



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CIVIL CASE NO. 112 OF 2005.

DAVID BOWEN ::: PLAINTIFF.

VERSUS

**GEORGE BOWEN)
WILSON BOWEN) ::: DEFENDANTS.**

J U D G M E N T.

1. The plaintiff is the father of the two defendants. In this suit by an amended plaint, he seeks for orders for a sum of Ksh. 11,000/= being of the balance of the money for the lease agreement. He is also seeking for a declaration that he is the registered proprietor of the land parcel Trans Nzoia/Suwerwa/67. He also seeks for a permanent injunction restraining the defendants, their agents or servants from interfering with the plaintiff's property. The defendants filed a defence and counterclaim claiming that they have a beneficial interest since they were born and brought up on the suit land. They sought for an order that the plaintiff's land be subdivided equally between the plaintiff and the defendants for reasons that the defendants acquired title by adverse possession. The plaintiff also filed an interlocutory application seeking for an interim order of injunction. The parties agreed by consent. The parties recorded the following consent order:-

- 1. Pending the hearing and determination of the suit herein, the defendant's activities on the plaintiffs land parcel No. Trans Nzoia/Suwerwa/67 be restricted to 3 acres each on where they are currently occupying.*
- 2. The plaintiff activities in the suit land be and is hereby restricted to the remaining 14 acres.*
- 3. The parties herein to comply with the orders hereinabove strictly.*

2. The plaintiff gave evidence in support of this claim, he testified that he was aged 85 years of age, he retired from the Kenya Army and relies on the suit land to derive an income for himself and family. He also relied on the evidence of his wife and step mother of the defendants Ruth Chepkorir Bowen and his daughter who is the step sister to the defendants Margaret Bowen. According to the plaintiff, and his witnesses, he is the registered proprietor of title No. Trans Nzoia/Suwerwa/67. The plaintiff had two wives but the mother of the defendants passed away in 1978 leaving him with the defendants and their other siblings who were very small. The plaintiff therefore married PW2 who took care of the defendants and their other siblings until they attained the age of majority.

3. The plaintiff's complaint against the defendants is that they have been interfering with the suit land by denying the plaintiff the right to lease the suit land so that he can earn some money to support himself and his other children who require school fees. The defendants have expressed misgivings against PW1 and her children and they have been staking a claim that the entire parcel of land belonged to their late mother. It is because of this misconception that the defendants have been interfering with the plaintiff. The dispute was arbitrated before the local D.C. and the chief of the area. Indeed on the 7th July, 2005, the chief made a report regarding a meeting held between the plaintiff and the family where the family had agreed that the land be divided between the two families but the defendants refused their sisters to get a share and proposed that the land

be divided among the plaintiff and themselves. The defendants also threatened their step mother to leave the homestead but the members present decided against that and advised the family to meet later and find a lasting solution. A father meeting was held by the chief on 7th April, 2006 where the chief confirmed that the plaintiff was willing to divide his land between the two houses but the defendants refused where upon the plaintiff gave the defendants 6 acres to plough. However, the acrimony between the plaintiff and the defendants went on. There are many reports by the plaintiff where he alleged that he was assaulted by the defendants. The plaintiff was issued with P3 form. Further the plaintiff testified that although the defendants were ordered to occupy 3 acres each, they have not done so. They have continued to harass the plaintiff and especially the daughters from the 2nd house which has small school going children. The defendants have also interfered with the tenants when the plaintiff leases out the land to raise some money. This matter was once settled before the local police and the defendants were ordered to pay the plaintiff some money Ksh. 54,000/= being for the lease of the land. PW2 and PW3 also gave evidence of how the defendants have systematically harassed them and the plaintiff. The defendants resent their stepmother and they usually graze their cattle on PW1's portion of land. PW3 testified that she was forced to drop out of school due to lack of school fees.

4. On the part of the defendants, George Kibowen gave evidence on behalf of his co-defendant. He testified that since 1965 to date he has lived and depended on his father's parcel of land. The land is about 22 acres and he leases a portion from his father. He produced documents to show how he leased 7 acres from his father and the two wrote a lease agreement after he paid Ksh. 29,000/=. The defendant denied interfering with the plaintiff peaceful occupation of the land. He claims that the plaintiff showed him where to build his house and he has in occupation of only 3 acres as per the court order. Both counsel for the plaintiff and the defendants filed written submissions in support of their respective positions. Counsel for the plaintiff urged the court to injunct the defendant from interfering with the plaintiff's property except for the 3 acres that each defendant has been using. On the part of the defendants, their counsel also filed written submission and also urged the court to make a finding that the defendants are entitled to 3 acres each where they have settled from 1980s.

5. There is no dispute the plaintiff is the father of the defendants. He is also the registered proprietor of the suit premises. Decisions over disputes of this nature abound both the High Court and the Court of Appeal. Counsel for the plaintiff argued that the court should follow the decision by the Court of Appeal in the case of **Muriuki Marigi Vs. Richard Marigi Muriuki & Another, Civil Appeal No. 189 Of 1996 (Nyeri)**. The dispute involved a father and a son over the ownership of a parcel of land registered in the name of the appellant under the provisions of Registered Land Act (Cap 300). The court of Appeal dismissed the son's claim on the grounds that customary trust is not an overriding interest which is envisaged under Section 30 of Cap 300. This was also the decision taken in the reported cases of **Obiero vs. Opiyo & Others [1972] EA 227 and Esiroyo vs. Esiroyo & Another (1973) EA 388**. Furthermore the defendants did not prove the contributions they made towards purchasing the suit property. Their evidence according to counsel fail to satisfy the principles set out under the Law of Evidence because there were no documents produced to prove the payments. The defendants are legitimately expected to assist their parents in the normal cause of growing up. That contribution cannot be enforceable in law against the parents.

6. Unlike the above cases, the issue of customary trust was not based. Secondly, this case was filed by the plaintiff who is the father of the defendants. Going by the evidence from the parties in this case, the plaintiff did not wish to have his sons evicted. Indeed there is even no prayer for eviction. The plaintiff's desire which is also captured in the written submissions by his counsel is to have the defendants confined to a portion of 3 acres each where he allocated them and where they have been cultivating and built their homes. The defendants filed a counterclaim seeking to be declared owners of the portion they occupy having acquired their rights by prescription. The defendants counterclaim cannot hold in law because they did not follow the prescribed procedure of filing an originating summons. Moreover, no evidence was adduced to support the counterclaim. Upon evaluation of the evidence the plaintiff did not show how the sum of Ksh. 11,000/= was owed by the defendants. The defendants on their part produced documents to show how they paid for the lease of 7 acres before the chief. The agreements before the chief was witnessed. Regarding the prayer for declaration, I would have no problems to declare the plaintiff the absolute owner of the land parcel Trans Nzoia/Suwerwa/67 subject to the defendants occupying a portion of 3 acres each. The defendants are hereby injuncted by a permanent order of injunction together with their agents or servants or anyone claiming through them from interfering with the plaintiff's other balance of 16 acres. This being a family matter each party should bear their own costs.

Judgment read and signed this 15th day of July, 2011.

MARTHA KOOME.

JUDGE.