



Muchuku ((Suing as the Legal Representative of the Estate of Paul Muchuku Muriuki - Deceased) v Joreth Limited & 2 others (Civil Case 523(O.S) (ELC) of 2014) [2022] KEELC 13618 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13618 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL CASE 523(O.S) (ELC) OF 2014

JO MBOYA, J

OCTOBER 19, 2022

IN THE MATTER OF CLAIM TO TITLE TO LAND BY ADVERSE POSSESSION

OVER

HALF SHARE IN L.R. NO. 13330/192 (ALSO IDENTIFIED AS

PLOT NO.391 IN THOME FARMERS NO.5 LIMITED

BETWEEN

ALICE MUTHONI MUCHUKU PLAINTIFF

(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PAUL MUCHUKU MURIUKI - DECEASED

AND

JORETH LIMITED 1ST DEFENDANT

GEORGE MURIITHI GITHINJI 2ND DEFENDANT

PURITY WANJIRU MURIITHI 3RD DEFENDANT

JUDGMENT

Background and Introduction

1. Vide amended originating summons application dated the March 2, 2021, the plaintiff herein has approached the honourable court seeking for the following reliefs;
 - i. That the estate of Paul Muchuku Muriuki, now deceased be declared to have acquired title by adverse possession to the suit premises identified as half share of plot No 391 in Thome Farmers No 5 Limited and also known as LR No 13330/192.



- ii. That the registration of Joreth Limited, George Muriithi Githinji and Purity Wanjiru Muriithi, as proprietors of LR No 13330/192 and or any other persons deriving title from Joreth Limited based on half share of the land previously identified as half share of plot No 391 in Thome Farmers No 5 Limited and now known as LR No 13330/192 be cancelled forthwith and the Chief Land Registrar of titles do rectify the register to enter the name of the plaintiff as co-proprietor of the said property half share of LR No 13330/192 in place of the 2nd and 3rd defendants or anyone deriving title from the defendants.
 - iii. The costs of these proceedings be borne by the defendants.
2. The initial originating summons was premised on the various grounds which were enumerated and elaborated in the body thereof and same was further supported by the affidavit of Paul Muchuku Muriuki sworn on the May 2, 2014 and to which the deponent annexed various, albeit numerous documents in support thereof.
 3. Subsequently, Paul Muchuku Muriuki passed on and an application was made for purposes of substitution of the deceased. For clarity, the application for substitution was allowed vide orders made on the February 22, 2021.
 4. Following the allowance of the application for substitution, the original plaintiff, that is, Paul Muchuku Muriuki, now deceased, was replaced by one Alice Muthoni Muchuku, who is now the plaintiff.
 5. Suffice it to point out that arising from the substitution of the deceased plaintiff, an amended originating summons was duly filed and same is supported by an affidavit sworn by Alice Muthoni Muchuku. For completeness, the supporting affidavit is sworn on the March 2, 2021.
 6. Nevertheless, upon the filing of the originating summons, same was duly served upon the respondents, who thereafter proceeded to and filed their responses to the originating summons. In this regard, the first respondent filed a replying affidavit sworn by one Peter Mungai and same was sworn on the November 14, 2016.
 7. On the other hand, the 2nd and 3rd respondents responded *vide* a replying affidavit sworn by the 2nd respondent on his own behalf and on behalf of the 3rd respondent.
 8. Similarly, it is imperative to observe that other than the affidavits filed by the parties, the parties also filed written statements, as well as bundle of documents.
 9. Be that as it may, upon the close of pleadings, the subject matter was listed for direction and thereafter the parties agreed to have the matter disposed of by way of *viva voce* evidence.

Evidence By The Parties:

a. Plaintiff's case:

10. The plaintiff's case gravitates and revolves around the evidence of Alice Muthoni Muchuku, who testified as PW1.
11. The witness herein testified that one Paul Muchuku Muriuki, now deceased, was her father and that upon the death of the deceased, same (the witness) was constituted as the legal administratrix of the estate of the deceased *vide* grant of letters of administration ad litem.



12. Upon being issued with the grant of letters of administration, the witness contended that same was thereafter substituted as the plaintiff *in lieu* of the original plaintiff. In this regard, the witness stated that same therefore had the requisite capacity to testify for and on behalf of the deceased.
13. Having laid the basis/foundation for her testimony, the witness thereafter identified the supporting affidavit sworn by Paul Muchuku Muriuki on the May 2, 2014. In this regard, the deponent chose to adopt and rely on the contents of the said supporting affidavit.
14. Suffice it to point out that vide the affidavit sworn on the May 2, 2014, the deceased had contended that same was the proprietor of half share of plot No 391 in the entity known as Thome Farmers No 5 Ltd, having been so registered on the August 23, 2001. In this regard, the witness tendered and adduced in evidence a copy of the share certificate and ballot paper respectively.
15. Further, the deceased had also deposed to the fact that upon his registration in the year 2001, same had acquired the suit plot from Thome Farmers No 5 Ltd in the year 1974 and thereafter same entered upon and took possession of the suit property.
16. It was further contended that in the year 2001, Muya Thabai Self-help Group, who had hitherto held half share in plot number 391, sold their half share to David Wokabi Muriithi and his wife Philomena Wairimu Muiruri. In this regard, it was stated and contended that the deceased was obliged to surrender the share certificate which had hitherto been issued in 1974 and a new certificate was issued in the names of the deceased and David Wokabi Muriithi and Philomena Wairimu Muiruri, as the proprietors of plot number 391.
17. Other than the foregoing, it was also stated that upon the acquisition of the half share in respect of plot No 391, the deceased entered upon and took possession of the suit plot in the year 1975 and same remained in occupation without selling his said portion to anyone.
18. Be that as it may, the witness further added that after Muya Thabai Self-Help Group who sold their half share to David Wokabi Muriithi and his wife, same proceeded to and constructed their residential home on the half portion. However, the half portion belonging to the deceased remained undeveloped and the deceased therefore allowed David Wokabi Muriithi and his wife to cultivate his half portion.
19. Nevertheless, the witness added that in February 2014, the deceased made arrangements and decided to construct some structures on his half portion. In this regard, it was stated that the deceased indeed erected a semi-permanent site house, dug a pit latrine and re-fenced the portion.
20. In addition, the witness added that however before the deceased could proceed with further construction, some people whom the deceased did not know came onto the suit plot and demolished the structures that had been constructed by the deceased.
21. Further, the witness has stated that following the demolition of the structures which had hitherto been constructed by the deceased, the deceased lodged a complaint with the police with a view to carrying out investigations to discern the persons who are culpable for the destruction/demolitions of the structures which were build on the suit plot.
22. Notwithstanding the foregoing, the witness added that the deceased bought, purchased and acquired the suit plot from Thome Farmers No 5 Ltd and thereafter same entered upon, took possession and remained thereon without disturbance or interruptions.
23. Other than the foregoing, the witness testified that after the deceased lodged a complaint with the police and upon making further enquiries, it transpired that the persons who had demolished the structures build by the deceased were actually the 2nd and 3rd defendants herein.



24. At any rate, the witness added that it also transpired that the first defendant herein was purporting to have sold the suit plot or the portion thereof in dispute to the 2nd and 3rd defendant.
25. Other than the foregoing, the witness added that at no point in time did the 1st defendant alert or inform the deceased about the sale of the suit plot, which belonged to the deceased and therefore ought not to have been sold.
26. On the other hand, the witness testified that the deceased having acquired the suit property from Thome Farmers No 5 Ltd, and having been on the suit property for more than 40 years, the 1st defendant's title in respect thereof, if any, therefore stood extinguished and the 1st defendant had no lawful title capable of being sold to and transferred in favor of the 2nd and 3rd defendants.
27. Other than the foregoing, the witness adopted the contents of her affidavit of March 2, 2021 as well as the contents of the written statement dated the March 2, 2021. For clarity, the contents of the supporting affidavit and the witness statement were adopted as the further evidence of the witness
28. On the other hand, the witness herein also referred to the supporting affidavit sworn by Paul Muchuku Muriuki on the May 2, 2014 and the further affidavit sworn on the December 15, 2016; and the contents of both were duly admitted and constituted as further evidence in chief
29. Further, the witness alluded to the various documents which were attached to the supporting affidavit sworn on the May 2, 2014 and sought to produce same as exhibits.
30. For coherence, the said documents were admitted, produced and marked as exhibits p1 to p8 respectively.
31. On cross examination by learned counsel for the 1st defendant, the witness testified that the deceased bought and acquired the suit property in the year 1974. In this regard, the witness added that the deceased was thereafter issued with a share certificate, to confirm the purchase/acquisition of the suit property.
32. Be that as it may, the witness stated that the share certificate, which was issued to and in favor of the deceased was later on surrendered to Thome Farmers No 5 Ltd. In this regard, the witness clarified that same did not have a copy of the share certificate.
33. Other than the foregoing, the witness also stated that the land was purchased from Thome Farmers No 5 Ltd. However, the witness added that same did not have the various receipts to confirm the purchase thereof.
34. It was the further testimony of the witness that the suit property or better still the portion that belonged to the deceased, was acquired through a self-help group and thereafter the deceased paid the requisite survey fees, culminating into the designated portions being identified and pointed out.
35. In further answer to a question in cross examination, the witness pointed out that the suit plot is currently registered in the name of the 1st defendant, but the 2nd and 3rd defendants are also laying a claim to ownership of the suit property.
36. Nevertheless, the witness further added that indeed the suit property is currently, shown to be registered in the names of the 2nd and 3rd defendants.
37. On cross examination by learned counsel for the 2nd and 3rd defendants, the witness stated that same did not have any title to and in respect of the suit property. In this regard, the witness added that the same was laying a claim to the suit property on the basis of adverse possession.



38. Further, the witness stated that the certificate of title over and in respect of the suit property was issued on the April 6, 2011. Nevertheless, the witness pointed out that the suit property arose from a subdivision of LR No 13330, which was registered in the name of the 1st defendant.
39. On the other hand, the witness stated that same is claiming the land from Thome Farmers No 5 Ltd. However, the witness admitted that Thome Farmers No 5 Ltd has not been sued in respect of the subject matter.
40. Finally, the witness stated that the 2nd and 3rd defendants were issued with title documents in the year 2013 and that by the time of filing the suit neither the deceased nor the witness herein, had been on the suit property for 12 years, reckoned from when the title of the suit property was issued.
41. On re-examination, the witness stated that prior to the creation of the title in respect of the suit property, there existed another parcel of land, namely, LR No 1330, registered in the name of the 1st defendant.
42. Further the witness added that the suit property arose from the subdivision of the said LR No 1330, which previously belonged to and was registered in the name of the 1st defendant.
43. Other than the foregoing, the witness stated that though the land was bought from Thome Farmers No 5 Ltd, the deceased did not have a problem with Thome Farmers No 5 Ltd. Indeed, the witness added that the deceased was allowed vacant entry and took possession of the suit plot.
44. Other than the foregoing, the witness alluded to another suit, namely, Nairobi HCC No 6206 of 1992. However, the witness pointed out that same was not aware of the existence of the said suit at the time of filing of the subject matter.
45. Finally, the witness stated that the various documents, including the original share certificate which were issued to and in favor of the deceased were lost in the year 2007 and that the deceased indeed lodged a complaint/report with the police, pertaining to and concerning the loss of the various documents.
46. With the foregoing testimony, the plaintiff's case was closed.

b. 1st Defendant's Case:

47. The 1st defendant herein called one witness, namely, David Karanja Nderitu who testified as DW1.
48. The witness herein stated that same is a manager with the 1st defendant and that by virtue of being such manager, same was conversant with and knowledgeable of the facts pertaining to and concerning the subject matter.
49. Other than the foregoing, the witness testified that the suit property, namely, LR No 13330/192, was initially part and parcel of LR No 13330 belonging to and registered in the name of the 1st defendant.
50. Further, the witness testified that the original parcel of land, namely, LR 13330 was thereafter subdivided into various portions, *inter-alia* the suit property which was thereafter sold to the 2nd and 3rd defendants.
51. At any rate, the witness pointed out that neither the original parcel of land nor the suit property had hitherto been registered in the name of Thome Farmers No 5 or at all. In this regard, the witness added that Thome Farmers No 5 Ltd and the 1st defendant are separate and distinct legal entities.
52. In the premises, the witness added that on the basis of the distinction between Thome Farmers No 5 Ltd and the 1st defendant herein, the share certificate, fee receipts, survey receipts and receipts for



payment and acknowledgment of membership in Thome Farmers No 5 Ltd, which the plaintiff has alluded to, are therefore of no effect and consequence, as pertains to the suit property.

53. It was the further testimony of the witness that sometime in the year 1992, the 1st defendant herein filed a suit against various trespassers, who had entered upon and trespassed onto portions of LR No 13330 and the 1st defendant sought to evict the various trespassers.
54. Be that as it may, the witness added that the said suit, namely, Nairobi HCC No 6206 of 1992 was thereafter settled and compromised *vide* a consent entered into in the year 2002.
55. Pursuant to the consent, the witness has stated that the 1st defendant and the trespassers agreed that the trespassers would pay the sum of Kshs 200, 000/= only, each to the 1st defendant who would thereafter process and effect transfer of the designated portions of the original parcel of lands to the compliant trespassers.
56. Be that as it may, the witness added that even though the rest of the trespassers complied with the terms of the consent and paid what had been agreed upon, the plaintiff herein continued to trespass onto a part of the 1st defendant's land, albeit without lawful basis.
57. Other than the foregoing, the witness added that the remainder portion of the original property, were thereafter subdivided and sold. In this regard, the witness alluded to the sale of the suit property to and in favor of the 2nd and 3rd defendants.
58. At any rate, the witness added that after the subdivision of the original parcel of land culminating into creation of more than 600 sub-divisions, the 1st defendant remained in occupation and possession of the suit property and hence it cannot be said that the plaintiff/deceased was ever in occupation thereof.
59. Further, the witness also added that at the time of the sub-division of LR No 13330, culminating to *inter-alia*, the suit property, the deceased was not in possession of the suit property at all.
60. Other than the foregoing, the witness adopted the contents of the replying affidavit sworn on the November 14, 2016, as well as the contents of the written statement dated the November 15, 2021. For completeness, the contents of the two documents were admitted as further evidence on behalf of the witness.
61. Other than the foregoing, the witness referred to the bundle of documents attached to the supporting affidavit sworn on November 14, 2016 and sought to have same produced as defense exhibits.
62. In this regard, the said documents were produced and marked as exhibits d1 to d5, respectively.
63. On cross examination by learned counsel for the plaintiff, the witness pointed out that same is currently the manager of the 1st defendant and by virtue of being the manager, same is conversant with the facts of this matter.
64. Other than the foregoing, the witness also pointed out that prior to his employment as the manager with the 1st defendant, there was a manager by the name of Robertson Nderitu, whose statement same has adopted.
65. While still under cross examination, the witness pointed out that the original property, namely, LR No 13330, belonged to and was registered in the name of the 1st defendant. At any rate, the witness added that the original property belonged to and was registered in the name of the 1st defendant right from the year 1950's.



66. Further, that by the year 1974 LR No 13330 belonged to the 1st defendant and not Thome Farmers No 5 Ltd.
67. Other than the foregoing, the witness admitted that there was a transaction between the 1st defendant and Thome Farmers No 5 Ltd, whereby the 1st defendant had sought to sell the original property to Thome Farmers No 5 Ltd, but the transaction aborted or collapsed. In this regard, the witness pointed out that the impugned transaction did not go through.
68. On the other hand, the witness also stated that the sub-division of the original parcel of land was never done by the 1st defendant, but by Thome Farmers No 5 Ltd.
69. On re-examination, the witness maintained that though there was a transaction between the 1st defendant and Thome Farmers No 5 Ltd, that transaction did not go through or at all. In this regard, the witness clarified that the land remained the property of the 1st defendant.
70. Besides, the witness also added that at the time when the 1st defendant sold the property to the 2nd and 3rd defendant, the plaintiff herein was never in possession of the suit property.
71. Premised on the foregoing, the 1st defendant's case was closed.

c 2nd And 3rd Defendants' Case:

72. The 2nd and 3rd defendants' case revolves around the testimony of one George Muriithi Githinji. For clarity, the witness herein is the 2nd defendant.
73. The witness herein testified as DW2 and same stated that the 3rd defendant and himself entered into a land sale agreement over and in respect of the suit property. Further, the witness added that prior to and before entering into the land sale agreement, the 3rd defendant and himself carried out due diligence over and in respect of the suit property and authenticated that same was vacant and undeveloped.
74. Having entered into the land sale agreement, the witness added that the 1st defendant processed and thereafter effected the transfer and registration of the suit property to and in favor of the 3rd defendant and himself.
75. It was the further testimony of the witness that after the transfer and registration of the suit property in the name of the 3rd defendant and himself, the 3rd defendant and himself entered onto and took possession of the suit property. For the avoidance of doubt, the witness pointed out that the suit property was vacant and there was no evidence of third party claims thereof.
76. Other than the foregoing, the witness added that thereafter the 3rd defendant and himself engaged and retained an architect and engineer to advise on the intended construction of a residential house. In this regard, the witness stated that the 3rd defendant and himself indeed procured the advice of the architect and thereafter commenced the construction of the residential house.
77. Be that as it may, the witness also testified, that in March 2014, the 3rd defendant and himself commenced the construction of the residential house on the suit property. However, before same could proceed, the witness indicated that same received information that someone had deposited building materials on the suit property and upon receipt of the said information, same proceeded to the site and met a gentleman, namely, the original plaintiff, now deceased.
78. It was the further evidence of the witness that after the incident relating to the deposit of building materials by the original plaintiff on the suit property, a complaint was lodged at Kasarani police station



- and same was summoned to the said police station, whereupon both the original plaintiff and himself were told to avail evidence of their ownership of the suit property.
79. It was the further evidence of the witness, that same was able to produce and avail a copy of his certificate of title of the suit property, whereas the original plaintiff, could not produce any.
 80. Premised on the foregoing, the witness testified that thereafter the police allowed same to return to the suit property and to commence construction, which he did and that currently both the 3rd defendant and himself are occupying the suit property.
 81. Finally, the witness pointed out that at the time when the suit property was sold to the 3rd defendant and himself, same was vacant and there was no development, of whatsoever nature or at all.
 82. In this regard, the witness has stated that the allegation that there was a semi-permanent site house, pit latrine and fence, on the suit property, is misleading, erroneous and false.
 83. Other than the foregoing, the witness referred to a replying affidavit sworn on the December 9, 2016 as well as the witness statement dated the December 14, 2014. For clarity, the witness sought to adopt same as his further evidence in chief.
 84. Suffice it to point out that the replying affidavit and the contents of the witness statement dated the December 14, 2016, were indeed admitted and constituted as the further evidence of the witness.
 85. Other than the foregoing, the witness also referred to the list and bundle of documents dated the December 14, 2016 and same sought to adopt and rely on the said documents, as exhibits on behalf of the 3rd defendant and himself. For clarity, the documents were duly admitted as defense exhibits 6 to 12 respectively.
 86. On cross examination, by learned counsel for the plaintiff, the witness pointed out that prior to entering into the sale agreement with the 1st defendant, same proceeded to and carried out a physical search over the suit property and indeed confirmed that same was vacant.
 87. Further, the witness added that the suit property, currently is developed and that the 3rd defendant and himself are currently residing in the suit property.
 88. Other than the foregoing, the witness pointed out that prior to purchasing the suit property, same had previously visited the land in question and that during the various visits, there was no evidence of any third party claimant.
 89. At any rate, the witness added that same was also able to speak to one Philomena Wairimu Murithi, who was recorded as one of the owners of the half portion of the suit property.
 90. However, while under further cross examination, the witness retracted his previous evidence and stated that same did not speak to Philomena, during his visit to the property and as part of the physical search.
 91. On re-examination, the witness clarified that at the time same acquired the suit property, same did not know that the said suit property belonged to any third party.
 92. Further, the witness added that after he bought and acquired the title of the suit property, he became the owner thereof and that thereafter the 3rd defendant and himself constructed and developed a residential house/home on the suit property. In short, the witness reiterated that it is the 3rd defendant and himself who are currently in occupation and possession of the suit property.
 93. With the foregoing testimony, the 2nd and 3rd defendants' case was closed.



Submissions By The Parties:

a. Plaintiff's submission:

94. The plaintiff filed elaborate written submissions dated the July 12, 2022 and in respect of which the plaintiff identified four pertinent issues for consideration.
95. The first issue that was addressed by learned counsel for the plaintiff relates to the nexus between Thome Farmers No 5 Ltd and the 1st defendant. In this regard, counsel for the plaintiff submitted that the 1st defendant herein sold the original parcel of land namely, LR No 13330 to Thome Farmers No 5 Ltd and thereafter Thome Farmers No 5 Ltd took possession of the entire original parcel of land.
96. Further, counsel for the plaintiff placed emphasis on the affidavit of one Joseph Wambaa and contended that after the original parcel were sold to and in favor of Thome Farmers No 5 Ltd, Thome Farmers No 5 Ltd had the authority to alienate, sell and dispose of portions of the said property to various purchasers, including the original plaintiff, now deceased.
97. It was the further submissions of counsel for the plaintiff that arising out of the transaction between the 1st defendant and Thome Farmers No 5 Ltd, Thome Farmers No 5 Ltd thereafter had the authority and mandate over the original parcel of land.
98. On the other hand, counsel added that it is Thome Farmers No 5 Ltd that sold the suit plot, which is now comprised in the suit property, to the original plaintiff, now deceased.
99. The second issue that has been raised by counsel for the plaintiff relates to the fact that upon the purchase of the suit plot by the original plaintiff, now deceased, the original plaintiff entered upon, took possession and remained in occupation of the suit plot since the year 1974.
100. In the premises, counsel for the plaintiff has submitted that by the time the 1st defendant was purporting to sell and transfer the suit property to the 2nd and 3rd defendants, the 1st defendant's rights and interests over the suit property stood extinguished.
101. The third point raised by learned counsel for the plaintiff relates to whether or not the filing of the suit, namely, Nairobi HCC No 6206 of 1992, affected the plaintiff's rights to and claim over the suit property.
102. In this respect, counsel pointed out that the said suit did not touch on and or concern the plaintiff. For clarity, the learned counsel pointed out that the plaintiff and by extension, the original plaintiff, now deceased, were never parties to the said suit. Consequently, the said suit did not interrupt the running of time as against the plaintiff.
103. The fourth point that the plaintiff has ventilated relates to whether or not the 2nd and 3rd defendants are *bona fide* purchasers for value without any notice of defect in the title of the 1st defendant, in respect of the suit property.
104. In respect of the foregoing issue, counsel for the plaintiff has submitted that the 2nd and 3rd defendants had knowledge of the existence of a third party occupation over and in respect of the suit property, by the time same sought to buy and purchase the suit property.
105. At any rate, learned counsel for the plaintiff has added that the fact that the 2nd and 3rd defendants had a title to the half share of the suit property does not defeat the plaintiff's claim and or entitlement thereto on the basis of the doctrine of adverse possession.



106. In support of the foregoing submissions, the plaintiff's counsel has cited and relied on various decisions including *Peter Kamau Njau v Emanuel Charo Tinga* (2016)eKLR, *Njuguna Ndatbo v Itumo* (2002)eKLR, *Benjamin Kamau Murima & others v Gladys Njeri*, Court of Appeal civil appeal No 213 of 1996 Unreported) and *Patrick Mwangi Magu v Joreth Ltd* (2015)eKLR.

b. 1st Defendant's Submissions:

107. On her part, the 1st defendant has filed written submissions dated the September 22, 2022 and same has raised three pertinent issues for consideration.

108. Firstly, counsel for the 1st defendant has submitted that LR No 13330/39 which was the original parcel of land belonged to and was registered in the name of the 1st defendant. In this regard, counsel for the 1st defendant has added that by virtue of being the registered proprietor of the suit property, the 1st defendant was therefore at liberty to alienate, sale and dispose of portions thereof.

109. Further, learned counsel for the 1st defendant has submitted that Thome Farmers No 5 Ltd, which has variously been referred to by the plaintiff herein was never the owner of the original parcel of land and therefore could not by any chance, have sold or alienated any portion thereof to any person, the plaintiff not excepted.

110. The second issue that has been raised by learned counsel for the 1st defendant relates to whether the plaintiff herein was in actual occupation and possession of the suit property. In this regard, learned counsel for the 1st defendant has submitted that the plaintiff has failed to tender any credible evidence or at all that same was truly in occupation of the suit property, either as claimed or at all.

111. At any rate, counsel for the 1st defendant has added that in the absence of actual and physical possession, the plaintiff's claim as pertains to adverse possession becomes, premature, misconceived and legally untenable.

112. The third issue raised by learned counsel for the 1st defendant concerns whether the 1st and 2nd defendants were *bona fide* purchasers for value without notice. In this regard, counsel for the 1st defendant has submitted that at the time of transfer of the suit property to the 2nd and 3rd defendant, the 1st defendant had an apparent valid title.

113. In the premises, learned counsel for the 1st defendant has contended that the 2nd and 3rd defendants therefore became *bona fide* purchasers for value without any notice of any defect, whatsoever in the title of the 1st defendant.

114. In support of the foregoing submissions, learned counsel for the 1st defendant has cited and referred to various decisions, inter-alia, *Jandu v Kirplal & another* (1975) EA 225 *Kweyu v Omutut* and *Gabriel Mbui v Mukindia Maranya* 91993)eKLR, *Lawrence Mukiri v Attorney General & 4 others* (2013)eKLR and *Kinyanjui Kamau v Gorge Kamau* (2015)eKLR.

115. Premised on the forgoing, learned counsel for the 1st defendant has therefore sought to have the plaintiff's suit dismissed.

c. 2nd And 3rd defendants' submissions:

116. On behalf of the 2nd and 3rd defendants' written submissions were filed on the September 6, 2022. For clarity, learned counsel for the said 2nd and 3rd defendants addressed and amplified four issues for consideration .



117. First and foremost, learned counsel submitted that the 2nd and 3rd defendants have a lawful and legitimate title to and in respect of the suit property.
118. On the contrary, counsel pointed out that the plaintiff does not have any scintilla of claim to and in respect of the suit property.
119. Contrasting the claims of the plaintiff to the suit property as against the claims by the 2nd and 3rd defendants, learned counsel submitted that the 2nd and 3rd defendants rights to the suit property supersede those of the plaintiff.
120. In support of the foregoing submissions, counsel for the 2nd and 3rd defendants invited the honourable court to take cognizance of the provisions of sections 24, 25 and 26 of the [Land Registration Act, 2012](#).
121. The second issue that has been raised by counsel for the 2nd and 3rd defendants relates to the allegations that the transfer and registration of the suit property in favor of the 2nd and 3rd defendants was fraudulent. However, counsel has pointed out that despite making allegations pertaining to fraud, no credible evidence was tendered to prove allegations of fraud either as required by the law or at all.
122. In any event, counsel further added that the plaintiff's claim would essentially, lie as against Thome Farmers No 5 Ltd and not against the 2nd and 3rd defendants, the latter, who have no relationship with the plaintiff.
123. The third issue addressed by counsel for the 2nd and 3rd defendants concerns whether any evidence was tendered by the plaintiff to show possession and occupation of the suit property or at all.
124. According to counsel for the 2nd and 3rd defendants, in the absence of possession and occupation of the suit property, the plaintiff's claim predicated on adverse possession was therefore misconceived and legally untenable.
125. Nevertheless, counsel pointed out that the plaintiff herein was unable to prove evidence of occupation of the suit property by the deceased, save for the deposit of the building materials, which in any event, was an attempt to take possession long after the 2nd and 3rd defendants were in possession and control.
126. Lastly, the counsel for the 2nd and 3rd defendants has submitted that the 2nd and 3rd defendants were/ are bona fide purchasers for value without notice of any defect in the title of the vendor, namely, the 1st defendant herein.
127. To the extent that the 2nd and 3rd defendants are *bona fide* purchasers for value, learned counsel added that the 2nd and 3rd defendants' title is therefore insulated and vindicated by law and hence same, is indefeasible.
128. In support of the foregoing submissions, learned counsel for the 2nd and 3rd defendants has cited and relied on various decisions on *inter-alia* [Dr Joseph NK Arap Ngok v Justice Moiwo Ole Keiwa & 4 others](#) civil application No 60 of 1997 (unreported), [Joyce Njeri Kariuki v Joreth Ltd & 3 others](#) (2014)eKLR, [Lawrence P Mukiri v The Attorney General & 4 others](#) (2013)eKLR and [Paul Muira & another v Jane Kendi Ikinyua & 2 others](#) (2014)eKLR.

Issues For Determination:

129. Having reviewed the amended originating summons dated the March 2, 2021, the affidavit in support thereof, the documents attached thereto and the response by the defendants; and having evaluated the oral evidence tendered by the parties and upon considering the written submissions, the following issues are germane for determination;



- i. Whether the original plaintiff, now deceased and by extension the current plaintiff have acquired adverse possessory rights over the suit property.
- ii. What reliefs ought to be granted.

Analysis And Determination

Issue number 1 - whether the original plaintiff, now deceased and by extension the current plaintiff have acquired adverse possessory rights over the suit property.

130. The plaintiffs claim pertaining to and in respect of the suit property, namely LR No 13330/192 touches on and concerns adverse possession.
131. Essentially, the plaintiff contends that the deceased having bought, acquired and became the owner of half share of plot No 391, same was allowed entry onto and possession of the subject portion of the suit property. For clarity, the plaintiff pointed out that the entry and possession commenced in the year 1974.
132. Further, the plaintiff also contended that having entered upon and taken possession of the half share of the suit property in 1974, same acquired and accrued adverse possessory right by the year 2013, when the 1st defendant purported to sell and transfer the suit property to and in favor of the 2nd and 3rd defendants.
133. For coherence, the plaintiff testified that the statutory duration having lapsed or extinguished, the 1st defendant's title ceased to exist. In this regard, the plaintiff contended that the 1st defendant therefore had no valid and legal title to confer upon the 2nd and 3rd defendants.
134. Given the nature of the plaintiff's claim, it is important to underscore that before a claim for adverse possession can be deemed to have been proven, it is incumbent upon the claimant to demonstrate that same has been in actual, visible, open and notorious occupation and possession of the portion of land which is the subject of adverse possession.
135. Similarly, the claimant must also tender evidence that the occupation or possession has been non-permissive actual possession, which is hostile to the title of the current owner. In this regard, the actual possession must relate to a defined, definite and distinct portion and the impugned occupation must be exclusive.
136. On the other hand, the other set of ingredients that must be demonstrated and proven relates to the fact that the possession must be continuous, uninterrupted and unbroken for the necessary statutory duration, same being the twelve (12) year period. See section 7, 12, 13 and 17 of the [Limitation of Actions Act](#), chapter 22, Laws of Kenya.
137. To vindicate the foregoing observations, it is imperative to take cognizance of the holding in the case of *Jandu v Kirplal & another* (1975) EA 225, where the Court of Appeal for East Africa stated and held as hereunder;

- “(1) 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...



That there must be actual possession (which requires some sufficient degree of physical occupation for the requisite 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. In other words, the intruder must have some apparent title, the appearance or semblance of title but not the reality of it, for the expression “colour of title” in law means, that which is title in appearance but not in reality. He must have with him his own apparent right which affords him some semblance of title under which he claims to found his occupation of the land independently of anyone else’s power. If he has no semblance or shadow of right to be on the land, he cannot rely on adverse possession.
- (3) The occupation of the land by the intruder who pleads adverse possession must be nonpermissive use, ie without permission from the true owner of the land occupied.
- (4) The nonpermissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the dispossessed owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others. A person in possession of land is not entitled to the protection of the statute of limitations as against the owner of the paper title where the latter and his predecessors in title have not been kept dispossessed or have not abandoned possession of the land for the statutory period and the person claiming the protection of the statute has been in possession with an animus possidendi for the requisite time.
- (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 purposes 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. The idea of open and notorious possession entails possession that gives visible evidence to one on the surface of the possessed land. The purpose of this element is to afford the owner an opportunity for notice. He need not actually have seen the evidence, but is charged with seeing what reasonable inspection would disclose. Possessory acts carried out only under cover of darkness will be insufficient to justify a claim based on adverse possession. Related to the requirement of actual possession, the requirement of openness and notoriety, also calls for the need that the possessor’s acts must be substantial and leave some physical evidence.



If the acts are too insubstantial or temporary, there is no actual possession and the possession will not be notorious. Seasonal or sporadic use of land whose nature does not ordinarily justify such use, would not readily lend themselves as evidence of open and notorious and continuous actual possession.

- (7) The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period. This element means that the possession by the adverse possessor must continue without significant interruption for a solid block of time at least as long as the period of limitation, being at the moment twelve years before the filing of suit.
- (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. Just as the adverse possessor cannot succeed if he did not know he was in actual possession of another's land, the owner who had not intended to part with possession or is unconsciously dispossessed, cannot be said to have been evicted or to have quite the land

138. The second decision that underscores the ingredients which I have isolated, highlighted and amplified in the preceding paragraphs is the case of *Gabriel Mbuvi v Mukindia Maranya* (1993)eKLR. For coherence, the court held as hereunder;

“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 is a matter of fact..... there must be actual possession (which requires some sufficient degree of physical occupation for the requisite period).

139. Nourished by the elaborate exposition of the law as pertains to adverse possession, contained and displayed in the foregoing decisions, it is now appropriate to interrogate the totality of the evidence tendered and to discern whether the plaintiff has proved and established a claim for adverse possession.
140. Firstly, the plaintiff testified that the deceased entered upon, took possession and remained in occupation of the subject portion of the suit property. In fact, the plaintiff added that the deceased even constructed a semi-permanent site house, pit-latrines and also fenced the suit property.
141. Nevertheless, the defendants' contradicted/disputed the averments or evidence of the plaintiff. To the contrary, the defendants stated that up to and including the year 2013 when the suit property was sold to and transferred in favor of the 2nd and 3rd defendants, there were no structures or developments on the impugned portion of the suit property.
142. At this juncture, it is appropriate to point out that the burden of proof, that is, of proving that indeed the deceased was in occupation of the impugned segment of the suit property and that in fact, same has been in such occupation laid on the shoulders of the plaintiff.
143. The question is, was that burden of proof discharged, either as required under the law or at all.



144. I must state that the plaintiff herein was a single witness who testified before the honourable court. Consequently, the plaintiff's evidence was neither corroborated nor supported by any one else, not even David Wokabi Murithi and Philomena Wairimu Muiruri, whom the plaintiff had stated were her immediate neighbors.
145. At any rate, it is imperative to recall that the deceased had indicated that same had demised, leased and or otherwise allowed David Wokabi Murithi and Philomena Muiruri, to cultivate and use the impugned portion of the suit property.
146. Surely, if the deceased and by extension the plaintiff were in occupation and possession of the suit property and indeed, had allowed her immediate neighbors to cultivate same at one point in time, one would have expected the plaintiff to procure the attendance of the said immediate neighbors for purposes of providing some corroboration.
147. Sadly, the said immediate neighbors who at one point are said to have leased or used the segment of the suit property, with the authority of the deceased and by extension the plaintiff herein were not called. For clarity, the reason why same were not called was never ventilated.
148. Be that as it may, one would have expected that the said persons/neighbors would have been helpful, to enable the court appreciate the veracity of the plaintiff's claim, over and in respect of the impugned portion of the suit property.
149. Notwithstanding the foregoing, it is also important to observe that towards proving occupation and possession of the suit property, the plaintiff tendered and adduced before the honourable court photographs showing the suit premises, the fencing and (sic) the destroyed developments. See exhibit P7, contained at pages 68 and 69 of the original bundle filed by the deceased plaintiff.
150. I must point out that the photographs (which were copies) being electronic evidence ought to have been accompanied by electronic certificate in accordance with and or adherence to section 106B of the [Evidence Act](#), cap 80 Laws of Kenya.
151. However, it is common ground that no such electronic certificate was attached to the photographs nor tendered in evidence, whatsoever.
152. To my mind, the failure to generate, attached and adduce in evidence an electronic certificate in terms of section 106B of the [Evidence Act](#) renders the photographs, which were adduced before the honourable court invalid, legally untenable and devoid of any probative value.
153. Respectfully, if the photographs were being produced to show and establish occupation and possession, then I must point out that same, are of no legal/ probative value and therefore are unhelpful.
154. To underscore the significance of electronic certificate as pertains to electronic evidence, *inter-alia*, the impugned photographs, it is appropriate to recall, and reiterate the dictum of the Court of Appeal *vide* the holding in the case of [County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others](#) [2015] eKLR, where the court stated as hereunder;
65. Section 106B of the [Evidence Act](#) states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in this section are satisfied in relation to the information and computer."
66. In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible)



electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced. For ease of reference, we wish to reproduce section 106B of the [Evidence Act](#) in its entirety:

- “106B Notwithstanding anything contained in this Act, any information
- (1) contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
 - (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—
 - (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
 - (b) during the said period, information of the kind contained in electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
 - (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
 - (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
 - (3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub section (2) was regularly performed by computers, whether—
 - (a) by combination of computers operating in succession over that period; or
 - (b) by different computers operating in succession over that period; or



(c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

- (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
 - (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
 - (c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and
 - (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.
- (5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”

67. In relation to this case, the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that person’s activities using a computer or some other electronic devise and fed into a computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the output is an electronic record of the information it contains and describes the manner in which it was produced.
68. The *Evidence Act* does not provide the format the certificate required under sub-section 106B(2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.
69. In this case as we have said the electronic record was made by one Denis Kongo, a freelance photojournalist. He, however, did not annex to his affidavit sworn on December 11, 2014 the required certificate. The averments in that affidavit themselves did not meet the above stated threshold of sub-section 106B(2) of the *Evidence Act*. Those averments therefore fell short of the required certificate. In the circumstances, we agree with counsel for the appellants that the



electronic evidence of Denis Kongo was inadmissible and the learned judge erred in relying upon it.

155. The second critical point to address relates to the fact that adverse possession can only be decreed in favor of a person who has hitherto been in possession, continued to be in possession and effectively remains to be in possession, including at the time of the filing of the suit. Simply put, the possession must not have been interrupted or broken at any point in time.
156. However, in respect of the subject matter, the deceased plaintiff admitted and acknowledged that on or about February 2014, some persons who were hitherto unknown to him entered upon, took possession and demolished *inter-alia* the site house, pit-latrines and the fence, which same had erected on the suit property.
157. My understanding of the averment contained at paragraphs 10 and 11 of the supporting affidavit sworn on the May 2, 2014 connotes that the deceased plaintiff's occupation and possession of the suit property, if any, was broken/interrupted by the unknown third parties, whom the deceased latter on established to be the 2nd and 3rd defendants.
158. Certainly, the plaintiff in his own words, lost possession of the impugned portion of the suit property and effectively the plaintiff herein could not therefore mount the subject suit on the May 2, 2014, knowing very well that same had ceded/lost possession of the impugned portion of the suit property.
159. Suffice it to state that claim premised on adverse possession can be terminated in various ways. For clarity, same can be terminated *inter-alia*, by the adverse possessor acknowledging the title of the land owner, ceding possession, being served with civil proceedings or better still where the land owner makes an effective entry and recovers vacant possession of the suit property.
160. In respect of the subject matter, evidence abound, that indeed the plaintiff lost possession and occupation of the suit property when same admittedly was deprived of the suit property courtesy of the events that reportedly took place in February 2014.
161. In my considered view, the deceased and by extension the plaintiff, having lost possession and occupation of the suit property by February 2014, same could not legally and lawfully mount a claim for adverse possession *vide* the originating summons, which was filed/ lodged in court in May 2014.
162. To my mind, without possession and occupation, which reflects *aminus possidendi*, no claim for adverse possession can apply, be sustained or maintained, whatsoever and howsoever.
163. To buttress the foregoing observation and essentially the circumstance under which adverse possession is terminated or extinguished, it is appropriate to take cognizance of the holding in the case of [Njuguna Ndatbo v Itumo](#) (1993)eKLR, where the Court of Appeal stated and held as hereunder;

“The passage from Cheshire's *Modern Law of Real Property* to which Potter JA made reference in *Githua v Ndeete* is important and deserves to be read in full. It is at page 894 section vi under the rubric the methods by which time may be prevented from running and the learned author says -

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. Such a nominal entry, even though it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry



every year, in this case called continual claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the *Real Property Limitation Act 1833*, in a section which has been repeated in the *Limitation Act 1939*, that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry, or sue for recovery of the land.'

I agree that the mere filing of a suit for recovery of possession may not disrupt the possession of the adverse possessor, it being a physical thing, but as regards the stopping of time for the purposes of the Act, I would fully subscribe to the position expounded by Potter JA in *Githu v Ndeete*, and which has solid backing in the passage I have read from Cheshire. It is the sensible step to take instead of going into the disputed land armed to dislodge the adverse possessor, an act which can only result in a serious breach of the peace or even loss of life. It may well be true that in India the position as set out by Kneller JA in *Muthoni v Wanduru* does work, but I do not regard it as a practical approach to take in land disputes in Kenya. As there are authorities of this court going both ways I am free to decide which way to go. On this particular point I will go with the Potter JA. The only reason I can think of for the apparent contradiction in the decisions I have discussed is the total absence of law reports during the period under review, a calamity which has yet to be redressed."

164. Premised on the foregoing observations, I come to the irresistible and inescapable conclusion that the plaintiff herein has neither established nor proved the claim for adverse possession.
165. Finally, it must be noted that the burden of proof laid on the plaintiff and not otherwise. Consequently, having failed to discharge the evidential burden of proof, the plaintiff's claim must fail.

Issue number 2 What Reliefs ought to be granted.

166. It is common ground that the suit before the honourable court was commenced and originated *vide* originating summons which was thereafter amended pursuant to leave of the court.
167. There is also no gainsaying that upon being served with the originating summons as well as the amended originating summons, neither of the defendants filed a counterclaim or cross suit.
168. Nevertheless, the 2nd and 3rd defendants have since agitated before the honourable court a contention that same are *bona fide* purchasers for value without notice of any defect in the 1st defendant's title.
169. That may very well be so. However, it is common knowledge that parties are bound by their pleadings. Consequently, no party, the 2nd and 3rd defendants not excepted, can be allowed to travel far and wide beyond his/her pleadings.
170. Without belaboring the point, it is appropriate to adopt, reiterate and reproduce the observation of the Court of Appeal in the case of *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & others* (2014) eKLR, where the honourable Court of Appeal observed as hereunder;

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary



to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “any other business” in the sense that points other than those specific may be raised without notice.”

171. Premised on the foregoing dictum, it is my finding and holding that the plea of *bona fide* purchaser for value, was not one of the issues captured in the pleadings and thus worthy of determination herein.
172. However, even assuming that the honourable court had the requisite jurisdiction to entertain the issues of *bona fide* purchaser for value in the absence of the requisite pleadings, the next critical hurdle would be whether such issue can be entertained or adjudicated upon, on the basis of originating summons.
173. Sadly, I am of the contrary position. Such an issue pertaining to *bona fide* purchase, if at all, can only be addressed vide a claim mounted in the ordinary manner of proceedings. For clarity, such a claim is not envisaged vide the provisions of order 37 rule 1 of the [Civil Procedure Rules](#).
174. If emphasis was required, then I would pick out the decision of the Court of Appeal in the case of [Kibutiri v Kibutiri](#) (1983)eKLR, where the court stated and held as hereunder;

“In cases where complex issues and contentions questions of fact and law are raised the judge should dismiss the summons and leave parties to pursue their claim by ordinary suit because the scope of inquiry which is made and dealt with in an originating summons is limited. The procedure by way of originating summons is intended to enable simple matters to be settled by the court without the experts of bringing an action in the usual way not to enable the court to determine matters which involve a serious question. This was said in the case of *Re Giles* (2)[1890] 43 CH D 391a decision cited with approval by this Court's predecessor in *Kulsumbhiai v Abdulluussein* [1957] EA 699.

See also *Bhari v Khan* [1965] EA 94 in which it was held that the scope of an inquiry which could be made on an originating summons and the ability to deal with a contested case was very limited. When it becomes obvious that the issues raise complex and contentious questions of fact and law, a judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit.”

Law JIA in obiter further stated “ I would like to advice judges who have to deal with originating summons to consider the judgement of this court (Court of Appeal) in *Kenya Commercial Bank Ltd v James Osebe* civil appeal No 60 of 1982 in which the law relating to and the scope of originating summonses were extensively reviewed. That case referred to *Official Receiver v Sukhdev* [1970] EA 243 which was also cited to *Bhandari I.* in which Madan I as he then was refused to deal with that which he referred to as a mass of facts in dispute by way of originating summons.”

175. Guided by the dictum in the decision (supra), I must point out that this honourable court is not poised to make a pronouncement on the issue of the doctrine of *bona fide* purchase for value.



176. In the circumstances, the issue/claim relating to *bona fide* purchaser for value, albeit without notice of any defect must be left to lie in peace. Same does not belong here and the parties, will be free to address same elsewhere, that is assuming, the law avails any such window.

Final Disposition

177. Having travelled through the various issues that were isolated, highlighted and amplified in the body of the judgment herein, it must have become apparent that the plaintiff's claim is certainly unproven.

178. Consequently and in the premises, I come to the conclusion that the plaintiff's case herein, is devoid and bereft of merits.

179. In a nutshell, the plaintiff's case *vide* amended originating summons dated the March 2, 2021, be and is hereby dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin / Benson: Court Assistant

Mr. Kingara for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd and 3rd Defendants

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