



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 690 OF 2014 (O.S)**

**IN THE MATTER OF ADMINISTRATION OF THE ESTATE OF BETH MUTHONI  
MUTHOMI (DECEASED)**

**AND**

**IN THE MATTER OF TEA GROWERS LICENCE NO.089109 (GROWERS NO. GH0060547)  
ON LR NO. THEGENGE/GATHUTHI/453**

**AND**

**IN THE MATTER OF DECLARATION AND DETERMINATION OF TRUST**

**BETWEEN**

**NANCY WANJIKU MAKAU.....PLAINTIFF**

**-VERSUS-**

**SPERANZA NJERI MATHENGE.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. The plaintiff herein took up the summons dated 8th December, 2014 for determination of various questions relating to the tea bushes growing in the parcel of land known as LR No. Thegenge/Gathuthi/453 and particularly the tea bushes relating to growers licence No.089109 issued to grower No. GH0060547 one Beth Muthoni (deceased).
2. The plaintiff *inter alia* prays that the defendant be permanently restrained from managing, harvesting, selling, benefiting or in any other way dealing with the tea bushes in question.
3. The plaintiff who claims to be the beneficial owner of the tea bushes described in paragraph (1) above accuses the defendant, who is her sister-in-law, of having unlawfully interfered with her interest in the tea bushes by forcibly taking over
4. The tea bushes in question are said to have been given to the deceased (the plaintiff's mother), Muthomi Mathenge alias Kabutu Mathenge, also deceased.

5. After the plaintiff's mother was given the tea bushes, she was issued with a tea growers licence and number mentioned in paragraph (1) hereinabove.
6. It was the plaintiff's evidence that after she was given the tea bushes, her mother continued tending the bushes, 1000 in number, and reaping the benefits therefrom. This went on until she fell sick and became unable to tend the bushes on her own.
7. At that juncture, the plaintiff took her mother to her home in Machakos and together they began tending the bushes and sharing the proceeds therefrom.
8. It was the plaintiff's testimony that to facilitate joint receipt of the proceeds from the bushes, her mother opened and operated a joint fosa account with her.
9. The plaintiff further informed the court that her mother who died sometime in 2014 had sometime in 2012 executed a will bequeathing the bushes to her.
10. The plaintiff further informed the court that following the death of her mother, the defendant forcibly took over the tea bushes and began enjoying the proceeds therefrom.
11. Explaining that the defendant had separated with her husband, who is the plaintiff's brother, the plaintiff informed the court that before the defendant forcibly took over the bushes she neither tended them nor benefited from the proceeds therefrom.
12. Owing to the defendant's alleged illegal and unlawful dealings with the suit property, the plaintiff has suffered and continues to suffer loss and prejudice.
13. For the foregoing reasons, the plaintiff urges the court to restrain the defendant from accessing the proceeds of the suit property and grant an order that the defendant pays her mesne profits from May 2014 to the date she will hand over the suit property to her.
14. On her part, the defendant admits having taken possession of the suit property following the death of the plaintiff's mother (her mother-in-law) and denies the allegation that her action was illegal or unlawful.
15. Claiming that she is entitled to half-share of the suit property, the defendant explained that after her mother-in-law passed on, she took possession and control of the suit property with the authority of the area chief.
16. Terming the plaintiff's suit, frivolous, vexatious, bad in law and an abuse of the process of the court, the defendant contends that the plaintiff not being the administrator of the estate of her mother or father has no *locus standi* to bring and prosecute the instant suit.
17. With regard to the will allegedly executed in favour of the plaintiff, the defendant contends that her mother-in-law could not lawfully bequeath the plaintiff the suit property because she had no valid interest in the suit property which she could pass to the plaintiff (the plaintiff's mother was not the registered proprietor of the land).

### **Submissions**

18. On behalf of the plaintiff, it is submitted that the plaintiff's case is well founded because the subject matter of the suit, the tea bushes, were bequeathed to her by her mother who was the owner of the tea bushes.
19. On account of the disposition, the plaintiff contends that she acquired beneficial title to the bushes.
20. It is submitted that upon the death of the testator, the plaintiff retained the equitable right to enforce the disposition against all third parties. It is further submitted that the bushes belonged to the testator at

the time of making the will and at the time of her death. The deceased could, therefore, dispose of the bushes as her property.

21. Concerning the respondent's contention that the land did not belong to the testator, it is submitted that the testator's interest in the land was merely possessory and that the interest was devisable. In that regard reference is made to **Halbury's laws of England, 4th edition Vol 50 paragraphs 228 and 231.**

22. By converting the tea bushes for her sole benefit, the defendant is said to have committed fraudulent conversion of the plaintiff's beneficial interest in the suit property.

23. The plaintiff further submits that a trust was created in her favour by the deceased by opening a joint account with her.

24. Arguing that the purpose of the joint account was to receive the proceeds from the sale of the bushes for subsequent appropriation by the deceased and herself, the plaintiff submits that she has a right to succeed the joint account and is enforcing the right to succeed the account and its benefits by survivorship.

25. By opening another account and using it to appropriate the proceeds from sale of the bushes, the defendant is said to be committing fraudulent conversion of the suit property.

26. It is further submitted that besides her right to enforce the equitable interests in her favour, the plaintiff has capacity to make the claims herein despite the fact that she is not the legal representative of the estate of the deceased. In that regard reference is made to the case of **Betha Kanini v. Agnes Ithiru Njoka (2011)e KLR** where it was held that; **"Possession of land if lawful entitles the possessor to exercise right to possess, use and enjoy the land. It can indeed be said that the rights of a possessor of land are akin to those of a registered owner. Those rights are in my view enforceable. A possessor can enforce those rights against one seeking to either eject them from the land or to interfere with their occupation of it...I am therefore for different reasons to those considered by the trial magistrate in agreement with her conclusion in her judgment. The respondent had locus standi to protect her interest in the suit property as a possessor..."**

27. The defendant is said to have admitted that she converted the income from the suit property for her own use yet she did not produce any evidence that the deceased bequeathed the suit property to her or show that the plaintiff is not the donee of the property.

28. Since the plaintiff is seeking an equitable remedy against conversion of her beneficial interest in the income derived from the suit property by the defendant, it is submitted that the defendant should be ordered to deliver up accounts and reconstitute the plaintiff.

### **Analysis and determination**

29. I have carefully read and considered the respective cases of the parties to this dispute. In my view, the case raises issues of succession of the estates of the deceased persons herein which issues by dint of the provisions of **Section 2** of the Law of Succession Act (LSA), Cap 160 Laws of Kenya, are better dealt with by a Succession Court. I say so because by dint of the provisions of **Section 45** of the LSA as read with **Section 82** of the LSA, it is an administrator or a personal representative of the estate of a deceased person who has power to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his estate.

30. Whereas the plaintiff contends that the subject matter of this dispute was bequeathed to her by her mother in law, it is noteworthy that, the question as to whether she is entitled to the subject matter of the suit property would require to be subjected to the process contemplated in the Law of Succession Act, to wit propounding of the will.

31. In the circumstances of this case, there is no evidence whatsoever that either the plaintiff or the

defendant is a personal representative or administrator or executor of the will allegedly left by the deceased. For that reason, I find their possession and use of the suit property to be in violation of **Section 45** of the Law of Succession Act, Cap 160 Laws of Kenya.

32. In view of the foregoing and in the absence of any succession proceedings on which the orders sought by the applicant can hinge, I decline to grant the orders sought.

33. To protect the suit matter of this suit from further dissipation by the respondent, I direct that the administration of the subject matter of this suit be carried out by the Public Trustee pending filing and determination of succession proceedings in respect thereof.

34. The upshot of the foregoing is that the applicant has not made up a case for being issued the orders sought.

35. This being a family dispute, I direct that each party bares their own costs.

36. Orders accordingly.

**Dated, signed and delivered in open court at Nyeri this 11<sup>th</sup> day of October, 2017.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Ms. Muthai h/b for Adrew Kariuki for defendants

N/A for the plaintiff

Court assistant - Esther