IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 322 OF 2012

BETWEEN

MUHIDDIN MOHAMED MUHIDDIN *(suing for and*

on behalf of the Estate of Mohamed Muhiddin Mohamed Hatimy).....**APPELLANT**

AND

JACKSON MUTHAMA & 168 OTHERS .....RESPONDENTS

(Being an appeal against the judgment and decree of the High Court of Kenya at Mombasa (Tuiyot, J.) dated 24th September, 2012

in

H.C. Commercial Suit No. 32 of 2007)

****

JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of ***Tuiyot J***. in Mombasa ***Commercial Suit No. 32 of 2007.***

Briefly, the facts of the case are that the appellant herein filed suit against the respondents by way of a plaint dated 3rd August, 2005. The appellant's complaint is encapsulated in paragraphs 5 and 6 of the plaint which state as follows:-

> ***5. That all the alleged tenants, licencees, squatters and/or intended purchasers have on separate dates and years erected, permanent, semi-permanent, temporary structures and houses on the said land with or without Consent of the land owners and in particular the Plaintiff as the legal representative of the Estate herein.***
>
> ***6. That the Plaintiff in attempting to regularize the position has made various consultation, invitation, offers in writing to the said alleged tenants, licensees, squatters and/or intended***

purchasers to come forth and enter into formal agreements recognizing their tenancy, occupation or licensee status but all they have done is offer little insignificant sums on cash towards ground Rent, and Municipal Rates, making the said sums to be in arrears.

The appellant sought orders, *inter alia*, that:

(a) A prohibitory and permanent injunction to issue restraining the Defendants whether by themselves, their servants and/or Agents or representatives from Trespassing, building or continuing to build, entering onto, occupying, possessing, selling, disposing off, or in any other manner howsoever and whatsoever from dealing with or interfering with the Plaintiff's private use, occupation, ownership and quiet enjoyment of the said ¾ portion of the Plot Number 106/1/MN.

(b) Order of Eviction and demolition of all structures, houses on the land and have vacant possession of the said Plot in order to develop and sell the same on behalf of the heirs to the Estate.

The respondents filed a joint statement of defence dated 13th October, 2005. In paragraphs 5, 12 and 15 they stated thus:

"5. The defendants deny the contents of para-5 of the plaint in as far as they are not alleged tenants, licenses *(sic)****, squatters and/or intended purchasers*** *BUT* ***the defendants are lawful occupants of the portions of land on where their houses stand on plot No. 106/1/M.N. and thus any allegations to the contrary are strictly put to proof.***

12. The defendants aver and maintain *strongly* ***that they are lawful occupants of the plot and have acquired proprietary interest over the same and as such the prohibitory/permanent injunctive orders sought-for herein are incapable of being issued against them in the circumstances.***

15. The defendants further aver and maintain that the plaintiff's suit is time-barred under the Limitation of actions Act and thus ought to be dismissed with costs by this Honourable Court."

The matter proceeded to hearing initially before ***Sergon, J.*** and then ***Ibrahim J***, (*as he then was*) and later before ***Tuiyot, J*** who delivered his judgment on 24th September, 2012 and found that the suit against the respondents was time-barred save for the 69th respondent against whom the suit was devoid of merit. The appellant was dissatisfied with the said judgment and hence this appeal. The appellant listed no less than 14 grounds of appeal. However, the gravemen of the appeal is contained in grounds 1, 2, 3(a), (b), (c), (d) and (e) of the memorandum of appeal, to wit:-

"1. The Honourable judge erred in law in dismissing the plaintiff's suit on the basis of time limitation under adverse possession.

2. The Honourable judge erred in law and in fact in holding that the Defendant had acquired rights under adverse possession without evidence being adduced by the defendant.

3. (a) There was no suit before the court seeking adverse possession;

(b) No evidence had been adduced by the Defence to solidify the claim for adverse possession;

(c) No counterclaim for adverse possession had been preferred by the defence;

(d) Judgment for an award of adverse possession were *(sic)* ***completely lacking;***

(e) Adverse possession as an equitable remedy can only be advanced as a sword and not as a

shield in law."

During the hearing of the appeal ***Mr. Alera*** for the appellant urged us to find that there was no claim before the High Court for adverse possession nor a counter-claim for adverse possession which relief in any event cannot be sought by way of a counter-claim; that since the respondents paid ground rent to the appellant's relations, adverse possession could not be inferred; that the period of limitation *(if at all*) was to start running from 20th September, 2003 when a notice to vacate was served on the respondents and not earlier.

In response ***Mr. Okanga*** for the respondents contended that the respondents had not claimed the suit land by adverse possession but that the appellant's suit was dismissed for being time-barred; that the period of limitation started running before 1982 when some of the respondents purchased land from Twahir Mohamed and later from Saida and her husband; that although these purchases were *void ab initio* as the two were not possessed of letters of administration to enable them convey an interest to the purchasers, the purchasers had been in occupation for sufficient periods to raise the defence of limitation.

This being a first appeal from the trial court, we have an obligation to consider and evaluate the evidence which was adduced in the trial court and come to our own conclusion bearing in mind however, that the trial Judge had the advantage of seeing and assessing the demeanor of witnesses for which we must allow (see ***Selle & Another v Associated Motor Boats Co.*** **Ltd [1968] EA 123**). In undertaking that obligation we are guided by the principle that a Court of Appeal will not normally interfere with a finding of fact of the trial court unless it is based on no evidence or on misapprehension of the evidence or the Judge is shown to have acted on wrong principles in reaching the findings he did.

PW1 ***Muhiddin Mohamed Muhiddin*** (*the appellant herein*) is the only witness who testified as against the respondents. He is a son and administrator of the estate of Mohamed Muhiddin Mohamed Hatimy (*the deceased*) who died on 3rd May, 1982. The deceased was the registered owner of plot No. 106/Section 1/MN Mombasa (*the suit land*) comprising of about 6.1 acres. The suit land had been transferred from Twahir bin Mohamed El-Barawi (*the transferor*) to the deceased on 12th May, 1959. This transfer is reflected on entry No. 26 on the title and it provides:

"Transfer to Mohamed Mohidin in respect of ¾ th undivided share of Twaher bin Mohamed El-Barawi (*the transferor****)."***

On 12th October, 2000 the appellant obtained letters of administration in respect of the deceased's estate and which letters were confirmed on 22nd October, 2004

As at the time of the appellant's testimony in court there were about 91 houses on the suit land – some permanent and others temporary. On 1st August, 2003 the appellant served the respondents with a notice of failure to pay ground rent. The outstanding rates owed to Mombasa Municipal Council had then accumulated to the tune of Kshs.2.5 million. His evidence was that he himself never leased nor sold land to any of the respondents.

On the other hand the respondents called a total of seven (7) witnesses including ***L. J. Manghnani*** (DW5) the lawyer whose firm handled some of the transactions between the appellant's family members and the respondents. However, he could not remember much due to old age. He was then 82 years old. In 1982 ***Moses Mwacharo Kirubai*** (DW1) purchased a plot measuring 36'x56' from Twahir (*the transferor)*. He paid Kshs.3,150/=. He was duly issued with a receipt. He built a 10 roomed Swahili type house in 1985. He thereafter paid ground rent on a monthly basis through Saida Twahir (*Saida)* the appellant's aunt and the deceased's sister. In 2004 he paid a total of Kshs.90,000/= as he wanted to purchase the plot so as to cease being a tenant. It is then that he stopped paying rent. Alhad Mohamed Muhiddin, a brother of the appellant demanded between Kshs.250.000/= – Kshs.400,000/= per plot. He denied being a squatter but an "*owner"* and a "*tenant*". He admitted that although he was to pay Kshs.250,000/= for his plot, he had paid a total of Kshs.90,000/= awaiting the determination of the court case.

In 1986 ***John Ngira Ojiambo*** (*DW2 although wrongly referred to as DW1*) purchased a plot measuring 36'x56' and paid Kshs.10,000/= to Saida. He built a 10 roomed house. He later (*in 1990*) obtained another plot measuring 70'x40' in an area that he says was stony and hence referred to it as "*the quarry plot*". He paid Kshs.5,000/= to Saida for this. Apart from the purchase price, he paid ground rent at the rate of Kshs.200/= - 250/= per month. In 2005 he sold one of the plots to ***Mary Nafula*** (*the 69th respondent*) for Kshs.800,000/=. An agreement dated 11th February, 2005 for the sale of "*house without land*" on plot No. Section/106 MN Mombasa was prepared by ***M/s Abdalla and Murshid Advocates*** and signed by himself, the purchaser and the appellant as a witness. He continued to pay ground rent to A. Muhiddin for "*the quarry plot*" and at one point paid Kshs.30,000/= to cover the outstanding rent arrears.

Wilson Kalama Chimwaga (DW3) purchased a plot measuring 50' x 90' in 1968 from the transferor. He pays ground rent at the rate of Kshs.200/= per month in recognition of the fact that he is an owner of a "*house without land."* On 16th August, 2004 he paid Alhad Muhiddin ground rent for five (5) months at the rate of Kshs.200/= per month. He told the trial court that he continued to pay the ground rent until it was "*stopped by Government"*.

James Gitonga Ngari (DW4) purchased two plots in an auction in 1982. One of the houses belonged to one Fatuma Hassan and had been attached by the deceased as ***Fatuma Hassan*** had defaulted to pay rent. He testified that "*in the auction I bought house without land."* The third house was an exchange with a house he had in an area called Mishomoroni.

Joseph Ouma Were (DW6) owns a 9 roomed Swahili-type house. He has been in occupation since 1986. He paid Kshs.10,000/= to Saida for the plot. He himself does not pay ground rent although he is aware that other persons do. His plot measures 55' x 75'.

Juma Zedi Mtinginya (DW7) purchased a plot from the transferor and has lived on the suit property since 1966. He paid ground rent initially of Kshs.26/= per month to the deceased and later Kshs.50= per month to Saida. He stopped paying the rent after paying Kshs.10,000/= to Saida's husband namely Noordin Mohamed.

Upon conclusion of the said evidence *Tuiyot, J*. dismissed the appellant's suit on the basis that the cause of action against all the respondents save the 69th respondent was time-barred. As for the 69th respondent the learned Judge found that the cause of action against her lacked merit. It is the said dismissal that provoked this appeal.

On our part we have considered the evidence on record, the rival oral submissions and the authorities touching on the matter.

As stated above, the deceased who died on 3rd May, 1982 was the registered owner of the suit land. On 12th October, 2000 the appellant who is the son of the deceased, obtained letters of administration which letters were confirmed on 22nd October, 2004. The deceased was survived by the appellant and his other siblings namely, Hyder Mohamed Muhiddin, Umi Mohamed Muhiddin, Twahir Mohamed Muhiddin, Alhad Mohamed Muhiddin and Amina Mohamed Muhiddin. It would appear that long before the issuance and confirmation of the letters of administration, the transferor and Saida '*sold*' plots on the suit land to several persons. Out of those who testified DW1, DW3 and DW7 purchased plots from the transferor in 1982, 1968 and 1966 respectively; DW2 and DW6 both purchased plots from Saida, in 1986, whilst DW4 purchased two plots in an auction in 1982 besides exchanging one of the plots with one that he owned in Mishomoroni. Alhad Mohamed, Saida and the husband of Saida namely Noordin as well as the deceased often received rent payments.

In the memorandum of appeal and his submissions before us Mr. Alera faulted the judgment of the court on the basis that the learned Judge erred in finding that the respondents had proved adverse possession yet the respondents paid ground rent albeit to the appellant's relations. The learned counsel further submitted that the mode of assertion of a claim of adverse possession to a suit land is also crucial. He reiterated that the proceedings herein were commenced by the appellant by way of plaint and that the respondents

responded to the claim by way of a defence and there was no counterclaim in the defence which in any case could not be used to lay claim by an adverse possessor.

On the other hand, it was the respondents' position that their claim on the suit land was not based on adverse possession and they maintained that this view was an invention of the appellant.

The position in law as to what constitutes adverse possession and the procedure to assert it is now well settled. In ***Wambugu v Njuguna [1983] KLR 172*** at holding 4, this Court held:

> ***"Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid agreement the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist."***

And in the case of ***Kweyu v Omuto [1990] KLR 709*** the Court, on the issue of permission and adverse possession had this to say,

> ***"Adverse possession and possession with permission cannot co-exist. Adverse possession does not start until the date of possession with permission (which usually follows a sale of land) expires."***

The fact of payment of rent, in our view, was a recognition that the respondents were tenants on the suit land and had permission to be on the land. The respondents' acknowledgment by payment of rent albeit to persons who had no authority removes them from the position of being on the land adversely.

As for the procedure for asserting a claim of adverse possession, in the case of ***Bwana v Said [1991] KLR 454,*** the Court of Appeal held:-

> ***"firstly that the proper procedure for asserting entitlement by way of adverse possession was vide an originating summon under Order 36 Rule 3D as it was then (now Order 37) and***
>
> ***Secondly, that it was not possible to correct the position by converting the action into a claim by way of an originating summons as there is no provision in the Civil Procedure Rules by which this could be done."***

In ***Bwana v Said*** (*supra*) the Court of Appeal drew inspiration from observation in the judgment of ***Sir Eric Law, J.A.*** (*as he then was*) in ***Kibiriti v Kibiriti [1983] IKLA 38*** that provided:

> ***"The procedure by way of originating summons is intended to enable simple matters to be settled by the Court without the expense of bringing an action in the usual way, not to enable the Court to determine matters which involve a serious question."***

We are therefore in agreement that the procedure for asserting a claim of adverse possession is vide an originating summons. Moreover, the period of adverse possession does not run if the initial entry onto the land was in contravention of the law. As explained, none of the purchasers dealt with the registered owner or with the appellant who was issued with the letters of administration. This Court in ***Chemjor Chepkuto v Chepkonga Magobe & 20 Others Nakuru C.A. No. 44 of 2007*** held that an illegal entry cannot confer an advantage to a possessor so as to entitle him to land by adverse possession. In the case the Court relied on the case of ***Marpis Investment Company (K) Limited v Kenya Railways Corporation [2005] 2 KLR 40,*** wherein the Court of Appeal *inter alia* stated that:

> ***"No Court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the Court and if the person invoking the action of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded***

the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist them."

Be that as it may, we have looked at the pleadings, the testimonies of the defendants, the submissions and the judgment of the learned Judge and are in agreement with ***Mr. Okanga*** that the respondents never raised the issue of adverse possession. Nowhere in their pleadings nor in their testimonies in court did the respondents raise the issue of adverse possession. In the defence dated 13th October, 2005 the respondents in paragraphs 5, 12 and 15 contended that they were lawful occupants and that the appellants cause of action was time-barred. They stated:

"5. The defendants deny the contents of para-5 of the plaint in as far as they are not alleged tenants, licenses, squatters and/or intended purchasers BUT the defendants are lawful occupants of the portions of land on where their houses stand on plot No. 106/1/M.N. and thus any allegations to the contrary are strictly put to proof.

12. The defendants aver and maintain strongly that they are lawful occupants of the plot and have acquired proprietary interest over the same and as such the prohibitory/permanent injunctive orders sought-for herein are incapable of being issued against them in the circumstances.

15. The defendants further aver and maintain that the plaintiff's suit is time-barred under the Limitation of Actions Act and thus ought to be dismissed with costs by this honourable court.

In our view the central issue that will ultimately determine this appeal is whether the respondents' occupation of the suit land was lawful and the issue as to whether the appellant's cause of action was time-barred.

Firstly, we would like to deal with the respondent's assertion that their occupation of the suit land was lawful. All the witnesses who testified indicated that they purchased their plots from persons other than the deceased and the appellant. As stated above, DW1, DW3 and DW7 made payments for the plots they occupy to the transferor whilst DW2 and DW6 made payment to Saida. As noted above the suit land was transferred by the transferor to the deceased on 12th May, 1959. As at 1982, 1968 and 1966 when the transferor sold plots to DW1, DW3 and DW7the transferor was no longer the owner as his ownership ended upon the transfer to the deceased. On her part Saida was not seized of legal capacity as she had no letters of administration and neither was she the registered owner. The transaction between her and DW2 and DW6 were *void ab initio*. It mattered not that the transferor was her father and that she was the sister of the deceased. The letters of administration were obtained by the appellant on 12th October, 2000 and which letters were confirmed on 22nd October, 2004. The appellant told the trial court that he never sold any plot to any of the respondents. From the record none of the respondents dealt with the appellant nor the deceased.

From a legal stand point, the only person who could confer rights in respect of the suit land was the registered owner namely the deceased or the appellant once he was confirmed as the administrator of the deceased's estate. On the legality of the transaction between the respondents and the transferor as well as Saida the learned Judge rendered himself thus:

"None of the defendants who testified showed that they either transacted with the Deceased when he was alive or with the Plaintiff who had due authority to transact after 17th October, 2000 when he was issued with Grant of Letters of Administration. What is to be said about the other Defendants who did not testify?"

The learned Judge proceeded to examine the position of the respondents who did not testify thus:

"On 1st October 2004, D Exhibit 13) the Plaintiff wrote this letter –

1st October, 2004

The District Commissioner,

Mombasa District,

Mombasa

RE: PLOT NO. 106/MN/1

I, Muhiddin Mohamed Muhiddin the Administrator of the estate of the late Mohammed Muhiddin would like to inform you that, the above quoted plot situated at Kongowea, Mwaweni in the Mombasa District is the property of the late Mohammed Humiddin who is my father (deceased on 3rd May, 1982).

The plot is now occupied by illegal tenants who claims to have accrued (bought) the land from person not heirs to the late Mohammed Muhiddin. The property now risks to be auctioned by the Mombasa Municipal Council due to a huge amount of accumulated unpaid land rates

I, the Administrator and the entire family of the late Mohammed Muhiddin have taken the initiative to sub divide the plot and sale offering first priority to the people who own houses on the plot.

We have had a meeting with the occupiers which was called by the area Chief together with the village elders and have already communicated this information to them.

Therefore, while the sub-division process is going on I request your office to help us resolve the whole process in a peaceful manner.

Thanking you in advance.

Yours faithfully,

MUHIDDIN M. MUHIDDIN

ADMINISTRATOR"

Tuiyot, J. concluded:

> ***"In it the Plaintiff is talking of illegal tenants occupying the suit property on the strength of transactions with unauthorized persons. No evidence was tendered to refute this. In my view the other Defendants, save for the 69th – Defendant, fall in the category of those who have testified."***

In our view the learned Judge was right in coming to the conclusion that he did that all the respondents had dealt with persons without authority. Their occupation of the suit land was therefore without a colour of right.

However, as regards the 69th respondent the learned Judge found that the suit against her was devoid of any merit. With all due respect to the learned Judge, we do not agree. The 69th respondent purchased her plot from DW2 in 2005. DW2 on the other hand had purchased the plot he sold to the 69th respondent from Saida whom as we have said above, had no legal authority. It therefore follows that DW2 had no valid claim on the plot. It matters not that the sale agreement was witnessed by the appellant. We too find

that the 69th respondent's occupation of the suit land is equally unlawful.

The respondents who testified dealt with the transferor or with Saida herself. There is also evidence that Alhad one of the sons of the deceased as well as Noordin (*the husband of Saida*) received some rent payments. All these family relations had no authority to deal with the deceased's property and their involvement was tantamount to inter-meddling with the estate of a deceased person.

The other ground raised by the appellant was that:

> ***"1. The Honourable judge erred in law in dismissing the plaintiff's suit on the basis of time limitation under adverse possession."***

Indeed, it was on this basis that the learned Judge dismissed the appellant's suit by rendering himself thus:

> "***On a balance I find that the Defendants (save the 69th Defendant and DW2) have been on the land at least from 1985. The 69th Defendant as I had earlier noted is on the land pursuant to the agreement dated 11th February 2005 and consented to expressly by the Plaintiff while DW2 bought and occupied his second plot in 1990. It is accepted, I think, that permission given to them by Twahir(s), Saida or Alhadi was a nullity as occupation and stay of the Defendants (save the 69th Defendant) on the land was and is inconsistent with the proprietary rights of the Deceased estate. The right of action to recover the land accrued to the Plaintiff immediately the Defendants (save the 69th Defendant) occupied the land. The time for purposes of reckoning limitation would start to run from the date of actual occupation occurred as the occupation was found on a void transaction. I draw an analogy of the circumstances in Samuel Miki Waweru vs Jane Njeru Richu (Civil Appeal No. 122 of 2001 (***unreported***) when the Court of Appeal said-***
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> ***'In our view, where a purchaser of land or a lessee of land in controlled transaction is permitted to be in possession of the land by the vendor or lessor pending completion and the transaction, thereafter becomes void under Section 6(1) of the Land Control Act for lack of consent of the Land Control Board, such permission is terminated by the operation of law and the continued possession, if not illegal becomes adverse from the time the transaction becomes void.'***
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> ***This Court has found that the Defendants (save for the 69th Defendant) occupied the land from at least 1990. This suit was filed in 2005. This would be about 15 years from the time a right of action accrued. For that reason the suit runs foul of the provisions of Section 7 of the Limitation of Actions Act-***
>
> ***'An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person'.'***

In our view the learned Judge fell into an error of law by not addressing the unique and peculiar land system in the Coast region commonly referred to as "*house without land*". It goes without saying that the respondents paid nominal sums of money for the "*purchase*" of the plots they occupied. Besides the "*purchase price*", the respondents paid land rent on a monthly basis albeit intermittently. It is only DW6 who testified that he had not been paying ground rent, although he was aware that the others were doing so. Besides, in their own testimonies the respondents' indicated that they had purchased "*house without land.*" Indeed, the sale agreement between DW2 and the 69th respondent, the agreement was for the sale of "*house without land.*" It was the respondents' further evidence that they constructed Swahili-type houses on their various plots.

In ***Famau Mwenye & 19 Others v Mariam Binti Said Malindi H.C.C.C. No. 34 of 2005; Ouko J***. (*as he then was)* describes the phenomenon of "*house without land*" as follows:

> ***"… a land tenure unique only to Mombasa which has baffled scholars, practitioners and even jurists. The land system is only referred to as*** *'House without land.'* ***That is the owner of the house is different from the owner of land on which it stands. \|it therefore defies the common law concept of land expressed in the*** *latin maxim cujus est solum et esqus and coelum et ad infereos* ***– translated in English as the owner of the soil owns also the airspace above it and all the geospace below and any fixtures which may have been annexed onto the soil even by a stranger"***

In ***William Henry Farrar v Yusufali Abdulhussein Adamji [1934] Vol. XVI. P1 IKLR 40 app 41-43.***

> ***"It is well settled that by Mohammedan law a building erected by one person – even by a trespasser – on the land of another does not become attached to the land but remains the property of the person who erected it, see Hamilton's Hedaya (Allen's Ed.) p. 539; Secretary of State v Charlesworth (IE.A.L.R. 24) but the argument here is that where a person is the registered owner of a plot of land there is a conclusive presumption that he is also the owner of all buildings whatever kind thereon, unless the person claiming such buildings holds a certificate of interest under section 20(2)(c) of the Land Titles Ordinance, and there is an exception in the certificate of Title to the land. In other words, that the Land Titles Ordinance (Ch. 143) has, to this extent at all events, abrogated the Mohammedan law.***
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> ***In such circumstances the owner of the building stands in the relation either of monthly tenant or of licensee to the landowner, and I understand that it has never been the practice for the owner of such building to have their interest (whatever it be) noted in the Land Registry, although the buildings are frequently made a security for loans by the deposit of some sort of memorandum of charge in the registry of Documents, and, if they are sold, the purchaser either becomes tenant of the site or removes the materials****."*

In the case ***Famau Mwenye & 19 Others v Mariam Binti Said*** (*supra*) the Court makes a distinction of this phenomenon *"…as the owner of the house is different from the owner of the land on which it stands" and in* ***William Henry Farrar v Yusufali Abdulhussein Adamji*** *(supra*) it was clearly stated that:

> ***"a … building erected by a person on the land of another does not become attached to the land but remains the property of the person who erected it."***

It therefore follows that the respondents' interests were confined to their houses. They cannot therefore invoke the provisions of the Limitation of Actions Act and argue that they have been on the land from before 1982 and that the appellant's cause of action was time-barred. They did not occupy the land as they owned "*houses without land*" and their houses inspite of being on the appellant's land, did not attach to the land. In our view it was wrong for the learned Judge to dismiss the appellant's case on the basis that the cause of action was time-barred as he failed to distinguish between an occupier's interest on 'house without land" and that of an occupier of land.

As for the 69th respondent, the learned Judge found that the suit against her was without merit as she purchased her plot from DW2 in 2005. Again it was clear that the interest of DW2 was that of "*a house without land*." The 69th respondent's interest is similar to that of the other respondents. The agreement for sale dated 11th February, 2005 between DW2 and the 69th respondent is for sale of *"House without land on plot No. Section/106/MN Mombasa."* The agreement between an owner of "*a house without land*" and a purchaser could only transfer the "*house without land*" and not the parcel of land on which the house is built.

In the case of ***Secretary of State for Foreign Affairs v Charlesworth Pilling & Co. & Another*** ***[1901]*** The Law Reports, (HL & PC), 373 the privy Council considered the evidence of an expert in Islamic Law and stated:

> ***"Their evidence is conclusive that in a case such as the present the landowner cannot claim possession of buildings placed upon his land by a trespasser, but can only call upon the***

trespasser to remove the building and restore the land to its original state."

The appellant is entitled to call upon the respondents to remove the buildings standing on the suit land.

For all the foregoing reasons we have come to the inevitable conclusion that the appellant's appeal must succeed and the judgment of *Tuiyot, J.* dismissing the appellant's suit is set aside.

In lieu therefore judgment is entered in favour of the appellant as against the respondents in terms of prayers (a) and (b). However, given that the respondents may be living on the suit land and/or have tenants in occupation of their houses, we direct that the respondents remove their houses and handover vacant possession within a period of ***three (3) months*** from the date hereof failing which eviction order to issue. Further, in view of the circumstances of this case we order that each party shall bear his/her own costs. Orders accordingly.

Dated and delivered at Mombasa this 18th day of July, 2014.

H. M. OKWENGU

……

JUDGE OF APPEAL

ASIKE-MAKHANDIA

…….

JUDGE OF APPEAL

F. SICHALE

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR