



**In re Estate of Targok Chelagat (Deceased) (Civil Appeal 5 of 2022)  
[2024] KEHC 2036 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2036 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CIVIL APPEAL 5 OF 2022  
RB NGETICH, J  
FEBRUARY 29, 2024**

**BETWEEN**

**RKC ..... PLAINTIFF**

**AND**

**PHILIP ARAP KIPLAGAT ..... 1<sup>ST</sup> RESPONDENT**

**ANDREW KIBOIWO KIPLAGAT ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of the Honourable V.O. Amboko dated 21st February, 2022 in the Resident Magistrate's Court at Kabarnet Succession Cause No.9 of 2021)*

**JUDGMENT**

1. The Appellant lodged an Appeal vide a Memorandum of Appeal dated 3<sup>rd</sup> March, 2022 seeking the following reliefs:
  - a. An order that the appeal herein be allowed with costs and the judgment and/or order of the Honourable V.O. Amboko issued on 21<sup>st</sup> February, 2022 be set aside.
  - b. An order confirming that the appellant is the sole beneficiary of parcel no. Baringo/Kapropita/xxx.
  - c. Costs of the appeal.
2. The Appellant's grounds of appeal are that the Learned magistrate erred in law and fact in finding that there was no conclusive evidence adduced by the Appellant that Parcel Numbers Baringo/Kapropita/164 and Baringo/Kapchomuswo 'A'/91 were part of the deceased estate whereas there were overwhelming evidence to the contrary that the said parcels of land were actually part of the deceased estate and ought to have been taken into consideration in the distribution of the Estate of the



- deceased; that the Learned Magistrate erred in both law and fact in failing to find that the deceased had substantively distributed her estate before her demise.
3. The Learned magistrate erred in both law and fact in finding that there is no proof that the deceased bequeathed parcel number Baringo/Kapropita/xxx to the Appellant when there was overwhelming evidence to the contrary that the deceased had bequeathed it to the Appellant hence the substantive developments on the property by the Appellant without any objection by the Respondents.
  4. That the Learned Magistrate erred in both law and fact in disregarding the Appellants evidence thereby arriving at a manifestly unjust conclusion that Parcel Number Baringo/Kapropita/xxx was the only estate asset.
  5. The brief facts of the case are that the Appellant, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are the children of the deceased and during her lifetime, the deceased had settled the 1<sup>st</sup> Respondent on Parcel No. Baringo / Kapropita/ 164, the 2<sup>nd</sup> Respondent on Parcel No. Baringo/Kapchumuswo `A'/91 and the Appellant on Baringo/Kapropita/ xxx. That the 1<sup>st</sup> Respondent's parcel is ancestral land which hosted the deceased matrimonial home before she gifted it to him; the 2<sup>nd</sup> Respondent's parcel is property purchased by the deceased and gifted to him while the Appellant's Parcel Number Baringo/Kapropita/ xxx which is the subject of this appeal was also purchased by the deceased for the appellant but it could not be registered in his name at the time of registration as he was still under age.
  6. It is the appellant's contention that the two properties owned by the respondents ought to have been taken into account when distributing the estate of the deceased as they were gifted to them inter vivos; that the registration and transfer of the said gifts were duly completed by the deceased during her life time
  7. The Respondents' argument is that Parcel No. Baringo/Kapropita/ xxx is the only property of the deceased's estate and ought to be distributed equally among the three beneficiaries and parcels numbers Baringo/Kapropita/ 164 and Baringo / Kapchumuswo'A' / 91 ought not to be taken into account when distributing the estate of the deceased as they allegedly purchased them.
  8. The appeal proceeded by way of written submissions.

### **Appellant's Submissions**

9. The appellant quotes section 42 of the [\*law of succession act\*](#) provides as follows: -

“ 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 of this Act. That property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”
10. And submit that in the case of re Estate of Gedion Manthi Nzioka (Deceased) [2015] eKLR the court defined gifts inter vivos as gifts between living persons, which for them to be effective, have to be granted by deed or an instrument in writing, or by delivery, or by way of declaration of trust by the donor, or by way of resulting trust or presumption of gifts of land by registered transfer, or by a declaration of trust in writing.



11. The appellant submit that evidence adduced clearly demonstrated that they were born and raised on parcel no Baringo/Kapropita/ 164 before the deceased purchased parcel number Baringo/Kapropita/ 186, where she relocated with him.
12. That he has also demonstrated that the deceased in trying to settle her children had purchased parcel No. Baringo/Kapropita/ xxx in conjunction with him and also sold her livestock and bought parcel number Baringo/Kapchomuswo "A"/91 for the 2<sup>nd</sup> respondent. That the deceased during her life time gifted the 1<sup>st</sup> and 2<sup>nd</sup> respondent's parcels number Baringo/Kapropita/ 164 and Baringo/Kapchomuswo 'A'/91 respectively which were gifts actualized by the deceased through registration of the 1<sup>st</sup> respondent as the registered owner of the family matrimonial property and purchased parcel no.91 for the 2<sup>nd</sup> respondent and caused it to be registered in the 2<sup>nd</sup> respondent's name.
13. The Appellant submit that this evidence of prior dispositions and/or gifts inter vivos to the respondents by the deceased in parcels numbers Baringo /Kapropita/ 164 and Baringo/Kapchomuswo A/91 by the deceased was not controverted by the respondents save for the allegations that they purchased but did not prove purchase.
14. Further that the evidence of pw2 and pw3 corroborated his evidence that parcel no. Baringo/ Kapropita/ 164 was ancestral land gifted to the 1<sup>st</sup> respondent by deceased during registration and she also acquired parcel number Baringo / Kapchomuswo 'A'/91 through purchase and gifted it to the 2<sup>nd</sup> respondent; that the deceased had distributed land to her children during her life time.
15. In support of his argument the Appellant cited Kakamega Succession cause no. 421 of 2014 and In Machakos High Court P& A Cause No. 639 Of 2012 In the Estate of Nathan Mutuli Sila (Deceased) Julius Nthiwa Mulinge Versus Florence Matinda Muling where the court observed and held as hereunder:-

“My view is that all the beneficiaries were aware of the declarations made by their father during his lifetime. The said declarations were wishes of the deceased and it now behoves upon his children to adhere to the same. My understanding of Section 42 of the Law of Succession Act is that previous benefits made to beneficiaries must be brought into account during the confirmation of the grant. As the deceased had made an elaborate distribution of his assets to his children then it is only proper that they obey the same.”

"Consequently, I disagree with the protestor's claims and hereby proceed to find that the deceased had prior to his death distributed his properties to his children and which is in tandem with the mode proposed by the Petitioner".

16. As captured above, the appellant argue that at the time of acquisition of parcel number Baringo/ Kapropita/ xxx by the deceased, he was a minor and could not be registered as the owner of the property and added that he has developed it extensively by erecting permanent structures thereon and even settling his children on it and the Respondents have never raised any objection concerning the said developments and/or allocations of certain portions of the said parcel of land to his children as they know that he is the sole owner neither have the Respondents settled and/or utilized the said parcel of land a clear indication that it belongs to the Appellant; and urge this court to consider that he has made extensive development on the property without any objection from the respondents until recently.
17. In conclusion, the Appellant submit that he is the rightful sole beneficiary of the parcel number Baringo/Kapropita/ xxx owing to the earlier gifts inter vivos to the respondents by the deceased which were actualized during her lifetime.



## Analysis And Determination.

18. This being the first appellate court, the duty of first appellate court was stated in the case of *Selle vs. Associated Motor Boat Co.* [1968] EA 123, where the Court expressed itself as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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 this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955), 22 E.A.C.A 270.”

19. In view of the above, I have perused and analyzed evidence adduced before the trial court together with submissions filed and authorities cited by the parties herein and wish to consider whether the appellant is the sole beneficiary of parcel no. Baringo/Kapropita/ xxx.
20. The primary duty of a succession court is to identify the beneficiaries, ascertain the assets and ultimately distribute the deceased estate to the rightful beneficiaries. It is the duty of the parties to adduce evidence on who are the beneficiaries of the estate and assets and liabilities of the deceased; and their proposal on distribution or how the deceased intended to distribute assets to the beneficiaries.
21. The appellant’s argument is that the deceased had distributed her property during her life time and he was gifted parcel no. Baringo/Kapropita/ xxx but is still registered in her name as at the time of purchase, he was still a minor whereas Parcels No. Baringo/Kapropita /164 and Baringo/Kapchomuswo `A`/91 which was ancestral land was gifted to the 1st respondent and parcel no. 91 purchased by the deceased was gifted to the 2<sup>nd</sup> respondent.
22. It is not in dispute that the two properties Parcels No. Baringo/Kapropita /164 and Baringo/Kapchomuswo `A`/91 are not registered in the name of the deceased. The question is whether the two properties belonged to the deceased and whether the deceased registered the properties in the names of her two sons the respondents herein during her life time. In the trial court, the 1<sup>st</sup> respondent testified that he purchased parcel 164 from Koima at Kshs 1500 and that he paid the last instalment in the year 1969. He said Andrew the 2<sup>nd</sup> respondent saw him buy the land. He said that parcel xxx was family land; that parcel 186 is where his mother was buried and they allowed the appellant to build on a portion of the land. He said he has title deed for parcel 164. He further stated that Baringo/Kapropita /823 belong to 2<sup>nd</sup> respondent and that he purchased it next to family land.
23. From evidence adduced by the 1<sup>st</sup> respondent, their mother passed on in the year 2007. There is no doubt that at the time of the demise of the deceased, the appellant was an adult. The question that arise is, why she did not transfer parcel xxx to the appellant if she intended to gift him with the parcel. Further if parcel 164 was ancestral land, the question that arise is why was the deceased not buried in the said parcel.
24. Upon considering evidence adduced before the trial court in totality, I am of the view that parcel Baringo Kapropita/xxx was the only parcel for the estate available for distribution between the 3 beneficiaries herein and the two properties being Parcels No. Baringo/Kapropita /164 and Baringo/Kapchomuswo `A`/91, do not form part of the estate and are not therefore available for distribution. The trial magistrate did not therefore err in her determination and I see no merit in this appeal.



**Final Orders: -**

25. ...

1. This appeal is hereby dismissed.
2. Costs of the appeal to the Respondents

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.**

.....

**RACHEL NGETICH**

**JUDGE**

In the presence of:

- Mr Chebii for Appellant.
- Mr Kiptoo for Respondents.
- Kibet – Court Assistant.

