



**Omar (Suing as legal representative of the Estate of Warsame Omar Farah) v Abdi & 4 others
(Environment and Land Case E218 of 2020) [2024] KEELC 4010 (KLR) (6 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4010 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E218 OF 2020**

JO MBOYA, J

MAY 6, 2024

BETWEEN

**MOHAMED WARSAME OMAR PLAINTIFF
SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF WARSAME OMAR
FARAH**

AND

**HATHAR HAJI ABDI 1ST DEFENDANT
NORTH ESTERN IMPEXICO AGENCIES LIMITED 2ND DEFENDANT
NAIROBI CITY COUNTY 3RD DEFENDANT
METROPOLITAN SERVICES 4TH DEFENDANT
ATTORNEY GENERAL 5TH DEFENDANT**

JUDGMENT

Introduction And Background

1. The instant suit was commenced vide Plaintiff dated the 6th November 2020; by and on behalf of Warsame Omar Farah, [now deceased]. However, the said Plaintiff passed on during the pendency of the suit and same was substituted by the current Plaintiff, who is the duly appointed and constituted Legal representative of the Estate of Warsame Omar Farah, deceased.
2. On the other hand, the original Plaintiff was subsequently amended culminating to an amended Plaintiff dated the 21st January 2022, which amended Plaintiff was re-amended culminating into the amended-amended Plaintiff dated the 18th January 2023.



3. For good measure, the operative Plaintiff, which anchors the instant proceedings is [sic] the amended amended Plaintiff dated the 18th January 2023 and in respect of which the Plaintiff has sought for the following reliefs[verbatim]:
 - i. An order of declaration declaring that the agreement of sale part of LR No. 37/714 and indemnity between the Plaintiff and the 1st Defendant was/is valid and enforceable.
 - ii. An order specific performance to compel the 1st Defendant and/or 2nd Defendant to immediately transfer the agreed 1 acre portion of LR No 37/714 located along Shimo La Tewa Road off Mombasa Road, Nairobi to the Plaintiff, failing which the Registrar of Titles to process and register the Plaintiff as owner of the agreed portion of LR No. 37/714.
 - iii. An order of Mandatory injunction to compel the 3rd and 4th Defendant to immediately cancel the proposed sub-division of LR No. 37/714 into plots “A” and “B” measuring 1.1900 HA and 0.3911 HA, respectively.
 - iv. An order of permanent injunction to restrain the 1st, 2nd, 3rd and 4th Defendants either in person or through agents, assigns, employees or howsoever otherwise, from entering, remaining upon, occupying, selling, leasing or in any manner dealing in the 1 acre portion of LR No. 37/714 under occupation and use by the Plaintiff.
 - v. In the alternative to prayer [b] above, the 1st Defendant be ordered to immediately refund the purchase price of the 1 acre of portion LR No. 37/714 at the market value obtaining at the time of Judgment plus interest at commercial rates from 2004 until complete payment.
 - vi. General damages for breach of contract, fraud and Loss of business.
 - vii. A declaration that the 2nd Defendant’s right[s] over the 1 acre portion of LR No. 37/714 occupied by the Plaintiff has been extinguished.
 - viii. An order that the Plaintiff has of right obtained title over the 1 acre portion of LR No. 37/714 that he occupies through adverse possession.
 - ix. An order directing the 2nd Defendant to effect transfer of the 1 acre portion of LR No 37/714 to the Plaintiff.
 - x. Costs of the suit.
4. Upon being served with the amended amended Plaintiff dated the 18th January 2023, the 2nd Defendant responded thereto vide an amended statement of defense and counterclaim dated the 24th February 2023 and wherein the 2nd Defendant has sought for the following reliefs;
 - i. The sum of Kes.141, 968, 059/- Only.
 - ii. Interest on [i] above at court rates from the date of filing a counterclaim until payment in full.
 - iii. A declaration that the Agreement dated 20th May 2011 is illegal and enforceable against the 2nd Defendant.
 - iv. An order for Eviction of the Defendant in the counterclaim from the subject property being 1.0 acres that the Plaintiff occupies on the property LR No. 37/714.
 - v. An order of permanent injunction against the Defendant in the counterclaim either by himself, his employees, his agents and/or any one claiming on his behalf, barring him from trespassing onto, developing and in any manner interfering with the counter-claimers on LR No. 37/714.



- vi. Cost of the suit and the counterclaim.
5. On the other hand, the 1st, 3rd, 4th and 5th Defendants neither filed any statement of defense to the amended amended Plaintiff dated the 18th January 2023 or at all.
6. First forward, the instant matter came up for pre-trial direction[s] on the 27th February 2023, whereupon the Parties confirmed that same had filed the requisite documents [list of documents] and witness statement and hence the Suit was ready for hearing.
7. Arising from the foregoing, the matter was duly confirmed ready for hearing culminating into same being fixed for hearing on the 12th February 2024, when the Plaintiff's case was had and closed.

Evidence By The Parties':

a.Plaintiff's Case:

8. The Plaintiff's case revolves [gravitates] around the evidence of one witness, namely, Mohamed Warsame, who testified as PW1.
9. It was the evidence of the said witness [PW1] that same is a son of Warsame Omar Farah, now deceased and also the legal administrator of the Estate of the said deceased. Furthermore, the witness averred that by virtue of being a son of the deceased, same [witness] is conversant with the facts of the instant matter.
10. On the other hand, the witness averred that same has since recorded a witness statement in respect of the instant matter. In this regard, the witness adverted to the witness statement dated the 6th February 2023 and which the witness sought to adopt and rely on as his evidence in chief.
11. For good measure, the witness statement under reference was duly adopted and admitted as the evidence in chief of the witness.
12. Additionally, the witness alluded to a List and bundle of documents dated the 6th November 2020, containing 25 documents and which Document[s] the witness sought to adopt and produce before the court as exhibits on behalf of the Plaintiff.
13. Suffice it to point out that the documents at the foot of the List dated the 6th November 2020 were thereafter admitted and produced before the court as Exhibits P1 to P25, respectively.
14. Other than the foregoing, the witness also alluded to the Supplementary List and bundle of documents dated the 18th January 2021, containing 5 documents and which documents the witness sought to tender and produce before the court. Instructively, the documents at the foot of the List dated the 18th January 2021 were thereafter admitted and marked as Exhibits P26 to P30 respectively.
15. On the other hand, the witness averred that same has also filed an amended amended Plaintiff dated the 18th January 2023, together with a verifying affidavit sworn on even date. In this regard, the witness implored the court to find and hold that same [witness] has duly proved his case on a balance of probabilities and hence deserving of the reliefs sought thereunder.
16. On cross examination by learned counsel for the 1st Defendant, the witness averred that same [Witness] took over the conduct of the suit herein after the death of his Father, namely, Warsame Omar Farah, now deceased.
17. Nevertheless, the witness stated that same currently resides in Canada. In any event, the witness added that same [witness] moved and settle in Canada in 1980.



18. Whilst under further cross examination, the witness averred that same [PW1] is conversant with the facts of the subject suit as well as the terms of the agreement which was entered into between the deceased and the 1st Defendant.
19. Furthermore, the witness added that the second agreement which was entered into between the deceased and the 1st Defendant related to the suit property. It was the testimony of the witness that the suit property was initially owned by the 2nd Defendant.
20. On further cross examination, it was the testimony of the witness that even though the suit property was initially owned by the 2nd Defendant, same [witness] is not aware of when the 2nd Defendant ceased to own the suit property.
21. Besides, it was the testimony of the witness that the agreement between the deceased and the 1st Defendant was prepared and executed by the same advocates, who acted for both the deceased and the 1st Defendant. The witness added that same [witness] was not present at the time when the agreement was prepared and entered into.
22. Additionally and whilst under cross examination, the witness averred that the deceased [Warsame Omar Farah] was running a Motor garage on the suit property.
23. On the other hand, the witness added that same [witness] has not tendered any evidence to show that the deceased was operating a garage on the suit property.
24. It was the further testimony of the witness that neither the deceased nor himself [witness] was living/ residing on the suit property.
25. On further cross examination, the witness added that clause 16 of the said Sale agreement shows the details of the advocate who crafted and prepared the sale agreement.
26. Nevertheless, it was the further testimony that same has neither produced any evidence and in particular, any official search in respect of the suit property. In any event, the witness clarified that his late father [Warsame Omar Farah] was aware that the suit property belonged to the 1st Defendant.
27. Other than the foregoing, the witness stated that same had produced a letter dated 16th February 2016 and which letter confirmed that the 1st Defendant duly acknowledged the purchase price. In any event, the purchase price was made [paid] *vide* cheque[s].
28. Whilst under further cross examination, the Witness stated that even though the payments were made vide cheques, same [witness] has however not produced any copies of the cheque.
29. In any event, the witness clarified that what was paid on account of the purchase price was Kes.15, 000, 000/= only.
30. On cross examination by learned counsel for the 2nd Defendant, the witness averred that the transaction in question commenced in the year 2004. Furthermore, the witness added that the transaction took place in Nairobi.
31. Furthermore, it was the testimony of the witness that when the agreement was being drawn and executed, same was not present. However, the witness added that same is aware that the sum of Kes.11, 000, 000/= only was duly paid.
32. Whilst under further cross examination, the witness averred that the suit property was however registered in the name of the 2nd Defendant. Nevertheless, the witness averred that the payment of Kes.11, 000, 000/= Only, was made to and in favor of the 1st Defendant.



33. Besides, the witness averred that same [witness], is aware that the deceased was a tenant on the suit premises between the year 1983 to the year 2004.
34. On further cross examination, the witness stated that his late father however entered into and executed a sale agreement dated the 28th May 2011. Besides, the witness added that his late Father duly paid the entire purchase price.
35. It was the further testimony of the witness that even though the sale agreement was entered into between his late Father and the 1st Defendant same [witness] is not aware whether the 1st Defendant had title or ever obtained titled to the suit property.
36. O further cross examination, the witness averred that the 1st Defendant had the capacity to sell the land. Additionally, it was the testimony of the witness that same was not aware whether there was ever any demand for rents issued to his Father. Nevertheless, the witness averred that it was his Father who was receiving rents from the premises.
37. Furthermore, the witness averred that even though his Father was receiving rents from the premises, same [witness] has not brought any tenancy agreement before the court. However, the witness reiterated that his Father [now deceased] had tenants on the suit property.
38. On cross examination by learned counsel for the 3rd Defendant, the witness averred that the 3rd Defendant was never informed of the sale agreement between the 1st Defendant and his late Father. In any event, the witness added that his late Father never paid rates to the City council of Nairobi, [now defunct].
39. On re-examination, the witness averred that the payments towards and on account of the purchase price were made in terms of the clauses of the sale agreement.
40. Additionally, the witness averred that same [witness] has never seen the certificate of title in respect of the suit property.
41. Whilst under further re-examination, the witness stated that the amended amended Plaintiff which is before the court has not been signed by and on his behalf. Nevertheless, the witness added that despite the fact that the amended amended Plaintiff has not been signed, same [witness] still seeks the reliefs enumerated thereunder;
42. With the foregoing testimony, the Plaintiff's case was duly closed.

b.1st Defendant's Case:

43. It is instructive to note that though the 1st Defendant was duly served with both the original Plaintiff as well as the amended amended Plaintiff, [the latter which anchors the current suit] same did not file a statement of defense thereto.
44. On the other hand, it is also worthy to note that the 1st Defendant also did not file any List or bundle of documents; or witness statement.
45. In any event, it is worthy to reiterate that learned counsel for the 1st Defendant also intimated to the court that same was closing the 1st Defendant's case without tendering any evidence [whether oral or otherwise].
46. Suffice it to point out that the 1st Defendant's case was thereafter closed albeit without any evidence being tendered by and on behalf of the 1st Defendant.



c.2nd Defendant's Case:

47. The 2nd Defendant's case herein revolves and gravitate[s] on the basis of the evidence of one witness, namely, Abdul Raheem Raithar Haji Abdi. Same testified as DW1.
48. It was the evidence of the witness [DW1] that same is a director of the 2nd Defendant company. Besides, the witness averred that same is also conversant with the facts of the instant matter.
49. Additionally, it was the evidence of the witness that same has since recorded a witness statement dated the 4th February 2023 and which witness statement same [witness] sought to adopt and rely on as his evidence in chief. Instructively, the witness dated the 4th February 2023 was thereafter adopted and admitted as the evidence in chief of the witness.
50. On the other hand, the witness alluded to the List and bundle of documents dated the 26th February 2023 containing 12 documents and thereafter sought to tender and produce the documents beforehand as exhibits on behalf of the 2nd Defendant.
51. Suffice it to point out that the documents at the foot of the List and bundle of Document[s] dated the 26th February 2023 was thereafter produced and marked as Exhibit[s] D1 to D12, respectively.
52. Furthermore, the witness adverted to the amended statement of defense and counterclaim dated the 24th February 2023, together with the verifying affidavit thereto; and thereafter implored the Honourable court to adopt and rely on the contents thereof.
53. On cross examination by learned counsel for the 3rd Defendant, the witness averred that the 1st Defendant herein is his [witness] Father. In any event, the witness averred that same [First Defendant] has neither filed witness statement nor Statement of Defence in respect of the instant matter.
54. Whilst under cross examination, the witness averred that same was privy to the letter dated the 2nd August 2016 which same [witness] confirm to have emanated from the office of the Honorable Attorney General.
55. On further cross examination, it was the testimony of the witness that same [witness] is not conversant with an advocate known as Yunis & Co Advocate. In any event, the witness added that the 2nd Defendant did not sell the suit property to the deceased or at all.
56. Whilst under further cross examination, the witness averred that the suit property belongs to the 2nd Defendant and that the 2nd Defendant did not authorize the 1st Defendant to sell the suit property or at all.
57. On the other hand, it was the testimony of the witness [DW1] that same is aware that the 1st Defendant entered into a lease agreement in respect of the suit property.
58. On further cross examination, the witness averred that same [DW1] is aware of the firm of Mohamed and Muigai LLP Advocates. However, the witness clarified that the said law firm has never acted for the 2nd Defendant.
59. Upon being referred to a letter from the firm of Mohamed and Muigai LLP Advocates, the witness herein indicated that the letter in question forwarded a copy of the sale agreement. Nevertheless, the witness clarified that the said agreement was between the 1st Defendant and the deceased.



60. Other than the foregoing, it was the testimony of the witness that the letter from Mohamed and Muigai LLP Advocates which was referenced, confirmed that the purchase price of Kes.15, 000, 000/- Only, was indeed paid to the 1st Defendant.
61. Whilst under further cross examination, the witness averred that the deceased [Warsame Omar Farah] entered into the suit property in the year 2004. Furthermore, the witness averred that the deceased entered into the suit property as a tenant.
62. On the other hand, it was the further testimony of the witness that same reiterates the contents of his witness statement, which contents the witness avers reflect the correct position as pertains to the dispute beforehand.
63. Additionally and while under further cross examination, the witness averred that the rents from the suit property were being collected by the Estate of the deceased. Nevertheless, the witness added that the lease in respect of the suit property expired.
64. It was the further testimony of the witness that the lease in respect of the suit property was subsequently renewed on the 18th March 2015. Furthermore, the witness added that the renewal/extension was for a period of 50 years w.e.f 1st October 2004.
65. Other than the foregoing, it was the testimony of the witness that the 2nd defendant has filed a counterclaim and in respect of which same [2nd Defendant] is seeking to recover rent arrears. In any event, the witness added that the rents arrears relates to the period dating back to the years 2004.
66. Additionally, it was the evidence of the witness, that the counterclaim for rental arrears is Kes120, 000, 000/= only.
67. On further cross examination, the witness reiterated that the 2nd Defendant did not sell the suit property or any portion thereof to the deceased. To the contrary, the witness added that same was only aware of a lease agreement.
68. With the foregoing testimony, the 2nd Defendant's case was duly closed.

d.3rd Defendant's Case:

69. The 3rd Defendant herein neither filed any List and bundle of documents nor witness statement or at all. Consequently and in this regard, the 3rd Defendant offered no evidence before the court.
70. For coherence, the 3rd Defendant's case was closed without any evidence [whether oral or Documentary], being tendered and/or adduced before the court.

e.4th and 5th Defendants' Case:

71. Notably, the 4th and 5th Defendants neither entered appearance nor filed any statement of defense. Furthermore, the 4th and 5th Defendants also did not file any witness statement or at all.
72. Suffices it to point out that the 4th and 5th Defendants' case[s] were duly closed, albeit without any evidence being tendered and/or placed before the court.



Parties' Submissions:

a. Plaintiff's Submissions:

73. The Plaintiff herein filed two [2] sets of written submissions dated the 25th February 2024 and 19th March 2024, respectively.
74. In respect of the two [2] sets of written submissions, learned counsel for the Plaintiff has highlighted and canvassed six [6] issues for consideration by the Honourable court.
75. Firstly, learned counsel for the Plaintiff has submitted that the Plaintiff's claim based on breach of contract and premised on the sale agreement, which was entered into between the deceased and the 1st Defendant is not time barred. In particular, learned counsel for the Plaintiff has cited and relied on the provisions of clause 5 [b] of the said sale agreement, which stipulates the completion duration attendant to the sale agreement.
76. Additionally, learned counsel for the Plaintiff has also submitted that according to clause 5[b] of the sale agreement, the sale agreement remained alive until such time that the 1st Defendant was to avail/produce the title in respect of LR No. 37/714 [the suit property].
77. Furthermore, learned counsel has submitted that the Plaintiff herein was never aware of or notified of the existence of the certificate of title up to when same [the Plaintiff] discovered that the certificate of title had indeed been renewed in favor of the 2nd Defendant.
78. Arising from the foregoing, learned counsel for the Plaintiff has thus submitted that the computation of time in respect of the cause of action for breach of contract would thus commence from October 2020 when the Plaintiff discovered that certificate of title had been issued and that the 1st Defendant was neither keen to perform his part of the contract [sale Agreement].
79. To this end, learned counsel for the Plaintiff has cited and relied on the holding in the case of [*South Nyanza Sugar Company Ltd v Dickson Aoro Owuor*](#) [2017]eKLR.
80. Secondly, learned counsel for the Plaintiff has submitted that the 1st Defendant entered into the sale agreement whilst knowing that same was not in possession of the certificate of title.
81. In any event, learned counsel for the Plaintiff has submitted that despite entering into the sale agreement, [contract] it is evident that the 1st Defendant was neither keen nor desirous to complete the contract.
82. In this respect, learned counsel for the Plaintiff has submitted that the contract under reference was frustrated by the 1st Defendant and hence the 1st Defendant is guilty of breach of the contract under reference.
83. Thirdly, learned counsel for the Plaintiff has submitted that the 1st Defendant who entered into and executed the sale agreement with the deceased was a director of the 2nd Defendant company. Consequently and in this regard, learned counsel has added that by virtue of having been a director of the 2nd Defendant, the acts and/or actions of the 1st Defendant are thus binding on the 2nd Defendant.
84. Arising from the foregoing, learned counsel for the Plaintiff has invited the court to find and hold that the 2nd Defendant is therefore bound by the actions of the 1st Defendant and hence [2nd Defendant] is privy to the sale agreement which was entered into over and in respect of the suit property.



85. In support of the foregoing submissions, learned counsel for the Plaintiff has cited and relied on inter-alia, *Zion Mall Ltd v Mohammed Jama Abdi* [2017]eKLR, *Limuru Tiibiya General Stores Ltd v Peter Ng'ang'a & Another* [2020]eKLR, *Quin & Asktons v Salmon* [1989]AC, *Leonards Carrying Company Ltd v Asiatic Petroleum Company* [1915]AC 705 HL and HL *Blton [Engineering] Co Ltd v T. L. Graham & Sons Ltd* [1957]CA 159, respectively.
86. Fourthly, learned counsel for the Plaintiff has submitted that the Plaintiff herein entered onto and took occupation of the suit property in the year 1983. Furthermore, learned counsel for the Plaintiff has averred that ever since the Plaintiff took possession of the suit property, same [Plaintiff] has remained in occupation of the suit property to date.
87. Additionally, learned counsel for the Plaintiff has submitted that the duration of which the Plaintiff has been and remained in occupation of the suit property exceeds 12 years.
88. Consequently and in this regard, learned counsel for the Plaintiff has invited the Honourable court to find and hold that the Plaintiff has acquired possessory rights to and in respect of the 1 acre portion of the suit property.
89. In view of the foregoing, learned counsel for the Plaintiff has thus invited the court to find and hold that the Plaintiff is therefore entitled to the 1 acre portion of the suit property by dint adverse possession [prescription].
90. To this end, learned counsel for the Plaintiff has cited and relied on the holding in the case of *James Maina Kinya v Gerald Kwendaka* [2018]eKLR.
91. Fifthly, learned counsel for the Plaintiff in his rejoinder submissions has submitted that even though the amended amended Plaintiff has not been accompanied by a verifying affidavit; the failure to file a verifying affidavit is neither fatal nor offensive.
92. In any event, learned counsel for the Plaintiff has submitted that the provisions of Order 4 Rule 1[2] of the *Civil Procedure Rules* 2010, does not envisage the filing of a verifying affidavit to the amended or any subsequent Plaintiff. For good measure, learned counsel has contended that only the original Plaintiff ought to be accompanied by a verifying affidavit.
93. In short, learned counsel for the Plaintiff has submitted that the amended amended Plaintiff, which anchors the suit beforehand is competent, albeit without the Verifying Affidavit.
94. In support of the foregoing submissions, learned counsel for the Plaintiff has cited and relied on the holding in the case of *National Bank of Kenya Ltd v Bernard Onkoba Tinega T/a Betico Auctioneers & 2 Others* [2004]eKLR.
95. Finally, learned counsel for the Plaintiff has submitted that a claim for adverse possession can be commenced by means other than vide Originating Summons. Consequently and in this regard, learned counsel has contended that the suit pertaining to adverse possession which has been commenced vide Plaintiff is therefore competent and lawful.
96. In support of the foregoing submissions, learned counsel for the Plaintiff has cited and relied on the holding in the case of *Chevron Kenya Ltd v Harrison Charo Wa shutu* [2016]eKLR.
97. Consequently and in view of the foregoing, learned counsel for the Plaintiff has implored the Honourable court to find and hold that the Plaintiff herein has been able to prove his case on a balance of probabilities and thus same ought to be allowed as prayed.



b.1st Defendant's Submissions:

98. The 1st Defendant filed written submissions dated the 20th March 2024 and in respect of which same has raised, highlighted and canvassed four [4] salient issues for consideration by the court.
99. First and foremost, learned counsel for the 1st Defendant has submitted that to the extent that the amended amended Plaint by and on behalf of the Plaintiff is not accompanied by a verifying affidavit, then same [amended amended Plaint] is invalid.
100. Additionally, learned counsel for the 1st Defendant has submitted that there being no verifying affidavit that has been filed by the Plaintiff, the suit beforehand contravenes the provisions of Order 4 Rules 1[2] of the Civil Procedure Rules 2010 and thus the Plaintiff's suit sought to be struck out.
101. Secondly, learned counsel for the 1st Defendant has submitted that the remedy of specific performance, which has been sought for by the Plaintiff herein is neither available nor legally tenable. For good measure, learned counsel for the 1st Defendant has submitted that the suit property against which [sic] specific performance did not belong to the 1st Defendant, with whom the deceased entered into a sale agreement.
102. At any rate, learned counsel for the 1st Defendant has also submitted that the order for specific performance is an Equitable relief and same can only be granted upon proof of certain pertinent ingredient[s] which the Plaintiff has neither proved nor established.
103. In a nutshell, learned counsel for the 1st Defendant has contended that the Plaintiff herein has neither met nor proved the requisite ingredient[s] to warrant the grant of the Equitable relief of specific performance.
104. To buttress the foregoing submissions, learned counsel for the 1st Defendant has cited and relied on inter-alia the holding in the case of Kenya Power & Lighting Company Ltd v Nathan Karanja gachoka & Another [2016]eKLR, Gichinga Kibutha v Caroline Nduku [2018]eKLR and Reliable Electrical Engineering Company Ltd v Mantrac Kenya Ltd [2006]eKLR.
105. Thirdly, learned counsel for the 1st Defendant has also submitted that even though the Plaintiff has sought for the alternative prayer for refund of the purchase price of the suit property at market rate, same has however not proved his entitlement to refund of the purchase price.
106. In any event, learned counsel for the Defendant has also contended that the prayer of refund of the purchase price is also prohibited and/or barred by the provisions of Section 4[1] of the Limitation of Actions Act, Chapter 22 Laws of Kenya.
107. Learned counsel for the 1st Defendant has also submitted that the Plaintiff's claim to the suit property on the basis of adverse possession is misconceived and legally untenable insofar as the Plaintiff's entry onto and occupation of the suit property was on the basis of a tenancy agreement. In this regard, learned counsel for the 1st Defendant has pointed out that the occupation and possession of a portion of the suit property was vide permissions and consent [lease] by the 1st Defendant.
108. In support of the submissions that the Plaintiff herein is not entitled to the prayer anchored in adverse possession, learned counsel for the 1st Defendant has cited and relied on inter-alia the case of Njoki Wainaina v Josphat Thuo Githachuri & 3 Other ; National Land Commission & Another [Interested Party] [2021]eKLR and Chevron Kenya Ltd v Harrison Charo Wa shutu [2016]eKLR, respectively.
109. In short, the 1st Defendant has invited the Honourable court to find and hold that the Plaintiff's suit is devoid and bereft of merits and thus ought to be dismissed with costs.



2nd Defendant's Submissions:

110. The 2nd Defendant filed written submissions dated the 12th march 2024; and in respect of which same [Second Defendant] has highlighted seven [7] salient issues for consideration and determination by the Honourable court.
111. Firstly, learned counsel for the 2nd Defendant has submitted that the Plaintiff's suit, which is anchored on the basis of the amended amended Plaintiff and which is not accompanied by a verifying affidavit is fatally incompetent and thus invalid.
112. In this regard, learned counsel for the 2nd Defendant has invited the Honourable court to take cognizance of the provisions of Order 4 Rule 1[2] of The Civil Procedure Rules 2010, which underscore [operative Plaintiff] must be accompanied by a verifying affidavit.
113. In support of the foregoing submissions, learned counsel for the 2nd Defendant has cited and relied on inter-alia the case of Oriental Commercial Bank Ltd v Shashikant Chandubhai Patel [2011]eKLR and Delphis Bank Ltd v Asudi [K] Ltd & Another HCC No 82 of 2003 [UR].
114. Secondly, learned counsel for the 2nd Defendant has submitted that the impugned sale agreement was entered into between the deceased and the 1st Defendant in his [1st Defendant's] personal capacity and not otherwise.
115. Furthermore, learned counsel for the 2nd Defendant has submitted that the 2nd Defendant herein was neither a party nor privy to the sale agreement under reference. In this regard, Learned counsel for the 2nd Defendant has submitted that the 2nd Defendant is not bound by the terms of the sale agreement under reference.
116. Thirdly, learned counsel for the 2nd Defendant has submitted that the prayer for specific performance, which has been sought for by and on behalf of the Plaintiff herein is not legally tenable. In this regard, counsel submitted that the prayer for specific performance cannot issue against the 2nd Defendant without legal and enforceable agreement [Contract] against the 2nd Defendant.
117. In support of the foregoing submissions, learned counsel for the 2nd Defendant has cited and relied on the holding in the case of Reliable Electrical Engineering Ltd v Mantrac Kenya Ltd [2006]eKLR.
118. Fourthly, learned counsel for the 2nd Defendant has submitted that in the absence of any sale agreement [contract] between the Plaintiff and the 2nd Defendant, no damages can issue and/or be granted as against the 2nd Defendant or at all.
119. Fifthly, it is the submissions by learned counsel for the 2nd Defendant that the Plaintiff herein entered onto to the suit property as a tenant and remained in occupation thereof from the year 1983 to date, albeit in the capacity of a tenant. Nevertheless, learned counsel for the 2nd Defendant has added that the Plaintiff has however failed to pay the requisite rents, either in the manner agreed or at all.
120. Sixthly [6th] learned counsel for the 2nd Defendant has submitted that the Plaintiff is not entitled to the prayer anchored on adverse possession insofar as the Plaintiff has not been occupation of the suit property in a manner adverse to the interests of the 2nd Defendant.
121. To the contrary, learned counsel for the 2nd Defendant has submitted that the Plaintiff has been in occupation of the suit property with the permission and consent of the 2nd Defendant on account of tenancy agreement.



122. In any event, learned counsel for the 2nd Defendant has submitted that the suit premised on adverse possession is incompetent and thus legally untenable for being in contravention of the provisions of Order 37 Rule 7 of the Civil Procedure Rules 2010.
123. Seventhly, learned counsel for the 2nd Defendant has submitted that the Plaintiff's claim premised and/or based on refund of the sum of Kes.15, 000, 000/= Only, is statute barred by dint of the provision[s] of the Limitations of Action[s] Act, Chapter 22, Laws of Kenya.
124. Consequently and in this regard, learned counsel for the 2nd Defendant has invited the Honourable court to find and hold that the prayer for refund is thus misconceived and invalid.
125. Finally, learned counsel for the 2nd Defendant has submitted that the Plaintiff herein has remained in occupation of the suit property, albeit without paying the agreed rents or at all. In any event, learned counsel for the 2nd Defendant has added that attempts by the 2nd Defendant to collect rents from the Plaintiffs have not bore any fruit or at all.
126. Furthermore, learned counsel for the 2nd Defendant has submitted that the Plaintiff owes the 2nd Defendant rents amounting to Kes.141, 968, 069/= only which the Plaintiff ought to be directed to pay and/or liquidate.
127. In a nutshell, learned counsel for the 2nd Defendant has invited the Honourable court to find and hold that the 2nd Defendant has duly established her claim at the foot of the counterclaim dated the 24th February 2023.

c.Submissions by the 3rd, 4th and 5th Defendants:

128. Notably, the 3rd, 4th and 5th Defendants did not file any written submissions either within the circumscribed timeline or at all.
129. For the avoidance of doubt, the only submissions which are on the record of the court are the ones which have been referenced and highlighted in the preceding paragraph[s].

Issue for Determination:

130. Having appraised the pleadings filed by and on behalf of the Parties, the evidence [oral and documentary tendered] and having considered the written submissions on record, the following issues do crystalize [emerge] and are thus worthy of determination;
 - i. Whether the Plaintiff's suit anchored on the amended amended Plaint dated the 18th January 2023 is incompetent and whether same [suit] ought to be struck out or otherwise.
 - ii. Whether the Plaintiff herein is entitled to an order for Specific performance over and in respect of a portion of the suit property or otherwise.
 - iii. Whether the Plaintiff's suit and particularly as pertains to refund of the purchase price paid at the foot of the sale agreement is statute barred or otherwise.
 - iv. Whether the Plaintiff is entitled to the suit property or the 1 acre portion thereof on account adverse possession or at all.
 - v. Whether the 2nd Defendant is entitled to the remedy sought at the foot of the counterclaim or any thereof.



Analysis and Determination:

Issue Number 1 Whether the Plaintiff's suit anchored on the amended amended Plaintiff dated the 18th January 2023 is incompetent and whether same [suit] ought to be struck out or otherwise.

131. The Plaintiff's suit herein was originated vide original Plaintiff dated the 6th November 2020 and which Plaintiff was duly accompanied by a verifying affidavit sworn on even date. Nevertheless, the Plaintiff herein thereafter sought for and obtained leave culminating into the filing of an amended Plaintiff which introduced further averments to the Plaintiff as well as adding additional reliefs/remedies thereunder.
132. Nevertheless, it is instructive to note that even though the Plaintiff filed an amended Plaintiff, same [the amended Plaintiff dated the 26th January 2022], was however not accompanied by a verifying affidavit.
133. Moreover, the Plaintiff herein subsequently amended the amended Plaintiff culminating into the amended amended Plaintiff dated the 18th January 2023. For good measure, it is the amended amended Plaintiff under reference which anchors the current proceedings.
134. Be that as it may, it is common knowledge and same was duly conceded by learned counsel for the Plaintiff that the amended amended Plaintiff was neither accompanied nor verified by a verifying affidavit or at all.
135. In any event, it is the contention by learned counsel for the Plaintiff that the amended and amended amended Plaintiff did not require to be accompanied and/or verified by a verifying affidavit. On the contrary, learned counsel for the Plaintiff posits that the provisions of Order 4 Rule 1[2] of the *Civil Procedure Rules*, 2010 only requires a verifying affidavit to accompany the original Plaintiff and not otherwise.
136. Furthermore, learned counsel for the Plaintiff has ventured forward and cited the decision in the case of *National Bank of Kenya Ltd v Bernard Onkoba Tinega T/a Betico Auctioneers & 2 Others* [2004]KLR as the basis for the foregoing contention.
137. On the other hand, learned counsel for the 1st and 2nd Defendant, respectively, have submitted that the provisions of Order 4 Rule 1[2] of the *Civil Procedure Rules*, 2010 require that the Plaintiff [the operative plaintiff] which anchors the suit ought to be verified by a verifying affidavit. In this respect, learned counsel for the 1st Defendant has submitted that the amended amended Plaintiff, which is the operative Plaintiff beforehand, needed to be accompanied and verified by a verifying affidavit.
138. Furthermore, learned counsel for the 1st and 2nd Defendant respectively have contended that in the absence of a compliant verifying affidavit, the Plaintiff's suit anchored on the amended amended Plaintiff is therefore incompetent and fatally defective. Consequently, learned counsel for the 2nd Defendant has implored the Honourable court to find and hold that the Plaintiff's suit is incompetent and thus ought to be struck out.
139. Having considered the rival submissions, I hold the firm opinion that the provisions of Order 4 Rule 1[2] of the *Civil Procedure Rules*, 2010 envisage that the Plaintiff [which means the operative plaintiff] ought to be accompanied by a verifying affidavit. Instructively, the word deployed vide Order 4 Rule 1[2] of the *Civil Procedure Rules*, 2010 refers to the Plaintiff and not a Plaintiff.
140. In my humble albeit considered view, the terminology used and deployed by the Rules committee in terms of Order 4 Rule 1[2] of the *Civil Procedure Rules*, 2010 calls upon every Plaintiff to file a verifying affidavit alongside the Plaintiff at any time there is a Plaintiff being filed.



141. In this respect, where the original Plaintiff is amended, it behooves the Plaintiff to file a verifying affidavit verifying the contents [many a times additions or subtractions] contained in the amended Plaintiff.
142. Furthermore, it is also not lost on this court that where the original Plaintiff is amended, the effect of amendment is to supersede the original Plaintiff, as well as the verifying affidavit hitherto attached to the original Plaintiff. For good measure, once an amendment is perfected, the Plaintiff cannot be allowed to revert back and make any reference to the previous Plaintiff and by extension the verifying affidavit which was attached thereto.
143. Considering the import and tenor of the analysis [details in terms of the preceding paragraphs], I do not share in the thinking and position reflected in the case of *National Bank of Kenya Ltd v Bernard Onkoba Tineba T/a Betico Auctioneers & 2 others* [2004]eKLR.
144. Additionally, it is my humble view, that amendments or further amendments, have the import of bringing forth new averments into the body of the operative Plaintiff [amended plaintiff/further amended plaintiff], which averments can only be verified by an accompanying verifying affidavit and not otherwise.
145. On the other hand, there is no gainsaying that where there are new additions and/or subsequent deletion[s], brought forth vide an amended or further an amended plaintiff, it cannot be said that the previous verifying affidavit [which accompanied the original Plaintiff], can prophetically be utilized to verify an amendment, which was not fathomed [envisaged] at the time of the swearing of the initial verifying affidavit.
146. Without belaboring the point, it is my holding and finding that it behooved the Plaintiff to file a verifying affidavit to accompany the amended Plaintiff or the amended amended Plaintiff, with a view to verifying [validating] the additional paragraphs and/or reliefs that were brought forth vide the amended amended Plaintiff.
147. Simply put, the foregoing position [in my humble view] reflects the true import and tenor of Order 4 Rule 1[2] of the *Civil Procedure Rules* 2010, whose purpose was to make the averment[s] at the foot of the requisite Plaintiff to be verified under Oath, namely, vide the attendant verifying affidavit.
148. Having found and held, in terms of the foregoing paragraphs, the next question that require[s] determination relates to whether or not the impugned amended amended Plaintiff, which has not been duly accompanied/verified by a verifying affidavit, ought to be struck out.
149. Ideally, where a litigant and/or his legal counsel fails to comply with the explicit provisions of the law, such failure and/or infraction of the law, ought to be met with an appropriate sanction, inter-alia striking out. [See the holding of the Court of Appeal in the case of *Nicholas Kiptoo Korir Arap Salat v Independent Electoral and Boundaries Commission and 7 Others* [2013]eKLR-as per Kiage, JA].
150. Nevertheless, I am alive to the weighty issues and matters which have been canvassed by the Parties and hence [despite my reservations] I am not minded to strike out the suit on the basis of the infraction[s] alluded to in the preceding paragraph[s].
151. Notably, I am inclined to invoke and adopt the ratio decidendi espoused by the Supreme Court [The apex Court] in the case of *Moses Mwicigi & Others v The IEBC* [2016]eKLR, where the court stated and observed as hereunder;
 - (65) This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion



bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

- (66) Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159 (2) (d) of the *Constitution*, which proclaims that, "... courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the Courts.
- (67) As an instance, there are times when the disregard of Rule 33 of the *Supreme Court Rules* clearly undermines the Court's ability to deliver justice to all the parties in a dispute. (This is concerned with the mode of instituting appeals). In such a situation, the shield of Article 159 (2) (d) will not be deployed by the Court in aid of the offending litigant. Such is, however, not the case in the instant appeal. Notwithstanding the failure to adhere to all the requirements of the Rule at the initial stages, by the appellants herein, their subsequent actions did ensure that the Court was not without all the requisite documentation, for undertaking a consideration of the matter.
152. Consequently and in view of the foregoing, I am prepared to excuse the lapse[s] and inadvertence by and on behalf of legal counsel for the Plaintiff.
153. Nevertheless, it is appropriate to state and reiterate that this court is not prepared to whitewash blatant and flagrant disregard of the Rules of procedure, whose purpose is to ensure that Justice is served in a consistent and predictable manner.
154. For coherence, the Plaintiff and his legal counsel are hereby advised to heed the warning which was highlighted by the Court of Appeal in the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR, where the court underscored as hereunder;

A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of *Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 Others* Civil Appeal No. 290 of 2012 as follows;

"In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act*(Cap 9). Procedure is also a handmaiden of just determination of cases."

155. In a nutshell, my finding and holding in respect of issue number one [1] is to the effect that though the amended amended Plaintiff needed to be accompanied by verified by a verifying affidavit; the failure to do so is excusable in the circumstances.

Issue Number 2 Whether the Plaintiff herein is entitled to an order for specific performance over and in respect of a portion of the suit property or otherwise.

156. The Plaintiff herein has sought for a plethora of reliefs, inter-alia an order for specific performance pertaining to and concerning a portion of the suit property measuring one acre, which was [sic] the subject of the sale agreement entered into and executed on the 20th May 2011.



157. It is instructive to recall that the sale agreement under reference was entered into between Hathar Haji Abdi [as the vendor] and Warsame Omar Farah [now deceased] as the purchaser.
158. It is also worth noting that Hathar Haji Abdi entered into a sale agreement in his personal capacity and not as a director of the 2nd Defendant or otherwise.
159. On the other hand, it is appropriate to point out that in the body of the said sale agreement [Contract] Hathar Haji Abdi [the vendor] has described himself as the sole proprietor of the suit property.
160. Be that as it may, it turned out that the suit property did not belong to and was not registered in the name of Hathar Haji Abdi, who was the vendor or at all.
161. At any rate, evidence abound that even at the time when Warsame Omar Farah, now deceased was entering into the sale agreement with Hathar Haji Abdi, same [the purchaser] was privy to and knowledgeable of the fact that the 1st Defendant was not registered owner of the suit property.
162. On the contrary, Warsame Omar Farah, now deceased, who was the purchaser, was privy to and knowledgeable of the fact that the suit property was registered in the name of the 2nd Defendant and not otherwise.
163. In respect of the foregoing position, it suffices to reproduce the salient aspects of the evidence by PW1 whilst under cross examination by learned counsel for the 1st Defendant.
164. Same stated as hereunder;

“I don’t have any certificate of official search, if any that was undertaken. I do confirm that my late father knew that the land belonged to the 2nd Defendant”.

165. To the extent that the purchaser, now deceased knew that the suit property belonged to the 2nd Defendant who was not a party to the sale agreement, same [purchaser] cannot now be heard to contend that an order of specific performance can issue and/or be granted against the 2nd Defendant.
166. For coherence, there is no gainsaying that a contract [sale agreement] can only bind the Parties thereto and not otherwise. Consequently and in this regard, the 2nd Defendant was neither privy to nor party to the contract and hence the doctrine of privity of contract does not bind the 2nd Defendant.
167. To this end, it suffices to adopt and reiterate the holding of the Court of Appeal in the case of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR, where the court held as hereunder;

Thus in *Agricultural Finance Corporation v Lengetia Ltd (supra)*, quoting with approval from *Halsbury’s Laws of England*, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was, reiterated:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”



Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter.

168. Secondly, it is also not lost on this court that the suit property, in respect of which the Plaintiff seeks for an order for specific performance is currently charged to and in favor of NCBA Bank Kenya PLC. [See the charge documents which was registered on the 9th November 2020 *vide* entry number 5].
169. For good measure, no evidence was tendered by the Plaintiff or otherwise that the charge in favor NCBA Bank PLC [which charge] currently supersedes the 2nd Defendant's title to the suit property [subject to the equity of redemption], has been Discharged or at all.
170. Nevertheless, there is no gainsaying that the existence of the Charge [details in terms of the preceding paragraphs] militates against the grant of an order for specific performance].
171. Notably, any order, including an order for specific performance, which will affect the title of the suit property, will no doubt impact on the rights of the chargee. Consequently and in this regard, if any such order were to be issued; then NCBA Bank Kenya PLC [who was not a party] will be prejudiced, nay condemned unheard contrary to Article 50[1] of the Constitution, 2010. [See also the ratio in the case of *Standard Charter Financil Services Limited v Manchester Outfitters Limited[now Kings Woolen Ltd]* 2016] eKLR; and *The Speaker, Kisumu County Assembly v The Clerk, Kisumu County Assembly Service Board and Others* [2015] eKLR].
172. Thirdly, as concerns the 1st Defendant, it is common ground that no order for specific performance can issue as against same insofar as same [1st Defendant] does not own the suit property.
173. To my mind, if any such order were to issue, same shall be in vain and in futility and yet, a court of law [the Court herein not excepted] does not act in vanity.
174. Notwithstanding the foregoing, it is imperative to underscore that an order for specific performance is an equitable relief/remedy and thus same can only be issued where certain pertinent ingredients are established.
175. To this end, I can do no better than to cite and reiterate the holding in the case of *Reliable Electrical Engineering Company Limited v Mantrac Kenya Limited* [2006]eKLR, where the court stated and held thus;

The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.

176. In a nutshell, my answer to issue number two [2] is to the effect that the Plaintiff herein has not met the requisite threshold to warrant the grant of the equitable remedy of specific performance at all.
177. Consequently and in this regard, same [specific performance] cannot issue.



Issue Number 3 Whether the Plaintiff's suit and particularly as pertains to refund of the purchase price paid at the foot of the sale agreement is statute barred or otherwise.

178. Other than the prayer for specific performance, which has been highlighted and addressed in the preceding segments of the Judgment, the Plaintiff herein has also sought for an alternative prayer for refund of the purchase price which was paid to and in favor of the 1st Defendant.
179. Instructively, the Plaintiff herein tendered and adduced evidence that Warsame Omar Farah, now deceased paid to and in favor of the 1st Defendant the entire sum of Kes.15, 000, 000/= only and which payment was duly acknowledged by the 1st Defendant.
180. Arising from the foregoing, the Plaintiff has thus contended that in lieu of specific performance [which this court has already addressed] same [Plaintiff] ought to be granted a refund.
181. On the other hand, both the 1st and 2nd Defendants have contended that the Plaintiff plea/prayer for refund of the purchase price is time [Statute] barred. In this regard, learned counsel for the 2nd Defendant has cited and highlighted the provisions of Section 4[1] of *The Limitation of Action Act*, Chapter 22 Laws of Kenya.
182. Despite the contention by and on behalf of learned counsel for the 1st and 2nd Defendants that the Plaintiff's suit for refund of the purchase price is statute barred, it is my humble view that the said submissions are actually mistaken, misconceived and erroneous.
183. To start with, the 1st Defendant herein engaged and retained the services of M/s Mohammed and Muigai LLP Advocates who generated inter-alia the letter dated the 26th September 2017 and in respect of which same [M/s Muhammed & Muigai Advocates LLP] acknowledged that the 1st Defendant received the purchase price of Kes.15, 000, 000/=. [See exhibit P13].
184. On the other hand, the same firm of M/s Mohammed Muigai Advocates also wrote a letter dated the 7th December 2017 and in respect of which the 1st Defendant [the vendor] was still confirming and acknowledging the existence of the sale agreement between same [1st Defendant] and Warsame Omar Farah. [See exhibit P9].
185. Furthermore, there is also no gainsaying that the 1st Defendant herein also retained and engaged the services of M/s Yunis & Associates Advocates who generated a letter dated 28th July 2017 and in respect of which, the 1st Defendant was inter-alia offering to refund the Kes.15, 000, 000/= to the Plaintiff. [See exhibit P16].
186. In my humble, albeit considered view, the import of the letters, [whose details have been highlighted in the preceding paragraphs] was to acknowledge the debt in terms of the purchase price that had been paid to and received by the 1st Defendant.
187. Premised on the foregoing, the computation of timeline for breach of the sale agreement [Contract] and in particular for recovery for refund must be reckoned from the last date of acknowledgement. In this case, the contents of the letter highlighted suffice.
188. Simply put, it is my finding and holding that the Plaintiff's claim pertaining to and or concerning refund of Kes.15, 000, 000/= Only, is not time barred.
189. Similarly, it is also my finding and holding that the payment of the sum of Kes.15, 000, 000/= to and in favor of the 1st Defendant was neither controverted nor challenged. For good measure, it is not lost



on this court that the 1st Defendant neither filed any statement of defense nor offered any evidence in rebuttal.

190. On the other hand, DW1, who testified on behalf of the 2nd Defendant is confirming that Kes.15, 000, 000/- Only, was indeed paid to the 1st Defendant. For brevity, DW1 stated as hereunder whilst under cross examination by learned counsel for the 3rd Defendant;

“I can see the letter from M/s Mohammed Muigai Advocates LLP and the letter is forwarding a sale agreement. The said firm of advocate are said to have been acting for the 1st Defendant. The letter in question was also confirming receipt of Kes.15, 000, 000/= only. There is a sale agreement and the sale agreement was signed by the 1st Defendant”.

191. In a nutshell, it is my finding and holding that the Plaintiff’s claim for refund of Kes.15, 000, 000/= Only, as against the 1st Defendant is meritorious.

Issue Number 4 Whether the Plaintiff is entitled to the suit property or the 1 acre portion thereof on account adverse possession or at all.

192. From the relief at the foot of the amended amended Plaintiff, the Plaintiff herein also sought for an order that same has since acquired prescriptive rights [adverse possession] over and in respect of a portion of the suit property on the basis of occupation thereof for more than 12 years. [See Sections 7 and 12 of the *Limitation of Action Act*, Chapter 22, Laws of Kenya.]
193. According to the Plaintiff, same entered upon and took possession of the designated portion of the suit property from the year 1983 and has remained in occupation therefor to date. In this respect, the Plaintiff thus contends that same [Plaintiff] is deserving of a suitable declaration on the basis of adverse possession.
194. Despite the contention by and on behalf of the Plaintiff herein, it is worth recalling that the Plaintiff himself acknowledged and admitted that same entered upon the suit property or the designated portion thereof on the basis of a tenancy.
195. Additionally, it is also not lost on the court that the Plaintiff herein entered into and executed a sale agreement with the 1st Defendant over and in respect of a portion of the suit property on the 20th May 2011.
196. Quiet clearly, the Plaintiff herein would not be executing a sale agreement over and in respect of the designated portion of the suit property, if at all, same [Plaintiff] had acquired adverse possessory rights thereto.
197. Other than the forgoing, there is no gainsaying that the Plaintiff herein has propagated his case on the basis that same entered into a lawful sale agreement over and in respect of the suit property and same has variously been pursuing the performance of the terms of the sale agreement.
198. To my mind, the Plaintiff herein by virtue of the documents tendered before the court acknowledges that his occupation is premised on the existence of [sic] a contract and hence same cannot now turn around and seek to implead adverse possession.
199. Instructively, a claim for specific performance [which denotes the existence of a valid contract], is antithetical to a claim for adverse possession. Simply put, the two causes of action, which are parallel, cannot be propagated simultaneously.



200. To buttress the foregoing position of the law, it suffices to adopt and reiterate the ratio in the case of *Sisto Wambugu v Kamau Njuguna* [1983] eKLR, where the court stated and held thus;

In my judgment, the plaintiff, having in effect been able to go in and stay under the contract, cannot now repudiate the contract with hindsight. As I have said, if at any time he made it clear that he was no longer bound by the contract, then different considerations would apply. Equally, no doubt, if he had made that clear, then the vendors would have taken action against him. It is only the fact that he was there as a purchaser pending completion which has enabled time to run in his favour, as he says, and which enables him to claim a title by adverse possession. Accordingly, in my judgment, although the full period required by the 1939 Act has elapsed, the plaintiff has not shown that he was in adverse possession.”

201. Most recently, the Court of Appeal in the case of *Catherine Koriko & 3 Others v Evaline Rosa* [2020]eKLR, stated and held thus;

A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property.

202. Arising from the foregoing analysis, it is my finding and holding that the Plaintiff herein has not met the requisite conditions that underpin a claim for adverse possession. [See the decisions in *Kuria Kiarie v Sammy Magera* [2018]eKLR and *Chevron Kenya Ltd v Harrison Charo Wa Shutu* [2016]eKLR].

Issue Number 5 Whether the 2nd Defendant is entitled to the remedy sought at the foot of the counterclaim or any thereof.

203. Other than the Plaintiff herein, who had raised and highlighted a plethora of reliefs; it is also worth noting that the 2nd Defendant also filed a counterclaim and sought for various reliefs.
204. First and foremost, the 2nd Defendant contended that Warsame Omar Farah, now deceased was a tenant in the suit premises and hence same was obligated to pay monthly rents in the sum of kes.400, 000/= only per month.
205. However, it was the contention by and on behalf of the 2nd Defendant that despite being a tenant in the suit premises, the deceased never paid the requisite rents w.e.f 2004. In any event, it has been contended that the rents have remained in arrears to date.
206. Arising from the foregoing the 2nd Defendant has therefore implored the Honourable court to find and hold that the Plaintiff is indebted on account of rent arrears in the sum of Kes.141, 968, 059/= only.
207. Be that as it may, it is imperative to recall that even though the 2nd Defendant contends that the Plaintiff was a tenant and was obligated to pay monthly rents of Kes.400, 000/- per month, no tenancy agreement was ever tendered and/or produced before the court.
208. At any rate, there is no gainsaying that the tenancy if any between the 2nd Defendant and the Plaintiff herein would be one touching on and concerning the disposition of an interests in land. Consequently, it would have been imperative that same be reduced into writing. [See Section 3[3] of the *Law of Contract Act*, Chapter 23, Laws of Kenya].
209. Other than the foregoing, it is also worth recalling that though the 2nd Defendant contended that the monthly rents was agreed in the sum of Kes.400, 000/= Only, per month no evidence, not even a rent



- book or receipts, was tendered before the court to show that the Plaintiff have ever paid any such rent or at all.
210. Other than the foregoing, there is evidence by and on behalf of DW1 that it was Warsame Omar Farah, now deceased, who was indeed collecting rents from the suit property.
211. To this end, it suffices to reproduce the evidence of DW1 whilst under cross examination by counsel for the 3rd Defendant.
212. Same testified as hereunder;
- “I do stand by the contents of the witness statement. The rents from the suit property was being collected by the estate of the deceased”.
213. From the foregoing, it is evident and apparent that DW1 was indeed confirming that it is Warsame Omar Farah, now deceased and by extension the Plaintiff herein [Legal Administrator] who have been collecting rents.
214. Notwithstanding the foregoing, it is important to point out that a claim touching on rent is a one for special damages and hence the claimant [2nd Defendant] was not only called upon to particularly plead same but same [2nd Defendant] was obligated to specifically prove the claim. [See the decision in *Capital Fish Kenya Ltd v Kenya Power & Lighting Company Ltd* [2016]eKLR].
215. Sadly, the 2nd Defendant herein has neither tendered nor produced any scintilla of evidence to underpin the claim for rent arrears or at all. In short, the figure for Kes.141, 968, 059/= only has merely been thrown on the face of the court.
216. Other than the foregoing, it is also worth mentioning that the claim for rent arrears in the sum of Kes.141, 968, 059/= only w.e.f would also have been time barred on account of the provisions of Section 4[1] of the *Limitation of Action Act*, Chapter 22 Laws of Kenya.
217. Consequently, even if credible evidence had been tendered towards proving the said claim, [which is not the case], I would still have found that a substantial chunk of the claim is statute barred and hence not awardable.
218. To this end, it suffices to cite and take cognizance of the holding in the case of *Gathoni v Kenya Cooperative Creameries* [1982]eKLR, where the court held thus;
- The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.
219. Be that as it may, it is important to recall that the suit property still belongs to and is registered in the name of the 2nd Defendant. In this regard, same [Second Defendant] is no doubt entitled to recover vacant possession thereof from the Plaintiff.
220. As pertains to the extent and scope of the rights of a land owner, [the 2nd Defendant not excepted], I can do no better than to adopt and endorse the holding of the court in the case of *Mohansons (Kenya) Limited v Registrar of Titles & 2 others* [2017] eKLR.
221. For coherence, the court stated and held as hereunder:



- (17) The petitioner as a registered proprietor of the suit property has established a strong prima facie case for the grant of the reliefs for the protection of his property rights sought in the petition. I do not agree that the petition is about ownership of the suit property which should be determined by a civil suit rather than by petition for protection of property rights. Having perused petition, I do not accept that the petitioner has violated the rule of specificity of pleading constitutional claims as propounded by *Anerita Karimi Nejrū v. A.G* No. 1 (1979) KLR 154. The petitioner as registered proprietor asserts his constitutional right to protection of property under Article 40 of the *Constitution*. If he 2nd Respondent contends that the title of the petition is vitiated by fraud, misrepresentation or the certificate of title is illegal, unprocedural or obtained through a corrupt scheme, it is for the said respondent to move the appropriate Court by suitable proceedings in that behalf for such determination. In the absence and prior to any such determination, the petitioner is entitled to protection of his undoubted property rights.
- (18) As held by the Court of Appeal for East Africa held in *Moya Drift Farm Ltd. v Theuri* (1973) EA 114 a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not have possession of the property. *Spry, V-P* at 116, considered the effect of section 23 of the *Registration of Titles Act* and held –

“I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession.”

Sir William Duffus, P. *ibid* at p.117 agreed with Spry, JA as follows:

“In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land.”

222. In a nutshell, it is my finding and holding that the 2nd Defendant by virtue of the provisions of Sections 24 and 25 of the [Land Registration Act, 2012](#), is thus entitled to vacant possession and by extension, an order of Permanent injunction to vindicate her Rights to and in respect of the suit Property.

Final Disposition:

223. Arising from the forgoing discourse, it must have become apparent and evident that both the Plaintiff and the 2nd Defendant have partially succeeded in their respective claims.
224. Consequently and in the premises, I do proceed to and hereby enter Judgment in favor of the Plaintiff as hereunder;
- i. The Plaintiff is entitled to refund of Kes.15, 000, 000/= Only, being the purchase price paid to the 1st Defendant.



- ii. The refund of Kes.15, 000, 000/= only in terms of clause [1] shall attract interest at court rates [14%] w.e.f 20th May 2011 until payment in full.
 - iii. For the avoidance of doubt, the refund, in terms of clause [1] shall be recovered from the 1st Defendant herein.
 - iv. The rest prayers at the foot of the amended amended Plaintiff are hereby declined.
225. On behalf of the 2nd Defendant Judgment be and is hereby entered in terms of the counterclaim as hereunder;
- i. A declaration be and is hereby made that the agreement dated 20th May 2011 is illegal and unenforceable as against the 2nd Defendant.
 - ii. The Plaintiff be and is hereby directed to vacate and hand over vacant possession of the portion of the suit property under his occupation and the vacant possession be surrendered within 180 days from the date hereof.
 - iii. That in default to vacate and hand over vacant possession in terms of clause [ii], the 2nd Defendant shall be at liberty to levy eviction against the Plaintiff and in this regard an eviction order shall issue.
 - iv. In the event of eviction being levied by and on behalf of the 2nd Defendant, the costs/expenses if any shall be certified by the Deputy Registrar and same shall be recovered from the Plaintiff.
 - v. Subject to recovery of vacant possession, an order of permanent injunction shall and is hereby issued to restrain the Plaintiff either by himself, agents, employees and/or anyone claiming under the Plaintiff, from entering upon and/or remaining on the suit property, namely, LR No. 37/714 or any portion thereof.
 - vi. Any other relief at the foot of the counterclaim not expressly granted is hereby dismissed.
226. As pertains to costs, I decree that either Party shall bear own costs taking into account the circumstances, which have been highlighted in the preceding paragraphs. In any event, the determination, is evenly balanced.[See the principles highlighted by the Supreme Court [the Apex Court in the case of Jasbir Singh Rai and 3 others v Tarlochan Singh Rai and 4 Others [2014]eKLR].
227. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY, 2024.

OGUTTU MBOYA,

JUDGE

In the presence of:

Benson – Court Assistant.

Dr. Okubasu and Mr. Aluoch for the Plaintiff.

Mr. Peter Muchoki for the 1st Defendant.

Mr. Kamwaru for the 2nd Defendant.

Ms. Kiplai for the 3rd Defendant.

N/A for the 4th and 5th Defendants

