



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 461 OF 2012

HENRY NDUNGU KINUTHIA.....PLAINTIFF

=VERSUS=

JORETH LIMITED.....1ST DEFENDANT

ACCO LIMITED.....2ND DEFENDANT

JUDGMENT

The dispute before the court revolves around the ownership of all that parcel of land known as L.R No. 13330/633 (formerly known as plot No. 263) situated at Thome V estate, off Thika Road, Nairobi (hereinafter referred to as “the suit property”). The plaintiff brought this suit against the defendants on 31st July, 2012. The plaintiff averred that at all material times, he was the beneficial owner and occupier of the suit property. The plaintiff averred that he purchased the suit property from one, Joseph Njuguna Njoka at a consideration of Kshs. 105,000/= through an agreement for sale made in writing on 21st August, 1989. The plaintiff averred that it was a term of the said agreement for sale that the completion date would be on or before 20th September, 1989 and that the said Joseph Njuguna Njoka would allow the plaintiff to take possession, occupy, develop and use the suit property without any interference. The plaintiff averred further that it was a term of the said agreement that the said Joseph Njuguna Njoka would cause the suit property to be transferred and registered in the name of the plaintiff without any delay once the plaintiff had paid the agreed purchase price in full.

The plaintiff averred further that as at the time he purchased the suit property, the suit property was registered in the name Thome Farmers No. 5 Limited (hereinafter referred to as “Thome”) and that Joseph Njuguna Njoka’s interest in the suit property was evidenced by a share certificate No. 839 that was issued to him by Thome. The plaintiff averred that Joseph Njuguna Njoka sold the suit property to him on the strength of the said share certificate and a consent that he obtained from Thome. The plaintiff averred that Joseph Njuguna Njoka (hereinafter referred to as “the vendor”) had also acquired the suit property from a previous owner on the strength of a share certificate and a consent from Thome.

The plaintiff averred further that it was an implied term of the contract between the plaintiff and the vendor that the title to the suit property that was held by the 1st defendant was so held in trust for the plaintiff and that the title in favour of the plaintiff was to be processed at the expense of the plaintiff by Thome which held the head title from which the suit property was to be excised. The plaintiff averred that pursuant to the terms and conditions of the said agreement between him and the vendor, the plaintiff paid the entire purchase price to the vendor on the completion date and immediately took possession of the suit property and began developing it. The plaintiff averred that he enjoyed quiet possession of the suit property without any interference until 19th February, 2004 when he received a letter from the 1st defendant’s advocates alleging that he was a trespasser on the suit property.

The plaintiff averred that in the said letter, the 1st defendant’s advocates demanded from the plaintiff payment of a sum of Kshs. 200,000/= to enable the 1st defendant process a title in favour of the plaintiff in respect of the suit property. The plaintiff averred that by a letter dated 9th July, 2012, the 1st defendant’s advocates informed the plaintiff that the suit property had been sold and transferred to the 2nd defendant and demanded vacant possession of the property. The plaintiff averred that it was as a result of the said letter dated 9th July, 2012 from the 1st defendant’s advocates that the plaintiff realised that he had been deprived of the suit property by the defendants and that the 1st defendant had fraudulently transferred the suit property to the 2nd defendant. In his particulars of fraud, the plaintiff averred that the 1st defendant withheld the title to the suit property with the sole purpose of depriving the plaintiff of the same and that the 1st defendant did not directly address the plaintiff verbally or otherwise on the requirements for processing the title for the suit property in his favour.

The plaintiff averred further that the 1st defendant transferred the suit property to the 2nd defendant without notice to the plaintiff and that the 2nd defendant purported to purchase the suit property knowing too well that the plaintiff was the beneficial owner thereof and was in occupation of the same. The plaintiff averred further that the 1st defendant transferred the suit property to the 2nd defendant knowing too

well that the plaintiff was in occupation of the property and after it had received correspondence from the plaintiff's advocates demanding that a title to the said property be processed in favour of the plaintiff.

The plaintiff averred that the 1st defendant breached its trust obligation to the plaintiff by selling and transferring the suit property to the 2nd defendant without the plaintiff's consent or knowledge. The plaintiff averred further that possession of the suit property by the defendants and their predecessors in title was discontinued upon completion of the sale of the suit property to the plaintiff on 20th September, 1989 and that the plaintiff had enjoyed continuous and uninterrupted possession of the suit property for 23 years. The plaintiff averred that the defendants had threatened him with eviction from the suit property which threat was real. The plaintiff averred that his claim against the defendants was based on the agreement for sale dated 21st August, 1989 and in the alternative, on adverse possession. The plaintiff sought judgment against the defendants jointly and severally for;

- (a) A declaration that the plaintiff was the rightful owner of the suit property.
- (b) In the alternative and without prejudice to prayer (a) above, a declaration that the plaintiff was the legal owner of the suit property by adverse possession of over 12 years.
- (c) An Order that the defendants transfer the suit property to the plaintiff.
- (d) A permanent injunction restraining the defendants by themselves, their trustees, servants, workmen and agents or otherwise howsoever from interfering with quiet enjoyment, dispossessing or evicting the plaintiff, auctioning, selling, charging, or dealing in any manner with the suit property.
- (e) General damages.
- (f) Any order that this honourable court may deem fit to grant.
- (g) Costs of the suit.

The 2nd defendant filed a defence and a counterclaim against the plaintiff on 20th November, 2012. In its defence and counterclaim dated 9th November, 2012, the 2nd defendant denied the plaintiff's claim in its entirety. The 2nd defendant denied that the plaintiff had any beneficial interest in the suit property or that the plaintiff purchased the suit property as alleged in the plaint or at all. The 2nd defendant averred that if at all the plaintiff entered into any agreement in respect of the suit property which it denied, the said agreement was null and void the same having been entered into by persons who had no right or interest in the suit property and who acted without authority or consent of the registered proprietor thereof.

The 2nd defendant averred further that at no time was the suit property registered in the name of Thome Farmers No. 5 Limited (Thome) as alleged and further that a certificate of share ownership did not constitute title to land. The 2nd defendant averred further that the plaintiff failed to carry out due diligence or basic search to determine the authenticity of the title he was purchasing. The 2nd defendant denied that the 1st defendant held title to the suit property in trust for the plaintiff as alleged and contended that the plaintiff had contradicted himself by claiming on the one hand that the title to the suit property was held by the 1st defendant in trust for him and on the other hand that the property was registered in the name of Thome Farmers No. 5 Limited (Thome). The 2nd defendant averred further that if at all the plaintiff carried out any development on the suit property, the same was done by him as a trespasser with the full knowledge of the risks involved and that the plaintiff had no remedy for such acts of willful trespass.

The 2nd defendant denied that it was involved in any fraud in the acquisition of the suit property and averred that in April, 2012 it learnt that the 1st defendant had put up the suit property for sale to the public. The 2nd defendant averred that it carried out due diligence and upon confirming through searches that the suit property was registered in the name of the 1st defendant commenced negotiations which resulted in an agreement for purchase of the suit property at a consideration of Kshs. 1,800,000/= from the 1st defendant. The 2nd defendant averred that it entered into an agreement for sale with the 1st defendant and upon payment of the above stated consideration, it obtained a transfer of the suit property in its name. The 2nd defendant averred that after registration of the said transfer, it was issued with a certificate of title for the suit property on 22nd May, 2012. The 2nd defendant averred that it visited the suit property and established that there were temporary structures erected thereon and upon enquiry, it was informed that the premises were occupied by trespassers who had no right, interest or authority to be on the property. The 2nd defendant averred that it obtained an undertaking from the 1st defendant that the occupants of the suit property were trespassers who would eventually be evicted and vacant possession of the property given to the 2nd defendant upon the conclusion of the transaction.

The 2nd defendant averred that it did not participate in, condone or had knowledge of any fraud regarding the suit property as alleged by the plaintiff. The 2nd defendant averred that it purchased the suit property in good faith for valuable consideration without notice of the alleged interest the plaintiff had on the property. The 2nd defendant averred that it obtained a good and indefeasible title in respect of the suit property. The 2nd defendant denied that it was necessary for it to obtain consent of the plaintiff before the property was transferred to it and averred that all requisite consents were duly obtained. The 2nd defendant averred that the plaintiff's claim over the suit property on account of adverse possession had displaced his allegations that he had purchased the property.

The 2nd defendant averred further that it was the registered owner of the suit property and as such was entitled to possession thereof. The 2nd defendant averred that the plaintiff's continued occupation of the suit property without permission from the 2nd defendant amounted to actionable trespass. The 2nd defendant denied that it had received any notice to sue from the plaintiff or that the plaintiff was entitled to any

of the remedies sought in the plaint.

In its counterclaim, the 2nd defendant reiterated the contents of its defence and averred that it purchased the suit property for valuable consideration from the 1st defendant who was the registered owner thereof at the time of the said purchase. The 2nd defendant averred that it carried out due diligence on the suit property prior to entering into the sale transaction and established that the 1st defendant was the proprietor of the suit property. The 2nd defendant averred that it purchased the suit property in good faith and without notice of fraud or any defect in the title that was held by the 1st defendant. The 2nd defendant averred further that it was the registered owner of the suit property and as such entitled to quiet enjoyment and possession thereof. The 2nd defendant averred that the plaintiff had trespassed on the suit property and continued to maintain temporary structures on the property despite demands by the 2nd defendant that he vacates the property. The 2nd defendant averred that it had been denied the use of the suit property due to the said acts of trespass by the plaintiff and it continued to suffer loss and damage as a result of the said tortious acts by the plaintiff. The 2nd defendant averred that despite demand to vacate and a notice of intention to sue, the plaintiff had persisted in his acts of trespass thereby causing injury to the 2nd defendant.

The 2nd defendant sought judgment against the plaintiff for;

- (a) An order of eviction against the plaintiff and/or his agents from the suit property.
- (b) General damages and mesne profits for trespass and loss of use of the suit property.
- (c) A permanent injunction restraining the plaintiff either by himself, his agents or servants from interfering with the 2nd defendant's possession of the suit property.
- (d) Costs.

The 1st defendant filed its defence and counterclaim on 14th February, 2013. In its defence and counterclaim, the 1st defendant averred that it was a stranger to the averments contained in paragraphs 4, 5, 6 and 7 of the plaint as it was not privy to the contract between the plaintiff and Joseph Njuguna Njoka (vendor). The 1st defendant denied that it was at all material times holding the suit property in trust for the plaintiff. The 1st defendant averred that it was at all material times the legal and registered owner of all that parcel of land known as L. R. No. 13330 having been so registered on 19th December, 2000. The 1st defendant averred that L.R. No. 13330 came about as a result an amalgamation or consolidation of the 1st defendant's two parcels of land known as L.R No. 4920/3 and L.R No. 4921/3 which parcels of land had been held by the 1st defendant since early 1950s.

The 1st defendant averred further that the suit property namely, L.R. No. 13330/633 was as a sub-division of L.R No. 13330 and that the same had never been registered in the name of any person other than the 1st defendant and subsequently the 2nd defendant upon transfer. The 1st defendant averred that the plaintiff was at all material times a trespasser on the suit property and denied that the plaintiff had enjoyed quiet possession of the suit property from 1989 to 2004. The 1st defendant averred further that it was at all material times the registered owner of the suit property and that on or about 20th April, 2012 it transferred its interest in the suit property wholly to the 2nd defendant for valuable consideration. The 1st defendant averred that the 2nd defendant was the registered owner of the suit property. The 1st defendant denied that it was involved in any act of fraud in relation to the transfer of the suit property to the 2nd defendant. The 1st defendant averred further that there was no contractual or fiduciary relationship between the 1st defendant and the plaintiff in relation to the suit property. The 1st defendant averred further that if the plaintiff was seeking the suit property by adverse possession then the procedure invoked by the plaintiff was not correct. The 1st defendant denied that the plaintiff had served upon it a notice of intention to sue.

In its counterclaim, the 1st defendant reiterated the contents of its defence and averred that in 1992, the 1st defendant had filed a suit namely, Nairobi HCCC No. 6206 of 1992 against 24 identifiable persons and in general against those persons who had trespassed on L.R. Number 13330 which suit was determined in 2002 by consent. The 1st defendant averred that the consent order provided among others that trespassers on the said parcel of land were to pay an all-inclusive sum of KShs. 200,000/= to the 1st defendant after which the portions of land that they were occupying would be transferred to them. The 1st defendant averred further that during the entire period of about 30 years when it was engaged in the process of consolidation and subsequent sub-division of L.R No. 13330 an exercise which ended in 2000, the plaintiff was not in occupation of the property.

The 1st defendant denied that the plaintiff had been in open and uninterrupted occupation of the suit property since 1989 as alleged. The 1st defendant averred that the plaintiff without any right whatsoever illegally entered the suit property owned by the 1st defendant and had refused to vacate the same despite several notices served upon him to do so. The 1st defendant averred that it had suffered loss from denial of use and quiet enjoyment of the suit property. The 1st defendant claimed both special and general damages against the plaintiff. The 1st defendant sought judgment against the plaintiff for;

- (a) An order of eviction from the suit property.
- (b) An order that the officer commanding (OCS) Kasarani Police Station do supervise the eviction of the plaintiff from the suit property.
- (c) A permanent injunction restraining the plaintiff, its servants, agents or anybody claiming through the plaintiff from interfering with, alienating or trespassing upon all that parcel of land known as L.R No. 13330/633(suit property) or any part thereof.

(d) A permanent injunction restraining the plaintiff through its servants, agents or anyone acting under his authority from interfering with the 1st defendant's possession and quiet enjoyment of all that parcel of land known as L.R. No. 13330/633(suit property).

(e) A mandatory injunction compelling the plaintiff by himself or through its servants, agents or anyone acting under his authority to remove any structures, materials and/ or constructions that may have been erected on the suit property.

(f) General damages for trespass.

(g) Costs of the suit.

(h) Interest on (f) and (g) above.

(i) Such other further or consequential relief and remedies which this honourable court may deem fit to award.

The plaintiff filed a reply to the 1st defendant's defence and defence to the 1st defendant's counterclaim on 24th April, 2013. The plaintiff averred that it was a stranger to the 1st defendant's allegations that the 1st defendant was the registered proprietor of the suit property. The plaintiff averred that the alleged ownership of the suit property by the 1st defendant took place while the plaintiff was in possession thereof having taken such possession in 1989. The plaintiff denied that it was a trespasser on the suit property and contended that he had had uninterrupted quiet possession of the suit property for more than 12 years. The plaintiff averred further that having acquired the suit property by way of adverse possession, the 1st defendant did not have a good title or interest in suit property capable of being transferred to the 2nd defendant. The plaintiff averred that his claim over the suit property by adverse possession was proper. In his defence to the counterclaim, the plaintiff denied all the allegations contained in paragraphs 14 to 22 of the counterclaim. The plaintiff averred that he was not and had never been a party to any suit by the 1st defendant or to Nairobi HCCC No. 6206 of 1992 and as such, he could not and ought not to be subject to the consent order that was entered into by the parties in that suit without his knowledge or participation.

The plaintiff averred further that since he was not a party to Nairobi HCCC No. 6206 of 1992, any orders made therein were not binding upon him and as such his occupation was not interrupted by the filing of the said suit as alleged by the 1st defendant. The plaintiff denied that he entered into the suit property illegally and without any right and reiterated that he entered the suit property pursuant to a sale agreement dated 21st August, 1989. The plaintiff denied that the 1st defendant was entitled to the reliefs sought in its counterclaim. The plaintiff urged the court to enter judgment in his favour as prayed for in the plaint.

The plaintiff filed a reply to the 2nd defendant's defence and defence to the 2nd defendant's counter claim on 27th June, 2013. The plaintiff averred that as at the time he acquired the suit property, neither the 1st nor the 2nd defendant had been registered as proprietors thereof and as such had no interest or right over the property to warrant their authority or consent being sought for the transaction. The plaintiff averred that the 2nd defendant failed to carry out due diligence to establish the history of the suit property by inspecting the property prior to purchase and that if it had done so, it would have noted that the same was occupied. The plaintiff averred further that he entered into the suit property 1989 as a purchaser for value and continued in occupation of the suit property until 19th February, 2004 when he was accused of trespass. The plaintiff denied having committed any acts of willful trespass on the suit property. The plaintiff denied further that the structures he had put up on the suit property were temporary structures.

The plaintiff averred that the 2nd defendant was aware that the plaintiff was not a trespasser on the suit property but a purchaser of the same for value. The plaintiff averred that the price at which the suit property was sold to the 2nd defendant was way too low for a property in that particular area and made the circumstances under which the property was sold to the 2nd defendant suspect. The plaintiff denied that the 2nd defendant obtained a good indefeasible title over the suit property and contended that even if the title was good and indefeasible as claimed, the same was subject to the plaintiff's interest and title over the property as an adverse possessor. In his defence to the counterclaim, the plaintiff averred that he had a better title to the suit property by way of adverse possession and that he was entitled to quiet enjoyment and possession of the property as opposed to the 2nd defendant.

The plaintiff denied further that he was a trespasser on the suit property and that the structures he had put on the property were temporary in nature. The plaintiff denied further that the 2nd defendant had suffered any loss and damage as alleged or at all due to non-use of the suit property. The plaintiff denied that the 2nd defendant was entitled to the reliefs claimed in the counterclaim. The plaintiff urged the court to enter judgment in his favour as prayed for in the plaint and to dismiss the 2nd defendant's counterclaim with costs.

At the trial, the plaintiff gave evidence and called one witness while the 1st and 2nd defendants called one witness each. In his evidence, the plaintiff (PW1) adopted his witness statement dated 30th July, 2012 as part of his evidence in chief. The plaintiff told the court that in 2012 he received a letter from 1st defendant demanding that he vacates the suit property. In the said letter, the 1st defendant claimed that the suit property had been sold to the 2nd defendant and that he should vacate the same within 7 days. He stated that the letter referred to L.R No. 13330/633 ("the suit property"). The plaintiff stated that the suit property belonged to him having purchased the same on 21st August, 1989. He stated that the suit property was by then known as L.R No. 263, Thome V. The plaintiff stated that he was to take possession of the suit property upon payment of the purchase price in full. He stated that he paid the full purchase price and took possession of the suit property in 1989. He stated that upon taking possession, he fenced the property using a stone wall and installed a gate. The plaintiff stated that after fencing the property, he put up structures thereon which he was using for his construction business. He stated that he connected both water and electricity to the suit property. He stated that water was connected to the premises in 1999.

The plaintiff stated that it was until July, 2012 that a claim was made in respect of the suit property by the 2nd defendant and that this is when he came to know of the 1st and 2nd defendants' interest in the suit property. He stated that he was not aware of Nairobi HCCC No. 6206 of 1992 referred in the 1st defendant's counterclaim. He stated that he was not a party to that case and was not privy to the decision that was

made in the matter. The plaintiff stated that the suit property was part of a large parcel of land and that his understanding was that after the subdivision of the larger parcel of land, he would be given a title for the suit property. He stated that he did not know how plot No. 263 became L.R No. 13330/633.

The plaintiff stated that the suit property was transferred to the defendants fraudulently because the transfer was done without his knowledge while he was in possession thereof. He stated that no one came to view the property during the transactions that led to the said transfers. He stated that the value of the suit property in 2012 far exceeded Kshs.1.8 million at which the property was sold to the 2nd defendant by the 1st defendant. The plaintiff stated that the suit property at that particular time was valued at about Kshs.70 million. He stated that he had occupied the property for more than 12 years as at the time the 2nd defendant made a demand for vacant possession. He urged the court to declare him the owner of the suit property by virtue of the agreement for sale that he entered into with the vendor and by adverse possession. He also urged the court to grant the other prayers sought in the plaint. The plaintiff produced as exhibits the documents attached to his list of documents dated 30th July, 2012. The documents were produced as plaintiff's exhibits 1(a) – (g). The plaintiff also produced a valuation report by Sundown Valuers and Realtors dated 25th September, 2013 as plaintiff's exhibit 2. Finally, the plaintiff produced the documents attached to his supplementary list of documents dated 16th November, 2015 as plaintiff's exhibits 3 (a) – (e).

The plaintiff's witness was Joseph Mwaura Njoroge (PW2). He told the court that he was a registered valuer and a director of Sundown Valuers and Realtors Ltd. He told the court that his company carried out valuation of the suit property on 25th September, 2013 and prepared a report. He stated that the suit property comprised of an office block cum workshop and there was also an underground water tank and a gate house. He stated that in addition, there was a servant quarter block and the property was secured by a perimeter stone wall. He stated that these were permanent structures by virtue of the material that was used in their construction. He stated that they valued the property at Kshs. 50,500,000/= with the land being valued at Kshs. 32,000,000/= and the improvements thereon being valued at Kshs. 18,500,000/= . PW2 stated that from his observations, the improvements on the suit property were not recent and that in reaching that conclusion, he considered the effect of weather on the property.

The 2nd defendant's director, John Peter Mbue Mwangi (DW1) gave evidence on its behalf. He told the court that the 2nd defendant purchased the suit property from the 1st defendant and that he was personally involved in the transaction. He adopted as part of his evidence in chief his witness statement filed in court on 20th November, 2012. He told the court that; the 2nd defendant was dealing in property development. The 2nd defendant wanted a property on Thika Road for that purpose. An agent informed him that there was a property on sale along Thika Road. The said agent gave him a copy of the title for the suit property. He thereafter contacted the 1st defendant which was the owner of the suit property. The 1st defendant confirmed that the property was on sale. He instructed the 2nd defendant's advocates to do a search which confirmed that the property was owned by the 1st defendant and that it had no encumbrance. Thereafter, the 2nd defendant entered into an agreement for sale with the 1st defendant and the suit property was transferred to the 2nd defendant on 22nd May, 2012. He produced a copy of the instrument of transfer dated 20th April, 2012 as defence exhibit 1 and a copy of stamp duty pay in slip dated 30th April, 2012 as defence exhibit 2. He stated that after registration of the transfer in favour of the 2nd defendant, the 2nd defendant was issued with a certificate of title in respect to the suit property. He produced a copy of the certificate of title for the suit property as defence exhibit 3. He stated that he visited the suit property after executing the instrument of transfer and found a fence with a gate. He stated that when he asked the 1st defendant about the occupants of the property, he was told that the property was occupied by a trespasser and that the trespasser had been asked to vacate the property. He stated that the 2nd defendant did not acquire the suit property fraudulently and that the 2nd defendant had not obtained possession of the property. He stated that the plaintiff was a trespasser on the property and was still in occupation. He urged the court to grant the 2nd defendant vacant possession of the property.

The 1st defendant called its farm manager, Robertson Nderitu Mwihi (DW2) as its witness. DW2 told the court that he had permission of the 1st defendant to give evidence on its behalf. He adopted his witness statement dated 11th June, 2013 as part of his evidence in chief. He told the court that he knew L.R. No. 13330. He stated that the property was owned by the 1st defendant. He stated that the property arose from an amalgamation of two parcels of land known as L.R No. 4920/3 and L.R No. 4921/3. He stated that the suit property was a portion of L.R No. 13330. He stated that the suit property was also owned by the 1st defendant which sold the same to the 2nd defendant. He stated that he did not know Joseph Njuguna Njoka (vendor) who allegedly sold the suit property to the plaintiff. He stated that the suit property had never been transferred to the said Joseph Njuguna Njoka at any time and that the property was never owned by Thome No. 5 Limited (Thome). DW2 stated further that Thome and the 1st defendant were not related and that the 1st defendant did not sell the suit property to Thome. He stated that Thome did not make any payment to the 1st defendant in respect of the suit property.

DW2 stated further that the 1st defendant had filed a suit against Thome among others namely, Nairobi HCCC 6206 of 1992. He stated that apart from Thome, there were 23 other defendants in the suit and that the 1st defendant and the persons it had sued in that suit entered into a consent under which it was agreed that those who wanted to purchase land from the 1st defendant were to pay a sum of Kshs. 200,000/= within 6 months exclusive of miscellaneous charges. DW2 stated that the said consent was between the 1st defendant and the people who had purchased land from Thome. He stated that the plaintiff was not one of the people who paid Kshs. 200,000/= to the 1st defendant. He stated that the plaintiff was aware that payment of the said sum of Kshs. 200,000/= was required. He confirmed that there was a structure on the suit property. He stated that the said structure was not a house but a garage. He stated that the user of the suit property was residential and that the structure that the plaintiff had put up on the property was illegal. He stated that he wrote to the plaintiff to stop construction on the suit property without the permission of the 1st defendant and that the plaintiff used to lock the gate. He confirmed that the 2nd defendant paid to the 1st defendant the full purchase price for the suit property and that the 2nd defendant had a title for the suit property although it has not taken possession of the same.

DW2 stated that the plaintiff was not entitled to the prayers sought in the plaint as he did not pay for the suit property when he was called upon to do so. He urged the court to dismiss the plaintiff's suit. With regard to the compensation claimed by the plaintiff, he stated that the plaintiff was not entitled to the same as he was not authorised to develop the suit property. He produced the documents attached to the 1st defendant's bundle of documents dated 11th June, 2013 as defence exhibit 4.

After the conclusion of evidence, the parties made closing submissions in writing. The plaintiff filed his submissions on 8th October, 2018 while the 1st and 2nd defendants filed their submissions on 20th June, 2019 and 6th June, 2019 respectively.

I have considered the pleadings, the evidence tendered in support of the parties' respective cases and the submissions by counsels. The parties did not agree on the issues for determination by the court. From the pleadings, the following in my view are the issues that arise for determination in this suit and the counterclaims by the defendants:

1. Whether the plaintiff is the lawful owner of the suit property.
2. If the answer to issue No. 1 is in the negative, whether the plaintiff is a trespasser on the suit property.
3. Whether the plaintiff is entitled to the reliefs sought in the plaint.
4. Whether the 1st defendant is entitled to the reliefs sought in its counterclaim.
5. Whether the 2nd defendant is entitled to the reliefs sought in its counterclaim.
6. Who is liable for the costs of the suit?

Whether the plaintiff is the lawful owner of the suit property.

The plaintiff has sought a declaration that he is the lawful owner of the suit property by virtue of an agreement for sale dated 21st August, 1989 between the plaintiff and Joseph Njuguna Njoka (vendor). In the alternative, the plaintiff has claimed the suit property by adverse possession. Before, I consider the merit of the plaintiff's claim under the two heads, I wish to deal with an issue that was raised by the defendants as a preliminary objection to the plaintiff's claim to the suit property by adverse possession. The defendants had contended that the plaintiff having claimed the suit property under the agreement for sale dated 21st August, 1989 it was not open to the plaintiff to claim the same property by adverse possession since the two claims are contradictory or inconsistent to each other.

I find no merit in this argument. In my view, the plaintiff's claim to the suit property is based on the agreement for sale dated 21st August, 1989. The claim over the suit property by adverse possession has been brought as an alternative claim to the main claim which is based on the said agreement for sale dated 21st August, 1989. I am of the view that there is no law barring a party who has sued on an agreement for sale of land from pleading an alternative claim based on adverse possession. In the Court of Appeal case of John Kamunya & Another v John Nginyi Muchiri & 3 others, Nakuru Civil Appeal No. 123 of 2007, that was cited by the plaintiff, the court held that the two claims are severable and that in the circumstances as are obtaining in this suit, a claim based on sale and another by way of adverse possession is in order. I therefore find no merit in the objection raised by the defendants to the alternative claim by the plaintiff based on adverse possession.

With that objection out of the way, I will now consider the merit of the plaintiff's claim under the agreement for sale dated 21st August, 1989 and the alternative claim based on adverse possession. The agreement for sale dated 21st August, 1989 on the basis of which the plaintiff has brought this suit against the defendants was made between the plaintiff and Joseph Njuguna Njoka (vendor). There is no mention of the 1st and 2nd defendants in the said agreement. According to the said agreement, it was the obligation of the vendor to cause the suit property to be transferred and registered in the name of the plaintiff without undue delay after the plaintiff had paid the full purchase price. It was also the duty of the vendor to allow the plaintiff to possess, use, occupy and develop the suit property without any interference. The 1st and 2nd defendants were not parties to the said agreement. Since the defendants were not parties to the said agreement, they were not bound by the same.

As at the time the plaintiff entered into the said agreement for sale with the vendor, the vendor was not the registered owner of the suit property. From the evidence before the court, the vendor appears to have acquired the suit property from one, Cecilia Wanjiku sometimes in April 1981. The said Cecilia Wanjiku is said to have held one share in Thome Farmers No. 5 Limited (Thome) and was issued with share certificate No. 600 which entitled her to the suit property. There is no evidence that Cecilia Wanjiku and Thome were registered as proprietors of the suit property at any time. The plaintiff's case was that he acquired the suit property from the vendor on the strength of a share certificate that had been issued to the vendor by Thome which certificate was transferred to the plaintiff who was issued with share certificate No. 839 by Thome. From the evidence before the court, neither Thome nor the vendor had any proprietary interest in the suit property. The vendor could not therefore transfer or convey any valid or lawful interest in the suit property to the plaintiff. The plaintiff's claim against the defendants based on the agreement dated 21st August, 1989 in my view is misconceived and has no merit. The plaintiff had also claimed that the 1st defendant held the suit property in trust for him. There is nothing on record or in the agreement aforesaid from which this court can infer that the 1st defendant held the suit property in trust for the plaintiff before the property was sold to the 2nd defendant. The plaintiff's claim based on trust is in the circumstances baseless.

On the plaintiff's alternative claim based on adverse possession, I am satisfied from the evidence on record that the property that was purchased by the plaintiff as L.R No. 263 from the vendor and the property that was purchased by the 2nd defendant from the 1st defendant as L.R No. 13330/633 is one and the same property on the ground and is occupied by the plaintiff. I am also satisfied from the evidence on record that the plaintiff took possession of the suit property in or about 1989. According to the agreement for sale dated 21st August, 1989 (plaintiff's exhibit 1(c)), the plaintiff was allowed to occupy the suit property by the vendor and the property was sold to him in vacant possession. The documents that were produced in evidence by the plaintiff as plaintiff's exhibits 3(a) to 3(d) show that the plaintiff was in occupation of the suit property in 1999. The valuation report that was produced by the plaintiff as plaintiff's exhibit 2 shows that the plaintiff developed the suit property extensively upon taking possession thereof. The plaintiff's evidence that he occupied the suit property soon after

purchasing the same from the vendor was not shaken in cross-examination by the defendants. In my view, the fact that the plaintiff was not a defendant in Nairobi HCCC No. 6206 of 1992 is not a proof that as at the time that suit was filed he was not in occupation of the suit property.

From the proceedings of Nairobi HCCC No. 6206 of 1992 that were produced in evidence by the 1st defendant as part of defence exhibit 4 (see pages 8 – 57 of the exhibit), the said suit was filed following a report dated 11th December, 1991 on the activities of squatters on the two parcels of land that were consolidated and later subdivided to give rise to among others, the suit property. According to the said proceedings, those who were trespassers on the said parcels of land as at the date of that report and who were sued in that suit were 23. There is no evidence that no more trespassers entered the suit property after 11th December, 1991 when the said report was made. The plaintiff's contention that he took possession of the suit property in 1989 and that he was in occupation as at 1999 when he connected water to the property and continued in possession is therefore not farfetched.

As I have stated earlier, the person who sold the suit property to the plaintiff was not the owner thereof. From the evidence on record, as at the time the property was sold to the plaintiff, the same was owned by the 1st defendant. The plaintiff therefore entered the suit property without the permission or consent of the 1st defendant which was the registered owner of the property and continued in occupation for a period in excess of 12 years. I am satisfied in the circumstances that the plaintiff has acquired title to the suit property by adverse possession.

In Salim v Boyd and Another [1971] EA 550, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted occupation of the land for a period of 12 years or more. In Kimani Ruchine & Another v Swift, Rutherford Co. Ltd. & another [1977] KLR 10 Kneller J. stated as follows at page 16:

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

In Wambugu v Njuguna [1983] KLR 172 the Court of Appeal stated as follows:

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

The evidence before the court shows that the plaintiff put up a stone wall around the suit property after taking possession, connected water and electricity, and constructed buildings thereon. From the evidence on record, the plaintiff's occupation of the suit property was open and was not interrupted until the year 2012 when a demand was made upon the plaintiff to vacate the property. The plaintiff having entered and occupied the suit property without the permission of the owner, openly and without force for uninterrupted period of over 12 years has in my view satisfied the conditions for adverse possession set out in the cases cited above.

Due to the foregoing, it is my finding that the plaintiff has acquired title to the suit property by adverse possession. In Githu v Ndeti [1984] KLR 77, it was held that the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession. As at the time the 1st defendant transferred the suit property to the 2nd defendant, the plaintiff's adverse possession claim over the suit property had crystallised and attached to the property. The transfer of the property by the 1st defendant to the 2nd defendant could not therefore defeat the plaintiff's claim over the suit property that had already accrued. In other words, the 1st defendant's interest in the property had become extinguished and it had nothing to transfer to the 2nd defendant. I am in agreement with the plaintiff's contention that Nairobi HCCC No. 6206 of 1992 did not stop time from running in his favour in respect to the suit property. It was common ground that the plaintiff was not a party to that suit and was not bound by the consent that was recorded in the suit by the parties thereto.

I am of the view that the 2nd defendant purchased the suit property at its own risk. When it purchased the suit property from the 1st defendant, the property was occupied by the plaintiff. The 2nd defendant never bothered to find out from the plaintiff what interest he had on the property. The 2nd defendant's director gave evidence that he did not visit the suit property until after a transfer had been executed in the 2nd defendant's favour by the 1st defendant. A person purchasing a property which is occupied by a third party without making inquiry from the occupier of his interest in the property does so at his own risk should it turn out that the occupier has a lawful and valid interest in the property. It is my finding in conclusion that the right that the 2nd defendant acquired in the suit property was subject to the plaintiff's adverse possession claim.

If the answer to issue No. 1 is in the negative, whether the plaintiff is a trespasser on the suit property.

Having held that the plaintiff has acquired the suit property by adverse possession, this issue must be answered in the negative. The plaintiff being an owner of the suit property by adverse possession has a right to enter, occupy and use the same. Since the plaintiff has a right to be on the suit property, it is my finding that the plaintiff is not a trespasser on the suit property.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

The plaintiff's claim over the suit property on the basis of the agreement for sale dated 21st August, 1989 has no merit as I have held above. However, the plaintiff's suit succeeds on the alternative claim over the property by adverse possession. The plaintiff is therefore entitled to a declaration that he has acquired the suit property by adverse possession and an order for the 2nd defendant to transfer the property to him. The plaintiff is also entitled to an injunction restraining the defendants from interfering with his occupation of the property. Since the plaintiff is still in occupation of the suit property and no evidence was led that he had suffered any loss or damage arising from the demands that were made upon him by the defendants to surrender possession of the suit property, I find no merit in his claim for general damages.

Whether the 1st defendant is entitled to the reliefs sought in its counterclaim.

From my findings above, it clear that the 1st defendant did not prove its claim against the plaintiff. The 1st defendant is therefore not entitled to the reliefs sought in its counterclaim.

Whether the 2nd defendant is entitled to the reliefs sought in its counterclaim.

As I have stated as concerns the 1st defendant's claim, the 2nd defendant's claim against the plaintiff was also not proved. The 2nd defendant is therefore not entitled to any of the reliefs sought in its counterclaim against the plaintiff.

Who is liable for the costs of the suit?

As a general rule, costs follow the event and it is at the discretion of the court. Since the plaintiff is successful in his claim and there is no cause urged before me on the basis of which I can depart from the general rule on costs, I would award the plaintiff the costs of the suit and the counterclaims by the defendants.

Conclusion:

In conclusion, I enter judgment for the plaintiff against the defendants jointly and severally on the following terms;

1. The counterclaims by the 1st and 2nd defendants against the plaintiff are dismissed.
2. It is declared that the plaintiff has acquired title to all that parcel of land known as L.R. No. 13330/633 (formerly known as plot No. 263) in Thome V Estate, off Thika Road, Nairobi by adverse possession.
3. The 2nd defendant shall transfer to the plaintiff all that parcel of land known as L.R No. 13330/633 (formerly known as plot No. 263) in Thome V Estate, off Thika Road, Nairobi within 60 days from the date hereof and shall execute all requisite documents for the effective transfer of the property to the plaintiff.
4. The plaintiff shall meet all the statutory and other legal expenses associated with the said transfer.
5. In the event that the 2nd defendant fails or refuses to execute the instrument of transfer of the suit property in favour of the plaintiff or any other necessary document as ordered above, without prejudice to any other right or remedy the plaintiff may have against the 2nd defendant, the Deputy Registrar of this court shall be authorised to execute the instrument of transfer and any other document necessary to effect the transfer of L.R No. 13330/633 (formerly known as plot No. 263) in Thome V Estate, off Thika Road, Nairobi to the plaintiff.
6. The plaintiff shall have the costs of the suit and the counterclaims.

Delivered and dated at Nairobi this 13th Day of February, 2020

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Osoro for the plaintiff

Mr. Banji h/b for Ms. Koech for the 1st Defendant

N/A for the 2nd Defendant

C. Nyokabi-Court Assistant