



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII

Civil Case 172 of 2009

DOUGLAS AIMA ONTWEKA.....PLAINTIFF

-VERSUS-

JUSTUS AMINGA MANGONDI.....DEFENDANT

JUDGMENT

The remains of the late Rusibella Bitutu, who died on 7/8/2009, are lying in a mortuary waiting to be buried. The plaintiff is aged 23 and son of the deceased. He wants to bury the deceased's body on parcel no. Majoge /Magenche/1342 which he says belonged to his late grandfather Ontweka Okwena. This was the father of the plaintiff's father and also the father of the defendant. Plaintiff's father was called Aima Mangondi and died in 2004.

The late Ontweka Okwena has not been succeeded. The defendant is not the administrator of his estate. The land is still in his (the deceased's) name. The plaintiff's case is that the defendant has refused to allow the burial of his mother's remains on this land. He wants his mother's remains to be buried at the site where his father (Aima Mangondi) was buried in 2004. Aima had a portion on this land and his elder wife resides here. Mr. Masese for the plaintiff did not seek to demonstrate that the defendant has capacity to be sued in respect of the land in question, which land has not been succeeded. Further, in paragraph 3 of the plaint the plaintiff pleaded that he was the son and personal or legal representative of the late Rusibella Bitutu. There was no evidence of such legal representation. There is therefore the question whether the plaintiff had the capacity to bring this suit

The plaintiff gave evidence that the land in question belonged to his grandfather Ontweka Okwena, and produced Certificate of Official Search (Exhibit 1). It shows the land was registered in the name of Ontweka Okwena on 10/2/1970. It is 3 acres. It has been stated in the forgoing that the plaintiff is 23. He was therefore not born in 1970. The reason why this land is contentious is because the defence called a witness Ontweka Okwena (DW1) who stated that the land in respect of which the defendant has been sued is his. He testified that the search Certificate produced as Exhibit 1 is in respect of his land. He showed the court his ID. Card which reads his names.

The defendant told court the land in question belongs to DW1 and that he (the defendant) has nothing to do with it. Both witnesses stated that the late Ontweka Okwena left land, a portion of which the deceased Aima Mangondi was living on and on which he was buried. Aima Mangondi's elder wife was left on this land and she lives on it.

The defendant's position is that it is this wife of the late Aima Mangondi that the plaintiff should be suing, and not him. He denied he has

refused the plaintiff to bury his late mother on the land. Both the defendant and DW1 testified that the land in the Certificate is far from where the late Ontweka Okwena left his land.

The other witnesses who testified for the plaintiff were PW2 Francis Ombongi, who is the father of the deceased Rusibella Bitutu, and David Omwenga(PW3), who is son of PW2 and brother to the deceased. Their evidence was basically that the deceased was married to the late Aima Mangondi and dowry was paid to them. The defendant's position was that the late Aima Mangondi had only one wife who lives in the portion he left. I found the defendant not truthful on the issue of whether or not the deceased was his brother's wife. It is not in dispute that his brother (Aima Mangondi) was, before his death, working and staying in Naivasha. He was staying with the deceased. The defendant knew that fact. He testified that he first learnt of the deceased to be staying with his brother in 1986. He died in 2004, while still staying with her. I accept the evidence of the plaintiff, PW2 and PW3 that the deceased was Aima Mangondi's wife with whom they had children who included the plaintiff.

The defendant, I find, will definitely inherit part of his late father's land. So will the family of the deceased Aima Mangondi. Until their father's estate is eventually succeeded, however, their claim to it has not crystallized. An order cannot therefore be made compelling the defendant to bury the remains of the late Rusibella Bitutu on parcel Majoge /Magenche/1342. This assumes that this land belongs to their late father, which fact I find not proved on balance in view of the evidence of DW1.

In all, I find the suit not only incompetent but also not proved, and the same is dismissed with costs.

Dated, signed and delivered at Kisii this 27th day of November, 2009.

A.O.MUCHELULE

JUDGE

Before A.O.Muchelule-J

Mongare court clerk

Mr. Masese for plaintiff

Mr. Koina for Mr. Bw'Ondika for Defendant

COURT: Judgment in open court

A.O.MUCHELULE

JUDGE

27/11/2009

