



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC NO. 191 OF 2017

(FORMERLY NAIROBI ELC NO. 137 OF 2013)

THE PRESBYTERIAN FOUNDATION.....PLAINTIFF

VERSUS

STANLEY CHEGE.....1ST DEFENDANT

JOHN NYAGA.....2ND DEFENDANT

JUDGMENT

By a **Plaint** dated 29th January 2013 the Plaintiff brought this suit against the 1st and 2nd Defendants jointly and severally for orders that;

- a) A permanent injunction restraining the Defendants by themselves, servants ,agents employees and any persons claiming under them from interfering in any way developing, constructing alienating, transferring or in any other way dealing with the parcel of Land Number 13858/97.*
- b) Vacant possession of L.R No. 13858/97.*
- c) Eviction orders against the 1st and 2nd Defendants from the suit property L.R 13858/97.*
- d) Damages for trespass.*
- e) Mesne profits.*
- f) Costs of the suit and interest.*

In its Statement of Claim, the Plaintiff averred that it was and is still the registered owner of the suit property having purchased it in the year 2000, and was duly issued with a Certificate of title under the **Registration of Titles Act**, and therefore it has a good title.

The Plaintiff alleged that in blatant breach of its proprietary rights in

the suit property, the Defendants sometimes in 2011 without any colour of right unlawfully encroached and trespassed on the said property and commenced construction without its knowledge or consent. It further averred that despite its efforts to have the Defendants vacate the suit property they have refused declined and/or neglected to give vacant possession. It therefore contended that the Defendants remain in occupation of the suit property unlawfully, illegally and without any title.

It particularized unlawful occupation by the Defendants as;

trespassing on the suit property and putting up structures without any valid title and without the consent and/or approval of the Plaintiff; erecting permanent and temporary structures on the suit property, failing and refusing to vacate the suit property and denying it the use and occupation of the suit property. The Plaintiff further contended that as a result, it has suffered loss and damage due to the Defendants acts of commission and omission.

The suit is contested and the Defendants filed a statement of Defence

and Counterclaim. In their Counterclaim as against the Plaintiff, the Defendants sought for orders that;

- a) A declaration that the Plaintiff's title has been extinguished by effluxion of time and its claim to L.R No.13858/97 Githurai is time barred and offends the provisos of the Limitations of Actions Act, Chapter 22 Laws of Kenya.*
- b) A declaration that the 1st and 2nd defendants are entitled to L.R No. 13858/97 Githurai by prescription.*
- c) An order that the 1st and 2nd Defendants be registered as the owners of L.R No. 13858/97- Githurai.*
- d) General Damages.*
- e) Interest at such rate as this Court may determine to be appropriate in the circumstances of the claim.*
- f) Costs of the Counter claim.*
- g) Such further or other Orders, relief as this Honourable Court may deem just and fair to grant.*

In their Defence, the Defendants denied all the allegations made in the Plaint and averred that they have been the lawful owners and occupiers of the suit property from the year **1999** and that the Plaintiff is the one in breach of the law by encroaching and alleging that the said parcel of land belongs to it. They further denied ever been asked to vacate the suit property and that they are in the suit property unlawfully or that the Plaintiff ever suffered any loss. It was therefore alleged that the Plaintiff's claim is without any legal foundation and thus warrants for dismissal.

In their Counterclaim the Defendants reiterated the statement of Defence and averred that the Plaintiff has dragged them to Court to deny them what legally belongs to them. They further alleged that they have a claim to the suit by way of Adverse Possession and no one can defeat that right as the Plaintiff's right to the suit had been extinguished by the expiry of time and therefore their claim to the ownership of the suit property is time barred. The Defendants contended that they should be registered as owners of the suit property.

The Plaintiff filed a Reply to Defence and Counter claim dated **5th June 2013**, and denied the allegations in the Defence and reiterated the contents on their **Plaint**. It further averred that it took vacant possession of the suit property upon its purchase in the year **2000** and had been in such possession until the year **2011**, when the Defendants unlawfully trespassed on the property. It further averred that the Defendants claim of adverse possession does not lie as they are unlawful trespassers.

After various Applications, the matter proceeded for viva voce evidence wherein the Plaintiff called five witnesses and the Defendants gave evidence for themselves and called no witness.

PLAINTIFF'S CASE

PW1 - Njenga Njoroge, adopted his witness statement dated **1st September 2016**, and testified that he was a Chairman of the **Presbyterian Committee of P.C.E.A Ndeiya Parish** from **2000 to 2004** and they purchased the suit property being **L.R No.13858/97**, from the late **Eliud Ngala Mwendwa**. It was his testimony that they did the formalities and entered into a **Sale Agreement** dated **1st September 2000**, and they were then shown the plot in Githurai which was vacant. He produced the **Sale Agreement** as **Exhibit 1**. He told the Court that after the agreement, they paid the money through a cheque of **Kshs.900,000/=** and they were issued with a **receipt** which he produced as **exhibit 2**. Further that the **transfer document** dated **18th September 2000** was signed by the seller and he produced it as **exhibit 3**. They then got a clearance certificate and the vendor gave them a Consent from the **Municipal Council of Ruiru** to transfer the document to them. He then produced the bundle of documents from the Municipal Council as exhibits. Further that they then registered the transfer in favour of the Church and they were issued with a Certificate of title which he produced as exhibit. That they were then given possession of the plot by the seller and they fenced it with a barbed wire and they then embarked on the process of development. They engaged the services of an architect to draw plans which he produced as exhibits. He further testified that he took the members of the Development Committee and the Architects to the site and there was no one occupying the suit land. Further that they engaged an Engineer to give them the Bill of Quantities(BQs) and the Quantity Surveyor required **14 million** to prepare the Bill of Quantities and the Development Committee was still looking for the money when the term of his committee ended in **2004**. In **2005** he took the new committee and the members to see the plot and the property was still vacant.

It was his testimony that the suit property was bought by the **PCEA Ndeiya Parish** and the title is the name of the **Presbyterian Foundation** as all the properties for the Church are held by the Foundation in trust for the parties. That when he handed over the suit property to the Chairman, it was vacant.

On cross examination he stated that when they purchased the suit property, they visited it many times and when they visited the property with **Mr. Eliud Ngala**, his Manager showed them all the beacons and they took possession immediately and fenced it with barbed wire but it is not there anymore. He confirmed that they did not erect any structure on the suit property as they did not have funds to put up the structures immediately. It was his testimony that there was no one living on the suit property as it was clear. He testified that according to him, between the year **2000 and 2004** when they took possession, there was no one on the suit property.

On cross examination, he stated that there was no one on the suit land when he visited the property and there were no structures or any encroachment.

PW2 - Samuel Ndungu Nginyo adopted his witness statement dated **1st September 2016**, and testified that he was the Chairman of the **Development Committee** for **PCEA Ndeiya Parish** from the year **2004 to 2007**. That he took over from **Mr. Njoroge** who handed over to him all the properties and they visited the plot in Githurai in **January 2005**. It was his testimony that the suit property was fenced with barbed wire and had no structures and drawing plans had been handed over to him. Further that they started to look for Developments funds and they used to visit the plot regularly and also pay rent. He testified that he was the Chairman till **2007** and in **2008** he handed over to the new Chairman and the plot was still vacant and no one had encroached on it.

On cross examination he testified that the location of the suit property was shown to them by **Mr. Njoroge** and not **Eliud Ngala**. He testified that they had all the documents and they went and saw the property and it there. He acknowledged that he did not engage the services of a surveyor as in his tenure as it was not necessary. But they had visited the plot and paid land rent and rates. He further testified that in the year **2007** there was no encroachment and it was still fenced.

PW3 Samuel Gatheru Kanyoro adopted his witness statement and testified that he is the property officer of the **Presbyterian Foundation**. That the suit property is registered in the name of **Presbyterian Foundation, Ndeiya Parish**. Further that the **Foundation** is a **Limited Company** and it holds the properties for the **PCEA Churches** within the East African Countries. Further that they hold the property in trust but in management it is under the respective Parish.

PW4 - Giograph Ngugi Mbugua adopted his witness statement dated **29th January 2013**, and testified that he is the Chairman of the **Development Committee** of **PCEA Ndeiya Parish** having become one in the year **2008**. It was his testimony that when he took over from one **Samuel Ndungu**, he was taken through the church property as he was to foresee the properties of the church. He was also shown the suit property which is in Githurai and he was taken to view the property and saw that it was fenced and there was no development and no one residing there. He further testified that they were to pay the land rents and rates which they have been paying. He produced the **Land Rents receipt** as **exhibit 11** and **Clearance receipts** as **exhibit 12**.

Further that he is still in office and that they had planned to build apartments for rent but they found that a person had encroached on the suit land in the year **December 2011**. He testified that they had visited the suit property earlier in **August 2011** and there was no encroachment and the land was still vacant. He further testified that when they found that the encroacher had put up a foundation, they sought assistance from the area District Officer who referred them to the area local chief. When they did not get assistance from the local administration, they finally got to know about the encroacher when they were given his telephone number and they met him and filed the suit.

In cross examination he testified that in the year **2009**, he was the treasurer of the Development Committee and in **2013** he was the Chairman and treasurer of the Development Committee. It was his testimony that he was shown the suit property by the Chairman who remained in the committee. He further testified that the property was already fenced and there was no development, but he was not shown the property which was fenced. He denied that he was shown the wrong property. It was his testimony that in **August 2011**, there was no one on the suit property but after four months when he went back, they found that the suit property had been encroached on with a foundation and two courses of stones. He told the Court that there were building plans brought by the people who initially purchased the suit property for the church though he did not produce the plans. He further testified that when they were given the numbers of the intruders they instructed their Advocates but did not try to evict them.

On re-examination, he testified that they were taken by the former chairman to see the property and he saw a fenced property. He further testified that there were plans brought by the people who were there when the building plans were drawn and the plans have not changed.

PW5 - Gilbert Nganga adopted his witness statement and testified that he is the Chairman of the Property Committee in the Church a position he holds from the year **2014**. Further that the Property Committee takes care of the properties owned by the Church. It was his testimony that the suit property belongs to **Presbyterian Foundation** and that in **2011**, he found that some people had encroached on it. That the intruders had laid foundation and put up two courses of stones. They sought assistance from the area Chief as per the **letter** dated **6th may 2013**, which he produced as **exhibit 13** who then summoned the encroachers and he produced the Summons in court.

It was his testimony that he had been on the land in **August 2011** and the land was clear. He urged the Court to grant the prayers as per the **Plaint**.

On cross examination he testified that there is a Development Committee and there is a Property Committee. He testified that the Development Committee assists in planning and financing the Property Committee but the Committee dealing with the property was the Property Committee. He further testified that in **August 2011** there was no encroachment and when they found the encroachment, they informed the **area Chief** and **District Commissioner Ruiru**, but they did not meet the encroachers. He further testified that the Chief summoned them to his office but denied that they told the Chief that they were in the wrong land. He testified that he did not know why the Chief did not take action. He further testified that they have legal documents and that they filed the suit in **2013**. He acknowledged that they did not go back to the vendor of the land and were never informed that they were on the wrong land. It was his testimony that the reason why he could not go back to the seller is because he had given them all the documents and reiterated that the Defendants are intruders. Further that the Church is suffering as it has a title for the suit property but the said land has been encroached on. That initially they were in possession and that they used to visit the property four times a year and that the construction began in **August 2011**, and stated that they did not find the intruders on the ground.

On re-examination, he testified that they were seeking assistance so that they could identify the intruders. He further testified that the Property and Development Committees work together. It was his evidence that the Development Committee assists the Property Committee financially. It was his testimony that one of the duties of the Property Committee was to visit the properties and they do it every four months. He further testified that they had no reason to go back to the vendor and that they had never met the encroacher before coming to Court.

DEFENCE CASE

DW1 - John Kennedy Nyagah testified that he is a building technician working at the University of Nairobi. It was his testimony that he resides in Githurai 45 and has lived there with his family for 14 years. That he moved to the suit property in the year 2001 and he had put up a semi-permanent structure as the area was an open bushy area. Further that he was shown the land by the children of **Ngala Mwendwa**. He confirmed that he knew **Mutie** and **Ngala** who were selling the land. He told the Court that he paid his down payment wherein the purchase price was **Kshs.290,000/=** and he was to pay it in instalments for a period of **3 years**. He produced the **Sale Agreement** as exhibit and testified that the owners of the suit property were **Chris Ngala** and **Willy Mutie**.

He further testified that in **2001**, he built a Mabati structure and continue paying the purchase price. He produced a **bundle of receipts** as **exhibit 3**. It was his testimony that when he moved into the property, there was no interruption until **2013**, when he found people taking photographs of the plot. He was then told that they had trespassed on the land. He testified that in **2001**, there was no fence and they looked for the beacons and did the fencing and in **2013**, the fence and structure that he had erected were still there. He testified that the Plaintiff put a fence near his plot and upon being told that they had trespassed, they claimed his plot. It was his testimony that when they spoke to their lawyers they were informed that they had been sued and they also sent out a demand to the sellers which he produced as exhibits.

He testified that when he sought an explanation from the vendors, they were told that the Plaintiff was given the wrong land and there was a confusion between the two parcels of land. He urged the Court to declare that they are the owners of the suit land allow their Counter-claim.

On cross examination, he testified that before he entered into the land he signed a sale agreement and paid **Kshs.50,000/=**. Further that the purchase price was **Kshs.290,000/=** as per his witness statement, while the **Sale Agreement** showed **Kshs.350,000/=**. He testified that if he was to pay within a certain period, he was to pay **Kshs.290,000/=** but thereafter he was to pay **Kshs.350,000/=** and the receipts in Court are for **Kshs.350,000/=**. He further testified that he started paying for the plot in **2001** and he finished payment in the year **2009**. That the agreement states that he was to get possession upon completion and he finished in the year **2009**. That he bought the suit property from **Willie Mutie** and **Chris Ngala** and **Ngala Mwendwa** was their father. He further testified that he could not recall if he carried out a search, but he was shown a map and subdivision. It was his testimony that he was not shown a title deed as documents showed **Ngala Mwendwa** and the receipts were issued by **One to One Investment**. He further acknowledged that he did not confirm from the Lands office that the Company owned the land. He further acknowledged that according to the Sale Agreement, he was to be given some documents and one of them was a transfer but he did not obtain it. Further that he has been going to the vendor offices and they have been promising him that they would give him the documents but they have not done so. He told the Court that the receipts in Court are not for plot **No. 13858/97/3** which is the suit property as per the Sale Agreement. He further testified that he put up a semi-permanent structure but he did not obtain the development permit. Further that he put up the building but he did not carry out the building plans. He further testified that the temporary structure was a 2 bedroomed house with all amenities being water and electricity. He confirmed that he did not have documents to show that he entered into the suit land in **2001** and that he did not have any document varying the Sale Agreement to show that he could enter the suit property before finishing payment. It was his testimony that in the sale agreement, there was no provision for Certificate of the seller. That he completed payment of the full purchase price in **2009**.

On re examination, he testified that he took possession of the suit property in **2001** and there was no structures and he enjoyed quiet possession until **2013**. He further testified that he had electricity and he had put up a two bedroomed flat which had been there for **4 years** where he lives with his family. He further testified that in the Sale Agreement, he was promised a title deed and he was to pay some amount for some time and Exhibit 3 is a breakdown of all the payments for the contract. That he had paid **Kshs.320,000/=** in **July 2001** and the extras were penalties. He further testified that he knew **Ngala Mwendwa** and that he had known that he had taken possession.

DW2 - Stanley Moses Chege adopted his witness statement and testified that he lives in Githurai 45 since **2001** with his family on the suit land after purchasing it. Further that the plot was advertised in the newspaper and he went to the office wherein he met two gentlemen who introduced themselves as the owners of the land. He testified that they negotiated the price and bought the suit land for **Kshs.290,00/=** and he was to pay in installments. They signed a Sale Agreement and they negotiated the mode of payment. That he paid first in the year **2000** and he produced the **Contract** as **exhibit 1** and a **Sale Agreement** dated **1st August 2000** as **exhibit 2**. Further that he took possession in the year **2001** after the final payment of the purchase price and he was to clear the balance in the year **2001**. That he started constructing in the year **2001** wherein he built a Kiosk, after being shown all the beacons and he fenced the plot. He alleged that there was no fence and he was not asked by anyone when he took possession and he has lived on the suit property since then. He told the Court that he was given a Certificate bearing the name of the Company which he produced as **exhibit 5**.

That he had not yet been issued with the title deed but he produced the vendors Certificate of registration and that he has constructed some rooms for tenants and a residential home for himself and he pays for the utilities. He produced water bills dated **2011**. He stated that he realized there was a problem when he was told that some people had gone to the plot and met his wife and served them with Summons in **2013**. When he went to **Ngala Mwendwa's** office, he was told to check at **Mutie's** office wherein he was told that they had not sold the land to anyone. That the vendors via a letter dated **8th May 2013** confirmed that he was the owner of the suit land. That they met the Plaintiff and attempted to settle the matter in the presence of **Chris** and **Mutie** who offered the Plaintiff an alternative plot. He urged the Court to find that they are the registered

owners of the suit land.

On cross examination, he stated that he first signed a plot buying contract for a **40 by 80 ft** plot. He acknowledged that the sale agreement states that it was **100 by 110 ft** and that the plot was to be subdivided into three. He further testified that the plot is the same and that his plot is **33 by 100 ft** which is **No.13858** and the registered number is **97** according to the Sale Agreement and that the documents refer to the same property. That the vendors showed him a map in the office to show him that they own the plot and was also shown the beacons but he was not given the title deed.

He acknowledged that he has never conducted any search and that he had receipts issued by **Katmut Investment Company Limited** and the property that he signed for was **No.13858/104** and the next receipt is for **plot No.3** and there is no receipt for payment of plot **No.13858/97/2**. He testified that the money was received in the vendors offices and he was allowed to put up a structure before completion of the purchase price. He confirmed that he did not have documents to confirm that he put up semi-permanent structure and that he did not have approvals from the Municipal Council. He further testified that he pays for water and electricity but the electricity receipt is for **2013**. He further

confirmed that he did not have bills for **2001** as he connected the water in **2011**.

Further that the office of **Ngala Mwendwa** and that of the vendors is

the same as he was the father of **Chris** and **Mutie** who were trading as **One 2 One Investment Traders** and **Ngala Mwendwa** was the registered owner of the suit property. He stated that he believed at first that the land was under **One 2 One Investment**. He acknowledged that he did not receive the documents as stated in the sale agreement and there was no title deed. He further testified that he has been pursuing title to this land and that he has evidence of his structure on the suit land.

On re-examination he testified that his parcel of land is **33 by 100ft** and he relies on the Sale Agreement. It was his testimony that the reason as to why he has not subdivided the land is because the plots do not have title deeds though he had been promised title deeds. He further testified that he did a search on the land and that is why he paid before the title was out. He testified that some receipts were issued by the Secretary and that all the payments he made were for the suit property. Further that his lawyer carried out a search and that he built the kiosk in the **year 2001** and later the other structures.

On the **4th of July 2018**, the Court directed the parties to file written submissions and in compliance with the said directive the Plaintiff through the Law Firm of **Kangethe Waitere & Co. Advocates** filed their submissions on **5th June 2018** and relied on various decided cases. The Defendants did not file any submissions despite being granted various chances to do.

The Court has carefully read and considered the pleadings of the parties the evidence adduced and the written submissions by the Plaintiff and finds that the issues for determination are;

- 1. Whether the registration of the Plaintiff as the owner of parcel land No. L.R 13858/97 is valid.*
- 2. Whether the Defendants are entitled to the suit property by way of Adverse possession.*
- 3. Whether the Defendants are entitled to the orders sought.*
- 4. Whether the Plaintiffs are entitled to the orders sought.*

1. Whether the registration of the Plaintiff as the owner of parcel land No. L.R 13858/97 is valid.

The Plaintiff through the evidence of its witnesses alleged that it bought the suit land from one **Eliud Ngala Mwendwa** and to this effect the Plaintiff has produced a **Sale Agreement** dated **1st September 2000**, and a transfer document dated **18th September 2000**. The Plaintiff also produced a Certificate of title indicating that the said **Eliud Ngala** is the one who was the registered owner of the suit property before the same was transferred to the Plaintiff.

On the other hand, the Defendants have alleged that they bought the suit land from a Company that is called **One 2 One Investment** that is owned by the sons of the said **Eliud Ngala Mwendwa**, who was the registered owner of the suit property. The Sale Agreements by the Defendants are dated **1st August 2000**.

There are two Sale Agreements that had been involved in the alleged purchase of the suit properties by both the Plaintiff and the Defendants who had each their own Sale Agreements. In order to determine whether a Sale Agreement for purchase of land is valid, the Court is required to interrogate whether it has met the threshold as envisaged under **Section 3 (3)** of the **Contract Act**.

The parties have produced sale agreements before this Court .Further that the same were reduced into writing and signed by all the parties. **Section 3 (3)** of the **Contract Act** provides that;

“3(3)No suit shall be brought upon a contract for the disposition

of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

The Court has carefully perused the sale agreements produced as Exhibit by the Plaintiff and the Defendants and noted that the same is in writing and signed by the parties. They thus met the requirements of **Section 3(3)** of the **Contract Act**. Further the agreement for sale

contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreements confirms that the same is a valid sale agreement which is enforceable by the parties. See the case of **Nelson Kivuvani...Vs...Yuda Komora & Another, Nairobi HCCC No.956 of 1991**, where the Court held that:-

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

The Court has already held that the Sale Agreements are valid. However the Court still has to determine which of the Sale Agreement to uphold. In the Sale Agreement produced by the Defendants the Court notes that the said **One 2 One Investment Company** has been listed as the vendor and the registered owner of the suit property, However no documentation has been provided before this Court to indicate that the said **One 2 One Investment** are the registered owners of the suit property. Further the Court notes that the receipts that have were presented by the 2nd Defendant do not relate to this suit property and therefore there is no way that the 2nd Defendant could say that he was purchasing the instant suit property while being issued with receipts for a different property.

On the contrary, the Plaintiff produced a Sale Agreement that this Court has held and found is valid. Further it has also produced a transfer document and a certificate of title indicating that the said **Eliud Ngala Mwendwa** was the registered proprietor of the suit land. The Plaintiff has also produced a receipt showing that the purchase price was duly paid. The Plaintiff was then registered as the proprietor of the suit property. **Section 26(1)** of the **Land Registration Act** which was imported from **Section 28 of the Registered Land Act, Cap 300 Laws of Kenya** (Repealed) provides;

“the Certificate of Title issued by the Registrar upon registration, 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 the 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.

It then became incumbent upon the Defendants to prove that the registration of the plaintiff’ as the proprietor of the suit land was either obtained by fraud, misrepresentation, or the same was acquired illegally or unprocedurally. Further Section 24 of the Land Registration Act provides;

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease

vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Also see the case of **Dr. Joseph Arap Ngok...Vs...Justice Moiwo Ole Keiwua & 5 Others, Civil Appeal No.Nai.60 of 1997**, where the Court held that;

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

In the absence of any of the above factors, and the Court having held that the Plaintiff’s properly bought the suit land, paid for the purchase price and transfer was effected, this Court therefore finds and holds that the registration of the Plaintiff as the proprietor of the suit property is valid.

2. Whether the Defendants are entitled to the suit property by way of Adverse possession.

The Defendants have alleged in their Counter Claim that they have

been in the suit property from the year **1999** and have been in an interrupted possession and occupation of the suit property and therefore they are entitled to the same by way of adverse possession. The Plaintiff on the other hand has denied these allegations and called witnesses who testified that when they bought the suit land the same was vacant and that they visited the suit property from time to time from the time it was bought to the year **2011** when they noticed that the Defendants had encroached onto their property. PW1, PW2, PW3 testimonies collaborated each other where they claimed that they had visited and inspected the suit property and that they had found none on the suit property for all those years.

On the other hand, the Defendants in their Defence had claimed that they took possession of the suit property in the year **1999 and 2000**, however their **Sale Agreements** are dated **August 2001**. The question then begs whether they took possession even before entering into a sale agreement with the Vendor. Further in their testimonies in Court, the Defendants averred that they took possession of the suit property in the year **2001**. However, the Court notes that the evidence of the Defendants and their pleadings are contradicting and the same calls for a red flag. To further reinforce their allegations that they have been in possession of the suit land for a continuous period of **14 years** as alleged, the Defendants produced water bills and electricity bills as evidence of their occupation and possession. This Court has carefully perused the said bills and notes

that the same were issued between **2011 and 2012** and therefore concurs with the Plaintiff's submissions and the testimony that the Defendants occupied the suit land within the period of **2011 and 2013** uninterrupted.

Section 107 of the **Evidence Act**, provides that;

"1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

The Defendants having alleged that they were in continuous occupation of the suit property for a continuous period of over **twelve years** as required by law, the onus was upon them to prove this fact. It is this Court opinions that the Defendants have failed to prove that they had been in occupation and possession of the suit land from either the year **1999** or the year **2001**. For Court to find that adverse possession exists a party must prove that possession claimed was adequate and in continuity. See the case of **James Maina Kinya...Vs...Gerald Kwendaka [2018] eKLR**, where the Court held that:-

*The law in respect to adverse possession is now settled. For one to succeed in a claim of adverse possession he must satisfy the following criteria stated in the case of **Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430**, where the Court held;*

"Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances".

*In the case of **Public Trustee vs. Wanduru, Madan J A** stated as follows; -*

"... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run".

From the foregoing this Court finds and holds that the Defendants have failed to prove their claim of Adverse Possession and therefore they are not entitled to the same.

3. Whether the Defendants are entitled to the orders sought.

In their Counter Claim the Defendants had urged the Court to find that the Plaintiff's title had been extinguished by effluxion of time and they are therefore entitled to adverse possession. They had also sought to be registered as the owners of the suit property and urged the Court to grant them General Damages.

This Court has already held that the Plaintiff held a valid title to the suit property. The Court further held that the Defendants are not entitled to the suit by way of adverse possession. In this regard therefore, the Court finds that the Counter claim by the Defendant is not merited as they have failed to prove their case on a balance of probability and the same is dismissed wit cost to the Plaintiff.

4. Whether the Plaintiffs are entitled to the orders sought.

This Court has found that the Plaintiff has been able to prove that it's the valid registered owner of the suit property and as such entitled to the Orders of permanent injunction. The Plaintiff is also entitled to vacant possession.

On the prayer of Mesne Profits, Section 2 of the **Civil Procedure Act Cap 21 of the Laws of Kenya** defines 'mesne profits' as follows:-

"mesne profits", in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

Mesne Profits being special damages must therefore be specifically pleaded and proved. As the Plaintiff did not specifically plead the same, the Court finds that the Plaintiff is not entitled to the same.

On the prayer for General Damages, in **Clerk & Lindell on Torts (17th Edition)** para 17-01, 'Trespass' is defined thus:-

“An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil of land also constitutes trespass”

From the above definition, it would therefore mean that the Defendants entered onto the suit property of the Plaintiffs without any justifiable cause and without its consent and consequently the Court find and holds that the Plaintiff is entitled to General Damages. In calculating the said damages, it is not necessary that the plaintiff should prove that damages occurred. However all that matters is that there was an unlawful entry and then the court would calculate the damages.

Having considered the circumstances of this case and being persuaded by the above findings, the Court finds an award of **Kshs.200,000/=** as general damages is adequate and proceeds to award the same.

The sum total of the matter herein is that having carefully read and considered the pleadings by the parties, the evidence adduced and the written submissions, the Court finds that the Plaintiff has proved its case on the required standard and consequently the Court enters Judgment for the Plaintiff against the Defendants jointly and severally in terms of **prayers No.(a), (b), (c), (d) and (f)**. Further the Plaintiff is **awarded general damages** to the tune of **Kshs.200,000/=** and the Defendants are directed to vacate the suit premises within a period of **60 days** from the date hereof.

Failure to vacate as directed above, the Plaintiff is at liberty to apply for eviction of the Defendants herein. However, the Defendants' Counter-claim is dismissed entirely with costs to the Plaintiff.

It is so ordered.

Dated, Signed and Delivered at Thika this 18th day of October, 2019.

L. GACHERU

JUDGE

18/10/2019

In the presence of

Mr. Githinji holding brief for M/S Kangethe for the Plaintiff

No appearance for the Defendants though aware of the Judgment date.

Lucy - Court Assistant

Court – Judgment read in open court.

L. GACHERU

JUDGE

18/10/2019