



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL CASE NO. 43 OF 2002**

**HANA LWOSI MAKHUTSO ..... PLAINTIFF**

**V E R S U S**

**ADRIANO MWABISHI MOHANDE ..... DEFENDANT**

**J U D G M E N T**

In her originating summons the plaintiff seeks to be declared as having acquired ownership of plot number **IDAKHO/SHISEJERI/1179** by way of adverse possession. She would also want to have the defendant's title revoked and the land transferred to her. The plaintiff's testimony is that the defendant is her brother in-law. He is a brother to her husband. Her husband is alive but is mentally sick. The land in question was registered in the name of **NAKWA MABISHI** who was her other brother in-law who died in 1979. She has been using the land since 1964. The defendant had himself registered as the owner in 1995. No succession was filed. She has some houses on the land and cultivates it. At one time the defendant tried to sell the land. This was in 2002 and she registered a caution. The defendant does not live on the land as he moved out with his father and went to live at Musoli which is quite far from Eregi. Her further evidence is that her husband **LAURENT MUHANDE** is registered as the owner of plot number 1178 and they use the two plots.

**PW2 ANTHONY MUTARO MWANGA** lives in in Eregi and is a neighbor to PW1. He knows the defendant as a brother in-law to PW1 and that PW1's husband is mentally ill since 1979. According to him the plaintiff has been living on the suit land since 1964 and is cultivating it. The land was in the name of **NAKWA** who used to live with Laurent in the same area.

The defendant testified that he is a retired nurse. The plaintiff is his sister in-law. His brother Laurent Muhanda is alive and at home. His brother is not mentally sick. His brother owns plot number **KAKAMEGA/SHISEJERI/1178**. Plot number 1179 belonged to the clan and was given to them by their mother. Nakwa Nabisi is his name and when he was baptized he took the name of **ADRIANO**. Their father's name is **MUHANDE**. He later went to change the title deed to change his name. He lives on plot number **KAKMEGA/SHIKULU/450** which he bought himself. He used to live in plot number 1179 before moving to his own plot.

Parties filed written submissions. Counsel for the plaintiff contends that the plaintiff has proved her case as she has lived on the suit land since 1964. The defendant has himself fraudulently registered as the owner. The plaintiff only knew about that registration in 2001 when the defendant went with prospective purchasers. On the other hand the defendant maintains that the land was registered in the names of a deceased person who died in 1979. There was no succession and the doctrine of adverse possession does not apply. Further that the defendant is Nakwa Nabisi and he changed his name to Adriano. The defendant only changed the title into his name.

The extract for the suit land issued by the land registry shows that the suit land was opened on the 21.11.1973 and registered in the names of **NAKWA MWABISHI**. The plot is 0.7 Ha. On 18.1.1995 **ADRIANO MWABISHI MOHANDE** got himself registered as the proprietor by way of change of name and title was issued to him the following day. It is the plaintiff's evidence that Nakwa Mwabishi was her brother in-law who died in 1979. PW2 corroborates that evidence. According to the submissions by the defence counsel it is indicated that if the land was registered in the names of a deceased persons whose succession has not been done then adverse possession cannot apply. At the same time the submissions by the defendant indicate that the deceased Nakwa Mwabishi is the same person as the

defendant. Given the evidence on record I do find that Nakwa Mwabishi is a different person and not the defendant. The defendant ought to have produced his old identity card if indeed he was called Nakwa Mwabishi as well as his baptismal card. I do find that the defendant committed fraud by having himself registered as the owner of the suit land in the pretext that it was change of name. His action is a criminal act which should not be entertained. The contention by the defence that since the defendant has a title deed and should be declared as the lawful owner of the property is not acceptable as the registration was obtained fraudulently.

Since the land was registered in the names of a deceased person and it is the plaintiff's evidence that they used to utilize the land together with the deceased I cannot apply the doctrine of adverse possession as doing so would be applying the doctrine on the estate of the deceased. There is no evidence that the deceased had no child or wife. I do order that the plaintiff herein file a succession cause and if there is no other beneficiary in form of a child or wife of Nakwa Mwabishi I do declare the plaintiff to be the sole beneficiary of that estate. The title deed issued to the defendant is hereby revoked and I order the property plot number **KAKAMEGA/SHISEJERI/1179** to be restored in the names of **NAKWA MWABISHI**. This suit is determined in the above terms and each party shall meet his/her own costs.

**Delivered, dated and signed at Kakamega this 20<sup>th</sup> day of March 2014**

**SAID J. CHITEMBWE**

**J U D G E**