



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 367 OF 1979**

**IN THE MATTER OF THE ESTATE OF CLEOPHAS GICHARU KIRUNGU (DECEASED)**

**SUSAN WANJIKU KIINGATI.....APPLICANT**

**VERSUS**

**JUDY GATHONI GICHARU.....RESPONDENT**

**RULING**

1. The deceased Cleophas Gicharu Kirungu died on 28<sup>th</sup> May 1977. He was survived by a widow Esther Njoki Gicharu and six children, namely Geoffrey Kirungu Gicharu, Peter Kirungu (deceased), Judy Gathoni Gicharu (respondent), Harriet Wairimu, Zainabu Waithira (deceased) and Susan Wanjiku Kiingati (applicant). Grant of letters of administration with annexed will was issued to the Public Trustee on 11<sup>th</sup> February 1979. The Public Trustee later transferred all the assets of the estate to Esther Njoki Gicharu and Geoffrey Kirungu Gicharu to hold in trust for themselves and for all the beneficiaries of the estate. On 26<sup>th</sup> September 2004 all the beneficiaries of the deceased were present when the following order was recorded, and to which they each appended their signature:-

**“(1) That LR No. 526/9 registered in the name of Esther Njoki which she inherited from Cleophas Gicharu Kirungu (deceased) shall not be sold or adversely dealt with other than the 60 acres already sold.**

**(ii) THAT LR No. 526/9 constitutes life interest of Esther Njoki and shall not be adversely dealt with other than with the leave of the court.**

**(iii) THAT Geoffrey Kirungu Gicharu hereby gives an undertaking that upon the determination of the life interest of Esther Njoki, he shall not lay claim to the suit property.**

**(iv) THAT the respective inheritances by other beneficiaries of the Estate of Cleophas Gicharu Kirungu (deceased) shall be respected by all beneficiaries with (out) any interference.”**

2. On 14<sup>th</sup> March 2016 the applicant filed this application against her mother Esther Njoki seeking that the court appoints a neutral manager to manage and collect all earnings of the estate; that the respondent or any other person be restrained from destroying trees, burning charcoal from the tree

cover or interfering in any other way with LR No. 526/6; that the respondent or any other person be restrained from interfering with the family of the late Peter Kirungu and allow them to enjoy quiet possession of the 15 acres they had been allocated in LR No. 526/6. In the grounds and affidavit sworn by the applicant to support the application it was clear that following the decision of the Public Trustee to pass over the estate to Esther Njoki and Geoffrey Kirungu the same (estate) was substantially distributed to the beneficiaries. This included the applicant. The estate comprised 951 acres and it would appear that 290 acres or thereabouts has been left in the hands of Esther Njoki. Upon that land she has a life interest. She claimed further that Esther Njoki is quite old (at 90 years) and of poor health and has become unable to manage the land, and has consequently handed over the land to the respondent; that the respondent has leased part of the land to one George Thewa of Njoro; that the two and others have allowed the cutting and felling of trees on the land and for the same to be used to burn charcoal; there is extensive deforestation; very little land has been left for cattle grazing owing to leasing; the respondent has run down the machinery on the land and sold off some assets, and has begun building a house on the land, all these without the consent of the beneficiaries. Lastly, the respondent has begun issuing threats of eviction against Jane Kirungu, the widow of Peter Kirungu (son of the deceased). It is for these reasons that the applicant sought the appointment of a manager to run the estate; the quiet enjoyment of the land allocated to her (20 acres); and the quiet enjoyment of the 15 acres allocated to the late Peter Kirungu.

3. Esther Njoki and the respondent each swore a replying affidavit to deny the allegations of the applicant. Their case was that the estate has been distributed and that what was left was given to Esther Njoki and over it she has a life interest. She denied that she was wasting the estate, and stated that all that she was doing on the land was cultivation. The respondent denied that she had threatened to evict the widow of Peter Kirungu. Lastly, it was deponed that the deceased died before the enactment of the **Law of Succession Act (Cap. 160)** and therefore the provisions of the **Act** as invoked in the application could not be the legal basis to grant the application.
4. I note that in regard to the complaint about the threatened eviction of the widow of Peter Kirungu by the respondent, the widow did not swear an affidavit to support the claim. Therefore, the claim remained unsupported. Secondly, the applicant had a problem with the fact that Esther Njoki had allowed the respondent to manage the land for her. This was admitted by Esther Njoki who stated that, although she is of sound mind, she suffers from arthritis which has limited her movement. This is why she has asked the respondent and Harriet Wairimu (another daughter of hers) to assist her in the management of the land. This, she said, is done under her instructions. They denied that they, or the respondent, had wasted or deteriorated any aspect of the estate. It was further admitted that Esther Njoki had leased 20 acres to George Thewa on which he cleared bushes to cultivate. Wastage and/or destruction was denied.
5. Esther Njoki has a life interest on the remainder of the estate. Her management of that estate is what has irked the respondent to the extent that she wants a separate manager to be engaged. The consent recorded indicated that Esther Njoki would not sell or otherwise adversely deal with the remainder of the estate. She has not sold the land. The allegation that some of the assets thereon have been sold was not substantiated. The idea of the consent was to make sure that Esther Njoki utilizes the land to her benefit throughout the course of her life, and would not do anything to threaten the title. So that, at the end of her life, the land would be available for the distribution to the beneficiaries of the deceased. The registration of the land in her name gave her absolute control, use and management during her lifetime. It has been held that property over which a surviving spouse has a life interest in does not pass absolutely to the surviving spouse but instead held by the surviving spouse in trust for the children, and that such trust determines upon her death or remarriage of the widow (**In the Matter of the Estate of Benson Chepkwony (deceased) NRB H.C. Succession Cause No. 842 of 1991**).
6. I have considered the facts that this application has presented. I do not find that the acts complained of have been proved, or that the respondent and Esther Njoki have done anything adverse to the title, or have contravened the consent order. I dismiss the application with costs,

and discharge the orders that had been issued on 7<sup>th</sup> April 2016.

**DATED and SIGNED at NAIROBI this 6<sup>TH</sup> day of JUNE 2016**

**A.O. MUCHELULE**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 7<sup>TH</sup> day of JUNE 2016**

**W. MUSYOKA**

**JUDGE**