



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

CIVIL CASE NO. 3043 OF 1996

- 1. BENSON NDERU KARANJA }**
- 2. ELIUD NDERU KARANJA . }**
- 3. DAVID NDUNGU . }**
- 4. EDWARD NJENGA . }**
- 5. CHARLES KARUGA . } PLAINTIFFS**

VERSUS

- 1. NELSON MUCHAI }**
- 2. ERICK MUCHAI } DEFENDANTS**

JUDGMENT

The Plaintiffs claim that in 1965 the 1st and 2nd Defendants together with one Kangethe Murua (deceased), Kabiro Kinuthia (deceased), Mwaura Karanja (deceased), and Nelson Muchai joined a business association called Munderu Farmers Traders (the business) That upon the deaths of said deceaseds the 3rd, 4th and 5th Plaintiffs their sons were admitted as parties to the business. The reference to 1st and 2nd Defendant in the Plaintiff should refer to the 1st and 2nd Plaintiff.

The 1st Defendant is the owner of a piece of land known as Kiambaa/Thimigua/569 (The suit premises) on which the 2nd Defendant his grandson has a house in which he resides. This suit related to a portion of the suit premises of one quarter of an acre (the plot), which has not been surveyed.

The Plaintiffs claim that they bought the plot from the 1st Defendant and obtained a loan from the Agricultural Finance Corporation (A.F.C.) for that purpose.

The Plaintiff's further aver that when the business collapsed the partners continued operating from the plot where a borehole was situated until 1986 when the borehole stopped working.

The Plaintiffs further claim they have been in adverse possession of the plot from 1973 and had thereby acquired a title by adverse possession against the 1st Defendant.

In January, 1986 it is alleged the 1st Defendant without any right entered this plot and constructed a house for the 2nd Defendant.

The Plaintiff raised two issues.

1. Did the Plaintiff purchase the plot from the 1st Defendant and
2. Have the Plaintiffs been in adverse possession of the plot for 12 years prior to the filing of this suit on the 10th December 1996.

With regard to the purchase of the property the 1st Defendant stated the business was for farming. The Plaintiffs bought the plot from the 1st Defendant and signed an agreement. The original was with the Defendant although he had a copy. They borrowed from the A. F.C. Kshs..56,000/= which was charged against the land of the original partners in the business. The title deeds were charged. They were unable to repay so each party took a portion of the loan and repaid it from his own pocket. After the loan was repaid the Plaintiffs asked the 1st Defendant to give the plot to the parties including the 1st Defendant. They bought the land for five goats and one lamb. They had not entered the land because the 1st Defendant had refused. There was a borehole on the land put in by the partnership. The water from the borehole was used by six members until it broke down. So far as the 3rd, 4th and 5th Plaintiffs are concerned they inherited their father's share although only the 4th Plaintiff has Letters of Administration.

This witness produced a copy of the green card to the suit premises, a copy of a Power of Attorney in respect of a number of properties including the suit premises whereby the original parties in the business gave the 1st Defendant a Power of Attorney, a letter from the Kenya Power of Lighting Co., Limited dated 19/3/1986 and copy of an Application form from A.F.C. seeking a loan by the business for Shs.56,000/= for the purpose of increased drilling of the existing bore hole. Also P.W.2 produced a copy of an agreement stating that the 1st Defendant had sold the plot where there is a bore hole for five goats and one lamb.

It is not in dispute that no Land Control Board consent was neither sought nor obtained in respect of the sale agreement.

It is dated 16/5/1973 and thus became void by virtue of the provisions of the Land Control Act.

The 2nd Plaintiff gave evidence and said the parties put a fence around the plot. In cross –examination he said that since erecting the fence they did not visit the plot again.

P.W.3 a photographer produced some photographs. He stated the fence shown surrounds the tank.

Both Defendants gave evidence.

On the evidence before me the Plaintiffs have not established a binding and enforceable agreement for sale and are not entitled to a declaration that the plot belongs to the Plaintiffs.

Further on their own admissions the Plaintiffs had not entered the plot as the Defendant had refused them possession. There is no evidence whatsoever that the Plaintiffs have been in adverse possession of the plot at all and certainly not for 12 years prior to the filing of this suit. In the result I dismiss this suit with costs to the Defendants.

Dated and delivered at Nairobi this 22nd day of April,.2005

P.J. RANSLEY

JUDGE