



REPUBLIC OF KENYA

IN THE REPUBLIC OF KENYA AT KERICHO

SUCCESSION CAUSE NO.106 OF 1999

IN THE MATTER OF THE ESTATE OF DAVID ARAP MISOI (DECEASED)

WYCLIFF KITUR CHELUGET.....PROTESTOR/APPLICANT

VERSUS

BORNES CHEMETET.....1ST PETITIONER

GRACE CHEPKEMOI MISOI.....2ND PETITIONER

JUDGMENT

1. This ruling relates to the protest by Wycliffe Kitur to the mode of distribution of the estate of David Misoi proposed by the petitioners in this cause in the affidavit sworn on 16th September 2016. The protestor filed a protest dated 22nd September 2016 in which he indicated that he is not opposed to the mode of distribution in respect of the other assets of the deceased, his protest being confined to the property known as **No. Kericho/Chemoiben/142**.
2. On 27th January 2017, directions were taken that the protest be disposed of by way of oral evidence. The protestor gave oral evidence and called no witnesses.
3. The protestor, Wycliffe Kitur Cheluget, a resident of Boito in Bomet County testified that the deceased, Daudi Arap Misoi was his father. The petitioners, Bornes Chemetet and Grace Chepkemoi Misoi are his step mothers. His testimony was that the dispute before the court was in respect of his land in Boito, being **Kericho/Boito/695**, on which he had lived for forty years having bought it in 1972.
4. According to the protestor, he used to lease land and farm maize which he sold in order to get money to buy the land. He had bought the land, which is 10 acres, for Kshs. 12,000/-. He had paid Kshs 8900, then a further Kshs. 3100. He had also bought a house that was on the land, and trees on the land, for Kshs 400 and 41 respectively. His brothers, Isaiah Cheluget and Samuel Kipkurui, had been witnesses to the purchase. He had received the title to the land in 1978 after he finished paying for the land. He produced in evidence a title to the said land which was annexed as **WKC1** in the affidavit sworn on 22nd September 2016.
5. The protestor further testified that he had a good relationship with his father, who used to ask him to assist the family. His father had not given him any land at the time of his death in June 1971. The protestor had bought the land in dispute in March 1972, when his stepmothers were in their own homes and did not know that he had bought the land in dispute.
6. According to the protestor, the deceased had more than 300 acres of land. He does not live on any of those 300 acres but on the land he had bought. He had a right to a share of his father's properties, and he asked the court to assist him to get a share of his father's estate and to leave the land that he had bought to him.
7. In cross-examination by Mr. Akinyi for the petitioners, he stated that he used to live in Litein, in Chemoiben on family land that had been given to him by the deceased. The land on which he used to live in Chemoiben is number 142 and is 36 acres. The deceased had six wives, his mother was the first wife, and Kericho/Chemoiben/142 belonged to his parents and it is only his mother who used to live on Kericho/Chemoiben/142.
8. The protestor further testified that the deceased had close to 300 acres, and each wife would have got around 50 acres. When he moved from Kericho/Chemoiben/142 to live in Boito, he left a house which he had built there and it is still standing. He has lived in Boito for almost 40 years.
9. With respect to his purchase of the land at Boito, he testified that he had gone with his brother, Isaiah Cheluget, to pay the seller, one Kipkoech Cheboin. He confirmed that he knew one John Kipsang Cheboin, a neighbour and brother of Kipkoech Cheboin. He denied that

he had gone with Isaiah Cheluget to buy the land because it was being bought with family money. He maintained that he was only interested in his mother's land, **Kericho/Chemoiben/142**. He denied that it had been agreed that **Kericho/Boito /695** should be included in the estate of the deceased. The parcel had not been bought with family funds from the estate and is his own property which he had bought with his own money.

10. In re-examination, he stated that the deceased's children from the 1st house should share the land in Chemoiben, but his land in Boito should not be shared.

11. The 1st petitioner, Bornes Chemetet, testified that she was the sixth wife of the deceased, who had six wives. She named them as Samary, Rachel, Tapranei, Taplelei, Takotuny and Rachel. The 1st petitioner, who was quite elderly, appeared uncertain about the wives of the deceased, and the names she gave would indicate that together with the 1st petitioner, the deceased had seven wives. Her testimony was that she stays on land in Kimolwet which belonged to the deceased, and that the deceased had subdivided his parcels among his wives. She had got approximately 30 acres in Kimolwet.

12. She identified the protestor as her son from Samary's house. He had moved to land in Boito, which had been bought by the deceased. The deceased had told her that he was buying the land for Samary's house as their parcel was small. The land in Boito, which was 10 acres, was bought after the demise of the deceased. The 1st petitioner did not know who had gone to purchase the land. She had only received information from the deceased that he was going to buy land to add to the 1st wife's. She did not know where the money used to buy the land came from, but it was bought when her co-wife, Samary, was still alive.

13. The 1st petitioner confirmed that the protestor lives in Boito and that before he went to Boito, he was living at Chemoiben where he had build a house. However, her husband, the deceased, had not disclosed to her the source of the money for the land. She also did not know who sold the Boito land.

14. In cross-examination by Mr. Ondicho for the protestor, she stated that the deceased had several pieces of land, which she named as one in Nyamanja, Kimolwet, Ngoronga, Boito and Chemoiben. The deceased had these parcels of land at the time she married him. The one at Boito had not been bought, but her husband had told her that he would buy land to add to the one at Chemoiben for his first wife. He had not purchased the land at the time of his death. She had heard that he had purchased the land but did not know where the money had come from.

15. The second witness for the petitioners was Grace Chepkemoi Misoi, (Grace) the 2nd petitioner and a co-wife of the 1st petitioner. She echoed the 1st petitioner's evidence that the deceased had six wives, out of whom only two were still alive.

16. She testified that the deceased had approximately 279 acres of land. The one that the protestor was living on, which is 10 acres, had not been bought during the deceased's lifetime. After the addition of 10 acres where the protestor resides, the deceased's land became 279 acres. Grace further testified that the 10 acres were bought after the death of the deceased, but that he had planned that land was to be bought for the 1st house.

17. According to Grace, the deceased had two tractors, and the money for the Boito land came from these two tractors.

18. It was her testimony further that she is entitled to 46 acres from the estate, and that they had sat as a family and agreed that each house gets 46 acres. The house of Samary has 36 acres at Chemoiben and 10 acres at Boito. She maintained that the 10 acres at Boito was bought with estate money and did not belong to the protestor.

19. In cross-examination, she stated that she could not remember when the deceased had told her that he would buy additional land. She also maintained that the money for purchasing the Boito land came from two tractors which the protestor had been managing. She further confirmed that when the protestor was managing the tractors, he would support all the houses of the deceased. She also confirmed that the land in Boito had been bought in 1972 or 1973. According to Grace, the protestor was a very hardworking man, and has tea on the land, and he was also a teacher. She maintained, however, that the deceased had bought the 10 acres in Boito. That one Samuel, Zakayo and Isaiah had counted the money outside Kimolwet and then had gone to buy the land.

20. The third witness for the petitioners was Sally Rotich, a daughter of the deceased and step-sister of the protestor. Her evidence was that the deceased had a total of 269 acres of land in total. Before he passed away, he had indicated that each of his houses should get 46 acres.

21. With respect to Kericho/Boito/695, her testimony was that it was the property of the deceased. That her brothers had bought it after the demise of their father, who had planned to buy the land but passed away before he could do it. She alleged that the land was bought by the protestor, Samuel, Isaiah and Zakayo, using the deceased's money. The land was given to the house of Samary, the deceased's first wife, as her parcel of land was 36 acres so she was given the 10 acres to make 46. Samary had then instructed the protestor, who is her son, to go and reside on the land. She maintained that the land parcel number Kericho/Boito/695 forms part of the estate of the deceased.

22. In cross-examination, she stated that the deceased did not tell them many things, but had mentioned that he intended to purchase 10 acres to add to the first house as their parcel was smaller. That the deceased had mentioned this to his son, Samuel (who is deceased). She did not know the amount the deceased left when he died, but that Samuel had taken the money as he was in charge of all operations at home. She denied that the protestor had bought the land, or that he used to rent land for farming.

23. The final witness for the petitioners was John Kipsang Arap Cheboin, a farmer in Boito. He testified that he did not know the petitioners, though he knew two persons from the family of the deceased, namely Isaiah Cheluget and John Cheluget. In 1971, he was working with the Ministry of Lands and Adjudication, and between 1971 – 1972, he was stationed at Litein. His work was to hold the tape measure for measurement of land. Kipsang was a brother of Kipkoech arap Cheboin, who had told them that he wanted to sell his parcel of land, Kericho/Boito/695 measuring 10 acres. According to Kipsang, his brother had sold the land to the deceased; that three people, Isaiah

Cheluget, John Cheluget and a third person whose name he could not remember had gone to the home of Kipkoech arap Cheboin in Boito to pay for the land. They had carried the money, Kshs 10,000, in a basket. They handed over the money to Kipsang's brother for the purchase of the land. According to Kipsang, they knew the land was being purchased by the family of Daudi Misoi, and that Isaiah Cheluget and John said the land would be registered in the name of the family. He had witnessed a sale agreement between the family of Daudi Arap Misoi and his brother, Kipkoech Arap Cheboin.

24. In cross-examination, he stated that Isaiah and John had gone to see his brother with Kshs.10,000/-, though he could not recall who was carrying the money. He had witnessed the money being counted, though they had not been told where the money came from. A sale agreement had been drawn which indicated that it was Daudi Misoi's land, and the sale agreement had been signed by Isaiah and John.

25. At the close of the hearing, Mr. Akinyi indicated that the last witness for the petitioners, Mr. Isaiah Kiplangat Cheluget, had passed away on 26th June 2017. He had, however, signed a statement dated 8th February 2017 which had been filed on the same date and which he requested the court to adopt under section 35 of the Evidence Act. As Mr. Ondicho for the protestor indicated that there was no objection, the statement dated 8th February 2017, which had been signed by Isaiah Kiplangat Cheluget, was admitted to the record as part of the petitioner's evidence.

26. In the said statement, Mr. Cheluget states that the land, Kericho/Boito/695, belonged to the estate of the deceased. That the deceased had indicated his intention to purchase additional land for the 1st house, but had passed away before doing so. That Cheluget, the protestor and another brother, Zakayo Cheluget, had gone to purchase the land from Kipkoech arap Cheboin. They had discovered, later, that the protestor had transferred it to his name.

27. At the close of the oral hearing of the protest, I directed the parties to file written submissions, and the matter was fixed for mention on 19th October 2017 to confirm compliance. While the petitioners had filed their submissions on that date, the protestor had not, and the matter was rescheduled for mention on 16th November 2017 to enable the protestor file his submissions. On that day, both parties had filed their submissions which were highlighted by Mr. Mugumya for the protestor and Mr. Akinyi for the petitioners.

The Submissions

28. In his submissions dated 6th November, 2017 and highlighted by Mr. Mugumya, the protestor states that the basis of his protest is a consent dated 16th September, 2016 and filed in court on 19th September, 2016. At paragraph b (iv) of the consent, it is stated that **Kericho/Boito/695** belongs to the deceased. However, according to the protestor, it is his property. The said consent was subsequently adopted and formed part of the summons for confirmation of grant, and the land title number Kericho/Boito/695 is being subdivided among the members of the 1st house.

29. The protestor submits that the property was registered in his name on 14th August, 1978. He had produced a copy of the title in his evidence in court. The deceased in this matter had died on 25th June 1971. The title to Kericho/Boito/695 was still in the protestor's name and has never been cancelled. If the petitioners had wanted to balance things so that all the houses of the deceased had an equal share, they had gone about it the wrong way. The protestor was not involved in the consent dated 16th September, 2016, which involved the caveator, Sally Cheron Rotich and the petitioners, but not the protestor. His submission was that adopting the consent was to deny him a right to be heard. Further, that the petitioners did not have the *locus standi* to litigate on behalf of the deceased person in respect of Kericho/Boito/695 if they feel he had an interest in the said land.

30. The protestor further submitted that this court did not have the jurisdiction to entertain the issues pertaining to Kericho/Boito/695. The protestor relied on the provisions of section 7 of the Limitation of Actions Act to submit that the petitioners were seeking to sneak in the land among the assets of the deceased without following due process, 45 years after the death of the deceased. He urged the court to allow the protest and remove Kericho/Boito/695 from the summons for confirmation of grant and allocate the protestor his rightful share in Kericho/Chemoiben/142 where he was being allocated 6.1 acres.

31. In his submissions in reply, Mr. Akinyi for the petitioners conceded that the consent dated 16th September 2016 was with respect to the caveat by one Sally Cheron Rotich, one of the daughters of the deceased, and that the consent did not involve the protestor. He submitted that at the time the consent was entered into, the caveat was the only protest on record as the protestor had not filed his protest. He further conceded that Kericho/Boito/695 is registered in the name of the protestor.

32. According to Mr. Akinyi, when the caveator lodged her protest, she had mentioned that there were some discrepancies in form P & A 5, and that some properties belonging to the deceased had been left out. According to the caveator, Kericho/Boito/695 was one of these properties which had been left out. The caveator had contended that the parcel was purchased using funds from the estate, and it was on this basis that the parcel was indicated in the consent as one of the assets of the deceased. The argument by the petitioners and the caveator was that the protestor had registered the property in his name fraudulently. The petitioners and caveator had done the consent on distribution so that each house would get a total of 46 acres. In doing so, they had factored in Kericho/Boito/695 measuring 10 acres to be shared among the first house where the protestor belongs.

33. In his submissions in reply, Mr. Mugumya observed that the first summons in this matter were filed in 1999. Nowhere in the subsequent pleadings had it been alleged that the deceased's resources were used to purchase Kericho/Boito/695. His submission was that the claim on the protestor's land is an afterthought aimed at defrauding the protestor of his land.

34. I have considered the protest in this matter, and the oral evidence adduced by the parties. From the pleadings, the basis of the inclusion of the property number Kericho/Boito/695 was the consent between the caveator and the petitioners dated 16th September 2016. The protestor, the registered owner of the said land, was not a party to the consent. In my view, this is a consent that cannot be binding on the protestor, and cannot be taken as a lawful basis for including the land registered in his name, Kericho/Boito/695, among the assets of the

deceased and as available for distribution among his beneficiaries.

35. The court also notes that this succession cause was filed way back in 1999, almost twenty years ago. Nowhere in the documents filed in the cause in those years has the petitioners ever raised the issue of the said land as belonging to the deceased. One is inclined to agree with the submissions of Counsel for the protestor that the claim to this land is an afterthought.

36. The petitioners and their witnesses allege that this land was bought using the funds of the deceased. I have set out at some length their evidence. Their evidence was variously that the land was bought from money left by the deceased, or money that was made from tractors that the deceased had owned before his death. However, none of them was able to point out specifically the source of the funds. There was also an allegation that there was a sale agreement with respect to the property, but it was never produced in evidence.

37. The evidence of the protestor is that he was a teacher and used to lease land for farming. He bought the land after the death of the deceased, and the land was registered in his name in 1978. In the absence of clear evidence that the funds for the purchase of the property were funds from the estate, and that the protestor somehow fraudulently registered the property in his name, I am unable to find a basis on which the land, Kericho/Boito/695, can be said to form part of the estate of the deceased.

38. In making this decision, I note the averments of the petitioners in the application for confirmation of grant. The petitioners did not include the said property in the assets of the deceased until after the consent between the petitioners and the caveator was filed on 19th October 2016. In the mode of distribution that they propose, the house of the 1st wife of the deceased was to get 36 acres comprised in Kericho/Chemoiben/142, which was to be shared equally between the sons of the deceased by his first wife, with each of them getting a total of 6.1 acres or thereabouts. Kericho/Boito/695 would supply the missing 10 acres. The other houses of the deceased were each to get a total of 46 acres or thereabouts.

39. That the petitioners wished to have each of the houses of the deceased have an equal number of acres of land from the estate of the deceased is laudable. However, this cannot be achieved by including the property registered in the name of the protestor among the assets of the estate, without clear evidence that the land was purchased from funds of the estate.

40. The land was purchased some years after the death of the deceased, and was registered in the name of the protestor 7 years after the death of the deceased. It is my finding therefore that the protest has merit. Property title number Kericho/Boito/695, which is registered in the name of the protestor, does not form part of the estate of the deceased and shall not be included in the distribution of the estate of the deceased. The protestor, as a son of the deceased from the 1st house is, however, entitled to a share of Kericho/Chemoiben/142 to which his mother's house is entitled.

41. Orders accordingly.

Dated Delivered and Signed at Kericho this 18th day of May 2018

MUMBI NGUGI

JUDGE