



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 622 OF 2012 (OS)

JOYCE NJERI KARIUKI (Suing as the Administrator of the Estate of

JOSEPHAT KARIUKI MARIMA).....PLAINTIFF

=VERSUS=

JORETH LIMITED.....1ST DEFENDANT

LIVINGSTONE GITONGA MUCHUNGI.....2ND DEFENDANT

JAMES MUSAU KIMEU.....3RD DEFENDANT

CHARLES KAMARI.....4TH DEFENDANT

JUDGMENT

Introduction

1. The dispute in this suit revolves around the question of ownership of Land Reference Number 13330/542, measuring approximately 0.2642 hectares, situated in Thome Estate, Nairobi City County (the **suit property**). The suit property is comprised in a Certificate of Title first registered in the name of Joreth Limited (the **1st defendant**) on 6/4/2011 as **I.R 129796/1**. The title was created as a subdivision out of a larger parcel of land registered in the name of the 1st defendant. On 13/12/2011, the 1st defendant transferred the suit property to the 2nd, 3rd and 4th defendants at a consideration of Kshs 1,600,000.

2. On 20/9/2012, the plaintiff took out an originating summons dated 18/9/2012 on behalf of the estate of Josephat Kariuki Marima (**the deceased**). She sought the following adverse possession orders under Sections 37 and 38 of the Limitation of Actions Act and Order 37 rules 3D and 7 of the Civil Procedure Rules:

- 1) *A declaration that the plaintiff has acquired title to the whole of Land Parcel No LR 13330/542 by way of adverse possession.*
- 2) *An order that the plaintiff be registered as proprietor of Land Parcel No LR 13330/542 in place of the 2nd, 3rd and 4th defendants who are now the registered proprietors.*
- 3) *An order directing the defendants to execute transfer of the said Land Parcel No LR 13330/542.*
- 4) *Alternative to prayers 1 and 2 above, a declaration that the respondents hold Land Parcel No LR 13330/542 in trust for and on behalf of the plaintiff.*
- 5) *An order for costs of and incidental to this suit.*
- 6) *Such other/further relief as the nature of the case may require or this honorable court may deem fit to grant.*

3. The originating summons was supported by an affidavit sworn by the plaintiff on 18/9/2012, the plaintiff's written witness statement dated 19/12/2014, and a witness statement by James Mwaura Ndungu dated 30/12/2014. The originating summons was opposed by all the defendants. Hearing of the originating summons proceeded by way of *viva voce* evidence.

Plaintiff's Case.

4. The case of the plaintiff was that she was the widow of the late Josephat Kariuki Marima who died in 2003. She was the administrator of the Deceased's Estate. During his lifetime, the deceased purchased Plot Numbers 322 and 324 in Thome Estate from M/s Thome Farmers No 5 Limited. In 1995, the deceased sold Plot Number 324 to his daughter and son-in-law. The deceased retained Plot Number 322. Subsequently, Plot Number 322 was surveyed as Land Reference Number 13330/542. In 2007, she learnt that Thome Farmers No 5 Limited and Joreth Limited had a dispute about purchase price relating to the larger parcel out of which the suit property was carved. It was resolved that each plot purchaser was to pay Kshs 200,000 to Joreth Limited's Advocates, M/s Kimani Kahiro & Associates Advocates, to facilitate processing of titles in the names of the various parties who had purchased sub-divisions of the land through Thome Farmers No 5 Limited. She paid Kshs 50,000 to M/s Kimani Kahiro & Associates Advocates. She subsequently learnt that Joreth Limited had changed its advocates without informing her. She further learnt that through their new advocates, Joreth Limited had proceeded to sell the suit property to the 2nd to 4th defendants. She contended that, the deceased having purchased and subsequently taken possession of the suit property in 1995, he acquired title to the suit property through adverse possession and the 1st defendant had no valid title to pass to the 2nd to 4th defendants in 2011. Consequently, she sought the above orders.

1st Defendants' Case

5. The 1st defendant opposed the originating summons through a replying affidavit sworn on 26/11/2012 by Mr Duncan Ndegwa. Further, the 1st defendant filed a witness statement signed by Robertson Nderitu on 26/11/2018. The case of the 1st defendant was that in the 1950s, it acquired two large parcels of land; **LR No 4920/3** and **LR No 4921/3**. It subsequently amalgamated the two parcels into **Land Reference Number 13330**. The suit property (Land Reference Number 13330/542) was a sub-division out of LR No 13330. At all material times prior to the sale of the suit property to the 2nd to 4th defendants, the 1st defendant was the registered proprietor of the suit property. The suit property has never belonged to Thome Farmers No 5 Limited. The 1st defendant was a separate entity from Thome Farmers No 5 Limited.

6. The 1st defendant further contended that in 1992, it instituted **Nairobi HCCC No 6206/1992** against all persons who had at that time trespassed on its land, Reference Number 13330. The said suit was settled through a consent recorded in 2002 pursuant to which it was agreed that all parties who were able to provide the 1st defendant with genuine documents to establish payment of money to Thome Farmers No 5 Limited would be allowed to pay the 1st defendant Kshs 200,000 after which the 1st defendant would transfer respective plots to them. The plaintiff never produced relevant documents and never paid the sum of Kshs 200,000.

7. The 1st defendant contested the plaintiff's claim that the deceased and the deceased's estate had been in open, physical and uninterrupted occupation of the suit property for 12 years or at all. The 1st defendant added that in any event, the filing of Nairobi HCCC No 6206/1992 constituted an interruption.

Case of the 2nd, 3rd and 4th Defendants

8. The 2nd, 3rd and 4th defendants opposed the originating summons through a replying affidavit sworn by James Musau Kimeu (the 3rd defendant) on 17/12/2012. Their case was that they purchased the suit property from the 1st defendant in November 2011. Transfer in their favour was registered on 13/12/2011. When they purchased the suit property and caused it to be transferred into their names, the suit property was vacant. They added that the semi-permanent structure currently on the suit property was erected by the plaintiff's agents after they (2nd to 4th defendants) had acquired the suit property and had taken possession.

9. They further contended that the plaintiff's claim of adverse possession had no basis because the plaintiff was alleging breach of contract by the 1st defendant. Lastly, they contended that the plaintiff lacked *locus standi* to bring this suit.

Plaintiff's Evidence

10. Hearing commenced on 29/5/2017. The plaintiff testified as PW1 and called James Mwaura Ndungu who testified as PW2. The plaintiff adopted her affidavit sworn on 18/9/2012 and her written witness statement dated 19/12/2014 as part of her sworn evidence-in-chief. Her testimony was that she was the widow of the late Josephat Kariuki Marima who died in 2003. The deceased purchased Plot Numbers 322 and 324 from Thome Farmers No 5 Limited. The deceased subsequently sold Plot Number 324 to his daughter and son-in-law. Plot No 322 was subsequently surveyed as Land Reference Number 13330/542. In 2007, she learnt that there was a dispute between Thome Farmers No 5 Limited and Joreth Limited over plots owned by shareholders of Thome Farmers No 5 Limited. It was subsequently resolved that parties who had purchased plots from Thome Farmers No 5 Limited would pay Kshs 200,000 to Joreth Limited for each ½ acre plot to facilitate transfer of the plots into their names. The money was to be paid to Joreth Limited's Advocates, M/S Kimani Kahiro & Associates Advocates. She made a partial payment of Kshs 50,000 to the said Advocates. Subsequently, Joreth Limited (the 1st defendant) changed its advocates and proceeded to sell and transfer the suit property to the 2nd to 4th defendants. She added that the deceased and his estate had been in occupation of the suit property all along. She produced 20 exhibits, among them, share certificates and undated balloting papers from Thome Farmers No 5 Limited.

11. In cross-examination, she stated that her deceased husband did not disclose to her the company from which he acquired the suit property. She paid Kshs 50,000 to the 1st defendant so that she could get title to the suit property. She was to pay the balance subsequently. She lived in her rural home in Kandara, Muranga. Her daughter, Agnes Muthoni, is the one who used to do farming on the suit property. She had never lived on the suit property. When he was alive, her late husband too lived in their rural home in Kandara.

12. James Mwaura Ndungu (PW2), an advocate of this court, testified that he lived in Thome Estate. He stated that, together with his wife, Agnes Muthoni Mwaura, they purchased Plot No 324 in Thome V from Josephat Kariuki Marima (the deceased) for a consideration of Kshs 400,000. The deceased owned 2 Shares comprised in Share Certificate No 761 in Thome Farmers No 5 Limited. The two shares translated to Plot Nos 322 and 324. The deceased became a shareholder of Thome Farmers No 5 Limited in 1979. On 3/9/1999, together with the deceased, they went to Githunguri Town where the offices of Thome Farmers No 5 Limited were located. They paid Kshs 10,000 and the

deceased's two shares were split and one of the shares was transferred to him (PW 2). Consequently, he became owner of one share representing Plot No 324 while the deceased retained one share representing Plot No 322. They entered into their Plot in 1995 and began constructing a dwelling house thereon. They finished building their house in 1997 and moved in. The deceased requested them to use the suit property until the time when he or any other member of the family would decide what to do with the Plot. They have been cultivating the suit property since December 1995. They built a semi-permanent structure on the suit property in 1995. The structure is used by their workers. The deceased died in 2003 and they continued with the arrangement which the deceased had put in place.

13. PW2 added that in 2007, they learnt that Thome Farmers No 5 Limited had a dispute with the 1st defendant. They were subsequently asked to pay Kshs 200,000 to the 1st defendant through the firm of Kimani Kahiro & Associates Advocates. They started paying the money to the said firm. Before they finished paying the money, he learnt that the 1st defendant had withdrawn instructions from the said law firm. He later learnt that the firm of **Chege Wainaina & Co Advocates** had been instructed by the 1st defendant to take over the matter. He went to M/s Chege Wainaina & Co Advocates and found the two files relating to the two Plots. He learnt from the said law firm that the title for Plot No 324 was ready and was in his name but Plot No 322 had been sold to the 2nd, 3rd and 4th defendants.

14. It was the evidence of PW2 that at no time did the 1st defendant interrupt the plaintiff's physical possession of the suit property. He added that the 1st defendant came to the scene 33 years after the deceased had bought the suit property. He further stated that the 1st defendant fraudulently sold the suit property to the 2nd to 4th defendants while aware that it had no good title to pass to them and with a clear motive of depriving the deceased's estate the suit property.

15. PW2 added that he got his title in 2012 after paying Kshs 200,000 to the 1st defendant through its advocates. The sum of Kshs 200,000 was for processing of the title. The deceased had never lived on the suit property. He (PW2) had been cultivating the suit property since 1995.

The 1st Defendant's Evidence

16. The 1st Defendant called one witness, Robertson Nderitu Mwehu - DW1. He stated that he was a manager of the 1st defendant. His evidence was that the plaintiff and Thome Farmers No 5 Limited have never been in possession of the suit property. He stated that the 1st defendant owned **LR No 4920/3** and **LR No 4921/3**. The 1st defendant amalgamated the two parcels to create **LR No 13330**. The suit property was a subsequent sub-division out of **LR 13330**.

17. DW1 added that Joreth Limited and Thome Farmers No 5 Limited were two distinct entities and the latter did not own shares in the former. In 1992, the 1st defendant instituted a suit against all persons who had at that time trespassed on Land Reference Number 13330. Subsequently, a consent was recorded in court pursuant to which it was agreed that all parties in the suit who could provide the 1st defendant with genuine documents of payment of money in relation to the plots they claimed were to be allowed to pay the 1st defendant a sum of Kshs 200,000 after which the 1st defendant would transfer the plots to them subject to them paying stamp duty and other expenses connected with the transfer. The 1st defendant placed notices in the newspapers inviting interested persons to come out and pay the monies. The plaintiff and the deceased did not come out to produce documents of ownership. The plaintiff and the deceased did not pay the sum of Kshs 200,000. Consequently, the suit property was sold and transferred to the 2nd to 4th defendants.

18. DW1 added that the suit property had never been occupied by the plaintiff. He further stated that the only plot he was aware was occupied was No 324 in respect of which the 1st defendant had issued a title to PW2 following payment of Kshs 200,000 to the 1st defendant by PW1. DW1 further testified that Nairobi HCCC No 6206/1992 which the 1st defendant instituted against several persons who had trespassed on the suit property constituted an interruption. He urged the court to dismiss the plaintiff's suit.

Evidence of the 2nd to 4th Defendants

19. The 2nd, 3rd and 4th defendants led evidence by the 3rd defendant, James Musau Kimeu -DW2. His testimony was that they purchased the suit property from the 1st defendant in November 2011 at a consideration of Kshs 1,600,000. A certificate of title was issued in their names on 13/12/2011. The suit property was vacant when they purchased it. The semi-permanent structure on the suit property was erected after they acquired the suit property. They purchased the suit property following an advertisement in the newspaper. They obtained a search which revealed that the suit property was owned by the 1st defendant. At the time of purchase, the suit property had maize, beans and nappier grass. When they went to fence the suit property, they were chased away by PW2. They were accompanied by a surveyor when they viewed the suit property, both prior to and after the purchase.

Plaintiff's Submissions

20. The plaintiff filed written submissions through Ms L G Kimani of the firm of M/s L G Kimani & Co Advocates. Counsel identified the following as the two key issues falling for determination in the suit: (i) whether the plaintiff has acquired title to the whole of Land Parcel Number LR 13330/542 by way of adverse possession; and was (ii) who should bear costs of this suit.

21. Counsel argued that the fact that there was a transaction involving sale of LR No 4920/3 and LR 4921/3 to Thome Farmers No 5 Limited by the 1st defendant was not disputed; was conceded by DW1; and was borne by the proceedings and orders relating to Nairobi HCCC No 6206 of 1992. Counsel contended that the legality or otherwise of the sale transaction was not the subject of this suit. Counsel argued that there was evidence that Thome Farmers No 5 Limited subdivided the land and dished plots to its shareholders, among them, the deceased, who was allocated Plot Nos 322 and 324. It was contended that the deceased and his estate had occupied the suit property from 1976. Counsel added that the deceased and his estate built a site house on the suit property and employed a worker who has lived on the suit property all along. It was further submitted that the defendants had admitted that the plaintiff had a site house and crops on the suit property.

22. Counsel for the plaintiff argued that possession can either be actual or constructive. Relying on **Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR**, counsel argued that possession in the present dispute was both actual and constructive. Relying on the **Court of Appeal** decision in **Patrick Mogo Mwangi Kimuny v Joreth Limited [2015] eKLR**, counsel submitted that the filing of Nairobi HCCC

No 6206/1992 cannot be considered to be an assertion of title constituting an interruption against the plaintiff's occupation of the suit property because the plaintiff was not privy to the suit.

23. Ms Kimani contended that the plaintiff has been in actual, open, notorious, exclusive, hostile, continuous and uninterrupted possession of the suit property for more than 12 years having bought the parcel in 1976 and having been in use of the parcel since 1995.

24. As against the 2nd to 4th defendants, Ms Kimani argued that at the time the three defendants purchased the suit property, the rights of the plaintiff had already crystallized, and the 1st defendant had no right to sell the suit property to them. Counsel faulted the 2nd to 4th defendants for not carrying out proper due diligence. Counsel urged the court to grant the prayers in the originating summons and award the plaintiff costs of the suit.

1st Defendants Submissions

25. The 1st defendant filed written submissions through Mrs Koech of Nyiha, Mukoma and Company Advocates. Mrs Koech argued that for a claimant to succeed in a plea for an order of adverse possession, the claimant must establish the following ingredients: (i) intention to dispossess; (ii) actual, open and notorious use of the land; and (iii) uninterrupted possession for a period of 12 years. Relying on the **Court of Appeal** decision in **Kweyu v Omutut [1990]KLR 707** and the decision in **Gabriel Mbui v Mukindia Maranya [1993]eKLR**, counsel argued that the undated photographs of crops yet to mature cannot be assumed to have been taken in 1995. Counsel added that there was no evidence of intention to dispossess the 1st defendant of the suit property through adverse possession because the plaintiff was categorical that when the deceased bought the land from Thome Farmers No 5 Limited, he thought Thome Farmers No 5 Limited had purchased the land from the 1st defendant.

26. Mrs Koech further submitted that there was no evidence placed before court to demonstrate that the deceased or the plaintiff was in open and notorious possession of the suit property. Counsel added that the plaintiff had failed to demonstrate that the deceased and his estate were in possession of the suit property for an un-interrupted period of 12 years.

27. Lastly, counsel submitted that the plaintiff had failed to demonstrate that the title acquired by the 2nd to 4th defendants was obtained fraudulently, illegally, unprocedurally or through misrepresentation or corrupt scheme. Relying on the decision of Kuloba J in **Gabriel Mbui v Mkindia Maranya [1993] eKLR**, counsel urged the court to dismiss the suit.

Submissions by the 2nd - 4th Defendants

28. The 2nd to 4th defendants filed written submissions through Ms Ahomo of M/s Issa & Company Advocates. Counsel identified the following as the issues falling for determination in this suit: (i) whether the plaintiff has a valid claim in law for adverse possession? (ii) whether the plaintiff has any valid claim under contract against the 1st defendant? (iii) whether the 2nd to 4th defendants are the absolute proprietors of Land Reference Number 13330/542 and hold a good title? and (iv) who should bear the costs of this suit.

29. Counsel submitted that both PW1 and PW2 had confirmed in their evidence that both the deceased and the plaintiff in this suit resided in Kandara, Muranga. Counsel contended that on account of that evidence, it was clear that the plaintiff had failed to prove exclusive, continuous and uninterrupted possession of the suit property for a period of 12 years. It was further submitted that no evidence had been tendered to demonstrate that the plaintiff was in adverse possession of the suit property prior to 1992, the year when the 1st defendant asserted its rights through **Nairobi HCCC No 6206/1992** against trespassers who had entered the suit property as shareholders of Thome Farmers No 5 Limited.

30. Counsel for the 2nd to 4th defendants added that the claim for adverse possession should fail because the plaintiff had failed to satisfy the threshold and principles set out in the case of **Gabriel Mbui v Mukindia Maranya [1993] eKLR**. Counsel argued that the plaintiff having confirmed payment of Kshs 50,000 towards purchase of the suit property between 2007 and 2009, she cannot lay a claim of adverse possession three years after the payment. It was contended that the plaintiff would not have paid Kshs 50,000 if she was an adverse possessor.

31. Counsel urged the court not to rely on photocopies of photographs produced by the plaintiff, contending that the plaintiff had failed to lead evidence relating to the source of the photographs, the person who took the photographs, the date when the photographs were taken, and the device used to take the photographs. Reliance was placed on the decision in **Samuel Kazungu Kambi v Nelly Ilongo, the Returning Officer, Kilifi County & 2 Others [2017] eKLR**.

32. Counsel added that in a claim for adverse possession, the person claiming adverse possession must be in physical and continuous possession of the land. It was contended that the plaintiff has never been in physical possession of the suit property. Counsel added that constructive possession through a licensee must be preceded by actual physical possession by the adverse possessor.

33. Relying on the decision in **Muraguri Gathitho v Mathenge Thiongo [2009]eKLR** counsel for the 2nd to 4th defendants argued that the plaintiff's suit was self-defeating because the plaintiff was simultaneously claiming title to the suit property as an adverse possessor and as a purchaser. It was contended that possession can only be adverse if the claimant has been in possession without the permission of the owner.

34. Lastly, counsel submitted that the plaintiff had not proved any of the elements upon which the title of a registered proprietor may be defeated under the Registration of Titles Act. Counsel urged the court to dismiss the plaintiff's suit.

Analysis & Determination

35. I have considered the originating summons together with the rival evidence and submissions. I have also considered the legal

framework on the doctrine of adverse possession and the prevailing jurisprudence on the subject.

36. This originating summons was taken out by the plaintiff in her representative capacity as the administrator of the estate of Josephat Kariuki Marima. She sought adverse possession orders on behalf of the estate of Josephat Kariuki Marima. Parties to this suit did not agree on a common statement of issues. Having considered the pleadings, evidence, and submissions presented by the parties, two issues fall for determination in this suit. The first and key issue is whether the estate of the late Josephat Kariuki Marima acquired title to Land Reference Number 13330/542 by way of adverse possession. The second issue relates to costs of the suit.

37. In taking out the originating summons, the plaintiff relied on a limited grant of letters of administration *ad litem* issued to her on 10/8/2012 in **Nairobi High Court Succession Cause Number 1665 of 2012**. The grant was limited to the filing of a suit. Secondly, the grant relates to the estate of the **Late Joseph Kariuki Marima**. It does not relate to the estate of **Josephat Kariuki Marima**. However, because none of the parties to this suit raised this discrepancy, I will not focus on it and my determination will not rest on it. I will proceed to make brief pronouncements on the key issue.

38. The legal framework underpinning the doctrine of adverse possession is **Section 7 of the Limitation of Actions Act** which provides as follows:

7. Action to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

39. The tenor and import of the above legal framework is that a land owner who fails to take prompt legal action to eject a trespasser out of his land within 12 years from the date of entry into the land by the trespasser loses the land to the trespasser. Upon expiry of 12 years, he cannot bring a claim for recovery of the land from the trespasser.

40. Doubts that existed regarding the place of the doctrine of adverse possession after the promulgation of the Constitution of Kenya 2010 were settled by the **Court of Appeal** in the case of **Mtana Lewa v Kahindi Ngala Mwangadi [2015] eKLR**.

41. Section 38 of the Limitations of Actions Act provides a framework on how an adverse possessor is to move the court for orders vesting the land in the adverse possessor. The Section provides as follows:

38. Registration of title to land or easement acquired under Act

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under Subsection (1) of this Section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

(3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

(5) The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.

42. The essential and mandatory ingredients that a claimant seeking adverse possession orders under Section 38 of the Limitation of Actions Act must establish have been spelt out by our courts in various cases, among them: (i) **Kweyu v Omutut [1990]KLR 709**; (ii) **Patrick Magu Mwangi Kimnyu v Joreth Limited [2015]eKLR**; (iii) **Peter Mbiri Michuki v Samuel Mugo Michuki [2014]eKLR**; and (iv) **M'Mbaari M'Ithara v James Mbaka [2019] eKLR**.

43. Gicheru JA summed up in **Kweyu v Omutut [1990]LRR 709** the essential and mandatory requirements which a claimant seeking adverse possession orders under Section 38 of the Limitation of Actions Act must demonstrate in the following words:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor.

(Colour of title is that which is a title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford colour; and, second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law

from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms ("claim or colour of title") mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use, done publicly and notoriously."

44. The plaintiff in this suit claims that the deceased acquired the suit property through purchase of shares in Thome Farmers No 5 Limited. There is no dispute that the suit property was part of a larger parcel of land which belonged to Joreth Limited (1st defendant). There is also no dispute that at the time of instituting this suit, the suit property was registered in the names of the 2nd to 4th defendants. The defendants contend that the 1st defendant lawfully sold the suit property to the 2nd to 4th defendants in 2011. The defendants assert that the estate of the late Josephat Kariuki Marima has never been in adverse possession of the suit property.

45. The affidavit in support of the originating summons and the plaintiffs' witness statement do not state the exact date or year when the deceased entered the suit property or when adverse possession commenced. Her evidence was that, together with the deceased, they lived in Kandara, Muranga County. She stated that the deceased did not personally live on or cultivate the suit property. Her further evidence was that her daughter and son-in-law used to cultivate the suit property and grow crops thereon.

46. PW2 who is an advocate of this court testified and stated as follows in his written witness statements dated 30/12/2014:

"From December 1995 to date, we have been cultivating this plot wherein we have built a semi-permanent house for use by some of our workers. In 2003, the said Josephat Kariuki Marima passed away and we continued with the same arrangement with his family"

47. On her part, counsel for the plaintiff submitted as follows at paragraph 1 of page 7 of the plaintiff's written submissions:

"Actual use of the plot started when the deceased gave the plot to his daughter and son-in-law in 1995 to take care of and to utilize on his behalf."

48. The death certificate which was produced by the plaintiff as an exhibit in relation to the death of Josephat Kariuki Marima shows that he died on 15/2/2003.

49. What emerges from the above evidence is that, if indeed PW2 together with his wife, Agnes Muthoni, on behalf of or as licensees of the deceased, engaged in activities adverse to the title of the 1st defendant, their activities commenced in 1995. By February 2003 when the deceased died, only 8 years had lapsed. Secondly, the only succession instrument presented to this Court as evidence in relation to succession to the estate of Josephat Kariuki Marima is the Limited Grant of Letters of Administration *Ad Litem* issued by the High Court at Nairobi on 10/8/2012. That Grant was restricted to the filing of an unspecified suit.

50. PW1, PW2, and indeed counsel for the plaintiff, think and believe that time for purposes of adverse possession continued to run uninterrupted after the death of Josephat Kariuki Marima. I do not agree with that thinking. My interpretation of the law of adverse possession is that when an adverse possessor dies, time stops running. Time resumes running when a grant is issued to the deceased adverse possessor's personal representative and the personal representative continues with the adverse possession activities which the deceased was engaged in prior to his death. Should the personal representative elect not to engage in adverse possession activities, time does not run, notwithstanding issuance of the grant.

51. My interpretation is informed by the legal framework in **Section 13** of the Limitation of Actions Act which provides as follows:

13. Right of action not to accrue or continue unless adverse possession

(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under Sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.

52. The rationale behind the above legal framework, which also informs my interpretation of the law of adverse possession in relation to a deceased adverse possessor, is that the law grants the land owner twelve years within which to initiate proceedings to recover his land from the adverse possessor. Once the adverse possessor dies, there is no party against whom to initiate land recovery proceedings. That party becomes available when the grant relating to the estate of the deceased adverse possessor is issued by the court. Time for the purposes of adverse possession does not therefore run in the absence of a duly appointed personal representative. Put differently, unless and until a personal representative is duly appointed by the succession court, nobody has the legal capacity to purport to engage in adverse possession activities on behalf of the estate of the deceased.

53. Consequently, it is my finding that upon the death of Josephat Kariuki Marima in February 2003, time stopped running for the purpose of adverse possession. The only evidence of legal representation presented by the plaintiff is the Limited Grant issued to the plaintiff on 10/8/2012, about 40 days prior to the taking out of the present originating summons. The plaintiff contends, through evidence of PW2 and through submissions of her counsel, that time started running in 1995. The fact of adverse possession is, however, strongly contested by the defendants. Even if the court were to believe the plaintiff in her assertion that there was adverse possession from 1995, there is no evidence that the threshold of 12 years was met before this suit was commenced in September 2012. I say so because only 8 years had lapsed by the time the deceased died. No grant was taken until August 2012. The present originating summons was subsequently taken out in September 2012, about 40 days after issuance of the Limited Grant.

54. The defendants filed responses to the plaintiff's claim. The 2nd to 4th defendants who are the current registered proprietors asserted their right to the suit property through their response dated 17/12/2012.

55. The totality of the foregoing is that the plaintiff has failed to satisfy the criteria upon which vesting orders under Section 38 of the Limitation of Actions Act are issued. Consequently, the orders sought in the originating summons dated 18/9/2012 are not available to the plaintiff. The suit herein is accordingly dismissed.

56. Because of the history of this dispute which suggests that the predicament in which the estate of Josephat Kariuki Marima finds itself in were caused by the disagreement between Joreth Limited and Thome Famers No 5 Limited, both which had the late Honourable Arthur Magugu as a common player in the material transaction, there will be no award of costs in this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF JUNE 2020.

B M EBOSO

JUDGE

In the presence of:-

Mrs Grace Koech for the 1st Defendant

June Nafula - Court Clerk