



**Kibinge & 2 others v Joreth Limited & 5 others (Environment and Land Case Civil Suit 618 & 151 of 2015 (Consolidated)) [2023] KEELC 17856 (KLR) (12 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17856 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 618 & 151 OF 2015 (CONSOLIDATED)  
SO OKONG'O, J  
JUNE 12, 2023**

**BETWEEN**

**PETER KAMAU KIBINGE ..... PLAINTIFF**

**AND**

**JORETH LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**TRUPHENA E. OMUNGALA ..... 2<sup>ND</sup> DEFENDANT**

**KENNETH L.W AKIDE ..... 3<sup>RD</sup> DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT AND LAND CASE CIVIL SUIT 151 OF 2015**

**BETWEEN**

**TRUPHENA E. OMUNGALA ..... 1<sup>ST</sup> PLAINTIFF**

**KENNETH L.W AKIDE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MARY WAMBUI ..... 1<sup>ST</sup> DEFENDANT**

**P.K.KIBINGE ..... 2<sup>ND</sup> DEFENDANT**

**PETER KAMAU KIBINGE (SUED AS THE ADMINISTRATOR OF THE ESTATE OF MARY WAMBUI KIBINGE) ..... 3<sup>RD</sup> DEFENDANT**



## JUDGMENT

1 These two suits were consolidated on 24<sup>th</sup> April 2017 with ELC No. 618 of 2015 (O.S) as the lead file. I will hereinafter refer to the two suits only as ELC No. 618 of 2015 and ELC No. 151 of 2015 where the context so permits.

### **ELC No. 618 of 2015:**

2 ELC No. 618 of 2015 was commenced by way of an Originating Summons dated 2<sup>nd</sup> July 2015. In the Originating Summons the Plaintiff in the suit sought the following orders;

1. That the Plaintiff in the suit, Peter Kamau Kibinge be declared to have acquired L.R No. 13330/39 commonly known as Plot No. 287 Thome Farmers No. 5 Limited (hereinafter referred to as “the suit property”) by adverse possession as against the Defendants in the suit.
2. That the Plaintiff’s right of adverse possession overrides the transfer of the suit property by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
3. That the registration of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, Truphena E Omungala and Kenneth L.W.Akide as the proprietors of the suit property and/or any other person deriving title from the 1<sup>st</sup> Defendant in the suit, Joreth Limited be cancelled and the register of the property be rectified to reflect the name of the Plaintiff as the proprietor of the property and a certificate of title be issued to him.
4. That the costs of the suit to be borne by the Defendants.

3 In his affidavit in support of the application sworn on 2<sup>nd</sup> July 2015, the Plaintiff, Peter Kamau Kibinge stated that the sale of the suit property by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was fraudulent and was intended to dispossess the Plaintiff of his rights in the property. The Plaintiff averred that he entered and occupied the suit property in 1994. The Plaintiff averred that upon entering the suit property, he fenced the same and had since then been planting food crops thereon for a period in excess of 21 years without any interruption. The Plaintiff averred that in November 2013 unknown persons came to the suit property claiming that they were the new owners thereof and that they had purchased the property from the 1<sup>st</sup> Defendant. The Plaintiff averred that this was notwithstanding the fact that he had commenced development on the suit property. The Plaintiff averred that upon taking possession of the suit property in 1994, he put up structures thereon on which his employees were staying peacefully with the full knowledge of the 1<sup>st</sup> Defendant. The Plaintiff averred that his occupation of the suit property was peaceful, open, and uninterrupted by the Defendants or anybody else since 1994.

4 That Plaintiff averred that it was until 2014 that he learnt that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had acquired the suit property through purchase from the 1<sup>st</sup> Defendant after he had filed ELC No. 1533 of 2013 against the 1<sup>st</sup> Defendant. The Plaintiff averred that the 1<sup>st</sup> defendant had knowledge of his occupation of the suit property for over 12 years required for an adverse possession claim. The Plaintiff averred that he had not parted with possession of the suit property. The Plaintiff annexed to his supporting affidavit among others, photographs of the development he had commenced on the suit property.

5 The Originating Summons was opposed by the 1<sup>st</sup> Defendant through a replying affidavit sworn by Robertson Nderitu on 2<sup>nd</sup> November 2018. The 1<sup>st</sup> Defendant averred that it owned a parcel of land known as L.R No. 13330 which came about following amalgamation on 19<sup>th</sup> December 2000 of the



- 1<sup>st</sup> Defendant's erstwhile two parcels of land, L.R No. 4920/3 and L.R No. 4921/3 which the 1<sup>st</sup> Defendant owned since 1950s. The 1<sup>st</sup> defendant averred that the suit property was a subdivision of L.R No. 13330 and that prior to the sale and transfer of the same to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the same had never been registered in the name of any other person apart from the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant averred that the suit property was advertised for sale and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants put in a bid for the same which bid was accepted by the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant denied that the Plaintiff had been in open and uninterrupted physical occupation of the suit property. The 1<sup>st</sup> Defendant averred that it was the one which was in continuous occupation of the suit property.
- 6 The 1<sup>st</sup> Defendant averred that it filed a suit in 1992 namely, HCCC No. 6206 of 1992 against several persons who had trespassed on L.R No. 13330 which suit was determined in 2002 through a consent order. The 1<sup>st</sup> Defendant averred that in 2013, the Plaintiff hurriedly constructed a structure on the suit property while a suit that he had filed against the 1<sup>st</sup> Defendant, ELC No. 1533 of 2013 was pending. The 1<sup>st</sup> Defendant averred that the Plaintiff could not have occupied the suit property for a period in excess of 12 years as he had alleged since his alleged occupation was interrupted by the said suit that the 1<sup>st</sup> Defendant filed against trespassers on L.R No. 13330 in 1992. The 1<sup>st</sup> Defendant averred that the Plaintiff had not been in occupation of the suit property and that if he was, his occupation was not continuous for a period of 12 years. The 1<sup>st</sup> Defendant averred that the reliefs sought by the Plaintiff could not be granted.
- 7 The Plaintiff's Originating Summons was opposed by Truphena E. Omungala and Kenneth L.W. Akide, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the suit through a replying affidavit sworn by Kenneth L.W. Akide on 2<sup>nd</sup> July 2019. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the suit property was offered to them for sale at Kshs. 6,000,000/- by the 1<sup>st</sup> Defendant, Joreth Limited through the law firm of Njeri Kariuki & Company Advocates in a letter dated 18<sup>th</sup> September 2009. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that prior to their paying for the suit property, they were shown several plots for sale by the agent of the said law firm and they liked the suit property. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that after paying a deposit of Kshs. 600,000/- they signed the letter of offer and returned the same to the said law firm. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that they paid a further sum of Kshs. 900,000/- and obtained a loan for the balance of Kshs. 4,500,000/- from Equity Bank Limited which they utilised to clear the purchase price. They averred that the suit property was subsequently transferred to them on 23<sup>rd</sup> July 2010 and they were issued with a Certificate of Title No. I.R 132661 in respect of L.R No. 13330/39.
- 8 The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that upon being issued with the Certificate of Title for the suit property, they took possession thereof. They averred that in December 2014, they were informed by a neighbour that someone had constructed a site house on the suit property and was in the process of putting up a building thereon. They averred that they later learnt that it was the Plaintiff who had entered the suit property and commenced development thereon. They averred that they arranged for a meeting with the Plaintiff at which they showed the Plaintiff their title to the suit property while the Plaintiff on his part told them that his claim to the suit property was based on a suit that he had filed against the 1<sup>st</sup> Defendant.
- 9 The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that they were the rightful owners of the suit property and that they had been paying rates to the Nairobi City County since they acquired the property. They averred that the plan for the development that the Plaintiff had commenced on the suit property was approved by the Nairobi City County on 5<sup>th</sup> June 2014. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the Plaintiff who trespassed on the suit property in 2014 could not sustain an adverse possession claim. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the mother title for the suit property namely, L.R No. 13330 was the subject of an earlier suit, Nairobi HCCC No. 6206 of 1992 which suit was concluded through a consent order



that was recorded on 27<sup>th</sup> July 2003. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the suit property among others was thereafter advertised for sale by the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the Plaintiff's suit was brought in bad faith and should be dismissed.

### **ELC No. 151 of 2015**

10 ELC No. 151 of 2015 was filed by Truphena E. Omungala and Kenneth L.W. Akide as the Plaintiffs against Mary Wambui, P.K.Kibinge, and Peter Kamau Kibinge who was sued in his capacity as the administrator of the estate of Mary Wambui Kibinge. The Plaintiffs in this suit averred that they were the registered proprietors of all that parcel of land known as L.R No. 13330/39, I.R No.85119/536 (the suit property) having acquired the same on 23<sup>rd</sup> July 2010 from Joreth Limited (“Joreth”). The Plaintiffs averred that in December 2014, the Defendants trespassed on the suit property and placed thereon a Development Permit/Approval Notice No. CPF-AF 666 bearing the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and began committing acts of waste thereon by erecting a site house and other structures. The Plaintiffs averred that they had a meeting with the 2<sup>nd</sup> Defendant and showed him their title for the suit property but the Defendants persisted in their illegal and wrongful acts complained of. The Plaintiffs averred that as the registered proprietors of the suit property their rights over the property were indefeasible and immune to the Defendants’ claim. The Plaintiffs sought judgment against the Defendants for;

1. A declaration that the suit property belonged to the Plaintiffs.
2. An injunction to restrain the Defendants or either of them by themselves or their servants or agents from continuing to trespass upon and committing acts of waste upon the suit property.
3. An order that the Defendants remove themselves from the suit property or be evicted therefrom.
4. General Damages for trespass.
5. Interest on General damages at court rates.
6. Costs of the suit.

11 The claim by the Plaintiffs in this suit was defended by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who filed a defence and a counter-claim. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that they were one and the same person and as such it was not necessary to sue one person twice even if he was being sued in different capacities. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred further that the 1<sup>st</sup> Defendant, Mary Wambui Kibinge (“the deceased”) died on 6<sup>th</sup> March 2008 and as such the suit against her was a non-starter and void ab initio. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the deceased bought shares in Thome Farmers No.5 Limited (“Thome”) in 1970s with a view to being allocated a plot within L.R No. 4920/3 and L.R No. 4921/3 which parcels of land Thome was in the process of buying from Joreth Limited (“Joreth”). The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the deceased was issued with a Share Certificate No. 1211 dated 4<sup>th</sup> January 1991 for one share that entitled the deceased to one parcel of land measuring 0.5 of an acre. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that Thome allocated to the deceased a parcel of land known as Plot No. 287 (“the suit property”) which was pointed out to the deceased and the 2<sup>nd</sup> Defendant upon payment of a sum of Kshs. 1,000/- by the deceased. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that upon being shown the boundaries of the suit property, the 2<sup>nd</sup> Defendant erected a barbed wire fence around the property in 1991. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that in 1994, the 2<sup>nd</sup> Defendant erected a temporary structure on the suit property and together with the deceased, they started cultivating maize, beans, vegetables and Napier grass on the property. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that in the same year, the 2<sup>nd</sup>



Defendant employed a caretaker to look after the property and to assist in farming activities. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the 2<sup>nd</sup> Defendant and the deceased tilled the suit property together until 2000 when the deceased became sick. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that from 2000, the 2<sup>nd</sup> Defendant engaged in cultivation alone and did so without any interruption and was still doing so as at the time of filing the defence. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that Thome did not issue the deceased with a title for the suit property despite several visits to its offices.

- 12 The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that in November 2013 when the 2<sup>nd</sup> Defendant and his son were erecting a permanent house on the suit property to replace the temporary structure that he had put up thereon, some people came to the suit property claiming that they had purchased the same from Joreth and that they had a title. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the 2<sup>nd</sup> Defendant sued Joreth in ELC No. 1533 of 2013 which suit he withdrew upon learning of the true status of the suit property at the land office. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the 2<sup>nd</sup> Defendant subsequently filed a suit by way of Originating Summons against Joreth and the Plaintiffs herein claiming the suit property by adverse possession. That is, ELC No. 618 of 2015(O.S). The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the 2<sup>nd</sup> Defendant learnt of this suit after filing ELC No. 618 of 2015(O.S) since he was not served with Summons to Enter Appearance in this suit. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the 2<sup>nd</sup> Defendant and the deceased having been in open and continuous possession of the suit property from 1994, the Plaintiffs' claim against them was time barred and furthermore, the title that Joreth had in the suit property had been extinguished as at the time it purported to transfer the property to the Plaintiffs. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the Plaintiffs were holding the suit property in trust for the 2<sup>nd</sup> Defendant and as such the 2<sup>nd</sup> Defendant was entitled to have the property transferred to him. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred further that the transfer of the suit property by Joreth to the Plaintiffs was fraudulent, null and void. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that at the time Joreth purported to sell the suit property to the Plaintiffs, it was aware that it had sold and handed over the property to Thome which had in turn sold and handed over the same to the deceased. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that Joreth was involved in multiple litigation arising from its sale of the parcels of land occupied by members of Thome.
- 13 In their counter-claim, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants reiterated the contents of their defence. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the deceased purchased the suit property as Plot No. 287 now L.R No. 13330/39 from Thome. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants reiterated that the 2<sup>nd</sup> Defendant and the deceased fenced the suit property in 1991 and used the same from 1994 for cultivation of various crops. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that they also put up temporary structures on the suit property. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the title of Joreth in the suit property stood extinguished after the 2<sup>nd</sup> Defendant had occupied the property continuously for over 12 years from 1994. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the Plaintiffs to whom Joreth transferred the suit property held the same in trust for the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the estate of Mary Wambui Kibinge had acquired title to the suit property by way of adverse possession and that the property should be transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants sought judgment against the Plaintiffs for;
1. A declaration that the suit property was owned by the 2<sup>nd</sup> Defendant and the estate of Mary Wambui Kibinge.
  2. A permanent injunction restraining the Plaintiffs from trespassing or in any way interfering with the Defendants' use and/or enjoyment of the suit property.
  3. General damages.



4. Costs of the suit.
  5. Interest on 3 and 4 above.
- 14 I have not seen on record any reply by the Plaintiffs to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' defence and a defence to their counter-claim.

**The evidence tendered by the parties:**

- 15 The Plaintiff in ELC No. 618 of 2015(O.S) who is also the Defendant in ELC No. 151 of 2015, Peter Kamau Kibinge (PW1) (hereinafter referred to only as "Kibinge") was the first to give evidence in the consolidated suit. Kibinge adopted his affidavit filed in support of the Originating Summons as his evidence in chief and produced the documents attached to the said affidavit as exhibits. Kibinge told the court that he wished to rely on the evidence given in ELC No. 618 of 2015(O.S) in his defence in ELC No. 151 of 2015.
- 16 The next witness was David Karanja Nderitu (DW1). DW1 told the court that he was a manager with the 1<sup>st</sup> Defendant in ELC No. 618 of 2015(O.S) (hereinafter referred to only as "Joreth"). He adopted his witness statement dated 17<sup>th</sup> June 2021 as his evidence in chief and produced the documents attached to Joreth's list of documents filed on 7<sup>th</sup> November 2018 as exhibits. He stated that Thome did not own the suit property and that the same was owned by Joreth at all material times before it transferred the same to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in ELC No. 618 of 2015(O.S) (hereinafter referred to only as "the Akides") on 23<sup>rd</sup> July 2010. He stated that Kibinge was not in occupation of the suit property in 1992 otherwise he would have been sued by Joreth in HCCC No. 6206 of 1992 that was filed by Joreth against those who had trespassed on L.R No. 13330 that gave rise to the suit property. He stated that the suit property was vacant when the same was sold to the Akides. DW1 stated that Kibinge entered the suit property and commenced construction of a structure thereon in 2013.
- 17 The second witness for the defence was Nina Wanjiru (DW2). DW2 told the court that she was the owner of L.R No. 13330/50 which was in the same area as the suit property. She stated that she bought her plot in 2010, put up a house thereon and had been living on the same since then. She stated that Akide used to pass near her plot when he came to visit the suit property and that they used to exchange greetings. She stated that she met Akide for the first time in 2010 or thereabouts and that he told her that he was the owner of the suit property. DW2 stated that when she met Akide for the first time, the suit property had no development. DW2 adopted her witness statement dated 24<sup>th</sup> June 2019 as part of her evidence in chief. On cross-examination by the advocate for Joreth, DW2 stated that the suit property was not far from her plot and that from her plot, she could see what was happening on the suit property. She stated that she had not seen Kibinge in the neighbourhood or on the suit property.
- 18 The last witness was Kenneth Wabwire Akide (DW3) who was the 3<sup>rd</sup> Defendant in ELC No. 618 of 2015 and 2<sup>nd</sup> Plaintiff in ELC No. 151 of 2015(hereinafter referred to only as "Akide"). He told the court that the 2<sup>nd</sup> Defendant in ELC No. 618 of 2015 was his spouse. Akide stated that together with his said spouse (the Akides), they were the joint owners of the suit property. Akide adopted his witness statement in ELC No. 151 of 2015 and replying affidavit in ELC No. 618 of 2015 as his evidence in chief. Akide produced the documents attached to their list of documents dated 1<sup>st</sup> July 2019 filed in ELC No. 151 of 2015 and the documents attached to his replying affidavit dated 2<sup>nd</sup> July 2019 filed in ELC No. 618 of 2015 as exhibits. Akide urged the court to grant the prayers sought by them in ELC No. 151 of 2015.
- 19 On cross-examination by the advocate for Joreth, Akide stated that before purchasing the suit property he visited the same in the company of an agent of Joreth. He stated that during that visit, he found the



suit property vacant. On cross-examination by the advocate for Kibinge, Akide stated that he visited the suit property for the first time in 2009 and that there was no cultivation being undertaken on the same. Akide stated that they purchased the suit property at Kshs. 6,000,000/- and not at Kshs. 200,000/- indicated in the instrument of transfer as the consideration. He stated that the value of the suit property for Stamp Duty purposes was assessed at Kshs. 1,500,000/-. He denied that Kshs. 200,000/- was indicated in the transfer as the consideration so as to deny the Government the exact Stamp Duty. He stated that the only thing he did with the suit property was to fence the same.

#### **The submissions by the parties:**

20 After the close of evidence, the parties made closing submissions in writing.

#### **Kibinge's submissions:**

21 Kibinge filed his submissions dated 19<sup>th</sup> July 2022. Kibinge submitted that he had occupied the suit property exclusively for an uninterrupted period of more than 12 years prior to the filing of the Originating Summons and as such he had acquired the suit property by adverse possession. Kibinge submitted that the Akides failed to show that they had been in possession of the suit property. Kibinge submitted that the Akides also conspired to underpay stamp duty rendering their evidence on the ownership of the suit property inadmissible. Kibinge submitted that he had proved his case on a balance of probabilities while the Akides' case was not proved to the same standard. Kibinge urged the court to enter judgment in his favour as prayed in the Originating Summons and for the Akides' case to be dismissed.

#### **Joreth's submissions:**

22 Joreth filed submissions dated 1<sup>st</sup> August 2022. Joreth framed 3 issues for determination. The first issue was whether Joreth was the registered owner of L.R No. 13330/39. The second issue was whether Kibinge was in actual, open, visible and uninterrupted occupation of the suit property. The third issue was whether the Akides were entitled to the suit property as the bona fide purchasers thereof for value. The final issue was who should bear the costs of the suit.

23 On the first issue, Joreth submitted that the evidence before the court showed that the suit property which was a subdivision of L.R No. 13330 was at all material times registered in the name of Joreth until it was transferred to the Akides. Joreth submitted that there was no evidence that the suit property had been owned by Thome at any time. Joreth submitted that in the circumstances, Kibinge's claim that he acquired the suit property from Thome had no basis. Joreth submitted that as the owner of the suit property, it was at liberty to sell the property to whomsoever it wished.

24 On the second issue, Joreth cited several authorities including *Mbira v. Gachuhi* [2002]1EALR 137, *Jandu v. Kirpal & Another* [1975] EA 225 and *Mtana Lewa v. Kahindi Ngala Mwangandi* [2005]eKLR on what constitutes adverse possession and proof of the same. Joreth submitted that the onus was upon Kibinge to prove his adverse possession claim. Joreth submitted that Kibinge had to prove that he had been in actual, open, exclusive and hostile possession of the suit property. Joreth submitted that Kibinge failed to adduce documentary evidence to support his allegation that he had been in actual possession of the suit property since 1991 prior to the filing of the Originating Summons. Joreth submitted that there was no evidence showing that Kibinge had put up a structure on the suit property for a caretaker and of the fence that Kibinge claimed to have put up on the suit property. Joreth submitted further that there was also no evidence of cultivation by Kibinge of the suit property.

25 Joreth submitted that on its part, it demonstrated that it had owned and occupied the parcels of land that gave rise to the suit property continuously since 1950s. Joreth submitted that Kibinge was not



in occupation of the suit property when the Joreth was undertaking consolidation and subdivision of the parcels of land that gave rise to the suit property. Joreth submitted that if at all the Kibinge was in occupation of the suit property then such occupation could only have been a secret one that could not support an adverse possession claim.

- 26 Joreth submitted that Kibinge did not also prove that Joreth was aware of his alleged occupation of the suit property. Joreth submitted that it was not aware of Kibinge's occupation of the suit property until 2013 when Kibinge hurriedly put up a house thereon by which time Joreth had already transferred the suit property to the Akides. Joreth averred that if at all Kibinge occupied the suit property in 1991 then time stopped running in 1992 when Joreth filed HCCC No. 6206 of 1992. Joreth submitted that the said suit was not settled until 2002 and as such Kibinge had not occupied the suit property for an uninterrupted period of 12 years at the time he brought the Originating Summons. In support of this submission, Joreth cited *Joseph Gahumi Kiritu v. Lawrence Munyambu Kabura*, Civil Appeal No. 20 of 1993 and *Githu v. Ndeete*[1984]KLR 776.
- 27 Joreth submitted that Kibinge's claim could not succeed because Kibinge had not occupied the suit property for a period of 12 years without interruption. Joreth submitted that Kibinge failed to prove his adverse possession claim to the required standard.
- 28 On whether the Akides were entitled to the suit property having acquired the same in good faith for value without notice, Joreth submitted that the Akides acquired the suit property lawfully from a registered owner thereof after conducting the necessary due diligence. Joreth submitted that Kibinge's claim that the Akides acquired the suit property fraudulently was not proved. Joreth submitted that Kibinge failed to specifically plead fraud and to prove the same. On the issue of costs, Joreth submitted that it was entitled to the costs of the suit as against Kibinge. Joreth urged the court to dismiss Kibinge's suit with costs to Joreth.

#### **The Akides' submissions:**

- 29 The Akides filed their submissions dated 2<sup>nd</sup> June 2022. The Akides framed a total of five issues for determination by the court. The first issue was whether Kibinge had established his adverse possession claim. The Akides cited *Gabriel Mbui v. Mukindia Maranya* [1993]eKLR and submitted that there was no clarity from the evidence adduced by Kibinge as to when he entered the suit property. The Akides submitted that in his Originating Summons, Kibinge stated that he entered the suit property in 1991 while in his supporting affidavit, he claimed to have entered the property in 1994. The Akides submitted that Kibinge did not adduce evidence showing physical occupation of the suit property for the required period. The Akides submitted that there was no documentary or photographic evidence of Kibinge's occupation of the suit property. The Akides submitted that although Kibinge claimed that the suit property was under the management of a care taker, the caretaker was not called as a witness. The Akides submitted that there was also no evidence of the alleged cultivation that Kibinge claimed to have been undertaking on the suit property. The Akides reiterated Joreth's submission that Kibinge was not one of those sued by Joreth in HCCC No. 6206 of 1992. The Akides also reiterated Joreth's submission with regard to the stoppage of time during the pendency of the said suit.
- 30 On the issue whether Kibinge was entitled to the reliefs sought in the Originating Summons, the Akides submitted that Kibinge failed to prove his adverse possession claim. The Akides submitted that Kibinge was not entitled to the reliefs sought in the Originating Summons. On the issue whether the Akides had established that they were the bona fide owners of the suit property, the Akides submitted that Kibinge had not challenged the legality of the process through which the Akides acquired the suit property. On whether the Akides were entitled to the reliefs sought in the plaint, the Akides submitted that Kibinge did not prove the allegations of fraud levelled against the Akides. The Akides submitted



that in the absence of proof that the Akides acquired the suit property fraudulently, the Akides were entitled to the reliefs sought.

- 31 On the issue of costs, the Akides submitted that costs follow the event. The Akides submitted that they had proved their case on a balance of probabilities and as such they were entitled to the costs of the suit.

**Analysis and determination of the issues arising:**

- 32 I have considered the pleadings, the evidence tendered by the parties and the submissions on record. The only issues arising for determination in this suit are; whether Kibinge has met the threshold for an adverse possession claim in relation to the suit property, whether Kibinge is entitled to the reliefs sought in the Originating Summons in ELC No. 618 of 2015(O.S), whether the Akides acquired the suit property fraudulently, whether the Akides are entitled to the reliefs sought in the plaint in ELC No. 151 of 2015 and whether Kibinge is entitled to the reliefs sought in his counter-claim in ELC No. 151 of 2015.

- 33 Whether Kibinge has met the threshold for an adverse possession claim in relation to the suit property:  
In *Gabriel Mbui v. Mukindia Maranya*(supra) the court stated that:

“The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period. Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant. Adverse possession rests on de facto use and occupation by an entrant. The rule that his entry must be followed by possession and appropriation to his use is founded on the reason that a right of action cannot accrue unless there is somebody against whom it is enforceable. Possession is a matter of fact, depending on all the particular circumstances of the case, and the type of conduct which indicates possession varies with the type of land. That there must be actual possession (which requires some sufficient degree of physical occupation for the requisite period) has been well-established in a series of cases...”

In the same case the court stated that a person claiming land by adverse possession must establish on a balance of probability the following elements;

1. The person must make physical entry and be in actual possession or occupancy of the land for the statutory period.
2. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
3. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
4. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
5. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are



inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.

6. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
7. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
8. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
9. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
10. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.

34 In *Kimani Ruchine & Another v. Swift, Rutherford Co. Ltd. & another* [1977] KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, necplecario (no force, no secrecy, no evasion) .....The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

35 In *Wambugu v. Njuguna* [1983] KLR 172 the court stated as follows:

“First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The *Limitation of Actions Act* (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

In *Mwangi Githu v. Livingstone Ndeete* [1980] eKLR, Potter J. quoted volume 24 of Halsbury's Laws of England, 3<sup>rd</sup> edition, page 252 where the authors stated as follows:

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it (q). Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”



- 36 From the evidence on record, I am not satisfied that Kibinge has proved his adverse possession claim. First, it is not clear to the court whether Kibinge is claiming the suit property by adverse possession in his own right or as an administrator of the estate of Mary Wambui, deceased. Kibinge appears to me to have put forward two separate claims in respect of the suit property. In his Originating Summons, Kibinge is claiming the suit property by adverse possession in his own right. Kibinge has claimed that he entered and occupied the suit property in 1994 and had remained in peaceful occupation of the same until 2013 when the Akides came forward to claim that they had purchased the property from Joreth. Kibinge did not mention his mother Mary Wambui Kibinge, deceased (hereinafter referred to only as “the deceased”) in his Originating Summons. In his defence and counter-claim in ELC No. 151 of 2015, Kibinge contended that he was the administrator of the estate of the deceased and that the deceased bought shares in Thome in the 1970s with a view to being allocated a plot within L.R No. 4920/3 and L.R No. 4921/3 (later amalgamated to form L.R No. 13330). Kibinge averred that the deceased acquired the suit property in 1991 by virtue of her shareholding in Thome. Kibinge averred that Thome never issued the deceased with a title for the suit property. Kibinge averred that together with the deceased they occupied and used the suit property from 1994 until 2000 when the deceased became sick and was unable to continue cultivating the property. Kibinge averred that from 2000, he cultivated the suit property alone. In his prayers in his counter-claim in ELC No. 151 of 2015, Kibinge sought among others, a declaration that the suit property was owned by Kibinge and the estate of the deceased.
- 37 There is no doubt that Kibinge’s claim in the Originating Summons is inconsistent with his claim in ELC No. 151 of 2015. As mentioned earlier, in the Originating Summons (ELC No. 618 of 2015), Kibinge claims the suit property by adverse possession in a personal capacity while in ELC No. 151 of 2015, Kibinge claims the suit property in a personal capacity and in his capacity as the administrator of the estate of the deceased. Either way, I am not satisfied that the claim has been established. In his personal claim, Kibinge did not tell the court how he entered and occupied the suit property. As the Akides pointed out in their submissions, Kibinge claimed in the body of the Originating Summons that he entered the suit property in 1991 while in his affidavit in support of the Originating Summons, Kibinge claimed that he entered and occupied the suit property in 1994. Whichever the case, apart from his conflicting accounts of his entry into the suit property, no tangible evidence was placed before the court by Kibinge as proof of his actual physical occupation or possession of the suit property in 1991 or 1994. The only evidence that Kibinge placed before the court was the building that he started constructing on the suit property in 2013. The existence of the alleged caretaker’s house and crops which Kibinge claimed to have been cultivating on the suit property were not established beyond mere allegations. In the absence of actual continuous and uninterrupted physical possession or occupation of the suit property by Kibinge for the statutory period of 12 years, an adverse possession claim over the property cannot be maintained by Kibinge.
- 38 With regard to his joint claim with the deceased, again Kibinge has not fared any better. Kibinge who claimed that the suit property was allocated to his deceased mother by Thome and was occupied by him and the deceased from 1991 has not persuaded me that his alleged occupation of the property with his deceased mother was adverse to the interest of Joreth in the property. Kibinge could have occupied the suit property only on the basis that the same was owned by his deceased mother. He had no distinct interest in the property. According to his testimony, his mother died in 2008. I am of the opinion that it was from 2008 that if Kibinge had been in actual possession of the suit property he could have had a distinct claim over the property in the event that the adverse possession by the mother had not crystallised and as such the claim could not be made by the estate. For the deceased mother, she was said to have entered and occupied the suit property following an allocation thereof to her by Thome in which she was a shareholder. Kibinge made no attempt of whatsoever nature to prove that



the deceased was a shareholder of Thome and that she was allocated the suit property by Thome. The basis of the deceased's alleged entry into the suit property was therefore not established. Kibinge also failed to prove that the deceased was in actual physical occupation of the suit property. The existence of the structures that Kibinge claimed to have put up on the suit property together with the deceased was not proved. The cultivation that the deceased is said to have been carrying out on the suit property was also not proved.

39 Due to the foregoing, it is my finding that Kibinge did not prove his adverse possession claim in ELC No. 618 of 2015(O.S).

40 Whether Kibinge is entitled to the reliefs sought in the Originating Summons in ELC No. 618 of 2015: Kibinge having failed to prove that he had acquired the suit property by adverse possession, he is not entitled to any of the reliefs sought in the Originating Summons. There is no basis for declaring Kibinge to be the owner of the suit property and for the cancellation of the title held by the Akides in respect of the property.

41 Whether the Akides acquired the suit property fraudulently:

The suit property was registered under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). Section 23 of the Registration of Titles Act provides as follows:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”.

42 Section 26 of the [Land Registration Act](#), Act, 2012 which repealed the Registration of Titles Act, provides as follows:

“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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”



- 43 In *Railal Gordhanbhai Patel v. Lalji Makanji* [1957] E.A 314, the court stated as follows at page 317:
- “Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
- 44 In *Virani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 E.A KLR 269, it was held that:
- “Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt”.
- 45 In *Kampala Bottlers Ltd. v Damanico (UG) Ltd.* [1990-1994] E.A141(SCU), the Supreme Court of Uganda held that:
- “To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof must be heavier than a balance of probabilities generally applied in civil matters.”
- 46 The registration of the Akides as the proprietors of the suit property could be challenged on account of fraud, misrepresentation, mistake, illegality, procedural impropriety or corruption under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) and the Registration of [Land Act](#), 2012 that repealed the same. The burden was on Kibinge to prove the allegations of fraud pleaded against the Akides in relation to the manner in which they acquired the suit property. I am not satisfied from the evidence on record that the Akides acquired the suit property fraudulently.
- 47 As correctly submitted by the Akides, Kibinge did not challenge in substance the process through which the Akides acquired the suit property. Kibinge did not refute the fact that the suit property was registered in the name of Joreth as the owner thereof and that Joreth offered to sell the same to the Akides at Kshs. 6,000,000/-. Kibinge did not also contest the fact that the Akides accepted the offer and paid the full purchase price to Joreth before the property was transferred and registered in their names on 23<sup>rd</sup> July 2010. Kibinge did not contest the fact that the Akides were issued with a Certificate of Title for the suit property on 23<sup>rd</sup> July 2010. Kibinge had contended that the Akides schemed with Joreth to deny the Government Revenue by under-declaring the value of the suit property. Kibinge claimed that this was evidence of fraud. The alleged underpayment of Stamp Duty could in my view not vitiate the transfer in favour of the Akides. The underpaid Stamp Duty can be recovered by Kenya Revenue Authority from the Akides at any time. It had no effect on the legality of the transaction between Joreth and the Akides. It is therefore my finding that Kibinge failed to prove that the Akides acquired the suit property fraudulently.
- 48 Whether the Akides are entitled to the reliefs sought in the plaint in ELC No. 151 of 2015:
- From the evidence on record, I am satisfied that the Akides acquired the suit property lawfully. The Akides received an offer to purchase the suit property from Joreth. They conducted due diligence that confirmed that the property was owned by Joreth. They accepted the offer and paid the purchase price in full. The property was thereafter transferred to them and they were issued with a certificate of title in respect thereof. Kibinge did not place before the court any evidence of wrongdoing on the part of the Akides in relation to the manner in which they acquired the suit property. The Akides proved that



Kibinge was not on the suit property in 2010 when they acquired the suit property and that he entered the property and started constructing a house thereon in 2013 after the property had been registered in the name of the Akides. Kibinge failed to establish his adverse possession claim over the suit property. Kibinge did not, therefore, convince this court that he had any lawful or justifiable cause for entering and occupying the suit property. Kibinge is therefore a trespasser on the suit property. As a trespasser, Kibinge is liable to the Akides in damages. The Akides did not lead evidence or submit on the damage that they had suffered as a result of Kibinge's trespass on the suit property. The court will therefore only award nominal damages. In the circumstances, the Akides are entitled to the reliefs sought against Kibinge in their plaint filed in ELC No. 151 of 2015.

49 Whether Kibinge is entitled to the reliefs sought in his counter-claim in ELC No. 151 of 2015.

I have held above that Kibinge failed to prove that his deceased mother and he had acquired the suit property by adverse possession and that the Akides acquired the suit property fraudulently. Due to the foregoing, Kibinge is not entitled to the reliefs sought in his counter-claim in ELC No. 151 of 2015.

#### **Who is liable for the costs of the suit?**

50 Costs of and incidental to a suit are at the discretion of the court. As a general rule, costs follow the event. In the present case, Kibinge has failed in his claim against the Joreth and the Akides while the Akides have succeeded in their claim against Kibinge. No reason has been given by Kibinge why the Joreth and the Akides should be denied the costs of Kibinge's Originating Summons and counter-claim in ELC No. 151 of 2015. I will award Joreth and the Akides the costs of the consolidated suits and the counter-claim.

#### **Conclusion:**

51 In conclusion, I hereby make the following orders;

1. The Originating Summons dated 2<sup>nd</sup> July 2015 filed in ELC No. 618 of 2015(O.S) is dismissed.
2. The counter-claim brought by Peter Kamau Kibinge in ELC No. 151 of 2015 is dismissed.
3. Judgment is entered for the Plaintiffs in ELC No. 151 of 2015, Truphena E. Omungala and Kenneth L.W. Akide against Peter Kamau Kibinge in his personal capacity and in his capacity as the administrator of the estate of Mary Wambui Kibinge in terms of prayers (a), (b) and (c) of the plaint dated 16<sup>th</sup> February 2015.
5. Peter Kamau Kibinge in his personal capacity and in his capacity as the administrator of the estate of Mary Wambui Kibinge shall vacate and handover possession of all that parcel of land known as L.R No. 13330/39 to Truphena E. Omungala and Kenneth L.W. Akide within 30 days from the date hereof in default of which they shall be at liberty to apply for warrants for his forceful eviction therefrom.
6. Peter Kamau Kibinge in his personal capacity and in his capacity as the administrator of the estate of Mary Wambui Kibinge shall pay to Truphena E. Omungala and Kenneth L.W. Akide Kshs. 250,000/- as general damages for trespass.
7. Joreth Limited shall have the costs of ELC No. 618 of 2015(O.S) to be paid by Peter Kamau Kibinge in his personal capacity and in his capacity as the administrator of the estate of Mary Wambui Kibinge.



8. Truphena E. Omungala and Kenneth L.W. Akide shall have the costs of ELC No. 151 of 2015 and ELC No. 618 of 2015(O.S) to be paid by Peter Kamau Kibinge in his personal capacity and in his capacity as the administrator of the estate of Mary Wambui Kibinge.

**DELIVERED AND DATED AT KISUMU ON THIS 12<sup>TH</sup> DAY OF JUNE 2023**

**S. OKONG'O**

**JUDGE**

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

Mr. Gichigi for the Peter Kibinge

N/A for Joreth

N/A for the Akides

Ms. J. Omondi-Court Assistant

