



**NO.155**

**REPUBLIC OF KENYA**

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

**E & L CASE NO. 16B OF 2008**

**EVANS ABUNDA MWERUTI.....PLAINTIFF**

**VERSUS**

**BILITA NYABOKE NYANCHOGA.....1<sup>ST</sup> DEFENDANT**

**CHARLES NYAKOE NYANCHOGA.....2<sup>ND</sup> DEFENDANT**

**REUBEN OMARI NYANCHOGA.....3<sup>RD</sup> DEFENDANT**

**ELIJAH B. NYANCHOGA.....4<sup>TH</sup> DEFENDANT**

**GILBERT RATEMO NYANCHOGA.....5<sup>TH</sup> DEFENDANT**

**PETER ABURI NYANCHOGA.....6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff is the registered proprietor of all that parcel of land known as **LR No. Nyamira/ Manga Settlement Scheme/ 629** (hereinafter referred to as “**the suit property**”). The Plaintiff brought this suit against the defendants by way of a **Plaint** dated 11<sup>th</sup> April, 2008 in which the Plaintiff sought a declaration that the

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Plaintiff is the registered proprietor of the suit property, an order of eviction against the defendants from the suit property and a permanent injunction restraining the defendants from entering into, cultivating and/or interfering with the suit property. In the said **Plaint**, the Plaintiff averred that, he purchased the suit property from one, Nyanchoga Ogaro James and that on a date which is not indicated, the defendants jointly and/severally without consent or permission from the Plaintiff and without any justifiable or lawful excuse dispossessed the Plaintiff of the suit property and occupied the same as a result of which the Plaintiff suffered loss and damage. The Plaintiff averred further that the defendants have refused and/ or declined to vacate the suit property even after a demand was served upon them to do so thereby rendering the filing of this suit necessary.

2. The defendants were served with the summons to enter appearance and they neither entered appearance nor filed a

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statement of defence to the Plaintiff's claim. The suit was fixed for formal proof on 3<sup>rd</sup> June, 2013 and 19<sup>th</sup> June, 2013. The Plaintiff gave evidence and called no witness. In his evidence, the Plaintiff testified that; he purchased the suit property from one, Nyanchoga Ogaro and had the same registered in his name on 26<sup>th</sup> May, 2000. He was thereafter issued with a title deed for the suit property. Nyanchoga Ogaro is deceased. He died after transferring the suit property to the Plaintiff. The 1<sup>st</sup> defendant is the widow of Nyanchoga Ogaro while the 2<sup>nd</sup> to 5<sup>th</sup> defendants are his sons. In the year 2008, the defendants entered the suit property and planted maize thereon. The defendants have since then continued with maize cultivation on the suit property. In the year 2009, the Plaintiff attempted to enter the suit property and take possession thereof but he was arrested, charged at Keroka Resident Magistrate's Court with the offence of destroying the defendants' crops on the suit property and convicted. The Plaintiff's conviction

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and sentence was however overturned by the High Court on appeal. The Plaintiff produced in evidence, a copy of a title deed for the suit property which showed that the suit property was registered in the name of the Plaintiff on 26<sup>th</sup> May, 2000. The Plaintiff also produced copies of the proceedings and judgment that was made in the criminal case that was preferred against him at Keroka Resident Magistrate's Court. The Plaintiff also produced a copy of the proceedings and judgment of the High Court in the appeal that he had preferred against the said decision of Keroka Resident Magistrates Court.

3. After the Plaintiff's testimony, the Plaintiff's advocate Mr. Soire in his final submissions 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 defendants is based on the tort of trespass. In the book, **Clerk**

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**& Lindsell on Torts, 18<sup>th</sup> Edition at paragraph 18-01**, trespass to land is defined 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 18-110). 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 proved that the suit property is registered in the name of the Plaintiff. The Plaintiff produced in evidence a title deed for the suit property in the name of the Plaintiff which confirmed the Plaintiff's ownership of the suit

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property that was registered in his name on 26<sup>th</sup> May, 2000. The defendants although served did not enter appearance and as such failed to tender any evidence at the trial to challenge the Plaintiff's claim. The Plaintiff's testimony was therefore not controverted. It is my finding therefore that the Plaintiff has proved that he is the registered proprietor of the suit property and that the defendants have trespassed thereon by entering thereon and carrying on cultivation of maize without the Plaintiff's permission or any lawful cause or excuse. In conclusion therefore, it is my finding that the Plaintiff has proved his case against the defendants on a balance of probability. I have noted that the Plaintiff withdrew his claim against the 5<sup>th</sup> defendant on 7<sup>th</sup> October, 2012. I therefore enter judgment for the plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants jointly and severally for;

- i. **Vacant possession of all that parcel of land known as LR. No. Manga Settlement Scheme/ 629, to be delivered within ninety (90) days from the date of**

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**being personally served with a copy of this judgment and the decree arising therefrom;**

- ii. **An order of permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants, their agents, servants and/or any persons claiming under them from entering into, re-entering, cultivating and/or interfering with LR. No. Manga Settlement Scheme/ 629 once vacant possession thereof is handed over to the Plaintiff pursuant to order (i) above or within ninety (90) days of being served personally with a copy of this judgment and the decree arising therefrom whichever comes earlier;**
- iii. **The costs of the suit to the Plaintiff.**

**Signed, dated and delivered at KISII this 15<sup>th</sup> day of November, 2013**

**S. OKONG'O,**

**JUDGE.**

**In the presence of:-**

..... for the Plaintiff

..... for the Defendants

.....  
Clerk.

Court

**S. OKONG'O,**

**JUDGE.**

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