Daniel (Substituted by Agatha Miriko Ikiara) v Ntoiti (Civil Appeal 46 of 2018) [2024] KECA 1290 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1290 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 46 OF 2018

W KARANJA, J MOHAMMED & LK KIMARU, JJA

SEPTEMBER 20, 2024

BETWEEN

TIRITHA MARINGA DANIEL (SUBSTITUTED BY AGATHA MIRIKO IKIARA) ..... APPELLANT

AND

REGINA ATIA NTOITI ..... RESPONDENT

(Being an Appeal from the judgment of the High Court of Kenya at Meru (A. Ong'injo, J.) dated 22nd June, 2017 In High Court Succession Cause No. 159 of 1999)

JUDGMENT

Background

1. This appeal relates to the estate of M'Murunga M'Rinkanya alias Murunga Gaciungu (the Deceased) who died on 9th August 1978 at Nkubu. The dispute before the High Court involved the property forming the estate of the Deceased and the beneficiaries of the said Estate.

2. Tiritha Maringa Daniel (the appellant) now deceased and substituted by Agatha Miriko Ikiara petitioned for letters of administration intestate for the estate in her capacity as the daughter of the Deceased. The grant was issued to her on 8th February, 2008.

3. The letter by the local Area Chief, Nkuene Location- Nkubu, dated 7th April 1999 in support of the appellant's petition indicated that:

> " The deceased was survived with the following family members and extended family:
>
> 1. Tiritha Maringa Daniel – daughter
> 2. Florence Mwari Mbirika - daughter

3. Augostino Mbiraru – son-deceased

4. Paul Mwithaura - grandchild

5. Mary Gacheru – grandchild

The deceased had a piece of land parcel number Nkuene/Taita/198 measuring 4.76 acres of which the family - clan elders under the chairmanship of the area Asst. chief agreed that it should be subdivided and shared among the above family members. ...”

4. Before its confirmation, Regina Atia Ntoiti, (the respondent herein) objected to the confirmation of the grant to the appellant on grounds that the Petition was filed secretly and the appellant deliberately excluded her so as to dispose of Land Parcel No. Nkuene/Taita/198 (the suit property); that she was a daughter-in-law of the Deceased equally entitled to apply for the letters of administration; that she obtained a grant of letters of administration in respect of her late husband, Augustino Mwithimbu (Augustino), a brother to the appellant and son of the Deceased through Meru H.C Succession Cause No. 130/1998.

5. The respondent having objected to the confirmation of the grant, filed an answer to the appellant's Petition dated 2nd March, 2001 and a cross- application for the grant of letters of administration for the same estate.

6. The appellant's case was that she was handed the title to the suit property by her father for herself, her sisters and the Deceased's granddaughter, Mary. That the Deceased had given land Parcel No. Nkuene/Kithunguri/231 (Land Parcel 231) to Augustino (Deceased) which land was inherited by the respondent hence Augustino and the respondent were not entitled to a share of the suit property.

7. The respondent on the other hand maintained that her consent was not sought before the issuance of the grant in favour of the appellant despite being the administratix of the estate of the son of the Deceased, Augustino, and ranked equally to the appellant in taking of the grant. The respondent sought for the grant of the estate of the Deceased to be issued to her and the estate be administered according to Meru customary law since the deceased died in 1978, which was before the operation of the Law of Succession Act. The respondent's position was that inheritance under Meru customary law was patrilineal and hence the appellant was not entitled to any share of the estate of her father, the Deceased. According to the respondent, Land Parcel No. 231 belonged to Augustino and was not a gift to him from the Deceased as alleged by the appellant.

8. Upon conclusion of the hearing and after analysis of the evidence, the High Court, (A. Ong'injo, J.) sought to determine 5 issues namely: the net estate of the Deceased; the beneficiaries/dependents of the Deceased; the shares each beneficiary was entitled to; whether the estate was subject to customary law or statutory law; and whether there was a *gift inter vivos* in favour of Augustino to be factored in the distribution.

9. In its judgment dated 22nd June 2017, the High Court found that Land Parcel No. 231 was first registered in the name of Augustino (deceased) and there was no evidence that the said land belonged to the Deceased. Further, that the estate of the Deceased herein consisted of the suit property and the same was to be distributed among the 4 children of the Deceased or their surviving children and or spouses to share equally.

10. Regarding the application of customary law over statutory law, the High Court rendered itself as follows:-

> "This court therefore finds that the only property belonging to the deceased's estate is Nkuene/Taita/198 which is to be distributed amongst the deceased's persons 4 children or their surviving children and/or spouses. I will find that they are entitled to share equally amongst the four children. Whatever is due to any one of the four children of the deceased will be shared equally among their surviving children. It was claimed that the deceased died in 1978 before the *Law of Succession Act* came into force and therefore the Meru people being patrilineal, the deceased's estate should be distributed to his sons/son and their dependents/ beneficiaries.
>
> That would mean that the entire estate goes to Paul Muthaura who is the only surviving male in the deceased's lineage. It would also infer that the objector and her step daughter Mary Gaceri would also miss out on the distribution. The property in question was registered in 1966 under the Native Land Registration Ordinance of 1959. Such land cannot therefore revert to Customary Law merely because the *Law of Succession Act* had not come into force by the time the deceased died. It's registration brought it under regime that is statutory which take precedence over customary law. In consideration of the provision of that Constitution the fact that the estate is made of a registered immovable property, this court cannot make orders that are discriminatory in nature or inconsistent with the Constitution as such an order would be null and void, ab initio."

11. The High Court ordered as follows:

    i. The Objector (the respondent herein) and Petitioner (the appellant herein) are granted letters of administration to jointly administer the estate of the late Murunga Gaciungu (the Deceased);

    ii. Certificate of confirmation to issue as ordered i.e. parcel of land No. Nkuene/Taita/198 (the suit property) to be shared equally among the four children of the Deceased and/or their survivors where they are themselves deceased;

    iii. Costs of the cause and administration to be paid from the proceeds of the estate and/or by the beneficiaries equally as agreed.

12. It is this finding that provoked the instant appeal. The appellant filed her notice of appeal dated and lodged on 5th July, 2017. The appellant in her memorandum of appeal dated 19th March, 2018 sought for the impugned judgment and all the consequential orders of the High Court to be set aside; a certificate of confirmation of the grant be issued excluding Augustino (deceased), his widow (the respondent) and their 2 children namely Paul Muthaura and Mary Gacheri from the distribution of the suit property, and costs.

13. The appellant's grounds of appeal are that the High Court erred in law and in fact by:-

    i. Holding that the respondent is entitled to share the net intestate to wit the suit property in equal proportions with other heirs yet there was before the learned judge ample corroborated and unchallenged evidence to demonstrate and prove that Augustino (deceased) who was a son of the deceased had previously been given another Land Parcel No. 231 by the deceased when he was alive as a *gift inter vivos* and the respondent and her children inherited it after the death of Augustino (deceased).

ii. Failing to find that Land Parcel No. 231 which Augostino (deceased) was given by the Deceased as *gift inter vivos* measures 8 acres whereas the suit land L.R No. Nkuene/Taita/198 measures 4.79 acres. Accordingly, the respondent was not entitled to any share from the suit property as giving her or Augostino (deceased) or their children any share therefrom would be unfair benefit; and

iii. Failing to find and hold that the respondent did not prove how else, if not a *gift inter vivos*, Augustino acquired the aforesaid 8 acres of land comprised in Land Parcel No. 231.

Submissions by Counsel

14. At the plenary hearing, the appellant was represented by learned counsel Mr. Kariuki holding brief for learned counsel Mr. Carlpeters Mbaabu. The respondent was represented by learned counsel Mr. Mwarania. Counsel for the appellant had filed written submissions which he opted to briefly orally highlight. Counsel for the respondent had not filed written submissions and submitted orally.

15. Counsel for the appellant urged us to find that the trial court erred in holding that the respondent is entitled to share the net estate being the suit property in equal proportions with other heirs. Counsel submitted that before the High Court there was ample, corroborated and unchallenged evidence demonstrating that Augustino, a son of the Deceased had previously been given Land Parcel No. 231 by the Deceased as a gift inter vivos. Counsel asserted that Section 42 of the *Law of Succession Act* requires such land to be taken into account during distribution of the estate. In counsel's opinion, the respondent ought not be allowed to inherit a further share of the Deceased's estate having been gifted 8 acres of Land Parcel No. 231. Counsel asserted that courts have held that express wishes of a deceased should not be ignored. Counsel further submitted that it is unfair and amounts to unjust enrichment to allocate the respondent on behalf of Augustino a further portion. Counsel emphasized that evidence was adduced proving that Land Parcel No. 231 was registered in the name of Augustino after the Deceased gifted the same to him. Counsel submitted further that there was sufficient evidence proving that the Deceased distributed his estate during his lifetime whereupon the suit property was given to the appellant to hold in trust for herself and her two sisters. Counsel submitted that pursuant to Section 42 of the *Law of Succession Act*, the wishes of the deceased should be respected, as there was no evidence that the said wishes were illegal or unfair.

16. Counsel further submitted that the respondent did not prove how else her husband; Augostino (deceased) acquired the 8 acres of Land Parcel No. 231 if not by way of *gift inter vivos*. Counsel emphasized that there was no evidence of purchase of the said parcel of land by Augustino. In counsel's opinion, the burden of proof under Section 107 of the *Evidence Act* lay upon the respondent which she failed to discharge. Counsel emphasized that the appellant gave ample evidence of the existence of a *gift inter vivos* in favour of Augustino in respect of Land Parcel No. 231.

17. Counsel for the respondent opposed the appeal and submitted that the copy of the title in respect of Land Parcel No. 231 attached in the record indicates under the proprietorship section that the first registered owner was Augustino. Counsel asserted that there was no evidence of the alleged *gift inter vivos* from the Deceased to Augustino. Counsel further submitted that the fact that Augustino had another piece of land does not disentitle him from inheriting the Deceased's Estate herein through the respondent. Counsel urged this Court to dismiss the appeal on those grounds.

Determination

18. This is a first appeal. The court reminds itself of its mandate as the first appellate court to re-evaluate the evidence, assess it and reach a conclusion bearing in mind that it neither saw nor heard the witnesses

and make due allowance for that. See Rule 31 (1) of the *Court of Appeal Rules* and this Court's decision in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR. Also see *Selle v Associated Motor Boat Company Ltd* (1968) E.A 123.

19. After analyzing the grounds of appeal, the issues that stand out for determination before this Court are whether the respondent was entitled to share the estate of the Deceased in equal proportions with other heirs and whether Land Parcel No. 231 was a *gift inter vivos* from the Deceased to Augustino.

20. It should be noted that there is a mix up in respect of Land Parcel No. 231 as pointed out by learned counsel for the respondent, Mr. Mwarania that the said parcel has been referred as Nkuene/Kithunguri/123 in some of the documents in the record. A cross check with a copy of the title in the record indicates that the correct number is Nkuene/Kithunguri/231.

21. On the issue whether the respondent was entitled to a share of the estate herein, we note that it was not disputed that the respondent was seeking a share of the estate on behalf of Augustino who was a son of the Deceased. As such it is not in doubt that Augustino was a beneficiary of the Deceased's estate herein and the respondent pursuant to the confirmed grant was administering his estate as issued in Meru H.C Succession Cause No. 130 of 1998. In the circumstances, we find that the High Court did not err in finding that the respondent was entitled to a share of the estate of the Deceased herein as a spouse of Augustino (a son of the Deceased).

22. On the question regarding what constituted the estate herein, this shall be determined alongside the issues of whether there was a *gift inter vivos* as alleged by the appellant. Counsel for the appellant has strongly contended that evidence was tendered demonstrating that the Deceased gave Augustino Land Parcel No. 231 as a gift during his lifetime and as such, Augustino was not entitled to any further share of the Estate.

23. As per the appellant's petition, the estate of the Deceased consisted of the suit property only and the beneficiaries of the estate included the two children of Augustino excluding the respondent only. Was there evidence of a*gift inter vivos* from the deceased to his son Augustino (deceased)?

24. A few authorities will shed light on the issue of gifts inter vivos. The High Court (Nyamweya, J. – as she then was) *In re Estate of Godana Songoro Guyo* (Deceased) [2020] eKLR stated as follows regarding the legal requirements of a *gift inter vivos*:

> " What is the requirement of law as far as a *gift inter vivos* is concerned? I find useful guidance in Nyamweya J in her decision in the case of *Re? Estate of the Late Gedion Manthi Nzioka (Deceased)* [2015] eKLR, where she stated as follows:
>
> "In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the *Law of Succession Act* provides as follows with respect to gifts made in contemplation of death:
>
> ...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 way of a declaration of 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 trust in writing. Gifts inter vivos must be complete for the same to be valid."

25. In *Halsburys Laws of England* 4th Edition Volume 20(1) at para 67 }expounds on gifts inter vivos in the following terms.

> "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."

26. Further, Odunga's Digest on *Civil Case Law and Procedure* Vol (III) Page 2417 at paragraph 5484 (d) e – 1 expounds as follows:

> " 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 Walve* {2002} 1WLR 2075 *Maledo v Beatrice Stround* {1922} AC 330 Equity will not come to the aid of 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 done has under his control everything necessary to constitute his title completely without any further assistance from the donor, the done need no assistance from 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 done has within his control all those things necessary to enable him, complete his title. 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 yet been registered as a proprietor. (See *Shell's Equity* 29ED Page 122 paragraph 3)"

27. The appellant faulted the trial court for failing to find that there was no other way that Augustino acquired Land Parcel No. 231 except as a *gift inter vivos* from the Deceased. The trial court's analysis was that Land Parcel No. 231 was registered in the name of Augustino as a first registered owner in 1965 while the suit property was registered in the name of the Deceased in 1966, one year later. The trial court reasoned that there was no justification for the Deceased to register land in favour of his son, Augustino first and not for himself, which reasoning we fully agree with. The proprietorship of Land Parcel No. 231 on the copy of the title deed neither shows that the said land was initially owned by the Deceased nor that it was given to the respondent's husband, Augustino as a gift. This, coupled with the Chief's letter dated 7th April, 1999 and the contents of the Petition for letters of administration, confirms that the Estate of the Deceased herein consisted of only the suit property.

28. The appellant submitted that Land Parcel No. 231 ought to be taken into account in the distribution of the estate of the Deceased to avoid unjust enrichment by the respondent. It is notable that there was no entry in the proprietorship section of the certificate of title of freehold title in reference to Land Parcel No. 231 to indicate that it was ever registered in the name of the Deceased.

29. Section 42 of the *Law of Succession Act* provides as follows:

> "(42) Where-
>
> a. an intestate has, during his 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."

30. Section 38 of the *Law of Succession Act* provides as follows:

> " Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children."

31. From the record, two children and two grandchildren survived the Deceased. By dint of Section 38 of the *Law of Succession Act* the two children, the appellant and her sister, Florence and two grandchildren (Paul and Mary) who were Augustino's children were entitled to a share of the estate of the Deceased.

32. In the circumstances, we find that the High Court did not err in finding that the net estate of the deceased was the suit property and the same should be shared equally among the Deceased's surviving children and where they are deceased, then to their spouses and children. We further find that the High Court did not err in finding that there is no legal basis for taking into account Land Parcel No. 231 in the distribution of the estate of the Deceased.

33. In the circumstances, after re-evaluation of the record, we find that the appeal has no merit. Accordingly, we find no reason to disturb the findings by the High Court.

34. The upshot is that the appeal is hereby dismissed. This being a family matter, the order that commends itself to us is that each party will bear their own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR