IN THE COURT OF APPEAL

NAIROBI

(CORAM: MUSINGA, J. MOHAMMED & KANTAI, JJ.A.)

CIVIL APPEAL NO.119 OF 2016

BETWEEN

RAVJI KARSAN SANGHANI..APPELLANT

AND

PAMUR INVESTMENT LIMITED...RESPONDENT

(*Being an appeal from the Judgment of the Environment and Land Court of Kenya*

at Nairobi (L. Gacheru, J.) delivered on 18th March 2016

in

E.L.C. No. 1154 of 2005.)

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JUDGMENT OF THE COURT

1. On 22nd September 2005 ***Ravji Karsan Sanghani***, the appellant, filed an originating summons seeking the following orders:

> **“***(a) The Plaintiff be declared to have become entitled by adverse possession of over twelve (12) years (sic) ALL THAT piece of land registered under the Registration of Titles Act (Chapter 281 of the Laws of Kenya) and comprised in Title No. L.R. No. 209/10596 and situate in the City of Nairobi.***
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> ***(b) The said Plaintiff be registered as the Sole Proprietor of the said piece or parcel of land namely L.R. No. 209/10596 in the place of the above named PAMUR INVESTMENT LIMITED in whose favour the said parcel of land is registered.***
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> ***(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 (sic) the parcel of land known as L.R. No. 209/10596 or any part thereof.***
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> ***(d) The costs of this application be provided for.”***

2. In the supporting affidavit sworn by the appellant, he stated that the parcel of land known as ***L.R No. 209/10596*** (‘*the suit land*’) comprising 0.3655 hectares or thereabout and situate in the city of Nairobi was registered in the respondent’s name on 21st July 1987; that since 1979 he had been in continuous exclusive and uninterrupted occupation of the suit land and exercised on it acts of ownership openly and conspicuously by doing, among other things, fencing it in 1979, levelling and filling hardcore and murram in 1979, installation of water supply in 1980; constructing a parking bay in 1984; installation of a 3 phase electricity transformer in 1985 and planting trees thereon.

3. The appellant further stated that on 14th July 2005 the respondent through its agent, ***Tysons Limited***, placed an advertisement for sale of the suit land in a local newspaper; that he did an official search that revealed that the respondent became the registered proprietor of the suit land with effect from 1st March 1986; that the respondent had never occupied or taken possession of any part of the suit land since 1979; that in view of the foregoing, the respondent’s title in the suit land was extinguished in or about 1998 by virtue of the appellant’s continuous and exclusive adverse possession of the suit land for over 12 years and he is therefore entitled to be

registered as the owner thereof.

4. In a replying affidavit sworn by ***John W. Muriuki***, a director of the respondent, he stated that the respondent became the registered proprietor of the said suit land on 21st July 1987, having been granted a lease by the Government of the Republic of Kenya for a term of 99 years from 1st March 1986; that the appellant had never been in actual possession of the suit land; that none of the appellant's acts of possession of the suit land as alleged arising from 1979 are capable of creating a right of adverse possession since the respondent's ownership of the suit land commenced in 1987; that in exercise of its proprietary rights, the respondent entered into an informal licence agreement with one Maurice Adhinga in 1997 for a period of 10 years; that the appellant with the knowledge and consent of the respondent had since the year 2000 been storing 4 containers on part of the suit land and enjoyed easement rights to the adjacent property L.R No. 209/10468; and that the appellant's offices have always been at Kariba Estate and not on the suit land as alleged.

5. After a full hearing, the trial court (***L. Gacheru, J***.) dismissed the appellant's suit, holding that the appellant had not proved that he had been in exclusive and uninterrupted possession of the suit land for a period exceeding 12 years or that the respondent had been dispossessed of the suit land over the statutory period.

6. Being aggrieved and dissatisfied with the said judgment, the appellant preferred an appeal to this Court. In his memorandum of appeal, the appellant stated, *inter alia*, that the learned trial judge erred in law in her appraisal of the evidence and interpretation of the principles of adverse possession; that the court's findings were contrary to the observations made when the trial court visited the suit land on 3rd December 2010; and further erred in law in giving undue weight to the appellant's testimony and that of his witnesses while correspondingly giving due weight to the testimony of the respondent and that of its witnesses.

7. When the appeal came up for hearing, counsel for the parties agreed to have it disposed of by way of their written submissions without any oral highlighting. We have carefully perused the entire record of appeal, the submissions and the authorities cited by both parties. As the first appellate court, we remind ourselves of the oft-cited dicta in ***Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] E.A. 123*** that:

> ***"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.'***

8. The same principles had earlier been stated by the Court of Appeal for Eastern Africa in the celebrated case of ***Peters v Sunday Post Limited [1958] E.A. 424*** where ***Sir Kenneth O'Connor*** delivered himself as follows:-

> ***"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."***

9. Guided by these principles, we shall proceed to consider and evaluate the evidence that was tendered by the parties and draw our own conclusions. The appellant's evidence was that he entered into a parcel of land in South B, Nairobi, in 1979, three quarters of which was then a disused quarry, which he reclaimed and started carrying on various developments as stated in his affidavit. At that time the disused land, which he said measured about 5 acres, was government land. The suit land is part of the 5-acre parcel of land, according to the appellant.

10. It is trite law that adverse possession cannot operate in respect of land that is owned by the government. See ***section 41*** of the ***Limitation of Actions Act***. However, the suit land, which measures approximately one (1) acre or thereabout, was registered in the respondent's name on 21st July 1987. That is the earliest date that time could begin to run for purposes of a claim of the suit land under the doctrine of adverse possession.

11. The appellant's offices are situated in an adjacent property known as Kariba Estate, and the appellant stated in cross examination that he accesses his offices by walking across the suit land, which he uses, inter alia, as a parking and storage yard for his commercial trucks. The designated use of the suit land as per the Grant is "***for private residential purposes***."

According to the appellant, the respondent did not utilize the suit land or take any action to assert its ownership of the land until July 2005 when it advertised it for sale, by which time its right of ownership had been extinguished after lapse of more than 12 years' use and occupation of the suit land adversely by himself.

12. The appellant's evidence was corroborated by Salim Omar Maluki, Julius Njihia Njoroge, Mary Waveti Mbagathi and Maurice N. Adhinga.

13. ***Salim Omar Maluki***, PW2, testified that in 1984 he approached the appellant and sought permission to put up a kiosk on a portion of the 5-acre parcel of land, which the appellant granted. The witness said that the appellant had undertaken various developments on the suit land, though he conceded that some of them were undertaken after the filing of the suit. The witness

did not however specify whether his kiosk was standing on the disputed one -acre suit land or on the other four acres.

14. ***Maurice Nyanjwaya Adhinga***, PW3, testified that in 1987 the appellant permitted him to put up a workshop on the land he was occupying. He corroborated the appellant's testimony that he had substantially developed the suit property over the years. He said that he met one John Muriuki, the respondent's Managing Director in July 2005 and they entered into an agreement allowing him to continue occupying the suit land.

15. ***Mary Waveti Mbagathi***, an employee of R. K. Sanghani Company Limited that is associated with the appellant, testified that the company occupies a parcel of land measuring about five acres at South B area, where she also resides; that she was employed by the company in 1983; that electricity was installed in the suit premises in 1985; that there are about 200 fellow employees who are residing on the 5 acre parcel of land; that the appellant had carried out many developments on the suit land but a number of them were done about four years after the appellant filed the suit.

16. The appellant's last witness, ***Julius Mulwa Njoroge***, PW5, an employee of the appellant, testified as to how they filled a quarry that was near the suit land with hard cores on the appellant's instructions; that the appellant occupies the suit land and had developed it since 1979, but some of the developments, including, paving the ground with ''cabro'' blocks was done in the year 2005.

17. On the part of the respondent, ***John Muriuki***, the founding director, stated in his witness statement, which was adopted as his evidence in chief, that he resides in South B area of Nairobi since 1985; that the other director of the respondent is his wife, ***Pauline Muriuki***; that the suit land, that is also in South B area, was allocated to the respondent by the government in February 1986; that upon payment of all the requisite dues he personally followed up with the Director of Surveys and had the plot surveyed and the beacons fixed; the deed plan was prepared, signed and title issued on 21st July 1987; that in November 1987 he instructed an Architect, ***Dr. David Thiong'o Muchiri***, to prepare a schematic design of maisonnettes to enable the respondent solicit for development finance; that he personally took the Architect to the site and there was no occupant at all; that although the Architect prepared the designs as instructed, the project did not take off as there was a slump in the property market at the time and could not secure funding for the project.

18. The witness further stated that in 1991 he decided to explore the viability of putting up apartments as opposed to maisonnettes, and in April 1991 he went to the site with Architect George Kagochi; that later in November 1996 the witness and Architect Julius Gichohi Wairagu (DW2), who had been instructed by Architect Dr. David Thiong'o Muchiri, went again to the site to locate the sewer line and there was no one in occupation of the suit land. The appellant was occupying an adjacent parcel of land.

19. Mr. Muriuki further stated that in 2001 together with his wife they drove to the suit land and went to see the appellant, whose office was in the ground floor in a building inside Kariba Estate, having been told that the appellant wanted to buy the suit land; that they discussed the issue of sale but did not agree on the price; that in 2002 he was requested by a Mr. Peter Gakunu, who has a plot in the neighbourhood, to get him a surveyor to locate beacons for his plot, and the witness identified a surveyor and they drove to the suit land, parked their vehicle and proceeded to Mr. Gakunu's plot. The appellant was not in occupation of the suit land, the witness stated.

20. In 2005 the respondent instructed M/s Tysons Ltd to advertise the suit land for sale. Before Tysons could place an advertisement in the newspapers their Field Officer had to be taken to the site so that he could physically see the plot for purposes of showing it to potential buyers and they did so; that thereafter the advertisement was made and Tysons Ltd informed Mr. Muriuki that a potential buyer (who turned out to be the appellant), had requested for a copy of the title before he could make a written offer; that shortly thereafter the appellant commenced the suit, claiming that he had been in adverse possession of it.

21. The witness stated that it was only in 2005 when the appellant encroached a part of the suit land and the improvements thereon were done after the suit was filed.

22. The evidence of Mr. Muriuki was corroborated by his wife, Pauline Muriuki (DW1), Julius Gichohi Wairagu (DW2), and Dr. David Thiong'o Muchiri (DW3).

23. Before we consider the grounds of appeal, we need to restate what this Court held in ***Wambugu v Njuguna** [1983] KLR 172*:

> ***"In order to acquire by the 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 it or by having discontinued his possession of it. Dispossession of the proprietor that defeats 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 or 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."***

24. In considering whether the appellant satisfied the principles stated above, we think it is important to restate the dicta in ***Kweyu v Omutut** [1990] KLR 709* at page 716 where ***Gicheru, J.A.*** delivered himself as follows:

> ***"By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period of 12 years, it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality).***
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> ***Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and***

second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms ("claim or colour of title") mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on *de facto* ***use and occupation.***

To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use done publicly and notoriously."

25. For possession to be adverse, it must start with a wrongful dispossession of the rightful owner of the land in a peaceful and open manner; must be continuous and exclusive for over a period of twelve years, with a clear and manifest intent by the claimant of asserting his or her right of ownership of the land in question so as to defeat that of the registered owner. As ***Gicheru, J.A.*** put it, it is not enough for a claimant to simply prove that he has been in occupation of the land for a period exceeding twelve years, the claimant must also prove that the intent of such occupation was to assert right of ownership.

26. We now turn to the grounds of the appeal. In the first one, the appellant faults the learned judge for failing to give due weight to his evidence as relates to possession of the suit land. According to the appellant, he entered the suit land in 1979. By then the suit land had not been alienated; the respondent became the registered proprietor on 21st July 1987. The learned trial judge held that in 1987 and 1997 when the respondent visited the suit land in the company of Architects it was unoccupied. The learned judge had heard conflicting evidence as to when the appellant occupied the suit land, not the entire 5-acre parcel of land.

27. The appellant was aggrieved by the learned judge's remark that "***the Court has considered that evidence by Defence witnesses and their demeanour in court and the court has no reasons to doubt them."*** He argued that the learned judge did not make any finding regarding the appellant's evidence and that of his witnesses.

28. It is trite law that a trial court is entitled to see, hear, assess and gauge the demeanour of parties and their witnesses, which an appellate court cannot. In ***Jonas Akuno O'Kubasu v Republic [2000] eKLR***, it was held that when the question arises as to which witness is to be believed and that question turns on the manner and demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses. However, an appellate court may differ with the findings by the trial court if the impression based on the demeanour is inconsistent with the evidence. See ***EphantusMwangi & Another v Duncan Mwangi [1982-1988] 1 KAR 278.***

29. Mr. Muriuki and his wife, the two directors of the respondent company, were residing near the suit property when the respondent applied for allotment of the suit land. We think that they must have been aware of the physical condition and situation of the suit land. The land must have been surveyed and beacons fixed thereon before the grant was issued, as stated by Mr. Muriuki. The assertion by the appellant and his witnesses that they had never seen any surveyor on the ground is doubtful. After the grant was issued, we do not think the two directors of the respondent company would have seen the appellant developing the suit land and fail to take appropriate action to protect the respondent's interests. As earlier stated, they were residing in the same locality and it was not difficult for them to know what was happening.

30. Secondly, two of the respondent's witnesses were Architects and had no personal interest in the suit property. They were taken to the suit land by the respondent in the course of discharge of their professional services. Like the learned trial judge, we have no reason to disbelieve their testimony that when they visited the suit land in 1987 and 1997 there were no developments thereon. There were however some structures and a kiosk that were located outside the boundaries of the suit land. The architectural material that was tendered in evidence by the respondent and the testimony of the two Architects revealed that the extent of the land that was to be occupied by the intended developments was well identified. There was no indication that any structures needed to be pulled down to give way to the proposed developments. It was not disputed that the appellant undertook some developments on the suit.

31. The learned judge not only summarized the evidence of each of the witnesses but also analysed it. Having done so, she was inclined to believe the testimony of the respondent and of his witnesses, and that was also influenced by their demeanour. On our part, we have no basis of discrediting the trial court's finding as regards the demeanour of the respondent's witnesses. It is a strong thing for an appellate court to differ with the trial court's views on the demeanour of witnesses who appeared before it. An appellate court does not have such benefit. We must therefore dismiss grounds 1 and 9 of the appeal.

32. Grounds 2, 3, 4 and 8 of the appeal relate to the findings made by the trial court in relation to the observations made by ***Okwengu, J.*** (as she then was), when she visited the suit land on 3rd December 2010. The learned judge noted that the whole plot was approximately 5 acres; there were two buildings, one being permanent which was put up three years after the case was filed; the whole plot was fenced, partly with chain link, bamboo and corrugated iron sheets; the ground had "cabro" works on some part of the plot, a water metre, a store, a motor vehicle rump and nearly 6 timber and iron sheet structures used as staff quarters. The respondent's witness, Mr. Muriuki, was able to identify the area occupied by the suit land, even though the beacons had been disturbed. On the other hand, the appellant told the court that he could not tell where the external boundaries of the suit land were.

33. In ***Gerisho Muindi Baruthi v Willays Mukobwa & Another*****, *Civil Appeal No. 98 of 1998***, this Court held that only exclusive possession of a parcel of land which is definite could suffice in a claim of land if such possession was for a period of more than 12 years. The learned judge was therefore right in holding that the appellant "***failed to prove that the land he is claiming from the defendant is identifiable and definite."***

34. It is also doubtful whether the appellant's intention in entering a portion (or even the whole) of the suit land whenever he may have done so was to dispossess the respondent of the same, since adverse character of such possession must be proved, as held in ***Kweyu v Omutut*** (*supra*). We say so because whereas the appellant alleged that he did not enter the suit land with the respondent's permission, Mr. Muriuki (DW4) stated in his affidavit in reply to the originating summons that since the year 2000 the appellant had been allowed to store some 4 containers on a part of the suit land. Although the appellant denied having ever sought such consent, there was admission that there had been some containers on a part of the suit land but had since been removed to give way to some developments thereon. There was no sufficient proof of adverse intent in the appellant's occupation of the suit land. We therefore dismiss grounds 2, 3, 4 and 8 of the appeal.

35. Ground No. 6 faults the learned judge for holding that the appellant became aware that the respondent was the registered owner of the suit land in the year 2005 and that is when time started to run. In a claim of land under the doctrine of adverse possession, the claimant must show that the registered owner of the land knew or ought to have known about the adverse possession over the statutory period but took no action to retake the land. The learned judge cited the case of ***Charles Matheka v Haco Industries Ltd*****, *Misc. Civil Case No.1 of 2004*** where ***Lenaola, J.*** (as he then was) held that:

> ***"...one of the hallmarks of any claim for adverse possession is that the registered owner was aware of the trespasser's 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."***

36. In ***Benson Mukuna Wachira v Assumption Sisters of Nairobi Registered Trustees [2016] eKLR***, this Court held that:

> ***"A claim for adverse possession arises where land owned by a person is claimed by a trespasser on the basis that the trespasser, with the knowledge of the owner, has occupied it adversely to the title of the owner continuously for an uninterrupted period of not less than 12 years."***

See also ***Kimani Ruchine v Swift Rutherford & Co. Ltd [1980] KLR 10***. Similarly, in ***Titus Kigoro Munyi v Peter Mburu Kimani [2015] eKLR***, this Court held that in a claim for adverse possession, actual or constructive knowledge of adverse possession must be proved. This the appellant failed to do. The record does not reveal that the respondent was at all aware of the appellant's unlawful occupation of the suit land. To the contrary, there is no denial that the appellant initiated the suit only after the respondent through Tysons Ltd advertised the land for sale.

37. All in all, we find and hold that the appellant did not prove his claim over the suit land in accordance with the principles of adverse possession. The appeal is without merit and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 29th day of January, 2021.

D. K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR