REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 252 OF 2007(O.S)

1. RHODA CHEPLANGAT KANDIE .....1ST PLAINTIFF

2. KIGEN KANDIE.....2ND PLAINTIFF

3. KIPTUI KANDIE.....3RD PLAINTIFF

(All suing as Administrator of estate of Aaron Kimosop Kandie)

VERSUS

KANZIWA LIMITED.....DEFENDANT

RULING

1. By a Notice of Motion application dated 20th July 2012, the Defendant sought an order that judgment on admission be entered against the plaintiffs by dismissal of the suit in its entirety. The application is based on the provisions of **Order 13 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules.**

The plaintiff, David Kahumbu swore an affidavit in support on the 20th July 2012 and further relies on grounds as appear on the face of the application. It is stated that by their pleadings and oral evidence in court, the plaintiffs admitted that they are not in possession of the suit land and were not even at the commencement of the suit.

The application is opposed by a replying affidavit sworn on the 16th February 2012 by the second plaintiff. On the onset, this court was informed that the case is partheard before Justice Emukule J, and substantial evidence had been taken.

2. For the applicant, it is submitted that the suit seeks to determine the issue of adverse possession of the plaintiffs upon the defendants land parcel. It is on record that the defendant took possession of the suit land in 2004 and is in occupation since. As such, counsel for the defendant submits that there is no need to proceed with hearing of the case as that translates to waste of court time. The court is urged to allow the application.

3.The Respondents/plaintiffs have objected to the grant of the orders sought. It is submitted that by the time this originating summons was taken out on the 16th April 2013, the plaintiffs were in possession of the suit land. It is submitted that the plaintiffs took possession in 1982 upto 2004 when they were evicted but got back possession by 2007.

It is also submitted that an order of *status quo* was issued by the court on 29th November 2009. At this time, it is submitted, the plaintiffs were in possession but also the defendant had invaded part of the land.

With these allegations and counter allegations, it is the respondents submission that the case should proceed to full hearing.

4. Ms. Magana Advocate for the applicant reiterated that as at 29th November 2009 when order of status *quo* was granted, the defendant/applicant was in possession and is up to date. On the same breath, the plaintiff's claim to be in possession. The court has considered the application and arguments by both counsel.

5. For an order of entry of judgment on Admission to be issued, the court must satisfy itself that the admission by the party against whom judgment ought to be entered has expressly and equivocably admitted the claim, and that there is no room for guess work. This is a claim on adverse possession of land.

Each party claims to be in occupation. Status *quo* as at 29th November 2009 is in dispute. The case is partheard. From the court proceedings, three plaintiff witnesses have testified. The last time the case was in court for hearing was on the 13th January 2012. This application was filed on the 20th July 2012.

Needless to say, the delay in prosecuting the application has caused a lot of delay in the finalization of the case.

6. For summary judgment to be granted, the court must be satisfied that the matter is plain and obvious and where it is not, a party is not to be deprived of his right to have his case tried, if necessary where there has been discovery and oral evidence. Where a party shows as *bonafide* triable issue, he must be allowed to attend the case without conditions – See **Industrial and Commercial Development Corporation vs Daber Enterprises Ltd (2000) I EA 75**.

Where a *bona fide* defence and triable issues have been disclosed, the court has no discretion to exercise in regard to the defendants or plaintiff's right to prosecute or defend. See **Momanyi vs Hatimy and Another 2003) 2 EA 600**.

7. For the defendant to be entitled to Judgment on admission such admissions must be plain and clear, and there should be no room for doubt. The proceedings in the present case do not portray circumstances of clear and plain admissions.

The court would be doing an injustice to the plaintiffs if it were to allow the application that would in effect lock out the plaintiffs from the seat of justice. That by all means would be a traversity of justice.

For those reasons, the application dated 20th July 2012 is disallowed as being without merit.

The Respondents shall have costs of the application.

8.It is so ordered.

Dated, signed and delivered in open court this 14th day of July 2016

JANET MULWA

JUDGE