



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KERICHO**

**ELC CIVIL CASE NO. 84 OF 2012**

**VIVIAN CHERONO .....PLAINTIFF**

**VERSUS**

**MARIA CHELANGAT KERICH .....DEFENDANT**

**JUDGMENT**

1.The Applicant **Vivian Cheron** moved this court by way of Originating Summons dated 4<sup>th</sup> October, 2012 and filed on 22<sup>nd</sup> October, 2012. She prays for the determination of the following questions:

- I. **Whether** the Plaintiff/Applicant herein being a granddaughter to **Tapletgoi w/o Kirui** and a daughter to the Defendant herein, has rights and interest as a heir and dependant of the estate of the late **Tapletgoi w/o Kirui**.
- II. **Whether** land parcel known as **L.R. No. Kericho/Kyogong'/932** is registered in the name of the Defendant to hold in trust for the Plaintiff/Applicant and for her brothers **David Bett, Barnabus Bett, Francis Peter Bett and Reuben Bett**.
- III. **Whether** the Defendant/Respondent's action of omitting the Plaintiff/Applicant herein as one of the beneficiaries to land parcel **L.R. No. Kericho/Kyogong'/932** and distributing the said land parcel to her sons namely **David Bett, Barnabus Bett, Francis Peter Bett and Reuben Bett** is by means of fraud and/or fraudulent breach of trust.
- IV. **Whether** the Plaintiff/Applicant being a granddaughter to the late **Tapletgoi w/o Kirui** and a daughter to the Defendant herein is entitled to recover a total of (1,3) acres of land comprised in land parcel **L.R. No. Kericho /Kyogong'/ 932** from the Defendant/Respondent as heir of the estate of the late **Tapletgoi w/o Kirui**.
- V. **Whether** pending the hearing and determination of this suit an order of injunction do issue restraining the Defendant, her servants, agents and/or any other person under the authority of the Defendant from subdividing, selling, carrying out any other dealings, transactions, conveyance and/or interfering with the Plaintiff's quiet use, possession occupation of parcel land known as **L.R. No. Kericho/Kyogong'/932**.
- VI. **Whether** an order do issue by this honorable court that the Defendant herein do transfer (3) acres comprised in land parcel **L.R. No. Kericho/Kyogong'/932** to the Plaintiff and in default the Deputy Registrar of this honorable court shall have the power and mandate to do so.
- VII. **Whether** an order of injunction do issue restraining the Defendant, her servants, agents and/or any other person under the authority of the Defendant from evicting, alienating, carrying out any other dealings, transactions, conveyance and/or interfering with the Plaintiff's quiet use, possession and occupation of (1,3) acres of land transferred to the Plaintiff out of parcel of land known as **L.R. No. Kericho/Kyogong'/932**
- VIII. **Whether** such other and/or further necessary directions be given by this honorable court to meet

the ends of justice.

IX. **Whether** the costs of this suit be provided for by the Defendant/Respondent.

2. The Originating Summons was supported by an affidavit sworn by the Plaintiff on 4<sup>th</sup> October, 2012. she deponed that she is the daughter of the defendant and a Granddaughter of **Tapletgoi wife of Arap Kirui** (hereafter referred to as the deceased), was unmarried with two unmarried children.

3. The suit property being part of **Kericho/Kyongong/293** (hereafter referred to as the suit property) belonged to her grandmother but was now registered in the defendant's name who holds the same in trust on her own behalf and also on behalf of the applicant being one of the dependants of the deceased.

4. The respondent fraudulently and secretly took out letters of Administration in respect of the estate of the deceased and failed to disclose that the applicant was a dependant to the estate as one of her daughters and a grandchild to the deceased. The plaintiff further depones that she has been residing and cultivating a portion of the suit property but the defendant has now subdivided the said parcel into five portions among her sons and left her out with no share in the estate of the deceased although entitled to an equal share with her brothers.

5. The Defendant filed a Replying affidavit sworn on 15th November, 2012 in which she deponed that the plaintiff is her daughter who got married to one David Chamdany in 2001 and dowry was paid. However in 2003, the plaintiff deserted her matrimonial home.

6. She averred that she had applied to the Bomet Land control board to be allowed to subdivide the suit property into five portions of 0.84 hectares each which she intends to transfer to her five sons but not to her two daughters who are married and not entitled to a share of the suit property according to Kipsigis customary Law. Her other daughter is married and living happily in her matrimonial home and has not laid any claim on the suit property therefore the plaintiff's claim is misconceived and should be dismissed.

7. On 31<sup>st</sup> July, 2013 directions were taken that the originating summons would be disposed of by way of Viva Vorce evidence.

### **The Applicant's case.**

8. The applicant testified on 25<sup>th</sup> November, 2013 that the defendant was her mother, she had two children but had never been married and both her father and grandmother were deceased. She had five brothers who all lived in the family land (suit property) and one sister who was married and lived at her matrimonial home in Ndarameta. She further testified that she currently did not live on the suit property because her brothers had chased her away although she had been living in her father's house prior to the eviction. She stated that her mother had subdivided the suit property between her brothers but left her out and even allowed her sisters in laws to graze their cattle and destroy her crops on the portion she had been cultivating. As a result, she now had nowhere to live and cultivate as each of her brothers have fenced off their respective portions. Despite seeking help from the Provincial Administration her problem was not solved and she now urges the court to grant her an equal share to that of her brothers.

9. On cross examination, the Plaintiff responded that she was living at home in 2001, did not know the man counsel for the defendant was pointing out to her and he was not her husband. She had leased out some land to cultivate in 2002 at Bomet Chemanen from her cousin Joel Towett and was living at his home because she had no land anywhere else. She stated that the surveyors had come to subdivide the suit property a week before her mother went to apply for consent at the Land Control Board.

### **The Defendant's case**

10. **DW1** testified that she was the registered owner of the suit property having acquired the same from her mother in Law. She stated that she had five sons and two daughters and the plaintiff was one of them. All her sons lived with her on the suit property and were married and her two daughters were also

married. The plaintiff had been married to David Chamdany and his home was in Chemanen. She confirmed that the plaintiff had left her matrimonial home and come back to her family home where DW1 had accommodated her in one of her kitchens and gave her some land to cultivate. After some time the plaintiff had moved out before the subdivision was done and was now living outside the homestead but within the village with her children but she did not know why the applicant had left. Her husband had severally come to persuade her to go back to the matrimonial home but she had adamantly refused and was now claiming that she wanted a portion of the family land equal to her brothers although she was not entitled as she was married. Furthermore she had already subdivided the family land among her sons.

11. On cross examination she responded that she did not remember when the applicant got married but she had only stayed with her husband for 2-3 years before she returned to her parents home. She stated that she did not have any document to show that the applicant had her own land and the only reason for not giving her land was because she was married and the husband had not chased her from the matrimonial home or divorced her and had kept coming to take her back. She admitted that the plaintiff's husband had not paid dowry for the applicant because he was an orphan but had requested for more time but there were witnesses to this union. If the plaintiff was not married, she (DW1) would have consulted her sons and the elders on what the plaintiff's entitlement to the family land was.

12. **DW2**, David Chamdany testified that he lived at Chemanen in Bomet County and that the applicant was his wife (Catherine Cheron). He had married her under Kipsigis Customary Law in 2002 which union was witnessed by old men from his village and who could confirm this. The plaintiff stayed with him at his 2 acre farm for 2 years after which she ran away and went back to her father's home. He now lived at his farm with his brother who had his own portion of land inherited from their father but the land was not subdivided and the title was still in the name of their father. He had no objection to her mother giving the plaintiff land if she so wished.

13. On cross examination, **DW2** stated that he was not aware the plaintiff had brought her mother to court but reiterated that the plaintiff was his wife whom he had married when she already had two children from another man. He had never remarried since the plaintiff left him nor had he been maintaining them after she left with her children. He denied ever appearing before the Land board, area chief or county Commissioner in relation to the suit land and had only appeared before them regarding his matrimonial dispute with the plaintiff.

### **Submissions**

14. Despite being given adequate time only the defendant filed her submissions.

15. The defendant's counsel reiterated what was contained in the pleadings and the testimony of the witnesses. He submitted that the defendant had subdivided the suit property into five portions and the beneficiaries were her five sons whom the plaintiff had failed to join as parties to the suit. This therefore made the plaintiff's claim fatal as no order could issue against a party who had not had an opportunity to present their case in court.

16. He further submitted that the consent to subdivide the suit property was granted by Bomet Land control board on 13<sup>th</sup> September, 2013. The plaintiff had testified that she was aware of the Land Control Board meeting and even attended it. She had not appealed against the consent which was final and could not be challenged in any court as provided for under section 8(2) of the Land Control Board Act Cap 302 Laws of Kenya.

### **Analysis**

17. As a member of the international community, Kenya subscribes to international customary laws and has ratified various international covenants and treaties. In particular, it subscribes to the International Bill of Rights, which is the Universal Declaration of Human Rights (1948) and two international human rights covenants: the covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights (both adopted by the UN General Assembly in 1966).

18. In 1984, it also ratified, without reservations, the Convention on the Elimination of All forms of Discrimination Against Women, in short, 'CEDAW'. Article 1 thereof defines discrimination against women as:-

**"Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social cultural, civil or any other field."**

19. In the African context, Kenya subscribes to the African Charter of Human and Peoples' Rights, otherwise known as the *Banjul Charter* (1981), which it ratified in 1992 without reservations. In Article 18, the Charter enjoins member states, *inter alia*, to:-

**"...ensure the elimination of every discrimination against women and also ensure the protection of rights of the woman and the child as stipulated in international declarations and conventions."**

20. The Constitution of Kenya 2010 which takes hierarchical primacy in the mode of exercise of jurisdiction under Article 2(6) provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya.

21. Article 27 of the constitution addresses equality and discrimination. Article 27 (1) states;

**“ Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

(2) .....

**(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**

**(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**

**(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”**

22. The constitution is therefore very clear that in all areas including division of property, there should be no form of discrimination whether by race, sex, marital status, ethnic or social origin, culture, etc. It goes further to say what will happen to any law that is inconsistent with the Constitution.

23. Article 2(4) outlaws any law that is discriminatory in itself or in effect. It provides; **"Any Law including customary Law, that is inconsistent with this Constitution is void to the extent of the inconsistency and any act or omission in contravention of this Constitution is invalid."**

24. The manner in which courts apply the law in this country is spelt out in Section 3 of the Judicature Act Cap 8 laws of Kenya. The application of African customary Laws takes pride of place in section 3(2) but it is circumscribed thus:

**“2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”**

25. In the instant case it is common ground that the defendant inherited this land from her mother in law who had in turn inherited the same from her husband. The deceased her lifetime, held the suit property in trust for her sons, one of whom was the defendant's husband and father to the applicant. It therefore follows that the suit property being ancestral land, the defendant equally holds the same in trust for her dependants.

26. A trust is defined in the **Black's Law Dictionary, 8th ed**, as *“The right enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another person (the settlor) for the benefit of a third party (the beneficiary).”*

27. Under Kipsigis Customary law inheritance is partrilinal. The sons share the land equally. No specific portion of land is usually set aside for the widow but she is entitled to cultivate part of the share of the youngest son. Her entitlement terminates on her death. The daughters are not entitled to any share of the land. They live with their mother until they are married. See **Cotran, E., Restatement of African Law, Volume 11, Sweet and Maxwell, 1969 pp 118)**

28. The Kipsigis customary law as practiced by the defendant is inconsistent with the Constitution and is therefore void to the extent of that inconsistency. Article 27 requires that both male and female be treated the same. It requires that women whether married or unmarried be treated in the same manner as their brothers when it comes to division of family property.

29. The applicant is therefore entitled to an equal portion of land as her brothers. Although the applicant may have got married at some point, she is now estranged from her husband and there is no indication that she will go back. She has children. Indeed both her mother and her former husband have confirmed that the husband had on several occasions tried to persuade her to return to him but she had refused. At the same time the applicant denies being married to Dw2. If the applicant is not assisted by this court to get her entitlement where will she go? Should she be left out because she was not married or if she was at one point, she had refused to go back to her husband? Although Kipsigis customary Law does not allow daughters to inherit land, it at least allows unmarried daughters to live with their mothers on the family land. At the very least this is what the defendant should have done for her daughter. See the case of **Mary Rono vs. Jane Rono & William Rono Civil Appeal 66 of 2002.**

30. For the reasons stated above I make the following declarations ;

1. That Applicant herein being a granddaughter to **Tapletgoi w/o Kirui** and a daughter to the Defendant herein, has rights and interest as heir and dependant of the estate of the late **Tapletgoi w/o Kirui.**

2. That defendant holds land parcel **L.R. No. Kericho/Kyogong'/932** registered in her name in trust for the applicant, her sister and for her brothers **David Bett, Barnabus Bett, Francis Peter Bett and Reuben Bett.**

3. That Applicant being a granddaughter to the late **Tapletgoi w/o Kirui** and a daughter to the respondent herein is entitled to recover an equal portion of land comprised in land parcel **L.R. No. Kericho /Kyogong'/ 932** from the Respondent as heir of the estate of the late **Tapletgoi w/o Kirui** to that of her brothers.

4. I now order that the Defendant herein do resurvey, subdivide land parcel **L.R. No. Kericho/Kyogong'/932**, apply for consent to the Land control board and transfer an equal portion of land to the applicant in equal measure to that of her brothers within 90 days at her cost. In default the Deputy Registrar of this honorable court to sign the respective transfer documents.

5. The costs of this suit are awarded to the applicant.

**Dated signed and delivered in open court at Kericho this 26<sup>th</sup> day of March 2014.**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

Mr Mutai holding brief for Mr Mitey for Respondent

N/A for the plaintiff/Applicant

CC:

**L N WAITHAKA**

**JUDGE**