



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 83 OF 2012

TOM L. WANAMBISI.....PLAINTIFF

VERSUS

DICKSON W. BABANDEGE.....1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION2ND DEFENDANT

PAUL M. OKECH T/A PAMBO INVESTMENTS3RD DEFENDANT

J U D G M E N T

TOM L. WANAMBISI (the plaintiff herein) moved to this Court vide his plaint dated 18th October 2012 seeking the following remedies as against **DICKSON W. BABANDEGE**, **AGRICULTURAL FINANCE CORPORATION** and **PAUL M. OKETCH T/A PAMBO INVESTMENTS** (the 1st, 2nd and 3rd defendants respectively): -

(a) A declaration that the sale and transfer of the plaintiff's land parcel NO **NDIVISI/MAKUSELWA/89** to the 1st defendant by the 2nd and 3rd defendants was unlawful, illegal, null and void and that the said sale and transfer be and are hereby set aside and the title issued to the 1st defendant over the said parcel of land ought to be cancelled forthwith.

(b) A declaration that the 1st defendant's entry into the land parcels NO **NDIVISI/MAKUSELWA/89** and **90** without a Court order and while the land parcel NO **NDIVISI/MAKUSELWA/90** was not the subject matter of any charge was illegal, null and void and amounts to trespass.

(c) The sum of Kshs. 5,203,550.00 and interest as particularized in paragraph 15 on account of destruction of property and theft and general damages for trespass.

(d) Costs of this suit.

(e) Any other relief as the Court may be pleaded to grant.

The basis of the suit is that at all material times, the plaintiff was the registered proprietor of the land parcels **NO NDIVISI/MAKUSELWA/89** and **90** (herein after the suit properties) and in or about the month of May 2005, he approached the 2nd defendant which agreed to give him a loan of Kshs. 330,000/= against the security of the land parcel **NO NDIVISI/MAKUSELWA/89**. That in or about the month of January 2010, the 2nd defendant without any notification instructed the 3rd defendant to sell the land parcel **NO NDIVISI/MAKUSELWA/89** by Public Auction to recover the sum of Kshs. 684,100.00. The sale was advertised for 16th April 2010 outside the **KITALE POST OFFICE** and although the plaintiff was present, no Auction took place. Notwithstanding the fact that no Auction took place, the plaintiff received a letter dated 5th November 2010 from the firm of **KINUTHIA KAHINDI & COMPANY ADVOCATES** acting on behalf of the 1st defendant asking him to vacate the land parcel **NO NDIVISI/MAKUSELWA/89** on the basis that the 1st defendant had purchased it during the Auction held on 16th April 2010 which never took place.

On or about 29th December 2010 a group of four (4) men armed with sticks, axes, pangas and a tractor trespassed onto the land parcels **NO NDIVISI/MAKUSELWA/89** and **90** and started ploughing it as well as demolishing worker's residences, a resource center and destroying other properties worth millions of shillings some of which they carried away. The inventory of the destroyed and stolen properties whose value is given as Kshs. 5,203,550/= is listed in paragraph 15 of the plaint. It is the plaintiff's case that the transfer of the land parcel **NO NDIVISI/MAKUSELWA/89** was done without the consent of the Land Control Board and was therefore illegal, unlawful, fraudulent, null

and void. Particulars of the fraud and illegality on the part of the defendants is pleaded in paragraph 18(i) to (x) as follows: -

- (i) The plaintiff was not served with any statutory notices before the sale of his land.**
- (ii) The 2nd and 3rd defendants did not comply with the Auctioneers Act and the Provisions of the Agricultural Finance Corporation Act before transferring his land to the 1st defendant.**
- (iii) There was no Public Auction where the plaintiff's land was sold.**
- (iv) The 2nd and 3rd defendants transferred the plaintiff's land to the 1st defendant in secret and without holding an Auction.**
- (v) No application was made to the relevant land Control Board and no valid consent was even granted to sanction the purported transfer.**
- (vi) No consent could be granted by the Board on 11/11/2010 on the basis of an application and transfer forms signed on 15/11/2010.**
- (vii) The Land Control Board cannot grant consent before an application for consent is made and/or grant such consent retrospectively.**
- (viii) No fees was paid on the application for consent.**
- (ix) The 1st defendant did not have any eviction order when he trespassed into land parcels NO NDIVISI/MAKUSELWA/89 and 90 and his entry and destruction of property inside land parcel NO NDIVISI/ MAKUSELWA/90 was unlawful.**
- (x) Land parcel NO NDIVISI/MAKUSELWA/90 was not the subject matter of any charge and the 1st defendant's entry and destruction of property inside the said parcel of land was illegal, null and void and an act of impunity.**

Arising out of the trespass and destruction of the property, the plaintiff incurred a loss of Kshs. 5,203,550.00 hence this suit.

The plaintiff filed his statement and those of his witnesses **ISAAC NALYANYA WEKULO (PW 2)**, **PENINA WANGARE MUNGAI (PW 3)** and **RONALD MATERE SIKUKU (PW 4)**. He also filed his list of documents.

In his statement dated 18th October 2012, the plaintiff confirms that he was the registered proprietor of the suit properties and on 11th April 2005, he approached the 2nd defendant for a loan of Kshs. 330,000.00 which was secured by the land parcel **NO NDIVISI/MAKUSELWA/89**. The loan was for purposes of growing maize but due to the vagaries of the weather, he did not get a good crop and was therefore unable to repay it.

In January 2010 and without any notice, the 2nd defendant offered the land parcel **NO NDIVISI/MAKUSELWA/89** for sale by Public Auction on 16th April 2010 outside the **KITALE POST OFFICE** to recover Kshs. 684,100.00. However, he went to the venue and no sale took place as advertised. He received a letter from **KINUTHIA KAHINDI & COMPANY ADVOCATES** on behalf of the 1st defendant requiring him to vacate from the land parcel **NO NDIVISI/ MAKUSELWA/89** because the 1st defendant had bought it at the Auction whereas there was no sale. He therefore refused to comply with the letter but on 29th December 2010, four (4) men armed with sticks, axes and pangas trespassed onto the suit properties using a tractor and destroyed workers' residences, a resource centre, coffee estate nursery among others. They were later joined by another group of eleven (11) men who continued to destroy more property valued at Kshs. 5,203,550.00 as per the report from **CHRISCA REAL ESTATE** Valuers. That the destruction of his property was as a result of fraudulent and illegal acts by the defendants as no notices were served upon him and the land parcel **NO NDIVISI/ MAKUSELWA/89** was transferred to the 1st defendant in blatant disregard of procedures laid down in the Land Control Act. Further, that the destruction of his 2,000,000 coffee trees, 150 stems of bananas and ¼ acre of beans were done without an order of the Court.

In his statement, **ISAAC NALYANYA WEKULO (PW 2)** a village elder at **MAKUSELWA** village states that on 29th December 2010 he was informed by **PENINA WANGARE MUNGAI (PW 3)** that a group of men had invaded the plaintiff's farm and demolished houses, a store and evicted the workers. He went to the plaintiff's farm the next morning and noticed that there was massive destruction of houses with foodstuff such as coffee, maize, beans and groundnuts spilled. He reported the incident to the Assistant Chief and later, the plaintiff came with the Officer Commanding Police Station (**OCS**) and he recorded his statement.

PENINA WANGARE MUNGAI (PW 3) is an Estate Clerk at the plaintiff's farm and recalled that on the afternoon of 29th December 2010, she was breast feeding her child when she was informed that some men had arrived and were ploughing the drive – way. She went out and seven (7) men two of whom he recognized as **NATHAN NDEGE** and **KEVIN WAMBULWA** told him that they had purchased the farm and had strict instructions to evict them. They left and returned one (1) hour later with a group of fifteen (15) men armed with pangas, axes, sticks and rungus forcing her to flee and she telephoned the plaintiff who was in Kitale. The plaintiff advised her to report to the local village elders as he contacted the District Officer, Chief and Police.

The group had meanwhile destroyed houses and stores and also scattered food stuff. When she later did an inventory, she found that the following had been stolen from the store: -

- Ø 50 bags of maize
- Ø 20 bags of beans
- Ø 50 bags of coffee (top grade)
- Ø 35 bags of coffee (mbuni)
- Ø Assorted herbicides and insecticides
- Ø 5 Hardi Knapsacks prayers
- Ø 2 Motorised Knapsacks prayers

She later recorded a statement at Webuye Police Station.

RONALD SIKUKU (PW 4) also recorded his statement on the events of 29th December 2010. He recalled that at about 1 p.m., he saw several men arrive on the farm on a tractor and immediately started ploughing the drive – way leading to the coffee plantation. They asked him who he was and he said he was a casual worker. The men informed him that they had bought the farm in an Auction and the new owner had sent them to evict the occupants. The men then drove away only to return later with a group of fifteen (15) men armed with axes, pangas and runqus and proceeded to destroy houses and other properties.

The following morning, he helped the clerk to do an inventory of what had happened and the matter was left to the plaintiff to handle while he recorded his statement at Webuye Police Station.

The plaintiff also filed his list of documents dated 18th October 2012 to which he annexed the following: -

1. Certificate of Official Search in respect to the land parcel NO NDIVISI/MAKUSELWA/90.
2. Certificate of Official Search in respect of the land parcel NO NDIVISI/MAKUSELWA/89.
3. Title Deed for the land parcel NO NDIVISI/MAKUSELWA/89.
4. Survey map for the land parcels NO NDIVISI/MAKUSELWA/89 and 90.
5. Application for consent of the Land Control Board dated 15th November 2010.
6. Letter of consent dated 11th November 2010.
7. Transfer by chargee dated 15th November 2010.
8. Valuation report by CHRISCA REAL ESTATE dated 1st April 2011.
9. Letter addressed to the plaintiff from KINUTHIA KAHINDI & COMPANY ADVOCATES dated 5th November 2010.
10. Abstract of title for land parcel NO NDIVISI/MAKUSELWA/89.
11. Loan offer from Agricultural Finance Corporation dated 11th April 2005 and Certificate of Acceptance.
12. Notification of Sale dated 4th February 2010 by Pambo Auctioneers.
13. Letter dated 4th February 2010 addressed to the plaintiff from Pambo Auctioneers.
14. Demand letter dated 22nd February 2011 addressed to the plaintiff.

Although not contained in the list of documents, the plaintiff also annexed thereto a Notice of the Public Auction to be held at the **KITALE POST OFFICE** on 16th April 2010 for the land parcel **NO NDIVISI/MAKUSELWA/89**.

The 1st defendant filed his defence and Counter – Claim dated 25th July 2016 while the 2nd and 3rd defendant filed a joint defence dated 30th November 2012.

In his defence, the 1st defendant pleaded that he is a stranger to the averments in the plaint and put the plaintiff to strict proof thereof. He added that he participated in a Public Auction on 16th April 2010 outside **KITALE POST OFFICE** where he was the highest bidder and the

land parcel **NO NDIVISI/ MAKUSELWA/89** was sold to him. It was subsequently transferred to him and was registered in his name after he had met all the requisite conditions. He then issued a demand notice to the plaintiff on 5th November 2010 asking him to vacate the land parcel **NO NDIVISI/MAKUSELWA/89** so that he could develop it but the plaintiff has not complied.

The 1st defendant denied having invaded the suit property on 29th December 2010 having damaged the properties or have obtained registration of the land parcel **NO NDIVISI/MAKUSELWA/89** as alleged in paragraphs 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the plaint. He also denied that the plaintiff is entitled to any of the remedies sought in the plaint and put the plaintiff to strict proof thereof. He added that since the plaintiff was in default in the repayment of the loan, the 2nd defendant was entitled to sell it to recover its money due. He pleaded further that this suit is incompetent, lacks merit and is an abuse of this Court's process which ought to be struck out with costs. He also denied the jurisdiction of this Court.

In his Counter – Claim, the 1st defendant pleaded that on 26th March 2010 he read in the Standard Newspaper that the land parcel **NO NDIVISI/ MAKUSELWA/89** would be sold by Public Auction outside the **KITALE POST OFFICER** on 16th April 2010. He was interested, attended the Auction and was the highest bidder. The land was transferred to him and he obtained a title deed in accordance with the law. He then made several futile demands to the plaintiff to vacate together with his agents, workers, servants and whoever is claiming through him.

The 1st defendant therefore seeks Judgment against the plaintiff as follows: -

- (a) Eviction orders against the plaintiff by himself, his agents, workers, servants and whomsoever claiming through him from the land parcel NO NDIVISI/MAKUSELWA/89.**
- (b) An order of permanent injunction as against the plaintiff by himself, his agents, workers, servants and whomsoever claiming through him restraining them from entering, occupying, trespassing and/or in any other manner interfering with the 1st defendant's use, occupation, and access to the land parcel NO NDIVISI/MAKUSELWA/89.**
- (c) Mesne profits**
- (d) Costs of this Counter – Claim.**
- (e) Any other further relief that the Honourable Court may deem just to grant.**

Surprisingly, the 1st defendant this time pleaded that this Court has the requisite jurisdiction to grant his Counter – Claim.

The 1st defendant filed his statement and list of documents both dated 25th July 2016.

His statement is basically a rehash of what is in his defence and Counter – Claim.

The 1st defendant also filed the following documents: -

- (a) Title Deed to the land parcel NO NDIVISI/MAKUSELWA/89.**
- (b) Certificate of Search for the land parcel NO NDIVISI/MAKUSELWA /89.**
- (c) Demand letter addressed to plaintiff from KINUTHIA KAHINDI ADVOCATES dated 5th November 2010.**
- (d) Letter dated 31st January 2011 from the Agricultural Finance Corporation addressed to the District Officer Webuye.**
- (e) Memorandum of Sale dated 20th April 2010.**
- (f) Copy of newspaper advertisement dated 26th March 2010.**
- (g) Foreclosure Notice dated 13th June 2006 from Agricultural Finance Corporation addressed to the plaintiff.**
- (h) Notice dated 4th February 2010 addressed to the plaintiff from PAMBO AUCTIONEERS.**
- (i) Notification of Sale dated 4th February 2010 from PAMBO AUCTIONEERS.**
- (j) Letters dated 28th September 2012 and 5th October 2012.**

In their joint defence, the 2nd and 3rd defendants stated that on or about 11th April 2005, the plaintiff entered into a loan agreement with the 2nd defendant for the sum of Kshs. 330,000/= secured by a charge upon the land parcel **NO NDIVISI/MAKUSELWA/89** for the purposes

of growing 30 acres of maize. That the loan was repayable within a period of one (1) year but the plaintiff defaulted and was heavily in arrears and he was notified to regularize his account. He however remained in default and so on 13th June 2006, he was served with a statutory Notice of Sale but continued to dishonor his obligation to repay the loan. The 3rd defendant served him with a 45 days' redemption notice and notification of sale after which the land parcel **NO NDIVISI/MAKUSELWA/89** was sold by way of a Public Auction on 16th April 2010 following an advertisement in the Standard Newspaper on 26th March 2010. The 1st defendant was declared the highest bidder at the said Auction which was conducted at the **KITALE POST OFFICE**. The 2nd defendant executed the requisite transfer documents in favour of the 1st defendant.

The 2nd and 3rd defendants therefore denied the allegations of fraud and illegality made against them in paragraphs 17 and 18 of the plaint. They added that their actions were well within the purview of the law for the reasons that: -

(a) The plaintiff failed, neglected and/or refused to honour his debt repayment obligation thus constraining the 2nd defendant to instruct the 3rd defendant to dispose off the land parcel NO NDIVISI/ MAKUSELWA/89 which had been offered as security for the loan advanced.

(b) The 3rd defendant served the plaintiff with a 45 days Redemption Notice and notification of sale of the land parcel NO NDIVISI/MAKUSELWA /89 which had been offered as security for the loan sum advanced.

(c) Upon expiry of the 45 days Redemption Notice, the 3rd defendant duly advertised all that land parcel NO NDIVISI/MAKUSELWA/89 for sale in the Standard Newspaper on 26th March 2010 and the sale was to be conducted on 16th April 2010.

(d) The Auction was conducted on 16th April 2010 at the KITALE POST OFFICE and the 1st defendant was the highest bidder.

(e) That the requisite transfer documents were executed in favour of the 1st defendant by the 2nd defendant in exercise of it's statutory power as chargee which is not subject to the provisions of the Land Control Act Chapter 302 Laws of Kenya.

That the plaintiff has no cause of action against them and his suit should be dismissed with costs.

The 2nd defendant filed the statement of **JAMES SHAMALA** it's Manager at the Bungoma Branch as well as it's list of documents dated 7th June 2019 and a further list of documents dated 8th November 2019.

In his statement dated 7th June 2019, **JAMES SHAMALA** confirms that he is aware about the subject of these proceedings. That sometime on or about 11th April 2005, the plaintiff applied for and was granted a loan of Kshs. 330,000/= from the 2nd defendant for purposes of growing maize. That the loan was to be repaid with interest within one (1) year from 11th April 2005 and the plaintiff offered as security, the title to the land parcel **NO NDIVISI/MAKUSELWA/89** which was registered in his names. However, the plaintiff adamantly refused to honour his part of the obligation to repay the loan and demand notices were issued. The plaintiff remained adamant and the 2nd defendant was constrained to initiate the recovery process by serving the requisite Notices to the plaintiff after which the 3rd defendant was instructed to issue a 45 days Redemption Notice and Notification of Sale dated 4th February 2010. The land parcel **NO NDIVISI/MAKUSELWA /89** was thereafter advertised for sale and still the plaintiff did nothing to redeem his loan. The said land was thereafter sold and has already been transferred.

The 2nd and 3rd defendants filed the following list of documents dated 7th June 2019: -

- 1. Loan Agreement dated 11th April 2005.**
- 2. Notification of Charge dated 18th April 2005.**
- 3. Certificate of Search dated 18th April 2005.**
- 4. Instalment reminder dated 31st December 2005.**
- 5. Statutory Notice dated 13th June 2006.**
- 6. 45 days Redemption Notice dated 4th February 2010.**
- 7. Notification of sale dated 4th February 2010.**
- 8. Daily Nation (it's actually Standard Newspaper) Notice dated 26th March 2010.**
- 9. Memorandum of Sale dated 20th April 2010.**

By a further list of documents dated 8th November 2019, the 2nd and 3rd defendants filed the letter of consent dated 11th November 2010 from the **WEBUYE LAND CONTROL BOARD** for the transfer by the 2nd defendant as chargee of the land parcel **NO NDIVISI/MAKUSELWA/89** to the 1st defendant.

The plaintiff filed a reply to the 1st defendant's defence and also a defence to the Counter – Claim in which he joined issues with the 1st defendant's defence and reiterated the contents of his plaint verbatim. He put the 1st defendant to strict proof of any Court order directing any eviction.

The plaintiff pleaded further that the Notice he received from **KINUTHIA KAHINDI ADVOCATE** on behalf of the 1st defendant was illegal and that no Auction took place. He added that the purported sale and transfer of the land parcel **NO NDIVISI/MAKUSELWA/89** was fraught with illegalities and the 1st defendant is not entitled to the orders sought in the Counter – Claim which should be dismissed with costs.

The hearing commenced on 28th January 2020 when the plaintiff testified. He later called as his witnesses **ISAAC NALIANYA WEKULO (PW 2)**, **PENINA WANGARE MUNGAI (PW 3)** and **RONALD MATERE SIKUKU (PW 4)**. They all adopted as their evidence their statements contents of which I have already summarized above. The plaintiff also produced as his documentary evidence the list of documents mentioned above.

The 1st defendant also adopted as his evidence his statement referred to above and produced his list of documents in support of his defence and Counter – Claim.

JAMES SHAMALA (DW 2) the 2nd defendant's Manager at their Bungoma Branch testified on behalf of the 2nd and 3rd defendants and similarly adopted as his evidence his statement dated 7th June 2019 and produced the list of documents filed by the 2nd and 3rd defendants in support of their case.

Submissions were thereafter filed by **MS TIROP** instructed by the firm of **GICHERU & COMPANY ADVOCATES** for the plaintiff, **MR MILIMO** instructed by the firm of **MILIMO P. M & COMPANY ADVOCATES** for the 1st defendant and by **MR MABONGA** instructed by the firm of **RASHID NGAIRA ADVOCATES** for the 2nd and 3rd defendants.

I have considered the evidence by all the parties as well as the submissions by Counsel.

In my view, the following issues call for my determination.

- 1. Whether the plaintiff offered the land parcel NO NDIVISI /MAKUSELWA/89 as security to secure a loan from the 2nd defendant and if there was a default in repayment of the same.**
- 2. Whether in exercise of its powers as Chargee, the 2nd defendant legally sold the land parcel NO NDIVISI/MAKUSELWA/89 to the 1st defendant through a Public Auction conducted by the 3rd defendant.**
- 3. Whether the transfer of the land parcel NO NDIVISI/MAKUSELWA /89 to the 1st defendant was illegal and ought to be cancelled and whether the plaintiff is entitled to damages for trespass onto the land parcels NO NDIVISI/MAKUSELWA/89 and 90.**
- 4. Whether the plaintiff is infact a trespasser on land parcel NO NDIVISI /MAKUSELWA/89 and should be evicted therefrom and permanently injuncted together with his agents, workers, servants and whomsoever acting through him from entering, occupying or trespassing thereon and also pay mesne profits for the use thereof.**
- 5. Who should bear the costs.**

Before I delve into the evidence and the respective merits of each case, I must consider the issue of my jurisdiction which was raised by the 1st defendant although, in my view, with no serious conviction.

In paragraph 12 of his defence, the 1st defendant pleaded that: -

12: “The jurisdiction of this Honourable Court is not admitted.”

However, in paragraph 21 of his Counter – Claim, the 1st defendant states: -

21. “This Court has jurisdiction to hear and determine this claim.”

One cannot approbate and reprobate at the same time. Other than those pleadings, no evidence was placed before me to suggest that the Court has no jurisdiction to handle this dispute. Jurisdiction is a cardinal issue in any proceedings and can even be raised by the Court on its own motion because without it, a Court must down its tools - **THE OWNERS MOTOR VESSEL ‘LILLIAN S’ .V. CALTEX OIL**

Cognizant of the fact that an issue of jurisdiction is a threshold one that the Court must determine at the earliest opportunity before moving forward, I did consider it on my own motion while considering the 1st defendant's Notice of Motion dated 20th February 2018 seeking to commit the plaintiff to civil jail for contempt of Court. I held that I have the requisite jurisdiction in handling the said application and the suit. This is how I addressed myself in my ruling delivered on 20th September 2018: -

“I have first grappled with whether I have jurisdiction to handle this matter in view of the recent decision by the Court of Appeal in CO – OPERATIVE BANK OF KENYA LTD .V. PATRICK KANGETHE NJUGUNA & OTHERS C.A CIVIL APPEAL No 83 of 2016 where the Court of Appeal stated that the jurisdiction of this Court does not extend to dispute relating to mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.”

I then went on to state as follows: -

“I had to be clear on the issue of jurisdiction because the 2nd and 3rd defendants are the Agricultural Finance Corporation and Pambo Investments respectively who from the documents filed herein, appear to have sold the land parcel NO NDIVISI/MAKUSELWA/89 (the suit land) to the 1st defendant through a public auction on 16th April 2010 after the plaintiff who had charged it was un – able to service a loan for which he had offered the suit land as collateral. From the plaint filed herein on 19th October 2012 however, the plaintiff's claim is that the said sale was unlawful, illegal, null and void and should be cancelled and that the 1st defendant's entry onto the suit land amounts to trespass for which he claims a sum of Kshs. 5,203,550/= being the value of his properties damaged during the said trespass. The dominant issue here is really trespass to the suit land and not the issue of settlement of amounts owing to any of the parties herein which was the issue in the CO – OPERATIVE BANK OF KENYA .V. PATRICK KANGETHE NJUGUNA case (supra).

I therefore take the view that I have the requisite jurisdiction to determine this suit and the application before me. The issue of this Court's jurisdiction to determine this dispute and therefore the application dated 20th February 2018 was never raised by the parties but I thought it prudent to put it out of the way first because an issue of jurisdiction can even be raised by the Court on its own motion.”

No appeal was preferred against that ruling and I still hold the same view having now had the benefit of hearing all the parties in this dispute.

That the plaintiff secured a loan of Kshs. 330,000/= from the 2nd defendant using the title to the land parcel **NO NDIVISI/MAKUSELWA/89** as security and that he defaulted in meeting his obligation towards the repayment of the loan due is not really in dispute. Infact it is admitted. This is what the plaintiff states in paragraphs 4 and 5 of his statement dated 18th October 2012: -

4: “On the 11th of April 2005, I approached Agricultural Finance Corporation which is the 2nd defendant in this suit for a loan facility. After negotiations, AFC agreed to grant a loan facility. After negotiations, AFC agreed to grant me a loan facility of Kshs. 330,000.00 which was secured by land parcel number NDIVISI/MAKUSELWA /89.”

5: “The primary purpose for which I sought the loan facility from AFC was to grow 30 acres of maize. 25% of the loan amount was to be retained for purposes of disbursement during harvesting. However, due to the vagaries of whether, the crop I planted did not give a good yield. Therefore, I did not manage to repay the loan as agreed.”

I did not hear the plaintiff question his indebtedness to the 2nd defendant arising out of the default in meeting his obligation to repay the loan of Kshs. 330,000.00. When he was cross – examined by **MR MAINGA** for the 2nd and 3rd defendants, he said:-

“It is true that I applied for a loan from the 2nd defendant in 2005. It was for Kshs. 300,000 to be repaid in one year. I was to have finished by 2006 but I did not pay in 2006, 2007, 2008 and 2009. I did not pay a single cent by 2009. I can see my document No 12. It is a notification of sale by the Auctioneers called PAMBO INVESTMENTS. I have signed the notification of sale.”

The said notification of sale dated 4th February 2010 is also among the documents filed by the 2nd and 3rd defendants in this case. It is duly signed both by the Auctioneer and by the plaintiff as he agreed during cross – examination. The notification of sale shows that as at 4th February 2010, he was indebted to the 2nd defendant in the sum of Kshs. 684,100/=.

The thrust of the plaintiff's case is that notwithstanding his indebtedness to the 2nd defendant, there was infact no Auction of the land parcel **NO NDIVISI/MAKUSELWA/89** on 16th April 2010 whereby the 1st defendant was the highest bidder and that the transfer of the said land to the 1st defendant was illegal and fraudulent for reasons set out in paragraph 18 of the plaint. Specifically, that there was no statutory notice issued before the sale, that there was no compliance with the provisions of the Auctioneers Act and the Agricultural Finance Corporation Act, that there was no consent from the Land Control Board and that infact, no Auction was held on 16th April 2010. All the above have been refuted by the defendants. In her submissions, Counsel for the plaintiff has referred extensively to the provisions of **Section 97(1) and (2) of the Land Act** for the proposition that the sale of the land parcel **NO NDIVISI/MAKUSELWA/89** was not procedural.

The events giving rise to this suit took place in 2010. The Land Act came into force in 2012 and so the law applicable in 2010 was the now repealed Registered Land Act. **Section 74(1) and (2)** of the repealed law provided as follows: -

74(1) “If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the charge may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement as the case may be.”

(2) “If the chargor does not comply within three months of the date of service with a notice served on him under sub – section (1), the chargee may:

(a) appoint a receiver of the income of the charged property;

or

(b) sell the charged property.”

Section 153(a) of the Registered Land Act provides that: -

153 “A notice under this Act shall be deemed to have been served on or given to any person –

(a) If served on him personally;

(b) -

(c) -

(d) –

(e) - .”

As already indicated above, the Notification of Sale dated 4th February 2010 and issued by the 3rd defendant and which is annexed to the 2nd and 3rd defendants’ list of documents is signed by the “debtor” who is the plaintiff herein. A copy of the Notification of Sale produced by the plaintiff does not bear the signature of the plaintiff but I did not hear him deny having signed on 13th February 2010 the Notification of Sale produced by the defendants as indicated therein. In any event, as I have already indicated above, the plaintiff admitted to have signed it when he was cross–examined by Counsel for the 2nd and 3rd defendants. There can be no merit in the allegation that no statutory notice was issued to him.

With regard to the claim that the 2nd and 3rd defendants did not comply with the provisions of the Agricultural Finance Corporation Act, no specific provision of the said Act was cited. However, **Section 33(1)** of the said Act allows the corporation to serve the debtor with a notice either personally or by post. Among the documents produced by the 2nd and 3rd defendants is a “**Foreclosure Notice**” dated 13th June 2006 and sent by Registered Post to the plaintiff at his address being **P. O. BOX 1589 KITALE**. That is the same address at which the letter of offer of the loan facility was sent to him on 11th April 2005. Again, I did not hear the plaintiff say that he did not receive the notice. **Section 33(3)** of the same Act authorized the 2nd defendant to execute all the relevant documents on behalf of the debtor to facilitate the transfer of the charged property and give a good and un – encumbered title to the purchaser. Among the documents produced by the plaintiff is a “**Transfer by Chargee in exercise of power of sale**” duly executed by the 2nd defendant in respect of the transfer of the land parcel **NO NDIVISI/ MAKUSELWA/89** to the 1st defendant.

The plaintiff has also pleaded among the allegations of fraud and illegality that no consent of the Land Control Board was sought and granted for the transfer of the land parcel **NO NDIVISI/MAKUSELWA/89** to the 1st defendant. Since the 1st defendant acquired the said land following a Public Auction by the exercise of a mortgagee’s statutory power of sale, no such consent was required.

On the issue that there was no compliance with the Auctioneers Act, again the particular provision has not been cited. Counsel for the plaintiff has submitted citing **Section 97(1) and (2)** of the **Land Act** that no valuation of the land parcel **NO NDIVISI/MAKUSELWA/89** was carried out before the Auction. As I have already indicated above, the Land Act 2012 was not in force when the Auction was carried out on 16th April 2010. The repealed Registered Land Act did not provide for the valuation of land prior to a sale by Public Auction. However, whereas **Rule 15** of the **Auctioneer’s Rules** provides for such a valuation to be done, I consider that to be a mere irregularity which should not invalidate any sale. In the case of **JACOB OCHIENG MUGANDA .V. HOUSING FINANCE COMPANY OF KENYA LTD 2002 eKLR**, the Court of Appeal considered that issue and said: -

“The property was knocked down at a Public auction. If there was any irregularity in the conduct of the auction, the applicant would be entitled to damages against the auctioneer pursuant to Section 26 of the Auctioneers Act which provides that subject to the provisions of any other law, a person who suffers any special or general damages by the unlawful or improper exercise of any power of a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer by action.”

In this case, the plaintiff has not demonstrated by cogent evidence that the sale of the land parcel **NO NDIVISI/MAKUSELWA/89** would have fetched a higher value than the Kshs. 780,000.00 which the 1st defendant paid for it’s acquisition following the Public Auction held on

16th April 2010. What the plaintiff produced was a valuation report dated 1st April 2011 by the firm of **CHRISCO REAL ESTATES** showing the value of properties damaged on the land parcel **NO NDIVISI/MAKUSELWA/90** which was not the subject of the Auction conducted on 16th April 2010. And by the time the land parcel **NO NDIVISI/MAKUSELWA/89** was sold by Public Auction on 16th April 2010 and fetched the sum of 780,000.00, the plaintiff's indebtedness to the 2nd defendant as per the Notification of Sale dated 4th February 2010 was KShs. 684,100.00. Clearly, the 3rd defendant acted in the best interests of all the parties herein.

The plaintiff avers that there was infact no Public Auction held on 16th April 2010 contrary to the assertions by the defendants herein. The plaintiff stated the following in his oral testimony when he was cross – examined by **MR MAINGA**:-

“So I was aware that my land parcel NO NDIVISI/ MAKUSELWA/89 was to be sold to recover Kshs. 740,000/=. However, there was no sale.”

When he was re – examined by his Counsel **MR ODHIAMBO**, he said: -

“There were few people at the Auction. I asked the Auctioneer what was going to happen. He said the Auction will be done again. But the Manager AFC insisted that there was an Auction.”

As the party asserting that no Auction took place on 16th April 2010, the plaintiff bore the burden to prove that fact given that the defendants had already led evidence that indeed the Auction was conducted pursuant to the issuance of the necessary notices and the 1st defendant was the highest bidder. It is strange that if indeed no Auction took place on 16th April 2010 as averred by the plaintiff, no single letter was addressed to the 2nd defendant alluding to that anomaly, if any. One would have expected the plaintiff to take up that issue immediately since it amounts to a criminal offence and could also be the subject of disciplinary proceedings against the 3rd defendant before the Auctioneers Licencing Board. That the issue was only brought up in these proceedings some two (2) years after the event is a clear demonstration that it is a mere afterthought. This Court is satisfied that indeed a Public Auction took place on 16th April 2010 as advertised and the 1st defendant was the highest bidder for the land parcel **NO NDIVISI/MAKUSELWA/89**. The 1st defendant has since obtained the registration of the land parcel **NO NDIVISI/MAKUSELWA/89** and holds a title issued in his name on 11th January 2011. He is essentially an innocent purchaser for value and I do not see any justification for cancelling that title on the basis of fraud or illegality.

He who comes to equity must do so with clear hands. It is on record that as far back as 31st December 2005, a reminder was issued to the plaintiff in the following terms: -

“Please be reminded that the payment of the next instalment(s) on your loan(s) will be due on the date shown in the following table. We shall be obliged if you pay on or before that date. Also shown see other over – due instalments you have not settled to – date.”

The amount due then was the principal sum of KShs. 330,000.00 including interest of KShs. 29,948.63 making a total of KShs. 359,948.63. The letter then continues: -

“Failure to pay the total amount due within 14 days after the instalment date will result to farm visit inspection and/or foreclosure at additional costs to you.

This reminder includes payments upto 31.12.05.

Please ignore this reminder if you have already paid the total amount due.

Yours faithfully

for the Managing Director.”

Thereafter, a foreclosure Notice was sent to him on 13th June 2006 demanding from him the sum of KShs. 376,880/= and giving him twenty-one (21) days to pay the debt failure to which the 2nd defendant would ***“take steps to realize it's charge on LR. NO NDIVISI/MAKUSELWA/89.”*** Despite that adequate notice to redeem his property, the plaintiff made no effort to do so and neither did he approach the 2nd defendant with any requests for accommodation notifying them of any challenges he may have been facing in repaying the loan due. He maintained a studious silence. If I may paraphrase using abit of Kiswahili, it was like the plaintiff was silently telling the 2nd defendant: -

“it's true that I have defaulted. So mta do?”

Well, the 2nd defendant took up the challenge and did what it is mandated to do when there is a default and that is to initiate the recovery process in execution of it's statutory powers of sale. In the circumstances, there can be no basis for imputing any fraud or illegality on the part of the 1st defendant in the manner in which he acquired the ownership of the land parcel **NO NDIVISI/MAKUSELWA/89**. The plaintiff has beseeched this Court to declare that the transfer of the land parcel **NO NDIVISI/MAKUSELWA/89** to the 1st defendant was illegal, unlawful, null and void and to cancel the title issued to him. The threshold for cancelling a title to land is set out in **Section 26(1) of the Land Registration Act** which states: -

26(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, un-procedurally or through a corrupt scheme.” Emphasis added.

Whereas the plaintiff has made allegations of fraud and illegality upon the 1st defendant, the evidence adduced falls far short of proving those allegations. The view I take of the matter is that the 1st defendant’s title is indefeasible and he was not involved in any irregularity, fraud, misrepresentation or corrupt scheme in the acquisition of the title to the land parcel **NO NDIVISI/MAKUSELWA/89** to warrant the cancellation of his title as sought by the plaintiff.

A not too dissimilar situation arose recently in the case of **TARABAN COMPANY LTD .V. HARCHAN SINGH SEHMI C.A CIVIL APPEAL No 463 of 2019** where the Court found that although fraud and irregularity had been proved, the purchaser was not involved. The Court in up – holding the title stated thus: -

“There was no evidence adduced before the trial Court to show that the Appellant played any role, or was involved in any way in the said process. If title was acquired by fraud, or misrepresentation, illegal, unprocedural or corrupt scheme, the same was before the Appellant came into the picture. We therefore find that the Appellant was a bona fide innocent purchaser for value for these reasons and it’s title could not and cannot be challenged.”

That Judgment was delivered on 8th October 2021 and is currently the latest decision by the Court of Appeal on the doctrine of innocent purchaser for value. I have already found that the Auction conducted by the 2nd and 3rd defendants was procedural and above board. Even if there was fraud or illegality, the 1st defendant was not involved.

The plaintiff asserts that the 1st defendant trespassed onto the land parcels **NO NDIVISI/MAKUSELWA/89** and **90** without a Court order and is therefore liable to pay him the sum of Kshs. 5,203,550.00 for the resultant illegal destruction of his properties and general damages for trespass. Having bought the land parcel **NO NDIVISI/MAKUSELWA/89** at a Public Auction on 16th April 2010, a Memorandum of Sale was prepared on 20th April 2010 declaring him the owner of the land. A transfer by chargee in exercise of it’s power of sale was executed by the 2nd defendant under the repealed Registered Land Act [FORM R.L.4] transferring the land parcel **NO NDIVISI/MAKUSELWA/89** to the 1st defendant on 15th November 2010. For all practical purposes therefore, the 1st defendant became the beneficial owner of the land parcel **NO NDIVISI/MAKUSELWA/89** following the Auction held on 16th April 2010. On 5th November 2010, the firm of **KINUTHIA KAHINDI ADVOCATES**, acting on behalf of the 1st defendant, wrote to the plaintiff instructing him to desist from trespassing on the land parcel **NO NDIVISI/MAKUSELWA/89** and warning him that the 1st defendant would seek legal redress should the trespass continue. This was followed by a letter dated 31st January 2011 and addressed to the **DISTRICT OFFICER WEBUYE** by the 2nd defendant in the following terms: -

“THE DISTRICT OFFICER WEBUYE DIVISION

WEBUYE

Dear Sir

L. R. NO NDIVISI/MAKUSELWA/89

We refer to the above captioned parcel of land previously registered in the name of TOM LIHRU WANAMBISI.

We wish to bring to your attention that the corporation sold this land through a Public Auction in exercise of it’s statutory power of sale after the ex – owner defaulted in his loan repayment. The said parcel has since been transferred to one DICKSON WANDIRI BABANDEGE who was the highest bidder at the said Auction.

MR WANDIRI informs us that he is unable to gain entry and or take possession owing to hostility by the ex – owner and his agents. The purpose of this letter is to request your good officer to offer him the necessary assistance to enable him gain peaceful entry into all this parcel of land.

Yours assistance in the matter will be highly appreciated.

Yours faithfully

SHEILA C. SANGA

FOR: Ag MANAGING DIRECTOR

CC OCS – WEBUYE POLICE STATION

BRANCH MANAGER AFC – KITALE

DICKSON W. BABANDEGE.”

In view of all the above, the plaintiff cannot plead, as he has done in paragraph 18 of his plaint, that the defendants committed acts of trespass on his land. If anything, following the memorandum of sale issued on 20th April 201 and the subsequent registration of the land parcel **NO NDIVISI/MAKUSELWA/89** in the name of the 1st defendant, it was the plaintiff who became a trespasser on the said parcel of land. Indeed, by a ruling dated 3rd October 2017, **MUKUNYA J** enjoined the plaintiff by himself, his agents, workers and servants from interfering with the defendants use, occupation and access to the land parcel **NO NDIVISI/ MAKUSELWA/89**. Prior to that, by another ruling dated 29th August 2013, **OMOLLO J** had dismissed the plaintiff’s application seeking to injunct the 1st defendant, or his servants and agents from trespassing into and taking possession of the land parcels **NO NDIVISI/MAKUSELWA/89** and **90**. In the said ruling **OMOLLO J** addressed herself as follows: -

“This Court has noted from the documents filed that the sale took place on 16th April 2010. The suit property was thereafter transferred to the 1st defendant on 11th January 2011. According to him, the 1st defendant moved onto the suit property on 29th December 2010. He is seeking to stop/injunct what took place two years back.”

On that evidence, the inevitable conclusion is that after 20th April 2010, it was the plaintiff, rather than the 1st defendant, who became a trespasser on the land parcel **NO NDIVISI/MAKUSELWA/89**. Trespass is defined in **BLACK’S LAW DICTIONARY 10TH EDITION** as: -

“An unlawful act committed against the person or property of another especially wrongful entry on another’s real property.”

In paragraph 20 of his plaint, the plaintiff has pleaded as follows: -

20 “On or about 17th October 2012, the 1st defendant forcefully and without any order of Court forcefully invaded the land parcel number NDIVISI/ MAKUSELWA/89 and uprooted 2,000 stems of coffee, ¼ acre of beans and 150 stems of tissue bananas after which the 1st defendant vacated from the land.”

As is now clear, by 17th October 2012, the 1st defendant was already the owner of the land parcel **NO NDIVISI/MAKUSELWA/89** following the Auction of 16th April 2010 and was already in possession of a title deed to the said land issued on 11th January 2011. He was therefore, in terms of **Section 27(a)** of the repealed **Registered Land Act** under which the title was issued, the **“absolute”** owner of the land parcel **NO NDIVISI/MAKUSELWA/89** entitled to all the **“rights and privileges belonging or appurtenant thereto.”** He cannot therefore be accused of trespassing on his own land. That claim must be dismissed.

In paragraph 11 of his plaint, the plaintiff has pleaded as follows: -

11: “On or about 29th December 2010, a group of four (4) men armed with sticks, axes and pangas and a Massey Ferguson Tractor with a three (3) disc plough entered into the plaintiff land parcels number NDIVISI/ MAKUSELWA/89 and 90 and started ploughing the drive ways, demolished workers’ residences, the resource centre in the plaintiff’s compound, coffee estate, nursery and destroyed other property whose particulars are set out in paragraph 16 below.”

In paragraph 8 of his statement dated 18th October 2012, he alludes to the invasion that took place on the land parcels **NO NDIVISI/MAKUSELWA/89** and **90** in the following terms: -

8: “I did not comply with the letter from M/S KINUTHIA KAHINDI & COMPANY ADVOCATES because I knew that no sale by Public auction had taken place. On 29th December 2010 a group of 4 men armed with sticks, axes and pangas and a Massey Ferguson Tractor into (sic) my parcel of land NDIVISI/MAKUSELWA/89 and 90 started destroying everything including destroying or demolished workers’ residences, resource centre, coffee estate, Mersey (sic) among other properties. Later on the same day, the four men were joined by another group of eleven and continued to carry out demolitions and destroying my property which is worth million. According to a valuation which I requested from Chrisco Real Estate, the total value of destroyed property ran to Kshs. 5,203,550.00.”

And in paragraph 10 of the same statement he says: -

10: “The 1st defendant again invaded my land in the company of armed people on 17th October 2012 and uprooted 2,000 coffee trees, ¼ acre of beans and 150 stems of tissue Bananas.”

As is now clear from the evidence of the plaintiff’s witnesses **ISAAC NALYANYA WEKULO (PW 2)**, **PENINA WANGARE MUNGAI (PW 3)** and **RONALD SIKUKU (PW 4)**, the invasion to the land parcel **NO NDIVISI/MAKUSELWA/90** took place on 29th December 2010 and the plaintiff was not present. The witnesses also confirmed that the 1st defendant was not among the group of persons who invaded the land parcel **NO NDIVISI/ MAKUSELWA/90**. **ISAAC NALYANYA WEKULO (PW 2)** did not even see the invaders. This is what he said when cross – examined by **MR MILIMO**: -

“I did not see the people who damaged the plaintiff’s property.”

On her part, **PENINA WANGARE MUNGAI (PW 3)** said as follows when cross – examined by the same Counsel: -

“I knew NATHAN NDEGE and KEVIN WAMBULWA on 29th December 2010 when they invaded the farm. I did not know the 1st defendant.”

She did not see the 1st defendant among the seven (7) men who invaded the land.

When he was cross – examined by **MR MILIMO RONALD MATERE SIKUKU (PW 4)** said: -

“I did not see the 1st defendant at the scene. I only later came to learn that the 1st defendant had purchased the land No 89.”

None of the plaintiff’s witnesses have mentioned in their statements dated 18th October 2012 that they saw the 1st defendant among the group of armed men who invaded the land parcel **NO NDIVISI/MAKUSELWA/90**. The 1st defendant had no interest in that land and therefore no motive to invade it. It is therefore stretching the imagination too far for the plaintiff’s Counsel to make the following submission in support of the plaintiff’s case: -

“From the witness statements of PENINA WANGARE and ISAAC NALYANYA it is clear that the 1st defendant and his agents forcefully and illegally trespassed on the plaintiff’s property NDIVISI MAKUSELWA/89 which is the suit parcel and NDIVISI/MAKUSELWA/90 which is not part of this suit causing damages.”

It is of course the law that in civil cases, the standard of proof is on a balance of probabilities. The evidence adduced by a party as proof of the facts which he alleges must nonetheless be cogent, clear and certain. Evidence based on mere conjecture or speculation will not be sufficient. In the absence of any evidence placing the 1st defendant at the scene of the events that occurred on 29th December 2010 or showing that the persons who destroyed properties on the land parcel **NO NDIVISI/MAKUSELWA/90** were his agents or servants, there would be no basis upon which this Court can make a finding that the 1st defendant trespassed onto and damaged the properties on the land parcels **NO NDIVISI/MAKUSELWA/89** and **90** valued at Kshs. 5,203,550.00 and hold him liable for the same. The plaintiff is infact the trespasser on the land parcel **NO NDIVISI/MAKUSELWA /89** belonging to the 1st defendant. He is the party liable to be evicted therefrom.

As already stated above, a binding contract between the 1st and 2nd defendants with respect to the land parcel **NO NDIVISI/MAKUSELWA/89** was executed on 20th April 2010. Thereafter, the 1st defendant was registered as the proprietor of the said parcel of land and obtained a title issued on 11th January 2010. The duty cast on the 2nd defendant was to act in good faith and ensure that it realized the security and recovered the money borrowed by the plaintiff. The land parcel **NO NDIVISI/MAKUSELWA/89** was sold at a sum of Kshs. 780,000.00 when the plaintiff’s indebtedness stood at Kshs. 684,100.00. There is no evidence to suggest any fraudulent undervalue of the charged land. The plaintiff’s right of redemption has long been extinguished and the plaintiff is not entitled to the remedy of setting aside the 1st defendant’s title to the land parcel **NO NDIVISI/ MAKUSELWA/89**. Enough accommodation was extended to him to redeem his property, a notice was issued and an advertisement was carried in the newspaper. More fundamentally, as he admitted during the trial, the loan sum ought to have been paid by the year 2006 yet by the year 2009, he had not paid a single cent towards redeeming the charged property. Indeed, the plaintiff’s complaint is not that he has not been given any credit for any sums paid towards the repayment of the loan due to the 2nd defendant. What else was the 2nd defendant expected to do in the circumstances other than to realize the security and make the funds available to other borrowers? Having approached the Court with unclean hands, the plaintiff cannot now seek equity from this Court.

His claim is for dismissal.

On the other hand, the 1st defendant is now the proprietor of the land parcel **NO NDIVISI/MAKUSELWA/89**. He is therefore entitled to all the rights and privileges appurtenant thereto. Those rights include the right to evict the plaintiff and permanently injunct him and his agents from interfering with the 1st defendant’s occupation thereof. It is instructive to note that by a ruling dated 3rd October 2017, **MUKUNYA J** had injuncted the plaintiff from interfering with the 1st defendant’s occupation and use of the said parcel of land. That order was disobeyed and by a ruling dated 20th September 2018, the plaintiff was cited for Contempt of Court. This does not portray a good image of the plaintiff with regard to obedience of Court orders.

The 1st defendant also sought an order for mesne profits from 2010 till the date of this Judgment. A claim for mesne profits is a special damages claim which must be specifically pleaded and proved. The 1st defendant did not specifically plead that claim and no evidence was led in that regard. That remedy is therefore not available to the 1st defendant and must be dismissed.

Ultimately therefore and having considered all the evidence in this matter, this Court makes the following disposal orders: -

1. The plaintiff’s suit is dismissed.

2. Judgment is entered for the 1st defendant against the plaintiff as per his Counter – Claim in the following terms: -

(a) The plaintiff shall vacate the land parcel NO NDIVISI/ MAKUSELWA/89 within three (3) months from the date of

this Judgment or be evicted therefrom.

(b) An order of permanent injunction is hereby issued restraining the plaintiff by himself his agents, workers, servants, or whomsoever acting through him from entering, occupying trespassing or in any other way interfering with the 1st defendant's use and occupation of the land parcel NO NDIVISI/MAKUSELWA/89.

(c) The claim for mesne profits is dismissed.

(d) The plaintiff shall meet the defendants' costs of the dismissed suit.

(e) The plaintiff shall also meet the 1st defendant's costs of the Counter – Claim.

Boaz N. Olao.

J U D G E

28th October 2021.

Judgment dated, signed and delivered at **BUNGOMA** by way of electronic mail this 28th day of October 2021 in keeping with the **COVID – 19** pandemic guidelines.

Right of Appeal explained.

Boaz N. Olao.

J U D G E

28th October 2021.

Explanatory note: -

This Judgment was due on 12th October 2021 but I was away in Nairobi for medical treatment. The delay is regretted.

Boaz N. Olao.

J U D G E

28th October 2021.