



In re Estate of the Late Marusoi Arap Murei (deceased) (Succession Cause 123 of 2002) [2022] KEHC 11356 (KLR) (20 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
SUCCESSION CAUSE 123 OF 2002**

AN ONGERI, J

MAY 20, 2022

**IN THE MATTER OF THE ESTATE OF THE LATE MARUSOI
ARAP MUREI (DECEASED)**

BETWEEN

EZEKIEL CHEBELYON 1ST PETITIONER

MARY CHEPNGENO CHEBELYON 2ND PETITIONER

AND

ELIJAH CHEBELYON 1ST RESPONDENT

ALICE MUREI CHEBELYON 2ND RESPONDENT

JUDGMENT

1. The application coming for consideration in this judgment is the affidavit of protest dated April 1, 2019 against confirmation of grant issued to Elijah Chebelyon on March 11, 2014. In which it is deposed as follows:
 - (i) That the 1st respondent herein, Elijah Chebelyon, without the knowledge of the 1st petitioner made an application for grant of administration intestate issued on the March 11, 2014 and that the said grant was issued fraudulently by means of alteration of facts.
 - (ii) That the deceased shared his property comprising of LR No Kericho/tebesonik/161 amongst his three sons by subdividing it into four parts, namely LR No Kericho/tebesonik/387 to be owned by Ezekiel Chebelyon, LR No Kericho/tebesonik/388 to be owned by Mary Chebelyon widow to Andrew Chebelyon, LR No Kericho/tebesonik/389 to be owned by Ibrahim



Chebelyon And LR No Kericho/tebesonik/390 was retained by the deceased for his own utility.

- (iii) That from the year 1982 to 1987 the deceased gave the 1st petitioner's husband, Andrew Chebelyon (deceased) control over the suit parcel of land to till and to assist the deceased in maintenance and paying of hospital bills until his demise in 1987 whereupon the 1st petitioner took control of the land until she was chased away by Ibrahim Chebelyon (deceased).
- (iv) That the 1st petitioner complained to the deceased, who then took back control of his parcel of land and leased it to Edward Cheruiyot his grandson and a son to Ibrahim Chebelyon, for KShs 2000 per year until the demise of the deceased on the December 19, 1991.
- (v) That upon the demise of the deceased, Edward Cheruiyot assumed occupation of the said parcel of land, contrary to the wishes of the deceased that the parcel of land be divided equally amongst his three sons.
- (vi) That Edward Cheruiyot a grandson of the deceased is not supposed to be the absolute owner of the parcel of land LR No Kericho/tebesonik/390.

2. The protestor called one witness Ezekiel Kipkoech Chebelyon whose evidence was as follows;

That the husband to the 1st petitioner, Andrew Chebelyon (deceased), was given land parcel known as LR No Kericho/tebesonik/390 measuring 3.41 hectares (8.42 acres) by Marusoi Arap Murei (deceased) to be able to till and assist the aging Marusoi Arap Murei (deceased) for maintenance and hospital bills. That the late Andrew Chebelyon took control of the said parcel of land from 1982 to June 1987 when he passed on, and his widow Mary Chebelyon took control of the said parcel of land until she was chased away by Ibrahim Chebelyon (deceased) who started tiling the land.

- 3. It was stated by the witness, that the 1st petitioner herein registered her complaint with Marusoi Arap Murei, who took over control of his parcel of land known as LR No Kericho/tebesonik/390 and began leasing it to his grandson Edward Cheruiyot, at the rate of KShs 2000 per year. The grandson thereafter took possession of the said parcel of land upon the demise of Marusoi Arap Murei.
- 4. It was stated that a meeting was held at the Bureti Divisional headquarters by the Land Dispute Tribunal elders, who reached a verdict that the parcel of land LR No Kericho/tebesonik/390 measuring 3.41 hectares be shared equally amongst the beneficiaries of the deceased and as such Edward Cheruiyot who is a grandson of Marusoi Arap Murei (deceased) and the son to Ibrahim Chebelyon (deceased) is not supposed to be the absolute owner of the said parcel of land.
- 5. The 1st respondent called two witnesses Edward Cheruiyot and Philip Chebelyon whose evidence was as follows; Edward Cheruiyot stated that he is the son of Ibrahim Kipkemoi Chebelyon (deceased) and the grandson of Marusoi Arap Murei (deceased). He stated that the late Marusoi Arap Murei, brought him up like his own son and even met his emotional and financial needs including paying his school fees up to high school.
- 6. Edward Cheruiyot also stated that Marusoi Arap Murei gifted him 3.41 hectares comprised in his land originally known as LR No Kericho/tebesonik/161, before his demise and he took possession of the same. He stated that he built a two roomed semi-permanent house and planted 2000 exotic trees on the said land, and he bought stones with the intention of constructing a permanent house but he could not due to financial constraints.



7. Philip Chebelyon stated that he is the son of the late Marusoi Arap Murei and that Edward Cheruiyot is the grandson of Marusoi Arap Murei and was dependent on him during his lifetime. He stated that Marusoi Arap Murei brought up Edward Cheruiyot as one of his sons, and met all his emotional and financial needs, including paying his school fees up to high school.
8. He stated that in the year 1987, the deceased gifted Edward Cheruiyot approximately 3.41 hectares of land comprised in his land originally known as LR No Kericho/tebesonik/161, who took possession of the same and built a two roomed semi-permanent house and planted 2000 exotic trees on the said parcel of land. He further stated that Edward bought some stones with the intention of building a permanent house, but could not due to financial constraints.
9. The parties filed written submission here as follows;

The 1st petitioner submitted that the respondents unfairly awarded the property Registration No LR No Kericho/tebesonik/390 measuring 8.42 acres entirely to Edward Cheruiyot who is a grandson to the deceased, on the grounds that Edward Cheruiyot lived on the subject property and has been using it since his childhood; this was contrary to the decision of family members' that the property should benefit all beneficiaries of the deceased.

It was also submitted that Edward Cheruiyot being a grandson to the deceased is not a beneficiary to the estate as per the provisions of section 29 of the Law of Succession Act; and further that Edward Cheruiyot will benefit twice from the estate of the deceased, as he is also to benefit from the estate of Ibrahim Chebelyon (deceased) who was a son to and a beneficiary to the estate of the deceased.

It was submitted by the 1st petitioner that the subject property, LR No kericho/tebesonik/390 should be distributed equally among the beneficiaries of Marusoi Arap Murei.
10. The respondents on the other hand, submitted that the decision of the Land Dispute Tribunal at Bureti, that the parcel of land LR No Kericho/tebesonik/390 be shared equally amongst the beneficiaries is not binding on the high court, which is a superior court; and that the tribunal lacked jurisdiction to deal with matters touching on title to land and its findings should therefore not be considered.
11. It was also submitted by the respondents that Edward Cheruiyot is entitled to the land parcel LR No/kericho/tebesonik/390, by virtue of it being a gift inter vivos from the deceased and that the land was never leased to him by the deceased for Kshs 2000 per year as alleged by the petitioner. It was submitted that the petitioners themselves were beneficiaries of various bequests by the deceased and it is only just that they respect the wishes of the deceased in bequeathing the suit land to Edward Cheruiyot.
12. It was submitted that the petitioners have failed to prove their allegations as set out in their affidavit of protest and the same should be dismissed to enable final distribution of the deceased estate to take place.
13. The issue for determination in this suit is whether the suit parcel of land known as LR No Kericho/tebesonik/390 measuring approximately 3.41 hectares (8.42) acres formed part of the free estate of Marusoi Arap Murei (deceased) or it was a gift *inter vivos* by the deceased to Edward Cheruiyot.
14. The 1st respondent herein, claims that the suit parcel of land LR No Kericho/tebesonik/390 was given to Edward Cheruiyot by the deceased as a gift *inter vivos* during his lifetime.
15. The law requires that a gift *inter vivos* should be complete in order to be valid, and a gift in land should be effected through a written memoranda, registered transfer or a declaration of trust in writing showing that the land was gifted to the deceased's grandson.



16. *In re Estate of The Late Gedion Mantbi Nzioka (deceased)* [2015] eKLR, Nyamweya J stated as follows: “For gifts *inter vivos*, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts *inter vivos* must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee.”
17. The 1st respondent claims that the deceased gifted Edward Cheruiyot the parcel of land as the deceased was aware that Edward was utilizing and had developed the parcel of land before his demise.
18. The law is however very clear that mere occupation of land is not evidence that the land was issued as a gift *inter vivos*.
19. *In re Estate of M’raiji Kitbiano (deceased)* [2017] eKLR, the court held as follows: “...although occupation may be a consideration in appropriate cases, mere occupation of the estate property does not in itself amount to gift *inter vivos* by the deceased or give the person in occupation any or exclusive right of entitlement to the particular estate property. Much more is required to establish the promise or unfulfilled intention by the donor to make the gift and the donor’s subsequent conduct which gave the donee a right to enforce the promise or unfulfilled intention to make a gift *inter vivos*. If for example the donee had applied for and obtained consent to transfer the suit land to the applicant, perhaps the result of these proceedings could have been different. But nothing of the sort is present here. I therefore dismiss the claim based on gift *inter vivos* and find that the suit land is part of the estate.”
20. There is lack of sufficient evidence before me that the deceased issued to his grandson Edward Cheruiyot the suit parcel of land as a gift *inter vivos*, in the absence of such evidence it can only be concluded that the suit land formed part of the estate of the deceased and is free for distribution amongst his beneficiaries.
21. The Estate is therefore to be distributed equally amongst all beneficiaries.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 20TH DAY OF MAY 2020.

A. N. ONGERI

JUDGE

