



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISII

ELC NO. 1121 OF 2016

THOM SAMUEL MARORO.....PLAINTIFF

VERSUS

ISAAC MAGANGI OMWOYO1ST DEFENDANT

JOSPEH OENGA OMWOYO.....2ND DEFENDANT

EVANS NYABONI OMWOYO.....3RD DEFENDANT

SABINA OMWOYO.....4TH DEFENDANT

J U D G M E N T

1.The plaintiff suing as the administrator of the estate of Samson Maroro Ochanda (deceased) instituted the present suit by way of plaint dated 13th May 2008 against the defendant and sought the following orders: -

(a) A permanent injunction do issue against the Defendants, their agents/servants and /or employees and any other person, whatsoever acting on their behalf restraining them from entering, trespassing and/or occupying the suit parcel.

(b) A declaration that the Defendants occupation of the suit parcels is illegal and that any dealings, transactions and/or agreements if any, with any person whatsoever that conducted their illegal entry and occupation thereof are null and void abinitio.

(c) Damages for trespass.

(d) Costs of the suit and interest at Court rates.

(e) Any other alternative relief the honourable Court may deem fit and just to grant.

2. The defendants filed a counter claim dated 28th June 2010 and sought the following orders against the plaintiff.

(i) A declaration that the late Samson Maroro Ochanda, held in trust a portion of the suit lands measuring 3 acres where the defendants currently occupies and cultivates the same are entitled to continue using and occupying the same.

(ii) Costs of the counterclaim and interest.

3.The claim by the plaintiff was that his late father in 1960/1961 purchased land that was owned by the 1st - 3rd defendants father and husband of the 4th defendant one Burasi Omwoyo (now deceased). That after the sale of the land the said Burasi Omwoyo moved out of the land together with his family and relocated with his family to Tanzania. The plaintiff's deceased father occupied the land and following the land adjudication process was registered as the owner of the land being land parcel **Majoge/Boochi/70** measuring approximately 8.5 acres in 1968. He subsequently subdivided the land into two portions, **Majoge/Boochi/2342 and 2343** which were still registered in his name. The plaintiff averred that the Defendants in the year 2007 started staking claim of ownership to a portion of the suit premises claiming that their deceased father had not sold the whole parcel of land. The defendants instituted a claim before the Ogembo Land Disputes Tribunal but the proceedings were quashed on application by the plaintiffs to the High Court.

4. The defendants for their part alleged that the plaintiff's father had fraudulently caused himself to be registered as the owner of the

entire parcel of Land when he had not purchased the whole land. The defendants claimed to have been in continuous occupation of a portion of the land and claimed that the plaintiff's father held a portion of 3 acres in trust for themselves.

Evidence by the parties

5. The plaintiff in support of his case called 5 witnesses while the 1st and 4th defendants testified on behalf of the other defendants and in support of the defendants case. The plaintiff's mother and step mother testified as PW1 and PW2 while the plaintiff testified as PW4. Briefly the evidence in support of the plaintiff case was as follows:-

6. PW1 Agnes Nyaega Maroro was the 2nd wife of Samson Maroro Ochanda (deceased). She testified that her late husband purchased land at Ogembo from one Burasi Omwoyo in 1960. She stated that at the time the land did not have any title. It was her further evidence that she was present when the purchase was made and that the seller after the purchase of the land by her late husband migrated with his wives and children to Tanzania. The witness stated that her and her husband occupied the houses that had been built by Burasi Omwoyo on the land and carried on farming activities on the suit land. The witness stated they were farming on the whole parcel of land upto 1997 when her husband died. She stated it was after her husband's death that some people invaded the land and built temporally structures on one portion and were staking ownership claims.

7. The witness further testified that by the time her husband died he had subdivided the land into two portions and allocated one portion to herself and the other portion to her co-wife. She stated that on the portion allocated to her she had planted tea leaves and trees. She stated the persons who invaded the portion allocated to her were the sons of the person who sold the land to them and that they have occupied her portion of land. She was emphatic that Burasi Omwoyo sold his entire land to her husband and that it was not true that portion of 3 acres was left unsold as alleged by the defendants.

8. In cross examination the witness stated that her husband and the seller made an agreement at the time of sale but she did not have a copy of the agreement. She stated the witnesses to the agreement had all died. She stated she did not know the acreage of the land that they purchased but at the time of sale there were two grass thatched houses which they occupied after the seller left with his family. The witness further stated that the seller of the land together with his two wives left the land in the year 1961 and that she and her husband resided on the land at Ogembo for 4 years before they went back to Esani(Nyamira) whereafter her Co- wife went to reside at the land at Ogembo. She stated her Co-wife still resides at Ogembo and her at Esani. She denied her late husband only bought a portion of the land belonging to Burasi Omwoyo.

9. PW2 Jerusa Manderere Maroro was the first wife of Samson Maroro Ochanda (deceased) and a co- wife to PW1. She stated in her evidence that her husband migrated to Ogembo in 1961 after he had bought a shamba from Omwoyo Burasi. She stated that she moved from Esani to the land her husband had purchased in 1963/1964. She affirmed that when she moved and started residing in the land at Ogembo, Omwoyo and his family was not there as they had left. She stated that at the time of purchase the land had no title but after the survey during the adjudication process the land was numbered **Majoge/Boochi/70**. She stated her husband had bought the whole land which measured about 9.5 acres.

10. The witness additionally stated that she was utilizing the entire portion and that during the time her husband was alive, no person raised any claim of ownership of any portion of the land. She stated that her husband had subdivided the land into two portions by the time he died in 1997. She stated the defendant invaded the land some time in 2008 whereupon they cut trees and started constructing houses on the land. She stated that even after they made a report to the police the intruders did not move out. The defendants claimed that the portion they occupied belonged to them as their father had not sold the whole land. She stated the defendants had apportioned the land to themselves and have constructed houses thereon.

11. In cross examination by Mr. O M Otieno advocate for the defendants, PW2 affirmed that her co wife (PW1) was married by her husband in 1960 and that she went to reside with her husband at Ogembo immediately he purchased the land from Omwoyo. She affirmed she was not present when the agreement for the purchase of the land was made . She stated at the time the surveyors came during the adjudication process she was at the land and that Omwoyo was not there as he had left with his family after he sold the land. She maintained that her husband had purchased the whole land and not only a portion. She stated the defendants were occupying both her co-wife's portion and her portion of the land.

12. PW3 James Mogusu Obara in his evidence relied on the witness statement that he had recorded. His evidence was to the effect that Samson Maroro Ochanda bought land from Omwoyo Burasi before the land adjudication had been carried out. It was his evidence that Omwoyo left for Tanzania after selling his land and that he was not around when the process of land adjudication took place. The witness affirmed that Maroro (husband to PW1 and Pw2) took possession of the land in the same year that he purchased the same.

13. PW4, the plaintiff herein, is the son of Samson Maroro Ochanda (deceased) and he obtained a grant of letter of administration (Adlitem) to enable him institute the present suit on behalf of the estate of the deceased. In his evidence he stated his father was registered as the owner of land parcel Majoge/Boochi/70 as per the abstract of title in 1968. He stated that his father subdivided the land into two portions in 1991 between his mother and his stepmother. The subdivision resulted in land parcels **Majoge/Boochi/2342 and 2343** which, however, were not transferred out to the plaintiff's mother and stepmother.

14. The plaintiff testified that on 26th April 2008 the defendants forcibly entered the suit property at night and have occupied up to 80 % of the land. The defendants entered the land following the collapse of the dispute that they had lodged before the Gucha Land Disputes Tribunal claiming that the plaintiff's father had not purchased the whole land but a portion of the land. This was after the High Court vide Kisii HC Misc Application No.25 of 2008 quashed the proceedings before the Tribunal for want of jurisdiction. The plaintiff further stated that he instituted the instant suit where pursuant to an interlocutory application he sought a mandatory injunction directing eviction of the defendants from the suit land. The order for eviction was granted and the defendants were evicted from the land but they returned back to the land. The plaintiff applied for committal of the defendants to prison for contempt of Court for disobeying a Court order and the defendants were found guilty of contempt and convicted and sentenced to serve 4 months imprisonment. The defendants however returned back to

the suit property upon being released from prison.

15. In cross examination the plaintiff stated that he and his brother have built their houses on land parcel **Majoge/Boochi/2342**. He stated he was born in 1970 and his father had by then purchased the suit land. The plaintiff however conceded that all the information he had relating to the sale transaction between his late father and Omwoyo was what he had been told and what was available in official documents.

16. PW5 Jeremiah Mokuwa Maroro was a brother of PW4. He testified that his deceased father is the registered owner of land parcel **Majoge/Boochi/70** which was subsequently subdivided to create land parcels **Majoge/Boochi/2342** and **2343**. He stated that following his father's death in 1997 they continued to peacefully reside in the suit land until 2001 when the defendants wanted to bury the 1st - 3rd defendants step-mother and co-wife of the 4th defendant on the suit land. The witness stated their family objected and the defendants were prevailed upon to bury the deceased elsewhere. The witness said this was the first time he had come into contact with the defendants after they came back and were accommodated by their relatives who owned land nearby. He stated the defendants soon thereafter lodged a dispute relating to the land before the Gucha Land Disputes Tribunal. He said the claim was against the wives of his late father. He stated that the family raised objections regarding the proceedings before the Tribunal and the High Court Vide Kisii HC Misc App No 25 of 2008 issued an order barring the Tribunal from proceeding with the proceedings. The witness stated further that after the Tribunal proceedings were stopped by the high Court the defendants forcibly entered the suit land on 26th April 2008 at night and built temporary structures on the hilly part of the land.

17. The witness stated that his father had bought the land from Omwoyo in 1960. He stated Omwoyo's brothers own the parcels of land that are adjacent to theirs. He stated that upon the area being declared an adjudication section his father was registered as the owner of land parcel **Majoge/Boochi/70** as the first registration and that the family had lived on the land peacefully upto 2008 when the defendants invaded the land. He stated he grew up on that land and that during all the time no one had raised any claim relating to the land. He stated that prior to 2007/2008 the defendants did not live in the area. Not even with their relatives. He observed that the defendants perhaps were taking advantage of the 2007/2008 post election violence to seek to recover land that had otherwise been lawfully sold by their father.

18. The witness stated that although the defendants had been found guilty of contempt of Court for refusing to vacate the suit land they still persisted in illegal occupation of the land. He stated that the acts by the defendants have prevented them from utilizing their land. He stated the defendants have occupied the entire portion of land above the road that separates the two land parcels.

19. In cross examination the witness reiterated that his father bought the land in 1961. He conceded he was not party to the negotiations at the time of sale. He stated he had never seen any copy of the agreement between his father and Omwoyo.

20. PW6 Omundi Onkundi was a nephew to Samson Maroro (deceased) and he testified that while on their way to Mombasa, where he was going to seek treatment, they encountered the wife of Burasi Omwoyo in the Bus (OTC) who informed Maroro that her husband had some land that he wanted to sell and move elsewhere. He said that when they were back from Mombasa he and his nephew went to see the land and met Omwoyo with whom the price for the land was negotiated and agreed at the equivalent of 6 cows. The witness affirmed the land had a river at the bottom and was hilly on the upper part. He stated that Omwoyo sold his entire land and not a portion. The witness said he did not witness any agreement of sale. He stated Omwoyo had houses on the land which he left for his nephew after the sale. He said his nephew later demolished the houses and constructed new ones. He stated Maroro was residing at Gesima Settlement Scheme.

21. DW1 Sabina Osebe Omwoyo the 4th defendant was the wife of Burasi Omwoyo. In her evidence she adopted her witness statement made on 17th March 2014. It was her evidence that land parcel **Majoge/Boochi/70** later subdivided into land parcels 2342 and 2343 belonged to her late husband before he sold a portion thereof to Samson Maroro Ochanda (deceased) father of the plaintiff. She stated that her husband only sold a portion to the plaintiff's father but the latter at the time of land registration took advantage and had the whole land registered in his name. She stated that her husband only sold 5 acres leaving 3 acres for her. She stated that her portion of 3 acres is separated from the other portion by a road and was on the upper side while Maroro's portion was on the lower side. She averred that it was the children of Maroro who claimed that he had bought the whole land. She stated that the dispute arose only after the death of the plaintiff's father. She denied that she had at any time left occupation of the upper portion of the land.

22. In cross examination by Momanyi advocate for the plaintiff DW1 admitted that after they sold the land they went to Tanzania but they later came back. She stated they went to Trasmara after they came back from Tanzania and from Trasmara they went to Gwasi. She further said her husband and her two deceased Co-wives were buried on the suit property. The witness stated that they have built on and occupy the upper part of the land. She said Maroro's two widows occupy the lower part and that was the portion bought by Maroro.

23. DW2 Isaac Magangi Omwoyo was the son of Burasi Omwoyo. He testified that he was residing in his father's land formerly **Majoge/Boochi/70** (now subdivided to create land parcels 2342 and 2343). He stated that he was born in 1972 and that he resides on the upper portion of the suit land with his family. He stated Samson Maroro's family occupies the lower part and that their portions of land are separated by a road. He said his father died in 1988 and was buried on the suit land. He stated Samson Maroro died in 1997 that before his death they never had any problems and lived amicably as neighbours. He stated problems arose in 2008 when his brother started buildings houses on the disputed land. He claimed that as at that time he and DW1 already had house and were residing on the suit land.

24. The witness stated they had not known that Samson Maroro had caused the entire land to be registered in his name and that they only discovered this fact in 2008 when the plaintiff caused them to be arrested and arraigned in Court over a criminal case. The witness admitted that they were convicted of contempt of Court and imprisoned for 4 months and that upon release from prison they went back to the same land. The witness denied they had filed a dispute before the Ogembo Land Disputes Tribunal. He asserted that when his relatives died they were all buried on the disputed property. He stated he had been born on the suit land and had resided on the land all his life.

25. Upon closure of the trial the parties filed final written submissions. Having carefully considered the pleadings, the evidence adduced, and the submissions filed by the parties the following issues stand out for determination.

(i) Whether the plaintiff's father was lawfully registered as owner of land parcel Majoge/Boochi/70 subsequently subdivided into land parcels Majoge/Boochi/2342 and 2343.

(ii) Whether the plaintiff's father held a portion of 3 acres of the suit land in trust for the estate of Burasi Omwoyo?

(iii) Whether the defendants entry onto the suit land was forceful and therefore a trespass?

(iv) What orders/reliefs show the Court grant?

(v) Who should bear the costs of the suit.

26. On the evidence that I have summarized albeit in brief hereinabove, there is uncontroverted evidence that Samson Maroro Ochanda, the plaintiff's deceased father was registered as owner of land parcel **Majoge/Boochi/70** measuring 8.5 acres approximately on 17th May 1968. The land was later subdivided to create land parcels **Majoge/Boochi/2342** and 2343 and the title closed on 20th November 1991 as per the abstract of title closed on 20th November 1991 as per the abstract of title tendered in evidence. The defendants acknowledged the late plaintiff's father was indeed registered as the owner of the original land parcel 70 and the subdivision thereof save that they contended they only discovered in 2008 that he had been so registered as owner of the entire parcel of land when he had only purchased a portion thereof.

27. There is also credible evidence that indeed Samson Maroro (deceased) bought land from Burasi Omwoyo (deceased) who was the father of the 1st- 3rd defendants and husband of the 4th defendant. The evidence of PW1, PW3 and PW6 clearly establish there was a land sale transaction between Samson Maroro Ochanda and Burasi Omwoyo. Pw1 was present when the sale transaction took place while PW6 who was a nephew to Samson Maroro participated in the negotiations when the consideration of the equivalent of 6 cows was agreed. Although no documentary evidence in form of a written agreement was produced in evidence I am satisfied that indeed there was a land sale transaction whereby Burasi Omwoyo sold land to Samson Maroro.

28. The defendants in their submissions have argued that the plaintiff did not prove that the father purchased the entire parcel of land to dislodge the defendants claim that he had only purchased a portion of the suit land. The defendants pointed to the absence of any written agreement and /or the plaintiff's failure to produce one as being adverse to the plaintiff's case. The defendants placed reliance on the cases of the *Estate of Soti Kigen Kiprotich Kigen -vs- Samson Kigen (2003)eKLR*; *Central Microfilm operators (1990) Ltd -vs- Teachers Service Commission (2015) eKLR*, and *Munyu Maina -Vs- Hiram Gathiha Maina (2013)eKLR*; I have reviewed these authorities cited by the defendants counsel and I am not persuaded the facts and circumstances of the present case are similar as in the cases referred to.

29. In the instant case there is no dispute that there was a sale of land. Indeed the defendants admit as much save that they allege not the whole land was sold. The evidence as led establishes that following the sale of the land, Burasi Omwoyo and his family left the land and the plaintiff's father with PW1 assumed possession of the land. This was in 1960/1961 long before land adjudication took place. Land adjudication in Majoge where the land was located took place in 1967/1968 resulting in the plaintiff's father being registered as the owner of land parcel **Majoge/Boochi/70**.

30. PW3 in his evidence was emphatic that Burasi Omwoyo sold his entire land and migrated to Tanzania. PW6 equally gave evidence that Burasi Omwoyo sold his entire land and went to Tanzania. DW1 wife to Burasi Omwoyo admitted that when they sold the land they went to Tanzania although she said they came back. She did not state when they came back from Tanzania. DW2 was born in 1972 after the plaintiff's father had already been registered as the owner of the suit property. If DW2's evidence was to be believed, there was no time their family left occupation of the suit land. If that was true, the defendant offered absolutely no explanation as to why their father was not adjudicated as the owner of the portion they occupied during the land adjudication. Further as per the evidence the 1st- 3rd defendants father died in 1988 and in the circumstances one is bound to question why for 20 years from 1968 when the plaintiff's father was registered, the defendants father had not challenged his registration as owner. Of course I am aware the defendants stated they only discovered the plaintiff's father had been registered as owner in 2008. I do not believe them. In this day and age when everybody craved to have title to land particularly in areas where land had been adjudicated, I cannot see how the defendants father and/or the defendants themselves would have stayed for all the years without knowledge that the land had been adjudicated and title issued to the plaintiff's father. In my view the explanation could only be because they had sold the land and were away during the process of adjudication and only returned to the land on the chance that they could wrestle some portion of the land from the plaintiff's family.

31. On the basis of the evidence, it is my determination that there was a sale of land between the defendants father and the plaintiff's father in 1960/1961 and though there was no written agreement, there was delivery of possession in part performance of the agreement which satisfied the legal requirement at the time, as it was not mandatory that the contract be in writing and the contracting parties signatures to be witnessed as presently required under Section 3(3) of the Law of Contract Act, Cap 21 Laws of Kenya. The defendants, it does appear in my view attempted to wrestle back a portion of the land sold by their father to the plaintiff's father in 2007/2008 after a period of well over 40 years. I believe the plaintiff's evidence that indeed the defendants invaded the suit land in 2008 in an effort to return back to the land that their father had lawfully sold to the plaintiff's father. The defendants were using extra judicial means after their avenue through the Land Dispute Tribunal hit a dead end. The Court cannot countenance such acts of lawlessness. It is not lost to the Court that these are the same defendants who have been found to be in contempt of Court in this same suit for disobeying an order of the Court directing them to be evicted from the suit land.

32. The defendants contend that they have occupied the upper part of the suit property and that the portion they occupy is separated from the portion the plaintiffs family occupy on the lower part by a road. The copy of the registry Index Map (RIM) tendered in evidence by the plaintiff show there is a road that traversed across all the parcels of land in the area notably land parcels of 74,73,72,70 (now 2342 & 2343) etc which clearly is an indication that this road of access must have been created during the land adjudication process in 1967/1968. The defendants were not in occupation of any portion of land parcel 70 then. If they had been their rights and interest would have been noted. The evidence as per the record was that the portion the defendants invaded and occupied in 2008 was hilly explaining why the plaintiff's family had settled and established their homesteads on the lower part below the road.

33. On the basis of my discussion and analysis of the evidence tendered by the parties I am persuaded that indeed the plaintiff's late father purchased land from Burasi Omwoyo and that the latter relinquished whatever interest he held on the land he sold. During the land adjudication process, the plaintiff's father was properly adjudicated as the owner of the land he had bought. There is no evidence that there was any objection by either the defendant's late father or any member of his family to the adjudication committee. Upon conclusion of the land adjudication process and the registration of the plaintiff's father as the owner of the suit land he acquired absolute rights of ownership of the suit land which were indefeasible unless it was proved that he had obtained registration fraudulently. Section 28 of the Registered Land Act, Cap 300 Laws of Kenya (now repealed) provided as follows:-

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

(a) to the lease, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affected the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee

34. The rights of a registered proprietor were however subject to any of the overriding interests itemized under section 30 of the Act Section 143 of the Act provided for the instance where rectification of the register could be ordered by the Courts.

Section 143 (1) *Subject to subsection (2), the court may order rectification of the registration by directing that the registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake).*

(2) The register shall not be rectified so as to affect the title of the proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

Section 143 (1) appeared to give protection to fraudster who somehow acquired a first registration of the title while Section 143(2) appeared to suggest that a registration obtained fraudulently and it was demonstrated the registered proprietor was party to or had knowledge of the fraud, was not protected. This anomaly respecting the obvious inconsistency has been put to rest in the new Land Registration Act, 2012 which replaced the Registered Land Act. Section 25 of the new Act enacts the rights of a proprietor as were provided under section 28 of the repealed Act. Section 26 of the new Act provides for the instances where the title of registered proprietor may be challenged.

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

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, unprocedurally or through a corrupt scheme.

35. In the present matter the defendants have alleged fraud in their counterclaim. The defendants have contended that the plaintiff's father fraudulently caused the defendant's portion of 3 acres that was not sold to him to be transferred and registered in his name (plaintiff's father) As I have discussed above, there was no evidence that the plaintiff's father only purchased a portion of the land. The evidence adduced established that Burasi Omwoyo (deceased) sold all his land and migrated to Tanzania. This evidence was not rebutted. The parties were agreed there had been a land sale transaction before the process of land adjudication took place. The defendants did not lay any basis for their claim that Burasi Omwoyo only sold a portion of his land. This claim in my view is unjustifiable having regard to how the parties conducted themselves all through. The defendant's father (Burasi Omwoyo) never sought to recover any land from the plaintiff's father at my time during his lifetime. He died in 1988 as per the evidence. The defendants themselves only initiated legal proceedings before the Tribunal in 2007 though the DW2 in his evidence strenuously denied they had initiated any proceedings before the Tribunal. This was quite intriguing because there is not only a copy of the proceedings of Kisii HC Misc Application No.25 of 2008 on record where the plaintiff sought to have the proceedings before the Tribunal quashed but also correspondence from the Tribunal and the Tribunal's

proceedings where DW2 was indicated as a party . The evidence of DW2 in regard to whether or not they had initiated proceedings before the Tribunal was simply unbelievable.

36. The defendants in my view failed to prove any fraud as against the plaintiff's father and consequently the title he holds in respect of the suit property remains lawful and valid. The defendant's have contended that the plaintiff's father held 3 acres in trust for them. It is my determination that the defendants adduced no evidence to justify the finding of a trust in their favour. He who alleges the existence of a trust has the burden to prove by evidence the facts that give rise to the trust. It is not sufficient to allege a trust exists and then offer no evidence. The defendants in my view failed to discharge this burden and it is my determination that no fraud was proved and neither was the existence of any trust in favour of the defendants established.

37. From my analysis of the evidence it must have become evident by now that the entry of the defendants onto the suit property was forceful and therefore the entry was unlawful and constituted trespass. The defendants unlawfully trespassed onto the plaintiff's land in 2008 and have since then denied the plaintiff's family the use of the portion that they have illegally occupied . Trespass is actionable perse and any damage need not be proved. The plaintiff is entitled to damages for trespass and having regard to the nature and circumstances of this case I award the plaintiff damages for trespass in the sum of Kshs.200,000/= on account of loss of user.

38. The upshot is that I hold and find that the plaintiff has proved his case on a balance of probabilities and is entitled to judgment. I hold the counterclaim by the defendants to be unproved to the requisite standard and I dismiss the same. In the premises I enter judgment in favour of the plaintiff on the following terms: -

(i) The defendants are in trespass of land parcels Majoge/Boochi/2342 and 2343 that they occupy and they together with their agents, licencees and /or servants are ordered to vacate and deliver vacant possession of the same to the plaintiff within sixty (60) days of delivery of this judgement failing to which an eviction order for their forcible removal to issue upon application by the plaintiff .

(ii) A permanent injunction to issue against the defendants, their agents, servants and/or any to her person acting on their behalf restraining them from entering , trespassing and/or occupying the suit parcels.

(iii) The plaintiff is awarded Kshs.200,000/= general damages for trespass on account of loss of user with interest at Court rates from date of judgment until payment in full.

(iv) The costs of the suit and counter claim are awarded to the plaintiff.

JUDGMENT DATED AND SIGNED AT NAKURU THIS 21ST DAY OF FEBRURY 2020.

J. M. MUTUNGI

JUDGE

JUDGEMENT DELIVERED AT KISII THIS 5TH DAY OF MARCH 2020.

J ONYANGO

JUDGE