



**Shah & another v Shah (Civil Appeal 268 of 2019)
[2024] KECA 76 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KECA 76 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 268 OF 2019
MA WARSAME, KI LAIBUTA & JM MATIVO, JJA
FEBRUARY 9, 2024**

BETWEEN

RUPAL SHAH 1ST APPELLANT

RAKHI SHAH 2ND APPELLANT

AND

SEJAL SHAH RESPONDENT

*(Being an appeal against the Ruling and Order of the High Court
at Nairobi (Honourable Lady Justice R. Ougo, J.) delivered on 21st
February 2019 in High Court Succession Cause No.793 of 2013)*

JUDGMENT

1. This appeal concerns the distribution of the residual estate of the late Dhirajlal Bhagwanji Shah (“the deceased”) and, in particular, over the property known as LR No.209/80/22 General Mathenge drive, Nairobi (“the suit property”) amongst the three siblings party to this appeal. The deceased wrote a will on 2nd March 2005 appointing his brother, Ramesh Bhagwanji Shah (“Ramesh”) and his (the deceased’s) wife Kanchan Dhirajlal Shah (“Kanchan”). The Will is uncontested.
2. The suit property was registered in the joint names of the deceased and his wife, Kanchan. Kanchan died on 2nd March 2006 paving way for the suit property to be registered in the sole name of the deceased under the doctrine of survivorship applicable to joint ownership of property. On 27th March 2009, the deceased transferred 2/3 of his interest in the suit property equally to two of his daughters, Rupal and Rakhi, the 1st and 2nd appellants, respectively. The consideration for the said transfer was as a gift to them out of his natural love and affection.
3. On 16th April 2013, the executors of the said will petitioned for a grant of probate. On the 18th November 2015, the High Court made an order to substitute Ramesh as an executor for Rupal and



Rakhi. The executors and beneficiaries did not agree on matters concerning the estate, and were unable to confirm the grant within 60 days as ordered by the Court. On 26th April, 2016 Sejal, the respondent herein, filed an application under section 71(1) and (4), and section 74 of the *Law of Succession Act* for, inter alia, confirmation of grant as proposed in her schedule incorporating other properties being the deceased's inheritance from the deceased's parent, and other accounts and investments from companies in which the deceased was a shareholder. She also sought to exclude other properties from the estate, particularly an account at Fina Bank, which she wanted declared as belonging to her absolutely, and exclusion of the monthly payment of Shs.40,000/- to Rupal from the estate.

4. While the application was pending, the appellant filed another application on 25th May 2018. It is a summons for the reasonable provision in her favour by being allocated the entire portion of 1/3 of the suit property in the name of the deceased, for leave to withdraw the application for confirmation of grant and reckoning of a gift *inter vivos* in favour of the appellants, and further reckoning payment of the sum of Shs.41,015,327/- made by the applicant to redeem a property of the deceased charged for a loan. The application was made under section 26 of the *Law of Succession Act* and rules 63, 67 and 73 of the *Probate and Administration Rules*.
5. Upon parties filing submissions, the High Court framed 3 issues for determination. These are whether the court should allow the withdrawal of the application dated 21st April 2016; whether the grant should be confirmed as sought by the applicant; and whether the applicant is entitled to the refund of Shs.41,051,327/- and the monies held at Fina Bank.
6. In the impugned ruling made on 21st February 2019, the learned Judge did not allow the withdrawal of the initial application, but opted to determine the two applications concurrently. Applying section 26 of the *Law of Succession Act*, the Judge construed the wording of the deceased's Will that he intended to have his daughters have equal shares in the residual estate. Since Rupal and Rakhi already have 1/3 of their share each in the suit property, it was only equitable that Sejal gets the remaining 1/3 that was held by the deceased. In so doing, the siblings will each have equal shares. The Judge also based his decision on making reasonable provision for the respondent.
7. In the end, the Judge issued a fresh grant of probate in the names of Sejal, Rupal and Rakhi; confirmed the grant as per the deceased's will with clause 6 of the Will applying to the undisputed assets of the deceased, and awarded Shejal 1/3 share in the suit property. The Judge also directed parties to take a hearing date to determine whether the funds held at Fina Bank formed part of the residual estate. On the issue of refund of Shs.41,015,327/- paid by Sejal to Guaranty Trust Bank (Kenya) Limited, the Judge held that it was a matter for determination in the Winding Up Petition.
8. The appellants, dissatisfied with the finding, sought leave of the High Court to appeal. In their Notice of Appeal dated 28th February 2018, the appellants appeal is "against such part of the Ruling as decides that Sejal Shah shall get 1/3 share in LR No.1870/11/137 General Mathenge Drive Nairobi." The six grounds of appeal contained in the memorandum of appeal have been argued under three broad heads in the appellants written submissions dated 10th February 2020.
9. The sum total of the appellants' case is that the trial court failed to consider what constitutes the residual estate of the deceased. To them, the residual estate constituted the free assets as at the time of his death and not the assets at the time of writing the Will. Based on this argument, only 1/3 of the share of the suit property was available for sharing, the deceased having in his life time bequeathed 2/3 of the suit property to the appellants. Accordingly, it was not available for the Judge to consider equality of distribution of the entire suit property among the siblings in the manner that the learned Judge did. The learned Judge thus did not give effect to the wishes of the deceased but instead re-wrote the Will, acting as testator and substituted in the Will what the court thought was fair and equitable.



The appellants relied on the cases of *John Gitata Mwangi & 3 others v Jonathan Njuguna Mwangi & 4 others* [1999] eKLR on reasonable as opposed to equal or fair distribution, and *In the Matter of the Estate of the Late Sospeter Kimani Waithaka* Succession Cause 341 of 1998 quoted with in approval *in re Estate of Pratik Ramesh Meghji Shah* [2015]eKLR in which it was held inter alia that “in matters of normal preferences for certain beneficiaries or dependents, maybe for their special goodness to the testator, the Court should not freely intervene to alter them.”

10. Further, the appellants submit that the trial court failed to consider the circumstances under which a dependent can seek reasonable provision under section 26 of the *Law of Succession Act*. The trial court erred in making a reasonable provision to the respondent, without first determining her share from the entire estate by wrongly applying the law on gift inter vivos as codified under section 42 of the *Law of Succession Act*. It was therefore wrong for the trial court to consider the gift inter vivos in sharing the estate in a matter where the deceased had a valid Will and his estate was not intestate. Moreover, the respondent never made a claim of not having been reasonably provided for out of the net estate of the deceased. In the same breadth, the trial court did not make any finding that the respondent had not been reasonably provided for. The trial court therefore did not exercise its discretion judicially under the circumstances.
11. The Respondent filed submissions dated 18th November 2021.
They address three issues raised by the appellants. The respondent maintains that the 2/3 share in the suit property was a gift inter vivos to the appellants for several reasons, including that the gift was made to the appellants after the death of Kanchan, the deceased’s wife, as part of the estate succession planning, the gift fits the provisions of sections 27 and 28(d) of the *Law of Succession Act*, the gift was completed to the exclusion of the respondent, and no consideration was paid by the appellants. Reference is made to *In re Estate of the Late Gedion Manthi Nzioka (deceased)* [2015] eKLR, which refers to gifts inter vivos and gifts in contemplation of death (mortis causa) as set out in section 31 of the *Law of Succession Act*. The respondent submits that the law is settled in Kenya that, where there is proof of a gift inter vivos by the deceased to any of the beneficiaries, the same ought to be taken into account by the court when making distribution to avoid unequal or inequitable distribution to any of the beneficiaries. The respondent relies on the Court of Appeal decisions in *Samuel Maina Mwangi & 2 others v Muthoni Kagiri* [2013]eKLR and *Patrick Munene Migwi v Simon Nyamu Migwi* [2017]eKLR.
12. The respondent agrees with the trial court’s finding that there was a clear intention by the deceased to have his three daughters inherit property equally. She emphasizes that the suit property was the family home, sentimentally important to all the three daughters. The respondent adopts the rule on the interpretation of a Will as laid down by the House of Lords in *Perrin & others vs Morgan & others* [1943]AC 399 and Rule 1 of the First Schedule of the Construction of Wills to the *Law of Succession Act*, which provides that “the wording be such that the intention of the Testator can be known therefrom.” The respondent in any event cites Rule 16 of the First Schedule of the Construction of Wills to the *Law of Succession Act* to the effect that the construction of a will shall not be varied by events subsequent to its execution. The respondent also cites *Re the Estate of Kashmira Singh Jandu (Deceased)* [2016]eKLR, which dealt with equitable distribution of an estate taking into account property devolved inter vivos. The respondent concludes by stating that the trial judge did not err in any way in her decision to distribute the whole 1/3 of the suit property to the respondent. The respondent urges us to decline the appeal with costs to the respondent.
13. Counsel appeared virtually to highlight their respective submissions. Mr Kimani on behalf of Walker Kontos Advocates appeared for the appellants and Mr. Mwangi of Macharia-Mwangi & Njeru Advocates appeared for the respondents.



14. The fulcrum of the appeal is on the distribution of 1/3 share of the suit property as contended by different parties. The appellants are of the view that the three siblings should have the 1/3 share of the said property divided equally while the respondent believes that she should retain the entire 1/3 share as found by the trial Judge in the following manner:

“ 14. ...The deceased died after the commencement of the [Law of Succession] Act. From the wording of this Will the deceased intended to have his daughters have equal shares in the residual estate, Rupal and Rakhi already have 1/3 of their share each in the said property, its only equitable that Sejal gets the 1/3 which was being held by the father, in so doing they will each have equal shares. In my view am not re-writing the Will but considering the deceased’s intentions as stated in his Will, (that his daughters shall share the residual in equal share) and making a reasonable provision for the Applicant. The property in General Mathenge Drive family home L.R. No.1870/11/137 shall be shared in equal portions 1/3 each.” (Emphasis by the trial court.)

15. As the first appellate court, rule 31 of the Court of Appeal Rules 2022 obliges that we re-appraise the evidence and draw inferences of fact. Where exercise of judicial discretion is involved, we only interfere when it is demonstrated, to our satisfaction, that the discretion was exercised capriciously by the trial court. This duty was set out by this Court in Eva Naima Kaaka & Another v Tabitha Waitthera Mararo [2018] eKLR (Civil Appeal 132 of 2017) as follows:

“This being a first appeal, the duty of this Court is to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that an appellate court would not normally interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence or that the Judge was shown demonstrably to have acted on a wrong principle in reaching such conclusion.”

16. It is common ground that the deceased had a written Will and the Will is undisputed. In determining this issue, we shall have to first establish the extent of the residual estate in the suit property taking into account the transfer of the 2/3 shares to the appellants. Thereafter, we shall determine the intention of the deceased before inquiring into the reasonable provision to be made to a dependent on application out of the deceased’s net estate.

17. The deceased’s Will provided as follows:

“

“ 3. I Give to my daughters Sejal, Rakhi Shah(hereinafter called Rakhi) and Rupal Shah (hereinafter called “Rupal”) in equal shares absolutely all my interest in and to the property known as Land Reference No.209/80/22 Nairobi

4. I give to Rupal absolutely:-

1. Ten Thousand (10,000) of my shares (“the said Shares”) in Site Development Limited ...

2. My Motor Vehicle Mercedes Benz registered as KAJ 500G.

5. Subject to Clauses, 2,3 and 4 hereinabove if Kanchanshall survive me for a period of thirty (30) days I give to her absolutely all my real and personal property whatsoever ... hereinafter called “my residuary estate”)



6. If Kanchan shall not survive me for that period then I GIVE my residuary estate absolutely to Sejal, Rakhi and Rupal in equal shares.”

It is uncontested that Kanchan died before the deceased and that, subsequent to the writing of the Will, the deceased transferred 2/3 of the suit property to the appellants. Save for the shares in Jaydees Knitting Factory Limited, property known as LR Number 209/80/22 Nairobi, shares in Site Developmen Limited, and motor vehicle KAJ 500G, the Will did not list any other assets.

18. Instead, the Will made a general provision as to the distribution of the residual estate excepting the properties that had already been included in the Will. The general distribution provided that the deceased’s spouse would be entitled to all the residual estate absolutely provided the deceased did not outlive her. As this did not happen, the fallback position was as per clause 6 of the Will, which meant that all the daughters would be entitled to the residual estate equally. It is on this basis that the trial court distributed all the uncontested properties between the parties equally to the satisfaction of all of them.
19. The only point of departure is the distribution of the suit property which, at the time of death of the deceased, only 1/3 of the share was registered to the deceased. Was the 2/3 share of the property as transferred to the appellants amount to a gift *inter vivos* within the meaning of section 42 of the Law of Succession Act? Section 42 of the Law of Succession Act provides as follows:
20. As observed by Nyakundi J. in Khalifa Abdalla Khamis v Mohamed Abdalla Khamis [2021] eKLR, it is a cardinal rule in our jurisprudence that the right to dispose of property by will or gift is exacting in its requirement as observed by Nyamweya J. (as she then was) in Re: Estate of the Late Gedion Manthu Nzioka (deceased) [2015] eKLR where she stated as follows:
- “In Law, gifts are of two types (gift inter-vivos and gifts made in contemplation of death (gifts *Mortis Causa*). For gifts inter-vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing, or by delivery, by a way of a declaration of a trust by the donor, or by way of resulting trusts or the presumption of gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of a trust in writing. Gift’s inter- vivos must be complete for the same to be valid.”
21. In Munyole v Munyole (Civil Appeal 21 of 2017) [2022] KECA 373 (KLR) (18 February 2022) (Judgment), we held that in order for the court to conclude that a deceased person had made a gift inter vivos to a beneficiary, evidence must be led to this effect.
22. In the present case, the facts are largely undisturbed. The appellants do not dispute receiving the 2/3 share of the suit property in the deceased’s life time.

The record indicates that shares in the property were successfully transferred to the appellants to the exclusion of the respondent and no consideration was paid. We are satisfied that section 42 of the Law of Succession Act applies, and that the gift made in the deceased’s life time amounted to a gift inter vivos, which has to be taken into account in distributing the deceased’s assets. This is because, despite the existence of the Will, the deceased only distributed the specific assets set out in the Will as already noted above.

23. The rest of the properties belonging to the deceased, including the suit property, were left to the general distribution clause in favour of equal distribution of property to the siblings. This, in the learned Judge’s view, was the intention of the deceased. The trial court was persuaded accordingly in the wake of the overwhelming evidence before her. Indeed, the trial judge applied the same criteria to the rest of the properties of the deceased in her ruling, and that decision is not in dispute. With this finding, we



are satisfied that the trial judge was not only correct in finding that the entire suit property was part of the residual estate, but also that the general intention of the deceased was for her daughters to have an equal share of the residual estate. Having considered the gift inter vivos in favour of the appellants, it was only logical that the remaining 1/3 of the share of the suit property be allocated to the respondent. It is our further persuasion that, with the intention of the deceased already provided for in the Will, there was little discretion, if any, on the Judge to decide otherwise.

24. As for the provision of the respondent as a dependent under section 26 of the Law of Succession Act, the section governs Provisions for dependents not adequately provided for by will or on intestacy. It states that

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependent, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependent, order that such reasonable provision as the court thinks fit shall be made for that dependent out of the deceased’s net estate.”

Section 27 of the same Act provides that

“In making provision for a dependent the court shall have complete discretion to order a specific share of the estate to be given to the dependents, or to make such other provision for him by way of periodical payment or a lump sum, and to impose such conditions as it thinks fit.”

25. As already found, it is not in doubt that the respondent is a sister to the appellants. As siblings, none of them has any superior claim over the other in the distribution of the deceased’s assets among them. It was not open to the trial court to consider any other or further provisions made to any specific sibling out of the estate. For instance, Rupal was specifically allocated shares in Site Development Limited and a motor vehicle KAJ 500G under the Will. This was the deceased’s intention, which we cannot purport to rationalize or understand as to interfere with. If we were to extrapolate the appellants’ argument in this respect, then it opens up the entire distribution of all the assets, in which case this specific provision will have to be taken into account in determining whether the residual estate has been distributed equally among the siblings. We reject any invitation to consider, at this juncture any other provisions that any of the parties may have accrued under the estate. In saying so, we are mindful of the trial court’s finding deferring some issues affecting the extent of the estate for determination in other proceedings.

26. The upshot of our decision is that the appeal does not succeed.

Like the trial court, bearing in mind the nature of the dispute and the parties involved, we see no need to award any costs. Accordingly, we hereby dismiss the appeal, and each party shall bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY FEBRUARY, 2024.

M. WARSAME

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

