



**Haree Construction Limited v Joreth Limited & 2 others (Environment & Land
Case 610 of 2012) [2023] KEELC 16012 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16012 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 610 OF 2012**

**LN MBUGUA, J
MARCH 2, 2023**

BETWEEN

HAREE CONSTRUCTION LIMITED PLAINTIFF

AND

JORETH LIMITED 1ST DEFENDANT

BONIFACE MURIITHI KIHUNGI 2ND DEFENDANT

MARGARET WAMBUI NGUGI 3RD DEFENDANT

JUDGMENT

Pleadings

1. The plaintiff instituted this suit through a plaint dated 18.9.2012, which was amended and finally further amended on 7.5.2018. The Plaintiff claims ownership of the properties known as Land Reference 13330/520 & 13330/524 (suit plots) located off Thika Road and formerly described as Plot No. 265 and 269 respectively under Thome Farmers No.5 Limited.
2. The Plaintiff further contends that after purchasing the suit plots, it was required to pursue title from the 1st Defendant and to pay ksh.200, 000/= per plot to the 1st Defendant through its appointed advocates M/S Kimani Kahiro & Associates. The said Advocates later informed the plaintiff that the deed plans for the two plots were not available.
3. Subsequently, the 1st Defendant announced that it had changed its Advocates to Chege Wainaina & Company Advocates. The Plaintiff continued to pursue its title through the 1st Defendant's new Advocates but they also claimed that they did not have the two deed plans in respect of the suit plots. The said advocates would later inform the Plaintiff to vacate the suit plots by a notice dated 3rd March 2012.



4. The Plaintiff then learnt that the said new Advocates had purportedly sold the suit plots LR. No. 520 to the 2nd Defendant and L.R No. 524 to the 3rd Defendant herein.
5. The plaintiff therefore prays for judgment in the following terms:-
 - a. A declaration that the parcels of land known as Land Reference No. 13330/520 Title No. I.R 129790 and Land Reference No. 13330/524; Title No. I.R 129791 are owned by and belong to the Plaintiff by virtue of purchase and adverse possession.
 - b. A declaration that the purported sale and transfer of Land Reference No. 13330/520 Title No. I.R 129790 and Land Reference No. 13330/524; Title No. I.R 129791 by the 1st Defendant is illegal, fraudulent and totally unlawful and the same be cancelled forthwith.
 - c. That the registration of Boniface Muriithi Kihunga as proprietor of Land Reference No. 13330/520 Title No. I.R 129790 and Margaret Wambui Ngugi as proprietor of Land Reference No. 13330/524; Title No. I.R 129791 or any other persons deriving title from Joreth Limited based on the land previously known as Plots No. 265 and 269 respectively be revoked and the titles be cancelled forthwith.
 - d. That the Registrar of the High Court be authorized to execute any deeds necessary to effect the transfer of Land Reference No. 13330/520 Title No. I.R 129790 and Land Reference No. 13330/524; Title No. I.R 129791 to the name of Haree Construction Limited.
 - e. That the land Registrar do rectify the register to cancel the registration to Boniface Muriithi Kihungi and Margaret Wambui Ngugi respectively and to enter Haree Construction Limited as registered proprietor of Land Reference No.13330/520 Title No. I.R 129790 and Land Reference No. 13330/524; Title No. I.R 129791.
 - f. That Land Reference No. 13330/520 Title No. I.R 129790 and Land Reference No.13330/524; Title No. I.R 129791 be transferred to the Plaintiff forthwith.
 - g. That a permanent injunction do issue restraining the Defendants, their agents, servants or any other persons claiming title through the Defendants from transferring, assigning, building, entering, charging or in any other way interfering with the Plaintiff's quiet occupation and use of the suit premises.
 - h. Costs of the suit.
 - i. Any other relief deemed fit by the court.
6. The 1st Defendant filed a statement of defence dated 15.8. 2014 contending that the suit properties are a subdivision of their title known as L.R. No. 13330 and that at no time was ownership of the plots transferred to Thome Farmers No. 5, Manji Dhanji Halai, Rhoda Njeri or the Plaintiff.
7. The 2nd Defendant filed a defence and counterclaim dated 29.4. 2014. It is his case that he is the registered owner of the property known as Land Reference Number 13330/520 by virtue of purchase from the 1st Defendant for kshs.9 million vide a sale agreement dated 26.7.2011. He counterclaims for orders that the Plaintiff's case be dismissed, that there be an order declaring the plaintiff to be a trespasser, general damages for trespass and an order of eviction against the plaintiff.
8. The 3rd Defendant filed a statement of defence and counterclaim dated 30.7.2018 in opposition to the suit. It is her case that she is the registered owner of the property Land Reference Number 13330/524 having purchased it from the 1st Defendant. She counterclaims for the dismissal of plaintiff's suit, an



eviction order against the Plaintiff as well as a permanent injunction restraining the plaintiff from interfering with LR 13330/524.

The Evidence

Plaintiff's Case

9. At the hearing of the Plaintiff's case, PW1 was HARJI MEGJI DHANJI, a director of the Plaintiff Company. He adopted his rather lengthy witness statement contained in 16 pages dated 30.5.2018 as his evidence in chief. He also produced the 18 documents contained in the Plaintiff's bundle of documents filed on 31.8.2018 as Plaintiffs Exhibits 1-18. PW1 also produced a supplementary bundle dated 26.11.2021 which contains a replying affidavit with several annexures sworn in the case HCCC No. 1321 of 2006 on 27th February 2019 by one Joseph Wambaa, a director of the 1st Defendant as P. Exhibit 19.
10. PW1's testimony was that the Plaintiff purchased a total of 3 plots in Thome Farmers No. 5 Limited. One of the plots was No.267 purchased from Peter Muiruri Kamau, which became 13330/521, and was duly transferred to him. The other two plots were not transferred to him and they form the subject matter in this suit. One of the suit plot is No. 265 purchased from Rhoda Njeri Kariuki for ksh.900,000/= in the year 2001, while the other plot is No. 269 purchased from Manji Dhanji Halai in the year 1998 at a cost of ksh.950,000/=. The Plaintiff has developed the plots which border each other, and are also adjacent to the undisputed plot No.521.
11. Pw1 avers that the sellers of the suit premises were allottees of Thome Farmers No.5 Limited and the only documents they gave the Plaintiff were their share certificates bearing the name of Thome Farmers No. 5 Limited.
12. The Plaintiff made payments to Thome Limited and the share certificates in respect of the 2 suit plots were transferred to its name. The plaintiff was then referred to Kimani Kahiro Advocates who were acting for the 1st Defendant and asked to pay ksh.200, 000/= per plot for title processing of which, the plaintiff agreed to pay. At that point, none of the 3 plots had been transferred. The plaintiff paid a total sum of kshs.371,000/= as a down payment for the 3 plots but was only given the deed plan No. 270613 for the undisputed parcel of land known as Land Reference No. 13330/521. Kimani Kahiro Advocates explained that the deed plans for the other 2 parcels of land were not available and as soon as the same were traced, they would call the plaintiff to pay the balance of what was demanded to enable the 1st Defendant issue titles.
13. Subsequently, the 1st Defendant appointed a new firm of Advocates and notified the public of the appointment of the firm of M/S Chege Wainaina & Co. Advocates to be handling all the transactions relating to Land Reference No. 13330. The said Notice was by a caveat emptor in the Daily Nation Newspaper of 2.12.2010. The new Advocates demanded that the Plaintiff furnishes them with evidence that it had made payments to the former 1st Defendant's Advocates. The details of payments were forwarded to the said Advocates by the Plaintiff's Advocates; M/S T.K Kariba Mbabu & Company Associates vide a letter of 30.11.2011. Chege Wainaina & Co Advocates then agreed to execute a transfer in respect of the property known as Land Reference No. 13330/521, but said that they did not have in their records deed plans for Land Reference 13330/520 and 524.
14. However, by a letter dated 23.3.2012, the said Advocates indicated that they had sold the 2 suit plots to the 2nd and 3rd Defendants. Attempts by the plaintiff to register caveats over the suit plots at the land registry came to naught as the relevant files had gone missing.



15. Pw1 also stated that he has not seen any sale agreement between the 2nd Defendant and the 1st Defendant or any evidence of payment and that the 3rd defendant's case is statute barred since the Plaintiff has been in possession of the suit land since 1998. For plot 524, the plaintiff fenced the same and uses it for storing construction materials and as a parking place, while for plot 520, the plaintiff constructed permanent and semi permanent structures and has heavily invested over ksh.62 million thereon without any objection from the Defendants. Further, the plaintiff was in occupation of the suit land at the time the 2nd Defendant purported to buy plot 520.
16. It was also PW1's testimony that the Plaintiff was not a party to the case Nairobi HCCC No. 6206 of 1992, thus was not privy to the consent order recorded in that case.
17. Upon cross-examination by counsel for the 1st defendant, PW1 stated that the Plaintiff is seeking orders as an adverse possessor and as a purchaser. He further stated that Plot No. 520 was purchased in 2002 from Rhoda Njeri who was an allottee of the suit plot by Thome 5, she died 2 years after the sale. The Plaintiff then fenced this plot by erecting a masonry wall and started using it as a workshop and parking with temporary structures in 2002 without a change of user. However, after obtaining change of user in year 2012, the plaintiff started using the plot for commercial purposes.
18. He further stated that the Plaintiff took possession of Plot No. 524 upon purchase in 1998 from one Manji. It erected a chain link fence and planted Ki-Apple, then utilized the plot as a storage site for loose materials.
19. On cross-examination by counsel for the 2nd defendant, Pw1 stated that he got a title to the plot No. 521 which is adjacent to the two plots in issue having bought it from Thome 5 via share certificate and its transfer was facilitated by the 1st Defendant who have also facilitated transfers of the two plots in issue to the 2nd and 3rd Defendants.
20. Referred to the sale agreement between the Plaintiff and Rhoda Njeri Kariuki for plot 520, Pw1 stated that he purchased it in year 2001. He pointed out that paragraph (c) of the agreement states that the Plaintiff was buying share certificate No. 1381 for Plot No. 265. The share certificate was issued by Thome 5 who were not a party to the agreement. He stated that the Plaintiff's claim for Plot 520 is purely based on the said share certificate where plot 520 is mentioned.
21. On cross-examination by counsel for the 3rd defendant, Pw1 reiterated that he bought Plot 524 from one Manji Dhanji. The Plaintiff is claiming the plot based on the share certificate and the fact that it took possession and has been using it for storage. He clarified that 269 is the plot no, while No. 524 is the Land Reference Number. He also stated that while the sale agreement was entered in 1998, a transfer was effected by Thome 5 in year 2002. The plaintiff has been using this plot for keeping construction materials and labour camps.
22. On payment of ksh.200,000/= per plot to the 1st Defendant, Pw1 stated that he learnt of the requirement from neighbors, thus he was required to pay ksh.600,000/= but they paid ksh.317,000/= or thereabout for the 3 plots and were issued with receipts.
23. On re-examination, pw1 stated that the Plots 520 and 521 are fenced together and they have a common access at plot 521. For Plot 521 which he was issued a title for, he used the same procedure in purchasing plots 520 and 524 and was paying buyers through Kimani Kahiro Advocates.
24. He also stated that the receipt dated 25.6.2007 issued to the Plaintiff by Kimani Kahiro Advocates is specific that the clients account is the 1st Defendant and the payments are made in reference to LR No. 13330/520, 521 and 524 and below the receipt, it is indicated plot Nos. 265, 267 and 269. Thus as far back as year 2007, the 1st Defendant was aware of the Plaintiff's claim in the suit parcels.



Case of 1st Defendant.

25. DW1, Jonathan Ciano introduced himself as a manager of the 1st Defendant. He adopted his witness statement dated 17.10 2022 as his evidence. He also produced the documents in their bundle of 15.8.2014 as D. Exhibits 1-4.
26. Dw1's evidence is that the 1st Defendant is the registered owner of Land Reference No. 13330 which title was as a result of an amalgamation of its 2 titles known as L.R Number 4920/3 and 4921/3 which it held since the early 1950's. He contended that Plots LR No. 13330/520 and 524 are a subdivision of LR No. 13330. He further stated that at no point were the subject properties ever vested in either Manji Dhanji Halai, Rhoda Njeri or Thome Farmers No.5 to enable them pass any interest in the land to the Plaintiff.
27. He averred that the Plaintiff has been on the subject properties illegally without the consent of the 1st Defendant and was issued with a notice to vacate but he has not complied with it.
28. He also pointed out that in 1992, the 1st Defendant filed a case HCCC Number 6206 of 1992 against 24 identifiable persons and in general those persons who had trespassed onto what is now LR Number 13330. The matter was determined in the year 2002 by a consent order, which provided that the Defendants would pay a sum of ksh.200, 000/= to the 1st Defendant herein then transfers would be effected to the individual Defendants. He stated that the Plaintiff had expressed interest in the suit plots but it did not take any steps to comply with the consent order and was only issued with a title to 13330/521 upon compliance.
29. The cross examination by counsel for the 2nd defendant was nil.
30. On cross – examination by counsel for the 3rd defendant, Dw1 stated that there was no one in possession of the 2 suit plots and that he was not aware that the plaintiff had entered the plots a long time ago.
31. On cross-examination by counsel for the plaintiff, Dw1 stated that Joreth Limited and Thome farmers were not related. Referred to paragraph 55 of the Plaintiff's supplementary documents, he stated that he is familiar with the resolution dated 26.2.1974 by Joreth Ltd to sell 2 parcels of land to Thome Farmers Limited. The 2 titles were later amalgamated to form one title LR 13330 and the plots in dispute 13330/520 and 524 are a subdivision of parcel 13330. He added that the 1st defendant did not respond to the Replying affidavit of John Wambaa contained in the aforementioned supplementary list of documents. He further stated that in the last page of that bundle, there is a letter dated 26.2.1993 authored by AK Magugu, who was chair and Director of the 1st Defendant. He maintained that there was no relationship between Thome 5 Limited and Joreth Limited.
32. He also stated that there could have existed dealings between Joreth and Thome, but he does not know if they were consummated. He further stated that at page 58-62 of the Plaintiff's supplementary bundle of 26.11.2021, there are payments by Thome farmers to directors of Joreth Limited.
33. He stated that there is correspondence at page 63, 64 and 65 where Kamwere Advocate was giving an update of survey of the two plots which were amalgamated to form LR 13330 and there is no evidence to show that the 1st Defendant objected to the proposed subdivision. He also stated that at page 67 of the same bundle, he could see receipts issued to Thome Limited for surveying. He stated that the letter dated 15.1.1997 addressed to the Commissioner of lands states that the land belongs to Thome Farmers Limited.



34. He also stated that he had seen communication between Chege Wainaina Advocates and Plaintiff in relation to payments made to Kimani Kahiro Advocates on 25th June 2007, 3rd September 2007 and 22nd September 2009, and that reference has been made to the 2 plots in issue. He confirmed that by then Kimani Kahiro were the advocates for the 1st defendant.
35. Dw1 further stated that between 2007 and 2011, the 1st defendant did not take any action to remove the Plaintiff from the suit premises.
36. When re-examined, Dw 1 stated that the Plaintiff and Thome 5 Limited have no agreement or venture. He further stated that the affidavit of Joseph Wambaa contained in the Plaintiffs supplementary bundle, was filed when the said Wambaa was giving evidence on behalf of Thome Farmers Limited in HCCC 6206 of 1992. Referred to the resolution by 1st Defendant found in plaintiff's supplementary bundle, Dw1 stated that there was no subsequent agreement to sell the property to Thome Limited. He also stated that the cheques at page 58 of the Plaintiff's further supplementary documents do not indicate the purpose of the payments.

Case of the 2nd Defendant.

37. The 2nd Defendant Boniface Muriithi Kihungi testified as DW2. He adopted his witness statement filed on 10.6.2014 as his evidence. He also produced documents in his bundle filed on the same date as his D. Exhibits 1 and 2. His testimony is that he purchased Land Reference No. 13330/520 in 2011. He had a chance to view it before purchase and observed that the Plaintiff had fenced 2 plots together using a stone wall. He was informed by the 1st defendant that the plaintiff had no proprietary rights over the suit premises. Thus Dw2 was convinced that the plaintiff was a trespasser.
38. On cross examination by counsel for the 1st defendant, Dw2 stated that plaintiff had fenced the two plots together (521 and 520) whereby access thereof was via plot 521. There was no access through plot 520. However the gate was opened for them and they found out that there was a building on plot 521 but on plot 520, there was a shed structure used for welding. To date, he has not had access to his plot No. 520.
39. On cross-examination by counsel for the 3rd defendant, Dw2 initially stated that plot 520, his plot, was being used as a dumping site but he changed course saying he thought the dumping was on plot 524, the one across the road which was fenced with barbed wire.
40. On cross –examination by counsel for the plaintiff, Dw2 reiterated that he found the suit plot 520 fenced with a stone wall by the plaintiff. One had to go through the gate erected on parcel 521 in order to access plot 520. It was his testimony that the Plaintiff permitted him to view the plot in the beginning of year 2011. He found the same being used as a storage yard and a welding shed which can be a workshop. After purchasing the land, he went and told the Plaintiff that he was ready to take up possession but the Plaintiff declined that request.
41. Dw2 also stated that he made payments for the plot to the 1st defendant and the agreement was that they would give him vacant possession. However, the plot was not vacant.
42. When re-examined he stated that he had gone to the suit plot in January 2011. The Plaintiff did not show him any title to the land and he did not ask why it had no title. The 1st Defendant showed him the suit property, then they entered into the sale agreement dated 26.7.2011, and was also shown the original title by the 1st Defendant.



Case of the 3rd Defendant.

43. The 3rd Defendant Margaret Wambui Ngugi testified as DW3. She adopted her witness statement dated 2.8.2018 as her evidence in chief. She also produced 4 documents in her bundle dated 29.11.2021 as her D. Exhibit 1-4.
44. Her testimony is that in early 2011, she learnt that Land Reference No. 13330/524 was on sale by its registered owner, the 1st Defendant. She went to view the land and the same was vacant and by then, the Plaintiff was occupying the adjacent plot, Land Parcel No. 13330/521 as a construction site. She conducted due diligence before purchasing that land.
45. She further stated that while the Plaintiff claims that it purchased plot 524 from Rhoda Njeri Kariuki who was owner by virtue of her shareholding in Thome Farmers No. 5 Limited, neither of them could pass any good title of the suit property to the Plaintiff. On the Plaintiff's claim for adverse possession, she stated that the land was vacant at the time she purchased it and the Plaintiff only invaded it while this case was pending in court.
46. On cross examination by counsel for the 1st defendant, Dw3 stated that she visited plot 524 before buying and found it was vacant save for a barbed wire. It was located on the opposite side of plot 521 and there is a road in between. As per plaintiff's valuation report, the property had no structures, but the property is currently used as a dumping site.
47. On cross-examination by counsel for the 2nd defendant, Dw3 stated that the land she bought was owned by the 1st defendant, an issue confirmed by the valuer.
48. On cross - examination by counsel for the plaintiff, Dw3 stated that the sale agreement between her and the 1st Defendant indicated that she was to get vacant possession. However, she did not get such vacant possession as there was dumping of stones and there was barbed wire fencing. She also stated that she did not get vacant possession because someone else was in control of the same. She never engaged the plaintiff. The transfer of parcel 524 was made to her on 30.7.2012.
49. When re-examined, she stated that when she bought the plot, it was vacant but currently, there is a stone wall around it which was built later after she had bought the land.

Submissions

50. The submissions of the plaintiff are dated 15.11.2022 where it contends that there is nexus between Thome Farmers No. 5. Limited and the 1st Defendant, since the 1st Defendant transacted with Thome Framers No.5 limited over the mother title LR 13330 from which the suit property is derived. It was argued that Thome 5. Limited took full possession of the mother title and subdivided the land with full knowledge of the 1st Defendant and there was no objection raised by the 1st Defendant.
51. On the issue of litigation in case no. HCCC No.6206 of 1992, it was submitted that the plaintiff was not a party in that case and that the consent entered therein was signed by 6 out of 23 Defendants and was only applicable to those Defendants. Further, the outcome of the case did not interfere with the Plaintiff's possession, and that the final out come of that case is unknown.
52. On the issue of payments for the suit premises, it was submitted that such payments were made to Kimani Kahiro Advocates from the year 2007-2009 which is proof that the 1st Defendant was aware that the Plaintiff had a legitimate claim over the suit property and the said advocates exchanged correspondence with Chege Wainaina & Co. Advocates, thus there was no basis for the said Advocates to decline to process titles for the Plaintiff.



53. On the 2nd and 3rd Defendant's counterclaims, the Plaintiff submitted that they have no merits as both Defendants were aware of the Plaintiff's possession and occupation of the suit properties even before they got into agreements with the 1st Defendant. It was argued that the sale transactions were never completed since the 2nd and 3rd Defendants never got vacant possession of the suit properties.
54. On whether the 2nd and 3rd Defendants are innocent purchasers for value without knowledge of the Plaintiff's claim, it was submitted that the two defendants had admitted that they have never taken possession of the respective plots that they lay claim on. By their own evidence, they viewed the properties before purchase and saw that the properties were in the Plaintiff's control, thus they cannot pose as innocent purchasers for value without knowledge.
55. On the issue of adverse possession, the Plaintiff submits that having moved into plot No. 520 in 1998, it had occupied it for 14 years by year 2012 when it filed this suit, thus any claim to that title had become extinguished. In respect of plot No. 524, there is evidence that by 2007, the 1st Defendant was aware of the Plaintiff's claim as it paid the 1st Defendant's advocates for title processing. It argued that since it had moved into the suit property by 2002, it had been on the plot for 10 years when it filed this suit thus a case of trespass against it cannot be sustained by the 2nd and 3rd Defendants as they are time barred under the *Limitation of Actions Act*. The Plaintiff therefore states that it has proved its case to the standard required in civil proceedings.
56. The plaintiff relied on the cases of Patrick Magu Mwangi Kimunyu v Joreth Limited [2015] eKLR, ELC No. 174 of 2009 Richard Kariuki Joel Gichu v Joreth Limited & 2 others and ELC No. E101 OF 2020 Edward Mbogo v Joreth Limited, to buttress its claims of adverse possession on the suit properties.
57. The Plaintiff also submits that its claim over the suit properties qualifies to be an overriding objective under Section 28(b) of the *Land Registration Act*. To this end, reliance was made to the case of Munyua Maina v Hiram Githiha Maina [2013] eKLR.
58. The submissions of the 1st defendant are dated 23.1.2023 where it is contended that the Plaintiff failed to prove that Rhoda Njeri and Manji Dhanji from whom it purchased the suit premises LR No. 13330/520 & 524 had any proprietary rights thereof. Further, the Plaintiff also failed to abide by the terms of the consent judgement entered in HCCC No. 6206 of 1992, thus it cannot use the Court as a conduit to sanitize its clear breach of its obligations to the disadvantage of the 1st Defendant. It was also submitted that the Plaintiff cannot sustain a claim for specific performance or enforce any proprietary rights. To this end, reference was made to the cases of Purple Rose Trading Company Ltd v Bhanoo [2014] eKLR and the case of Goan Institute Nakuru v Said Advalla [2007] eKLR.
59. The 1st Defendant also submits that the contract between itself and the 2nd and 3rd Defendants was on a willing seller-willing buyer basis and since they have certificates of titles which have not been challenged, the court cannot unseat their titles on unsubstantiated claims as they are protected under Section 26 of the *Land Registration Act*. Reference was made to the cases of Gabriel Mbui v Mukindia Maranya [1993] eKLR and the case of Behange v School Outfitters Limited [2001] E.A. 20.
60. It is also the 1st Defendant's submission that the Plaintiff is playing a game of odds with the court by claiming for specific permanence as well as adverse possession, yet the two prayers cannot co-exist. Reference was made to the cases of Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR and the case of Hyde v Pearce [1982] 1 ALL ER 1029 for that position.
61. The 1st defendant contends that even if the court was to consider the claim of adverse possession, the Plaintiff did not prove that claim, pointing out that Plaintiff's claim on adverse possession fails on



- computation of time and failure by the Plaintiff to demonstrate that it has been in actual occupation of the suit land. It cited the case of *Kweyu v Omuto* [1990] KLR 709, *Gabriel Mbui vs. Mukindia Manyara* [1993] eKLR and *Illinois Steel Company vs. Budsisz* 115 Wis 68.
62. The 1st Defendant also submits that while the Plaintiff relies on previous decided cases, they are distinguishable from this case, in that in the case of *Patrick Magu Mwangi v Joreth Limited, Edward Mbogo v Joreth Ltd & others*, the Plaintiffs were in possession of the suit premises and had even built their residential homes there, but in the instant suit, the properties are vacant save for the fences illegally built in a bid to show the possession.
63. The submissions of the 2nd Defendant are dated 20.1.2023 where the following issues have been framed for determination;
- a. Whether the Plaintiff has proved its claim for adverse possession of LR No. 1330/520?
 - b. Whether the 2nd Defendant is an innocent purchaser for value without notice?
 - c. Whether the sale and transfer of the suit property (LR 1330/520) by the 1st Defendant to 2nd Defendant is legal?
 - d. Who should pay cost?
64. The 2nd Defendant submits that the Plaintiff has not met the ingredients of an adverse possessor as stated in the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, *Titus Mutuku Kasuve v Mwaani Investment Limited & 4 others* [2004] eKLR and *Mbira vs. Gachuhi* (2002) 1EALR 137. He points out that Plaintiff allegedly purchased Plot 520 in year 2002 and had been on the said plot for 10 years prior to filing suit, thus the occupation had not met the 12 years period required in a claim for adverse possession.
65. On the issue that the 2nd defendant was an innocent purchaser, it was submitted that the 2nd defendant had met this criterion as he had conducted due diligence before purchasing the suit property from the 1st Defendant who is the registered owner. To this end, reference was made to the case of *Katende v Haridar & Company Limited* [2008] 2 E.A 173.
66. The 2nd Defendant also submits that since he is in possession of title, he is the indefeasible owner of the suit plot. He also cites past decided cases on this issue, being *Kenneth Chege Kamau & 2 others v Thome Farmers No.5 Ltd & 3 others* [2019] eKLR as well as the case of *Richard Nyamwange & another v Samuel Kimani Gathemba & 10 others* [2020] eKLR to persuade the court to dismiss the Plaintiff's case.
67. The submissions of the 3rd Defendant are dated 19.1.2023; where they addressed the following issues;
- (a) whether the transfer of LR No. 13330/524 to the 3rd Defendant by the 1st Defendant was done legally and procedurally and
 - (b) whether the Plaintiff has acquired title by way of adverse possession.
68. On the issue as to whether the transfer of parcel 524 to the 3rd Defendant was legal, it was submitted that it is only the 1st Defendant who could pass property as it is the registered owner. It was argued that the Plaintiff never purchased the suit property from the 1st Defendant and neither did it comply with the consent order issued in HCC No. 6206 of 1992 that required it to pay ksh.200,000/=.
69. On the issue of adverse possession, it was submitted that by the time the 3rd defendant bought the suit property in 2011, it was vacant, unfenced and uncleared and it is only after she bought it that the Plaintiff purported to take possession by constructing a perimeter fence which prompted her to file a



counterclaim and seek for eviction orders. Reference was made to the following cases: Public Trustee vs. Wanduru Ndegwa [1984] eKLR, Meru Hccc No. 3 of 2004 Joseph Kaburu vs. M'Arimu Kamuru and Eunice Wambui Nderitu, Kenneth Kimari Gitere vs. Joreth Limited [2020] eKLR. She also relies on the case of Sisto Wambugu v Kamau Njuguna [1983] eKLR 172 to submit that the Plaintiff cannot lay claim on the suit plot by virtue of being a purchaser and the same time by virtue of being an adverse possessor.

Determination

70. It is not in dispute that the 2nd and 3rd Defendants hold title over the suit Land Reference Nos. 13330/520 and 524 respectively. There is also no controversy that the 1st defendant owned the large parcel of land L.R No. 13330 which was subdivided into various plots including the suit properties. Court decisions relating to disputes within land parcel LR No. 13330 touching on Joreth Limited and or Thome Farmers No. 5 are in abundance. Okongo J in Richard Nyamwange & Another v. Samuel Kimani Gathemba & 10 Others [2020] eKLR observed that Joreth Limited kept on changing their position concerning the relationship it had with Thome Farmers No. 5 Limited in relation to the large parcel of land LR No. 13330 from one case to another. The current case is no exception whereby the witness who testified for Joreth Limited maintained the position that they had nothing to do with Thome Farmers No 5 Limited.
71. However, the history of the dispute relating to the parcel of land LR No. 13330 and its resultant subdivisions is well captured in a raft of court's decision, See Kenneth Chege Kamau & 2 Others v. Thome Farmers No. 5 Ltd & 3 Others [2019] eKLR and the Court of Appeal case of Patrick Magu Mwangi Kimunyu v. Joreth Limited [2015] eKLR, where it was stated as follows;
- “Joreth Limited, the respondent herein, is the registered owner of the properties known as LR No 4290/3/1 and 4921/3/1 which were amalgamated to LR No. 13330 and sold to Thome Farmers No. 5 Limited. Thome Farmers subdivided the plots and allocated to its shareholders....”
72. The bottom line is that there are claimants who occupied the suit land through association with Thome Farmers No. 5 Limited of which the plaintiff falls in this category.
73. The avalanche of litigation appears to have gained momentum when Joreth limited went to court in the case Nairobi HCCC 6206 of 1992 suing some of the parties who had settled on the land parcel LR No. 13330 for trespass.
74. With this back ground I proceed to frame the issues for determination as follows;
1. Whether the plaintiff is entitled to the two suit properties 520 and 524 by way of adverse possession or purchase.
 2. Whether the 2nd and 3rd defendants are bonafide purchasers of the suit properties 520 and 524 respectively,
 3. Whether there should be an order of eviction and damages for trespass against the plaintiff,
 - 4) What are the appropriate reliefs.
75. It is worthy to note the plaintiff had acquired the three plots at different times from different persons. One plot. No 267 (521) is not contested, while the other 2 plots Nos. 265 (520) and 269 (524) are the subject matters in this case. In that regard, the court will sever the claims of adverse possession and purchase from each other so as to determine which plot is aligned to which particular claim.



Adverse possession

76. The defendants have given the correct legal position relating to the claim of adverse possession to the effect that such a claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years; See Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 others [2004] eKLR, Mtana Lewa vs. Kahindi Ngala Mwangandi (2015) eKLR, Kweyu v. Omuto [1990] eKLR and Gabriel Mbui v. Mukindia Manyara [1993] eKLR.
77. The plaintiff was so verbose in both his Witness statement and submissions that he ended up mixing the suit plot numbers, whereby in his submissions, he claimed that plot No. 520 is the one he bought in 1998, (see page 16 of the aforementioned submissions). However, his pleadings, evidence and documents reflect that parcel 524 is the one he allegedly bought in 1998 while 520 was acquired in the year 2001.

Land Reference N. 13330/ 520.

78. In paragraph 11 of his recorded statement, Pw1 stated that “ the plaintiff has had quiet, open notorious and continuous use and occupation of this property since 2002.” This suit was filed in year 2012 hence the statutory 12 years period have not been met. Thus the claim of adverse possession on the above mentioned property (No. 520) fails.

Land Reference No. 13330/524;

79. The title to this parcel is in the hands of the 3rd defendant. The Plaintiff challenges the said title on the basis that it purchased the suit parcel as plot 269 from Manji Dhanji on 1st June 1998. The plaintiff led evidence to buttress this claim and also availed a document at page 31 of its bundle to show that Mr. Manji was transferring the said land to the plaintiff in 1998. The plaintiff claims that it has been in occupation of the said land since then.
80. The 3rd defendant however contends in her witness statement and re-examination that the suit property was vacant by the time she bought it in year 2011, and that the plaintiff only invaded the same after this suit was filed. This evidence was however shattered during cross examination by plaintiff's counsel when Dw3 stated as follows;
- “I was to get vacant possession of the land 524. I did not get vacant possession as there was dumping of stones. There was barbed wire fencing.
- I never got vacant possession because some one was in control of it.”
81. Even during cross examination by counsel for the 1st defendant, Dw3 had stated as follows;
- “I viewed the property before buying and I found it was a vacant plot but there was barbed wire..”
82. Dw3 appears to have been buoyed by the valuation report of the plaintiff which indicated that the plot No. 524 was vacant.
83. However, it is quite clear that the suit plot no.524 was under the control of the plaintiff by year 2011 or 2012 when the 3rd defendant purported to buy the same. The plaintiff had fenced the said land and



was using it to put in construction materials. The valuation report availed by the plaintiff at page 54 of their bundle though indicating the plot as vacant clearly indicated at page 58 that it is:

“A rectangular shaped gently sloping red soils plot whose boundaries are marked by barbed wire on reinforced concrete posts on one side and fully grown live hedge to three sides. Access is via a double leaf metal grille gate. There were no structural improvements on the parcel as at the date of our inspection.

The plot is currently used as a dumping site.”

84. One does not need to have put up permanent buildings to pass the criteria of occupation in a claim of adverse possession. The key elements in a claim of adverse possession is the non permissive, open notorious and exclusive occupation of land for the statutory period of 12 years without any interruption, See *Mbira –v- Gachuhi* (2002) IEALR 137. In respect of the subject property, plot 524, the plaintiff acquired the same in 1998 as per his documents. The plot was not built up, but plaintiff had put up a barbed wire fence along with a live fence and was utilizing the land by storing construction stones thereon. One could only access the property via a metal grill gate.
85. From this analysis, it is clear that there was manifestation of animus possidendi, that is occupation with the clear intention of excluding the owner and all other persons by the plaintiff in respect of parcel 524 such that the 3rd defendant was not able to take possession of the property at the time of purchase, and to-date, the situation remains the same. The foregoing analysis leads to the finding that the plaintiff is entitled to the suit property No 524 by way of adverse possession.

Purchase

86. The suit property No.524 is now severed from the analysis relating to the claims of purchase in view of the positive findings on adverse possession. The court will therefore determine the claim of purchase only in relation to parcel No. 520.
87. The Plaintiff led evidence that it purchased Plot No. 265 from Rhoda Njeri Kariuki, an allottee of the land by Thome Farmers No.5 Limited. A transfer of shares was effected to the Plaintiff by the said company and the Plaintiff was issued with certificates for the suit plots bearing the name of the said company. However, it is quite clear that the 1st defendant never effected the transfer of this land to Thome Farmers No. 5. Can this be a basis for the 1st defendant to claim that the plaintiff had no rights and or interests to the suit property No. 520?. There are tell tale signs that indeed the 1st defendant were well aware of the plaintiff's interests on that land.
88. One point for consideration relates to the plaintiff's undisputed plot No. 521. The plaintiff contends that the mode of purchase of the undisputed plot 521 was similar to the other two suit plots where consultation was done at the offices of Thome 5, but purchasers would go to Joreth limited for the issuance of titles. The receipt at page 86 of plaintiff's bundle contains payments to the 1st defendant by the plaintiff (sh.100,000) for all the three plots identified as LR. 13330/520, 521, 524 being plot No. 265, 267 & 269. The plaintiff certainly did not buy parcel No. 521, (by then plot 267) from Joreth, he acquired it from one Peter Muiruri Kamau an allottee of Thome 5. However, Joreth is the one who facilitated issuance of the title thereof. That fact is relevant in terms of the provisions of Section 6 of the *Evidence Act*, and the 1st defendant cannot turn around and feign ignorance of acquisition of interests in the suit property through a similar version.
89. Another point for consideration relates to the payments made by the plaintiff to Kimani Kahiro and Company Advocates. Dw1 has admitted that the said advocates were acting for the 1st defendant. The



Plaintiff paid the said firm of advocates a total sum of Sh. 371 576 as is evident from the receipts at page 86-88 of the Plaintiff's bundle dated 30th May 2018. The said receipts acknowledge payments on account of the 1st Defendant (Joreth Limited). The first defendant has not denied having received the said monies, and they never made a demand of any specific balance from the plaintiff before 26.7.2011 when the 1st defendant allegedly sold the suit land (520) to 2nd defendant.

90. Dw1, the witness for the 1st defendant acknowledged that by year 2007 “Joreth was aware that plaintiff had expressed their rights over the suit land.”
91. The 1st defendant has not denied receiving these monies from the plaintiff. It follows that by the time the 1st defendant embarked on selling the suit plot No. 520 sometime in year 2011, this land was already encumbered by the interests of the plaintiff.
92. It appears that the 1st Defendant filed a case HCCC 6206 of 1992 where it sued 23 Defendants who had occupied the larger parcel LR 13330. There is no evidence that the Plaintiff or the persons he purchased the suit plots from were parties to the said case. If anything, the consent dated 13.6.2003 which has been availed by the 1st defendant at page 13 of their bundle indicates that it only applied to 6 out of 23 defendants. It follows that the said consent cannot bind the Plaintiff to the terms set out there in. Thus the letter written by 1st defendant's advocates dated 26.9.2011 accusing the plaintiff of none compliance with the consent order is of no consequence (see page 93 of plaintiff's bundle). This conclusion is aligned to the findings of the Court of Appeal in the case of Patrick Magu Mwangi Kimunyu v Joreth Limited [2015] eKLR where a similar issue was raised.
93. Another point to note is that the Plaintiff was always willing to pay whatever was being demanded by the 1st Defendant through its latter appointed Advocates Chege Wainaina & Company Advocates. This is well captured in the letters exchanged between the advocates of the two protagonists found at page 90 to 97 of plaintiff's bundle. However, even as the said advocates were involved in discussions on the suit properties, particularly on the issue of missing deed plans, as at 20.1.2012 (see letter at page 97 of plaintiff's bundle), the 1st defendant had already entered into a sale agreement with the 2nd defendant to sell plot No. 520 on 26.7.2011!
94. It is not lost to this court that even though the 1st defendant was aware of plaintiff's interests on the suit property No. 520, and was aware that plaintiff was in possession of the said land, it never sought to have the plaintiff evicted from the suit premises.
95. This is a situation whereby the 1st defendant accepted monies from the plaintiff for the processing of the titles, and even processed one of the titles, but secretly embarked on selling the suit plot No. 520 to another entity simply because the 1st defendant was the registered owner of that land. Thus the 1st defendant was guilty of non disclosure of very material facts.
96. In Re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR, Gikonyo J had this to say in relation to issues of non-disclosure;

“Non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law”.



97. The crafty machinations of the 1st defendant ought to be tamed through the principles of equitable estoppel, and justice. To this end, I make reference to the provisions of Section 120 of the Evidence Act where it is provided that;

“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

98. In the case of *Inwards and others vs. Baker* (1965) 1 AllER 446, Lord Denning stated as follows with regard to equity;

“It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that, as the result of that expenditure, he will be allowed to remain there. It is for the court to say in what way the equity can be satisfied.”

It was further held that;

“Since the defendant had been induced by his father to build the bungalow on his father’s land and had expended money for that purpose in that expectation of being allowed to remain there, equity would not allow that expectation so created to be defeated, and accordingly the defendant was entitled to remain in occupation of the bungalow as against the trustees (of the will of his father).”

99. In *Kenya National Capital Corporation Ltd. vs. Albert Mario Cordeiro & Another* (2014) eKLR, it was stated that:

- “(i) The person claiming the equity believed that he had or was going to have a right in or over the property of the person against whom the equity is claimed.
- (ii) The person against whom the equity is claimed was aware of the mistaken belief or created the belief or encouraged the belief.
- (iii) The person claiming the equity acted in reliance on the belief”. Emphasize added

100. In the case of *Zakaria Kiruki Ikiara v Shadrack Mwit M’ Mwarania & 2 others* [2018] eKLR, I stated as follows on matters equity;

“This is a court of law as well as a court of equity see –*Karuntimi Raiji vs. M’Makinya M’Itunga* (2013) eKLR where it was held that “It is inconceivable that a court of equity can leave a party with a genuine claim without a remedy. A court of equity ought to intervene in fairness to ensure that an applicant’s possible interests are not vitiated.”

101. In *Carol Construction Engineers Limited & another v National Bank of Kenya* [2020] eKLR, reference was made to Lord Denman CJ in the English case, *Pickard v Sears* 112 E.R. 179 as follows;

“The rule of law is clear that where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so



as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the time”.

102. In the instant case, the 1st defendant by its conduct had recognized the plaintiff as a purchaser and occupant of parcel No. 520 as far back as year 2007. If the 1st Defendant believed it had rights and interests still subsisting in the said land by July 2011, nothing would have been logical than to declare that interests openly instead of selling the land secretly. It is noted that the revelation of the sale was only made by the 1st defendant on 23. 3. 2012 (see the letter on page 98 of plaintiff’s bundle).
103. Equity regards as done that which ought to have been done. And in this case, the extent of the equity was well known to both the plaintiff and 1st defendant as at July 2011. I therefore find that by July 2011, the plaintiff possessed rights and interests over the suit property No. 520 which were an encumbrance upon the title held by the 1st defendant. Thus the 1st Defendant had no rights and or interests to pass unto the 2nd Defendant in so far as that parcel of land No. 520 was concerned.

Bonafide Purchaser

104. Was the 2nd defendant a bonafide purchaser of the land?. In view of the fact that the title held by the 2nd defendant for parcel No. 520 was under challenge, then it was incumbent upon the 2nd defendant to proffer sufficient evidence to prove that he was an innocent purchaser. See *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR.
105. The 2nd Defendant had no proof that he actually purchased the suit property. Further, he admitted that when he viewed the suit plot before sale, he saw that it was fenced with a stone wall all around constructed by the plaintiff. In his own words, the 2nd defendant stated that;

“You have to get to gate of 521, get inside in order to access gate of 520. So I never got possession of the property. I did not ask the plaintiff why they fenced the land...”

106. The 2nd defendant had set out to buy land which was in control of someone else. It is quite clear that he does not fit the description of a bonafide purchaser as set out in the Ugandan case of *Katende –vs- Haridas & Company Ltd* [2008] 2 E A 174 where the judges of appeal defined a bona fide purchaser thus:

“ A bonafide purchaser is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly”.

Trespass and Damages

107. Is the plaintiff a trespasser, should it be evicted from the suit premises? Are the 2nd and 3rd defendants entitled to damages for trespass? In view of the analysis and the findings so far made herein where plaintiff’s rights over the two suit plots have been affirmed, then the answers to the above issues are in the negative. Thus the counterclaims of the 2nd and 3rd defendants must fail.

Relief

108. In the final analysis judgment is hereby entered in the following terms;
1. The Counter claims of both the 2nd and 3rd defendants are hereby dismissed.
 2. The claim of the plaintiff is allowed in the following terms:
 - a. The plaintiff is entitled to land parcel LR No. 13330/524 by way of adverse possession.



- b. An order is hereby issued for the cancellation of the title for L.R 13330/524 registered in the name of Margaret Wambui Ngugi Wanjiku and instead, the plaintiff is to be registered as the owner of the said land.
 - c. An order is hereby issued declaring the plaintiff as the rightful owner of land parcel LR No. 13330/520.
 - d. An order is hereby issued for the cancellation of the title L.R. 13330/520 in the name of Boniface Muriithi Kihungi and instead, the plaintiff is to be registered as the owner of the said land.
3. An order is hereby issued directing the defendants to facilitate the transfer of the suit properties LR Nos. 13330/524 and 13330/520 in favour of the plaintiff; In default, the Deputy Registrar of this court is hereby directed to sign all the requisite documents to facilitate the said transfers.
 4. The plaintiff shall meet all the costs appertaining to the transfer and the registration of the suit properties LR Nos. 13330/524 and 13330/520 into his name.
 5. In order to give effect to the implementation of this judgment, the aforementioned transfers of the suit properties shall not be subjected to the requirements of the land control board.
 6. The 1st defendant is the author of the unsavoury state of affairs; they are condemned to pay costs of the suit to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Ann Mbugua and Mr. Kingara for Plaintiffs

Njueni holding brief for Mrs. Koech for 1st Defendant

Miss Njeri Kariuki holding brief for Mr. Githinji for 3rd Defendant

Gichuhi for the 3rd Defendant

