



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 467 OF 1986**

**IN THE MATTER OF THE ESTATE OF KAHIRO KIBUNYI**

**(DECEASED)**

**RULING**

The dispute is in respect of the estate of Kihuro Kibunyi who died on 11.6.79 aged about 60 years. He left on piece of land - land parcel no. Githunguri/Kimathi/336 measuring about 10.2 acres. He was survived by Esther Wamani Kahiro - wife; Johnson Kibuny Kahiro - son; Virginia Wanjiru Mbuthia (daughter); David Ndichu Kahiro (son) Samuel Githara Kahiro (son) and Hanah Wangari Nganga (daughter)

The petition for Grant of letters of administration filed by Johnson Kibunyi on 16.7.86 on 7.1.87 Edith Wambui Kubai and Njoki Ndera filed Kiambu SRMs succession cause no. 4/87 in respect of the same estate. On 8.7.87 the Kiambu succession cause was consolidated with this cause. I have heard the evidence from both sides some of the following material emerge from the evidence.

The father of Kahiro Kibunyi whose estate is in dispute is Kibunyi Gathaara. Kibunyi Gathaara had three brothers Chuchu; Thanare and Kubai All the four brothers died long time ago before Land Adjudication Each of them had his own land but it is alleged that Kubai sold his land to his brother Chuchu. It is evident that all the four brothers had died before land adjudication in about 1955. Kubai Gathaara had a wife Edith Wambui Edith Wambui has five daughters - Nyokabi; Njoki; Wanjiru; Njanja and Gathithi. All are married except Njanga. Njanja has three children. Kubai; Kamau and Githara all living. It is said that Njanja is mentally sick and lives in a village Town Mitahalo. It is agreed that Njanja was married to Karanja Gachunu but some witnesses say that she was divorced.

There is also evidence that Edith Wambui was cultivating a portion of the land in dispute and during land adjudication she was given the share of her husband Kubai. However according to some witnesses the land adjudication committee decided that Kahiro Kibunyi be registered for his father's share and share of Edith Wambui and that he would hold Wambui's share in trust for her. Njoki Ndera (RO2) a daughter of Edith Wambui however states that Kahiro Kibunyi fraudulently caused himself to be registered as proprietor of the share of his father and share of Edith Wambui but Kubai Njoroje (PW4) states that there was no fraud According to him it is Edith Wambui who during Land Adjudication caused the land belonging to Kibunyi Gathaara and Kubai Gathaara to be registered in the name of Kahuro Kibunyi on his behalf and as her trustee.

There is evidence which I accept that Edith Wambui was occupying a distinct portion of the land for a long time until she died about four years ago. She had houses on the portion of the land and she was buried in that portion. On the other hand there is evidence which I accept that Kahiro Kibunyi had been using a distinct portion of the land with his wife and children which he and his children has highly developed. He has a big coffee plantation on this land. All this was evident when court visited the locus quo It appears that the people now claims the portion which Edith Wambui was using are Nyokabi Gathaiya - daughter of Edith Wambui and who is married to Gatheiya Kibocha (PW1) and Njanja's children led by Joseph kamau Karanja (PW3) it is evident that Kubai Gathara husband of Edith Wambui was already deceased at the time of land demarcation and that he was not buried in the land in dispute. There is no evidence that Njanja herself is claiming the share of Edith Wambui If she was she could have caused a manager to be appointed to pursue her interest in his case. If she is claiming a share of the land she doing so indirectly through her sons. At this stage therefore the dispute is between the wife and children of the deceased Kahiro Kibunyi the Registered owner of the land in dispute and some daughters of Edith Wambui and children of Njanja. As Edith Wambui was claiming a share which belonged to her husband. Kubai Gathaara which share she had not go before her death her daughters and her grand

children must of necessity be claiming a share of the estate through her. That is the reality.

This is a succession case. We are dealing with the estate of a person who died in 1979 and who was registered as proprietor of the land in dispute after land adjudication in about 1955 and who is the first registered owner of the land. The title of Kahiro Kibunyi is absolute subject of course to overriding interests and any trusts in order to advance their case the claimants, if I may call them so, have taken the court to pre land adjudication rights of Kubau Gathaara to get a share of the land and since Kubai Gathaara was not alive the right of his wife Edith Wambui to get a share of the land. These rights were extinguished upon the registration of Kahiro Kibunyi as the proprietor of the land subjected to overriding interest and trusts if any. By the time of death of Edith Wambui she had no title to the share of the land she was occupying. She would only have got a little if Kahiro Kibunyi had in his lifetime transferred a portion to her. Alternatively she would have got the title if she had obtained a decree of the court that she was entitled to a specific acreage of the land. Edith Wambui did not file a suit in the lifetime of Kahiro Kibunyi for a declaration that Kahiro Kibunyi held a share of the land in trust for her. She had not filed such a suit against the legal representative of Kahiro Kibunyi before she died. Declaration of trust such as is sought would only have been made in a suit filed in the normal way not only the succession proceedings, pleadings which conform with rules of procedure are required. The probate court has no jurisdiction to make a declaration in matter like this involving complex customary rights of ownership of land.

Lastly the claimants claiming through Edith Wambui have not obtained a grant of letters of administration in respect of the estate of Edith Wambui so that they would have capacity to pursue her interests in this dispute. In conclusion, it is evident that Edith Wambui had no legal estate at the time of her death as she had not obtained a declaration of trust against Kahiro Kibunyi or his legal representative or obtained a share of the land through transfer by Kahiro Kibunyi or his legal representatives.

So at the time of her death all she had is a right of occupation of the portion she was using itself an overriding interest which right of occupation was terminated by her death.

The result is that I dismiss claim to a share of the land by Edith Wambui's daughters and grandsons and order that the land in dispute be inherited by the widow and children of Kahiro Kibunyi.

In the circumstances of this case I make no orders as to the costs.

E. M. Githinji

Judge

17.2.99 Mr. Kiari Njau present

Mr. Makori holding brief for Imbachi present Mr. Kiaria Njau

I apply for leave to appeal Order: Leave to appeal granted

E. M. Githinji

Judge