



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT ELDORET**

**Civil Suit 7 of 2012**

**LUCY KEMBOI.....PLAINTIFF**

**-VERSUS-**

**1. CLETI KURGAT.....1<sup>ST</sup> DEFENDANT**

**2. BENJAMIN KURGAT.....2<sup>ND</sup> DEFENDANT**

**3. VERONICAH KURGAT (CHEMWENO).....3<sup>RD</sup> DEFENDANT**

**4. AGNESS KURGAT.....4<sup>TH</sup> DEFENDANT**

**5. BENADETTE KURGAT.....5<sup>TH</sup> DEFENDANT**

**6. CONSOLATA KURGAT.....6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

The Plaintiff **Lucy Chepkoech Kemboi** filed this suit against the six defendants herein, who are all her in-laws. The orders she is seeking jointly and severally against the defendants are as listed hereunder;

**a)** To be restrained from collecting the body of the deceased Ambrose Kipkoech Kurgat from the mortuary of Moi Teaching and Referral Hospital, or anywhere else may be preserved and or in any way seeking to arrange for his burial and or interment.

**b)** To grant the Plaintiff authority to arrange for the collection, burial and interment of the body of her husband, the late Ambrose Kipkoech Kurgat, at their matrimonial home at Kamariny, Keiyo Marakwet County, on such reasonable time as she may determine, with liberty to the Defendants to participate at their discretion.

- c) To permanently restrain the Defendants jointly and severally by way of an injunction from evicting the Plaintiff (and her children) from her inheritance, particularly the 16 acre land parcel at Kamariny, Keiyo County and the about 77 acres at Eureka Farm, Uasin Gishu County.
- d) To permanently restrain the Defendants jointly and severally from denying the Plaintiff and her three (3) children from enjoying their matrimonial properties, especially their tractor Registration Number KLV and Motor Vehicle Registration Number KAB 750Y, their house at Kamariny, Keiyo Marakwet County, their furniture, utensils, bedding, jewellery and sundry at Chembulet near Eureka, Uasin Gishu County.
- e) To pay all and every cost of preservation of the body of the Late Mr. Ambrose Kipkoech Kurgat from the date of his demise on 29<sup>th</sup> December 2011 up to the date of his collection from MTRH or such further or other preservation facility the body may be taken to.
- f) To pay all costs of this suit and interest.
- g) To give such other or further orders and directions the court may deem fit and proper to grant in the interest of justice and fairness.

The listing of the matter is as follows;

The Plaintiff is the widow of the Late Ambrose Kipkoech Kurgat. The deceased died on the 29<sup>th</sup> December, 2011 at the Moi Teaching and Referral Hospital from a kidney condition.

The problem arose when the meeting to make the funeral arrangements, commenced and the problem relates to where the deceased's remains are to be interred.

The Plaintiff and the Defendants were unable to agree on the burial site, hence this suit.

## **FACTS**

The Plaintiff PW1 gave evidence that the deceased was her husband and he was suffering from a kidney condition and was admitted to Moi Teaching and Referral Hospital and passed on, on the 29<sup>th</sup> December 2011.

The deceased was a brother to all the six (6) defendants.

The Defendants held meetings on the 31<sup>st</sup> December 2011 and on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> January, 2012 and made funeral arrangements without involving her nor her children.

The meetings were held at her deceased's husband's step-mother's house and she was not afforded any hearing and was only given information as to what had been decided.

The Plaintiff stated in evidence that she enquired from the chairman of the funeral committee one Raphael Serem (DW2) as to the location of the burial site but she was told that it had not been agreed upon.

The Plaintiff in her evidence said she got suspicious when the defendants fixed the burial date for Friday the 6<sup>th</sup> January 2012, yet the Defendants refused to disclose the burial site to her. That she only got to know that the Defendants intended to bury the deceased next to the grave of his late father Thomas Chepkurgat Cheptiony through the defence filed by the Defendants, after she had filed a suit in the Chief Magistrates Court.

The Plaintiff gave evidence that the deceased had a homestead and she had constructed a house thereat together with her late husband. A photograph (marked as "P.Exh 1") was produced in evidence as

the homestead of the deceased.

The Plaintiff 's evidence was that the homestead and house are located on a parcel of land which piece of land was demarcated and given to her late husband by the deceased's late father Thomas Chepkurgat Cheptiony. The portion of land measured approximately sixteen (16) acres.

The Plaintiff conceded in cross examination that the portion of the property where they had built their homestead was a part of the greater estate of the late father in-law. That the whole piece of land was still registered in the name of the said father in-law and that no one had taken out letters of administration.

It was upon this portion of land that the Plaintiff wants to inter her late husbands remains.

Whereas the Defendants want to inter the remains at a grave site set apart by the Plaintiffs late father in-law as a family graveyard, which site had the graves belonging to the deceased's father, mother, sister and grandmother.

The intended grave site was approximately two hundred (200) metres from her homestead.

It was the Plaintiff's prayer that she be allowed to bury her late husband at the right place where she had built a house and established a homestead.

She also prayed for costs of the suit and costs for preservation of the body and that the Defendants be condemned to pay the said costs.

In support of her case the Plaintiff called a witness PW2 to testify on her behalf on Keiyo customs.

PW2 – one Cheruiyot Arap Chebii gave evidence on Keiyo customs. He stated that he was 81 years of age and conversant with Keiyo customs.

His evidence was that the meetings to make arrangements for the funeral must be held at the house of the deceased in consultation with the deceased's widow and children. That it was the practice that a married man be buried in his "BOMA" and it is the clan elders who decide where a deceased person is buried.

The Plaintiff then closed her case.

All the defendants did not testify, this duty was left to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and they called the chairman of the funeral committee as their witness.

DW1 testified that the meetings were all held at his late fathers homestead.

At the first two meetings the chairperson was DW3 and at the meeting held on 2/1/2012 Luka Kite was the chairperson.

That at all the meetings the Plaintiff was always present and that the Defendants had never locked her out.

His evidence was that their late father had set apart a part of the land as a graveyard. The burial site was outside the "Boma" of his late father. His late father's remains, his mothers, his sister's and grandmother had been interred on this piece of land.

His grand mother died in 1979, his mother Catherine Cheptiony died in 1985, his late father died in 2001 and his late sister Evelyne Kurgat in 2006 and all their remains were interred at this burial site.

DW1 gave evidence to the effect that the house built by the Plaintiff and deceased on the portion of land was built in August, 2011 only for the purposes of hosting the deceased's daughter's wedding.

Otherwise the deceased had a rented room in Chembulet and carried on the business of a bar, thereat. He also testified that the Plaintiff lived in a rented house in Iten and that she never slept in this home built in Kamariny. That she would attend the funeral meetings and would retire to her house in Iten after the meetings.

It was DW1's contention that the deceased had not been shown any portion of land by their late father but he went ahead and built the house on the portion.

DW1 stated that their fathers estate had not been distributed and that the site of the deceased's house might not be the deceased's allotment upon distribution.

DW1 gave further evidence of a late brother of theirs known as Michael Kurgat who died in 2002 and was buried on a piece of land that he had been given by their late father. This brother had established his home on that piece of land, hence his being interred there.

His prayer was that the family be allowed to inter the deceased at the family grave yard.

After DW1 testified, he was followed by Agnes Kurgat DW2 a sister to the deceased who gave evidence that she attended the funeral meetings but she was not allowed by custom to contribute.

Her evidence was that the Plaintiff was also in attendance and that the Plaintiff did not raise any objections to the resolutions made.

She testified that she got to know of the communal family gravesite in 1985 when they buried their late mother. That father had set side a family grave yard where all relatives would be buried and that is where her late brother Ambrose Kipkoech Kurgat should also be interred.

DW3 one Lucas Kite gave evidence that he had chaired some of the funeral arrangement meetings. That the Plaintiff and all the defendants were in attendance and the Plaintiff was allowed to freely participate in the meeting.

He testified that he knew that the late Thomas Chepkurgat Cheptiony had set aside a grave yard for family members.

He acknowledged that the deceased had built a structure which had a toilet and a fence, but no water and he went further to testify that the late Ambrose never slept in the house.

He ended by saying that the Plaintiff was there when they decided where the deceased was to be buried.

### **ISSUES FOR DETERMINATION:**

From the facts and evidence adduced, the issues for determination are set out hereunder:

- a) Who should bury the deceased.
- b) Where had the deceased established a home.
- c) TITLE No. IRONG/SERGOIT/363.
- d) The burial site for the remains of the deceased.
- e) Costs.

### **THE LAW**

There are various relevant laws applicable to this case as listed hereunder:

- a) Article 27 (3) and (4) of the Constitution.
- b) Keiyo Customary Law.
- c) Section 66 of the Law of Succession.
- d) Case law – the authorities referred to by Counsel in their submissions.

### **ANALYSIS**

It is not in dispute that the Plaintiff was married to the deceased.

The authority relied upon by Counsel in submissions also gives the Plaintiff entitlement to bury the deceased. In **NJOROGE VS NJOROGE & ANOTHER (2004) 1 KLR** Ojwang J as he then was, held that;

***“.....the person who is the first in line of duty in relation to the burial of the deceased person is the closest to the deceased in legal terms. Generally the martial union will be found to be the focus of the closest chain of relationship touching on the deceased.....”***

Section 66 (a) of the Law of Succession act (Cap 160) Laws of Kenya provides that when it relates to the taking out of the Grant of Letters of administration the surviving spouse or spouses with or without the beneficiaries is the preferred choice.

This case has not reached the stage where Letters of Administration are being sought for. The Section in the Act is only being cited to emphasis the fact that the widow is always the preferred choice.

The Constitution of Kenya (2010) at Article 27 (3) and (4) gives both women and men the right to equal opportunities in cultural and social spheres and also provides that there should be no discrimination directly or indirectly against any person on any ground.

It is also not in dispute that Keiyo customary law is applicable herein and that under the said customary law the clan together with the deceased’s brothers are responsible for the burial of the deceased.

Therefore, even though Keiyo Customary Law applies herein, the Plaintiff having been married to the deceased has a right derived from the written law to bury the deceased.

The next issue relates to where had the deceased established a home.

There is a house built on the portion of land where the Plaintiff wants to inter the deceased’s remains. The house was built in August 2010 and it came out in evidence that the house was only fully utilized on one occasion which was during the wedding arrangements for the deceased’s daughter.

Evidence was adduced by PW1 and DW1 that the deceased had a rental room in Chembulat where he resided upto the time of his demise. He lived in the said premises and operated a bar, nearby.

The Plaintiff had a rental house in Iten and during the period when funeral arrangements were taking place it was the Plaintiffs evidence that she would leave Kamariny where she had built her house and go back to sleep at her rental house in Iten.

This house of her’s was only 200 metres from the place the meetings were being held. Yet she opted to travel 2 kms to Iten to her rental house.

The Plaintiff's evidence was that the house built by the deceased and herself was temporary in nature, made of iron sheets.

I shall refer to the finding made by MILLER, LAW and POTTER in the case of **APELI –VS- BULUKU C.A NO. 12 OF 1979** where it was held as follows;

**“.....a person wishing to be buried outside his father's homestead takes steps to have an acceptable and established home elsewhere.....”**

Keiyo customary law also requires that a married man to be interred in his homestead where he has built and established a “BOMA”.

By conduct and by inference from the facts I find that neither the deceased nor the Plaintiff had established a permanent home at Kamariny.

The next issue relates to the property known as **IRONG/SERGOIT/363**. It is not in dispute that the above property is still registered in the **THOMAS CHEPTARUS CHEPTIONY** name of the deceased's father. Also it is not in dispute that no Grant of Letters of Administration have been taken out, to date and that the estate has also not been distributed.

It is also a fact that the deceased did not own the portion of the property where the Plaintiff wants to bury his remains. The fact that a temporary house had been built on the said portion did not confer ownership of the property upon the deceased.

DW1 adduced evidence that even though the Plaintiff and deceased had built their house on the portion of land, the beneficiaries exact portions and locality were yet to be determined.

I find that the deceased did not have a Title to the portion of land as the estate was yet to be distributed nor had a Grant of Letters of Administration been taken out over their late fathers estate.

The Plaintiff it would appear is attempting to lay and secure a claim in the estate.

The three remaining issues relate to the burial site of the deceased, costs of the suit and costs of the preservation of the body.

It is a fact that the property known as **IRONG/SERGOIT/363** is still in the name of the late **THOMAS CHEPTARUS CHEPTIONY** and that the estate is yet to be administered and distributed.

It is therefore a proven fact that the deceased did not own the portion of the property where he had built his house. The Plaintiff has not proved the fact that the deceased had intended to establish a permanent house on the portion of the property at Kamariny.

The Plaintiff did not adduce any evidence with regard to the wishes of the deceased as to the place he wanted to be interred.

By giving the Plaintiff the body to inter at the burial site of her choice, I find this will interfere with the other family members' rights to the property.

### **FINDINGS:**

People come to court to exert their rights and the Plaintiff has come to this court seeking for her legal right to bury the deceased at a place of her choice.

This court finds that the Plaintiff's rights are provided for and protected by the Constitution in that the Plaintiff should not be discriminated upon by cultural practices. This court finds that she has an equal right with the Defendants and the clan to bury the deceased's remains.

Where should the deceased's remains be interred?

It is a fact that the estate of the late **THOMAS CHEPKURGAT CHEPTIONY** is yet to be administered and or distributed.

It is also a fact that the deceased did not own the land where the Plaintiff wishes to inter the deceased's remains. To establish a permanent home, the deceased must have owned the property or have his own land elsewhere. The case of **APELI VS BULUKI (Supra)** lends credence to this fact.

Evidence was adduced that there exists a common family grave site created by the late **THOMAS CHEPKURGAT CHEPTIONY**. Evidence was further adduced that this site is only two hundred (200) metres from the Plaintiffs site of choice.

**CONCLUSION**

The judgment of this court is that the deceased's body be handed over to **LUCY KEMBOI & KLETI KURGAT** jointly or to any one of them for burial at the site set apart by the late **THOMAS CHEPKURGAT CHEPTIONY** for interment of the deceased the late **AMBROSE** remains.

The costs of preservation of the remains at the Moi Teaching and Referral Hospital to be paid by both the Plaintiff and the defendants.

Each party shall bear their own costs.

Dated and delivered at Eldoret this 13<sup>th</sup> day of March 2012.

**A.MSHILA**  
**JUDGE**

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**Coram:**

Before Hon. A.Mshila J

Court clerk: Andrew

Counsel for Plaintiff.....

Counsel for Defendant.....

**A.MSHILA**  
**JUDGE**