the estate of the deceased as follows;

- a. L.R ABOTHUGUCHI/GAITU/4003 equally to Evangeline Mwendwa M'Rinkanya, Harriet Ncabira M'Rinkanya, Florence Kathure M'Rinkanya, Faith Kiario M'Rinkanya and Doris Kanya M'Rinkanya subject to the reduction of the share of Florence which she sold.**
- b. L.R ABOTHUGUCHI/GAITU/4004 wholly to Julius Mwenda Nkanata in accordance to the acreage that he bought.**
- c. L.R ABOTHUGUCHI/GAITU/4005 wholly to David Mutwiri Nkanata in accordance to the acreage that he bought.**

d. L.R ABOTHUGUCHI/GAITU/4006 wholly to David Mungiria Rinkanya.

e. L.R ABOTHUGUCHI/GAITU/4007 wholly to Pharis Migiira Mbogori in accordance to the acreage that he bought.

f. L.R ABOTHUGUCHI/GAITU/4008 wholly to Abel Mputhia M'Rinkanya.

g. L.R ABOTHUGUCHI/GAITU/4009 wholly to Isaac Kithinji M'Rinkanya.

h. Plot 3A Ucheru Market wholly to Abel Mputhia M'Rinkanya

2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 8 grounds of appeal as follows: -

- a. That the Learned Senior Principal Magistrate erred in law and in fact by disregarding the clear provisions of the Law of Succession Act in sale of immovable property of the deceased before the confirmation of the grant in allowing the respondents' protest.
- b. That the Learned Senior Principal Magistrate erred in law and in fact in arriving at a finding that there was

gift inter vivos yet the deceased had not even initiated the process of transferring the properties to the beneficiaries.

- c. That the Learned Senior Principal Magistrate erred in law and in fact in arriving at a finding that the protestors are bona fide purchasers yet the Appellants had no title to pass or sell the deceased's estate to the respondents.
- d. That the Learned Senior Principal Magistrate erred in law and in fact by validating the land sale agreement entered by the Appellants with the respondents over the deceased estate after the demise of the deceased.
- e. That the Learned Senior Principal Magistrate erred in law and in fact by allowing the 3rd Respondent's protest yet the land sale agreement he had entered with the deceased was barred by the Limitation of Actions Act.

- f. That the Learned Senior Principal Magistrate erred in law and in fact by allowing intermeddling with the deceased estate in his judgment.
- g. That the Learned Senior Principal Magistrate erred in law and in fact by relying on speculations and conjectures in the judgment.
- h. That the Learned Senior Principal Magistrate made a finding outside the weight of the pleadings and evidence.

3. The Appellants pray the appeal be allowed, trial court's judgment be set aside with costs here and below.

4. The Appeal was canvassed through written submissions.

Appellant's Submissions

5. The Appellants submitted that the protestors were not children of the deceased but purchasers of land from children of the deceased.

6. The Appellants submitted that the land sale agreements entered between the protestors and some of the deceased's beneficiaries do not qualify them to benefit from the estate for reasons that the sale agreement was entered into after

the demise of the deceased and with the deceased's children who did not have capacity to deal with the estate pursuant to Section 82(b)(ii) of the Law of Succession Act, the 1st and 2nd protestor did not prove their respective cases while the 3rd protestor's case was time barred since the purported sale agreement between him and the deceased was entered on 6th July, 2015 after lapse of six year period and the protest having been filed on 12th October 2021 without leave of court was barred by Section 4(a) of the Limitation of Action Act.

7. The Appellants argued that if the protestors have any claim against the parcels of land meant for the beneficiaries of the deceased, they should wait for the estate to be distributed to each of the beneficiary, then lodge a claim at ELC against the purported beneficiaries of the deceased.
8. Regarding the distribution of the deceased's estate, the Appellants, relying on section 38 of the Law of Succession Act, submitted that the beneficiaries had reached an agreement on how the estate should be distributed. They prayed that this court do allow each beneficiary to receive

their respective portion of the land as agreed and the protestors thereafter be permitted to lodge their respective claims if they so wish.

Respondents' Submissions

9. The respondents submitted that their protest had merit because they demonstrated that they were bona fide purchasers for value and that the evidence on record showed that the deceased had gifted his beneficiaries their respective portions of land during his lifetime and as such they had powers to deal with their respective shares in the manner they wished including selling to them. In support of their submissions, the respondents relied on the cases of ***Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR, Llyods Bank Plc Vs Rosset, (1991) 1 AC 107, 132, Steadman v Steadman [1976] AC 536, 540, Johnson Muinde Ngunza & another v Michael Gitau Kiarie & 12 others [2017] eKLR, Warothe & 2 Others vs. Naomi Wanjiru Wachira Nyeri HCSC No. 122 of 2002, Micheni Aphaxard Nyaga & 2 others v Robert Njue & 2 others [2021] eKLR, In re***

Estate of Phyllis Muthoni Mínoti (Deceased) [2018] eKLR & in re Estate of Chesimbili Sindani (Deceased) [2021] eKLR

10. The Respondents thus urged this court to dismiss the appeal with costs to them.

Analysis & Determination

11. This being the first appellate court, it has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in **Selle & Another vs Associated Motorboat Co. Ltd (1968) EA 123.**
12. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they are not based on no evidence, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in **Mbogua Kiruga v Mugecha Kiruga & another [1988] eKLR**

13. After analyzing the entire record, I find the sole issue for determination is whether the Appeal is merited.
14. The Appellants contend that the sales to the protestors were not sanctioned by law, whereas the protestors assert that the agreements they entered into with some of the deceased's beneficiaries were lawful, as the beneficiaries had been gifted their respective portions of land by the deceased during his lifetime and therefore had the authority to dispose of those portions as they wished.
15. I will thus first determine whether the alleged gift intervivos existed. Section 42 of the **Law of Succession Act** on gift inter-vivos which provides as follows:

“Where 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 Property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35, the property shall be taken into account in determining the share of

the net intestate finally accruing to the child, grandchild or house.”

16. The concept of a *gift inter vivos* is made clearer and more comprehensible in **Halsbury’s Laws of England** 4th Edition Volume 20 (1) at para 67 which states as follows:

“Where a gift rests merely in a promise, whether written or and, 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 so.”

17. In the same vein, Judge Odunga J. A. in his **Book Digest on Civil case law and procedure** volume 3 Page 2417 para 5484 had this to say on the same subject matter:

“Generally speaking, the moment in time when the gift takes effect is dependent on the nature of the gift; the statutory provisions governing the steps taken by the donor to effectuate the gift. (See in *Re Fry Deceased* (1946) CH 312 *Rose and Trustee Company Ltd v Rose* (1949) CL 78 *Re: Rose v Inland Revenue Commissioners* (1952) CH 499 *Pennington v Wulfe* (2002) 1WLR 2075 *Maledo v Beatrice Stroud* (1922) AC 330 Equity will not come to the aid of the volunteer and therefore, if a donee needs to get an order from a court of equity in order to complete his title, he will not get it. If on the other hand the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee need no assistance from the equity and the gift is

complete. It is on that principle that in equity it held that a gift is complete as soon as the donor has done everything that the donor has to do, that is to say as soon as the donee has within his control all those things necessary to help him complete his title, no assistance from court of equity will be required by the donee. Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise, a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not been registered as a proprietor.”

18. It is evident from these provisions that any gift of a share of the deceased's assets to a beneficiary must be made during the deceased's lifetime. The effect of such a gift is to reduce the residual net estate available for distribution to the other

beneficiaries. In other words, for purposes of calculating the free estate of the deceased, the gifted share is taken into account as part of the overall distribution.

19. For a beneficiary to be able to deal with his gift inter vivos, that gift must have been perfected, meaning that the transfer has to be complete. Before that is done, the beneficiary may be able to stake a claim in regards to his/her share of the estate, but cannot purport to dispose of or transfer such gift to 3rd parties.
20. Turning to the matter at hand, I note the Respondents, claimed to have purchased their land from the beneficiaries, and not the deceased. For instance, the 1st respondent claims to have purchased the following parcels of land, each to be excised from LR No. ABOTHUGUCHI/GAITU/510:
 - a) 1 acre from Jediel Muriungi on 2nd June 2016; $\frac{1}{4}$ acre from David Mungiria on 17th October 2016;
 - b) 0.78 acres from Godfrey Murangiriu on 19th June 2017; and $\frac{1}{4}$ acre from Florence Kathure on 23rd September 2019. The sellers are the 2nd, 4th and 3rd Appellants respectively.

21. He produced the relevant sale agreements and acknowledgment notes to support his claim and demonstrate that he had fully paid the purchase price.
22. The Appellants do not dispute this, but contend that the Court should first distribute the land to them and thereafter they shall transfer their respective portions to the 1st respondent.
23. According to the death certificate on record, the deceased died on 28th March 2016. Prior to his demise, he had subdivided his land, LR No. ABOTHUGUCHI/GAITU/510 into seven portions. Namely; ABOTHUGUCHI/GAITU/4003, 4004, 4005, 4006, 4007, 4008 and 4009 as shown by the mutation form produced in evidence. Each beneficiary was allocated their respective portion and they took possession thereof. However, the parcels of land remained in the name of the deceased.
24. It appears like it is on the basis of their settlement on the ground that that the Appellants sold their respective portions to the 1st respondent.

25. In my view the sale of the land by the beneficiaires is a clear case of intermeddling with the estate as set out under section 45 of the Act. It states as follows;

No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any

**payments made in the due course of
administration.**

26. In view of the foregoing, I disagree with the trial court's finding that the deceased's actions of demarcating the land, openly showing his children their respective shares, and each child accepting the same, amounted to a valid gift inter vivos.
27. The respondents had the duty to conduct due diligence prior to undertaking the sale of the land. That due diligence would have readily shown that the land was in the name of the deceased.
28. Even though the trial court was trying to do justice to the respondents, the court cannot sanction an act that is illegal.
29. Therefore the sale of parts of the estate by the beneficiaries was unlawful and cannot be acted upon. The order of distribution of the estate to the respondents based on the purported sale agreements is set aside.
30. The recourse for the respondents lies in a claim against the beneficiaries who sold the land to them. That claim cannot be handled by the court as a succession court.

31. The 2nd Respondent stated that the deceased sold to her 1 acre of land on behalf of the 2nd Appellant. She produced an acknowledgment note dated 15th April 2016, indicating that the deceased received Ksh. 100,000/= as the purchase price on behalf of the 2nd Appellant. That assertion cannot be true as the deceased died on 28th March 2016. It is evident that she purchased the land from the 2nd appellant and not the deceased. The 2nd Appellant's testimony was that the deceased had given him parcel no. ABOTHUGUCHI/GAITU/4007 during his lifetime and that he sold the same to the 2nd respondent. Considering what I have stated above, that sale was also illegal, thus null and void.
32. Regarding Julius Mwenda Nkanata, he testified that on 6th July 2015, he purchased ½ acre of land from the deceased to be excised from LR No. ABOTHUGUCHI/GAITU/510. He produced a sale agreement of that date and an acknowledgement of payment note dated 30th January, 2020.

33. It is clear that Julius made partial payment to the deceased, then continued to make further payment to the first respondent herein, after the death of the deceased. In my opinion his fate is just like that of the other purchasers.
34. Section 93 of the Law of Succession Act provides safeguards for purchasers in good faith, from a personal representative of the estate, but this requires proper verification of their claims.
35. In Jacinta Wanja Kamau vs Rosemary Wanjiru Wanyoike and Another (2013) eKLR where the appellant therein unsuccessfully sought protection under Section 93, the Court of Appeal sitting in Nyeri stated:-

“Before the appellant could seek protection as a purchaser under Section 93 of the Act, she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser. In any case and as provided by Section 82(b) (11) of the Act it would have been illegal for Beatrice Njeri Mugondu to sell the land before the confirmation of the grant.”

36. In light of the foregoing, I find that the trial court erred in its judgment in so far as it granted the respondents a share of the estate. The judgment is set aside in its entirety.
37. So what orders should issue?
38. I think that the proper course would be to remit the cause back to the trial court for the summons for confirmation to be heard afresh, excluding the respondents as they are not beneficiaries. They have the option to sue the appellants in a different forum.
39. The appellants, having acknowledged that they sold part of the estate, which is unlawful, cannot be allowed to benefit from that illegality without any consequences. They ought to be dealt with for intermeddling with the estate as provided under section 45 of the Law of Succession Act. I will leave that issue to the trial court to deal with.
40. Despite being successful I think this is a clear case where the appellants should be denied costs as they willingly participated in an illegality.
41. The following orders do issue;

- a. **The appeal is allowed and the judgment of the lower court is set aside.**
 - b. **The lower court file is remitted back to the said court for confirmation of the grant.**
 - c. **Each party shall bear their own costs on this appeal.**
42. Orders accordingly.

Dated, Signed and Delivered at Meru this 7th day of May, 2026.

**H. M. NYAGA
JUDGE**