



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Civil Appeal 20 of 2010**

BELIDA SHIBUTSE :::::::::::::: APPELLANT

VRS

SABINA WAFULA NYONGESA :::::::::::::: RESPONDENT

JUDGMENT

The Appellant Belinda Shibutse appeals against the judgment of Webuye Resident Magistrate in PMCC No.18 of 2010.

The facts are that the Respondent Sabina Nafula Nyongesa successfully obtained a permanent injunction against the Appellant to restrain the Appellant from burying the remains of her husband Jestimore Wanyama Musebe on the Respondent's land parcel L.R. No. NDIVISI/KHALUMULI/3209. The Appellant being dissatisfied with the said orders appeals to this court relying on five grounds raising the following issues:

- a) ***That the magistrate erred in law and fact by over-relying on the Respondent's evidence as opposed to that of the Appellant;***
- b) ***That the magistrate equated the right to bury with the right of adverse possession and therefore arriving at an erroneous judgment;***
- c) ***That the judgment was not backed by evidence.***

The Respondent's claim was that being the proprietor of land parcel no.NDIVISI/KHALUMULI/3209, the Appellant was not entitled to bury the body of her deceased husband on the land. The respondent testified that the original parcel number NDIVISI/KHALUMULI/939 belonged to her late husband Eliud Nyongesa. When he died, she filed a succession cause and distributed the estate of the deceased to all the beneficiaries and purchasers of various portions on the land. The suit premises parcel no.3209 measuring 0.07 hectares was registered in the Respondent's name. The Appellant resides on the parcel of land with her family. The original land L.R. No.NDIVISI/KHALUMULI/939 was bought by the Respondent and her late husband. The Appellant has no right over the land and must be restrained from burying her late husband Jestimore Wanyama on the land. There is a pending suit filed by the Respondent's husband for eviction orders against the deceased Jestimore Wanyama.

The Appellant in her evidence claimed that her late husband Jestimore Wanyama had bought a portion of land from his deceased brother Nyongesa measuring 1.1 acres for a consideration of Ksh.2,500/= cash and four (4) cows in 1976. The Appellant and her family entered the land in 1976 and have been there since then. Two grandchildren of the Appellant have been buried on the land. The Appellant claims she has a right to bury her husband on the same land. She called one witness DW2 who testified that the deceased Jestimore bought land from his deceased brother Nyongesa.

The Appellant did not produce any documentary evidence to prove ownership or any other kind of legal interest on the land. Both parties admitted that there is a pending suit in court whereby the Respondent's late husband Nyongesa sought to evict the Appellant from the land. It is not disputed that Nyongesa died before the case was determined. During the lifetime of the Appellant's husband, he did not file any suit to claim any legal interest on the land. The Appellant likewise has not attempted to lodge such a claim in respect of the land in question. The magistrate was hearing a case of a permanent injunction but not a case of ownership of the land. The court found that the Appellant had no legal interest on the land and proceeded to grant to the Respondent the injunction sought. The Appellant claimed that she had buried two grandchildren on the same land which fact was not denied by the Respondent. However, the said burials were done by the consent of the Respondent and her family. The act of burying her grandchildren on the land does not give the Appellant any licence to bury the remains of her deceased husband on the Respondent's land. The Respondent would have to consent to such an act which she has refused.

The Appellant argued that she has overriding interests on the Respondent's land and is entitled to bury the deceased on the land. The land in issue here is registered under the Registered Land Act, Cap 300. Section 30 of the Act provides for overriding interests which are not necessarily registrable unless the Registrar so directs. Among the rights listed in section 30, the right to bury is not included. It cannot therefore be referred to as an overriding interest. Section 27 vests in the proprietor absolute ownership of the land while section 28 gives the proprietor indefeasible rights. The Appellant failed to prove before the court any rights which could entitle her to bury the remains of the deceased on the land.

On evaluation of the evidence of both parties, I find that the Respondent proved ownership of the land while the Appellant failed to prove

any legal interest in the land. The judgment was supported by cogent evidence contrary to the claim by the Appellant to the contrary. There is no merit on the ground that the magistrate over-relied on the Respondent's evidence as opposed to that of the Appellant. The magistrate evaluated all the evidence before him and reached a correct finding.

I find that the appeal has no merit and dismiss it accordingly. I uphold the judgment of the Resident Magistrate, Webuye. The Appellant will pay the costs of this appeal.

F. N. MUCHEMI

JUDGE

Judgment delivered in open court on the 22nd day of July, 2010 in the presence of the Mr. Kakoi for the Appellant and the Respondent.

F. N. MUCHEMI

JUDGE