REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 1154 OF 2005

IN THE MATTER OF LAND PARCEL NO.L.R. NO. 209/10596 NAIROBI

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT, CHAPTER 22 LAWS OF KENYA

RAVJI KARSAN SANGHANI...PLAINTIFF

VERSUS

PAMUR INVESTMENT LIMITED...DEFENDANT

JUDGMENT

This suit was instituted vide an Originating Summons dated ***22nd September 2005***, wherein the Plaintiff sought orders that:-

a. ***The plaintiff be declared to have become entitled by adverse possession of over twelve years all that piece of land registered under the Registration of Titles Act (Chapter 281 Laws of Kenya) and comprised in Title No. LR. No. 209/10596 and situate in the City of Nairobi.***

b. ***The plaintiff be registered as the sole proprietor of the said piece or parcel of land namely LR. No. 209/10596 in the place of the above named Pamur Investment Limited in whose favour the said parcel of land is registered.***

c. ***The defendant by itself, its agents and or servant or otherwise howsoever be permanently restrained from evicting demolishing any structures erected thereon, trespassing into, interfering with the possession of, selling, transferring or in any other way disposing off the parcel of land known as L.R. No. 209/10596 or any part thereof.***

d. ***The costs of the application.***

The application was supported by an affidavit sworn by the plaintiff. It is the Plaintiff's case that ***L.R. No. 209/10596***(*the suit property*) measures about ***0.3655 hectares*** and was registered in the name of the defendant on ***21st July 1987.*** However, that he had been in exclusive, continuous, uninterrupted possession of the whole property since 1979 and had developed the property by erecting a chain-link wire/off cuts wood fence; installed electricity and water supply; constructed office and store building, parking bay area, a workshop for repairing and maintaining tractors andlorries, main gate and security offices; and planted trees. Consequently, that the defendant's title had been extinguished by virtue of his

possession and the defendant could therefore not transfer the title to prospective purchasers.

The application was opposed by John W. Muriuki, a Director of the defendant who swore a Replying Affidavit on ***18th November 2005***. He deposed that the suit property was registered in the name of the Defendant but that the user as specified in the grant was residential and that although the area had been zoned for residential purposes, the Plaintiff had not been using it as residential premises. The Director refuted the Plaintiff's claim that he had been in exclusive and uninterrupted possession deposing that the defendant has exercised its ownership and proprietary rights.

It was deposed that the defendant came into possession by virtue of a grant registered on ***21st July 1987*** and obtained a lease from 1st March 1986 for a period of 99 years. Thereafter, that the defendant entered into an informal license agreement with Maurice Nyanjwaya Adhinga(*hereinafter Adhinga*) which conferred on the licensee a license to possess, use and occupy the property for a period of 10 years.It was further deposed that the plaintiff with the full knowledge and consent of the defendant erected a structure in 2003 and also stored 4 containers on a portion of the suit property and enjoyed easement rights to adjacent properties – ***LR. No. 209/10468 and 209/10597.*** Therefore, that plaintiff's use of the property from the year 2000 had been with the knowledge and permission of the defendant.

The plaintiff swore a Supplementary Affidavit on ***24th March 2006*** wherein he refuted the allegation of the informal license agreement with Adhinga, deposing that it was he who allowed the said Adhinga to enter and occupy a portion of the property since 1992. In support of this claim, the Plaintiff annexed an affidavit sworn by the said Adhinga on 24th March 2006. Adhinga deposed that he was approached by John W. Muriuki in July 2005, who took him to the firm of B.N. Muchira& Co. advocates where he found an already drawn agreement. He was required to sign the agreement which provided that he was allowed to occupy and use the said property for a period of 10 years commencing 1st January 1997. It was his deposition that he was informed that the license agreement was necessary so as to protect him from land grabbers. Adhinga deposed that he met John W. Muriuki for the first time in 2002 and not 1997 as alleged. He also deposed that he entered and occupied a portion of the suit property in 1992 with the permission of the Plaintiff whom he found in possession of the entire suit property.

Substantive hearing of the suit commenced on ***9th November 2010*** when the plaintiff (PW1) testified that he was a general contractor and transporter. He stated that he was carrying out business at the suit property which he entered in 1979. While stating that three quarters of the premises had been used as a quarry, PW1 contended that he reclaimed the land and started selling building material from the place. He averred that in 1980, he installed water and electricity on the suit property and further, that he constructed a garage, storage place, and accommodation facilities for his 12 staff members, wooden workshop, as well as a parking area.

The evidence of PW1 was that on 14th July 2005, he found an advert placed on the newspaper by Tyson and that upon conducting a search, he established that the plot in the advert was the suit property. He averred that after obtaining a copy of the certificate of title, he realized that the property was registered in the name of the defendant and that they filed this suit in order to protect their interest.

PW1 informed the court that he entered the land peacefully and that he did not seek any permission to carry out the developments. He made reference to drawings approved by the City Council and averred that apart from the developments, he had given a small portion of land to Salim in 1984 and Adhinga who operated a kiosk and jua kali garage respectively. According to PW1, two of his staff members namely Julius Njoroge Njihia whom he employed as a driver in 1979 and Mary Iveti who had been in his employment since ***1983-1984*** were still residing in the premises. PW1 denied assertions that the developments were with the permission of John Muriuki, a director of the defendant. He contended that he did not know the said defendant's director and averred that he never officially entered the premises. He averred that he had approximately 300 staff working on the premises and further, that about 50 of them were living in the premises.

In cross-examination, PW1 stated that the 300 employees were security guards, mechanics, tyre repairers,

office clerks, and drivers. He contended that the suit property was 0.360 hectares and that he also stored trucks and old machines on the premises. PW1 did not know where the external boundaries of the suit property were. He stated that the whole plot measured about 4 to 5 acres and that he was only claiming a portion of the suit property where he was occupying. He averred that the pictures annexed to his affidavit did not show all the developments on the land.

PW1 informed the court that the grant had been issued to the defendant by the government on 20th July 1987 and further, that he never applied for the plot from the Commissioner of Lands. He stated that when he saw the advert by Tysons in the years 2005, he had not taken any action to lodge a claim for adverse possession. While stating that he was shocked to learn that the land he was occupying had been advertised for sale, PW1 averred that although the advert stated that the land was for residential purposes, he had been using the same for commercial purposes.

PW1 clarified that there was no agreement between him and Adhinga for the portion of land outside his fence that he had given Adhinga to occupy. He was however referred to an affidavit sworn by Adhinga on 24th March 2006 where Adhinga claimed to have met John Muriuki and to have entered into a licence agreement. PW1 reiterated that his claim for adverse possession was based on his occupation since 1979.

In re-examination, PW1 stated that the developments started in 1979 and had been going on even as at the time of hearing. He denied knowing Mr. Muriuki and averred that he was using the premises for storage of building material, parking of trucks, repairing, and maintenance of trucks as well as for storage of spare parts.

The plaintiff called Salim Omali Maluki (PW2) as his second witness. He gave an oral testimony and filed a witness stated dated 4th May 2011. He stated that in 1984, he approached the Plaintiff to give him a portion of the suit property and was a given a portion measuring 40 X 30ft. Therein, he constructed a kiosk and a one bedroomed house where he lived in. He further stated that in 1984, the suit property was a disused quarry which the Plaintiff reclaimed by filling the same with hardcore, stones and murram. He informed the court that since 1984, he saw the plaintiff carrying out construction of more servant quarters, a wooden workshop, store, ramp, offices and electricity installation. The evidence of PW2 was that the plaintiff had been in actual possession of the suit property since 1984 and that he first saw the defendant's director by the name Muriuki when the court visited the site on 3rd December 2010.

On cross-examination, PW2 admitted to not having been shown ownership documents by the plaintiff. He reiterated that apart from the plaintiff, there was no other occupant on the suit property in 1984. He was emphatic that he found the plaintiff on the plot and could not tell whether the plaintiff had entered into an agreement with another person or whether the plaintiff was the registered owner.

During re-examination, PW2 contended that his wife used to be in the kiosk throughout and that he was residing in the room within the compound. He stated that the plaintiff allowed him into the plot and that he had not been asked for any money.

Maurice Nyajwaya Adhinga (PW3) testified and swore a statement on ***4th May 2011.*** He stated that he approached the Plaintiff and was given a portion of the property measuring 50 X 80ft in 1987 where he had constructed a workshop and 10 units of houses for himself and his employees. It was his evidence that he had known the Plaintiff as the owner of the property having found him in actual possession of the entire property. He reiterated the evidence of PW2 on the developments carried out on the suit property and stated that since 1987, he had known the plaintiff as the true owner of the property and further, that the plaintiff's possession had never been interrupted.

It was the evidence of PW3 that while in his premises in July 2005, he was approached by John W. Muriuki who introduced himself as the owner of the suit property and requested him to accompany him to his advocate's office for purposes of signing a document that would protect him from land grabbers. PW3 stated that he did not know that he was signing a lease agreement and further, that the agreement had been prepared by an advocate who did not have a practicing certificate. He produced a letter from the Law

Society of Kenya dated ***15th May 2006***, to this effect as Exhibit 1.

On cross-examination, PW3 stated that the plaintiff allowed him to use his land but did not show him title to the land. He averred that he did not know that there was another owner of the portion of land he was occupying. He contended that Muriuki informed him that he had been sent by the plaintiff and only revealed that he was the owner of the property when they went to his office which he did not believe. He confirmed that he never saw any surveyors on the suit property.

During re-examination, PW3 contended that he had been on the plot for a long time and reiterated that he never say any survey been carried out on the plot. He averred that the plaintiff or his workers were always at the workshop.

Mary Weveti Mbagathi (PW4) gave oral testimony in addition to her witness statement dated ***4th May 2011***. She stated that she was employed by the Plaintiff as a Secretary on ***17th November 1983.*** She found the Plaintiff in actual possession and running his business on the suit property and was allocated a house thereon where she had been residing up to the hearing day. It was her evidence that the defendant had never been on the property save for ***3rd December 2010***, during a court visit.

On cross-examination, PW4 stated that the plaintiff's company had constructed offices and employee houses on the property. She reiterated that she had been employed in 1983 and that the plaintiff's company was responsible for their salaries. She admitted that the plaintiff had carried out cabro works on the suit property four years after the filing of this suit sand further, that the plaintiff had also set up a modern store in the year 2009. According to this witness, the plaintiff's company had employed about 1000 employees.

PW4 denied that the plaintiff had land on Aoko Road. Although she admitted that Adhinga had been given land by the plaintiff where he was not paying any rent, she averred that the garage of Adhinga was on a different parcel of land altogether. She informed the court that her duties entailed dealing with deliveries and fueling of the plaintiff's motor vehicles.

In re-examination, PW4 reiterated that she was paid by the plaintiff's company which was in existence in 1983. She contended that the plaintiff had erected a fence as well as temporary developments. The evidence of PW4 was that Adhinga had been given land by the plaintiff to run a garage.

Julius Njihia Njoroge (PW5) testified as the last plaintiff's witness. He swore a statement on ***4th May 2011,*** and his evidence was that he had been employed as a driver by the Plaintiff since 1979. He stated and that he lived in one of the servant's quarters on the property with his family. He averred that the Plaintiff moved into the suit property when the land had been cleared and a perimeter fence erected. Further that part of his work had been to bring filling materials such as hardcore, murram and stones to fill the suit land which was a disused quarry. It was his evidence that he was present when the Plaintiff took actual possession of the property and initiated all the developments and subsequently upgraded the structures.

In cross-examination, PW5 stated that he was paid by the plaintiff and that there were about 300 employees. He stated that Adhinga had a temporary garage and that he had been given the plot by the plaintiff. According to PW4, the plaintiff had not erected a permanent fence but had planted a live fence. He contended that the cabro works were done in the year 2005.

The defendant called (DW1) as its first witness. She filed a witness statement dated 20th June 2011, and testified that she and her husband namely ***John Muriuki*** were the founding directors of the defendant company. She stated that she visited the suit property with her husband in 2001, and that they walked through the plot to Kariba estate where they entered into an office in a commercial building where they found the plaintiff. She averred that after discussing various issues, they parted with the plaintiff on the understanding that should they wish to sell their plot, they would let the plaintiff know.

In cross-examination, DW1 stated that there was no development when she visited the property in 2001. She stated that they had not developed the property and that she did not see any container or water tank since the property was bare. She contended that there was no gate and that she could not remember her husband whom she was in the company of telling the plaintiff that he wanted to sell the plot to him. While stating that the suit property had been allocated to them, DW1 averred that it was her husband who dealt with the property and she could therefore not tell whether people were squatting on the land.

DW1 could also not tell when the defendant company was incorporated or whether land rent and rates had been paid stating that her husband handled property issues. She contended that the suit property was in their possession and further, that they did not engage architects to draw the building plans.

In re-examination, DW1 reiterated that she could not remember seeing anyone on the property when she visited in the year 2001.

Julius Gichohi Wairagu (DW2) testified that he was an architect with the Ministry of Housing. His statement dated 20th June 2011 was adopted as part of his evidence. He averred that in 1996, he was requested by Dr. David Muchiri, an architect, to assist him with preparation of designs for the development of flats on the suit property. He stated that he prepared designs which did not show drainage and sewer alignments and that in order to establish the correct location of the sewer; he visited the property in 1997 in the company of Dr. Muchiri and Mr. Muriuki. His evidence was that they accessed the property through Aoko road and that the property was unoccupied.

In cross-examination, DW2 stated that although he was working for the ministry, he also worked for individuals and charged for the private work. He stated that he was instructed by Dr. Muchiri to prepare building plans for the suit property and that he came up with designs which were however, not approved. He stated that he charged Dr. Muchiri Kshs 5,000/- and that he issued him with a receipt.

DW2 stated that when they visited the plot in the year 1997, the land was unoccupied and was an open space with no perimeter wall or gate. He averred that there was no chain link or a wooden office and further, that he did not see any containers.

In re-examination, DW2 reiterated that he visited the suit property in 1997 in the company of Mr. Muchiri and Mr. Muriuki. He averred that his instructions were to prepare drawings and that the lead architect was Mr. Muchiri. He was emphatic that there was no development on the suit property at all.

David Thiong’o Muchiri (DW3) testified in court and sought to have witness statement dated 20th June 2011 adopted as part of his evidence. He stated that he was a registered architect and that in 1987, he was instructed by Mr. John Muriuki to prepare a comprehensive development scheme for construction of maisonnettes on the suit property. He averred that upon receipt of the instructions, he visited the site with Mr. John Muriuki to observe the layout and identify the location of utilities and services such as the sewer.

DW3 stated that the suit property was totally unoccupied and that they met no one in the land in the course of their inspection. He averred that he prepared a design for maisonettes which he handed over to Mr. Muriuki but that the project did not take off. The evidence of DW3 was that in 1996, Mr. Muriuki requested him to prepare proposals for developments of apartments on the suit property. He contended that he prepared some sketches and brought on board another architect, Mr. Wairagu (DW2) with whom they visited the suit property in June 1997 where they found the property still unoccupied.

In cross-examination, DW3 stated that although he was an employee of the Nairobi City Commission in 1997, he took instructions from the defendant in his private capacity. He stated that he charged for the work done which was paid by Mr. Muriuki but could not remember the amount charged. The evidence of DW3 was that he did the planning work and engaged DW2 to finalize the work on behalf of his client. He contended that he did not pay DW2 and that instead, he was paid by the client.

DW3 informed the court that he visited the site in 2006 and that there was no gate. He contended that

there was nothing on site and that only grass was growing on the land. He informed the court that he first visited the site in 1986 and that the preliminary drawings he prepared were not approved.

In re-examination, DW3 stated that the drawings were in respect to the suit property which he had visited. He could not recall the dates when he visited the suit property and only recalled that it was in the late 1990s. He reiterated that there were no developments on the property and further, that there was no encroachment. He clarified that whereas he prepared the sketches, DW2 was to finalize the work with the client. According to him, squatters were on the neighbouring plots.

The last defence witness was John W. Muriuki(DW4). He swore a statement on 20th June 2011 and testified that he was the founding director of the defendant company which was on 28th February 1986 allocated the suit property, then an un-surveyed Plot No. A. He stated that upon payment of the purchase price and survey fees, the property was surveyed and beacons placed and that subsequently, a deed plan was prepared and signed on 16th July 1987 giving the plot L.R. No. 209/10596 and subsequently, that registration took place on 21st July 1987.

It was evidence of DW4 that he instructed an architect to draw up design plans for maisonettes on the property in November 1987 and that as a matter of course; he took the architect to the property for physical inspection. However, that the project did not kick off until 1991 when he approached another firm of architects with a desire to construct flats and in April 1991, he took the architect to the property for observation. The evidence of DW4 was that during both visits, the suit property was vacant. He stated that he went to the site with other architects in 1996 during which time the property was still unoccupied.

DW4 stated that he met the Plaintiff in 2001 who was interested to purchase the property but that they did not agree on the purchase price of Kshs. 2 Million proposed by the Plaintiff. That in the year 2005, he instructed M/s Tysons Limited to advertise the plot for sale when he learnt that the Plaintiff had taken possession of a part of the property. DW1 contended that during the court visit in 2010, it was evident that the Plaintiff was not in occupation of the entire property. Additionally, that the Plaintiff had admitted to the court that the developments on the land including the buildings, gate, and cabro paving on the ground had been done after the filing of this suit.

On cross-examination, DW4 stated that until 2005, he had actual physical possession of the suit property. He contended that the gate and fence on the suit property had been put up after the year 2005. DW4 informed the court that when he visited the suit property before 1987, it was empty and further, that it was not a disused quarry. He averred that the suit property could be accessed from Aoko Road or through Kariba estate. He denied that the chain link had been put up in 1979. DW4 contended that the land was allocated to him by the government and that he paid approximately Kshs 78,000/-. He stated that he had not paid rent to the government since the year 2005 but that he had paid rates to the City Council.

DW4 stated that he paid David Thiongo between Kshs 20,000/- and 25,000/-. He informed the court that DW2 had been engaged by DW3 with his knowledge. While denying that there was no canteen from Aoko Road in the year 2005, DW4 averred that there was a kiosk which was put up after Kariba estate was built. He denied that PW2 was given the land in 1984 and averred that when he was allocated the land in 1987, there was no canteen. According to DW4, PW2 had established the kiosk on a road reserve. He referred to an agreement dated 12th July 2005 between PW3 and the defendant and contended that it was executed before B. N. Muchira advocate. He contended that he and PW3 jointly gave the advocate instructions and that both of them paid for the services rendered.

DW4 contended that PW3 paid him a peppercorn. He stated that he had no receipts for services rendered to him by PW3 at the garage. He denied knowledge that B. N. Muchira was not a qualified advocate. While contending that he visited the plaintiff in the company of his wife, he averred that although the plaintiff gave him an offer of Kshs 2,000,000/-, he did not allow him to develop the land. He however stated that he verbally allowed the plaintiff to up containers on the property.

In re-examination, DW4 stated that the land was allocated to him in 1986 and that it was empty when he

visited it before and after the allocation. He informed the court that his second allotment letter was dated 14th April 1987 and that his title was issued on 20th July 1987. He contended that he was shown all the beacons by the surveyor and that there was no development in 1987. He averred that he visited the property with Mr. Thiong'o whom he instructed in 1987 and that it could not have been possible for them to inspect the suit property had the plaintiff been on site.

DW4 contended that they negotiated the garage verbally long before 2005. He stated that the kiosk was outside the suit property's fence and that the plaintiff's office was also outside the land, in a neighbouring property, when he visited the plaintiff in 2001. He maintained that as at 2005, there was no development and reiterated that the plaintiff was outside the suit property.

Parties were directed to file written submissions. The plaintiff in submissions dated 17th November 2014 averred that there was uncontroverted evidence that he had been in actual physical possession of the suit property since 1979. He contended that although the defendant was registered as the owner of the property in 1986, the defendant's title was extinguished in 1998 following his continuous and exclusive possession for a period longer than 12 years. Reference was made to the case of **Banjamin Kamau Murima & 3 others vs. Gladys Njeri CA No. 213 of 1996** for the proposition that occupation derived from the proprietor of the land in the form of permission or agreement or grant cannot be adverse. Counsel argued that there was uncontroverted evidence that the plaintiff did not seek permission from the defendant to occupy and use the suit property.

The plaintiff relied on the case of **Viginia Wanjiku Mwangi vs. David Mwangi Jotham Kamau (2013) eKLR** where the court stated that adverse possession required open, continuous, exclusive, actual possession and non permissive or hostile use of the property and it was argued that the plaintiff had met the said conditions. While stating that he had been in actual physical possession of the property since 1979, the plaintiff submitted that during a site visit, the court noted that all the developments on the suit property belonged to the plaintiff and further noted that the defendant had no developments of the suit property.

In further submission, the plaintiff averred that the defendant had been dispossessed and its possession discontinued for the statutory period. Reliance was placed on the case of **Ng'ati Farmers Co-operative Society Ltd vs. Councillor John Ledidi & 15 others CA No. 64 of 2004** and **Viginia Wanjiku Mwangi vs. David Mwangi Jotham Kamau (2013) eKLR** for the submission that dispossession constitutes acts done which are inconsistent with the proprietor's enjoyment of the soil for the purpose for which he intended to use it. It was submitted that the defendant had admitted possession by stating in its replying affidavit dated 18th November 2005 that the plaintiff had not been using the land for residential purposes as required by the grant.

Counsel contended that the drawing exhibited by the defendant which had not been approved could not be construed to constitute possession and/or control of the suit property. The plaintiff argued that pursuant to his open occupation which was without the defendant's permission and was uninterrupted, he had acquired title to the suit property and therefore, that he had proved his claim on a balance of probabilities.

The defendant filed submission dated 11th December 2014 where it was argued that the applicable principles had been set out in the case of **Wambugu vs. Njuguna (1983) KLR 172**. Counsel for the defendant submitted that the claim for adverse possession ought to fail since the plaintiff had not move the court under the appropriate provisions of the Limitation of Actions Act. The defendant submitted that the plaintiff had failed to discharge the burden of proving his case. Reliance was placed on the cases of **Gerishon Muindi Baruthi vs. Willys Gatinku Mukobwa & another CA No. 98 of 1998** and **Teresa Wachuka Gachira vs. Joseph Mwangi Gachira (2009) eKLR** for the proposition that the burden of proof in a claim for adverse possession was on the claimant.

While stating that it became the registered proprietor of the suit property on 1st March 1996, the defendant argued that the plaintiff had in his affidavit admitted its ownership of the suit property. It is the defendant's submissions that therefore, time could only start running against it from the date it became the

registered proprietor on 1st March 1986. Counsel argued that the plaintiff tendered contradictory evidence by alleging to have used the suit property since 1979 while at the same time contending that he was not aware of the defendant's proprietary rights over the suit property until an advertisement was done on 14th July 2005 and that his case should therefore fail.

The court was referred to the case of **Kimani Ruchine & another vs. Swift Rutherford Company Ltd(1977)KLR 10** and **Charles Matheka vs. Haco Industries Ltd(2008)eKLR** for the proposition that a registered proprietor must be shown to have been aware of the trespassers possession . The defendant submitted that whereas the title showed that the land measured 0.3655 of a hectare which was approximately one acre, the plaintiff and his witnesses had claimed to have been occupying a portion of land measuring approximately 5 acres. Counsel contended that from the evidence on record and the site visit report, the plaintiff was unable to prove the exact portion of land measuring about 1 acre as well as the location of its beacons to distinguish the suit property from other parcels of land.

The defendant submitted that it had not been disputed that the plaintiff was party to other suits where he was seeking similar reliefs for adverse possession in **HCCC No. 1277 of 2001, Abel Ondimu Sagini & another and HCCC No. 1240 of 2001, Rajv Karsani Sanghani vs. Peter Gakunu.** It is the defendant's submission that since its land measures approximately 1 acre, the plaintiff's assertion that he is occupying about 5 acres constitutes an opportunity for mischief or abuse of the court process where orders issued in the plaintiff's favour may be used against other parties who are not before the court.

Counsel submitted that the plaintiff had failed to show the exact location and beacons of the suit property which he sought to acquire by adverse possession and that the said possession had been for a period of over 12 years. The defendant contended that from the site visit report, its portion of land had only a semi structure which was built around the year 2000. It was submitted that there was a clear indication that the plaintiff was occupying the parcels of land next to the defendant's and that the structures on the defendant's land had only been there for about 5 years prior to the filing of the suit and not 12 years as required by law. The defendant made reference to the case of **Gerishon Muindi Baruthi vs. Willys Gatinku Mukobwa & another CA No. 98 of 1998** for the proposition that exclusive possession of a portion of parcel of land which is definite would entitle an applicant to establish his claim for adverse possession provided a period of 12 years has run.

In further submission, the defendant averred that the plaintiff had failed to prove that he had been in possession for the requisite 12 years. It was submitted that the evidence of the defendant's witnesses that they visited the property in 1997 when there were no developments was not controverted. Counsel averred that two of the defendant's witnesses were professionals and that there demeanour was that of persons with no personal interest in the land and further, that their evidence was corroborated by documentary evidence. Counsel argued that it was clear that the defendant's parcel was next to other parcels of land which had been invaded and encroached by the plaintiff and other people.

In respect to the plaintiff's claims that he gave PW3 part of the suit property to use as a garage, the defendant submitted that a claim for adverse possession cannot be through third parties. Counsel argued that the portion used by PW3 was pursuant to an agreement entered into by the said party and the defendant's director and the reference was made to the case of **Wambugu vs. Njuguna (1983) KLR 172** for the submission that a licensee has no adverse possession and further, that times only begins to run from the date the licence is determined.

While stating that a party who approaches the court for equitable relief must do so in clean hands, the defendant argued that contradictions by the plaintiffs and his witnesses shows bad faith and an attempt to mislead the court. It was submitted that whereas the plaintiff testified that he had occupied the suit property since 1979, PW4 who claimed to have worked for the plaintiff since 1983 stated that the suit property was used by R. K. Sanghani Co. Ltd who was her employee and paid her salary. Counsel contended that the developments on the suit property put up by the plaintiff after the filing of this suit was a sign of bad faith and was intended to defeat the defendant's claim.

The defendant contended that although the plaintiff and his witnesses testified of developments on the suit

property measuring 4 or 5 acres, none of them was able to confirm which of the alleged developments were on the defendant's parcel. It was also submitted that the plaintiff's evidence alleging that there were numerous developments on the suit property was not supported by the site visit report and was a confirmation that the plaintiff's witnesses were not truthful. According to the defendant, the plaintiff's deposition in his supplementary affidavit that PW3 entered the property as his licensee in 1992 was not supported by evidence and was further contradicted by PW3's witness statement where he stated that he entered the suit property in 1987.

The defendant sought to distinguish the case of **Banjamin Kamau Murima & 3 others vs. Gladys Njeri CA No. 213 of 1996** by stating that the there was no dispute on the claimant's continuous occupation and possession unlike in the present case. The case of **Virginia Wanjiku Mwangi vs. David Mwangi Jotham Kamau (2013) eKLR** was also distinguished on the basis that the defendant did not testify in court and the claimant's evidence was therefore not controverted.

The case of **Ng'ati Farmers Co-operative Society Ltd vs. Councillor John Ledidi & 15 others CA No. 64 of 2004** was distinguished on grounds that the defendant had admitted the appellant's developments unlike in the present case where the developments were on the adjacent property as confirmed by the court during the site visit. Lastly, it was submitted that the boundaries on the defendants parcel were not clear and that the plaintiff had been unable to distinguish the defendant's portion from the adjacent parcels of land some of which he had similar suits to this one with their registered owners.

This Court has now carefully considered the Originating Summons herein, the replies therein, the evidence on record, the cited authorities and the written laws and the court makes the following findings:-

There is no doubt that the claim herein for adverse possession. The issues for determination are:-

i. ***Weather the Plaintiff herein has established a claim under adverse possession.***

ii. ***Whether the Plaintiff as the adverse possessor has been in occupation and possession of the suit property exclusively and openly without interruption for a period of 12 years.***

iii. ***Whether the Defendant has been dispossessed or has discontinued its possession for the statutory period.***

iv. ***Whether the Plaintiff is entitled to the reliefs sought.***

Before embarking on determination of the above issues, the court has to point out the issues that are not in dispute.

There is no doubt that the Defendant herein, **Pamur Investment Ltd** is the registered owner of the suit property herein, **LR NO. 209/10596** having been registered on ***20th July 1987***, as evident from the **Grant** produced in court by the Defendant being **IR NO. 42789** for a term of 99 years from 1st March 1986. The Plaintiff has also admitted that the Defendant herein is the registered owner of the suit property. There is also no doubt that the Defendant herein was allotted the unsurveyed plot by the Commissioner of Lands vide Letters of Allotment dated ***26th February 1986*** and ***24th April 1987.*** It is also evident that vide a letter dated ***20th February 1987,*** the Defendant herein accepted the offer and enclosed Bankers cheque of ***Kshs.70,000/-*** being payment of ***Kshs.69,321/35*** as charges specified in the letter of offer and land Rent. There is also no doubt that the area allotted to the Defendant is ***0.25ha*** as evident from letter of offer and the sketch plan attached thereto. The Deed Plan however shows that the area is ***0.3655ha*** and the land allocated to the Defendant is ***LR NO. 209/10596.***

There is also no doubt that the Plaintiff has claimed that he has occupied the suit land from 1979 and his claim is for ***LR. NO.209/10596*** and he alleged that the suit land was about 4 to 5 acres. When the court visited the suit land on 3/12/2010, the court noted that the whole plot was approximately 5 acres.

It is also evident that the suit land is registered under the Registration of Title Act Cap 281 LOK (now repealed) and as provided by Section 23 (1) of the said Act, the Defendant was therefore the **absolute** and **indefeasible** owner of the suit premise and his title thereto is not open to challenge except on reasons of fraud or misrepresentation.However, the suit herein is brought under section 38 of the Limitation of Actions Act which provides that:

i. ***Where a person claims to have become entitled by Adverse possession of land Registered under any of the Acts cited in Section 37 or Land comprised on a lease registered under any of those Act, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as the proprietor of the Land.***

This suit is brought under ***Order XXXVI Rule 3D*** of the Civil Procedure Rules (before amendment 2010) which provided that:

i. ***An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.***

ii. ***The summons shall be supported by an affidavit***
iii. ***The court shall direct on whom and in what manner the summons shall be served.***

The Defendant herein raised two preliminary issues which the court will deal with in its findings and determination.

The Plaintiff has claimed that it is entitled to be declared the owner of the suit land by virtue of adverse possession. However, the Defendant has disputed the Plaintiff's claim and averred that the Plaintiff is not entitled to ownership of the suit property at all or by doctrine of adverse possession.

Since the issue of whether Plaintiff is entitled to ownership of this parcel of land by virtue of doctrine of adverse possession is disputed, the court in deciding the matter will be guided by the principles set out in various Judicial pronouncements on what constitutes adverse possession. However, it is evident that the burden of proof is always on the claimant or the persons claiming to have acquired ownership by virtue of adverse possession. This was the finding in the case of **Gerishon Muindi Baruthi vs. Willays Gatinku Mukobwa and Another Civil Appeal NO. 98 of 1998** where the court held that the burden of proof in a claim of adverse possession is on the claimant.

The principles to be considered in cases of adverse possession were set out in the case of **Wambugu vs. Njuguna (1983) KLR 172**, where the Court of Appeal held that,

> "***in order to acquire by Statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of, or by having discontinued his possession of it. Dispossession of the proprietor that defeat his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which is intended to use it. The claimant must prove that the Respondent had either been dispossessed and had discontinued possession of the suit land for a continuous statutory period of 12 years as to entitle him, the Respondent to title to that land by adverse possession".***

The Plaintiff herein being the claimant had the onus of proving his claim. He had the duty to prove that he used the land without the knowledge of the registered owner and without force, without secrecy or evasion. This was the findings in the case of **Kimani Ruchine vs. Swift Rutherford & Co. Ltd 1980 KLR,** where the court held that:

> "***The Plaintiff had to prove that they used this land which they claim is of right, Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the Plaintiff must show that the Company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation".***

The Plaintiff herein had a duty also to prove that the land he was claiming was definite and identifiable. This was the findings in the case of **Gerishon Muindi Baruthi (Supra**) where the court held that:

> "***Exclusive possession of a portion of parcel of land which is definite would entitle the appellant to establish his claim on ground of adverse possession provided the period of 12 years has run".***

The Plaintiff herein had a duty to prove that the title holder herein that is the Defendant, **Pamur Investment Ltd** had been dispossessed and had discontinued its possession for the statutory period of 12 years.

The Plaintiff herein alleged that he took possession and occupation of the suit land from 1979. He further claimed that he had put up structures on the suit property and has even allowed PW2 and PW 3 to use the land. It was his evidence that he did not know the Defendant herein until when the suit land was advertised for sale in the year 2005 and when he expressed his interest, he realized that it was indeed the suit land where he had been in occupation since the year 1979.

It is evident that the Defendant got registered as the proprietor of the suit land in the year 1986. From the Plaintiff's own evidence, he did not know of this registration until the year 2005. The Plaintiff became aware that the Defendants were the registered owners in the year 2005, and that is when time started to run. The Defendant on its part testified that it contracted Dw2 and Dw3 to draw architectural drawings for the Company in the year 1987 and 1997. It was the evidence of DW4 that when the two architects visited the suit land, the land was not occupied. DW4 further testified that in the year 2002, he also visited the Plaintiff herein and had a friendly chat with him and that the plaintiff told Dw4 that he was lucky as Plaintiff had acted as a buzzer zone for his land, by keeping away squatters.

The Court has considered that evidence by Defence witnesses and their demeanor in court and the court has no reasons to doubt them. The court finds that the Defendant did acquire the land in the year 1986 and this land was unoccupied when Dw2 and Dw3 visited the same in the year 1987 and 1997 respectively for architectural drawings. The Plaintiff cannot therefore claim that he was in exclusive possession of the same from 1979. Since the Defendant did visit the land and contracted the Dw2 and Dw3 for architectural drawings, the Plaintiff cannot claim to have dispossessed the Defendant herein as there is no evidence that the Defendant herein discontinued their possession of the suit land.

The fact that the Defendant had not put any development did not mean that the Defendant had discontinued possession of the suit land or abandoned it. See the case of **Kazungu Mateja Mbaru & 5 Others Vs Thathini Co.Ltd Misc. Application No. 503 of 2005.**

Though it is evident that possession can take different forms such as fencing and cultivations as was held in the **Kimani Richune case (Supra),** it is evident that the Plaintiff herein did confirm during the site visit by the Court that some of the developments were undertaken about 10 years before the filing of the suits. Other development like cabro work were done during the subsistence of the suit. The acts done by the Plaintiff were mostly done during the subsistence of this suit and the Court cannot hold and find that they were acts inconsistent with the enjoyment of the land by the Defendant herein.

Further, since the Plaintiff had the onus of proving the exact extent of the Defendant's land that he was claiming ownership by adverse possession; the court finds that he failed to do so. The Plaintiff and his witnesses testified that the land they occupied was approximately 4 to 5 acres in size. However, the Defendant's land is about 0.36ha or approximately 1 acre as seen from the Deed Plan attached to the Certificate of Title. The Plaintiff failed to prove that the land that he is claiming from the Defendant is identifiable and definite. That was the findings in the case of **Gerishon Muindi Baruthi case (Supra).** For a claim under adverse possession, the claimant had a duty to prove that the land claimed was identifiable without any shadow of doubt. The Plaintiff herein failed to do so and it was his evidence that he obtained a copy of the ***Title Deed,*** after the suit land had been advertised for sale in the year 2005. The plaintiff therefore came to learn of the particulars of the suit land in the year 2005. There is no evidence that the portion of land claimed by the Plaintiff is identifiable and definite.

Further, given that the Plaintiff leant that the Defendant was the registered owner in the year 2005, they cannot claim that their occupation of the suit land was adverse to the Defendant as a period of 12 years had not lapsed since they saw the advertisement in the newspapers. I will be persuaded by the findings in the case of **Charles Matheka vs. Haco Industries Ltd Misc No. 1 of 2004** Machakos High Court where Lenaola J held that,

> ***"……one of the hallmark of any claim for adverse possession is that the registered owner was aware of the trespassers possession but did not interrupt it for a period exceeding twelve years. If the possession was stealthy, secret, and evasive, then no adverse possession can attach".***

The Plaintiff herein came to learn that Defendant was the registered owner of the suit land in the year 2005. The Defendant has not admitted that he was aware of the Plaintiff's occupation of its land prior to the filing of the suit. The court cannot therefore hold and find that the Plaintiff herein was in ***adverse possession*** of the suit land herein. The fact that the Defendant had not put up any development on the suit land did not dispossess him of its property. See the case of **Kazungu Mateja Mbaru & 5 Others (Supra).**

Having now analyzed the evidence herein and the relevant laws, the court finds that the Defendant is the registered owner of the suit property herein and as provided by Section 26(1) of the Land Registration Acts, it is the ***absolute*** and ***indefeasible*** proprietor of the said parcel of land. Such proprietorship can only be defeated by operation of the law provided by Section 25 of the said Land Registration Act.

The Plaintiff has attempted to claim that the Defendant's proprietorship of the land has been defeated or extinguished by operation of the law by dint of Section 38 of the Limitation of Actions Act. However the Court finds that the said claim is not sustainable and the court proceeds to determine the set out issue as follows:

On issue No. 1, the Plaintiff has been unable to establish a claim of adverse possession, as pleaded by him in his Originating Summons and as testified by him and his witnesses.

On issue ***No. II,*** the Plaintiff has also been unable to prove that he has been in exclusive and uninterrupted possession of the suit land for a period of over 12 years. Further on issue no. III, there was no evidence that the Defendant has been dispossessed or had discontinued its possession of the suit land for the statutory period.

For the above reasons, the Plaintiff is not entitled to the relief sought in the Originating Summons and therefore the claims by the Plaintiff herein should fail.

Having carefully considered the available evidence herein, the court finds that the Originating Summons herein filed by the Plaintiff on ***22nd September 2005***, is not merited and the same is dismissed entirely with costs to the Defendant.

Orders accordingly.

Dated, signed, and delivered this ***18th*** day of ***March 2016.***

28 days Right of Appeal.

L. GACHERU

JUDGE

In the presence of

M/s Kafafa holding brief Mr Solonka for the Plaintiff

Mr Gachie holding brief for Mrs Karanu for Defendant

Court Clerk : Kajuju

L. GACHERU

JUDGE

Court:

Judgement read in open Court in the presence of the above Advocates.

28 days Right of Appeal.

L. GACHERU

JUDGE

18/3/2016