Kagina v Kagina & 2 others (Civil Appeal 21 of 2017)
[2021] KECA 242 (KLR) (3 December 2021) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 21 OF 2017

RN NAMBUYE, W KARANJA & AK MURGOR, JJA

DECEMBER 3, 2021

BETWEEN

CHRISTOPHER NDARU KAGINA ..... APPELLANT

AND

ESTHER MBANDI KAGINA ..... 1ST RESPONDENT

TABITHA IKAMBA KAGINA ..... 2ND RESPONDENT

CHARITY NJOKI KAGINA ..... 3RD RESPONDENT

(Appeal from the ruling of the High Court of Kenya (John M. Mativo, J.) dated 20th September, 2016 in Nyeri Succession Cause No. 300 of 2013)

JUDGMENT

1. This is a first appeal arising from the ruling of the High Court of Kenya, J. M. Mativo, J. dated 20th September, 2016 in Succession Cause No. 300 of 2013.

2. The background to the appeal is that the appellant and the respondents were appointed as joint administrators of the deceased's estate. He filed a chamber summons application dated 8th April, 2013, brought under sections 47 and 48 of the *Law of Succession Act*, Cap 160 Laws of Kenya (the Act), Rules 73 and 49 of the *Probate and Administration Rules*, seeking declarations that: the respondents had jointly and severally variously defrauded the estate of the deceased of properties enumerated in the body of the application namely: Embu/ Municipality/1112/37; Embu/Municipality/1112/107; Embu/ Mavuria/227; Mbeti/Gachoka/1460; Mbeere/Kiambere/143; Embu/ Mavuria/227; Mbeti/ Gachoka/1460; Nthawa/Gitiburi/ 1282; Riacina Adjudication Section – 508; Riacina Adjudication Section – 172; Riacina Adjudication Section – 693; Riacina Adjudication Section – 6553; Riacina Adjudication Section – 1852; Riacina Adjudication Section – 4170; Riacina Adjudication Section – 4339; Gachoka/Gachuriri/842; Nthawa/Siakago/2265; Mbeti/ Gachoka/ 513; Mbeere/Mbita/4257; Mbeere/Mbita/4258; and Vehicle Reg. No. KAT 10H White Pick Up; (the subject suit properties).

According to the appellant all the above subject properties belonged to the estate of the deceased and therefore fell for consideration for distribution. It was, therefore, imperative in the circumstances for the Court to issue an order of stay of any further intermeddling in the affairs of the estate of the deceased by the respondents or any other persons and or agents claiming through them pending distribution and that costs of the application be borne by the respondents.

3. The application was supported by an affidavit and a supplementary affidavit of the applicant. It was opposed through the 1st respondent's preliminary objection (P.O.) dated 22nd May, 2013 and a replying affidavit sworn by the 1st respondent on 26th October, 2015 and filed on 27th October, 2015.

4. In summary, the appellant's complaints were that the respondents in collusion with third parties crafted fictitious and false sale agreements purporting to have been drawn by the deceased during his life time on the basis of which they disposed of the suit properties either to themselves or to third parties. The particulars of the dispositions complained of were given as follows: the 1st respondent subdivided parcel number Mbeere/Mbita/41 and created two parcels namely Mbeere/ Mbita/4257 and transferred to the District Commissioner Mbeere South, while retaining Mbeere/Mbita/4258 to herself; the 1st respondent fraudulently transferred Embu/ Municipality/1112/ 37 to herself; the 2nd respondent fraudulently transferred Embu/ Municipality/112/107 to herself; the 3rd respondent disposed of the deceased's vehicle Reg. No. KAT 109H; the 1st and 2nd respondents jointly and severally disposed of Mbeti/Gachoka/1460, Mbeere/Kiambere/Gachoka/842; the 1st 143, Nthawa/ Gitiburi/1282, Embu/Mavuria/227 and Mbeti/respondent falsely claimed that her daughter, Mary Ndegi Kagina bought parcel number Nthawa/Siakago/2265 during the deceased's lifetime yet the said land parcel was still registered in the deceased's name; the 1st respondent falsely claimed that the deceased bequeathed parcel number Mbeti/Gachoka/ 513 to her son, Peter Ngari Kagina and others without any proof thereof; and lastly, the 1st respondent and her children falsely claimed that the apportionment of parcel number Mbeti/Gachoka/513 was done on 22nd September, 2005 during the lifetime of the deceased when the evidence available proved the contrary.

5. In rebuttal, the 1st respondent contended in her P.O. that the application was bad in law, mischievous, frivolous and totally devoid of merit while in her lengthy replying affidavit, she deposed cumulatively, inter alia, that the deceased shared out most of his properties amongst his wives and children including the appellant, during his lifetime. He had also sold out some of his properties to third parties also during his life time.

   She conceded effecting transfer of properties alluded to in paragraph 5 of the appellant's supporting affidavit, but added that those transfers were in accordance with the deceased's wishes. All she and the co-respondents did was to simply effectuate the wishes of the deceased by completing transfer documents already executed by the deceased but which transactions the deceased had not finalized as at the time of his demise. She was aware of the subdivision of Plot No. 41 which according to her, she only finalized the transaction in favour of the Government in accordance with the deceased's wishes. She denied forging the signature of the deceased with regard to the transfer of parcel number Embu/ Municipality/1112/37 to herself. To her recollection, the transfer was effected in her favour during the lifetime of the deceased.

6. In her opinion, failure to transfer parcel number Nthawa/Siakago/2265 to Mary Ndegi Kagina, her daughter during the lifetime of the deceased was not per se proof that the said Mary never purchased the said property from the deceased. According to her, motor vehicle KAT 109H was not estate property as it belonged to one of her sons who gave instructions to her daughter, Charity, to sell the said motor vehicle and apply the proceeds towards the deceased's medical bills. She has personal knowledge that land parcel number Mbeti/Gachoka/513 was shared out during the lifetime of the deceased and all that was left for the administration to do was to effectuate the transfers in the names of the allotees.

Plot No. Mbeti/ Gachuriri/284 was similarly transferred in the appellant's name during the deceased's lifetime and in respect of which the appellant had not raised any complaint. The application was, therefore, in her opinion brought in bad faith as it was not only selective with regard to information the appellant had put forth in support thereof but it was also a clear demonstration that the appellant was also economical with relevant factors surrounding his complaint to court.

7. She further asserted that the appellant had also failed to disclose in his supporting papers that he unilaterally leased out properties belonging to the estate of the deceased namely, Mbeere/Kirima/2146, Mbeti/ Gachoka/513 and 284, and Gachiriri/ 285. Neither had he included these properties in the list of properties forming the free estate of the deceased which according to the 1st respondent had also been intermeddled with by the appellant. His application was therefore tainted with bad faith. She therefore urged the Court to dismiss it.

8. The application was canvassed through oral testimonies and written submissions at the conclusion of which the trial Judge analyzed the record and identified only one issue for determination, namely, whether the respondents had in any manner either jointly or severally intermeddled with the deceased's estate. To resolve the issue, the Judge applied the threshold on the construction of section 45 of the *Law of Succession Act* as construed and applied by Tanui, J. in the case of *Gitau & 2 Others vs. Wandai & 5 Others [1989] JKR 231* for theholding, inter alia, that: intermeddling with property of a deceased person consists of conduct or actions of a person not vested with letters of administration either intestate or with a will annexed, taking possession of, disposing or otherwise intermeddling with any free property belonging to an estate of a deceased person, and expressed himself thereon, inter alia, as follows:

> "... if a deceased person has during his life time sold, transferred, disposed or in any manner given out his properties either in exchange of consideration or as gifts inter vivos, such gifts or properties whether transfer had been registered or not do not form part of the deceased's estate. In fact, the Law of Succession in my view protects and preserve transactions made by the deceased during his life time."

9. The Judge also construed section 47 of the Act donating mandate to the High Court to determine any dispute under the *Law of Succession Act* and pronounce such decrees and make such orders thereon as may be expedient; Rule 73 of the Probate and Administration Rules donating the inherent power to the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court; and lastly, Rule 49 of the Probate and Administration Rules for provision that a person who desire to make an application to court relating to the estate of a deceased person for which no provision is made elsewhere in the Rules shall file a summon supported, if necessary by affidavit and concluded that he was therefore properly seized of the appellant's application with jurisdiction and or mandate to pronounce himself thereon on its merits.

10. The Judge then summarized the appellant's complaints as laid in support of his application as already highlighted above albeit in summary form. On the issue of the expert witness, the Court adopted the position taken in a persuasive authority namely, Buham and Others [2005] EWCA CR. M. 1980, on the approach a court should take when addressing questions regarding admissibility, qualifications, relevance and competence of expert testimony which in law are left to the discretion of the trial court. Secondly, there is also need for the court to subject such expert testimony to vigorous in-depth analysis, weigh it along with all other evidence bearing in mind that the duty of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise with regard to issues in controversy before the Court.

11. In consideration of the above, the Judge distilled own elements/ ingredients for admitting and acting on expert evidence as more particularly set out in the impugned ruling and which we find prudent not to rehash.

12. Also taken into consideration among numerous others is the case of *Stephen Kinini Wang'ondu vs. The Ark Limited [2016] eKLR* fromwhich the Judge drew out four tests to be applied by a court when considering admission and acting on expert evidence as more particularly set out in the ruling and which we also find prudent not to rehash and expressed himself thereon, inter alia, as follows:

> " In my view its correct to state that a court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it. A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative or manifestly illogical. Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable.
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> It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. Theimportance of proving the facts underlying an opinion is that the absence of such evidence deprives the court "of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence." An expert report is therefore only as good as the assumptions on which it is based.
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> An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based."

13. The Judge also drew inspiration from persuasive jurisprudence on the duties of a court, namely, the decision of the Supreme Court of South Africa in the case of *Kunz vs. Swart 1924 AD 618* and *Annama vs. Chetty 1946 AD 142*; *Whitehouse vs. Jordan [1981] 1 W.L.R. 246*, HL, at 256, per Lord Wilberforce; *Pollivitte Ltd vs. Commercial Union Assurance Company Plc [1987] 1 Lloyd's Rep. 379* at 386, per Garland J., and *Re J (1990) F.C.R. 193,* per Cazalet J.; *Derby & Co Ltd vs. Weldon (No.9)*, The Times, November 9, 1990, CA, per Staughton L.J.; for the cumulative holding/propositions, inter alia, that: in instances in which a court is confronted with issues of admissibility or otherwise of expert opinion evidence, the Court is enjoined to apply caution before accepting and acting on such expert evidence. It should only do so in instances where there is sufficient demonstration that the expert opinion is the independent product of the expert's own work arrived at in a manner uninfluenced by any extraneous factors as to the form or content. It is also objective and an unbiased opinion, arrived at on matters within the expert's own expertise, and lastly, that the report contains the truth and nothing but the whole truth.

14. Applying the above threshold to the expert evidence on the record tendered through appellant's own witness, the Judge expressed himself thereon as follows:

> " I have considered the evidence tendered by the document examiner and the report prepared by the said witness and I am persuaded that the said evidence is not build on a sub-strum of facts which are proved to the satisfaction of the court according to the appropriate standard of proof. As stated above, such evidence must be read together with the rest of the evidence

but not independently. The evidence by the document examiner in the opinion of this Court does not establish that it is 'highly probable' that the documents in question were forged."

15. On the evidence of witnesses called by the appellant in support of the application, starting with the evidence of the Land Registrar, the Judge ruled that the District Land Registrar who gave evidence on the transfer process relating to parcels numbers Embu Municipality/1112/37 and 107 confirmed that the transfers were in order. The requisite transfer documents had been duly presented to their office but misplaced at the time of setting up of Mbeere District Land Registry. The Judge therefore concluded that the transfers of the subject two properties were by way of a gift. In the Judge's opinion, the law permits a person to give gifts inter vivos and once given, such gifts are protected by the law as valid. The law also protects and preserves the wishes of a deceased person made during his life time. According to the Judge and from the evidence tendered through this witness, the transfers of the two subject properties were registered as required as there was evidence that the lands office accepted the documents of transfer and had no reason to doubt the authenticity of the signatures of the deceased. Neither had any application been made by any party aggrieved with those transactions to have them annulled on the basis of the alleged fraud. Further, that the fact that the records at the council offices had not been up dated was not sufficient ground for challenging the titles.

16. On plot numbers 172, 508, 693, 6553, 1852, 4170, 4339, the Judge appreciated the evidence of Mr. Njiru Marete, the Mbeere District Lands Adjudication Officer whose summary was that all the transfers for the above mentioned plot numbers were lawful having been effected on the strength of the documents presented to that office for that purpose. The Judge therefore concluded that no fraud had been proved in respect of those transfers. According to the Judge, the evidence tendered through Njiru Marete corroborated the respondents' assertions that the properties in question were given to the recipients by the deceased in his lifetime. The Judge also observed that the appellant had not rebutted the 1st respondent's assertion that he had also been given land during the lifetime of the deceased whose transfer in his favour was perfected after the demise of the deceased and which the appellant neither refuted nor included in the list of properties he alleged had been fraudulently transferred after the demise of the deceased.

The Judge then expressed himself thereon as follows:

> "I have also evaluated the evidence of a tenant in one of the premises also called by the applicant. Other than being a tenant, he did not state he interacted with the deceased in such a manner that he knew whether or not the deceased gave out his properties during his life time or whether he transferred the properties in question or not.
>
> The applicant accuses the Respondents of having transferred the properties in question fraudulently. The Respondents asserted that the deceased gave out the various parcels of land prior to his death and as stated above, the applicant was also a beneficiary of the gifts inter vivos which he did not dispute. The fact that the transfers may have been registered at later dates is not itself evidence of fraud."

17. Turning to the threshold for proof of fraud, the Judge took into consideration the Court of Appeal decision in the case of *Central Kenya Ltd vs. Trust Bank Limited & 4 Others [1996] eKLR* for the holding, inter alia, that: allegations of fraud must be strictly proved; great care needs to be taken in pleadings containing allegations of fraud or dishonesty; there must be sufficient evidence to justify the allegation; fraud and conspiracy to defraud are very serious allegations; and lastly, that the burden of proof for fraud is slightly much higher than that of balance of probability.

18. Other cases also taken into consideration were *Belmont Finance Corporation Ltd. vs. Williams Furniture Ltd [1979] Ch. 250, 268*; *Mpungu & Sons Transporters Ltd vs. Attorney General & Another [2006] 1EA 212*; and lastly, *Jennifer Nyambura Kamau vs. Humphrey Nandi, [2013] eKLR* both for the holdings/propositions cumulatively that an allegation of dishonesty must be pleaded clearly and with particularity; the burden of proving fraud was heavier than the balance of probabilities standard, generally applied in civil matters; and lastly, that fraud must be proved as a fact by evidence whose standard of proof is beyond a balance of probabilities but not as high as that of beyond reasonable doubt applicable in criminal proceedings.

19. On the totality of the above assessment and reasoning, the Judge dismissed the appellant's application and declined to grant prayers: three (3), five (5) and six (6) for the appellant's failure to give particulars of fraud attributed to the respondents nor prove the same to the required threshold; prayer two (2) was declined because it was neither proved nor was it clear; prayer four (4) was declined because in the Judge's opinion, matters raised in paragraphs 17, 18, 19 and 20 of the appellant's supporting affidavit contained issues touching on the respondents' proposed mode of distribution of the deceased's estate as well as the issue as to whether the deceased died intestate or otherwise which issues according to the Judge all fell for determination before the court seized of the application for confirmation. In the Judge's opinion, the court pronouncing itself on the said issues at that point in time would be tantamount to pre-empting the outcome of the application for confirmation; that furthermore, it was also prudent for the court seized of the confirmation proceedings to give an opportunity to the disputing parties to express themselves on these issues governing the mode of distribution of the deceased's estate before drawing out any conclusion thereon. Also, that if the court were to express itself thereon prematurely in an interlocutory application that would not only preempt but also embarrass the outcome of the pending application on distribution.

20. The appellant was aggrieved. He is now before this Court on an interlocutory appeal raising (9) grounds of appeal which may be rephrased that the learned Judge erred in law and in fact in: failing to properly or sufficiently consider and apply the provisions of the *Law of Succession Act* to the issues in controversy as between the respective parties to the appeal; failing to consider the applicant's supporting affidavits and written submissions in support of the issues raised in the application thereby arriving at the wrong decision; erred in rejecting and or dismissing the forensic examiner's report without any contrary expert opinion; showing a clear bias in favour of the respondents in his assessment and reasoning on the facts on the record to the appellant's prejudice; failing to properly appreciate that on the facts on the record Embu/Municipality/1112/37 and 107 were illegally and fraudulently transferred to the respondents; in failing to properly appreciate or sufficiently consider the weight of the appellant's witnesses testimonies as tendered before court; introducing a will in the matter, which will was totally nonexistent; and lastly, the impugned decision was against the law and facts placed before the Judge by the respective parties and therefore should be interfered with set aside and substituted with an order allowing the appellant's application in its entirety.

21. The appeal was canvassed via Go-To-Meeting platform due to the prevailing Covid-19 challenges through the appellant's written submissions orally highlighted in the presence of the appellant. There was no appearance for the firm of Mulwa Isika on record for the respondents, served electronically with a hearing notice for the hearing of the appeal on Monday, May 24, 2021 at 8.41am. The Court being satisfied that counsel for the respondents had due notice both for filing the submissions and hearing, allowed the appellant to prosecute the appeal.

22. Supporting the appeal, it is the appellant's position, that he had sufficiently demonstrated before the trial Judge that the respondents jointly and severally alienated, transferred, disposed of and or otherwise intermeddled with the subject suit properties enumerated in the body of the application.

23. Contrary to the respondents' assertions that all the subject suit properties were transferred during the lifetime of the deceased, evidence sourced through the Town Clerk Embu Municipality was explicit that Embu/Municipality 1112/37 was transferred to the 1st respondent on 17th September, 2010 which was long after the demise of the deceased. The appellant also submitted that when a Mr. Joseph Muringe Munguti was confronted over the issue he simply stated that the original documents were misplaced during the process of opening up of Mbeere District Lands office. There was, therefore, nothing to fault the document examiner's evidence that the signatures purportedly attributed to the deceased on the documents involved in the divestation of the subject suit properties from the deceased to the purported beneficiaries were in fact forgeries.

24. The appellant also asserts that a letter from the same Embu Municipality office dated 15th March, 2010 in response to his inquiries about the position of property numbers Embu/Municipality 1112/37 and 107 indicated clearly that these two properties were still registered in the names of the deceased which in the appellant's opinion was sufficient confirmation of his assertion that those properties still formed part of the deceased's distributable estate. The appellant had also used the same method with regard to the subdivision of Mbeere/Mbita/4257 and 4258. The information sourced from the relevant authorities revealed that the subdivision on this property was executed and transfer effected in favour of the 1st respondent and the District Commissioner on 29th April, 2010.

25. In light of the above submissions the appellant's position is that evidence of witnesses he called to testify on his behalf in support of his application should not have been discounted in the absence of evidence tendered by the respondents to the contrary. It is also the appellant's position that the records held at the Lands Registry indicated clearly that parcel numbers, Riciana Adjudication sections 508, 172, 693, 6553 and 4170 were transferred on 11th January, 2010 while Riciana Adjudication Section 4339 was transferred on 14th November, 2010. This was later on subdivided into Riciana Section 508 resulting in a derivative number 6553 which the respondent sold to Mutuobare Secondary School in 2010. As for motor vehicle KAT 109H white pick-up, the appellant contends that the 3rd respondent admitted that the vehicle was disposed off after the demise of the deceased. On the sale agreements with regard to parcel numbers Embu/Mavuria/227, Mbeti/Gachoka/1460, Mbeere/ Kiambere/143 and Nthawa/Gitiburi/ 1282, the appellant asserts that these were found fictitious and vitiated by the report of the forensic document examiner he called to give evidence in support of his application. He maintained LR No. Nthawa/Siakago/ 2265, was still registered in the names of the deceased. Lastly, that there was no proof that Mbeti/Gachoka/ 513, was bequeathed to the 1st respondent's son, Peter Ngari Kagina during the deceased's lifetime.

26. On the totality of the above submissions, the appellant prays for the appeal to be allowed in its entirety with costs to him.

27. This is a first appeal. Our mandate is to analyze and reassess the evidence on the record and reach our own conclusion on the matter. *Selle vs. Associated Motor Boat Company [1968] E. A 123*, *Jabane vs. Olenja [1986] KLR 661, 664*. This court stated in Jabane vs. Olenja [supra] that it will not lightly differ from the findings of fact of a trial Judge and will only interfere with them if they are based on no evidence. See also *Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 E. A 212* wherein the court summarized the principle in the following words: "This being a first appeal to this court, is to reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect....".

28. We have considered the record in light of the above mandate. The issues that fall for our determination are the same rephrased above forming the appellant's complaints on appeal.

29. On the jurisdiction of the Court to determine the matter, the record is explicit that the trial Judge correctly took into consideration sections 47 and Rules 73 and 49 of the Probate and Administration Rules and properly concluded that he was properly seized of the matter. This is because section 47 of the Act donates powers to the High Court to determine disputes under the Act, Rule 73 of the Probate and Administration Rules donates inherent power to the High Court to determine disputes under the Act not sufficiently provided for substantively either in the provisions of the Act or the Rules for ends of justice to be met to the parties while Rule 49 of the Probate and Administration Rules is the provision that governs presentation to the High Court of applications such as the one that had been presented by the appellant and which the trial Judge was seized of. We affirm the Judge was properly seized of the matter and properly expressed himself thereon on its merits.

30. On the threshold for proof of allegation of intermeddling in a deceased person's estate by any person, the provision of law that fell for consideration and application by the trial Judge at the trial and now by this Court on appeal was and still is section 45(1) of the Act. It provides:

> " 45.(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....."

31. The record is explicit that the Judge properly appreciated this fact and took into consideration both foreign and local jurisprudence on the threshold for sustaining a plea of intermeddling in a deceased person's estate. Of primary consideration by the trial Judge was the decision of a court of coordinate jurisdiction in the case of Gitau & 2 Others vs. Wandai & 5 Others [supra], already highlighted above.

32. It is apparent from the record that the bone of contention and which we find was properly appreciated by the Judge was, at what point in time were the impugned transfers of the subject suit properties appellant alleged formed the deceased's estate executed divesting title to those properties from the deceased to the beneficiaries. As we have already stated above, the appellant's position was that the deceased never divested himself of the titles to the subject suit properties during his lifetime. According to him, all the impugned transactions were effected after the demise of the deceased, while the position of the 1st respondent on the other hand was that these ceased being the deceased's properties during his lifetime.

33. We have revisited that rival position on the record and agree with the position taken by the Judge that a deceased person has capacity to divest himself of property during his lifetime known in law as gifts inter vivos which in the Judge's opinion and correctly so in our view are not only protected under the Act but are also sanctionable by a court of law irrespective of whether they are perfect or imperfect. By perfect is meant, complete, meaning the transfer of the gift inter vivos in favour of the beneficiary was effected and completed during the lifetime of the deceased while by imperfect is meant the transfer of the gift in favour of the recipient was incomplete as at the time of the demise of the deceased. As correctly observed by the Judge, lack of completion of the process of transfer does not of itself render the gift inter vivos invalid. It can be perfected by the grant holder if there is no contest over it, or alternatively sanctioned by a court where proven.

34. Our take on the above rival position is that we find no mis-appreciation or misapplication of the law on intermeddling. The position taken by Tanui, J. in the Gitau & 2 Others vs. Wandai & 5 Others case [supra] is the correct threshold to be applied by a court addressing a complaint of alleged intermeddling in a deceased person's estate and which we find from the record the Judge properly appreciated and applied.

35. On the alleged Judge's failure to take into consideration the evidence appellant put forth in support of his application, the position we take is that taken by the Court in *Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001*, for the holding, inter alia, that it is not for the appellate court to set aside the trial court's exercise of discretion on the approach to take in the analysis and appreciation of facts in the first instance and substitute its own simply because if it had been the trial court it would have exercised the discretion differently. See also in *Kiruga vs. Kiruga & Another [1988] KLR 348*, wherein the Court of Appeal expressed itself thereon inter alia, as follows:

> " An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the Judge can be said to be plainly wrong. It is a strong thing for an appellate court to differ, from the finding, on question of facts, of the Judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed the jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon evidence should stand. But this is jurisdiction, which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

36. Bearing the above caution in mind, our position is that upon our perusal of the expert report tendered in evidence by the expert the appellant called to testify on his behalf, the oral testimony tendered by the expert witness and his responses to questions put to him on cross-examination, in light of the totality of the record as appraised by the trial court in the first instance and now this Court on appeal, our position is that we wholly agree with the learned Judge's decision as to why the Judge discounted the said expert's evidence even though there was no contrary expert opinion to controvert it. Our reasons for reaching the above conclusion are as follows: firstly, the expert opinion evidence was not binding on the Judge, neither does it bind this Court. Second, it had failed the test of qualification as an expert report for the witness's failure to adduce evidence on his credentials. Third, the experts evidence of existence of alleged deceased's forged signatures on the impugned documents was contradicted by the evidence of the land registrar and district land adjudication officer who were witnesses called by the appellant himself in support of his application. It is on record that three witnesses gave evidence that the impugned documents were in fact regular; that there were delays in perfecting those transfers caused by factors beyond the control of the beneficiaries, namely, relocation of the lands registry to Mbeere District.

37. Our position on the appellant's complaint that his witnesses evidence on the intermeddling in the deceased's estate was ignored, is that the record as highlighted above explicitly and sufficiently demonstrated that, the Judge adequately addressed his mind to that evidence in his ruling wherein he held, inter alia, and correctly so in our view that the appellant called the District Land Registrar who gave evidence on the transfer process relating to parcels numbers 37 and 107 and stated that the transfers were in order and that all the requisite documents were presented, but the requisite consents were misplaced at the time of setting up the Mbeere Land District Registry. The Judge also took cognizance of the fact that no application had been made either by the appellant or any other aggrieved person to have those transactions annulled. Second, that the fact that the records at the council offices had not been updated was not a sufficient ground to challenge the validity of those titles. Third, the law permits the giving gifts inter vivos and once given, such gifts are protected by law as valid unless otherwise decided invalid by a court of law and, lastly, that the law also protects and effectuates the wishes of a dead person made during his life time, provide that the wishes are not in contraventions of the provisions of the succession laws.

38. Lastly, as regards the appellant's allegation on the introduction of a Will in the matter, all that the learned Judge stated, and this was clear from the ruling was that the issue as to whether the deceased died intestate or not was a matter to be determined at the hearing of the confirmation of grant proceedings in the course of which parties will be given an opportunity to tender evidence in support of their rival position to the application for confirmation and proposed mode of distribution.

39. The assessment and reasoning of the Judge highlighted above explicitly in our view indicates clearly that the facts put forth by the appellant in support of the application and those put forth by the 1st respondent in rebuttal thereof were properly appreciated by the Judge including the evidence tendered by the appellant both through documentary exhibits and that through oral testimonies of witnesses he tendered to court to give oral testimony in support of his application.

40. On the appellant's complaint that the Judge erroneously rejected the forensic expert report, in the absence of any other contrary expert opinion, the record assessed above and which we fully adopt and find no need to replicate here is explicit that the Judge went to great lengths to set out in extenso the principles of law on admission and acting on evidence of an expert witness; and the role of the court with regard thereto. Of greater consideration by the Judge at the trial and now this Court on appeal as the now crystallized principle/proposition on the issue is that in order for such evidence to fall for consideration by a court of law there is necessity for the expert to explain to the satisfaction of the court the basis for his/her expertise.

41. We agree with the appellant's observation that no other expert evidence was called either by the court or the 1st respondent to controvert the testimony of the expert called to testify on his behalf. The record is also however explicit that the reason why the Judge discounted the said evidence was not only because the same had been controverted by any other evidence tendered through another expert witness opinion to the contrary but because the expert witness called by the appellant, although he gave evidence on the nature of trainings he had undergone and where he had under taken those trainings, he failed to tender any proof with regard thereto in the form of academic testimonials or his expertise. Our take on the above undisputed factual position is that without proof and submission of the witnesses' credentials to the court, there was nothing to demonstrate that the said witness was indeed a forensic expert.

42. In *Shah and Another vs. Shah and Others [2003] 1 EA 290* wherein Ombija, J. expressed himself on this issue, inter alia, as follows:

> " One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct...The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony...The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of one expert in preference to the opinion of the other, is the responsibility of the court...Properly grounded

expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion."

43. See also the reiteration by the High Court in *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139*; and *Juliet Karisa vs. Joseph Barawa & Another Civil Appeal No. 108 of 1988*, that a Court is entitled to reject expert opinion if upon consideration of such an opinion in conjunction with all other available evidence on the record, there is proper and cogent basis for doing so, and secondly, that a court must form its own independent opinion based on the entire evidence before it and such evidence must not be rejected except on firm grounds.

44. In light of the above crystallized legal position on the threshold for admission and acting on expert opinion evidence and which we have already stated above, the Judge set out and analyzed these in extenso and gave cogent reasons as to why he discounted the expert testimony of the appellant's expert witness in the absence of any other evidence to the contrary. We find no reason to interfere with that finding as it was well founded. The position in law is that it was not sufficient for the witness to merely assert that he was an expert. It was not only imperative to the witness but he was also obligated to show proof of the source and extent of his expertise, a test the appellant's witness failed to satisfy.

45. Turning to bias allegedly exhibited by the Judge against the appellant and in favour of the respondent, the approach we take in resolving the appellant's complaint is that taken by this Court in the case of *Standard Chartered Financial Services Limited & A.D. Gregory vs. Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited, Galot Industries Limited & C. D. Cahill [2019] eKLR*.

In this application the court addressed extensively the parameters for sustaining a plea of bias. We however find it prudent only to highlight salient aspects of that reasoning for purpose of our determination of this issue herein.

46. On the definition, the Judges had recourse to:

> " *The Oxford English Dictionary* defines bias "as an inclination or prejudice for or against one thing or person" while Black's Law Dictionary defines the word bias as follows:
>
> "Inclination, bent, prepossession, a preconceived opinion, a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. Condition of mind, which sways judgment and renders a judge unable to exercise his functions impartially in particular case. As used in law regarding disqualification of judge, refers to mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved."……

The Judge's take on the above definition was that:

> " Bias, whether it is perceived or actual, undermines the public confidence in a judicial officer's ability to dispense justice.

47. On case law, the Judge reviewed a wealth of both binding and persuasive jurisprudence on the subject both local and foreign. Among these were the case of *R vs Gough, [1993] 2 All CR 724*; *Metropolitan Properties Co., Ltd vs. Lannon (1969) 1 QB 577, [1968] 3 All ER 304*, [1968] 3 WLR 694; *Webb vs. The Queen (1994) 181 C L* R 41; *R vs. Sussex Justices ExP. Mc Carthy [1924] 1 KB 256*; *Kimani vs. Kimani (1995-1998) 1 EA 134*; *Attorney General of the Republic of Kenya vs. Prof Anyang' Nyong'o*

and Others (5/2007) [2007] EACJ 1; *FLS Aerospace Ltd [1999] EWHC B3 (Comm) (20 April 1999)*; *Kaplan & Stratton vs.L.Z. Engineering Construction Limited & 2 Others [2000] eKLR***.

48. Several principles were distilled from the above case law. Of importance to us in the determination of the appellant's complaint on this issue is that dealing with the role of the court addressing the complaint of alleged explicit or implicit bias on the part of a court or tribunal sitting in adjudication over a matter namely, that:

> "If an allegation of apparent bias is made, it is for the court to determine whether there is a real danger of bias in the sense that the judge might have unfairly regarded with favour or disfavour the case of a party under consideration by him or, in other words, might be predisposed and or prejudiced against one party's case for reasons unconnected with the merits of the issue."

49. Our take on the above exposition in light of the appellant's complaint on this issue when considered in light of the totality of the record is that in order to succeed, the aggrieved party has to give instances and or particulars of the alleged bias. The court is then obligated to test such an allegation by applying the threshold expounded above to the complaints raised by the aggrieved parties and determine whether basis is laid for sustaining or in the determination of the complaint of alleged bias and to give reasons either way. Herein, all that we have before us and on the basis of which the appellant has invited us to vindicate him is a mere complaint. No instances or particulars of the alleged bias were given by the appellant.

50. The above finding notwithstanding, our position is that the Judge's assessment of the facts as laid before him and the reasoning made thereon as already highlighted above, leaves no doubt in our minds that the judge balanced the scales of justice properly. There is evidence that he analyzed the factual basis as proffered by the respective parties herein and found that the version proffered by the appellant was ousted by the assertions proffered by the 1st respondent for reasons given in the impugned ruling. In the result, this complaint too is rejected.

51. From the foregoing, we find no sufficient justification to interfere with the learned Judge's exercise of discretion both with regard to the evidence presented at the trial court and the evidence of the expert witness. The upshot is that this appeal has no merit and is therefore dismissed.

52. As parties are members of one family, we make no order as to costs.

Dated and Delivered at Nairobi this 3rd day of December, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR