



REPUBLIC OF KENYA



KENYA LAW
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**Ngugi v Mukuria (Probate & Administration Appeal 4A of 2017)
[2025] KEHC 11395 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11395 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
PROBATE & ADMINISTRATION APPEAL 4A OF 2017**

TW OUYA, J

JULY 31, 2025

BETWEEN

DANSON NJIRAINI NGUGI APPELLANT

AND

NJAMBI NDUNG'U MUKURIA RESPONDENT

(Being an appeal against the ruling and order of the learned Senior Resident Magistrate A. Mwangi, delivered on 24th February 2017 in Kigumo Senior Resident Magistrate Succession Cause No. 120 of 2011)

JUDGMENT

1. The Appellant lodged the instant appeal via a Memorandum of appeal dated 9th March 2017 urging the following grounds:
 - i. The learned magistrate erred in law and fact by unfairly distributing land parcel No. Loc17/Kamahuha/149 between the beneficiaries despite the weight and nature of evidence on record;
 - ii. The learned Magistrate erred in both law and fact in that she did not consider the evidence given by the appellant regarding the ownership of land parcel No. Loc.17/Sabasaba/597 while distributing the deceased's property when it was not a free property of the deceased;
 - iii. The learned magistrate erred in law and fact in giving an erroneous and self-contradictory analysis of gifts *inter vivos* at the expense of the appellant despite the nature and weight of the evidence given;
 - iv. The learned magistrate erred in both law and fact by giving an erroneous and self-contradictory analysis of Section 40 of the *Lw of Succession Act*.
2. Therefore, the Appellant prayed that the ruling, orders and decree be set aside, redistribution be ordered and costs of the Appeal.



3. The deceased had two wives, who each had five children. The 1st wife and three of her children are deceased, with the Respondent herein being the widow of the only son of the first wife. The 2nd wife is still alive together with three of her children.
4. The Appellant herein was appointed the administrator of the estate of the late Mukuria Thiong'o alias Mukuria Murungu Thiong'o on 31st July 2013. Accordingly, he filed summons for confirmation of grant issued to him listing Loc 17/Kamahuha/149 as the only asset of the deceased's estate and proposed the same be shared equally between Njambi Ndungu Mukuria and Geoffrey Gitau Mukuria. The Respondent filed an affidavit of protest against the confirmation of grant proposing that Loc 17/Kamahuha/149 be shared by allocating 3.1 acres to herself and 0.5 acres to Geoffrey Gitau Mukuria. The Respondent contended that one of the wives of the deceased had her own land in Sabasaba i.e Loc 17/Sabasaba/597 measuring 2.6 acres registered in the name of her late son Peter Njaramba Mukuria. Therefore, giving Geoffrey Gitau Mukuria 0.5 acres from Loc 17/Kamahuha/149 would equalize the shares between the two houses as her family, which is under the 1st wife known as Nyakihu Mukuria would retain 3.1 acres from Loc 17/Kamahuha/149 and the 2nd wife would get 2.6 acres issued to the late Peter Njaramba Mukuria and 0.5 acres to Geoffrey Gitau Mukuria making a total of 3.1 acres.
5. The trial magistrate in his ruling while recognizing that Loc17/Sabasaba/597 was a gift *inter vivos* given to the late Njaramba by the deceased, stated that:

“It should be noted that Njaramba's widow is not keen in inheriting the Kamahuha land, but since this land was given to him by the deceased whose express wishes were that the 2nd family moves to this land, then I consider the gift to have been given to Njaramba to hold in trust for the 2nd family. As such when considering the share for each house, then the 2.6 acres of land should be taken into consideration. The net intestate is 3.6 acres. The 1st house represented by the protestor has none whereas the 2nd house has 2.6 acres sabasaba land through the late Njaramba. To equitably distribute the estate I consider the protestor's proposal that the 2nd family be added 0.5 acres of the Kamahuha land through Gitau and the 1st to remain with 3.1 acres of the Kamahuha land to be equitable.”
6. It is this finding of the trial magistrate that the Appellant is aggrieved and dissatisfied with, hence the instant appeal.
7. By court directions, the parties the Appeal was disposed through written submissions.
8. It was submitted by the Appellant that land parcel No. Loc.17/ Sabasaba/597 is not part of the assets of the deceased therefore it does not form part of the deceased's estate as the land was already gifted to Peter Njaramba Mukuria before the demise of the deceased, it was a gift *inter vivos*. Reliance was placed on the case of *In the matter of the Estate of Godana Songor Guyo (Deceased)* Malindi High Court Succession 15 of 2018 in urging what amounts to a gift *inter vivos*. Towards this end, it was submitted that the deceased fully intended that Peter Njaramba Mukuria wholly inherits Loc.17/Sabasaba/597 and therefore the same is not subject to transfer to another beneficiary. It was submitted that the two remaining beneficiaries, Njambi Ndung'u Mukuria and Geoffrey Gitau Mukuria could only inherit Loc.17/Kamahuha/149.
9. The Respondent on the other hand submitted that the two properties are the properties of the deceased and thus part of his estate to be distributed among the beneficiaries. It is the Respondent's contention that the appellant's claims are thus baseless and not founded on any law or evidence.



10. Having considered the grounds of Appeal, the submissions and the ruling of the trial magistrate as well as the proceedings, the issue for determination that sticks out is whether the deceased had during his lifetime distributed his estate by way of gifts '*inter vivos*' or gifts '*causa mortis*' to some of the beneficiaries and if so, whether they should be taken into consideration when determining the ultimate entitlement of the respective beneficiaries.
11. 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.”

12. Gift *inter vivos* are provided under Section 42 of the [Law of Succession Act](#) that:

“Where-

- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (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.”

13. The characteristics of the gifts *inter vivos* are that they are made and settled during the lifetime of the deceased and have been identified, awarded and settled for the person to whom it has been given. It is a gift made to a beneficiary when the deceased was alive and is considered when distributing the net intestate estate so that person who received it may be considered as having received his share and may reduce or diminish any entitlement to the net intestate estate. The gift which is transferred and settled for the beneficiary during the life-time of the deceased, will not form part of his estate but it will be taken into account in determining the share of the net intestate estate finally accruing to that beneficiary.

14. The High Court in [Micheni Aphaxard Nyaga & 2 others v Robert Njue & 2 Others](#) [2021] eKLR observed that:

“The concept of gifts is divided into two categories. First gifts *inter vivos* and gifts *causa mortis*. Gifts *inter vivos* as contemplated in the Law of Succession are such that the owner of the property or asset donates it to another without expectation of death. In any event the person who makes such a gift must have the capacity and competency to gift the property and the gift must be perfected. In the case of *inter vivos* the gift must go to the donee absolutely during the lifetime of the donor. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts. Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the donee.”



15. The test on a *gift causa mortis* is defined as a gift made in expectation of death. The donor causes the property or goods in his possession to be delivered to another. The general distinction between a *gift causa mortis* and a gift *inter vivos* is that its revocable by the donor and his capacity must meet the requirements under Section 11 of the [Law of Succession](#) in the making of a Will.
16. The requirement of the law for such gifts are that they may be settled by a deed or an instrument in writing by delivery, by way of a declaration of trust by the donor or by a resulting trust or transfer and registration. In other words, the gift must have passed from the deceased to the recipient for it to be valid. This means that the gift is no longer the property of the deceased but for the purpose of distribution of the estate to the dependents it will be traced and taken into account when distributing the estate with respect to the beneficiary who received the gift.
17. In [Munyole v Munyole](#) (Civil Appeal 21 of 2017) [2022] KECA 373 (KLR) (18 February 2022) (Judgment), the Court of Appeal 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.
18. In regard to the matter at hand, it is not disputed that the late Njaramba was gifted Loc. 17/ Sabasaba/597 *inter vivos* and that the beneficiaries seem to all agree on the same. In the same breadth, it is also not disputed that all the other beneficiaries, other than the Respondent herein and one Geoffrey Gitau Mukuria, a son to the deceased chose not to lay a claim on the deceased's estate.
19. The Court of Appeal in [Shah & Another v Shah](#) (Civil Appeal 268 of 2019) [2024] KECA 76 (KLR) (9 February 2024) (Judgment) when addressing the aspect of gift *inter vivos* in the deceased's estate remarked thus:

“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.(Emphasis Added)

...

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.”

20. From the foregoing, I am compelled to agree with the finding of the trial magistrate that the share already advanced to the late Njaramba as a gift *inter vivos* ought to be taken into account while distributing the net estate of the deceased. Therefore, the allegation by the appellant that the land allocated to the late Njaramba did not form part of the deceased estate to be misguided.
21. The upshot of the matter is that the appeal herein is dismissed and each party to bear its costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY, 2025.

HON. T. W. OUYA

JUDGE

For Appellant Ms Kimani

For Respondent Ms Wanjiru HB T.M Njoroge

Court Assistant Brian

