



**Murage v Zakaria (Civil Appeal E008 of 2023)
[2024] KEHC 8301 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E008 OF 2023**

**LW GITARI, J
JUNE 27, 2024**

BETWEEN

CHARLES MURITHI MURAGE APPELLANT

AND

PACIFICA KAGENI ZAKARIA RESPONDENT

(Appeal Against from a ruling delivered in the CM's court Chuka Succession Cause No. 241/2018)

JUDGMENT

1. This appeal arises from a ruling delivered in the CM's court Chuka Succession Cause No. 241/2018, in the Estate of Zakaria Muraga Rithaa alias Murage Nyaga (deceased).
2. In the said ruling, the learned Magistrate held that the application dated 13/5/2019 filed by the appellant who was seeking an order that she was entitled to file petition in the estate of the deceased was without merits and it was dismissed. The appellant was dissatisfied with the said ruling and filed this appeal based on the following grounds: -
 1. That the Learned Magistrate of the Lower Court erred in law and fact by making a ruling which consequence was the confirmation of a Grant with a proposed mode of distribution that was arbitrary, skewed, discriminatory and biased.
 2. That the Learned Magistrate of the Lower Court erred in Law and in fact in failing to consider the established and very clear interests of most of the beneficiaries of the Estate of the Late Estate of Zakaria Muraga Rithaa Alias Murage Nyaga (Deceased) in her findings and the consequent ruling.
 3. That the Learned Magistrate of the Lower Court relying on extraneous considerations and inferences and/or misapprehended the law in arriving at an erroneous decision against and without considering the evidence on record.



4. That by relying on extraneous considerations and inferences the learned magistrate erred in law and fact because by relying on such inferences the same had high chances of misleading the court to arriving at wrong findings, determinations and orders.
 5. The learned Magistrate misdirected herself into using wrong principals of the law in arriving at an erroneous decision whereas there was clear evidence tendered by the Appellant in support of the appellant's case/interests.
 6. The learned trial Magistrate further misdirected herself by not considering and/or sticking to the pleadings tendered by the Appellant herein.
 7. The learned trial Magistrate erred in law and fact by grossly misdirecting herself against the very clear evidence adduced by the appellant and thereby arriving at an erroneous decision against the very elaborate and clearly legitimate interests of the appellant.
 8. The learned trial Magistrate totally misdirected himself into applying unknown and/or wrong principles of the law in arriving at an erroneous and injudicious decision.
 9. The Learned Magistrate erred in law and in fact by rendering a ruling that is manifestly and out rightly capable of fomenting anarchy, chaos and conflict amongst the beneficiaries of the Deceased's estates.
3. The appellant prays that the appeal be allowed and the ruling dated 19/10/2022 be set aside.
 4. The respondent opposed the appeal and prays that it be dismissed.

Brief Background

5. The deceased whose estate is the subject matter of these proceedings died intestate on 16/10/2009 at Rubate, Meru South. A grant of letters of administration was issued to Charles Murithi Murage in his capacity as the son of the deceased. The deceased was survived by Lolain Kainda and Pasfica Kageni who are his two daughters. His three other sons were deceased and had left behind children who survived them.
6. The two daughters filed an objection to the issuing of their grant to the respondent and also filed a Petition by way of cross-petition. They also filed the application dated 13/5/2019 and the leaned trial magistrate dismissed it.

The Appeal

7. The appeal was disposed off by way of written submissions.

Appellant's Submissions

8. The appellant submits that the main issue for determination is whether the deceased left any instructions as how the estate ought to be distributed and which of the proposed modes of distribution by either the petitioner or the protestor is more equitable. The appellant submits that the deceased had effectively settled his beneficiaries in their respective entitlements.
9. That the distribution was more equitable and lawful. The appellant submits that Land Parcel No. Magumoni/Rubate/313 measures 4.76 but the land distributed was 5.26 acres. That this is an issue which could have been resolved by the learned trial magistrate calling for a surveyor's report. That there is serious doubts as to how Humprey Nyaga Mwiathi who is a nephew of the appellant and the respondent get 0.76 acres and his siblings get nothing. He has urged the court to rely on Section 42 of



the [Law of Succession Act](#) and has urged the court to be guided by In Re-estate of Late Gideon Manthi Nzioka (deceased) (2015) eKLR.

10. The appellant further submits that this court being the 1st appellate court has a duty to analyze the evidence and come up with its own independent finding as stated in Selles & Another –vs- Associated Motorboat Company Ltd 1968 E.A 424.

The Respondents Submissions

11. He submits that the issue for determination is whether the deceased gave a gift inter-vivos to one Humprey Mwiathi Ntwiga. He submits that the said Humprey Mwiathi Ntwiga was given a portion of land by the deceased during his lifetime for his exclusive use. He submits that the appellant admitted this fact during cross-examination and stated that Humprey lives on the subject portion and has built a permanent house thereon as well as carrying out farming activities while his siblings lives on their father's land. He relies on the case of In Re-Estate of Nyachico Osidi (deceased) (2019) eKLR, In Re-Estate of Philis Muthoni M'noti (2018) EKL and Section 42 of the [Law of Succession Act](#) and urges the court to find that the administrators of the estate of the deceased should be compelled to complete the said gift by having the subject portion inherited by Humprey.
12. The second issue raised by the respondent is whether the learned trial Magistrate erred in adopting the respondent's mode of distribution. The respondent submits that the mode of distribution by the court was properly adopted as it proposed equal distribution of the estate of the deceased save for the portion of Humprey Ntwiga whose siblings did not get a share as they had land elsewhere. The said beneficiaries had land elsewhere which was settled for their father and where his children lives. The respondent submits that the mode of distribution is not equitable and does not conform to Section 38 of the [Law of Succession Act](#). That the appellant did not tender any evidence to prove that the deceased wished that she gets a bigger portion. He relies on Re-Estate of Phoebe Nziza Kikumu (deceased) (2019)eKLR and prays that the mode of distribution by the leaned magistrate be upheld.

Analysis And Determination

13. I have considered the appeal and the submissions by the parties. I note that the appellant has compressed the grounds of appeal into two and raises only two issues, that is gift inter-vivos and distribution of the estate. I find that the issues for determination are:
 1. Whether the deceased had during his lifetime given a piece of land to Humprey Mwiathi as a gift inter-vivos.
 2. Distribution of the estate.

1. Whether the deceased had during his lifetime given a piece of land to Humprey Mwiathi as a gift inter vivos.

14. The [Law of Succession Act](#) recognizes that a person who owns properties has power to distribute any or all of them during his lifetime. This can be byway of testamentary gifts or gifts intervivos settled by the deceased for the child or grandchild in his lifetime.
15. Section 5(1) of the [Law of Succession Act](#) provides that any person who is of sound mind and is not a minor may dispose off all or any of his free property by a will.
 6. Gifts intervivos are provided under Section 42 of the [Law of Succession Act](#) which provides: -
 42. Previous benefits to be brought into account 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.”

The gift may be settled for a child or a grandchild.

16. The characteristics of the gifts *inter vivos* are that they can be made and settled during the life time of the deceased and have been 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 the 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 lifetime of the deceased will not form part of his net intestate estate but is taken into account in determining the share of the net intestate estate finally accruing to that beneficiary. The person giving the gift must have the capacity and competency to gift the property and the gift must be perfected, that is to say that the gift must go to the donee absolutely during the lifetime of the donor.
17. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gift. Further it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift.
18. There is a requirement that gifts made during the lifetime of an intestate are settled by a deed or an instrument in writing, by delivery, by a declaration of trust or transfer and registration. Thus for the gift to be valid, it must have passed from the deceased to the recipient for it to be valid. The gift must cease to be the property of the deceased but will be considered at the time of distributing the net intestate properties. In Halsbury's Laws of England 4th Edition Volume 20(1) at Para 67 it is stated with regard to incomplete gifts:

“where a gift tests merely on a 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 a deed is however binding even though it is made without consideration. If a gift is to be valid the donor must have done everything with 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 what was in his power to do.”
19. See Odunga's Digest on Civil Case Law and Procedure Vol (III) Page 2417 at paragraph 5484 (d) (e) where he stated that “the moment in time when the gift takes effect is dependent on the nature of gift the statutory provisions governing the steps taken by the donor to effect the gift. Thus for a gift of a piece of land, the gift becomes effective upon execution of all the documents necessary to effect a transfer and registration of the land in the name of the donee and cannot be recalled thereafter even though the donee has not been registered as the proprietor.
20. In this case, the respondent adduced evidence that Humprey Mwiathi was given land by the deceased. He stated that Humprey built his homestead there and the deceased pointed out the boundaries. She further testified that Humprey Ntwiga was given another land elsewhere. That portion given to Humprey Mwiathi was not sub-divided. PW2 gave similar evidence.



21. The respondent on the other hand testified that the deceased had not given Humprey Mwiathi any land. He testified that Humprey Mwiathi is a grandson of the deceased and therefore not a beneficiary of the estate of the deceased.
22. I have perused the affidavits of protest. I do not find any evidence in the said affidavit to prove that the deceased gave land to Humprey Mwiathi. The appellant had the burden to prove that the deceased gave Humprey Mwiathi a piece of land during his lifetime.

Section 107 of the [Evidence Act](#) Provides: -

“ 107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

23. For a gift *intervivos* to be proved, the requirement of the law is that the gift be granted by deed, an instrument in writing or by way of declaration of trust by the donor. Gifts *intervivos* must be completed for them to be valid. The Learned trial Magistrate held that the said Humprey Mwiathi was settled on the land by the deceased and it is not the portion that belonged to his father. I find that the learned trial Magistrate erred by holding that Humprey Mwiathi was gifted a portion of land by the deceased and should get an equal share with other beneficiaries. The learned trial Magistrate misconstrued the word “settled” as it appears under Section 42 of the [Law of Succession Act](#) to mean he had been settled on the land. The true meaning of the word “settled” under Section 42 mean that the deceased had taken all the necessary steps to pass the land to Humprey Mwiathi by executing transfer documents and having the land registered in his name. This was not done during the lifetime of the deceased. In *Re-Estate of the Late Gideon Manthi Nzioka (deceased) (2015) eKLR*, “in a persuasive decision it was stated that gifts in 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.”
24. The trial Magistrate also erred by treating the said Mwiathi as a beneficiary entitled to an equal share with the children of the deceased. Section 29 of the [Law of Succession Act](#) defines dependants. It provides: -

“29. Meaning of dependant

For the purposes of this Part, “dependant” means-

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
 - (b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
 - (c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”
25. Grandchildren are not first line dependants as they benefit from the estate of their grandparents through their parents. They can also inherit if it is proved that they were being maintained by the



deceased during his lifetime. The said Humprey Mwiathi was supposed to benefit from the land which was given to his father and share it with his siblings. The father of Humprey Mwiathi who is Humprey Ntwiga was given land elsewhere. This is not in dispute. Humprey Ntwiga is a brother of the parties herein. Humprey Mwiathi was therefore supposed to get a share from his father's share. He did not qualify as a beneficiary of the deceased. In the circumstances, I find that the Humprey was not gifted any property by the deceased *inter vivos* and was not a beneficiary of the deceased. The ground has merits.

Distribution Of The Estate

26. The deceased was survived by his children only who are the parties in this case. Section 27 of the *Law of Succession Act* gives the court the sole discretion to make provision for a dependant. The Section provides: -

“27. Discretion of court in making order

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

27. Section 29 of the Act on the other hand defines a dependant. The section provides that wives and children are the first line dependants entitled to the estate of the deceased whether or not maintained by the immediately prior to his death. The Act makes provision on how the estate should devolve and in this case the relevant section is Section 38 of which provides: -

“38. Where intestate has left a surviving child or children but no spouse 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.”

28. The parties herein are the children of the deceased. They are entitled to share the estate of the deceased equally. The proposed mode of distribution by the appellant cannot be upheld as it goes against the clear intention of the Act that the estate shall be distributed equally. As for the mode of distribution by the respondent since it proposed to give land to Humprey Mwiathi who is not a beneficiary the mode of distribution cannot be upheld. The land should be distributed equally to all the beneficiaries and the surviving children of the beneficiaries who are deceased.

That is to say:

Land Parcel No. Magumoni/Rubate/313- 4.76 Acres

1. Lolaine Murage
2. Pasfica Kagani
3. Charles Murithi
4. Lenise Njeri
5. Alvin Njoka and Appolos Njeru Jointly in equal shares.



6. Makena Nyaga, Maureen Kawira, Lena Wanja and Phelomena Karwitha Jointly in equal shares

Land parcel No. Magumoni/Itugururu/108 5.4 Acres to be distributed to the beneficiaries and the children of the deceased beneficiaries.

1. Lolaine Murage - 0.9 Acres
2. Pacilia Kageni - 0.9 Acres
3. Charles Murithi - 0.9 Acres
4. Lenise Njeri - 0.9 Acres
5. Alvin Njoka and Appolos Njeru - .9 Acres -Jointly in equal shares.
6. Makena Nyaga, Maureen Kawira, Lena Wanja and Phelomena Karwitha 0.9 Acre -Jointly in equal shares

I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 27TH DAY OF JUNE 2024.

L.W. GITARI

JUDGE

27/6/2024

Ms Muthoni Ndeke for the Respondent

Mr. Mawira for Appellant

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

27/6/2024

