



**Bor ((Suing as the legal administrator of the Estate of the Late Kiptiniya Arap Maiyo)) v Ngisirei (Environment & Land Case 103 of 2021) [2023] KEELC 443 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 443 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KAPSABET**  
**ENVIRONMENT & LAND CASE 103 OF 2021**  
**MN MWANYALE, J**  
**JANUARY 31, 2023**

**BETWEEN**

**HELLEN JEPTUM BOR (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE KIPTINIYA ARAP MAIYO) ..... PLAINTIFF**  
**(SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE KIPTINIYA ARAP MAIYO)**

**AND**

**EVERLYN CHEMOGON NGISIREI ..... DEFENDANT**

**JUDGMENT**

1. Hellen Jeptum Maiyo, also known as Hellen Jeptum Bor (suing as the legal administratix of the Estate of the Late Kiptiniya Arap Maiyo took out an Originating Summons dated 20<sup>th</sup> April 2021 through her Advocates on record Messrs. Isiaho Sawe and Company Advocates, seeking orders;
  - i) That a declaration do issue that the Respondent, Evelyn Chemogon Ngisirei, is holding L.R. NO. NANDI/NDALAT/282 as a Trustee for an/on behalf of the beneficiaries of the late Tapletgoi Kobot Kiplelmet who passed away on 15<sup>th</sup> June 1967.
  - ii) That a declaration do issue that L.R. NO. NANDI/NDALAT/282, is subject to a generational trust, the same constituting an ancestral land.
  - iii) That a declaration do issue that the registration of one Evelyne Chemogon Ngisirei, the Respondent herein, over the suit parcel of land as L.R. NO NANDI/NDALAT/282 is purely as a trustee for the Applicant and all other beneficiaries of the Estate of the late Tapletgoi Kobot Kiplelmet.
  - iv) That upon the grant of prayers 1, 2 and 3 above, the Respondent’s aforesaid trust over the suit parcel of land be accordingly terminated and in its place the suit parcel of land be distributed



to the legal beneficiaries entitled thereto including the Applicant and all the children of the late Kiptiniya arap Maiyo (Deceased).

- v) That the title deed in the name of one Evelyne Chemogon Ngisisrei, the Respondent herein be accordingly cancelled and in its place, titles do issue in respect of the beneficiaries entitled thereto including the Applicant and all the eight (8) children of the late Kiptiniya arap Maiyo (deceased)
  - vi) Costs of the suit.
2. The Respondent filed a Replying Affidavit in opposition to the originating summons.
  3. Simultaneous with filing of the Originating Summons, the Applicant filed an application, notice of motion dated 20/4/2021, which sought temporary injunctions pending initially hearing of the application and later hearing of the case.
  4. On 24/5/2021, before the Hon. Justice Kibunja sitting at Eldoret, Environment and Land case, interim orders were issued in terms that status quo on both the ground and the register of all that parcel of land known as L.R. NO. NANDI/NDALAT/282 were issued.
  5. The matter was thereafter transferred to Kapsabet ELC upon establishment of the Court and when the Advocates for the parties appeared in Court on 8/11/2011, they agreed by consent for the orders issued on 24/5/2021 to be confirmed pending hearing and determination of the case, and leave was granted filing of further Affidavits.
  6. The Applicant and Respondent did not take directions for conversion of the Originating Summons to a plaint but called witnesses to testify, consequently on the strength of the decision by the Court of Appeal in the case of **Shedrack Bungei vs Selina Jerotich Eldoret Civil Appeal No. 4 of 2018** deemed the calling of witnesses as conversion of the Originating Summons to a plaint and the Replying Affidavit to a defence.
  7. The Applicant shall now be referred to as Plaintiff and the Respondent shall now be referred to as the Defendant.

#### **PLAINTIFF'S CASE:-**

8. It is the Plaintiff's claim as deponed in her affidavit in support of the originating summons that;
  - a) She is the widow of the late Kiptiniya Arap Maiyo who was the adoptive son of the late Lemet and the late Tapeletgoi Kobot Kiplelemet; and was the administratrix of the Estate of the late Kiptiniya Arap Maiyo
  - b) That she was married to the said Kiptiniya Arap Maiyo in accordance with Nandi Customary Law in 1979, and they settled on L.R. NO. NANDI/NDALAT/282 which belonged to the late adoptive parents, to wit, the late Tapeletgoi Kobot Kiplelemet.
  - c) Her late husband had been adopted by the Lemet and Tapeletgoi at young age whereupon the adoptive parents.
    - i) initiated/circumcised him as their child
    - ii) Dowry for his 1<sup>st</sup> wife paid for by the late Tapeletgoi Kobot Kiplelemet as her mother.
  - d) That the late Lemet proceeded his wife in death and the late Tapeletgoi Kobot Kiplelemet's married under a woman to woman marriage, to the Defendant Evelyne Chemogon Ngisisrei.



- e) That the Respondent Evelyne Chemogon Ngisirei, secretly undertook succession after the death of her husband Tapletgoi Kobot Kiplelmet without involving Kiptiniya Arap Maiyo.
- f) Having been registered as the proprietor of NANDI/NDALAT/282, the Defendant threatened to evict the Plaintiff in 1998 and the dispute was referred to elders who resolved that the Kiptiniya Arap Maiyo was a son of the late Lelmet and late Tapletgoi Kobot Kiplelmet.
- g) That the threat to evict the Plaintiff was repeated recently leading to filing of the suit seeking orders as captured in paragraph 1 of this judgment.

**DEFENDANT’S CASE:-**

9. The Defendant’s Replying Affidavit deponed on 31/5/2021 was converted to a defence and in a nutshell, it is the Defendants case that;
- i) She is the widow of the Tapletgoi Kobot Kiplelmet who had been married to Arap Lelmet but did not have children.
  - ii) That she was married under Nandi Customary Law, and that the late Kiptiniya Arap Maiyo was a farmhand and a herdsman who lived with the late Tapletgoi Kobot Kiplelmet and her husband Arap Lelmet.
  - iii) That during the lifetime of the Tapletgoi Kobot Kiplelmet, the late Kiptiniya arap Maiyo was given I acre to cultivate.
  - iv) When the children from his first marriage returned, while Kiptiniya had remarried the Plaintiff herein, the late Kiptininya arap Maiyo was given an additional one acre.
  - v) A dispute arose and matter was referred to the elders who resolved that the family of Kiptininya be given an additional two acres in consideration of the children of the first wife and the second wife, hence making it a total of 4 acres.
  - vi) That the 4 acres given to the family of the late Kiptiniya Arap Maiyo was not given to them as a matter of right, and not as a family member but for the consideration that he worked for our family for several years until his demise.
  - vii) That the late Kiptininya Arap Maiyo came as a young boy and when he was ready for circumcision, he was circumcised at his home at Aldai and he was never adopted or raised as a child of the late Arap Lelmet and Tapletgoi Kobot Kiplelmet, but was only a farm worker.
  - viii) That she had charged the property to AFC when she continues to pay the loan, and she is not holding the property as a trustee.
  - ix) The Defendant thus prayed for the Originating Summons to be dismissed with costs.

**PLAINTIFF’S EVIDENCE:-**

10. The Plaintiff testified as PW1 and called an additional 3 witnesses.  
It was PW1 testimony while adopting her witness statement dated 20/4/2021 and her supporting affidavit of the same date which was converted into a further statement that.
11. She was the administratrix of the Estate of Kiptinya Arap Maiya and she produced a grant as P Exhibit 1 and a chief letter as P Exhibit 2, she equally produced as P Exhibit 3A certificate of succession and



a receipt as 3B, an application for registration dated 9/10/1980 as P Exhibit 3 (c), application for certificate of succession as P Exhibit 3 (d).

She produced a notification of death of registered proprietor as P Exhibit 3 (e) application for land certificate as P Exhibit 3 (f), receipt thereof as 3 (g) application for certificate of lease as 3 (h) and certificate dated 4/2/1959 as 3 (i).

12. It was her testimony that she lived on NANDI/NDALAT/282 and has lived thereon from 1979 and was still living thereon. There was no one who stopped her husband's burial, as her husband was buried on the suit property.
13. In cross – examination, she stated that her late husband had another wife who was now deceased but had left two children Emily Chemutai and Irine Maiyo. She further stated in cross – examination that she did not meet the late Arap Lelmet and Tapletgoi Kobot Kiplelmet during their lifetime. When she was married she met the Respondent living there. That her late husband was not a farm hand but an adopted son.
14. She stated in further cross – examination that she together with her sons cultivate on the same property, but in a different area from where the Respondent and her children cultivated. She refused at the suggestion that the Respondent had given them 4 acres since the property had not been subdivided.  
  
She was aware that portions of the property had been sold to other families that resided thereon. In response to P Exhibit 3 9e) and asked why she did not object to the succession proceedings, she responded that she was not aware of the succession proceedings, but her husband ought to have been given half share, but was not given.
15. In re-examination, she stated that she was not present when the Respondent went to the chief and the District Officer in respect of P Exhibit 3. She stated that when a dispute arose, it was reported to the village elders, and that the one acre given to her husband has not been identified by a surveyor and given to her. She had no problem if the children of her co-wife were given a portion of her husband's share.
16. PW2, Aron Kimaiyo Chepkwony testified and adapted his witness statement dated 20/4/2021 as part of his evidence in chief. It was his testimony that the parties to the case were his neighbors and village mates but he was not related to them.
17. It was his testimony that he knew the property in dispute as he attended a dispute as a village elder (**kokwet**), where the Plaintiff had complained of a threat for eviction by the Defendants.
18. That there were no minutes of the meeting but the meeting resolved that the property was to be shared between the Plaintiff and the Defendant and the Plaintiff was thus not evicted.
19. It was his testimony that Kiptinya Arap Maiyo was an adopted son of Tapletgoi Kobot Kiplelmet and Arap Lelmet. He further stated that the late Kiptinya Arap Maiyo was buried on a Section of the suit property.
20. In cross – examination, he stated that he was present during a meeting that was called to resolve a dispute between the Plaintiff and the Defendant.
21. He stated that the resolution was to subdivide the property but the issue of acreage was not confirmed. He confirmed that Hellen the Plaintiff and Evelyne the Defendant cultivated in different sections of the property.
22. It was his testimony that he met the late Tapletgoi Kobot Kiplelmet and Arap Lelmet and that the late Kiptinya was regarded as son, he was not aware where Kiptinya was circumcised.



23. He indicated that in Nandi customs he had not seen a person who has adapted a son conduct a woman to woman marriage.
24. He emphasized that after the dispute was resolved, the parties have been living in harmony, during the meeting, the elders were aware that the title had been issued to the Respondent, and part of the property had been sold. He was not aware why this suit was filed.
25. In re-examination, he stated that he was not part of the adoption process of Kiptiniya by Arap Lelmet, as Kiptininiya was older by age. He clarified further that the meeting did not resolve the acreage to be given to the Plaintiff and the Defendant. He was adamant that he did not see the reason, as to why the case was filed.
26. PW3, Mr. Kipketer Chuma testified in the case and he adopted his witness statement dated 20/4/2021. It was his evidence that the Plaintiff and the Defendants are his neighbors. It was his testimony that the suit property belonged to both the Plaintiff and the Defendant; and that initially it belonged to Tapletgoi and Arap Lelmet.
27. He stated that in 1972, a man called Arap Tegerei wanted to sell the property but Kiptiniya Arap Maiyo refused for the property to be sold confirming that Kiptiniya Arap Maiyo was an adopted son upon his death Kiptiniya was buried on the suit property and there was no protest.
28. On cross – examination by Ms. Tum for the Defendants, the witness stated that he had settled in the general area near the suit property in 1971, hence he did not meet Arap Lelmet but he met Tapletgoi who was the wife.
29. During the time, he met Kiptiniya Arap Maiyo living in the suit property with his own house and he would cultivated the whole property together Evelyne. She stated that Hellen and her children have moved a bit but the fence is still same. Evelyne and her children are living on the property and living harmonious.
30. He indicated that he wanted to buy the parcel from Arap Tegerei who was the man husband to Everlyne but Arap Maiyo refused the sale. Arap Tegerei was the man who would sire children for Tapletgoi Kobot Kiplelemet. He was not aware whether Kiptiniya knew that the property had been registered in the name of the Defendant. It was Kiptiniya who had told him not to buy the property as it was family property.
31. in re-examination, he stated that the property was being sold by Arap Tegerei when he was living with Evelyne the Defendant, but was not aware of the acreage been used by Hellen or Evelyne.
32. PW4, Philemon Willis Songok equally testified, it was his testimony that he is a retired senior chief, of Kapkaket in having been a chief from 2008, but previously as an assistant chief from 1986 – 1993. He stated that he knew the parties to the dispute as people living in the same farm, as the land in question was in his jurisdiction.
33. It was his testimony that in 1989, he attended the burial of the late Kiptiniya in the suit property but there was no objection to the burial and that the family of the late Kiptiniya has not relocated to any other place.
34. On cross – examination by Ms. Tum, he confirmed having been the chief where the suit property was located. He stated he knew the property did not know the parcel number and the registered proprietor it was his testimony that he had met Arap Lelmet and the late Tapletgoi as a young school going boy. He did not know how Kiptiniya went to the property but he saw him thee. He did not attend any meeting of a dispute in his capacity as a chief or assistant chief neither as a private person.



35. He knew the homestead but by passing by, he could not tell which houses belong to which person, but they were new houses that have been built. He was not aware of any vacant land as the two families were using the properties for grazing and cultivation.
36. He could not tell the acreage of the property occupied by the Plaintiff, he was not aware of any fence, but they were night Bomas to protect animals. The two families were living together in his lifetime and Maiyo never raised a complaint.
37. In re- examination by Mrs. Isiaho Sawe the witness stated that he could not differentiate the portions occupied by each family, and was not able to tell to whom the additional houses belong Evelyne has not brought any complaint regarding occupation by Hellen of the suit property.
38. After the testimony of the 4 witnesses the Plaintiff closed her case.

#### **DEFENDANT'S CASE:-**

39. DW1, was the Defendant Evelyne Chemogon Ngisirei who adopted her replying affidavit dated 31/5/2021. It was her evidence that the Plaintiff was the wife of the late Kiptiniya Arap Maiyo.
40. It was her testimony that she was not related to Kiptiniya Arap Maiyo although they lived together at Kaptatet; in NANDI/NDALAT/282 which now belongs to her; but the property was now charged to AFC having taken a loan; in 2021 before the suit was filed.
41. She produced her documents listed in the list of documents dated 16<sup>th</sup> June 2021 2021 as D exhibit 1 a copy of chief's letter and (2) copy of title deed as D Exhibits 2.
42. It was her further testimony that the property had initially belonged to Tabletgoi Kobot Kiplemet who was her husband through woman to woman marriage known as "*Kelel*" in Nandi. It was her testimony that in Nandi customs it is not possible to have an adopted son then undergo woman to woman marriage. She indicated that her witnesses Esther Chemutai and Irine Maiyo were children of the first wife of Kiptiniya and are step children for Hellen.
43. In cross – examination by Ms Isiaho, the witness stated that she did not remember when she was married but that Tabletgoi died in 1967 when she was about 14 years. When she was married the late Kiptiniya was on this suit land and he did not attend her wedding. She did not remember when Kiptiniya married the first wife but Kiptiniya was already in occupation when she was married; and had already divorced the first wife when she got married.
44. Kiptiniya was already an adult who had undergone circumcision, that from the first wife Kiptiniya had 4 children one died and the 3 left with their mother but would visit their father; while the deceased child of Kiptiniya was buried at her grandmother's place, Kiptiniya was buried in the suit property.
45. She had informed all family members of the succession process, she indicated that there was a meeting in 1994 and she was not aware of the resolutions, but she remembered Aaron Chepkwony was in the meeting; and they were other people in the meeting too.
46. The family of Kiptiniya were aware that she was using the title deed as collateral. There are 4 acres that belong to the family of Kiptiniya is comprised in the same title and ought to have been informed about the charge.
47. It was her testimony that she bore 8 children and because of the Kelel the children belong to Tabletgoi Kobot Kiplemet. She undertook succession after the death of Tabletgoi and the property now belongs to her.



48. That the late Kiptiniya was initially given one acre but eventually given 4 acres as a gift. The first two acres were given to Kiptiniya during his lifetime and the additional 2 acres given to his family after his death. The gift was an appreciation for the work done to her. They have lived peaceful in the arrangement till when the suit was filed. She told the Court that she had sold part of the parcel about 7 acres, and the original acreage was 18 acres, she gifted the Kiptinya Family 4 acres, and the remainder was for her children.
49. She confirmed that Arap Tergerei was the biological father to her 8 children and that she was not aware of a failed sale, by Arap Tergerei to Arap Mursoy and Gilbert Chumo (PW3) in 1972.
50. It was her testimony that she secured the title in 1980 and the late Kiptiniya died in 1989, but could not recall when she gifted Kiptiniya the two acres.
51. She confirmed that she had not transferred the 4 acres because she had not subdivided and she was not opposed to the Court to granting the 4 acres that she had already given to Kiptiniya. She was opposed to the property to be shared into two.
52. She did not involve the family of the late Kiptiniya when she sold the property because the property was hers and neither did she share the proceeds with the family of late Kiptiniya.
53. She stated that late Kiptiniya was circumcised in Aldai and not on the property. The 4 acres belonging to late Kiptiniya was demarcated she was aware that Hellen was opposed to the children of the co – wife getting shares.
54. In re-examination, she stated that she had found late Kiptiniya on the suit property when she got married. The chief would pin posters about succession and the late Kiptiniya was well aware of the succession.
55. Before she took loan, she went to the Land Control Board and there was no objection by family of the late Kiptiniya on the loan. Kiptiniya family knew of the sale and did not object. She stated that the purchasers live on the suit property but was opposed to the sharing of suit property into half since they were not related; the Defendant was willing to transfer the 4 acres to the Kiptiniya family as they had lived thereon for a long time.
56. DW2 Joel Kiptarus Misoi, equally testified. It was his testimony while adopting his witness statement dated 16/06/2001 that he knew the Defendant who was married to Tabletgoi Kobot Kiplelmet but did not when she was married and the year that Tabletgoi Kobot Kiplelmet died.
57. It was his testimony that when Evelyne was been married Kiptiniya was already an adult and in the suit property. He knew that Kiptiniya was a farm laborer and elders decided that he be given 4 acres.
58. In cross – examination, he stated that Evelyne was the wife of Tabletgoi Kobot and that the Defendant was his stepmother as the late Arap Lemet was a brother to his late father called Kimisoi Arap Tergerei; who had sired children with Evelyne.
59. He was not aware that the late Kiptiniya had been initiated by his late father, but he knew from his father that Kiptiniya was a farm labourer; according to Nandi customs a farm hand is given a sheep as a gift but since Kiptiniya had a wife and children, the elders gave him 4 acres.
60. In re-examination, the witness stated that Arap Lemet was a brother to his late father and he was thus related to the Defendant, while Kiptiniya was a herder whom the elders decided to give 4 acres; although he was to be given a sheep since he had two wives and the decision was made when Kiptiniya



was alive and Tapletgoi had died, and there has never been a dispute as each family resides on their demarcated areas.

61. DW3 was Esther Chemutai Tuwei who testified and adopted her witness statement. In her statement the witness stated that;-

She was a daughter of the late Kiptiniya Arap Maiyo, from his first marriage. That her late mother was a niece of the late Tapletgoi Kobot Kiplelemet and hence she would not have allowed her niece to marry her adopted son.
62. It was her testimony thus that her late father Kiptiniya Arap Maiyo was not an adopted son but only working in their farm and was given 4 acres as a token of appreciation to be shared equally between the two wives.
63. In cross – examination she stated that she was born in 1964 and she was the third born of the late Kiptiniya. The first born was Mary Chebet now deceased, second born is Philomena Chepkemboi whilst the 4<sup>th</sup> born was Irine Maiyo. That all of them were born on suit property but left when their mum become sick and passed on in 1971 in her parents hands and they never returned to the suit property.
64. She did not know where her parents were born, but her mother was buried in Nairobi. It was her testimony that her father was a farm hand, and did not know how her father occupied the suit property. Her father died in late 1980's and was buried on the suit property. She had been told that her father had been given 4 acre and as a child of the first house she was seeking 2 acres but had not filed a suit. She had no objection if the share of her father is split into two and her mother was thus entitled to half the share to wit 2 acres.
65. In re- examination by Ms. Tum, the witness stated that she was born on the suit property. She stated that her mother's house was no longer standing, and her mother was not buried on the suit property. My father was a farm hand and not a family member family. The reason her mother was buried elsewhere is that her father did not have a property. She clarified that her father was given 4 acres as a gift and when she went to seek the mother's share, in Company of the chief she was met with hostility.
66. DW4 Joseph Tek, was summoned by the Court as an expert witness pursuant to Order 18 Rule 10 of the Civil Procedure Rules and Section 146 (4) of the Evidence Act to testify on the Nandi customs in relation to adoption.
67. It was his evidence that he was a member of the Kaburwo Council of Elders. Whose qualifications are (i) must be a reputable member of society age of 55 and above, (ii) subscribe to membership either annually or life.
68. It was his testimony that customs are taught from generation to generation. He further testified on the circumstances leading to woman to woman marriage also known as **kelel** among the Nandi.
69. It was his evidence that the same occurs when a woman who is married does not bear children and family is desirous of having children. It can happen when husband is alive or deceased.
70. The lady to be married has to be searched and the family must be a good family. The woman **"husband"** must be willing to continue with lineage. The ceremony for the marriage is like a normal ceremony including the show up and **"koito"**.
71. Thereafter the woman **"husband"** then chooses who sires the children. The woman would be free to elect another man if she does not want the man chosen. A relative of the male husband can be chosen to sire the family.



72. The witness further testified on Nandi customs on adoption and it was his evidence that the practice of adoption was still being practiced. An adopted child can come from any community and the adoptive parents are allowed to initiate the child.
73. It is possible to adopt a child and thereafter conduct woman to woman marriage but it is not common. The adopted son as well as the children of the wife are deemed siblings in terms of inheritance, they are entitled as children.
74. In cross examination by Ms Tum the witness stated that the main purpose of women to women marriage is to bear children and lineage to continue. It is possible to adopt then afterwards conduct a woman to woman marriage if the adopted child is a mature person he stays on his house. They are certain rites of passage that are performed for an adopted son, including an introduction ceremony and the adopted child is given the family name as well as his children and adoption is done before initiation and in the ceremony of circumcision is where the naming is done.
75. Circumcision can be done elsewhere but the child has to be named and to subscribe in the clan and is consulted on family affairs.
76. He further stated that a worker can also be deemed to be an adopted child and be gifted but does not get the rights of a family name and is not equal to other adopted sons. In case of a dispute between woman to woman wife and an adopted son, same should be shared equally.
77. DW5 Job Kiplelei Tanui also testified and adopted his witness statement. In his statement it was his testimony that he knew the late Arap Lelmet who married Tapletgoi Kobot Kiplelmet but they had no children. They had Kiptiniya Arap Maiyo to assist them as a farm hand.
78. That the Defendant was brought in as a wife on a woman to woman marriage under the Nandi customary law. The late Kiptiniya was given 1 acre in his lifetime as a gift thereafter his wife was given an additional acre. In 1994 the children of the late Kiptiniya demanded their mother's share and dispute was referred to the elders and neighbors whereat Evelyne the Defendant gave an additional 2 acres to the family of Kiptiniya so as to make 4 acres on account of the two wives that the late Kiptiniya had.
79. In cross – examination, the witness stated, that he was not related to the family of Lelmet, but he was the village elder in Kapkaket from 1987 to 2011. He stated that the late Kiptiniya was given 1 acre by Evelyne and Kiptiniya was older than Evelyne.
80. The villagers were present when the gift was given and Hellen Maiyo was present; in 1994, Aron Chepkwony was not in the meeting, but the resolution was that the family of Kiptiniya was to be given 4 acres.
81. The elders can gift someone depending on what the family wants. The family villagers and neighbor's agreed to give Kiptiniya 4 acres in 1974 and the boundaries are still intact.
82. That in the 1994, meeting Evelyne wanted to gift Kiptiniya 2 acres but the villagers refused and the family of Kiptiniya was thus gifted 4 acres.
83. In re- examination, he stated that Kiptiniya was a worker and in 1994 he was already dead. The elders resolved to give the family 4 acres, Helen was present together with her family.
84. DW6 Irine Chepkios Maiyo testified and adopted her witness statement dated 16/6/2021. In her statement, it was her testimony that she was a daughter of the late Kiptiniya Arap Maiyo from his first wife and that Helen the Plaintiff was her stepmother. She stated that her father had no relationship with Arap Lelmet and Tapletgoi, as he was a worker.



85. It was her evidence that her late mother was a niece of the late Tapletgoi and if indeed the late Kiptiniya her father was an adopted son the late Tapletgoi would not have allowed him to marry her niece.
86. It was her evidence that her late father was not an adopted son but was a farm hand who had been given 4 acres as a token of appreciation which was to be shared equally between the two wives.
87. In cross – examination, she stated that she did know how her father had entered into the property of Arap Lemet. She was born on the suit property and her father was buried there. She was present in the 1994 meeting although her father had died when they were given additional 2 acres. She stated that she testified because her stepmother Helen had refused to give them the two acres. She was not aware that the property had been charged, if the property is sold, she shall ask Evelyne for a refund.

**RE – EXAMINATION:-**

88. . She stated that she got to know that her father was a farm hand when she attended the meeting. She did not doubt that her father had stayed in that home as a child. She is satisfied with the two acres given to them as children of the first wife and the two acres given to Helen by Evelyne.
89. That this suit was commenced because Hellen felt that she could get additional property.
90. After hearing 6 defence witnesses the defence case was closed. Parties were then invited to file written submissions on the matter.
91. I have carefully read the pleadings the evidence on record and the submissions and I frame the following as issues of determination.
  - i). who is entitled to commence a claim under customary trust?
  - ii) was the Plaintiff entitled to lay acclaim under customary trust?
  - iii) has the Plaintiff proved her case, and if so if she entitled to the reliefs?
  - iv) has the Defendant proceed her defences?
  - v) what reliefs ought to issue?
  - vi) who bears the cost of this suit?

**ANALYSIS AND DETERMINATION:-**

92. On issue number, as to who is entitled to claim under customary trust, the Supreme Court in the case of Isaac M'inanga Kiebia vs Isaaya Theuri M'intari and Another 2018 eKLR at paragraph 18 laid down the elements to be considered so as to qualify a claimant as a trustee.
  - i) The land in question was before registration, family, clan or group land
  - ii) The claimant belongs to such family clan or group
  - iii) The relationship of the claimant to such family, clan or group is not so tenuous as to make his/her claim idle or adventurous.
  - iv) The claimant could have been entitled to be registered as an owner of other beneficiary of the land but for some other intervening circumstances.
  - v) The claim is directed against the registered proprietor who is a member of the family; clan or group



93. The above elements as set out by the Supreme Court thus guide the Courts generally when faced with a claim based on customary trust and this claim been based on customary trust the overt shall use the 5 elements above as a barometer to find whether the Plaintiff's claim succeeds.
94. Issue number 2, as to whether the Plaintiff could institute this claim based on customary trust.
95. The Plaintiff in his pleadings states that her late husband in whose estate the suit had been filed was an adopted son of the late Tapletgo Kobot Kiplelmet on account of his initiation on the home of Arap Lelmet, and that he was considered as a son as dowry for his 1<sup>st</sup> wife was paid for by the late Tapletgoi Kobot Kiplelmet.
96. DW4, Mr. Joseph Tek, explained in detail the process of adoption in the Nandi Community, it was his testimony that, an adopted son would be initiated in the home, and after the initiation ceremony he would be introduced to the family and a naming ceremony would take place during the initiation.
97. The late Kiptiniya Arap Maiyo is said to have been initiated at the home of Arap Lelmet, however he was not introduced to the family members of including Arap Tergai as a family member and neither did he take the family name; hence for the criteria of adoption, the late Kiptiniya did not meet the said criteria and there is therefore no evidence of support the claim of the late Kiptiniya as an adopted son.
98. DW4, further stated that a herds boy or a farm hand would also be considered as an adopted son but does not take the family name and his rights would be different from an adopted son properly so called.
99. In their evidence DW3 and DW4 stated that the late Kiptiniya Arap Maiyo was their father and their mother was a niece of the late Tapletgoi Kobot Kiplelmet who was supposedly adoptive mother of the late Kiptiniya, hence she would not have allowed her niece to be married to her adopted son.
100. The Courts finds a credible the said evidence as an adopted son according to DW4 has same rights as other children and it would have been difficult to have a marriage between an adopted son and a niece of the family.
101. For the above reason and as well as the reason that the late Kiptiniya Arap Maiyo did not take the family name, the Court finds that the late Kiptiniya Arap Maiyo was not an adopted son, but accepts the narrative that he was a farm hand who was treated as an adopted son, but whose rights were less superior than **“an adopted son properly so called.”**
102. Accordingly the Court finds that the late Kiptiniya Arap Maiyo was not a family member, clan member to be able to claim under customary trust as his relationship to the family of the late Arap Lelmet was so remote and his claim as a farm hand is thus adventurous. Thus in answer to issue number 2, the Plaintiff cannot claim under customary trust.
103. On issue number 3, having found that the late Kiptiniya Arap Maiyo was a farm hand and the Plaintiff lacks capacity to institute a claim under customary trust for not being a family or clan member, the Court equally finds that the Plaintiff has not proved her case on a balance of probabilities and is not entitled to the reliefs sought.
104. The defence as raised by the Defendant is thus merited as the Plaintiff claim fails.
105. The Court however notes that P exhibit No. 1 was a letter of the chief indicating that the Defendant had gifted the family of the late Kiptiniya Arap Maiyo 4 acres of lands; and the Defendant in her evidence indicated her readiness to transfer the said 4 acres, the Court further notes that the above was reached at in a meeting held by village elders, neighbor's and family in 1994 as was stated by DW5 and DW5, the said meeting thus formed part of transitional dispute resolution mechanisms which



fall under the ambits of Alternative Justice System, which the Court ought to recognize under article 159(2) (c) of *the Constitution* of Kenya and Section 20 of the Environment and Land Court, so long as it is not repugnant to justice and morality.

106. Pursuant to Section 20 of the Environment and Land Court and noting that the resolution of the 1994 meeting is not repugnant to justice and morality, this Court on its own motion hereby recognizes the resolution so reached in 1994, granting 4 acres to the families of the two wives of the late Kiptiniya Arap Maiyo and adopts the same as a judgment of this Court in terms that;-

- i) Upon discharge of the title of NANDI/NDALAT/28 from the A.F.C the Defendant Evelyne Ngisirei shall cause subdivision within 90 days thereof and transfer the 4 acres to be registered in the name of the Plaintiff for herself and as a Trustee for all the children of late Kiptiniya Arap Maiyo from the two wives.
- ii) the 4 acres in (i) above were already identified and are the ones that the family of the Plaintiff were given in the resolution of the meeting held in 1994 and currently residing thereon.
- iii) The Plaintiff shall bear the costs of this suit.
- vi) Judgment accordingly.

**DATED AT KAPSABET THIS 31<sup>ST</sup> DAY OF JANUARY, 2023.**

**Hon. M. N. Mwanyale,**

**JUDGE**

**In the presence of;**

**Ms. Isiaho Sawe for Plaintiff**

**Ms. Koech Lelei holding brief for Ms. Tum for the Defendant.**

