IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO - ODEK, JJ.A.)

CIVIL APPEAL NO. 22 OF 2013

BETWEEN

PETER MBIRI MICHUKI..APPELLANT

AND

SAMUEL MUGO MICHUKI.................................RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nyeri

(Wakiaga, J.) dated 25th October, 2012

in

Nyeri H.C.Civil Case No. 62 of 2009)

JUDGMENT OF THE COURT

1. Samuel Mugo Michuki *(deceased on 23rd December, 2002)* took out an Originating Summons dated 6th February, 1991, against Peter Mbiri Michuki, the appellant in this matter. In the Originating Summons, the deceased as the applicant/plaintiff sought the following orders and declarations:

> ***a. Did the applicant/plaintiff pay the whole of the purchase price of the suit premises to the defendant/appellant herein?***
>
> ***b. Is the applicant/plaintiff entitled to ownership and or to become the registered proprietor of the suit property?***
>
> ***c. In the alternative, has the applicant/plaintiff become entitled to the title and ownership of the suit property by virtue of adverse possession and occupation of the suit premises?***

2. The suit property in dispute between the parties is ***Land Parcel Loc.12/Sub Loc.1/T16*** situated at Gakira market in Muranga District. At all material times, the registered proprietor of the suit property has been the appellant Peter Miri Michuki.

3. In support of the Originating Summons, the applicant states that sometimes in 1964, an oral agreement for sale of land was entered into between the applicant and the appellant wherein a sum of Ksh. 200/= was paid as purchase price for the suit property; that in part performance of the sale agreement, the

applicant took possession of the suit property and in 1970 he built a house thereon. The applicant states that he has been in physical open actual and uninterrupted occupation of the suit property from 1964 and he permitted his elder brother Joseph Njuki Michuki to live on the suit property with the full knowledge of the appellant. The applicant states that the defendant demanded a further Ksh. 100/= towards the purchase price which was paid. That since 1964, he has never used force to occupy the suit properly and neither has he used force to continuously remain in possession from 1964 to the date of filing the Originating Summons.

4. In opposing the Originating Summons, the appellant in his replying affidavit emphasized that he is the registered proprietor of the suit property and the applicant has no colour of right on the same. That in 1970, the applicant advanced him a sum of Ksh. 300/= but there has never been an agreement to purchase the suit property; that the applicant has never been in occupation of the suit property; that after 1970, the applicant's elder brother Joseph Njuki Michuki took possession of the suit property with his consent. That the applicant and his elder brother have been on the suit property with the consent of the appellant and the issue of adverse possession does not arise.

5. After a full hearing of the case with witnesses called by the applicant and the defendant, a letter dated 18th August 1978 from Karuga Wandai & Co. Advocates on behalf of the appellant was tendered in evidence. The letter read in part as follows:

> ***"Our above named client, Mr. Peter Mbiri Michuki, has deposited with us Ksh. 300/= for our transmission to you because he has changed his mind of selling the land in question. That he has requested you to vacate his said piece of land as soon as possible".***

6. In the judgment dated 25th October, 2012, the trial court (Wakiaga, J.) allowed the applicant's claim for adverse possession and held that there was a sale agreement between the parties. The court stated as follows:

> ***"That as at 18th August, 1978, the defendant's position was that he had changed his mind of selling the land in question and that therefore requested vacant possession from the plaintiff. If it is stated by the defendant that the plaintiff had only advance him the sum of Ksh. 300/= to enable him take his sick wife for treatment, nothing would have been much easy that for his then advocates on record to state so in their letter of demand. The defendant has further stated that he had given permission to one Joseph Njuki Michuki to construct the house therein but this has been contradicted by the affidavit of the said Joseph Njuki Michuki who has deponed that the plaintiff in 1964 bought the said plot from the defendant at an agreed consideration of Ksh. 200/= and paid a further sum of Ksh. 100/= and that he had been in occupation of the said plot with the permission of the plaintiff herein… If there was no sale as stated, the defendant could not have written to the plaintiff on the sale along the lines of the letter from Karuga Wandai Advocates. I have noted that this is a plot in Kangema urban centre and is therefore not an agricultural land where the consent of the Land Control Board is mandatory. I therefore find as a fact that there was a valid sale agreement … upon which the plaintiff took possession of the suit property".***

7. On the issue of adverse possession the trial court stated that the plaintiff became adverse as at 1971 when it was discovered that the title was in the name of Peter Njuki and not the defendant herein and at the time of filing the Originating Summons the plaintiff had been in continous possession for a period of almost twenty years. Even if time were to begin to run from 1978 when the defendant sent a letter to the plaintiff through the firm of Karuga Wandai & Co. Advocates, then at the time of filling the Originating Summons, the 12 year period for adverse possession lapsed.

8. Aggrieved by the judgment and orders of the trial court, the appellant has lodged this appeal citing eight grounds in his memorandum of appeal as follows:

> ***i. That the learned Judge erred in law and fact in making reliance to sworn affidavits by deceased persons who were not called to give evidence.***

ii. The learned Judge erred in law and fact in holding that there was a valid agreement for sale thereby arriving at an erroneous finding.

iii. The learned Judge erred in law and fact in holding that the land in question did not require the consent from the Land Control Board as it was "in an urban centre" a finding that is erroneous and against the law.

iv. The learned Judge erred in law and failed to take into consideration that Elizabeth Wanjiku Mugo was made "party" to a suit which had already abated as the date of 5th May 2005 upon which the consent to make her a party was entered into, the suit had already abated.

v. That the learned Judge erred in law and fact in failing to note that as at the date of hearing and after a period when there was no suit obtaining, the defendant/appellant had already taken over possession of his land and developed the same, thereby effectively determining any adverse possession that could have existed thereto before.

vi. The learned Judge erred and failed to take into account that it is the defendant/appellant who has continually paid all the rates in relation to the suit property to Kangema Town Council.

vii. The learned Judge fell into error in failing to note that the plaintiff would be unjustly enriched through taking possession of all development thereon and also the rates paid by the appellant; a position that clearly militated against any order of adverse possession as at the date of judgment the developments having been made when there was no suit.

viii. That the learned judge gave judgment against the law and weight of evidence.

9. At the hearing of this suit, the appellant was represented by learned counsel Messrs C. M. Karweru while the respondent was represented by learned counsel Messrs T. M. Getange.

10. Counsel for the appellant submitted that the learned judge transferred the suit property to respondent based on the doctrine of adverse possession. It was submitted that there was no adverse possession because the respondent and his elder brother had entered into the suit property with the consent, permission and license of the appellant; that possession by the respondent was terminated in 2011 when the appellant physically re-took possession and occupation of the disputed property; that the suit filed by the deceased plaintiff abated in 2003 and there was no pending suit in relation to the disputed property when the appellant exercised his right as the registered proprietor to re-enter and take possession of the suit properly; that if any adverse possession by the plaintiff was in place, the same was terminated when the appellant re-took possession in 2011; that the learned judge erred in fact and law in finding that there was adverse possession by the respondent as at the date of the judgment on 25th October, 2012, despite the fact that as of this date, the appellant had re-taken possession of the suit property. It was also submitted that the original plaintiff was never in physical and actual occupation of the suit property and as such, no adverse possession can be claimed by a person who has never been in possession; that the person who was in actual occupation was Joseph Njuki Michuki, the elder brother to the original plaintiff and it is Joseph Njuki Michuki who can claim adverse possession.

11. The appellant further urged this Court to find that even if there was a sale agreement between the parties, the same was not valid as it did not comply with the provisions of the Law of Contract Act which requires an agreement for sale of land to be evidenced in writing.

12. Counsel for the appellant urged this Court to find that the suit by the respondent abated on 25th December, 2003, and any claim to adverse possession was extinguished; that the original applicant/plaintiff died on 25th December, 2002, and no application was made to substitute a personal representative until 2005. That one year from the death of the plaintiff in 2003, the suit automatically abated as a matter of law and on 5th May 2005 when the parties hereto by consented that Elizabeth Wanjiku Mugo by made *"party"* the suit, this consent was a nullity *ab initio* because the suit had already

abated. Counsel submitted that in 2011, the High Court upon application by the respondent revived the suit that had abated; that the order reviving the suit was not retroactive but was effective from the date of the order; that the re-possession of the suit property by the appellant took place when the suit had abated and the order for revival did not nullify the re-possession of the suit property with the consequence that any adverse possession that may have existed in relation to the suit property had effectively been terminated. That upon re-taking possession of the suit property, the appellant had undertaken development thereon and it would be an unjust enrichment to allow the respondent to take title and possession of the disputed property including all the developments made by the appellant when the suit had abated.

13. Counsel for the respondent opposed the appeal submitting that the original plaintiff was in actual and physical occupation and possession of the suit property from 1964; that possession of the suit property was both actual and constructive; that the original plaintiff was in constructive occupation and possession of the suit property when he put his elder brother Joseph Njuki Michuki in possession of the land. That the said Joseph Njuki Michuki in his affidavit in support of the Originating Summons clearly stated that he was in occupation and possession of the suit property by consent and on account of the original plaintiff. Counsel submitted that the evidence on record shows that the plaintiff entered the suit property in 1964 and has been in continuous occupation and possession until 2011 when the appellant demolished the house which had been built by the original plaintiff. On the issue of abatement of the suit, it was submitted that the suit was revived through a court order that the effect of revival of the suit under ***Order 23*** of the ***Civil Procedure Act and Rules*** is that the suit remained alive and effective from the date it was filed in 1991. That the order to revive the suit did not mean that the suit became alive and effective from 2011 when the order was made; that revival of the suit is retroactive to the date of filing suit and not to the date of the order reviving the suit.

14. Counsel for the respondent submitted that the learned Judge did not err in finding that the suit property was an urban property that did not require consent of the Land Control Board; it was submitted that the property is situated in a Town Council and it is a ratable property and that is why rates are payable to Kangema Town Council. Counsel submitted that payment of rates is not proof of ownership; that a person who pays rate is not necessarily the owner of the property and one cannot acquire possession by paying rates. Counsel submitted that the learned Judge did not err in finding that there was a sale agreement between the parties; that the evidence contained in the affidavits filed in support of the Originating Summons clearly indicate that a purchase price of Ksh. 200= was paid to the appellant and a further Ksh. 100/= was paid as part of the purchase price.

15. We have considered the rival submissions by counsel and examined the record of appeal. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. (See ***Selle -vs- Associated Motor Boat Co. [1968] EA 123; Jabane – vs- Olenja, [1986] KLR 661, 664.*** This Court stated in ***Jabane – vs- Olenja [1986] KLR 661***, 664, that it will not lightly differ from the findings of fact of a trial judge and will only interfere with them if they are based on no evidence ***(see Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870.***

16. Counsel for the appellant submitted that the plaintiff having died in 2002, no substitution was made to make anyone a personal representative *ad litem* till 5th May, 2005 and by such time, the suit had abated. It was submitted that when Elizabeth Wanjiku Michuki was made a party to the suit by consent on 5th May, 2005, as a matter of law and jurisdiction this could not be done as the consent entered on that day was a nullity *ab initio* there being no case to record it in the suit having abated. The respondent submitted that the parties entered into a valid consent on 5th May, 2005, to make Elizabeth Wanjiku Michuki a party to the suit and represent the deceased plaintiff; that proceedings and hearing were conducted in the presence of counsel for the appellant and with Elizabeth Wanjiku Michuki as the representative of the deceased plaintiff; that the consent recorded was valid and the entire proceedings were valid.

17. We have considered the submission by the appellant the decision by this Court in ***Maneklal Maganlal Rawal – v- Manilal Maganlal Rawal,*** *(1990) 2 KLR 145* and ***Pim – v- Morton, (1978) KLR 196*** are relevant to the issue of representation. In in ***Maneklal Maganlal Rawal – v- Manilal Maganlal***

Rawal (1990) 2 KLR 145, one of the issues for determination by the court was framed as follows: that the present plaintiff is not proper legal representative of the deceased and is not entitled to continue with the proceedings in the name of the plaintiff as the consent to make the present plaintiff a party was made the suit having abated. Gachuhi, J.A. in his judgment stated that the consent order was granted without any opposition and it was conclusive. Hancox CJ in his judgment observed that:

> ***"In nine cases out of ten, no doubt, there is unlikely to be a dispute regarding legal representation; the decision by the High Court to record consent was a valid determination of the issue of legal representation. The appellant was properly represented and could easily have objected but did not do so. It would be quite wrong and contrary to principle, 13 years later to cast doubt on the situation upon which everybody had quite obviously acted for all that time".***

18. We adopt the dicta by Hancox CJ and Gachuhi JA in the case of ***Maneklal Maganlal Rawal – v- Manilal Maganlal Rawal, (1990) 2 KLR 145*** and refer to the cases of ***Pim – v- Morton, (1978) KLR 196*** and ***Kothari – v- Quereshi, (1967) EA 564***. In the instant case, the trial court made an order reviving the suit that had been filed by the deceased plaintiff. A revival order operates as an order reinstating the suit. It not only revives the suit from the date its filing but revives all proceedings, rulings and orders made in the matter. In this case, the consent order made by the parties on 5th May, 2005, was revived by the revival order. Guided by the dicta in ***Maneklal Maganlal Rawal – v- Manilal Maganlal Rawal***, and applying the same to the facts of this case, we are unable to declare as a nullity *ab initio* the consent that made Elizabeth Wanjiku Michuki a party to the suit filed by the deceased.

19. Five other critical issues arise for our consideration and determination in this appeal. First is whether the learned judge erred in fact and law in finding that there was a valid sale agreement between the parties; second whether the transaction between the parties required the consent of the Land Control Board, third is whether adverse possession was proved; fourth whether the claim for adverse possession in the suit as filed by original plaintiff had abated and finally whether the High Court erred in making orders based on adverse possession without considering that the appellant had re-taken possession of the suit property.

20. On the issue whether there was a sale agreement between the parties, the learned judge made a finding that there was a valid sale agreement. The Judge observed that the applicant in his supporting affidavit stated that he had paid a purchase price of Ksh. 200/= and a further Ksh. 100/=. We are of the view that the learned judge did not err in finding that a valid sale agreement existed. We are fortified in this view because the letter dated 18th August, 1978, from Karuga Wandai & Co. Advocates on behalf of the appellant stated that the appellant had deposited Ksh. 300/= for transmission to the plaintiff because he had changed his mind to sell the land; we find that this letter is corroborative evidence illustrating that a sale agreement had been entered into between the parties and purchase price had been paid. On the strength of this corroborative evidence, we are convinced that the learned Judge did not err in finding that there was a sale agreement.

21. The next issue for our consideration is whether the consent of the Land Control Board was required for the sale transaction between the parties. The trial court held that the suit property was situated in Kangema urban centre and as such, it was not an agricultural land that requires consent of the Land Control Board. It is the appellant's case that the suit property was registered under the ***Registered Lands Act (Cap 300 of the Laws of Kenya)***; that all land registered under the Act is agricultural land and any dealing requires consent of the Land Control Board.

22. The sale agreement and transaction between the parties hereto was entered into in 1964 and in the same year the plaintiff/respondent took possession of the suit property. The commencement date of the Land Control Act is 12th December, 1967. The Act does not operate retroactively and it is our considered view that transactions entered into before the commencement of the Act do not require consent of the Land Control Board. The agreement between the parties hereto having been entered into in 1964 is outside the purview of the Land Control Act. In addition, the plaintiff's claim in this case is grounded on the doctrine of adverse possession. In ***Public Trustee – v- Wanduru, (1984) KLR 314 at 320 and 326*** it is stated that the provisions of the ***Land Control Act*** have no application where the claim to title of

agricultural land is by operation of law such as by adverse possession.

23. The appellant further submitted that if at all there was a sale agreement between the parties, the same was not valid as it did not comply with the provisions of the Law of Contract Act which require an agreement for sale of land to be evidenced in writing and signed by all the parties. Counsel submitted that the sale agreement between the parties hereto was not in writing and was not signed by all the parties. **(See *Morgan – v- Stubenitisky,* 1*977) KLR 188; Wagichiengo – v- Gerald (1988) KLR 406.***

24. Section 3(3) of the ***Law of Contract Act*** provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested. ***Section 3(7)*** of the ***Law of Contract Act*** excludes the application of ***Section 3(3)*** of the said Act to contracts made before the commencement of the subsection. ***Section 3(3)*** of the ***Law of Contract Act,*** came into effect on 1st June, 2003. The trial court found that the sale agreement between the parties was an oral agreement made in 1964 between the appellant and the plaintiff. Prior to the amendment of ***Section 3(3)*** of the ***Law of Contract Act*** in 2003, the subsection read as follows:

> ***(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;***
>
> ***Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-***
>
> ***(1) Has in part performance of the contract taken possession of the property or any part thereof; or***
>
> ***(11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract. '***

25. We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the plaintiff/respondent had to satisfy the trial court that he either, took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-evaluated the evidence we concur with the finding of the learned judge that the plaintiff/respondent proved that he had actual and or constructive possession of the suit property since 1964 and the possession was open, uninterrupted and continuous till the filing of the Originating Summons by the Plaintiff in1991. It is our view that ***Section 3 (7)*** of the ***Law of Contract Act*** makes exception to oral contracts for sale of land coupled with part performance. We find that ***Section 3 (3)*** of the ***Law of Contract Act*** came into effect in 2003 and does not apply to oral contracts for sale of land concluded before ***Section 3 (3)*** of the ***Act*** came into force. The proviso to ***Section 3 (3)*** of the ***Law of Contract Act*** applies in this case and we hold that the sale agreement between the appellant and the plaintiff did not violate or offend the provisions of the ***Law of Contract Act***.

26. The other issue for determination is whether adverse possession of the suit property by the plaintiff was proved. The appellant submitted that there was no adverse possession by the plaintiff, Samuel Mugo Michuki who died on 23rd December, 2002; that the plaintiff never occupied the suit property but it was the plaintiff's elder brother, Joseph Njuki Michuki, who occupied the same with consent of the appellant. It was further submitted that if any adverse possession existed, the same was terminated in 2011 when the appellant re-entered the property after the death of the plaintiff and the abatement of the suit. This Court in ***Francis Gicharu Kariri – v- Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi)*** approved the decision of the High Court in the case of ***Kimani Ruchire –v – Swift Rutherfords & Co. Ltd., (1980) KLR 10 at page 16 letter B***, where Kneller J. held that:

> ***"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 persuasion). So the plaintiff 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 by way of recurrent consideration."

27. Counsel for the respondent submitted that there was adverse possession by the plaintiff. It was submitted that the plaintiff/respondent entered the suit property in 1964 and occupied the same by claim of right and he put his elder brother on the suit property; that the respondent's occupation was not only actual and physical but open and uninterrupted. Possession of land or any property for that matter need not be actual and physical; possession can also be constructive. In the instant case, the record shows that the plaintiff entered the suit property in 1964; constructed a house thereon in 1970 and put his elder brother to live in the house and the plaintiff together with his wife occasionally visited and lived in the house. These facts on record not only prove actual possession but also constitute constructive possession of the suit property by the plaintiff. The elder brother of the plaintiff was in possession of the suit property by license and permission of the plaintiff. In law, actual possession of any property by a licensee is constructive possession thereof by the licensor.

28. The next issue for our consideration is to determine from which date time began to run in support of the claim for adverse possession by the plaintiff. It is the appellant's contention that there was no adverse possession. The trial court held that time for adverse possession began to run in 1971 when the plaintiff together with the appellant went to the lands office in Muranga to start the process of transfer of the suit property to the plaintiff and found that the property was registered in the name of Peter Njuki and not Peter Mbiri Michuki.

29. On our part, we are of the view that there are four alternative timelines that could be used to compute when time began to run for purposes of the plaintiff's claim for adverse possession. These are 1964, 1970, 1971 or 1978. The year 1964 is the year of the sale agreement between the parties and in this year the plaintiff took legal possession of the suit property. In 1970, the plaintiff constructed a house on the suit property and put his elder brother in actual physical possession and occupation. Subsequent to this year, the plaintiff continued to have actual as well as constructive possession of the suit property. As correctly established by the trial court, in 1971, the plaintiff together with the appellant went to the lands office in Muranga and found that the property was not registered in the correct names of the appellant. In 1978, counsel for the appellant Messrs Karuga Wandai & Co. Advocates, wrote a letter dated 18th August 1978 to the plaintiff/respondent indicating that the appellant had changed his mind to sell the suit property.

30. The evidence on record shows that in each of these years, the plaintiff/respondent was in actual and or constructive possession of the suit property; that the possession by the plaintiff was open, uninterrupted and based on a claim of right and or occupation as a bona fide purchaser for value. From whichever year adverse possession is computed, as at the time of filing the Originating Summons in 1991, twelve (12) years had lapsed and the plaintiff's right and claim based on adverse possession had arisen, accrued and vested. The record shows that the plaintiff's possession of the suit property was *nec vi, nec clam and nec precario*; possession by the plaintiff continued uninterrupted and without force until his death on 25th December, 2002; after his death, possession by the plaintiff continued through his dependants and personal representative until 2011 when the appellant demolished the house that had been constructed on the suit property. Our analysis and appreciation of the facts established on the record leads us to conclude that the trial Judge did not err in finding that the 12 year period for adverse possession had been proved.

31. The appellant contend that the plaintiff and his elder brother were in possession of the suit property pursuant to consent given by the appellant and there can be no adverse possession when entry is by consent of the registered proprietor. In ***Mwinyi Hamis Ali – v- Attorney General and Philemon Mwaisaka Wanaka, Civil Appeal No. 125 of 1997*** it was held that "***adverse possession does not apply where possession is by consent and in a court of law, sympathy takes a second stand as the Court is governed by statutes***." 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 license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined".***

32. Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant *qua* vendor. In the case of ***Public Trustee – v- Wanduru, (1984) KLR 314 at 319*** Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run. By 1971, the appellant had not transferred the suit property to the respondent. In 1978, if any permission or license to enter the suit property had been given by the appellant, the same was terminated by the letter dated 18th August, 1978 from Karuga Wandai & Co. Advocates. From 18th August, 1978, onwards, the continued occupation and possession of the suit property by the plaintiff was adverse to the appellant's title. Computing adversity from 18th August, 1978, we are satisfied that the plaintiff's claim for open and uninterrupted possession of the suit property for a period exceeding 12 years was proved to the required standard when the Origination Summons was filed on 7th February,1991.

33. Counsel for the appellant submitted that if any adverse possession existed, the same was terminated in 2011 when the appellant re-entered the suit property after the death of the plaintiff and the abatement of the suit. There are four issues for our consideration; first is whether the death of the plaintiff extinguished the claim to adverse possession; second whether abatement of the suit as filed by the plaintiff extinguished the claim for adverse possession; third whether the order reviving the suit after abatement revived the claim to adverse possession and lastly, whether re-entry in the suit property by the appellant after abatement of the suit extinguished the claim to adverse possession. The appellant submitted that the plaintiff died on 22nd December, 2002, and the suit abated in 2003; that an order reviving the suit was made in 2011, and in the intervening period the appellant had re-taken possession of the suit property and terminated any claim to adverse possession that the plaintiff could have had.

34. In ***Mwangi & Another –v – Mwangi, (1986) KLR 328***, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. In the case of ***Public Trustee – v- Wanduru, (1984) KLR 314 at 321*** it is stated that a purchaser in possession has an overriding interest under the provisions of the ***Registered Land Act***. ***Order 24 Rule 1*** of the ***Civil Procedure Rules*** provides that the death of a plaintiff shall not cause the suit to abate if the cause of action survives or continues. The issue is whether the claim for adverse possession survives the death of a plaintiff. ***Section 16*** of the ***Limitation of Actions Act (Cap 22 of the Laws of Kenya)*** provides that actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration. The effect of this provision is that when the letters of administration was granted for the estate of the plaintiff in this case, the administration of the estate dates back to the date of death and an order reviving an abated suit does not operate prospectively to establish an interval of time between the abatement and revival of the suit but is retroactive; an order reviving a suit revives the case from the date the suit was filed by the deceased.

35. The dicta in ***Mwangi & another –v – Mwangi, (1986) KLR 328***, establishes the principle that the rights of a person in possession or occupation of land are equitable rights which are binding on the land. In ***Public Trustee – v- Wanduru, (1984) KLR 314 at 324,*** it is stated that in adverse possession, the title of a registered proprietor is not extinguished but is held by him in trust for the person who, by virtue of the Limitation of Actions Act, has acquired title against the proprietor. In the instant case, the plaintiff was in occupation of the suit property and his possessory rights are not only equitable rights but an overriding interest binding on the land. ***Section 18*** of the ***Limitation of Actions Act*** provides that subject to ***Section 20(1)*** of the ***Limitations Act***, the ***Act*** applies to equitable interests in land … and accordingly a right to action to recover the land … accrues to a person entitled in possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his interest were a legal estate in the land. ***Sub-Section 18 (4)*** provides that where land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale, not being a person solely and absolutely entitled thereto, a right of action to recover the land accrues during such possession to any person in whom the land is vested as trustees or to any other person entitled to a

beneficial interest in the land or the proceeds of sale.

36. It is our considered view that when the appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price for the suit property, the appellant became a trustee holding the suit property in favour of the plaintiff. The plaintiff having paid the purchase price and took possession acquired an equitable beneficial interest in the suit property. ***Section 18 (4)*** of the ***Limitation of Actions Act*** applies in the instant case and the right to recover the suit property was not extinguished by death of the plaintiff. The plaintiff having been in possession of the suit property, ***Section 13 (1)*** of the ***Limitation of Actions Act*** applies as it provides that a right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run.

37. The appellant raised the issue of unjust enrichment and urged this Court to find that the trial court erred in transferring the suit property to the respondent without considering that the appellant had re-entered the property and made developments and improvements thereon. Equity aids the vigilant and equity suffers no wrong without a remedy. He who comes to equity must follow the law. The appellant knew that a claim for adverse possession had been made by the plaintiff in 1991; the appellant knew that the plaintiff was in physical and actual occupation of the suit property; the appellant knew that there was a suit pending between the parties; the appellant knew that the abated suit could be revived and application to revive the same was in court; the appellant demolished the house on the suit property with knowledge that there was pending litigation. The concept of unjust enrichment is an equitable concept. The appellant is seeking an equitable remedy to prevent unjust enrichment before this Court. This Court is an appellate court and has no original jurisdiction to determine what improvements if any were made on the suit property by the appellant. We decline to make any further comments relating to unjust enrichment as this subject was never canvassed and considered by the trial court.

38. The totality of our evaluation of the evidence and the law relevant in this matter is that the respondent proved adverse possession and this appeal is hereby dismissed. The judgment of the trial court dated 25th October, 2012, be and is confirmed. The costs of this appeal shall be paid by the appellant.

Dated and delivered at Nyeri this 8th day of October, 2014.

ALNASHIR VISRAM

....

JUDGE OF APPEAL

MARTHA KOOME

....

JUDGE OF APPEAL

J. OTIENO-ODEK

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR