



**Inshwil Builders Engineering Company Limited v Mwihike
Farmers Company Limited & 9 others (Environment & Land Case
1373 of 2014) [2024] KEELC 5861 (KLR) (30 August 2024) (Judgment)**

Neutral citation: [2024] KEELC 5861 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1373 OF 2014
EK WABWOTO, J
AUGUST 30, 2024**

BETWEEN

INSHWIL BUILDERS ENGINEERING COMPANY LIMITED PLAINTIFF

AND

**MWIHIKE FARMERS COMPANY LIMITED 1ST DEFENDANT
KIBANYU KIMANI 2ND DEFENDANT
GITHAIGA MWIHIKE 3RD DEFENDANT
GEOFFEREY WACHIRA KIGO 4TH DEFENDANT
MUGAMBI MWAI 5TH DEFENDANT
KIIRU MUGAMBI WAMWAI 6TH DEFENDANT
MWAURA WANGAI 7TH DEFENDANT
NJOGU NJOROGE 8TH DEFENDANT
THOME WAMBO WOMEN GROUP 9TH DEFENDANT
KIMSON HOLDINGS COMPANY LIMITED 10TH DEFENDANT**

JUDGMENT

1. The Plaintiff seeks the following reliefs vide a further amended plaint dated 14th April 2023;
 - a. A declaration that the 7.4 acres of the suit property legally belongs to the plaintiff with the remaining one (1) acre being held in trust by the plaintiff for the benefit of the 10th defendant or the benefit of the 10th defendant's nominee.



- b. An order for immediate vacation of the suit property by the 1st to 8th defendants from the plaintiffs 7.4 acres.
 - c. An order that the OCS of Kayole police station enforce the courts order issued herein.
 - d. A permanent injunction restraining the defendants either by themselves or by their agents, employees, servants, workers or in any other way from interfering with the plaintiff's quiet enjoyment and possession of the suit property to the extent of the 7.4 acres.
 - e. Damages for illegal tress/encroachment on the plaintiff's aforesaid parcel of land.
 - f. Costs of the suit.
2. The suit was contested by the defendants. The 1st to the 8th defendants filed an amended statement of defence and counterclaim dated 21st April 2022. The 1st to the 8th defendants sought a dismissal of the plaintiff's suit and equally sought the following reliefs in their counterclaim;
- a. The plaintiff's suit be dismissed with costs.
 - b. A declaration to issue that the 1st to 8th defendants are the rightful owners of 1.8 acres portion of the land occupied by themselves out of L.R No. 6845/106 situated in Embakasi Nairobi or in the alternative that the 1st to 8th defendants have acquired title by adverse processes to the 1.8 acre portion of land occupied by themselves out of L.R No. 6845/106 Embakasi Nairobi and that they be registered and issued with the certificate of title in respect of the said portion of 1.8 acres forthwith.
 - c. That the registration of the plaintiff as proprietor of the 1.8 acres occupied by the 1st to 8th defendants out of L.R No. 6845/106 Embakasi Nairobi be cancelled forthwith and the chief registrar of titles to register out of L.R No. 6845/106 – Embakasi Nairobi.
 - d. A permanent injunction to issue to restrain the plaintiff and the 9th and 10th defendant by themselves, their agents or otherwise howsoever form entering, occupying, transferring, assigning, changing or in any other way interfering with the 1st to 8th defendants' occupation of the 1.8 acres portion of land out of L.R No. 6895/106, Embakasi Nairobi.
 - e. Any other relief the court may deem fit and just to grant.
 - f. The costs of the main suit and the counterclaim be paid by the plaintiff.
3. The 1st to 8th defendants also filed a witness statement of Kibanyu Kimani dated 21st November 2014 and trial bundle dated 26th November 2014.
4. The 10th defendant filed its Defence dated 30th July 2020. A witness statement dated 16th April 2021 signed by Joseph Kimani Mbugua, its managing director and CEO. The 10th defendant filled a notice of claim against the 1st to 9th defendants dated 20th March 2023.

The Plaintiff's case.

5. The plaintiff argued that it was the legal and bonafide owner of the suit property known as L.R No. 6845/106 situated in Embakasi area of Nairobi County measuring 7.4 acres having purchased it from the 10th defendant who was selling the same as the agent or on behalf of the Thome Wambo women group vide an agreement of sale dated 8th July 2003.



6. It was also argued that the suit property was carved out of an 8.4-acre parcel of land that was subdivided into two portions of 7.4 acres and one (1) acre. The plaintiff bought the 7.4 acres parcel leaving the 1-acre parcel which was to be transferred to the 10th defendant or its nominee. It was also argued that the plaintiff has since obtained the title to the suit property and that it holds 1 acre of the said parcel of land in trust for the 10th defendant or to the 10th defendant's nominee. It was further argued that the 1st to 8th defendants have on several occasions beginning September 2014 jointly and severally trespassed, encroached upon and illegally entered upon the suit property and purported to build on it while having no color of right to do so.
7. At the trial, Patrick Newton Gukura Muraya testified on behalf of the plaintiff and was the sole plaintiff's witness. He adopted his witness statement dated 15th December 2020, the plaintiff's list of documents dated 15th December 2020 and the plaintiff's trial bundle on record. Pursuant to leave granted by the court, the plaintiff also produced the Nairobi City County approved subdivision plan of the suit property approved on 24th March 2022 in his evidence in chief.
8. When cross examined by counsel for the 10th Defendant, he stated that the property was previously owned by Thome Wambo Women group and the plaintiff bought the land when it was vacant without any encumbrances. He also stated that the 10th defendant never breached the sale agreement.
9. On cross examination by counsel for the 1st to 8th defendant, he stated that the plaintiff had no claim against the 10th defendant. He stated that he could not tell how much the 1st defendant paid for the said purchase. He did not have the transfer in court. The agreement between the 1st and 10th defendant was never disclosed to him. It was also never disclosed that they were to get 1.8 acres. He also stated that the said agreement was null and void as it was never completed and that the plaintiff is the owner of the 7.4 acres.
10. When asked about the plaintiff's title to the property, he stated that the same was issued on 19th May 2017 and was issued while the matter was still pending in court. He also stated that he was aware of the 1st defendant's claim of 1 acre and not 1.8 acres.
11. When reexamined, he stated that there was nothing preventing the plaintiff from pursuing the title. He also stated that he was not part of the agreement involving the 1st defendant. The 1st defendant never wrote to him demanding the portion of their land. The remaining 1 acre has to be transferred to the 10th defendant or its nominee and that he is not claiming anything against the 10th defendant. He also stated that the 1st defendant does not feature anywhere in the agreement.

The case of the 1st to 8th Defendants

12. The case of the 1st to 8th defendant's is contained in their amended statement of defence and counter claim dated 21st April 2022, the witness statement of Kibanyu Kimani dated 21st November 2014, the trial bundle dated 26th November 2014 and the oral testimony adduced by Kibanyu Kimani on the 11th October 2023.
13. The 1st to 8th defendants denied that the plaintiff was the legal and bonafide owner of L.R No. 6845/106 the suit property herein.
14. It was argued that the 1st defendant bought from the 10th defendant a portion of land measuring 1.8 acres or thereabout of L.R No. 6845/106, the 1st defendant took possession of the whole of the said portion of land and subdivided the same into numerous sub plots which were in turn sold to the 1st defendant's shareholders among them being the 2nd to 8th defendants.



15. It was pleaded that the plaintiff was made aware of the 1st defendant's ownership of the 1.8acre portion of land by a letter dated 6th August 2004 and that it has therefore been a matter within the plaintiff's knowledge since then over a period 18 years during which time the plaintiff has had knowledge and acquiesced to the 1st to 8th defendants ownership of the 1.8 acre share portion out of the suit property.
16. The existence of the agreement between the plaintiff and the 10th defendant was denied and several particulars of fraud and illegality were pleaded at paragraph 8 of the amended statement of defence and counter claim dated 21st April 2022.
17. The 1st to 8th defendants pleaded and sought the following reliefs in their counterclaim;
 - a. The plaintiff's suit be dismissed with costs.
 - b. A declaration to issue to that 1st to 8th defendants are the rightful owners of the 1.8 acres portion of land occupied by themselves out of L.R No. 6845/106 situated in Embakasi, Nairobi or in the alternate that the 1st to 8th defendants have acquired title by adverse possession to the 1.8 acres portion of land occupied by themselves out of L.R No. 6845/106 Embakasi, Nairobi and that they be registered and issued with the certificate of title in respect of the said portion of 1.8 acres forthwith.
 - c. That the registration of the plaintiff as the proprietor of the 1.8 acres occupied by ye 1st to 8th defendants out of L.R No. 6845/106 Embakasi, Nairobi be cancelled forthwith and the Chief Registrar of Titles to register the 1st to 8th defendants as the registered properties of the said portion.
 - d. A permanent injunction be issued to restrain the plaintiffs and the 10th defendants by themselves, their agents, servants, or otherwise howsoever from entering, occupying, transferring, assigning, charging or in any other way interfering with the 1st to 8th defendants occupation of the 1.8 acres portion of land out of L.R No, 6895/106 Embakasi, Nairobi.
 - e. Any other relief the court may deem fit and just to grant.
18. During trial, Kimani Kibanyu a director of the 1st defendant testified on its behalf, he relied on his statement dated 26th November 2014 together with the 1st to 8th defendants trial bundle in his evidence in chief.
19. It was his testimony that the 1st defendant had paid a total of Kshs 600,000 to the 10th defendant towards purchase of the said land. The 1st defendant later got 1.8 acres and subdivided it into 15 plots to its members who took possession and developed the same. They had stayed in the land for over 13 years as at the time of filing the instant suit by the plaintiff and the plaintiff knew that they were in the said land. The said portion was not available for sale after they had taken possession.
20. When cross examined, he stated that they had an agreement with the defendant. They did not pay the entire sum but paid only Kshs 600,000. The said agreement had not stated the price of 1 acre, they were to buy the entire parcel but only paid Kshs 600,000 which was acknowledged by the 10th defendant. The same was paid through a banker's cheque and that the amount paid was equivalent to 1.8 acres.
21. He also stated on further cross examination that the agreement permitted the 1st Defendant to be given land equivalent to the purchase price that they had paid. The 1st Defendant did not do another agreement stating that they will only buy 1.8 acres. They engaged their own surveyor who told them of what acreage they were to get according to the amount of money they had paid and they were told that the same was 1.8 acres even though the 10th Defendant never indicated anywhere that the land was 1.8



acres. He further stated in cross examination that they were not supposed to put up any structures on that land which was stipulated under special condition No. 4. He also stated that they were not given the title and that he was not sure if the plaintiff had the same. He also stated that his members had put up permanent houses in the property.

22. On cross examination by counsel for the 10th Defendant he stated that the land initially belonged to Thome Wambo Women's Group, and the 10th Defendant was selling the land on behalf of Thome Wambo Women's Group. The agreement had a completion period of 120 days and it was to expire around 21st April 2002. He conceded that he had no evidence to confirm that the banker's cheque was received by the 10th Defendant. He also stated that there was a letter dated 12th September 2002 which stated that no further payment will be accepted. He also stated that there was no other letter confirming that they had received Kshs 600,000. He did not have his bank statement in court and that the photos do not show where the land is located.
23. When re-examined, he stated that there was an agreement for the purchase of the land in respect to payment that had been made. The 1st Defendant paid a deposit of Kshs 300,000 and later paid another installment of Kshs 300,000. The banker's cheque was from the National Bank of Kenya. The said cheques were not returned to them and that the 10th Defendant has not controverted the computation on the size of the land that the 1st Defendant was to get. The photos were for the suit property and its members had constructed on the same.

The case of the 10th Defendant

24. The 10th Defendant filed a statement of Defence dated 30th July 2020, witness statement by Joseph Kimani Mbugua, the Managing Director and CEO of the 10th Defendant dated 16th April 2021. The 10th Defendant also filed a notice of claim against the 1st to 9th Defendants dated 20th March 2023.
25. Joseph Kimani Mbugua the managing director and CEO of the 10th Defendant testified on behalf of the 10th Defendant during trial. He adopted and relied on his witness statement dated 16th April 2021 in his evidence in chief.
26. It was his testimony that the land belonged to Thome Wambo Women's Group and the 10th Defendant sold the land as its agent upon which Kshs 300,000 was paid in respect to the said agreement and they did not receive any further payments. He also stated that the first defendant breached the sale agreement and the agreement was revoked. He also stated that the sum of Kshs 300,000 entitled them to only 0.8 acres and later the land was advertised for sale and the plaintiff showed interest upon which negotiations were done and the transaction undertaken.
27. When cross examined by counsel for the plaintiff, he stated that 7.4 acres were sold to the plaintiff for Kshs 2,664,000, the plaintiff paid the entire sum in full. He also stated that the entire parcel was 8.4 acres, 7.4 acres was transferred to the plaintiff, further the plaintiff has been willing to transfer 1 acre to the 10th Defendant and its nominees. He also stated that 0.8 acres belongs to the 1st Defendant, upon which Kshs 300,000 was paid by the 1st Defendant. He also stated that there was no evidence that the remaining balance was ever paid.
28. When cross examined by counsel for the 1st to 8th defendant, he stated that the cost of the land was Kshs 335,000 per acre. The 1st Defendant only paid Kshs 300,000. He also conceded that the letter dated 16th September 2002, showed that a total of Kshs 600,000 had been paid. He also stated that their advocates never replied to that letter neither did they receive the same and it had no acknowledgement stamp to confirm that it was received.



29. On further cross examination, he stated that the default was on the part of the 1st Defendant, the sale agreement had timelines for 120 days. The same agreement also stated that no structures were allowed on the suit property until completion of payment. He also stated that the said agreement had not made time to be of essence and he was not aware if any completion notice was ever issued and served.
30. When reexamined, he stated that there was a condition on the agreement that the property was not to be sold to any other person within 120 days. He was not served with any additional cheques. He has never received any summons from the police. There is no correspondence confirming that D. G Kimani advocates acknowledged payment of Kshs 600,000 since only Kshs 300,000 was received. He also denied ever being charged in any court of law for receiving any money and not delivering.

The Plaintiff's submissions

31. The plaintiff filed its written submissions dated 5th April 2024. Counsel for the plaintiff submitted on the following issues;
- a. What is the size of the suit land the plaintiff is entitled to vis a vis the size the 1st to 8th defendants and 10th defendant are entitled to, in view of the two (2) sale agreements, one between the 1st Defendant and the 10th Defendant and the other between the plaintiff and the 10th Defendant.
 - b. Is the plaintiff entitled to general damages for illegal trespass/encroachment of its portion of land to the extent of 0.8 acre by the 1st to 8th Defendants.
 - c. What is the quantum of general damages to be awarded to the plaintiff.
 - d. Who bears the costs of the suit.
32. It was submitted that PW1 Patrick Newton Gukura Muraya and the 10th Defendants witness Joseph Kimani Mbugua were both in agreement during their testimony that the plaintiff purchased 7.4 acres of the suit property and was entitled to the same. It was also submitted that the 1st to 8th Defendants breached the sale agreement dated 21st December 2001 as the 1st Defendant only paid a sum of Kshs 300,000 against the full purchase price of Kshs 2,814,000. Only Kshs 300,000 had been paid by the 1st defendant which was commensurate to 0.8 acre, and accordingly the 1st to 8th Defendants are only entitled to 0.8 acre of the suit property.
33. It was further submitted that the plaintiff had proved illegal trespass/encroachment of its portion of land of the suit property by the 1st and 8th Defendants and accordingly the plaintiff is entitled to the sum of Kshs 5,000,000 as general damages for illegal trespass/encroachment. The case of Mombasa ELC Case no.59 of 2015 Mohamed Raiz Shoukat and Another -vs- Yasin Abubakar Argwings Kodhek and 3 Others was cited in support of the Plaintiff's case and the court was also urged to grant costs of the suit

Submissions of the 1st to 8th Defendants

34. The 1st to 8th Defendants filed written submissions dated 26th April 2024 in support of their case. It was submitted that the contradicting positions taken by the plaintiff and the 10th Defendant in the matter are both without any basis and no evidence has been led to challenge the 1st Defendant and further there is no evidence to challenge the computation showing that the commensurate acreage for Kshs 600,000 was 1.8 acres that the 1st to 8th Defendants claim and are rightly entitled to on the basis of the evidence adduced before this court.



35. It was also submitted that there was no evidence that the 10th Defendant took out and served any completion notice upon the 1st Defendant and further that the sale agreement of 21st December 2001 did not make time of essence.
36. Citing the case of Gami Properties Limited -vs- NSSF & 2 others (2018) eKLR, it was submitted that a completion notice ought to have been served if indeed time was to be considered to be of essence.
37. It was further submitted that by the time the plaintiff and the 10th Defendant were entering into the sale agreement of 8th July 2003, the said transaction was at all times subject to the 1st Defendant's beneficial interest of 1.8 acres from the mother title and that the 10th Defendant did not retain any interest in the 1.8 acres of land that it could purport to transfer to the plaintiff. The said agreement was made 2 years after the agreement of 21st December 2001.
38. Counsel submitted that the 1st to 8th Defendants had demonstrated in evidence that as far back as 4th August 2004 the plaintiff's Advocates had issued a demand letter in which they acknowledged that the 1st to 8th Defendants were on the suit property where they had put up beacons and dug trenches for construction. The said letter was responded to on 6th August 2004 and the 1st Defendant made it very clear that they had purchased 1.8 acres out of L.R No. 6845/106 and they were equally in possession of the said portion.
39. Counsel further submitted that the 1st to 8th Defendants had pleaded in their amended statement of Defence dated 21st April 2022 that the plaintiff's suit as against the 1st to 8th Defendants is time barred by the *limitation of actions act*. The action of trespass ought not to have been brought after the end of three years under section 4(2) of the Limitations of Actions Act. The plaintiff became aware of the 1st to 8th Defendants presence on the 1.8 acres of land and hence the latest time the suit ought to have been filed should have been the year 2010.
40. In respect to the counter claim, it was submitted that the 1st Defendant had adduced evidence through its witness Kibanyu Kimani DW1 to the effect that it took possession of the 1.8 acres of land upon execution of the sale agreement of 21st December 2001, pursuant to special condition No.4 of the said agreement. It was also submitted that after it had received Kshs 600,000 the plaintiff subdivided the portion into several parcels and sold to 2nd to 8th Defendants who have put up their residential homes.
41. It was further submitted that a total of 13 years had lapsed by the time this suit was filed in 2014. There was no evidence by the plaintiff that any of them took any steps to remove the 1st to 8th Defendants from the suit property. The occupation of the 1.8 acres of the suit property by the 1st to 8th Defendants has been continuous, open and uninterrupted since 2001 and that the plaintiff even acknowledged their occupation of the land when it issued a demand letter of 4th August 2004. The cases of Ndathi -vs- Itumo & 20 Others (2002) eKLR and C.A No.52 of 2012 Patrick Magu Kimunyu -vs- Joreth Limited (2015) eKLR were cited in support of the counter claim.

The Submissions of the 10th Defendant

42. The 10th Defendant filled written submissions dated 10th May 2024. Counsel submitted on the following issues;
 - a. Whether the 10th Defendant was an agent in the sale transaction over the suit property.
 - b. Whether the 1st Defendant defaulted in paying the full purchase price within the stipulated period.
 - c. Whether the 2nd to 8th Defendants are privy to the sale agreement dated December 2001.



43. Counsel submitted that all parties to the suit agreed that the suit property was originally registered to Thome Wambo Women's Group. The 10th Defendant's witness in his statement and evidence before court had stated that the 10th Defendant was selling the suit property as an agent of the Thome Wambo Women Group and that the said evidence was not controverted.
44. It was also submitted that the plaintiff's witness while being cross examined by counsel for the 1st to 8th defendants testified that at the time when he purchased 7.4 acres of the suit property the entire suit property was registered in the names of Thome Wambo Women Group and that the 10th Defendant had power of attorney to sell the same on behalf of the 9th Defendant.
45. It was also submitted that the 1st Defendant's witness while being cross examined by counsel for the 10th defendant equally testified that the suit property initially belonged to the women group and that the 10th defendant was selling it on behalf of the 9th Defendant.
46. It was further submitted that the 10th Defendant being an agent of the group as acknowledged by the plaintiff and the 1st Defendant, no cause of action can be sustained against the 10th Defendant under any of the two sale agreements executed in the sale transaction. The case of *City Council of Nairobi - vs- Wilfred Kamau Githua /Githua advocates and Another* (2016) eKLR was cited in support.
47. As to whether the 1st Defendant defaulted in paying the full purchase price, it was argued that the initial sale agreement was executed on 21st December 2001 between the 10th Defendant and the 1st Defendant. The purchase price for the entire property was Kshs 2,814,000. A deposit of Kshs 300,000 was paid and the remaining balance was never completed within the stipulated time frame which was 120 days. It was submitted that condition No.4 of the said agreement allowed the 1st Defendant to take possession of the suit property at the execution of the agreement but restricted putting up of any structures until completion of the transaction. Citing the case of *Dhanjal Investments Limited -vs- Shabaha Investements Limited (Court of Appeal No. 80 of 2019)* (2022) KECA 366 (KLR)(18th February 2022) (Judgement) it was submitted that the submissions by the 1st to 8th Defendants that a completion notice ought to have been issued are misconceived and misplaced in light of the express terms of the sale agreement and the settled law where time has been made to be of essence.
48. Counsel further submitted that the sale agreement dated 21st December, 2001 was between the 1st Defendant and the 10th Defendant. The 1st Defendant is a separate entity from its members and none of its members can individually claim any right from a contract entered into by the 1st Defendant as they can only claim through the 1st Defendant. None of the 2nd to 8th Defendants attended court to prove their identity and interest in the suit property.
49. It was the 10th Defendant's submission that the 1st defendant's witness did not produce any authority or consent which allowed him to prosecute the counterclaim on behalf of the 2nd and 8th defendants. Therefore, the 1st defendant's witness only represented the 1st defendant and hence therefore the 2nd to 8th defendants did not attend court to lead evidence to substantiate any claim against the plaintiff and or the 10th Defendant.

The 1st defendant's witness testified that he does not own or claim a plot on the suit property for himself and neither has he constructed on it. It was his testimony that after the execution of the sale agreement dated 21st December, 2001, they gave the suit property to their members who constructed houses. None of the members being the 2nd to 8th defendants attended court to substantiate the said allegations that they had constructed any houses on the suit property. The 1st defendant's witness did not lead any substantive evidence such as share certificates to indicate who the members of the 1st Defendant were and their respective alleged interest on the suit property. The photos of houses that the 1st defendant's



witness produced before court have nothing in them to suggest that they are located on any portion of the suit property; they could be random photos obtained elsewhere.

50. It was further submitted that to the extent that the 1st Defendant's witness admitted to not owning any house on the suit property he has no locus to argue on who may or may not have constructed on the suit property. Counsel also submitted that even if the 1st defendants' members could have constructed houses on the suit property, which is denied, the alleged constructions would have been in breach of special condition 4 of the sale agreement dated 21st December 2001.
51. Relying on the case of *Bharminder Sing Osahan -vs- Helicopters International Limited* (2021)eKLR it was argued that the 2nd to 8th Defendants cannot in their individual capacities claim any right under the sale agreement dated 21st December 2001. The court was urged to dismiss the claim against the 10th Defendant and the 1st to 8th Defendants counter claim.

Analysis and Determination

52. The court has carefully considered the pleadings, the testimonies and submissions herein and is of the view that the issues that arise for determination are as follows;
 - I. Whether the plaintiff has proved its claim against the defendants to the required standard.
 - II. Whether the plaintiff is entitled to the reliefs sought.
 - III. Whether the 1st to 8th Defendants counterclaim is merited and warrants the grant of the reliefs sought.
 - IV. What orders should issue as to costs.
53. It was the plaintiff's case that through a sale agreement dated 8th July 2003 it acquired 7.4 acres from the 10th Defendant to be excised from the suit property. The 10th Defendant witness confirmed that indeed the plaintiff purchased 7.4 Acres and paid the full price of Kshs 2,664,000. The plaintiff took possession of the said 7.4 Acres in the year 2003 after the execution of the agreement with the 10th Defendant on 8th July, 2003. The plaintiff later sub divided the property to smaller units and sold those smaller units/sub-plots to other 3rd parties. The plaintiff confirmed that in the approved sub-division plan it has reserved plot No.5 for the 10th Defendant or its nominee.
54. The total acreage of the suit property was 8.4 Acres. That prior to the plaintiff buying the said 7.4 Acres of the suit property the 10th Defendant had sold about 1 Acre of land to 1st to 8th Defendants who were in occupation of the said one (1) Acre.
55. It was also the Plaintiff's case that it had the title of the entire property in its name and that it is ready and willing to hive off one (1) acre of the suit property occupied by the 1st to 8th Defendants and transfer the same to the 10th Defendant or to the 10th Defendant's Nominee but at the cost of the said 10th Defendant or the said 10th Defendants Nominee.
56. During trial, the plaintiff's witness produced PExh 4, which was an affidavit sworn by Mr. Kimani J Mbugua the director of the 10th Defendant sworn on 20th March 2015.
57. The 1st Defendant and the others maintained that it had entered into a sale agreement dated 21st December 2002 with the 10th Defendant to purchase the suit property for a sum of Kshs 2,814,000 but only paid Kshs 600,000 and they were entitled to 1.8 Acres which they had taken possession of and had its members develop on the same.



58. It is trite that he who alleges must prove. This principle is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 provides as follows:

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

59. Sections 109 and 112 of the same Act states as follows;

- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
- “112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

59. From the evidence that was tendered herein, it is not in dispute that the plaintiff and the 1st defendant entered into a sale agreement with the 10th Defendant seeking to purchase the suit property separately. The 1st defendant’s agreement with the 10th defendant was dated 21st December 2001 while the plaintiff’s agreement with the 10th defendant was dated 8th July 2003.

60. The evidence on record shows that the plaintiff entered into a sale agreement with the 10th Defendant for purchase of 7.4 Acres and paid the full purchase price of Kshs 2,664,000, however this agreement came after the 1st Defendant had already entered into an earlier agreement dated 21st December 2001 and had paid a sum of Kshs 300,000 and even taken possession of 1.8 acres of the said property.

61. While the 1st Defendant had alleged that it had paid a sum of Kshs 600,000 it however emerged during trial that only a sum of Kshs 300,000 was paid towards the purchase of the said property. The 1st Defendant was unable to prove how a sum of Kshs 600,000 was paid to the 10th Defendant.

62. The evidence adduced before court also demonstrated that by the time the plaintiff and the 10th Defendant were entering into the sale agreement of 8th July, 2003, the said transaction was subject to the 1st Defendant’s existing beneficial interest of 1.8 acres from the mother title upon which the 1st Defendant had taken possession and developed the same. It therefore follows that at the time the transaction between the 10th Defendant and the plaintiff was executed, the same ought not to have included the 1.8 acres being occupied by the 1st Defendant as at that time.

63. In respect to the prayers sought by the plaintiff, it is the finding of this court that the Plaintiff can only be entitled to the portion of the suit property excluded the 1.8 acres of the entire parcel 8.4 acres being claimed by the 1st to 8th Defendants. This in essence will only include 6.6 acres of the said property.

64. In respect to the prayers for damages for illegal trespass as pleaded and submitted by the Plaintiff, the evidence tendered herein shows that the 1st to 8th Defendants occupied the 1.8 acres of the suit property after the execution of the sale agreement dated 21st December 2001 and as such the prayer for damages for illegal trespass is not for granting.

65. In respect to the 1st to 8th defendants counterclaim, it is worth noting that a counterclaim just like any other suit ought to be proved to the required standard.



66. It was the case of the 1st to 8th Defendants case in the counterclaim that they bought the suit property from the 10th Defendant who was selling it on behalf of the Thome Wambo Women’s Group and that they took possession of 1.8 acres of land upon execution of the sale agreement dated 21st December 2001.
67. The evidence adduced herein clearly confirmed that the 1st to 8th Defendants took possession and had developed the said portion of 1.8 Acres. It was also evident that they had been in occupation for a period of over 12 years as at the time of filing suit.
68. Moving to the claim for adverse possession, the law on the same is provided for under Section 7 of the *Limitation of Actions Act* as follows;
- “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.”
69. Further provisions are made under Sections 13, 17 and 38 of the *Limitation of Actions Act* whose net effect is to extinguish the title of the proprietor of the land in favour of a party who has been in possession thereof for a minimum period of 12 years.
70. Discussing the essential elements in a claim for adverse possession, the Court of Appeal in the case of *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi* [2020] eKLR stated thus:
- “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.”
71. Equally in the case of *Mtana Lewa –v- Kahindi Ngala Mwangandi- COA MALINDI* (2015) eKLR it was held that:
- “Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.”
- Also see *Paul Mwangi Gachuru vs. Kamande Nguku* (2017) eKLR.
72. The analysis of the evidence adduced herein shows that there was a sale agreement between the 1st Defendant and the 10th Defendant executed on 21st December 2001 upon which only a sum of Kshs 300,000 was paid towards the acquisition of the suit property leaving some substantial balance. The 1st Defendant as per the said agreement took possession of 1.8 acres of the suit property upon its execution on 21st December 2001. It therefore appears that the initial entry into the suit land was as per the said agreement hence there was consent from the seller. However, the agreement was not finalized as the 1st Defendant never completed by paying the remaining balance just like the case of *Paul Mwangi Gachuru* (Supra). The evidence on record shows that the entry was permissive in the beginning and



later the agreement was never completed but the 1st Defendant took possession and remained in the 1.8 acres of the suit property.

73. It was also evident that the 1st Defendant after taking possession of the 1.8 Acres subdivided and sold to the 2nd to 8th Defendants who developed the said portion. This evidence was not challenged in any way. In light of the foregoing the court finds the counter claim by the 1st to 8th Defendants is merited.
74. Having considered the totality and weight of the evidence tendered here it is the finding of this court that the plaintiff's claim partially succeeds only to the extent of being entitled to the portion of the suit property excluding the 1.8 acres occupied by the 1st to 8th Defendants while the 1st to 8th Defendants counterclaim is merited and they are entitled to the reliefs sought herein.
75. In respect to the costs of the suit and counterclaim, this court having considered the circumstances of this case and also the fact that the plaintiff's claim has partially succeeded directs each party to bear own costs of the suit and counterclaim.

Final Orders

76. In the end, this court issues the following final orders; -
- a. A declaration is hereby issued that only 6.6 acres of the suit property belongs to the plaintiff.
 - b. The 1st to 8th Defendants counterclaim is hereby allowed as follows; -
 - i. The 1st to 8th Defendants have acquired title by way of adverse possession to the 1.8 acres portion of land occupied by themselves out of L.R No. 6845/106 – Embakasi Nairobi and they be registered and issued with certificate of title in respect of the said portion of 1.8 acres.
 - ii. The registration of the Plaintiff, Inshwil Builders Engineering Company Limited as proprietor of the 1.8 acres occupied by the 1st to 8th Defendants out of L.R No. 6845/106 – Embakasi Nairobi be cancelled and the Chief Registrar of Titles to register the 1st to 8th Defendants as the registered properties of the 1.8 acre portion of land out of the suit property.
 - iii. A permanent Injunction is hereby issued restraining the Plaintiff and 10th Defendant from entering, occupying, assigning charging and or interfering with the 1st to 8th Defendants occupation of the 1.8 acres of L.R No, 6895/106.
 - c. Each party to bear own cost of the suit and counter claim.

Judgement accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF AUGUST 2024

E. K. WABWOTO

JUDGE

In the presence of:

Mr. Waweru h/b for Mr. Kingara for 1st to 8th Defendants.

Mr. Aol for the 10th Defendant.

N/A for the Plaintiff.



Court Assistant: - Judy.

