

IN THE DISTRICT COURT HELD AT WEIJA, ACCRA ON WEDNESDAY THE 26TH
DAY OF OCTOBER, 2022 BEFORE HER WORSHIP RUBY NTIRI OPOKU (MRS),
DISTRICT MAGISTRATE

SUIT NO. G/WJ/DG/A9/20/2021

1. ABRAHAM YAKUBU (HEAD OF FAMILY)
 2. ABUBAKARI IDRUSU YAKUBU
 3. MOHAMMED KELLY YAKUBU
 4. DAWUDA YAKUBU
 5. MOROTALA MOHAMMED YAKUBU
 6. ELIAS MOHAMMED YAKUBU
- } PLAINTIFFS

VRS

ADIZA MORO

DEFENDANT

PLAINTIFFS ARE ABSENT

DEFENDANT IS PRESENT AND REPRESENTED BY ALHAJI ABDUL LATIF
HOLDING BRIEF FOR RITA KUNKUTI ALI ESQ.

JUDGMENT

On 31st December 2020, the Plaintiffs caused a writ of summons to issue against the Defendant for the following reliefs;

1. An order for the defendant to be ejected from the unnumbered house of the late Mohammed Armed Yakubu at Kasoa New Town since she has remarried.

2. An order for the defendant to submit all relevant documents including deceased husband's phone, bank accounts and death certificate.

The defendant filed notice of entry of appearance by her lawyer on 13th January 2021 and filed a statement of defence on same day and counterclaimed for the following reliefs;

- a. Declaration of title to the said room the subject matter of the dispute
- b. Damages for trespass to the said property
- c. Perpetual injunction restraining the plaintiffs, their assigns and successors in title from interfering with the defendant's ownership and possession of the said room
- d. Declaration that the defendant is the rightful person to hold the property of her children in trust until they attain the ages of 18 years
- e. General damages
- f. Costs

On 27th July 2022, 1st plaintiff representing the plaintiffs informed the court that he was indisposed and as a result, he has relinquished his leadership position in the Yakubu family and as a result prayed the court to forward all correspondence to his uncles in Obuasi.

Subsequently, when the case was called for hearing, plaintiffs were all absent and the court was furnished with a letter dated 31st August 2022 signed by the 1st Plaintiff as "Former Leader of Yakubu Family."

Counsel for the defendant prayed the court to dismiss the action and allow the defendant to prove her counterclaim.

Accordingly, the court dismissed the action and called on the defendant to prove her counterclaim pursuant to Order 25 r 1(2) (b) of the District Court Rules 2009 (C.I.59) which provides as follows;

“Where an action is called for trial and a party fails to attend the trial, the trial Magistrate may where the defendant attends and the plaintiff fails to attend dismiss the action and allow the defendant to prove his counterclaim if any”

THE CASE OF THE DEFENDANT

Defendant informed the court that her husband died on 30th October 2018 and after his death, the head of family of the deceased who is the 1st Plaintiff decided that the property of the deceased be shared according to Islamic law and so the Chief Imam for Kasoa shared the property accordingly. As the surviving spouse, defendant was give three rooms out of her late husband’s twenty four bedroom house.

It is the case of the defendant that the 1st plaintiff told her that he wanted to hold her children’s share of the property in trust for them until they attain majority which proposal she was vehemently opposed to. According to defendant, she is the only surviving parent of her four children and so she is the rightful person to hold the property that devolves on them until they attain 18 years.

Defendant added that 1st plaintiff sold the craps which belonged to her deceased husband before his death and the amount realised from the sale was shared for all six children of the deceased at the Legal Aid Commission in Accra.

It is the further case of the defendant that after the distribution of the property of her late husband, the 5th Plaintiff rented out his share of the property and continued to live in the part that was given to her eldest child until after a year when she asked him to move out for her to renovate that portion of the property. 5th Defendant got angry and destroyed

everything in the room before he moved out of same. Defendant tendered pictures of the damaged items and same was admitted in evidence and marked as Exhibit 1 series.

Defendant informed the court that she waited for the prescribed period within which to wait prior to remarrying after the death of her husband and is currently married. She added that her new husband visits her for short periods in the house and as a result, she is constantly harassed, threatened and sometimes beaten by 1st Plaintiff, his son and other unnamed persons who on countless occasions have asked her to leave the room which devolved on her after the death of her husband simply because she is remarried. Defendant says she has lodged complaints of her beatings and harassment to the Toll Booth Police Station and tenders police reports and medical reports in evidence. Same were admitted and marked as Exhibits 2 series.

Defendant says that prior to her second marriage, 1st plaintiff had earlier informed her that he wanted one of his family members to marry her which she did not agree to.

Defendant says she reported 1st plaintiff's intention to take over her children's share of the property to the Legal Aid Commission where the 1st plaintiff was advised to assist her to obtain letters of administration but he refused.

Defendant concluded that plaintiffs are not entitled to their reliefs.

At the end of the trial, the issue that was set down for determination is whether or not the defendant is the rightful person to hold the property of her children until they attain the ages of majority.

BURDEN OF PROOF

With regard to the counterclaim of the defendant, it is trite that the defendant bears the same burden as a plaintiff in proving her counterclaim which is on the preponderance of probabilities.

In *Tetteh Ayaa Iddrisu v. Winfred Otuafo & Anor* [2010] SCGLR 818, the Supreme court held as follows;

“A party who counterclaims bears the burden of proving his counterclaim on the preponderance of probabilities and will not win on that issue only because the original claim failed.”

Ansah JSC in *Joseph Akonu-Baffoe and 2 others v Lawrence Buaku and Another*, Civil Appeal No. J4/6/2012 emphasized the position of the law on counterclaim as follows;

“In essence, a defendant’s counterclaim is to be treated in the same way as the plaintiff’s case. The roles are reversed and the defendant as plaintiff in the counterclaim assumes the burden to prove his case.”

On the day of the hearing plaintiffs were not in court to cross examine the defendant even though there is an affidavit of service of a hearing notice on the court’s docket.

The law is that when a party makes an averment and same is not denied by the adversary, no issue is joined and the party does not have to lead any evidence to prove same. Again when a party gives evidence of a material fact and same was not cross examined upon, the court is bound to accept the evidence.

This position of the law was given judicial blessing in the case of *in Re Presidential Election Petition; Akuffo-Addo, Bawumia & Obetsebi-Lamptey (No 4) vrs. Mahama, Electoral Commission & National Democratic Congress (No 4)* [2013] SCGLR (Special Edition) 73 when at page 425, Anin Yeboah JSC (as he then was) held;

“I accept the proposition of law that when evidence led against a party is left unchallenged under cross examination, the court is bound to accept that evidence:”

Applying the law cited supra, I am bound to accept the evidence of the defendant.

Judgment is entered in favour of the defendant against the plaintiffs as follows;

1. That the defendant is the rightful person to hold the property of her children who are minors in trust until they attain the ages of majority.
2. The plaintiffs, their assigns, privies, workmen and successors are perpetually restrained from interfering with the property the subject matter of this dispute.
3. General damages of GHC5,000.00 is awarded in favour of the defendant against the plaintiffs
4. Costs of GHC2, 000.00 is awarded in favour of the defendant against the plaintiffs.

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H/W RUBY NTIRI OPOKU (MRS.)
(DISTRICT MAGISTRATE)