IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KOOME & KANTAI, JJ.A)

CIVIL APPEAL NO. 325 OF 2014

consolidated with

CIVIL APPEAL NO. 131 OF 2013

BETWEEN

JOYCE MUGURE MWANGI.....1ST APPELLANT

PATRICK GITAU MBUGUA.....2ND APPELLANT

JOHN NGWIRI.....3RD APPELLANT

MBURU MURIAMA.....4TH APPELLANT

RAHAB WANJIRU.....5TH APPELLANT

MARY WANJIKU MUTHONGA.....6TH APPELLANT

AND

JOACHIM NGUGI KIARIE.....1ST RESPONDENT

JOHN MUKIRAE.....2ND RESPONDENT

DANIEL NJOROGE.....3RD RESPONDENT

L. WILSON.....4TH RESPONDENT

MATHEW ALEXANDER BLACK.....5TH RESPONDENT

G.Z ULYATE.....6TH RESPONDENT

consolidated with

CIVIL APPEAL NO 325 OF 2014

JOHN MUKIRAE KINUNGI.....1ST APPELLANT

DANIEL NJOROGE.....2ND APPELLANT

AND

JOAKIM NGUGI KIARIE & 10 OTHERS.....RESPONDENTS

(Being an appeal from the Judgment/Decree of the High Court of Kenya at Nairobi (Mbogholi, J.), dated 2nd August 2012

in

HIGH COURT CIVIL CASE No. 1029 of 1982 (OS)

consolidated with

HIGH COURT CIVIL CASE No. 568 of 1990 HIGH COURT CIVIL CASE No. 507 of 1981 HIGH COURT CIVIL CASE No. 79 of 1989 (OS)

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JUDGMENT OF THE COURT

[1] The dispute that gave rise to the instant appeal was a result of four suits that were consolidated and heard together. The impugned judgment by Mbogholi, J., the subject matter of this appeal also gave rise to two appeals **No 131 of 2013** and **No 325 of 2014** which were consolidated and heard together. The central issues that were distilled from all the suits were whether the appellants proved a claim of adverse possession in respect of a property described as LR. No 336/17 measuring about 6 acres situated within the Baba Dogo area in Nairobi County (hereinafter referred to "as suit premises"). The appellants in CA No. 325 of 2014 had sought a declaration that they had purchased the suit premises from the known agent of the registered owner one Mrs. Wilson in 1964, and that they should have been declared as purchasers/or in advance possession by virtue of the sale agreement. The registered proprietor of the suit premises or his estate never defended the suits.

[2] It is necessary to give a glimpse of the four suits as follows;

1) **Joakim Ngugi Kiarie vs. G.Z Ulyate & 6 0thers HCCC No 1029 of 1982.** The plaintiff sought by way of an amended originating summons to be registered as the proprietor of the suit premises absolutely; and the 1st to the 7th defendants (appellants in CA No 131 of 2013) be restrained by an order of injunction from trespassing or otherwise interfering with the plaintiffs' possession of the suit premises. During the hearing, the plaintiff (**Joakim)** testified and relied on the evidence of two other witnesses. He told the court that he used to teach at a nearby school, Baba Dogo Primary School and that is how he moved in and occupied the suit premises on or about 1964 and has lived there ever since without any interruption or interference by the registered owner. This was with the permission of Mrs. Wilson who was introduced to him by Mwangangi Kitivo who also testified as (PW3). When Mrs. Wilson left the country for Australia in 1970, she left Joakim with instructions to move into the main house and to continue occupying the suit premises and paying rates to the Nairobi City Council which he did regularly. Nonetheless Mrs. Wilson never returned, but Joakim continued paying the rates due to the City Council of Nairobi on behalf of the estate of the owner, G. Z. Ulyate who was the registered owner of the suit premises. At one time Joakim had defaulted in the payment of rates and he was sued by the Nairobi City Council as per the documents that he produced in evidence. At another point in time his house burnt down and he mobilized support from neighbours and rebuilt it. After his house burnt down in 1980 the suit premises was invaded by the appellants but Joackim kept reporting the matter to the local administration and finally filed suit where he obtained restraining orders. One of the respondents Patrick Gitau Mbugua was committed to civil jail for disobeying the orders. After weighing the evidence, the learned trial Judge was persuaded that Joackim was had proved his case and found in his favour.

[3] In the second suit being;

2) **HCCC Nos 568 of 1990, Agri-Hardware (E.A) Ltd vs. John Mukirae & 8 Others**, the plaintiff claimed that it bought the suit premises from the defendants who were plaintiffs in HCCC No 507 of 1981 and they were issued with the vesting order on the 19th December, 1986 however the said title was subsequently cancelled after the vesting order was set-aside. Thus the suit was predicated on the claim of ownership by way of sale. However, during the hearing, this plaintiff did not attend court and did not give any evidence thus the suit was dismissed for want of prosecution and nothing arises on it in this appeal.

[4] The claim in the 3rd suit being;

3) **John Mukirae and Daniel Njoroge vs. L. Wilson and Mathew Alexander Black HCCC No 507 of 1981.** In this case the plaintiffs who are the appellants in CA No 325 of 2014 pleaded that they purchased the suit premises from Mrs. Wilson who was the known agent of the administrator of the estate of the registered proprietor. Their claim was for specific performance following a sale agreement that was dated 4th March, 1965 and in the alternative, there be a declaration that the title of the registered proprietor was extinguished by virtue of the adverse possession of the plaintiffs over the suit premises for a period in excess of 12 years. The evidence in support of this claim was an agreement of sale of land where the plaintiffs claim to have paid a sum of Ksh.30,000 out of the total agreed sum of Ksh.60,000. The balance of Ksh30,000 was subsequently deposited in court when a vesting order was registered against the title. However the vesting order was later cancelled on an application which was made in the same case by Jaockim. In regard to this case the learned trial Judge found the defendants who were sued left the country in 1970, and going by the documents that were produced in evidence, the defendant (Mrs. Wilson) was not the owner of the suit land nor was she the administrator of the estate of the registered owner. The Judge therefore concluded that the said Mrs. Wilson had no capacity to transfer any interest in the suit premises and on those basis the suit was dismissed.

[5] The claim in the 4th suit being;

> 4) **Patrick Gitau Mbugua & 3 Others vs. Mathew Alexander Black** **HCCC No 879 of 1989** the plaintiffs (appellants in CA No 131 of 2013) sought an order by way of an originating summons dated 23rd February, 1989 that they be registered as proprietors of the respective plots they claimed to have been in occupation. Also an order barring the defendants (registered owner of the suit premises) from claiming the suit premises by virtue of the Limitation of Actions Act; and that the defendants be ordered to execute transfer and to do all the necessary acts to convey the said titles to the plaintiffs and in default the Deputy Registrar of the court be ordered to sign all the necessary documents on behalf of the defendants. Patrick Gitau Mbugua gave evidence on behalf of his co-plaintiffs claiming that they had moved into the suit land around 1964 around the same time Joackim is said to have moved in. It was their case that they were entitled to the suit premises jointly and severally with Joackim. However the claim of occupation of the suit land by Patrick and his co- plaintiffs was disbelieved by the trial Judge who found the evidence by Patrick lacking credibility. This suit was dismissed.

[6] As evidenced from the above synopsis, all the four suits were in respect of a parcel of land known as LR No. 336/17. The registered proprietor or his agents, assignees or successors in title did not defend the suit. The contest was between Joackim who first filed his case seeking an order that he be declared to be in adverse possession against the appellants who also claimed the same rights as they also filed subsequent suits that were consolidated.

[7] After weighing the evidence before him, Mbogholi, J concluded as follows in his own words;

> ***"Going by all the material presented before me, I am persuaded that the plaintiff in High Court Civil Case No. 1026 of 1982 i.e Mr. Joakim Ngugi Kiarie has presented a case that justifies the orders he seeks. His possession and occupation of the suit premises was adverse to the title holder. Completion in respect of that occupation is non-existent. The defendants should therefore be restrained from interfering with that position. I find he i.e Mr. Joakim Ngugi Kiarie should be registered as the proprietor thereof. There is evidence that there are several occupiers on the suit premises which may have been invited by the defendants herein. I know from history of land disputes in this country that forceful removal or demolition may lead to dangerous consequences. I advise that it is at this stage that arbitral proceedings may be called upon.***
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> ***For now I give judgment in favour of the plaintiff in High Court Civil Case No. 1029 of 1982 Mr. Joakim Ngugi Kiarie against all defendants jointly and severally with costs of the suit. High Court Civil Case No. 879 of 1989 is hereby dismissed with no order as to costs"***

[8] It is the said judgment that has provoked the instant appeals by the appellants. The appellants in Civil Appeal No 131 of 2013 have raised 7 grounds of appeal which can be summarized as; the Judge erred by finding the appellants failed to prove their claim based on evidence of adverse possession on a balance of probabilities; the trial Judge failed to consider the accrued right of ownership vested on the appellants by virtue of the Limitation of Actions Act; erred in finding that Joackim had superior rights in adverse possession against the appellants; failing to consider the evidence tendered by the appellants thereby arriving at an erroneous decision. In Civil Appeal No 325 of 2014 the appellants raised some 6 grounds that challenge the findings and conclusion that Joakim proved a case of adverse possession; failing to give reasons for such a conclusion and for failing to evaluate submissions and authorities submitted by the appellants; failing to exercise discretion judiciously; misconstruing the case; showing open bias against appellants and for failing to make conclusive findings.

[9] The 1st respondent (Joakim) also filed a cross-appeal against part of the judgment that advised parties to invoke arbitral proceedings by faulting the learned trial Judge for failing to pronounce a conclusive judgment on the dispute by the parties and instead advising them to invoke arbitral proceedings; delegating judicial functions to arbitral proceedings which order is unclear and uncertainly worded within a judgment that was concluded; and finally for failing to issue an eviction order against several illegal occupiers who were the appellants.

[10] The parties filed their respective written submissions and when the appeal came up for hearing in Court, M/s. Migos Ogamba & Co advocates for the appellants were absent despite the fact that they had been duly served with a hearing notice. Counsel for the respondents implored us to dismiss the appeal, which we declined as counsel for the appellant had nonetheless filed written submissions which we will consider. Even **Miss. Njuguna** learned counsel for the appellants in CA No 131 of 2013 after urging us to dismiss the appeal in CA No 325 of 2014 merely relied on her clients written submissions and did not make any highlights. So was **Mr. Kinuthia** for the 1st respondent, while the other respondents who were named as the registered owners of the suit premises did not appear.

[11] In the appellant's written submissions in CA No 325 of 2014, counsel has recapped the summary of what transpired before the High Court and emphasized on what he termed uncontroverted evidence that the owner of the suit premises was one Harriet Matilda Ulyate who

died testate leaving a will to Mathew Alexander Black in 1965. The said Mathew also left the country and was represented by his known agent one Mrs Wilson. That is when his clients entered into an agreement with Mrs. L. Wilson who was the only traceable agent of the said Mathew for the purchase of the suit premises at an agreed consideration of Ksh.60,000 out of which they paid a sum of Ksh.30,000 to the said Wilson before she left the country in 1970.

[12] According to counsel for the appellants, there was cogent evidence that one Mathew who was the executor of the will of the late Ulyate, the registered proprietor of the suit premises left the country in 1970 and the suit was filed in 1981 after 12 years and the learned trial Judge erred by not issuing orders of specific performance in line with the decision in Eldoret Civil Appeal No 185 of 2007; and relied on the case of **David Mose Gekaria vs. Hezron Nyachae**; in the alternative or to find the appellants were entitled to the suit premises by way of adverse possession as per Malindi ELC No 108 of 2011, relying on **Kahindi Ngala Mwangandi vs. Mtana Lewa**. For the said reasons counsel urged us to allow the appeal and substitute thereto an order of specific performance of the agreement dated 4th March 1965 and an order that the appellants be registered as proprietors by way of purchase/or adverse possession.

[13] C. N. Kihara & Co Advocates also filed written submissions pointing out that they were the plaintiffs in HCCC No 879 of 1989 and the defendants in HCCC No 1029 of 1982. Going by the pleadings in those cases, especially where they were sued as defendants, it was submitted that the appellants were in occupation of the suit premises together with the 1st respondent (**Joackim)**. That is discernable from the pleadings in HCCC No 1029 of 1982 that indeed the prayer was to restrain the appellants from trespassing or otherwise interfering with the Joackim's possession of the suit premises. The appellants urged in their submissions that the prayers sought in their suit being HCCC No 879 of 1989 which was not challenged by the registered owner of the suit premises be granted based on the evidence on record which resonates with the prayers sought Civil Appeal No 131 of 2013.

[14] The appeal was opposed by Joackim who also filed a cross appeal. In opposing the appeal, counsel supported the main finding by the Judge that the 1st respondent was entitled to the suit premises by virtue of the principle of adverse possession. Reiterating the ratio *decidendi* in the case of **Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & Another** [2015] e KLR where this Court stated that in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. The Judge believed the evidence of Joackim and his witnesses and gave reasons why he disbelieved the evidence by the appellants.

[15] On the cross-appeal counsel made reference to the case of **Kenya Airports Authority vs. Mitu-Bell Welfare Society & 2 Others [2016] e KLR** in which the trial Judge was faulted for giving orders that allowed third parties to engage in identifying an appropriate resolution to the appellants' grievances which he termed as abdication of judicial function. According to counsel, a court seized of judicial function which involved hearing evidence and rendering a judgment cannot leave out some matters not adjudicated for an arbitrator to come in and deal with the same matters. It was not practical to partially take a matter from the seat of judgment and refer certain aspects to arbitration. For these reasons the Judge erred for failing to issue an eviction order against several occupiers after declaring the 1st respondent the owner of the suit premises. Thus according to counsel, Joackim was able to establish his entry into the suit property was peaceful, he had been in occupation and actual possession for a period of over 40 years. Counsel urged us to allow the cross- appeal and grant an order of eviction of the appellants.

[16] We have considered the records of appeal in both CA No 131of 2013 and CA No. 325 of 2014 which arise from the same judgement. We have duly fleshed out the salient issues as per the above summary and deliberated on the written submissions. From the foregoing summary, three issues stand out for determination. Whether the appellants in both appeals proved their cases on a balance of probability that they were in exclusive possession, openly and without interference of the suit premises for a period of 12 years; whether by virtue of a sale agreement entered into by the appellants to purchase the suit premises from Mrs. Wilson, a known agent of the executor of the will of the registered owner, entitled them to be granted an order of specific performance or adverse possession; whether the appellants in CA No 131 of 2013 were entitled to the orders sought as their suit was not defended and they gave evidence to show that they were in possession of the suit premises alongside Joackim. Finally, whether the trial Judge erred by advising the issue of eviction be subjected to arbitration.

[17] In dealing with those issues we have to bear in mind that this is a first appeal; that being so, we have a duty to analyze and re-assess the evidence on record and reach our own independent conclusions in the matter. This Court in **Sumaria & another vs. Allied Industries Ltd.**

> **(2007) KLR 1** expressed itself as herein under:-
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> ***"Being a first appeal the court was obliged to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that a court of appeal would not normally interfere with a finding of fact by the trial court unless if it was based on misapprehension of the evidence or that the Judge was shown demonstrably to have acted on a wrong principle in reaching the finding he did."***

[18] That said, on whether the appellants proved their case to the required standard, it is necessary to state that the appellants who filed

HCCC No 507 of 1981 were seeking an order of specific performance of an agreement for sale of the suit premises dated 4th March, 1964. During the hearing, David Njoroge Wanyoro gave evidence in support of the claim stating that they bought the suit premises from Mrs. Wilson who was the known agent of the registered proprietor; that they paid Khs.30,000 to her towards the purchase price but she left the country in 1970 before the sale was completed. Thus the appellants filed suit which proceeded by way of formal proof, a judgment in their favour was entered on 19th December, 1986 to the effect that the suit land be registered in their favour and the balance of the purchase price was deposited in court. However, that judgment was set aside on an application that was made by Joackim challenging the vesting order on the grounds that he was not made a party and he had filed HCCC No 1029 of 1982. The vesting order was set-aside and the land reverted to its original status.

[19] In regard to the appellants claim over the said sale, the trial Judge found Mrs. Wilson was not the owner of the suit premises neither was she the administrator of the estate of the registered owner. The Judge went on to say this about Mrs. Wilson;

> ***"She therefore had no capacity to transfer any interest in that particular piece of land. Even if she executed that agreement, she had no authority to do so and no title could pass from her to the plaintiffs. Therefore, no specific performance can be ordered based on that agreement in favour of the plaintiff that prayer fails.***
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> ***The two plaintiffs never moved onto the suit premises and so they never took possession or occupied the same. There is no basis therefore, to lay any claim by way of adverse possession… proof of a case of this nature is on a balance of probability. A party claiming land on the basis (sic) adverse possession has to proof that he has used this land which he claims as of right. There must be evidence of no force, no secrecy and no evasion. They must also show exclusive and uninterrupted possession before the filing of a claim, see Kimani Ruchine & Another vs. Swift, Rutherfold Co Ltd & Another (1980) KLR 10. A party must also establish that the owner has lost his right to the said parcel of land or has discontinued possession thereof. See Littledal v Liverpool College (1900) 1 CH 19 at page 21"***

[20] Did the Judge err in making those conclusions? We do not think so; as in our considered view, the Judge was spot on as far as the position in law was concerned regarding the competency of Mrs. Wilson to enter into a valid sale agreement with the appellants on behalf of the registered owner when she was not the executor or administrator of the deceased owners' estate. Moreover, we find the claim of specific performance would have run into further head winds of limitation of time if the alleged agreement was entered into in 1965, the order for specific performance was sought in 1981 when the suit was filed after 17 years. Also as was held in a persuasive case of;- **Reliable Electrical Engineers Ltd…..vs….Mantrac Kenya Limited (2006) eKLR,** wherein Justice Maraga (as he then was) stated that:-

> ***"Specific performance, like any other equitable remedy is discretionary and the Court will only grant it on well known principles.***
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> ***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 enforceable. Even when 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 influenced or where it will cause severe hardship to the defendant."***

[21] On the claim of adverse possession which was the case by the appellants in CA No 131 of 2013, it was Patrick Gitau Mbugua who gave evidence in respect of his co- plaintiffs in HCCC No 879 of 1989 that was Loice Mugure, John Ngwiri, Mburu Muriama, and Mary Muthiora. They were also the defendants in HCCC No 1029 of 1982. According to Patrick, he and his co- plaintiffs moved into the suit premises in or about 1964. The property was under the care of Mrs Wilson who also had no proprietary interests over the land and when she left the country in 1970 she asked Patrick and his co-plaintiffs to elect one person in whose name they would continue paying the land rates and other outgoings in regard to the suit premises and that is how they chose Joackim who was then a teacher at an adjacent school, Baba Dogo Primary School. They contended that Joackim filed HCCC No 1029 of 1982 and they filed their suit in 1989 after they had unsuccessfully tried to be joined as parties in HCCC No 507 of 1981 where a vesting order had issued. Patrick was emphatic that he and his co- plaintiffs were living in the suit premises for uninterrupted period of 12 years from 1964 having entered at the same time with Joackim. As a result they had acquired ownership of the portions they occupied by virtue of adverse possession against the original owners.

[22] The above evidence was contrasted with that of Joackim and his two witnesses who contended that he moved into the suit premises in or about 1964 and the appellants invaded his land in 1980. He produced several documents of the reports he made against the invaders before the local administration. A letter dated 16th August, 1989 by the then District Officer addressed to the Chief Ruaraka/

Kasarani was a case in point. Due to these invasions he finally filed suit seeking to be registered as absolute proprietor and an order restraining the appellants from trespassing or otherwise interfering with his possession of the suit premises. An interim order maintaining the status quo on the suit land until the hearing and determination of the suit and barring any further construction on the suit premises was issued by consent on 18th January, 2001. The record also shows that Patrick was alleged to have disobeyed the said order as he went on with construction on the suit premises. As a consequence he was committed to civil jail for a period of 3 months on 18th October, 2001.

[23] The Judge who heard and saw the witnesses testify accepted the evidence of Joakim whom he found had taken possession of the suit premises in 1964, was paying the City Council Rates and was fully recognized by the local authorities as the person in charge of the suit premises. When he defaulted in the payment of rates he was sued and summons to that effect were adduced in evidence. The Judge also accepted the evidence that was supported by a newspaper cutting that Joackim's house burnt down in 1980 and he was helped by neighbours to put up another house. That was the time the appellants invaded the suit premises, started sub-dividing it and selling to others. The Judge also found credible the evidence of Joackim's witnesses Michael Musuanji Muli (PW2) who said he had lived on the suit premises from 1976 as a tenant renting one of the rooms from Joackim. So was Mwangangi Kitivo (PW3) who testified that at the material time, he was the chairman of Baba Dogo Primary school and he was the one who introduced Joackim to Mrs. Wilson and he was allowed to stay in one of the houses. When Mrs. Wilson left the country, Joackim moved into the main house. These two witnesses were categorical that the respondents invaded the suit premises after Joackim's house was burnt down in 1980.

[24] On the conclusions drawn by the trial Judge after the evaluation of evidence taken in court, we can do no better than refer to the principle enunciated in the celebrated case of **Peters vs. Sunday Post [1958] E.A. 424 and p. 429 E Sir Kenneth O'Connor P.** said:-

> ***"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"***

[25] The learned Judge found the evidence of Patrick unreliable and this is what he stated in his own words;

> **"Patrick Gitau Mbugua DW1 denies that he was cited and committed for contempt of court. However, the rulings on record are against him in that respect. He has also said that he did not breach the court order but, with** (sic) **the same breath gave evidence to say that he caused the land to be subdivided. He also started paying rates to the City Council of Nairobi in his name and others. This would mean he assumed ownership of the land without any court order. Part of his evidence reads as follows "we have rented out the developed area". In my view this is a conduct of a person who is bent on, not only breaching the court order, but also building up evidence to justify a pre-drawn conclusion, and that is, he is entitled to the land in question.**
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> **In the course of the trial I watched the parties testify. I observed their respective demeanour. Whereas Mr. Kiarie PW1, Mr. Michael Muswanii Muli and PW3 Mwangangi Kitivo displayed utmost humility, Mr. Patrick Gitau Mbugua appeared in my view evasive. It will be recalled that this case was adjourned severally but at no time did he offer to bring forward the police abstract to show that his identity card had been lost. This is because his age had been put into question…"**

[26] The Judge having found from the evidence that the appellants moved in the suit premises in or about 1980 when Joackim's house burnt down; that they filed the suit in 1989; they had a burden under the doctrine of adverse possession to prove that they used the suit land as of right without interference and peacefully for a period of over 12 years ***Nec vi, nec clam, precario*** (no force no ceasing no persuasion) yet possession must be continuous, open and notorious. It is the trial Judge who had the advantage of seeing the appellants as well as other witnesses testify; to watch their demeanors and to determine who was speaking the truth. We have no basis of questioning that assessment of evidence and outcome.

[27] At the hearing of a claim of adverse possession just like in any other civil suit, the burden is upon the person claiming adverse possession to prove that claim on a balance of probability. In **Kimani Ruchine v Swift Rutherford & Co.Ltd (1980) KLR** it was stated on this point that;

> ***"The plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario….. So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endevours to interrupt it or by any recurrent***

consideration; See Wanyoike Gathire v Berverly (1965) EA 514, 518, 519 per Miles, J."

We think we have said enough to demonstrate that the findings by the trial Judge cannot be faulted thus the appellants' appeals lack merit; and we have no justifiable reasons for disagreeing with the trial Judge. Accordingly the consolidated appeals fail and we dismiss them with no order as to costs.

[28] This now takes us to the cross-appeal by the 1st respondent where he faulted the trial Judge for advising the parties to seek arbitration regarding the issue of eviction of the appellants from the suit premises.

Counsel cited the dicta from the case of **Telkom Kenya Limited vs. John Ochwada (2014) eKLR** where this Court expressed that:

> ***"It would be a serious abdication of the judicial function was the same to be delegated to the parties who come to the courts for that very determination. Such delegation is a nullity for all purposes and the challenge to the learned judge's ruling on that score is well-founded and upheld."***

We agree that if the Judge needed to invoke arbitration process, that process is put in motion before hearing the matter and rendering a judgment, once final orders were made, it is unprocedural to refer one issue for arbitration. This is because when a Judge hears a matter, and writes a judgment that is purely a judicial function that requires him or her to consider all grievances and to pronounce with reasons appropriate resolutions.

[29] What the Judge did would inevitably present practical problems of what would happen if the parties disagreed with the award or opinion of the arbitrator. Would they return to the same Judge who might feel he was now *functus officio* of the matter. See **Black's Law Dictionary 970 (10th ed. 2014** which states that in law, a judgment is a decision of a court regarding the rights and liabilities of parties in a legal action or proceeding. A judgment is the final court order regarding the rights and liabilities of the parties; it resolves all the contested issues and terminates the law suit; it is the court's final and official pronouncement of the law on an action that was pending before it.

[30] If we may make further reference to the case of **Kenya Airport Authority** (supra), a judgment has the effect of terminating the jurisdiction of the court that delivered it. Save as expressly provided for by law (for example in revisionary jurisdiction or under the slip rule) a judgment makes the court *functus officio* and transfers jurisdiction to an appellate court if appeal is allowed. It marks the end of litigation before the court that pronounced the judgment. When used in relation to a court, *functus officio* means that once a court has passed a judgment after a lawful hearing, it cannot reopen the case. The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter.

[31] We therefore find merit in the cross-appeal and accordingly allow it by interfering with part of the decision of the learned Judge advising the parties to invoke arbitral proceedings. Just like the High Court, we make no order ass to costs.

Dated and delivered at Nairobi this 21st day of June, 2019

W. OUKO, (P)

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JUDGE OF APPEAL

M. K. KOOME

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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.

DEPUTY REGISTRAR