Ansett v Oraro & 3 others (Environment & Land Case 2 of 2023) [2025] KEELC 3057 (KLR) (24 February 2025) (Judgment)

Neutral citation: [2025] KEELC 3057 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NANYUKI

ENVIRONMENT & LAND CASE 2 OF 2023

AK BOR, J

FEBRUARY 24, 2025

BETWEEN

FIONA LOUISE ANSETT ..... PLAINTIFF

AND

GEORGE ODINGA ORARO ..... 1ST DEFENDANT

DAVID MORTON SILVERTEIN (BEING EXECUTORS OF THE ESTATE OF LIVIA LE POER TRENCH) ..... 2ND DEFENDANT

ANTHONY KIMARU MUTAHI ..... 3RD DEFENDANT

CHIEF LAND REGISTRAR ..... 4TH DEFENDANT

JUDGMENT

1. Stuart Richard Cunningham (Cunningham) filed Nyeri HCCC No. 36 of 2010 against Livia Le Poer Trench (Livia Trench) claiming that prior to his demise, her husband James Trench entered into an agreement dated 29/6/1994 for the sale of the land known as L.R No. 10422/13 ("the suit property") to Cunningham at the agreed consideration of Kshs. 1,500,000/=. Cunningham claimed that he paid a deposit of Kshs. 150,000/= to Donald Vincent [1982] Ltd who acted as stakeholders of James Trench and the balance of Kshs. 1,350,000/= was to be paid on the completion date.

2. Cunningham averred that he entered the suit property in August 1995, and that that year he carried out extensive improvements on the land, built his house on the suit property and continued to live there. James Trench died before transferring the suit property and through Nairobi High Court Succession Case No. 1306 of 2001 the grant was not confirmed until 28/11/2007 following a dispute between James Trench's daughter and Livia Trench.

3. Cunningham relied on the acknowledgment by James Trench's daughter regarding the sale of the suit property to him. He filed suit and in the Amended Plaint dated 9/3/2018, he sought specific

performance by the 1st and 2nd Defendants as executors of the estate of the late Livia Trench for the transfer of the suit property to his name so that he could pay the balance of the consideration.

4. Cunningham pleaded that on 3/10/2015 his property was invaded by a rowdy armed gang of over 50 led by the 3rd Defendant who by then was the Member of the National Assembly (MP) for Laikipia East laying claim to the property. The gang caused havoc and destruction of property. Further, that the 3rd Defendant remained on the suit property and destroyed the Plaintiff's training track for his horses and would harass Mr. Cunningham by preventing him from leaving or entering his home. Additionally, that the 3rd Defendant entered the suit property, erected structures and started using the land without Mr. Cunningham's authority.

5. Mr. Cunningham learned in June 2017 that the suit property had been transferred to the 3rd Defendant. On conducting a search on 16/6/2017, he discovered that the suit property had been transferred to the 3rd Defendant and registered in his name on 5/9/2016 while this case was pending. He averred that the 3rd and 4th Defendants conspired and caused the suit property to be fraudulently registered in favour of the 3rd Defendant.

6. Cunningham averred that he was entitled to the suit property by virtue of adverse possession because his possession had been without force or secrecy and had exceeded 12 years. Further, that he enjoyed quiet possession over the years until his possession was unlawfully disrupted by the 3rd Defendant. He pleaded that he had been in open, notorious, continued and exclusive use of the suit property and sought a declaration that he had been in possession of the suit property peacefully, openly and continuously for 12 years at the time of filing the suit and was therefore entitled to ownership of the suit land by adverse possession. He also sought to have the Chief Land Registrar directed to register the suit property in his name and a permanent injunction to restrain the Defendants from entering, occupying, trespassing or claiming title of suit land. He also sought cancellation of the title held by the 3rd Defendant over the suit property.

7. In the Amended Defence and Counterclaim dated 11/5/2010, Livia Trench denied Cunningham's claim and averred that Cunningham did not complete his end of the commercial bargain within the timelines envisaged in the contract and that the agreement therefore became void. She denied having been a joint owner of L.R No. 10422 and clarified that she acquired interest in the property only after the death of her husband, James Trench and upon obtaining grant of probate to his estate. She averred that Cunningham was allowed conditional possession of the suit property on the date of the agreement as a licensee and added that Cunningham had had ample time and opportunity to renegotiate the contract of sale with James Trench but did not do so until he died in 2001.

8. Further, that there was no contract to be enforced as at the date of his death or upon confirmation of the grant of probate to his estate on 28/11/2007. She maintained that by the time James Trench died the contract between him and Cunningham had lapsed by effluxion of time and non-performance on the part of either or both parties and added that James Trench's health deteriorated physically and mentally to a point where he was mostly unable to manage his affairs. According to her, this was the basis for Cunningham's continued possession of the suit property.

9. That following the death of James Trench and the lengthy litigation arising from contestation of his will, letters of administration to his estate were granted to her on 30/5/2006 and by virtue of this, L.R No. 10422 part of which the suit property comprises, was assented to and vested in her. She issued a demand letter dated 26/2/2009 to Cunningham to vacate the suit property and he responded on 4/3/2009 intimating that he would not comply with the notice because he was occupying the suit property by virtue of an agreement or by way of adverse possession.

10. She averred that either on the onset of the incapacity of James Trench or upon the expiry of the notice to vacate, Cunningham became a trespasser on the suit property. She sought an order for Cunningham to vacate the suit property or be evicted from it, mesne profits at the rate of Kshs. 10,000/= per month from January 2000, general damages for trespass plus costs and interest.

11. In his defence dated 30/4/2018, the 3rd Defendant denied Cunningham's claim and averred that since the intended sale fell through the suggested payment by Cunningham would be illegal and time barred. He added that if Cunningham had carried out any developments on the suit property, those were illegal and should be removed. The 3rd Defendant averred that he was the registered proprietor of the suit property with all the attendant rights and that Cunningham's claim for adverse possession did not arise since he did not occupy the whole of the suit property and that he had always been aware of the notice to vacate given by the late Livia Le Trench.

12. The 3rd Defendant counterclaimed that he was the registered proprietor of the suit property, which he claimed was lawfully transferred to him by the 1st and 2nd Defendants as executors of the will of Livia Trench. He contended that the sale agreement between Cunningham and James Trench became void by operation of law and that Cunningham's occupation of part of the suit property was illegal and he should vacate the land. He sought an order of vacant possession of the suit property and costs of the suit.

13. The 4th Defendant filed a defence on 27/4/2018 and denied Mr. Cunningham's claim. It denied fraudulently transferring and registering the suit property while averring that it executed its statutory duties in accordance with the law. It also averred that Cunningham's claim was statute barred and that damages were not payable as the Plaintiff sought.

14. The hearing of the suit commenced before Lady Justice L. N. Waithaka at the Nyeri Environment and Land Court (ELC) on 4/4/2019. Stuart Richard Cunningham gave evidence and told the court that he moved to Nanyuki with his wife, Fiona Ansett and to the suit property in 1995. James Trench asked him if he was interested in buying the suit property which was a subdivision of L.R No. 10422 IR 17358 that had been transferred to James Trench and his late wife Nancy on 23/11/1963. Cunningham recounted how he entered into a sale agreement dated 29/6/1994 with James Trench for the consideration of Kshs. 1,500,000/= and paid a deposit of Kshs. 150,000/= to the stakeholders for James Trench. He also explained how he built his residential home on the suit property in 1995 and planted trees. He stated that he got on well with James Trench and they used to visit each other. After entering into the formal agreement, they realised that the title deed indicated that the land was agricultural and not residential. James Trench undertook to process the change of user and urged him to move onto the plot as the issue of the title was sorted out.

15. Cunningham's lawyer in the transaction was the late Keith Osmond while James Trench was represented by Daly and Figgis Advocates. He relied on correspondence exchanged between the two law firms dated 21/4/1995, 15/4/1995, 12/9/1995 and 16/9/1995 as well as the photographs showing the developments undertaken on the suit property between 1994 and 1996 and told the court that by 1996, they had already moved into their new house which they had constructed on the suit property although they had already relocated their horses to the suit land in 1995.

16. He stated that James Trench married Livia Le Poer Trench in the mid-90s after Cunningham had moved his family to the suit property. James Trench died in 2000. After his death, Livia Trench was appointed executrix of his estate. She did not progress the issuance of the title to Cunningham. Mr. Keith Osmond advocate died in 2015. Livia Trench died in 2010 and grant of probate for Livia's Estate was issued to George Odinga Oraro and David Silverstein who are the 1st and 2nd Defendants in this

case. Cunningham was made aware that the late Livia's estate had been distributed as stated in the Will dated 11/1/2007 and the suit property which was listed as part of Livia's property was bestowed to the 1st and 2nd Defendants. He relied on the certificate of confirmation of grant dated 25/2/2013. He was emphatic that the suit property was never part of Livia's property and should not have included a such. The 1st and 2nd Defendants substituted Livia in the suit on 31/10/2012.

17. Cunningham told the court that he had had exclusive possession of the suit property for over 20 years until late 2015 when the 3rd Defendant invaded and illegally occupied part of the land. He recounted how while sleeping in his house in October 2015, he was awoken by a fearsome noise near the stables. His worker rushed to the house and shouted that they should stay inside. When he looked out of the window he saw the 3rd Defendant who he knew, leading a huge crowd of armed men. The 3rd Defendant was the MP for Laikipia West Constituency. The armed men surrounded the house and threatened them that they would burn down the house while they were in it. They destroyed and stole property. He reported the incident at the Nanyuki Police Station.

18. He instructed a lawyer to seek legal redress against the 3rd Defendant and an order was issued on 13/10/2015 restraining him from interfering with the suit property. A consent was entered into vide which the 3rd Defendant was allowed to remain on 18 acres of the land while he was to occupy 1 ½ acres based on the court's decision. He added that the 3rd Defendant had remained on the suit property and had destroyed property including the training tracks for their horses. The gang also remained on the land and continually terrorised his family, friends, visitors and workers making them lead a life of intimidation, torture and disruption. Their guests continued to be subjected to armed intimidation. He added that on numerous occasions the 3rd Defendant and his armed gang had prevented him from leaving or entering his home. He mentioned that on 13/9/2017 he was attacked by one of the 3rd Defendant's workers who hit him with a hammer. He reported the matter to the police in Nanyuki and the assailant was apprehended.

19. Sometime in June 2017, he received information that the suit property had been transferred to the 3rd Defendant. On his instructions, his advocate conducted a search at the lands office and confirmed that indeed the land had been transferred and registered in the Defendants on 5/9/2016. He produced copies of the registration documents. This happened yet the 3rd Defendant was a party in the suit from October 2015. He maintained that the suit property should not have been dealt with by any party to the suit before the case was determined and added that the transfer and registration was irregular and was aimed at defeating justice and his rights over the land. He invited the court to find that he was the rightful owner of the suit property.

20. On cross examination, he conceded that he erected a house on the suit property and took possession with the consent of the seller. Further, that he paid a deposit of Kshs. 150,000/= but had not paid the balance because the seller was to fulfil certain conditions. He conceded that the sale agreement dated 29/6/1994 gave the completion date as 31/7/1994. As far as he was concerned, the agreement was still valid even after the completion date. He maintained that Livia Trench's letter dated 26/2/2009 telling him that his sale agreement with Mr. Trench had expired and that she was selling the land to somebody else was of no effect because he was the owner of the suit property and Mrs. Trench had no right over the land. He reiterated that he moved into the suit property in 1994 and that the 3rd Defendant entered the land in 2015. He explained that he brought the 1st and 2nd Defendants as parties to the case because they were appointed Executors of Livia's estate. He was not aware of the succession proceedings for the estate of Livia Trench. By the time he applied to join the 3rd Defendant to the suit Livia was already dead.

21. On being cross examined by Mr. Nderitu, he stated that the Chief Land Registrar was made a party to the suit because he issued the title to the 3rd Defendant. When they visited his lawyer in Nairobi they were shown a title for agricultural land yet they were to be issued with a title for residential property. Although he had deposited the balance of the purchase price with his lawyer it could not be paid before he was issued a title deed. He was not aware that the executors of the late Livia sold the suit property to the 3rd Defendant.

22. On re-examination, he told the court that he did not know anything about Land Control Board (LCB) consent and who between the seller and the buyer was to obtain the consent. His understanding was that he was purchasing residential land and not agricultural land which is what James Trench's lawyer confirmed. He maintained that he had been diligent in pursuing the title for his parcel of land over the years and that the lawyers were holding the balance of the purchase price and had always been willing to release it upon the release of the title deed. He relied on the correspondence between his lawyer and the seller's lawyer on the attempts to change the title for the land from agricultural to residential.

23. James Kituku, an advocate of the High Court of Kenya employed as a Senior Associate by Oraro & Company Advocates (Oraro & Co) gave evidence. He told the court that he represented the 1st and 2nd Defendants in conveyancing transactions concerning properties in Nanyuki which formed part of the estate of the late Livia Trench. In 2016 he received instructions from the 1st and 2nd Defendants to prepare two transfers relating to L.R Nos. 10422/20 and 10422/21 which were to be transferred to the 3rd Defendant. The former parcel of land was to be transferred for the sum of Kshs. 32,500,000/= and the latter one for Kshs. 8,400,000/=. He produced copies of the blank transfer instruments which he prepared. The transfers were executed by the 1st and 2nd Defendants as executors in the presence of Mrs. Pamela Oburu Ager, a partner in the conveyancing department of their firm. He pointed out that from the duly executed and registered transfer forms, it could be seen that the 1st and 2nd Defendants transferred L.R No. 10422/20 to the 3rd Defendant for Kshs. 32,500,000/= which was indicated on the transfer while L.R. No. 10422/21 was transferred by the 1st and 2nd Defendants to the 3rd Defendant for Kshs. 8,400,000/=.

24. He told the court that on 5/8/2016 the 3rd Defendant went to the offices of Oraro & Co in Nairobi and requested the office to avail to him the original title in respect of L.R No. 10422/2 so that the transfer in respect of a subdivision plot he had purchased being L.R No. 10422/21 (original number LR. No. 10422/2/21) could be lodged for registration. The 3rd Defendant informed Mr. Kituku and their conveyancing clerk Mrs Susan Mucii and Mrs Pamela Ager that he had left his documents being stamped at the lands office. Mr. Kituku handed over to Mrs. Susan Mucii the original title on 5/8/2015 and she took it for booking alongside the 3rd Defendant's transfer with respect to L.R No. 10422/2/21 at the lands office for registration. Susan did not receive feedback on the progress of the registration and several days later when she went to inquire about the status of the documents at the lands registry, she was shocked to learn that the transfer had been registered and the documents including the original title collected by the 3rd Defendant. Mr. Kituku tried contacting the 3rd Defendant to request him to return the title document and a copy of the transfer but he did not pick his calls.

25. When his office conducted a search over L.R No. 10422/2 which is the mother title, it became apparent that a new title had been issued in respect of L.R No. 10422/2/21 vide I.R No. 17358/45. L.R No. 10422/13 (original number 10422/2/13) which the registered proprietors had neither agreed to sell nor executed any sale transfer in favour of the 3rd Defendant had been fraudulently transferred to the 3rd Defendant vide I.R No. 179263. He produced a copy of the title which shows that L.R No. 10422/20 was transferred to the 3rd Defendant on 28/3/2016, L.R No. 10422/21 was transferred to the 3rd Defendant on 5/8/2016 while L.R No. 10422/13 was transferred to the 3rd Defendant on 5/9/2016.

26. Mr. Kituku maintained that neither the 1st nor the 2nd Defendant executed any sale or transfer of L.R No. 10422/13 (original number 10422/2/13) to the 3rd Defendant. Further, that they could not have executed any transfer over this parcel of land to the 3rd Defendant since the land was a subject of this claim by the Plaintiff and being in court was subject to the doctrine of lis pendens. He did not doubt that the transfer in respect of the suit property was a forgery having superimposed a new cover page and page 1 since he neither prepared nor received instructions to do so. He produced the transfer forms, the agreement for sale over L.R No. 10422/20 Nanyuki and the letters dated 8/9/2015, 1/12/2015, 7/12/2015 in relation to L.R No. 10422/20. He also produced copies of the transfer in relation to this parcel of land as well as the transfer for L.R No. 10422/21 as well as the registered transfer in respect of L.R No. 10422/20.

27. On cross examination, he reiterated that he was not aware of any sale agreement between the Executors of the estate of Livia Trench and the 3rd Defendant for the sale of L.R No. 10422/13. He maintained that the 1st and 2nd Defendant did not execute a transfer for L.R No. 10422/13 to the 3rd Defendant while the matter was in court.

28. On being cross examined by Mr. Ng'ang'a representing the 3rd Defendant, he conceded that the photographs affixed to the transfer in the 3rd Defendant's list of documents appeared to be those of the 1st and 2nd Defendants. Although he claimed in his evidence that the transfer to the 3rd Defendant was fraudulent, he had not reported the matter to the police since the matter was in court. He stated that the mother title over the suit property had been in their custody but they released it for purposes of the transfer of parcel number 21. He did not have a letter to this effect but added that they had only prepared a transfer for parcel number 21 and not any transfer for parcel number 13 which is the suit property.

29. He was adamant that although the transfer for parcel number 13 appeared to be from their office, there was no correspondence between their firm and the 3rd Defendant's advocate to show that their firm prepared the transfer. He relied on his affidavit and witness statement in support of the contention that his firm never prepared the transfer for parcel number 13. He was referred to page 65 paragraph 9 and 10 of the 3rd Defendant's list of documents in which the 1st Defendant confirmed in his affidavit sworn on 3/2/2012 that the 3rd Defendant had a purchaser's interest over parcel number 13.

30. When cross examined by the 4th Defendant's advocate, he told the court that the instructions he received from the 1st and the 2nd Defendants were to prepare and transfer parcel number 21 and the only outstanding parcel was number 13. They were in charge of the mother title. The 3rd Defendant went to their office and they released the mother title to him to transfer parcel number 21. They released the mother title to their clerk who accompanied the 3rd Defendant to the lands office. He stated that the 3rd Defendant came into possession of the title in the lands office but not in their office. He agreed that the transfer had entries from the lands office on the assessment of the stamp duty.

31. He was emphatic that the transfer of parcel number 13 was fraudulent and that neither he nor Pamela had prepared the transfer documents for parcel number 13 while maintaining that they were only involved in the preparation of the transfers for parcel numbers 20 and 21. In his view, the fraud over the transfer of parcel number 13 could have been perpetrated by the 3rd Defendant and the lands office because his own office did not participate in the preparation of the transfer documents. They only discovered that parcel number 13 had been transferred to the 3rd Defendant when they conducted a search. They did not lodge a complaint at the lands office about the fraudulent transfer because the matter was in court and the Chief Land Registrar was a party to the suit.

32. The suit was transferred from Nyeri ELC to Nanyuki ELC in January 2023. When the matter came up before this court on 28/2/2023, Mr. Amalemba advocate informed the court that Lady Justice Waithaka had heard the Plaintiff's case and that the Plaintiff closed his case before he died and was substituted by his wife. The 1st and 2nd Defendants had also been heard and they had closed their case. The matter was fixed for hearing and on the day of the hearing, the court was informed that the 3rd Defendant had filed a trial bundle containing new documents which were filed without the leave of the court. The 3rd Defendant maintained that his documents were properly on record. The court delivered a ruling on 19/7/2023 vide which it struck out the 3rd Defendant's amended defence and counterclaim, additional documents and the witness statements filed in court on 10/2/2023. The 3rd Defendant applied for adjournment on 18/10/2023 when the matter came up for hearing and the matter was put off to 8/11/2023.

33. The 3rd Defendant gave evidence on 8/11/2023. He told the court that he was the registered owner of the suit property vide I.R No. 179263 which he produced. He bought the land from Livia Trench vide the sale agreement dated 4/8/2009, a copy of which he produced. Before signing the sale agreement, he visited the suit property with the vendor and the boundaries were pointed out to him. He met Cunningham who was living in the farm house who received them and did not have any opposition to him being shown the beacons. Prior to signing the agreement, the seller had obtained the letter of consent for sale in his favour for the suit property dated 18/6/2009.

34. Upon entry into the agreement, he paid Kshs. 700,000/= which was 10% deposit of the purchase price to Mwangi Kariuki Advocates as stakeholder for the vendor, Livia Trench. Later on 30/10/2009 before the completion date he paid the balance of Kshs. 6,300,000/= to Mwangi Kariuki Advocates and was issued a receipt for that amount. He stated that earlier on he had been sent by the vendor with a letter to collect the deed plans for the suit property and parcel number 18 from Oraro and Company Advocates and then deliver them to Mwangi Kariuki Advocates for purposes of preparing the sale agreement and transfers in his favour for both properties. That he received these from Pamela Ager, a partner in Oraro & Co after she contacted Livia Trench, the proprietor of the properties. He signed the transfer between himself and Livia and returned it to Mwangi Kariuki Advocates but unfortunately Livia Trench died before executing it together with the transfer for parcel number 21.

35. The monies for the purchase for both L.R No. 10422/13 and L.R No. 10422/21 were being held by Mwangi Kariuki Advocates as stakeholders. The total sum for the two parcels was Kshs. 15,400,000/=. Soon after the death of Livia, Oraro & Co who were acting for her estate asked for Kshs. 2,000,000/= from the money held by Mwangi Kariuki Advocates as stakeholders for the sale of L.R Nos. 10422/13 and 10422/21. He authorised Mwangi Kariuki Advocates to remit the monies to Oraro & Co which they did vide the bank transfer dated 23/6/2010 to the account of Oraro & Co held at standard bank. He produced a copy of the banking slip.

36. Further payments were made to Oraro & Co as the executors upon their demand for the monies held by Mwangi Kariuki Advocates. He stated that Kshs. 5,399,200/= was paid on 20/9/2010; Kshs. 698,850 was paid on 5/10/2010; Kshs. 6,300,000 was paid on 2/12/2015 and that Mwangi Kariuki Advocates retained the sum of Kshs. 1,001,950/=. He relied on copies of the banking slips in support of the averment that the full purchase price of Kshs. 15,400,000/= for parcel 21 and the suit property was fully disbursed to the executors of the vendor's estate.

37. Mr. Kimaru told the court that sometime in June 2016, he held a meeting with the 1st Defendant in the presence of Pamela Ager at the offices of Oraro & Co at ACK Gardens Annex on the issue of the transfer of parcel number 21 and the suit property and complained about the delay in executing the transfer yet he had fully met his obligations regarding the sale of the two parcels of land and the executors had

already got the certificates of confirmation of grant on 25/2/2013 yet Oraro and Company Advocates had failed to respond to his lawyers. He tendered his lawyer's letter as evidence in the case.

38. On 6/7/2016 Pamela Ager who was handling the conveyancing transaction called him and told him that the transfers for the suit properties and parcel number 21 were ready for his collection. He stated that he went to the offices of Oraro & Co and was handed the transfers for both the suit property and parcel number 21 together with the mother title being LR. No. 10422/2. He produced the deed plan numbers 164633 and 164641. He deposited these documents together with the land rent and land rates clearance certificates for both parcels at the land registry at Nairobi. Thereafter, he lodged the transfers at various dates at the land registry Nairobi for registration. Parcel number 21 was registered on 5/8/2016 while the suit property was registered on 5/9/2016.

39. He personally paid the land rent and rates for parcel numbers 19, 20, 21 and 13 with the authority of Pamela Ager on the promise that he would be reimbursed the whole amount. That with the assistance of Susan, a clerk from Oraro & Co and with the authority of Pamela Ager, he opened land rent accounts in his name for parcel numbers 20, 21 and 13 while the one for parcel number 19 was open in the name of Mahmood Butt on 11/3/2016 and on the same day he paid the rent arrears for all of them.

40. He also proceeded to open accounts for L.R Nos. 10422/20, 10422/21 and 10422/13 with the County Government of Laikipia in his name. He told the court that he had agreed with Pamela Ager to open the accounts in his name and to clear all the outstanding rates and that Oraro & Co on behalf of the executors would reimburse him fully for the expenses incurred. He took all the receipts in his name to Oraro & Co and was reimbursed the full amount for the land rent and rates that he had paid for parcel numbers 13, 20, 21, 19 and L.R No. 10422/2 being the mother title vide cheque number 209681 of 31/3/2016 for Kshs. 228,485/=.

41. He told the court that he was aware that although Cunningham had signed a sale agreement with James Trench, he had failed to pay the full purchase price. He was also aware that Cunningham was given 30 days' notice to vacate the suit property on 26/2/2009. He added that Livia as the executrix of the late James Trench had on several occasions pronounced her revocation of the agreement between her late husband and Cunningham due to passage of time and non-performance. He was also aware that the late Livia Trench instituted Nyeri High Court Civil Case No. 23 of 2010 against Cunningham on 19/2/2010 seeking to evict him from the suit property.

42. Mr. Kimaru told the court that the executors of the estate of Livia Trench who are the 1st and the 2nd Defendants acknowledged the sale of the suit property to him in the affidavit sworn by the 1st Defendant in Nairobi Succession Cause No. 2376 of 2010. Further, that they undertook to transfer the properties once they obtained the grant of probate and it was confirmed. Based on that concession, he withdrew the suit.

43. The 3rd Defendant stated that of the whole suit property he was occupying approximately 17.7 acres in which he had constructed dwelling houses for his workers, stores, an office, a pen for sheep and goats and planted over 50,000 tree seedlings. He had installed electricity, connected water and fenced all around and along the access road with poles, chain link and razor wire. He had built an access road with drainage and was carrying out crop and livestock farming. He was emphatic that the Plaintiff who was occupying only 1.28 acres of the suit property was on the land illegally since his license to be on the land had expired on 26/2/2009 when he was given notice to vacate.

44. He stated that in the past 10 years he had done six other land sales with the estate of Livia Trench, five of which Oraro & Co represented the Estate of Livia. He maintained that in all the transactions he had conducted himself above board. He produced a copy of the mother title. Regarding the order made on 10/10/2012, his view was that it was null and void since it was made after the abatement of the suit

and it was therefore incapable of being obeyed. He challenged the substitution of the 1st Defendant and the extension of time while urging that the Plaintiff could not have been unaware of the demise of the Defendant given that they lived within a distance of 2 kilometres of each other's home in a closely knit community comprising five Europeans and one African. He urged the court to review its earlier decision extending time for substitution.

45. He relied on the correspondence from Livia Trench to Cunningham regarding the point that Cunningham was a licensee of Livia's and had been given notice to vacate a small part of the suit property which he was occupying. He added that the suit property was subject to the *Land Control Act*. He urged the court to issue orders to evict the Plaintiff from the part of the suit property which he was illegally occupying as a trespasser since his licence had expired on 26/2/2009 when he was given a notice to vacate by the original Defendant, Livia Trench.

46. On cross examination by Mr. Amalemba representing the Plaintiff, the 3rd Defendant told the court that he lived on the suit property and had been there for the last 5 years. He claimed to have occupied the land since 2001 in a house which he started constructing in November 2009. He denied invading the suit property on 3/10/2015. He claimed that he took possession in 2001 while Livia Trench was still alive. Further, that he signed the agreement dated 3/8/2009 in 2009. Mr. Mwangi Kariuki was not his advocate. He was represented by the late G. M. Wanjohi.

47. He confirmed that he filed an objection in the succession cause for the estate of Livia Trench. When he was asked whether Livia Trench was suffering from dementia and shown the affidavit of protest regarding the state of mind of Livia he responded that Livia's state of mind was perfect on 3/8/2009 and that she died in June 2010. She had been in and out of hospital and at one time broke her hip and the 3rd Defendant took her to hospital.

48. He stated that he purchased the suit property for Kshs. 7,000,000/= which he paid to Mwangi Kariuki Advocate then it was remitted to Oraro & Co. He conceded that he was facing criminal charges in relation to the suit property and the charges related to stealing the certificate of title for L.R No. 10422/2. He was shown the charge sheet, count 2 related to making a false document. He conceded that he was aware of the existence of this suit in 2015 and was added as a party in 2017. He was referred to the consent dated 19/10/2015 which stated that the status quo was to be maintained and confirmed that the order benefited him. He was not aware that the 1st and 2nd Defendants disowned his transfer. He was also not aware that Pamela Ager had disowned the transfer dated 6/7/2016 between the 1st and 2nd Defendants on one part and him on the other part regarding the sale of the suit property. The transfer indicated the purchase price for the suit property as Kshs. 8,400,000/=.

49. He was transferring three parcels of land in 2016 being parcel numbers 20, 21 and 13. He had the transfer for parcel number 21. He denied superimposing the execution page for parcel number 13 on that of number 21. He denied being in the habit of invading people's land. He reiterated that the Plaintiff was a trespasser on the land which he purchased but conceded that the Plaintiff had been on the suit land in 2001 in a stone house belonging to Mr. Trench.

50. When he was cross examined by Mr. Rabut for the 1st and 2nd Defendants, he stated that James Trench died on date 17/3/2001 while Livia Trench died on 16/6/2010. He maintained that Livia Trench was of sound mind before her death and that they were friends. He would assist her in her issues dealing with permits amongst others. They communicated frequently. He did not produce Livia Trench's Will and only produced the certificate of grant. He conceded that the agreement dated 3/8/2009 drawn by Mwangi Kariuki and Company Advocates in respect of the suit property gave the purchase price as Kshs. 7,000,000/=, while the letter of consent dated 18/6/2009 indicated the consideration as Kshs. 2,000,000/=. His explanation was that they got the consent when Livia Trench had agreed to sell the

land to him at Kshs. 2,000,000/=. He had not mentioned this in his witness statement. The transfer indicated the consideration as Kshs. 8,400,000/=.

51. He confirmed that he signed the transfer and that there were three different considerations for the suit property that is Kshs. 2,000,000/=, 7,000,000/= and 8,400,000/=. He was emphatic that he had evidence of payment of Kshs. 6,300,000/= and relied on the receipt dated 30/10/2009 issued by Mwangi Kariuki and Company Advocates. He also relied on the bank transfer to Oraro & Co dated 5/10/2010 of Kshs. 698,850/=. He relied on the letter dated 8/10/2010 signed by Pamela Ager confirming that the funds had been deposited into their account. The email from Mwangi Kariuki advocate to Oraro Advocates dated 5/10/2010 referred to payment of Kshs. 700,000/= deposited by the purchaser.

52. He stated that the consideration for parcel number 20 was Kshs. 32,000,000/= while the consideration for parcel number 21 was Kshs. 8,400,000/=. He conceded that L.R No. 10422/13 had been inserted by a hand by Mr. Mwangi Kariuki Advocates. At some point during cross examination he denied being Anthony Kimaru Mutahi while arguing that his name was Anthony Mutai Kimaru.

53. Regarding the orders made by the court barring him from interfering with the suit property he stated that a consent was recorded courtesy of which he was in occupation of 18 acres while the Plaintiff occupied 1.2 acres. Between 7/10/2015 and 19/10/2015 when the consent was recorded the orders had not been vacated. He maintained that the order was vacated by operation of time. He presented the transfer for registration on 5/9/2015 since according to him the orders did not exist between 7/10/2015 and 5/9/2016. He presented the transfer for registration on a date he could not remember and the transfer was stamped on 5/9/2016. The valuation was endorsed on 1/9/2016 and the land was valued for Kshs. 18,500,000/=. He did not have evidence of payment of stamp duty in court and relied on the franking of the transfer.

54. When he was cross examined by Ms. Gichobi for the 4th Defendant, he denied being involved in any fraud with the lands office over the suit property. When he was re-examined by Mr. Nganga Advocate he stated that he entered the suit property on 1/7/2001 as a grazer who had leased the land for grazing. He signed the sale agreement on 3/8/2009. He stated that he gave Mwangi Kariuki Advocate cash in the sum of Kshs. 700,000/=. The criminal proceedings were commenced in 2021 while this suit was pending. He stated that Mr. Mwangi Kariuki testified in the criminal case and confirmed that he drew the agreement, received payment and that he transferred the money Oraro & Co upon their demand. He was adamant that there were no fraud charges brought by the 1st and the 2nd Defendants against him in relation to his acquisition of the suit property. The criminal case had not been concluded.

55. He explained that after Livia died and Oraro was gazetted he went to see Oraro advocate about his interest. He filed a protest in the succession cause because he wanted the executors to recognize his interest in Livia Trench's estate. He was not challenging Livia Trench's mental status. The grant to Oraro was confirmed on 25/2/2013. He stated that the Will was not attached to the certificate of confirmation of grant and the certificate of confirmation did not mention his interest in the suit property. The 1st Defendant told him that the property had to be listed so that he could transfer it. He emphasised that there were no outstanding issues regarding parcel numbers 21 and 20 and that the payments made through Mwangi Kariuki Advocates to Oraro and Company Advocates could only be in relation to parcel number 13.

56. The 3rd Defendant called Joseph Ninja Mutugi, a surveyor to give evidence on his behalf. Mr. Mutugi visited the suit property in September 2022 and prepared the report dated 21/9/2022 which he produced in court. When he visited the land he found the 3rd Defendant and Mr. Cunningham in occupation of the land, this was based on what his client told him. He did not carry out a search on the

land as the 3rd Defendant showed him the title for the suit property. The 3rd Defendant accompanied him to the land and pointed out the developments he had undertaken. He also showed him the physical boundaries for Mr. Cunningham.

57. Vincentia Juma, a land registrar attached to the Office of the Chief Land Registrar at Ardhi House testified on behalf of the 4th Defendant. She produced a search done on the suit property together with copies of the transfer dated 6/7/2016 and the title over the suit property. She also produced copies of the rates clearance certificate and LCB consent issued on 11/6/2009 together with the application for LCB consent dated 18/6/2009. The consent by the Commissioner of Lands for the transfer of the suit property is dated 11/6/2009 while the details of the property owner in the application for valuation for stamp duty gives the names of the 1st and 2nd Defendants. The value submitted by the parties was 8,400,000/= but on the valuers' comments it was indicated that the declared amount was to be raised to Kshs. 18,500,000/=. That application was received on 26/8/2016 and the advocate's name is given as Oraro & Co. Another application for valuation for stamp duty which the land registrar produced for parcel number 21 gave the value of the land as Kshs. 8,400,000/= but the second page is not filled. The certificate of confirmation of grant attached to the documents showed that parcel numbers 19, 20 and 13 were to be shared equally among the 1st and the 2nd Defendants.

58. The Land Registrar stated that there had been no complaint of fraud made by any of the parties against their office. She clarified that the role of the Land Registrar was to register documents presented for registration. When a document is presented it is taken to an investigation officer to analyse the document and ensure all requirements for registration were made. Once satisfied that the documents meet the requirements they make an entry and forward the documents to a Registrar. The Registrar also does due diligence before signing and stamping the documents. She stated that the registrar deals with many documents and they could not tell whether documents were plucked out as the parties claim. According to them, the correct documents were submitted for registration.

59. On cross examination she told the court she was not aware of the criminal case in Milimani. If an allegation of fraud is raised, the Land Registrar summons both parties to present their documents and if they find an element of fraud they reject the documents and forward the matter to DCI for further investigations. In her view, the documents in their possession were proper and they had not been asked to place a restriction. She was not aware that this suit existed when the 3rd Defendant was registered as the proprietor of the suit land. She stated that they check if stamp duty was assessed and paid and if the documents were franked.

60. When cross-examined by Mr. Mbugua, she stated that she could see revenue stamps on the transfer which show that stamp duty was paid. The date of presentation was 5/9/2016. The assent in favour of the 1st and 2nd Defendants was registered on 21/3/2016. Based on the investigations they carried out they were satisfied with the execution and proceeded to register the transfer in favour of the 3rd Defendant. There was no court order restraining dealings with the suit land. She maintained that they followed all the processes before issuing the title to the 3rd Defendant.

61. The court directed parties to file and exchange written submissions. The Plaintiff submitted that he entered into an agreement with James Trench on 29/6/1994 and paid a deposit. He took possession of the land and constructed their family home in 1995 where his family lived continually and publicly. The sale was subject to change of user from agricultural to residential by the vendor as acknowledged through the advocates correspondence. The 3rd Defendant invaded the suit property on 3/10/2015 brandishing a sale agreement between him and Livia Trench dated 9/8/2009.

62. When a search was conducted on 16/6/2017, the Plaintiff was surprised to learn that the suit property had been transferred to the 3rd Defendant's name yet at the time there were injunctive orders in force

restraining the 3rd Defendant from interfering with or transferring the suit property. The Plaintiff submitted that the 3rd Defendant did not provide evidence of his use or occupation of the suit property prior to 3/10/2015 and pointed out that he begun construction in 2019 and occupied the house in 2020.

63. The Plaintiff relied on the order made on 18/11/2017 and the fact that the 3rd Defendant was convicted of contempt of court on 23/7/2020 and sentenced for disobeying the court order to maintain the status quo on the land. The Plaintiff pointed out that the 3rd Defendant was also facing criminal charges relating to the transfer of the suit property to his name. The Plaintiff submitted that the Defendant relied on documents which were not signed including the letter dated 16/9/2010 from Mwangi Kariuki and Company Advocates and the one dated 28/9/2010 from Oraro & Co to Mwangi Kariuki and Company Advocates.

64. Further, that the 3rd Defendant was among 15 persons who filed objection proceedings in Milimani High Court Succession Cause No. 2376 of 2010 challenging the Will of Livia Trench dated 11/1/2007 on the grounds that she suffered from dementia and on this basis the alleged agreement between Livia Trench and the 3rd Defendant dated 3/8/2009 should be invalidated.

65. The Plaintiff submitted that in order to be entitled to land through adverse possession, the claimant must prove that he had been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either by dispossessing the owner or by discontinuation of possession by the owner on his own volition as the Court of Appeal held in Kasuve v Mwaani Investments Limited & 4 Others 1 KLR 184. She submitted that the original Plaintiff, Stuart Cunningham entered into an agreement with James Trench for the sale of the suit property on 29/6/1994 and took possession after paying the deposit. The balance of the purchase price was released to his advocates and was to be paid to the vendor upon certain conditions including change of user by the vendor from agricultural to residential. Despite several reminders, the condition was not fulfilled by the time the vendor died on 17/3/2001. Mr. Cunningham constructed his house and resided in it with its family from 1995. He was in continuous and exclusive possession until 3/10/2015 when the land was invaded by a rowdy gang led by the 3rd Defendant who took possession of part of the property.

66. It was submitted that the Plaintiff's possession was open, uninterrupted and continuous and remained that way even after filing this suit in 2010 until the invasion by the 3rd Defendant in 2015. From 1995 to 2010 when he filed this suit, 12 years had lapsed and his claim based on adverse possession had arisen, accrued and vested. The Plaintiff maintained that the agreement for sale was frustrated by the vendor and from then on the possession was nec vi, nec clam and nec precario thereby fulfilling the three essential ingredients for one to prove the right over a property through adverse possession. The Plaintiff relied on Katana v Chengo & Another [2023] KEELC 16527 [KLR] [21/3/2023] where the court held that entry onto land by a purchaser on the basis of a land sale agreement could mature into adverse possession if the sale transaction was not completed.

67. It was submitted that the 3rd Defendant had been a party to the suit yet caused the transfer to be registered on 5/9/2016 at a time when there were several orders including the one for the maintenance of status quo given on 19/10/2015. The Plaintiff relied on the doctrine of lis pendens incorporated by Section 52 of the Transfer of Property Act whose purpose is to preserve the suit property until the case was determined or the court gave orders on how the suit property would be dealt with. Reliance was placed on the decision in Abdalla Omar Nabhan v the Executor of the Estate of Saad Bin Abdalla Bin Abuod & another, Malindi HCCC No. 63 of 2013.

68. The Plaintiff submitted that the 1st and 2nd Defendants as executors of the Will of the original Defendant's heirs had disowned the purported transfer of the suit property to the 3rd Defendant

while maintaining that they only transferred parcel number 21. They denied executing the transfer documents as claimed by the 3rd Defendant and asserted that the transfer was fraudulent and the documents presented to the land registry were forged in a scheme orchestrated by the 3rd Defendant. The Plaintiff relied on the evidence of James Kituku who told the court that they could not have transferred the suit property as they were aware that there was an ownership dispute in court.

69. The Plaintiff attributed some blame to the 4th Defendant for failing to investigate whether the 1st and 2nd Defendants actually executed the transfer deed. Further, that the 3rd Defendant failed to give an account of how he acquired his title over the suit property. The case of Mistry Amar Singh v Serwano Wofunira Kulobya [1963] EA 408 was cited where it was held that whenever an act of illegality was brought to the attention of the court, then the court should not allow anybody to benefit from such an illegality. It was submitted that the transfer and registration in favour of the 3rd Defendant reeks of fraud and the court was invited to invoke Sections 26 and 80 of the Lands Registration Act and find that the 3rd Defendant's title was suitable for revocation on account of fraud and illegality.

70. Regarding the alternate prayer for specific performance and damages, it was submitted that there was a valid agreement for sale whose terms had never been completed due to default by the vendor. Further, that the Plaintiff had always been ready and willing to perform its obligations under the agreement for sale and it was the vendor who was in breach. Openda v Ahn [1984] KLR 208 was cited with the general rule being that a purchaser was entitled to recover damages at large where a seller refused to implement an agreement for any reason other than a defective title and compensation contemplated by the contract which could reasonably have been in the contemplation of the parties was likely to wasted if the contract were broken. It was urged that the 1st and 2nd Defendants ought to be compelled to complete the terms of the agreement or in the alternative, compensate with land or damages equivalent to the suit property. The Plaintiff urged the court to grant the reliefs sought in the plaint and the costs of the suit.

71. The 1st and 2nd Defendants gave a summary of the facts to this case. They submitted that James Trench entered into an agreement for sale with Stuart Cunningham on 29/6/1994. James Trench died on 17/3/2001 and the grant of probate was issued to his wife Livia Trench on 28/11/2007. That the Plaintiff's case was that he was in occupation of the suit property between 1994 and 2001 with the knowledge and consent of the original owner. Upon issuance of grant of probate to Livia Trench, she entered into another agreement for sale with the 3rd Defendant on 3/8/2009 at the agreed consideration of Kshs. 7,000,000/=. Stuart Cunningham died on 22/12/2019 and was substituted by Fiona Louise Ansett as Plaintiff in the suit.

72. Not being aware of the transaction between Livia Trench and the 3rd Defendant, the Plaintiff filed this case seeking specific performance of the agreement dated 29/6/1994. Livia Trench did not disclose to the Plaintiff the existence of the agreement she had executed with the 3rd Defendant. Livia Trench, the executor of the estate of the original owner died on 16/6/2010 and letters of administration for her estate were granted to the 1st and 2nd Defendants on 25/2/2013. The executors were joined to these proceedings by consent of the parties on 19/11/2012. At the time of joinder, the 1st and 2nd Defendants were informed of the orders in place and opted not to proceed with the transaction for the sale of the suit property with the 3rd Defendant as that would have been in breach of the well settled doctrine of lis pendens. The 3rd Defendant had filed objection proceedings to the grant of the letters of administration to the 1st and 2nd Defendants in Succession Cause No. 2376 of 2010 where he sought to be recognised as a beneficiary to the estate.

73. The 1st and 2nd Defendants submitted that during the period of the administration of the estate of Livia Trench there were three parcel numbers being parcel number 13, 20 and 21. There being no pending

litigation regarding L.R Nos. 10422/20 and 10422/21, the 1st and 2nd Defendants entered into sale agreements with the 3rd Defendant for the purchase of these parcels of land and they were subsequently transferred to the 3rd Defendant. They executed sale agreements dated 25/10/2013 for the sale of L.R No. 10422/20 for Kshs. 32,050,000/= and that property was transferred to the 3rd Defendant upon payment of the full purchase price of 1st and 2nd Defendants.

74. Unknown to the 1st and 2nd Defendants, the 3rd Defendant had fraudulently procured the transfer of the suit property to himself and the fraud was based on the fact that no transfer documents were issued by the 1st and 2nd Defendants to the 3rd Defendant and the transfer was done on 5/9/2016 in blatant breach of the existing court order and the proceedings pending before this court. The 1st and 2nd Defendants submitted that the 3rd Defendant produced and relied on a transfer dated 6/7/2016 which gives the consideration for the suit property as Kshs. 8,400,000/= which is different from the price appearing in the sale agreement and the consideration appearing in the application for LCB consent. They pointed out that it was to be noted that the consideration was strikingly similar to the consideration set out in the transfer instrument for L.R No. 10422/21.

75. The 1st and 2nd Defendants set out two main issues for determination, one based on the doctrine of lis pendens and secondly, whether the suit property was fraudulently transferred to the 3rd Defendant. They submitted that the doctrine of lis pendens had been addressed by superior courts in many decisions including Ruthi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR and Mawji v US International University & Another [1975] KLR 185 and its main purpose was to preserve the suit property while a legal action was pending so that the suit could be brought to a successful determination. The doctrine is incorporated in section 52 of the transfer of the property act of 1882.

76. The 1st and 2nd Defendants submitted that it was not contested that the proceedings were commenced between the original parties seeking orders for specific performance of the agreement dated 29/6/1994. Parties entered into a consent and agreed that the suit property would not be interfered with unless the court issued an order. They pointed out that the courts have held that the doctrine of lis pendens applies to prevent the transfer and disposition of suit property or other dealings that may take the property out of the reach of the other parties in the suit. They submitted that the doctrine was based on justice, equity, expediency and good conscience. It was also based on sound policy. They submitted that the transfer of the suit property to the 3rd Defendant it was contrary to the well-established principle of lis pendens and the 3rd Defendant knew that there was a dispute between the original Plaintiff and Defendant over ownership of the suit property.

77. The 1st and 2nd Defendants submitted that the transfer of the suit property to the 3rd Defendant was shrouded in fraud and inconsistencies that go to the root of its title. They cited Dina Management Limited v County Government of Mombasa & 5 Others [2023] KESC 30 (KLR) where the apex court elucidated the inquiry to be undertaken to determine whether a party was a bona fide purchaser for value. The purchaser must prove that he purchased the property in good faith, he had no knowledge of the fraud, he purchased for valuable consideration, the vendor had a valid title, he purchased without notice of any fraud and was not a party to the fraud.

78. The 1st and 2nd Defendants submitted that the 3rd Defendant did not purchase the suit property in good faith. They urged that the record reflected that sometime in 2012 a consent was recorded in court barring interference with the suit property unless by an order of the court. Livia Trench died and letters of administration were issued to the 1st and 2nd Defendant and it fell upon them as executors of her Will to conclude the sale and transfer of the suit property by Livia Trench to the 3rd Defendant. They contended that being aware of the interest claimed by the Plaintiff, it was not possible for the 1st Defendant, an advocate of the High Court of Kenya with good standing to proceed with the

transaction as the 3rd Defendant purported. In any event, the 3rd Defendant had been joined to the proceedings and ought to have known that the suit property should not be interfered with.

79. They submitted that the 3rd Defendant had knowledge of the fraud and invited the court to look at the documents produced by the 3rd Defendant which give three different purchase prices. The consideration in the sale agreement was Kshs. 7,000,000/=, the LCB consent stated the purchase price as Kshs. 2,000,000/= while the transfer disclosed a purchase price of Kshs. 8,400,000/=. They reiterated that the purchase price of Kshs. 8,400,000/= indicated in the transfer was strikingly and suspiciously similar to the purchase price for L.R No. 10422/21 which the 3rd Defendant bought from the 1st and 2nd Defendants. They pointed out that despite the similarity in the purchase prices, the acreage for the two parcels were different and that L.R No. 10422/21 measured 8.146 ha while the suit property measured 7.653 ha and as such the two parcels of land could not be sold for the same price. They added that there was no chance that the executors could have signed that transfer for the suit property and that in any event, the correspondence for the sale and transfer of the non-contentious transactions between the 1st and the 2nd Defendants with the 3rd Defendant.

80. The 1st and 2nd Defendants submitted that the 3rd Defendant did not pay any valuable consideration for the purchase of the suit property. They pointed out that the documents filed by the 3rd Defendant contained three separate purchase prices of Kshs. 7,000,000/=, Kshs. 8,400,000/= and Kshs. 2,00,000/= relating to the same property but to be found in different documents. They contended that the 3rd Defendant had not produced evidence before the court to show what was the actual purchase price for the suit property. They were emphatic that the 3rd Defendant did not pay any consideration for the suit property.

81. They submitted that the land originally belonged to James Trench and upon his demise it devolved to his wife Livia Trench and on her death, the suit property was transferred to the 1st and 2nd Defendants as executors of her Will. The 1st and 2nd Defendants submitted that the transfer of the suit property was actuated by fraud which the 3rd Defendant had notice of. At the time the 3rd Defendant entered into the sale agreement with Livia Trench for the purchase of the suit property, Livia Trench was aware of the existence of the sale agreement between the original owner and Cunningham. Further, that the 3rd Defendant was aware about these proceedings when he executed the transfer.

82. The 1st and 2nd Defendants submitted that the 3rd Defendant purported to have entered into the sale agreement with them yet the documents which the 3rd Defendant relied on show that the agreement was executed by the parties on 3/8/2009. The 1st and 2nd Defendants urged the court to award them costs against the 3rd Defendant. They concluded that the 3rd Defendant failed to prove that he acquired a good title over the suit property on the basis that the inconsistency surrounding his acquisition of the land were so grave that on a balance of probabilities this court should cancel the acquisition of the suit property by the 3rd Defendant.

83. The 3rd Respondent was emphatic that the 1st and 2nd Defendants had not made any claim against him and that they were only sued in their capacity as Executors of the Estate of Livia Trench who during her lifetime entered into an agreement for sale of the suit property to him. He maintained that he fully performed that contract and that nothing was owed to the deceased's estate.

84. The 3rd Defendant set out the main issues for determination as whether the Plaintiff had proved his case of ownership of the suit property through adverse possession or whether he was entitled to orders of specific performance of the sale agreement dated 29/6/1994; whether the Plaintiff was entitled to damages against the 3rd Defendant; whether the 3rd Defendant was entitled to orders of vacant possession against the Plaintiff; and who should bear the costs of the suit and counterclaim.

85. The 3rd Defendant submitted that under the sale agreement dated 29/6/1994 which Mr. Trench entered into with the Plaintiff, the completion date was 31/7/1994 by which date the balance of the purchase price was to be paid and that Cunningham had admitted during cross examination that he did not pay the balance of the purchase price. He submitted that Cunningham could not show that he deposited the balance of the purchase price with his lawyer and attributed the failure to complete to the change of user of the suit property from agricultural yet Mr. Trench had completed his part on 15/8/1994.

86. According to the 3rd Defendant, since Cunningham took possession of the suit property around 1995 with the consent of the seller, Mr. Trench, then he was a licensee of James Trench and that the Plaintiff could not assert his claim for adverse possession since the non-permissive element would not be present so as to sustain the claim for adverse possession. He submitted that the claim for adverse possession fails on this account. He referred to the decision in Sisto Wambugu v Kamau Njuguna [1983] eKLR on the point that time cannot run in favour of a licensee and that he had no adverse possession. The court also held that the respondent could not obtain an order for specific performance of the agreement unless he had performed his part of the bargain or could show that he was at all times ready and willing to do so.

87. The 3rd Defendant relied on Christopher Kioi & Another v Winnie Mukolwe & 4 Others [2018] eKLR where it was held that a claim for adverse possession could not succeed if the person asserting the claim was in possession with the permission of the owner or pursuant to an agreement of sale or lease or otherwise. He also cited Benjamin Kamau Murima & Others v Gladys Njeri (Civil Appeal No. 213 of 1996) where it was held that in determining whether or not the nature of the actual possession of the land in question was adverse, one had to also look at whether the occupation was derived from the proprietor in form of permission or agreement and if it was, then such occupation was not adverse.

88. The 3rd Defendant submitted that James Trench died on 17/3/2001 and Livia Trench was given a grant of probate on 30/5/2006 with the certificate of confirmation of grant issued on 28/11/2007 yet the Plaintiff did not take any action to litigate his claim to the suit property. Further, that Livia Trench issued an eviction notice to Cunningham on 26/2/2009 which effectively terminated his license. Cunningham filed Nyeri ELC Case No. 36 of 2010. The 3rd Defendant contended that from the date of termination of the license to the date of filing suit the non–permissive period was only one year which was not sufficient to sustain a claim for adverse possession.

89. The 3rd Defendant submitted that he completed paying the purchase price to Livia Trench's advocates, Mwangi Kariuki & Co Advocates on 30/10/2009 and continued being in possession of the suit property not as a grazer but as a bona fide owner awaiting transfer. That he had an overriding interest in the suit property having paid the purchase price unlike the Plaintiff who to date had not completed paying the purchase price. Further, that from 30/10/2009 when he paid the balance of the purchase price he became the bona fide owner in occupation and had continued to be in occupation to date save for the 1.27 acres that the Plaintiff and Fiona Ansett had refused to vacate.

90. The 3rd Defendant urged that the constructive trust established earlier between the original Defendant, Livia Trench and him was taken over by the 1st and 2nd Defendants as Executors of Livia Trench's estate. He added that they were only holding the title in trust before transferring it to him. He was emphatic that they could not claim it as their own and that furthermore, they demanded, received and acknowledged receipt of the purchase price in full from Mwangi Kariuki Advocates who had received it on behalf of Livia Trench.

91. Thus he argued that it was unconscionable and a breach of an executors' fiduciary duty for the 1st and 2nd Defendants to claim that there was no sale more so in light of the affidavit sworn by the 1st

Defendant and the request for and acknowledgement of the purchase price in full. On this point, he cited Macharia Maina & n87 Others v Davidson Mwangi Kagiri [2014] eKLR where the Court of Appeal observed that the conscience of humanity dictated that constructive trust and proprietary estoppel applied where an individual received the purchase price and pleaded that the agreement was void.

92. The 3rd Defendant submitted that the Plaintiff was not entitled to an order for specific performance since the sale agreement dated 29/6/1994 lapsed on 31/7/1994 and that his occupation of the suit property was on the basis of a license. He urged that a suit to enforce that agreement for sale based on the alleged breach of contract ought to have been filed within six years of the date the alleged breach which would be around 2000. Further, that James Trench died in 2001 yet by then the Plaintiff had not completed the sale by paying the balance of the purchase price. He relied on the letter from Daly and Figgis Advocates which forwarded the completion documents which were to be held until the purchase price was paid.

93. The other point taken up by the 3rd Defendant was that the suit land being agricultural, it fell within the ambit of the *Land Control Act* and that there was no evidence that the transaction was sanctioned by the relevant LCB. That based on Section 6 of that Act, the agreement became void after the expiry of six months from 29/6/1994. Based on this, the court ought not to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract which is illegal if the illegality is brought to the notice of the court.

94. The 3rd Defendant submitted that the Plaintiff's claim fails and should be dismissed with costs. He emphasised that he had a valid title to the suit property and had undertaken extensive improvements on the land. That he carried out the improvements since July 2001 when he occupied the land as a grazer. He relied on the pictures showing his occupation and developments as well as the surveyor's report. He claimed that he developed the land with the consent of the original defendant way back in 2001 after the death of Mr. Trench and that the Plaintiff did not object to the developments. That by not protesting to the 3rd Defendant's entry in 2001 the Plaintiff acquiesced his right and acknowledged the original owner's right and subsequently the 3rd Defendant's ownership rights after he continued in occupation.

95. Regarding the issue of contempt and lis pendens, the 3rd Defendant's submission was that the contempt case was not about occupation or transfer but alleged construction which he had denied. He claimed that he was tried twice for contempt and hence suffered double jeopardy. He surmised that the order of 8/11/2017 applied to both the Plaintiff and the 3rd Defendant in equal measure and that by the time the order was issued, the suit property had already been transferred to him. That prior to joining the suit, he had substantially developed the suit property as evidenced by the survey report and photographs which he tendered in evidence. Some of the developments included planting trees and a live hedge, construction of a road, storm water drain, culvert crossings, zero grazing unit for dairy cows, structures for chicken, rabbits and sheep and pig rearing, a dwelling house, an underground tank and installation of electricity and water mains. He was emphatic that the developments were carried out before the contempt proceedings and that he had been in occupation of the land for 17 years and had a title over the suit property.

96. In his view, the issue of lis pendens was litigated in the Plaintiff's application of 4/7/2017 and should not be reintroduced for consideration by this court. The 3rd Defendant maintained that there was no proof of invasion and added that when the Plaintiff was given notice to vacate on 3/10/2015 it was not an invasion but was for him to vacate the suit land since his suit had been dismissed for want of prosecution and had not been reinstated within 30 days as ordered by the court. On the succession

cause for the Estate of Livia Trench, the 3rd Defendant maintained that it was concluded while denying the allegation that he averred that Livia Trench's faculties were impaired. He pointed out that the 1st Defendant as Executor swore an affidavit regarding the suit property and acknowledged that he was a purchaser for value pending transfer. He contended that any claim of dementia should have been pleaded and proved by the Plaintiff in the succession cause.

97. He concluded that for the Plaintiff to seek cancellation of his title he must first prove his proprietary right that supersedes that of the 3rd Defendant. He cited Kivindu & Another v Musau & 4 Others (2023) KECA 1015 (KLR) where the court stated that it must be shown that the respondent's title was obtained through fraud, misrepresentation, corrupt act or other means that can impeach the title. He urged the court to dismiss the Plaintiff's claim for general damages on the basis that no attempt was made to plead and prove these. He urged the court to dismiss the Plaintiff's suit and allow the counterclaim.

98. The 4th Defendant submitted that upon being satisfied that the transfer for the suit property drawn by Oraro & Co. was proper and duly executed, it effected the transfer in favour of the 3rd Defendant. It relied on Section 46 of the *Land Registration Act* and the requirement by the *Stamp Duty Act* to have documents stamped before they can be accepted for registration. Further, it argued that fraud must be specifically pleaded and proved and cannot be inferred from facts.

99. The 3rd Defendant filed what it termed as Rejoinder Submissions on 24/9/2024 following the grant of leave by the court on 16/9/2024. He pointed out that the only pleading filed by the 1st and 2nd Defendants was the Amended Statement of Defence which was filed by the original Defendant, Livia Trench on 11/5/2010. He elaborated that through the consent of the parties recorded on 22/11/2023, the 1st and 2nd Defendants withdrew the Defence dated 12/6/2018. The 3rd Defendant urged that no allegation of fraud or issue of lis pendens was urged in the defence of the 1st and 2nd Defendants and that as the Executors of the Estate of the late Livia Trench they had not applied to amend their defence.

100. The 3rd Defendant contended that the twin issues of fraud and lis pendens on which the 1st and 2nd Defendants submissions were based are to be disregarded by the court owing to the legal position that parties are bound by their pleadings. He cited various decisions in support of this legal position and the fact that the court ought to frame issues that arise from the pleadings. The 3rd Defendant reiterated that he was not a party to the suit until 30/4/2018 when he entered appearance but that he acquired title over the suit property and was registered as the owner on 6/7/2016. He added that he had been acquitted of the charges in the criminal case mentioned during the trial, the case that touched on the manner in which he acquired title over the suit property.

101. The 3rd Defendant argued that the 1st and 2nd Defendants could not lawfully make a claim against a co-defendant without complying with Order 1 Rule 24 of the Civil Procedure Rules by filing and serving a notice making such a claim or specifying the issues they wish to have determined between the defendants. The 3rd Defendant invited the court to disregard and expunge the submissions of the 1st and 2nd Defendants.

102. The main issue for determination is who between the Plaintiff and the 3rd Defendant has a superior claim to the suit property. The Plaintiff's claim is premised on rights accrued through adverse possession or in the alternative, specific performance of the sale agreement dated 29/6/1994 between the late Mr. James Trench and the late Cunningham.

103. The 3rd Defendant's claim is that he is the registered proprietor of the suit property which he purchased from Livia Trench vide the agreement dated 4/8/2009 but unfortunately, she died before she had transferred the land to him. That it fell upon the 1st and 2nd Defendants as executors of the Will of

Livia Trench to complete the transaction and transfer the land to him since he had paid the purchase price in full.

104. It is not in contention that Cunningham entered into a sale agreement with James Trench on 29/6/1994 and that Cunningham was granted possession of the suit property which he developed in 1995 or thereabouts and lived on until Livia Trench issued a notice to him to vacate the land on 26/2/2009. Livia Trench would later enter into another agreement to sell the same property to the 3rd Defendant in August 2009. By the time Livia Trench issued the notice to vacate the suit property to Cunningham on 26/2/2009, Cunningham had been in exclusive, open and uninterrupted possession of the suit property for over thirteen years.

105. Cunningham's explanation for the failure to complete the sale transaction was that he was waiting for James Trench to change the user of the land from agricultural to residential as indicated in the correspondence between Daly and Figgis Advocates and K.H Osmond Advocates dated 21/4/1995 and 15/6/1995. Kaplan and Stratton also wrote to K.H Osmond Advocates on 11/7/2006 and 18/10/2006 regarding the sale transaction between Cunningham and James Trench who had died by then. Kaplan and Stratton informed K.H Osmond through their letter of 5/12/2008 that they were no longer acting in the matter and had sent the documents to Oraro & Company Advocates. Oraro & Company Advocates wrote to Kaplan & Stratton on 4/5/2009 to inform them that Livia Trench had asked that Mwangi Kariuki Advocates handle the matters relating to the proposed sale of L.R No. 10422/13 and L.R No. 10422/18.

106. The 3rd Defendant claimed that he took possession of the suit property in 2001 as a grazer. At the time the 3rd Defendant entered into the sale agreement dated 3/8/2009 with Livia Trench, he was aware that Cunningham was in occupation of the suit property. Clause 6 of the agreement stipulated that the property was sold subject to any occupation as at the completion date and in particular, the purchaser was not to call upon the vendor to remove or cause the removal or to take proceedings for the removal of one Stuart Cunningham, his servants, agents or persons claiming under him. Further, that the agreement constituted an indemnity by the purchaser for any proceedings that may be taken by a third party against the vendor. Save for this, the land was sold with vacant possession on the completion date against the release to the vendor of the balance of the purchase price. The completion date was given as 90 days of the date of execution of the agreement.

107. There is no mention of the 3rd Defendant having used the suit property for grazing or any other use prior to the date of the agreement. The agreement contained the entire agreement between the parties. Clause 9 incorporated a disclaimer to the effect that the 3rd Defendant had inspected the suit property and was purchasing it with full knowledge of its condition and was not relying on any representation from the vendor.

108. Based on the sale agreement between the 3rd Defendant and Livia Trench, the 3rd Defendant could only have entered the land after August 2009 and after completion of the sale through payment of the purchase price which seems to have been paid on 5/10/2010 and 2/12/2015 as Kshs. 700,000/= and Kshs. 6,300,000/= respectively. The court is inclined to believe the evidence of Cunningham that the 3rd Defendant took possession of the suit property in October 2015 and not earlier than that. The Plaintiff was therefore in occupation of the entire suit property from 1994 until October 2015. The 3rd Defendant stated in his evidence that the Plaintiff was only occupying approximately 1.28 acres of the land comprising the suit property.

109. The certificate for confirmation of grant for the Estate of Livia Trench dated 25/2/2013 indicates that the suit property was to go to the 1st and 2nd Defendants. In this court's view, it is only James Trench or Livia Trench or the Executors of their respective Wills who could legally assert their rights of

ownership of the suit property or defend a claim for adverse possession against the Plaintiff and not the 3rd Defendant whose claim to the suit property arose on 30/10/2009 as purchaser and not earlier than that. If indeed Livia Trench had allowed the 3rd Defendant to use part of her land for grazing from 2001 as he contended, that did not vest any interest or entitlement to the suit property in the 3rd Defendant before he entered into the sale transaction in 2009.

110. The court is not persuaded that the 3rd Defendant entered the suit property before 2015. He had no legal interest in the suit property prior to 3/8/2009 when he entered into the sale agreement with Livia Trench who knew that the Plaintiff was on the land and had even issued a notice to Cunningham to vacate the suit property.

111. The 3rd Defendant maintained that he had fully paid the purchase for the suit property. The receipt issued by Mwangi Kariuki & Co. Advocates on account of payment of Kshs. 6,300,000/= is dated 30/10/2009. Oraro & Co Advocates wrote to Mwangi Kariuki Advocates on 21/6/2010 seeking Kshs. 2,000,000/= to meet the funeral expenses of Livia Trench The letter does not indicate the land reference number but mentions that the balance of Kshs. 6,400,000/= was to be put in an interest earning account. From this letter, it can be deduced that the property in question was the one being sold for Kshs. 8,400,000/= which would be L.R No. 10422/21 and not the suit property.

112. The documents which the 3rd Defendant produced as evidence of the payments made to Oraro & Co add up to a total of Kshs. 8,098,450/= comprising Kshs. 2,000,000/= paid on 23/6/2010, Kshs. 5,399,200/= paid on 20/9/2010 and Kshs. 699,250 paid on 5/10/2010. L.R No. 10422/13 was inserted by hand on the copies of the emails dated 5/10/2010 and 8/10/2010 relating to the sum of Kshs. 698,850/= which Mwangi Kariuki Advocates stated that it comprised the sum of Kshs. 700,000/= deposited by the 3rd Defendant less banking charges. The sum of Kshs. 6,300,000/= was forwarded on 2/12/2015.

113. The letter dated 16/9/2010 from Mwangi Kariuki Advocates to Oraro & Co only mentioned parcel numbers L.R No. 10422/21 and the suit property but does not mention L.R No. 10422/20 yet these transactions were being undertaken at the same time by Oraro & Co. The 3rd Defendant confirmed that the transactions over parcel numbers 20, 21 and 13(the suit property) were going on at the same time and he even applied for rates clearance for these plots as well as parcel number 19. The purchase price for parcel numbers 20 and 21 were therefore comingled and one cannot tell with certainty that the 3rd Defendant paid the purchase price for the suit property to the 1st and 2nd Defendants. The 3rd Defendant produced copies of the rates demand notes for L.R No. 10422/20, L.R No. 10422/21 and the suit property, which are all dated 21/3/2016.

114. The copy of transfer for the suit property which the 4th Defendant produced gives the consideration as Kshs. 8,400,000/=. The copy of title shows that L.R No. 10422/18 (orig 10422/2/18) was transferred to the 3rd Defendant on 17/11/2009 as entry number 40. The grant of probate in the matter of Livia Trench to the 1st and 2nd Defendants together with the assent to the two of them as beneficiaries were both registered on 21/3/2016 as entry numbers 41 and 42. Entry number 45 which was registered on 5/8/2016 was the transfer of L.R No. 10422/21 and entry number 46 is the transfer of the suit property to the 3rd Defendant registered on 5/9/2016.

115. The letter of consent to transfer the suit property which the 4th Defendant produced is dated 11/6/2009 and is addressed to Livia Trench. It was irregular for the 4th Defendant to complete the registration of the transfer of the suit property to the 3rd Defendant using this consent without requiring that a new letter of consent be procured by the 1st and 2nd Defendants by virtue of the assent registered at entry number 42 which showed that the two of them were the beneficiaries of the land.

This is why the they also executed the transfer. It is quite unusual for a seller to apply for consent of LCB consent before executing a land sale agreement and without being paid the purchase price or at least part of it. The agreement for the sale of the suit property which Livia Trench entered into with the 3rd Defendant is dated 3/8/2009 yet the LCB consent was given on 18/6/2009 and gives the purchase price as Kshs. 2,000,000/= with what seems like the number 4 overwritten on the digit 2.

116. The letters of consent from the LCB dated 30/10/2013 and 30/3/2016 for effecting registration of the transfers over L.R No. 10422/20 and L.R No. 10422/21 indicate that these parcels of land were being transferred by the 1st and 2nd Defendants as executors of Livia Trench. Since the transfer of the suit property was registered on 5/9/2016, it should only have been registered if it were accompanied by LCB consent obtained by the 1st and 2nd Defendants as executors of the estate of Livia Trench and not otherwise.

117. The consideration for the suit property on the application for valuation for stamp duty form produced by the 4th Defendant was given as Kshs. 8.4 million and the land size is 7.653 ha. This sum also appears as the consideration for L.R No. 10422/21 whose size is 8.146 ha in the application for valuation produced by the 4th Defendant. The certificate of confirmation of grant dated 25/2/2013 shows that the 1st and 2nd Defendants were to share equally L.R No. 10422/19, L.R No. 10422/20 and the suit property as well as funds held in a bank account.

118. The court notes that the Rates Clearance Certificate issued by the County Government of Laikipia on 21/3/2016 gives the registered name of the proprietor of the suit property as the 3rd Defendant yet it should have been the 1st and 2nd Defendants which was before the land was transferred to the 3rd Defendant on 5/9/2016. These documents produced by the 4th Defendant demonstrate that the 4th Defendant did not diligently perform its role of scrutinising the documents lodged for registration of the transfer of the suit property to the 3rd Defendant before registering the transfer in favour of the 3rd Defendant.

119. The 1st and 2nd Defendants denied selling the suit property to the 3rd Defendant or that they executed the transfer for the suit property in his favour. According to the evidence of James Kituku, the 1st and 2nd Defendants instructed him to prepare transfers relating to two parcels of land being L.R No. 10422/20 and L.R No. 10422/21, and he produced copies of the blank transfer instruments that he prepared. He told the court that the transfers were executed by the 1st and 2nd Defendants as executors in the presence of Mrs. Pamela Oburu Ager, a partner in the conveyancing department of their firm.

120. Mr. Kituku told the court that they could not have executed the transfer of the suit property to the 3rd Defendant since the land was the subject of litigation and therefore subject to the doctrine of lis pendens. His view was that the transfer in respect of the suit property was forged by being superimposed over pages for the transfer in respect of parcel number 21. He confirmed that their firm released the transfer documents for parcel numbers 20 and 21 to the 3rd Defendant to lodge at the lands office.

121. Based on Mr. Kituku's evidence that neither the 1st nor the 2nd Defendant executed any sale or transfer of L.R No. 10422/13 to the 3rd Defendant and the fact that it was only the 1st and 2nd Defendants who could legally have transferred the suit property as executors of the Will of Livia Trench, the root of the 3rd Defendant's title is questionable and was fraudulently obtained. The other glaring irregularity in the 3rd Defendant's documents and case is the three different purchase prices for the suit property. The 3rd Defendant failed to prove that his title over the suit property was legally acquired.

122. On the issue of lis pendens which arose from the submissions of parties, the court notes that an order was issued by the court on 10/10/2012 restraining Livia Trench or her agents from interfering with the Plaintiff's quiet enjoyment of the suit property and further restrained her from transferring the land without an order of the court. That order bound the 1st and 2nd Defendants who were joined to the suit on 31/10/2012. The typed proceedings show that the 3rd Defendant was represented by Mr. Ng'ang'a when the matter came up on 19/10/2015 in the High Court before Ngaah J. Mr. Ng'ang'a informed the court that he had been instructed to appear for the proposed Defendant who later became the 3rd Defendant. Having been tried for contempt, the 3rd Defendant was aware about the orders restraining dealings with the suit property but nevertheless went ahead to cause the registration of the transfer of the suit property to his name in disdain of the doctrine of lis pendens.

123. The Plaintiff ought to have taken steps to have the contract for the sale of the suit property concluded within a reasonable time. The Plaintiff's claim for specific performance fails for being statute barred.

124. The Plaintiff has proved his claim of adverse possession of the suit property on a balance of probabilities. The court grants prayers 1, 2, 3, 4, 5 and 6 of the plaint dated 9/3/2018.

125. The counterclaims by the original defendant, Livia Trench and that of the 3rd Defendant fail and are dismissed. Each party will bear its own costs for the suit and the counterclaim.

DELIVERED VIRTUALLY AT EMBU THIS 24TH DAY OF FEBRUARY 2025.

K. BOR

JUDGE

In the presence of: -

Mr. Michael Amalemba for the Plaintiff

Mr. William Ochieng for the 1st and 2nd Defendants

Mr. Anthony Mutahi- the 3rd Defendant in person

Mr. Lenin Kibe for the 4th Defendant