



**Life interest: where court gives part to  
Appoint a successor.**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HCCA NO. 21 OF 1990**

**JANET TIRINDI KATHUNGURI.....PLANTIFF**

**VERSUS**

**JEREMIAH NJOGU.....DEFENDANT**

***LESIT J.***

**RULING**

The application under consideration is the one dated 4<sup>th</sup> October 2010. It has been brought by the Respondent in this Civil Appeal under S. 3 and S.3A of the Civil Procedure Act.

The application seeks two prayers:

- 1. That court be pleased to approve the appointment of GELVERSE MUTETHIA JOHN as Applicant/Respondent's successor in terms of the judgment of the honourable S.O. Oguk dated 26.9.1990**
- 2. That the honourable court be pleased to order the immediate transfer of L.R. Ntima/Igoki/2488 measuring approximately ½ acre to the said GELVERSE MUTETHIA JOHN absolutely.**

The grounds upon which the application is made is cited on the face of the application and also in the Supporting Affidavit sworn by the Respondent who is the Applicant herein, of even date.

The gist of the affidavits and the grounds is that the Respondent/Applicant seeks to exercise her option as

provided in this court's judgment of 26<sup>th</sup> September 1990, passed by Hon. Oguk J.

The judgment is on record. At page 5 of the judgment, paragraph 2 provides that:

**“Having considered all the matters that were argued before me on this appeal, I see no justifiable grounds for interfering with the well considered judgment of the learned Senior Resident Magistrate giving the respondent JANET TIRINDI KATHUNGURI a life interest on half ½ acre of land out of land parcel No. NTIMA/NTAKIRA/685 around her present house. She will have a life interest on the aforesaid half (½) an acre of land to be excised out of land No NTIMA/NTAKIRA 685 around her present house which must be properly surveyed and proper boundaries clearly marked out. Against her name in the title to this land will be added the words “TRUSTEE”. This means that upon her death, this land will revert to any member of the sons of the Appellant, TWARUGOJI KIRIMUNYA whom the Respondent will appoint as her successor”.**

The learned Oguk J ordered that the Respondent should have a life interest over ½ an acre out of the land Ntima/Ntakira/685. The learned Judge provided that the Respondent would hold the land in trust and that upon her death it could revert to any member of the sons of the Appellant herein whom the Respondent would appoint as her successor.

The Appellant/Respondent opposed the application. The Appellant who was acting in person relied on his replying affidavit. The Appellant's contention is that the application should not be allowed as it had been brought in defiance of a Court of Appeal decision. The Appellant relied on annexure 2 to his affidavit for the proposition that the orders sought herein would contravene the said court order from the Court of Appeal.

I have carefully considered the application, the supporting affidavit by the Applicant/Respondent and the replying affidavit by the Appellant. I considered submissions by Mrs Ndorongo and Mr. Kiambi for the Applicant/Respondent and those by the Appellant in person.

The application seeks an order of this court granting her approval to appoint a successor for the portion of land registered in her name, in line with the orders of Hon. Oguk J., as per his judgment of 26<sup>th</sup> September 1990. The applicant is seeking to appoint a successor over the suit property and to have the land transferred to the successor as mandated in the learned Judge's judgment.

The portion of the judgment giving the applicant the authority to appoint a successor and to transfer the land to such successor is quoted within this judgment. The application is in line with the judgment of the learned judge.

The only reason the application may be declined is if there is evidence to the effect that the learned Oguk, J's judgment has either been set aside or varied.

The other ground I can foresee which would warrant the court to dismiss the application is if it is shown that the appointed successor goes against the express order of the learned Judge Oguk. His order specified among who the applicant could choose a successor.

I have looked at the Replying Affidavit and considered all the annexures thereto. The Appellant urged the court to consider very carefully the Court of Appeal order which is annexure 2 in his replying affidavit. The Appellant urged the court to find that granting the applicant's application would be an affront to the Court of Appeal order.

Annexure 2 is a consent order entered into between the Appellant and one Samuel Muriithi. The order is a consent order. It is dated 17<sup>th</sup> May 1988. That consent order cannot be a variation or in contradiction of the judgment of Oguk J of 26<sup>th</sup> September 1990. The order has not been demonstrated to touch on the

Applicants parcel of land. The evidence before the court shows that the Applicant has ½ acre portion of land hived from parcel No. 685 registered in her name.

Annexure 3 of the Appellants affidavit is a judgment of the Court of Appeal dated 17<sup>th</sup> May 1991. The judges of the Court of Appeal rejected the Appellants application to stay the judgment of Hon. Oguk, J.

The rest of the annexures to the Appellants Replying Affidavit is a demonstration of the lengths the Appellant has gone into trying to defeat the judgment of Hon. Oguk, J. All these efforts have been fruitless.

After considering this application I find that the prayers sought are in line with the judgment of this court by Hon. Oguk, J dated 26<sup>th</sup> September 1990. That judgment has not been set aside, varied or interfered with in any way. It is a valid order of this court.

The Appellant's objection and opposition to the prayers sought in this application is without merit and is dismissed.

The Applicant's application dated 4<sup>th</sup> October 2010 is granted in the following terms:

- 1. That this court approves the appointment of GELVERSE MUTETHIA JOHN as the Applicant/Respondents successor in terms of Judgement of Hon. Oguk dated 26.9.1990.**
- 2. That an order be and is hereby issued transferring L.R. Ntima/Igoki/2488 measuring approximately ½ acre to the said GELVERSE MUTETHIA JOHN absolutely.**
- 3. Each party to bear their own costs.**

Dated Signed and delivered at Meru this 3<sup>rd</sup> day of February 2011

**LESIT, J**

**JUDGE**