



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 561 OF 2013

CONSOLIDATED WITH HCC 12 OF 2006

BENJAMIN KIBIWOT CHESULUTPLAINTIFF

VERSUS

MARY CHELANGAT1ST DEFENDANT

WILSON KERICH2ND DEFENDANT

JUDGMENT

(suit by plaintiff to have defendants evicted from his land; Defendants claiming to be wife and son of plaintiff and making counterclaim for portion of land; son demised in course of proceedings and mother wanting to inter him on suit property; whether 1st defendant was married to plaintiff; no proof of marriage; no other right to claim the land; no proof that 2nd defendant was son, but even if he was, no right to claim the property while plaintiff still alive; no right to inter his body in the suit property; plaintiff's suit succeeds; defendants counterclaim dismissed).

1. This judgment is in respect of two files which were consolidated. The first suit was originally filed in the High Court at Nakuru and registered as Nakuru High Court Civil Suit No. 12 of 2006. This suit has two person as plaintiffs, that is, Benjamin Kibiwot Chesulut and Samwel Kitenya, and two persons as defendants, that is Mary Chelangat and Wilson Kerich. In the plaint, it was pleaded that Benjamin Chesulut is the owner of the land parcel Plot No. 42 Kirobon within L.R No. 11323 measuring approximately 60 acres (the suit property) and that the 2nd plaintiff had leased 24 acres of the said land from the year 1998. It was pleaded that on 10 January 2006, the defendants invaded the said land and forcefully evicted the 2nd plaintiff hence dispossessing him. It was pleaded that they proceeded to erect structures on the land. In the suit, the plaintiffs sought vacant possession of the suit property, general damages for unlawful occupation, and mesne profits of Kshs. 40,000/= per month.

2. The defendants filed defence which they amended on 22 February 2013 to include a counterclaim. They denied that they are strangers in the suit property and pleaded that they have been dependants of the 1st plaintiff (Chesulut) as wife and son respectively. They denied trespassing into 24 acres said to have been leased to the 2nd plaintiff and pleaded that instead, it is the 2nd defendant who has trespassed into 5 acres of the suit land which they are entitled to. In the counterclaim, they pleaded that Chesulut voluntarily settled them on 5 acres of the suit property but that Chesulut has persistently harassed them with a view of evicting them. They sought prayers that they are entitled to be declared owners of 5 acres of the suit property and sought a perpetual injunction to restrain the plaintiffs from interfering with their

peaceful use of this portion of 5 acres.

3. The second suit was filed in the Environment and Land Court as Nakuru ELC Case No. 561 of 2013. Chesulut is the sole plaintiff whereas the defendants are the same as in the previous suit. The prayers sought in the plaint are a declaration that the plaintiff is owner of the suit property and for a permanent injunction to restrain the defendants from the said land. There is also a prayer for general damages. It is not clear why this suit was filed as the prayers sought are really no different from those sought in the first suit. Be as it may, the defendants filed defence in which they inter alia pleaded that they own part of the suit property as it was given to the 1st defendant (Chelangat also described in the proceedings as Mary) as wife to Chesulut.

4. Before anything could happen to this second suit, the 2nd defendant (Wilson) died in the month of February 2015. Chesulut filed an application for injunction to stop the burial of Wilson on the suit property. I directed that instead of hearing the application, the suit itself proceed for hearing on merits. I was of the view that the claim of the 2nd defendant (deceased) was similar to that of the 1st defendant and the same could be subsumed in the 2nd defendant's claim. I directed the matter to proceed as it is and the body of the 2nd defendant not to be interred pending hearing of the case.

B. EVIDENCE OF THE PARTIES

(i) Plaintiff's evidence

5. Mr. Chesulut testified that he is aged 84 years old and engaged in farming. He stated that he has a home in Ngata and in Keringet areas. He was previously employed as a teacher and retired in the year 1997. He testified that he purchased the suit property from Kirobon Farmers Company Ltd and produced an allotment letter from the said company showing that he has been allocated the suit property. He testified that in the year 2000, he received information from his cattle herder that Wilson (the deceased) had trespassed into the suit property and was building a timber house. He testified that the two did not have his permission to be on the land and he was not happy with their presence. He stated that Wilson had even proceeded to deface his mother's (Chesulut's) grave. He reported their presence to the police and both Chelangat and Wilson were arrested. They were charged and convicted of trespass. He testified that he has no relation whatsoever with Chelangat and had no idea how she settled on his land. He denied having any relationship with Wilson. He stated that he has never lived with any of them and has never been husband to Chelangat. He testified that he has never built a house for Chelangat and has never supported either Chelangat or Wilson in any way. He denied that Wilson is his son. He stated that he had no idea where the two used to live prior to them coming into his land but he knew Chelangat's father, who was also a member of Kirobon Farmers Company Ltd, and who had purchased 80 acres. He stated that Wilson ought to be buried elsewhere but not on his land and that Chelangat ought to be removed from his land.

6. In cross-examination, he stated that the name Kipkerich (tied to Wilson's name Kerich) was a nickname that he carried but was not his official name. He admitted having a son bearing the surname Kerich but stated that he did not know how come Wilson also bore the surname Kerich. He testified that his ancestral land is in Kabianga in Kericho at Kibingei village. He was the only son to his mother, but he has several step-brothers. He stated that he has 4 wives. The first wife, Taprandich is deceased; the second wife is Borta; the third wife Leah; and the 4th wife Lina. Leah and Borta live in Ngata, whereas, Lina lives in Keringet, on the suit property. He stated that he married his wives under Kipsigis Customary Law. He denied that one Kibet, a son of one of his step-brothers was circumcised together with Wilson, at his (Chesulut's) home. He denied having participated in the circumcision ceremony of Wilson. He denied having taken Wilson to the suit property in the year 1998 and denied having showed him a place to till on the suit property. It was put to him that Chelangat's father was present when he showed Wilson where to settle, and this he denied. He testified that Chelangat and Wilson came to the land in the year 2000 without his permission. He filed a case against Chelangat in the Molo Magistrate's Court. He could not tell how many children Chelangat has. He denied having been in any relationship with Chelangat, even as a girlfriend.

7. PW-2 was Joel Kimitei Korir aged 64 years old. He is a nephew of Chesulut being son to his sister. He testified that he knows Chesulut well as he was raised up by him as one would raise up his own son. He testified that he knows the whole of his family as he is also part and parcel of the same. He testified that Chelangat and Wilson are not part of the family of Chesulut. He testified that they have never been to any marriage ceremony to celebrate the marriage of Chelangat to Chesulut. He testified that he does not even know Wilson, and has never met him, and only read of his death in the newspapers, which showed that he was aged 46 years at the time of death. He testified that on the suit property, lives Lina and her children, and also several sons of Leah. He testified that they have tried on several occasions to remove Chelangat and Wilson.

8. In cross-examination, PW-2 testified that he lives in Subukia and that he started living with Chesulut in the year 1971. He went to Secondary School in Kabianga, and he testified that at that time, Chesulut used to live in Kibingei. He testified that Chesulut moved to Ngata in the year 1973. He was cross-examined extensively on the family of Chesulut and he mentioned his wives and children and where they live. He testified that some of the sons of Chesulut bear the surname Kerich and others Biwot. He knew Chesulut's proper name as Kibiwott, and not Kipkerich and testified that according to Kipsigis custom, the preface "Kip-" is usually dropped when using the father's provided name as surname of the sons. He testified that Chelangat's parents also lived in Kibingei and he used to see Chelangat in the village. He was aware that Chelangat's family moved to Ngata, but was not sure of the year and whether Chelangat lived with them. He was not aware of any "Koito" ceremony, having been performed on behalf of Chelangat. He testified in re-examination that no house has ever been built for Chelangat and that he would have visited if one was built.

9. PW-3 was Noah Kiprono Kerich. He is 60 years old and is son to Chesulut. He is the first born son of Taprandich, the first wife of Chesulut. His mother died in the year 1964. He testified that his father, has three other wives whom he named. He denied that Chelangat was wife to his father. He testified that she has no home or house built for her. He testified that she entered into the suit land by force and developed it. He stated that Chesulut restrained them and chose to prefer charges against her in court. He denied that Wilson was his brother despite the use of the surname Kerich.

10. In cross-examination, PW-3 stated that within the family, several of his step-brothers bear the surname Kerich. He testified that Chelangat was about a year or two older than him and he used to see her at Kibingei when he was young. He testified that between the years 1978 and year 2000, it was Leah and Lina who lived on the suit property but that Leah now lives in Ngata, although her children are in Keringet. He stated that she has a house built for her in both Keringet and Ngata. He knew Kibet, but could not tell whether he was circumcised together with Wilson. He stated that he only came to know Wilson in the year 2000 and does not recognize him as his brother. He had no knowledge of any marriage between Chelangat and Chesulut and stated that he has never been informed of any "Koito" (engagement) ceremony.

11. With the above evidence, Chesulut closed his case.

(ii) Defence evidence

12. Mary Chelangat testified as DW-1. She testified that she was born in Kericho and knows Chesulut as father to her children. She testified that she got married to Chesulut while in Kabianga but could not tell the year. She testified that she got married to him through a traditional wedding under custom. She stated that she lived with him and got a child who died. It is after this that they conducted a traditional wedding ceremony. She testified that there were about 12 people in the wedding ceremony. Her father was present. She could also recall, Chepsoo Chepkwony and arap Soi, as among those who were present. She testified that others have since died. She stated that they lived in Kabianga for about 3 years. That is where she got her first child who died and also gave birth to Wilson. She stated that she now had four other children after Wilson, namely, Patricia, Charles Kerich, Irene, and Lorna. She testified that Patricia was born in Subukia where she was living with the plaintiff, who was then a farm manager at Koelal Enterprises. Charles, Irene and Lorna were born in Ngata at the home of her father. She testified that Chesulut was employed as a teacher in Sondu, and in Kiptere, before he resigned to become a farm manager. He later

left this job and went back to teaching at Kibingei until he retired. She stated that while he was teaching, she used to live with his (Chesulut's) mother and that it was only in Enterprise (Subukia) and Lumek (Sondu), that they lived together with Chesulut. She testified that at some point he taught at Kabianga and during this time, she used to live with Chesulut's mother. She did not have a house of her own and they would have their private moments at Borta's house, as she had a house in Kabianga. She stated that she is the third wife after Borta. She knew the plaintiff's father and mother of Chesulut and named some of his siblings.

13. She testified that Wilson was circumcised together with Kibet at Kabianga and that it was the plaintiff who took him for circumcision. She stated that Wilson went to school at Kabianga and finalized his education at Ngata, and that it was the plaintiff who catered for his education.

14. She testified that Chesulut had told her to stay at their home until he gave her land. She stated that later he took Wilson to the suit land, and that Wilson built a grass-thatched house, and later a mud-walled house with a mabati roof. He also built a separate kitchen and dug a well. She testified that Wilson got married and now has 5 children and has been on the land for over 20 years. She testified that Chesulut had her charged in Molo Court and was of the opinion that he did not want her where he had shown Wilson land. She testified that she and Wilson were charged with trespass. The judgment of the appellate court in that criminal case was produced as an exhibit.

15. She stated that one Alfred, a step-brother of Chesulut also lives at the suit land. She testified that the plaintiff had pointed out 5 acres to Wilson but later buried his mother within this portion of land. She stated that Chesulut has recently allocated one acre out of this portion to Alfred who has now built a house.

16. She added that when Chesulut wanted to marry her, he asked her parents for her hand. She stated that they came to her parents' home and asked them for permission to marry her. She stated that her father is now deceased but her mother is still alive.

17. In cross-examination, Chelangat could not remember the year that she got married to Chesulut. She mentioned some names of a few people who she said were present. Of those present, one Chepsoo, who married from the same family as her father, was her closest relative. This evidence later changed in further cross-examination where she stated that her parents were present. She was specifically asked whether any dowry was paid and she said none was paid. She stated that of Chesulut's family, only his mother was present. They did not go to Chesulut's home after the wedding ceremony but she stayed at her home for about a week. She admitted that Chesulut never built for her a house.

18. She testified that her first child was buried at Chesulut's father's home at Kibingei and that they got six children in total (although on further cross-examination, she stated that the burial was on Chesulut's own land at Kabianga). She stated that she has another surviving son who lives with her in the suit land. She reiterated that Chesulut showed Wilson 5 acres of the land, and that after about one week, she joined him. She stated that Chesulut gave Wilson the land and not her, because at that time, she was working in Nakuru Town, and did not have time to be with Wilson when he was shown the land. She could not remember the year that Wilson was shown the land.

19. She testified that they had their matrimonial home in Kabianga where they lived for a long time.

20. DW-2 was one James Kipsigei Chepkwony, aged 69 years old. He is brother to Chelangat. He testified that he knows Wilson as the son of Chesulut and that Chesulut married Chelangat around the year 1960. He stated that they were lovers before and later Chesulut's mother came to ask for her to be married by Chesulut. He stated that he himself did not participate in dowry negotiations and that dowry was discussed by Chesulut's mother, and parents to Chelangat. He stated that they were just the three of them. He stated that on this day, dowry was not agreed, but that on the following day, Chesulut's mother delivered 3 cows as dowry. He stated that their father wanted 6 cows as dowry and kshs. 1,000/= in cash. Chesulut's mother said that she will deliver the other 3 cows in Kirobon but their father wanted the cows immediately so a stalemate ensued. He stated that despite this lack of agreement on dowry payable,

Chesulut continued living with Chelangat and they got a child. The child unfortunately got sick and died. He testified that the child was buried at their (Chelangat's) father's home. He stated that later in time, Chesulut differed with Chelangat after they got their second child and Chelangat came back home. He could not tell from whom Chelangat got the other children. He testified that his father subsequently sold the land in Kibingei and moved to Nakuru. Chelangat was initially left with her mother in Kericho but later joined them.

21. He testified that for one to be recognized as a wife in Kipsigis custom, there must be a ceremony called "tumtokeset" where grass is tied around the wrist. He stated that he was not present in such ceremony but was informed that it was done.

22. He testified that Wilson at some point informed him that he had asked (Chesulut) for some land, and when they met later, Wilson advised him that Chesulut had given him land in Keringet.

23. In cross-examination, DW-2 stated that it was only Chesulut's mother who came to ask for the hand of Chelangat although his (Chesulut's) father was still alive. His father did not attend, but according to DW-2, either parent could attend. He stated that Chelangat did not go with Chesulut after delivery of the three cows because their father was waiting for all six cows to be paid. He stated that in the meantime, Chesulut invited Chelangat to live with him.

24. With the above evidence the defence closed its case. I should probably mention that after the close of the Defence case, an application for DNA testing was made. I considered it on merit and rejected it. As far as my knowledge goes, there is no appeal against that ruling.

C. SUBMISSIONS OF COUNSEL

25. In his submissions, counsel for the defendant, submitted that Chelangat and her brother testified that Chelangat was wife and Wilson was son to Chesulut. He submitted that there was evidence of two ceremonies, the Koito, and the other, where grass was tied around the wrist. He submitted that a trust has arisen and that the defendants are entitled to 5 acres of the suit land. He relied on the case of ***Mbui Mukangu v Gerald Mutwiri Mbui (2014) eKLR***.

26. Counsel for the plaintiff on the other hand submitted that it has been shown that the plaintiff is owner of the suit land. He submitted that the defendants had failed to prove paternity or a valid marriage, if any. He further submitted that proprietorship does not accrue by dint of paternity, more so, where the property in issue is not ancestral property. He submitted that the plaintiff could only be held to hold the land in trust if it was ancestral land. He submitted that the case of ***Mukangu v Mbui*** was distinguishable to this case. On his part, he relied on the case of ***Ahmed Ibrahim Suleiman & Another vs Noor Khamis Surur (2015) eKLR***.

D. DECISION

27. It is with the above pleadings, evidence and submissions that I need to determine this suit. But before I go any further, I sincerely wish to give my condolences to Chelangat, who has lost a son. I can only imagine the pain of a mother who has lost a child. In as much as I have great sympathy for her, my decision will however only be on the basis of the law and facts tendered.

28. Although this is a consolidation of two suits, and in the first suit, there was also named Samwel Kitenya as plaintiff, I think the real plaintiff in both suits is Chesulut. The core issue is whether he is entitled to have the suit property exclusively to himself or whether the defendants are entitled to a share of the same. The defendants have in fact laid claim to 5 acres of the suit property.

29. It is not in contention that it is the plaintiff who is the legal owner and proprietor of the suit property. This is in fact not denied by the defendants. Their claim over the property is based on the ground that Chesulut is husband to Chelangat and father to Wilson, and because of that relationship, then they are entitled to a portion of the suit property. Pursuant to this claim of a right to a portion of the suit property,

it is the assertion of Chelangat, that she has every right to bury Wilson on the suit property.

30. In my view, this suit may be disposed off by answering the following questions .

- (i) Was there any marriage between Chesulut and Chelangat ?
- (ii) Is Chelangat entitled to the suit property whether or not there was a marriage ?
- (ii) Is Wilson the son of Chesulut ?
- (iii) Is Wilson entitled to the land, whether or not he is the son of Chesulut ?
- (iv) Is Chesulut obliged to permit Chelangat to reside on the suit property ?
- (iv) Is Chesulut obligated to have Wilson buried on the suit property ?

Issue 1 : Was there any marriage between Chesulut and Chelangat ?

31. The case of Chelangat is premised upon the assertion that she is the wife of Chesulut. Chesulut on the other hand was categorical that he has no relation of whatever kind with Chelangat.

32. I have found significant inconsistencies between the defendant and her witness on whether there was ever a marriage ceremony, and if there was one, when and how it was conducted.

33. According to the evidence of Chelangat, before conducting the traditional wedding, she used to live with Chesulut. They got a child before the traditional ceremony, which child died, and was buried at Chesulut's father's home. DW-2 on the other hand testified that Chesulut and Chelangat got a child after the traditional marriage ceremony. He also testified that Chelangat's first child was buried at Chelangat's father's home, not Chesulut's home.

34. It will also be noted that Chelangat testified that at the traditional ceremony, there were about 12 people in attendance. It was also her evidence that no dowry was ever paid. DW-2 did not attend any marriage ceremony, but only heard that one was conducted. However, he stated that he was present when dowry negotiations were done, and such negotiations were only conducted by three persons, that is the mother of Chesulut and the parents of Chelangat. He stated that there was no agreement on dowry, but that three cows were nevertheless delivered. These are of course considerable inconsistencies between the evidence of the two.

35. Of significance too, no person who was said to be present at either the dowry ceremony, or the wedding ceremony, was called as a witness. Chelangat mentioned that her mother was alive, and also mentioned several other persons who she stated attended the ceremony and who are still alive, but none was called as a witness to prove that these functions indeed took place as alleged.

36. It is sad that neither party deemed fit to call an expert witness on the conduct of marriage ceremonies and of the customs of the Kipsigis tribe. I have been forced to seek recourse to *Cotran, Restatement of African Law, Volume 1, The Law of Marriage and Divorce, Sweet & Maxwell, (1968)*. Chapter 11 of the text covers the Nandi and Kipsigis traditions. At pages 115 and 116 thereof, the text explains that first when a boy selects his bride, he informs his parents. The parents of the boy then visit the girl's family to ascertain their assent and dowry negotiations (*Koito*) take place. If the discussion is successful, the agreement reached is sealed by a ceremony at which the girl, hands butter to her father, and her father anoints the parents of the boy. A day is then fixed for the girl's family to visit the boy's family to view the cattle to be paid as dowry. After inspection of the cattle, a day is fixed for the *ratet* ceremony, the most important of ceremonies, which takes place at the boy's home. In the ceremony, the bride and groom, tie a special grass, *segutiet*, around each other's wrist.

37. Chelangat herself did not mention any *ratet* ceremony. She stated that no dowry was paid. If I am to

follow Chelangat's version, I find it unusual that only 12 people would be present in such an important occasion. If I am to follow the version of DW-2, I find it curious that he himself would be absent in such an important ceremony, given that he is the immediate elder brother of Chelangat. I also find it strange that Chesulut's father would not be present in dowry negotiations, and that the dowry negotiations, according to DW-2, were conducted by the mother to Chesulut. That to me does not add up. Interestingly, Chelangat could not even remember the year that she got married. I take judicial notice that traditional marriage ceremonies and dowry negotiations are great occasions which involve a number of people from both the clan and village, not a handful, and certainly not just three people as mentioned by DW-2. Neither are they easy occasions to forget.

38. On the other hand, Chesulut's witnesses testified that they do not know Chelangat as wife of Chesulut. They testified that Chelangat has no home built for her by Chesulut, a fact confirmed by Chelangat herself. If indeed Chesulut had married Chelangat, I would have expected him to settle her in a certain place, just as he had settled all other of his wives. I would also have expected some sort of interaction with the rest of the family, for Chesulut is a polygamous man. But there does not seem to have been any sort of relationship between the children of Chelangat and the rest of the family of Chesulut, both nuclear and extended.

39. From the above, I am not convinced that any traditional marriage took place. If ever there was intention for Chesulut to marry Chelangat, that intention never evolved into a full blown marriage. That is the reason that the first child of Chelangat, was not buried at Chesulut's home, but was buried at Chelangat's father's home. DW-2 in fact gave an elaborate account of how the child died, and how he was buried, which account I consider more credible than that delivered by Chelangat.

40. On the first issue therefore, I do hold that Chelangat was never married to Chesulut.

Issue 2 : Is Chelangat entitled to the suit property whether or not there was a marriage ?

41. Chelangat's case is that she is entitled to the suit land by virtue of her marriage to Chesulut. She has claimed five acres of it. I have already held that there was no marriage between Chelangat and Chesulut. It follows that Chelangat cannot claim the suit property by dint of marriage, because none exists. Can she now claim the land by any other means ?

42. I do not see how Chelangat can claim the land. There is no evidence of sale, assignment, or even adverse possession of the land. In fact, the evidence shows that immediately Chelangat set foot on the suit land, Chesulut filed a complaint for Forcible Detainer (not trespass) and Chelangat was duly charged in the Molo Magistrate's Court. She was convicted in the first instance, but succeeded on appeal. The appellate court was of the view that there was a reasonable doubt created, owing to the defence raised by Chelangat in the criminal case, that she was wife to Chesulut.

43. Counsel for the defendant argued that a trust has been created, and the question that I now ask is, by what method was such trust created ? Chelangat could at most have been a girlfriend, and I do not agree to the hypothesis, that a girlfriend is entitled to the land of the boyfriend, based solely on that loose relationship. That will be stretching the concept of a trust too far. I have looked at the case of ***Mbui Mukangu vs Gerald Mutwiri Mbui*** relied on by counsel for the defendant. But the facts therein are completely distinguishable to those in this case. In the said case, the dispute was between a father and son, where the relationship between the two was not in doubt, and the land in issue was ancestral land. The court held that there was a customary trust created between the two parties. That is not what we have in this case. The land in issue is not customary land and neither has it been shown that Chelangat is wife to Chesulut.

44. I will shortly address the issue of whether Wilson is son to Chesulut on the next point, suffice it to state that in so far as the relationship of Chesulut and Chelangat goes, I am not prepared to presume any trust between the two that would bestow any rights to Chelangat over the suit property.

Issue 3 : Is Wilson the son of Chesulut ?

45. From the evidence tendered, I am unable to make a concrete finding on whether or not Wilson is Chesulut's son. Chesulut completely denied having sired Wilson, and he called his relatives to demonstrate that at no time did he have any attachment to him. On the other hand, Chelangat insisted that Chesulut was father to Wilson. She pointed out to the use by Wilson, of the surname "Kerich" , which was a nickname of Chesulut. But I do not think that this alone would be proof enough of paternity.

46. It was also stated that Wilson so closely resembles Chesulut's son, but again, I find this to be too farfetched in the circumstances, and even if it was not, I did not have the benefit of seeing Wilson for myself, so that I can compare his features with that of the sons of Chesulut or to Chesulut himself. I already mentioned that I rejected the application for DNA. Thus , whether or not Wilson was son to Chesulut, is a matter that I am completely unable to resolve with the evidence before me. It could be that he is son to Chesulut, but again, it could very well be that he is not, and without any evidence, I do not wish to state any more on that.

Issue 4 : Is Wilson entitled to the land, whether or not he is the son of Chesulut ?

47. The important question is whether Wilson is entitled to part of the suit land, specifically, the five acres that he has claimed jointly with Chelangat. His entitlement to the land is based on nothing more than the argument that he is son to Chesulut. I have already held that I am unable to tell from the evidence before me, whether Wilson is son to Chesulut, but even assuming that he is son to Chesulut, would that alone give him entitlement to five acres of the suit property ?

48. It is not alleged that Wilson purchased, leased, or had 5 acres of the land transferred to him. Counsel again relied on the concept of a trust and the holding in *Mbui Mukangu v Mbui*. I have already mentioned that the holding in that case was based on ancestral land, and on the reasoning, that the respondent was born on that land and was raised up therein. That is not the position in our case. Wilson was not born on the suit land and neither was he raised on it. Neither is the suit property the ancestral land of Chesulut.

49. Can the fact that one is son to another, entitle the son to the property of his father, while his father is still alive ? This indeed is precisely what Chelangat is arguing; that because she is of the view that Wilson is son to Chesulut, then Wilson is entitled to 5 acres of the suit land, as of right. On my part, I find it difficult to infuse into our jurisprudence, a decree that a son is entitled, as of right, to whatever share he deems fit out of his father's (or mother's) personal property, irrespective of the wishes of the father, while the father is alive (or mother as the case may be). That in my view, will be too dangerous a precedent, for any son (or indeed daughter) would simply take over the property, or properties, of their parents, irrespective of their parents' wishes or intents, and deal with the same as they wish. In my view, if indeed Chelangat is certain that Wilson is son to Chesulut, then she has to await until the estate of Chesulut is being shared, to claim a right on behalf of Wilson, for a share of his estate. It may still therefore be worthwhile to preserve the DNA of Wilson, just in case, such issue has to be dealt with in future. But I am not prepared to hold that simply because Wilson was son of Chesulut (assuming that he was), then he is, solely by dint of that relationship, entitled to 5 acres of the suit land.

50. It was said that Chesulut gave Wilson the land, but there is no such evidence. In fact it seems to me that Chesulut was not comfortable with the presence of Wilson on the suit property. It will be noted that he commenced his civil cases against both Wilson and Chelangat way back in the year 2006, and I find it difficult to come to the conclusion that Chesulut promised Wilson, or Chelangat, any land out of the suit property.

51. My finding on this issue therefore is that so long as Chesulut is alive, neither Wilson nor Chelangat can force him to cede part of his property to them.

Issue 5 : Is Chesulut obliged to permit Chelangat to reside on the suit property ?

52. I have already held above, that I do not see on what basis Chelangat is entitled to the suit property, and I have also not seen any basis upon which Wilson would be entitled to the suit property. Chesulut is

the sole proprietor of the suit property and he does not have any legally recognizable union with Chelangat. As owner of the suit property, he is entitled to deal with it as he wishes, and he has a right to determine whom to give the right of ingress and egress. If he wants Chelangat in his property, so be it, but if he does not want Chelangat in his property, he cannot be forced to have her in his property, and neither can he be forced to donate to her 5 acres of the suit property. I have already held that there was no marriage between the two, and their relationship at best, was that of boyfriend and girlfriend at some point. That I have already mentioned is not good enough to create a trust, which would oblige Chesulut to cede some land to Chelangat.

53. My holding on this issue is that Chesulut has every right to bar Chelangat from the suit property and is therefore entitled to an order of permanent injunction.

Issue 6 : Is there any obligation on Chesulut to have Wilson buried on the suit property ?

54. I think not. It cannot be contested that there would be no such obligation if Wilson was not son to Chesulut. But let us assume that Wilson is son to Chesulut; would that alone, make this court compel Chesulut to inter the remains of Wilson in the suit property ? The property is not ancestral land and Wilson cannot lay any ancestral claim to it. The land is wholly owned by Chesulut. He has a right to deal with the property as he wishes. If he does not wish to have anyone buried on that land, that is his right. It follows that even if Wilson is son to Chesulut, that does not in any way oblige Chesulut to bury him on this land.

55. I have not found any law upon which he can be compelled to inter Wilson, and none has been shown to me. Neither have I found any law upon which Chesulut can be compelled to have interred, the body of Wilson, on the suit property, and none has been referred to me by counsel for the defendants.

56. Chesulut had little or no attachment to Wilson. He was not married to Chelangat, his mother, and he never recognized Wilson as his son. By written law, he has no duty to bury Wilson. Even if we are to go by custom, custom would still not compel him to bury Wilson, let alone to have him buried on his land. According to Kipsigis custom, a child born out of wedlock is regarded as that of the girl's father (See *Cotran, supra*, page 121).

57. There being no obligation upon Chesulut to bury Wilson, then I am unable to hold that Chesulut has an obligation to have the remains of Wilson interred on the suit land.

58. I think I have dealt with all issues in this case. I now need to deal with the orders sought. In the first suit, the plaintiffs sought vacant possession of the suit property, general damages for unlawful occupation, and mesne profits of Kshs. 40,000/= per month. In the second suit, the plaintiff sought a declaration that he is the owner of the suit property and for a permanent injunction to restrain the defendants. No evidence of mesne profits was tendered by the plaintiff and I am unable to award anything on this head. I however agree that the plaintiff is entitled to a declaration that he is the owner of the suit property as against the defendants, and also for a permanent injunction in his favour. As to general damages, for unlawful occupation, I make a token award of Kshs. 5,000/= in his favour. Chelangat on the other hand had sought orders that she is entitled to 5 acres of the suit property jointly with Wilson. I have held that she has not demonstrated any written law or custom which would make her entitled to any share of the suit property. Her claim therefore fails. As to costs, I am not too happy with the fact that Chesulut filed two cases seeking more or less the same orders. He will only get costs for one suit.

59. I now make the following final orders :-

(a) As between the plaintiff (Chesulut) and the defendants, I declare the plaintiff the owner of the whole of the property described as Plot No. 42 Kirobon within L.R No. 11323.

(b) I direct Mary Chelangat to move out of the property Plot No. 42 Kirobon within L.R No. 11323 forthwith and if she does not then the plaintiff is at liberty to apply for her

eviction.

(c) *I issue a permanent injunction restraining Mary Chelangat from the property Plot No. 42 Kirobon within L.R No. 11323.*

(d) *I make an order that Mary Chelangat has no right to inter the body of Wilson Kerich on the property Plot No. 42 Kirobon within L.R No. 11323 and that Benjamin Chesulut has no obligation to bury the said Wilson Kerich on the said property .*

(e) *I make a token award of Kshs. 5,000/= as damages for trespass in favour of the plaintiff against Mary Chelangat.*

(f) *I award the plaintiff costs of one suit only which will be the case with the lesser costs.*

60. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 14th day of May 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr Biko for the plaintiff.

Mr Cheruiyot holding brief for Mr Morintat for defendant.

Court Assistant: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU