IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KOOME & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 64 OF 2015

BETWEEN

GRACE WAIRIMU SORORA

(*Suing on behalf of The Estate of Sorora Oloitiptip)*…..… APPELLANT

VERSUS

CHAKA LIMITED…….....…..……. 1ST RESPONDENT

PAN AFRICAN CREDIT & FINANCE LTD

***(through the Deposit Protection Fund Board)* …… 2ND RESPONDENT**

ASHFORD KANGETHE T/A

TOI EDUCATION SERVICES…..... 3RD RESPONDENT

BRIDGING SAVINGS AND

CREDIT CO-OPERATIVE SOCIETY….....4TH RESPONDENT

THE PRINCIPAL REGISTRAR OF TITLES…….....5TH RESPONDENT

KIBICHO LTD (*through the Official Receiver)* .....6TH RESPONDENT

CITY COUNCIL OF NAIROBI…….....…..…...…..7TH RESPONDENT

(*Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi P. Nyamweya J., dated 2nd March 2015*

in

High Court ELC No. 340 of 2010 and High Court ELC No. 564 of 2010)

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JUDGMENT OF THE COURT

[1] A parcel of land known as L. R. Number 209/9749 Nairobi situated along Joseph Kangethe Road, Woodley area (suit land) was at the centre of dispute in four different law suits that were consolidated with the consent of all the parties and were heard and determined together under **ELC No 592 of 2012**. The main dispute over the suit land was instituted by the late Francis Sorora Oloitiptip on 19th July, 2007, he however passed away before the suit was disposed of; he was substituted 5 years later in July 2012 by his widow Grace Wairimu Sorora (appellant). The suit was against Kibicho Ltd, (6th respondent) through the Official Receiver (Kibicho Ltd was under liquidation). The appellant sought to be declared owner of the suit property by virtue of adverse possession having occupied the suit land for a period of twelve (12) years. The appellant pleaded that she and her late husband were in possession of the suit property from 1981 without any interruption. The learned trial Judge however found that the appellant was in possession of the suit land from 1985 which possession was interrupted in 1995; the Judge therefore held the appellant was not able to prove a claim of adverse possession.

[2] The second suit being ELC No 340 of 2010 was also filed by the appellant by way of a plaint on 14th July 2010. She sued Nairobi City Council, (7th respondent), on behalf of the estate of her late husband claiming that she runs a business under the name and style of **Zam Zam Bar** among other businesses and that she had constructed temporary structures and a sewer line on the suit property with the approval of the City Council of Nairobi. What provoked the said suit was a an enforcement notice dated 9th July, 2010 that was issued by the Nairobi City Council purporting to demolish the appellant's structures which they deemed "*illegal structures*". The appellant challenged the said enforcement notice as she contended that she was duly licenced to carry out her business and sought orders by way of a permanent injunction, restraining Nairobi City Council from interfering with the suit premises. In disposing this suit, the learned trial Judge found the documentary evidence of approved drawings that the appellant presented in support on this claim were forgeries.

[3] Also ELC No 592 of 2010 was filed by the appellant on 2nd December 2010 against Chaka Limited, Pan Africa Credit and Finance Ltd, Ashford Kangethe T/A Toi Educational Services, Bridging Savings and Credit Cooperative and the Registrar of Titles as the 1st, 2nd, 3rd, 4th and 5th defendants respectively. The appellant accused the 1st respondent of collusion in transferring the suit property from Kibicho Limited in its favour and the appellant sought a declaration that the transfer was null and void due to fraud. Further orders sought by the appellant in the said suit were a permanent order of injunction restraining Chaka Ltd from any dealings with the suit property. On the part of Chaka Ltd, it filed a defence and counterclaim seeking various heads of damages. This claim of fraud regarding sale and transfer of the suit property by Pan Africa Credit & Finance Ltd to Chaka Ltd was dismissed. The counter-claim by Chaka Limited was particularly allowed.

[4] The fourth suit was filed by Ashford Kangethe being ELC No. 564 of 2010; it would seem that the same was not prosecuted during the hearing and thus it fell by the way side.

[5] The four suits were heard, with the appellant adducing her own evidence and relying on one expert witness on handwriting. On the part of the respondents, Eunice Kibule Sudi testified on behalf of Chaka Ltd, Doris Mugambi on behalf of Pan Africa Credit & Finance Limited as the liquidation agent for the Deposit Protection Fund Board. John Ojwang, who was then Acting Director of Development Control with the Nairobi County and Emanuel Kenga an Assistant Police Commissioner of Police gave evidence on behalf of the City Council of Nairobi. The record of this appeal shows the learned trial Judge fastidiously recorded the evidence and submissions and upon evaluating the evidence, she concluded that the appellant failed to prove a claim of adverse possession; the counter-claim by Chaka was partially allowed as per the following orders;

> **"I accordingly enter judgment for the Chaka Ltd as against Grace Wairimu Sorora only to the extent of the following orders:**
>
> **1. That Grace Wairimu Sorora and/or her agents and servants shall within 30 days of the**

date of this judgment vacate the parcel of land known as LR No. 209/9749 and shall remove all structures constructed thereon within the said 30 days. Upon default the Nairobi County Government and Chaka Ltd shall be at liberty to evict Grace Wairimu Sorora and/or her agents and servants, and to demolish the said structures, and eviction orders to issue.

2. That Grace Wairimu Sorora shall pay Chaka Ltd the sum of Kshs 100,000/= as nominal damages for trespass together with interest at court rates from the date of this judgment until payment in full.

3. That the prayers by Grace Wairimu Sorora in the Originating Summons and various plaints filed in ELC 340 OF 2010, and ELC 29 OF 2012 are denied.

4. That the prayers by Ashfold Kangethe T/A Toi Education Services in a plaint filed in ELC 564 of 2010 are denied.

5. Each party shall bear their own costs of the consolidated suits."

[6] The aforementioned orders provoked this appeal which is predicated on the following eight grounds of appeal:

1. The learned Judge of the High Court erred in fact and law, in her assessment and evaluation of evidence on the appellant's claim for adverse possession, by finding that the appellant had only proved actual occupation and possession of property Land Reference No. 209/9749 Nairobi, from 1985 and not 1981, despite undisputed evidence of her occupation and possession of the property since 1981 and the fact that the Originating Summons in High Court ELC No. 29 of 2012 was not opposed.

2. The learned Judge of the High Court erred in law, in calling for, admitting additional evidence and relying upon the 2nd respondent's further list of documents dated 5th February, 2015, filed after the conclusion of the hearing and filing of submissions and without hearing the applicant on the evidence herein, which the learned Judge proceeded to determine the appellant's claim for adverse possession on.

3. The learned Judge of the High Court erred in law, in holding that the appellant's occupation and possession of the property had been interrupted by the institution of **HCCC No. 3178 of 1995, Kibicho Limited vs. Nairobi City Council & Another** when this issue had not been pleaded, evidence tendered thereon or submissions in respect thereof made by any party, when the said suit did not seek to recover the property from the appellant and was of no consequence, the same having been dismissed on 29th June, 2006.

4. The learned Judge of the High Court erred in law, in holding that the sale and transfer of the property to the 1st respondent was not illegal and fraudulent, notwithstanding the sale and transfer thereof *pendete lite*, in secrecy, during the occupation and possession thereof by the appellant and after the accrual of the applicant's right of entitlement to title by adverse possession.

5. The learned Judge of the High Court erred in law, in holding that the property was lawfully sold and transferred to the 1st respondent in exercise of the 2nd respondent's statutory power of sale, when no such power of sale existed, the 2nd respondent having obtained a decree in **HCCC No. 644 of 1986, Pan African Credit & Finance Limited vs. Kibicho Limited & 2 Others,** on 18th January, 1990 for the recovery of the money secured by the charge over the property and executed the decree through winding up proceedings in **Winding Up Cause No. 44 of 1991,** in the matter of Kibicho Limited.

6. The learned Judge of the High Court erred in law, in holding that the property was lawfully sold and transferred to the 1st respondent in exercise of the 2nd respondent's statutory power of law,

when no such power of sale existed, the power having been exercised outside the limitation period and when the appellant's right to entitlement to the property on account of adverse possession had accrued.

7. The learned Judge of the High Court erred in fact and law, in her assessment and evaluation of evidence in respect of the approvals for the structures erected on the property and in holding that the approvals were forgeries.

8. The learned Judge of the High Court erred in law, in holding that the suit as against the 2nd respondent was incompetent for want of leave, when the 2nd respondent was a party claiming a right over the property through and under Kibicho Limited, against whom leave to sue had been granted on 12th June, 2007 and the 2nd respondent having applied and been joined as a party to **High Court ELC No. 29 of 2012** before the consolidation of the 4 suits on 16th November, 2012.

[7] Parties named in this appeal except the 4th and 6th respondents filed extensive written submissions and lists of authorities. Our attention was drawn to a letter dated 7th November 2016 by the 4th respondent indicating that they have no interest with the appeal; the third respondent appeared in person and stated that he too had no interest in the appeal, while the 6th respondent did not participate in the proceedings before the High Court and although served with the record of appeal, it did not enter appearance. During the plenary hearing, Mr. Havi learned counsel for the appellant relied on his written submissions on behalf of the appellant filed on 20th September 2016, and what he referred to as "amended" submissions filed on 1st November 2016. Counsel collapsed all the grounds of appeal which were argued under the broad theme of a claim for adverse possession. According to Mr. Havi, the learned trial Judge erred in the computation of time against the abundant and unchallenged evidence by the appellant that she was in occupation from 1981 and not 1985. Counsel relied on a letter of offer dated 22nd January 1981 by the Nairobi City Council by which the appellant's late husband was allocated the suit property.

[8] Apparently the same suit land was allocated and a title was registered in favour of Kibicho Limited and a certificate of title was issued by the Commissioner of Lands on 25th March 1983 and subsequently the same title was charged to Pan African Credit and Finance Limited on 28th July 1983 to secure a loan of Ksh 4,000,000/=. Counsel for the appellant argued that the appellant was in occupation when the title was issued to Kibicho Ltd, and when the charge was created. That is why Kibicho Ltd filed a suit Nairobi HCCC No 3178 of 1995 against City Council of Nairobi seeking an order to remove the operators of kiosks and businesses that were in the suit premises. Counsel faulted the Learned Judge for holding that there was interruption of occupation despite the fact that the appellant or her late husband were not parties to the above suit; moreover the said suit was struck out because it was filed by a party who lacked *locus standi.*

[9] In further submissions, Mr. Havi for the appellant pointed out that the 2nd respondent asserted a claim over the suit property in 2007, when a suit being ELC No 2167 OF 2007 was instituted against the appellant and other persons who operated businesses within the suit property. However that suit was withdrawn; confirming that the appellant was in occupation without interruption for 30 years; he made reference to a case which is frequently cited in cases of this nature that is; **SISTO WAMBUGU VS KAMAU NJUGUNA** (1983) e KLR. In the case, the claim of adverse possession was predicated on entry to the suit land by the claimant on the basis of an alleged sale agreement which the registered owner later repudiated. The majority decision allowed the appeal by the claimant and laid emphasise on *inter alia* that for possession to be interrupted, there must be a claim by the present owner. According to counsel for the appellant, the learned Judge erred in the computation of time by holding time started running in 1985 which was against the weight of evidence that was supported by documents that clearly showed that the appellant was in possession from 1981; by the time Pan Africa Credit acquired title and attempted to assert its claim in 2007, the claim of adverse possession had already crystallized; furthermore the suit by Pan African Credit & Finance Limited was struck off. Counsel did not urge other grounds of appeal on fraudulent sale and transfer *pendete elite*.

[10] In response to the appellants' submissions, Mr Langat learned counsel for Chaka Ltd the 1st respondent relied on his written submissions filed on 15th July 2016, as well as the list of authorities. Counsel restated the chronology of how the suit property was purchased by the 1st respondent who was an innocent purchaser for value without notice of any defect in title; originally the suit property was registered in the name of Kibicho Ltd on 28th July 1983. The registered owner charged the suit property to Pan African Credit and Finance Limited to secure a loan of Ksh 4 million. Kibicho Ltd, as the loanee, defaulted in repayment; Pan Africa Credit & Finance Limited filed a suit to recover the loan and they obtained judgement and a decree dated 18th January 1990 in HCCC No. 644 of 1986, however Kibicho Ltd was placed under receivership on 24th September 1992 and the Official Receiver appointed in Winding up cause No 44 of 1992. By a twist of fate, Pan Africa Credit was also placed under receivership and fell under liquidation by the Deposit Protection Fund (DPF) from 14th August 1994 by virtue of the provisions of the then **sections 35** and 36 of the Banking Act.

[11] The mandate of DPF as liquidator of Pan Africa Credit & Finance Limited was to recover debts owed to the bank by its customers, that is how the suit property was sold to Chaka Ltd in exercise of the bank's statutory power of sale under a private treaty for a consideration of Kenya shillings sixteen million; that title according to counsel cannot be impugned; even if there were irregularities in the manner in which the title was issued, as long as the title was acquired within the law and no fraud was committed by Chaka Ltd. The appellant failed to demonstrate that the 1st respondent committed any fraud, stated counsel.

[12] Counsel further submitted the claim of adverse possession was not proved; citing the provisions of section 7 of the Limitation of Actions Act that sets a statutory threshold of 12 years possession for occupation by a claimant of land to give rise to a claim of adverse possession; in 2001, Chaka Ltd entered the suit property after purchasing it, but more squatters entered the land who were licenced by the Nairobi City Council; the squatters invaded the land and several suits were filed against the Nairobi City Council as well as the squatters and even the appellant; the filling of the said suits in effect interrupted any purported occupation by the appellant. To support that position counsel cited the case of **WILLIAM GATUHI MURATHE Vs GAKURU GATHIMBI** [1998] e KLR where the court cited with approval a passage from ***CHESHIRE'S MODERN LAW OF REAL PROPERTY*** page 894 in which the learned author posited as follows;-

> **"Time which has begun to run under the Act is stopped, either when the owner asserts his right or when his right is admitted by an adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a merely formal entry was sufficient to vest possession in the owner and to prevent time from running against him. Such a nominal entry, even though it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry every year, in this case called continued claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the Real Property Limitation Act 1833, in a section which has been repeated in the Limitation Act 1939, that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable effective entry, or sue for recovery of the land."**

[13] It was Mr Langat's further arguments that a claim for adverse possession could not stand for reasons that even the decree, which the appellant had obtained in HCCC No. 723 of 2008 on 23rd June 2009 and issued on 30th June 2009, was reviewed and set aside on grounds of misrepresentation and concealment of material facts; by dint of the provisions of **section 17** of the Limitation of Actions Act, a claim for adverse possession against Chaka Ltd could only start running from 16th July, 2009 when it was registered as owner. Lastly counsel submitted that the documents produced by the appellant to support her claim such as the permit to construct a sewer and building plan approvals were fake documents as the officer of the Nairobi City Council who was alleged to have signed them, disowned them; moreover the

suit land could not have been available for development as it was registered in the name of Chaka Ltd who paid colossal sums of money as purchase price and to redeem the suit property of outstanding City Council rates and rents; it would be unconscionable, unconstitutional and tantamount to undue enrichment if a registered owner of a property can be divested of their property rights which is guaranteed in the Constitution. Counsel for the 1st respondent urged us to dismiss the appeal.

[14] Mr. Mwangi learned counsel for the Pan Africa Credit Finance through the liquidating agent, Deposit Protection Fund Board; (DPF), for the 2nd respondent opposed the appeal, he relied on the written submissions filed on 26th September 2016. In his oral highlights during the plenary hearing, he submitted that a right by the lender cannot be defeated by a claim of adverse possession. The interest by the lender were noted in the title, when the appellant purported to occupy the suit land, she ought to have noted there were interests by a bank over the suit premises; the lender is not supposed to deal with physical possession, and similarly a borrower cannot part with possession of the charged property without written consent of the lender; the appellant was a squatter who operated businesses on the suit property with permission or licence by the Nairobi City Council who were 3rd parties and lacked authority to deal with the suit property; permission or licence to utilize suit property by a third party cannot constitute adverse possession; the appellant failed to prove their claim that occupation was uninterrupted; the record shows that there were numerous suits filed against the Nairobi City Council who issued licences to the appellant to operate a business. The first registered owner of the suit premises sued Nairobi City Council to stop them from issuing licences in HCCC No. 3178 of 1995 and a mandatory order of injunction was issued on 5th February 1999 to stop Nairobi City Council from allowing kiosks that were operating on the suit premises.

[15] Mr. Mwangi argued that as litigation is meant to seize a property; it interrupts occupation therefore the claim for adverse possession was not proved by the appellant. The appellant's claim against the lender cannot be defeated; the 2nd respondent sold the suit property in exercise of the bank's power of sale, the 1st respondent had no notice by the adverse possessor; the 1st respondent entered into contract of sale on 6th June 2008 and a charge was executed on 11th June 2008. Counsel also pointed out that a decree for adverse possession was made on 23rd June 2009; but the lender was not a party to the suit, when they learnt about it in the course of transferring the suit property to the 1st respondent, they successfully applied to set the order aside which was done on 6th September 2010. Counsel for the 2nd respondent agreed with the findings by the learned trial judge that a bank exercising a statutory power of sale with respect to land that is in possession of another person that possession cannot be peaceful in the face of recovery proceedings. Counsel urged us to take into account the provisions of **Article 40** of the Constitution which protects individuals or in association with others who acquire and own property of any description in any part of Kenya.

[16] The 3rd respondent, Ashford Kangethe appeared in court in person, he did not make any submissions; he drew our attention to an affidavit he had sworn on 7th November 2016 indicating in a pertinent paragraph as follows;-

> **"That I do confirm that Chaka Ltd purchased the suit property legally in terms of the documents (sic) procedure before this Honourable Court and I confirm (i) I withdrew from the case on the 22nd November 2010 as per court order ELC No. 564 of 2010 (copy attached) (ii) the decree for her adverse possession was set aside on 22nd September 2010 as per court order CIVIL CASE NO 723 OF 2008 and (iii) document presented before the court (sic) have been investigated by the DCI and found to be forgeries (copies attached)**
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> **That I do not wish to be involved in the appeal .....…"**

[17] On the part of Mr. Mutali, learned counsel for the Principal Registrar of Titles, he too opposed the appeal, he relied on the written submissions filed on 2nd November 2016 and associated himself with the submissions made on behalf of the 1st and 2nd respondents.

[**18]** Ms. Awour learned counsel for the 7th respondent also opposed the appeal. While associating her client's position with the position taken by the 1st, 2nd and 4th respondents, she highlighted the issue of an enforcement notice that was issued by Nairobi City Council on 9th July 2010; it was a proper notice that was duly issued under **section 30** of the Physical Planning Act; to remove and/or demolish illegal structures that were elected on the suit property. According to Ms. Awour, there are elaborate procedures for approval of any development plans and mechanism to address and resolve grievances and disputes arising from the process of approval of development plans; the learned trial Judge after analysing the evidence correctly found, the documents filed by the appellant did not emanate from her clients but were mere forgeries contrived to build a case for the appellant of adverse possession.

[19] Ms Awour went on to state that the appellant did not produce any evidence to show that she or her late husband sought or obtained approvals before constructing the illegal structures on the suit land, nor did she tender any proof of payment of approval fees or minutes of the building evaluation committee to show that her application was approved; moreover the buildings on the purported plans are not the ones on the ground which fact lends credence to the finding by the trial Judge that the expert report by PW2 was not credible. The appellant did not also adduce any documentary evidence to show that she was paying annual rates or land rent which is an obligation by any property owner occupying property in Nairobi. The learned Judge made a sound finding that the appellant's documents were forgeries, contrived to support a claim that was unfounded in law. Counsel for the 7th respondent also urged the appeal be dismissed.

[20] By way of a brief rejoinder, Mr. Havi emphasized that his client's claim was not predicated on an occupation licence, but relied on a trade licence to demonstrate the period in which the appellant was in occupation. As regards the suit filed by Kibicho Ltd, counsel submitted that it was dismissed and that is why the appellant was not evicted from the premises; there was ample evidence to demonstrate the property was occupied by squatters thus the 1st respondent cannot claim to have been an innocent purchaser for value. Finally, counsel urged that a mere fact that there was change of ownership of title which did not interrupt the appellants' occupation cannot affect the period of occupation.

[21] This is a first appeal, that being so, we are conscious of our duty to re-evaluate the evidence before the trial court and determine the matter afresh with the usual caveat that we did not hear or see the witnesses testify. See the case of ***Selle v Associated Motor Boat Company, [1968] EA 123,*** at page 126 where it was held:

> ***"...this Court must*** **consider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in that respect…". See also; - Williamson Diamonds Ltd. v. Brown [1970] E.A.1.)**

[22] We have carefully considered both the affidavit and oral evidence presented before the learned trial Judge and it is clear what the appellant set out to prove in the originating summons was a claim of adverse possession. Therefore the issue of who was the registered owner of the title in the period when the appellant claims to have become entitled to the suit premises by adverse possession is a relevant one; when the period of adverse possession started running and whether the occupation was continuous, open, peaceful and without the permission of the owner. *Nec vi, nec clam, nec precario* (No force, no secrecy, no permission are relevant matters for our determination, although the main issue remains whether the appellant proved the claim of adverse possession. In ***Kimani Ruchire v. Swift Rutherford & Co. Ltd.*** **[1980] KLR. 10** at pg 16 Letter B, **Kneller J** (as he then was) said:-

> **"The plaintiffs have to prove that they have used this land which they claim as of right. Nec vi, nec clam, nec precario (No force, no secrecy, no permission). 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 purposes or any endeavours to interrupt it or by way of recurrent consideration."**

[23] The suit in the High Court was decided upon the evidence adduced on the issue of whether the appellant was able to prove the claim of adverse possession. As already stated, the four parties who actively participated in the trial that is the appellant, 1st 2nd 3rd and 7th respondents called witnesses. The learned Judge was fastidious in the way she considered and analysed all the evidence that was before her. It is clear from the record that the Judge assessed the credibility of the witnesses and in the end preferred the version by the respondents especially in regard to documentary evidence produced by the appellant being the approvals from the 7th respondent of the building plans and for construction of a sewer line to the suit premises. This is what the learned Judge stated in a pertinent paragraph of the said judgment while addressing the issue of the validity of the documents which formed the basis of the claim of adverse possession;-

> **"The plans relied upon by Grace Wairimu Sorora marked DV-48 dated 15th `February 2005 have been highly contested, and the person who is alleged to have approved them namely DW3 gave evidence and denied that he approved or signed the purported building plan marked DV-48. It was also his testimony that he started approving building plans in the year 2007 yet the said plan was allegedly signed by him in the year 2005. DW3 also disputed the stamp used in the purported drawing as not being the one used by the Nairobi City Council at the time.**
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> **The court also observed that different versions of the said plan were produced in evidence, with the original copy that was produced in Court showing marked differences from the certified copy that was filed in court particularly as to the positioning of the disputed stamp and signature. In addition, there was conflicting expert opinion given on the authenticity of the signature of DW3 on the said plan.**
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> **The court notes in this regard that PW2 who was one of the expert witnesses, in his report and testimony made reference to documents marked "A" and "B" being 2 sets of the original drawings drawn on 19th July 1999, approved and registered as DV-48 on 15th February 2005 by the director of City Planning and Architecture that contained the disputed signatures. However he did not attach the said documents to his report and this court cannot therefore in the circumstances find that the document that he examined was the disputed plan marked DV-48. This court cannot therefore rely on the finding in the said report that found DW3's signature to be genuine. In addition it cannot find that the plans marked DV-48 dated 15th February 2005 were approved by Nairobi City Council in the**
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> **light of the evidence of DW3 that he did not sign or approve them and conflicting evidence as to its authenticity".**

[24] This was a case decided on the facts derived from the evidence adduced by witnesses as what was to be proved or disproved was that the appellant had acquired title to the suit property by adverse possession; that she and her late husband were in continuous possession of a defined portion of the suit land for a period of over twelve years. The documentary evidence that was relied on by the appellant to prove, exclusive use of the property and that perhaps quiet and open possession that was with the permission of the 7th respondent, included a letter of allocation, approved building plans, a trade licence payment receipts and sewer line. Those documents were disallowed by the trial Judge and on our part we see no justifiable reason for disagreeing with the above reasoning by the trial Judge.

In the celebrated case of;-***Peters v. 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."

Besides, the suit land did not belong to the 7th respondent; the title was mortgaged and was in the name of the Kibicho Ltd, and as rightly submitted by counsel for the respondents, if there were any approvals given to the appellant, by the City Council, it was given by a third party who had no interest in the land and therefore the approvals were of no legal effect.

[25] Further, when dealing with circumstances in which this Court may interfere with factual findings of the High Court, this Court cited the following principles with approval in ***Kiruga v. Kiruga & Another*** **[1988] KLR 348** and went on to emphasize and hold as follows:-

"2. An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.

3. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.

4. Where it happens that a decision may seem equally open either way, the appellate approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed."

[26] This now leads us to the crux of the matter, whether the appellant proved she and her late husband were in adverse possession of the suit property. Although the appellant's written submissions contained many arguments, Mr Havi principally concentrated on the issue of adverse possession. The appellant's claim is adverse possession of the suit land which is a principle of law founded under section 38 of the Limitation of Actions Act, the material part of which provides as follows;-

"(1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, 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 proprietor of the land.

(2) An order made under subsection (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act."

[27] A central issue for determination as regards when the time would stop running against an adverse possessor has been amply set out by the above provisions of the law and it has been restated in several decisions of this Court some of which have been cited in this appeal. For example in the case of ***William Gatuhi Murathe vs. Gakuru Gathimbi*** (Civil Appeal No. 49 of 1996) (unreported) this Court followed the decision in the case of ***Joseph Gahumi Kiritu vs. Lawrence Munyambu Kabura*** (Civil Appeal No. 20 of 1993) (unreported) which reviewed previous judgments of this Court on the issue of time and it was held that the filing of a suit for recovery of land would stop time from running for the purposes of Section 38 of the Limitation of Actions Act under which a person may claim to have become entitled to land by adverse possession. We would set out the following excerpt from the judgment of Kwach, J.A. in ***Kiritu vs. Kabura*** (supra).

"The passage from Cheshire's Modern Law of Real property to which Potter JA made reference in Githua v Ndeete is important and deserves to be read in full. It is at page 894 Section VI under the rubric THE METHODS BY WHICH TIME MAY BE PREVENTED FROM RUNNING and the learned author says-

"Time which has begun to run under the Act is stopped either when the owner asserts his

right or when his right is admitted by the adverse possessor.

Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. Such a nominal entry, even though it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry every year, in this case called continual claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the Real Property Limitation Act 1833, in a section which has been repeated in the Limitation Act 1939, that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry, or sue for recovery of the land.'

I agree that the mere filing of a suit for recovery of possession may not disrupt the possession of the adverse possessor, it being a physical thing, but as regards the stopping of time for the purposes of the Act, I would fully subscribe to the position expounded by Potter JA in Githu v Ndeete, and which has solid backing in the passage I have read from Cheshire. It is the sensible step to take instead of going into the disputed land armed to dislodge the adverse possessor, an act which can only result in a serious breach of the peace or even loss of life. It may well be true that in India the position as set out by Kneller JA in Muthoni v Wanduru does work, but I do not regard it as a practical approach to take in land disputes in Kenya. As there are authorities of this Court going both ways I am free to decide which way to go. An on this particular point I will go with the Potter JA. The only reason I can think of for the apparent contradiction in the decisions I have discussed is the total absence of law reports during the period under review, a calamity which has yet to be redressed."

[28] The principles are well settled, the issue here is whether the learned trial Judge misapprehended the evidence of when the appellant took possession of the suit land. The suit property was registered in the name of Kibicho Ltd in March 1983, and it was immediately charged to the 2nd respondent to secure a loan of Kshs. 4 million which was never repaid and therefore the property was sold to the 1st respondent in exercise of the bank's statutory power of sale. On this issue, the learned trial Judge held that the appellant entered the suit property with the permission of the City Council of Nairobi, the 7th respondent herein in August 1985. This finding was supported by a letter dated 20th August 1985 written by the 7th respondent to the appellant's husband that allocated him the suit property to carry out his business. The learned Judge also considered the other documentary evidence that was produced by the appellant in evidence such as; a letter of allotment purportedly issued by the City Council to the appellant; an application for approval to construct a sewer line on the suit property; the payments for licences and approval for building plans. The Judge held these documents were not genuine and gave reasons for that conclusion. We entirely agree with the reasoning by the Judge; for example why would City Council write another letter of allocation to the appellant in 1985 if the appellant was allocated the same plot in 1981? That is why the learned trial Judge accepted the evidence of occupation as shown in the letter of 20th August 1985 which she reproduced in full in the impugned judgment. The Judge therefore concluded and rightly so when she posited as follows;

"I therefore find that from the evidence adduced, Grace

Wairimu Sorora was only able to prove her actual occupation and possession of the suit property as from 1985 and not from 1981 as claimed. Time for purposes of adverse possession and limitation of actions therefore started to run from 1985."

[29] It is the trial Judge who heard and saw the witnesses testify, especially the appellant who had the burden of proving the claim of adverse possession. The appellant testified that she took possession of the suit premises with the permission of the 7th respondent which is a local authority. The appellant produced a letter of authority dated 1985 and in our own re-evaluation of the evidence, we find no justifiable reason to depart from the said findings of fact. To us there is no other way the 7th respondent could give

authority for occupation of a premises either as a licencee or a tenant other than through a written communication and the Judge was spot on in this regard.

[30] In further re- evaluation of the matters that were before the learned trial Judge, we note that the title to the suit premises was registered in March 1983.

What the appellant needed to prove was that her occupation was continuous, open, peaceful and without permission of the owner. The permission was given by a third party the 7th respondent who was perhaps mistaken to be the owner or the trustee of the suit property as the question that follows was on what basis would the 7th respondent licence a party to carry out business on another's land? It is evident that the appellant was licensed by the 7th respondent to operate a business on the suit premises which as aforesaid raises a pertinent issue of whether by the said licence, the registered owner and the bank that held a legal charge over the suit property can be divested of their legal interests under the charge by virtue of a licence issued by a third party. The role played by the 7th respondent as a local authority did not help the appellant's case, because the appellant was merely licenced to carry on business and in our view that did not give rise to a claim of ownership of the suit land. We agree with submissions by the respondents that if a party is licenced to carry on a business on a piece of land and they later claim ownership after occupying the land without paying rent, that would amount to undue enrichment.

[31] It is also evident that several suits were instituted against the 7th respondent as well as the appellant and other squatters who were in occupation of the suit property; one of them being **HCCC No. 3178 of 1995.** To us this was further interruption of the appellant's continuous occupation of the suit land, it is immaterial that the suit was struck out on technicality; the mere filing of suit interrupted the continuation of peaceful occupation of the suit land. What is relevant is that before the period of 12 years, the registered owner of the suit property had raised a claim thereby interrupting the appellant's peaceful and continuous possession. We agree with the specific finding made by the learned trial Judge in respect of the aforesaid suit as stated in the following passage;-

> "**The suit in HCC No. 3178 of 1995 was filed ten years into the commencement of occupation of the suit property by Grace Wairimu Sorora, which this court has found to have been in 1985, and was therefore within the limitation period of 12 years. Therefore the time for purposes of adverse of adverse possession effectively ceased to run for Grace Wairimu Sorora on about 26th October 1985 when the claim in HCCC No. 3178 of 1995 was made. This court therefore finds that the required threshold of 12 years uninterrupted possession for adverse possession to attach was not met by Grace Wairimu Sorora. Further, that the registered owner of the suit property, being Kibicho Ltd did take legal proceedings to recover the said property in HCCC No. 3178 of 1995 within the statutory limitation period of 12 years from the date of the accrual of the cause of action, as required by section 7 of the Limitation of Action."**

[32] In conclusion, as the only issue that was germane was adverse possession, we think we have said enough to demonstrate that the appellant failed to prove the claim. The documents were rightly rejected as forgeries that were merely contrived to support a claim of adverse possession that did not meet the legal threshold. Accordingly, this appeal lacks merit and it is hereby dismissed. Due to the nature of the dispute and the role that was played by the 7th respondent, a local authority that licenced the appellant to conduct business on the suit property without permission of the registered owner, we are reluctant to condemn the appellant with costs, similarly as ordered by the learned trial Judge each party shall bear their own costs of this appeal. The judgment and decree of the High Court is hereby upheld.

Dated and delivered at Nairobi this 12th day of May, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR