



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 280 OF 2016 (O.S)

MUMBU HOLDINGS LIMITED.....PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND.....1ST DEFENDANT

GOLDROCK INTERNATIONAL

ENTERPRISES(KENYA) LIMITED.....2ND DEFENDANT

JUDGMENT

The Plaintiff brought this suit by way of an Originating Summons dated 22nd March 2016 and filed on 23rd March 2016 seeking the following orders;

- a) A declaration that the Plaintiff is the lessee from the Government of Kenya of all that parcel of land measuring 0.3521 of a hectare or thereabouts within the parcel of land known as L.R No. 12948/178 MOUNTAIN VIEW NAIROBI by reason of adverse possession under Section 7 of The Limitation of Actions Act, Chapter 22 Laws of Kenya.
- b) An order that the Plaintiff has become entitled by adverse possession to 0.3521 of a hectare of all that parcel of land known as L.R No. 12948/178 MOUNTAIN VIEW NAIROBI and registered in the names of the Defendants as proprietors.
- c) An order that the Land Registrar do enter in the register the said substitution under Section 125 of the Registered Land Act, Chapter 300 Laws of Kenya.
- d) An order that the Defendants to pay the cost of the application to the Plaintiff.

The Plaintiff's case.

The Originating Summons was supported by the affidavit of the Plaintiff's director John Mbuu in which he deponed as follows: At all material times, the 1st Defendant was the registered proprietor of all that parcel of land known as L.R No. 12948/178 MOUNTAIN VIEW NAIROBI measuring 1.670 hectares or thereabouts (hereinafter referred to only as "the suit property"). The Plaintiff occupied a portion of the suit property measuring 0.3521 of a hectare or thereabouts (hereinafter referred to only as "portion of the suit property") from June 1995 and built a stone perimeter fence around it. In February, 1996, the Plaintiff commenced construction of 7 high end 4 bedroomed residential houses on the portion of the suit property with the full knowledge of the 1st Defendant. The 1st Defendant through its advocates threatened to evict the Plaintiff from the portion of the suit property through a demolition notice dated 31st July 1996. The said threat was not followed by any action.

The Plaintiff completed the construction of the said houses and had since then had peaceful and uninterrupted occupation of the portion of the suit property. The Plaintiff invested in excess of KShs. 77,000,000/- in developing the portion of the suit property. Sometimes in 2015, strange people started visiting the portion of the suit property. Upon conducting a search at the Land Registry, the Plaintiff discovered that the 1st Defendant had transferred the suit property to the 2nd Defendant. The 2nd Defendant had not objected to the Plaintiff's occupation and must have acquired its title to the suit property fully aware that the Plaintiff was in occupation of the portion of the suit property.

The Plaintiff had been in continuous, uninterrupted and exclusive use and possession of the portion of the suit property for a period of 20 years from 1995 with no objection from the Defendants or any third party. The Plaintiff was in the circumstances entitled to ownership of the portion of the suit property by adverse possession.

The Plaintiff filed two further affidavits on 22nd June, 2016 in further support of the Originating Summons both sworn by its director, John

Mbuu. The affidavits were in reply to the affidavits that had been filed by the defendants in reply to the Originating Summons. In its affidavit in reply to the replying affidavit by Caroline Rakama-Odera, the 1st Defendant's Legal Officer, the Plaintiff stated that the Plaintiff was not aware of any illegality surrounding the title of the portion of the suit property. The Plaintiff denied that the 1st Defendant had at any time offered to sell to the Plaintiff the portion of the suit property at market price or at any other price. The Plaintiff averred that the sale of the suit property by the 1st Defendant to the 2nd Defendant was fraudulent and that the same was subject to the Plaintiff's rights in the suit property that had crystalized after the expiry of 12 years from the time it entered the property.

In its affidavit in reply to the replying affidavit of John Chege, the 2nd Defendant's Company Secretary, the Plaintiff took issue with the amount that was secured by the charge over the suit property and what was indicated as the purchase price of the suit property. The Plaintiff averred that the figures given by the 2nd Defendant had discrepancies. The Plaintiff averred that the Defendants were aware as at 31st July, 1996 that the Plaintiff was in occupation of the portion of the suit property. The Plaintiff averred that the 2nd Defendant had misrepresented to the chargee, Chase Bank (K) Limited that the suit property was free from encumbrances. The Plaintiff averred that the 2nd Defendant's title to the suit property if any was subordinate to the rights of the Plaintiff in the property. The Plaintiff averred that having occupied the portion of the suit property for more than 20 years it had by operation of law ceased to be a trespasser thereon. The Plaintiff reiterated that the 2nd Defendant acquired the suit property fraudulently.

In his witness statement dated 14th December, 2016, the Plaintiff's said director, John Mbuu, explained how the Plaintiff came to be on the suit property. He stated as follows: In 1995, the Plaintiff was approached by one, Elijah Kimalel Koskei who offered to sell to the Plaintiff part of the suit property that had been allocated to him by the Commissioner of Lands. The Plaintiff entered into a sale agreement with the said Elijah Koskei and while awaiting the processing of the transfer and issuance of a Certificate of Title in the Plaintiff's favour, the Plaintiff started developing the portion of the suit property. The Plaintiff thereafter received a demolition notice dated 31st July, 1996 referred to earlier. Following that notice, several properties that were on the suit property were demolished but the Plaintiff's buildings on the portion of the suit property were not touched. The Plaintiff's occupation of the houses that it had constructed on the portion of the suit property and from which it was collecting a monthly rent of Kshs. 450,000/- remained undisturbed. The Plaintiff had uninterrupted occupation of the portion of the suit property until 15th February, 2016, when the 1st Defendant sent a demand letter to the plaintiff alleging that the Plaintiff had trespassed on its land. This is what prompted the filing of this suit. The Plaintiff termed the transfer of the suit property by the 1st Defendant to the 2nd Defendant and the subsequent charging of the property to a bank by the 2nd defendant fraudulent.

The 1st Defendant's case.

The 1st Defendant's responded to the Originating Summons through a replying affidavit sworn by its Legal officer, Caroline Rakama-Odera on 14th December, 2017. In the affidavit, the 1st Defendant stated as follows:

The 1st Defendant purchased the suit property together with other 119 pieces of land from Mount Swiss Developers(Kenya) Limited in or around August 1994 for Kshs. 270,000,000/-. The 1st Defendant intended to construct 900 low cost houses on the said 120 pieces of land but the development was opposed by residents of Mountain View estate who insisted that the 1st Defendant could only construct one dwelling house on each sub-plot in accordance with the terms and conditions of the Grant that was held by the 1st Defendant for the parent title for the said pieces of land.

Following this development, the 1st Defendant subdivided the suit property into 7 sub-plots for the construction of single dwelling houses on each plot. During the subdivision exercise, the Commissioner of Lands erroneously subdivided the suit property into 6 subplots which he purported to allocate to third parties. One of the sub-plots measuring approximately 0.3521 designated as L.R No. 21316 was allocated to one, Elijah Koskei. This is the parcel of land (the portion of the suit property) that the plaintiff is claiming herein. The Commissioner of Lands acknowledged the error and cancelled the Grants that had been issued to the said third parties for the sub-plots that originated from the suit property. The said Elijah Koskei however purported to sell the portion of the suit property to the plaintiff. The plaintiff thereafter commenced construction of houses on the portion of the suit property in disregard of the matters aforesaid.

The Plaintiff and the Commissioner of Lands accepted a proposal by the 1st Defendant that the Plaintiff pays to the 1st Defendant the full market value of the portion of the suit property and that the 1st Defendant surrenders the residue of the lease of the property to the Commissioner of Lands in consideration of allocation of an alternative piece of land of equal size and value to the 1st Defendant.

The 1st Defendant contended that this suit was an attempt by the plaintiff to circumvent the illegalities surrounding its acquisition of the portion of the suit property from Elijah Koskei by claiming that he had acquired the land by adverse possession.

In her witness statement filed together with the said replying affidavit, the 1st Defendant's said Legal Officer reiterated the contents of her replying affidavit and stated further as follows: In or around July, 1996, the 1st Defendant became aware that certain construction works were being undertaken on a portion of the suit property by unknown third parties. The 1st Defendant served the said third parties with eviction notices and raised the issue of the invasion with the Commissioner of Lands. It was at this point that the 1st Defendant learnt that on or about May, 1995, the Commissioner of Lands had subdivided the suit property into 6 sub-plots referred to as A, B, C, D, E and F. All the 6 sub-plots were allocated to third parties with Plot A being allocated to Elijah Koskei. The Commissioner of Lands acknowledged that the suit property that was subdivided to give rise to the 6 plots was private property and that the same belonged to the 1st Defendant. The Commissioner of Lands cancelled the Part Development Plan on the basis of which the said subdivision of the suit property was carried out and recalled the 6 allotment letters that had been issued for the 6 sub-plots for cancellation. The Commissioner of Lands cancelled the allotment letters relating to sub-plots B, C, D, E and F. It emerged that Elijah Koskei the allottee of sub-plot A had caused the same to be surveyed and had sold the same to one, John Mbuu and the said John Mbuu had commenced construction on the property which was at advanced stage.

In response to the eviction notice aforesaid, the Plaintiff intimated to the 1st Defendant that sub-plot A which measured 0.3521 hectares was known as L.R No. 21316, Grant No. I.R 67951(the portion of the suit property) and that the same had been transferred to him by Elijah Koskei through a deed of transfer registered on 8th March, 1996. The Plaintiff conceded that the said L.R No. 21316, Grant No. I.R 67951(the portion of the suit property) was part of the 1st Defendant's land but contended that it was an innocent purchaser of the said property for value that it disclosed to be Kshs. 400,000/-. Several discussions were held between the Plaintiff, the 1st Defendant and the Commissioner of Lands to resolve the dispute over the portion of the suit property in which a number of proposals were put forward. In the spirit of amicably resolving the dispute, the 1st Defendant agreed to surrender its rights in the portion of the suit property to the Plaintiff on condition that the Plaintiff pays to the 1st Defendant Kshs. 6,325,149.60 being the market value of the said property and the 1st Defendant surrendering the residue of its lease over the portion of the suit property to the Commissioner of Lands in exchange for a different piece of land of equal size and value to be provided by the Commissioner of Lands to the Plaintiff. The Plaintiff never paid to the 1st Defendant the said amount or any part thereof and the 1st Defendant proceeded to sell the portion of the suit property to the 2nd Defendant.

The 2nd Defendant's case.

The 2nd Defendant opposed the Originating Summons through a replying affidavit and further replying affidavit sworn by its Company Secretary, John Chege on 25th May, 2016 and 7th March, 2017 respectively. In the replying affidavit sworn on 25th May, 2016, the 2nd Defendant's said company secretary stated as follows: The suit property was transferred by the 1st Defendant to the 2nd Defendant on 23rd December, 2013 for valuable consideration. The 2nd Defendant obtained a loan from Chase Bank (K) Limited (the bank) to purchase the property and a charge was created in favour of the bank over the property to secure the loan. The charge had remained registered against the title of the suit property since the 1st Defendant had not finished repaying the loan. The Plaintiff had admitted that it was occupying the portion of the suit property and that it was a trespasser on the property. The orders sought against the 2nd Defendant could not issue because a right to claim the portion of the suit property by adverse possession had not arisen as against the 2nd Defendant. An adverse possession claim could also not arise against the 1st Defendant because it was a public body. The 2nd Defendant's title that was acquired for value without notice was indefeasible.

In his further replying affidavit dated 7th March, 2017, the 2nd Defendant's said Company Secretary stated as follows: The interests of the 2nd Defendant as the registered proprietor of the suit property override those of the Plaintiff who had not proved any registrable interest in the portion of the suit property. Before purchasing the suit property, the 2nd Defendant carried out a search that revealed no registered encumbrance. The 2nd Defendant did not purchase the suit property fraudulently. The Plaintiff's acquisition of the portion of the suit property was illegal rather than by adverse possession. The Plaintiff unlawfully acquired title to the portion of the suit property a fact that it failed to disclose to the court.

In his witness statement dated 7th March, 2017, the 2nd Defendant's said Company Secretary stated as follows: The 1st Defendant advertised the suit property for sale. Following a tendering process, the 2nd Defendant received a letter of an award on 19th October, 2012 having submitted the highest bid. The 1st and 2nd Defendants commenced and completed the relevant formalities for sale of land and on 23rd December, 2013 the suit property was transferred to the 2nd Defendant and simultaneously charged to Chase Bank(K) Limited. As per the contract of sale, the 1st Defendant was supposed to point out the beacons and to give the 2nd Defendant vacant possession upon payment of the full purchase price. When that obligation crystallized, the 1st Defendant instructed a surveyor to conduct a survey on the property. The survey showed that the Plaintiff had encroached on the suit property. The 2nd Defendant demanded vacant possession from the Plaintiff and 1st Defendant. That demand gave rise to the current suit by the Plaintiff.

The 2nd Defendant having been registered as the owner of the suit property on 23rd December, 2013, the 12-year statutory period for adverse possession had not lapsed against it as at the time this suit was brought. The transfer of the portion of the suit property by Elijah Koskei to the Plaintiff was rooted in an illegal allotment which the Plaintiff ignored and continued developing the property. The Plaintiff was using the doctrine of adverse possession to sanitize a title that was fraudulently acquired. The Plaintiff's cause of action if any was against the person who sold the portion of the suit property to it. The Plaintiff had not sued the person although it had been made aware of the illegality in 1996. The 1st Defendant as a statutory body was immune to claims of adverse possession. Granting of the reliefs sought by the Plaintiff would be tantamount to rewarding a trespasser.

The Originating Summons was heard through oral evidence. At the trial, the witnesses for both parties reiterated the contents of the affidavits and witness statement that I have highlighted above and produced a number of documents in support of the parties' respective cases. The parties thereafter made closing submissions in writing. The Plaintiff filed further submissions in reply to the 1st and 2nd Defendants' submissions. From the pleadings, the following in my view are the issues that arise for determination in this suit;

- 1) Whether the Plaintiff has proved its adverse possession claim in respect of the portion of the suit property.
- 2) Whether the Plaintiff is entitled to the reliefs sought in the Originating Summons.
- 3) Who is liable for the costs of the suit?

Determination.

Whether the Plaintiff has proved its adverse possession claim in respect of the portion of the suit property.

I have considered the Originating Summons together with the evidence that was tendered by the Plaintiff in support thereof. I have also considered the evidence that was tendered by the Defendants in opposition to the application. In Gabriel Mbui v Mukindia Maranya[1993]

eKLR, the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following elements;

1. **The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.**
2. **The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.**
3. **The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.**
4. **The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable *animus possidendi*, that is to say occupation with clear intention of excluding the owner as well as other people.**
5. **Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.**
6. **The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.**
7. **The possession must be continuous uninterrupted, unbroken for the necessary statutory period.**
8. **The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.**
9. **The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.**
10. **The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.**

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

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

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

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

In Githu v Ndeete [1984] KLR 776 it was held that:

1. **“Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.**
2. **A title by adverse possession can be acquired under the Limitation of Actions Act to a part of the parcel of land which the owner holds title.”**

It is on the foregoing principles that the Plaintiff's claim falls for consideration. The burden was on the plaintiff to establish the elements of adverse possession set out in the above cases. Before considering whether the Plaintiff has met the threshold for adverse possession, there is a preliminary issue that was raised by the parties that I need to dispose of first as it touches on the competency of the Plaintiff's claim against the 1st Defendant and its determination will also have a bearing on the merit of the Plaintiff's claim against the 2nd Defendant. The issue is whether the Plaintiff's claim is barred under section 41(a)(1) of the Limitation of Actions Act, Chapter 22 Laws of Kenya which provides as follows:

“This Act does not—

(a) enable a person to acquire any title to, or any easement over—

(i) Government land or land otherwise enjoyed by the Government.”

The 1st Defendant submitted that it is a State Corporation established under section 5 of the National Social Security Fund Act, 2013(NSSF Act) and as such a public entity. The 1st Defendant submitted that the 1st Defendant is controlled by the Government and that its assets including land are enjoyed by the Government. The 1st Defendant cited section 70 of the NSSF Act, 2013 and submitted that the Government not only enjoys the assets of the 1st Defendant but also shares in its liability as its sole guarantor. The 1st Defendant submitted that if the 1st Defendant was to lose the portion of the suit property; it would be a direct loss to the Government. The 1st Defendant submitted that since the 1st Defendant's land is enjoyed by the Government the same cannot be acquired through adverse possession. The 1st Defendant cited the cases of Joseph Ndungu Kamau v John Njihia[2020]eKLR and Peter Ndungunya Ole Sono & 2 others v Lands Limited & another [2019]eKLR and submitted that while computing the period of limitation for the purposes of adverse possession, the period through which the proprietor of land was a state corporation must be excluded. The 1st Defendant contended that the period between 18th August, 1994 and 4th December, 2013 when the 1st Defendant was registered as the proprietor of the suit property should be excluded while determining the limitation period for the purposes of the Plaintiff's adverse possession claim.

The 1st Defendant cited Kimoi Ruto & Another v Samwel Kipkosgey Keitany & Another[2014]eKLR and Industrial & Commercial Development Co-operation v Reuben Arap Simotwo & 20 others[2019]eKLR and submitted that even through the 1st Defendant is not one of the Corporations mentioned in section 2 of the Limitation of Actions Act, Chapter 22 Laws of Kenya, its land is enjoyed by and is for the benefit of the Government and as such falls within the exception provided under section 41(a)(1) of the Limitation of Actions Act, Chapter 22 Laws of Kenya.

In its submissions, the 2nd Defendant reiterated the foregoing submissions by the 1st Defendant. The 2nd Defendant cited among others, Articles 61, 227 and 260 of the Constitution on the definition of public land, public entity and the State respectively. The 2nd Defendant also cited sections 4 and 6 of the NSSF Act that provides for the objectives of the 1st Defendant and the composition of its trustees respectively. The 2nd Defendant submitted that the 1st Defendant is a Government entity or agency. The 2nd Defendant submitted that land held by the 1st Defendant is enjoyed by the Government and as such cannot be acquired by way of adverse possession. In support of this submission, the 2nd defendant relied on R.D.Shetty v The International Airport Authority of India & others[1979]AIR 1628, 1979SCR(3)1014 and Association of Retirement Benefits Schemes v Attorney General and 3 others [2017]eKLR.

In response to the foregoing submissions, the Plaintiff cited Tsuma Lewa Deche & Another v Board of Trustees National Social Security Fund [2009] eKLR and submitted that the 1st Defendant is not a state Corporation and as such land held by the 1st Defendant is not excluded from the provisions of the Limitation of Actions Act, Chapter 22 Laws of Kenya.

I have considered the submissions by the parties on the issue of whether or not the land held by the 1st Defendant can be acquired by way of adverse possession under sections 7,17 and 38 of the Limitation of Actions Act, Chapter 22 Laws of Kenya. From the objectives of the 1st Defendant and the level of Government control in its operations and management, I am persuaded that the 1st Defendant is a Government agency or entity and as such the land held by the 1st Defendant is land enjoyed by the Government for the purposes of section 41(a)(1) of the Limitations of Actions Act, Chapter 22 Laws of Kenya. The 1st Defendant's name in itself has a public connotation. It distinguishes the 1st Defendant from private pension funds. I am not in agreement with the decision in Tsuma Lewa Deche & Another v Board of Trustees of National Social Security Fund(supra) that was cited by the Plaintiff. I am of the view that the court did not consider in detail the objectives of the 1st Defendant and the level of Government control in the 1st Defendant. The decision in my view turned only on the issue of whether or not the 1st Defendant is a Corporation within the meaning of section 2 of the Limitation of Actions Act, Chapter 22 Laws of Kenya. I am inclined to adopt the opinions of Munyao J. and Ohungo J. in Kimoi Ruto & Another v Samwel Kipkosgey Keitany & Another(supra) and Industrial & Commercial Development Co-operation v Reuben Arap Simotwo & 20 others(supra) respectively on this issue. In any event, the court is not bound by the said decision that was made by a court of equal status.

Due to the foregoing, it is my finding that the land held by the 1st Defendant is shielded from adverse possession claims by section 41(a)(1) of the Limitation of Actions Act, Chapter 22 Laws of Kenya. It follows therefore that the period within which the 1st defendant held the suit property as the registered proprietor thereof cannot be counted in the computation of limitation period for the purposes of section 7 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.

Having disposed of that preliminary issue, I will now consider whether the Plaintiff has established his adverse possession claim. It is common ground that the suit property was at all material times registered in the name of the 1st Defendant. It is also common ground that the plaintiff entered and occupied a portion of the suit property measuring 0.3521 of a hectare (the portion of the suit property) in 1995 following an agreement of sale that it entered into with one, Elijah Koskei who had acquired the property through an illegal and fraudulent allotment by the Commissioner of Lands. It is also common ground that the Plaintiff was aware of the illegality of its occupation of the portion of the suit property and that even with this information he continued to develop the property. It is also common ground that the 1st Defendant was aware by 1996 that the Plaintiff was in occupation of the portion of the suit property illegally and that it was developing the same. It is also common ground that save for demand letters that it sent to the Plaintiff through its advocates on 31st July, 1996 and 29th November, 1996, the 1st Defendant took no action with a view to removing the Plaintiff from the portion of the suit property. It is common ground that the Plaintiff's occupation of the suit property was without the permission of the 1st Defendant and that it was open and uninterrupted from 1995 until 2013 when the Plaintiff sold the suit property to the 2nd Defendant. It is not disputed that the Plaintiff's activities on the portion of the suit property was adverse to the interest of the 1st Defendant in the property. It is also common ground that the portion of the suit property occupied by the Plaintiff is identifiable from the larger suit property. Due to the foregoing, if the Plaintiff's claim was not barred by section 41(a)(1) of the Limitation of Actions Act aforesaid, I would have held that as at 23rd December, 2013 when the 1st Defendant transferred the suit property to the 2nd Defendant, the Plaintiff had acquired the portion of the suit property by adverse possession. This however is not the

case. As I have held earlier, the Limitation of Actions Act does not apply to the land held by the 1st Defendant and as such, the Plaintiff's right to claim the portion of the suit property by adverse possession had not accrued as at 23rd December, 2013 when the 1st Defendant transferred the suit property to the 2nd Defendant. The Plaintiff's claim against the 1st Defendant must fail in the circumstances.

It is common ground that the 2nd Defendant acquired the suit property on 23rd December, 2013. From the court record, this suit was filed on 24th March, 2016. This was barely 3 years from the time when the 2nd Defendant acquired the suit property. The 12-year statutory period for adverse possession claim under section 7 of the Limitation of Actions Act had therefore not lapsed as at the time of the filing of the suit herein. The claim against the 2nd Defendant was therefore made prematurely and as such untenable.

For the foregoing reasons, it is my finding that the Plaintiff has failed to prove its adverse possession claim against both defendants.

Whether the Plaintiff is entitled to the reliefs sought.

From my findings above, this issue is answered in the negative.

Who is liable for the costs of the suit?

Under section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya, costs of and incidental to a suit is at the discretion of the court. There is no doubt that the Plaintiff stands to suffer huge loss as a result of this judgement. I am of the view that this loss would have been avoided if the 1st Defendant had asserted its rights over the portion of the suit property promptly. The 1st Defendant also sold the suit property to the 2nd Defendant with full knowledge of the existence of the Plaintiff on the suit property. I am not persuaded that the 2nd Defendant was not aware that the Plaintiff was occupying a portion of the suit property when it purchased the same. Even if it is assumed that it was not aware of that fact, it had the ability to know whether or not the Plaintiff was on the suit property. The 2nd Defendant which had spent Kshs. 35,000,000/- in purchasing the suit property ought to have surveyed the property as part of due diligence before submitting its tender to the 1st Defendant. For the foregoing reasons, I will deny the defendants the costs of the suit.

Conclusion.

In conclusion, I find the Plaintiff's suit not proved. The same is dismissed with each party bearing its own costs.

Dated and Delivered at Nairobi this 18th day of March 2021

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Manyara h/b for Mr. Mwaura for the Plaintiff

Mr. Oriema Okoth and Mr. Mwangi for the 1st Defendant

Mr. Andrew Mwangi h/b for Mr. Sisule for the 2nd Defendant

Ms. C. Nyokabi-Court Assistant