



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**CIVIL CASE NO. 688 OF 2012**

**IN THE MATTER OF SECTION 37 AND 38 OF**

**THE LIMITATION OF ACTIONS ACT,**

**CAP. 22, LAWS OF KENYA**

**AND**

**IN THE MATTER OF ORDER 37 RULE 1(a)(g), RULE 7, RULE 14**

**OF THE CIVIL PROCEDURE RULES CAP. 21, LAWS OF KENYA**

**AND**

**IN THE MATTER OF LAND PARCEL NO.**

**NANDI/KAMOBO/358 AND NANDI/KAMOBO/1056**

**AND**

**IN THE MATTER OF CLAIM FOR OWNERSHIP AND ADVERSE**

**POSSESSION OF THE LAND PORTION MEASURING**

**1.5 AND 2.0 ACRES RESPECTIVELY**

**AND**

**IN THE MATTER OF THE ESTATE OF AZENGA MAKENZI – DECEASED**

**AND IN THE MATTER OF AN APPLICATION**

**BETWEEN**

**TIMOTHY ATAMBA ABOKI.....PLAINTIFF**

**VERSUS**

**ELIZABETH MMBONE MUSA.....1<sup>ST</sup> DEFENDANT**

**BENSON TOY MMBULIKA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**PLAINTIFF'S CASE**

1. **Timothy Atamba Aboki** (*hereinafter referred to as the plaintiff*) has come to this court by way of originating summons against **Elizabeth Mmbone Musa** and **Benson Toy Mmbulika** (*hereinafter referred to as the defendants*) Widow and son to **Musa Azenga** (*hereinafter referred to as deceased and the seller or vendor*) claiming to have acquired ownership to title of the portion measuring 1.5 acres of land parcel No. Nandi/Kamobo/358 and 2.0 acres of land No. Nandi/Kamobo/1056 through adverse possession. The plaintiff prays for the determination of the following issues:

*a. Whether a declaration that the plaintiff herein is the rightful owner of suit parcels No. Nandi/Kamobo/358 measuring 1.5 acres and Nandi/Kamobo/1056 measuring 2.0 acres on the grounds that the plaintiff herein bought the suit parcels for value and paid the full amounts and has as well been in occupation and possession of the suit parcels openly, peacefully, continuously and actively of the said portions measuring 1.5 acres and 2 acres since 15<sup>th</sup> March, 1982 should issue.*

*b. Whether an order that the plaintiff should be registered as the proprietor of the portions measuring 1.5 acres land parcel NANDI/KAMOBO/358 and in place of the defendants should issue*

*c. Whether an order that the plaintiff be registered as the sole proprietor of the portion measuring 2.0 acres NANDI/KAMOBO/1056 should issue.*

*d. Whether an order restraining the defendants by themselves, agents, workers and or employees from interfering in any manner with the applicant's quiet enjoyment and occupation of the said portion of land measuring 1.5 acres and 2.0 acres respectively should issue*

*e. Who should pay costs.*

2. The summons is based on the affidavit of Timothy Atamba Aboki whose import is that after the sale of both parcels and the issuance of consent to transfer to the plaintiff from the seller, **one Musa Azenga**, ID 4358810/67 of P. O. Box 6, Kapsabet who is now deceased moved to Matunda in Uasin Gishu District with his family including the defendants where they have lived since 1982 and that the plaintiff paid the purchase price in full and took the transfer forms to the Lands office at Kapsabet to effect the transfer but all the said documents were misplaced and eventually got lost and he did not have copies of the same and that to date, the land parcels have never been transferred and registered in the names of the plaintiff herein as his efforts to do so have been in vain.

3. The defendants eventually took advantage of the fact that the plaintiff has not registered the land parcels in his name to commence succession proceedings in Eldoret High Court Succession Cause No. 132 of 2005.

4. The defendants proceeded to have land parcel No. NANDI/KAMOBO/358 registered in their names on 15<sup>th</sup> February, 2010 after misleading the court by completely omitting parcel NANDI/KAMOBO/1056 measuring 2.0 acres from the lists of assets registered in the names of the deceased but jointly failed to disclose to the court that fact that the applicant had purchased the whole of parcel No. NANDI/KAMOBO/358 measuring 1.5 acres and NANDI/KAMOBO/1056 measuring 2.0 acres and was therefore a creditor of the deceased. The defendants chose to transfer NANDI/KAMOBO/358 and had it registered in their names after which they moved back in October, 2010 and started fencing and destroying blue gums and cypress tree on the said parcel.

5. The plaintiff has developed the said parcels NANDI/KAMOBO/358 by putting up a permanent brick house planted blue gums and cypress trees and has fenced off the place using barbed wire and posts. That on Nandi/Kamobo/1056 measuring 2.0 acres, he has also substantially developed it by planting blue gum trees, cypress and indigenous trees as well as napier grass.

6. That in November, 2010, the defendants destroyed a store that the plaintiff had put up in Nandi/Kamobo/358, uprooted fencing posts and demarcated the land from Nandi/Kamobo/1056. The defendants are wasting the applicant's property in the defence that they are the registered owners while the same was done under non-disclosure of material facts to court.

7. The plaintiff states that the transfer of the suit land parcel Nandi/Kamobo/358 to the defendants on 15<sup>th</sup> February, 2010 was irregular, illegal and void ab initio and that the rights of the applicant for quiet enjoyment of his property that was legally acquired have been and continued to be infringed by the defendants.

#### **DEFENDANTS' DEFENCE**

8. The defendants did not file replying affidavits to the originating summons but filed replying affidavits where their defence can be discerned.

9. The 1<sup>st</sup> **defendant** states that she is a farmer, widow to the late Musa Azenga to whom she got married in 1970 as 2<sup>nd</sup> wife when he had already bought land Nos. Nandi/Kamobo/358 and 1056 and registered as owner of L. R. No. Nandi/Kamobo/358 on 16.6.1976. His 1<sup>st</sup> wife was Esnas Amerika with whom they lived in Kamobo village with her eight (8) children. Because of misunderstanding in the home in 1982, her late husband went and bought Esnas Amerika land in Soy where she moved to and left her in his earlier land where they lived and got five (5) children. Her late husband had built her two houses on L.R. No. Nandi/Kamobo/358 and built for the children on L. R. No. Nandi/Kamobo/1056. They had planted tea on L. R. No. Nandi/Kamobo/358 and eucalyptus trees on L. R. No. Nandi/Kamobo/1056. Her husband died on 13.10.1997 and according to Luhya customs, he was buried at the 1<sup>st</sup> wife's homestead in Soy on L. R. No. Lugari/Likuyani/Block 1/47. According to the 1<sup>st</sup> **defendant**, her late husband had four (4) pieces of land:

*a. Lugari/Likuyani/Block 1/235.*

*b. Lugari/Likuyani/Block 1/47.*

*c. Nandi/Kamobo/358.*

*d. Nandi/Kamobo/1056*

10. After the death of her husband, they agreed to do succession so that each of them would get title deeds for the portions of land that he had shown them prior to his death. The family chose her and her son Benson Toy Mmbulika to be the administrators.

11. They filed a succession cause No. 132 of 2005 in which the 1<sup>st</sup> respondent, her son Benson toy Mmbulika, her co-wife Esnas Amerika and her son Joram Azenga were granted letters of administration intestate on 12.2.2007 and confirmation of the grant issued on 19.12.2008. However, the grant came out with an error where L.R. No. Nandi/Kamobo/1056 had been omitted. She returned the grant to court for correction and was thereafter issued with an Amended Certificate of Confirmation of grant on 18.10.2010. When her husband died in 1997, the family agreed to sell L. R. No. Lugari/Likuyani/Block 1/235 and used the proceeds to meet the funeral expenses. Her co-wife and her children remained with L. R. No. Lugari/Likuyani/Block 1/47 as the 1<sup>st</sup> respondent and her children remained with L. R. NO. Nandi/Kamobo/358 and L. R. No. Nandi/Kamobo/1056; but they have equal acreage. During the violence that followed, the 2007 general elections, she was forced to go to her sister's place in Soy leaving behind all her property. When she returned to her land following a government directive, she found her houses had been demolished and someone was living in what was her children's three roomed house. When she enquired who he was, he became hostile saying he was at his home.

12. She reported the matter to the chief who summoned Timothy Aboki who had trespassed into her land. They had three sittings at the chief's office on 2.4.2010, 30.4.2010 and 21.5.2010. During all the meetings, those who attended included: the chief, a village elder Andrew Bett; herself and her son Benson toy and Timothy Aboki. After presenting evidence, the chief ruled that the land was hers. In 2011, Timothy Aboki sued her in court claiming ownership of both L. R. No. Nandi/Kamobo/358 and L. R. No. Nandi/Kamobo/1056. He also forcefully harvests tea and cuts down trees without her authority.

13. She has the title deed for L. R. No. Nandi/Kamobo/358, but that for L. R. No. Nandi/Kamobo/1056 had not come out following a restriction filed by Timothy Atamba Aboki at the Lands office. She requests that the court assists her to evict Timothy Atamba Aboki from her pieces of land L. R. No. Nandi/Kamobo/358 and L. R. No. Nandi/Kamobo/1056 and stop him from harvesting tea and trees from these pieces of land to have Timothy Aboki pay her for the staying on and using her property; and harvesting and selling her tea and trees and costs and interests of this suit.

14. The 2<sup>nd</sup> defendant states that he is a farmer and resident of Kamobo village, Kamobo sub-location, Kamobo location, Nandi District. He is a son to the late Musa Azenga Makenzi. After his father's demise in 1997, he moved with his mother, Elizabeth Mmbone Musa to court in 2005 to petition the court for letters of administration which the court in Eldoret gave them. His father had among other property, land number Lugari/Likuyani/Block 1/Vihiga/235, Lugari/Likuyani/Block 1/Vihiga/47, Nandi/Kamobo/358 and Nandi/Kamobo/1056. Because his father had two wives and therefore, two families, it was agreed by court consent that Joram Okumu and Esinas Amerika, his step-brother and his step mother respectively, be given land number Lugari/Likuyani/Block 1/Vihiga/47 to administer on behalf of the 1<sup>st</sup> family and Elizabeth Mmbone Musa, his mother and him, Benson Toy Mmbulika were given Lugari/Likuyani/Block 1/Vihiga/235, Nandi/Kamobo/358 and Nandi/Kamobo/1056. They possess all the valid documents to prove their legal and rightful ownership of the land parcels.

15. The 2<sup>nd</sup> defendant, his mother, his siblings lived on land parcel number Nandi/Kamobo/358 and Nandi/Kamobo/1056 until the year 2007 when elections went sour and hell broke loose, they had to take refuge elsewhere but upon coming back in 2000, they found a stranger whom they later learnt was one Mr. Timothy Atambo Aboki occupying their land parcels. They tried to ask him how, when and why he was there but he could not give them audience. They sought the chief's intervention.

16. The chief and even the District Officer summoned them more than twice and on every occasion, Mr. Timothy Atambo Aboki insisted that he bought that land from their father. When asked to produce documents and witnesses to authenticate his claims, he could not do so. It has been a nightmare staying with a stranger, Mr. Timothy Atambo Aboki and his family on their land. They have experienced very hard times because he harvests their tea the one they economically depended on for their livelihood and the education of his siblings, he also stays in his cottage, built on land parcel number Nandi/Kamobo/1056, denying him his right of peace and privacy, cuts down their trees and even uses the police at the Kapsabet Police Division to threaten them.

17. They do not know Mr. Timothy Atambo Aboki, they are neither relatives nor friends. They have never transacted any deal concerning anything with him, and yet he is the sole cause of their sorrow and suffering. They ask the court to not only evict Mr. Timothy Atambo Aboki from their home, but to also make him pay for the inconveniences, the damages and the suffering he has caused them all this while

#### **PLAINTIFF' S EVIDENCE**

18. When the matter came up for hearing, the plaintiff; **PW1**, Timothy Atamba Aboki testified that the two parcels of land are his thus Nandi/Kamobo 358 and Nandi/Kamobo/1056 and that he bought them from Musa Azenga Son of Makenzi the registered proprietor. He produced the Agreement as P. Exh.1.

19. He went to the Aldai Land Control Board in 1982 and obtained the prerequisite consent. He produced the Minutes of the meeting of the Land Board as P. Exh.5 when consent was given for transfer. He referred to Minute No.400/82 in respect of Nandi/Kamobo/1086 and Minute No.401/82 for Nandi/Kamobo/358 wherein consent was given to transfer. He did not transfer because he was very busy and his family was already putting up on the land having taken possession in 1982 and has been in occupation for 28 years until 2007 when he was temporarily evicted due to post election violence in which his property was burnt. He produced a photo of his burnt permanent house. He had two houses, one for himself and one for his children.

20. During post-election violence in in 2007, people went and surrounded his house but he managed to run away. He was assisted by the Red Cross and became an Internally displaced person. On return, he found the defendant in his land having entered in 2010 which fact made him report to the police.
21. However, he was summoned by the chief who asked the plaintiff to produce the documents but the plaintiff could not as everything was burnt in the house and that the agreement was with the Advocate.
22. He produced a photo of the house he constructed in 1984 as P. Exh.9. He showed the photo of the tea planted in 2000 which he takes the tea to Tea Estate. The Tea is in both parcels of land thus Nandi/Kamobo/ 358 and Nandi/Kamobo/ 1056. He plucks in 1056 while the 1<sup>st</sup> Defendant plucks in 358, against a Court Order. He has also planted maize in Nandi/Kamobo/ 1056. The Chief wrote to the Ministry that the Tea was the plaintiff's.
23. He was not told that the defendant had done succession but when he went to Lands Ministry, he was surprised that the Land was transferred. He placed a caution on the parcel of land. The caution is dated 7/3/2011
24. He went to the Chief who referred him to the Agricultural Officer. He prays that he be allocated the land. His wife was buried on the land. He prays for the orders in the originating summons and for costs and interest.
25. *On Cross-examination by M/s. Mmbone*, she states that she bought Land from Musa Azenga whose wife was Ezinas Azenga. He did not process title because he thought that there would be no objection since he trusted Azenga
26. **On Re- examination by Nyachiro**, he states that the Defendant entered the Land on one Saturday in 2011, when the plaintiff was in Church as he worships at the Seventh Day Adventist Church.
27. **PW2, Simeon Kiptabot Arap Too** states that he knows the Plaintiff and this case as he stays at Kamobo and his land is next to the plaintiff's. His parcel of land was Nandi/Kamobo/1054 but was subdivided into Nandi/Kamobo/1056 and Nandi/Kamobo/358. He sold Musa Azenga land registration No. Nandi/Kamobo/1056 and Nandi/Kamobo/389. Musa Azenga sold the land to Timothy Aboki.
28. He states that he knew the wife of Azenga before she died. Musa Azenga had one wife called Esnas Amerika. Mr Azenga had two houses thus a main house and a kitchen wherein he resided in the main house. He states that he does not know the Defendant and that she is not the wife of Azenga. He knows that the plaintiff bought the land from Musa Azenga.
29. The plaintiff has planted trees, tea and maize. He constructed a house that was torched during clashes. He saw the destroyed houses of plaintiff. He confirms that the house in the photo belongs to plaintiff and that the plaintiff has stayed in the parcel of land for more than 30 years. According to the witness, Musa Azenga went to Soi with his family. The defendant went to the land approximately 3 years before PW1'S testimony. The plaintiff called Elders to determine the dispute when the defendant went onto the land. On the Land, there are about six people that he does not know in occupation. He told people that the land has a case.
30. **PW3**, Kiptanui Chepkwony states that he knows the Plaintiff since 1982 when he bought Musa Azenga's land. Musa Azenga stayed with Simeon Kiptabot Arap Too and his wife until the wife died. He knew that Azenga had one wife thus Eznas Azenga. He does not know any other wife. He was a witness in the land agreement for the plaintiff but he does not have the agreement as It burnt in 2007 during clashes. The plaintiff's wife and child were buried on the land. There is a burnt house and an existing house. There is a lady staying in a house constructed in 2010.
31. There is a house constructed by Salim, a buyer. It was put up after 2010. The plaintiff has planted trees, tea and connected power. He did all the improvements.
32. **On Cross examination by Mbone** he states that he was present when Azenga sold land to the plaintiff and that he is the second witness in the agreement. The agreement was burnt in the house. The house was burnt in post-election clashes.
33. **PW4** Raymond Tirop Tanui **States** that he lives in Kapsabet. He is a Senior Clerical Officer at Kapsabet lands Office. His work is to prepare agenda and Minutes of the Land Control Board and he does attend Land Boards and has worked for 9 years. There are minutes for this case for 17/3/1982 being minute No.400/82 in respect of Land No.1056(Nandi/Kamobo) which was a transfer. Consent was given to Musa Azenga to transfer the whole parcel of two acres to Timothy Atamba Aboki with the consideration of Kshs.14,000/=. Minute No. 401 was also for a transfer. Consent was given to Muza Azenga to transfer to Timothy Atamba Aboki. The owner of the Land does a search to ensure that the land is clear. In this case, there was not caution. Minute No. 401/82 consideration was Kshs. 11,000 and Minute No. 400/82 was Kshs. 14,000.
34. **PW5** Esther Jepkoech **States** she has lived and is married at Kamobo in Nandi County for many years. Moreover, she is the village elder.
35. She knows Timothy Atamba Aboki as he moved to Kamobo in 1982 in the land sold by Musa. Musa bought the land from Simeon Too. Timothy Atamba has been staying at Seremi but was also staying on the suit land since 1982 where he had constructed. He had a wife and children. His wife died on the parcel of land and was buried on the land. She knows Elizabeth Mmbone Musa. She came to know her in 2011 because she used to collect milk from the home of this witness. This witness asked her who she was and she said that she was the wife of Musa. The land belongs to the plaintiff. The defendant entered the land in 2011.

#### **DEFENDANT'S EVIDENCE**

36. **DW1**, Elizabeth Mmbone Musa States the two suit parcels of land, Nandi/ Kamobo /358 and Nandi/ Kamobo/1056 are her duly acquired property through transmission. She produced the title deed for Nandi Kamobo/358. She produced the green card for Nandi/ Kamobo /1056.

37. She produced the certificate of official search that shows that the land Nandi/ Kamobo/ 1056 is registered in her name but has a restriction. She states that her husband did not sell the land. The agreements are fake because she knows her husband's signature.

38. She produced the certificate of confirmation of grant dated 18.10.2010. The title was issued on 15.2.2010 after the succession cause. Her husband did not go to the land board. The houses in the picture are not on the land according to 1stg defendant. The land has no grave. When the court visited the ground, there was no house.

39. According to the 1<sup>st</sup> defendant the agreement is fake and fraudulent and that the date is not proper. The deceased did not transfer the land to the plaintiff and did not go to the land board. The signature on the agreement was not his.

40. **DW2** Andrew Kiprop Bett States from 2010, he has been the village elder and was in a committee of the chief that heard this land matter. Elizabeth Mmbone and Benson Toy Mbulika went to the chief's office. Their complaint was that someone was living in their land. The committee was appointed to confirm the dispute. The defendants gave them the documents. They wrote to the plaintiff to respond to the allegations that he was a trespasser. He claimed that the land was his but did not have the documents then. He asked for time to avail the documents. He was given the hearing. When he returned, he said that the documents were not available as they had been burnt. The chief gave him time to go to Lands and District Officer to get copies. He was given three (3) weeks, thereafter, he said he had not obtained the documents. The plaintiff came to court directly and that was the end of his participation.

41. On cross- examination he states that he was 15 years when the agreement was signed and does not know what happened to the Azengas and when shown the agreement he confirms that it was signed by the plaintiff and Mr. Azenga.

#### **SUBMISSIONS BY THE PLAINTIFF**

42. The plaintiff submits that in the instance case, the Land Control Board consent was issued within the legally prescribed period. As he was issued only three days after the sale agreement and the application was made by the vendor. The two parcels of land being agricultural land, consent had to be obtained from the Land Control Board before transfer could be effected. In the present suit, the consent was obtained before the lapse of six months as envisaged in Section 8(1) of the Land Control Act this was as per the Aldai Land Control Board Minutes dated 17.3.1982.

43. In the circumstance, the plaintiff submits that the sale agreement between the plaintiff and the vendor Muza Azenga (deceased) was binding and enforceable since the consent had been obtained within the prescribed period.

44. The plaintiff cites the case of David Sironga, where it was held that the following five fundamental conclusions, are self-evident and flow directly from the above express provisions of the Land Control Act:

**(a) All transactions involving agricultural land situate in a Land Control area are void for all purposes unless the Land Control Board within that Land Control area has sanctioned them.**

**(b) Even declaration of a trust in agricultural land situated in a land control area is not spared, without consent of the Land Control Board, it is also void.**

**(c) Consent of the relevant Land Control Board must be obtained within six months of the making of the agreement relating to agricultural land.**

**(d) The High Court however has power, for good reason, to extend the period for applying for consent.**

**(e) Where the transaction is ultimately void for lack of consent, any money or consideration paid by a would-be purchaser is recoverable as a debt.**

**(f) It is a criminal offence punishable by imprisonment or fine or both to pay or receive payment in respect of a void transaction or to take possession or remain in possession of land which is the subject of such void transaction.**

45. The reason behind the above stringent provisions of The Act is to be found, in the rationale of the land control legislation. The same applies in the instant suit.

46. The plaintiffs further cite the case of *Leonard Njonjo Kariuki Vs Njoroge Kariuki alias Benson Njonjo, CA No. 26 of 1979*, court affirmed that once the land in question was proved to be agricultural land within a controlled area, transactions affecting it were controlled transactions which in law became void in the absence of consent from the Land Control Board.

47. The plaintiff submits that the defendant in her evidence disputed the sale agreement stating that the signature of the deceased was forged but there was no evidence produced in court by the defendant to prove the said allegations of forgery and she was not present at the time of the execution of said sale agreement. The plaintiff together with the deceased appeared before the Aldai Land Control Board and a consent was issued even the consideration stated in the said sale agreement was clearly stated in the Minutes hence the signature was authentic and was properly appended to the documents. The defendant did not file a counterclaim to claim the said parcels of land.

48. The plaintiff objected to the registration of the title deeds since the defendant was full aware that the plaintiff was in occupation and did not inform him to be included in the succession matter.

49. He refers to the case of Mwangi & Another Vs 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 Vs 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.

50. The plaintiff submits that he has been staying peacefully on the parcel of land without any interference to since 1982 and his wife and children are buried on the said parcel of land and therefore is entitled to the land by virtue of being in adverse possession.

51. The plaintiffs pray that an order be issued that the plaintiff is the lawful owner of parcel L. R. NANDI/KAMOBO/1056 and L. R. NANDI/KAMOBO/358 and the title issued to the plaintiff be cancelled and new title deed be issued to the names of the plaintiff. It is the plaintiff submission that the defendant wants to use the succession to defraud him with his genuinely parcels of land. She concealed material facts to this court

### **SUBMISSIONS BY THE DEFENDANT**

52. The defendants submit that they are widow and son to the late Musa Azenga Makenzi respectively; and that they are not related in any way, either by blood or marriage, to one Timothy Atamba Aboki- the plaintiff in this case. That they are the legal and rightful owners of land parcels Number Nandi/Kamobo/358 and Nandi/Kamobo/1056 by way of transmission after acquiring the confirmation of grant by the High court at Eldoret in the year 2008, following Musa Azenga Makenzi's demise in the year 1997.

53. The confirmation of the grant of administration letters, their original Title-deed, the official searches and green cards are prima facie evidence that they are the bona fide owners of land parcels Number Nandi/Kamobo/358 and Nandi/Kamobo/1056.

54. They have lived on the land parcels number Nandi/Kamobo/358 and Nandi/Kamobo/1056 continually since early 1970s to date, safe for the year 2008 when they vacated shortly following the post-election violence, only to come back and find one Timothy Atamba Aboki occupying their land and that Mr. Timothy Atamba Aboki's claim for ownership of Land parcel number Nandi/Kamobo/358 and Nandi/Kamobo/1056 is both unfounded and misguided.

55. He has demonstrated that he neither understands nor owns the suit land parcels by misquoting their measurements in acres. Contrary to Mr. Atamba's claim that the two land parcels measure 1.5 and 2.0 acres respectively, the irrefutable truth is that land parcel number Nandi/Kamobo/358 measures 0.9 ha., equivalent to 2.25 Acres whereas land parcel number Nandi/Kamobo/1056 measures 0.6 ha., equivalent to 1.5 Acres. The purported land sale agreement between Timothy Atamba Aboki and the late Musa Azenga Makenzi raises very serious doubts. This is because the signature thereof is clearly not Musa Azenga Makenzi's. The court can easily verify this by subjecting the signature in the 'land sale agreement' to scrutiny against the real Musa Azenga's signature in his Identity card copy.

### **ANALYSIS AND DISPOSITION**

56. I have considered the evidence on record and do find that the defendants; Elizabeth Mmbone Musa and Benson Toy Mmbulika are the registered proprietors of the suit parcel number Nandi/Kamobo/358 and No. Nandi/Kamobo/1056. The defendants were registered pursuant to amended certificate of confirmation of grant issued by hon Justice Philomena Mwilu, High Court judge as she then was on the 19<sup>th</sup> of October 2010 in respect to the estate of the late Musa Azenga wherein a grant had been issued on the 18<sup>th</sup> of October 2010 to Elizabeth Mmbone Musa and Benson Toy Mmbulika. In the amended confirmation of grant the parcels of land in dispute were to be transmitted to the defendants.

57. The parcel of land Nandi/Kamobo/358 was transmitted to the said defendants and certificate of title issued whilst No. Nandi/Kamobo/1056 was transmitted but title was not issued due to a restriction. In essence, according to the confirmation of grant issued by the High Court, the two properties were to be registered in the names of the defendants through transmission.

58. The plaintiff claims that while the defendants were processing their letters of administration and confirmation of grant he was already in possession and was just displaced violently due to the tribal clashes of 2007. The plaintiff has produced the agreement of sale of land between himself and Musa Azenga dated 15<sup>th</sup> day March 1982.

59. At the time of the agreement Mr. Musa Azenga was the registered proprietor of the two parcels of land measuring 3.5 acres in total for which the plaintiff paid Kshs. 25,000 on the spot and was allowed to take possession immediately on the signing of the agreement.

60. The parties agreed to sign the application for the consent of the land control board Aldai which they did and that as evidenced by the minutes of the 8<sup>th</sup> meeting of the Aldai Land Control board held in the district officers office the 17<sup>th</sup> March 1982 minute no 400/82 Nandi Kamobo 1056 which shows that the board deliberated on the issue of transfer of the said parcel of land and consent was given to an application by Musa Azenga to transfer the whole parcel of land of approximate Area 2.0 acres to Timothy Atambo Aboki in consideration of Ksh. 14,000.

61. Moreover, minute no 401/82 in respect of Nandi /Kamobo/358 indicates that consent was given to Musa Azenga to transfer the whole parcel of land aforesaid of approximate are 1.5 acres to Timothy Atambo Aboki in consideration of Ksh. 11,000. The transfer for the two parcels of land was not done but the plaintiff took possession. I have considered the evidence of PW1, PW2, PW3, PW4, and PW5 and do find that the fact that Mr. Timothy Atambo Aboki entered the land in the year 1982 is corroborated and that he was violently evicted in 2007 during the post-election violence. These witnesses state that the plaintiff bought the land from Musa Azenga who died in the year 1997. They

never saw the defendants until the year 2010.

62. I have seen the extract of O.B 2 of 31 December 2007 at 00.01 hours at Kapsabet Police station which shows that the plaintiff reported the burning of his house where his documents and those of his children were destroyed by the fire. When the matter was referred to the chief Kamobo location the plaintiff could not produce any document because the same had been burnt in the house. The document produced as Dex 13(a) is a letter from the chief Kamobo location to the Agricultural extension officer Kapsabet Division in respect of the damage of tea bushes on Nandi Kamobo/358 on 9/9/2014. The letter showed that the tea bushes belonged to the plaintiff.

63. The defendant's allegations that her husband went and bought land to the first wife in Soy in 1982 where she moved and the defendants remained in the suit properties is countered by the evidence of PW5, the village elder, Esther Jepkoech who lives in Kamobo. She appeared truthful and confirmed that she has lived at Kamobo for many years. According to PW5, the defendant entered the land after the land clashes of 2007. The claim by the defendants that Musa Azenga planted tea Bushes and eucalyptus trees on the land cannot be true otherwise it could have been mentioned in the agreement of sale. The plaintiff produced many photos but of importance is the photo marked as PEX 9 a photo of an old house constructed in the year 1984 which is the clearest evidence that in 1984, the plaintiff was in possession.

64. The defendants' allegation that the agreement is fake lacks any basis as the said agreement was relied upon by the Aldai land control board to issue the consent to transfer the two parcels of land and that **PW3**, Kiptanui Chepkwony the witness to the agreement states that Mr. Azenga signed the agreement.

65. The plaintiff's claim is based on the principle of adverse possession. Adverse possession is basically a legal principle applied where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, the period is twelve 12 years. The process starts by default or inaction of the owner. The essential requirement being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in **Section 7** of the Limitation of Actions Act, which is in these terms: -

***“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”***

66. The Limitation of Actions Act makes further provision for adverse possession at **Section 13** that:

***“(1) 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 (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.***

***(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land.***

***i. 3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”***

67. **Sections 37 and 38** of the Limitation of Actions Act stipulate that if the land is registered under one of the registration acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him. **Section 37** provides that: ***“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”***

68. Going back to the facts, it is not disputed that the defendants are the registered proprietors of the suit property, however it is a fact the plaintiff purchased the properties from Musa Azenga, the alleged husband of the 1<sup>st</sup> defendant and went to the extent of obtaining the consent of the land control board the Aldai District. However, he rested on his laurels by failing to execute a transfer and processing of the title. That notwithstanding, he immediately took possession of the land in 1982. When the proprietor died in 1997, the plaintiff had been in occupation for 15 years and when the court issued the letters of Administration on 18<sup>th</sup> October 2010 the plaintiff was already in possession of the suit property, having been in possession for more than 12 years after the death of proprietor.

69. The plaintiff has established that in 1984 he had constructed a house on the suit properties and that he also planted tea on the said land and therefore between 1982 to 1997 the registered owner was holding the property in trust for the plaintiff as he was already in adverse possession and that the property was not available for transmission to the defendants.

### **CONCLUSION AND AWARD**

70. The plaintiff therefore succeeds in his case and it is hereby declared that the plaintiff herein is the rightful owner of suit parcels No. Nandi/Kamobo/358 measuring 1.5 acres and Nandi/Kamobo/1056 measuring 2.0 acres on the grounds that the plaintiff herein bought the suit parcels for value and paid the full amounts and has as well been in occupation and possession of the suit parcels openly, peacefully, continuously and actively of the said portions measuring 1.5 acres and 2 acres since 15<sup>th</sup> March, 1982.

71. The court does therefore order that the plaintiff be registered as the proprietor of the portions measuring 1.5 acres land parcel NANDI/KAMOBO/358 and in place of the defendants. That the honorable court does also order that the plaintiff be registered as the sole proprietor of the portion measuring 2.0 acres NANDI/KAMOBO/1056.

72. There be an order restraining the defendants by themselves, agents, workers and or employees from interfering in any manner with the applicant's quiet enjoyment and occupation of the said portion of land measuring 1.5 acres and 2.0 acres respectively.

73. **Costs of this summons be borne by the defendants.**

**Dated and delivered at Eldoret this 7<sup>th</sup> day of May, 2018.**

**A. OMBWAYO**

**JUDGE**