



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL APPEAL NO. 2 OF 2005

BEATRICE MAKOKHA CHINA APPELLANT

=VERSUS=

STANLEY KACHEMULO RESPONDENT

[From the decree and order of E.H. Keago, R.M. in Busia S.R.M.C.C.C No. 205 of 2000]

JUDGEMENT

The respondent herein, by a plaint dated 5.5.2000, claimed for:-

- a) Declaration that the Defendant holds title to Bukhayo/Buyofu/85 in trust and for the use of the plaintiff.
- b) Registration of the said title presently in the name of the appellant as proprietor be cancelled.
- c) The suit land be transferred to the Respondent as the sole proprietor.
- d) Costs.

In his evidence the Respondent stated, in summary, that the land was originally registered in three names i.e. Stanley Kachemulo (Plaintiff) Dickson Okomoli and Okolomote Ondinyo, as tenants in common. That Okolomote Ondinyo died and the Appellant Beatrice Makokha China obtained a grant of letters to his estate. Respondent averred further that without his and other owner's knowledge, the Defendant managed to transmit the whole interest in the title and obtained a title in her sole name sometime in 1992. He further averred that such registration of the title in her sole name to the exclusion of the Respondent and the third registered owner, must have been accomplished by fraud or mistake. The plaintiff also averred and later testified that on the death of the other two co-proprietors, he became the sole proprietor. He produced copy of the present title in the sole name of the appellant and an official search tending to show that the title was originally registered in the three names.

The Appellant who was the Defendant in the lower court had testified that she is the sole registered proprietor of the suit land. That the land originally belonged to her brother Okolomote Ondinyo who upon his death, she obtained a grant of Letters in Succession Cause No. 103 of 1995 and registered the land in her sole name.

The Appellant also testified that the Respondent had no relationship with Okolomote and could not expect to inherit from the deceased Okolomote's estate. She said that she was entitled even as a woman to inherit her brother's estate. She admitted that the Respondent stays on the suit land where he has planted sugar cane.

Appellant's witnesses on the other hand testified that the mother and father of the Appellant died and were buried on the suit land – Bukhayo/Buyofu/85. However, DW2, Michael Wafula admitted that the land was originally registered in the names of three people as testified by the Respondent. He said he did not know how the other names, i.e. Stanley Kachemulo (plaintiff) Dickson Omokoli and Okolomote Ndinyo were removed during succession. The trial magistrate, accepted as a fact that the suit land was originally registered in three names i.e. Stanley Kachemulo, Dickson Omokoli and Okolomote Ndinyo. He concluded that even if it were true that the Appellant was the rightful heir to Okolomote Ndinyo's, she would in Succession Cause No. 103 of 1995 only take 1/3 share of the land; not the whole title. He accordingly held that taking the absolute ownership was illegal and contrary to the provisions of the relevant law.

On the above ground only he allowed the Respondent/Plaintiff's Claim and ordered for the cancellation of the present title in Appellants name. The effect would be that the title will revert to the three original names before a partition would follow probably in three equal shares.

I have carefully considered the evidence. Subject to the official search being accurate, I find the decision of the trial magistrate proper and correct. If indeed the title was as at the time of succession registered in three names, then, the court that carried out succession acted in error to allow the Appellant to take over the interests of the other living proprietors.

In the circumstances this appeal would have no merit. It is dismissed. In the circumstances of this case and considering the power and discretion given to this court under S.27 of the Civil Procedure Act, I would make no order as to costs here and below. Orders accordingly.

Dated and delivered at Busia 25th Day of August 2011

D.A ONYANCHA
JUDGE