



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 252 OF 2007

RHODA KANDIE.....1ST PLAINTIFF

KIGEN KANDIE.....2ND PLAINTIFF

KIPTUI KANDIE (All suing as the administrators of the

Estate of Aaron Kimossop Kandie).....3RD PLAINTIFF

VERSUS

KANZIWA LIMITED.....DEFENDANT

JUDGMENT

1. By an Originating Summons taken out by the plaintiffs, (being administrators of the Estate of the Late Aaron Kimosop Kandie who died on 7th July 2002- (grant of letters of Administration issued to plaintiffs on 9th November 2004 in Succession Cause NO.991 OF 2003 at Nairobi) filed the Originating Summons on the 21st November 2007, against the Defendant, Kanziwa Ltd seeking determination from the court on the following questions.

2. (1) Whether the plaintiffs have become entitled to be registered as the proprietors of 50.18 Hectares from LR. NO. 9726 Njoro by way of Adverse Possession.

(2) Whether the plaintiffs should be so registered as proprietors of 50.18 Ha of LR NO.9726 Njoro .

(3) Whether the Defendant should, through its officers/directors, execute the necessary and relevant conveyance documents to effect the registration of the plaintiffs as the proprietors of 50.18 Ha of LR 9726 Njoro within 14 days of service of such order and in default the Court's Deputy Registrar be authorized to execute such documents.

(4) Which party ought to bear costs of the suit.

3. **One of the Administrators Kigen Kandie** swore the affidavit in support on the 21st November 2007 and annexed thereto numerous documents to support their assertions.

4. In opposing the Originating Summons, a Replying Affidavit was sworn by the Defendant's Director Kahumbu on the 6th February 2009 and filed on even date.

5. In addition, both parties, to urge their respective -----positions filed lists of documents and witness statements. For the plaintiffs, eight witnesses testified while four testified for the defendant, upon which evidence parties filed written submissions.

6. The Plaintiffs Case.

By various documents filed and produced as exhibits, the plaintiffs testified to the effect that the Late Aaron Kandie purchased 50.18 Ha out of LR NO.9726 (herein called the suit property) the property of the Defendant situated at Njoro within Nakuru County.

7. The plaintiffs produced

a) a copy of the grant of letters of Administration issued to them on the 25th March 2003 as exhibit ("KKI"),

b) Certificate of Title of LR NO.9726 Njoro as “KK2”,

c) Molo Land Control Board Consent (KK3a”) and “KK3b” the application for consent to subdivide and sale the suit property.

d) The Molo Land Control Board approved the subdivision and sale of the 50.18 Ha as evidenced by a copy of the letter dated 24th December 1982 from the Chairman of the Board,

e) By a letter dated 8th December 1982, the then Commissioner of Lands wrote to the District Commissioner (“KK5b”) by a letter dated 23rd December 1982 indicating that

f) There was no objection to the proposed subdivision, upon consents obtained from the various bodies (“KK 6a, KK 6b, and KK 6 c“)

8. Upon purchase of the property 1982, the plaintiffs testified that the deceased and his family took possession, and moved into the 50.18 Ha portion and commenced farming activities, planting wheat, maize and cattle herding, build homes for their workers and have been in active occupation and use of the portion without interruption by the defendant.

9. It is further the plaintiffs case that since the completion of purchase and occupation of the land portion, several communication was sent out to the Defendant seeking for subdivision of the land to excise the plaintiff’s portion (PW 1 evidence) and approvals for subdivision from Nakuru County Council dated 28th January, 2004, approved.

10. Further a deed plan dated 8th December 2004 for the sub-division (PEXh 8), and letters confirming the excision of 50.18 Ha from the suit property were tendered to the court – (PEXhibit 13,14).

11. **PW6**, a Government Surveyor based at Nakuru County testified and confirmed that indeed a sub-division of the suit property was effected and a new number LR 570/51 given on Njoro Map I, and that he did not know the parties to the suit, nor the party who applied for the sub-division.

12. **PW7**, a son of the deceased testified that his late father purchased the portion in 1982 and that the Defendant failed to give them the title of the sub-division, and relied on the documents produced to the court.

13. It was his evidence that the defendant was not in occupation of the portion purchased, and that Kandie’s family was, from 1982 and there were no disputes upto 2002 when his father died save in 2004 when they filed a case – **HCCC NO. 237/2005** (Withdrawn) some squatters invaded the land, but they continued being in occupation, even after the time of filing of this Originating Summons to date. He testified on the 14th October 2019, citing the Originating Summons, Paragraph 15, that the deceased family were and are in possession and occupation therefore not trespassers.

14. Upon intense cross-examination he reiterated that the Late Kandie’s family is in occupation of the land, and actively farming wheat, barley, flowers and herding cattle therein. He confirmed that the Defendant attempted to encroach on their portion in 2007 – LR 9726/1 necessitating filing of this suit, as purchasers and in occupation since 1982.

15. Defendant’s Case.

The totality of the defendant’s case, is stated by the its four witnesses is that the deceased, Aaron Kandie never purchase the property, and that the portion in dispute is leased out to some persons as captured in the evidence of DW1, director of the Defendant, David Kahumba that Kandie’s family have never been in occupation thereon, but admitted that the late Kandie had his farm next to the Defendants where he used to herd his cattle.

16. It is its further testimony that the Defendant has not surrendered the portion claimed to the plaintiffs. Despite testifying that he had the original title deed to the suit land, he did not produce it to the court.

Parties however, by consent, produced copy of Title LR NO.9726 (Original NO.4894/1 and 4825-(PEXhibit 9 being Notification of approval).

17. **DW3**, who stated to be a neighbor of the disputed land since 1970 testified that he knew the owner as Kaziwa Ltd, but that the deceased, the late Kandie used to farm in the farm that is adjacent to the Kaziwa farm and that Kandie’s family too used to farm on their portion adjacent thereto, but on Kaziwa farm, but had not knowledge of the dispute now in court.

18. **DW4’S** evidence reiterated DW’s evidence that Kandie’s family farm their farm – wheat, flowers and herding cattle adjacent to Kaziwa Farm.

19. Issues for Determination.

The questions raised for determination by the plaintiffs, in the Originating Summons, in my view, are the issues that fall for determination.

20. **Legal Principles that underpin the matter of purchase of land and Adverse Possession.**

a) Section 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya.

b) Section 3 (37) Law of Contract Act, Cap 23 Laws of Kenya.

21. Relevant Case Law (among others).

1) **Kwenyu Vs. Omuto Court of Appeal Civil Appeal NO.8 of 1990 (Unreported).**

2) **Sisto Wambugu Vs. Kamau Njuguna (1983) KLR, Pg. 172**

3) **Wilfred Kegonye Babu Vs. Henry Mose Oruko (2019) e KLR.**

4) **Mtana Lewa Vs. Kahindi Ngala Mwangandi (2015) e KLR.**

5) **Titus Kigoro Munyi Vs. Peter Mburu Kimani (2015) e KLR.**

6) **Wilson Kazungu Katana & 110 Others Vs. Salim Abdulla Bakswwein & another (2015) e KLR**

22. **Analysis and Determination**

Purchase of the portion claimed by the plaintiffs?

The gravamen of the totality of this case is question NO.1 in the plaintiffs Originating Summons. If answered in the affirmative, then questions 2 and 3 will likewise be so answered.

23. The evidence adduced before me is that the late Aaron Kandie and his family moved and took possession of part of the Defendant's land parcel NO. 9726 situated at Njoro in the year 1982, upon which they undertook farming activities and cattle rearing upto the year 2002 when Aaron Kandie died, before the Defendant excised the portion the Kandie family occupied, and made use of.

24. It is also clear from the evidence by both the plaintiffs and the Defendant that the occupation and use of 50.18 Ha of the suit property LR 9726 by the Late Aaron Kandie and his family was by permission and authority of the Defendant upon purchase of the same.

25. This is so because PExhibit 14, a letter signed by J.F. Kahumbu dated 22nd September 1983 reveals

“----- I hereby confirm my willingness to sell the said portion of my firm. In this regard, I am by copy of this letter, requesting the AFC to give consent to the exercise and sale of that portion of my farm. Additionally I am also requesting AFC to arrange for the necessary survey and valuation of the said portion of my land to facilitate the sale of the same”.

26. The writer, J.F. Kahumbu was the father of DW1 David Kahumbu who swore the Replying Affidavit to the Originating Summons. This witness admitted to have been only 12 years old when the sale and purchase was undertaken by his late father and the late Aaron Kandie.

27. It is upon the above requests by the Defendant that Molo Land Control Board gave its consent for the subdivision and sale of the portion measuring 50.18 Ha to the Late Aaron Kandie on 24th December 1982 and the District Commissioner of Lands of no objection to the subdivision upon obtaining of all consents from the various bodies – Pexhibit KK3 (a), KK3 (b), KK6(a) & (b) & (c) (see paragraph 7 of this judgment).

28. Had there been no sale and purchase, such letters and consents would not have been written. The defendants witnesses did not question the said letters and consents in their evidence or at all, including their submissions by their advocates, M/s Gatu Magana & Co. Advocates, who submitted that there was no evidence of payment of the purchase price.

29. Granted, there was absence of a sale agreement as testified by PW5 who stated that AFC had it in its possession but at time of testifying could not be availed.

Section 3(3) of the Old Law of Contract Act, (2003) which was then applicable states:

(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 –

i. Has in part performance of the contract taken possession of the property or any part thereof, or

ii. Being already in possession, continues in possession in part performance of the Contract and has done some other act in furtherance of the contract.

30. All the witnesses, including the Defendant's testified that the Kandie family were in possession of a farm and cultivating, farming and herding cattle adjacent to Kaziwa's (defendants). None testified that the adjacent portion to the Defendants, occupied by the Kandie's was not part of the property as no parcel numbers were stated.

31. The above **Proviso to Section 3(3) Cap 22** therefore cushions both parties in the absence of the written agreement which the DW5 testified was in its possession but could not be found or availed.

A certified copy of the Title of LR NO.9726 – the suit property was produced as PExhibit 9.

32. This is in line with **Court of Appeal case Wilson Kazungu Katana & 101 others Vs. Salim Abdalla Bakshwein & another (2015) e KLR**, while reiterating the imperative of complying with **Provisions of the old Order XXXVI Rule 3 D(2)** that a certified copy of title ought to be annexed to the Originating Summons.

33. The fact that the certified copy of Title was not filled with the Originating Summons, in my considered view would not cause to be incompetent and therefore a candidate for striking out, as it was but a technical procedural flaw that no doubt goes to the merit of the suit – **Article 159 (2) (d) of the Constitution** – as urged by the Defendant – See also **Court of Appeal Case Kwenyu Vs. Omito (Supra)**.

34. The portion claimed by the plaintiffs was identifiable, a fact testified as being adjacent to the Defendant's farm (Defendant's witnesses evidence) and by the parcel No. being LR 9726/1 as ably shown in the documents produced by the plaintiffs and enumerated earlier in this judgment – **Wilson Kazungu Katana (Supra)**.

35. By the largely uncontroverted evidence of the plaintiffs, I am satisfied that the plaintiff's later father, the late Aaron Kandie purchased the portion of 50.18 Ha from the Defendant's larger LR NO.9726, which portion after subdivision, which again is not controverted by any evidence, was allocated its parcel NO.9726/1.

This is the portion the defendant has failed and neglected to sign the necessary documents to facilitate registration in favour of the late Aaron Kandie, and the plaintiffs.

The subdivision is exhibited as PExhibit 3,7,8 – (See paragraph 7,8,9,10 & 11 of this judgment.

36. **Possession and Occupation?**

As at 1982, the Kandie family were already in active possession and use of the portion sold to them. Both the plaintiffs and defendants evidence attest to this fact; and while in occupation, the late Kandie was actively pushing the defendant to sign the necessary documents for the registration of the subdivision which they failed upto the date of his death in 2002 – evidence by the Molo Land Control Board consent to transfer.

37. DW1 the director of the Defendant admitted that the plaintiffs (Kandie's family) occupied and grazed their cattle on the suit property upto around 2007 when a dispute arose, leading to this suit.

38. It is therefore my finding, and I hold that the late Kandie's family – the plaintiffs were in actual possession and use of the suit land from the year 1982, upto 2004 and thereafter to date.

39. Continuous and uninterrupted possession and occupation.

By the above, the plaintiffs claim to be entitled to be registered as the proprietors of the portion of 50.18 Ha , by way of adverse possession.

40. The principles and test of the doctrine of Adverse Possession are stated in several case law.

The **Court of Appeal in Titus Kigoro Munyi (Supra)** held that, for a party to succeed, it has to show the following:

i. That he has been in continuous and uninterrupted possession of the land for 12 years or more.

ii. That such possession has been open and notorious to the knowledge of the owner.

iii. That such possession was without the permission of the owner.

iv. That the plaintiff has asserted a hostile title to the owner of the property.

41. In the case (**Court of Appeal) Wilson Kazungu Katana (Supra)** the **Court of Appeal** expounded the said principles, especially (3) above that

“----- in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition----- what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use ----- for one to state a claim on a parcel of land on the basis of adverse possession, he must show that he entered the

parcel of land more or less as a trespasser as opposed to by consent of the owner.

42. The Court continued to say;

“-----it is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession----- The person proving all these is on the person asserting adverse possession----- so that a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way throughout, or before the permission of the owner and remains that way throughout, or before the permission is terminated or if before the expiry of the period, the owner of the land takes steps to assert his title to the land-----”

43. The statements and holding by the Learned Judges of Appeal are applicable to the present case entirety. The plaintiff's entered the suit land with permission of the owner, who had sold the said portion to the late Kandie, as already rendered by this court.

44. The occupation and possession was seamless, from 1982 upto when he died, in 2002, when the defendant failed to procure the registration of the portion to the Late Kandie. No interruption of the use of the land was testified to by the Defendant's witnesses. It was open and notorious DW3, 4, for over twelve years.

45. However, the plaintiffs dispossessed the defendant by the open acts of farming and grazing cattle, and settlement by the family on the portion. The defendant were openly barred from the use and enjoyment of the soil by the plaintiff.

46. Further, as stated in the above Wilson Kazungu Case, if the owner at some point terminates the consent and the applicant does not move but continues to occupy the land, and the owner takes no steps to effectively terminate the possession for a period of twelve years, after then, meaning after the twelve years, such applicant would be perfectly entitled to sue on account of adverse possession.

47. Take the scenario hereto. The plaintiff's father bought the land and entered into the land in 1982. At no one time did the defendant take effective steps or any step at all to evict the plaintiffs. Twelve years of possession ended by the year 1994. None of the defendant's witnesses testified to having attempted to dispossess the plaintiffs (Late Kandie). For a period of twelve years from 1994-2006, no such steps were taken. The plaintiffs continued to occupy and utilize the land. In 2007 they asserted their rights by filing this suit.

48. By the Originating Summons, the plaintiffs have demonstrated a clear and unmistakably right to be protected under the Laws of Land Ownership, by adverse possession, by seeking answers to the questions they raise, which rights they state are threatened.

49. **Conclusion.**

For the foregoing reasons, and citing the equitable maxim that equity looks on as done that which ought to be done, I come to the conclusion that the plaintiffs have proved their claim of ownership of the portion of 50.18 Ha out of the suit land, to the standard of proof, upon balance of probability.

50. **Accordingly**, I find and hold that:

1) The plaintiffs are entitled to be registered as the proprietors of 50.18 Hectares to be excised from LR NO.9726 Njoro by way of Adverse Possession, being the portion excised, and given parcel NO.9726/1.

2) The defendant is directed and ordered, by its directors to execute the necessary and relevant Conveyance Documents to effect the registration of the plaintiffs as the Proprietors of 50.18 Ha within LR. NO.9726 Njoro, being subdivision NO.LR9726/1 within 14 days of the said documents being presented to it by the plaintiffs.

3) In default of (2) above the Deputy Registrar of the High Court at Nakuru Law Courts is authorized to call for the Conveyance documents and execute the same to facilitate NO.(1) above.

4) The defendant is condemned to pay costs of the suit to the plaintiffs.

Delivered, Signed and Dated at Kerugoya electronically this 15th day of May 2020.

J.N. MULWA

HIGH COURT JUDGE

ADVOCATES:

Mukite Musangi & Co. Advocates

NAKURU (Ref. K10/011)

Gatu Magana & Co Advocates

NAKURU.