



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 577 OF 2012**

**RICHARD NYAMWANGE.....1<sup>ST</sup> PLAINTIFF**

**MONICA NYAMWANGE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SAMUEL KIMANI GATHEMBA.....1<sup>ST</sup> DEFENDANT**

**DANIEL GATHEMBA KIIRU.....2<sup>ND</sup> DEFENDANT**

**KIMANI KAHIRO T/A KIMANI KAHIRO & CO. ADVOCATES.....3<sup>RD</sup> DEFENDANT**

**CHEGE WAINAINA T/A CHEGE WAINAINA & CO. ADVOCATES.....4<sup>TH</sup> DEFENDANT**

**PETER MUNGAI.....5<sup>TH</sup> DEFENDANT**

**VEMA AGENCIES LIMITED.....6<sup>TH</sup> DEFENDANT**

**LIVINGSTONE GITONGA MUCHUNGI.....7<sup>TH</sup> DEFENDANT**

**JAMES MUSAU KIMEU.....8<sup>TH</sup> DEFENDANT**

**CHARLES KAMARI.....9<sup>TH</sup> DEFENDANT**

**JORETH LIMITED.....10<sup>TH</sup> DEFENDANT**

**THE REGISTRAR OF TITLES AND COMMISSIONER OF LANDS.....11<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Background.**

This is one in a series of cases involving Joreth Limited, the 10<sup>th</sup> defendant herein and the shareholders of a company known as Thome Farmers No. 5 Limited over the ownership of portions of land that originated from L.R. No. 4290/3/1 and L.R No. 4921/3/2 which were later consolidated to form L. R No. 13330. According to one of the cases between the parties that went up to the Court of Appeal namely, [Patrick Magu Mwangi Kimunyu v Joreth Limited, Nairobi Court of Appeal, Civil Appeal No. 52 of 2012](#), Joreth Limited was at all material times the registered owner of L.R. No. 4290/3/1 and L.R No. 4921/3/2. Joreth Limited sold L.R. No. 4290/3/1 and L.R No. 4921/3/2 to Thome Farmers No. 5 Limited. Thome Farmers No. 5 Limited was a land buying company with several shareholders.

Thome Farmers No. 5 Limited took possession of L.R. No. 4290/3/1 and L.R No. 4921/3/2 and subdivided the same into several half (½) acre plots which it allocated to its shareholders. Some of the shareholders of Thome Farmers No. 5 Limited developed their plots while others sold their plots to third parties. The said third parties became shareholders of Thome Farmers No. 5 Limited by virtue of such purchase. Joreth Limited did not however transfer to Thome Farmers No. 5 Limited L.R. No. 4290/3/1 and L.R No. 4921/3/2 which it later

consolidated to form L.R No. 13330. In the circumstances, neither Thome Farmers No. 5 Limited nor its shareholders acquired legal title over L.R No. 13330 and its subdivisions.

Sometimes in 1992, Joreth Limited filed a suit at the High Court in Nairobi namely, HCCC No. 6206 of 1992 against Thome Farmers No. 5 Limited and 23 others seeking vacant possession of the portions L.R No. 13330 that Thome Farmers No. 5 Limited had allocated to some of its shareholders that Joreth Limited referred to as trespassers. In the said High Court suit, a consent was recorded between Joreth Limited and some of the defendants in the suit to the effect that the said defendants would pay to Joreth additional sum of Kshs. 200,000/- after which Joreth Limited would transfer to them the said portions of L.R No. 13330 that had been allocated to them by Thome Farmers No. 5 Limited. It is not clear as to what became of that suit as far as the defendants who never subscribed to the said consent were concerned. A number of shareholders of Thome Farmers No. 5 Limited who were allocated portions of L.R No. 13330 were not parties to that suit.

From the date of that consent that Joreth Limited applied to all those who were allocated portions of L.R No. 13330 by Thome Farmers No. 5 Limited, the shareholders of Thome Farmers No. 5 Limited who paid Kshs. 200,000/- in accordance with the terms of the consent, retained their plots and had the same transferred to them by Joreth Limited while those who refused to pay had their plots sold by Joreth Limited to third parties. It is this state of affairs that has generated several suits before this court one of which is the present case.

I have used the Court of Appeal decision aforesaid that was produced as an exhibit and as an authority in this suit for the facts giving rise to the dispute between Joreth Limited and the shareholders of Thome Farmers No. 5 Limited because I have noted that Joreth Limited keeps changing their position concerning the relationship it had with Thome Farmers No. 5 Limited in relation to L.R No. 13330 from one case to the other. With that background, I will now consider the dispute before the court.

### **The Plaintiffs' case**

The plaintiffs brought this suit by way of a plaint dated 28<sup>th</sup> August, 2012 filed in court on 5<sup>th</sup> September, 2012. The plaint was amended on 24<sup>th</sup> October, 2012. In their amended plaint, the plaintiffs averred that at all material times they were the beneficial owners of all that parcel of land known as Plot No. 132 also known as L.R No 13330/142 (original L.R No 4921/3/R) (hereinafter referred to only as the "suit property"). The plaintiffs averred that in the transactions that led to their acquisition of the suit property the 1<sup>st</sup>, 2<sup>nd</sup> and 10<sup>th</sup> defendants acted as the vendors of the property while the 6<sup>th</sup> defendant acted as an agent in the transaction. The plaintiffs averred that the 3<sup>rd</sup> and 4<sup>th</sup> defendants acted as the advocates in the conveyancing transaction while the 5<sup>th</sup> defendant played the role of a consultant.

The plaintiffs averred that on or about July 1989, the plaintiffs on the one hand and the 1<sup>st</sup> and 2<sup>nd</sup> defendants on the other hand entered into an agreement for sale of the suit property with the consent and approval of the 10<sup>th</sup> defendant. The plaintiffs averred that they purchased the suit property at a price of Kshs. 170,000/-. The plaintiffs averred that in performance of the terms of the said agreement, they paid the entire purchase price for the suit property through the 3<sup>rd</sup> and of 6<sup>th</sup> defendants' offices. The plaintiffs averred that upon execution of the said agreement, they took possession of the suit property and constructed a semi-permanent structure thereon that was occupied by a caretaker. The plaintiffs averred that they had been in occupation of the suit property for over 15 years.

The plaintiff averred that they had been living in the United States of America and on return to Kenya in 2012, they started following up on the title of the suit property. The plaintiffs averred that the 4<sup>th</sup> and the 5<sup>th</sup> defendants were dealing with the issuance of title documents for among others the suit property. The plaintiffs averred that through acts of fraud and/or breach of the terms of the agreement for sale aforesaid, the defendants had declined to transfer the suit property to them. The plaintiffs averred that the defendants illegally and fraudulently transferred the suit property to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants with the knowledge of the plaintiffs' interest therein. The plaintiffs averred that on or about the 21<sup>st</sup> October, 2012, the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants maliciously destroyed the plaintiffs' property on the suit property purporting to be the lawful owners of the property. The plaintiffs averred that as a result of the defendants' actions aforesaid, they suffered loss and damage. The plaintiffs sought judgment against the defendants jointly and severally for;

1. A permanent mandatory injunction directed at the defendants to effect transfer of Plot No. 132 being L.R No. 13330/142 (original L.R No. 4921/3/R) to the plaintiffs.
2. An order of specific performance of the agreement dated July 1989.
3. A permanent mandatory injunction directed at all the defendants to disclose their roles in the sale of Plot No. 132 being L.R No. 13330/142 (original L.R No. 4921/3/R) and confirm the proprietorship of the said parcel of land.
4. A permanent injunction to restrain the defendants whether by themselves, their servants and/or agents from alienating, selling, charging, transferring, trespassing or in any other way whatsoever interfering with the plaintiffs' quiet possession of Plot No. 132 being L.R No. 13330/142 (original L.R No. 4921/3/R).
  - a) An order to cancel Certificate of Title, Title Number I.R 138016, Land Reference Number 13330/142 registered as I.R 138016/1 on 26<sup>th</sup> June, 2012 in the names of the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants.
5. Alternatively, damages at current market value of the suit property.
6. Costs of the suit.

### **The 1<sup>st</sup> defendant's case.**

The 1<sup>st</sup> defendant filed his defence dated on 6<sup>th</sup> July, 2017. The 1<sup>st</sup> defendant averred that the 2<sup>nd</sup> defendant (deceased) who was his father and he were the registered owners of the suit property. The 1<sup>st</sup> defendant averred that together with his deceased father, they sold their interest in the suit property which they acquired from Thome Farmers No. 5 Limited in 1975 to the plaintiffs at a consideration of Kshs. 170,000/-. The 1<sup>st</sup> defendant averred further that they transferred the suit property to the plaintiffs in 1989 after which their proprietary rights in the property ceased. The 1<sup>st</sup> defendant averred that they sold the suit property to the plaintiffs through the 6<sup>th</sup> defendant who acted as their agent in transaction. The 1<sup>st</sup> defendant averred that the plaintiffs were the lawful owners of the suit property being the holders of a valid share certificate from Thome Farmers No. 5 Limited in respect of the property.

The 1<sup>st</sup> defendant averred that after the plaintiffs paid the full purchase price, they were given vacant possession of the suit property and had remained in possession. The 1<sup>st</sup> defendant averred that all along they dealt with Thome Farmers No. 5 Limited in relation to the suit property and that the plaintiffs were to follow up the transfer of the property to their names with Thome Farmers No. 5 Limited and the 10<sup>th</sup> defendant which were responsible for processing the same. The 1<sup>st</sup> defendant averred that Thome Farmers No. 5 Limited had purchased L.R No. 13330 from the 10<sup>th</sup> defendant before subdividing it and allocating portions thereof to its members including the 1<sup>st</sup> and 2<sup>nd</sup> defendant who were allocated the suit property. The 1<sup>st</sup> defendant prayed that judgment be entered for the plaintiff against the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants as prayed in the plaint.

### **The 3<sup>rd</sup> defendant's case.**

The 3<sup>rd</sup> defendant filed his defence dated 29<sup>th</sup> October, 2012 on 30<sup>th</sup> October, 2012. The 3<sup>rd</sup> defendant denied that the plaintiff was at all material times the beneficial owner of the suit property. The 3<sup>rd</sup> defendant averred that at all material times, he acted for the registered owner of the suit property which was the 10<sup>th</sup> defendant and not for any other party. The 3<sup>rd</sup> defendant denied that there was an agreement for sale between the 1<sup>st</sup> and 2<sup>nd</sup> defendant, and the plaintiffs in relation to the suit property. The 3<sup>rd</sup> defendant denied further that the plaintiffs had made payment of the purchase price for the suit property through the 3<sup>rd</sup> defendant's office. The 3<sup>rd</sup> defendant denied that he was involved in any acts of fraud or breach of contract in relation to the suit property as alleged by the plaintiffs or at all. The 3<sup>rd</sup> defendant averred that the plaintiffs' suit was statute barred by virtue of section 7 of the Limitation of Actions Act, Chapter 22 Laws of Kenya and as such should be struck out.

### **The 4<sup>th</sup> and 5<sup>th</sup> defendants' case.**

The 4<sup>th</sup> and 5<sup>th</sup> defendant filed their statement of defence on 25<sup>th</sup> October, 2012. The 4<sup>th</sup> and 5<sup>th</sup> defendants averred that they were strangers to the plaintiffs' claim. The 4<sup>th</sup> and 5<sup>th</sup> defendants averred that around 2010, the 10<sup>th</sup> defendant appointed the 4<sup>th</sup> defendant as its advocate and the 5<sup>th</sup> defendant as special manager and auditor in respect of all that parcel of land known as L.R No. 13330 that had been subdivided into 640 plots measuring half (½) acre each that was owned by the 10<sup>th</sup> defendant. The 4<sup>th</sup> and 5<sup>th</sup> defendants averred that the 4<sup>th</sup> defendant was mandated by the 10<sup>th</sup> defendant to handle all legal issues arising in relation to the said parcel of land including preparing transfers in favour of the claimants to portions of that land who had complied with all the requirements pertaining to the purchase thereof. The 4<sup>th</sup> and 5<sup>th</sup> defendants averred that the 5<sup>th</sup> defendant's role was to verify the genuine claimants of the various plots comprised in L.R No. 13330 and who had complied with all the requirements for the purchase of the same which included making a payment of Kshs. 200,000/- to the 10<sup>th</sup> defendant within 6 months from 27<sup>th</sup> July, 2003 in accordance with the court order that was issued in Nairobi HCCC No. 6202 of 1992.

The 4<sup>th</sup> and 5<sup>th</sup> defendant averred that the terms of the orders that were made in the said Nairobi HCCC No. 6202 of 1992 applied not only to the parties to that suit but also to those who were not parties but who had a claim over the said plots comprised in L.R No. 13330. The 4<sup>th</sup> and 5<sup>th</sup> defendants averred that their mandate did not extend to determining to whom the said plots were to be transferred and the execution of the instruments of transfer which was a preserve of the directors of the 10<sup>th</sup> defendant. The 4<sup>th</sup> and 5<sup>th</sup> defendants averred that they had no power to transfer the suit property to the plaintiffs and as such the plaintiffs' claim against them was bad in law and should be struck out. The 4<sup>th</sup> and 5<sup>th</sup> defendants averred that they were agents of a known principal. The 4<sup>th</sup> and 5<sup>th</sup> defendants denied that they were involved in any acts of fraud or breach of contract in relation to the suit property. The 4<sup>th</sup> and 5<sup>th</sup> defendants averred that they were not privy to any agreement with the plaintiffs relating to the suit property or any other land and as such no breach of contract could be attributed to them. The 4<sup>th</sup> and 5<sup>th</sup> defendants averred that the plaintiffs' plaint disclosed no cause of action against them and urged the court to strike out the same as against them.

### **The 6<sup>th</sup> defendant's case.**

The 6<sup>th</sup> defendant filed its defence on 5<sup>th</sup> June, 2017. The 6<sup>th</sup> defendant averred that the 1<sup>st</sup> and the 2<sup>nd</sup> defendants were the legal owners of the suit property having acquired the same from Thome Farmers No.5 Limited for valuable consideration. The 6<sup>th</sup> defendant averred that it acted as the 1<sup>st</sup> and the 2<sup>nd</sup> defendants' agent in the sale and transfer of the suit property to the plaintiffs in 1989. The 6<sup>th</sup> defendant averred that after purchasing the suit property, the plaintiffs were issued with new share certificate by Thome Famers No. 5 Ltd. and the old share certificate that was held by the 1<sup>st</sup> and the 2<sup>nd</sup> defendants was cancelled. The 6<sup>th</sup> defendant averred that the plaintiffs were the legal proprietors of the suit property. The 6<sup>th</sup> defendant averred that it conducted due diligence and confirmed from Thome Farmers No. 5 Limited that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were the owners of the suit property before advertising the same for sale. The 6<sup>th</sup> defendant averred that after the plaintiffs purchased the suit property, they were given possession of the property and were still in actual possession of the property over 20 years after the sale. The 6<sup>th</sup> defendant averred that the sale of the suit property to the plaintiffs was not tainted with any fraud or illegality. The 6<sup>th</sup> defendant averred that there was evidence that Thome Farmers No. 5 Limited purchased L.R. No. 13330 which resulted from amalgamation of L.R 4920/3 and L.R No. 4921/3 from the 10<sup>th</sup> defendant. The 6<sup>th</sup> defendant urged the court to enter judgement in favour of the plaintiffs against the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants.

### **The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants' case.**

The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants filed their defence and counterclaim against the plaintiffs on 14<sup>th</sup> January, 2013. The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants averred that they were the registered proprietors of L.R No. 13330/142("the suit property") having purchased the same from the 10<sup>th</sup> defendant. The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants averred further that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had never had any proprietary interest in the suit property. The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants averred that the 10<sup>th</sup> defendant executed an instrument of transfer of the suit property in their favour as tenants in common on 31<sup>st</sup> May, 2012 after paying the purchase price of Kshs. 1,800,000/-. The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants averred that the said transfer was registered on 26<sup>th</sup> June, 2012. The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants averred that prior to the sale and subsequent transfer of the suit property to them, they conducted due diligence and confirmed that the suit property was in the sole possession of the 10<sup>th</sup> defendant and that there was no encumbrance on the property forbidding the sale thereof. The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants averred that they were bona fide purchasers of the suit property for value without notice. The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants averred that the plaintiffs were trespassers on their property purporting to have purchased the property from persons who had no proprietary interest in the same.

The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants averred that prior to the institution of this suit, they had never heard of the plaintiffs or heard of any interest if any that they had on the suit property. The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants averred that it was only the 10<sup>th</sup> defendant which was known to them and denied that they colluded with the other defendants to defraud the plaintiffs.

In their counterclaim, the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants reiterated that they were the registered proprietors of the suit property having purchased the same for valuable consideration from the 10<sup>th</sup> defendant. The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants reiterated that the instrument of transfer that was executed in their favour by the 10<sup>th</sup> defendant on 31<sup>st</sup> May, 2012, was registered on 26<sup>th</sup> June, 2012 after they had complied with all the formalities. The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants averred that on or about October, 2012, the plaintiffs trespassed onto the suit property and hurriedly constructed semi- permanent structures thereon in a bid to lay claim to the property. The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants sought judgment against the plaintiffs by way of a counter-claim for;

1. An order compelling the plaintiffs whether by themselves, their servants and or agents to vacate the Land Reference Number 13330/142 and give vacant possession forthwith to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants and in default the plaintiffs be evicted from the suit premises.
2. A permanent injunction restraining the plaintiffs whether by themselves, their servants and/or agents from trespassing on, occupying, developing or interfering in any way with the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants' quiet possession and proprietary rights to Land Reference Number 13330/142.
3. Payment of mesne profits for unlawfull occupation of the premises at Kshs. 100,000 per month from October, 2012 until the plaintiffs vacate the suit premises.
4. Damages for trespass.
5. Cost of the suit and interest on (3) above.

The plaintiffs filed a reply to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants' defence and defence to counter-claim on 22<sup>nd</sup> January, 2012. The plaintiffs reiterated that the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants acquired the suit property fraudulently. The plaintiffs' averred that the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants' averment that they purchased the suit property which was valued at over Kshs. 15,000,000/- at Kshs. 1,800,000/- was corroborative of the plaintiffs' claim that the property was acquired fraudulently. The plaintiffs denied that the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants were bona fide purchasers of the suit property for value without notice of the plaintiffs' interest therein. The plaintiffs averred that the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants were all along aware of their interest in the suit property and of the fact that they were in actual physical occupation of the same. The plaintiffs reiterated the contents of their plaint and reply to defence in their defence to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants' counter-claim.

### **The 10<sup>th</sup> defendant's case.**

The 10<sup>th</sup> defendant filed its defence on 6<sup>th</sup> May, 2015. The 10<sup>th</sup> defendant averred that it was at all material times the owner of the suit property. The 10<sup>th</sup> defendant denied that it owned the suit property jointly with the 2<sup>nd</sup> defendant or that the 6<sup>th</sup> defendant was its agent in the sale of the property. The 10<sup>th</sup> defendant denied that it entered into any agreement for sale of the suit property with the plaintiffs and contended that the plaintiffs entry and occupation of the property was illegal and was tantamount to trespass on the suit property. The 10<sup>th</sup> defendant denied that it was involved in any acts of fraud in relation to the suit property and averred that the suit property had never been registered in the name of Thome Farmers No.5 limited.

The 10<sup>th</sup> defendant averred that it was not the same as Thome Farmers No. 5 Limited neither was it related to the said company through partnership, joint venture or in any other way. The 10<sup>th</sup> defendant averred that any share certificates issued by Thome Farmers No. 5 Limited and payments made to the company had nothing to do with the 10<sup>th</sup> defendant and the same could not entitle the plaintiffs to any land or property owned by the 10<sup>th</sup> defendant. The 10<sup>th</sup> defendant averred that the proceedings in HCCC No. 6206 of 1992 were against twenty-four identifiable persons who had trespassed on L.R No. 13330. The 10<sup>th</sup> defendant averred further a consent order was made in that suit through which the defendants in that suit who were willing and other trespassers on L.R No. 13330 would pay a sum of Ksh 200,000/- plus legal costs to the 10<sup>th</sup> defendant after which the parcels of land that they were occupying would be transferred to them. The 10<sup>th</sup> defendant averred that it did not receive such payment from the plaintiffs herein. The 10<sup>th</sup> defendant averred that it was always the registered owner of the suit

property and that the same was legally transferred to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants for valuable consideration.

At trial, the 1<sup>st</sup> plaintiff, Richard Nyamwange Michieka (PW1) testified that he was a professor in the United States of America (USA) and upon retirement, he came back to Kenya. He stated that he stayed in the USA from 1975 to 2012 and used to visit Kenya from time to time. He stated that the 2<sup>nd</sup> plaintiff was his wife. He adopted his witness statement and the documents referred therein as his evidence in chief. He told the court that in 1989, the 2<sup>nd</sup> plaintiff and he entered into an agreement with the 1<sup>st</sup> and the 2<sup>nd</sup> defendants for the purchase of the suit property at a consideration of Ksh. 170,000/-. He stated that the suit property was previously known as L.R No 4921/3/R, Plot No 132. He stated that they purchased the suit property through the 6<sup>th</sup> defendant which acted as the agent of the 1<sup>st</sup> and 2<sup>nd</sup> defendants and which was represented by one, Francis Njuguna Gikonyo. The 1<sup>st</sup> plaintiff stated that they paid the purchase price in full and were issued with receipts. He stated that they made some of the payments to Thome Farmers No. 5 Limited.

The 1<sup>st</sup> plaintiff stated that the suit property was registered in the name of the 10<sup>th</sup> defendant and that the same had been purchased by Thome Farmers No. 5 Limited from the 10<sup>th</sup> defendant. He stated that the 1<sup>st</sup> and the 2<sup>nd</sup> defendants were shareholders of Thome Farmers No. 5 Limited and were allocated the suit property by Thome Farmers No. 5 Limited by virtue of their shareholding. He stated that when they came back from the USA, they started following up on the title of the suit property. He stated that they were informed that the 4<sup>th</sup> and 5<sup>th</sup> defendants were dealing with the subdivision of the hitherto larger parcel of land and the issuance of titles. He stated that they waited for some time to be issued with the title for the suit property and when the same was not forthcoming, they decided to consult their advocates on record. He stated that their advocates on record wrote to the 4<sup>th</sup> and 5<sup>th</sup> defendants among others on the issue. He stated that the 4<sup>th</sup> defendant responded and stated that he was not in a position to transfer the suit property to them because there was a suit touching on the issue that was pending namely, HCCC No. 6202 of 1992. The 1<sup>st</sup> plaintiff stated that he was not a party to the said suit and the order that was issued therein on 27<sup>th</sup> June, 2002. He stated that they decided to file the current suit when they could not get the title for the suit property. The 1<sup>st</sup> plaintiff stated that they were in possession of the suit property and had a building thereon.

The 1<sup>st</sup> plaintiff stated that the 7<sup>th</sup>, 8<sup>th</sup> to 9<sup>th</sup> defendants acquired title to the suit property from the 10<sup>th</sup> defendant while this suit was pending. He stated that certificate of title for the suit property was issued to the 7<sup>th</sup>, 8<sup>th</sup> to 9<sup>th</sup> defendants on 26<sup>th</sup> June, 2012 while this suit was pending. He told the court that there was no evidence on how the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants purchased the suit property from the 10<sup>th</sup> defendant. With regard to the 10<sup>th</sup> defendant's denial that it had any association with Thome Farmers No. 5 Limited, the 1<sup>st</sup> plaintiff referred the court to the affidavit of Joseph Wambaa filed in HCCC No. 1321 of 2006 and supplementary affidavit of the said Joseph Wambaa filed in HCCC No. 586 of 2008 in which the said Joseph Wambaa had explained the relationship between the 10<sup>th</sup> defendant and Thome Farmers No. 5 Limited in relation to the suit property. He stated that the said Joseph Wambaa was the only remaining director of Thome Farmers No.5 Limited.

The 1<sup>st</sup> plaintiff stated that he put up structures on the suit property in 1990 and that the same were partially demolished by the agents of the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants after 7<sup>th</sup>, 8<sup>th</sup> to 9<sup>th</sup> defendants acquired the property. He stated that he reported the demolition to the police and some of the people who had invaded the suit property were arrested. The 1<sup>st</sup> plaintiff stated that he took photographs of the demolished structures which were attached to their further list of documents. The 1<sup>st</sup> plaintiff produced the documents annexed to their list of documents dated 28<sup>th</sup> August, 2012 filed in court on 5<sup>th</sup> September, 2012 as Plaintiffs' Exhibit 1, the documents annexed to their supplementary list of document dated 12<sup>th</sup> January, 2016 filed in court on the same day as Plaintiffs' Exhibit 2 and the documents annexed to their further list of documents dated 15<sup>th</sup> July, 2016 filed in court on 18<sup>th</sup> July, 2016 as Plaintiff's Exhibit 3. The 1<sup>st</sup> plaintiff urged the court to grant the prayers sought in the amended plaint plus the costs of the suit.

In cross examination by the advocate for the 10<sup>th</sup> defendant, the 1<sup>st</sup> plaintiff stated that he was residing in USA and that he came back to Kenya in 2012. He told the court that he purchased the suit property in August, 1989 and he left the property in the hands of a caretaker by the name, Joel Michieka. He stated that the said caretaker used to do farming on the suit property and that he was still in occupation. He stated that he had put up a semi-permanent structure on the suit property made of iron sheets and that apart from Joel Michieka, he had other workers on the suit property. He told the court that he intended to put up apartments and that the property was surveyed and had beacons in place. He stated further that the 1<sup>st</sup> and 2<sup>nd</sup> defendants who sold to him the property showed him the boundaries thereof. He stated that the sellers owned shares in Thome Farmers No. 5 Limited by virtue of which they were allocated the suit property.

The 1<sup>st</sup> plaintiff stated further in cross-examination that Thome Farmers No. 5 Limited purchased the suit property from the 10<sup>th</sup> defendant and that they purchased the property on the strength of a share certificate that was issued to the 1<sup>st</sup> and 2<sup>nd</sup> defendants by Thome Farmers No. 5 Limited. He testified further that before they purchased the suit property, they confirmed from Thome Famers No. 5 Limited that Thome Famers No. 5 Limited had purchased the property from the 10<sup>th</sup> defendant which was to issue them with title in respect thereof. He told the court that he was aware there was a suit between the 10<sup>th</sup> defendant and some people namely, HCCC No. 6206 of 1992. He stated that he was not a party to the suit neither was he aware that Thome Farmers No. 5 Limited was joined in the suit. He stated further that he paid Kshs. 200,000/- to the 10<sup>th</sup> defendant through the 3<sup>rd</sup> defendant, Kimani Kahiro & Co. Advocates for the purpose of processing a title for the suit property in their favour although they did not have an agreement for sale with the 10<sup>th</sup> defendant. The 1<sup>st</sup> plaintiff stated that he was not familiar with the order that was made on 27<sup>th</sup> June, 2002 in HCCC No. 6206 of 1992.

He told the court that when he was asked to pay Kshs. 200,000/-, he was not told that the payment was to be made pursuant to the said court order. He stated that he was directed by the 3<sup>rd</sup> defendant to pay the said sum of Kshs. 200,000/- for which a receipt was issued. He stated that he effected the payment of the said sum of Kshs. 200,000/- over a period of time and it was accepted. He told the court that the suit property was not transferred to him and that when he came back to Kenya, he went to the 4<sup>th</sup> defendant, Chege Wainaina & Co. Advocates who were handling the issue of the titles and that the 4<sup>th</sup> defendant told him to bring the receipts that had been issued to him by Thome Farmers No. 5 Limited. He stated that while he was still putting the same together, the title to the suit property was issued to other persons. He told the court that he had owned the suit property since 1989 and that when the property was sold by the 10<sup>th</sup> defendant to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants, they had already filed this suit.

In cross-examination by the advocate for the 4<sup>th</sup> defendant, the 1<sup>st</sup> plaintiff reiterated that they purchased the suit property in 1989. He stated that the sale agreement dated 1<sup>st</sup> August 1989 that he had produced was erroneous and that the correct agreement was the one dated July 1989. He stated that he was a shareholder of Thome Farmers No.5 Limited and that he did not know the role that the 4<sup>th</sup> defendant who was acting for the 10<sup>th</sup> defendant was to play in the transaction. In cross-examination by the advocate for the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants, the 1<sup>st</sup> plaintiff stated that his problem with the 7<sup>th</sup> to 9<sup>th</sup> defendants was that they benefited from an illegal transfer of the suit property from the 10<sup>th</sup> defendant. He stated that the suit property was under the occupation of a caretaker who was his relative.

In re-examination, the 1<sup>st</sup> plaintiff reiterated that they were not parties to HCCC No. 6206 of 1992 and that he was not bound by the orders that were made therein. He told the court that he attempted to comply with the order by making the payment that was required to the 3<sup>rd</sup> defendant which payment was accepted. He stated that he did not know the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants before he sued them. He stated that the suit property was transferred to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants in 2012 while he had occupied the property since 1990. He stated that he had never vacated the property since he took possession and that if the 7<sup>th</sup> to 9<sup>th</sup> defendants had come to the suit property they would have seen his servants in the premises and the structures he had put up thereon. He stated that the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants sent thugs to demolish his structures on the suit property. He stated that the 7<sup>th</sup> to 9<sup>th</sup> defendants were aware that he was in occupation of the suit property. He told the court that the 5<sup>th</sup> defendant was a consultant who was sent to him by the 4<sup>th</sup> defendant to verify the documents that he had in his possession. The plaintiffs' case was closed with the evidence of the 1<sup>st</sup> plaintiff.

In his evidence, the 1<sup>st</sup> defendant, Samuel Kimani Gathemba (DW1) adopted his witness statement dated 5<sup>th</sup> June, 2017 as his evidence in chief. He stated that he and his deceased father, the 2<sup>nd</sup> defendant were shareholders in Thome Farmers No. 5 Limited. He stated they sold their share in Thome Farmers No. 5 Limited to the plaintiffs and the plaintiffs were duly issued with a share certificate. He stated that as far as he was concerned, the suit property belonged to the plaintiffs. DW1 relied on the documents that were produced by the plaintiffs in evidence save for the photograph which he was not in agreement with. In cross examination by the plaintiffs' advocate, DW1 stated that when they were selling the suit property to the plaintiffs, they engaged the 6<sup>th</sup> defendant to act as their agent in the transaction and that it was the 6<sup>th</sup> defendant which would know when the property was handed over to the plaintiffs. He stated that he visited the suit property for the last time in 1989 and that he would not know whether structures were put up on the suit property after his visit.

Francis Njuguna Gikonyo (DW2) gave evidence on behalf of the 6<sup>th</sup> defendant as its director. DW2 told the court that he was an estate agent. He adopted his witness statement filed in court on 6<sup>th</sup> June, 2017 as his evidence in chief. He testified as follows. The 1<sup>st</sup> and 2<sup>nd</sup> defendants came to his office with a share certificate and an allotment card No.7 and instructed him to sell the suit property. He visited the office of Thome Farmers No. 5 Limited to verify the genuineness of the documents that were presented to him by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Thome Farmers No. 5 Limited confirmed that the documents were genuine after which he advertised the suit property for sale in the Nation and the Standard Newspapers. The 1<sup>st</sup> plaintiff got interested in the properties and came to his office. He visited the suit property along Thika road near Safari Park Hotel with the 1<sup>st</sup> plaintiff after which they agreed on a price of Kshs. 170,000/-. The 1<sup>st</sup> plaintiff paid the purchase price in full together with transfer fees of Kshs. 1000/- that was paid to Thome Farmers No.5 Limited. Possession of the suit property was thereafter handed over to the plaintiffs and that marked the end of his instructions by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. In cross-examination by the advocate for the plaintiff, DW2 stated that after he handed over the suit property to the plaintiffs, he visited the suit property some years later and found out that the plaintiffs had put up some structures on the property.

The next to give evidence was the 8<sup>th</sup> defendant, James Musau Kimeu (DW3). DW3 gave evidence on his own behalf and on behalf of the 7<sup>th</sup> and 9<sup>th</sup> defendants. He relied entirely on his witness statement that was filed in court on 14<sup>th</sup> January, 2013 as his evidence in chief. He produced as exhibits the instrument of transfer dated 31<sup>st</sup> May, 2012 and registered on 26<sup>th</sup> June, 2012 and the certificate of title No. I.R 138016 for the suit property dated 26<sup>th</sup> June, 2012 as Defence Exhibits 1 and 2 respectively. In his statement, DW3 stated that on 31<sup>st</sup> May, 2012, the 10<sup>th</sup> defendant transferred the suit property to them as tenants in common having purchased the property at a consideration on Kshs. 1,800,000/-. He stated that before they entered into the agreement for sale with the 10<sup>th</sup> defendant, they conducted due diligence that revealed that the property was in sole possession of the 10<sup>th</sup> defendant and that it had no encumbrance forbidding the sale and transfer thereof. DW3 stated that they were bona fide purchasers of the suit property for value without notice of the plaintiffs' interest in the property and that they were the absolute proprietors of the property with indefeasible rights in respect thereof. DW3 reiterated the contents of the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants' defence and counter-claim that the plaintiffs had no interest in the suit property. He stated that the plaintiffs purported to have purchased the suit property from Thome Farmers No. 5 Limited which had no proprietary interest in the property. DW3 stated that after they acquired the suit property, the plaintiffs trespassed into the suit property and hurriedly constructed semi-permanent structures thereon for the purposes of laying a claim to the property.

In cross-examination by the advocate for the plaintiff, DW3 told the court among others that when purchasing the suit property, they were shown the same by a site agent and that at that time, the same was not developed. When shown the photographs that had been produced by the plaintiffs in evidence, he stated that when they purchased the suit property, the structures on the photographs were not on the property. DW3 stated that when they went to clear the suit property after purchasing it, they found some structures thereon which they did not destroy. He stated that they were not aware that there was anyone in occupation of the suit property. He stated that the structures on the suit property were put up hurriedly by the plaintiffs.

The last witness was Robertson Nderitu Mwihi (DW4). DW4 was a manager with the 10<sup>th</sup> defendant. He adopted his witness statement dated 6<sup>th</sup> May, 2015 as his evidence in chief and produced the documents attached to the 10<sup>th</sup> defendant's list of documents dated 6<sup>th</sup> May, 2015 as exhibits. He stated that L.R No. 13330 belonged to the 10<sup>th</sup> defendant and that the property came about as a result of amalgamation of two plots namely, L.R No 4920/3 and L.R No. 4921/3. He stated that the 10<sup>th</sup> defendant did not sell Plot No. 13330 to anyone. He stated that the 1<sup>st</sup> defendant was not known to the 10<sup>th</sup> defendant and that the 10<sup>th</sup> defendant did not sell the suit property to him. He stated that the 10<sup>th</sup> defendant was not a party to the agreement for sale between the plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> defendants and did not receive any payment from the plaintiffs. He stated that the 10<sup>th</sup> defendant sued Thome Farmers No.5 Limited in Nairobi HCCC No. 6206 of 1992 for

possession of L.R No. 13330. He stated that when Thome Farmers No. 5 Limited was sued, the people who were in occupation of L.R No. 13330 agreed to pay for the portions thereof which they were occupying. He stated that the 10<sup>th</sup> defendant wanted Thome Farmers No. 5 Limited to evict from L.R No. 13330 those to whom it had purported to sell portions of the said property. DW4 stated that a consent was reached between the parties to that suit on 7<sup>th</sup> June, 2002 under which the trespassers on L.R No. 13330 were pay to the 10<sup>th</sup> defendant Kshs. 200,000/- each and would be issued with titles by the 10<sup>th</sup> defendant in respect of the portions in their occupation. He stated that all those who were in occupation of L.R No. 13330 were sued and the offer was extended to those who were not parties to the consent. DW4 stated that the 10<sup>th</sup> defendant put notices in the newspapers giving notice to those who were occupying L.R No. 13330 to pay the said sum of Kshs, 200,000/-. He stated that most of those who were occupying L.R No. 13330 made payments of the said sum of Kshs. 200,000/- and had titles issued to them. He stated that the plots in respect of which no payment was made were sold. He told the court that the plaintiffs did not pay the said sum of Kshs. 200,000/- as a result of which their plot was sold to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants. He stated that when the 10<sup>th</sup> defendant sold the suit property to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants, the same was vacant. DW4 denied that the plaintiffs were in occupation of the suit property.

In cross examination by the advocate for the plaintiff, DW4 stated that the 10<sup>th</sup> defendant had agreed to sell L.R No 4920/3/2 and LR No. 4921/3 that gave rise to L. R No. 13330 to Thome Farmers No. 5 Limited and that Thome Farmers No. 5 Limited did not pay the entire purchase price to the 10<sup>th</sup> defendant. He stated that when Thome Farmers No. 5 Limited subdivided L.R 13330, the property did not belong to it. He stated that Thome Farmers No. 5 Limited was to pay over Ksh 2 million and that he did not know the exact balance they were to pay. He stated that L.R No. 13330 was subdivided into 642 portions between 1980s and 1990s. He told the court that the titles for the said portions were to be given to those who had made payments of Kshs. 200,000/- to the 10<sup>th</sup> defendant. He stated that since Thome Farmers No. 5 Limited had failed to pay the full purchase price to the 10<sup>th</sup> defendant, it was only those who made the payment of Kshs. 200,000/- to the 10<sup>th</sup> defendant who were given titles by the 10<sup>th</sup> defendant.

He stated that the order that was issued in HCCC No. 6206 of 1992 affected everyone who was in occupation of L.R No. 13330 and that it was on the strength of that order that they called for Ksh. 200,000/- from all those who were in occupation of the land. DW4 stated that Kshs. 200,000/- was the purchase price payable to the 10<sup>th</sup> defendant and it was to be paid by members of Thome Farmers No. 5 Limited to get title. He told the court that all the members of Thome Farmers No.5 Limited who paid Kshs. 200,000/- within the prescribed time were given titles. He stated that the payments were being made to the 3<sup>rd</sup> defendant on behalf of the 10<sup>th</sup> defendant and that the plaintiffs could not get a title for the suit property because the payment that they made did not amount to Kshs. 200,000/-. He reiterated that when the 10<sup>th</sup> defendant sold the suit property to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants, it was vacant and that he was not familiar with the structures shown on the photographs that were produced by the plaintiffs in evidence. In re-examination, DW4 told the court that Thome Farmers No. 5 Limited was to pay Kshs. 2,000,000/- to the 10<sup>th</sup> defendant but paid Kshs. 1,250,000/- only. DW4 stated that the subdivision of L.R No. 13330 by Thome Farmers No. 5 Limited did not mean that the tile to the land passed to it. He stated that the shareholders of Thome Farmers No. 5 Limited were to pay Kshs. 200,000/- within 6 months and that the plaintiffs made payment on 8<sup>th</sup> February, 2007 to the 3<sup>rd</sup> defendant.

### **Submissions.**

At the end of evidence, parties made closing submissions in writing. The plaintiffs filed their submissions on 21<sup>st</sup> December, 2018, the 4<sup>th</sup> defendant filed his submissions on 23<sup>rd</sup> December, 2019, the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendant filed their submissions on 12<sup>th</sup> September, 2019 and the 10<sup>th</sup> defendant filed its submission on 5<sup>th</sup> December 2019.

The plaintiffs submitted that the suit property was sold by the 10<sup>th</sup> defendant to Thome Farmers No. 5 Limited and as such the same was not available to the 10<sup>th</sup> defendant for sale to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants. The plaintiffs cited Civil Appeal No. 52 of 2012. Patrick Magu Mwangi v Joreth Ltd. where the Court of Appeal confirmed the above position. The plaintiffs submitted further that even if Thome Farmers No. 5 Limited did not purchase the suit property from the 10<sup>th</sup> defendant and as such it had no capacity to transfer the same to the 1<sup>st</sup> and 2<sup>nd</sup> defendants who sold the same to the plaintiffs, the plaintiffs took possession of the suit property in 1989 and had remained in occupation thereof continuously and peacefully for 23 years until May, 2012 when the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants (hereinafter referred to only as “the 7<sup>th</sup> to 9<sup>th</sup> defendants where the context so permits) purported to purchase the same. The plaintiffs submitted that the continuous, peaceful and uninterrupted occupation of the suit property for those years entitled the plaintiff to own the suit property by adverse possession. The plaintiff submitted that even though they had commenced the suit by way of a plaint rather than Originating Summons and had also not sought to be declared to have acquired the property by adverse possession, the omission could not disentitle them to an order that they had acquired the suit property by adverse possession. In support of this submission, the plaintiffs cited Bayete Co. Ltd. v Kosgey [1998] LLR 813 that was cited with approval in Gulam Miriam Nooridn v Julius Charo Karisa [2015] eKLR.

The plaintiffs submitted further that the title held by the 7<sup>th</sup> to 9<sup>th</sup> defendants should be declared void for having been obtained un-procedurally contrary to section 26 of the Land Registration Act, 2012. The plaintiffs averred that the 7<sup>th</sup> to 9<sup>th</sup> defendants did not adduce evidence that they had entered into an agreement for sale with the 10<sup>th</sup> defendant. The plaintiffs submitted that it was not sufficient for the 7<sup>th</sup> to 9<sup>th</sup> defendants to produce a certificate of title that was issued to them for the suit property as evidence of their ownership of the property. The plaintiffs submitted that since the plaintiffs had been in occupation of the suit property for over 23 years, the 7<sup>th</sup> to 9<sup>th</sup> defendants had a duty to demonstrate that the process through which they acquired the suit property was lawful. The plaintiffs submitted further that the sale of the suit property by the 10<sup>th</sup> defendant to the 7<sup>th</sup> to 9<sup>th</sup> defendants also violated the provisions of section 3(3) of the Law Contract Act which provides that a contract for the disposition of an interest in land should be in writing. The plaintiffs cited the case of Alton Homes Limited & Anor v Davis Nathan Chelogoi & 2 Others [2018] eKLR in support of this submission. The plaintiffs urged the court to find that they have proved their case on a balance of probabilities and to declare that they are the legitimate and lawful proprietors of the suit property.

In his submissions dated 17<sup>th</sup> September, 2019, the 4<sup>th</sup> defendant submitted that the legitimate owner of L.R No. 13330 that was subdivided to give rise to among others the suit property was the 10<sup>th</sup> defendant and not Thome Farmers No. 5 Limited from which the plaintiffs derived their title. The 4<sup>th</sup> defendant submitted that at all material times he was instructed by the 10<sup>th</sup> defendant to handle all legal issues arising from

L.R No. 13330 that had been subdivided into 640 portions which instructions included preparation of transfers in respect of the said portions in accordance with the instructions of the 10<sup>th</sup> defendant. The 4<sup>th</sup> defendant submitted that he had no mandate to transfer the suit property to the plaintiffs as only the 10<sup>th</sup> defendant which was the registered owner thereof could do that. The 4<sup>th</sup> defendant submitted that he was an agent of a known principal and was not privy to any agreement relating to the suit property. The 4<sup>th</sup> defendant urged the court to dismiss the plaintiffs' suit with costs.

The 7<sup>th</sup> to 9<sup>th</sup> defendants submitted on three issues. The first issue was whether the plaintiffs had any proprietary interest in the suit property and whether they could sustain a claim for specific performance against the defendants. On this issue, the 7<sup>th</sup> to 9<sup>th</sup> defendants submitted that the plaintiffs failed to prove the existence of any transfer of the suit property in favour of Thome Farmers No. 5 Limited through which they claimed to have derived their title or in their favour. The 7<sup>th</sup> to 9<sup>th</sup> defendants submitted that the plaintiffs having failed to establish that they had any proprietary interest in the suit property, they could not sustain a claim for specific performance or enforcement of any proprietary rights. In support of this submission, the 7<sup>th</sup> to 9<sup>th</sup> defendants cited Faraj Mahas v J.B Martin Glass Industries & 3 others, Mombasa Court of Appeal Civil Appeal No. 130 of 2003 that was cited with approval in Goan Institute Nakuru & 3 others v Said Abdalla [2007] eKLR. In this case, it was held that a litigant can only succeed in enforcing a right of ownership of land if he has a title recognised by law.

The 7<sup>th</sup> to 9<sup>th</sup> defendants submitted further that specific performance is a relief for enforceable contract and that the court has no jurisdiction to grant an order of specific performance in this case since the suit is statute barred. The 7<sup>th</sup> to 9<sup>th</sup> defendants cited section 4(1) of the Limitation of Actions Act, Chapter 22 Laws of Kenya and submitted that an action founded on contract may not be brought after the expiry of 6 years. The 7<sup>th</sup> to 9<sup>th</sup> defendants averred that the plaintiffs were seeking an order of specific performance of the agreement dated July, 1989. The 7<sup>th</sup> to 9<sup>th</sup> defendants averred that this suit was filed on 5<sup>th</sup> September, 2012; 23 years after the cause of action arose and as such the suit was time barred and the relief sought could not be granted. In support of this submission, the 7<sup>th</sup> to 9<sup>th</sup> defendants cited Abraham Gina Adams & Another v James Ouma Natolio [2015] eKLR.

The second issue that was addressed by the 7<sup>th</sup> to 9<sup>th</sup> defendants in their submissions was whether the 7<sup>th</sup> to 9<sup>th</sup> defendants had a valid and indefeasible title over the suit property. The 7<sup>th</sup> to 9<sup>th</sup> defendants cited sections 24 and 26 of the Land Registration Act, 2012 which provides that registration of a person as the proprietor of land vests in that person absolute ownership of that land together with all rights and privileges belonging thereto and that the certificate of title issued by the registrar upon registration or to a purchaser upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner.

In support of this submission, the 7<sup>th</sup> to 9<sup>th</sup> defendants cited Arthi Highway Developers Limited v West End Butchery Limited & Others [2015] eKLR where the court considered the effect and purport of section 23(1) of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) and sections 25 and 26 of the Land Registration Act, 2012 and held that the foregoing provisions of the law give absolute and indefeasible rights to a registered owner of land that can only be defeated on grounds of fraud or misrepresentation to which the owner is proved to be a party.

The 7<sup>th</sup> to 9<sup>th</sup> defendants submitted that the certificate of title that was issued to them upon registration on 26<sup>th</sup> June, 2012 of the instrument of transfer that was executed in their favour by the 10<sup>th</sup> defendant on 31<sup>st</sup> May, 2012 conferred upon them absolute ownership and indefeasible right to own the suit property. In support of this submission, the 7<sup>th</sup> to 9<sup>th</sup> defendants cited the cases of Dynshaw Byramjee & Sons Ltd. v The Attorney General [1966] E.A 198 and Govindji Popatlal v Nathoo Visandji [1962] E.A 372.

The 7<sup>th</sup> to 9<sup>th</sup> defendants submitted that the plaintiffs pleaded and set out particulars of fraud but tendered no evidence in proof of the same. The 7<sup>th</sup> to 9<sup>th</sup> defendants cited section 107 of the Evidence Act, Chapter 80 Laws of Kenya and submitted that the onus was upon the plaintiffs to prove the alleged fraud. In support of this submission, the 7<sup>th</sup> to 9<sup>th</sup> defendants cited Ratilal Gordhanbhai Patel v Lalji Makanji [1957] E.A 314 where the court held that allegation of fraud must be strictly proved. The 7<sup>th</sup> to 9<sup>th</sup> defendants submitted that in the absence of such proof, their title to the suit property and its sanctity as provided for under section 26 of the Land Registration Act, 2012 must be upheld. The 7<sup>th</sup> to 9<sup>th</sup> defendants submitted also that they were bona fide purchasers of the suit property without notice of the plaintiffs' alleged interest therein since they had no interaction with the plaintiffs when they were purchasing the suit property and were not aware of their interest in the property.

On the appropriate reliefs to grant, the 7<sup>th</sup> to 9<sup>th</sup> defendants reiterated that the plaintiffs were not entitled to an order for specific performance. The 7<sup>th</sup> to 9<sup>th</sup> defendants submitted that agreement for sale dated July, 1989 only entitled the plaintiffs to a remedy of damages and not specific performance. The 7<sup>th</sup> to 9<sup>th</sup> defendants submitted further that they were not parties to the said agreement for sale and as such the plaintiffs could not enforce the same against them. The 7<sup>th</sup> to 9<sup>th</sup> defendants submitted that the plaintiffs were trespassers on the suit property since they wrongfully entered land that belonged to the 7<sup>th</sup> to 9<sup>th</sup> defendants. The 7<sup>th</sup> to 9<sup>th</sup> defendant submitted that since the plaintiffs had failed to establish that the suit property was fraudulently and/or illegally transferred to the 7<sup>th</sup> to 9<sup>th</sup> defendants, the plaintiffs had been in illegal occupation of the suit property. The 7<sup>th</sup> to 9<sup>th</sup> defendants submitted that the plaintiffs had failed to discharge their evidentiary burden to warrant the grant of the prayers sought in the plaint and urged court to dismiss the suit with cost and allow the counter claim.

The 10<sup>th</sup> defendant submitted on eight issues. The first issue was whether the plaintiffs had proved that he purchased the suit property. On this issue, the 10<sup>th</sup> defendant submitted that the plaintiffs did not establish that they entered into any agreement for sale or contract in respect of the suit property. The 10<sup>th</sup> defendant submitted that the plaintiffs were given an opportunity to regularise their ownership of the suit property through the orders that were given in HCCC No. 6206 of 1992 but chose not to do so. The 10<sup>th</sup> defendant submitted that it sold the suit property to the 7<sup>th</sup> to 9<sup>th</sup> defendants after the plaintiffs' failure to comply with the terms of the consent that was recorded in that suit. The 10<sup>th</sup> defendant submitted that it would be unfair to allow the plaintiffs to benefit from their own wrong doing. In support of this submission,

the 10<sup>th</sup> defendant cited Alghussein Establishment v Eton College [1991] 1 All ER 267 where it was held that a party should never be allowed to take advantage of his own wrong at the expense of the other party.

On the issue as to whether or not the sale agreement between the 10<sup>th</sup> defendant and the 7<sup>th</sup> to 9<sup>th</sup> defendants was valid, the 10<sup>th</sup> defendant reiterated the submissions by the 7<sup>th</sup> to 9<sup>th</sup> defendants that the 7<sup>th</sup> to 9<sup>th</sup> defendants acquired an absolute and indefeasible title over the suit property and that the plaintiffs failed to establish the acts of fraud alleged against the 10<sup>th</sup> defendant and the 7<sup>th</sup> to 9<sup>th</sup> defendants. On the issue as to whether the plaintiff could sustain a claim for both adverse possession and purchaser's interest, the 10<sup>th</sup> defendant distinguished the authority of Bayete (supra) that was relied on by the plaintiffs. The 10<sup>th</sup> defendant admitted that an action for adverse possession brought by way of a plaint is not incompetent. The 10<sup>th</sup> defendant contended however that the court cannot entertain a conflicting claim in which a party seeks a property through adverse possession and as a purchaser like in the present case. In support of this submission, the 10<sup>th</sup> defendant cited Muchanga Investments Limited v Safaris Unlimited (Africa) Limited & 2 others [2009] eKLR and Hyde v Pearce [1982] 1 All ER 1029 where the court held that a claim for adverse possession cannot succeed if the person asserting the claim has relied on the existence of a contract of sale to support his continued occupation of the property. The 10<sup>th</sup> defendant submitted further that even if the court was inclined to consider the adverse possession claim, the plaintiffs had not established the ingredients of adverse possession. The 10<sup>th</sup> defendant submitted that the plaintiffs had totally failed to prove that they were in actual, open and notorious possession of the suit property for over 12 years. The 10<sup>th</sup> defendant submitted that the plaintiffs had failed to prove their claim and urged the court to dismiss the same with costs.

### **Analysis of the issues arising and determination.**

The parties did not frame and file in court statement of agreed issues. As I have noted above, in their submissions, each party framed its own issues. From the pleadings and the evidence tendered, the following in my view are the issues which arise for determination in this suit and the counter-claim filed against the plaintiff by the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants;

1. Whether the plaintiffs are the beneficial owners of the suit property.
2. Whether the defendants had fraudulently and/or in breach of the agreement for sale pursuant to which the plaintiffs had acquired the suit property failed and/or refused to transfer the suit property to the plaintiffs and instead transferred the same to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants.
3. Whether the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants are the registered proprietors of the suit property.
4. Whether the plaintiffs trespassed on the suit property in or about October, 2012 and constructed semi-permanent structures thereon.
5. Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.
6. Whether the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants are entitled to the reliefs sought in the counter-claim.
7. Who is liable for the costs of the suit?

### **Whether the plaintiffs are the beneficial owners of the suit property.**

From the uncontroverted evidence on record, the plaintiffs acquired the suit property from the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 1<sup>st</sup> and 2<sup>nd</sup> defendants were shareholders of Thome Farmers No. 5 Limited (hereinafter referred to only as "Thome"). The 10<sup>th</sup> defendant was at all material times the registered owner of two parcels of land known as L.R No. 4920/3 and L.R No. 4921/3. On or about 26<sup>th</sup> February, 1974, the 10<sup>th</sup> defendant agreed to sell the two parcels of land to Thome at a price to be agreed upon. Following that agreement, Thome engaged surveyors who subdivided the two parcels of land into several ½ acre plots which it thereafter allocated to its shareholders. From the evidence on record, the 1<sup>st</sup> and 2<sup>nd</sup> defendants were allocated one of the sub-divisions of L.R No. 4920/3 and L.R No. 4921/3 that was referred to as Plot No. 132. It is not clear from the evidence on record as to when the two parcels of land were consolidated to give rise to L.R No. 13330. After the completion of survey and registration of the sub-plots, Plot No. 132 that was allocated to the 1<sup>st</sup> and 2<sup>nd</sup> defendants was given land reference number 13330/142 (the suit property). In July, 1989, the 1<sup>st</sup> and 2<sup>nd</sup> defendants sold the suit property to the plaintiffs at Kshs. 170,000/-. The sale was approved by Thome and after the 1<sup>st</sup> and 2<sup>nd</sup> defendants surrendered their share certificate, the plaintiffs were issued with share certificate No. 1109 by Thome on 31<sup>st</sup> August, 1989. It was not disputed that as at the time Thome allocated the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the 10<sup>th</sup> defendant had not transferred L.R No. 13330 to it. The property remained registered in the name of the 10<sup>th</sup> defendant. According to the 10<sup>th</sup> defendant, Thome had not finished paying for L.R No. 4920/3 and L.R No. 4921/3 when it subdivided the same and allocated portions thereof to its shareholders. The evidence that was adduced by the plaintiffs shows that Thome did not complete the payment of the purchase price for the two parcels of land. It follows therefore that Thome had not acquired any legal title over L.R No. 4920/3 and L.R No. 4921/3 and the subdivisions thereof when it allocated the same to its shareholders. The 1<sup>st</sup> and 2<sup>nd</sup> defendants who were allocated the suit property by Thome could not get a better title than that which Thome held. As at the time the 1<sup>st</sup> and 2<sup>nd</sup> defendants sold the suit property to the plaintiffs in 1989, they did not have a title to the suit property which they were allocated in 1975 by Thome. Thome had also not obtained a title to L.R No. 4920/3 and L.R No. 4921/3 (L.R No. 13330 after consolidation).

It is clear from the foregoing that neither the 1<sup>st</sup> and 2<sup>nd</sup> defendants nor Thome had a legal interest in the suit property that they could transfer to the plaintiffs. The 1<sup>st</sup> and 2<sup>nd</sup> defendants had only a beneficial interest in the suit property that was dependent on Thome obtaining a legal

title for the suit property from the 10<sup>th</sup> defendant and transferring the same to them. Since the agreement for sale between Thome and the 10<sup>th</sup> defendant was not completed due to the failure by Thome to complete the payment of the purchase price with the result that the 10<sup>th</sup> defendant did not transfer the legal interest in the suit property to Thome, the beneficial interest that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had in the suit property had no basis to stand on and had to give way to the 10<sup>th</sup> defendant's legal interest.

In their plaint, the plaintiffs averred that the 1<sup>st</sup> and 2<sup>nd</sup> defendants sold the suit property to them with the consent and approval of the 10<sup>th</sup> defendant. The plaintiffs did not place any evidence before the court showing that the 10<sup>th</sup> defendant had approved the transaction. It my finding and I so hold that as at July, 1989, the 1<sup>st</sup> and 2<sup>nd</sup> defendant had no valid proprietary interest in the suit property that they could transfer to the plaintiffs. In my view, what was conveyed successfully by the 1<sup>st</sup> and 2<sup>nd</sup> defendants to the plaintiffs was their one (1) share in Thome which did not entitle the plaintiffs to the suit property. The beneficial interest that the plaintiffs had in the suit property if any ceased when the 10<sup>th</sup> defendant who was the legal owner of the suit property transferred the same to the 7<sup>th</sup> to 9<sup>th</sup> defendants on 31<sup>st</sup> May, 2012 and the 7<sup>th</sup> to 9<sup>th</sup> defendants became the registered as proprietors of the suit property as tenants in common. The 7<sup>th</sup> to 9<sup>th</sup> defendants were issued with a certificate of title on 26<sup>th</sup> June, 2012 under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). In the case of Arthi Highway Developers Limited v West End Butchery Limited & 6 others (supra) the Court of Appeal stated as follows with regard to section 23 of the Registration of Titles Act:

**“The law is typically stated in the case of Dr. Joseph Arap Ngok v Moiwo Ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997 where the court categorically declared that;**

**Section 23 (1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such owner can only be subject to challenge on the grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact, the Act meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya be placed in jeopardy.”**

As correctly submitted by the advocates for the 7<sup>th</sup> to 9<sup>th</sup> defendants and the advocates for the 10<sup>th</sup> defendant, the plaintiffs did not prove that the transfer of the suit property by the 10<sup>th</sup> defendant to the 7<sup>th</sup> to 9<sup>th</sup> defendants was fraudulent or un-procedural. The plaintiffs had contended that failure by the 7<sup>th</sup> to 9<sup>th</sup> defendants to produce a copy of the agreement of sale between them and the 10<sup>th</sup> defendant rendered the transaction un-procedural for failure to comply with section 3(3) of the Law of contract Act. I find no merit in this argument. The 7<sup>th</sup> to 9<sup>th</sup> defendants produced a copy of the instrument of transfer dated 31<sup>st</sup> May, 2012 that was duly signed by the 10<sup>th</sup> defendant as vendor, and the 7<sup>th</sup> to 9<sup>th</sup> defendants as purchasers which transfer was duly witnessed and registered. This transfer in my view satisfies the provisions of section 3(3) of the Law of Contract Act. It follows from the foregoing that the 10<sup>th</sup> defendant conveyed to the 7<sup>th</sup> to 9<sup>th</sup> defendants a valid title. As was held in the case of Dr. Joseph Arap Ngok v Moiwo Ole Keiwua & 5 others (supra), the legal title over the suit property that was acquired by the 7<sup>th</sup> to 9<sup>th</sup> defendants from the 10<sup>th</sup> defendant superseded all equitable rights that existed over the suit property including the plaintiffs' beneficial interest.

In their submissions, the plaintiffs had contended that if the court did not find that they had acquired the suit property pursuant to the agreement for sale between them and the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the court should make a declaration that they had acquired the suit property by adverse possession since they had occupied the suit property openly, peacefully and continuously for uninterrupted period of 23 years prior to the filing of this suit. From the evidence adduced by the plaintiffs and the 1<sup>st</sup> and 6<sup>th</sup> defendants, I am satisfied that the plaintiffs had established the ingredients of adverse possession in relation to the suit property. The plaintiffs proved that they had taken possession of the suit property in 1989 and that the same was in their possession and under their control continuously until May, 2012 when the 10<sup>th</sup> defendant sold the property to the 7<sup>th</sup> to 9<sup>th</sup> defendants. I am of the view that possession of land through a caretaker for the prescribed period of 12 years is sufficient for the purposes of adverse possession. The fact that the plaintiffs were residing in the United States of America and had left the suit property in the hands of a caretaker cannot defeat his claim over the suit property by adverse possession as claimed by the 10<sup>th</sup> defendant. The plaintiffs had acquired the suit property by adverse possession as at the time the 10<sup>th</sup> defendant purported to transfer the property to the 7<sup>th</sup> to 9<sup>th</sup> defendants on 31<sup>st</sup> May, 2012.

That said, it is a pity that I am unable to declare the plaintiffs as the owners of the suit property by adverse possession. This is for the simple reason that the plaintiffs did not plead adverse possession in their amended plaint or as a defence to the 7<sup>th</sup> to 9<sup>th</sup> defendants' counter-claim. The plaintiffs raised the issue of adverse possession for the first time in their submissions. In Hemed Kassim Hemed v Fatuma Sheikh Abdalla [2014] eKLR, the court stated as follows on the importance of pleadings:

“4. The Court of Appeal in the case INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER –Vs- STEPHEN MUTINDA MULE & 3 OTHERS [2014]eKLR, considered with approval two foreign cases on the issue of parties being bound by their pleadings as follows-

**“... the decision of the Malawi Supreme Court of Appeal in MALAWI RAILWAYS LTD –Vs- NYASULU [1998]MWSC 3, in which the learned Judges quoted with approval from an article by Sir Jack Jacob entitled “The present Importance of Pleadings.” The same was published in [1960] Current Legal problems, at P174 whereof the author had stated-**

**‘As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as**

they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

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

The Appellants also cited the Ugandan case of **LIBYAN ARAB UGANDA BANK FOR FOREIGN TRADE AND DEVELOPMENT & ANOR Vs. ADAM VASSILIADIS [1986]UG CA 6** where the Uganda Court of Appeal (judgment of Odoki J.A) cited with approval the dictum of Lord Denning in **JONES Vs. NATIONAL COAL BOARD [1957]2 QB 55** THAT-

**'In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.'**

Referring also to a decision of Nigerian Supreme Court our Court of Appeal stated-

**"ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;**

**'... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.'**

I am in agreement with the 10<sup>th</sup> defendant that the case of Gulam Miriam Noordin v Julius Charo Karisa [2015] eKLR that was cited by the plaintiffs in support of their adverse possession claim is distinguishable. In that case unlike the one before the court, adverse possession was pleaded as a defence to a claim for possession. The plaintiffs had also relied on Bayete Co. Limited v Kosgey [1998] LLR 813 that was cited in that case. The plaintiffs did not make this case available to the court and I was unable to lay my hands on the same. Since I am not familiar with the facts of Bayete Co. Limited v Kosgey(supra), I am unable to rely on the same. It is my finding that the plaintiffs having failed to plead adverse possession either in their plaint or defence, they are not entitled to any relief in respect thereof.

In the final analysis, the plaintiffs have failed to establish that they acquired a valid title to the suit property from the 1<sup>st</sup> and 2<sup>nd</sup> defendants or that they are entitled to the property by adverse possession. In the circumstances, it is my finding that the plaintiffs are not the beneficial owners of the suit property. The first issue is therefore answered in the negative.

**Whether the defendants had fraudulently and/or in breach of the agreement for sale pursuant to which the plaintiffs had acquired the suit property failed and/or refused to transfer the suit property to the plaintiffs and instead transferred the same to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants.**

In Black's Law Dictionary 9<sup>th</sup> Edition at page 731 fraud is defined as:

**"a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."**

In Ratilal Gordhanbhai Patel v Lalji Makanji (supra), that was cited by 7<sup>th</sup> to 9<sup>th</sup> defendants, the court held that allegations of fraud must be strictly proved to a standard which is more than a balance of probabilities but not beyond any reasonable doubt. The court stated as follows at page 317:

**"Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."**

The plaintiffs did not prove fraud against any of the defendants. The plaintiffs did not also establish that the defendants breached the agreement that the plaintiffs entered into with the 1<sup>st</sup> and 2<sup>nd</sup> defendants in relation to the suit property. As correctly submitted by the 7<sup>th</sup> to 9<sup>th</sup> defendants, a part from the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the other defendants were not parties to the agreement for sale dated July, 1989. The 3<sup>rd</sup> to 12<sup>th</sup> defendants who were not parties to the said agreement could not have breached the same. As for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, I am not satisfied that they breached the agreement dated July, 1989. According to clause 3 of the agreement for sale, the only obligation that the 6<sup>th</sup> defendant who acted as agents of the 1<sup>st</sup> and 2<sup>nd</sup> defendants had was to transfer the share that the 1<sup>st</sup> and 2<sup>nd</sup> defendants held in Thome to the plaintiffs. The agreement provided as follows in part:

**"Vema Agencies Limited acting on behalf of the Vendors agrees with the Purchasers to finalise transfer arrangements of Plot No. 132 a portion of L.R 4921/3/R within a period of 21 days from the date of (sic) this agreement is signed and upon handing over a (sic) One Share Certificate together with one Allotment Card registered in the name of the Purchaser (MR.**

**RICHARD NYAMWANGE And MRS. MONICA NYAMWANGE) all from Thome No. 5 Limited(sic) will be deemed to be the final transfer and completion of sale by the Vendor (emphasis added)?**

There was no dispute that the 1<sup>st</sup> and 2<sup>nd</sup> defendants' share in Thome was successfully transferred to the plaintiffs and the plaintiffs were issued with a new share certificate by Thome on 31<sup>st</sup> August, 1989. In the circumstances, the 1<sup>st</sup> and 2<sup>nd</sup> defendants fulfilled their obligations to the plaintiffs in accordance with the terms of their contract. The plaintiffs have failed to establish that the defendants through acts of fraud and/ or in breach of the agreement dated July, 1989 failed to transfer the suit property to him. In any event, I am in agreement with the 7<sup>th</sup> to 9<sup>th</sup> defendants that even if there was a breach of the said agreement, the same could not be enforced because the suit by the plaintiffs for enforcement is time barred by virtue of section 4 of the Limitation of Actions Act, Chapter 22 Laws of Kenya. The agreement between the plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> defendants was made in July, 1989. This suit was filed on 5<sup>th</sup> September, 2012 after a period of 23 years from the date of the agreement. The plaintiffs' suit being a suit for enforcement of a contract should have been brought within 6 years from the date of the breach. According to the agreement between the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the transfer was supposed to be effected within 21 days from the date of the agreement assuming that it was the transfer of the suit property. Since the suit property was not transferred to the plaintiffs, their cause of action arose in 1989 and as such they should have brought the suit by 1995. The suit was therefore brought after the end of the limitation period.

Due to the foregoing, I have to answer issue number two in the negative. It has not been established that the suit property was not transferred to the plaintiffs as a result of the defendants' acts of fraud and/or breach of contract.

**Whether the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants are the registered proprietors of the suit property.**

From the evidence before the court, I am satisfied that the 7<sup>th</sup> to 9<sup>th</sup> defendants are the registered proprietors of the suit property. The 7<sup>th</sup> to 9<sup>th</sup> defendants produced in evidence a copy of an instrument of transfer dated 31<sup>st</sup> May, 2012 through which the property was transferred to them by the 10<sup>th</sup> defendant. The transfer was registered on 26<sup>th</sup> June, 2012 after which the 7<sup>th</sup> to 9<sup>th</sup> defendants were issued with a certificate of title for the suit property. A copy of the said certificate of title was also produced in evidence by the 7<sup>th</sup> to 9<sup>th</sup> defendants as an exhibit. These documents were not contested by the plaintiffs. It is my finding therefore that the 7<sup>th</sup> to 9<sup>th</sup> defendants are the registered owners of the suit property.

**Whether the plaintiffs trespassed on the suit property in or about October, 2012 and constructed semi-permanent structures thereon.**

Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, page, 923, paragraph, 18-01. In the case of Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR, it was held that title to land carries with it legal possession. When the plaintiffs entered the suit property, the same was not registered in the name of the 7<sup>th</sup> to 9<sup>th</sup> defendants. The plaintiffs entered the suit property with the permission of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, and Thome who were not the owners of the property. The plaintiffs brought this suit contending that they were the owners of the property and entitled to possession thereof. As I have held above, the plaintiffs have failed to establish that they are the beneficial owners of the suit property and that the 7<sup>th</sup> to 9<sup>th</sup> defendants had no right to enter therein. The court has also made a finding that the suit property is owned by the 7<sup>th</sup> to 9<sup>th</sup> defendants. The plaintiffs having failed to establish their interest in the suit property which is owned by the 7<sup>th</sup> to 9<sup>th</sup> defendants, they have no right to occupy the property. Since the plaintiffs are occupying the suit property without the 7<sup>th</sup> to 9<sup>th</sup> defendants permission, they are trespassers thereon. It is my finding therefore that the plaintiffs are trespassers on the suit property.

**Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.**

As I have mentioned at the beginning of this judgment, the plaintiffs sought several reliefs. From the findings that I have made above, the plaintiffs have not proved their case against the defendants. The plaintiffs are therefore not entitled to any of the reliefs sought in their amended plaint. There is completely no basis upon which the reliefs sought by the plaintiffs can be granted.

**Whether the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants are entitled to the reliefs sought in the counter-claim.**

I have already made a finding that the 7<sup>th</sup> to 9<sup>th</sup> defendants are the registered proprietors of the suit property and that the plaintiffs are trespassers on the property. In the circumstances, the 7<sup>th</sup> to 9<sup>th</sup> defendants have proved their claim against the plaintiffs. The 7<sup>th</sup> to 9<sup>th</sup> defendants are therefore entitled to vacant possession of the suit property and an injunction restraining the plaintiffs from interfering with the property in any way whatsoever. The 7<sup>th</sup> to 9<sup>th</sup> defendants are however not entitled to mesne profits and general damages sought. The evidence before the court shows that the 7<sup>th</sup> to 9<sup>th</sup> defendants purchased the suit property while the plaintiffs were in possession thereof. There is no evidence that they made any inquiries as to the rights if any that the plaintiffs had in the property. The plaintiffs came to court when the 7<sup>th</sup> to 9<sup>th</sup> defendants attempted to forcefully take possession of the suit property and obtained an order for the maintenance of status quo pending the hearing and determination of the suit. In the circumstances, I am not satisfied that the 7<sup>th</sup> to 9<sup>th</sup> defendants are entitled to mesne profits and damages for trespass. In any event, the 7<sup>th</sup> to 9<sup>th</sup> defendants did not tell the court how they arrived at a sum of Kshs. 100,000/- per month that they claimed as mesne profits. They did not also place any material before the court on the basis of which the court could assess the damages payable. For the foregoing reasons, it is my finding that the 7<sup>th</sup> to 9<sup>th</sup> defendants are only entitled to prayers (i) and (ii) of the counter-claim.

**Who is liable for the costs of the suit?**

Costs normally follow the event and are at the discretion of the court. In the circumstances of this case, I am of the view that it would only

be fair if each party bears its own costs.

**Conclusion:**

In conclusion, I hereby enter judgment on the following terms;

1. The plaintiffs suit is dismissed.
2. Judgment is entered for the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants in terms of prayers (i) and (ii) of the counter-claim dated 4<sup>th</sup> December, 2012.
3. The plaintiffs shall vacate and hand over possession of L.R No. 13330/142 to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants within 60 days from the date hereof in default of which the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants shall be at liberty to apply for their forceful eviction.
4. Each party shall bear its own costs of the suit.

**Delivered and Dated at Nairobi this 5<sup>th</sup> Day of May 2020**

**S. OKONG'O**

**JUDGE**

**Judgment read through Microsoft Teams Video Conferencing platform in the presence of;**

N/A for the Plaintiffs

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

N/A for the 3<sup>rd</sup> defendant

N/A for the 4<sup>th</sup> and 5<sup>th</sup> defendants

N/A for the 6<sup>th</sup> defendant

Ms. Lipwop for the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants

Mrs. Koech for the 10<sup>th</sup> defendant

Ms. C. Nyokabi for the 11<sup>th</sup> defendant