



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**SUCCESSION CAUSE NO 222 OF 2006**

**ESTATE OF THE LATE TAPKILE CHESANG CHERUIYOT**

**AND**

**EZEKIEL KIPTARUS MUTAI-----PETITIONER/RESPONDENT**

**VS**

**ESTHER CHEPKURUI TAPKILE-----OBJECTOR/APPLICANT**

**JUDGMENT.**

1. The late Tapkile Chesang Cheruiyot died on 13<sup>th</sup> November 1983 as per the death certificate filed herein.
2. The Applicant herein filed a Succession Cause No.141/99 (Kericho High Court) where she was issued with a grant on 8<sup>th</sup> December 1998. The same was confirmed on 25<sup>th</sup> October 1999. The said grant was challenged and was eventually nullified on 14<sup>th</sup> July 2006.
3. Kericho High Court Succession Cause No. 222/06 was then filed by the Respondent Ezekiel Kiptarus Mutai over the same estate. The Applicant filed another Succession Cause vide Kericho High Court Succession Cause No. 245/06 still over the same estate.
4. On 6<sup>th</sup> March, 2007 the Respondent was issued with Grant of letters of Administration intestate, in Succession Cause No. 222/06.
5. On 24<sup>th</sup> May 2007 the Applicant filed an application for revocation of the grant issued to the Respondent.
6. On 26<sup>th</sup> May 2007 the Respondent filed summons for Confirmation of grant.
7. On 7<sup>th</sup> November 2007 the parties agreed to consolidate Kericho High Court Succession Nos. 222/06 & 245/06 for hearing of the dispute and determination of the beneficiaries of the deceased's estate. The lead file was identified as Succession Cause No.222/06
8. The application for revocation of grant dated 24<sup>th</sup> May 2007 is based on the following grounds;
  - i. *The proceedings to obtain the grant were defective in substance.*

- ii. *The grant was obtained fraudulently by the making of a false statement and by the concealment from the Court of something material to the case.*
- iii. *The person to whom the grant was issued has failed to proceed diligently with the administration of the estate.*
- iv. *The Applicant is a surviving spouse of the late Tapkile Chesang Cheruiyot.*

*It is also supported by the Applicant's sworn affidavit.*

1. The Respondent is a brother to the deceased while the Applicant claims to be a wife to the deceased under the Kipsigis woman to woman marriage.

This Court has to determine whether the Applicant and the deceased were indeed married under the regime of woman to woman marriage, as claimed.

2. The Applicant relied on her affidavit evidence and that of three (3) others. They were cross-examined on the same.
3. The Applicant and her witnesses tried to show that indeed the deceased married the Applicant under Kipsigis customary law under the woman to woman marriage regime.
4. According to them the marriage took place on 2<sup>nd</sup> April 1982 at the house of Annah Tongen (PW2) who was the deceased's neighbour. This witness told the Court that the marriage ceremony between the Applicant and the deceased was attended by several people. She also made local brew which was to be taken after the ceremony.
5. The evidence of PW2 was supported by that of Kiprotich Arap Simetwo (PW3) and Martha Chepkorir Kurgat (PW4).

It was their evidence that indeed the late Tapkile Chesang married the Applicant herein.

6. **DW1 (Kipserem Arap Tonui)** is an elderly man aged 98 years. He confirmed to the Court that the late Tapkile was the daughter of Kimutai Arap Tambeni. She was married to Chepsengeny Arap Cheruiyot who paid dowry according to Nandi customs. The dowry was never returned according to him.
7. He added that where a married woman was barren she was allowed with the permission of her husband and inlaws to marry a woman. The children born would then belong to the woman husband and by extension to the husband.
8. The woman wife remains in the same homestead of the woman husband. He further stated that if Tapkile Chesang wanted to marry she could only do so according to Nandi customary law and not according to Kipsigis customs.
9. He further stated that Chepsengeny Cheruiyot married Tapkile in 1938 and he died in 1944. She lived at her husband's home for ten years after his death before going to Kipsitet to live with her mother. When she died she was buried in Kipsitet.
10. **DW1 (Kipserem Arap Tonui)** and **DW2 (Pius Kimayo Arap Mwei)** explained to the Court the process of marriage under Nandi Customary law. **DW3 (Ezekiel Kiptarus Mutai)** is the brother of Tapkile Chesang the deceased. He testified that Tapkile had continued to stay at her matrimonial home after her husband's death, but she later came to live with their mother because she was barren.
11. He denied knowledge of any marriage between the deceased and the Applicant herein. He also

denied chasing away the Applicant from the suit land. He claims to have been in occupation of the land even when Tapkile was living there with their mother.

12. He admitted owning land NO.L.R. NO. Kericho/Kipsitet/128. He denied knowing all the Applicants witnesses, including the Applicant. **DW4 (Esther Chepkemai Mutai)** who is DW3's wife, denied that Tapkile married the Applicant. She stated that even if she had married her the children would belong to the her husband whom she had left to come and live at Kipsitet. She admitted that all the witnesses they had called had come from Nandi and not Kipsitet where they live. She supported the evidence of DW3.

13. Both counsel filed written submissions which they also highlighted. It was Mr. Siele's submissions that Nandi & Kipsigis marriage customary Laws are the same. He referred to the book of Eugene Cotran (Annexure 3a & 3b), and Panel Fish on Kalenjin heritage (Annexure 4).

He cited the case of **Estate of Cherotich Kimongonyi K – Monica J. Katani Vs. Jackson Chekwony & Another MSA Succession Cause No. 212/10** on which he relied wholly.

14. He also raised an issue of representation by Mr. Nyaingiri who had not filed a notice of appointment. The record has a Notice of Appointment by M/s Nyaingiri dated 24<sup>th</sup> November 2010 and filed on 26<sup>th</sup> November 2010. Mr. Nyaingiri has been appearing for the Petitioner since then and Mr. Siele has never raised any issue on this. One wonders why he is doing that now.

15. In his Submissions Mr. Nyaingiri for the petitioner submitted that upon issuance of a temporary grant to the Respondent, objections were raised together with a cross petition. Two protests were also filed.

He further submitted that the Applicant had presented two death certificates to Court showing she was a daughter and also a daughter inlaw to the deceased, and wondered which was which.

16. He submitted that the land Kericho/Kipsitet/91 belonged to the deceased's father and the person entitled to inherit it is the Respondent who is a child of Tombeni and not the Applicant. The land was never sold to anyone, and there was no marriage between the deceased and applicant.

17. The first issue for determination is whether the Applicant Esther Chepkirui Tapkile was the “wife” of the deceased under the woman to woman regime practiced by the Kipsigis/Nandi. The determination of this issue will settle the issue of protests, cross petitions and or objections raised by Mr. Nyaingiri.

18. It has come out from the evidence of the Respondent that the deceased was married to Chepsengy Cheruiyot in 1938. The said Cheruiyot died in 1944. Tapkile died in 1983 that is, 39 years after the death of her husband.

19. The evidence is also clear that the marriage between Cheruiyot and Tapkile did not have any children. Tapkile left her matrimonial home and came to live with her mother on land No. 91 at Kipsitet. When her mother died in 1972 Tapkile had been living with her. Even after her mother's death she continued living on the said land until her death and she was buried there and not at Cheruiyot's home.

20. It is the Respondent's case that since the dowry paid by Cheruiyot was never returned Tapkile remained a wife of Cheruiyot.

This statement raises many questions.

- i. *Who is it that was to return the dowry? Was it Tapkile or those who received it? And if the recipients did not return it was Tapkile to blame?*

- ii. *Why did Tapkile elect to leave her matrimonial home a few years after her husband's death, and never to return?*
- iii. *If indeed the Respondent believed that Tapkile was still the wife of Cheruiyot, why was she buried on the Kipsitet land and not taken to Kaptumek of Nandi where Cheruiyot had been buried? No attempt was made to take her there. They were satisfied burying her on the Kipsitet land.*

1. Contrary to what the Respondent and his witnesses want this Court to believe, the moment Cheruiyot died, Tapkile became free and free indeed to remain single or remarry. To make her even more free was the fact that she was not able to bear children with Cheruiyot.

She therefore returned to her parents home and lived with her mother. There is no evidence to show that anyone was uncomfortable (including the Respondent) about Tapkile's stay or burial on this land No. 91.

2. **DW 3 ( Ezekiel Kiptarus Mutai)** who is Tapkiles brother stated in his evidence in Chief as follows;

“ - *When Cheruiyot died, Tapkile continued to live in her matrimonial home.*

- *Because Chesang Tapkile was barren she came home to stay with our late mother.*

- *When our mother died Chesang Tapkile continued to stay on.”*

3. It cannot be true that Tapkile (then a widow) left her home because she was barren. She had made up her mind as a widowed woman to go on with her life and that's why she never went back to Nandi.

4. My finding therefore is that though there may have been physical no human divorce between Tapkile and Cheruiyot or return of dowry, there was a heavenly one “until death do us part”. Upon Mr. Cheruiyot's death Tapkile was therefore at liberty to enter into any form of marriage acceptable to her and not just according to Nandi Customary Law.

5. The Applicant's claim is that she was married to Tapkile her woman husband. The Respondent and his witnesses say she was not. The Respondent further argues that the Nandi do not practice woman to woman marriage while the Kipsigis do.

Eugene Cotran a reknown author on the customs of various tribes in Kenya in his book “ The Law of Marriage & Divorce Vol. 1 (London; Sweet and Maxwell 1968) at Page 117 says;

### **WOMAN – TO – WOMAN MARRIAGE.**

*(Kitum Chi toloch). A woman past the age of (among the Nandi & Kipsigis) child – bearing and who has no sons, may enter into a form of marriage with another woman. This may be done during the lifetime of her husband, but is more usual after his death. Marriage consideration is paid, as in regular marriage and a man from woman's husband's clan has sexual intercourse with the girl in respect of whom marriage consideration has been paid. Any children born to the girl are regarded as the children of the woman who paid marriage consideration and her husband”.*

6. In his works, Eugene Cotran specifically bands the Nandi and Kipsigis together. He also bands the Elgeyo Marakwet and Tugen together. The thread running through them must be similar. It has been admitted by the Respondents that the Kipsigis practice woman to woman marriage. From the evidence on record its clear that the Nandi also practice it as stated by Eugene Cotran.

7. **PW2 (Hanna Tongen)** has stated that this marriage was conducted by the late Omango alias Arap Murgun. PW2, PW3 & PW4 all say Tapkile paid dowry for the Applicant; Segutiet was tied by

each as required. PW4 is the Applicant's mother and confirmed all these happenings.

8. When it comes to the Respondent's case on the same I find that the evidence of his witnesses is more on the essentials of a woman to woman marriage among the Nandis and on the inheritance of land parcel No. 91. There is no neighbour from Kipsitet who was called by the Respondent to show how Tapkile lived. Those from Nandi who testified denied knowing the Applicant. It could be true because they did not live in Kipsitet, where Tapkile lived.
9. Woman to woman marriage is recognized in some communities in Kenya. The Nandi & Kipsigis being among them. For such a marriage to be proved there must be evidence adduced to show its existence. In the case of **Monica Jesang Katan Vs. Jackson Chepkwony & Another** (Supra) J.B. Ojwang J (as he then was) found the existence of such a marriage under Nandi Customary Law following the consistent evidence that was adduced before the court. He held that the petitioner was a wife of the deceased within the meaning of Section 29 of Law of Succession Act. In the case of **Eliud Maina Mwangi Vs Margaret Wanjiru Gachangi NRB Court of Appeal NO.281 (A) of 2003 R Nambuye J.A** found that the Kikuyu woman to woman marriage had not been proved by the alleged "widow".
10. Upon analysis of the evidence before this Court I find the evidence of the Applicant to be consistent, and reliable as opposed to that of the Respondent and his witnesses. I consequently find that the Applicant Esther Chepkirui Tapkile was a wife of the deceased as per the operative customary Law, which was Kipsigis Customary Law. She therefore qualifies as a wife under Section 29 of the Law of Succession Act.
11. The second issue is to determine who is entitled to the deceased's estate. The estate the subject of this dispute is Land parcel No. Kericho/Kipsitet/91 which is registered in the names of Tapkike daughter of Tombeni and later Tapkile Chesang Cheruiyot which is not strange as those were the names appearing in her Identity Card. There is no dispute that Tapkike daughter of Tombeni and Tapkile Chesang Cheruiyot was one and the same person. No evidence was laid to show that Tapkile acquired this title by fraud.
12. The Respondent is laying claim on this land supposedly because he is the surviving brother of the deceased. Section 29 Law of Succession Act defines who a dependant is. The wife ranks first in respect of a deceased man.

**Section 29 Law of Succession provides;**

*(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*

*(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately*

*prior to his death; and*

*(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.*

13. The Respondent has also explained that the deceased was registered as proprietor in trust for him. This is not supported by any evidence. The Respondent had denied owning any land. However after being confronted with the official search in respect of L.R Kericho/Kipsitet/128 he admitted owning the said land. In Cross-Examination he state thus;

- *I sold the subdivision known as L.R. Kericho/Kipsitet/562, a subdivision of L.R. Kericho/Kipsitet 128.*

- *I am aware that Parcel No. 91 was given and registered in the name of Tapkile Chesang.*
  - *I was given land NO. Kericho/Kipsitet/128.*
1. *If he all along knew that parcel No.91 was for Tapkile why was he then laying claim on it? Since the land Kericho/Kipsitet/91 is registered in the names of the deceased and not the father of the Respondent I find that the person/persons entitled to inherit are the Applicant and her children.*
  2. *I consequently make the following Orders.*
    - i. *The grant issued to Ezekiel Kiptarus Mutai (Respondent) on 6<sup>th</sup> March 2007 Vide Succession Cause No. 222/06 is hereby revoked.*
    - ii. *A fresh grant to issue to Esther Chepkurui Tapkile and Geoffrey Kibet Chepkwony jointly.*
    - iii. *The same is confirmed and the land parcel No. Kericho/Kipsitet/91 be registered in the name of Esther Chepkurui Tapkile who will hold it in trust for herself and her children (Geoffrey Kibet Chepkwony, Josphat Kipkoech, Bornes Chepkorir, Holca Chepkoech and Maurine Chesang).*
    - iv. *Each party to bear his/her own costs.*

**Delivered, Dated and Signed in Open Court this 21st day of December. 2015.**

**H.I. ONG'UDI**

**JUDGE.**