



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 111 OF 2013. (FORMERLY HCC. NO. 43 OF 2012)

JAMES ILALE EKISA.....PLAINTIFF

VERSUS

TOM KEDINYANG OKUNDU & 6 OTHERS.....DEFENDANT

J U D G M E N T.

JAMES ILALE EKISA, hereinafter referred to as the Plaintiff, filed this case against **TOM KEDINYANG OKUNDU, PAULO OKWANA ABUK, IGNATIUS OWIRE OMOSHO, ISHA ALI MUKHABANI, JOYCE PAPAI AND ELIZABETH MANGENI**, hereinafter referred to as 1st to 6th Defendant respectively for;

- a. Eviction order against Defendants and those claiming under them from land parcel South Teso/Angoromo/713.
- b. Permanent injunction against Defendants and those claiming under them from trespassing and or encroaching onto land parcel south Teso/Angoromo/713.
- c. Costs of this suit.

The plaint, dated 28th May, 2013 was filed through M/S. Gabriel Fwaya advocate, and in it the plaintiff avers to the following among others;

1. That he was appointed the administrator of the estate of Matayo Ironiti Ilale on 5th March, 2012 in Busia H.C. succession Cause No. 7 of 2012.
2. That Matayos Ironiti Ilale, the deceased, was the registered owner of Land parcel South Teso/Angoromo/713 until his death.
3. That he got registered with the said land on 16th March, 2012 after being appointed as the administrator of the estate of Matayos Ironiti Ilale.
4. That the 1st Defendant is entitled to land parcel South Teso/Angoromo/719 and 2nd Defendant to South Teso/Angoromo/725.
5. That 4th to 6th Defendants have purchased portions of land parcel South Teso/Angoromo/719 from 1st Defendant.
6. That the Defendants have interfered and encroached into a portion of Land parcel South Teso/Angoromo/713 without authority and should be evicted and permanently enjoined.

Each of the Defendants were served with the court papers and the affidavit of service filed. The 2nd Defendant entered appearance twice on 5th July, 2012 and 13th October, 2012 in person. The 1st, 4th and 5th Defendant entered appearance through M/S. Manwari & co. Advocates through the memorandum of appearance dated 12th July, 2012. The 6th Defendant entered appearance in person on 13th July,

2012 through her memorandum of appearance dated 10th July, 2012. The 1st Defendant again entered appearance through memo dated 10th July, 2012 and filed on 13th July, 2012.

The 3rd Defendant did not enter appearance. Also, none of the Defendants filed any defence. The Plaintiff filed their request for judgment dated 15th August, 2012 against the 3rd Defendant who had neither entered appearance nor filed defence. The Plaintiff also filed a consent order dated 10th July, 2012, entered between himself, 1st, 2nd and 6th Defendant to the effect that judgment be entered against the three Defendants as prayed in the plaint with each party bearing his/her own costs.

The Plaintiff set the matter down for hearing on 12th March, 2013 and notified the Defendants. The 6th Defendants did not attend the court on that day and the hearing commenced as those present were ready. The court allowed the Defendants to cross-examine the Plaintiff and his witnesses on the appreciation that the case involved interests and rights to land.

The Plaintiff testified as PW 1 and told the court that Matayos Ironiti Ilale was his father and the registered owner of South Teso/Angoromo/713 until his death. PW 1 said he then filed Succession Cause No. 7 of 2012 and was appointed the administrator of his deceased father's estate, following which he was registered with the land. He added that, land parcel South Teso/Angoromo/713 neighbours parcel 719 which is registered in the names of Okudu Ekisa, who is the father of 1st Defendant and parcel 725 registered in the names of Yahana Ame who is father to the 2nd Defendant. He produced copies of the grant, green card and certificate of official searches for parcels 713, certificate of official searches for parcels 719 and 725, plus survey plan for Angoromo registration section diagram number 13 of 28th May, 2012.

Plaintiff said on 22nd April, 2012 he brought a surveyor to confirm the boundaries and acreage of land parcel South Teso Angoromo/713 and the surveyor prepared a report dated 15th May, 2012 showing the land was only 2.12 hectares on the ground instead of 4.6 hectares on the documents due to encroachment by parcels 719 and 725. The report indicated the surveyor needed a court order to confirm the ground acreage of the parcels 719 and 725. The report also showed that land parcel 719 had been subdivided.

Plaintiff informed the court that the 3rd, 4th and 6th Defendants had bought portions of land parcel South Teso/Angoromo/719 from 1st Defendant while the 5th Defendant had bought a portion of land from 3rd Defendant from the portion he had bought from 1st Defendant. He added that the portions 1st Defendant had sold to 3rd, 4th and 6th Defendant though meant to be from parcel 719 were placed on parcel 713 on the ground without his permission or consent.

The second witness was Titus Ojuang, the County Surveyor, who testified as PW 2 told the court of his finding when he visited land parcel South Teso/Angoromo/713 on 13th May, 2013. He said though the official document showed land parcel South Teso/Angoromo/713 was 4.6 hectares, he found it was only 2.12 hectares on the ground due to the encroachment by parcels 719 and 725. On the court confirming that the 1st and 2nd Defendant were agreeable to the witness confirming the ground sizes or acreages of parcels South Teso/Angoromo/719 and 725, PW 2 was stood down to be recalled after the exercise. When the hearing resumed on 31st March, 2014, PW 2 continued with his testimony. He told the court that following the court order of 15th May, 2013, he visited the suit lands on 12th June, 2013 in the company of the Land Registrar who testified as PW 3 and prepared a report which PW 3 produced as exhibit. To the report is annexed a sketch plan by PW 2 which shows how Land parcel South Teso/Angoromo/713 is occupied. The portion marked "A" is the only one used by Plaintiff and appears to be about half the size of the parcel. The portions marked "B, C, D and E" are occupied by persons who bought the portions allegedly from parcel South Teso/Angoromo/719 and 1st Defendant. The portion marked "F" marks the portion of Land parcel South Teso/Angoromo/713 taken by land parcel South Teso/Angoromo/725 by pushing the public road that marks the boundary between the two parcels to inside parcel 713. Both PW 2 and PW 3 told the court they repositioned

the boundaries marking parcels South Teso/Angoromo/713, 719 and 725 to the correct positions after establishing parcel 719 had encroached onto parcel 713 by 1.33 hectares and parcel 725 had encroached onto parcel 713 by 1.08 hectares. They also repositioned the public road to the correct position.

The Plaintiff then closed his case and after confirming none of the Defendants had filed any defence the court placed the case for judgment.

The court has carefully considered the testimonies offered by PW 1 to PW 3 and the exhibits produced and find as follows;

1. That land parcel South Teso/Angoromo/713 was first registered on 7th November, 1973 in the names of Matayo Ironi, who I take to be the father of the Plaintiff, and whose estate was the subject matter of Busia H.C. Succession Cause No. 7 of 2012.
2. That the Plaintiff was registered with the said land as administrator of the estate on 16th March, 2012.
3. That land parcel South Teso/Angoromo/713 was 4.6. hectares and neighbours parcels 719 and 725 which are 2.8. hectares and 2.0 hectares respectively, among others.
4. That the measuring exercise carried out by PW 2 and PW 3 following the court orders of 15th May, 2013 on 12th June, 2013 confirmed that land parcel South Teso/Angoromo/719, from which 1st, 3rd, 4th, 5th and 6th Defendant's claim portions, had encroached into parcel South Teso/Angoromo/713 had by 1.33 hectares. They also established that land parcel South Teso/Angoromo/725 had encroached onto land parcel South Teso/Angoromo/713 by 1.08 hectares
5. That the boundaries in respect of land parcels south Teso/Angoromo/713, 719 and 725 have now been repositioned to the correct positions reflecting the respective acreages or sizes of the three parcels.
6. That the exercise by PW 2 and PW 3 to reposition the boundaries for the three parcels of land clearly shows the 2nd Defendant, and his relatives who use land parcel South Teso/Angoromo/725, had been using a portion of 1.08 hectares belonging to South Teso/Angoromo/713 without permission or consent of the Plaintiff. It also shows that the 1st Defendant, who claim ownership of South Teso/Angoromo/719, had given out portions of the land currently used by 3rd to 6th Defendants which were placed on a portion of 1.33 hectares encroached from parcel South Teso/Angoromo/713 instead of placing them on the appropriate parcel and this was done without the consent of Plaintiff.
7. That none of the Defendants has a legally recognizable or enforceable interest over land parcel South Teso/Angoromo/713 and this may be the reason none filed a defence to the Plaintiff's case.
8. That none of the Defendants has shown the court that they deserve to be allowed to continue occupying the portions of South Teso/Angoromo/713 belonging to the Plaintiff that they currently occupy without his consent.
9. That those of the Defendants who occupy South Teso/Angoromo/713 including 3rd to 6th Defendants, have no right to continue occupying the Plaintiff's land and should instead pursue their respective claims in accordance with the provisions of the applicable law from the person who sold them the land.

Having found as above, it is clear that the Plaintiff's case has merit. He has established on a balance of probabilities that he is entitled to the prayers sort. Had the consent of 10th July, 2012 between Plaintiff on one part, and 1st, 2nd and 6th Defendants on the other part, been confirmed, the three Defendants would have escaped the costs. I therefore enter judgment for the Plaintiff against the Defendants in the following terms;

- a. That the Defendants are hereby ordered to vacate from the portions of land they occupy out of land parcel South Teso/Angoromo/713 and particularly marked as "B, C, D E and F" in the sketch plan by the County Surveyor, attached to the County Land Registrar's report of 12th June,

2013 and forwarded to the Deputy Registrar through the letter, dated 3rd July, 2013 and produced as exhibit 8 within thirty (30) days from today.

- b. That in default of the Defendants vacating from the said portions of land parcel South Teso/Angoromo/713 as ordered in (a) above and giving vacant possession to the Plaintiff eviction orders to issue without any further application.
- c. That the Defendants will pay the Plaintiff the costs of this suit.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED IN OPEN COURT THIS 13th DAY OF MAY, 2014.

IN THE PRESENCE OF;

JUDGE.