



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 225 OF 2000

IN THE MATTER OF THE ESTATE OF MUCHAI GACHUIKA (DECEASED)

MURITHI MITAMBO (suing as the legal representative of the estate of
M'MITAMBO MUCHAI)RESPONDENT

VERSUS

MARETE MUCHAI.....PETITIONER

JUDGMENT

1. **Muchai Gachiuka** ('the deceased') died in 1960 at Kigogo village. He was survived by the following;

1ST HOUSE

1. Lucia Ringa (deceased) - Wife
2. Nkanata Muchai - Son
3. M'Ithinji Kingori - Son
4. Ruguru Muchai - Son

2ND HOUSE

1. Sabella Muchai (deceased) - Wife
2. Mitambo Muchai (deceased) - Son
 - a. Murithi Mitambo
 - b. Kimathi Mitambo
 - c. Mark Kiambi
 - d. Mwenda Mitambo
 - e. Kibiti Mitambo
 - f. Mwitii Mitambo
 - g. Kinanu Mitambo
 - h. Kiende Mitambo
 - i. Gitiri Mitambo

3RD HOUSE

1. Zipporah Kiacia (deceased) - Wife
2. Marete Muchai

4TH HOUSE

1. Mama Tirindi (deceased) - Wife
2. Tirindi Muchai

2. Muriithi Mitambo and Marete Muchai are the joint administrators of the estate of the deceased. By the ruling of this court dated 9/7/2018 the petitioner was ordered to file land registry records showing the original land parcel number and proprietorship details. Further, this court on 12/2/2019 ordered that a comprehensive affidavit be filed on all dependents, any gifts or acquisition of estate properties, list of all estate properties, and mode of distribution.

3. It is the applicant's case that ABOGETA/U-KIUNGONE/405 belonged to Muchai Gachuika the deceased herein, and before his demise he gave his children their respective shares of land except two, namely Mitambo Muchai and Marete Muchai who were minors at the time. It is therefore his proposal that ABOGETA/U-KIUNGONE/405 be divided equally between the families of Mitambo Muchai and Marete Muchai.

4. The respondent on the other hand indicated that before the deceased's death, the deceased gathered ABOGETA/U-KIUNGONE/405, 747, 1361, 1362 and allocated them to himself and his 3 sons. He showed each of them their portion and they settled with their families. ABOGETA/U-KIUNGONE/405 the subject matter of this suit was registered in the name of the deceased and when the deceased died he left Marete Muchai and his mother in its utilization and occupation. However, in 2007 the children of Mitambo Muchai (deceased) as well as Nkatha Muchai entered and took part of the land and gave Marete Muchai 3.92 acres. The respondent stated he was later threatened with death and chased away by the sons of Mitambo Muchai. ABOGETA/U-KIUNGONE/405 was subdivided into 3 portions ABOGETA/U-KIUNGONE/3775-3778 on 18/2/2008.

ANALYSIS AND DETERMINATION

5. Some of the sons of the deceased have not participated in this case. Nonetheless, the land registry record show that, in 1970 the deceased shared his estate as follows:

ABOGETA/U-KIUNGONE/747 – Nkanata Muchai

ABOGETA/U-KIUNGONE/1361- Ithinji Muchai

ABOGETA/U-KIUNGONE/1362- Mitambo Muchai (now deceased)

ABOGETA/U-KIUNGONE/405- Muchai Gachiuka (now deceased)

Accordingly, this is a confirmation that indeed the deceased shared out his estate to his sons prior to his death, but retained ABOGETA/U-KIUNGONE/405 for himself. It is also clear that the deceased did not give land to the petitioner herein. From the explanation given, it was because he was a minor at the time.

6. The deceased therefore made gifts inter vivos to his children except the petitioner. Of gifts inter vivos see Re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR where Nyamweya J stated that:

“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)....

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. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. See in this regard Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 32 to 51.”

7. As I have found ABOGETA/U-KIUNGONE/747, 1361, 1362 were registered by the deceased in the names of the sons of the deceased during his lifetime. These gifts were therefore complete and those properties are not estate property. Except, however, they will be taken into account in determining their share of the net intestate. See sections 28 and 42 of the Law of Succession Act.

8. Section 38 of the Law of Succession Act CAP 160 of the Laws of Kenya provides for equality in sharing of the estate property amongst the children of the deceased. I have however stated before that sometimes equity and fairness should be the focus in distribution of the estate. For instance, the deceased may have made a gift to dependant which is much higher in size or value than the share each of the other beneficiaries will get from the estate and so forth and so forth. The said section provides as follows:

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 shall be equally divided among the surviving children.

9. In light of section 38 of the Law of Succession Act the estate should be distributed equally among all the children of the deceased. Section 3 (2) of the Law of Succession Act which defines child/children as follows:

References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

10. The respondent is a grandson of the deceased herein as he is the child of Mitambo Muchai. He is not a direct beneficiary of the deceased. He can only take the share that his father may be entitled to. I have found that the deceased made a gift inter vivos to Mitambo Muchai (now deceased), that is, ABOTHUGUCHI/U-KIUNGONE/1362. I take into account this gift and the others in determining their ultimate entitlements in the estate. When I take these gifts into consideration, I hold that the estate property which is number 405 should go to the petitioner. Accordingly, the children of the other sons of the deceased to whom gifts inter vivos were made by the deceased have no claim in the estate property. Ultimately, I make the following orders;

i. ABOGETA/U-KIUGONE/3776, 3777 AND 3778 are hereby cancelled and should revert back to ABOGETA/U-KIUGONE/405

ii. ABOGETA/U-KIUGONE/405 wholly go to MARETE MUCHAI

iii. Being a family suit there no orders as to costs.

Dated, signed and delivered in open court at Meru this 4th day of December, 2019

F. GIKONYO

JUDGE

IN PRESENCE OF

Otieno C for Muthomi for respondent

Nyenyire for applicant – absent

F. GIKONYO

JUDGE