



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 197 OF 2011**

**WILLIAM WAFULA OMOTO.....1<sup>ST</sup> PLAINTIFF**

**KONGO NYONGESA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**GEORGE NYOTA MUKUHA.....DEFENDANT**

**JUDGMENT**

**The plaintiffs' case:**

The plaintiffs brought this suit on 6<sup>th</sup> May, 2011 by way of plaint dated 4<sup>th</sup> April, 2011. The plaintiffs averred that at all material time to this suit the 1<sup>st</sup> plaintiff was the lawful owner and proprietor of all that parcel of land known as L.R No. Nairobi /Block 126/684 (hereinafter referred to as "the suit property"). The plaintiffs averred that the 1<sup>st</sup> plaintiff had employed the 2<sup>nd</sup> plaintiff as a farm hand cum watchman on the suit property in which the 1<sup>st</sup> plaintiff had 20 grade cows and dog kennels where he was breeding dogs for commercial purposes. The plaintiffs averred that on 14<sup>th</sup> March, 2011, the defendant made malicious report at Kayole and Ruai Police Stations through which he instigated unlawful arrest and detention of the 2<sup>nd</sup> plaintiff at Kayole Police Station for two days. The plaintiffs averred further that the 2<sup>nd</sup> plaintiff was released on 16<sup>th</sup> March, 2011 without any charge being preferred against him.

The plaintiffs averred that in the course of being arrested, the 2<sup>nd</sup> plaintiff was subjected to thorough beating, was called a land thief and humiliated by the arresting officer as a result of which the 2<sup>nd</sup> plaintiff lost dignity in the community. The plaintiffs averred that the 2<sup>nd</sup> plaintiff's unlawful arrest was as a result of a complaint made by the defendant and that the 2<sup>nd</sup> plaintiff held the defendant liable for damages occasioned to him as a result thereof.

The plaintiffs averred that the defendant had also made malicious and unlawful statement at the same police stations to the effect that the 1<sup>st</sup> plaintiff had stolen the suit property. The plaintiffs averred that acting on the said allegations by the defendant, the policemen at Kayole and Ruai Police Stations invaded the suit property in a commando style on 14<sup>th</sup> March, 2011 at about 2.30 pm with drawn out guns and chased away the 1<sup>st</sup> plaintiff's workers from the property. The plaintiffs averred that following that raid, 1<sup>st</sup> plaintiff farm produce, animal feeds and other farm implements were destroyed and his cattle and dogs exposed to danger.

The plaintiffs averred that in the process of harassing the 1<sup>st</sup> plaintiff's workers, the said policemen claimed to be acting at the behest of the defendant and announced to all and sundry that the 1<sup>st</sup> plaintiff had stolen the suit property and that they were out to evict the 1<sup>st</sup> plaintiff from the suit property. The plaintiffs averred that the defendant had by his unlawful actions aforesaid subjected the plaintiffs to extreme anguish, hardship and severely threatened and continue to threaten the 1<sup>st</sup> plaintiff's peaceful occupation and enjoyment of the suit property. The plaintiffs averred further that the defendant had by his unlawful actions aforesaid interfered with and continues to interfere with the 1<sup>st</sup> plaintiff's property rights protected by the Constitution of Kenya. The plaintiffs sought judgment against the defendant for;

- a) A permanent injunction restraining the defendant from interfering with the 1<sup>st</sup> plaintiff's quiet possession, occupation and ownership of Land Reference No. Nairobi/Block 126/684 either by himself or by his servants, agents or representatives.
- b) General damages for unlawful invasion of the suit property and destruction of farm implements, equipments and goods.
- c) General damages for unlawful and malicious arrest and detention of the 2<sup>nd</sup> plaintiff.
- d) Costs.

### The defendant's case:

The defendant filed a defence and a counter-claim on 27<sup>th</sup> May, 2011 that was amended on 25<sup>th</sup> September, 2013. In his amended defence and counter-claim dated 24<sup>th</sup> September, 2013, the defendant denied that he instigated the unlawful arrest and detention of the 2<sup>nd</sup> plaintiff at Kayole Police Station. The defendant averred that on 24<sup>th</sup> February, 2006, he purchased the suit property at a consideration of Kshs. 380,000/= from one, Maina Wanyeki who was originally allocated the property by Ngundu Farmers Co-operative Society. The defendant averred further that after payment of the purchase price, he was given the necessary documents of ownership of the property, took possession and commenced farming thereon until around 2009.

The defendant averred that on 20<sup>th</sup> June, 2006, someone broke into his house and stole the documents of ownership of the suit property which incident he reported at Kangema Police Station on the same day. The defendant averred that the documents that were used to transfer the suit property to the 1<sup>st</sup> plaintiff were the same ones that were stolen from his house. The defendant averred that Geoffrey Kamau Maina who allegedly sold the property to the 1<sup>st</sup> plaintiff had no capacity to sell the same. The defendant averred that the said Geoffrey Kamau Maina used fraudulent means to sell the suit property to the 1<sup>st</sup> plaintiff. The defendant averred that Geoffrey Kamau Maina swore a false affidavit to the effect that he was the owner of the suit property which was not the case as the defendant was the legal and beneficial owner of the suit property a fact that was known to the said Geoffrey Kamau Maina as he attested the sale agreement between the defendant and Maina Wanyeki.

The defendant denied that he was involved in the arrest and alleged assault of the 2<sup>nd</sup> plaintiff. The defendant averred that if the police arrested and detained the 2<sup>nd</sup> plaintiff, they did so in the course of their lawful duties and were not acting as agents of the defendant. The defendant averred that he was aware that the police interrogated one person from the suit property as the occupants of the property had unleashed on them 10 fierce dogs when they went to the premises. The defendant averred that Geoffrey Kamau Maina admitted to have fraudulently sold the suit property to the 1<sup>st</sup> plaintiff and offered to refund to the defendant the payment he had made towards the purchase of the property which offer was rejected by the defendant.

The defendant averred that the 1<sup>st</sup> plaintiff was a trespasser on the suit property and that the plaintiffs' claim against him had no basis. The defendant termed the plaintiffs' claim frivolous and vexatious and a waste of court's time. The defendant denied that the 2<sup>nd</sup> plaintiff was assaulted by the police, the defendant or anybody else. In his counter-claim, the defendant reiterated the contents of his defence and averred that the 1<sup>st</sup> plaintiff was occupying the suit property that belonged to defendant unlawfully and should be ordered to vacate the same. The defendant sought judgment against the plaintiffs by way of a counter-claim for;

- a) An order cancelling the registration of the plaintiff as a bona fide purchaser of L.R No. Nairobi/Block 126/684.
- b) A declaration that the 1<sup>st</sup> plaintiff was occupying L.R No. Nairobi/Block 126/684 illegally and should be evicted.
- c) The costs of the suit and the counter-claim.

The plaintiffs filed a reply to amended defence and defence to counter-claim on 9<sup>th</sup> October, 2013 in which the plaintiffs joined issue with the defendants in their amended statement of defence save where the same consisted only of admissions. The plaintiffs denied all the allegations made in the counter claim which they termed as bad in law and incapable of determination by the court.

At the trial, the 1<sup>st</sup> plaintiff, William Wafula Omoto (PW1) adopted his witness statement dated 4<sup>th</sup> April, 2011 and further witness statement filed on 19<sup>th</sup> April, 2013 as part of his evidence in chief. PW1 produced his bundle of documents filed in court on 29<sup>th</sup> August, 2012, further bundle of documents filed in court on 13<sup>th</sup> April, 2013 and the supplementary list of documents dated 23<sup>rd</sup> August, 2016 as plaintiff's exhibits 1, 2 and 3 respectively. He testified as follows; he was the owner of the suit property. He acquired the suit property on 17<sup>th</sup> March, 2010 from one, Geoffrey Kamau Maina. He came to know Geoffrey Kamau Maina and the fact that he was selling the suit property through a friend by the name Leah whose mother lived in the area where the suit property is situated who arranged for him to see the suit property and to meet Geoffrey Kamau Maina. When he visited the suit property, the same was not developed. He thereafter met with Geoffrey Kamau Maina at the office of Mukele advocate. After discussion, Geoffrey Kamau Maina agreed to sell to him the suit property at a consideration of Kshs. 1,234,000/=. At the meeting, he was informed that the suit property was still in the name of Ngundu Farmers Co-operative Society in liquidation. He went to the office of the liquidator of Ngundu Farmers Co-operative Society at Nyayo House with his advocate Mr. Mukele and Geoffrey Kamau Maina, and met the liquidator, Mr P. Uluma. Mr. Uluma confirmed that the suit property was available for sale and that it belonged to Geoffrey Kamau Maina. Following this confirmation, he instructed Mr. Mukele to prepare a sale agreement between him and Geoffrey Kamau Maina. After the agreement for sale was prepared he and Geoffrey Kamau Maina signed the same on 17<sup>th</sup> March, 2010 at the office of Mr. Uluma. He thereafter paid to Geoffrey Kamau Maina the full purchase price of which Kshs. 990,000/= was paid through a banker's cheque and Kshs. 244,000/= in cash. Geoffrey Kamau Maina thereafter handed to him the documents of title that were in his possession in relation to the suit property which included the share certificate. Mr. Uluma, the liquidator of Ngundu Farmers Co-operative Society thereafter transferred the suit property to him and commenced the process of obtaining a title for the suit property in his name. He paid Ngundu Farmers Co-operative Society Kshs. 11,500 in cash as transfer charges and was issued with a receipt dated 17<sup>th</sup> March, 2010.

He took possession of the suit property after three days after purchasing the same and fenced it with a barbed wire. He constructed a house for workers on the property and commenced cultivation of tomatoes. He also started rearing cattle and dog breeding on the suit property. Among the exhibits that he produced in court were photographs showing the activities that he was undertaking on the suit property. On 14<sup>th</sup> November, 2010, he was called by his workers who informed him that there were people on the suit property who wanted to see him. When he went to the suit property, he was told by the people who were looking for him that he had acquired the suit property fraudulently and that he was required to report at Kayole CID office.

He did not go to the CID office at Kayole but he referred the matter to his advocate because the people he met on the suit property did not

identify themselves. In March 2011, he received a distress call from his neighbour and workers that some people had raided the suit property and taken one of his employees into custody. He went to Ruai Police Station and reported the incident. The policemen at Ruai told him that they were not involved in the invasion of the suit property. He reported the matter to his advocate on record who wrote a letter of complaint to the Commissioner of Police on 16<sup>th</sup> March, 2011. Following the complaint, the 2<sup>nd</sup> plaintiff who was his employee and who had been arrested was released from Kayole Police Station where he had been locked up. During the invasion of the suit property, he lost a water pump and a wheelbarrow. After filing this suit, he was arrested and taken to Kayole Police Station where he was questioned and made to record a statement. He was released thereafter on a cash bail of Ksh. 30,000/= and told to go back to the Police Station to confirm if any charges had been preferred against him. No charges were preferred against him following that arrest. He told court that he was being harassed by the defendant and that it was the defendant who set the police on him.

He stated that the defendant was present on the day of his arrest. He stated that he was released on cash bail after 7 hours of detention and that he was supposed to be on duty on that day. He stated that the arrest caused him a lot of distress and that the arrest was a scheme by the defendant to humiliate him. He stated that the defendant was not in occupation of the suit property when he purchased it and that neither Uluma nor Geoffrey Kamau Maina mentioned to him that the suit property had at one time been sold to the defendant.

PW1 stated that he purchased the suit property from Geoffrey Kamau Maina and not from Maina Wanyeki (deceased) and that when he purchased the suit property, it had been transferred to Geoffrey Kamau Maina by the liquidator of Ngundu Farmers Co-operative Society. He testified that the suit property was vacant when he purchased it and that he occupied the same for 8 months before the police came to disrupt his possession by arresting his workers. He stated that he was still in possession of the suit property and that he had only taken a break from farming following the harassment. He denied that he was a trespasser on the suit property. He maintained that he followed due process in acquiring the suit property. He stated that the suit property had no title deed and that what was transferred to him was a share certificate. He urged court to allow the prayers sought in the plaint and dismiss the counter claim.

The 2<sup>nd</sup> plaintiff, Kongo Nyongesa (PW2) gave evidence after the 1<sup>st</sup> plaintiff. PW2 adopted his witness statement dated 4<sup>th</sup> April, 2011 as part of his evidence in chief. He testified as follows. He was an employee of the 1<sup>st</sup> plaintiff on the suit property. In March, 2011, police officers came to the suit property, arrested him and took him to Kayole Police Station. Nobody followed him to the police station and he did not call anyone for assistance. He could not remember what happened to him while he was at the police cell. When he was arrested, his colleagues who were with him on the suit property managed to escape. The police introduced themselves to them before they started running away from them. He was arrested in the process. Initially, he was not aware that those who came to the premises were police officers. He knew the defendant. He saw him during his arrest. The defendant came with the policemen. For the entire period he worked on the suit property, nobody had laid a claim to the property. He got injured while he was being chased by the policemen before he was arrested. He was not charged after the arrest. He stated that he had sued the defendant for causing his arrest as he had accompanied the police officers who arrested him. He stated that he was seeking damages against the defendant. In examination by the court, PW2 stated that he was new on the suit property and that when he was employed, there were 21 grade cattle being reared by the 1<sup>st</sup> plaintiff on the suit property and that the 1<sup>st</sup> plaintiff was also rearing pet dogs. He also told the court that there was a fence around the suit property made of barbed wire. He stated that he was not beaten on the suit property or in the police cell where he was kept for three days. He stated that he was beaten when he was being chased before he was arrested.

In his evidence, the defendant, George Nyota Mukuha (DW1) adopted his witness statement dated 25<sup>th</sup> September, 2013 as part of his evidence in chief. He also produced a bundle of documents dated 26<sup>th</sup> May, 2011 and filed in court on 27<sup>th</sup> May, 2011 as defendant's exhibit 1. He testified as follows. He knew one, Maina Wanyeki since 1965 as they were neighbours. Through his mother, he received information in January, 2006 that Maina Wanyeki wanted to sell some parcel of land in Kamulu (the suit property). He went in person to see the land. When he went to the suit property to view the same, he was accompanied by among others, Maina Wanyeki and his son, Geoffrey Kamau Maina. He owned a plot in Mlolongo which he sold to raise funds to purchase the parcel of land which Maina Wanyeki was selling. Maina Wanyeki and he agreed on a purchase price of Kshs. 380,000/= out of which he paid Kshs. 300,000/=. They entered into a written agreement for sale dated 24<sup>th</sup> February, 2006. After making the said payment, he was given possession of the suit property by Maina Wanyeki. They had agreed that he would pay the balance of the purchase price later. Maina Wanyeki died on 8<sup>th</sup> October, 2007 before he could pay the balance of the purchase price. On 20<sup>th</sup> June, 2006, someone broke into his house in Murang'a and stole some documents. When he checked, he found the share certificate No. 750 for the suit property missing. A balloting card No. 00405 was also missing.

He reported the invasion and the loss of the said documents at Kangema Police Station under O.B No 10/6/2006. The documents resurfaced in court after the filing of this suit. On 19<sup>th</sup> June, 2014, he saw the documents with the 1<sup>st</sup> plaintiff in court when he was going through them. The 1<sup>st</sup> plaintiff was sitting right behind him when he was going through the documents with his advocate. He saw the ballot card and the share certificate. The 1<sup>st</sup> plaintiff had filed copies of the said documents in court. On 27<sup>th</sup> June, 2010, he visited the suit property and before he reached the property, he noticed that the property had been fenced and there was a small house on the same. He did not get into the property nor see anyone on the property.

He learnt that the property was occupied by someone he did not know. He went to Maina Wanyeki's home at Kangema and informed Maina Wanyeki's wife (now deceased) that someone had entered the suit property. They called Maina Wanyeki's son, Geoffrey Kamau Maina who was running a business at Kangema who told them that he did not know who was on the suit property. He agreed with the family of Maina Wanyeki that they were to meet on the suit property to find out who had trespassed thereon but they did not turn up. George Kamau Maina who was to accompany him to the suit property went underground.

He reported the matter at Kayole Police Station on 27<sup>th</sup> July, 2010 and he was referred to Ruai Police Station. After he recorded a statement, he was referred back to Kayole CID. Geoffrey Kamau Maina was arrested and charged at Makadara Law Court in CR. Case No. 1087/12 in which he was convicted of the charges of falsification of information on oath and forcible detainer. Geoffrey Kamau Maina sold the suit property to the 1<sup>st</sup> plaintiff on 17<sup>th</sup> March, 2010 and it was the 1<sup>st</sup> plaintiff who was in possession of the suit property. The 1<sup>st</sup> plaintiff was not arrested. There was a time when he went with the CID officers to the suit property to ask for the 1<sup>st</sup> plaintiff's whereabouts and telephone contact. The 2<sup>nd</sup> plaintiff who was one of the workers on the suit property unleashed dogs on them and ran away. The 2<sup>nd</sup> plaintiff was arrested for the action of unleashing dogs on the police officers. He was taken to the police station and later forgiven. He was not

charged. The 1<sup>st</sup> plaintiff was also not charged but was asked to record a statement since the police wanted information from him. He did not ask the police to arrest the plaintiffs. He urged the court to give him possession of the suit property since he had a binding agreement with Maina Wanyeki (deceased). He also prayed for the dismissal of the plaintiff's suit.

The defendant's witness was CPL Mark Lipale (DW2). He testified as follows. In 2010/2011 he was attached to DCIO Kayole Police Station. On 15<sup>th</sup> November, 2010 while on duty at Kayole, he was directed by the Deputy DCIO to carry out investigations on a complaint that had been made by the defendant. The complaint related to trespass on the suit property. He was introduced to the complainant by the DCIO and he interviewed him. The complainant told him that someone had encroached on the suit property that he had purchased from one, Wanyeki (deceased). He visited the scene on the same day in the company of the complainant and two other officers. When they reached the suit property, he found two men whom they asked about the name of the owner of the property. The men were very cooperative and gave them the name and telephone contact of the 1<sup>st</sup> plaintiff. They called the 1<sup>st</sup> plaintiff and he came to the suit property. They told the 1<sup>st</sup> plaintiff that they had a complaint regarding the suit property and asked him to bring the title documents in his possession. The 1<sup>st</sup> plaintiff promised that he would come to the police station the following day.

The 1<sup>st</sup> plaintiff did not turn up as he had promised even after being called and told that the DCIO was waiting for him. The 1<sup>st</sup> plaintiff told him that he would not come to the police station but would go to court. This turn of events led him to carry out further investigations on the matter. He went to Nyayo House where he received some documents that had been filed by Geoffrey Kamau Maina, the son of Wanyeki who had sold the suit property to the defendant. He obtained information from one, Uluma that Ngundu Farmers Co-operative Society was in liquidation and that all the documents in relation to the company had been transferred to the Ministry of Co-operatives. He arrested Geoffrey Kamau Maina and charged him with the offences of false detainer and false swearing of an affidavit. Geoffrey Kamau Maina had stated in the affidavit that his mother had died and that he was the only surviving son of Wanyeki. At the time, Geoffrey Kamau Maina's mother was still alive and he had other siblings. The sale of the suit property to the 1<sup>st</sup> plaintiff was not genuine because Geoffrey Kamau Maina was a witness when his late father was selling the suit property to the defendant. Geoffrey Maina was prosecuted and found guilty of the said charges. DW2 produced a copy of the judgement in the criminal case as defence exhibit 4. He stated that there was no malice in the arrest of the plaintiffs because the 1<sup>st</sup> plaintiff refused to cooperate with the police and when he was brought to the police station under arrest, he was released.

#### The submissions:

After the close of evidence, the parties made closing submissions in writing. The plaintiffs filed their submissions on 19<sup>th</sup> March, 2019 while the defendant filed his submissions on 1<sup>st</sup> April, 2019. The plaintiffs framed several issues which they submitted on. On whether the defendant was liable for unlawful arrest and detention of the 2<sup>nd</sup> plaintiff, the plaintiffs relied on the case of Murunga v Attorney General [1979] KLR 138 which outlines the principles that govern claims founded on malicious prosecution. They submitted that the defendant made a complaint to the police who thereafter unlawfully arrested the 2<sup>nd</sup> plaintiff and released him without being charged. The plaintiffs submitted that 2<sup>nd</sup> plaintiff was arrested and detained without any reasonable or probable cause contrary to Article 49(1) (c) and (f) of the constitution of Kenya.

On whether the defendant is liable for the invasion and destruction of the 1<sup>st</sup> plaintiff's properties, the plaintiffs submitted that the 1<sup>st</sup> plaintiff's claim was based on the tort of trespass and that the 1<sup>st</sup> plaintiff was the legal proprietor of the suit property and was entitled absolute ownership of the property together with all the rights and privileges associated thereto. In support of this submission, the plaintiffs relied on sections 27 and 28 of Registered Land Act, Chapter 300 Laws of Kenya (now repealed) (RLA) which vests in the owner of a property absolute ownership with all associated rights and privileges. The plaintiffs submitted further that the 1<sup>st</sup> plaintiff's title to the suit property was indefeasible and that the register of the suit property could not be rectified by the cancellation of the registration of the 1<sup>st</sup> plaintiff as the owner of the suit property since the 1<sup>st</sup> plaintiff did not acquire the suit property through fraud or mistake. In support of this submission, the plaintiffs relied on section 143 of the RLA and the case of Denis Noel Mukholo Ochwada & Another v Elizabeth Murungari Njoroge & Another [2018] eKLR.

On whether the 1<sup>st</sup> plaintiff was an innocent purchaser of the suit property for value without notice of any defect in the title that was held by Geoffrey Kamau Maina, the plaintiffs submitted that the 1<sup>st</sup> plaintiff had established that; he was the registered owner of the suit property, he purchased the suit property in good faith, he had no knowledge of the alleged fraud, he purchased the suit property for valuable consideration, the vendor had apparent valid title and that he was not a party to the fraud. The plaintiffs submitted that the 1<sup>st</sup> plaintiff had proved the ingredients of a bona fide purchaser that was outlined in the case of Katende v Haridar & Company Limited [2008] 2 E.A 173.

On whether the defendant's counter claim was properly before the court, the plaintiffs submitted that the counter-claim was bad in law and not capable of determination by the court as the same was brought contrary to the provisions of Order 7 Rules 7 and 8 of the Civil Procedure Rules. The plaintiffs submitted further that in order to succeed in a claim based on fraud, fraud must be pleaded and particularised in accordance with Order 2 rule 2 of the Civil Procedure Rules and proved which the defendant did not do in this case. The plaintiffs relied on the case of Ratilal Gordhanbai Patel v Lalji Makanji [1957] E.A 314 on the threshold for proof of fraud. The plaintiffs urged the court to find that the defendant's counter claim was improper, not proved and to dismiss the same with costs. The court was also urged to grant the reliefs sought by the plaintiff in the plaint.

In his submissions in reply, the defendant framed three issues. On whether the 1<sup>st</sup> plaintiff purchased the suit property from an owner thereof or from a fraudster, the defendant submitted that the judgment that was delivered in the criminal case against Geoffrey Kamau Maina was conclusive proof that Geoffrey Kamau Maina who purported to sell the suit property to the plaintiff was not the owner thereof and that he received money from the plaintiff by false pretences. In support of this submission, the defendant relied on section 47A of the Evidence Act, Chapter 80 Laws of Kenya on the conclusiveness of a final judgment made in a criminal case. The defendant submitted that since Geoffrey Kamau Maina was not the owner of the suit property, he had no title in the property that he could convey to the 1<sup>st</sup> plaintiff. The defendant submitted further that since the suit property had no title, section 143 of the RLA relied on by the plaintiff was not applicable.

On the 2<sup>nd</sup> plaintiff's malicious arrest, detention and prosecution claim, the defendant submitted that from the evidence before the court, the defendant was justified in lodging a complaint with the police which led to the arrest of the 2<sup>nd</sup> plaintiff. The defendant submitted that after lodging a complaint with the police, it was the duty of the police to carry out investigations and to make independent decision on the same. The defendant submitted that there was no evidence that the complaint he had made to the police was malicious. The defendant submitted further that he did not arrest and detain the 2<sup>nd</sup> plaintiff and that the 2<sup>nd</sup> plaintiff's claim should have been directed against the Attorney General who was not sued. The defendant submitted that the 2<sup>nd</sup> plaintiff had failed to prove that he was charged maliciously and that the prosecution was terminated in his favour. The defendant relied on the cases of Eldoret ELC Suit No. 117 of 2014, Falcon Global Logistics Co. Ltd. v Management Committee of Eldama Ravine Boarding School, Isaac N. Okero v Samuel Onyango [2017] eKLR and Mombasa HCC No 188 of 2006, Abdulrazak Khalifa Salim & another v Ibrahim Rashid & another in support of his submissions and urged the court to dismiss the plaintiffs' case and to allow his counter-claim with costs.

#### Determination:

The parties did not frame and agree on issues for determination by the court. In their submissions, each party framed his own issues. From the pleadings, the following in my view are the issues that arise for determination in this suit and the counter-claim;

1. Whether the 1<sup>st</sup> plaintiff was the lawful owner of all that parcel of land known as L.R No. Nairobi/Block 126/684 (the suit property).
  2. Whether the defendant unlawfully entered the suit property and interfered with the plaintiff's occupation and enjoyment thereof.
  3. Whether the defendant unlawfully caused the 2<sup>nd</sup> plaintiff to be arrested in the process of which he was subjected to physical assault and thereafter detained.
  4. Whether the plaintiffs suffered damage and loss as a result of the alleged actions by the defendant.
  5. Whether the plaintiffs are entitled to the reliefs sought in the plaint.
  6. Whether the plaintiffs are occupying the suit property unlawfully.
  7. Whether the defendant is entitled to the reliefs sought in the counter-claim.
8. Who is liable for the costs of the suit?

#### Whether the 1<sup>st</sup> plaintiff was the lawful owner of all that parcel of land known as L.R No. Nairobi/Block 126/684 (the suit property).

It was common ground at the trial that the 1<sup>st</sup> plaintiff acquired his interest in the suit property from Geoffrey Kamau Maina. As at 17<sup>th</sup> March, 2010 when the 1<sup>st</sup> plaintiff entered into an agreement with Geoffrey Kamau Maina for the purchase of the suit property, the property was not registered in the name of the said Geoffrey Kamau Maina. The suit property was owned by Ngundu Farmers Co-operative Society Limited who had allocated the same to Geoffrey Kamau Maina's father, Wanyeki Maina, deceased. As at the date of the said agreement, Wanyeki Maina was deceased and as such Ngundu Farmers Co-operative Society Limited could only transfer the suit property to his legal representative. The uncontroverted evidence placed before the court by the defendant shows that Geoffrey Kamau Maina fraudulently represented to Ngundu Farmers Co-operative Society Limited that he was the sole beneficiary of the estate of Wanyeki Maina, deceased and was allowed by Ngundu Farmers Co-operative Society Limited to sell the suit property to the plaintiff. When the Geoffrey Kamau Maina was selling the suit property, he was well aware that his father, Wanyeki Maina, deceased had earlier sold the property to the defendant. Geoffrey Kamau Maina's said acts of fraud were discovered. He was arrested and charged in connection with the fraud. He was found guilty in a judgment that was delivered in the Chief Magistrates Court at Makadara, Criminal Case No. 1087 of 2012. In the judgment, the court made a finding that Geoffrey Kamau Maina had no title or right to occupy the suit property. The court also made a finding that Geoffrey Kamau Maina had falsely sworn an affidavit that he was the sole beneficiary of the estate of his deceased father, his mother having died after his father. It was on the strength of this false affidavit that Ngundu Farmers Co-operative Society Limited allowed the said Geoffrey Kamau Maina to sell the suit property to the 1<sup>st</sup> plaintiff. No evidence was placed before the court showing that the said judgment in the criminal case was appealed.

I am in agreement with the defendant's that from the evidence on record, Geoffrey Kamau Maina was not the owner of the suit property and had no interest in the same when he purported to sell the same to the 1<sup>st</sup> plaintiff. Whatever interest that the said Geoffrey Kamau Maina acquired in the suit property if any was acquired fraudulently through deceit and as such was null and void. In the circumstances, Geoffrey Kamau Maina had no valid interest in the suit property that he could sell and transfer to the 1<sup>st</sup> plaintiff. It follows therefore that the 1<sup>st</sup> plaintiff did not acquire any valid interest in the suit property that would have entitled him to occupy and use the suit property. The issue of an innocent purchaser for value does not arise in the circumstances of this case. Geoffrey Kamau Maina had no interest in the suit property that he could pass to any person innocent or otherwise. As correctly pointed out by the defendant in his submissions, Geoffrey Kamau Maina was not a legal representative of his deceased father, Wanyeki Maina. The suit property had also not been transferred to his name by Ngundu Farmers Co-operative Society when he purported to sell the same to the 1<sup>st</sup> plaintiff.

It is my finding arising from the foregoing that the 1<sup>st</sup> plaintiff did not acquire any proprietary or ownership rights in the suit property. The 1<sup>st</sup> plaintiff was therefore not the owner of the suit property when he entered thereon and took possession of the same.

#### Whether the defendant unlawfully entered the suit property and interfered with the 1<sup>st</sup> plaintiff's occupation and enjoyment thereof.

I am not satisfied from the evidence on record that the defendant unlawfully entered the suit property and interfered with the 1<sup>st</sup> plaintiff's occupation and enjoyment thereof. First, the defendant led uncontroverted evidence that the suit property was sold to him by the owner thereof, Wanyeki Maina, deceased before he died and that he had taken possession thereof before the 1<sup>st</sup> plaintiff purportedly purchased the same from Geoffrey Kamau Maina. The 1<sup>st</sup> plaintiff having entered the suit property without the defendant's knowledge, the defendant whose interest in the property was first in time had the right to enter the suit property to find out under what circumstances the 1<sup>st</sup> plaintiff came to occupy the same. If the defendant entered the suit property for that purpose, such entry could not be termed as unlawful. Secondly, the 1<sup>st</sup> plaintiff placed no evidence before the court showing that the defendant entered the suit property and caused damage or destruction to the 1<sup>st</sup> plaintiff's properties. From the evidence on record, the defendant only entered the suit property once when he accompanied police officers to the premises to obtain the particulars of the occupant thereof. The evidence before the court shows that when the defendant accompanied the police officers to the suit property for the second time when the 2<sup>nd</sup> plaintiff was arrested; the defendant did not enter the suit property. He remained outside the compound. Thirdly, the 1<sup>st</sup> plaintiff did not place any evidence in proof of the alleged damages that was caused to the suit property or his properties therein when the defendant allegedly entered therein.

Due to the foregoing, I am not satisfied that the defendant entered the suit property unlawfully and interfered with the 1<sup>st</sup> plaintiff's occupation thereof.

Whether the defendant unlawfully caused the 2<sup>nd</sup> plaintiff to be arrested in the process of which he was subjected to physical assault and thereafter detained.

From the evidence on record, I am satisfied that the complaint that the defendant made to the police was made in good faith. There is no evidence before the court that the complaint was actuated with malice or ill will. There is also no evidence that after the defendant made a report to the police, he directed the police to arrest any of the plaintiffs. I am in agreement with the defendant that the police were acting independently when they made a decision to arrest the 2<sup>nd</sup> plaintiff and to hold him in custody. The plaintiffs should have joined the Attorney General to the suit to give the police opportunity to explain their actions. I am not convinced that the fact that the defendant had accompanied the police to the suit property when the 2<sup>nd</sup> plaintiff was arrested is evidence that it was the defendant who directed the police to arrest him.

Whether the plaintiffs suffered damages as a result of the alleged actions by the defendant.

The plaintiffs did not place any evidence before the court regarding the damages that they allegedly suffered when the suit property was allegedly invaded by the defendant. The 2<sup>nd</sup> plaintiff who claimed to have been assaulted did not place any medical evidence before the court of the injuries that he allegedly suffered. The 1<sup>st</sup> plaintiff did not also place any evidence before the court showing that the items and farm implements that he was using on the suit property were destroyed or that the cattle and dogs he was rearing were injured during the alleged invasion. In the absence of any evidence, I am not satisfied that the plaintiffs suffered any damage when the defendant entered the suit property.

Whether the plaintiffs are entitled to the reliefs sought in the plaint.

It is clear from the findings above that the plaintiffs have not proved their cases against the defendant to the required standard. It follows therefore that the plaintiffs are not entitled to any of the reliefs sought in the plaint.

Whether the plaintiffs are occupying the suit property unlawfully.

I have held that the 1<sup>st</sup> plaintiff acquired the suit property from a fraudster and as such he did not get a valid title to the suit property. I have also held that the 1<sup>st</sup> plaintiff has no proprietary interest in the suit property. In the absence of any valid interest in the suit property, the 1<sup>st</sup> plaintiff's occupation of the property is without any lawful cause and as such is illegal.

Whether the defendant is entitled to the reliefs sought in the counter-claim.

The defendant led uncontroverted evidence that the suit property was sold to him by the owner thereof and that he took possession of the same. He stated that save for the year 2009 when the 1<sup>st</sup> plaintiff entered the property, he was always cultivating it. Since the 1<sup>st</sup> plaintiff has no lawful cause for occupying the suit property, he must hand over possession of the property to the defendant who had possession of the property prior to his unlawful entry. I am satisfied in the circumstances that the defendant is entitled to the reliefs sought in the counter-claim. I am not in agreement with the plaintiffs' argument that the defendant's counter-claim was defective. The counter-claim was properly pleaded in my view and proved.

Who is liable for the costs of the suit and the counter-claim?

As a general rule, costs follow the event and the court has a discretion in respect thereof. I am of the view that the filing of this suit was occasioned by Geoffrey Kamau Maina who sold to the plaintiff land that did not belong to him. If he had been joined in this suit as a party, I would have ordered him to pay the costs of the suit and the counter-claim. Since neither party felt the need of joining him to the suit, I will order each party to bear his own costs of the suit and the counter-claim.

Conclusion:

In conclusion, the plaintiffs' suit is dismissed and judgment entered for the defendant against the plaintiffs for possession of the suit property as prayed in the counter-claim. The plaintiffs shall vacate and handover possession of the suit property to the defendant within sixty (60) days from the date hereof in default of which the defendant shall be at liberty to apply for warrants for their forceful eviction from the suit

property. Each party shall bear his own costs of the suit and the counter-claim.

**Delivered and Dated at Nairobi this 30<sup>th</sup> day of January 2020**

**S. OKONG'O**

**JUDGE**

**Judgment read in open court in the presence of:**

Mr. Ouma h/b for Mr. Esuchi for the Plaintiffs

Ms. Waweru for the Defendant

C. Nyokabi-Court Assistant