



Kinyanjui v Joreth Limited & 2 others (Environment & Land Case 1189 of 2014) [2023] KEELC 21634 (KLR) (15 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21634 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1189 OF 2014**

**JO MBOYA, J
NOVEMBER 15, 2023**

BETWEEN

JOHN HARRISON KINYANJUI PLAINTIFF

AND

JORETH LIMITED 1ST DEFENDANT

FERDINAND MUNYIRI KAHARUKA 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

JUDGMENT

Introduction and Background:

1. The Plaintiff herein, [who is an advocate of the High Court of Kenya], has approached this Honourable court vide Originating Summons dated the 4th September 2014; and in respect of which same has sought for a Plethora of reliefs inter-alia;[verbatim];
 - i. A declaration do issue that the Applicant is entitled as the lawful proprietor of the property known as L.R No. 36/11/347, situate in Nairobi County by adverse possession.
 - ii. A declaration do issue that any interests or title claimed by the 1st and 2nd Respondents over the proprietorship of the property known as L.R No. 13330/260 (I.R No. 148466); has been extinguished and at any rate had been extinguished as of the purported registration of the 2nd Defendant thereof.
 - iii. John Harrison Kinyanjui be declared to have acquired title by Adverse Possession to the suit property known as L.R No. 13330/260 (I.R No. 148466).
 - iv. That the registration of Ferdinand Munyiri Kaharuka as proprietor of L.R No. 13330/260 (I.R No. 148466) and/or any other persons deriving title from Joreth Limited based on the



said property be canceled forthwith and the 3rd Defendant, Chief Land Registrar do rectify the parcel Register and all records held by him in respect of L.R No. 13330/260 (I.R No. 148466), and do enter the name of the Plaintiff, John Harrison Kinyanjui, as registered proprietor of the said property in lieu of the 2nd Defendant or any person deriving title from the 1st and 2nd Defendants.

- v. An Injunction do issue, restraining the 1st and 2nd Defendants either by themselves, their agents and/or servants or otherwise howsoever from entering, trespassing, remaining upon, occupying, leasing, licensing, selling, letting, partitioning, constructing upon, charging, carrying on any form of business, or otherwise howsoever dealing in the parcel L.R No. 13330/260 (I.R No. 148466); in Thome Farmers No. 5, and in any purported succeeding and derivative title thereto.
 - vi. The costs of these proceedings be borne by the 1st and 2nd Defendants in any event.
2. The originating summons by and on behalf of the Plaintiff is premised on various grounds which have been enumerated in the body thereof. Furthermore, the originating summons is supported by the Supporting affidavit sworn by the Plaintiff on 4th September 2014; and in respect of which the Deponent has attached 10 annexures, inter-alia, a certified copy of the extract of Title bearing the name of the 2nd Defendant herein.
 3. Instructively, upon being served with the Originating Summons, the 1st Defendant duly entered appearance and thereafter filed two sets of Replying affidavit(s) sworn by Peter Mungai and Duncan Ndegwa, respectively. For coherence, the two (2) sets of Replying affidavits are sworn on the 9th June 2017.
 4. On the other hand, the 2nd Defendant duly entered appearance and similarly filed a Replying affidavit together with a List and Bundle of documents dated the 9th June 2017. Nevertheless, it is appropriate to mention that the List of Documents attached to the 2nd Defendant's Replying affidavit is alleged to be filed on behalf of the 1st Defendant.
 5. First forward, the Originating Summons by and on behalf of the Plaintiff herein came up for directions on the 15th November 2017; whereupon the advocates for the Parties agreed to dispose of same vide viva voce evidence.
 6. Consequently and in this regard, the Honourable court proceeded to and directed that the Parties do file the requisite Witness Statement(s) and Bundle of Documents, to be relied upon and/or used during the trial.
 7. Suffice it to point out that thereafter the Parties proceeded to and indeed complied by filing the requisite witness statements, pertaining to and on behalf of the various witnesses, who were to be called during the trial.
 8. Subsequently, the instant matter was certified ready and the hearing ultimately commenced on the 5th October 2021; when the Plaintiff herein testified.

Evidence by the Parties':

a. Plaintiff's Case:

9. The Plaintiff's case gravitates and revolves upon the Evidence of Three [3] witnesses, namely, John Harrison Kinyanjui, Jane Nyiha Karanja and Peter Mungori Gukunga, who testified as PW1, PW2 and PW3, respectively.



10. It was the testimony of PW1 that the suit property was bought and/or purchased by PW2, namely, Jane Nyiha Karanja sometime in the year 1975; and thereafter same caused the suit property to be registered in the name of the Plaintiff. Besides, the witness also added that thereafter a Share certificate was issued on or about the year 1998 and which certificate bore the name of the Plaintiff herein.
11. Furthermore, the witness averred that upon the acquisition of the suit property by PW2, the witness herein ultimately entered upon and took possession of the suit property in 1995. Nevertheless, the witness added that the suit property was bought from the company known as Thome Farmers No. 5 Limited, who proceeded to and issued the share certificate.
12. Additionally, the witness testified that after entering upon and taking possession of the suit property in 1995, same also had occasioned to peruse the Register of the 1st Defendant herein relating to L.R No. 13330/260 (I.R No. 148466); which Register was at the material point in time held by one, Kimani Kahiro Advocate, [now Deceased], who was acting for the 1st Defendant Company. For good measure, the witness averred that same established and confirmed that his name was duly reflected and contained in the said Register.
13. Other than the foregoing, the witness also testified that upon confirmation that all the requisite fees had been paid, the said advocate, namely, Kimani Kahiro, [now Deceased], thereafter advised the witness to contact the 1st Defendant's surveyors, namely, Gatome & Associates Surveyor to proceed and point out to the witness the boundary limits/beacons pertaining to the suit property.
14. Furthermore, the witness averred that subsequently same indeed contacted M/s Gatome & Associates Surveyors who proceeded to and pointed out to the witness the boundary limits and/or beacons of the suit property. In this regard, the witness added that upon being shown the boundary limits, same indeed took possession of the suit property and commenced assorted activities thereon including clearing the Plot of grown grass and planting various flower Plants and Trees.
15. Other than the foregoing, it was the testimony of the witness that same also proceeded to and engaged an Architect, namely, Mr. Omondi Nawa, who proceeded to prepare architectural drawings pertaining to and concerning the housing project, which the witness had desired to erect/build on the suit property.
16. It was the further evidence of the witness that the architectural drawings which had been made by the said architect, was never approved by the Planning Authority, namely, the City Council of Nairobi (now defunct) on the basis that the witness was not in possession of a Certificate of title over and in respect of the suit property.
17. Additionally, it was the testimony of the witness that other than planting assorted flower Plants and Trees on the suit property, same also engaged one Mr. Kibue, on or around 1996, with a view to sinking a two feet trench round the suit property, so as to tame the flooding on the suit property. In this respect, the witness averred that the said Mr. Kibue actually proceeded to and dug a two feet trench all-round the suit property, which tamed the flooding on the suit property.
18. In addition, it was the testimony of the witness that on or about the year 2003; same moved his place of abode and went to reside at Ridgeways, Marana Properties, which was in the neighborhood of the suit property. Consequently and in this respect, the witness averred that given the proximity of his place of abode to the suit property, same constantly visited the suit property to ensure that the suit property was not trespassed upon by any Third Parties.
19. Furthermore, the witness also averred that on or about the year 2012; the neighbor, who was the owner of Plot LR. No. 13330/262 brought two containers onto his (neighbor's plot) and thereafter employed



- a Caretaker to occupy the container. However, the witness averred that when the neighbor brought the container onto his (neighbors plot), he (witness) was apprehensive that his Plot may be trespassed upon.
20. Be that as it may, the witness proceeded and averred that same was able to contact the caretaker, namely, Mr. Peter Mungori , who was residing in the container and the said caretaker assured him (witness) that same (caretaker) will not trespass onto the suit property. In any event, the witness added that the caretaker intimated to him (witness) that he (caretaker) would also watch over the suit property so as to ensure that there is no trespass thereto.
 21. Other than the foregoing, the witness testified that same established that the issues pertaining to the preparation of titles over and in respect of, inter-alia, the suit property and other properties falling within the entire of Thome Farmers No. 5 land was being handled by Mr. Njeru Nyaga, advocate. In this regard, the witness averred that same thereafter contacted the named Advocate with a view to imploring the said advocates to process and issue him (witness) with the Certificate of title over and in respect of the suit property.
 22. Nevertheless, the witness averred that when he (witness) contacted Mr. Njeru Nyaga Advocates, the said advocate informed him (witness) that he Documents/Files relating to the entire Thome Farmers No. 5 land; had been forwarded to another law firm name, the firm of M/s Kimani Kahiro Advocates. In this regard, the witness averred that same was thereafter advised to follow up the issue of his Certificate of title to the suit property with Mr. Kimani Kahiro Advocate.
 23. It was the further testimony of the witness that thereafter same proceeded to and sought audience with Mr. Kimani Kahiro Advocate, [now Deceased], who was holding the documents/files relating to the properties in respect of Thome Farmers No. 5 including the suit property. Further, the witness averred that after meeting Mr. Kimani Kahiro Advocates and upon submissions of his (witness share certificate), it was verified and confirmed that indeed the witness herein was entitled to the suit property.
 24. Other than the foregoing, the witness testified that Mr. Kimani Kahiro Advocate thereafter advised the witness to make arrangements and to pay the sum of Kes.250, 000/= only which amount was being paid by each shareholder with a view to facilitating the issuance of Certificate of title over the respective Plots, belonging to each and every Shareholder.
 25. Furthermore, the witness testified that pursuant to and in compliance with the advice emanating from Mr. Kimani Kahiro Advocates,[now Deceased], who was the advocate for the 1st Defendant, same (witness) proceeded to and indeed procured a cheque for the sum of Kes.250, 000/= only to enable the processing of the Certificate of title in respect of the suit property.
 26. Nevertheless, the witness averred that when same proceeded to hand over and remit the cheque to Mr. Kimani Kahiro Advocate, Mr. Kimani Kahiro informed the witness that the files relating to and concerning Thome Farmers No. 5 Land; had been taken away from him (Mr. Kimani Kahiro Advocate) and were now under the custody of Ms. Njeri Kariuki Advocates. Consequently, the witness testified that same was advised to contact the new advocates who had been retained by the 1st Defendant herein.
 27. It was the further testimony of the witness that thereafter same [Witness], made various efforts to contact and meet Ms. Njeri Kariuki Advocates, but however his various efforts did not bear any fruits. However, the witness added that same nevertheless, met the Secretary/Receptionist of Ms. Njeri Kariuki, Advocate, who assured him (witness) that if same was in occupation and possession of the suit property; then there was no problem and the witness was at liberty to continue his occupation, awaiting issuance of certificate of title.



28. Notwithstanding the foregoing, the witness testified that his attempt to procure and obtain the Certificate of title was not fruitful and that in the course of pursuing the question of issuance with Certificate of title with the firm of M/s Njeri Kariuki, advocates, same was thereafter informed that the documents/files relating to the entire of Thome Farmers No. 5 Land; had been forwarded to yet another advocates, namely, Mr. Chege Wainaina. In this regard, the witness averred that he was thereafter constrained to contact the new advocate Mr. Chege Wainaina with a view to ascertaining the status of the issuance of Certificate of title pertaining to the suit property.
29. However, the witness added that despite the efforts to reach out to and meet Mr. Chege Wainaina Advocate, same was unable to meet the said advocates, because the advocate was repeatedly out of the country.
30. Be that as it may, the witness testified that subsequently and after concerted efforts same was able to reach out Mr. Chege Wainaina Advocates, who informed the witness that the requisite fees for processing the Certificate of title over and in respect of the suit property was now Kes.4, 000, 000/= only which the witness was called upon to pay.
31. Other than the foregoing, the witness averred that despite the various endeavors to procure the issuance of a Certificate of title over and in respect of the suit property, same remained in continuous, open and uninterrupted possession of the suit property. In any event, the witness added that at no point in time was his occupation interrupted by any one, the 1st Defendant herein not excepted.
32. Additionally, the witness testified that on or about the 1st September 2014; same (witness) received a telephone call from PW3, namely, Mr. Peter Mungori, who informed same that there were some persons trespassing onto the suit property. In this respect, the witness averred that same was therefore constrained to and indeed went to the suit property to ascertain the identity of the Trespassers.
33. Besides, it was the further testimony by the witness that arising from the offensive trespass onto the suit property, same thereafter lodged a Complaint with the Provincial Police Officer- Nairobi, to facilitate investigations as to the true identities of the trespassers and the basis of their trespass onto the suit property.
34. Arising from the foregoing, the witness testified that the Complaint/Report which same (witness) had mounted with the Provincial Police Officer-Nairobi, transmitted to and later on acted upon by the DCIO- Kasarani, who dispatched two [2] officers to the suit property for purposes of investigations.
35. On the other hand, it was the testimony of the witness that during the course of the investigations by the DCIO- Kasarani, the 2nd Defendant herein proceeded to the said officer and availed a copy of the Certificate of title pertaining to and concerning the suit property. In this respect, the witness averred that it is at the said point in time that same discovered that the suit Property had been transferred to and registered in the name of the 2nd Defendant herein.
36. Be that as it may, the witness averred that having been in open, continuous and uninterrupted occupation of the suit property, which was (sic) bought/ purchased by PW2, but registered in the name of the witness, the suit property was not therefore available to be sold to and/or transferred in favor of any Third Party, the 2nd Defendant not excepted.
37. Besides, the witness averred that by virtue of having been in occupation and possession of the suit property since the year 1995, same has therefore acquired Adverse Possessory rights to and in respect of the suit property. In this regard, the witness has therefore invited the Honourable court to find and hold that he (witness) is entitled to the suit property vide adverse possession/prescription.



38. Other than the foregoing, the witness herein referred to the Supporting affidavit sworn on the 4th September 2014; whose contents have been reproduced hereinbefore and thereafter sought to adopt and rely on same as his Evidence- in- chief.
39. At the instance and request of the witness, the Supporting affidavit sworn on the 4th September 2014; was duly adopted and admitted as the Evidence- in- chief of the Witness, namely, the Plaintiff herein.
40. Additionally, the witness herein referred to the various annexures which had been annexed to the Supporting affidavit and implored the Honourable court to adopt and constitute same as Exhibits on behalf of the witness, [read, Plaintiff]. In the absence of any objection from the advocates for the adverse Parties, the annexures attached to the Supporting affidavit were admitted and constituted as Plaintiff's Exhibits P1 to P10, respectively.
41. Besides, the witness also alluded to the Electronic Certificate relative to the photographs which have been produced as Exhibits 4 to 8, respectively and thereafter sought to adopt the contents of the Electronic Certificate. Suffice it to point out that the Electronic Certificate dated the 4th September 2014; was duly admitted as part of the Plaintiffs Exhibits.
42. On cross examination by Learned Counsel for the 1st Defendant, the witness herein averred that the suit property was bought and/or acquired by his (witness) mother namely, PW2; from Thome Farmers No. 5 Limited, in the year 1975. It was the further evidence of the witness that though the property was bought by PW2, same was however registered in the name of the witness.
43. Besides, it was the testimony of the witness that Thome Farmers No. 5 Limited, who sold the property to PW2 is the one that transmuted to and became Joreth Limited, namely, the 1st Defendant herein.
44. Whilst still under cross examination, the witness testified that same (witness) was aware that PW2 indeed carried out and undertook a search over the suit property before same bought the share therein. However, the witness conceded that no Certificate of official search has been tendered to the court to confirm whether or not a search was indeed undertaken by PW2.
45. Additionally, the witness testified that same entered upon and took possession of the suit property in the year 1995; and that thereafter same has remained in open and uninterrupted possession of the suit property up to and including September 2014, when the 2nd Defendant herein unsuccessfully attempted to enter upon and take possession of the suit property.
46. Furthermore, it was the evidence of the witness that the boundary limits/beacons over and in respect of the suit property were pointed out to him (witness) M/s Gatome & Associates Surveyors, who were the surveyors for the 1st Defendant herein.
47. Other than the foregoing, the witness also avers that in his endeavors to procure and obtain Certificate of title to and in respect of the suit property, same engaged various advocates, who were hitherto acting for the 1st Defendant. In this respect, the witness averred that same interacted with, inter-alia, Njeru Nyaga, Kimani Kahiro, [now Deceased], Ms. Njeri Kariuki and Mr. Chege Wanaina, respectively.
48. In answer to a question pertaining to whether or not same (witness) has been in occupation of the suit property, the witness testified that indeed he has been in occupation and possession of the suit property and to this end the witness referred the court to the various photographs at pages 24, 25 and 26 of the Bundle of Documents adduced before the Honourable court on behalf of the Plaintiff.
49. Further and in particular, the witness pointed out that it is him [Witness], who planted the white bottle brush trees, which were standing on the suit property and on which the signage/ Board bearing the Notice, was affixed.



50. Finally, the witness averred that though the suit property is under his occupation and possession; same is however registered in the name of the 2nd Defendant.
51. Nevertheless, the witness contended that despite the registration of the suit property in the name of the 2nd Defendant, the 2nd Defendant's title to the Suit Property, was/is extinguished on the basis of adverse Possession.
52. The 2nd witness who testified on behalf of the Plaintiff is one Ms. Jane Nyiha Karanja. Same testified as PW2.
53. It was the testimony of the witness herein that same is conversant/ familiar with the facts pertaining to and concerning the acquisition of the Plot currently referred as L.R No. 13330/260.
54. It was the further testimony of the witness that it is her [Witness], who bought and acquired the Plot from Thome Farmers No. 5 Limited, in the year 1975, but chose to have the Plot registered in the name of the Plaintiff, who is her son. In this regard, the witness averred that thereafter a share certificate was generated and issued bearing the name of the Plaintiff.
55. Additionally, the witness testified that upon acquisition of the Plot, which is now the suit property; same entered upon and took possession thereof. In any event, the witness contended that same undertook cultivation on the suit property before she handed over the Plot in question to her son, namely, the Plaintiff herein.
56. Other than the foregoing, the witness herein confirmed to the court that same had recorded a witness statement dated the 31st October 2019; and in this regard, same sought to adopt and rely on the named Witness statement. For coherence, the witness statement in question was thereafter adopted and constituted as the Evidence- in -chief of the witness.
57. On cross examination by Learned Counsel for the 1st Defendant, the witness herein pointed out that it is her (witness) who bought/purchased the suit property from Thome Farmers No. 5 Limited. Furthermore, the witness pointed out that the Plot which same had bought was/is the one which is currently known as L.R No. 13330/260.
58. Whilst under further cross examination herein stated that after purchasing the Plot, which is now the suit property, same was taken onto the plot by a surveyor by the name of Gatome Surveyors. In particular, the witness pointed out that same was taken onto the land in the year 1990.
59. On cross examination by Learned Counsel for the 2nd Defendant, the witness herein pointed out that though she is the one who bought the suit property, she caused the name of the Plaintiff to be registered in the Share certificate. Furthermore, the witness added that she did so, so that the suit property would belong to the Plaintiff.
60. The third witness who testified on behalf of the Plaintiff is known as Peter Mungori Gukunga. Same testified as PW3.
61. It was the testimony of the witness that same is a caretaker of neighboring Plot, namely, L.R No.13330/262; belonging to Solomon Gitundu. Furthermore, the witness testified that same got to know of the Plaintiff herein on or about the year 2012; and that henceforth same interacted with the Plaintiff on various occasions when the Plaintiff went to supervise activities on the suit property.
62. Other than the foregoing, the witness herein intimated to the court that same had recorded a Witness statement dated the 31st October 2019; which witness statement the Witness sought to adopt and to rely on as his Evidence- in- chief.



63. At the request and instance of the witness, the Witness statement dated the 31st October 2019; was duly adopted and constituted as the Evidence- in- chief of the Witness.
64. On cross examination by Learned Counsel for the 1st Defendant, the witness herein pointed out that same got to know of the Plaintiff herein on or about the year 2012. Besides, the witness added that he was present and witnessed the Plaintiff herein planting assorted flower plants and trees on the suit property.
65. On cross examination by Learned Counsel for the 2nd Defendant, the witness pointed out that when the 2nd Defendant herein went on to the suit property he (witness) informed the 2nd Defendant that the suit property belonged to the Plaintiff.
66. Nevertheless, the witness admitted that the suit property has not been fenced by the Plaintiff or at all.
67. At the end of the testimony by PW3, Learned counsel for the Plaintiff mounted an application to have the Witness statement of Mr. Kimani Kahiro advocate, who had since passed on, to be admitted and constituted as Evidence on behalf of the Plaintiff. In this regard, Learned counsel for the Plaintiff cited and relied on the provisions of Section 33 of the Evidence Act, Chapter 80 Laws of Kenya.
68. Though the application under reference was vehemently opposed by Learned counsel for the 1st and 2nd Respondents herein, however, the application was allowed vide Ruling rendered on the 2nd February 2023. Consequently and in this regard, the Witness Statement by Mr. Kimani Kahiro, advocate (now deceased) was duly constituted as further evidence on behalf of the Plaintiff.
69. Suffice it to point out that upon the delivery of the Ruling rendered on the 2nd February 2023, the Plaintiff proceeded to and closed his case.

b.The 1st Defendant's Case:

70. The 1st Defendants case revolves around the Evidence of one witness, namely, Dr. Jonathan Ciano. Same testified as DW1.
71. It was the evidence of the said witness that same is a Manager with the 1st Defendant herein. In this regard, the witness pointed out that by virtue of being a Manager with the 1st Defendant, same is therefore conversant with the facts pertaining to and concerning the subject dispute.
72. Furthermore, it was the evidence of the witness that the 1st Defendant herein was the registered proprietor and/or owner of L.R No 13330, [Mother Title], which was duly registered in the name of the 1st Defendant on the 19th December 2000.
73. In any event, the witness averred that the title in respect of L.R No. 13330; arose from amalgamation/ consolidation of two titles, namely, L.R No's 4920/3 and 4921/3, respectively.
74. It was the further testimony of the witness that L.R No. 13330/260; (which is the suit property) has never vested in the Plaintiff. Furthermore, the witness averred that the 1st Defendant has never sold and/or transferred the suit property to the Plaintiff.
75. On the other hand, it was the testimony of the witness that the 1st Defendant herein is separate and distinct from Thome Farmers No. 5 Limited, which is alleged to have sold the suit property to and in favor of the Plaintiff herein. In addition, the witness testified that Thome Farmers No. 5 Limited, also does not own any shares in the 1st Defendant company.



76. Other than the foregoing, the witness averred that the 1st Defendant herein has been engaged in the process of consolidation and subsequent subdivision of L.R No. 13330, which is the Mother title that gave rise to, inter-alia, the suit property herein.
77. Besides, the witness testified that on or about 1992, the 1st Defendant herein was confronted with the problem of illegal occupation of L.R No. 13330; and as a result of the said illegal occupation, the 1st Defendant was constrained to and indeed filed Civil Proceedings vide HCC No. 6202 of 1992, against the various trespassers. In any event, the witness added that the said suit was however compromised vide Consent entered into and ratified by the court in the year 2002.
78. It was the further testimony of the Witness that the Plaintiff herein was, however, not one of the Parties to the suit, namely, Nairobi HCC No. 6206 of 1992.
79. Other than the foregoing, it was the testimony of the witness that insofar as the suit property belonged to and was registered in the name of the 1st Defendant, same (1st Defendant); was therefore at liberty to alienate and dispose of the suit property. In this regard, the witness testified that the 1st Defendant entered into and executed Sale agreement with the 2nd Defendant on or about May 2013; culminating into the transfer and registration of the suit property in the name of the 2nd Defendant.
80. Arising from the foregoing, the witness averred that the suit property thus belongs to and is registered in the name of the 2nd Defendant.
81. Other than the foregoing, the witness alluded to the Witness statement dated the 6th April 2023; and thereafter sought to adopt and rely on the named Witness statement. Consequently and in this regard, the witness statement was therefore adopted and admitted as the Evidence- in -chief of the Witness.
82. On the other hand, the Witness also alluded to the List and Bundle of Documents dated the 9th June 2017; and comprising of three [3] documents. In this regard, the witness sought to adopt and rely on the named Documents.
83. There being no objection to the admission of the named Documents, same were duly adopted and admitted as Exhibits D1 to D3, respectively, on behalf of the 1st Defendant.
84. On cross examination by Learned counsel for the 2nd Defendant, the witness herein averred that the suit property belongs to the 2nd Defendant. In any event, the witness added that the suit property was bought by the 2nd Defendant in the year 2009.
85. Furthermore, the witness averred that at the time when the suit property was being sold to the 2nd Defendant, same was sold without any occupation or otherwise. In addition, the witness averred that the Plaintiff herein was not in occupation of the suit property.
86. On cross examination by Learned Counsel for the Plaintiff, the witness testified that same was appointed as a Manager with the 1st Defendant company on or about the year 2016. Furthermore, the witness also stated that same is not the sole Manager.
87. Nevertheless, the witness herein admitted that despite contending to be the Manager of the 1st Defendant, same has however not tendered any Evidence pertaining to his appointment or at all.
88. Whilst under further cross examination, the witness averred that same does not have personal knowledge of the affairs of the 1st Defendant relating to the activities which took place between the year 2009 up to 2016. However, the witness added that same is aware that the 1st Defendant was incorporated in 1973.



89. Additionally, it was the testimony of the witness that on or about the year 1990 there were various people who were claiming ownership of the 1st Defendant's land and as a result, the 1st Defendant herein proceeded to and filed a suit before the High Court, namely, Nairobi HCC No. 6206 of 1992.
90. Other than the foregoing, the witness admitted that the Plaintiff was not one of the trespassers who were sued by the 1st Defendant.
91. On cross examination as to whether the Plaintiff was in occupation of the suit property, the witness stated that the Plaintiff has never been in occupation and possession of the suit property.
92. However, when referred to the photographs which were produced by the Plaintiff, the witness conceded that same could see a photograph of a white bottle Tree, which was grown-up. However, the witness stated that same would not be able to approximate the age of the said white bottle brush Tree.
93. Whilst still under cross examination by counsel for the Plaintiff, the witness herein pointed out that same was aware that Kimani Kahiro, [now deceased], was one of the advocates for the 1st Defendant. Further and in addition, the witness stated that Kimani Kahiro, thereafter handed over the files and documents belonging to the 1st Defendant to Ms. Njeri Kariuki Advocate, who latter on became the Sole advocates for the 1st Defendant.
94. Be that as it may, the witness stated that insofar as Mr. Kimani Kahiro Advocate was the custodian of the Documents on behalf of the 1st Defendant, same was knowledgeable of and privy to the history, background and ownership of the suit property.
95. On cross examination on the sale agreement which was entered into between the 1st and 2nd Defendants herein, the witness pointed out that the sale agreement was entered into and executed on or around May 2013. However, the witness changed tune and averred that the sale agreement before the Honourable court shows that same was entered into in the year 2009.
96. Other than the forgoing, the witness averred that the Sale Agreement which has been adduced before the Honourable court; does not have the date and month, when same was allegedly entered into or executed.
97. On cross examination as pertains to the Plaintiff's occupation and entry onto the suit property, the witness stated that same is not aware if the Plaintiff used force and gained possession of the suit property. In any event, the witness averred that to his knowledge the Plaintiff is not on the suit property.
98. Finally, the witness averred that if the Plaintiff is on the suit property, the same is on the suit property, albeit, without permissions and consent of the First Defendant, as well as the Second Defendant herein.
99. With the forgoing testimony, the 1st Defendant's case was closed.

c. 2nd Defendant's Case:

100. The 2nd Defendant's case gravitates around the Evidence of Three [3] witnesses namely, Ferdinand Munyiri Kaharuka, Ms. Njeri Kariuki, Advocate; and Ronald Tom Mbiru, who testified as DW2, DW3 and DW4, respectively.
101. It was the testimony of DW1 that same entered into a Sale agreement with 1st Defendant herein over and in respect of L.R No. 13330/260 (I.R No. 148466); situated at Thome Farmers No. 5 Limited, and thereafter the suit property was transferred and registered in his name.
102. Additionally, the witness testified that prior to purchasing the suit property, same undertook due diligence over and in respect of the suit property. In any event, the suit property was identified and



- pointed out unto him (witness) by the 1st Defendant's surveyor who located the beacons of the suit property.
103. It was further testimony of the witness that when same bought, purchased and acquired the suit property, the Plaintiff herein was not in occupation of the suit property. In addition, the suit property was vacant and was not developed.
 104. Other than the foregoing, the witness ventured forward and testified that there was also no sign/scintilla of any development, which had been undertaken by the Plaintiff.
 105. Be that as it may, the witness averred that same (witness) is aware that the Plaintiff has erected a Notice on the suit property with the wordings [this plot is not for sale by the owner – 0734733669]. In this respect, the witness however added that the said signage was erected long after he had purchased the said Plot.
 106. Other than the foregoing, the witness alluded to the Witness statement dated the 9th June 2017; whose contents have essentially been reproduced hereinbefore. Thereafter, the witness sought to adopt and rely on the said Witness statement.
 107. Suffice it to point out that the Witness statement dated the 9th June 2017; was thereafter adopted and admitted as the Evidence- in -chief of the witness.
 108. Furthermore, the witness also alluded to the List and Bundle of Documents dated the 2nd June 2022; and sought to adopt same. Consequently and in this regard, the Documents at the foot of the List dated the 9th June 2017; were duly admitted and marked as Exhibits D4, D5 and D6, respectively.
 109. Other than the foregoing, the witness also alluded to the List and bundle of documents 2nd June 2022 and also sought to have the named documents produced and admitted as Exhibits. Suffice it to point out that the named documents were duly admitted and constituted as Exhibits D7 to D11, respectively.
 110. On cross examination by Learned Counsel for the 1st Defendant, the witness herein stated that before buying the suit property, same conducted and undertook due diligence, by visiting the land and obtaining Certificate of official search from the Ministry of Lands.
 111. It was the further testimony of the witness that when same visited the suit Property, there was no Structure of any iota of development thereon or at all.
 112. In respect to when same bought and purchased the suit property, the witness stated that the said property was bought in the year 2009. Besides, the witness averred that same [Witness], paid the purchase price Kes.4, 200, 000/= only in cash to the 1st Defendant.
 113. It was the further testimony that though same bought the suit property in 2009, same was only transferred to him in the year 2013. In this respect, the Witness stated that the Suit Property was transferred to and registered in his name on the 20th day of August 2013.
 114. Whilst under further cross examination, the witness admitted and acknowledged that in the Bundle of Documents filed in court, same acknowledges that there is a white bottle brush Tree standing on the suit property.
 115. Furthermore, the witness also admitted that the said bottle brush Tree, that appears in his Documents, is the same bottle brush tree which has been produced by the Plaintiff and which the Plaintiff contends to have planted on the suit property.



116. On cross examination by Learned Counsel for the 1st Defendant, the witness herein pointed out that same carried out and undertook a search over and in respect of the Suit Property before he entered to the sale agreement with the 1st Defendant.
117. On the other hand, the witness added that when he visited the suit property, same found and established that the suit property was vacant and devoid of occupation.
118. The second witness who testified on behalf of the 2nd Defendant was Ms. Njeri Kariuki, advocate. Same testified as DW3.
119. It was the evidence of the witness herein that same has been an Advocate of the High Court of Kenya for a duration of 34 years; and that same is conversant/ familiar with the facts pertaining to the subject matter.
120. Other than the foregoing, the Witness intimated to the court that same had recorded a witness statement dated the 15th February 2022; and further that same was desirous to adopt and rely on the named witness statement. Consequently and In this regard, the witness statement dated the 15th February 2022; was thereafter adopted and admitted as the Evidence- in- chief of the witness.
121. On cross examination by Learned Counsel for the 1st Defendant, the witness herein pointed out that the suit property belonged to and was registered in the name of the 1st Defendant. In any event, the witness added that same knew the 1st Defendant since the year 1990.
122. Whilst under further cross examination, the witness herein confirmed that same was knowledgeable of and privy to the various Notices that were issued by and on behalf of the 1st Defendant.
123. Further and in addition, the witness added that the suit property before the court is one of the properties which has been alluded to in the Notices published by the 1st Defendant.
124. On cross examination by Learned Counsel for the Plaintiff, the witness herein stated that same was acting for the 1st Defendant, albeit, alongside Mr. Kimani Kahiro, Advocate, [now deceased].
125. Furthermore the witness averred that whilst both herself (witness) and Mr. Kimani Kahiro, now deceased, acted together for the 1st Defendant, it was nevertheless, the role of Mr. Kimani Kahiro, advocate, [now Deceased], to ascertain the status on the Plots on the ground.
126. Whilst under further cross examination, the witness added that it was Mr. Kimani Kahiro, advocates, [now deceased], who was to ascertain/ confirm the true owners of the various Plots.
127. However, when shown the Witness statement which was filed by Mr. Kimani Kahiro advocate, now deceased, which indicated that the Plaintiff herein was in occupation of the suit property at the material point in time, the witness contended that she was not in agreement with statement of Mr. Kimani Kahiro, advocate, now deceased.
128. In respect of the Sale agreement between the 1st Defendant and 2nd Defendants, the witness herein admitted that the sale agreement was drafted by herself. Furthermore, the witness added that the Agreement was crafted in the year 2009.
129. Whilst under further cross examination, the witness conceded that even though same [Witness], drafted the sale agreement, the sale agreement does not indicate the date and month when same was (sic) executed by the Parties.
130. Further and addition, the witness also admitted that same did not indicate the date when the Directors of the 1st Defendant appeared before her [Witness], for purposes of executing the Sale agreement.



131. As pertains to the manner in which the purchase price was paid, the witness herein stated that the Money/Purchase price was paid into her Advocate's-client Account. For coherence, the witness added that the 2nd Defendant did not pay the purchase price in cash to her office.
132. As pertains to the transfer instrument, the witness pointed out that the Transfer instrument was effected in the year 2014. However, the witness clarified that the Transfer instrument itself has not been produced nor tendered before the Honourable court.
133. Finally, the witness herein acknowledged that the suit property appears to have been transferred and registered in the name of the 2nd Defendant on the 20th August 2013, yet the sale agreement shows that Stamp Duty was allegedly paid in 2014. In this respect, the witness acknowledged that there appears to be a discrepancy between the transfer and registration of the suit property in favor of the 2nd Defendant and (sic) the payment of Stamp Duty.
134. The last witness who testified on behalf of the 2nd Defendant was one Ronald Tom Mbiru. Same testified as DW4.
135. It was the testimony of the witness that same is a Licensed Land surveyor. In this regard, the witness pointed out that as a land surveyor same is conversant/ familiar with survey works.
136. Furthermore, the witness herein also testified that same is conversant with the facts pertaining to the instant matter. In any event, the witness added that same has recorded a Witness statement dated the 16th February 2022; and which Witness statement same sought to adopt and rely on as his Evidence-in- chief.
137. At the instance and request of the Witness, the witness statement dated the 16th February 2022; was duly admitted and constituted as the Evidence- in -chief of the Witness.
138. On cross examination by Learned Counsel for the 1st Defendant, the witness herein stated and reiterated that same is a Land surveyor by profession. Furthermore, the witness testified that same visited the suit property in the year 2014.
139. It was the further testimony of the witness that when same visited the suit property in the year 2014, there were no structure(s) standing on the suit property. Besides, the witness added that there were No trees nor shrubs on the suit property.
140. On cross examination by Learned Counsel for the Plaintiff, the witness herein admitted that though same contends to be a registered surveyor, same has however not tendered nor produced before the Honourable court any certificate to confirm his qualification or license by Institute of Surveyors of Kenya.
141. Additionally, the witness avers that same was instructed on or about the Month of March 2014. However, the witness has admitted that he (witness) cannot recall the exact date of instructions.
142. It was the further testimony of the witness that the purpose of his instructions and visitation to the suit property was to carry out a re-survey and to affix the boundary Beacons.
143. On further cross examination as to whether there were any trees/shrubs standing on the suit Property, the witness averred that there were Trees and shrubs; but same were at the boundary of the suit property. Further and in addition, the witness admitted that there was also a fence.
144. Whilst under further cross examination, the witness stated that when he went to the suit property, same saw a signage/signpost on the suit Property.



145. On cross examination/ Examination by the Honourable court, the witness herein stated that same is a surveyor assistant. However, the witness added that he does not have any document or evidence to show that he is a surveyor assistant. Furthermore, the witness added that a surveyor assistant must be holder of a certificate of land survey.
146. Be that as it may, the witness admitted that same has neither tendered nor adduced any such Certificate before the Honourable court.
147. Finally, whilst still being examined by the court, the witness conceded as hereunder;
- “I now wish to state that in 2014, I was a student in college. That I now say, I was not authorized to sign/execute the beacon certificate that I have produced before the court”
148. With the foregoing testimony, the latter aspect which borders on perjury, the 2nd Defendant’s case was closed.

d. 3rd Defendant’s Case:

149. Though duly served with the Originating Summons together with Court processes herein, the 3rd Defendant neither entered appearance nor filed any Documents. Furthermore, the 3rd Defendant did not participate in the said proceedings. Further and in addition, the 3rd Defendant’s case was duly closed, albeit, without adducing any Evidence whatsoever.

Parties’ Submissions:

150. Upon the close of the Defendants’ case, the advocates for the respective Parties covenanted to file and exchange written submissions. Consequently and in this regard, the Honourable court proceeded to and circumscribed the timeline for the filing and exchange of the written submissions.
151. Subsequently, the Plaintiff indeed proceeded to and filed an elaborate Written submissions dated the 22nd September 2023, running into a total of 39 pages; and a huge Bundle of Authorities; whereas the 1st Defendant filed written submissions dated the 11th October 2023.
152. On the other hand, the 2nd Defendant filed written submissions dated the 5th October 2023. For coherence, the three [3] sets of written submissions forms part of the record of the Court.
153. Invariably, it is appropriate at this juncture to state that whereas the court is not disposed to rehash the various submissions alluded to by and on behalf of the respective Parties, it suffices to state that the court shall take into account the elaborate submissions; and apply same in the course of crafting the Judgment herein.

Issues for Determination:

154. Having reviewed the Pleadings filed by and on behalf of the Plaintiff and the Responses thereto; and having taken into account the written submissions filed on behalf of the respective Parties, (whose details have been alluded to elsewhere herein before); the following issues do arise and are thus worthy of determination;
- i. Whether the Plaintiff herein has been in open, continuous and uninterrupted occupation and possession of L.R No. 13330/260 (otherwise referred to as the suit Property).
 - ii. If the answer to number (i) above, is in the affirmative; whether such occupation/possession was Adverse/Hostile to the Title of the 1st Defendant.



- iii. Whether the 2nd Defendant acquired Lawful and Legitimate title to the suit property or otherwise.
- iv. What Reliefs, if any, ought to be granted.

Analysis And Determination

Issue Number 1

Whether the Plaintiff herein has been in open, continuous and uninterrupted occupation and possession of L.R No. 13330/260 (otherwise referred to as the suit Property).

155. The Plaintiff herein filed an elaborate Supporting affidavit sworn on the 4th September 2014; and in which same averred that what currently constitutes the suit property was bought and/or purchased by one, namely, Jane Nyiha Karanja (PW2) from a company known as Thome Farmers No. 5 Limited; on or about the year 1975.
156. Furthermore, it was also the averment of the Plaintiff and which averments was adopted as the Evidence in chief of the Plaintiff that though the Plot in question, [which now constitutes the suit property], was bought by PW2, same however caused the Plot to be registered in the name of the Plaintiff who is a son of PW2.
157. Additionally, the Plaintiff also tendered evidence that upon registration of the Plot [now suit property], in his (Plaintiff's name) same was issued with a Share certificate, which confirmed and authenticated the Plaintiff as the owner of one share in Thome Farmers No. 5 Limited, which share vested into the Plaintiff Plot number 343, which subsequently morphed into L.R No. 13330/260, the Suit Property herein.
158. On the other hand, the Plaintiff also tendered evidence that PW2 thereafter entered upon and took possession of the Plot in question and commenced to cultivate same prior to and before the suit property was eventually handed over to the Plaintiff.
159. Instructively, the evidence tendered by the Plaintiff was concerning the purchase, acquisition and initial occupation of the Plot, which ultimately became registered as L.R No. 13330/260, was corroborated by PW2, who is the Plaintiff's mother. Furthermore, it is worthy to remember that it is PW2 who bought the suit property, but caused same to be registered in the name of her son, namely, the Plaintiff herein.
160. Other than the evidence pertaining to the initial entry upon and occupation of the Plot, by PW2, the Plaintiff herein also tendered Evidence pertaining to and concerning the circumstances culminating into the suit property being pointed out unto him by the 1st Defendant's surveyor, namely, M/s Gatome & Associates Surveyors.
161. Be that as it may, it is also worthy to recall that the Plaintiff tendered evidence that the reference to and ultimate engagement of M/s Gatome & Associates Surveyors, was at the instance and advise of M/s Kimani Kahiro, advocate, (now deceased), who was retained and engaged by the 1st Defendant herein.
162. Suffice it to reiterate that DW1, namely, Dr. Jonathan Ciano, who testified on behalf of the 1st Defendant, also acknowledged and admitted that Mr. Kimani Kahiro, advocate (now deceased) was indeed the advocate retained and engaged by the 1st Defendant herein; and in whose custody the files and documents relative to L.R No. 13330, which is the mother title to the suit property, were placed.



163. Perhaps at this juncture it is appropriate to reproduce the substance of the Evidence of DW1 whilst under cross examination by Learned Counsel for the Plaintiff.

164. For good measure, the said witness testified and stated as hereunder;

“I know the previous advocates of the 1st Defendant herein. I knew that Mr. Kimani Kahiro, now deceased was an advocate for Joreth Ltd. I wish to add that he took over from Ms. Njeri Kariuki, advocate. I don’t know whether Mr. Kimani Kahiro, now deceased has acknowledged that the Plaintiff owns the land. The advocate Mr. Kimani Kahiro was the custodian of all the documents on behalf of the 1st Defendant. I do add that he therefore knew the story of the said ownership”

165. Apart from the foregoing testimony by the 1st Defendant’s own Witness, it is worthy to take cognizance of the Statement by Mr. Kimani Kahiro, advocate, which statement was admitted pursuant to the provisions of Section 33 of the Evidence Act Chapter 80 Laws of Kenya.

166. For good measure, the pertinent aspects of the Witness statement by Mr. Kimani Kahiro, Advocate, [now Deceased], are reproduced as hereunder;

“Paragraph 3

My knowledge of the matter herein regarding L.R No. 13330/260 (I.R No. 148466) and Thome Farmers No. 5 Ltd generally arose in my capacity as the person handling the legal affairs of Joreth Ltd, the 1st Defendant in regard to the said Thome Farmers No. 5 Ltd prior to the events complained of by the Plaintiff and more specifically before Njeri Kariuki Advocate and Chege Wanaina Advocate assumed the conduct of the affairs relating to the issuance of the certificate of title to the shareholder of Thome Farmers No. 5 ltd.

Paragraph 4

In my capacity as such advocate for Thome Farmers No. 5, I kept all the documents evidencing the list of shareholders thereof and in particular the current shareholders entitled to parcel of land as a consequence of being so fully paid up.

Paragraph 5

I recall sometime in the year 2010, the Plaintiff herein came to my chambers in the then Loita House (still my present location) and stated that he was a shareholder by virtue of share certificate number 1225 which from my record was plot number 260 which measures half an acre within Thome Framers No. 5.

Paragraph 6

He informed me that his mothers I.D Card Number 1813848 had been entered against his number because it was his mother (one Jane Nyiha) who had paid for the share to his benefit.

Paragraph 7

I immediately secured the register of all bona fide Thome Farmers No. 5 shareholders and indeed established that the name of the Plaintiff, John Harrison Kinyanju, was recorded as entitled to L.R No. 13330/260 (I.R No. 148466) by virtue of the said share certificate number 1225.

Paragraph 8



I confirmed with him that indeed the certificate of title for members were being processed and as such he would need to wait as the process was then taken time and the sum of Kes.250, 000/= only was required, which some members had resisted and requested to move the court.

Paragraph 9

The Plaintiff informed me that prior to coming in my law firm he had visited the law firm of Gitonga and that he had been informed that his name being on the register, he was entitled to proceed with possession thereof and that he had in fact taken possession in the year 1995 and all he wanted was a certificate of title.

Paragraph 17

As such person then representing Joreth Ltd, I had absolutely no doubt in my mind that the Plaintiff has always been in possession of the suit property as at the time he called on me in the year 2011.

Paragraph 19

Had the documents and processes of the 1st Defendant not been removed from my custody and execution to Njeri Kariuki Advocate, as I have stated above, I have no doubt in my mind that the some of Kes.250, 000/= only fee to process the title documents would have been applied to process the Plaintiff certificate of title in proof of his lawful possession and entitlement to the suit property.

167. From the witness statement of Mr. Kimani Kahiro advocate, [now deceased], who had hitherto acted for the 1st Defendant herein as pertains to the transactions affecting and/or touching on L.R No. 13330 (better still referred to as Thome Farmers No. 5) it is evident that the Plaintiff herein was indeed in occupation and possession of the what now constitutes the suit property as at 1995.
168. Significantly, it is worthy to recall that DW2, namely, Jonathan Ciano testified and confirmed that Mr. Kimani Kahiro, Advocate, [now Deceased], had indeed acted for the 1st Defendant herein as pertains to the transactions affecting and/or touching on the suit property.
169. Pertinently, DW1 stated as hereunder;
- “ the Advocate, namely, Mr. Kimani Kahiro, now deceased, was at one time the custodian of all the documents on behalf of the 1st Defendant. I do add that he therefore knew the story of the ownership”
170. Juxtaposing the Evidence of DW1 as against the witness statement of Mr. Kimani Kahiro, advocate (now deceased), there is no gainsaying that indeed the named advocate was privy to and knowledgeable of the facts pertaining to occupation and possession of the suit property by the Plaintiff.
171. Other than the foregoing, there is yet another perspective that vindicates and/or confirms that the Plaintiff was truly in occupation of the suit property much earlier than the year 2014, when the 2nd Defendant purported to enter upon the suit property.
172. In this regard, it suffices to underscore that the Plaintiff herein testified that upon the boundary limits/ beacons of the suit property being shown unto him by M/s Gatome & Associates Surveyors, same entered upon and took possession of the suit property in 1995.



173. Furthermore, the Plaintiff proceeded to and tendered evidence that in the course of being in possession of the suit property same undertook assorted activities, inter-alia planting bottled brush trees, which as at the September 2014; were grown up and discernable on the suit Property.
174. To this end, the Plaintiff tendered and produced before the Honourable court various photographs confirming that indeed there were white bottled brush trees, which were substantially grown up and on which the Plaintiff anchored the signage stating as follows;
- [“This Plot is not on sale – by owner”]
175. It is not lost on this court that the 2nd Defendant himself who testified as DW2; also proceeded to and tendered before the court various photographs, which include, inter-alia, the same white bottle brush tree, which the Plaintiff had adverted to and confirmed to have planted on the suit property.
176. For coherence, the 2nd Defendant (DW2) stated as hereunder;
- “Shown to the 2nd Defendant (his bundle of document) and the 2nd Defendant admits that there are white bottle brush trees at the boundary of the plot. I am the one who filed the bundle of document herein.....
- Referred to the Plaintiff’s bundle of documents and the witness state that there is a tree which is evident. The tree shown in the Plaintiff’s bundle is the same as the one in my bundle of documents”
177. Remarkably, DW2 is now confirming the existence of white bottle brush trees which are substantially grown up and which by any stretch of imagination, could not have been grown in the year 2014, taking into account their sizes and height.
178. Nevertheless, this Honourable court is at liberty to take Judicial notice of the size of the white bottle brush tree which are contained in Exhibits P4, P5, P6 and P8, respectively; which show that indeed the white bottle brush Trees, which the Plaintiff intimated to the court to have grown, were truly grown much earlier and most probably at the onset of the Plaintiff occupation of the suit property.
179. Additionally, it is worthy to underscore that the evidence by the Plaintiff that he (Plaintiff) is the one who grew the white bottle brush tree was neither controverted, impugned nor disputed.
180. The third aspect that is also worthy of consideration with a view to discerning whether the Plaintiff was in occupation of the suit property earlier than the time when the 2nd Defendant purported to enter thereof, relates to the testimony of PW3.
181. Instructively, PW3 testified that same was employed as a caretaker in respect of L.R No. 13330/262, which is a Plot neighboring the suit property. Furthermore, PW3 added that the owner of L.R No. 13330/262 had brought and installed a container on the neighboring Plot and that the container was sitting close to the boundary with the suit Property.
182. It was the further testimony of PW3 that same encountered the Plaintiff herein on or about the year 2012; and upon the encounter with the Plaintiff, the Plaintiff instructed him (PW3) to be watching over the suit Property.
183. Notably, PW3 averred that henceforth from the year 2012; he watched over the suit property and that it is him who informed/ alerted the Plaintiff when some Third Parties (read strangers) went on to the suit property on the 2nd of September 2014).



184. On the other hand, there is also the evidence by PW3, that when he informed the Plaintiff of the trespass onto the suit property by Third Parties (strangers), the Plaintiff indeed proceeded to the suit property and found the trespassers. In any event, the witness added that when the Plaintiff endeavored to enquire from the trespassers the basis on their entry onto the property, the trespassers ran away. Suffice to point out that there indeed evidence of a Person running away from the suit property in terms of the Photograph taken on the 2nd September 2014.
185. Suffice it to point out that the evidence by PW3, who resides in the neighborhood of the Locus in quo, was similarly never impeached, impugned and/or controverted.
186. Finally, the other critical perspective that also goes along to vindicate the fact that the Plaintiff had been in occupation and possession of the suit property; flows from the testimony of Ms. Njeri Kariuki, advocate. For good measure, same testified as DW3.
187. At this juncture, it is important to reproduce the critical aspect of the Evidence of the said witness whilst under cross examination by Learned counsel for the Plaintiff.
188. For ease of reference and brevity, the salient aspects are reproduced as hereunder;
- “I was an advocate for the 1st Defendant alongside Mr. Kimani Kahiru advocate, now deceased. I wish to state that it was the role of Mr. Kimani Kahiru, advocate to ascertain the status of the suit land. It was Mr. Kimani Kahiru, advocate who was to ascertain the true owners of the various plots”
189. Furthermore, Ms. Njeri Kariuki Advocate proceeded and testified as hereunder;
- “I have just seen the statement of Mr. Kimani Kahiru advocate. I don’t agree with the statement of Mr. Kimani Kahiru advocate. However, I cannot confirm the contents of what Mr. Kimani Kahiru has said”
190. It is imperative to recall that Mr. Kimani Kahiro advocate (now deceased) recorded a witness statement and confirmed that the Plaintiff herein was in possession of the suit property. Furthermore, the statement of Mr. Kimani Kahiro, advocate, which was adopted pursuant to the provisions to Section 33 of the [Evidence Act](#), vindicated that the Plaintiff had been in occupation from the year 1995.
191. On the other hand, Ms. Njeri Kariuki Advocate; attest to the fact that whereas both herself and Mr. Kimani Kahiro, advocate (now deceased), acted together on behalf of the 1st Defendant herein in matters pertaining to L.R No. 13330, it was however Mr. Kimani Kahiro, Advocate, [now Deceased], who was charged with the responsibility of ascertaining the occupation and possession of the various Plots and in particular the persons in occupation thereof.
192. Taking into account the role that was played by Mr. Kimani Kahiro advocate, vis -a viz the evidence tendered by Ms. Njeri Kariuki, it is evident that the position depicted in the witness statement of Mr. Kimani Kahiro advocate represents the true and correct picture as pertains to occupation and possession of the suit property.
193. Contrasting the testimony of DW3 (Ms. Njeri Kariuki Advocate) and the witness statement of Mr. Kimani Kahiro, advocate, (now deceased), this Honourable court is inclined to believe and does hereby believe the witness statement of Mr. Kimani Kahiro, advocate (now deceased).
194. From the various perspectives, which have been highlighted and amplified herein before, this court comes to the conclusion that the Plaintiff has tendered and placed before the court cogent, consistent



and credible evidence to vindicate the fact of his occupation and possession of the suit Property from the year 1995.

195. Conversely, the 1st and 2nd Defendants have failed to either place before the court plausible and cogent evidence to the contrary. Furthermore, it is instructive to recall that neither the 1st nor the 2nd Defendant was able to controvert the evidence that was brought forth by the Plaintiff and his witnesses.
196. In a nutshell, I come to the conclusion that the Plaintiff herein has been able to discharge the burden of proof showing that same has been in occupation of the suit property from the year 1995.

Issue Number 2

If the answer to number (i) above, is in the affirmative; whether such occupation/possession was Adverse/Hostile to the title of the 1st Defendant.

197. Having found and held that the Plaintiff has ably demonstrated that same has been in occupation and possession of the suit property from the year 1995; what now remains to be addressed relates to the circumstances culminating to his entry and occupation of the suit property and whether such occupation was hostile to the title of the 1st Defendant.
198. To start with, PW2; namely, Jane Nyiha, testified that same bought a Plot from Thome Farmers No. 5 Limited; and thereafter procured share number 1225. Furthermore, the said witness testified that the share which same acquired in Thome Farmers No. 5 Limited was registered in the name of the Plaintiff herein, who is her (PW2) son.
199. Other than the foregoing, PW2 further testified that upon purchase of the Plot, which ultimately morphed into the suit property, same entered upon and took possession thereof. In any event, the witness added that same cultivated the Plot in question up to and including the year 1995.
200. It was the further testimony by PW2 that on or about the year 1995, same handed over the Plot to the Plaintiff, who thereafter entered upon and took possession of the Plot in question, namely, the suit property.
201. On the other hand, the Plaintiff testified that from the year 1995; same has remained in occupation and possession of the suit property to date. Further and in any event, this court has since found and held that the Plaintiff has demonstrated his occupation of the suit property.
202. Other than the position taken by the Plaintiff, the 1st Defendant herein took the position that the mother title, namely, L.R No 13330, which was subsequently sub-divided, culminating into inter-alia the suit property, had never been owned by or registered in the name of Thome Farmers No. 5 Limited or at all.
203. Perhaps, it is appropriate to re-visit the Evidence tendered by Dr. Jonathan Ciano, who testified as DW1. For good measure, same testified as hereunder;

“ the 1st Defendant did not issue any share certificate over the suit property to the Plaintiff. I wish to add that Thome Farmers No. 5 Ltd and the 1st Defendant are different”.
204. If indeed, Thome Farmers No. 5 Limited who sold the Plot, [now the suit property] to the Plaintiff through PW2, is separate and different from the 1st Defendant herein; then it appears that Thome Farmers No. 5 Limited, dealt with the property belonging to the 1st Defendant, albeit without the 1st Defendant’s consent, permission and/or authority.



205. Additionally, it then means that Thome Farmers no. 5 Limited, was a trespasser on the Property belonging to the 1st Defendant; and proceeded to deal therewith without the 1st Defendant taking appropriate action against her or at all.
206. Arising from the foregoing, it would then mean that Thome Farmers No. 5 Limited; who sold the Plot in question to the Plaintiff, albeit through PW2 were trespassers and by extension vested in the Plaintiff herein rights attaching to and flowing from such Trespass.
207. To this end, the Plaintiff herein, who entered upon and remained in occupation arising from the sale of the suit property by (sic) Thome Farmers No. 5 Limited; then acquires and can legitimately stake a claim founded on adverse Possession.
208. To vindicate the foregoing exposition of the law, it suffices to adopt and reiterate the ratio decidendi in the case of Benson Mukuwa Wachira versus Assumption Sisters of Nairobi Registered Trustees [2016] eKLR, where the Court of Appeal stated and held thus;

“That is why the common law principle holds true that where one trespasser removes another trespasser who is in adverse possession to the title of the owner and continues to occupy the land, the period of adverse possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own (see *Amos Weru Murigu v. Murata Wangari Kambi & Another* (supra)). It is important to point out that in adverse possession, it is the knowledge by the owner of the land that there is a trespasser on his land that counts. There does not have to be a meeting of the minds, that is to say, that the owner knows of the trespasser and the trespasser knows of the owner. As long as the owner knows that there is a trespasser on his land and the owner does not assert his title or eject the trespasser, time in adverse possession will run. But knowledge that the owner knows of the trespasser on the land must be strictly proved. It is not enough for the trespasser to speculate that the owner must have known that he was on the land without showing clearly that the owner knew or could not in the circumstances of the case be ignorant about it. If there is evidence that the trespasser occupied and carried activities and/or developments on the land claimed which the world could see and it is shown, for instance, that the owner lives near the land claimed or visits the area where it is located, the owner cannot be allowed in law to feign ignorance that he does not know of the trespass.

209. Secondly, the other critical issue that is worthy of discussion relates to whether the Plaintiff's entry onto and possession of the suit property was procured by force or otherwise. In this respect, it is worthy to revisit yet again the testimony of DW1 and where same stated as hereunder whilst under cross examination by counsel for the Plaintiff;

“I don't know whether the Plaintiff used force to enter the land”

210. To the contrary, the Plaintiff's evidence was consistent and to the effect that the Plot, now comprising of the suit property, was bought by PW2, albeit in the name of the Plaintiff and that ultimately PW2 handed over the suit property unto him.
211. Essentially, what is discernable from the evidence by the Plaintiff is to the effect that his entry upon, occupation and possession of the suit property has been without any force or at all.
212. Additionally, the other aspects that also merits consideration is whether the Plaintiff's occupation and possession of the suit property has been with consent and permission of the 1st Defendant, who was hitherto the proprietor of the suit property.



213. To ascertain whether or not the occupation and possession of the Plaintiff was with the consent and permission of the 1st Defendant or otherwise, it is again instructive to take cognizance of the evidence of DW1.

214. Instructively, DW1 stated as hereunder whilst under further cross examination by Learned counsel for the Plaintiff;

“If the Plaintiff is on the suit property, I say he is there without the permission of the 1st Defendant”

215. Arising from the foregoing analysis, what becomes apparent is that the occupation and possession of the suit property by the Plaintiff has been free, open, continuous and uninterrupted for more than 12 years, by the time the 1st Defendant purported to sell and transfer the suit property to and in favor of the 2nd Defendant.

216. To my mind, the Plaintiff has been able to establish and satisfy the requisite ingredients that underpin a claim for adverse Possession. In this respect, it is appropriate to cite and reiterate the dictum in the case of Gabriel Mbui versus Mukindia Maranya [1993] eKLR, where the court held as hereunder;

While this definition is a fair starting point, from a consideration of the many cases decided, it is possible to define “adverse possession” more fully, as the nonpermissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it.

217. Additionally, the requisite ingredients that anchor adverse Possession were also elaborated upon and amplified by the Court of Appeal in the case of Mtana Lewa vs Kahindi Nala Mwangandi [2015] eKLR the Court of Appeal summed up what adverse possession entails adverse possession entails:

“... Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner...”

218. In a nutshell, I find and hold that the Plaintiff herein has established and demonstrated that his occupation and possession was indeed hostile to the title of the 1st Defendant herein and thus the 1st Defendant’s title to and interests over the suit property stood extinguished upon lapse of the statutory 12-year period adverted to and prescribed vide the provisions of Section 7, 13 and 17 of the [Limitation of Actions Act](#), Chapter 22, Laws of Kenya.

219. Before departing from the issue herein, it is appropriate to re-visit the dictum in the decision of Kweyu versus Omuto (1990)eKLR, where the court stated thus;

“By adverse possession is meant to possession which hostile, under a claim or color of title, actual, open, uninterrupted, notorious, conclusive and continuous. When such possession



is continued for the requisite period of 12 years, it confers and indefeasible title upon the possessor”

220. Suffice it to point out that the occupation and possession of the suit property by the Plaintiff herein fits within the parameters that were delineated by the Court of Appeal in terms of the excerpts quoted and alluded to in the preceding paragraphs.

Issue Number 3

Whether the 2nd Defendant acquired Lawful and Legitimate title to the suit property or otherwise.

221. It was the 2nd Defendant’s testimony and by extension position; that same entered into and executed an agreement for sale over and in respect of the suit property with the 1st Defendant. Furthermore, the 2nd Defendant testified that the sale agreement was entered into and executed in the year 2009, whereby the 1st Defendant sold to and thereafter transferred in favor of the 2nd Defendant the suit property herein.
222. Even though the 2nd Defendant adverted to and contended that same entered into a sale agreement with the 1st Defendant relating to and concerning the suit property in the year 2009, the 2nd Defendant however, admitted and acknowledged that the sale agreement which same tendered and produced before the court did not bear/contain the “date and the month” when same was (sic) entered into or at all.
223. On the other hand, the 2nd Defendant herein also stated that even though the sale agreement was entered into on some undisclosed date and month in the year 2009; the impugned sale agreement was utilized to facilitate the transfer and registration of the suit property in the year 2013.
224. Additionally, even though the 2nd Defendant, contended to have paid the requisite consideration/ purchase price in respect of the suit property, it is not lost on the court that same did not tender and/ or produce before the court any evidence to denote payment of the consideration.
225. Notwithstanding the foregoing, the curious issue that caught the eye of the court was that the suit property was allegedly transferred and registered in the name of the 2nd Defendant on the 20th August 2013; yet the agreement which anchored the purported transfer was submitted for assessment of stamp duty and was stamped sometime on the 21st August 2014.
226. Evidently, the purported Stamping in the year 2014, was quiet clearly, being done long after the impugned transfer and registration of the suit property in favor of the 2nd Defendant.
227. When the issue pertaining to the discrepancy between the date of transfer and registration of the suit property in the name of the 2nd Defendant vis-a -viz date of the payment of the stamp duty was put to Ms. Njeri Kariuki Advocate, [who was the transaction advocate] , same responded as hereunder;
- “ There was a transfer in respect of the property. the transfer was in 2014. The agreement for sale is stamped in the year 2014. I don’t have the transfer instrument before the court. The certificate of title shows that the transfer was undertaken on the 20th August 2013. There appears to be a discrepancy”
228. To my mind, the anomalies which have been acknowledged and adverted to by Ms. Njeri Kariuki advocate (DW3), vitiate the validity and propriety of the transfer and registration of the suit property in the name of the 2nd Defendant.



229. Consequently and in my humble view, if the determination of whether or not the 2nd Defendant acquired valid title was to be anchored on the process utilized in the acquisition of Certificate of title; then my answer would obviously be that the impugned Certificate of title was acquired contrary to and in violation of the provisions of Section 26 (1) (b) of the *Land Registration Act*, [2012].
230. Be that as it may, I am alive to the fact that what is before the court is a claim anchored on adverse possession. Consequently, I beg to address the question of whether the 1st Defendant could effectively transfer to and in favor of the 2nd Defendant any rights and/or interest over the suit property, long after her (1st Defendant's) right thereto stood extinguished.
231. Without belaboring the point, the answer to the issue alluded to in the preceding paragraph is obtainable in the holding of the Court of Appeal in the case of Gabriel Mbui versus Mukindia Maranya [1993] eKLR, where the court held thus;
- “It is self-evident from the enactments, that adverse possession extinguishes the title of the dispossessed unregistered owner, while by virtue of adverse possession a registered owner becomes a bare trustee for the stranger in occupation. Consequently, in either case, if the stranger has possession does not transfer title to the stranger. It does not give the intruder any title, but prevents the owner from asserting his title, and forms a basis for applying to have the title registered in his name. That means that by itself twelve years occupation does not make an intruder the owner of the land; the owner can no longer sue the occupier and the owner's title to land is extinguished (if unregistered) or is held by him as the legal owner but for the occupier as the cestui que trust whose legal ownership ripens only upon registration after a court order in that regard after determination of the claim and any other question on application by any person Interested.”
232. Similarly, the position that change of ownership of land which is subject to adverse possession/prescription, does not defeat the accrued rights of the adverse possessor was also elaborated upon in the case of Njuguna Ndatho v Masai Itumo & 2 Others [2002]eKLR.
233. Invariably, my answer to issue number three [3] is to the effect that the 2nd Defendant neither acquired nor procured any valid title to the suit property or at all, insofar as the 1st Defendant's rights over the suit property stood extinguished long before the impugned transaction in favor of the 2nd Defendant.

Issue Number 4

What Reliefs, if any, ought to be granted.

234. The Plaintiff herein sought for a plethora of reliefs touching on and concerning the suit property. In particular, the Plaintiff sought a declaration to the effect that the 1st Defendant's title to and in respect of the suit property stood extinguished long before the impugned transaction in favor of the 2nd Defendant.
235. Notably, whilst discussing issue number three [3] herein before, this court has since found and held that the 1st Defendant's title was extinguished by effluxion of time and thus the 1st Defendant ceased to hold any legitimate rights to and in respect of the suit property.
236. To the extent that the 1st Defendant was divested of lawful rights and/or interests over the suit property, same therefore had no title capable of being conveyed to and in favor of the 2nd Defendant, either at the foot of the impugned sale agreement or at all. Suffice it to invoke and apply the Doctrine of Nemo dat Quod non-habet.



237. From the foregoing exposition, what became apparent is that the Plaintiff herein has been able to establish, demonstrate and proved his claim to and in respect of the suit property.
238. Consequently and in the premises, I come to the conclusion that the Plaintiff is indeed entitled to the various reliefs enumerated at the foot of the Originating Summons dated the 4th September 2014.
239. Nevertheless, before departing from the issue herein, there is one startling matter that merits mention and a short address. For coherence, this relates to the testimony that was tendered before the court by DW4, namely, Ronald Tom Mbiru.
240. Instructively, the named witness informed the Honourable court that same is a Licensed surveyor and was thus authorized and mandated to undertake survey works, inter-alia, fixation of boundary beacons and preparation of the resultant Beacon Certificate, arising from survey works.
241. Furthermore, the named witness thereafter intimated to the court that pursuant to the instructions given unto him [Surveyor], by the 2nd Defendant, same proceeded to the said property and undertook the requisite survey works and thereafter signed a Beacon Certificate which was produced before the court.
242. Nevertheless, while under cross-examination by the court, the witness adopted a diametrically opposed position and at this juncture, it is appropriate to reproduce the salient aspects of the testimony.
243. Same are reproduced as hereunder;-

“I am a surveyor assistant. However, I do not have any document to confirm that I am a surveyor assistant. A surveyor assistant must be a holder of a certificate in lands surveying. I have not produced and/or availed any copy of such certificate before the court.

In 2014, I was a surveyor assistant. I now wish to state that in 2014, I was a student in college. I signed the beacon certificate before the court. I do confirm that the beacon certificate ought to have been signed by a surveyor. I was not authorized to sign /execute the beacon certificate which I have produced before the court.”

244. From the excerpt which have been reproduced in the preceding paragraph, it is apparent that DW4 consciously and deliberately chose to disseminate before the Honourable court evidence that same knew to be false.
245. Clearly, the witness herein was committing perjury, without blinking an eye.
246. In my humble view, time has come when courts of law must put their feet down to eliminate false and fraudulent witnesses, who operate as hired guns and whose mandate is to defraud/ defile the cause of Justice, without due care of the consequences attendant to such conduct.
247. As pertains to the foregoing exposition of the law, it suffices to adopt and reiterate the pronouncement by the Supreme Court of Kenya in the case of Raila Amollo Odinga and others Versus Ruto and others, (2022) [Judgment] where the court held thus;
- (d) This court cannot countenance this type of conduct on the part of counsel who are officers of the court. Though it is elementary learning, it bears repeating that affidavits filed in court must deal only with facts which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like the one before us, because they run the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed. We must remind counsel



who appear before this court, or indeed before any other court, or tribunal of the provisions of Sections 113 and 114 of the Penal Code, that swearing to falsehoods is a criminal offence, and too that it is an offence to present misleading or fabricated evidence in any judicial proceedings.

- (e) Section 114 of the Penal Code states that:“Any person who swears falsely or makes a false affirmation or declaration before any person authorised to administer an oath or a declaration upon a matter of public concern, and at such circumstances that the false swearing or declaration if committed in a judicial proceeding would have amounted to perjury, is guilty of a misdemeanour.”
248. Arising from the foregoing, what becomes clear is that no witness is at liberty to appear before the court and to disseminate evidence and/or information that is knowingly false and misleading. In any event, where the court comes to the conclusion that a witness is guilty of dissemination of false evidence, such a witness must not be left to go unpunished.
249. Consequently and in the premises, I come to the conclusion that DW4, namely, Ronald Tom Mbiru merits sanction and appropriate punishment by being referred to the Institute of surveyors of Kenya (ISK), who should interrogate whether the conduct thereof constitutes gross professional misconduct and if so, to take appropriate action inter-alia, suspension of same from the profession for such duration as the Institute may deem fit.
250. On the other hand, given the criminal aspect of the testimony, which anchors on perjury and taking into account the provisions of Section 108, 113 and 114 of the Penal Code, Chapter 63 Laws of Kenya, this is also an appropriate matter that merits investigation by the Directorate of Criminal Investigations and thereafter appropriate action by the Director of Public Prosecution in accordance with the Provisions of Article 157 of *the Constitution*, 2010.

Final Disposition:

251. Having considered thematic issues enumerated in the body of the Judgement, and upon application of the relevant law, it is evident that the Plaintiff herein has been able to establish, demonstrate and prove the reliefs sought at the foot of the Originating Summons dated the 4th of September, 2014.
252. In the premises, Judgment be and is hereby entered in favor of the Plaintiff in the following terms;-
- i. Declaration be and is hereby issued that the Applicant is entitled as the lawful proprietor of the property known as L.R No. 13330/260 (I.R No. 148466), by adverse possession.
 - ii. Declaration be and is hereby issued that any interests or title claimed by the 1st and 2nd Respondents over the proprietorship of the property known as L.R No. 13330/260 (I.R No. 148466) has been extinguished and at any rate had been extinguished as of the purported registration of the 2nd Defendant thereof.
 - iii. The Plaintiff herein, namely, (JOHN HARRISON KINYANJUI) be and is hereby declared to have acquired title by adverse possession to the suit property known as L.R No. 13330/260 (I.R No. 148466).
 - iv. That the Registration in favor of FERDINAND MUNYIRI KAHARUKA; as proprietor of L.R No. 13330/260 (I.R No. 148466) and/or any other persons deriving title from Joreth Limited based on the said property be and is hereby canceled forthwith and the 3rd Defendant, Chief Land Registrar do rectify the parcel register and all records held by him in respect of L.R No. 13330/260 (I.R No. 148466), and to enter the name of the Plaintiff, JOHN HARRISON



KINYANJUI, as registered proprietor of the said property in lieu of the 2nd Defendant or any person deriving title from the 1st and 2nd Defendants.

- v. Permanent injunction be and is hereby issued, restraining the 1st and 2nd Defendants either by themselves, their agents and/or servants or otherwise howsoever from entering, trespassing, remaining upon, occupying, leasing, licensing, selling, letting, partitioning, constructing upon, charging, carrying on any form of business, or otherwise howsoever dealing in the parcel L.R No. 13330/260 (I.R No. 148466) in THOME FARMERS NO. 5, and in any purported succeeding and derivative title thereto.
- vi. The witness, namely, Ronald Tom Mbiru, be and is hereby referred to the Institute of Surveyors of Kenya (ISK) for suitable interrogation in so far as same purported to have been a Licensed surveyor in the year 2014; and yet same subsequently admitted that he was a student in college.
- vii. The Institute of Surveyor of Kenya [ISK] shall be at liberty to mete out appropriate sanction or punishment as may be deemed just, expedient and mete in accordance with the provisions of the relevant Statute.
- viii. The aspect of perjury by the same witness, namely, Ronald Tom Mbiru shall be and is hereby referred to the Directorate of Criminal Investigations[DCI] for appropriate action and if necessary prosecution, taking into account the provisions of Sections 108, 113 and 114 of the Penal Code, Chapter 63 Laws of Kenya.
- ix. Owing to clauses (vi), (vii) and (viii) hereof, the Decree arising from this Judgment shall be served upon the Chief Executive Officer, Institute of Surveyors of Kenya [ISK] and the Directorate of Criminal Investigations, respectively, for further action.
- x. Costs of suit be and are hereby awarded to the Plaintiff and same shall be borne by the 1st and 2nd Defendants, either jointly and/or severally.

253. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER 2023.

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Ccourt Aassistant

Mr. Maina Makome for the Plaintiff.

Ms. Anami h/b for Mrs Wangui Koech the 1st Defendant.

Mr. Peter Gachuhi for the 2nd Defendant.

N/A for the 3rd Defendant

