



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**Civil Appeal 75 of 2004**

***(Being an appeal from the Ruling/Order of Senior Resident Magistrate, Hon.M. S. G. Khadambi, in Meru Civil Suit No.494 of 2004 on 30<sup>th</sup> September, 2004).***

**ELIZABETH NKIROTE ..... APPELLANT**

**VERSUS**

**KITHINJI MURUGU .....1<sup>ST</sup> RESPONDENT**

**WILSON KIRERA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The dispute regarding the parcel of land in question dates back many years when the appellant sued her late brother, M'Murugu M'Agere in HCC suit No.110/83. There is an application pending in that suit.

In that suit the Panel of Elders found that the appellant had only life interest on the suit land. The original file in HCC suit No.110 of 1983 disappeared without trace and what I am stating regarding that case is based mainly on the photocopies of documents included in the appeal and those I could glean from the skeleton file.

I have observed that the defendant in that suit died. On 9<sup>th</sup> August, 2004 the appellant brought the present suit against the respondents. The 1<sup>st</sup> respondent is the son of the late M'Murugu M'Agere – the defendant in HCC Suit No.110/83, while the 2<sup>nd</sup> respondent is said to have purchased from the 1<sup>st</sup> respondent the suit land, Abothuguchi/Katheri/2761.

In this suit the appellant sought for a permanent injunction against the respondents restraining them from entering or interfering with the suit land.

The respondents filed their respective statements of defence. Temporary restraining orders were issued pending *interpartes* hearing of an application which was filed simultaneously with the suit.

When the application came up for *interpartes* hearing, the respondent raised a point of preliminary objection which was argued and to which this appeal relates.

The points raised in the objection can be summarized as below:

(i) that the appellant lacked capacity to bring a suit in respect of the suit land which is registered in the name of her deceased brother without first obtaining grant of representation. Similarly that the 1<sup>st</sup>

respondent had no capacity to be sued.

(ii) that the suit was *res judicata* Meru RMCC No.322 of 1982 which was dismissed.

(iii) that it was also *res judicata* another suit HCCC No.110 of 1983- in which the Panel of Elders ruled that the appellant had only life interest on the suit land.

Learned counsel for the appellant responded that the issue of capacity does not apply as the appellant brought the suit, not on behalf of the estate of the deceased brother, but in her own personal capacity to protect her life interest awarded to her by the court. It was further argued that the suit was not *res judicata*.

The lower court considered the preliminary objection and in its ruling delivered on 30<sup>th</sup> September, 2004 sustained the objection and struck out the suit with costs to the respondent.

The court found that the appellant, without grant of representation of her late brother's estate, had no capacity to bring the suit. The court, however, found that the suit was not *res judicata*

That decision prompted this appeal, in which three grounds were argued, namely;

(i) that the trial magistrate erred in holding that the appellant could only protect her interest in the land after filing a succession cause.

(ii) that the magistrate misunderstood and failed to appreciate that the appellant had not filed the suit as a representative of the registered proprietor but in her capacity as a person with life interest over the land.

(iii) That the trial magistrate erred in finding that the suit was incompetent and striking it out.

Similar arguments as in the lower were advanced before me by both counsel. The only issue for determination, in my view, is whether the appellant had capacity to bring this suit in view of the fact that the registered proprietor was deceased and her only claim to the suit land is life interest..

Life interest is an equitable interest which is extinguished at the death of the holder. It follows, in this case, that the appellant was entitled to ownership of the suit land for the duration of her life.

Although the ownership of a life estate is technically temporary because it ends at a person's death, it is nonetheless treated as a complete ownership or fee simple so long as the holder lives. Because a life estate terminates at the holder's death, it cannot be inherited. Upon the death of a life tenant, ownership of the estate reverts to the original grantor.

It follows that ownership by a life tenant is on condition to be observed by the life tenant that the land must not be wasted or devalued. In other words, the appellant's right or interest over the suit land is independent of her deceased brother – but only conditional on her death. That being so she can treat the suit property as the legal owner subject only to requirement as to preservation to avoid wastage.

Indeed she is duty –bound to ensure that it is not interfered with in any way as long as she lives. That is precisely why she filed the suit in question to stop the respondents from interfering with the suit land.

The issue whether the 1<sup>st</sup> respondent could be sued does not arise in view of my finding above.

In the circumstances, this appeal is allowed, the order of the lower court striking out the suit set aside and the suit is ordered reinstated for hearing.

The costs of this appeal to the appellant.

**DATED AND DELIVERED AT MERU THIS 27<sup>TH</sup> DAY OF April, 2007**

**W. OUKO**

**JUDGE**