In re Estate of the Late Sawe Maina (Succession Cause 350 of 2015)
[2023] KEHC 3743 (KLR) (19 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3743 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 350 OF 2015

RN NYAKUNDI, J

APRIL 19, 2023

BETWEEN

PAUL KIPKORIR MAINA ..... 1ST PETITIONER

GILBERT KIPLIMO MAINA ..... 2ND PETITIONER

ISAAC MAINA ..... 3RD PETITIONER

AND

ESTHER JEPKONGOK TOO ..... 1ST RESPONDENT

SUSAN JEPTEPKENY MAINA ..... 2ND RESPONDENT

JUDGMENT

1. What is pending before this court is the distribution of the estate of the deceased. The administrators of the estate were appointed by virtue of the consent dated 5th February 2019.

2. The 2nd Petitioner contended that there were allegations that there were gifts *inter vivos* made by the deceased to the effect that;

    1. Esther Maina was entitled to 25 acres
    2. Isaac Maina is entitled to 25 acres
    3. Paul K Maina is entitled to 25 acres
    4. Emily C Maina is entitled to 12 acres
    5. Elizabeth Maina is entitled to 37.5 acres
    6. Gilbert Kiplimo Maina is entitled to 37.5 acres
    7. Beatrice J Maina is entitled to 12 acres

3. Learned counsel for the petitioner contended that the minutes of the family meeting dated 16th February 2010 does not amount to a gift *inter vivos* and proposed that the estate of the deceased be distributed equally, with the first widow and the children equally sharing 112 acres and the eight children of the second house share the balance of 108 acres after the 4 acres given out to Jonathan Birech and Sarah Serem have been deducted.

4. I note with concern that there are submissions and a proposed mode of distribution that were filed by Bundotich, Korir and Company Advocates on 27th February 2023, labelled as advocates for Gilbert Kiplimo Maina, Isaac Kipkorir Maina and Paul Kipkosgei Maina. The said Gilbert Kiplimo Maina is named as the 3rd Petitioner in submissions on the mode of distribution filed on 7th January 2020. I am at a loss as to why counsel failed to indicate clearly whether they are petitioners or respondents in the pleadings. However, I shall nonetheless consider their submissions as petitioners as Gilbert Kiplimo is listed as a petitioner.

5. Learned counsel filed written submissions and a proposed mode of distribution on 27th February 2023. Counsel submitted that the deceased in this case had prior to his death, considered how he wished to have his properties distributed after his death. He relied on the affidavit sworn by John Chumo who deponed that the deceased approached him with a view of subdividing and or partitioning his land as he wanted to share the same among his wives and children. Further, that the surveyor went ahead to execute the deceased's instructions where he marked boundaries on the ground and thereafter draw a sketch map for each child and his wives.

6. It was their case that that the deceased called and or summoned all family members where he made his intentions known, which intentions were reduced into writing where he executed minutes dated 16th February 2010 which was prepared by fixing his thumb print in the presence of family members including the Area Chief, assistant Chief village elder, his two widows and his sons.

7. He had settled his families by apportioning his land as follows;

    1. Sawe Maina - 74 Acres to be apportioned as follows;

        (a) 12 Acres to Emily Maina

        (b) 12 Acres to Beatrice Jepngetich Maina.

        (c) 1 Acre to Kapkoi Primary

        (d) Remainder 49 Acres to himself

    2. Esther Too (1st House) 75 Acres to be shared as follows;

        (a) 25 Acres to Esther Too

        (b) 25 Acres to Isaac Maina

        (c) 25 Acres to Paul Maina

    3. Elizabeth (2nd HOUSE) 75 Acres to be shared as follows;

        (a) 37.5 Acres to Elizabeth Maina.

        (b) 37.5 Acres to Gilbert Kiplimo Maina.

8. Counsel cited the case of *Re-Estate of Zakayo Ogoma Anyango* (Siaya Civil AppealNo. 7 OF 2019 and in *Re Late Morogo A Mugun(Deceased)* 2019 eKLR (Kericho Succession CaseNo. 113 OF 2011 on the issue of gifts *inter vivos*. He also cited the case of *Micheni Aphaxard Nyaga & 2 OthersV.*

Robert Njue & 2 Others (2021) eKLR. Chuka Civil AppealNo. 29 OF 2019 and urged that the court find that the deceased having prepared a deed or memorandum, proceeded to instruct a surveyor to partition the land and prepared a draft map and further proceeded to deliver possession of the land to the beneficiaries meets the threshold of gift *intervivos*. He submitted that the court should distribute the estate according to the deceased's wishes.

Analysis & Determination

9. The following issues arise for determination;

    1. Whether there was a gift *inter vivos*

    2. Mode of distribution

Whether there was a gift *inter vivos*

10. In this proceedings learned counsel Dr Chebii for Susan Maina introduced another tangent to the cause of action by inviting the court to consider the application of gift *inter vivos* as one of the remedies. Gifts *inter vivos* are such as one party or the deceased in this case makes to another without the expectation of death as a moving cause. The person who makes such a gift must have capacity, competence and full knowledge on what he or she intends to execute in favour of another person. That is, it must go into immediate and absolute effect. It is not a promise for the future. Gifts *inter vivos* therefore should not be confused with mutual promises or such donations which may require some condition precedent to be fulfilled by the donee. One of the key maxim in law on gift *inter vivos* is that equity will refuse to interfere in endeavouring to perfect an imperfect gift. In the case of *Kavanaugh –V- Lajoie*, 2014 ONCA 187 the Ontario Court of Appeal noted that for a gift to be valid and enforceable it must be perfected. In other words, the donor must have done everything necessary and in his power to effect the transfer of property. An incomplete gift is nothing more than an intention to gift. The donor is free to change his mind. See *Bergeb –V- Bergen* (2013) BCJ No.2552.

11. A gift *inter vivos* is a gift between the living. It is a gift of or relating to property conveyed not by will or in contemplation of an imminent death but during the conveyor's lifetime.

12. In *Re Estate of The Late Gedion Manthi Nzioka (Deceased)* [2015] eKLR Nyamweya J expounded on the requirements for valid gifts *inter vivos* as follows;

13. 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.

14. In *re Estate of The Late Gedion Manthi Nzioka (Deceased)*[supra] cited Halsbury's Laws of England as follows;

15. In *Halsbury's Laws of England* 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:

> " Where a gift rests merely in 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 deed

is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which 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 which it was in his power to do."

16. From the above it is deductible that the court will only compel the donor to complete and perfect the gift in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. Further, that the donor must have done everything necessary and in his power in order to transfer the property.

17. Therefore, the essentials of a gift *inter –vivos* are;

    a) It may be granted by deed, an instrument in writing, by delivery, by declaration of trust by the donor or by way of resulting trusts or presumption of.

    b) If it is a gift of land it must be by way of registered transfer, or declaration of trust in writing if the land is unregistered.

    c) It must be complete.

    d) It is not necessary for express acceptance from the donee.

18. The document alleged to be the evidence of the gifts *inter vivos* is the family minutes dated 16th February 2020. In order to determine whether there was a gift *inter vivos*, the following questions must be answered in the affirmative;

    1. Whether the gifts were by way of written transfer (land)

    2. Whether the gift was complete

Whether the gifts were by way of a registered transfer

19. As the gifts that are in question were parcels of land, they must be by way of registered transfer or a declaration of trust in writing. There were no registered transfers or declarations of trust issued in writing tabled as evidence. Simply put, the alleged gifts did not satisfy this requirement.

Whether the gift was complete

20. Generally, a gift in form of a parcel of land ought to be effected by way of a written memo or a transfer or declaration of trust in writing showing that the land was gifted to the sons of the deceased *inter vivos* or causa mortis. But, if a gift rests purely in 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.

21. In the present cause, there is no evidence that there was even a transfer of declaration of trust and therefore the same cannot have had a chance to be completed. The minutes of the meeting, in my considered view, cannot amount to a transfer or declaration of trust.

22. I am mindful of the fact that in African customs and culture a parent may deliver a certain property to a child and allow him or her to use it. This may be particularly true with regard to a son who has stepped out of the general homestead, gets married and the father looks upon him to start his own family. The father's intention to transmit that property to the son as a gift *inter vivos* rests entirely on delivery and complete surrender of the gift. What is the lacuna here? Whoever alleges has a duty to discharge the burden of proof on a balance of probabilities. There is no proof of facts without evidence unless it is

an admission by the adverse party. It is trite that the burden of proof does not shift to the defendants unless a *prima facie* case has been made out by the plaintiff. This is the position under the *evidence Act* as expressly stated under Sections 107, 108 and 109. Thus

107 (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.

108. Theburden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that shall lie on any particular person.

23. Evaluating the affidavit evidence I am of the considered opinion that giving access to property by the donor to the donee without delivery is moot. Therefore, the fundamental question is the adequacy of proof of delivery. The weight to be given is that the requirement of delivery is met by showing overt manifestations of the deceased intent to make the transfer in adherence to the gift.

24. In the premises, I find that there was no gift *inter vivos*.

Mode of distribution

25. It is not disputed that the deceased was survived by the following beneficiaries;

1st House

1. Esther Jepsongok Too,
2. Isaac Kipkorir Maina
3. Paul Kipkorir Maina
4. Emily Jepkemei Maina
5. Mary Jerotich Tangut
6. Monica Jelagat Sawe
7. Ruth Sheila Rotich

2nd House

1. Elizabeth Maina
2. Leah Jesang Cherono
3. Sarah Jepkoech Sawe
4. Jael Jemesunde Maina
5. Beatrice Jepngetich Maina
6. Gilbert Maina
7. Carolyne Chepleting Maina

8. Rebbecah Sigoei

26. The estate of the deceased comprised of the following properties;

LR No. 8518 (IR No. 14802/18 measuring 224 Acres

27. The estate was also comprised of the following movable assets;

a) Tractor KXH 049

b) Jembe, trailer and harrow

c) Maize planter and wheat planter

d) Boom sprayer, sheller

e) Posho mill – Ndume posho mill (teo)

f) Motor vehicle KAV

g) Livestock (cow)

28. I have considered the minutes of the meeting held on February 2016 and the affidavit of Esther Too in determining the mode of distribution. Despite there being no transfers of the property, it emerges that the estate of the deceased it is was already distributed amongst his beneficiaries during his lifetime with 49 acres left for himself. That 49 acres forms the estate that is available for distribution.

29. I am guided by Section 42 of the *Law of Succession Act* which provides; as follows:

> 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

30. I am guided by the pronouncements of Hon. A. Mabeya in In *Re Estate of S B S* [2014] eKLR where he stated as follows;

> To my mind, this means that the law recognizes that during one's lifetime he/she may settle any of his/her properties upon any of his/her beneficiaries. Upon such a person's demise, it is a requirement that such a property settled should be taken into account when distributing the estate. This in my view means that, such a settled property or portion will not be subject to distribution but will be taken into account when undertaking distribution. That it will not be removed from the hands or possession upon whose beneficiary it was settled by the deceased. This is so in order to avoid a situation whereby any particular beneficiary is favoured by having to share twice in the property of the deceased, that is, during his life time, and after his demise. The provision seeks to maintain equity in the distribution of a deceased's estate. In this regard, Section 42 of the Act seeks to respect the wishes and decisions arrived at by the deceased during his lifetime. It would seem therefore that, once a deceased has settled any property during his lifetime, the same may not be subject to disruption after his demise. This presupposes that in the event any person felt aggrieved with such a settlement, he has the opportunity to raise the issue with the settlor whilst he is still alive. In other words, the law respects how a person decides to deal with his free property during his lifetime.

Section 40 of the *Law of Succession Act* states as follows;

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

31. In consonance with the statutory provisions, the estate of the deceased is to be distributed equally among the two houses. As each house has seven members the same shall be distributed equally in addition to the property that they had been allocated by the deceased. It is imperative that I state that where there is agreement as to the distribution of an estate, the court does not go about creating disputes to be solved. If the wishes of the deceased are that his estate be distributed to his beneficiaries as he wished during his lifetime, the court shall not interfere with the same.

32. It is therefore the order of this court that the estate comprising of 226.2 acres be distributed as follows;

1. Esther Too (Widow) 28.5 Acres
2. Isaac Maina 28.5 Acres
3. Paul Maina 28.5 Acres
4. Elizabeth Maina 37.5 Acres (widow, deceased and the same devolve to her estate).
5. Gilbert Kiplimo Maina 37.5 Acres.
6. Emily Jepkemei Maina 15.5 Acres
7. Mary Jerotich Tangut 3.5 Acres.
8. Monica Jelagat Sawe 3.5 Acres.
9. Ruth Sheila Rotich 3.5 Acres.
10. Leah Jesang Cherono 3.5 Acres
11. Jael Jemesunde 3.5 Acres
12. Beatrice Jepngetich Maina 15.5 Acres
13. Carolyne Chepleting Maina_ 3.5 Acres
14. Rebecca Singoei 3.5 Acres

33. It is also necessary to mention at this point that the identifiable movable Assets value and level of depreciation remains in the realm of unknown save may be for the livestock comprising of cows and sheep.

34. It is therefore sufficient for the purposes of this judgement to order that a fresh inventory be undertaken by the County veterinary officer as it relates as to the condition of the livestock in question. Whereas on the aspect of other machinery and accessories a qualified mechanical engineer be outsourced from the county government to manifestly value the worthiness and importance as to usage of such ordained Assets of the estate.

35. It is presumed the circumstances upon which the experts shall be placed the requested reports would be availed within a period of 45 days from today's date. The qualified nature of immovable Assets as fairly contemplated in this ruling without any further delay be transmitted with the beneficiaries pending the valuation of the movable properties. It therefore calls for this court to issue a partial decree commonly known as certificate of confirmation of grant pertaining to the intestate estate of the deceased.

It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 19TH DAY OF APRIL 2023

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Dr Chebii Advocates

2. Mr Omboto Advocates