

**NOT FOR PUBLICATION**

NO. 26120

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'ITHERESA L. PREKASKI as successor in interest to MAUNA KEA  
AGRIBUSINESS CO., INC., Plaintiff-Appellee,

v.

NAKAIKUANA (k), also known as NAKAIKUAANA (k)  
Et al., Defendants,  
andJOSEPHINE HELELANI RABAGO and SUSAN N. BROWN  
Defendants-AppellantsAPPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT  
(CIVIL NO. 03-1-0067)NORMA T. YARMA  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

2005 OCT 25 AM 9:05

FILED

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Fujise, JJ.)

Defendant-Appellant Susan N. "Kamalii" Brown (Susan) and Defendant-Appellant Josephine H. Rabago<sup>1/</sup> (Josephine) appeal from the Final Judgment entered on September 9, 2003, by Judge Greg K. Nakamura, concluding that Plaintiff-Appellee Mauna Kea Agribusiness Co., Inc. (MKAI), then was the owner in fee simple of those portions of Land Patent Grant 3635 to Kealohaai, situated at Waiomao, Ka'u, Hawai'i, being LOT 2 within tax map key (TMK) (3) 9-4-4-25, LOT 3 within TMK (3) 9-4-4-23, and LOT 5 within TMK (3) 9-4-4-22. We affirm.

On March 5, 2003, MKAI filed a Complaint to establish its fee simple title to specified real estate. The Complaint alleged, in relevant part,

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<sup>1/</sup> The answer was filed by "Josephine H. Rabago". The opening brief was filed by "Josephine Helelani (Puahi) Rabago". We assume the two names apply to one and the same person.

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(a) H. K. Kamalii, by Deed dated May 4, 1894, recorded in Liber 146, Page 358, conveyed to C. Meinecke, after which title to LOT 2 within TMK (3) 9-4-4-25, LOT 3 within TMK (3) 9-4-4-23, and LOT 5 within TMK (3) 9-4-4-22, vested by mesne conveyances and corporate mergers in [MKAI].

On April 21, 2003, Josephine filed an answer stating that she "hereby claims under the Declaration by the Court as legal heirs of the Royal family hereby claims that any or all lands claim under quiet title or fee simple are hereby declared to be land that has been leased to the defendants by the Royal heirs. We here declare that not only by declaration of the court but also by genealogy[.]" (Exact quotation.)

On May 19, 2003, Susan filed an answer stating that she "denies, or has insufficient knowledge to admit or deny the allegations of the Complaint and leaves [MKAI] to prove at trial each and every allegation in its Complaint." (Exact quotation.)

Numerous other defendants filed answers stating that they (1) deny, or have insufficient knowledge to admit or deny, the allegations in the Complaint, and (2) claim a fee interest in the property by intestate succession through Henry Kamalii and/or deeds, wills, or other conveyances of record.

On June 30, 2003, MKAI filed a motion for summary judgment claiming (1) record title pursuant to the conveyance by H. K. Kamalii in 1894 to C. Meinecke, after which title vested in MKAI, and (2) title by adverse possession pursuant to "facts showing that [MKAI] or its predecessors, from as early as the 1950's to the 1970's, and lessees of [MKAI], or its predecessors, from the 1970's to 1996, openly, notoriously, continuously, and exclusively used the land for pasture."

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The motion for summary judgment by MKAI was supported by (1) the declaration of Sandra Nakano, an employee of Title Guaranty of Hawaii, Incorporated, in support of the paper title claim; (2) the declaration of Edward Andrade, Jr., a lifetime resident at Pahala, Ka'u, Hawai'i, in support of the adverse possession claim; and (3) the declaration of John C. Cross, Vice-President and Land Manager of MKAI, into which Seamountain-Hawaii Ranch Company, Inc., was merged on August 31, 1987, in support of the adverse possession claim.

On August 12, 2003, Judge Nakamura entered Findings of Fact and Conclusions of Law, and Order Granting Plaintiff's Summary Order Granting Plaintiff's Summary Judgment Motion that stated, in relevant part, as follows:

Land Patent Grant 3635 was granted to Kealohaai, after which title to those portions, being LOT 2 within TMK (3) 9-4-4-25, LOT 3 within TMK (3) 9-4-4-23, and LOT 5 within TMK (3) 9-4-4-22, vested by mesne conveyances in Luther R. Macomber, who conveyed by Deed dated October 9, 1862, recorded in Liber 16, Page 2, to four persons, one of whom was Luhia, who died intestate, whereupon title descended to her heirs, determined in 3<sup>rd</sup> Cir. Probate 382 to be her issue, one of whom was her son, HANALEI KAMALII (k), also known as HENRY KAMALII and H. KAMALII (k).

. . . .

To prevail on this claim, the evidence would have to show that H. K. Kamalii did not convey during life, and that title was still vested in him at death. By Deed dated May 4, 1894, recorded in Liber 146, Page 358, H. K. Kamalii, reciting that his father, HENERY (sic) KAMALII, was one of the heirs of Luhia, conveyed to C. Meinecke, after which title vested by mesne conveyances and corporate mergers in [Agribusness].

As a matter of law, the evidence establishes that paper title is vested in [MKAI].

The testimony of John C. Cross and Edward Andrade Jr. evidences that:

-- From as early as the 1950s to the 1970s, [MKAI] and its predecessors openly, notoriously, continuously, and exclusively used those portions of Land Patent Grant 3635, being LOT 2 within TMK (3) 9-4-4-25, LOT 3 within TMK (3) 9-4-4-23, and LOT 5 within TMK (3) 9-4-4-22, for

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pasture, and

-- From the 1970's to 1996, Richard P. Smart, and Kawaihae Ranch, Ltd. (lessees of Seamountain-Hawaii Ranch Company, Inc., a predecessor of [MKAI]), openly, notoriously, continuously and exclusively used those portions of Land Patent Grant 3635, being LOT 2 within TMK (3) 9-4-4-25, LOT 3 within TMK (3) 9-4-4-23, and LOT 5 within TMK (3) 9-4-4-22, for pasture.

Thus, even if there were evidence to support a title claim by anyone who filed an answer to the complaint or appeared at the summary judgment motion hearing, evidence of use of the land by [MKAI] and its predecessors for a period greatly exceeding the limitation statutes (1) establishes [MKAI's] title by adverse possession, and (2) bars a title claimant's action to recover possession from [MKAI].

On August 26, 2003, Susan filed an "Opposition to [MKAI's] Motion for Summary Judgment". In an accompanying affidavit she stated, in relevant part:

**Exhibit D** is the translation of the deed my great-great Grandfather supposedly signed.

(Remaining Exhibits contain references only)

4. I request that the court deny [MKAI's] Motion for Summary Judgment and schedule this matter for trial.

(I'm requesting additional time to pursue this matter at another level with proper Legal Representation)- Concerning the legality of the document and the signature of our descendant [sic].

(Emphasis in original.)

On September 9, 2003, Judge Nakamura entered Final Judgment in favor of MKAI.

On September 26, 2003, Josephine filed a notice of appeal. On October 8, 2003, Susan filed a Notice of Appeal. On August 24, 2004, this appeal was assigned to this court.

On January 27, 2005, MKAI filed a "Motion for Substitution of Plaintiff-Appellee" based on the facts that, on July 2, 2004, MKAI merged with C. Brewer and Company, Limited, and, by Quitclaim Deed dated November 30, 2004, C. Brewer and

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Company, Limited, conveyed its interest in the real estate at issue in this case. The requested substitution was approved on February 25, 2005.

Josephine and Susan challenge the conclusion "that paper title had vested in [MKAI] to the subject real properties, that [Susan's] predecessor in interest [H.K. Kamalii] had conveyed all of his interest by Deed dated May 4, 1894, and that he did not have any after acquired interest in the lands that passed on to [Susan]." (Emphasis in original.) They contend that "[a] genuine issue of material fact exists that the Deed on its face states H.K. Kamalii was only conveying his interest at that time. Other interests in the real property belonged to his siblings who subsequently died intestate and without issue. The Deed makes no mention of after acquired interests in the subject real property."

Josephine and Susan also challenge the decision that MKAI had obtained title by adverse possession. They contend that "there was no competent evidence presented in favor of this portion of the summary judgment motion." They argue that the court erred "in considering the testimony of John C. Cross and Edward Andrade, as well as the unsworn and unverified documents including a Deed dated 1894 that was attached to the testimony of Sandra Nakano filed by [MKAI] in support of the motion for summary judgment." They assert that "the statements were not made under oath and, [sic] not based on personal knowledge and are incompetent hearsay and inadmissible."

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MKAI argues that this court's consideration of Josephine's and Susan's points on appeal is barred by the general rule that an issue not raised in the trial court will not be considered on appeal. Chuck Jones and MacLaren v. Williams, 101 Haw. 486, 498, 71 P.3d 437, 449 (2003). Susan responds that the appellate court at its option may notice plain error committed by the trial court below. Montalvo v. Lapez, 77 Haw. 282, 884 P.2d 345 (1994).

We conclude that neither party clearly understands the burden imposed upon the courts by Hawai'i Rules of Civil Procedure (HRCP) Rule 56(c) (2005). It states, in relevant part, "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As a result of HRCP Rule 56(c), this was the issue presented to the circuit court by MKAI's motion for summary judgment. Josephine and Susan were not required to raise it.

We conclude that Josephine and Susan do not understand that the Rules of the Circuit Courts of the State of Hawai'i (RCC) Rule 7(g) (2005) permits declarations in lieu of affidavits. It states as follows:

(g) Declaration in Lieu of Affidavit. In lieu of an affidavit, an unsworn declaration may be made by a person, in writing, subscribed as true under penalty of law, and dated, in substantially the following form:

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I, (name of person), do declare under penalty of law that the foregoing is true and correct.

Dated:

\_\_\_\_\_  
(Signature)

In this case, the declarations of Sandra Nakano, Edward Andrade, Jr., and John C. Cross all satisfy the requirements of RCC Rule 7(g). Thus, even assuming MKAI's paper title is incomplete, its claim to title by adverse possession is complete and valid under HRCF Rule 56(c).

Accordingly, we affirm the Final Judgment entered on September 9, 2003, that Plaintiff-Appellee Mauna Kea Agribusiness Co., Inc., then was the owner in fee simple of those portions of Land Patent Grant 3635 to Kealohaai, situated at Waiomao, Ka'u, Hawaii, being LOT 2 within TMK (3) 9-4-4-25, LOT 3 within TMK (3) 9-4-4-23, and LOT 5 within TMK (3) 9-4-4-22.

DATED: Honolulu, Hawai'i, October 25, 2005.

Gerard D. Lee Loy,  
on the briefs, for  
Appellant Susan N. Brown.

Josephine Helelani Rabago,  
on the brief, Appellant *pro se*.

Donald E. Scearce,  
on the answering brief to  
Appellant Brown's opening brief,  
for Appellee Mauna Kea  
Agribusiness Co., Inc.

Philip J. Leas, Stacey Kawasaki  
Djou, and W. Keoni Shultz (Cades  
Schutte), on the answering brief  
to Appellant Rabago's opening  
brief, for Appellee Teresa L.  
Prekaski, as successor in  
interest to Mauna Kea  
Agribusiness Co., Inc.

  
Chief Judge

  
Associate Judge

  
Associate Judge