



**Nyabera v Amatta (Environment & Land Case 26 of 2019)
[2023] KEELC 19048 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19048 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 26 OF 2019**

EC CHERONO, J

JULY 28, 2023

BETWEEN

WALTER MAJANJA NYABERA PLAINTIFF

AND

PETER SEDEANO AMATTA DEFENDANT

JUDGMENT

Background

1. By a plaint dated 11th September, 2019 the plaintiff Walter Majanja Nyabera sued the defendant Peter Sedeano Amatta for orders that; -
 1. Land parcel numbers Bungoma/Ndalu/1112 and 1111 be reverted back to Bungoma/ Ndalu/ 53 in the names of settlement Fund Trustees.
 2. Costs
 3. Interest at court rates.
2. The defendants filed a statement of defence and counter-claim dated 18th October, 2019 denying the plaintiff's claim in the plaint and setting a counter-claim against the plaintiff for orders that;
 - a. A declaration that the Defendant is entitled to exclusive and unimpeded right of possession and occupation of all that piece of land title number Bungoma/Ndalu/1112 ("the suit land") which the plaintiff by himself or his servants or agents or otherwise is wrongfully in occupation and is accordingly, a trespasser thereon and is not entitled to remain on the suit land and as such should give vacant possession of the suit land.
 - b. General damages for trespass
 - c. Cost and interest on the counterclaim



- d. Any such further relief as this honourable court shall deem fit to grant.
3. The parties filed their compliance documents under Order 3,7 & 11 of the Civil Procedure Rules and the case proceeded for hearing on 1st May, 2023 and 22nd May, 2022. By consent parties agreed to file submissions on their various claims and this matter was set down for judgment.

The Plaintiff's Case

4. The Plaintiff stated that he is the administrator of Joash Nyabera Embaywa his deceased father and Rosoa Hamba Nyabera his deceased father's 3rd wife. That he obtained a confirmation of grant over his father's estate i.e Bungoma/ Ndalul 53 and Plot No. 13 Maragaili. That the said estate was distributed amongst its' beneficiaries. He averred that at the time Bungoma/ Ndalul 53 was still registered in the name of the settlement land trustees when his deceased father died despite him having written a letter to the District Land Adjudication and Settlement Officer, Bungoma District to have the said land discharged. The plaintiff further stated that the defendant went to the District Land Adjudication and Settlement Office to claim the Discharge of charge, though he was not a beneficiary of the estate and more specifically Bungoma/ Ndalul 53. The plaintiff pleaded that the defendant was engaged in fraudulent dealings and enumerated the particulars of fraudulent as;
 - a. Though not a beneficiary of the estate of Bungoma/ Ndalul 53, the defendant posed as one in obtaining discharge of charge dated 8th August 2014 and all other papers of the discharge until the same was granted to him.
 - b. Though not a beneficiary he filed a case against Rosoa Hamba Nyabera (Deceased) on the 30th April, 2012 instead of waiting for the plaintiff to carry out the administration of the late Rosoa Hamba Nyabera
 - c. The defendant going to the lands office for mutation in respect of Bungoma/ Ndalul 53 whereby he got land parcel no. Bungoma/ Ndalul 1111 and 1112 from the parcel no Bungoma/ Ndalul 53 on 1st February, 2015 and the same was registered on the 20th August, 2015 by the Land Registrar in the defendant's name.
 - d. Getting the Land parcels in his name i.e Bungoma/ Ndalul 1111 and 1112 without the consent of the plaintiff.
5. As such the plaintiff approached the seat of justice claiming for an order directing the land parcels Bungoma/ Ndalul 1111 and 1112 be reverted back to Bungoma/ Ndalul 53 and in the names of the settlement Fund Trustees.

The Defendant's Case

6. The defendant averred that letters of confirmation of grant to the estate of the late Joash Nyabera Embaywa were issued to the plaintiff and Rosoa Hamba Nyabera on 28th February, 2002 and the entitlements of the beneficiaries was defined therein and as per the plaint. He pleaded that Rosoa Hamba Nyabera was granted Five Acres forming part of Plot No. 53 Ndalul settlement. He states that the said Rosoa Hamba Nyabera died on 27th July, 2021 leaving behind a valid will dated 14th January, 2011 bequeathing him her interest in Plot No. 53 Ndalul settlement. The defendant further avers that he was issued with letters of administration with a will annexed over the estate of Rosoa Hamba Nyabera in Kitale HC SUCC Cause No. 246/2011 on 25th October, 2012. The defendant states that he pursued discharge of charge of Bungoma/ Ndalul 53 as a beneficiary/administrator of the estate of the late Rosa Hamba Nyabera who was entitled to Five acres of Bungoma/ Ndalul 53. He denies



the particulars of fraud enumerated in the plaint and avers that he was registered by transmission as the proprietor of Bungoma/ Ndalul 1112 in place of Roasa Hamba Nyabera and he holds the title to Bungoma/ Ndalul 1111 in trust for the other beneficiaries of the estate of Joash Nyabera Embaywa. The defendant averred that he was ready and willing to surrender title over Bungoma/ Ndalul 1111 to the other beneficiaries of the estate of Joash Nyabera Embaywa i.e as per the certificate of grant issued in Kitale HC SUCC CAUSE No. 56 of 1998 and that his title should not revert to the Settlement Fund Trustees. The defendant pleads that he is entitled to quiet possession of Bungoma/ Ndalul 1112 without interference from the plaintiff.

7. In his counterclaim the defendant averred the facts pleaded in his statement of defence and added that the plaintiff has wrongfully entered into Bungoma/ Ndalul 1112 without any justifiable cause barring him from enjoying his property. He avers that the plaintiff has damaged and wasted Bungoma/ Ndalul 1112 by utilizing the resources without the defendant's express consent causing him to suffer losses and damages. He avers that the plaintiff has no right to occupy the suit land and is a trespasser and he ought to vacate to avoid deterioration of the same. The defendant's prayers are as stated above in the introduction.

The Plaintiff's Evidence And Submissions.

9. PW1 Walter Majanja Nyabera adopted his statement dated 11th September, 2019 and produced documents marked as Pexhibit 1 -17. He reiterated the facts raised in his plaint and stated that his father Joash Nyabera Embaywa died in the year 1989 and subsequently he took out letters of administration for his estate i.e Bungoma/ Ndalul 53 and the same was subsequently distributed. He referred to PExhibit No. 1-5. PW1 stated that the defendant secretly and fraudulently had the property i.e. Bungoma/ Ndalul 53 discharged from the Settlement Fund Trustees, subdivided into two properties i.e. Bungoma/ Ndalul 1111 and 1112 and registered in his name although he was not a beneficiary. PW1 denied any relations with the defendant and stated that he only saw him at his step-mother's (Rosa Hamba Nyabera) burial and was he was surprised that the defendant had taken out letter of administration over the estate of Rosa Hamba Nyabera. He made reference to PExhibit 6-17
10. With regard the counterclaim against him PW1 reiterated that the defendant was not a beneficiary of the estate of Joash Nyabera Embaywa and he therefore was not entitled to Bungoma/ Ndalul 1112 or any part of Bungoma/ Ndalul 53 and therefore the orders sought. The witness testified that Bungoma/ Ndalul 1112 was bare and was not being used for cultivation or any other business but grazing cattle.
11. In his submissions the plaintiff raised 6 issues for determination and submitted as follows;

He submitted that Rosa Hamba Nyabera did not have any legal interest transferable in Bungoma/ Ndalul 53 adding that a widow only inherits a life interest in her late husband's estate. He relied on Section 35 (1) (a-b) of the *Law of Succession Act*, CAP 160 Laws of Kenya which provides that;

“Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

- a) the personal and household effects of the deceased absolutely; and
- (b) a life interest in the whole residue of the net intestate estate:

12. The plaintiff submitted that therefore the said Rosa Hamba Nyabera could not transfer what she did not possess and that the only transferrable assets were her movable assets.



13. The plaintiff further submitted that the suit property did not form part of the estate of the deceased as the same was not registered in her name and relied on Section 3 of the Law of Succession Act, CAP 160 Laws of Kenya on the definition of the word estate. Following the above PW1 submitted that the letters of confirmation issued on 25th October, 2012 in Kitale HC SUCC CAUSE No. 246 of 2011- Estate of Rosoa Hamba Nyabera were void ab initio.
14. Further submissions were that the plaintiff and his siblings were entitled to the Five acres inherited by Rosoa Hamba Nyabera from the estate of Joash Nyabera Embayea upon her demise as the legitimate children of the estate as per Section 39 and 40 of Law of Succession Act, CAP 160 Laws of Kenya. The plaintiff in his further stated that the procedure followed by the defendant in subdividing and transferring the suit property to his name and he relied on Section 61 of the Land Registration Act No. 3 of 2012.
15. PW1 stated that the defendant did not follow the correct legal procedure in obtaining letters of administration for the estate of Rosoa Hamba Nyabera. He stated that the defendant ought to have upon receipt of the letter of confirmation for the estate of Rosoa Hamba Nyabera caused an amendment on the original letters of administration i.e. Kitale HCCA SUCC CAUSE NO. 56 of 1998.
16. In support of the prayer to have the tiles Bungoma/Ndalu 1111 and 1112 revert back to Bungoma/ Ndalu 53 and in the name of the settlement Fund Trustees the plaintiff submitted that the defendant engaged in illegalities in causing for the transfer of the property to his name as enumerated in the plaint and that the defendant was in violation of the Laws of Succession and as such the provisions of Section 26 of the Land Registration Act, Cap 3 of 2012 ought to apply.
17. In respect to the counterclaim the plaintiff testified that the same did not satisfy the requirements under Section 107 (1) of the evidence Act . the plaintiff further alleges that there will be no effect in the event this honourable court revokes the tiles to Bungoma/Nadalu 1111 and Bungoma/Ndalu 1112. The plaintiff submitted that this court has the jurisdiction to determine the issue of life interest of a beneficiary in an intestate estate and matters of trusts.
18. The plaintiff finally submitted he was entitled to costs and the same ought to be awarded.

The Defendant's Evidence And Submissions

19. DW1 Peer Sedeano Amatta adopted his statement dated 18th October, 2019 and produced documents marked as DExhibit 1 -4. He reiterated the facts raised in his statement of defence and counter-claim. He stated that he knew the plaintiff and his siblings since 1967 and that they schooled within the same neighborhood. He testified that he obtained ownership of Bungoma/Ndalu/1112 personal representative of the estate of Rosoa Hamba Nyabera upon confirmation of grant in Kitale HC SUCC CAUSE No. 246 of 2011- Estate of Rosoa Hamba Nyabera. He testified that the plaintiff in this matter had initially filed a claim against him in Kitale ELC No. 27 of 2012 seeking a permanent injunction restraining him (the defendant) from intermeddling with the estate of Joash Nyabera Embwaya (the plaintiff's father) which application was disallowed. DW1 testified that he was the legitimate owner of Bungoma/Ndalu/1112 and that he was holding title in Bungoma/Ndalu/1111 in trust for the other beneficiaries i.e the plaintiff and his siblings. He reiterated that the interest in Bungoma/Ndalu/1112 was that of Rosoa Hamba Nyabera and he did not have claim over Bungoma/Ndalu/1111 and that the plaintiff and the other beneficiaries were free to take the tile for their further transfer to individual beneficiaries. In support he referred to DExhibit 1-4.



20. DW1 further testified that the plaintiff had interfered with his quiet occupation of Bungoma/Ndalu/1112 and that the said interference amounts to trespass. He added that the said trespass has occasioned losses on him as it has deprived him the right to benefit from the parcel. He states that if he was in occupation of the parcel he would have planted maize and made good harvest thus earning some money.
21. His prayers are as stated in the Introduction.
22. In his submissions the defendant submitted that the court in Kitale ELC No. 27 of 2012 upheld the legitimacy of his ownership of Bungoma/Ndalu 1112. He added that the plaintiff did not challenge the decision of that court. He submitted that by filing the current suit the plaintiff was trying to re-litigate over a decided matter forcing this court to sit on appeal from the decision of a court with similar jurisdiction and further to revoke a legitimate grant of letter of administration that the same amounted to an abuse of the due process of the court.
23. The defendant submitted that Under Section 61 of the [Land Registration Act](#), 2012 that he had all the right and justification to have the Five Acres held by Rosoa Hamba Nyabera transferred to him as her legal representative He denied having committed any act of fraud and stated that he had been registered as the proprietor of Bungoma/Ndalu 1112. Through transmission which was a legitimate procedure in law. The defendant submitted that as the legitimate proprietor of Bungoma/Ndalu 1112 he was entitled to quiet and peaceful enjoyment, use and occupation of Bungoma/Ndalu 1112. He submitted that his title had not been impugned on grounds of fraud under Section 26 (1) of the [Land Registration Act](#), 2012 and Section 80(1)(2) of the same Act. The defendant further submitted that the plaintiff had proved the element of fraud and his case generally on a balance of probabilities. He stated that the plaintiff ought to have challenged the sub-division in the succession court as the same was occasioned by the issuance of the certificate of grant in that court i.e Kitale HC SUCC CAUSE No. 246 of 2011.
24. The defendant further submitted that the plaintiff has occupied Bungoma/Ndalu 1112 and denied him access and he (the plaintiff) is guilty for trespass as described in Isaac E. N. Okero & Another vs. Tom Soya Okwach & Another (2021) Eklr.
25. Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines trespass as follows:

“ Any unjustifiable intrusion by one person upon land in possession of another.” Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”
26. Further Section 3 (1) of the [Trespass Act](#), Cap 294 provides that:

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
27. In making his case for an award of general damages the defendant relied on the case of E. N. Okero & Another vs. Tom Soya Okwach & Another (2021) Eklr, Africa Gospel Church Chebocho (Registered Trustees) vs. Paul Mutai alias Laigong (2017) eKLR and DIM Agencies Limited vs. Kenya Airports Authorities (2021) Eklr, Hassan Mohammed Haji vs. Mohamed Keynan & another (2019) Eklr and sought Kshs.100,000/=.



28. The defendant submitted that Raso Hamba Nyabera was entitled to the 5 Acres and that he followed the correct procedure in transferring ownership to his name and that Bungoma/Ndalu 1112 does not form part of the estate of Joash Nyabera Embwaya therefore it cannot revert to the deceased's name. He submitted that having produces a tile which is prima facie proof of ownership he has proved his counterclaim. He urged that this court lacked the jurisdiction to entertain the plaintiffs' prayer and that the plaintiffs case ought to be dismissed with costs as per Section 27 of the Civil Procedure code.

Analysis and Determination

29. This court carefully considered the pleadings by both parties, their oral testimonies and written submissions as well as the law. It finds four issues for determination. These are:
1. Whether the plaintiffs suit is properly before court
 2. Whether the defendant's title to the suit property is valid.
 3. Whether there was trespass by the plaintiff on the defendant's land.
 4. Who bares the costs of this suit

I now proceed to discuss them.

1. Whether the plaintiffs suit is properly before court.

30. In a addressing this question, the court takes into account the history pertaining the plaintiff's claim. The plaintiff seems to be disgruntled by the issuance of a grant for letters of administration for the estate of Rosoa Hamba Nyabra in Kitale HC SUCC CAUSE No. 246 of 2011 to the defendant and the decision of the court in Kitale ELC No. 27 of 2012 Walter Majanga Nyabera V. Peter Sedeano Amatta upholding the legitimacy of the defendant's ownership over Bungoma/Ndalu 1112.
31. On the other hand the defendant contends that the issues before this court fall, one; within the jurisdiction of the succession court in Kitale HC SUCC CAUSE No. 246 of 2011-Estate of Rosoa Hamba Nyabera where the plaintiff herein would have filed a protest or a revocation against issuance of the letter of administration to the defendant herein and two, within the jurisdiction of the Court of Appeal against the judgment in Kitale ELC No. 27 of 2012 Walter Majanga Nyabera V. Peter Sedeano Amatta.
32. It is unclear why the plaintiff did not explore any of the above avenues provided in law to challenge the decisions in the Succession and ELC Court but preferred this suit in thus court which is a parallel suit to the one in Kitale ELC No. 27 of 2012. Even in his evidence the plaintiff deliberately leaves out the existence of the ELC suit in Kitale in what seems like a effort to mislead this court. Having said the above it is clear that the plaintiff's case is an abuse of the court process and an attempt to forum shop as was described in *Satya Bhamu Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR where he court made a deliberate effort to outline some of the instances which would fall within the realm of the definition of an abuse of the legal process. It rendered itself in the following manner; "The situation that may give rise to an abuse of court process is indeed exhaustive, it involves situations where the process of the court has not been used or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of the court process in addition to the above arises in the following situations: -
- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.



- b. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
 - c. Where two similar processes are used in respect of the exercise of the same right for example a cross-appeal and respondent notice.
 - d. Where an application for adjournment is sought by a party to an action to bring another application to the court for leave to raise an issue of fact already decided by the court below.
 - e. Where there is no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
 - f. Where a party has adopted the system of forum shopping in the enforcement of a conceived right.
 - g. Where an appellant files an application at the trial court in respect of a matter which is already subject to an earlier application by the respondent at the Court of Appeal.
 - h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first.
 - i. Abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent."
33. Having stated the above the plaintiff's case is dismissed with costs to the defendant .

2. Whether the defendant's title to the suit property is valid.

34. It is trite law that he who alleges must prove. Section 107(i) (ii) of the [Evidence Act](#) provides that:
- i) Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."
 - ii) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person
35. Under section 26 of the [Land Registration Act](#) Certificate of title will be held as conclusive evidence of proprietorship, the section provides as follows;
- “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”



36. Under Section 24(a) of the *Land Registration Act*, 2012, the registration of a person as the proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges associated with that status. This position was reiterated in *Dr Joseph Arap Ngok Vs Justice Moiyo Ole Keiwa & 5 Others* Civil Appeal No. CA 60 of 1997 where the Court of Appeal stated as follows: -

“Section 23 (1) of the Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the *Land Registration Act*) gives absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.

37. Section 25, of the *Land Registration Act*, Act No. 3 of 2012. provides that the rights of a proprietor, whether acquired on first registration or 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. Such holding is only subject to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; or to the overriding interests noted in Section 28 of the LRA.

38. From the arguments by both parties it is not in dispute that there are two titles registered in the name of the defendant over parcel of land Bungoma/Ndalu/1111 and Bungoma/ Ndalu 1112 after subdivision of Bungoma/Ndalu/53. The same were so registered in line with Section 61(1) of the *Land Registration Act*, 2012.. The Plaintiff has stated that the Defendant fraudulently acquired titles to the suit properties and prayed to court to cancel the titles. To succeed in claiming fraud, the Plaintiff not only need to plead but also particularize it by laying out water tight evidence upon which the court would make such finding. It is therefore trite law that any allegations of fraud must be pleaded and strictly proved. I am guided by the Court of Appeal in case of *Kuria Kiarie & 2 Others –vs- Sammy Magera* [2018] eKLR where it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

39. The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules. As regards the standard of proof, this court in the case of *Kinyanjui Kamau – vs George Kamau* [2015] eKLR expressed itself as follows:-

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo –vs- Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden



to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...” In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

40. The Plaintiff is challenging titles to the suit property claims that the defendant is not a beneficiary of the estate of the deceased. However the defendant has produced evidence demonstrating how he came into ownership of the property. The plaintiff has not produced any decision from an appellate court negating the decisions in Kitale HC SUCC CAUSE No. 246 of 2011 to the defendant and the decision of the court in Kitale ELC No. 27 of 2012 Walter Majanga Nyabera V. Peter Sedeano Amatta which confirmed the defendnats ownership over Bungoma/ Ndalul 1112 to support his case.
41. My view on the issue raised by the plaintiff that the estate of Rosoa Hamba Nyabera ough to have reverted to the Estate of Joash Nyabera Embwaya upon her death and where the plaintiff relies on Section 35 of the [Law of succession Act](#). I find that the said section appears to apply only to cases where the deceased had married only once, in other words he had only one wife throughout. Section 40 of the Act on the other hand appears to address the case of a polygamist (as was in this case) where the deceased had several wives at some stage of his life. Section 35 of the [Law of Succession Act](#) caters for a situation where the deceased is survived by a spouse and children. The surviving spouse is entitled to the deceased’s chattels and a life interest on the residue. Under Section 40 of the Act, if the deceased had several wives, as opposed to households, the estate would devolve depending on the number of children in each house but by also adding any wives surviving him as an additional unit to the children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the children and the surviving spouses together. After that the family members would retreat to their respective houses where Section 35 of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of Section 38 of the [Law of Succession Act](#), the children would divide the estate equally amongst themselves. Section 40 was not designed for the circumstances of the instant estate, but it would appear more appealing for the purpose of distribution of the said estate than Section 35. Therefore, the property that devolved to Rosoa Hamba Nyabera pursuant to distribution in HC Probate And Administration Cause No. 56 OF 1998 cannot then revert to the estate of Joash Nyabera Embwaya for re-distribution
42. Further, certificate of titles in the name of the Defendant are to be taken by court as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner as per section 26 of the [Land Registration Act](#). Title documents are prepared and issued by the Land Registrar. In the absence of contrary documents from the office of the Land Registrar, the court has no reason to find the title documents to be fraudulent. The Plaintiff, in my view, has failed to prove the alleged fraud against the defendant. In this case, the Plaintiff has not tendered sufficient evidence that prove the particulars of fraud against the Defendant to the satisfaction of the court.
43. I find and hold that the Plaintiff has not proved her case against the Defendant on a balance of probabilities. Accordingly, the Plaintiff’s suit is dismissed with costs to the Defendant.

Now, Turning to the defendant’s counterclaim



3. Whether there was trespass by the plaintiff on the defendant's land.

44. This court having found that the defendant is the legitimate owner of Bungoma/Ndalu/ 1112 he is entitled to enjoy rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by any third party. I now proceed to determine whether the plaintiff has trespassed on the same.

45. Section 3 (1) of the *Trespass Act*, Cap 294 provides that:

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership

46. The defendant has in his submissions stated that as a result of the actions of the plaintiff regarding the alleged trespass he has suffered losses and damages and he claims the global sum of Kshs. 100,000/= for damages for trespass.

47. The onus is on the defendant to prove that the plaintiff has occupied his property thus denying him quite enjoyment over the same. However, despite seeking damages for trespass there is nothing produced in court in the form of photographs to demonstrate the nature of the trespass save for the testimony of the Defendant which is controverted by the plaintiff who testified that the parcel of land is an open field where cows graze and nobody lives there. Nothing would have been easier that for the defendant to produce documentary evidence to the effect of the alleged trespass *moreso* part (c) which states thus;

(c) The plaintiff's excavation of soil without the defendant's consent, on the suit land has created an eye sore and has therefore defaced the suit land.

48. It should be noted that in the authority relied on by the defendant i.e. Hassan Mohammed Haji v. Mohammed Keynana & Another (2019) Eklr in support of his claim for damage, the defendant therein did not appear in court to defend himself and therefore the plaintiff's case was uncontroverted.

49. Looking at the evidence by both parties I find that the defendant has not proved the allegation of trespass on a balance of probabilities. The prayer for general damages therefore fails.

50. In my view , the upshot of the foregoing analysis is as follows.

1. The plaintiff's suit is dismissed.
2. A declaration that the Defendant is entitled to exclusive and unimpeded right of possession and occupation of all that piece of land title number Bungoma/Ndalu/1112.
3. The defendant does surrender title, possession and occupation of all that piece of land title number Bungoma/Ndalu/1111 and undertake all the requisite steps to ensure transfer to the legal owners as per HC Probate And Administration Cause No. 56 OF 1998.
4. Costs to the defendant

Orders accordingly.

READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 28TH day of JULY, 2023.



HON E. C. CHERONO

ELC JUDGE

In the presence of

Mr. Ingosi for Defendant-present

Plaintiff/Advocate-absent

