



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**SUCCESSION CAUSE NO. 27 OF 1995**

**RUTH CHEPKORIR BORE.....PETITIONER**

**VERSUS**

**ANDREW KIPKORIR SOI.....OBJECTOR**

**JUDGMENT**

1. The dispute before me relates to land title number Kericho/Ndubai/344 which is registered in the name of the deceased, Kipruto Arap Bore. The administrator, Ruth Chepkorir Bore, was the 2<sup>nd</sup> wife and is the sole surviving widow of the deceased.
2. The deceased in this cause, Kipruto Arap Bore, died intestate on 21<sup>st</sup> August 1991. Form P&A 5 filed with the application for letters of administration intestate on 21<sup>st</sup> April 1995 showed that he had two beneficiaries, Martha Chesang Bore and Ruth Chepkorir Bore. He was the registered owner of two parcels of land, **Kericho/Ndubai/324** measuring 3.6 hectares and **Kericho/Ndubai /344** measuring 2.6 hectares.
3. It appears from the record that no action was taken on the matter between 18<sup>th</sup> August, 1995 when the application was gazetted in Kenya Gazette No. 44 of that date. Then, by an affidavit sworn on 4<sup>th</sup> July 2014, Ruth Chepkorir Bore sought to have the grant of letters of administration intestate issued to her solely. The basis of the application was that the 1<sup>st</sup> applicant, who was the first wife of the deceased, Martha Chesang, had died on 22<sup>nd</sup> June 2008. The 'family' had then decided that the letters of administration intestate should issue to Ruth Chepkorir Bore. Accordingly, letters of administration intestate were issued to Ruth Chepkorir Bore as administrator by Serгон J on 10<sup>th</sup> July 2014.
4. Thereafter, an application dated 30<sup>th</sup> March 2015 was made for confirmation of grant. In this application, it emerged that the deceased had other beneficiaries aside from the two applicants, Martha Chesang Bore (deceased) and Ruth Chepkorir Bore. In the 1<sup>st</sup> house of Martha Chesang Bore were four sons, **Edison Rutoh, Elijah Ruto, Paul Molel and Gilbert Ruto**.
5. From his 2<sup>nd</sup> house, the deceased was survived by his widow, **Ruth Chepkorir Bore**, and three sons, **Stanley Ruto, Phillip Ruto and Wesley Ruto**.
6. At paragraph 5, 6, and 7 of her affidavit, Ruth Chepkorir Bore set out the manner in which the family had agreed to share the estate of the deceased. This was that the land would be shared equally between the two houses of the deceased. The 1<sup>st</sup> house, which was occupying Kericho/Ndubai/344 which measured 2.6 hectares(6.42 acres), would be added one point two five (1.25) acres from Kericho Ndubai/324 which comprised 3.6 hectares (8.89 acres). The 1<sup>st</sup> house would be represented by Edison Ruto and the 2<sup>nd</sup> house by Ruth Chepkorir Ruto. The two would hold their respective house's shares in trust for the other beneficiaries of the estate.
7. All seems to have gone well with this arrangement, and eventually the grant was confirmed as prayed and a certificate of confirmation issued. It appears, however, that one Andrew Kipkorir Soi applied and the Registrar of Lands in Bomet placed a restriction on land title number Kericho/Ndubai/344. The administrator, Ruth Chepkorir Bore therefore filed an application dated 6<sup>th</sup> January 2016 in which she sought, first, that the respondent, Andrew Kipkorir Bore, be joined as an interested party to the matter; that the restriction placed on Kericho/Ndubai/344 by the Land Registrar, Bomet, be removed, and that the confirmed grant be rectified so that Ruth Chepkorir Bore would hold 3.1 hectares out of Kericho/Ndubai/324 instead of 2.6 acres as set out in the certificate of confirmed grant issued on 18<sup>th</sup> June 2016.
8. In his replying affidavit sworn on 3<sup>rd</sup> March 2016, the /objector/respondent indicated that he had no objection to being joined as a party to the application. He was also seeking orders that his brother, Joel Kipkurui Soi, be joined as the 2<sup>nd</sup> interested party. The respondent further indicated that he had no interest in Kericho /Ndubai/324. His interest was in Kericho/Ndubai/344, against which he had placed a restriction. The basis for the restriction was that he had been residing on the land since 1994 as the land belonged to him and his brother, Joel. The land had been bought for him and his brother by their elder sister, Esther Cheruto Tesot, around the year 1957. This was after their mother had

died and their father had left them, according to the respondent, to reside with his other wife.

9. The respondent further avers that around 1962, he and his brother Joel had left to go to reside in Kwale. They had left their elder sister, Martha Chesang, to look after Kericho/Ndubai/344 for them. Their sister Martha Chesang was married to the deceased in this cause as his 1<sup>st</sup> wife.

10. According to the respondent, the deceased in this cause had fraudulently had the parcel of land Kericho/Ndubai/344 registered in his name. This had led to a lengthy dispute which had been fueled by the administrator/applicant, Ruth Chepkorir Bore. The dispute had not yet been resolved, though they were still in the process of trying to resolve it. He further averred that he had become aware of the succession cause on 19<sup>th</sup> February 2016, and that he and his brother were in the process of filing an application for revocation of the grant issued to the administrator.

11. In a Supplementary Affidavit sworn on 4<sup>th</sup> August, 2017, the administrator denies that either the respondent or his brother Joel have an interest in the property of the deceased. She further avers that she had sought the assistance of the court to evict the respondent from Kericho/Ndubai/344 as he had no interest in the said land and was not a member of the family of the deceased but had remained in illegal occupation of the land. He had entered the said land with the permission of the administrator's co-wife as he was her relative, and had been accommodated by her co-wife.

12. It is her averment further that the respondent's brother, Joel Kipkurui Soi, had sold the land to the deceased, Kipruto Arap Bore, and given him vacant possession. Martha Chesang Bore, the deceased's 1<sup>st</sup> wife, had then settled on the land. It was her deposition that Joel Kipkurui Soi had freely sold his land to the deceased and had caused the transfer and registration to him. The deceased had therefore obtained the land lawfully, and the respondent had no claim to it.

13. She further deposed that the succession cause had been duly gazetted, and the respondent should have raised his claim at that stage and should not have waited to raise it at this stage.

### **The Evidence**

14. The respondent's case with respect to his claim to ownership of Kericho/Ndubai/344 and his assertion that it did not form part of the estate of the deceased was heard by way of oral evidence. The respondent, who appeared in person, called 4 witnesses. He did not file any witness statements.

15. His first witness was his brother, Joel Kipkurui Arap Soi. Mr. Soi appeared on a date when the matter was not scheduled for hearing. However, with the consent of Counsel for the administrator, the court acceded to hearing him early on account of his age. His testimony was that he was 78 years old and was the older brother of the respondent. He knew the petitioner, whom he stated was the co-wife of his sister, now deceased.

16. According to Joel Soi, he had bought the land in contention, which is in Kiptobit, in 1959. He had left the land to his sister. In 1962, he had left for Mombasa, leaving the respondent with their sister, Martha Chesang, who was taking care of him after their mother died in 1952.

17. Joel testified that his sister's husband, the deceased, had the land registered in his name. That when Joel returned (from Mombasa), they went to the Chief and the Chief said that the land should be divided into two. That the respondent would take one portion while their sister's husband, the deceased in this cause, would take the other portion. Joel had then left the area.

18. He asserted that he had then heard recently that his sister's children wanted to remove his brother, the respondent, from the land. He therefore wished to state to the court that Kericho/Ndubai/344 belongs to his brother, the respondent.

19. When cross-examined by Mr. Kiprono for the petitioner, Joel stated that he went to Mombasa in 1952 when he was 32 years old. He asserted that he had bought the land from one Chepulgang in 1959 for Kshs.5500/- Joel denied that he had sold the land to Kipruto Arap Bore, asserting that the deceased had his money from selling his (Joel's) two cows, which he had sold for Kshs 1,500. He alleged that he had passed by Arap Bore to ask for his money, and he denied that the money he had received was for the land

20. It was Joel's contention further that before he bought the land Kericho/Ndubai/344, he used to live in Longisa, where they all used to live before the death of their mother. That he was living with his sister Esther at Longisa after their mother died, then he went to Mombasa alone. He had left the respondent with their sister, Martha, then he invited him to Mombasa where he stayed until he finished class 7. The respondent did not go to secondary school but returned to Bomet, though Joel could not remember when the respondent returned to Bomet

21. Joel maintained that when he returned to Bomet, he found that his sister's husband had registered the land in his name, and his sister had developed a house on his land. She had informed him that she had built the house after her husband married a second wife. Joel confirmed that at the time, the land was not yet in his name, and he did not have a title to it. He asserted that there were no titles then, though he did not name the year he returned to Bomet.

22. Joel stated that he lived in Eloret and had no interest in the land. His argument was that his brother and the deceased should share the land. He did not want a dispute and had left the land for his sister and brother.

23. Joel further stated that when his sister, Martha, died in 2007 or 2008, he had gone for the funeral and had spoken to the children of the deceased. He did not say at the funeral that he had sold the land to the deceased. He had told the deceased's children that he had left their mother part of the land but that they would pay for the cows. He maintained that he had left part of the land to his brother and the other to the deceased.

24. The respondent then testified in support of his claim. He stated that he was claiming an interest in Kericho/Ndubai/344. He relied on his affidavit sworn on 3<sup>rd</sup> March 2016 as his evidence in chief. I have set out above the contents of the said affidavit.

25. In cross-examination by Ms. Ngetich, the respondent stated that the deceased was married to his fourth born sister, whom he used to live with, and that she was like his mother. He also used to live with his brother, Joel Soi, but that Joel used to travel a lot. He stated that he was born on the subject land, which belonged to his father.

26. When referred to his affidavit in which he had said that the land belonged to his brother, he stated that it had been bought by his sister for him and Joel and did not belong to his father. He maintained that the land was bought by his sister, and he knew that the land belonged to them as his sister told him so.

27. He further stated that they had a case in 2005 after the petitioners (sic) tried to register it in their (sic) names. He reiterated that the land belonged to him and Joel, that their sister was taking care of it, and the family of Arap Bore had their own land and were not entitled to live on the land.

28. He confirmed that his sister, Martha Chesang Bore, was buried on Kericho/Ndubai/344, but he did not know where Kipruto Arap Bore was buried as he was not there when he was buried. He confirmed, however, that as the wife of Arap Bore, his sister was to be buried traditionally on her husband's land, and that she was buried on Kericho/Ndubai/344. He confirmed that he had not tried to stop the burial on what he considered to be his land.

29. The respondent's third witness was his neighbour, William Kipngeno Sigira. His testimony was that more than ten years before his testimony, the respondent had said that his sister, Martha Bore, wanted to chase him from the piece of land he was occupying. The incident had happened after the death of the deceased. He further testified that 'they' knew that Joel had bought the piece of land. 'They' had discussed the issue with people from the village as the respondent had called a meeting and Martha had told them that she had bought the piece of land. Joel had also come for the meeting and had said that he had not sold the land to his sister. He had also said that he had not agreed that she should take his land, but she could take part of the land and leave the rest to the respondent. According to William, everyone had agreed with what Joel had said, except Martha.

30. Upon cross-examination by Ms. Ngetich, William confirmed that Martha was a sister of the respondent and was the wife of Kipruto Arap Bore. He maintained that he 'heard' that Joel bought the piece of land, though he did not witness the purchase. The meeting at which Joel had said he bought the land was held at the office of the assistant chief, then everyone had gone to the land. He asserted that the respondent should be given the land as he had been raised there.

31. The respondent's final witness was Richard Kipkurui Arap Tesot, also a neighbour of the respondent, living some 300 metres away. His evidence was that he had found the respondent on the land in contention when he moved there in 2005/2006. A dispute had started with respect to the land around that time, and it continued until a brother of the respondent was called. The respondent's brother said that he had bought the land for himself and for his brother, but later came to find out that his brother in law had put his name on the title. That as he did not want a major dispute, the respondent's brother had agreed before the elders that the respondent and his sister should share the land.

32. His evidence on cross-examination was that he knew that the respondent was living with his sister from the time he was young till he got married. He had found him on the subject land in 2005/2006, when the meeting of the elders had been held. He denied that he had stated that the respondent should be given land belonging to the deceased.

33. The petitioner, Ruth Chepkorir Bore, the 2<sup>nd</sup> wife and surviving widow of the deceased, relied on her statement dated 16<sup>th</sup> February 2018 with regard to the ownership of Kericho/Ndubai/344. Her evidence as set out in the statement is that the deceased had bought the land Kericho/Ndubai/344, from Joel in 1973. He had paid for it fully in 1974, and her co-wife, Martha, had moved there in 1975.

34. In 1994, the respondent had a land dispute at his home, so he requested his sister to allow him to move to her home, from where he used to follow the land dispute at his home. It was her case that the respondent had never raised a claim to the land until after the succession cause was complete. He had forcefully built a house on the land, Kericho/Ndubai/344.

35. In cross-examination by the respondent, she stated that she did not inform him about filing the succession cause as the piece of land in dispute belongs to the deceased. She had filed a case about the land as her co-wives' children live there and her husband had bought the land. Her husband and co-wife were deceased, and she was therefore in court on their behalf. She denied that her co-wife had allowed the respondent to build a house on the land. She confirmed that she could recall a time she had wanted to build a house on the land and her co-wife had told her that the land belonged to someone else. This was before the deceased had bought the land. The respondent's brother, Joel, had displayed the land as being for sale in 1973, had sold it in 1974, and the houses were constructed in 1975. She did not know how much the land was sold for, though she remembered that one Thomas Paliach was present when Joel was selling the land.

36. She asserted that the parcel of land that she was living on was purchased for her, and she was taken there when she was married to the deceased.

37. In response to questions from the court, she stated that the land was bought in 1974 by the deceased from Joel Soi. Nobody was living on the land when Joel Soi sold it. The respondent had come and build his house on the land in 1994, after the deceased had died. The respondent's sister, Martha, who died in 2008, was alive when the respondent build his house on the land. She was also living on the land.

38. Simion Kipkoech arap Malel relied on his statement dated 16<sup>th</sup> February 2018. In the statement which was adopted as his evidence in chief, he states that the respondent was a brother to his sister in aw, Martha Chesang Bore. That the deceased had bought the contested land from Joel Soi, a brother of the respondent. Joel had then caused the land to be registered in the name of Kipruto Arap Bore, after which Martha Chesang Bore had moved to the land. The respondent, who mostly used to live in Mombasa, used to visit his sister. He had never

lived on the land, and had only done so recently when he constructed a temporary house and refused to move out. Simion asserted that Kericho/Ndubai/344 belonged to his late cousin, Kipruto Arap Bore, and the respondent had no claim to it.

39. In cross-examination by the respondent, Simion stated that he lived some 4 km from the subject land and he knew the respondent well as they grew up together. He stated that the respondent used to visit his mother in law, Obot Anna, who was Simion's sister. The respondent used to come from his sister Martha's place in Kiptobit.

40. The administrator's third witness was Absolomon Kiprono Chebochok from Kiplabotwo sub-location. He was a retired Assistant Chief of Kiplabotwo sub-location. He relied on his statement dated 16<sup>th</sup> February 2018 which was adopted as his evidence in chief. His evidence as set out in the statement is that in 2006, the respondent had gone to his office with a complaint that the land Kericho/Ndubai/344 belonged to him and his brother, Joel Soi. That he alleged that the family of Kipruto Arap Bore had taken their land.

41. Absolomon had convened a meeting at which he had summoned Joel Soi. What emerged from the deliberations at the meeting was that Joel had sold his land to Kipruto Arap Bore. Absolomon had therefore given the respondent 14 days to move from the land. He stated that the land, Kericho/Ndubai/344 belonged to the deceased and his remains were interred there.

42. In cross-examination by the respondent, his evidence was that he had called the respondent's brother Joel and they had sat together and confirmed that Joel had sold the land without the respondent's knowledge. The land had gone to Arap Bore, the deceased. He confirmed that he was not a witness when the land was sold, and he did not get a letter from the village elders concerning the land. They had given the respondent time to vacate the land, and the notice had been given when the respondent's sister, Martha, was still alive.

43. In response to a question from the court, he stated that they got evidence from Obot Anna that she had been sent by Joel Soi to tell Kipruto to pay all the money for the land. The said Obot Anna had stated at the meeting that Arap Bore had not finished paying for the land.

44. His evidence in re-examination by Ms. Ngetich was that they had resolved at the meeting that the respondent should vacate the land in 14 days. Absolomon had been the assistant chief of the area from 1996 – 2008.

45. The final witness for the petitioner, Elijah Kimutai Too, a son of the deceased and Martha Chesang Bore also adopted his statement dated 16<sup>th</sup> February 2018 as his evidence in chief. He avers in the statement that the respondent is his uncle, being a brother of his mother, Martha Chesang Bore. That the respondent had come to their home in 1994 as he had a dispute over land at his home, which was not far from Elijah's home. He had requested to stay at their home as he waited for the land dispute at his home to be resolved. Prior to that, he had been living in Mombasa where he had land. He used to visit the family in Bomet when there was a function at the deceased's home. Elijah stated that they had lived well with the respondent until after the succession cause was completed, at which point he started laying a claim to the land. He maintained that the land, Kericho/Ndubai/344 belonged to his father, not to the respondent and his brother.

46. His evidence on cross-examination was that they had sat as a family in 1999 and decided that their cousin (sic) should not build on their father's land. The respondent was not living on the land at the time. Elijah had returned from Nairobi in 1999 and found that the respondent had brought building posts with the intention of building on the land.

47. It was his case that their mother, who was alive then, had told the respondent to leave the land. He had gone to the land in 1994 to bury a child, and had buried the child near Elijah's mother's house. He stated that his mother and father were buried on Kericho/Ndubai/324, but corrected that in re-examination to state that they were buried on Kericho/Ndubai/344.

## **The Submissions**

48. At the close of the oral hearing of the case, the court directed the parties to file written submissions. The respondent filed submissions dated 4<sup>th</sup> June 2018 while the administrator filed submissions dated 1<sup>st</sup> October 2018.

49. In his submissions, the respondent contends that the land Kericho/Ndubai/344 was bought for him and his older brother Joel in 1962 by their sister, Esther Tessot, before they relocated to Kwale. That they had tasked their sister, Martha Chesang Bore, to take care of the land. She and her husband, the deceased, had lived on the land.

50. The respondent claimed that he had come back to the land in 1992 to bury his daughter, and he had done so with no dispute. He had then build a house close to where his daughter was buried, and had lived there peacefully until after the demise of his sister, Martha Chesang. The administrator and his sister's children had then began to threaten him with the intention of evicting him from the land. It is his case that it was only then that he inquired and found that the deceased had fraudulently registered the land in his name. He had then registered a restriction against the land, and then had become aware of the succession proceedings on 19<sup>th</sup> February 2016. He asked the court to make a declaration that the land belongs to him, and that that the administrator had violated his rights by trespassing on his land and denying him the opportunity to utilise it.

51. In her submissions in response, the administrator argues that there is no dispute that the deceased is the registered owner of the land, Kericho/Ndubai/344. The distribution of his estate is therefore in accordance with the Law of Succession Act.

52. The administrator notes that the respondent claims that the land was fraudulently registered in the name of the deceased, while his brother, Joel Soi, alleges that he sold the land to the deceased but that he acquired the title to the entire portion without his consent. She notes that neither the respondent nor his brother Joel raised the issue of ownership of the land in the deceased's lifetime

53. The administrator further notes that the respondent raised a complaint after the demise of the deceased, which was settled in 2005 when a decision was made that he was not entitled to the land. She further notes that the respondent moved to the land after the demise of the

registered owner, and if he did so with the permission of any beneficiary, that amounted to intermeddling with the estate contrary to section 45 of the Law of Succession Act.

54. She notes further that the respondent is not a dependant of the deceased as defined in section 29 of the Law of Succession Act. He had also not proved that the deceased had acquired the land fraudulently, which in any event is not within the purview of the succession court. The administrator therefore asks the court to order the respondent to remove the restriction placed on Kericho/Ndubai/344 failing which the Registrar, Bomet Land Registry, be at liberty to do so.

### **Analysis and Determination**

55. I have considered the oral and affidavit evidence of the parties to this matter. The issue that I need to determine whether I should grant the orders that the administrator seeks in her application dated 6<sup>th</sup> January 2016. The main order that relates to the respondent is the order that seeks a direction that the restriction placed on title number Kericho.Ndubai/344 be removed.

56. In considering this issue, I find that I perforce have to consider the question whether the respondent has established an entitlement to the contested land. I appreciate that this in effect calls on me to consider the evidence on the basis of which he claims to be entitled to the land. There is also his claim that the land was fraudulently registered in the name of the deceased.

57. I bear in mind that I am dealing in this matter with the question of succession to the estate of the deceased. I also bear in mind that under the principles established in **R vs Karisa Chengo & 2 Others** (2017) eKLR decision, I have no jurisdiction to determine questions related to title to land. I am, however, given the evidence that has been placed before me, constrained to consider the question of the respondent's alleged entitlement to the land in dealing with the question whether the restriction on the land should be removed so that the estate of the deceased can be distributed.

58. I begin by observing that the land that the respondent lays a claim to was registered in the name of the deceased, Kipruto Arap Bore, in 1991. The respondent has not produced any document that shows that the land ever belonged to him or to his brother, Joel Kipkurui Soi. Instead, he has relied on oral evidence that seeks to establish his entitlement.

59. The evidence that he presents is, however, rather contradictory. It is, first, that the land belonged to his father. Then, that it was bought for him and Joel by their sister, Esther Tesot, in 1957. He maintains this contention even in his written submissions, seeming to disregard the evidence of his brother, Joel, which gives a contrary story. The evidence of Joel Soi is that he is the one who had bought the land. He had then sold it to his brother in law, the deceased. However, he had only sold part of the land, while a portion of it was to be left to the respondent. The evidence of the respondent thus clearly contradicts that of his witness, Joel.

60. I note that the deceased died in 1991. The respondent and his brother were adults, but at no time during the lifetime of the deceased did they make a claim to the land. Had the deceased transferred it to himself fraudulently, nothing would have been easier than for them to lodge a claim to recover the land.

61. It is also instructive that the respondent raised his claim during the lifetime of his sister, the 1<sup>st</sup> wife of the deceased. The evidence indicates that she had tried to remove the respondent on at least two occasions before her death. Meetings had been held with elders, and it had emerged that the conclusions reached at those family gatherings was that the respondent had no interest in the land.

62. The court notes that the respondent does not state that he has title to the land. He does not claim that the land was held in trust for him. He did not present any evidence to show that the land was bought for him and his brother, Joel, by their sister, Esther Tesot. On the contrary, he contradicted the evidence of his witness, Joel, who claimed that he had bought the land, had then sold part of it to the deceased, and that he had wished to leave a portion of it-he did not state which portion-to the respondent.

63. On the whole, I find that there is nothing before me on the basis of which I can find that the respondent has a claim to the estate of the deceased. The evidence that he has presented is either hearsay or contradictory. It cannot form the basis for finding that he is entitled to the land.

64. I observe in closing that the respondent seems to have found himself without shelter, and has unfortunately latched on his brother in law's land, where he had been given shelter and a place to bury his daughter, and made a claim thereon. Regrettably, the evidence on record does not support his claim. I am therefore unable to issue a declaration that he is entitled to any portion of Kericho/Ndubai/344 as he had asked the court to do.

65. Accordingly, I find that the application dated 6<sup>th</sup> January 2016 is merited. The respondent, Andrew Kipkorir Soi, is directed to remove the restriction placed on land title number Kericho/Ndubai/344 within 30 days of today. Should he fail to do so, the Land Registrar, Bomet, shall do so.

66. I further allow the rectification of the certificate of confirmation of grant to reflect that the administrator, Ruth Chepkorir Bore, shall receive 3.1 hectares out of Kericho/Ndubai/344.

67. There shall be no order as to costs.

**Dated Delivered and Signed at Kericho this 27<sup>th</sup> day of February, 2019**

**MUMBI NGUGI**

JUDGE