



**Skov Estate Limited & 6 others v Agricultural Development Corporation
& 21 others (Environment & Land Case 251 of 2012 & 318 of 2018
(Consolidated)) [2023] KEELC 224 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 224 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 251 OF 2012 & 318 OF 2018 (CONSOLIDATED)
FM NJOROGE, J
JANUARY 26, 2023**

BETWEEN

**SKOV ESTATE LIMITED 1ST PLAINTIFF
MUIGAI MACHARI 2ND PLAINTIFF
SIMON NYARARI 3RD PLAINTIFF
BEATRICE GICHUHI 4TH PLAINTIFF
MWANGI MWANIKI 5TH PLAINTIFF
ERASTUS GITHUKU 6TH PLAINTIFF**

AND

**AGRICULTURAL DEVELOPMENT CORPORATION 1ST DEFENDANT
LANDS LIMITED 2ND DEFENDANT**

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 318 OF 2018**

BETWEEN

AGRICULTURAL DEVELOPMENT CORPORATION PLAINTIFF

AND

**BONIFACE MOKAYA 1ST DEFENDANT
LANGISA NKURUMA 2ND DEFENDANT
MOKORO KIROBI 3RD DEFENDANT**



OLE MPULUTE KESHE	4 TH DEFENDANT
JOSEPH MWAURA	5 TH DEFENDANT
KAMAU NYARARI	6 TH DEFENDANT
JOSEPH KAMAU	7 TH DEFENDANT
NINJA NYARARI	8 TH DEFENDANT
ANN WAMUYU	9 TH DEFENDANT
BENARD NYADIKE	10 TH DEFENDANT
KAUNI MURENO	11 TH DEFENDANT
TIAMPATI KOOH	12 TH DEFENDANT
K OLE NCHOKO	13 TH DEFENDANT
NASIOKI KOOL	14 TH DEFENDANT
ESTHER WANJOHI	15 TH DEFENDANT
SK KAIGA	16 TH DEFENDANT
FRANK KIBELEKENYA	17 TH DEFENDANT
REGISTERED TRUSTEES OF MOTHER TERESA SCHOOLS	18 TH DEFENDANT
REGISTERED TRUSTEES OF NEW HORIZON SCHOOLS ...	19 TH DEFENDANT
REGISTERED TRUSTEES OF KAG CHURCH TIPIS	20 TH DEFENDANT

JUDGMENT

Introduction

1. The two consolidated cases herein are Nakuru ELC 251 of 2012 and Nakuru ELC 318/2018. They were consolidated on 12/11/2019 by the consent of the parties with Nakuru ELC 251/2012 being singled out to be the lead file. The matter was then set down for hearing.

Pleadings

Plaint in Nakuru ELC 251 of 2012

2. The plaintiffs claim in ELC 251 of 2012 is contained in the further amended plaint dated 6/4/2011. The plaintiffs sought the following orders against the defendants:
 - i. An order that the plaintiff company and its members bought the said land from the defendants and hence to effect transfer of title no LR NO 9467 to the plaintiffs and its members – specific performance and in default the court to execute all the transfer documents;
 - ii. In the alternative, a declaration that the plaintiffs are entitled to all that parcel of land known as title no LR NO 9467 by adverse possession;
 - iii. Costs of this suit;



- iv. Any other relief that this court may deem fit to grant.
3. In their further amended pleadings the plaintiffs in Nakuru ELC 251 of 2012 state that originally they leased the suit land from the defendants and while the lease was still in subsistence they applied to the 1st defendant to purchase the suit land in 1982; that on 27/11/1982 the 2nd defendant offered to sell the suit land to them which offer they accepted, signed an undertaking and paid a deposit of 20% as required by the letter of offer. According to the claimants the balance was to be paid in 30 half yearly instalments over a period of 15 years; with the first instalment falling due upon the obtainance of the land control board consent by the defendant; that the plaintiffs paid the instalments but the defendant failed to obtain the land control board consent; that on 5/11/1994 the 2nd defendant demanded the payment of the balance, then said to be Kshs 1,057,548/= within 30 days in default of which the land would be auctioned; that the plaintiffs then paid the balance on 11/7/1995 but the defendants have neglected to transfer the suit land to the plaintiffs. They aver that they paid the full purchase price before schedule. The plaintiffs also raised by their pleadings an alternative claim of adverse possession premised on the allegation that the transaction had been rendered void by non – obtainance of the land control board consent while as they had remained in possession continuously without force and without secrecy.

Defence in Nakuru ELC 251 of 2012

4. In that case the defendants filed an amended statement of defence on 18/11/2011. They denied offering the plaintiffs the suit land for sale. They further stated that no contract of sale exists between themselves and the plaintiff and that the plaintiff's claim has been overtaken by limitation; that in the alternative the transaction is unenforceable as it lacks a land control board consent; that the consent of the land control board was not applied for or obtained; that the transfer of a registered lease in favour of the plaintiffs was for a limited duration and the lease expired on 31/7/2003 and the 2nd defendant is in possession of the suit land. the defendants also deny that the claim for adverse possession can stand, giving the reasons that the 1st plaintiff entered the suit land under a lease; that upon expiry of which it was asked to vacate and the land is now under occupation by the registered owner; that the property belongs to a state corporation and is therefore government property.

Plaint in Nakuru ELC No. 318/2018

5. In the Nakuru ELC No 318 of 2018 the plaintiff stated that it owns the suit land through Lands limited; that the land is about 1300 acres; that the same has been set aside for special production of potato seeds on behalf of the state department for agriculture to ensure food security under the government policy; that the defendants under the guise of having purchased portions of the suit land from an unknown third party have proceeded to fence, occupy and take possession encroach or interfere with the suit property to the plaintiff's detriment, thus occasioning the plaintiff massive damage by frustrating the government potato seed project and compromising the government programme on food security; that the plaintiff's attempts to regain possession of the occupied portions have been met with hostility and resistance and threats of violence from the defendants. The plaintiff therefore seeks the following orders:
 - a. A declaration that the defendants are trespassers in property title No. LR 9467, Mau Narok, Nakuru County.
 - b. An eviction order against the defendant and other trespassers in occupation of any part of the plaintiff's land.



- c. A permanent mandatory injunction restraining the defendants from continuing being in occupation and/or trespassing onto the plaintiff's land either by themselves, their agents, servants and/or any person drawing title from them.
- d. Costs and interest of this suit.
- e. Any other relief that this honourable court shall deem fit to grant

Defence in Nakuru ELC 318 of 2018

6. The defendants in Nakuru ELC 318 Of 2018, though served by way of substituted service, did not file any defence. Some of them filed a memorandum of appearance through the law firm of Karanja Mbugua & Co advocates.

Evidence of the Parties

Evidence of the Plaintiff in Nakuru ELC 251 of 2012

7. PW1 – Erastus Githuku Njuguna testified on 21/6/2021 and adopted his witness statement as his evidence-in-chief and produced documents in Plaintiff's List of Documents dated 25th August 2010 as P. Exh 1 to 15 respectively. He stated that he and a group of 22 others purchased a plot from the 1st Defendant. They formed themselves into the Plaintiff company; he had the certificate of change of name showing registration of Plaintiff. They had leased the plot from ADC in the year 1968. In 1982, the officials from the ADC (1st Defendant) came and offered to sell the plot to the plaintiffs through assisted-owner scheme through the 1st Defendant letter of offer dated 27th November 1982 (P. Exh 3). The plaintiffs accepted the offer through a letter dated 9th December 1982 (P. Exh 4.) They were then instructed to pay 20% through the letter dated 13th September 1982 (P. Exh 6.) They paid the 20% of the purchase price and were issued with receipt. The money was raised depending on each person's shares. Some people refused to pay. 23 persons paid the 20%; the letter dated 15th December 1983 from the 2nd defendant (P. Exh 8) shows the names of those who paid. After paying the 20% they waited for the 1st Defendant to give them a title but none was forthcoming until 2010 when they filed this case. The balance of 80% was to be paid within 30 days of letter dated 5th November 1994 (P. Exh 10.) They went to Nairobi to enquire on the balance and they were advised that balance was Kshs. 1,055,700/= . They then struggled and raised the said amount which they paid through a banker's cheque. They were issued with a receipt (P. Exh 11) dated 11th July 1995. Since they had paid 100% of the purchase price, they moved to court to demand for a deed title. They paid land rates and land rent and were issued with receipts (P. Exh 13 and 14.) Currently, about 3,000 people are residing on the plot. There are developments including permanent houses, shops and schools. They still do not have any title. He prays that the court helps them to get title. He prays for judgment as per the plaint. He also has copies of other receipts which were not included in the Plaintiff's bundle filed on 8th September 2010. They are paginated as 1 to 17. He produced the bundles as P. Exh 16.

A Summary of the Plaintiff's Documentary Evidence

8. A copy of the letter of offer dated 27/10/1982 was produced. Purchase price was Kshs 1,596,000/= . Refundable application fees and requisition fees were Kshs 2000/= and Kshs 10/= respectively. Kshs 319,000/= being 20% had to be paid upon acceptance of the offer and the balance to be paid by way of a charge registered in favour of the seller against the title to the property, repayable by way of 30 half yearly instalments of Kshs 79,800/= , with interest at the rate of 10% per annum. The first installment was to fall due on the date that the consent of the Land Control Board would be received by the seller;



the subsequent instalments were payable on the 1st April and 1st October each year. Rent was payable until the date the consent of the land control board was obtained. The seller's lawyers were to prepare the charge. Acceptance of the offer was to occasion the execution of a surrender of the lease that the plaintiff held over the land; the seller reserved the right to increase the rate of interest.

9. The next vital document is the letter of acceptance of offer dated 9/12/1982. The letter conveyed the information that the sum of Kshs 65,300 had been paid and that the buyers expected to obtain money by the sale of proceeds of farming on the land and so they sought the seller's indulgence. The next document the plaintiffs produced is a letter dated 13/9/1982 from the 2nd defendant demanding the full payment of the 20% deposit required. There is another letter from Lands Limited dated 15/12/1983 in which the discussions between the plaintiffs and the defendants held on 14/1/1983 were summarized. It would appear that the members of the 1st plaintiff had disclosed the acreage to be held by each member and the payments that each was supposed to make. Another letter dated 5/11/1994 addressed to the 1st plaintiff and one Bal Dev Moorlaj gave the addressees 30 days' notice to purchase the farm in default of which the defendants' lawyers would be at liberty to sell the said farm by way of public auction.
10. There is a receipt issued by the 2nd defendant dated 11/7/1995 showing that the sum of Kshs 1,055,701.05 was paid to it vide a cheque number 004021 dated 11/7/1995.
11. The plaintiffs have among their documents an undated memo to the Minister for Agriculture- but which the court has reason to believe was written after 2003- in which they state that they have fully occupied the suit land and that their livelihood depends on the same, pleading with the government to direct the 1st defendant to honour the transfer of the land to the members of the 1st plaintiff. A demand note for rates from the County Council Of Nakuru which is dated 17/1/1995 was produced in evidence. It demanded payment of Kshs 30,444.40 from the 1st plaintiff. There is a receipt from the County Council dated 17/7/1995 showing that the amount demanded was paid to the County Council. There is also a Kenya Commercial Bank deposit slip of an obscure date for Kshs 14,096/= indicating payment to the Ministry of Lands being for land rent by the 1st plaintiff. It was the plaintiff's evidence that the defendants never cancelled the sale offer and that there was expectation that the balance of 80% was to be a loan through government.
12. Upon cross-examination by Mr. Ombui, PW1 stated that they moved into the plot in 1968. At that time, he was a member of the Plaintiff. The directors as that time were Moorlaj and Fred Kubai. PW1 became a director later. In 1968 he had 250 shares in the plaintiff. He does not know what percentage of shares that was. In 1982 when they were given letter of offer, the chairman of the Plaintiff was Mwangi Mwaniki while PW1 was secretary. He does not remember who the directors were in 1982; as at 1982, Moorlaj, Kubai and PW1 were directors. As at 1982, PW1 and others held 23% of the shares while 77% was held by some 5 people including Moorlaj and Kubai. Those who held 77% were not in the country as at 1982. They did not accept the offer of 1982. Prior to the 1982 offer, the plaintiffs were paying an annual rent of about Kshs. 47,000/=. The offer by the 1st defendant was subject to payment of 20% within two weeks, which the plaintiffs paid belatedly. PW1 signed P. Exh 4 in his capacity as secretary. As at 9th December 1988 they had not paid the full 20%. They requested for more time through P. Exh 4. They did not enter into any sale agreement. PW1 is aware that the balance of 80% was to be a loan through government. They paid the balance in 1995 upon receiving notice form the 1st Defendant. The receipt was issued in favour of the plaintiff and was forwarded vide P. Exh 10 which was addressed to Muraj and Skov estate. Through the offer of 1982, they no longer needed to pay the annual rent. Paragraph 13 of P. Exh 3 says the plaintiffs were to continue with their obligations. However, the 1st Defendant stopped them from continuing with payment of rent. A disagreement arose within the members of the Plaintiff. Some people were ready to pay while others were not ready. Within the group



owning 77% of shares, there was a disagreement as to the value of their shares. The Plaintiff's lease was to expire in 2003. The Plaintiff's shareholders were in two camps. Not all camps agreed to the purchase Item No. 21 in 1st and 2nd Defendant's list of documents dated 24th March 2017 which is a draft agreement. The signature purporting to be for secretary is not PW1's. As at 6th August 2003 the Plaintiff's secretary was Gichuhi. PW1 does not know if the Plaintiff still exists. The current over 3,000 occupants of the plot obtained the plots from their group of 23. Each member subdivided his portion to others as he desired. PW1 does not know how much land he owns or claim on the ground. There was another case which was filed in Nairobi in 2006 but the plaintiffs were not involved in the case.

13. Upon re-examination PW1 stated that the 1st Defendant always received their money and issued receipts to them. The 1st Defendant never cancelled its offer to them. According to P. Exh 8, each share was equivalent to 12 acres. Each got land according to his shares. At that point the plaintiff's case was closed.

Evidence of the Defendants

14. DW1, Anthony Ademba, Chief Legal Officer, Kenya Meat Commission testified on 9/5/2022 and adopted his witness statement dated 24/3/2017 filed on 31/3/2017 as his evidence-in-chief in both matters as consolidated; his evidence is that he previously worked with ADC from 2011 – 2019. He made a statement for this case while he was a legal officer at ADC. Lands Ltd is a wholly owned subsidiary of ADC. Both are Government Statutory Corporations. The main statement was made by the Regional Manager ADC who had since retired. The evidence he stated there is similar to DW1's evidence.
15. DW1 stated that ADC through Lands Ltd had leased the land from 1967 for 35 years to Skov Ltd. Then ADC offered the land to Skov Ltd for sale. The offer never went through. The Landlord/tenant relationship lapsed in 2002. Lands Ltd still owns the suit land. The extra claimants in ELC 318/2018 are trespassers whose relationship to the 1st plaintiff is not clear to DW1. That ADC was privy to their alleged agreements with Skov Ltd. If the sale was to go through an LCB Consent, a Commissioner of Land Consent, a Treasury Consent, and the Ministry of Agriculture Consent had to be obtained. DW1 relied on all the documents he had have annexed to his list of 24/3/2017 as exhibits in this case as DExh.1 – DExh.30; he stated that there are other cases by the Plaintiffs e.g. NBI HCCC No. 998/2006, NKR HCCC No. 192/2006; the applications for injunctive orders were dismissed and the cases were not concluded. Then they filed this case as HCCC No. 73/2010. He stated that the present suit should be dismissed and the prayers in ELC 318/2018 be allowed as prayed in the plaint with costs of both suits.

A Summary of the Defendants' Documentary Evidence

16. The letters dated 12/10/1982 and 16/12/1982 emphasize that the defendants needed the purchaser's members to be united in the purchase with a unanimous voice, in default of which the sale would not go on. The letter dated 16/12/1982 admits that payments for the sale had been made, and purported to stop the members of the 1st plaintiff who were paying on a pro rata basis from making any further payments. The matter was put to rest by the letter from the Attorney General Matthew Muli who advised the Chief Secretary in the Office of the President in a letter sated 17/6/1985 that the dispute amongst sections of the 1st plaintiff's members and the sale of the land and the proposed sale of the suit land to the 1st plaintiff should be treated as separate matters. In a letter dated 19/6/1989 the Attorney General's Office again through Mr. Ole Keiwua, Principal State Counsel advised that the only legally binding agreement for an option to purchase was between the 1st plaintiff and the 1st defendant and that the shareholders of the 1st defendant were not individually involved unless they were roped in



- by way of a fresh agreement which could only be done with the consent of the 1st defendant. The Attorney General warned the 1st defendant of acting in any manner that would render it liable to the 1st plaintiff for a breach of contract. The defendants appear to have accepted the Attorney General's advice and, while acknowledging receipt of payment of Kshs 196,716/= made to their Nakuru office (albeit they belatedly termed it as on a "without prejudice" basis) they communicated that position to the 1st plaintiff in a letter dated 28/7/1985.
17. The defendants have produced in their bundle a letter dated 20/8/1997 admitting that they received the sum of Kshs 1,055,701.05 from the 1st plaintiff. The same letter admits payments made to it by individual shareholders of the 1st plaintiff in the year 1995-1996.
 18. The defendants' internal memo dated 3/6/2003 states that the first offer was withdrawn after conditions were not met and a second offer was made on 27/11/1982, and that on 12/9/1985 the defendants notified the 1st defendant and one Mr Mwaniki that the offer had been withdrawn and any sum paid would be treated as rent. Thereafter, notice of outstanding rent was sent to the tenant. The same letter states that no loan account was opened for purchase of the farm.
 19. I have noted a letter by the defendants dated 2/7/2003 which in my view constitutes a new offer of sale to the 1st plaintiff once the lease expired on 31/1/2003. The value would be conveyed to the 1st plaintiff before that lease expiry date. The letter from J.N. Karori for the Commissioner for Lands dated 23/1/2003 assigned the suit property a value of Kshs 50,570,000/=. A letter dated 6/8/2003 forwarded a sale agreement to the 1st plaintiff asking for execution thereof and payment of Kshs 10,127,192 within 15 days. However, it is noted that the attached agreement is for land identified as LR NO 9674.
 20. There is evidence from the defendants' bundle that some individuals were asked to pay for the land. The letter dated 10/8/2004 is one such piece of evidence and it asks one Patrick K. Kariuki to pay Kshs 422,960 for 12 acres.
 21. Upon cross-examination by Ms. Karuga DW1 states as follows: that the lease to the Plaintiffs was from 1967; it does not indicate the amount payable for the lease by the Plaintiffs. The lease is not in the list of documents; it was to lapse in 2002 or thereabouts. There are correspondences between ADC and Skov Ltd; a letter dated 2/7/2003 from ADC to Skov Estates Ltd stated that the lease was not intended to be renewed and the lease had expired by then. The defendants had been trying to get possession of the land and start potato seed activities thereon but there was resistance and so it lodged this claim. Though the claim is not expressly worded as a claim of trespass the plaintiff has sought eviction of the defendants from the land as they are trespassers. It is true that ADC had offered the land for sale to Skov Ltd around 1982 according to DExh.5 dated 19/7/1982. It is not correct that the Plaintiffs paid for the land after that. Skov Ltd were only tenants. All payments to ADC by Skov were as tenants. DW1 was not aware of any 20% deposit for the alleged purchase by Skov Ltd. DW1 was not aware whether the payment was for purchase. The lease was a normal lease and rent was payable. ADC gave all directions over the land on behalf of Lands Ltd. The Plaintiffs are invaders. ADC is not in occupation due to the Plaintiffs, their agents and third parties.
 22. Upon re-examination by Mr. Ombui DW1 stated that 1300 acres is the size of the land. In ELC 318/2018 the plaintiff stated that the invaders have occupied 100 acres on the ground. (page 26 of the bundle). There was also an application for Adverse Possession which was dismissed by Wendo J. At that juncture the Defendants' case was marked as closed.



Determination

Issues for Determination

23. It is not in doubt that the suit land is owned by the defendants. It is also not in doubt that the plaintiffs in ELC 251 of 2012 and the defendants in ELC 318 Of 2018 are in occupation of some portions of the suit land believing that they have some right or interest in it one way or the other.
- a. Whether the plaintiffs in ELC 251 of 2012 are entitled to the suit land by way of adverse possession;
 - b. Whether orders of specific performance should issue to the plaintiffs in ELC 251 of 2012;
 - c. Whether the plaintiff in suit ELC 318 of 2018 has locus to file the suit;
 - d. Whether the defendants in ELC 318 of 2018 are trespassers on the suit land who ought to be evicted and permanently enjoined from interfering in any manner with the suit land;
 - e. Who ought to meet the costs of this litigation.

The said issues are addressed as herein under.

Whether the plaintiffs in Nakuru ELC 251 of 2012 are entitled to the suit land by way of adverse possession;

24. The claim for adverse possession by the plaintiffs is denied by the defendants on several grounds including that the plaintiffs entered the suit land under a lease which had been terminated and that the property is now in the possession of the owner. The trump card in the defence of the defendant is that the suit land is owned by a state corporation and is therefore government land. I will address the last point first because it is sufficient, if proved to be true, to dispose of the question as to whether the plaintiffs are entitled to the land by way of adverse possession.
25. In his evidence DW1 testified that Lands Ltd is a wholly owned subsidiary of Agricultural Development Corporation and that Both are Government Statutory Corporations. This evidence was not rebutted by the plaintiffs.
26. In the defendant's submissions it is urged that Section 41 of the *Limitation of Actions Act* makes the doctrine of adverse possession inapplicable where the land is public, trust land or owned by the government. That provision is worded as follows:

“ 41. Exclusion of public land

This Act does not—

- (a) enable a person to acquire any title to, or any easement over—
 - (i) Government land or land otherwise enjoyed by the Government;
 - (ii) mines or minerals as defined in the Mining Act (Cap. 306);
 - (iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);



- (iv) water vested in the Government by the Water Act (Cap. 372);
 - (v) land vested in the County Council (other than land vested in it by section 120(8) of the Registered Land Act (Cap. 300)); or
 - (vi) land vested in the trustees of the National Parks of Kenya; or
- (b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act (Cap. 280) or any Act repealed by that Act.”

27. The wording of Article 62 of *the Constitution* which defines public land is as follows:

“(1) Public land is—

- (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
- (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;
- (c) land transferred to the State by way of sale, reversion or surrender;
- (d) land in respect of which no individual or community ownership can be established by any legal process;
- (e) land in respect of which no heir can be identified by any legal process;
- (f) all minerals and mineral oils as defined by law;
- (g) government forests other than forests to which Article 63(2)(d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;
- (h) all roads and thoroughfares provided for by an Act of Parliament;
- (i) all rivers, lakes and other water bodies as defined by an Act of Parliament;
- (j) the territorial sea, the exclusive economic zone and the sea bed;
- (k) the continental shelf;
- (l) all land between the high and low water marks;
- (m) any land not classified as private or community land under this Constitution; and



- (n) any other land declared to be public land by an Act of Parliament
 -
 - (i) in force at the effective date; or
 - (ii) enacted after the effective date.
- (2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—
 - (a) clause (1)(a), (c), (d) or (e); and
 - (b) clause (1)(b), other than land held, used or occupied by a national State organ.
- (3) Public land classified under clause (1)(f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.
- (4) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.”

28. It is clear from Section 41(a) of the Act that the Act does not enable any person to acquire any title to public land or government land or land otherwise enjoyed by the government. The Government in Kenya is comprised of two tiers: the national government and the devolved governments. The defendants are corporations within the former. The evidence of DW1 is that Lands Ltd, the 2nd defendant who holds title to the suit land, is a wholly owned subsidiary of Agricultural Development Corporation (ADC) and that both are Government Statutory Corporations. That evidence was not rebutted by the plaintiffs. Indeed, I note that the 1st defendant is established under Section 3 of the *Agricultural Development Corporation Act*. The object of that Act is to “provide for the establishment of the Agricultural Development Corporation and for connected purposes.” I therefore hold that the 1st and 2nd defendants are state organs. Article 62(1)(b) provides that public land includes “Land lawfully held, used or occupied by any state organ except any such land that is occupied by the state organ as lessee under a private lease.” I have not found any evidence from, the plaintiffs to even remotely suggest that the defendants are holding the suit land under a lease. The land therefore belongs to the defendants and by extension to the government and the doctrine of adverse possession can not apply to it.

29. In the case of *Ravji Karsan Sanghani v Peter Gakunu* [2019] eKLR it was stated as follows by the Hon Justice Mutungi:

“The Plaintiff contended he occupied the suit land in 1979 and had since that time effected various developments thereon which demonstrated his occupation and possession was adverse to the rights and interests of the registered owner. Thus, even assuming the Plaintiff had during the period 1979 to 1986 occupied and possessed the land under circumstances that could amount to adverse possession, my view is the Plaintiff could not adversely possess the land against the Government such that the Government’s rights and interest over the land could be extinguished. The doctrine of adverse possession is inapplicable where the land is public or trust land or is owned by the Government.”



30. This court is persuaded that the suit land belongs to the government and the appropriate conclusion is that the doctrine of adverse possession does not apply to it.

31. As to whether the claim for adverse possession ought to fail for the reason that it has not been brought by way of an originating summons, I refer to the recent decision in Nakuru Land Case No. 77 of 2016 *Mary Wambui Gaitho and 203 Others vs Utheri Wa Lari Co Ltd and 11 Others* where the same issue was addressed and in which the court delivered itself as follows:

“ 54. Back to the issue of whether adverse possession can be sought in any manner other than by originating summons, it is noteworthy that the cases of *Chevron Kenya Limited vs. Harrison Charo wa Shutu* [2016] eKLR, *Kombe Vs. Omar & 2 others* [2003] 3 KLR (EP 391) and *Gulam Miriam Noordeen Vs. Julius Charo Karisa* [2015] eKLR support the proposition that a claimant is at liberty to raise his claim for adverse possession even by way of defence. I therefore reject the plaintiff’s objection to the procedure employed by the defendant of seeking to be granted orders declaration of adverse by way of a counterclaim.”

32. Consequently, I am of the view that the presentation of a claim for adverse possession by way of a plaint is not fatal to that claim.

Whether orders of specific performance should issue to the plaintiffs in Nakuru ELC 251 of 2012;

33. Specific performance is a remedy that is normally predicated on the existence of a legally binding contract. Was there a valid contract between the parties to this suit for the sale of the suit land? It is not in dispute that a contract is made when an offer is unconditionally accepted by the person to whom it is directed. In the case of *Vincent M. Kimwele v Diamond Shield International Limited* [2018] eKLR, it was stated as follows:

“ 14. The very rudimentary law of contract provides that there must be an offer and acceptance for the formation of a legally binding contract.

15. The author H. G. Beale, W. D. Bishop and M. P. Furmston in the book entitled *Contract Cases and Materials* state that:

“the traditional method of determining whether the parties have in fact agreed to be bound by a contract is to ask whether one party had made ‘offer’ and the other has ‘accepted’.”

34. In the case of *Harswell Trading Company Limited v Kenya Revenue Authority* [2019] eKLR it was stated as follows:

“ 29. It would seem therefore that the conditional acceptance by Harswell was an attempt by it to accept the offer made by KRA but on new terms. Clearly then there would be no agreement unless KRA accepted the new terms but as KRA rejected the conditional acceptance through its letter of 25th October 2004, there was no agreement as of that date.”



35. In *Spellman & Walker Co. Ltd v University of Nairobi* [2005] eKLR the court observed as follows:

“The plaintiff had merely expressed interest to take up the offer and made a proposal to make arrangements to discuss the matter within 7 days. In order for the binding contract to exist, there must be offer and acceptance.

Chitty on contracts 28th ED defines “offer as follows:

“The offer is an expression of willingness to contract made with the intention that it is to become binding on the person making it as soon as it is accepted by the person to whom it is addressed.”

while Acceptance is defined as follows:

“An acceptance is a final expression of assent to the terms of an offer”

From the letter by the plaintiff dated 15th May 1996 it is apparent that the plaintiff had expressed conditional acceptance awaiting further discussion. So that the acceptance did not amount to a final and unqualified expression of assent to the terms of the offer. So that there was no contract to be breached. Having come to that finding the plaintiff’s suit cannot therefore be sustained.”

36. Naturally, any letter of acceptance that does not amount to total acceptance of all the conditions set by a seller, unless consented to by the seller, amounts to a counter offer and can not be relied on to conclude that the correspondences have created a binding contract. The burden of proving such consent by the seller to the counter offer lies on the offeree.
37. The letter of offer in this case never made the offer subject to the preparation of a formal agreement and it is the finding of this court that a transfer can effectively be registered on the strength of a letter of offer alone where parties desire it to be so. Indeed, the language employed in Clause No 12 of the sale offer letter gives this court the firm impression that no agreement was needed and the parties would simply go to the preparation of the first charge and the transfer immediately after the acceptance of the offer. In this case, it is therefore evident that whether or not there was a legally binding agreement between the plaintiffs and the defendants depends on the construction of the correspondence between the parties.
38. The plaintiff’s case is that they applied to the 1st defendant to purchase the suit land in 1982 and that on 27/11/1982 the 2nd defendant offered to sell the suit land to them which offer they accepted and paid a deposit of 20% as required by the letter of offer. According to the claimants the balance was to be paid in 30 half yearly instalments over a period of 15 years, with the first instalment falling due upon the obtainance of the land control board consent by the defendant. They aver that they paid the full purchase price before schedule. According to the plaintiffs therefore the property was sold to them for a consideration by the defendants.
39. The defendants chose to deny the plaintiff’s claims; they stated that contrary to the Law of Contract Act no sale agreement was ever executed between the parties and no requisite consents were obtained from the relevant government departments for the sale and any money that was paid was credited into the rent account as per the terms of the lease between the 1st plaintiff and the defendants. It is also urged in their submissions that the 1st plaintiff did not take up the offer as made by the defendants and therefore any actions purportedly pursuant to the said offer are null and void and consequently, the claim for specific performance is misconceived.



40. It is clear that despite denial by the defendants there was an offer to sell the land to the then lessee in 1982, who was the 1st plaintiff. That the said offer was “accepted” vide the letter of acceptance of offer dated 9/12/1982 which stated that the sum of Kshs 65,300 had been paid by the 1st plaintiff and that the buyers expected to obtain money by the sale of proceeds of farming on the land and so they sought the seller’s indulgence.
41. It can be seen that after receiving the letter of offer, the 1st plaintiff made only a part payment of the 20% required by the defendants and sought their indulgence. That indulgence could only have been deemed to have been granted if there was neither any positive action on the part of the defendant to deny the 1st plaintiff access to the suit land nor any formal revocation of the offer. The 1st plaintiff was still entitled to the land under the lease even as the negotiations went on. It would therefore not help to seek to establish whether their continued possession of the land after their conditional acceptance aids in the determination as to whether the defendants acquiesced to that conditional offer to the extent that a valid contract was created.
42. It is clear from a wholistic examination of all the parties’ documentary evidence that the plaintiffs left out a considerable amount of documents which the defendant’s bundle brought into the court record. It is also clear from the defendant’s said bundle that the conditional acceptance of their offer by the plaintiff was not accepted, and that in fact it was utterly rejected. It is apparent from the records produced that the defendants went as far as seeking legal advice on a simmering issue as to whether the land sale could include individual shareholders, which the letter of offer never envisaged but which the plaintiffs wanted. The sale discussions dragged on for years and finally a fresh offer was made by the defendant to sell the suit land to the 1st plaintiff for the sum of Kshs 50,570,000/= vide the letter dated 2/7/2003. This is clear evidence that the letter of offer relied on by the plaintiffs in their claim was not deemed as accepted by the defendants.
43. A major indicator of whether there arose a binding contract or not also lies in the answer to the question as to whether the defendants or the 1st plaintiff ever performed their obligations as required by the letter of offer. This court finds that the requisite consents were not sought and this evidence comes from the defendants themselves, not the plaintiffs. The kinds of consents that the defendants stated were required for the transaction were the Commissioner of Land Consent, Treasury Consent and Ministry of Agriculture Consent in addition to the Land Control Board consent. The task of obtaining the consents was not apportioned in the letter of offer but a general reading of that letter of offer gives this court the impression that it was the defendants who were to seek those consents.
44. The relevant condition in the letter of offer which the 1st plaintiff accepted read that the first of the half yearly instalments for the payment of the land would fall due for payment on the date that the land control board consent was received by the defendants. ADC through Lands Ltd had leased the land for 35 years to Skov Ltd with effect from 1967. I find that the defendant’s evidence that ADC offered the land to Skov Ltd for sale but the offer never went through, and that all payments to ADC were made by Skov Ltd in their capacity as tenants to be correct.
45. It is this court’s view that besides not being able to reach a consensus ad idem, both the 1st plaintiff and the defendants did not perform their obligations as required by the letter of offer and there is therefore no contract capable of enforcement.



46. In the case of *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* (2006) eKLR the Court held as follows:

“Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles.

The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.

47. In conclusion, I find that that the defendants’ letter of offer of 29/11/1982 and the 1st plaintiff’s conditional acceptance vide the letter dated 9/12/1982 did not yield a binding contract regarding which the remedy of specific performance can be explored by this court. Besides, the proposal to create an agreement was between the 1st plaintiff and the defendants and therefore the other 5 individual plaintiffs who are natural persons do not have any cause of action under the letter of offer the 1st plaintiff relies on.
48. In the present matter therefore, orders of specific performance cannot issue to the Plaintiffs in Nakuru ELC 251 of 2012 because there was no valid contract between them and the 1st defendant capable of enforcement.

Whether the Plaintiff in Nakuru ELC 318 of 2018 has locus to file the suit.

49. The 3rd, 5th, 7th, 8th, 10th, 14th, 16th Defendants in their submissions raised the issue of whether the Plaintiff had the locus to institute the present suit. This is because and is as pointed out before, the suit property is not registered in its name but in the name of Lands Limited.
50. In Nakuru ELC 318 of 2018, the Plaintiff has described itself as a government corporation established by an Act of Parliament with the sole mandate of purchasing, holding and managing properties on behalf of the Government of Kenya.
51. The Plaintiff is established under the *Agricultural Development Corporation Act* which gives it power to sue and be sued but it does not authorize the Plaintiff to institute suits on behalf of its subsidiaries. At Paragraph 6 of the Plaint in Nakuru ELC 318 of 2018, the Plaintiff avers as follows:
- “The Plaintiff through its subsidiary known and described as Lands Limited is the registered proprietor of all that property known as Title No. LR 9467 comprising 1,300 acres or thereabout which property is located within Mau Narok area of Nakuru County”
52. At the hearing, the witness for the Plaintiff in Nakuru ELC 318 of 2018 who testified as DW1 admitted that the suit property is registered in the name of Lands Limited.



53. The court in the case of *Alfred Njau and Others vs City Council of Nairobi* (1982) KAR 229 held as follows:

“The term locus standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

54. Further the court in the case of *Daykio Plantations Limited v National Bank of Kenya Limited & 2 others* [2019] eKLR observed as follows:

“It is therefore evident that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’. Therefore, if a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a case worth listening to.”

55. In the case of *Valentine Opiyo & another v Masline Adhiambo t/a Ellyams Enterprises* [2014] eKLR the court observed as follows:

“The agreement was clear that the 1st appellant was acting on behalf of a limited liability company hence it cannot be said that he assumed liability on his own. This is clearly evident from the recital and execution part of the agreement which I have set out above. The principle flowing from corporate personality was established in the well-known case of *Salomon v Salomon* [1897] AC 78 where the House of Lords held that a company is in law a separate person from its members. The Court of Appeal in the case of *Victor Mabachi & Anor v Nurtarn Bates Ltd* NRB CA Civil Appeal No. 247 of 2005 [2013] eKLR held that, “[A company] as a body corporate, is a persona juridica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.””

56. The Agricultural Development Corporation and Lands Limited are separate entities with separate legal persona. In this matter, it is this court’s view that the Plaintiff had no locus to institute the present suit as the suit property is registered in the name of Lands Limited and the Plaintiff was not authorized to institute the present suit on its behalf. This suit should therefore be struck out.

57. Given the said finding, this court needs not address the issue of whether the Defendants in Nakuru ELC 318 of 2018 are trespassers on the suit land.

Who ought to meet the costs of the suit

58. It is my view that since the plaintiffs in the case of Nakuru ELC 251 of 2012 have failed to prove their case on a balance of probabilities and also since Nakuru ELC 318/2018 has been struck out, each party should bear its own costs.

59. In the upshot, I issue the following final orders:

- a. The plaintiffs’ suit in Nakuru ELC 251 of 2012 is hereby dismissed;
- b. The plaintiffs’ suit in Nakuru ELC 318 of 2018 is hereby struck out;
- c. Each party shall bear their own costs in the two suits.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 26TH
DAY OF JANUARY 2023.**

MWANGI NJOROGE

JUDGE, ELC, NAKURU

