



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE 441 OF 2013**

**EUNICE WAMBUI NDERITU.....PLAINTIFF**

**- VERSUS -**

**KENNETH KIMARI GITERE.....1<sup>ST</sup> DEFENDANT**

**JORETH LIMITED.....2<sup>ND</sup> DEFENDANT**

**CONSOLIDATED WITH**

**ELC NO. 706 OF 2014 (OS)**

**KENNETH KIMARI GITERE.....PLAINTIFF**

**- VERSUS -**

**JORETH LIMITED.....1<sup>ST</sup> DEFENDANT**

**EUNICE WAMBUI NDERITU....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 8<sup>th</sup> April 2013, the plaintiff seeks judgment against the defendants jointly and severally for:-

**a. An order of permanent injunction to restrain the defendants their agents and or servants from trespassing, encroaching, developing, alienating, disposing, selling and or in any manner whatsoever dealing with all that property known as LR No. 13330/246.**

**b. Costs of the suit.**

**c. Any other or further relief that this honourable court may deem fit just and fit to grant.**

2. By originating summons dated 3/6/2014, Kenneth Kimari Gitere, instituted ELC 706/14 (OS). Under order 37 rule 7 of the Civil Procedure Rule, Section 38 of the Limitation of Actions Act, Cap 22, Section 64 of Registered Titles Act, Sections 25, 26 and 106 of the Land Registration Act, 2012 and all enabling provisions of the law. LET Joreth Limited and Eunice Wambui be served with the summons through the plaintiffs advocates office within 15 days after service of this summons on them enter appearance to this summon which is issued on the application of Kenneth Kimari Gitere who claims to be entitled to be become registered as proprietor of the suit premises also known as Plot NO. 358, Thome Farmers No. 5 Limited and now known as LR No. 13330/246 for the determination of the following questions:-

**1. That Kenneth Kimari Giteri be declared to have acquired title by adverse possession to the suit premises known as Plot No. 358 in "Thome Farmers No. 5 Limited and also known as LR No. 13330/246.**

**2. That the registration of Joreth Limited and Eunice Wambui Nderitu as proprietors of LR No. 13330/246 and or any other persons deriving title from Joreth Limited based on the land previously known as Plot No. 358 and now known as LR No 13330/246 be cancelled forthwith and the chief registrar of titles do rectify the register to enter the name of the plaintiff Kenneth Kimari Gitere as registered proprietor of the said property LR No. 13330/246 in place of the 1<sup>st</sup> and 2<sup>nd</sup> defendants**

**or anyone deriving title from the defendants.**

**3. The costs of these proceedings.**

3. The originating summons is supported by the affidavit sworn by Kenneth Kimani Gitere, the plaintiff herein sworn on the 3<sup>rd</sup> June 2014.
4. By an order of 24<sup>th</sup> June 2015, Honourable J Mutungi allowed the application dated 26<sup>th</sup> November 2014 for consolidation of the two suits on 19<sup>th</sup> September 2018. It was further directed that ELC 706/14 (OS) be treated as a counterclaim.
5. The 2<sup>nd</sup> defendant, Joreth Limited filed a statement to the defence to the counterclaim dated 28<sup>th</sup> October 2018 and filed in court on 28<sup>th</sup> October 2018. It confirms that it sold the suit property LR No. 13330/246 to the plaintiff Eunice Wambui Nderitu and that it is a stranger to the averments in the counterclaim. That it did not sell the suit property to the defendant. The 2<sup>nd</sup> defendant also filed a replying affidavit through Robertson Nderitu, its operations manager, sworn on the 31<sup>st</sup> March 2017. The replying affidavit is in answer to the originating summons filed by the plaintiff in ELC 706/2014 (OS).
6. PW1 Eunice Wambui Nderitu, the plaintiff in ELC 441 of 2013 adopted her further witness statement dated 5<sup>th</sup> October 2015, her witness statement dated 8<sup>th</sup> April 2013, the replying affidavit to the originating summons in ELC 706 of 2014 (OS) filed on 3<sup>rd</sup> November 2018 and the list of documents dated 5<sup>th</sup> October 2015. She told the court that she is the registered owner of LR No. 13330/246 having bought the same from Joreth Limited. She said she saw an advertisement in the Daily Nation Newspaper in 2011 about sale of plots by Joreth Limited. She did due diligence before purchasing the said plot for Kshs.8,000,000/-. She produced a copy of advertisement as exhibit P1, the sale agreement as exhibit P2, a transfer exhibit p3 and a copy of title exhibit p4.
7. She further stated that in 2013, she wanted to develop the plot. She took an architect to the suit property but found some structures. She enquired and found the 2<sup>nd</sup> defendant (Kenneth Kimari Gitere) was the one who had put up the structures. She denied that the 1<sup>st</sup> defendant was in the plot in the 1990s. He could not have acquired the plot in 2013. She prays that the 1<sup>st</sup> defendant be restrained from interfering with her enjoyment of the suit property. She prays that the 2<sup>nd</sup> defendant's counterclaim be dismissed.
8. DW1, Robertson Nderitu operation manager with Joreth Limited, adopted his replying affidavit sworn on the 31<sup>st</sup> March 2017, and a witness statement dated 31<sup>st</sup> March 2017. He also adopted the list of documents dated 31<sup>st</sup> March 2017. He told the court that Joreth Limited has no relationship with Thome Farmers No. 5 Limited. He confirmed that at some point Joreth Limited sued Thome Farmers No 5 Limited for admitting members to its land without paying any money. The suit was HCCC 6206 of 1992. There was a consent between the parties dated 13<sup>th</sup> June 2003. It was agreed that members of Thome Farmers No 5 Limited were to pay Joreth Limited Kshs.200,000/- if they wanted to benefit from titles from Joreth Limited within six (6) months. He confirmed that Kenneth Kimari has title for LR No. 13330/241 which he has developed. That the receipts provided by the said Kenneth Kimari are in respect of LR No. 13330/241 and not the suit property. That Joreth Limited advertised for sale the plots which had not been bought. The advertisement is dated 4<sup>th</sup> June 2006. The suit property was among those advertised for sale. It appears as Plot No. 357. Kenneth Kimari had not paid for the said plot. He further stated that Kenneth Kimari resides in LR No. 13330/241 but when he heard the suit property had been sold, he tried to put up structures on the suit property. He confirmed that Eunice Wambui Nderitu (plaintiff) is the genuine and registered owner of the suit property.
9. DW2 Kenneth Kimari Gitere, the plaintiff in ELC 706/14 (OS) adopted his witness statements dated 3<sup>rd</sup> June 2014 and 2<sup>nd</sup> May 2013 respectively. He also relied on the list of documents dated 3<sup>rd</sup> June 2014. He told the court that the suit property is situated at Kasarani off Thika road towards Garden estate. That he owns two plots LR NO. 13330/241 and 246 previously 357, 358 respectively. That the plots were bought by his father, Gitere Kahura from Thome Farmers No. 5 Ltd in 1989. He produced the share certificate No. 1072 which confirms two (2) shares. The same is dated 27<sup>th</sup> February 1989. He also produced a receipt for survey fees for Plot Nos 357 and 358. He told the court that his father sold the plots to him in 1993. He produced the agreement as exhibit in this case. He then assumed ownership of the two plots.
10. He stated that he has constructed a home on LR NO. 13330/241 previously No. 357. That on Plot No. 358 now LR NO. 13330/246, he constructed a cowshed, servants quarters and pit latrine. He fenced it using cedar posts, planted napier grass on the lower side and bananas.
11. He told the court that his structures were demolished by the Chief, askaris and hired goons. He sought an explanation from the chief who told him he had received a letter from M/S Chege Wainaina Advocates who instructed him to evict him (Kenneth Kimari) but the chief did not have a court order.
12. He told the court that he has been on the suit property since 1989. That the plots belonged to Thome Farmers No 5 Ltd. He went to their offices so that he could be issued with titles. He was referred to the offices to M/S Njoroge Nyagah Advocates who told him he was to pay Kshs.295,567 for each plot. He said he paid a total of Kshs.395,000/- to the said firm but the titles were not processed. That his father fell sick and he had to take care of him. His father passed on in 2008. Thereafter he started following upon the titles. He was referred to Dan & Anderson Associates who asked him to pay Kshs.1,167,000/- in order for the titles to be processed. He paid a total of Kshs.1,100,000 leaving a balance of Kshs.67,000/-. He did not pay the said balance because he was only given a title for plot No. 357. Later he learnt that the plaintiff Eunice Wambui had bought LR No. 3330/246.
13. He said he learnt so when his structures were demolished. He was not aware of the transaction between the plaintiff and the Joreth Limited. That by 2011 he had been on the suit property for 20 years. His use was open and Joreth Limited had not asked him to leave. He produced the photographs to show the developments he had undertaken on the suit property meaning the same was not vacant in 2011. He further stated that he was not a party to HCCC 6206 of 1992 and the plaintiffs should claim a refund from Joreth Limited as the title held by Joreth Limited had been extinguished by operation of the law. He prays that his counterclaim be allowed.

14. DW3 Elijah Nturibi Wilson adopted his witness statement dated 29<sup>th</sup> April 2017. He told the court that the 2<sup>nd</sup> defendant has been his nieghobur since 1995. That his plot is LR No 13330/229 which he bought in 1995. That the 2<sup>nd</sup> defendant has constructed a home in one of the plots. That in the other plot he had constructed a cowshed and servant quarters and a toilet. He confirmed that the 2<sup>nd</sup> defendant is in possession of the suit property as shown in the photographs produced by the 2<sup>nd</sup> defendant. when cross examined by Mr. Gachuhi for the plaintiff he admitted the cowshed and the structures were demolished.

15. At the close of the oral testimonies, the parties tendered final submissions.

#### **The plaintiff's submissions.**

16. They are dated 23<sup>rd</sup> June 2020. Counsel anchored her case on **section 26 of the Land Registration Act, no. 3 of 2012** and submitted that the 1<sup>st</sup> Defendant was the registered proprietor to the suit property which it validly and genuinely transferred to the Plaintiff and that the 2<sup>nd</sup> Defendant has not proved any ground that can impeach and or defeat the Plaintiff's title to LR no 13330/246. Counsel raised two main questions for determination.

**i. Whether the transfer of the suit property to the Plaintiff by the 1<sup>st</sup> Defendant was done legally and procedurally.**

**ii. Whether the 2<sup>nd</sup> Defendant has acquired title through the doctrine of adverse possession.**

17. On the first issue Counsel contended that testimony of both the Plaintiff and the 1<sup>st</sup> Defendant Joreth Limited showed clearly that the suit property was registered to the 1<sup>st</sup> Defendant who advertised its sale by advertisement in the local dailies and later sold and transferred it to the Plaintiff at around 2011. Additionally it is clear that the 2<sup>nd</sup> Defendant had not purchased the land from the 1<sup>st</sup> Defendant and did not comply with the consent order issued in HCCC no. 6206 of 1992. Further, that the allegation by the 2<sup>nd</sup> Defendant that it he made payment to Njoroge Nyagah Advocates cannot hold as the said Advocates were not acting for Joreth Limited and moreover that by the time the 2<sup>nd</sup> Defendant was paying Kshs. 1,100,000/- as purchase price to Dan and Anderson Associates between August 2012 and February 2013 for LR 13330/241 and /246 was done when Joreth Ltd was not the registered proprietor any more as per a copy of the Plaintiff's title to the suit property issued on 15<sup>th</sup> September 2011. Thus, counsel submitted that it is clear that the sale and transfer of the suit property to the Plaintiff was valid. Further, that it is confirmed by receipts issued by Dan and Anderson Associates were for the transfer of LR 13330/241 where the 2<sup>nd</sup> Defendant is in occupation and therefore there was no fraud in the transfer of LR 13330/246 to the Plaintiff.

18. On the second issue, Counsel submitted that the law applicable is **section 37, 38 Limitation of Actions Act**, as set out in Meru **HCCC no. 3 of 2004 Joseph Kaburu v M'Arimu Kamuru** that in order for the claimant to succeed in a claim for adverse possession the claimant is duty bound to adduce evidence to the effect that he/she has been in possession of the suit land, that his occupation was exclusive, was adverse to the Defendant's rights as owner and his/her occupation had been continuous and uninterrupted or unchallenged for a continuous period of 12 years since possession. Further that **Nairobi Civil Appeal no. 73 of 1982 Public Trustee v Wanduru Ndegwa** it was held that for a claim of adverse possession to succeed the claimant must prove that he has been in continuous, open, exclusive and undisturbed possession of the suit property for a period of 12 years and cultivation alone without actual possession is not enough.

19. Counsel argued that the 2<sup>nd</sup> Defendant was not able to prove his claim for adverse possession as per his testimony where he clearly confirmed that he lives elsewhere on the L.R 13330/241 to which he has already obtained title documents from the 1<sup>st</sup> Defendant and he confirmed that he has never taken possession and he only alleged that he was doing cultivation and growing napier grass and was rearing cattle on the suit property and had put up cow sheds thereon, however he had no evidence of the structures, only alleged that they were demolished by the Plaintiff and he did not even have an OB number to show that he made a complaint after the alleged demolition. Therefore the 2<sup>nd</sup> Defendant did not prove continuous possession of the suit property for a period of 12 years.

20. Furthermore, that the Plaintiff confirmed that by the time she bought the suit property in 2011 it was vacant, unfenced, marshy and uncleared and the fact that she is the one who cleared it, planted trees and it was only after the Plaintiff bought the suit property that the 2<sup>nd</sup> Defendant purported to take possession and brought construction materials to the property hence the suit.

21. Moreover, Counsel for the Plaintiff, referring to the testimony and witness statement of the 1<sup>st</sup> Defendant's witness, contended that the 2<sup>nd</sup> Defendant cannot claim to have had exclusive and uninterrupted possession of the suit property because the effect of HCCC 6206 of 1992 and the Notices in the newspapers would be to legally interrupt any adverse possession and to assert the 1<sup>st</sup> Defendant's title to LR 13330.

22. Counsel further contended that the 2<sup>nd</sup> Defendant's payment of purchase price to Njoroge and Nyagah & Co Advocates in the year 2006 and again to Dan and Anderson Associates in 2012 meant that a claim for adverse possession can only arise upon expiry of 12 years after the last installment in 2012 which would be the year 2024. And even if it is counted from the year 2006 the earliest the 2<sup>nd</sup> Defendant could claim adverse possession would be the year 2018 and not 2014 when his claim was filed. He relied on the case of **Wambugu v Njuguna (1983) eKLR 172**. Counsel concluded that the Plaintiff has proved her case within the required standard and that she is the legal owner of the suit property which she validly purchased from the 1<sup>st</sup> Defendant and therefore the 2<sup>nd</sup> Defendant should be restrained from interfering with the suit property and that his claim of adverse possession it was submitted that the 2<sup>nd</sup> Defendant has not been able to prove his case and it should be dismissed.

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

23. The 1<sup>st</sup> Defendant's submissions are dated 29<sup>th</sup> July 2020. Counsel for the 1<sup>st</sup> Defendant argued that for purposes of adverse possession

time can only start running for the 2<sup>nd</sup> Defendant in the year 2013 since he had no intention of dispossessing the 1<sup>st</sup> Defendant of its ownership and that making an offer to purchase negates the assertion of being a trespasser. Further, that the 2<sup>nd</sup> Defendant in his testimony admitted that he was not resident on the suit property and that the designated user of that land was residential, as he had not applied for it to be exclusively agricultural.

24. Counsel contended that in claims for adverse possession courts have established that the claimant must provide ‘clear’ and ‘convincing’ proof of each of the required elements; it cannot be established by inference. This level of proof is more substantial than the ‘preponderance of evidence’ required in civil suits. **Kweyu v Omuto [1990] KLR 709**. That the burden lies with the 2<sup>nd</sup> Defendant to prove factually rather than a mere inference, that he has met all the elements stated in the above case for adverse possession. **Gabriel Mbui v ukindia Manyara [1993] eKLR. Snyder v Palmer 29 Wi 252. Illinois Steel Company v Budsisz 115 Wis 68**. Counsel stated that the Illinois Steel case noted that the facts essential to adverse possession must be established by clear and satisfactory evidence, the presumption being in favour of the true owner for the full period necessary to divest him of title.

25. Counsel further submitted that the intention to dispossess the registered owner of the land is an important ingredient of adverse possession. That if at all the Plaintiff took possession which is denied, it was not done with the intention of dispossessing the 1<sup>st</sup> Defendant through hostile means but on mistaken assumption of sale. Counsel argued that the possessor must exercise physical control in order to claim adverse possession. That **Powell v McFarlane ChD [1977] Slade J** noted that in order to claim ownership the squatter must be in factual possession the entire time of the limitation period. That the 1<sup>st</sup> Defendant demonstrated from his evidence and through cross examination of the 2<sup>nd</sup> Defendant’s witnesses that the Plaintiff cannot be said to have been in factual occupation of the land. Counsel contended that it is trite law that ‘for a possessor to prove possession, he must unfurl his flag on the land and keep it flying so that the owner may see; if he will, that the enemy has invaded his domains and planted the standard of conquest.’ The Court was also referred to the case of **Burgesses of London Borough of Lambeth v Blackburn [2001] EWCA Civ 912**. On factual possession and intention to possess, Counsel also referred the Court to **Charles Ngaruni v Zipporah Kathengu & others [2011] eKLR** and argued that the 2<sup>nd</sup> Defendant has failed to prove to this Court that it was indeed in actual, open and notorious possession of the land so its claim for adverse possession should fail.

26. On whether the Plaintiffs were in adverse possession of the suit premises it was submitted that the Plaintiff has not demonstrated that she has enjoyed exclusive possession of the suit property for over 12 years. No evidence showing he occupation since 1989. On computation of time, Counsel contended that though the 2<sup>nd</sup> Defendants testimony showed that he did negotiate to enter into an agreement with to purchase the suit property under the terms of the consent showing that he ceased to be a trespasser and entered into the realm of buyer, the time can only again start to be reckoned from the year 2013 when he last made a payment towards the suit property L.R. No 13330/246 by which time the same had been transferred to the Plaintiff. Reliance was placed on **Gabriel Mbui v Mukindia Maranya (supra)**. Counsel argued that the case **Patrick Magu Mwangi v Joreth Limited** that the 2<sup>nd</sup> Defendant relied on is distinguishable from this case in that the Plaintiff was in actual possession of the suit parcel having built residential homes.

27. On whether possession (if any) by the Plaintiff was interrupted, Counsel argued that Plaintiff allegedly took possession of the suit property in 1991 and by 1992 the 1<sup>st</sup> Defendant had filed civil suit 6206 of 1992, Counsel submitted that time for running began in 2002 and by 2009 when the Plaintiff instituted this suit, 12 years time had not reached therefore she could not claim the suit property by adverse possession.

28. On whether the sale of the suit property by the 1<sup>st</sup> Defendant to the Plaintiff was valid, Counsel relied on **section 26 of the Land Registration Act** and submitted that the 1<sup>st</sup> Defendant legally and lawfully sold its land to the Plaintiff. That there is no evidence provided showing that the title was acquired illegally.

29. Counsel for the 1<sup>st</sup> Defendant submitted that the Plaintiff cannot sustain a claim for both adverse possession and purchaser’s interest. They relied on the cases **Muchanga Investments Ltd V Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR** and **Hyde v Pearce [1982] 1 ALL ER 1029**.

30. In conclusion it was submitted that that the Plaintiff has succeeded in her case and the 2<sup>nd</sup> Defendant has failed to meet the burden of proof in support of his claim for adverse possession to the detriment of the 1<sup>st</sup> Defendant who then passed lean title to the Plaintiff

### **The 2<sup>nd</sup> defendant’s submissions**

31. The 2<sup>nd</sup> Defendant filed submissions dated 18<sup>th</sup> May 2020. His Counsel submitted that a letter dated 27<sup>th</sup> March 2013 annexed as KK10 to the 1<sup>st</sup> Defendant’s replying affidavit confirms that the Plaintiff was not in possession of the suit property which was backed by the oral testimony of the Plaintiff and the 1<sup>st</sup> Defendant. Further, that the letter confirmed that the 2<sup>nd</sup> Defendant was in possession and occupation of the suit property without the permission of the Plaintiff or 1<sup>st</sup> Defendant; that the Plaintiff was not in possession and intended to seek eviction orders. The attention was also drawn to the replying affidavit of Robertson Nderitu paragraph 5 which also confirmed that the 2<sup>nd</sup> Defendant was in possession. Counsel thus submitted that the contents of the letter taken together with the 2<sup>nd</sup> Defendant and his witness’ evidence that he took possession of the suit property in 1989 show that he has fully satisfied the legal ingredients required of a party laying claim to land by adverse possession. That at the time he entered the suit property in 1989 the 1<sup>st</sup> Defendant was registered as proprietor of the mother title and this his entry without permission was adverse to the title. They relied on the Court of Appeal case **C.A no. 213 of 1996 Benjamin Kamau Murima & others vs Gladys Njeri (unreported)**. It was further argued that the 1<sup>st</sup> Defendant is prevented by the doctrine of estoppels from denying that the 2<sup>nd</sup> Defendant is in possession after having acknowledged his possession previously. Reliance was also placed on **Ndathi v Itumo & 2 others (2002) 2, KLR** where it was stated that “assertion of a right by a proprietor occurs when the owner takes legal proceedings or makes an effective entry into the land” and that ‘writing a letter to an adverse possessor warning them to vacate land does not interfere with possession’. It was submitted that time started running in 1989 and that the 1<sup>st</sup> Defendant’s claim to the suit property was extinguished after 12 years in 2001 which was a whole 13 years before the filing of this suit.

32. It was submitted that the fact that there was a change of ownership by the transfer of the suit property by the 1<sup>st</sup> Defendant to the Plaintiff on 15<sup>th</sup> September 2011 did not interrupt the running of time in favour of the 2<sup>nd</sup> Defendant and also the Plaintiff took out legal proceedings after the lapse of 12 years. Reliance was placed on the Court of Appeal case of **Githu v Ndeete, 1964 KLR 776**. Further, that the filing of HCCC 6202 of 1992 by the 1<sup>st</sup> Defendant did not interfere with time, has no relevance to this suit, has no conclusive determination and the consent does not affect him as he was not a party to that suit. Moreover, he already was in possession at the time of filing that suit, but the 1<sup>st</sup> Defendant never gave reasons why it did not enjoin him.

33. It was submitted that the payments that the 2<sup>nd</sup> Defendant made were not disputed and the 1<sup>st</sup> Defendant has not explained why it would retain the money paid by the 2<sup>nd</sup> Defendant for processing of two titles while it only issue one and left the other out. The 2<sup>nd</sup> Defendant testified that he was willing to pay the balance due for the second title. That from his conduct in paying Kshs 1,000,000/- for processing he demonstrated he was able to pay the balance of Kshs 67,000/-. That the payments were not rejected or refunded hence by receiving payment for the processing of title in favour of the 2<sup>nd</sup> Defendant the 1<sup>st</sup> Defendant was acknowledging that he was in fact entitled to get the title of the suit property. Further, given this knowledge, the 1<sup>st</sup> Defendant could not lawfully transfer the title to the Plaintiff particularly since he was in open possession of the suit property for over 24 years. Counsel invited the Court to make an inference of fraudulent misrepresentation on the part of the 1<sup>st</sup> Defendant, making the 2<sup>nd</sup> Defendant believe he was going to get his title and then transferring it to the Plaintiff. Further, that the transaction between the 1<sup>st</sup> Defendant and the Plaintiff falls under **section 26(1) (a), (b) of the Land Registration Act**. Counsel argued that the processing and transferring of the title in the name of the Plaintiff having been tainted by the misrepresentation and fraud on the part of the 1<sup>st</sup> Defendant means that the title was unprocedurally and illegally transferred as per the principle laid out in **Eldoret ELC Case no. 609 of 2012 Elijah Makeri Nyangw'ra vs Stephen Mungai Njuguna & another [2013]eKLR**.

34. Counsel submitted that under **section 28(b) LRA** the position of the 2<sup>nd</sup> Defendant claim to have acquired rights to the suit property is given overriding interest. It was argued that the provision negates the position taken by the Plaintiff that after conducting a search and finding no encumbrances she was free to transact. That the fact that there were no encumbrances noted against the 1<sup>st</sup> Defendant title could not override specific statutory provisions and the Plaintiff's position is unsustainable in law. They relied on the Court of Appeal decision in **Munyu Maina v Hiram Gathiha Maina {2013}eKLR** and submitted that the 2<sup>nd</sup> Defendant's evidence of adverse possession has not been rebutted by the Plaintiff or the 1<sup>st</sup> Defendant neither have they placed evidence to warrant their acquisition of their title and the 2<sup>nd</sup> Defendant has proved his case to the standard required in civil proceedings. Counsel also referred the court to the cases of **C.A no. 52 of 2012 Patrick Magu Mwangi v Joreth Limited** and **ELC case no 174 of 2009 Richard Kariuki Joel Gichu v Joreth Limited & 2 others**. They prayed that the Court grant the orders prayed for in the O.S and dismiss the Plaintiff's suit with costs.

35. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed on behalf of the respective parties and the authorities cited. The issues for determination are:-

- i. Whether the sale and transfer of the suit property to the plaintiff by the 1<sup>st</sup> defendant was done legally/is it valid?**
- ii. Whether the 2<sup>nd</sup> defendant has acquired title through adverse possession.**
- iii. Who should bear costs?**

36. It is not in dispute that the plaintiff is the registered owner of LR NO. 13330/246 (hereinafter referred to as the "suit property"). **Section 26(1)** of the Land Registration Act, 2012 provides that:-

**The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

37. PW1, Eunice Wambui Nderitu told the court that she bought the suit property from Joreth Limited. She learnt of the suit property by an advertisement placed in the Daily Nation Newspaper by the 1<sup>st</sup> defendant. she then conducted due diligence and established that the suit property was owned by the 1<sup>st</sup> defendant. In support of her case she relied on the copy of the advertisement which shows that LR NO. 13330/246 was for sale, a copy of the sale agreement dated 24<sup>th</sup> June 2011 between the plaintiff and Joreth Limited for LR No. 13330/246 Thome. The purchase price is Kshs.8,000,000/-. The said agreement is executed by James Njenga Karume and Margaret Wairimu Magugu both directors of Joreth Limited.

38. She has also relied on a transfer in her favour dated 7<sup>th</sup> September 2011 and registered on 15<sup>th</sup> September 2011. There is also a deed plan NO. 255808 dated 18<sup>th</sup> October 2004.

39. DW1, Robertson Nderitu Operations Manager with the 1<sup>st</sup> defendant, confirmed that the 1<sup>st</sup> defendant Joreth Limited was the registered owner of LR NO. 13330, which was subdivided into several portions measuring 0.5 acres. That the 1<sup>st</sup> defendant had no relationship with Thome Farmers No 5 Limited. He further stated that some individuals alleging to be shareholders of Thome Farmers No 5 Limited had invaded Portions of LR NO. 13330. The 1<sup>st</sup> defendant filed a suit being HCCC 6206 of 1992 seeking to evict the said persons. The said suit was determined by a consent order, whereby the shareholders of Thome Farmers No 5 Limited who wished to get a title from the 1<sup>st</sup>

defendant would pay Kshs.200,000 within six (6) months.

40. DW1 confirmed that the 2<sup>nd</sup> defendant who was in occupation of LR No. 13330/241 complied with the consent order in HCCC 6206 of 1992 and was issued with a title for the said plot. As he did not pay for the suit property the same was available for sale to the members of the public and the same was advertised in the local dailies. This is how the plaintiff learnt of the availability of the said plot. DW1 confirmed that the plaintiff purchased the suit property and she was issued with a title. He also confirmed that when he took the plaintiff to the suit property the same was vacant and nobody was in occupation. His evidence corroborates that of the plaintiff.

41. The 2<sup>nd</sup> defendant on the other hand claims to be in occupation of the suit property. That he has been cultivating it. He stated that he complied with the consent order in HCCC 6206 of 1992 by paying Kshs.295,567 to the firm of M/S Njoroge Nyagah & Co. Advocates in the year 2006. That he later paid Kshs.1,100,000 to Dan and Anderson Associates who processed his title for LR 13330/241. This is where he resides with his family.

42. It is not in dispute that the suit property was registered in the name of the 1<sup>st</sup> defendant before it was transferred to the plaintiff. It is clear that the 2<sup>nd</sup> defendant only managed to pay for LR No. 13330/241. The suit property was therefore available for sale. The 2<sup>nd</sup> defendant admitted that he has not cleared a balance of Kshs.67,000. I find that the sale and the transfer of the suit property to the plaintiff by the 1<sup>st</sup> defendant was legal. I find that it is valid in that there was no fraud.

43. The 2<sup>nd</sup> defendant filed his originating summons dated 3<sup>rd</sup> June 2014 together with an affidavit in support seeking to be declared the owner of LR NO 13330/246 (the suit property) having acquired the same through adverse possession.

44. I have considered the principles governing the claim for adverse possession. They are:-

- a. That the plaintiff must have clear possession of the suit property.
- b. That the occupation of the land/property must be without the consent of the owners of the property.
- c. That the occupation must be uninterrupted for a continuous period of more than (12) years.
- d. That the plaintiff must exhibit an extract copy of title under litigation.

45. I am also guided by the case of **Peter Mberi Michuki vs Samuel Mugo Michuki CA No 220 of 2013**, where the Court of Appeal held that:-

**“.....this court in Francis Gicharu Kairuki vs Peter Maina Civil Appeal No 293 of 2002 Nairobi, approved the decision of the High Court in the case of Kamau Ruchiere vs Swift Ruthofords Co Ltd [1980] KLR where Kneller J held..... the plaintiffs have not proved that they used this land they claim as of right nec vi, nec clam nec precario (no force, no secrecy, no persuasion) so the plaintiff must show that the company had knowledge (or the means of knowing actual or constructive of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to attempt it by way of recurrent consideration.....”.**

The 2<sup>nd</sup> defendant in his evidence stated that he opted to purchase LR NO 13330/241 and LR No. 13330/246. It appears the payments he made were only sufficient to cater for one parcel of land being LR NO. 13330/241 which he was issued with a title and has constructed a house. The 2<sup>nd</sup> defendant has failed to prove that he had intentions of dispossessing the 1<sup>st</sup> defendant of its ownership of the suit property. These payments made by the 2<sup>nd</sup> defendant arose out of consent order in HCCC 6206 of 1992 where the 1<sup>st</sup> defendant had sought to evict certain trespassers from its land. I agree with the 1<sup>st</sup> defendant's submissions that time started running from when the 2<sup>nd</sup> defendant stopped making payments for the suit property in 2013.

46. DW3 Elijah Nturibe Wilson could not confirm that the 2<sup>nd</sup> defendant has been cultivating the suit property since 1995. In the case of **Gabriel Mbui vs Mukindia [1993] eKLR** the courts stated thus:-

**“The burden of proving title by adverse possession rests upon the person asserting it.....and on a balance of probability. What does he prove? He proves three adequacies; continuity probability and extent. For to prove title by adverse possession; it is not sufficient to show that some acts of adverse possession have been committed. It is all or nothing; there are no partial measures.”**

The fact that the 1<sup>st</sup> defendant filed HCCC 6206 of 1992 to assert its right against some trespassers means the 2<sup>nd</sup> defendant's alleged possession was not uninterrupted.

47. In the case of **Wambugu vs Njuguna [1983] eKLR** 172 it was held that:

**“The claimant possession, is deemed to have become adverse to that of the owner after the payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve (12) years after such payment and in this case it is clear the 2<sup>nd</sup> defendant if at all it mad payment to Dan and Anderson Associates in December, 2012 towards purchase price for the suit property, a claim for adverse possession can only arise upon expiry of twelve (12) years from the said date which could only have arose after the year 20124 and not before then and in case on**

account from the date of the alleged payment to Njoroge Nyaga & Co. Advocates in the year 2006 time for a claim of adverse possession could only run on expiry of twelve (12) years from the date of payment with in this case is year 2018 and meaning that the earliest the 2<sup>nd</sup> defendant could have lodged a claim for adverse possession should have been in the year 2018 as opposed to the year 2014 when the current claim was filed.”

48. I find that the 2<sup>nd</sup> defendant has failed to prove that his possession of the suit property has been open and notorious. I find that his claim for adverse possession fails. Accordingly I dismiss the 2<sup>nd</sup> defendant’s counterclaim with costs.

49. The upshot of the matter is that the plaintiff has proved her case on as against the defendants. Accordingly, judgment is entered for the plaintiff as against the defendants jointly and severally in the following terms:-

**a. That an order of permanent injunction is hereby issued restraining the defendants, their agents, and/or servants from trespassing, encroaching, developing, alienating, disposing, selling and/or in any other manner whatsoever dealing with that property known as LR NO. 13330/246.**

**b. That the plaintiff shall have costs of the suit.**

It is so ordered.

**Dated, signed and delivered in Nairobi on this 17<sup>th</sup> day of December 2020.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the plaintiff

No appearance for the 1<sup>st</sup> defendant

No appearance for the 2<sup>nd</sup> defendant

Kajuju – Court Assistant