



REPUBLIC OF KENYA

High Court at Busia

Civil Appeal 52 of 2010

YOKESOFAT OKIRING OKIRADI alias JOSEPHAT IKIRING)

ELIJAH OTEBA ALFAYO alias ALLAN ODEKE).....PLAINTIFFS.

AMOS ITEBA)

VERSUS

STEPHEN OKIRADU ALFAYO.....DEFENDANT.

J U D G M E N T.

YOKESOFAT OKIRING OKIRADI alias JOSEPHAT IKIRING,ELIJAH OTEBA ALFAYO alias ALLAN ODEKE and AMOS ITEBAhereinafter referred to 1st, 2nd and 3rd plaintiffs respectively, through M/S. Cheloti, Etole& company advocates filed this case against Stephen OkiranduAlfayo, hereinafter referred to as the defendant for the following:

- a) An order of eviction to remove the defendants from land parcel North Teso/Kamuriai/219.
- b) An injunction to restrain the defendant from cutting down trees or other destructive acts on the said land.
- c) Cost and interest.
- d) Any other relief.

The plaintiffs aver that they are the absolute proprietors in common and first registered owners since 16th June, 1975 of North Teso/Kamuriai/219. They added, that they filed this case after the defendant whomtheyhad allowed on the hand temporarily refused to vacate upon being asked to do so. They further added that the defendant had filed a case against them claiming a portion of land before the Amagoro land Dispute tribunal which was adopted by Busia PM.C Land case No.94 of 2008. That the plaintiffs thereafter filed Bungoma High Court Misc. application No.1010 of 2009 where orders of certiorari against the tribunal award and the Magistrate's court adoption order in the case referred to hereinabove was issued.

In his filed statement of defence, the defendant denied the plaintiffs claim and stated that the plaintiffs are his brothers and that land parcel No. North Teso/Kamuriai/219 originally belonged to their father one AlfayoOkirandu. He further stated that the plaintiffs left out his name when they were registering their father's land even though he had been in occupation of six acres from the time of the first registration to date. He further indicated that he would be asking for the suit to be struck out for being time barred.

In reply to the defence, the plaintiffs averred that the defendant is not a son of their father Alfayo Okirandu stating that their father died in 1947 while the defendant was born in the middle of 1950's. The plaintiffs added that they had allowed the defendant into their land temporarily in 1989 and terminated the licence in 2005 but the defendant declined to vacate. The plaintiffs also filed a list of their documents and witnesses statements and served them on the defendant's advocate.

After closure of the pleadings, the case was fixed for hearing on 26th September, 2012 when the date was changed to 20th February, 2013. On that day, the defendant and his advocate did not attend court even though served with a hearing notice. The court directed the hearing to proceed on 13th March, 2013 and asked the plaintiffs' counsel to serve a hearing notice. Come the 13th March, 2013 the defendant and his advocate were not present in court even though served with hearing notice. The court allowed the plaintiffs to present their case. The 1st and 2nd plaintiffs testified as PW 1 and PW 2 respectively restating that contents of the plaint.

Counsel to the plaintiffs then filed written submissions dated 18th March, 2013. He submits that the plaintiffs were not registered with the land as trustee but as absolute owners of a third share each and their rights are covered under section 28 of Registered Land Act Cap 300 of Laws of Kenya (Now repealed) and now section 25 of Land Registration Act No. 3 of 2012. He further submitted that the defendant is not a son of the plaintiffs father, Alfayo Okirandu as he was born 4 years after Alfayo's death. That the defendant is a son of Simon Okisai who remarried the plaintiffs mother after their father's death. He referred the court to the proviso to section 35 of the Law of Succession Act Cap 160 of Laws of Kenya and the Restatement of African Customary Law, Volume II by Eugene Cotran at Page 149 and submitted that the defendant should seek for inheritance from his father namely Simon Okisai.

The court has considered the pleadings herein, evidence tendered by PW 1 and PW 2 and submissions by the plaintiffs' counsel and find as follows:

- 1) That the plaintiffs are registered with land parcel North Teso/Kamuriai/219 as owners in common of a third share each.
- 2) That the plaintiffs registration is a first registration in terms of section 28 of Cap 300 of Laws of Kenya (Now repealed) and now section 25 of the Land Registration Act No.3 of 2012.
- 3) That from the plaintiff's pleadings, and the testimonies of PW 1 and PW 2 the defendant was born some years after the death of Alfayo Okirandu from whom the plaintiffs became entitled to the land in question.
- 4) That it is evident the defendant had launched a claim over the said land with the Amagoro Land dispute tribunal which had awarded him a portion of the land on 25th November, 2008. The award was adopted in Busia PMC. Land case No.94 of 2008 but the plaintiffs successfully had the award quashed under Bungoma High court Misc. App. No. 110 of 2009.
- 5) That the defendant do not appear to have launched any further claim over the land as even in this particular case, his filed statement of defence do not contain a counter claim.
- 6) That from the evidence adduced herein, the plaintiffs had allowed the defendant on to their land temporarily and in the year 2005, terminated the licence they had granted to the defendant. The defendant however declined to vacate and has remained on the land, hence this case.
- 7) The plaintiffs have established that, as the absolute owners of the land in question the continued occupation by the defendant on their land is against their express direction and amounts to trespass.

From the foregoing, the court is satisfied that the plaintiffs have established their case against the defendant on a balance of probabilities and are entitled to the orders prayed for. Judgment is hereby entered in favour of the plaintiffs against the defendant as follows:

- a. That the defendant, his servants, agents, assigns and a legal representative is given 90 days to vacate from Land parcel No. North Teso/Kamuriai/219 and in default to forcefully evicted.
- b. That an order of injunction is hereby issued to restrain and prohibit the defendant, his servants, agents, assigns and legal representatives from cutting down trees and committing other want acts of destruction on the said land.
- c. That the defendant will pay costs of this suit.

It is ordered.

S. M. KIBUNJA
JUDGE.

4TH JUNE, 2013.