



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUSIA**

**ELC. NO. 34 OF 2013**

**PETER OKIRING SAUSAU.....PLAINTIFF**

**VERSUS**

**CHARLES ONGUNA ETIANKORO.....1<sup>ST</sup> DEFENDANT**

**JOSEPH ETTANG OKAMIU.....2<sup>ND</sup> DEFENDANT**

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

**PETER OKIRING SAUSAU**, hereinafter referred to as the Plaintiff, filed the plaint dated 24<sup>th</sup> July, 2013 against **CHARLES ONGURA ETIAKORO** and **JOSEPH ETTANG OKAMIU**, hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> Defendant respectively for the following prayers:

- “ a) Permanent injunction restraining them (Defendants) either by themselves, employees, or any other person from interfering with the Plaintiff’s land parcel L.R.N. Teso/Kocholia/397.
- b) Eviction of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant from the Plaintiff’s land parcel L.R.N. Teso/Kocholia/397.
- c) Costs.”

The plaintiff averred that the Defendants had in January, 2013 entered into the said land without his authority and “ *cut down mature trees, cut mature grass and dug trenches and planted food crops therein and intend to put up structures on the Plaintiff’s above stated land.*”

The Defendants denied the Plaintiff’s claim and filed a joint statement of defence dated 12<sup>th</sup> June, 2013. The Defendants disputed that the Plaintiff is the registered proprietor of the suit land and aver that the land had been sold by one Charles Ipeket Sausau at Kshs.510,000/= under a written agreement with 1<sup>st</sup> Defendant’s wife and therefore all rights vests in the Defendants.

During the hearing, the Plaintiff testified as PW 1 and was represented by Mr. Elungata advocate. The Defendants were represented by Mr. Wangila advocate. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants testified as DW 1 and DW 3 respectively, and called one Charles Ipeket Sausau, who testified as DW 2.

**PLAINTIFF’S CASE.**

1. That he is the registered proprietor of the suit land, North Teso/Kocholia/397 on first registration.

The copy of the register and official search of the suit land in the Plaintiff's list of documents shows that the land was registered in the names of Sausau 22<sup>nd</sup> January, 1974.

2. That one Charles Ipeket, who testified as DW 2, filed Amagoro Land Disputes Tribunal case No. 6 of 2011 against the Plaintiff over the suit land, North Teso/Kocholia/397. The tribunal award was in favour of Charles Ipeket and was in the following words;

***“ This court awards to Mr. Charles Ipeket Sausau the land which was allocated to Mr. Ejakait Sausau as heir. Which Peter Okiring grabbed and joined with his to register parcel number North Teso/Kocholia/397.***

***The District Land Registrar is asked to facilitate survey, curving land on the east of the parcel No. North Teso/Kocholia/397 from the northern part of Land registration. North Teso/Kocholia/790 marking its ends to run towards the hills as indicated in the sketch map after taking measurements, then issue each with a title deed.”***

The award was adopted as the judgment of the court on 16<sup>th</sup> December, 2011 in Busia CM. Land Dispute Case No. 123 of 2011.

3. That the Plaintiff was not satisfied with the award and filed Busia H.C. Judicial Review No. 5 of 2012 in which Kimaru J, held;

***“.....the award of Amagoro Land Disputes Tribunal was ultra vires its jurisdiction. The award was made without jurisdiction. The proceedings leading to the award were null and void ab initio. The Judicial Review order craved for by the Applicant is granted. The Amagoro Land Disputes Tribunal is prohibited from hearing any dispute relating the title of land held by the Applicant. Similarly too, the Busia Chief Magistrate's court is prohibited from executing or giving legal effect to the said award of the Amagoro Land Disputes Tribunal.”***

That the Defendants entered into the suit land in 2012 and cut down trees and grass and the Plaintiff reported to the National Environment Management Authority (NEMA) and Ministry of Agriculture. The Plaintiff added that the Defendants started cultivating on the suit land in January, 2013 and that the judgment in the Busia H.C. Judicial Review Case number 5 of 2012 was delivered on 14<sup>th</sup> August, 2013.

### **DEFENDANTS' CASE,**

1. That Angela Nafula, who is wife to DW 1, entered into a land sale agreement with one Charles Ipeket Sausau, dated 11<sup>th</sup> February, 2012 over the sale of undisclosed parcel of land at Kshs.370,000/= . The 1<sup>st</sup> Defendant said his wife had worked briefly on the land she had bought before stopping but denied that he had personally encroached onto the Plaintiff's land.

2. That the land the wife of 1<sup>st</sup> Defendant was buying was to come from the subdivision of North Teso/Kocholia/397. That the vendor had given the 1<sup>st</sup> Defendant and his wife the death certificate of the uncle whose name he could not recall, the grant in respect of the administration of vendor's uncle's estate and the mutation forms in respect of the suit land. That after the 1<sup>st</sup> Defendant's wife cultivated on the land for one year, she stopped and it was taken over by the Plaintiff.

3. That the portion of land the 1<sup>st</sup> Defendant's wife was buying is yet to be transferred to her as the documentation processes are not complete.

4. That after the Amagoro Land Disputes Tribunal award, DW 2 planted the boundary marking his 5 hectares of the suit land but the Plaintiff uprooted it. He then had the suit land subdivided into parcels North Teso/Kocholia/3489 and 3488 for himself and plaintiff respectively. DW 2 said that he had then

sold a portion of his parcel to Nafula and 2<sup>nd</sup> Defendant (DW 3) but after the High court ruling of 14<sup>th</sup> August, 2013, he stopped transactions relating to the said land. DW 2 said nobody from his family has ever used the suit land but confirmed that the plaintiff and his family are the ones using it.

**ISSUES FOR DETERMINATION.**

1. Whether the plaintiff is the registered proprietor of the suit land, North Teso/Kocholia/397.
2. Whether the Defendants had acquired legal rights over the suit land following the sale agreements with DW 2 that entitles them to use the land.
3. Whether the Defendants have entered into the said land, caused acts of waste and cultivated on it and if so whether their acts amounts to trespass.
4. Whether the prayers sought should be issued.

**ANALYSIS OF THE EVIDENCE.**

1. That from the documentary evidence including copies of the register and certificate of official search for Land parcel North Teso/Kocholia/397, the plaintiff herein is the registered proprietor. His registration as owner of the suit land is a first registration. The provision of section 27 and 28 of the Registered Land Act, Chapter 300 of Laws of Kenya (Repealed) outlines the interests and rights of a registered proprietor as follows;

*‘‘27. Subject to this Act –*

*a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;*

*b. ....*

*28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject ;-*

*a. ....*

*b. ....*

*Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.’’*

The above provisions have been retained in the Land Registration Act No. 3 of 2012 under sections 24 and 25 in more or less the same words.

2. That in view of the finding in (1) above, and the High Court decision in Busia judicial review case No. 5 of 2012, reversing the finding of Amagoro Land Disputes Tribunal decision in respect of the suit land, Charles Ipeket Sausau has never owned or been registered as a proprietor of land parcel North Teso/Kocholia/397. The said Charles Ipeket Sausau therefore had no capacity to grant the Defendants herein or any of their relatives or persons claiming under them any legal right to the suit land or any portion thereof.

3. That the 1<sup>st</sup> Defendant conceded he had gone to the suit land when he said during cross-examination

that,

***“The land my wife bought is five kilometers from where I was born. I have visited that land.”***

The 1<sup>st</sup> Defendant further stated that; ***“My wife farmed on the land she bought for one year only. She had planted maize crops .....*”**

When the 2<sup>nd</sup> Defendant testified, he stated as follows; ***“ I bought a portion of land from DW 2. have not built on the land I bought from DW 2 but have been cultivating.”***

The testimonies of the two Defendants confirms the plaintiff’s claim that they have themselves and or through others, entered into the suit land without his consent. The fact that the Defendants admitted that they, their spouses or agents are cultivating portions of the suit land makes the court conclude that in the process of clearing the land for cultivation, some of the vegetation that was growing was removed, also without the Plaintiff’s consent. Even though the Defendants and or their spouses or agents may have believed that they had acquired legal rights over the land through the sale agreement entered with DW 2, the position of the law is that DW 2 had no capacity to sell any portion of the suit property and could therefore not grant or pass any legal rights over the suit land to the Defendants or anybody else.

**CONCLUSION.**

1. That the title of the Plaintiff to the suit land has not been challenged successfully in accordance with the Law and he remains the registered proprietor of the suit land, parcel North Teso/Kocholia/397.

2. That the High Court decision of 14<sup>th</sup> August, 2013 in Busia Judicial Review No. 5 of 2012, declaring the Amagoro Land Disputes Tribunal proceedings and award a nullity ab initio among other orders, has also not been challenged in accordance with the law and whatever legal rights may have appeared to have been conferred to any party under the tribunal award over the suit land does not exist.

3. That the Plaintiff has established his case against both Defendants on a balance of probabilities and the court enters judgment for him and against the Defendants in terms of prayers 12 (a) and (b) with costs. In furtherance to the order in prayer 12 (b) any Defendant and or their agents who may as of now be on the suit land without the Plaintiff’s authority is directed to vacate within sixty (60) days failure to which eviction order will issue and be forcefully evicted at their costs.

It is so ordered.

**S.M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON ...19<sup>th</sup> DAY OF MARCH, 2015.**

**IN THE PRESENCE OF; PRESENT.....PLAINTIFF**

**PRESENT.....1<sup>ST</sup> DEFENDANT**

**PRESENT.....2<sup>ND</sup> DEFENDANT**

**MR. KWEYU FOR MURUNGA FOR DEFENDANTS.**