



**Kirunyu v Joreth Limited & another (Environment & Land Case 920 of 2012) [2024] KEELC 1150 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1150 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 920 OF 2012  
OA ANGOTE, J  
FEBRUARY 29, 2024**

**BETWEEN**

**JOSEPH NJENGA KIRUNYU ..... PLAINTIFF**

**AND**

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

**ALPHA REALTY COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit by way of a Plaint filed in court on 30<sup>th</sup> November, 2012. The Plaint was amended on 11<sup>th</sup> October, 2013 and on 25<sup>th</sup> August, 2014. In what he refers to as his Amended Amended Plaint, the Plaintiff sought for the following orders:
  - a. A permanent injunction restraining the Defendants whether by themselves, their agents and/ or servants or any of them or anybody else whomsoever acting on their behalf from offering for sale or disposing of, transferring, wasting, taking possession of, alienating or otherwise howsoever from dealing with the parcel of land known as L.R. No. 13330/597 or any part thereof in any manner whatsoever adverse to the interest of the Plaintiff;
  - b. A declaration that the Plaintiff has become entitled to the parcel of land known as L.R. No. 13330/597 by way of adverse possession;
  - c. An Order of specific performance to the effect that the First Defendant do transfer forthwith the parcel of land known as L.R. No. 13330/597 to the Plaintiff and in default thereof the Deputy Registrar of this Honourable Court be authorized to sign the transfer documents of the parcel of land known as L.R. No. 13330/597 in favour of the Plaintiff;
  - d. Costs of this suit;
  - e. Interest on the costs above at Court Rates; and



- f. Any other relief as this Honourable Court may deem just to grant.
2. In the Plaint, the Plaintiff averred that the 1<sup>st</sup> Defendant was at all times material to the suit a signatory to all dealings in the property known as L.R. No. 13330/597, the suit property herein; that in February, 1975 and vide an oral agreement entered into by the 1<sup>st</sup> Defendant as vendor and the Plaintiff as purchaser, the 1<sup>st</sup> Defendant sold the suit property to him at an agreed price of KShs. 8,000.
  3. It was averred by the Plaintiff that he made several payments amounting to KShs. 8,000 to Thome Farmers No. 5 Limited, now known as Joreth Limited, the 1<sup>st</sup> Defendant herein; that he thereafter entered into the suit property, which is situated at Thome in Nairobi County, in the year 1975 and that he has been in occupation since then.
  4. The Plaintiff averred that despite paying the money into the Vendor's account, the 2<sup>nd</sup> Defendant unlawfully claims to have bought the suit property from the 1<sup>st</sup> Defendant, which claim is baseless and that despite numerous requests and demands to the 1<sup>st</sup> Defendant to settle the matter, the 1<sup>st</sup> Defendant has refused and/or neglected to revert and hence the suit.
  5. The Defendants opposed the suit. The 2<sup>nd</sup> Defendant filed a Defence and Counterclaim dated 17<sup>th</sup> November, 2014 denying knowledge of the oral agreement and payment of the KShs. 8,000 as alleged. It further denied that the Plaintiff had been in occupation of the suit property since 1975, and instead averred that it bought the suit property in the year 2009 and that at the time of the said purchase, the suit property was not occupied by the Plaintiff or any other person.
  6. According to the 2<sup>nd</sup> Defendant, the Plaintiff put up structures on the suit property after it purchased the suit property in a bid to frustrate its legitimate claim over the suit property and that it would not have purchased the suit property if vacant possession was not guaranteed by the 1<sup>st</sup> Defendant.
  7. The 2<sup>nd</sup> Defendant further denied knowledge of payment of any monies to the 1<sup>st</sup> Defendant or any request to the 1<sup>st</sup> Defendant to resolve the dispute. It averred that the Plaintiff cannot claim purchaser's interest over the suit property while at the same time seeking orders of specific performance and also seek that the suit be transferred to him by virtue of adverse possession.
  8. It is the 2<sup>nd</sup> Defendant's case that the Plaintiff's claims are misleading and contradictory because he claims to have bought the property in 1975 but in his Supporting Affidavit sworn on 20<sup>th</sup> December, 2012, he stated that he entered into the Agreement for purchase of the suit property in 2012; and that the Plaintiff has shown no basis for his claim over the suit property and his claim should be dismissed with costs.
  9. The 2<sup>nd</sup> Defendant averred in the counterclaim that it purchased the suit property from the 1<sup>st</sup> Defendant in 2009; that it conducted all due diligence to satisfy itself that the 1<sup>st</sup> Defendant was the registered proprietor of the suit property at the time of purchase and that it was not aware of any transaction between the Plaintiff and the 1<sup>st</sup> Defendant at the time it purchased the property.
  10. It is the 2<sup>nd</sup> Defendant's case that it was issued with a Certificate of Title on 4<sup>th</sup> September, 2014 and that it is now the registered owner of the suit property. The 2<sup>nd</sup> Defendant prayed for judgment against the Plaintiff as follows:
    - a. A declaration that the 2<sup>nd</sup> Defendant is the bona fide purchaser for value and the lawful registered owner of L.R. No. 13330/597;
    - b. A permanent injunction restraining the Plaintiff by himself, his agents, servants, employees, representatives or anybody else acting on his behalf from entering into, alienating, subdividing,



transferring, leasing, charging, dealing in, transacting on or in any manner disposing of the property as L.R. No. 13330/597;

- c. An order of eviction from the suit property of the Plaintiff, his agents, servants, employees, representatives or anybody else- acting on his behalf;
  - d. Damages for trespass;
  - e. The costs of the suit;
  - f. Any other relief that this Honourable Court deems fit and just to grant.
11. The 1<sup>st</sup> Defendant filed its Defence and Counterclaim dated 3<sup>rd</sup> May, 2016 where it denied being a signatory to any dealings as alleged by the Plaintiff. It further denied entering into a contract orally or at all with the Plaintiff and averred that it would challenge the validity of the oral contract in regard to the purchase of the suit property. The 1<sup>st</sup> Defendant denied the allegation that any payment was done to Thome 5 Farmers Limited, its alleged predecessor; or that the Plaintiff had been in possession of the suit property since 1975.
  12. The 1<sup>st</sup> Defendant averred that it became the legal and registered owner of L.R. No. 13330 on 19<sup>th</sup> December, 2000; that the said L.R. No. 13330 came about as a result of the amalgamation of its two titles, L.R. No. 4920/3 and L.R. No. 4921/3 which it had held since the early 1950s; that the suit property herein is a subdivision of the said L.R. No. 13330 and that it has never been registered in any other person's name apart from the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant upon sale and transfer.
  13. The 1<sup>st</sup> Defendant denied the allegation that the Plaintiff paid the purchase price into its account and averred that the Plaintiff failed to make good payment of the purchase price hence any agreement thereof, which was in fact denied, was rescinded. The 1<sup>st</sup> Defendant admitted the sale and transfer of the suit property to the 2<sup>nd</sup> Defendant and prayed that the Plaintiff be struck out and dismissed with costs to the Defendants.
  14. In its Counterclaim, the 1<sup>st</sup> Defendant averred that at all material times to the suit, it was the registered owner of the suit property; that it is not the same as Thome Farmers No. 5 Limited neither is it related by partnership, joint venture or in any other way; that it declined the Plaintiff's offer of KShs. 4,000,000 as consideration for the suit property because the property had already been sold to the 2<sup>nd</sup> Defendant and that the offer was an acknowledgment that the suit property belonged to the 1<sup>st</sup> Defendant.
  15. In the Counter claim, the 1<sup>st</sup> Defendant prayed for judgment against the Plaintiff for:
    - a. An order of eviction removing the Plaintiff its servants and/or agents together with any structures illegally erected on the parcel of land L.R. No. 13330/597;
    - b. A permanent injunction restraining the Plaintiff either by himself, his agents or servants from trespassing or in any way interfering with the Defendants' rights to the suit property L.R. No. 13330/597; and
    - c. General damages for loss of user and trespass over the suit property.
  16. In response, the Plaintiff filed a Reply to Defence and Defence to the 2<sup>nd</sup> Defendant's Counterclaim dated 15<sup>th</sup> December, 2014 denying the contents of the Defence and reiterated the averments in his Amended Amended Plaintiff. He further denied the contents of the Counterclaim and maintained that he is still the rightful and absolute owner of the suit property having purchase it from the 1<sup>st</sup> Defendant.



17. The Plaintiff also filed a Reply to the 1<sup>st</sup> Defendant's Defence and Defence to the Counterclaim denying every allegation contained in the 1<sup>st</sup> Defendant's Defence and joining issue with the 1<sup>st</sup> Defendant on the matters contained therein. The Plaintiff denied non-observance of any terms or conditions on his part as alleged in the Defence and reiterated that it is the 1<sup>st</sup> Defendant who is in breach by failing to transfer the suit property to him after receiving the purchase price.
18. The Plaintiff, in response to the 1<sup>st</sup> Defendant's Counterclaim, denied all averments in the counterclaim. He averred that the 1<sup>st</sup> Defendant was indeed the registered owner of the suit property but that the said registration was in trust for him; that the Plaintiff was not privy to the information that the 1<sup>st</sup> Defendant was not related to Thome Farmers No. 5 Limited; that he did not make an offer of KShs. 4,000,000; as alleged and further that he made no offer to make late payments to the 1<sup>st</sup> Defendants.

### **Hearing and Evidence**

19. The Plaintiff testified as PW1 and gave sworn testimony. PW1 stated that he bought the suit property from one Mr. Arthur Magugu who was a director of the 1<sup>st</sup> Defendant herein; that he paid a total of KShs. 3,100 to Thome Farmers Limited No. 5 and was issued with a share certificate; that on 19<sup>th</sup> July, 1979, he participated in balloting and was given a half acre of parcel of land known as Plot No. 203; that he fenced the property and put up a 3-bedroomed permanent house and grew napier grass and maize and that no one has ever come to disturb him and is still utilizing the land.
20. He testified that he signed a transfer on 6<sup>th</sup> February, 2007 which was signed by Njenga Karume and Harun Muturi on the part of the 1<sup>st</sup> Defendant; that he paid KShs. 8,100 as stamp duty but was never given any title to the plot; that on inquiry, Kimani Kahiro Advocate informed him that he had forwarded his documents to Njeri Kariuki Advocate, but the said Njeri Kariuki refused to see him when he visited her offices and threatened to call the police and that he then registered a caveat at the Lands Registry.
21. It was the evidence of PW1 that the suit property was in the name of the 1<sup>st</sup> Defendant and that he never ordered that the caveat be removed and he did not receive any notice of its removal despite the lands office having all his particulars as the caveator.
22. It was the Plaintiff's testimony that he paid KShs. 70,000 and the balance of KShs. 130,000 was to be paid upon receipt of the title; that he was ready and willing to pay the balance and that he never refused to complete, the agreement but the 1<sup>st</sup> Defendant transferred the property to the 2<sup>nd</sup> Defendant. It was the evidence of PW1 that he does not know how the land was transferred to the 2<sup>nd</sup> Defendant and that the 2<sup>nd</sup> Defendant never visited the suit property seeking to evict him and only met him during hearing of this suit.
23. He testified further that the Affidavit of Kimani Kahiro Advocate in the 1<sup>st</sup> Defendant's List of Documents was proof that the Advocate was working for the 1<sup>st</sup> Defendant; that his transfer was lodged at the lands office but he has never received a title and that all residents in the area bought their parcels through Thome 5 Farmers Limited.
24. It was the evidence of PW1 that he was not a party to HCCC No. 6206 of 1992 and knew nothing about it; that he had been on the land since 1975 and further that the 1<sup>st</sup> Defendant had no right to sell the suit property to the 2<sup>nd</sup> Defendant.
25. Finally, PW1 testified that the Transfer in his Bundle of Documents files was prepared by the 1<sup>st</sup> Defendant and he paid stamp duty as per the stamp duty document produced; that the transfer was



- lodged at the land registry; that there was no demand made for the balance of Kshs. 130,000 in exchange of the title in his name; that he was not informed that he was late in payment; that Thome Farmers No. 5 Limited is the one that applied to be joined in HCCC No. 6206 of 1992 and that it is not true that the 1<sup>st</sup> Defendant did not know of the sale of the land to Thome Farmers No. 5 Limited as claimed in the counterclaim.
26. David Mbugua Gachengeci, a director of the 2<sup>nd</sup> Defendant took to the stand first and testified under oath as DW1. DW1 stated that he found out about the property through a family member who lives at Thome Estate; that the family member got him in touch with the 1<sup>st</sup> Defendant's manager and that he visited the suit property and found only green napier grass and no buildings on it.
  27. DW1 stated that he was shown a map of the parcel of land when he visited by Njeri Kariuki Advocate who confirmed its availability and discussed the price; that he was given a letter of offer which he accepted and that although the 2<sup>nd</sup> Defendant holds the title, it has never taken possession of the land as the Plaintiff moved in and occupied it while he was processing the title documents.
  28. It was the evidence of DW1 on behalf of the 2<sup>nd</sup> Defendant that the suit property is registered in the name of the 2<sup>nd</sup> Defendant Company where he and his wife are directors and they intend to develop flats thereon and that he has sought for damages for trespass, an injunction and costs of the suit.
  29. In cross-examination, DW1 testified that he was not aware that Joreth Limited was the same as Thome Farmers No. 5 as he was not a shareholder of either company; that he could not recall if there was a deed plan for the suit property and that the Daily Nation Notice directed purchasers to the firm of Kahiro Kimani advocate and the letter from the said Advocate dated 12<sup>th</sup> August, 2010 referred to the sale of the suit property.
  30. DW1 testified that no agreement was entered into but that they acted on the basis of the letter of offer, which was addressed to him; that he did not write a letter instructing the 1<sup>st</sup> Defendant to transfer the property to the 2<sup>nd</sup> Defendant; that although the Letter of Offer is dated 21<sup>st</sup> July, 2009, he was not in Kenya as he had left the country in June, 2009 and that he is not aware how the caveat was removed from the suit property.
  31. It was the evidence of DW1 that he was informed of the Plaintiff's interest in the land through a letter from the 1<sup>st</sup> Defendant dated 6<sup>th</sup> November, 2012; that the letter talked of another purchaser who failed to complete payment and that he was informed that someone was building on the suit property while he was in America.
  32. In cross-examination, DW1 stated that according to the Final Notice in the Nation Newspaper produced in the Plaintiff's list of Documents, it showed the 1<sup>st</sup> Defendant was the owner of L.R. No. 13330; that he paid KShs. 4,000,000/- as deposit on acceptance of the offer; and that as per the letter dated 6<sup>th</sup> November, 2012, the Plaintiff had only paid KShs. 20,000.
  33. The 1<sup>st</sup> Defendant called its manager, Jonathan Ciano, who gave his sworn testimony as DW2. He produced the bundle of documents filed on 31<sup>st</sup> May, 2016 as his Exhibit 1 and the bundle of documents dated 2<sup>nd</sup> May, 2017 as his Exhibit 2. DW2 testified that the 1<sup>st</sup> Defendant amalgamated its two properties L.R. 4920/3 and L.R. No. 4921/3 into L.R. No. 13330 and that it never sold the land to anybody before the amalgamation.
  34. It was the evidence of DW2 that the 1<sup>st</sup> Defendant Company and Thome Farmers No. 5 Limited are different entities; that Thome Farmers never sold the land on behalf of the 1<sup>st</sup> Defendant; that the 1<sup>st</sup> Defendant became aware of and sued the 23 individuals who were claiming to have bought land from Thome Farmers and sued them in HCCC 6206 of 1992; that they sought for an injunction against



the 23 individuals but the Plaintiff was not one of them and that Thome Farmers was later joined in that suit as the 24<sup>th</sup> Defendant.

35. DW2 testified that the case was resolved by way of a consent order with specific defendants and later the consent was opened up to all buyers; that the Defendants were to pay KShs. 200,000 each to the 1<sup>st</sup> Defendant's then Advocate, Kimani Kahiro, as well as the payable stamp duty on the transfer, among other charges, and that within 6 months they were to be given titles.
36. According to DW2, many buyers did not comply with conditions in the consent order; that their plots were offered to willing buyers; that the 2<sup>nd</sup> Defendant received a Letter of Offer dated 21<sup>st</sup> July, 2009 for the suit property and that it paid for it and the land was transferred to it.
37. In cross examination, DW2 stated that there was no agreement to sale the land before amalgamation; that the Agreement between the 1<sup>st</sup> Defendant and Thome Farmers No. 5 Limited was never completed hence HCCC 6206 of 1992 and that the letter dated 23<sup>rd</sup> February, 1987 addressed to Hon. Magugu in respect of L.R. No. 4920/3 and L.R. 4921/3 confirmed that the two parcels belonged to the 1<sup>st</sup> Defendant.

### **Submissions**

38. The Plaintiff's Advocate submitted the Plaintiff has had possession of the suit property since 1979; that by the time of filing this suit, he had been in possession of the suit property for 33 years; that he continues to occupy the suit property and his occupation has been peaceful, continuous, uninterrupted and visible to anyone who ventured into the premises; that the 1<sup>st</sup> Defendant is the registered proprietor of the mother title, and that DW 2 confirmed that the Plaintiff's entry into the suit property was without permission of the 1<sup>st</sup> Defendant and therefore adverse to its title.
39. It was submitted that assertion of rights/interest by a proprietor occurs when the owner takes legal proceedings or makes an effective entry into the land (Ndathi vs Itumo & 2 Others (2002)2 KLR 642); that in this case, no action was taken by the Defendants to assert their rights on the property before filing of this claim; that the 2<sup>nd</sup> Defendant filed its counterclaim on 31<sup>st</sup> December, 2014 while the 1<sup>st</sup> Defendant filed its counterclaim on 31<sup>st</sup> May, 2016 and that since 12 years after 1979 expired in 1991 and the 1<sup>st</sup> Defendant's claims over the property were extinguished by operation of law.
40. Counsel submitted that a change in ownership by transfer of the title to the suit property from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant did not affect the Plaintiff's claim. Reliance was placed on the case of Githu vs Ndeete (1964) KLR 776 where it was held that change in ownership of land occupied by another under adverse possession does not interrupt such person's adverse possession.
41. With regard to the letter dated 27<sup>th</sup> August, 2012 offering to pay KShs. 4,000,000/-, counsel submitted that the said letter makes reference to another letter dated 12<sup>th</sup> July, 2012 that was not produced in court by the 1<sup>st</sup> Defendant; that the Plaintiff wrote a letter dated 12<sup>th</sup> September, 2012, 14 days after revoking the letter of 27<sup>th</sup> August, 2012 because it was wrongly written and that the same therefore does not carry any evidential value.
42. The Plaintiff's Advocate submitted that since the Plaintiff was not a party to HCCC No. 6206 of 1992, the consent order emanating therefrom was not binding on him and that this being the case, and since the said suit was not heard and determined on merit, the suit did not interrupt the Plaintiff's adverse possession of the suit property.
43. It was further submitted that on 16<sup>th</sup> October, 2014, the interim order granted on 18<sup>th</sup> February, 2013 was extended until the ruling date; that the ruling was delivered on 19<sup>th</sup> December, 2014 and the



transfer to the 2<sup>nd</sup> Defendant was registered on 4<sup>th</sup> September, 2014 while the orders were still in force and that the 1<sup>st</sup> Defendant, despite being aware of the orders preserving the suit property went ahead to transact contrary to the said orders and therefore the said transaction was unlawful, null and void ab-initio.

44. The 1<sup>st</sup> Defendant's Advocate submitted that the 1<sup>st</sup> Defendant was the registered owner of the mother title L.R. No. 13330 on 19<sup>th</sup> December, 2000 and acquired an indefeasible title under Section 26 of the Land Registration Act, and which title it transferred to the 2<sup>nd</sup> Defendant and that there is no evidence produced to show that the title transferred to the 2<sup>nd</sup> Defendant was acquired illegally.
45. Counsel submitted that Section 3(3) of the Law of Contract Act requires that no suit on a contract for the disposition of land can be entertained unless the contract is in writing, and therefore the alleged oral contract between itself and the Plaintiff is not valid; that due to the doctrine of privity of contract, the 1<sup>st</sup> Defendant cannot be bound by a sale he was not a party to and that the proper party who sold the land was Thome Farmers No.5 Limited.
46. On Adverse Possession, counsel submitted that the Plaintiff failed to satisfy all the conditions for the grant of the prayer for adverse possession; that the 1<sup>st</sup> Defendant knew all the trespassers on the mother Title before filing of HCCC 6202 of 1992 and that if the Plaintiff was in possession of the suit property, he would have been included as a party in the suit.
47. It was submitted that he who alleges must prove; that the Plaintiff failed to prove that he had been in open and notorious occupation of the suit property for over 12 years; and that the developments by the Plaintiff were done after the 2<sup>nd</sup> Defendant purchased the suit property.
48. The 2<sup>nd</sup> Defendant's Advocate submitted that the Plaintiff's allegations of an oral agreement between himself and the 1<sup>st</sup> Defendant was not proved. On the claim for adverse possession, the 2<sup>nd</sup> Defendant's Advocate submitted that a claim for adverse possession cannot arise out of a failed agreement unless the same is rescinded, repudiated or declared null and void; that the Plaintiff's claim did not comply with the mandatory provisions of Order 37 Rule 7 of the Civil Procedure Rules because it was not commenced by way of Originating Summons; that the Plaintiff did not meet the required threshold for adverse possession because he failed to show continuous possession of the land for a period of over 12 years and that his occupation was not adverse to the interests of the 2<sup>nd</sup> Defendant.
49. He submitted that computation of time could only commence from 2012 when the 2<sup>nd</sup> Defendant became aware of the Plaintiff's claim over the land and relied on the case of Titus Kigoro vs Peter Mburu Kimani (2015) eKLR; that time also stopped running when the 2<sup>nd</sup> Defendant filed its counterclaim to assert its rights as the registered owner of the suit property and that therefore the Plaintiff had failed to prove his claim and the same should be disallowed.
50. On the claim for specific performance, Counsel for the 2<sup>nd</sup> Defendant submitted that the prayer did not meet legal requirements because Thome Farmers No.5 Limited was never registered as the owner of the suit property and could not give better title than it had; that the Plaintiff could only claim specific performance from the party he contracted with, which is Thome Farmers No.5 Limited and not the 1<sup>st</sup> Defendant herein and that in any event, the alleged contract did not comply with Section 3(3) of the Law of Contract Act that requires a contract for disposition of land to be in writing.
51. It was also submitted on behalf of the 2<sup>nd</sup> Defendant that its counterclaim ought to be allowed with costs to the 2<sup>nd</sup> Defendant because there is no doubt that it is the registered owner of the suit property holding an indefeasible title; that it is not privy to any fraud or misrepresentation in acquiring the title to the suit property; that the Plaintiff has neither pleaded nor proved any such fraud or



misrepresentation and the court should thus uphold the sanctity of its title; and that the 2<sup>nd</sup> Defendant had shown a strong prima facie case for grant of a permanent injunction against the Plaintiff.

52. In response to the Plaintiff's submissions, the 2<sup>nd</sup> Defendant's Advocate argued that it was not enough to allege that the Plaintiff's children and employees lived on the suit property; that the Plaintiff also failed to prove the alleged payment of KShs. 70,000 to the 1<sup>st</sup> Defendant's Advocate; that the photos produced in court were not dated and thus could not give an indication of when the Plaintiff entered into the suit property and that the transfer of the suit property to the 2<sup>nd</sup> Defendant was registered on 18<sup>th</sup> October, 2012 before the order in court barring dealings with the land was made on 18<sup>th</sup> February, 2013.
53. According to the 2<sup>nd</sup> Defendant's counsel, if indeed the registration was done contrary to the court order, the Plaintiff should have instituted contempt of court proceedings against it; that all the authorities relied on by the Plaintiff can be distinguished by the fact that they were commenced in the proper way by Originating Summons and that the 1<sup>st</sup> Defendant asserted its right as registered owner when it filed HCCC No. 6206 of 1992.

### **Analysis and Determination**

54. Having considered the Pleadings, the testimony, the evidence and submissions of the parties, the following issues arise for determination: -
- i. Whether the suit is fatally defective for failure to comply with Order 37 Rule 7(1) & (2) of the Civil Procedure Rules, 2010?
  - ii. Whether there is a valid sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant and whether the contract was properly rescinded?
  - iii. Whether the occupation and possession of L.R. No. 13330/597 by the Plaintiff constituted adverse possession?
  - iv. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are entitled to the prayers sought in their respective counterclaims?
  - v. Who bears the costs of the suit?
55. A brief background of the suit is that Joreth Limited, the 1<sup>st</sup> Defendant herein, was the registered owner of two parcels of land known as LR No 4290/3/1 and 4921/3/1 which were amalgamated to form L.R. No. 13330. Thome Farmers No. 5 Limited (Thome Farmers) is alleged to have bought the parcel of land known as L.R. No. 13330, the Mother Title, took possession thereof, commenced sub-division of the land into half acre plots and allocated the plots to its shareholders, vide a sub-division scheme approved by the Ministry of land and Settlement through a letter dated 23<sup>rd</sup> January, 1987.
56. The evidence before this court shows that the Plaintiff is the registered proprietor of one (1) share in the entity known as Thome Farmers No 5 Limited, having been registered on 29<sup>th</sup> July, 1979 vide Share Certificate No. 508. The evidence further shows that Thome Farmers No. 5 Limited did allocate him the suit premises then known as Plot 203, which the Plaintiff now claims is the suit property and which arose from the subdivision, through a process he referred to as balloting.
57. The Plaintiff produced in evidence a card issued by Thome Farmers No. 5, which shows that he was allocated Plot No. 203. It was his evidence that after the allocation of the suit property, he took possession of the suit property and that he built a 3-bedroomed permanent house on one part of the suit property, and begun to farm on the remaining part and generally made use of the suit property.



58. It is the Plaintiff's case that as at the time of filing of the suit in 2012, he had been in open and uninterrupted possession of the suit property for a period of over 33 years. The Plaintiff argued that he had acquired title to the suit property by way of adverse possession, and that any claim by the Defendants or anyone else had been extinguished.
59. The 1<sup>st</sup> Defendant on its part alleged that it filed a suit in 1992, to wit HCCC No 6206 of 1992, against people it considered trespassers on the parcel of land. This suit was against all the alleged trespassers. Later on, Thome Farmers No 5 Limited was joined as a party.
60. The Defendants' position was that since the Plaintiff had taken possession of the property subsequent to a sale agreement and the passing of valuable consideration, there was no adverse possession because the Plaintiff was in open and permissive possession of the suit property, and not adverse possession and that the Plaintiff failed to show that he had been in possession of the suit property for the requisite number of years, and therefore did not satisfy the requirements for adverse possession.
61. The Defendants further alleged that the oral agreement for sale of land was not valid for failure to comply with Section 3(3) of the *Law of Contract Act*; and that even if there was a contract, the Plaintiff's failure to complete payment of the purchase price rescinded it. According to the 2<sup>nd</sup> Defendant, having been registered as proprietor of the suit property, his title to it is indefeasible and the Plaintiff should be ordered to vacate the same.
62. The 2<sup>nd</sup> Defendant in its submissions argued that the Plaintiff's purported claim for adverse possession failed to comply with the mandatory provisions of the Civil Procedure Rules, 2010 and therefore is defective and void ab initio. According to the 2<sup>nd</sup> Defendant, the suit was commenced by way of a Plaint and not an Originating Summons contrary to the *Limitation of Actions Act* and Order 37 Rule 7(1) and (2) of the Civil Procedure Rules.
63. When the suit herein was commenced, the Plaint did not contain the prayer for adverse possession. The said prayer was introduced when the Plaint was amended. The Amended Plaint raises other prayers including an order for specific performance, a permanent injunction, validity of the alleged oral agreement for sale as well as the transfer of the property to the 2<sup>nd</sup> Defendant which could not be adequately ventilated if the suit was brought by way of Originating Summons filed pursuant to the provisions of Order 37 Rule 7 of the Civil Procedure Rules.
64. Indeed, it is trite that Originating Summons is only intended to deal with simple matters and not complex issues. The Court of Appeal in *Ahad vs CJE* [2019] eKLR held as follows:

“It is however established that the procedure of originating summons is not intended for complex matters or matters where facts are contested. As stated by the Court in *Kenya Commercial Bank Ltd vs. Osebe* (above):

“The procedure of originating summons is intended for simple matters and enables the court to settle them without the expense of bringing an action. The procedure is not intended for determination of matters that involve serious questions. The procedure should not be used for the purpose of determining disputed questions of fact. The procedure of originating summons is designed for the summary or ad hoc determination of points of law, construction or certain specific facts for obtaining of specific directions of the court such as trustees, administrators or the courts execution officers.”



65. Further, courts have held that a claim for adverse possession can still be raised by way of a Plaintiff and even a counter claim. In *Emily Chepkor Chepkwony vs Paul Arap Chandock (2021) eKLR*, the court held as follows:

“8. The Court of Appeal referring to the holding in the *Njuguna Ndatho case (surpa)* in the *Chevron (K) Ltd case (supra)* states thus:-

“The courts, have since this decision, held that a claim by adverse possession can be brought by a plaintiff, See *Mariba -vs- Mariba Civil Appeal No.188 of 2002*, Counterclaim or defence as was the case here. See *Wabala -vs- Okumu (1997) LLR 609 (CAK)*. In *Gulam Mariam Noordin -vs- Julius Charo Karisa Civil Appeal No 26 of 2015*, where the claim was raised in the defence this court in rejecting the objection to the procedure stated as follows:-

“Where a party like the respondent is in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of *Wabala -vs- Okumu (1997) LLR 609 (CAK)* which like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The court of Appeal in upholding the claim did not fault the procedure. Similarly, in *Bayete Co. Ltd -vs- Kosgey (1998) LLR813* where the plaintiff made no specific plea for adverse possession, the plea was nonetheless granted”.

From the above exposition of the law by the court of appeal as relates to the competency of suits commenced by a plaintiff where adverse possession is raised, it is evident that a suit is not rendered fatally defective merely because the suit is commenced by way of a plaintiff rather than by way of an originating summons. It is not lost to the court that in the majority of cases where the plaintiff instituted a claim for title on the basis of adverse possession commenced by an originating summons, the court invariably directs that the originating summons be deemed to be a plaintiff and the response thereof a defence and that the suit be heard by way of Viva voce evidence. This essentially is to enable the evidence of the parties to be tested under cross examination... The nature of the prayers sought in the plaintiff are such as would invite oral evidence and I am satisfied an originating summons would not have been an appropriate pleading to afford the parties the opportunity to fully ventilate their issues. No party



would suffer any prejudice if the suit was permitted to proceed to formal trial as each party will have the opportunity to adduce evidence and cross examine the witnesses of the other party.”

66. This court agrees with the above sentiments.
67. From the evidence before the court, it is not in dispute that the suit property is a sub-division of L.R. No. 13330, the mother title, which was registered in the name of the 1<sup>st</sup> Defendant. It is also not in dispute that the mother title is itself derived from an amalgamation of two titles, LR. No. 4920/3 and L.R. No. 4921/3 previously held by the 1<sup>st</sup> Defendant. The suit property was on 4<sup>th</sup> September, 2014 registered in the name of the 2<sup>nd</sup> Defendant.
68. At paragraph 68 of its submissions, the 2<sup>nd</sup> Defendant denies that the transfer from the 1<sup>st</sup> Defendant to itself was registered during the pendency a court order. Counsel argues that the Transfer was registered on 18<sup>th</sup> October, 2012 which was before the issuance of the said order. This is not only an outright lie but also misleading.
69. To set the record straight, a perusal of the court file reveals that in an Affidavit sworn on 24<sup>th</sup> January, 2014 by Nancy Wanja Gachengechi, a Director of the 2<sup>nd</sup> Defendant, she deposed as follows:

“On presentation of the transfer and accompanying documents for registration, the Applicant noticed that a caveat had been entered against the suit property by one Joseph Njenga Kirunyu, the Plaintiff/Respondent herein. This is true as evidenced by the comments of the Registrar on the Application for Registration.”
70. The court has seen the application for registration of the Transfer and the Transfer. The application for registration was stamped “Received” by the lands department on 18<sup>th</sup> October, 2012. However, on the face of the application for registration, the Lands Registrar has indicated that he was unable to effect registration of the Transfer Document for, among other reasons, “there is a caveat against 13330/597 registered as IR No. 85119/537”.
71. On 3<sup>rd</sup> December, 2014, the 2<sup>nd</sup> Defendant filed together with its Defence and Counterclaim, a List of Documents dated 17<sup>th</sup> November, 2014. The last document listed therein and produced before this court is a Certificate of Title in the name of Alpha Realty Company Limited. On the face of the Certificate of Title is an endorsement by the Registrar indicating that it was presented for registration on 4<sup>th</sup> of September, 2014.
72. The Certificate of Title itself is dated 4<sup>th</sup> September, 2014. There is no explanation given as to how the 1<sup>st</sup> and 2<sup>nd</sup> Defendant’s achieved the said registration despite the Caveat being in place.
73. There is also an allegation that the Caveat lodged against the suit property may have been removed without notice to the Plaintiff who had lodged it, as by law required. The existence of the caveat is not disputed, and a copy was presented in court. The caveat was lodged on 4<sup>th</sup> October, 2011 and was registered as I.R. 85119/537 under the Registration of Titles Act (RTA), (repealed) which was still in force at the time.
74. The effect of a caveat is set out at Section 57 (4) of the RTA as follows:-

“S.



- (4) So long as any caveat remains in force prohibiting the transfer or other dealing with land, the registrar shall not, unless the caveator consents in writing or (if the caveat does not forbid registration absolutely) the transaction is expressed to be made subject to the claim of the caveator or to any conditions expressed in the caveat, enter in the register any memorandum of transfer or other instrument purporting to transfer or otherwise deal with or affect the land in respect to which the caveat may be lodged.”

75. Under the RTA, a caveat could only be removed either by an order of the court on application as set out under Section 57 (5), or by an order of the Registrar after giving notice to the caveator to remove it and upon failure to comply with the notice under Section 57(6), or by the person who lodged it under Section 57(9) of the Act.
76. Undoubtedly, this court has seen no notice of the intended removal of the caveat or an order of the court to that effect. It is therefore unclear how the Defendants managed to procure registration of the transfer to the 2<sup>nd</sup> Defendant in the circumstances, save that it may have been obtained either by fraud, mistake or misrepresentation.
77. With regard to the court order, as stated above, the transfer of the suit property was registered in favour of the 2<sup>nd</sup> Defendant on 4<sup>th</sup> September, 2014, two years after the suit herein had been filed. The Plaintiff argued that there was in existence a consent order of 18<sup>th</sup> February, 2013 preserving the suit property yet the transfer was done, the said order notwithstanding. According to the record of proceedings of that day, the court directed that:-
- “By consent of the parties, the Defendant is restrained from any further dealings with the property known as L.R. No. 13330/597 situated at Thome 5 Nairobi until inter-partes hearing on 19<sup>th</sup> March, 2013. The Defendant to file their Replying Affidavit within 14 days.”
78. On 16<sup>th</sup> October, 2014 the court directed that the orders granted on 18<sup>th</sup> February, 2013 are extended until the ruling date. In an Affidavit sworn on 5<sup>th</sup> June, 2013 by one Peter Mungai, a Special Manager of the 1<sup>st</sup> Defendant, it was confirmed that as at the date of the Affidavit, the suit property was still registered in the name of the 1<sup>st</sup> Defendant. He deposed at paragraph 5 of said Affidavit as follows:
- “That the correct position is that the Title for L.R. No. 13330/597, the subject matter herein, is still registered under the name of Joreth Limited”
79. The Ruling of this court was delivered on 19<sup>th</sup> December, 2014, yet the transfer in favour of the 2<sup>nd</sup> Defendants was registered on 4<sup>th</sup> day of September, 2014. Both Defendants being parties to this suit knew of the order of the court barring dealings with the suit property, but they ignored it and went ahead to register the transfer nonetheless, in direct contravention of the said order.
80. The lands office might not have been aware of the interim order, but the fact is that both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were aware of it. They however went ahead and lodged the transfer for registration during the pendency of the order. That act is not only contemptuous, but also constitutes fraud and misrepresentation. The 2<sup>nd</sup> Defendant cannot therefore argue that his title is indefeasible considering the circumstances under which it was registered as the proprietor.



81. The next issue I will deal with is whether there was a valid sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant. The Plaintiff's suit is predicated on the alleged oral contract for sale of the suit property entered into between the Plaintiff and the 1<sup>st</sup> Defendant. The Defendants contend that since there is no written agreement over the purported sale of the suit property, the said oral agreement is null and void ab initio, and that if at all there was an agreement, the Plaintiff failed to make good payment of the purchase price and hence any agreement thereof was rescinded.
82. From the foregoing, it is important for this Court to first determine whether there was a valid contract in place. The Plaintiff has alleged that he entered into an oral sale agreement with the 1<sup>st</sup> Defendant for the purchase of the suit property. Section 3(3) of the Law of 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.”

83. However, section 3(3) of the Law of Contract was amended in 2003. Before then, the said section provided as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it:

Provided that such a suit shall not be prevented by reason only of the absence of writing where an intending purchaser or lease who has performed is willing to perform his part of the contract-

- i. has in part performance of the contract taken possession of the property or any part thereof; or
- ii. being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

84. The Plaintiff in his Amended Amended Plaintiff states that his claim for specific performance is pegged on the alleged oral contract which was entered into in February, 1975. If indeed he took possession of the suit land before the amendment of section 3 (3) of the Law of Contract Act in the year 2003, then the alleged oral agreement is admissible in evidence.
85. However, the Plaintiff did not prove that he did meet the other terms of the alleged oral agreement, like payment of the full purchase price, neither did he call compelling evidence to show that such an agreement existed. Further, by the time the suit property was purportedly sold to him, the title had not passed to the vendor, Thome 5 Farmers Limited.



86. That being the case, an order for the prayer of specific performance cannot issue. The next issue to deal with is whether the occupation and possession of L.R. No. 13330/597 by the Plaintiff constituted adverse possession and hence entitling the Plaintiff to be registered as the owner in place of the Defendants.

87. The doctrine of adverse possession is founded on Section 7 of the *Limitation of Actions Act* which provides that:

“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.”

88. It is further anchored on Section 38 of the Act which provides inter alia:

“...where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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 the proprietor of the land.”

89. In *Gabriel Mbui vs Mukindia Maranya* [1993] eKLR, the court defined the term adverse possession as follows:

“the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it.”

90. For one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. This was explained in *Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakshwein & Another* [2015] eKLR as follows:-

“What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words, his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession. Besides adversarial entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession.”



91. This court has previously held that for an applicant to be entitled to an order that he is entitled to the land by way of adverse possession, he must meet the criteria set out in the case of *Gabriel Mbui vs Mukindia Maranya* [1993] eKLR as follows:

- “a) The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.
- b) The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
- c) The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
- d) The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
- e) Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it.
- f) The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
- g) The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
- h) The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
- i) The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
- j) The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.”

92. The Court of Appeal at Kisumu summarised this list into five requirements in the case of *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi* [2020] eKLR as follows:

- “40. A person who claims adverse possession must inter alia show:
  - (a) On what date he came into possession.
  - (b) What was the nature of his possession?



- (c) Whether the fact of his possession was known to the other party.
- (d) For how long his possession has continued and
- (e) That the possession was open and undisturbed for the requisite 12 years.”

93. The first condition on the time of entry into the land relates to the requirement to prove that the person claiming land by adverse possession did make physical entry and was in actual possession or occupancy of the land for the statutory period of not less than 12 years, and the entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. The entry must not be by permission of the owner of the land, and should not have been interrupted at all.
94. The Plaintiff contends that he entered into the parcel of land in the year 1975 after he bought it from Thome Farmers No. 5 Limited, who is alleged to have bought it from the 1<sup>st</sup> Defendant, and has been in occupation since then. If that is the case, he had been in occupation of the suit land for a period of 37 years before filing this suit, which is beyond the statutory period required for the claim. His claim arises from the purported oral agreement to purchase the suit property made between himself and Thome Farmers No. 5 Limited.
95. The evidence before this court shows that Thome Farmers No. 5 on its part took possession of the land in 1974 vide an alleged gentlemen’s agreement between the Directors of the two companies. Although there was a Board Resolution made by the Directors of the 1<sup>st</sup> Defendant of their intention to sell the land to Thome Farmers 5 Limited, this allegation was denied by the 1<sup>st</sup> Defendant, who testified that even if there was an intention to sell, Thome Farmers No. 5 never paid the purchase price and thus any agreement was vitiated.
96. At the time, the two titles L.R. No. 4920/3 and 4921/3 had not been amalgamated. The evidence before this court shows that Thome Farmers undertook subdivision of the two properties under a duly approved sub-division scheme vide a letter dated 23<sup>rd</sup> January, 1987.
97. The Plaintiff has provided a bundle of letters dating from as far back as 1974 all the way to 1993 detailing Thome Farmers No. 5 Limited’s activities on the land. The letters detail the sub-division process and involves correspondence between Thome Farmers No. 5 and government agencies as well as the surveyor who was retained to undertake the subdivision.
98. That being the case, it is safe to say therefore that Thome Farmers No. 5 Limited gained possession of the land in 1975, and since the gentleman’s agreement is denied by the 1<sup>st</sup> Defendant, the entry into the land by Thome Farmers No. 5 Limited was in itself non-permissive and adverse to the interests of the 1<sup>st</sup> Defendant over the mother title.
99. The conclusion by this court that Thome Farmers No. 5 Limited took possession of the land in 1975, sub divided it and sold to its members who took possession of their plots is fortified by the suit that was filed against the some of the purchasers by the 1<sup>st</sup> Defendant in 1992, and the consent that was subsequently filed, which was also signed by Thome Farmers 5 Limited which was joined in the suit.
100. Although the 1<sup>st</sup> Defendant sued the people it referrers to as squatters, the Plaintiff was not one of them. However, this cannot be used as evidence to show that the Plaintiff was not in possession of the suit property as at 1992 when the suit was filed by the 1<sup>st</sup> Defendant.



101. Upon analysis of the evidence before the court, it is the finding of this court that time for adverse possession started running from the time the Plaintiff obtained one share in the said Thome Farmers No. 5 Limited, which was on 29<sup>th</sup> July, 1979.
102. This determination is supported by a letter dated 14<sup>th</sup> March, 2011 written by the Plaintiff's then Advocate, one Mr. J.K.M Gichachi and addressed to the 1<sup>st</sup> Defendant. In the said letter, the Plaintiff's advocates states that the Plaintiff has been in occupation of the suit property since 1979. There is no evidence to show that the 1<sup>st</sup> Defendant ever denied this allegation at the time the letter was received.
103. Indeed, occupation of land can only be either with permission or dispossession. The two concepts cannot co-exist. The 1<sup>st</sup> Defendant was categorical that it did not sell the two properties comprised in L.R. No. 4920/3 and 4921/3. It must then follow that the occupation by Thome Farmers No. 5 Limited and the resulting activities on the 1<sup>st</sup> Defendant's two properties were without permission, and therefore the 1<sup>st</sup> Defendant was effectively dispossessed of the property by Thome Farmers No. 5 Limited.
104. The Plaintiff has also testified that he bought the suit property and took possession of thereof. He built a three bedroomed house on one part of the suit property and planted napier grass on the other part. His children and agents reside in the house and have done so for over 20 years now. As at the date of filing the suit, no one had laid claim on the suit property.
105. DW 1 testified that he visited the suit property and found no structure but saw napier grass growing thereon. While there is no proof that the buildings had been put up on the suit property when the 2<sup>nd</sup> Defendant visited the suit property, his testimony does corroborate the Plaintiff's as far as the napier grass is concerned. In *Daniel Kimani Ruchine & Others vs Swift, Rutherford Co Ltd & another* [1977] eKLR Kneller J held as follows:
- “ Possession can take different forms such as fencing or cultivation. It depends on the physical characteristics of the land. Cutting timber and grass from time to time is not sufficient to prove sole possession of the land, because these are acts which are not inconsistent with the enjoyment of the land by the person seemingly entitled to it. The resources or status of the claimants is not a factor in the correct approach to deciding what constitutes a sufficient degree of sole possession and user. The standard is an objective one and related to the nature and situation of the land. Certainly, where the cultivation of the land is the evidence put forward to support the claim by adverse possession then it should be definite as to area and to time; see, generally, *West Bank Estates Ltd v Arthur* [1966] 3 WLR 750.”
106. An assertion was put forward by both Defendants that the structures in the photographs filed herein were put up after purchase by the 2<sup>nd</sup> Defendant in order to defeat their rights over the suit property and enjoyment thereof. This allegation was not proved by either Defendants, but rather, is an admission of the intent of the Plaintiff to own the suit property to the exclusion of the registered owner or anyone else.
107. DW1's testimony that the 2<sup>nd</sup> Defendant Company never had possession of the suit property despite its registration as proprietor, is further proof of the dispossession and the Plaintiff's exclusive use of the suit property, with a clear intention of excluding the owner as well as other people from the suit property.
108. Furthermore, there is no reason that was given as to why the 2<sup>nd</sup> Defendant would be unable to gain entry and possession of the suit property, other than the fact that the land was already occupied by the Plaintiff. The Plaintiff's acts are thus hostile to the rights and interests of the registered owner.



109. The next question is whether the fact of his possession was known to the other party, being the registered owner. The 1<sup>st</sup> Defendant was aware that the suit property was occupied. DW2's testimony was to the effect that Thome Farmers had no authority to sell the land on behalf of the 1<sup>st</sup> Defendant; and that the 1<sup>st</sup> Defendant became aware that Thome Farmers had sold land to its shareholders.
110. It is on that basis that they sued the 23 individuals who were claiming to have bought land from Thome Farmers in HCCC 6206 of 1992. Thome Farmers later applied and were joined in the suit as the 24<sup>th</sup> Defendant. In the application for joinder, it sought to represent the interests of its members.
111. Consequently, it is the finding of the court that the 1<sup>st</sup> Defendant was aware of the occupation of the land comprised in L.R. No. 13330, the mother title, by members of Thome Farmers No. 5, and thus had constructive knowledge of the Plaintiff's occupation of the suit property.
112. Indeed, it cannot be argued that the filing of HCCC No. 6206 of 1992 disrupted the Plaintiff's occupation of the suit property. I say so because both the 1<sup>st</sup> Defendant and the Plaintiff testified that the Plaintiff was not a party to HCCC 6206 of 1992. The Plaintiff further testified that he did not know of existence of the suit that had been filed by the 1<sup>st</sup> Defendant.
113. Therefore, it is the finding of this court that the Plaintiff's possession of the suit property was visible, open and notorious, giving reasonable notice to the owner of his exercise of dominion over the land. It is also the finding of this court that the Plaintiff's possession of the suit property has been continuous, uninterrupted and unbroken for the statutory period of more than 12 years.
114. Having found that the Plaintiff is entitled to the suit property by way of adverse possession, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counterclaims are not merited and the same are dismissed with costs to the Plaintiff.
115. For those reasons, the court finds that the Plaintiff has proved his case on the required standard of balance of probabilities against the Defendants herein. Consequently, Judgement be and is hereby entered for the Plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein in the following terms:
  - a. A declaration be and is hereby issued that the Plaintiff has become entitled to the parcel of land known as L.R. No. 13330/597 by way of adverse possession;
  - b. An order be and is hereby issued directing the Chief Land Registrar to rectify the Land Register by cancelling the entry of Alpha Realty Company Limited and substituting it with that of Joseph Njenga Kirunyu as the owner of the parcel of land known as L.R. No. 13330/597.
  - c. A permanent injunction be and is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves, their agents and/or servants or any of them or anybody else whomsoever acting on their behalf from offering for sale or disposing of, transferring, wasting, taking possession of, alienating or otherwise howsoever from dealing with the parcel of land known as L.R. No. 13330/597 or any part thereof in any manner whatsoever adverse to the interest of the Plaintiff.
  - d. That the Defendants do pay the costs of this suit and the counter claims.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**O. A. Angote**

**Judge**

**In the presence of;**

Mr. Kingara for the Plaintiff



Ms Njureini for Koech for the 1<sup>st</sup> Defendant

Ms Onyango for Ojiambo for 2<sup>nd</sup> Defendant

Court Assistant - Tracy

