



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

Succession Cause 23 of 2002

IN THE MATTER OF THE ESTATE OF THE LATE TAPKIGEN MASE

AND

PHILIP BIEGON 1ST PETITIONER

EMMY CHEMUTAI 2ND PETITIONER

VERSUS

JOSEPH KIPNGENO CHEPKWONY OBJECTOR

JUDGMENT

Tapkigen Mase (*hereinafter referred to as the deceased*) died on the 10th June, 1991. On the 8th March, 2002, Philip Biegong and Emily Chemutai (*hereinafter referred to as petitioners*) made an application before this court to be granted letters to administer the deceased's estate. They listed eight persons including Joseph K. Chepkwony as the beneficiaries of the deceased's estate. The only property that comprised the deceased's estate was listed as **Kericho/Kabianga/903** measuring 3.2 hectares. On 12th June, 2002 Joseph K. Chepkwony (*hereinafter referred to as the objector*) filed an objection to the issuance of grant of letters of administration to the petitioners. In his objection, he stated that the petitioners were not the beneficiaries or dependants of the deceased. He deponed that he and his mother, Chepkorir Taplelei Mase, were the only dependants of the deceased. Directions were taken and the parties agreed to have the issues in dispute determined by the parties adducing *viva voce* evidence.

The petitioners called five witnesses in support of their case. PW1 Philip Kibet Biegong, one of the petitioners, testified that the deceased had married his mother called Leah Chepkorir Mase in a woman-to-woman marriage under the Kipsigis Customary Law because she was not blessed with any children. It was his evidence that the deceased married his mother as a second wife after she had already married Taplelei Mase, the mother of the objector. He testified that his mother had given birth to seven children, five daughters and two sons who he stated were now beneficiaries to the deceased's estate.

It was his further testimony that his mother and all her children lived on the deceased's parcel of land until the death of their mother on the 9th April, 1996 when they were chased away from the said parcel of land by the objector. It was his evidence that since the deceased had married two wives under the Kipsigis Customary Law, and then the said parcel of land should be subdivided into two equal portions to be inherited by the children of the two wives. PW1 testified that the deceased had paid dowry when she married his mother and further that she had constructed a house for his mother when she married her. He

conceded that he and his siblings did not at the moment reside at the deceased's parcel of land but with their maternal grandmother. He further conceded that he was circumcised at his maternal grandmother's home and was named Biegon after his mother's clan. PW1 did not recall the name of the clan of the deceased neither did he know her clan's totem. He also conceded that his mother was buried at the land of her parents and not on the parcel of land belonging to the deceased.

PW2 Philip Chepkwony, a resident of Kiptome village where the deceased used to live, testified that he knew the deceased had married two wives namely; Taprandich (the mother of the petitioners) and Mama Kipterer (the mother of the objector). It was his testimony that the mother of the objector was the first wife whilst the mother of the petitioners was the second wife. He testified that the mother of the petitioners lived with the deceased for a short while after their engagement ceremony but was chased away because of her drinking. When the mother of the petitioners died, the mother of the objector refused to allow her burial at the deceased's parcel of land. He also testified that the petitioners and their siblings were chased away from the said parcel of land by the objector. He testified that the elders met and tried to resolve the issue but were unable to. He testified that he did not know when the deceased married the mother of the petitioners. Neither did he know if any dowry was paid. He recalled that the deceased and the mother of the petitioners only lived together for a period of about one year before she was chased away by the mother of the objector. He testified that the deceased had constructed a house for the mother of the petitioners on her parcel of land but the same was no longer in existence.

PW3 Kipkering Biegon, PW4 Sarah wife of Joseph Biegon and PW5 Joseph Arap Sang all testified that they were present when the deceased married the mother of the petitioners under the Kipsigis Customary Law. PW5 testified that he was the master of ceremony and presided over the marriage between the deceased and the mother of the petitioners called Leah Chepkorir Mase. PW3 testified that PW2 Philip Chepkwony was present at the said wedding ceremony, although in his testimony PW2 denied this fact. Whereas PW3 testified that no cows were paid as dowry and only money was exchanged, PW4 testified that the deceased paid one bull as dowry. The deceased however authorized the said bull to be sold so that proceeds therefrom could be used to erect a house for the mother of the petitioners.

PW4 and PW5 testified that only the initial ceremonies related to the customary marriage under the Kipsigis Customary Law were fulfilled. In their view, the customary marriage between the deceased and the mother of the petitioners was properly celebrated under the Kipsigis Customary Law. Whereas PW3 and PW4 were not sure when the said marriage was celebrated, PW5 testified that the deceased married the mother of the petitioners sometimes before the year 1986. PW5 conceded that PW1 was not circumcised by the deceased but was circumcised in the homestead of his mother. PW5 further testified that when the deceased married the mother of the petitioners under the said Kipsigis Customary Law, the mother to the petitioner already had given birth to her seven children. PW4 testified that the mother of the petitioners was not buried at the deceased's parcel of land because the objector refused to grant permission for the said burial to take place. The mother of the petitioners was therefore buried at her parent's parcel of land. The petitioners then closed their case.

The objector called three witnesses in support of his case. As the first witness (DW1), he testified that the deceased married his mother Taplelei Mase under the Kipsigis Customary Law that allowed woman-to-woman marriage. He testified that he was the only child to his mother who was now aged and had lost memory. He resided on the parcel of land which was owned by the deceased with his mother. He testified that he knew the petitioners. He recalled that the petitioners went to the deceased's parcel of land in May, 2001 and attempted to erect a house on the land claiming that their mother had been married by the deceased. DW1 testified that in the entire period that he and his mother lived with the deceased, he did not see the mother of the petitioners reside on the deceased's parcel of land. He denied that any marriage took place between the deceased and the mother of the petitioners.

He further denied that the petitioners and their siblings at any time resided on the deceased's parcel of land. He further denied that the deceased had at any time constructed a house for the mother of the petitioners on her parcel of land. It was his testimony that when the deceased died neither the petitioners nor their mother attended the funeral. He was emphatic that he was the only male dependant to the deceased's estate because the deceased had circumcised him and named him Arap Chepkwony, meaning

a son of a woman. The objector testified that he knew PW3, PW4 and PW5 as his neighbours at Kiptome, although he knows that PW5 had moved away from Kiptome village. He denied that any house had been constructed on the deceased's parcel of land by the petitioners. He only recalled that the petitioners had attempted to build a house by erecting poles which he removed when he became aware of the designs of the petitioners. He denied that the mother of the petitioners had been married to the deceased and then chased away.

DW2 Timothy Sigei, a relative to the deceased, testified that he knew the deceased had only married one wife, that is Taplelei the mother of the objector. He denied any knowledge of there having been any Kipsigis Customary marriage between the deceased and the mother of the petitioners. He testified that he was at the funeral of the deceased when it was stated that the deceased had only one wife, the mother of the objector. He testified that he recognized the objector as the only male dependant of the deceased. As a resident of the area where the deceased lived, he did not recall the mother of the deceased making any claim on the deceased's parcel of land when she was alive. It was only after her death, that the petitioners started making a claim on the deceased's parcel of land. He recalled that a meeting was held by a panel of elders who decided that the petitioners had no claim whatsoever over the deceased's parcel of land because they had not established that their mother was married to the deceased.

DW3 Kipkoech Arap Koros, a resident of Kiptome village testified that his parcel of land was next to the deceased's parcel of land. He testified that he did not recall the deceased marrying the mother of the petitioners under the Kipsigis Customary Law. It was his testimony that the mother of the petitioners never at any time lived with the deceased at the deceased's parcel of land. He further recalled that the mother of the petitioners did not attend the funeral of the deceased. He recalled that no house had been erected on the deceased's parcel of land by the deceased for the mother of the petitioners. It was his further testimony that the petitioners only started making claims on the deceased's parcel of land after the death of their mother. He recalled that the petitioners attempted to erect a house on the deceased's parcel of land but were thwarted in their effort by the objector who prevented them and chased them away. In his view, the only legitimate dependants of the deceased's estate are the objector and his mother. The objector then closed his case.

The issue for determination by this court is whether the petitioners have established on a balance of probabilities that they are the dependants of the deceased and therefore entitled to be beneficiaries of the deceased's estate. It is the petitioners' case that the deceased married their mother under the Kipsigis Customary Law which allowed a woman who was not blessed with any children or in some instances who was not blessed with a male child, to marry another woman to procreate children on her behalf. In this case, the deceased was not blessed with any children. The undisputed evidence which was adduced by both the petitioners and the objector is that the Kipsigis Customary Law allowed for woman-to-woman marriage in the circumstances described above.

The petitioners adduced evidence to the effect that their mother Leah Chepkorir Mase was married to the deceased in a marriage ceremony which was presided over by PW5 John Arap Sang. The marriage was allegedly celebrated in the house of PW4 Sarah W/O Joseph Yeggon in the presence of PW3 Kipkering Biegon and PW2 Philip Chepkwony. PW5 testified how the said marriage ceremony was conducted in conformity with the dictates of the Kipsigis Custom. The evidence of the three witnesses called by the petitioners who allegedly witnessed the said celebration of the customary marriage between the deceased and the mother of the petitioners is however full of contradiction. Whereas PW3 claims that PW2 was present during the celebration of the said marriage, PW2 in his testimony denied that he was present.

Whereas PW3 claims that no dowry in form of cattle was paid, PW4 testified that the deceased paid one bull to the mother of the petitioners and then gave instructions that the said bull be sold so that proceeds therefrom could be used to construct a house for the mother of the petitioners. What is interesting about the evidence that was adduced by the said three witnesses of the petitioners is that the relatives of the deceased did not attend the said ceremony. DW2 Timothy Sigei, a member of the clan of the deceased, and a close relative of the deceased's late husband was not aware that such a ceremony had taken place. It appears that if the said ceremony had indeed taken place, which is doubtful, then the same was conducted in absolute secrecy. This is contrary to the accepted practice where marriages are conducted

and are known to the residents of the locality where the 'couple' resides.

Further, this court having evaluated the evidence of the said three witnesses of the petitioner formed the opinion that the contradiction in their evidence was such that it raises a possibility that the entire evidence was contrived. For instance, while it is a known fact that for a marriage under the Kipsigis Customary Law to be considered as valid, dowry must be paid in form of livestock, in the case of the alleged marriage between the deceased and the mother of the petitioners no such dowry was paid. Further it is clear from the evidence of the petitioners said witnesses that the mother of the petitioners and the deceased never at any time lived together in the same house.

The evidence of PW3 that the mother of the petitioners continued staying at her parents home after the celebration of the said marriage raises doubt that the said marriage actually took place. Another piece of contradictory evidence which was adduced by PW5 was to the effect that when the deceased married the mother of the petitioners, she already had her seven children. What the said witness was trying to impress to the court was that the deceased married the mother of the petitioners with a view of adopting her children as her own. The said evidence contradicts the evidence of the petitioners which was to the effect that the deceased had married their mother before they were born.

It is therefore the finding of this court that the petitioners have failed to prove to the required standard of proof on a balance of probabilities that the deceased married the mother of the petitioners under the Kipsigis Customary Law. I found the evidence of the objector that the deceased had only married his mother to be truthful. The evidence of his witnesses, particularly that of DW2 was cogent and consistent and indeed confirmed that the fact that deceased had not married the mother of the petitioners. The truth of the matter is that the mother of the petitioners never at any time during her lifetime lived on the parcel of land owned by the deceased. Neither did she attempt to reside on the said parcel of land until her death in 1996. It is only after her death that the petitioners attempted to lay claim on the deceased's parcel of land ostensibly because they alleged the deceased had married their late mother.

The petitioner (PW1) concedes that he was circumcised by his maternal uncles who named him Arap Biegon after his mother's clan. The petitioner did not even know the clan of the deceased. The objector on the other hand was circumcised by the deceased and was named Arap Chepkwony meaning that he was the son of a woman i.e. his 'father' was a woman. I found the evidence of the objector in that regard to be truthful. I also found his evidence that he chased away the petitioners in May, 2001 when they attempted to trespass into the deceased's parcel of land by erecting a structure thereon to enable them lay a claim over the said parcel of land, to be truthful. The evidence by the petitioners that the objector, with the assistance of his mother, chased their mother away from the parcel of land belonging to the deceased could not therefore be the truth.

The sum total of my analysis of the evidence adduced by both the petitioners and the objector is that I declare the objector and his mother to be the sole beneficiaries of the estate of the deceased. The petitioners in my view are opportunists who want to take advantage of the fact that the deceased had not given birth to any children to impose themselves on her parcel of land. The petitioners however overlooked the fact that under the Kipsigis Customary Law, the objector was already recognized as a son and heir to the deceased's estate. The petitioners are strangers to the deceased. **Under the Law of Succession Act** and also under the **Kipsigis customary Law** they have no right to inherit the deceased's parcel of land.

The objection proceeding is hereby upheld. The objector and his mother are declared to be the sole dependants of the deceased. They shall inherit the deceased's estate. The objector shall have the costs of this objection proceeding. The letters of administration intestate in respect of the deceased's estate are hereby granted to the objector. The same shall be confirmed after the expiry of the requisite period as provided by the law.

DATED AT KERICHO THIS 7TH DAY OF JUNE, 2006

L. KIMARU

JUDGE