



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO.85 OF 2011**

**MAURICE ONGURU OGOLA ..... PLAINTIFF**

**VERSUS**

**C O O .....1<sup>ST</sup> DEFENDANT**

**S O O .....2<sup>ND</sup> DEFENDANT**

**M A O .....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**1. Background;**

[particulars withheld] sub-location Suna West Division within Migori County was declared an adjudication section on or about the year 1979. During the demarcation of land within the Section, **Plot No. [particulars withheld], West Suna Wiga adjudication Section** (hereinafter referred to only as “**Plot No. [particulars withheld]**”) was demarcated and recorded in the names of one, **S O K** and **R O S** as owners in equal undivided shares. **S O K** (hereinafter referred to only as “**Sabina**”) died before the completion of the adjudication register. Sabina had a son by the name **A K** (hereinafter referred to only as “**A**”) who was mentally challenged. Abayo was the only son of Sabina. In view of his mental capacity he was incapable of siring children. Sabina nevertheless got for him a wife, one, **M A**, the 3<sup>rd</sup> defendant herein. The responsibility of siring children with **M A** was given to one, **P O A** (hereinafter referred to only as “**Oure**”, who was a relative of Sabina. Oure also became Abayo’s guardian. His role was to ensure that the lineage of Sabina is preserved.

2. After the completion of the adjudication register, **R O S** (hereinafter referred to as “**O**”) and Oure, the guardian of Abayo who was Sabina’s only son both filed objections under section 26 of the Land Adjudication Act, Cap 284 Laws of Kenya in relation to Plot No. [particulars withheld], namely, Objection No. 24 and Objection No. 112 respectively. In his objection, Obel sought the sub-division of Plot No. [particulars withheld] into two equal portions between him and Sabina so that each one of them should have a separate title. Oure on the other hand sought the cancellation of the name of Obel from the adjudication record on the ground that Obel was not related to Sabina and as such had no right to be registered with Sabina as co-proprietor of Plot No. [particulars withheld]. The two objections were consolidated and heard together. In his decision that was made on 23<sup>rd</sup> May 1979, the adjudication officer allowed Obel’s objection while the objection by Oure was dismissed with costs. In allowing Obel’s objection, the adjudication officer found that Obel was entitled to a portion of Plot No. [particulars withheld] having lived on the said parcel of land side by side with Sabina. Obel had claimed before the adjudication officer that he was put in possession of the said parcel of land in 1962 by one, **O O** who was Sabina’s brother. He contended that Sabina came to live with his said brother on the

same piece of land after the death of Sabina's husband at a place known as God Kwer. The adjudication officer was satisfied with Obel's claim over a half portion of Plot No. [particulars withheld] and ordered that Plot No. [particulars withheld] be sub-divided into two (2) equal portions. One portion was assigned parcel No. [particulars withheld] (hereinafter referred to as "Plot No. [particulars withheld]" where the context so admits) and recorded in the name of Obel while the other portion retained Plot No. [particulars withheld] and was recorded in the name of Sabina's son Abayo with Oure as his guardian.

3. Oure did not appeal against this decision by the adjudication officer to the Minister under section 29 of the Land Adjudication Act, Cap 284, Laws of Kenya. The adjudication register for West Suna Wiga Adjudication Section was thereafter finalized and forwarded to the Chief Land Registrar under section 27 of the Land Adjudication Act, Cap 284 Laws of Kenya for registration and issuance of titles under the Registered Land Act, Cap 300 Laws of Kenya (now repealed). Plot No. [particulars withheld] and Plot No. [particulars withheld] were registered on first registration under the Registered Land Act aforesaid on 1<sup>st</sup> November 1988 as West Suna/Wiga/ [particulars withheld] in name of A K (Abayo) with P O A (Oure) as his guardian and West Suna/Wiga/ [particulars withheld] in the name of R O S (Obel) respectively. The parcel of land known as LR No. West Suna/Wiga/ [particulars withheld] (hereinafter still known as "Plot No. [particulars withheld]") measured 6.0ha. while the parcel of land known as LR No. West Suna/Wiga/ [particulars withheld] (hereinafter now referred to as "the suit property") measure 6.2ha. Whereas Plot No. [particulars withheld] is still registered in the name of Abayo now deceased as the registered owner thereof with Oure (now also deceased) as his guardian, the suit property was sold by Obel to one, M O O, sometimes in the year 1992 at a consideration of kshs. 30,000/=. The suit property was transferred by Obel to Maurice Onguru Ogola, the plaintiff herein (hereinafter referred to only as "the plaintiff") on 19<sup>th</sup> August 1992 and the plaintiff was issued with a title deed for the suit property on the same day. On 21<sup>st</sup> December 1992, the plaintiff created a Charge over the suit property in favour of National Bank of Kenya Ltd to secure a sum of Kshs. 150,000/= that was advanced to him by the said bank.

#### 4. Prelude to the current suit:-

As I have stated above, the plaintiff purchased the suit property from Obel. The 3<sup>rd</sup> defendant herein is the wife of Oure, deceased who was the guardian of Abayo, deceased while the 1<sup>st</sup> and 2<sup>nd</sup> defendants are the sons of the 3<sup>rd</sup> defendant with Oure. Sometimes in the year 2006, the 1<sup>st</sup> defendant lodged a complaint with the Migori District Land Disputes Tribunal (hereinafter referred to as "the Tribunal") against the plaintiff in Tribunal Case No. 37/10/06/06/1367 claiming that the suit property was registered in the name of the plaintiff by mistake. The Tribunal dismissed the 1<sup>st</sup> defendant's claim for want of jurisdiction. The 1<sup>st</sup> defendant was dissatisfied with the decision of the Tribunal and preferred an appeal against the same to the Provincial Appeal Committee for Nyanza Province in Appeal Case No. 020/2007. The Appeal Committee dismissed the 1<sup>st</sup> defendant's appeal and upheld the decision of the tribunal on 14<sup>th</sup> March 2008. The Appeal Committee ordered the 1<sup>st</sup> defendant to vacate the suit property immediately.

5. On 21<sup>st</sup> April 2008, the 1<sup>st</sup> defendant filed a suit in the High Court at Kisii namely, Kisii HCCC No. 21 of 2008 in his capacity as the legal representative of Abayo against the plaintiff in which he claimed that the plaintiff had acquired the suit property fraudulently. The 1<sup>st</sup> defendant sought among other orders an order for the cancellation of the title of the suit property and the issuance of a new title in the name of Abayo and Oure. It is not clear from the record whether this suit was defended. On 11<sup>th</sup> February 2009, the plaintiff also filed a suit in the High Court at Kisii against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein namely, Kisii HCCC No. 21 of 2009. The plaintiff claimed that sometimes in the month of June, 2007, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein trespassed on the suit property and occupied a portion thereof measuring about 0.4ha. The plaintiff sought an injunction to restrain the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from trespassing on the suit property and an order for their eviction from the portion of the said property in their occupation. Like in Kisii HCCC No. 21 of 2008, it is not clear whether this suit was defended.

## 6. The suit before the court:-

The plaintiff filed this suit against the defendants on 11<sup>th</sup> May 2011. In the plaint dated 9<sup>th</sup> May 2011 the plaintiff averred that he is the registered proprietor of the suit property and as such he is vested with absolute and exclusive rights over the same to the exclusion of all and sundry. The plaintiff averred that the defendants have entered the suit property without his permission. The 1<sup>st</sup> defendant is said to be carrying out cultivation on a portion thereof while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have erected homesteads on the property and are also carrying out cultivation thereon. The plaintiff averred that the said acts of trespass on the suit property by the defendants have deprived him of the use and enjoyment of the property thereby subjecting him to loss and damage. The plaintiff has sought judgment against the defendants jointly and severally for;

1. **Declaration that the plaintiff is the registered and/or lawful owner of the suit property.**
2. **An order for the eviction of the defendants from the suit property.**
3. **A permanent injunction to restrain the defendants from entering, trespassing onto, cultivating, digging, building structures, interfering with and/or in any other manner dealing with the suit property.**
4. **General damages for trespass.**
5. **Costs of the suit.**

7 Together with the plaint, the plaintiff brought an application by way of Notice of Motion dated 9<sup>th</sup> November 2011 seeking an interim mandatory injunction against the defendants to vacate, be evicted and/or grant vacant possession of the suit property pending the hearing and determination of this suit and a temporary prohibitory injunction to restrain the defendants from entering, re-entering, trespassing onto, cultivating, digging, building structures interfering with and/or in any other manner dealing with the suit property pending the hearing and determination of this suit. The application was heard ex parte by Sitati J. who allowed the same as prayed on 22<sup>nd</sup> September 2011. The defendants are said to have been served with the summons to enter appearance together with the said application but failed to enter appearance and defend the same. The order of mandatory injunction that was issued by Sitati J. was executed by Odongo investment auctioneers on 9<sup>th</sup> May 2012 when the defendants were evicted from the suit property through the demolition of the houses that they had erected thereon.

8. On 28<sup>th</sup> June 2012, the defendants applied to set aside the ex parte orders that were made by Sitati J. on 22<sup>nd</sup> September 2011 on the ground that the application that gave rise thereto was not served upon them. They also sought the setting aside of the interlocutory judgment that had been entered against them and leave to enter appearance and/or file their statement of defence. The defendants' application was allowed on 23<sup>rd</sup> May 2013 by Sitati J. The court set aside the ex parte injunction that had been issued against the defendants and the interlocutory judgment that had been entered against them.

9. I have noted from the record that following the said orders of 23<sup>rd</sup> May 2013, the defendants filed a joint statement of defence on 10<sup>th</sup> July 2013 through the firm of Minda & Company advocates. In the said statement of defence, the 1<sup>st</sup> defendant in his capacity as a legal representative of Abayo, deceased, lodged a counter-claim against the plaintiff herein and the land registrar. In their statement of defence, the defendants averred that the plaintiff had concealed to the court the existence of Kisii HCCC No. 21 of 2009. The defendants averred further that they were in occupation of Plot No. **[particulars withheld]** that was registered in the name of Abayo. The defendants averred that in objection No. 24 that I have referred to hereinabove, the adjudication officer had ordered that Plot No. **[particulars withheld]** be sub-divided into two equal portions one of which was to be registered in the name of Obel and the other in the name of Abayo with Oure as his guardian.

10. The defendants averred that following the said decision, the original parcel of land known as Plot No. **[particulars withheld]** was sub-divided and a portion thereof that retained land reference No. **[particulars withheld]** was registered in the name of Abayo and it measured 6.0ha. The other portion that was assigned Plot No. **[particulars withheld]** ("the suit property") was registered in the name of Obel

and it measured 6.2ha. The defendants averred that according to the said decision of the land adjudication officer, Plot No. **[particulars withheld]** and Plot No. **[particulars withheld]** (“the suit property”) were each supposed to measure 6.1 ha. The defendants averred that contrary to the decision of the land adjudication officer, the plaintiff caused himself to be fraudulently registered as the owner of a portion measuring 6.2ha of the original parcel No. **[particulars withheld]** instead of 6.1ha thereof that he was entitled to. The defendants contended that their homesteads are situated on a portion of the original parcel No. **[particulars withheld]** measuring 0.1 ha. which the plaintiff had caused to be fraudulently hived off the original parcel No. **[particulars withheld]** and added to the suit property to make it 6.2ha instead of 6.1ha in accordance with the decision of the adjudication officer aforesaid.

**11.** In his counter-claim against the plaintiff and the land registrar, the 1<sup>st</sup> defendant averred that Plot No. **[particulars withheld]** and the suit property were supposed to measure 6.1ha each. The 1<sup>st</sup> defendant averred that the plaintiff fraudulently caused 0.1ha to be hived off Plot No. **[particulars withheld]** thereby leaving it with a measurement of 6.0ha. which portion was added to the suit property to make 6.2ha instead of 6.1ha. The 1<sup>st</sup> defendant sought judgment in his counter-claim for:

- i. A declaration that Plot No. [particulars withheld] and the suit property should each measure 6.1ha.**
- ii. The rectification of the registers of the two (2) parcels of land to correct their measurements.**
- iii. Cost of the counter-claim.**
- iv. Interest at court rates.**
- v. Any other relief the court may deem just and expedient to grant.**

The 1<sup>st</sup> defendant’s counter-claim was verified by the affidavit of the 1<sup>st</sup> defendant sworn on 10<sup>th</sup> July, 2013 in which he stated among others that:-

- i. “The contents of the counter-claim flow from my instructions to the advocates on record.”**
- ii. “I verify the veracity of and correctness of the contents of the counter-claim.”**
- iii. “I aver that there is no other suit filed in any court in Kenya between myself and the defendants over the subject matter of the counter-claim.”**
- iv. “I verily know that all that is deposed to herein is true and correct to the best of my knowledge, information and belief.”**

**12.** At the trial, the plaintiff gave evidence and did not call any witness. The defendants also gave evidence in their defence and did not call any witness. In his evidence, the plaintiff testified that he is the registered proprietor of the suit property. He told the court that he acquired the suit property from Obel. The plaintiff produced a copy of the register for the suit property and a copy of certificate of official search on the title of the suit property in proof of his title to the same. The plaintiff told the court that the 1<sup>st</sup> defendant filed several suits against him seeking to nullify his title over the suit property which suits were all determined in his (the plaintiff’s) favour. He stated that after the defendants failed to acquire the suit property through the legal process, the defendants entered the suit property without his permission and put up structures thereon. He stated that apart from their occupation of the suit property, the defendants are also mining gold ore and making bricks on the suit property. All these activities are being carried out without his permission. He stated that the defendants refused to stop the said acts of trespass even after a demand letter was addressed to them by his advocates on record to do so. The plaintiff urged the court to grant him the reliefs that he has sought in the plaint.

**13.** In cross-examination, the plaintiff stated that he was not aware that there was a case pending between him and the defendants. He reiterated that he acquired the suit property from Obel and added that it was not necessary for him to make inquiries on how Obel came to own the suit property. He stated that before purchasing the suit property, he carried out an official search on the title thereof which showed that the property was registered in the name of Obel. The plaintiff denied that the defendants have been in occupation of the suit property for 40 years. He maintained that the defendants were at all material times occupying Plot No. **[particulars withheld]** prior to their trespass on the suit property.

14. In his evidence, the 1<sup>st</sup> defendant told the court that he had filed a suit against the plaintiff namely, Kisii HCCC No. 21 of 2008 over the suit property and that the plaintiff had also filed an earlier suit against the defendants, namely Kisii HCCC No. 21 of 2009. He stated that the two cases were consolidated and are pending hearing before this court. The 1<sup>st</sup> defendant told the court that he is residing on Plot No. **[particulars withheld]** which according to him measures 12.2ha. The said parcel of land according to him was registered in the name of Sabina who was his grandmother. Sabina had a son Abayo who was of unsound mind. In order to keep her lineage alive, Sabina entered into a woman to woman marriage with his mother, the 3<sup>rd</sup> defendant. Oure who is his father was the one charged with the responsibility of siring children with the 3<sup>rd</sup> defendant on behalf of Sabina. The 3<sup>rd</sup> defendant had seven (7) children with Oure including the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 1<sup>st</sup> defendant told the court that some years back he wanted to have Plot No. **[particulars withheld]** transferred to his name.

15. Towards that end, he obtained a letter of recommendation from the area chief which he took to the land registrar for necessary action. The land registrar then asked him to carry out a search on the title of Plot No. **[particulars withheld]**. This is when he discovered that Plot No. **[particulars withheld]** had two (2) registers. One register was for Plot No. **[particulars withheld]** that was registered in the name of Abayo while the other register was for the suit property that was registered in the name of the plaintiff. The 1<sup>st</sup> defendant stated that according to the information that he obtained from the adjudication record, after the death of Sabina, three people including Obel lodged a claim over Plot No. **[particulars withheld]** which claims were all dismissed by the Land Adjudication Committee. The 1<sup>st</sup> defendant stated that while two of the people who had claimed Plot No. **[particulars withheld]** vacated the same after losing the claims that they had lodged with the Land Adjudication Committee aforesaid, Obel refused to do so. The 1<sup>st</sup> defendant claimed that in furtherance of his claim over Plot No. 271, Obel caused the Plot No. **[particulars withheld]** to be sub-divided into two (2) portions after the death of Sabina. This is how Plot No. **[particulars withheld]** in the name of Abayo and the suit property which was initially in the name of Obel came about. The 1<sup>st</sup> defendant stated that investigations conducted by the area District Officer concluded that Obel had acquired the suit property illegally.

16. The 1<sup>st</sup> defendant stated that he has occupied the suit property since he was born in 1970 and that both Sabina and Oure were buried on the property. He told the court that the houses which stood on the suit property which were destroyed by the plaintiff while executing the order of mandatory injunction that was subsequently set aside by the court were constructed on the suit property several years ago. He stated that the plaintiff has never occupied the suit property. The 1<sup>st</sup> defendant urged the court to dismiss the plaintiff's suit and proceed to cancel the plaintiff's title over the suit property so that the land comprised in the suit property can revert to Plot No. **[particulars withheld]**. The 1<sup>st</sup> defendant produced as exhibits among others; copies of the plaints that were filed in Kisii HCCC No. 21 of 2008 and Kisii HCCC No. 21 of 2009, copies of the proceedings in objection No.24 and No.112, a copy of the limited grant of letters of administration in respect of the estate of A K K and a copy of the register for Plot No. **[particulars withheld]**. In cross-examination, the 1<sup>st</sup> defendant stated that he was not sure whether his advocates had filed a statement of defence on their behalf in this suit. He stated that Plot No. **[particulars withheld]** was measuring 12.2ha before it was sub-divided by Obel into two portions. He told the court that he was not sure whether Oure had participated in the objections proceedings and if he did, whether he appealed against the outcome of the same to the Minister. He confirmed that the suit property was registered in the name of Obel on first registration and that neither Oure nor he had challenged Obel's title to the suit property. He stated that he became aware of the existence of the suit property in the year 1999. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants (DW2 and DW3) adopted the evidence of the 1<sup>st</sup> defendant (DW1).

17. I have considered the pleadings filed by the parties herein and the evidence tendered in support of the parties' respective cases. The parties did not agree on the issues for determination by the court. In their respective submissions, each party came up with its own set of issues. After considering the pleadings and the evidence tendered, the following in my view are the issues which arise for determination in this suit;

- i. **Whether the plaintiff is the lawful proprietor of the suit property and as such entitled to**

**exclusive and absolute rights over the same?**

- ii. **Whether the defendants have any legitimate rights and/or interest in the suit property?**
- iii. **Whether the plaintiff is entitled to the reliefs sought in the plaint?**
- iv. **Whether the defendants are entitled to the reliefs sought in the 1<sup>st</sup> defendant's counter-claim?**

#### **18. Issue No. I;**

I am satisfied on the evidence before me that the plaintiff acquired the suit property lawfully and that he is the lawful proprietor thereof. It is not in dispute that the suit property is a sub-division of the original Plot No. [particulars withheld]. It is also not in dispute that the sub-division of the original Plot No. [particulars withheld] was carried out following successful objection by Obel to the land adjudication officer for West Suna Wiga Adjudication Section in Objection No. 24 (See D. Exhibit No. 5). Following the decision in the said objection, the original Plot No. [particulars withheld] was sub-divided into two (2) portions namely, the present Plot No. 271 (this retained the original parcel number) and Plot No. [particulars withheld] ("the suit property"). There was no appeal to the Minister against the decision of the adjudication officer in Objection No. 24 aforesaid. The said decision was therefore final as far as the dispute that had arisen between Obel and Sabina (who was represented by Oure in the objection) over the suit property was concerned. Pursuant to the decision in the said objection, the current Plot No. [particulars withheld] was recorded in the name of Abayo while the suit property was recorded in the name of Obel. Upon the finalization of the adjudication register for West Suna Wiga Adjudication Section, Plot No. [particulars withheld] was registered in the name of Abayo while the suit property was registered in the name of Obel both on first registration on 1<sup>st</sup> November 1988.

19. I am in agreement with the submission by the plaintiff that the suit property having been registered in the name of Obel on first registration, Obel's title to the same was indefeasible. See, section 143 (1) of the Registered Land Act, Cap 300 Laws of Kenya (now repealed) and the court of appeal case of **David K. Kipsang –vs- James Kipchenger, Court of Appeal at Nakuru, Civil Appeal No. 214 of 2001 (unreported)** that was cited by the plaintiff. Since Obel had a valid title to the suit property, the title that he passed to the plaintiff was similarly valid. Section 37 (1) and (2) of the Land Registration Act, 2012 provides that a proprietor of land may transfer his land to any person with or without consideration by an instrument in the prescribed form and the transfer shall be completed by the filing of the instrument and the registration of the transferee as proprietor of the land. Section 24 of the said Act provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

20. I am unable to accept the defendants' submission that Obel had acquired the suit property irregularly and as such, he could not pass a valid title over the suit property to the plaintiff. As I have stated above, the proceedings of Objection No. 24 that was produced by the 1<sup>st</sup> defendant in evidence shows that Obel acquired the suit property lawfully. This position also finds support in the defendants' statement of defence and the 1<sup>st</sup> defendant's counter-claim in which the defendants have essentially admitted that Obel acquired the suit property lawfully through the said Objection. The defendants' only contention in the said defence and counter-claim is that Obel acquired 0.1ha. more from the original Plot No. [particulars withheld] than what he was entitled to. I must say that the evidence that was led by the defendants was completely at variance with their statement of defence and counter-claim. The oral evidence that was given by the defendants was also inconsistent with the documentary evidence that was adduced by them. The defendants' submissions are also not in consonant with the defendants' pleadings and documentary evidence on record. As I have stated above, the 1<sup>st</sup> and 2<sup>nd</sup> defendants father (Oure) participated in Objection No. 24 that was filed by Obel, in fact, Oure had his own Objection 112 in which he sought the eviction of Obel from the original Plot No. [particulars withheld]. The defendant's submission that Oure was not aware of the outcome of Objection No. 24 is not supported by any evidence on record. The defendants did not place any evidence before the court in support of their submission that Obel acquired the suit property fraudulently and therefore could not transfer a better title to the plaintiff. The onus of proof of fraud was upon the defendants. I am not satisfied that they discharged this burden in view of the inconsistencies in the evidence adduced and the pleadings.

21. I wish to add that Obel is not a party to this suit. The acts of fraud that the defendants have dwelt on at length are said to have been committed by Obel. The defendants have neither pleaded any act of fraud against the plaintiff nor led any evidence to the effect that the plaintiff was either involved directly in the fraud or would by necessary implication be taken to have been so involved. The defendants having failed to join Obel in these proceedings as a party, they cannot expect the court to make findings against him without giving him a hearing. If the defendants were serious in their contention that Obel had acquired the suit property fraudulently, the 1<sup>st</sup> defendant could not have failed to join him as a party to his counter-claim against the plaintiff and the land registrar. As I have stated above, the court cannot make a finding that Obel acquired the suit property fraudulently without hearing him. The plaintiff's title to the suit property that was acquired from Obel cannot therefore be impeached on account of alleged fraud by Obel which has not been established first by failing to join Obel in the case and secondly by failing to adduce any evidence in proof of the alleged fraud.

22. It is my finding therefore that the allegations of fraud leveled against Obel by the defendants have no basis and as such cannot have any impact on the plaintiff's title to the suit property. The defendants have also submitted that the plaintiff had failed to prove how he acquired the suit property in that he neither produced a copy of the instrument of transfer or the consent of the land control board. I see no merit in this submission. It was not disputed that the plaintiff is the registered proprietor of the suit property. He proved as much through the evidence that he adduced in court. The plaintiff being the registered owner of the suit property, there is a presumption in his favour that he acquired the suit property lawfully and regularly. It is up to the person who is challenging his title to prove otherwise. The plaintiff had no duty to prove anything more than the fact that he is the registered owner of the suit property having acquired the same from Obel. It was up to the defendants to prove their contention that the plaintiff acquired the suit property illegally. Since Obel is not challenging the plaintiff's title, the plaintiff has no duty to prove how he acquired the suit property from Obel.

23. Having held that the plaintiff acquired the suit property lawfully, it is my further finding that the plaintiff as the lawful proprietor of the suit property has absolute and exclusive rights over the suit property subject only to such limitations as are imposed by law. In this regard see, the provisions of sections 24, 25 and 26 of the Land Registration Act, 2012. In view of the foregoing, the defendants have no right to enter or occupy the suit property without the plaintiff's permission.

#### 24. Issue No. II;

As I have held above, the plaintiff is the registered proprietor of the suit property which he acquired lawfully. The defendants have not impeached the plaintiff's title in any material respect. The defendants have not persuaded me that they have any lawful or equitable interest in the suit property. I am in agreement with the submission by the plaintiff's advocates that the defendant's claim over the suit property through the estate of Abayo is misconceived because the suit property had at no time been registered in the name of Abayo and as such could not form part of his estate. As stated above, the suit property was registered in the name of Obel on first registration. The defendants claim over the same through Abayo therefore has no basis.

25. In his counter-claim, the 1<sup>st</sup> defendant has limited his claim to a portion of the suit property measuring 0.1ha. The 1<sup>st</sup> defendant has claimed that the original Plot No. **[particulars withheld]** measured 12.2ha. and that Abayo and Obel were to share the same equally according to the decision in Objection No.24, meaning that each was to get 6.1ha. The 1<sup>st</sup> defendant has contended that the sub-division of the original Plot No. **[particulars withheld]** was carried out irregularly in that the current Plot No. **[particulars withheld]** that was registered in the name of Abayo measured 6.0ha. only instead of being 6.1ha. while the suit property that was registered in the name of Obel measured 6.2ha. instead of 6.1ha. The 1<sup>st</sup> defendant's claim is for 0.1ha. of land that he claims to have been added to Plot No. **[particulars withheld]** ("the suit property") irregularly from the original Plot No. **[particulars withheld]**.

26. The 1<sup>st</sup> defendant did not adduce any evidence that the original Plot No. **[particulars withheld]** measured 12.2ha. The court cannot assume that because the current Plot No. **[particulars withheld]**

measures 6.0ha. and the suit property measures 6.2ha., the original Plot No. **[particulars withheld]** from which the two plots originated must have measured 12.2ha. The 1<sup>st</sup> defendant's claim over a portion of the suit property measuring 0.1ha. is therefore based on hypothesis or conjecture. A court of law cannot make a finding on such premises. Even if it is assumed that the original Plot No. **[particulars withheld]** that gave rise to Plot No. **[particulars withheld]** and the suit property was 12.2ha. and as such Abayo was entitled to a portion thereof measuring 6.1ha., the 1<sup>st</sup> defendant could not recover the said portion of land measuring 0.1ha. that he claims to have been added to the suit property irregularly from Obel because Obel's title was acquired on first registration and as such was indefeasible. I wish to add that even if the 1<sup>st</sup> defendant could maintain such a claim, the claim could only be maintained against Obel who has not been sued in these proceedings. The plaintiff who acquired the suit property from Obel with its measurement of 6.2ha. cannot be called upon to surrender a portion thereof measuring 0.1ha. to the 1<sup>st</sup> defendant in the absence of proof of any wrong doing on his part. There is no evidence that the plaintiff was aware that the suit property was supposed to measure 6.1ha. or that he was privy to the enlargement of the size of the suit property from 6.1ha. to 6.2ha. I am also in agreement with the submission by the plaintiff that since the sub-division of Plot No. **[particulars withheld]** that is the subject of the 1<sup>st</sup> defendant's counter-claim was done in the year 1979, the 1<sup>st</sup> defendant's claim is time barred whether considered on the basis of the alleged fraud or as a claim to land. Due to the foregoing, it is my finding that the defendants have no valid or legitimate interest in the suit property or any portion thereof.

### **27 . Issue No. III;**

I am satisfied that the plaintiff is entitled to the reliefs sought against the defendants. The plaintiff has proved that he is the lawful proprietor of the suit property and that the defendants have entered and occupied the property without his permission. The defendants have failed to give any lawful justification for their entry and occupation of the suit property. The defendants are therefore trespassers on the property and the plaintiff is entitled to an order for their eviction. The plaintiff is also entitled to a permanent injunction to restrain the defendants from re-entering the suit property once evicted. I am not satisfied however that the plaintiff has proved the general damages that he has claimed from the defendants for trespass on the suit property. General damages are not awarded as a matter of course. Damages whether special or general are compensatory in nature. It behooved the plaintiff therefore to place material before the court on the basis of which the court could be able to assess the damages claimed in this case. The plaintiff has submitted that he is entitled to an award of a sum of kshs. 200,000/= as general damages. This submission however has no basis or foundation on the evidence that was adduced by the plaintiff. It is my finding that the plaintiff has not proved his claim for general damages. In the case of **Andronico Otieno Anindo –vs- Moses Odera Owuor & 2 Others, Kisii HCCC No. 106 of 2006 (unreported)** that was cited by the plaintiff's advocates, the plaintiff (in that case) had led evidence that if the land on which the defendants had trespassed was not under their occupation, he would have grown maize thereon from which he would have earned Kshs. 180,000/=. That is not the scenario here. In the present case, the plaintiff did not tell the court the use on which he had put the suit property prior to the defendant's trespass and the income he would have earned from the property save for the said trespass.

### **28. Issue No. IV;**

I have already held hereinabove that the defendants have no legitimate interest in the suit property. In the absence of any such interest, the defendants are not entitled to any relief against the plaintiff.

### **29. Conclusion;**

I am satisfied that the plaintiff has proved his claim against the defendants to the required standard. The 1<sup>st</sup> defendant's counter-claim is however not proved. I therefore enter judgment for the plaintiff against the defendants jointly and severally as prayed in paragraphs (i), (ii) and (iii) of the plaint dated 9<sup>th</sup> May 2011. The defendants shall vacate and handover to the plaintiff the portion of the suit property under their occupation within 90 days from the date hereof failure to which the plaintiff shall be at liberty to apply to court for their forceful eviction. To bring finality to this dispute, I hereby order that the County

Land Registrar, Migori County shall visit the site of the suit property with the County Surveyor at the cost of the plaintiff and fix or mark the boundary between the suit property and Plot No. **[particulars withheld]** within 30 days from the date of service of a copy of the decree extracted from this judgment upon them. The Officer Commanding Migori Police Station shall provide security to the two officers if necessary. The 1<sup>st</sup> defendant's counter-claim against the plaintiff is dismissed. The plaintiff shall have the cost of this suit to be paid by the 1<sup>st</sup> defendant. I make no order as to the costs of the counter-claim as it was not defended.

**Delivered, Dated and Signed at Kisii this 24<sup>th</sup> day of April, 2015.**

**S. OKONG'O**

**JUDGE**

**In the presence of:**

Mr. Ochwangi for the plaintiff

Mr. A. Odero for the defendants

Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**