



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL CASE NO. 233 OF 2010**

**KIPLANGAT ARAP SIGIRA.....**  
**.....PLAINTIFF**

**VERSUS**

**JOSEA TOO.....1<sup>ST</sup> DEFENDANT**

**DAVID TOO.....2<sup>ND</sup> DEFENDANT**

**WILLIAM TOO.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff is the registered proprietor of all that parcel of land known as **LR No. Transmara/Kimintet “D”/890** (hereinafter referred to as “**the suit property**”). The Plaintiff brought this suit against the defendants by way of a **Plaint** dated 24<sup>th</sup> August, 2010 through which the Plaintiff sought; a declaration that the Plaintiff is the absolute and exclusive proprietor of the suit property, a permanent injunction restraining the defendants either jointly and/or severally from trespassing on and/or interfering with the Plaintiff’s activities on the suit property in any manner whatsoever and howsoever, mesne profits, eviction of the defendants from the suit property, costs and interest. In the said **Plaint**, the Plaintiff claimed that, sometimes in the year 1990, the Plaintiff permitted the 1<sup>st</sup> defendant to enter into the suit property on the understanding that the 1<sup>st</sup> defendant would take care of the suit property while at the same time cultivating the same for his own use. The Plaintiff at this time was working and residing in Narok town. This arrangement that the Plaintiff had entered into with the 1<sup>st</sup> defendant went on without any interruption until sometimes in the year 2007 when the 1<sup>st</sup> defendant without the consent or permission from the Plaintiff invited and caused the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who are his brothers to enter the suit property and construct thereon temporary structures. In view of this development, the Plaintiff withdrew his licence to the 1<sup>st</sup> defendant to occupy the suit property and demanded that all the defendants do vacate the suit property. The defendants have refused and/or neglected to comply with the Plaintiff’s demand aforesaid even after giving an undertaking before the area chief that they will do so. The Plaintiff claims that the defendants’ conduct aforesaid is illegal and amount to breach of the trust that the Plaintiff had bestowed upon the 1<sup>st</sup> defendant. The Plaintiff claims that the said activities by the defendants have subjected him to loss and damage as the defendants have now taken over occupation of the whole of the suit property and are extremely hostile and violent towards the Plaintiff. The Plaintiff claims that the defendants have no right to

occupy the suit property and as such their entry and continued occupation of the suit property is illegal.

2. The defendants were served with the summons to enter appearance. They neither entered appearance nor filed a statement of defence to the Plaintiff's claim. The suit was fixed for formal proof on several occasions when for one reason or the other the hearing did not take off. It was listed for hearing on 17<sup>th</sup> April, 2013 when it was ultimately heard. The Plaintiff gave evidence and called no witness. In his evidence, the Plaintiff testified that; he is the registered proprietor of the suit property and that he left the suit property in the hands of the 1<sup>st</sup> defendant who was to guard the same for him. He did not permit the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to enter into the suit property. His agreement was with the 1<sup>st</sup> defendant only. A part from the suit property that the 1<sup>st</sup> defendant was guarding, the Plaintiff had given to the 1<sup>st</sup> defendant a parcel of land elsewhere as a gift. The Plaintiff produced in evidence as exhibits a copy of a certificate of official search for the suit property dated 24<sup>th</sup> June, 2009, a copy of the tile deed for the suit property dated 4<sup>th</sup> June, 2004 and a copy of the Parcel Map showing the situation of the suit property on the ground. The Plaintiff testified further that the defendants are still in occupation of the suit property. He stated that when he was in occupation of the property, he used to cultivate maize on it and the yield was 100 bags per year which he used to sell at Ksh. 3000.00 per bag.
3. The Plaintiff's advocate Mr. Otieno in his final submission relied on the evidence on record and urged the court to enter judgment for the Plaintiff as prayed in the Plaint. I have considered the Plaintiff's case as pleaded and the evidence tendered in support thereof. The Plaintiffs' claim against the defendant is based on the tort of trespass. Trespass has been defined in, **Clerk & Lindsell on Torts, 18<sup>th</sup> Edition at paragraph 18-01** as consisting of **"any unjustifiable intrusion by one person upon land in the possession of another."** In the same book, it is stated that trespass is actionable at the suit of the person in possession of the land (**paragraph 18-10**) and that proof of ownership is a prima facie proof of possession(**paragraph 18-11**). In this case therefore, the Plaintiff was under a duty to prove that the defendants had unjustifiably entered the suit property which was in his possession. I am satisfied from the Plaintiff's testimony and the documents produced by the Plaintiff in evidence that the Plaintiff has proved on a balance of probability that the defendants have committed acts of trespass on the suit property. The Plaintiff has proved that he is the registered proprietor of the suit property. The Plaintiff produced in evidence a title deed for the suit property in his name and a certificate of official search which confirmed that the Plaintiff was registered as the proprietor of the suit property on 7<sup>th</sup> January, 2004. The Plaintiff testified that he had authorized the 1<sup>st</sup> defendant to occupy and cultivate the suit property while he was away in Narok town where he was working and residing. The arrangement between the Plaintiff and the 1<sup>st</sup> defendant was that the Plaintiff would guard the suit property while at the same time making use of the same. In breach of this understanding between the Plaintiff and the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant without the Plaintiff's permission or authority invited the 2<sup>nd</sup> and 3<sup>rd</sup> defendants into the suit property. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants on their part proceeded to occupy and to put up temporary structures on the suit property. The Plaintiff revoked the licence and/or permission that he had given to the 1<sup>st</sup> defendant to occupy the suit property and demanded that all defendants do vacate the suit property. The defendants have refused to vacate the suit property and have continued to occupy the whole property which they have converted to their own use. The defendants have not defended the suit. The Plaintiff's claim and testimony that they have no right to be on the suit property has not been controverted. The 1<sup>st</sup> defendant went into the suit property with the permission of the Plaintiff. Once that permission was withdrawn, the 1<sup>st</sup> defendant had no alternative but to vacate the suit property. His continued occupation of the suit property is an act of trespass. The same applies to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who entered into the suit property without the Plaintiff's permission and have continued to be in occupation even after a demand has been made upon them to vacate. The 1<sup>st</sup> defendant had no proprietary interest on the suit property and as such could confer none upon the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. I am satisfied that the Plaintiff is entitled to the reliefs sought in the Plaint save for the prayer for mesne profits.

The Plaintiff did not tender sufficient evidence in proof of this claim. There was no evidence to prove that the Plaintiff used to cultivate maize on the suit property. There was also no evidence of the quantum of maize he used to harvest and the net amount he used to earn from the sale of the said maize after factoring in all expenses. I am therefore unable to agree with the evidence led by the Plaintiff that he used to earn Ksh. 300,000.00 annually from the maize harvested from the suit property prior to the trespass thereon by the defendants. In conclusion therefore, it is my finding that the Plaintiff has proved his case against the defendants on a balance of probability. I therefore enter judgment for the plaintiff against the defendants as prayed in paragraphs 17 (a), (b) and (d) of the Plaint dated 24<sup>th</sup> August, 2010. The defendants, their agents and/or anybody claiming through them shall vacate the suit property within 60 days from the date of being served with a copy of the decree issued herein failure to which they shall be evicted and vacant possession given to the Plaintiff. The Plaintiff shall have the costs of this suit to be paid by the defendants jointly and severally.

**Signed, dated and delivered at KISII this 12<sup>th</sup> day of July, 2013**

**S. OKONG'O,**

**JUDGE.**

**In the presence of:-**

No appearance for the Plaintiff

No appearance for the Defendants

Mobisa Court Clerk.

**S. OKONG'O,**

**JUDGE.**