IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 269 OF 2001

BETWEEN

BABER ALIBHAI MAWJI ……..……... APPELLANT

AND

SULTAN HASHAM LALJI

GREENFIELDS INVESTMENTS LIMITED ……...……RESPONDENTS

(Appeal from the ruling of the High Court of Kenya at Nairobi (Ole Keiwua, J.) dated 24th January, 1996

in

H.C.C.C.NO.2849 OF 1995)

****

CONSOLIDATED WITH

CIVIL APPEAL NO. 155 OF 2004

BETWEEN

GREENFIELD INVESTMENTS LIMITED ……..…….. APPELLANT

AND

BABER ALIBHAI MAWJI ……....…..…… RESPONDENT

(An appeal from the decision of the High Court of Kenya at Nairobi, (Kuloba, J.) dated 30th July, 2003

in

H.C.C.C.NO.3655 OF 1995)

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JUDGMENT OF THE COURT

Following a consent order recorded on 22nd October, 2009, counsel for the parties agreed to have ***Civil Appeal Nos. 269 of 2001*** and ***155 of 2004*** heard and determined on the basis of an exchange of written submissions.

At the outset, it is also important to point out that the two appeals were not consolidated but counsel agreed that they should be heard one after the other. For this reason, a good starting point is to briefly describe what each appeal is about and the common ground between them.

Civil Appeal No.269 of 2001 is an appeal from the whole decision or ruling of the superior court in Nairobi ***Ole Keiwua, J.*** (as he then was), delivered on 24th January 1996 concerning property known as ***Land Reference No.214/273*** situate in Naivasha Close, off Muthaiga Road, Nairobi. In ***High Court Civil Case No. 2849 of 1995***, the appellant therein had filed suit against the respondents claiming general damages for trespass to the suit premises; general damages for wrongful detention of goods; an order for mandatory injunction for the return of the goods distrained to the appellant and an order of declaration that the said distress for rent was unlawful.

On their part, the respondents in the superior court raised the following objections to the chamber application:-

a) That the matters raised in the plaint and the applications are res judicata.

b) That the plaint does not disclose any cause of action and the plaintiff has not pleaded any right to the property. Further, any claim over property by the plaintiff is barred by Limitation of Actions Act.

c) The plaintiff has not claimed any enforceable right over the property and is not entitled to the reliefs.

d) The plaintiff is incapable of giving enforceable indemnity in damages.

Following a hearing in chambers, Ole Keiwua, J. (as he then was), dismissed the application for an injunction and held that the plaintiff had no answer to the preliminary points raised and that the suit was res judicata and was caught by the statute of limitation and as a result, the learned Judge struck out the entire suit.

On the other hand, ***Civil Appeal 155 of 2004*** relates to the same property as described above and it involves only two of the parties in ***Civil Appeal No. 155 of 2004*** namely ***Messrs Greenfield Investment Ltd*** as the appellant and ***Mr. Baber Alibhai Mawji*** as the respondent . The appeal springs from ***High Court Civil Case No. 3655 of 1995*** in which the respondent had by way of an Originating Summons sought to be registered as the owner of the property described above by dint of adverse possession. Kuloba, J. on 30th July 2003 ordered the registration of the respondent as owner by adverse possession. Vexed by the said order, the appellant filed an appeal to this Court against the whole judgment.

It is apparent from the aforesaid background information that the commonality of the two appeals arises from the fact that the main parties to the two appeals are the same and the property giving rise to the appeals also the same.

The appellant in ***Civil Appeal No. 269 of 2001*** was represented by learned counsel Mr. Satish Gautama while the respondent was represented by learned counsel Mr. Oraro. In ***Civil Appeal No. 155 of 2004*** the representations were reversed in that the appellant was represented by the learned counsel Mr. Oraro, whereas the respondent was represented by learned counsel, Mr. Satish Gautama.

The background facts to the appeals are that, by a plaint dated 3rd September, 1982, filed in High

Court ***Civil Case No. 2763 of 1982***, the respondent sought a declaration that the respondent is the beneficial owner of the property. In response to the plaint, the appellant filed a statement of defence and counterclaim in which it counterclaimed that the respondent was its tenant and at the same time applied for the suit High Court ***Civil Case No. 2763 of 1982*** to be struck out and by a court order dated 6th June 1988, the plaint was struck out and the suit dismissed. In the dismissed suit, the respondent had at the same time applied for an injunction order which was granted on 21st October, 1982 prohibiting the appellant from transferring or otherwise dealing with the property. Following the dismissal of the suit, the respondent obtained an order for stay of execution of the order for dismissal pending an intended appeal and further obtained an order stopping the sale of his goods. The intended appeal was not successful and the same was thrown out on technicalities.

In 1995 the respondent filed a second suit namely High Court ***Civil Case 2849 of 1995*** whose substance is the subject matter of ***Civil Appeal No. 269 of 2001*** and where the cause of action was substantively an injunction against the appellant. The suit was struck off by Ole Keiwua, J. (as he then was).

It is important to observe that in the first suit, High Court ***Civil Case No. 2763 of 1982*** the appellant had sworn an affidavit on 15th December, 1982 in which he deponed that he had entered into occupation of the suit property in January 1976 and thereafter he has been continuously, adversely and exclusively in un-interrupted possession and occupation. In the plaint, the appellant avers that he had agreed to purchase the suit property and that he had executed a sale Agreement with the first owner. The appellant contends that it is therefore beyond challenge that he did not at any time take possession through the consent of the registered owner since the second respondent became owner of the property in February 1977, long after he took possession. The appellant further contends that the record reflects the existence of this evidence, apparently, the respondent has disputed this. The substance of this first suit relates to the respondent's claim of ownership to the said property as a beneficiary. High Court ***Civil Case No. 2763 of 1982,*** was subsequently struck out on an interlocutory point without the merits of the suit being heard and determined.

The second suit was High Court ***Civil Case no. 2849 of 1995,*** (which is the subject matter of ***Civil Appeal No. 269 of 2001),*** in which the ruling of Ole Keiwua, J. is being challenged. The suit relates to a claim for rent by the appellant and distraint of the respondent's goods. It is important to point out that in the third suit (Originating Summons 3653 of 1995 (O.S) the late Pall, J. (as he then was) in a decision dated 12th March 1997 held inter-alia that the issue of adverse possession was not directly and substantially an issue in the previous suits between the parties namely ***Civil Suit No. 2763 of 1982,*** (the first suit) and ***Civil Suit No. 2849 of 1995,*** (the second suit) and that the Originating Summons in ***Civil Case No.3655 of 1995 (OS),*** before him disclosed a reasonable cause of action and the Judge refused to strike off the originating Summons claiming adverse possession and further ordered the suit to proceed to trial in the normal way.

This ruling of Pall, J. in turn gave rise to ***Civil Appeal No. 160 of 1997,*** where several issues now being raised in this appeal were finally determined including the issue of res judicata. Mr. Oraro the learned counsel for the appellant has submitted that the decisions in the cases of ***GATIMU KINGURU v MUYA GATHANGI (1976) KLR 753*** and ***MUTHUIRA v WANGOE (1988) KLR 166*** were misapplied**.** We shall be addressing this point later on in the judgment.

From a historical perspective, the significance of the judgment by Kuloba, J. is that, it was a follow up of the ruling of Pall, J. concerning adverse possession and it is the product of a full hearing on merit on the claim for adverse possession.

Aggrieved by the said ruling of Ole Keiwua, J., in High Court ***Civil Case No.2849 of 1995,*** the appellant has now appealed to this Court raising the following grounds:

1. The learned Judge totally misdirected himself when on a mere application by way of Chamber Summons dated 13th September, 1995 taken out by the appellant seeking an injunction under Order 39

of the civil Procedure Rules, to restrain the respondents, their servants or agents from selling, disposing off or alienating the appellant's movable property consisting of household goods, furniture and numerous other items on which the respondents had levied an unlawful distress purported to be for some alleged arrears of rent for six years amounting to Shs.5,040,000/-, in not only dismissing the appellant's application aforesaid for an injunction but without there being any application by the respondents for dismissal of the appellant's suit proceeded suo moto to strike out and dismiss the appellant's suit altogether with costs which he had no jurisdiction or power to do in the circumstances

2. The learned Judge wholly misdirected himself in not appreciating sufficiently, properly or at all that the sole matter before him upon the appellant's chamber summons aforesaid, was the hearing of the appellant's application for an injunction to restrain the respondents and the court brokers and bailiffs appointed by the respondents to levy distress from selling the goods distrained upon. There was no other issue before him, neither any application to strike out the appellant's suit. Consequently there was a denial of the principles of natural justice in that the appellant was denied the opportunity to show cause why his suit should not at that stage without a trial be struck out and dismissed altogether.

3. Further and in any event the learned Judge wholly misdirected himself in not finding that the distress that was levied was totally illegal and unlawful in that, inter alia, there was no relationship of landlord and tenant between the appellant and the respondent and there was no averment of any rent at any time having been agreed or payable by the appellant to the respondents leave alone the quantam thereof and further that the appellant was, according to the learned Judge a trespasser in any event against whom no distress lies.

4. The learned Judge having held that it was not in dispute that the appellant was not a tenant and having held that the appellant was a trespasser then erred in not holding that the distress levied by the respondents as aforesaid based on there being alleged arrears of rent of Shs.5,040,000/-, arbitrarily and unilaterally calculated and computed, was clearly unlawful and illegal and he ought to have restrained the respondents' court brokers/bailiffs from selling or disposing off the movable property and chattels of the appellant and erred in doing diametrically the opposite, namely, not only dismissing the appellant's application for injunction, but striking out the appellant's suit altogether with costs.

5. The learned Judge totally misdirected himself in holding that on account of the history of previous litigation between the parties the suit of the appellant was res judicata when it was not as the issues between the parties were entirely different, the appellant contending he was the beneficial owner of the suit property, the respondents contending to the contrary that the property was the property of the 2nd respondent who was not a trustee of the appellant, and this after the respondents and/or the second respondent withdrew its counterclaim against the appellant. In those circumstances, there could be no question of there being any relationship of landlord and tenant between the parties and consequently no distress.

6. The learned Judge erred in not appreciating sufficiently, properly or at all that the subject matter and the issues directly and substantially before him and the suit before him were entirely different and distinct from the issues between the parties in the previous litigation and that consequently there was no actual or constructive "res judicata in its wider sense".

7. The learned Judge totally misunderstood the contentions concerning the extinguishment of rights under the Limitation of Actions Act and that they had no relevance to the issue before him.

8. The learned Judge erred in finding that the suit before him was barred by limitation.

9. The learned Judge erred in finding that the appellant was a trespasser which is a perverse finding.

10. The learned Judge erred in finding in a roundabout manner that the appellant's suit was an abuse of the court process.

11. The learned Judge erred in finding that the issue of trust had been previously determined and in not appreciating properly or at all that the sole issue before him was whether the distress was lawful or not.

The respondent filed a third suit in 1995 namely High Court ***Civil Case No.3655 of 1995,*** in which the respondent claimed to have been in possession by way of adverse possession of the property since 1976. By a judgment dated 30th July 2003 the respondent's suit for adverse possession was allowed by Kuloba, J. hence the filing of ***Civil Appeal 155 of 2004***. The appellant company has relied on the following grounds:-

1. The respondent having instituted a suit in 1982 based on a purported beneficial entitlement to the property known as LR NO.214/273 (Original Number 214/42/1/2) [hereinafter referred to as "the Property"], at a time when, time had not accrued to enable him claim the title by way of adverse possession, and having in that suit (sic) interlocutory obtained orders preventing the appellant from dealing with the suit property. It was not open for the appellant to claim that concurrently the time was running in his favour during the pendency of that suit for the purposes of accruing the period necessary to make a claim for adverse possession.

2. The learned Judge misdirected himself in placing undue emphasis on the injunction granted in *H.C.C.C. No. 3655 of 1995* ***which in the event was discharged on appeal when the respondent's claim was based allegedly on his entitlement to the Property as a result of time which accrued prior to filing the said suit.***

3. The learned Judge erred in failing to appreciate the effect of the appellant's counter claim and the interlocutory orders obtained by the respondent in *H.C.C.C. No. 2763 of 1982* ***both of which stopped time from running in favour of the respondent for the purposes of gaining title by adverse possession. The learned Judge ought to have found, that the respondent having made a claim based on beneficial ownership and obtained interlocutory orders to preserve his rights over the property, time stopped running for the purposes of adverse possession.***

4. The learned Judge erred in failing to determine or otherwise find when the respondent's adverse possession actually began to run and at what point the respondent became entitled to the title to the Property by way of adverse possession.

5. The learned Judge misdirected himself on the nature of the respondent's occupancy of the property before the institution of the 1982 suit, such issue being vital to the determination of the accrual of time which may enable the respondent to claim as adverse possessor.

6. Having found that in permissive occupation the onus lies on the person in occupation to show how and when the possession ceased to be permissible and became adverse, it was not open for the learned Judge to determine that the respondent was in adverse possession prior to 1982, without any evidence to that effect.

7. The learned Judge erred in finding that the appellant company held the property for the benefit of the respondent. That assertion had been earlier pleaded by the respondent in an earlier suit instituted by themselves *(H.C.C.C. 2763 of 1982).* ***Whereupon the [plaint was struck out as disclosing no cause of action, and subsequently dismissed on appeal. The issue was pleaded yet again by the respondent in a second suit filed by themselves (HCCC 2849 OF 1995). It was therefore not open to the learned judge to consider the appellant as holding the property for the benefit of the respondent, the claim having, been rejected in earlier suits..***

8. The learned Judge misdirected himself in finding that time continued to run against the appellant while the respondent occupied the property as a beneficial owner. So long as the respondent occupied the property as a beneficiary no time could accrue in his favour.

9. The learned Judge's findings were contrary to the evidence and sub missions made before him.

10. The learned Judge erred in his application of the decisions in the cases of *Gatimu Kinguru vs Muya Gathangi (1976) KLR 253* ***and*** *Muthuita vs Wanoe (1982) KLR 166* ***which in the event had no relevance to the suit before him, the claim by the respondent based on beneficial ownership having been defeated.***

11. ***The learned Judge erred in awarding judgment before a certified copy of the title of the property was produced to the court. This was in contravention of Order XX rule 5a of the civil Procedure Rules which require such production where the grant of the judgment would result in some alteration to the title of land registered under any written law concerning the registration of title to land.***

From the above lengthy background to the two appeals, it is clear to the Court that in determining the merit of each of the appeals the Court is likely to encounter considerable overlap in terms of facts, reliefs or determinations hence the need at the outset, to have the two appeals in perspective all the time. We salute the two learned counsel for having assisted the Court in having the two appeals heard at the same time. The issues and grounds for determination are fairly intricate in that a number of suits were filed and some of the suits determined by a number of judges in the superior court who include the late Rauf, J., and the late Pall, J., (as they then were) Ole Keiuwa, J. (as he then was) and Kuloba, J. This Court was not spared either because appeals have been determined by a separate bench consisting of Akiwumi, J.A., Tunoi, J.A. and Shah, J.A. and another bench which did hear and determine a final appeal. Its composition was Gicheru, J.A. (as he then was, now C.J.), Akiwumi, J.A. and Owuor, J.A (as they then were). It seems obvious to us that all these determinations have a strong bearing on the critical issues for determination in the two appeals before us. In order to pick the threads in this maze of suits and appeals, as set out above, a good starting point in our opinion would be to tackle the appeals in a chronological order and in each appeal pose the all important question – what are the critical issues or grounds and what submissions have been made on each critical issue on behalf of each of the parties?

Turning to ***Appeal No. 269 of 2001***, in our view, the critical question for determination is whether the learned judge Ole Keiuwa, J. (as he then was) was entitled to adjudicate on issues such as limitation of actions and res judicata in a suit where the substantive claim was an order for an injunction and return of distrained goods. First, it is apparent from the ruling that the learned Judge did not lay the basis for his findings on the issues of limitation or res judicata. Thus, he made no reference to the nature of the alleged trust (which had not been pleaded) and whether it was express or an implied trust. It seems to us that he based his findings on preliminary objections of counsel for the respondent which objections did not constitute the pleadings in the suit. Our observations on this are strengthened by the ruling of Rauf, J. in High Court ***Civil Case No. 8763 of 1982*** between the same parties in which he struck out the suit on 6th June 1988. It had been brought by the appellant against the respondent based on an express trust. As regards res judicata, with respect, the challenged ruling by Ole Keiwua, J. is bare on the basis for the ruling in that no past cases were described in the ruling or past adjudicated issues which were being resurrected in the matter before the Judge.

In our view, the substantive issue before the Judge was whether or not to grant the injunction order sought. All the other findings were extraneous to the pleadings. A court of law cannot pluck issues literally from the air and purport to make determinations on them. It is the pleadings which determine the issues for determination. In this regard, we wish to recall this Court's holdings on the point in the case of ***CHUMO ARAP SONGOK v DAVID KEIGO ROTICH [2006] e*** KLR this Court held:

"The law is now settled, that parties to a suit are bound by the pleadings in the suit and the court has to pronounce judgment only on the issues arising from the pleadings unless a matter has been canvassed before it by parties to the suit and made an issue in the suit through the evidence adduced and submissions of parties."

Again, in the case of ***CHALICHA FCS LTD v ODHIAMBO & 9 OTHERS [1987] KLR 182*** the Court stated:-

"Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the

order thereon, was a nullity."

In the case of ***ANTHONY FRANCIS WAREHAM & OTHERS v KENYA POST OFFICE SAVINGS BANK CA 5*** and ***48 of 2002,*** (unreported)this Court held that a court should not make any findings on matters not pleaded or grant any relief which is not sought by a party in the pleadings.

Perhaps the significance of the superior court (Ole Keiwua, J.) having failed to lay a proper basis for its ruling on the critical issues becomes apparent through the ruling of Pall, J. (as he then was) given on 12th March 1997 over one year after the challenged ruling, where he held that for the appellant to have succeeded in High Court ***Civil Case No. 2763 of 1982***, he had to prove his right to the ownership of the suit property by virtue of an express trust which had been denied by the appellant and as regards High Court ***Civil Suit No. 2849 of 1995***, the appellant had inter alia to prove that he was occupying the suit property as a beneficial owner and had therefore suffered loss and damage by the respondents trespass onto the suit property. Justice Pall went on to specifically rule that in the Originating Summons in High Court ***Civil Case No. 3655 of 1995 (OS)*** all that the appellant was required to prove was that he had been in possession of the suit property for a continuous period of 12 years and that the possession was open and hostile to the respondent. The learned Judge was therefore of the view that the respondent's Originating Summons showed a valid cause of action which was not directly and substantially an issue in either of the appellant's two ***earlier*** suits. In High Court ***Civil Case No. 3655 of 1995 (OS),*** Pall, J. held that, the Originating Summons disclosed a distinct cause of action. The learned Judge also held that as the issue of adverse possession raised in the appellant's Originating Summons was not an issue in either of his two ***earlier*** suits; the said Originating Summons could not have been res judicata nor was his Chamber Summons for an interlocutory injunction. In ***Civil Appeal No. 160 of 1997***, Pall, J's ruling in High Court ***Civil Case No. 3655 of 1995,*** was challenged in this Court. The material part of the judgment of Gicheru, J.A. (now C.J.) held:-

"Although the suit property is the subject matter in all the three suits filed by the respondent as are referred to in this judgment, and as indicated at the beginning of this judgment, every point which properly belonged to the suit property which later was the subject of litigation those suits should with the exercise of reasonable diligence, have been brought forward in the said suits for the superior court to form an opinion and pronounce judgment on them if need be, it does not seem to me that the respondents claim of ownership to the suit property by adverse possession could have been brought into either of the respondent two earlier suits namely, **High Court** *Civil Cases Nos. 2763 of 1982* ***and*** *2849 of 1995* ***for the superior court to form an opinion and pronounce judgment on it. This was therefore not a matter that could have been litigated in the proceedings in the two civil suits referred to above. It is (sic) being litigated in the respondent's Originating Summons was not caught up by the doctrine of res judicata and was not an abuse of the process of the court."***

The significance of Justice Pall's decision and its upholding in the above decision by this Court is that it considerably dealt with the issues of res judicata and whether or not the appellant had a reasonable cause of action and the fact that the issue of adverse possession remained alive for determination by the superior court notwithstanding the institution of all the suits described. The determination by this Court in ***Civil Appeal No. 160 of 1997,*** in our view covered all the substantive grounds as set out above and we cannot therefore sit on appeal again as a Court.

Perhaps it is appropriate at this stage to observe that two judges of the superior court namely, Pall and Kuloba, JJ. had co-ordinate jurisdiction and what matters now is that the first appeal was filed against the ruling of Pall, J. and was heard by this Court before the ruling of Kuloba, J. and that there is considerable overlap in terms of issues determined by the two judges and in the case of the ruling by Pall, J. a final determination by this Court has been obtained.

In keeping with the principle of stare decisis, the determination in ***Civil Appeal No. 160 of 1997*** on the same issues and grounds remain the decision of this Court. It was given in 2000 and it would not be right for us to be asked to re-open the matter and make fresh pronouncements on the issues covered in the judgment or those which ought to have been covered. In our view, the respondents are barred by both the principle of issue estoppel and estoppel by record (or judgment).

It follows therefore that the respondent's written submissions go counter to this Court's decision in ***Civil Appeal No. 160 of 1997*** (Gicheru, Akiwumi, Owuor, JJ.A.). Granted that the application and interpretation of law does have inevitable weaknesses but on the positive side, some of its virtues are certainty and predictability. We are being asked to do away with the virtues and unravel past determinations of this Court. We decline to do so.

This Court's decision in ***Civil Appeal 160 of 1997*** casts a very long shadow on the challenged ruling. To illustrate the point, the objections raised by the learned counsel for the respondent, Mr Oraro before Ole Keiwua, J. (as he then was) were:-

a) The matter raised in the plaint and the application are res judicta.

b) The plaint does not disclose any cause of action and the plaintiff has not pleaded any right to the property. Further, any claim over property by the plaintiff is barred by Limitation of Actions Act.

c) The plaintiff has not claimed any enforceable right over the property and is not entitled to the reliefs.

d) ***The plaintiff is incapable of giving enforceable undertaking in damages.***

Taking the grounds as set out above, we are of the view that objection (a) is clearly caught by the doctrine of estoppel in view of the Court of Appeal's final judgment in ***Civil Appeal 160 of 1997*** between the same parties which finally disposed of the issue of res judicata.

The issue of the abuse of the process of court was also erroneously determined. With respect, there was nothing to support this objection in that it was completely out of place. The suit before the learned Judge did not at any time seek any declaration for judgment for adverse possession or any claim to the property in question. The claim before the Judge was for a declaration that distress for rent was unlawful and for damages for wrongful detention of goods and an order for mandatory injunction for the retention of the goods wrongfully distrained. In addition, High Court ***Civil Case No. 2763 of 1982*** was never heard on merit and there was no determination on merit on any issue in the suit both by the High Court and the Court of Appeal.

Again, regarding the objection and its subsequent upholding by the Judge, we think the same is particularly erroneous in law in that the limitation provisions relied on by the learned Judge namely, ***section 20(1)(b)*** of the Limitation of Actions Act refer to action to recover from the trustee trust property or the proceedings thereof in the possession of the trustees or previously received by the trustee and converted to his use. Surely the plaint in High Court ***Civil Case No. 2849 of 1995*** as indicated above did not raise of any of the actions contemplated by ***section 20(1)(b)*** of the Limitation of Actions Act.

Objection (c) was equally misplaced in that the plaint did not raise any enforceable right on the immovable property and the appellant only sought to stop or restrain what he considered was an illegal distress of moveable goods.

Finally concerning objection (d) the basis for the Judges' conclusion on this is not with respect clear to us in that the movable chattels were never at any time owned by the respondents or claimed by them and it is also clear that after the withdrawal of the respondent's counterclaim for rent, the issue of Tenant/Landlord relationship between the parties did not arise at all. In any event, from the Judge's own conclusion that the appellant was a trespasser, it is not clear how and why a trespasser would be required to give an undertaking as to damages where it is his goods which had been distrained.

All in all, the respondent's objections which were all apparently sustained by the learned Judge in his ruling striking out the suit, were not sound in law and ought not to have resulted in the striking out of the suit. In the result, a restoration of the suit is the way to go subject to the parties reassessing their final positions depending on the outcome of the second appeal herein.

As regards ***Civil Appeal 155 of 2004***, the critical question for determination is whether the respondent having made a claim based on beneficial ownership and obtained interlocutory orders including obtaining an injunction to assert his rights over the property, time stopped running for the purposes of adverse possession.

Again, in view of the final judgment of the Court in ***Civil Appeal No.160 of 1997,*** that all previous suits did not bar the claim for adverse possession, we find ourselves unable to re-open the determined issues in past suits so as to pave way for another contest before a differently constituted bench namely this panel!

In our view, the only issue for determination is whether the learned Judge's (Kuloba, J.) judgment can be faulted as regards his findings on the existence of adverse possession as a matter of fact. In other words, was the respondent in possession for 12 years? In the light of this Court's judgment in ***Civil Appeal No. 160 of 1997,*** that none of the suits was capable of bringing to an end a claim based on adverse possession, what is important now is for us to determine whether the superior court was correct in holding that the adverse possession was to the extent of the statutory period of 12 years in the circumstances. On this, the record shows substantial evidence of occupation and possession from 1976 to the date of judgment as per the affidavit in support of the Originating Summons in High Court ***Civil Case No.3653 of 1995*** including the sale agreement between the respondent and the previous owner of the suit property. As regards the effect of the injunction obtained by the respondent, it constitutes, in our view, an act asserting the respondent's rights of possession and therefore did not stop time running against the appellants. What was capable of stopping time from running was the counterclaim if it asserted the appellants right to possession but it only raised the issue of payment of rent and it is not insignificant that the counterclaim was subsequently withdrawn by the respondent and the injunction order was thereafter as a matter of fact as per the record perpetuated by a consent order recorded before Visram, J. (as he then was.) Such an order in our view preserved the status quo including the respondents continuing possession. It follows therefore that, if none of the suits or the claim of any relief stopped time from running in favour of the respondent, the adverse possession for 12 years is beyond challenge in the circumstances, having commenced in 1976 as the appellant attacks or claims were all based on the various claims which the respondent is said to have mounted since 1976. The appellants' attacks or claims are very well summarised in ground 7 of the memorandum of appeal where the impact of findings in High Court ***Civil Case No. 2763 of 1982,*** and High Court ***Civil Case No. 2849 of 1995,*** have been set out. With respect, we cannot open any of the determined issues such as express trust, beneficial ownership, Landlord and Tenant relationship or possible interruption of adverse possession without sitting on appeal of the final judgment of this Court in ***Civil Appeal No. 160 of 1997*** as reproduced above and which was handed down in the year 2000. The other important holding is that since ***Civil Appeal No.160 of 1997,*** was an appeal from the ruling of Pall. J, it is the appellant who is squarely barred by the doctrine of res judicata in its attempt in this appeal (155 of 2004) to rehash and reagitate the same grounds as finally determined by this Court in ***Civil Appeal No. 160 of 1997***. Although the challenged judgment of Kuloba, J. was delivered in July 2003 this does not alter the finality of the determination in ***Civil Appeal No. 160 of 1997,*** by dint of the hierarchy of the two courts. The demands of consistency, certainty and credibility in the law and the principle of stare-decisis constrain us not to interfere with the judgment since the wider interests of justice in the circumstances would be served better by confirming the judgment of this Court, which could not be upset by a superior court decision touching on the same issues.

In short we cannot in the light of this Court's findings in ***Civil Appeal No. 160 of 1997***, re-open and adjudicate on the following issues raised by the respondent.

1) That it was not in law open for the learned Judge to find that a claim in trust is not inconsistent with adverse possession if made before accrual of the limitation period for adverse possession which is twelve years.

2) That the learned Judge misdirected himself in finding that an injunction can be invoked in aid of a plea for adverse possession.

3) That the learned Judge misdirected himself by failing to consider or make any finding on the effect of

the first suit and the decision thereon on the claim for adverse possession.

4) That it was not in law open for the learned Judge to find that despite the respondent claiming as a beneficiary of trust before the accrual of the limitation period, time continued to run during the litigation of that claim.

5) That the learned Judge misdirected himself on the effect of injunction orders on a claim for limitation.

6) That the findings of the learned Judge are erroneous both in law and fact.

Re-opening them now would ignore the impact of the final determination by this Court in ***Civil Appeal No. 160 of 1997,*** in the year 2000 when the Court upheld Justice Pall's ruling that the issue of adverse possession was not directly and substantially an issue in the previous suits between the parties namely, ***Civil Suit Number 2763 of 1982,*** and ***Civil Suit No. 2849 of 1995,*** and that the Originating Summons Number 3655 of 1995 (OS) before him did disclose a reasonable cause of action and proceeded to order that the Originating Summons proceeds to trial in the normal way. For this reason, we agree with the respondent counsel's submissions that grounds 1 to 6 and 10 in the memorandum of appeal were fully adjudicated upon in ***Civil Appeal No. 160 of 1997,*** and what the appellant is trying to do before the panel is to re-agitate the same grounds for the second time. The remaining grounds 7, 8, 9, and 11 also seen from the background ***Civil Appeal No. 160/1997*** in our view, have not and cannot supplant the claim for adverse possession. In this connection, it is important to state that the record of appeal in ***Civil Appeal No. 160 of 1997,*** was exhibited at the hearing before Kuloba, J. and although the learned Judge is silent on the impact the final determination in ***Civil Appeal No. 160 of 1997,*** had on his judgment, in our view, it could not have escaped his attention.

Finally, we are also not oblivious to the fact that, going by court proceedings since 1982, nowhere do the appellants acknowledge the right of the respondent to the property and this is evident from the respondent's opposition to the claims based on express trust, beneficial ownership, landlord and tenant or injunction (which was infact continued with the consent of the appellant.) It is important that in all the suits the appellant never asserted its right to possession. Instead, it persistently asserted the right of ownership. In addition, although it was open to the respondent to counterclaim for recovery of possession, eviction or ejectment of the respondent, so as to rightly assert the right of possession, no such suit or challenge was ever mounted by the appellant. Surely even on this ground alone, possession by the respondent was by virtue of the suit hostile since the initial possession in 1976 was not with the consent of the registered proprietor (the appellant) because the ownership had not vested in it and the ownership vested in the respondent in February, 1977. The challenge over the relevant period was that the respondent was a tenant, a position which the appellant immediately abandoned. We think that in the circumstances, continuing possession remained uninterrupted, open, hostile and inimical to the ownership by the appellant. In our view, only a suit by the appellant asserting possession would have stopped the adverse possession and there was none. In the various suits cited the appellant sadly chose to ride on the back of the respondent as he asserted his rights and therefore there was no assertion by the appellant at all during the relevant period. This is the point made in the publication ***Limitation Periods 3rd Edition by McGee*** where he observes that "the proceedings of 1962 were commenced within 12 years limitation period and the commencement of proceedings stops running of time." In our view, the facts in the Mcgee illustration were different from those before us because the landlords there had gone to court in 1962 therefore time did not run against them. Here the appellant never went to court.

In our view, the learned Judge did correctly apply the principles as enunciated in the leading cases of ***Gatimu Kinguru vs Muya Gathangi [1976] KLR 253*** and ***MUTHUITA v WANGOE (1976) KLR 166*** that adverse possession and trust are not mutually exclusive and that even a person claiming entitlement to a beneficial interest could still be in adverse possession because such possession could, depending on the circumstances, still be adverse to the registered owner. It is also important that the registered owner in this case had persistently denied that the respondent had the beneficial ownership but at the same time, over a long period of time, failed to eject him yet the appellants fought many battles that the respondent was not a beneficiary of a trust, a beneficial owner or a tenant. In a situation such as this one before us where a registered owner is not sure of the status of the person in occupation of the land, there is a strong

inference that the possession is adverse to its interest.

We agree with Mr Satish Gautama's submissions that what is important is to determine whether the occupation by the respondent who is in turn claiming adverse possession was with or without the consent of the registered proprietor. Adverse possession in our view operates against ownership and the two are distinct rights. The first one extinguishes the second one. Assertions of ownership by the registered owner would not assist it unless the right to possession is asserted. There was no such assertion in any of the suits. An injunction order obtained by the possessor without any corresponding claim made by the owner to possession cannot in our view, stop the time running in favour of the possessor.

It is significant to observe that all the suits described in the appeals were commenced by the respondent and during the entire period of all the proceedings, the respondent remained in possession and it has not seriously been denied that he took possession in 1976 as a purchaser of the suit land from the previous registered owner. The respondent lost nearly all the suits but, his possession remained uninterrupted all the same. It is also important to note that the position taken by the appellants all along was to reject in each suit that the respondent had the right he asserted whether as a beneficiary under an express trust, beneficial owner and so on but at no time did the appellants commence ejectment proceedings in order to assert their right to possession. In our view had such a suit been commenced by the appellant's before the expiry of 12 years such an action would have had the effect of stopping time from running. In the circumstances, the closest the appellants came to asserting their rights was the institution of the counterclaim which was withdrawn and a consent order recorded for the status quo to remain. Here again, we think the counterclaim for inter-alia rent did not stop the time running against the respondent possessor because it was very quickly established that the parties did not have a tenant/landlord relationship and there was no proof of payment of rent and no ejectment of the possessor was sought in the counterclaim. Finally, on this issue of the effect of the suits on the claim for adverse possession, it is quite evident from the pleadings and the rulings of the courts in the suits cited that the respondent as adverse possessor did not at any time admit the appellant's right to possession. It follows therefore that the reliance by counsel for the appellant on the case of ***GITITU v NDEETE [1984] KLR 776*** is, with respect, a misapprehension of the ratio decidendi of the case. In brief, the ratio of the case is firstly that time ceases to run under the Limitation of Actions Act either when the owner asserts his right or when his right is admitted by the adverse possessor and secondly, the assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. On the basis of the facts and evidence on record, the appellant did not meet any of the requirements as set out in the case. In our view, the assertion of right must involve either the regaining of entry to the land by the owner or the commencement of a suit whose substance is to regain possession and any other suit by the owner would in our view, be ineffective in stopping the running of time. For example, in all the suits cited, the appellants asserted that the title was registered in one of them but the important move was to assert possession or regain possession. Adverse possession supplants ownership and this is the entire philosophy invoked in the principle of adverse possession. The un-interrupted possession was a continuous act which remained hostile to the right of ownership for the purposes of the Act as well. Again, the basis for this holding is ***GITITU v NDEETE (supra)*** where the right of the registered owner who came into the picture after the possession of the possessor was held to be subject to the right of the possessor who had started to acquire rights as a possessor.

In our view, a registered owner in asserting his right cannot ride on the back of the possessor's claims or suits, he must commence his own because where a possessor commences suit, one of the immediate effects of such a suit is on the ground, is a declaration to the world, that he is dispossessing the owner. This is because for the possessor to succeed, he must establish factual possession (which has not been challenged at all) and that he, the possessor has the requisite intention (***animus pessidendi***) to possess (the various suits by the respondent support this intention) – see the English case of ***LITTLE DALE v LIVERPOOL COLLEGE (1900) C.A. 968.*** All the suits clearly demonstrated the intention to possess.

Again although the suits concerned were hinged on various grounds e.g. express trust, beneficial ownership and so on for the purpose of adverse possession what is required is not an intention to own or even an intention to acquire ownership but an intention to possess see the case of

BUCKINGHAMSHIRE COUNTY COUNCIL v MORAN [1990] CL 623 at 642 and also in ***LODGE v WAKEFIELD METROPOLITAN CITY COUNCIL [1995] 2 EGLR 124*** where an occupier who wrongly believed that he was a paying rent tenant was held to have had necessary animus pessidendi. In our view, nothing turns on the submission by the appellant's counsel that because the respondent was a beneficiary (which status was fiercely resisted by the appellant) time could not run against the trustee. In this case, even assuming for the sake of argument, that the respondent was a beneficiary, he was a sole beneficiary and therefore, time could still run in his favour and it did. Similarly, as regards the effect of the alleged tenancy to the claim for adverse possession since the relationship of landlord and tenant was never upheld and it was finally decided that the respondent was a squatter, in our view, time did not stop running.

The respondent having been let into possession in 1976 as a purchaser under a contract for sale, time started running against the vendor and the subsequent owner from the time of entry into possession – see the case of ***BRIDGES v MEES [1957] Ch 475.***

In conclusion, we would like to add that possession has ancient origins in every community. In many ways, it is like a cradle right. Historically, it was first in time. The concept of ownership came later and in its trail, systems of registration of title. Adverse possession reasserts that ancient right of possession. The law allows possessors to reassert it where circumstances justify it such as in this case.

The upshot is that ***Civil Appeal No. 269 of 2001*** is hereby allowed with the result that the ruling of the superior court dated 14th July 1996 is set aside and the order prayed for in the Chamber summons dated 13th September, 1995 is granted. We award the costs of the appeal to the appellant.

In addition, for the foregoing reasons, ***Civil Appeal No. 155 of 2004,*** is dismissed with costs to the respondent.

It is so ordered.

DATED and delivered at Nairobi this 30th day of April 2010.

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

M.K.K. SEREM

DEPUTY REGISTRAR