



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CIVIL APPEAL NO.37 OF 2011**

(Appeal from the Judgment of Hon. Principal Magistrate Mr. T. Okello  
in Bomet PMCC No.1 of 2011 dated and delivered on 2<sup>nd</sup> September 2011)

**TAPSABEI CHEMITEY ROGONY - 1<sup>ST</sup> APPELLANT**

**PHIORIA KIPRONO MARINDANY - 2<sup>ND</sup> APPELLANT**

**VERSUS**

**JOSEA CHEPKWONY - 1<sup>ST</sup> RESPONDENT**

**SARAH CHUMO - 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The 1<sup>st</sup> Appellants herein namely: Tapsabei Chemitei Rokony and Phiora Kiprono Marindany sued Joseah Chepkowony and Sarah Chumo, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively before the Principal Magistrate's court, Bomet by way of Complaint whereof they sought for judgment in the following terms:

- a. An order restraining the Defendants, their agents and/or workmen from interring the body of the deceased in the land parcel number L.R. Kericho/Ndarawetta/705 until the determination of this suit.
- b. Costs and incidentals to this suit.
- c. Any other relief this honourable Court may deem just and fit to grant.

The Respondents denied the Appellants claim by filing a defence. The suit was heard and dismissed by Hon. T. Okello, learned Principal Magistrate on 2<sup>nd</sup> September 2011. The Appellants being aggrieved preferred this appeal.

On appeal, the Appellant put forward the following grounds:

1. THAT the learned trial Magistrate erred both in law and fact by dismissing the Plaintiffs' suit without considering the Plaintiffs' evidence and submissions on record.
2. THAT the learned trial Magistrate erred both in law and fact by disregarding the evidence on record and declaring that the deceased was never married and should be buried in her father's land.

3. THAT the learned trial Magistrate erred both in law and fact by declaring that the Defendants do not have land to bury the deceased yet the 2<sup>nd</sup> Defendant's 'husband' who is the mother of the deceased had bought a parcel of land at Kweni ab Ilet whereat she was buried.
4. THAT the learned trial Magistrate erred both in law and fact by failing to consider the Plaintiffs' evidence that the deceased's mother had re-married the 2<sup>nd</sup> Respondent after deserting the 1<sup>st</sup> Appellant's deceased husband.
5. THAT the learned trial Magistrate erred both in law and fact by declaring that the deceased's body should be buried in the land parcel No.Kericho/Ndaraweta/705 without considering the evidence that the deceased had chosen to live together with her mother in her mother's parcel of land at Kwenik ab Ilet.
6. THAT the trial Magistrate failed to find that Tapletgoi (deceased) never returned to live with her father at Mogindo Village after she left with her mother for Kwenik ab Ilet.
7. THAT the trial Magistrate failed to find that Esther Chepkorir (deceased) never returned to live with her father at Mogindo Village after she left with her mother for Kwenik ab Ilet.
8. THAT the learned trial Magistrate failed to analyze the evidence and more particularly the admission by the parties and the witnesses that no tangible family relationship existed between PW1 and PW2 on one hand and DW1 and DW2 on the other hand.
9. THAT the learned Magistrate erred in Law in ordering that the remains of Esther Chepkorir be interred at Plot No.Kericho/Ndaraweta/705 when the respondents never filed a counterclaim to the Appellants claim in the Plaintiff.
10. THAT the learned trial Magistrate erred both in law and fact by failing to consider the Kipsigis Customary Law that a child cannot be separated from the mother even in times of death.
11. THAT the learned trial Magistrate erred both in law and fact by failing to consider the Kipsigis Customary Law applicable to the case.
12. THAT the learned trial Magistrate erred both in law and fact by declaring that the Appellants should bear the mortuary charges of the deceased's body.

When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order for the same to be disposed of by written submissions.

I have carefully re-evaluated the case that was before the trial court. I have also considered the rival submissions. Before delving the deeper into the merits or otherwise of the appeal, let me set out in brief the case that was before the trial court. The undisputed facts of this case are that the parcel of land known as L.R. No.Kericho/Ndaraweta/705 is registered in the name of Kipkemoi Rogony. He is now deceased. Kipkemoi Arap Rogony was married to two wives namely Tapletgoi (*1<sup>st</sup> wife*) and Tapsabei Rokony (*1<sup>st</sup> Plaintiff*). The late Tapletgoi was blessed with one child namely Esther Chepkorir, now deceased. Phioria Kiprono Marindany (*2<sup>nd</sup> Plaintiff*) is the son of PW1 hence he is step brother of Esther Chepkorir, deceased. The Plaintiffs admit that the late Tapletgoi and Esther Chepkorir used to live on L.R. No.Kericho/Ndaraweta/705 before the 1<sup>st</sup> Plaintiff got married to the late Kipkemoi Arap Rogony. It is the contention of the 1<sup>st</sup> Plaintiff, that Esther Chepkorir should not be buried on the aforesaid parcel because she believes the land is hers. The 2<sup>nd</sup> Plaintiff is not averse if the late Esther is buried on the portion belonging to his brother Johana. What has come out clearly from the evidence tendered by the Plaintiffs is that they fear that if the late Esther Chepkorir is buried in the land in question they may lose their claim over the land. The question of inheritance is said to be pending hearing and determination before this court vide Kericho H.C. Succession Cause number 165 of 2003. The Defendants' case is that the body of the late Esther Chepkorir should be interred in L.R. No. Kericho/Ndarawetta/705 because it belonged to her late father.

Let me now turn my attention to the merits of the Appeal. The learned Principal Magistrate dismissed the suit for being without merit. Though the Appellants put forward a total of twelve grounds of appeal only one group commends itself for determination. It is a question as to whether or not the body of the late Esther Chepkorir should be interred in L.R. No.Kericho/Ndarawetta/705? It is the Appellants' submission that since the late Tapletgoi deserted the matrimonial home together with her daughter, the late Esther Chepkorir and never returned until their demise. The Appellants are of the view that Esther should be buried where the late Tapletgoi was buried in line with the Kipsigis Customary

Laws and rites. The Respondent's on the other hand are of the view that the late Esther should be buried in her father's land. After a careful consideration of the rival submissions it is clear that the late Tapletgoi never divorced with the late Kipkemoi Arap Rogony. It is also not in dispute that the late Esther Chepkorir is the biological daughter of the late Kipkemoi Arap Rogony. The late Esther was not married and had no land of her own hence she is therefore entitled to be buried in her father's land. The learned Principal Magistrate was therefore right to dismiss the suit. For the above reasons I see no merit in the appeal. It is dismissed with costs to the Respondents.

Dated, Signed and delivered in open court this 26<sup>th</sup> day of June 2014.

**J. K. SERGON**

**JUDGE**

In the presence of:

N/A for Mitey for Appellant

Miruka holding brief for Maengwe for Respondent