



REPUBLIC OF KENYA



KENYA LAW
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**M’Mugambi v Muriira (Civil Appeal 146 of 2019)
[2025] KECA 1427 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1427 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 146 OF 2019
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
JULY 31, 2025**

BETWEEN

FRANCIS MUTUA M’MUGAMBI APPELLANT

AND

GEREMANO MUGAMBI MURIIRA RESPONDENT

(Being an appeal from the judgment/decree of the High Court of Kenya at Meru (F. Gikonyo, J.) dated 5th December, 2018 In High Court Succession Cause No. 83 of 2003)

JUDGMENT

Background

1. This is an appeal from the judgment of the High Court of Kenya at Meru (F. Gikonyo, J.) delivered on 5th December 2018 in High Court Succession Cause No. 83 of 2003. The matter relates to the distribution of the estate of Mugambi Kobia (deceased), who died intestate on 10th June 1988.
2. Francis Mutua M’Mugambi (the appellant) filed a petition for letters of administration intestate in his capacity as a son of the deceased. Geremano M’Mugambi Muriira (the respondent) appeared in the proceedings on behalf of his deceased father, Muriira M’Mugambi, who was also a son of the deceased. According to the petition, the deceased was survived by three sons: Francis Mutua M’Mugambi (the appellant), Muriira M’Mugambi (represented by the respondent), and M’Nthiiri M’Mugambi. The assets listed in the estate included Land Parcel No. Abothuguchi/Kariene/462 and Plot No. 28 ‘A’ Kariene Market.
3. The instant appeal concerns the distribution of Plot No. 28 ‘A’ Kariene Market (the suit property).
4. The appellant, filed summons dated 30th December 2003 seeking confirmation of the grant issued on 19th May 2003. In the said summons, the appellant proposed that Land Parcel No. Abothuguchi/Kariene/462 be distributed as follows: 0.46 Ha to M’Nthiiri M’Mugambi, 0.023 Ha to Fredrick



- Kinyua Mutua (the appellant's son), 0.05 Ha to Wilson Kijogi Mwarania (a purchaser), and 0.49 Ha to himself. There was no dispute concerning this parcel of land.
5. The dispute arose regarding the distribution of the suit property. The appellant proposed that the entire suit property be allocated to him. The respondent's father (M'Muriira M'Mugambi), who filed a protest, opposed this proposition. He contended that he had not benefited from the distribution of Parcel No. Abothuguchi/Kariene/462 and thus claimed entitlement to a share of the suit property. He maintained that during their lifetime, the deceased had allocated land at Kiria to him and parcel No. Abothuguchi/Igane/887 to the appellant. He further alleged that the appellant had taken possession of the suit property, including shops and rooms constructed by the deceased, using some personally and renting out others, and had further developed the suit property to his sole benefit. Consequently, he sought equal division of the suit property between himself and the appellant, noting that M'Nthiiri M'Mugambi was satisfied with the appellant's proposed distribution.
 6. In response, the appellant swore an affidavit on 8th May 2013 and filed a written statement dated 4th October 2018, asserting that the suit property, although registered in the deceased's name, had been sold to him. He denied that the deceased had developed the property, contending that he had undertaken the developments himself. He claimed that in a family meeting held on 9th November 1986, the deceased had expressed his intention to gift the suit property to him. The appellant further stated that the suit property had initially been allocated to the deceased, who was unable to meet the County Council rates of Kshs.4,800. The appellant alleged that he paid half of the amount, with the other half being paid by a clan member, Isaiah M'Nthika (Isaiah), resulting in the division of the plot (40 x 80 feet) into two equal parts between himself and Isaiah.
 7. The respondent's father (Muriira M'Mugambi), by affidavit sworn on 28th September 2009, denied the appellant's assertions, contending that the appellant had failed to disclose the alleged gift of the suit property by the deceased or the fact that he had already been given Plot No. Igane/887. He insisted that the deceased had developed the suit property by constructing a shop and two rooms which were leased out. Further, that the appellant had leased part of the property for a cereal business and was paying rent. He also alleged that the appellant allowed his son to build on the suit property and undertook further construction during the pendency of the succession proceedings. He denied the existence of any family meeting concerning the distribution of the suit property.
 8. During the pendency of the proceedings in the High Court, the respondent's father (Muriira M'Mugambi) passed away, and the respondent, Geremano M'Mugambi Muriira, stepped in to represent his estate. The respondent was subsequently declared of unsound mind and his affairs were taken over by his wife and guardian, Beatrice Gakii Mugambi.
 9. The hearing proceeded partly by way of viva voce evidence and partly through adoption of witness statements as agreed by the parties. The appellant gave oral evidence. Upon evaluating the evidence, the trial court found in favour of the respondent. The court held that the developments on the suit property were carried out by the deceased and that further developments by the appellant occurred during the pendency of the suit. The court found that possession of rent receipts by the appellant was insufficient to prove ownership or gifting by the deceased. It also found inconsistencies in the minutes of the alleged 1986 meeting, suggesting possible forgery. The court concluded that the suit property formed part of the estate of the deceased and ordered it to be shared equally between the appellant and the respondent. The instant appeal challenges this finding.
 10. The appellant filed a notice of appeal dated 6th December 2018, which was lodged on 10th December 2018. He subsequently filed a memorandum of appeal dated 24th June 2019, seeking to have the



impugned judgment set aside, the suit property registered solely in his name and that the costs of the appeal be provided for.

11. The appellant's grounds of appeal were that the learned Judge erred in law and in fact by:
 - a. Failing to adequately consider the material placed before him;
 - b. Being influenced by extraneous matters;
 - c. Rendering a judgment against the weight of evidence; and
 - d. Ordering a distribution of the suit property that was not supported by the facts and was contrary to the law.

Submissions by Counsel

12. At the hearing of the appeal, learned counsel, Mr. Mbaabu appeared for the appellant while learned counsel, Ms. Ntarangwi appeared for the respondent. Both counsel relied entirely on their written submissions.
13. Mr. Mbaabu submitted that the deceased, in the presence of his sons and other witnesses, expressed his intention to bequeath the suit property to the appellant, who had paid the County Council rates. He maintained that the meeting minutes of 9th November 1986 supported this assertion and that the trial court erred in dismissing this evidence without proof of forgery. Counsel further submitted that the rent receipts were issued in the deceased's name as the suit property remained registered in his name at the time of payment. Counsel further submitted the Court to uphold the deceased's wishes as expressed in the 1986 meeting. Counsel relied on the case of *Beth Wambui & Another v Gathoni Gikonyo & 3 Others* [1988]eKLR.
14. In opposition, Ms. Ntarangwi submitted that by initiating an intestate succession cause, the appellant could not now claim that the suit property had been gifted to him. Counsel submitted that the minutes relied upon were unsigned in the affidavit but signed in court, raising questions regarding their authenticity. Counsel further submitted that if the appellant had indeed purchased the suit property, he should have had it transferred to him, which he did not. Counsel asserted that the trial court correctly ordered the equal sharing of the suit property since the third son, (M'Nthiiri M'Mugambi) was not contesting the proposal and had accepted the distribution. Counsel further asserted that the trial court properly analyzed the evidence and the appellant's demeanor in reaching Its decision.

Determination

15. This is a first appeal. The Court reminds itself of its duty as the first appellate court, which entails a fresh evaluation and analysis of the evidence on record and the drawing of independent conclusions therefrom, while bearing in mind that it neither saw nor heard the witnesses testify. (See Rule 31(1) of the Court of Appeal Rules, 2022 and the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR).
16. The key issue for determination is whether the trial court erred in law and fact in holding that the suit property formed part of the estate of the deceased and was thus subject to distribution.
17. The record indicates that the suit property was allocated to the deceased by the then Meru County Council, and consideration was paid to the Council in respect thereof. The appellant contended that he paid the consideration on behalf of the deceased, who lacked the financial means, and that the deceased, in a family meeting held in 1986, declared the property bequeathed to him.



18. The payment receipt for the allotment was issued in the name of the deceased. There is no documentary evidence indicating that the appellant made the payment. Even after the deceased's demise, all payments relating to rent and rates continued to be made in his name.
19. The appellant, in his replying affidavit sworn on 8th March 2013, deponed:
- THAT the truth of the matter is that although Plot No. 28 A Kariene was registered in my father's name he sold it to me... due to technicalities of law I have to go through the succession cause for the court to transfer the plot to me.”
20. During his testimony, the appellant stated that the deceased had gifted him the suit property. However, on cross-examination he claimed that the deceased left a will but that he had not filed it in court. He also admitted at the start of his evidence that the suit property had not been formally transferred to him.
21. There is no plausible explanation offered by the appellant as to why he did not secure a transfer of the suit property during the deceased's lifetime. The will, if any, was not presented before the High Court or this Court for consideration. Further, no evidence was tendered to establish the existence of an oral will in accordance with Section 9 of the *Law of Succession Act*, Cap. 160.
22. In *Re: Rufus Munyu (Deceased), Public Trustee v Wambui* (1977) KLR 137, it was held that instructions on a piece of paper could amount to an oral will, where the deceased died shortly thereafter. However, in this case, the minutes relied upon were recorded in 1986, two years before the deceased's death in 1988, which does not satisfy the legal threshold for an oral will.
23. Counsel for the respondent raised legitimate concerns about the authenticity of the minutes. The unsigned copy annexed to the affidavit dated 26th June 2019 differed from the signed version produced at trial as exhibit PEx2. The appellant could not explain this discrepancy, simply stating, “I do not know why this is the case.” This inconsistency casts doubt on the genuineness of the document. The trial court, having observed the appellant's demeanor, found him untruthful. This Court, though lacking that advantage, agrees with the trial court's assessment, as the record of the appellant's testimony lacks consistency.
24. Assuming that the deceased intended to gift the suit property to the appellant, the question remains: why was no formal transfer effected? The witness statements of Daniel Marangu Kirika and M'Nthiiri M'Mugambi affirm that the appellant took possession in 1975. Despite this, the suit property remained in the deceased's name until his death in 1988, and the appellant continued paying rates in that name.
25. The appellant cited the case of *Beth Wambui & Another v Gathoni Gikonyo & 3 Others* [1988] eKLR, but that case is distinguishable. In the case of *Beth Wambui*, a document presented as a will was before the court. In contrast, the appellant herein admitted that he did not file any alleged will.
26. Nyamweya J. (as she then was), in *Estate of the late Gedion Manthi Nzika (Deceased)* [2015] eKLR, clarified that:
- Gifts inter vivos must be complete to be valid.”
27. Further, Musyoka J. in *Re: Estate of Chesimbili Sindani (Deceased)* [2021] eKLR emphasized that:
- “Being shown and allowed to occupy land is not adequate proof of a gift inter vivos.”
28. Similarly, Sewe J. in *Re Estate of Biruri Kohoria (Deceased)* [2019] eKLR held that a gift not perfected in the lifetime of the deceased remains part of the estate.



29. Odunga’s Digest (3rd Ed., Vol 10, para 5484(d) e-1) quoted in Micheni Aphaxard Nyaga & 2 Others v Robert Njue & 2 Others [2021] eKLR, underlines that:

“Equity will not aid a volunteer in perfecting an incomplete gift.”

30. We are persuaded by the reasoning in the above decisions. The appellant cannot seek to rely on equity to complete a gift that was never perfected.

31. Upon re-evaluation of the evidence on record, we find the appeal devoid of merit. We accordingly uphold the findings of the High Court. The appeal is dismissed. Each party shall bear its own costs of the appeal, given the family nature of the dispute.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF JULY, 2025

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true Copy of the original

Signed

DEPUTY REGISTRAR

