REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 80 of 2003

(Being an appeal from the Ruling of Njeru Ithiga, SPM Meru delivered on 21st August, 2004)

NAHASHON NABEA ……..…..……. APPELLANT

VERSUS

MARGRET KANYIRI ……..…… RESPONDENT

JUDGMENT

This is an appeal from the decision of the court below (N.Ithiga, SPM) in which he gave judgment for the respondent against the appellant ordering the eviction of the latter from land parcel No.Kirimara/Kithima/Block 1/211 – (the suit land).

The appellant being aggrieved by that order has preferred this appeal listing seven (7) grounds out of which his counsel argued only six, dropping one which challenged an award for injuries which was clearly irrelevant.

Essentially the grounds challenge the decision of the court below on the basis that the respondent did not prove the case against the appellant; that the appellants exhibits were not considered; that costs were not prayed for yet they were awarded.

Before I consider these grounds, I must, as I am duty bound, reevaluate the evidence that was adduced in the court below in order to come to my own independent conclusion. When doing this I will be alive to the fact that the trial court had the advantage of seeing and listening to the witnesses, which advantage I lack.

In an amended plaint filed on 30th May, 2001 the respondent sought the eviction of the appellant from the suit land arguing that the two of them purchased land parcel No.Kirimara/Kithithina/Block 1/92 from Mutethia Cooperative in Timau. That the said Kirimara/Kithithina Bloc 1/92 was subdivided after the necessary consent was obtained from the Land Control Board.

Upon registration of the subdivision the respondent retained and was registered as the owner of the suit land, while the appellant was registered the owner of Kirimara/Kithithina Block 1/210.

The defendant further deponed that the appellant continued, after the subdivision and registration, to occupy the suit land. These averments were totally denied by the appellant in his statement of defence asserting that there was confusion and mix-up in the registration of the titles, with the suit land being

registered in the respondent's name instead of his name. That on the ground he is occupying the suit land while the respondent is occupying Kirimara/Kithithina/Block 1/210. That the respondent has ignored directives from the lands office to surrender her title for rectification together with that held by the appellant.

The court below considered these arguments and was persuaded that the respondent was the rightful owner of the suit land hence the orders being appealed against.

It is clear and there is no dispute that the appellant and respondent held one undivided parcel No.Kirimara/Kithithina/Block 1/192 which they purchased together. After the subdivision each one of them was bound to get his/her rightful share.

The only issue that fell for determination before the court below is the share each one of the two are entitled to. From the record there is evidence that the two parcels are of different sizes and measurements.

The suit land is said to be 1.40 hectares (or approximately 3.7 acres) while Kirimara/Kithithina/Block 1/210 measures 1.20 hectares (or approximately 3 acres). It was the testimony of DW1 Gibson Kihuga, the Land Registrar, Meru that these measurements should represent the position on the ground. The size of the parcels is important as it is contented that the parties made different contributions in the purchase of the original parcel.

It is not clear from the evidence how much (in monetary terms) was contributed by each party. While the respondent in her testimony mentions no sum of money, the appellant on his part states that he brought the parcel at Kshs.12,000/=.

But he, like the respondent, maintains that his share of the parcel of land is 3 acres representing 6/13 shares while that of the respondent is 3 ½ acres representing 7/13 shares. Whereas the appellant is categorical that the suit land is 3 acres and therefore the smaller of the two hence belonging to him, the respondent is of the firm position that the suit land measures 3 ½ acres and belongs to her by virtue of the shares she bought.

Two factors have persuaded me that the suit land is the bigger of the two and therefore belongs to the respondent whose shares was 7/13. The original parcel of land was held by the parties in common, subject to each party's contribution. It follows that the party who contributed more obtained and was entitled to a large portion than that of the party whose contribution was less.

Consequently, therefore the respondent having established that her contribution was more than that of the appellant her share on the ground reflected that ratio, namely that the larger portion of the sub-division was hers, and by logical implication the remainder is the appellant's. The appellant in his grounds of appeal has contended that there is no evidence that the larger portion is the suit land. There is sufficient evidence to the contrary view. Starting with the title deed (D.Exh.3), a letter from the Land Registrar, Meru, (D.Exh.1) and the Green Cards (Exh.1 A and Exh.1B) all confirm the position that the suit land is bigger.

The mutation, though not signed by the respondent, illustrates graphically the relationship of the two parcels in terms of their respective measurements. The second factor is in respect of a suit brought by the appellant in the lower court to evict the respondent's sister, being the PMCC No.Meru 22 of 1994. In that plaint the appellant averred that the respondent's sister, Gachoga Jaban had trespassed on his land No.Kirimara/Kithithina/Block1/210.

I found it necessary to call for the file to ascertain for myself the current status. I confirm that the matter is still pending finalization, 13 years since it was filed, with the appellant as the only witness who has testified. In his testimony before that court the appellant stated that he only occupies 2 ½ acres as the respondent's sister had for 3 years worked on ½ acre of his land.

He confirmed before the court that his entire land is fenced with barbed wires but the respondent's sister had encroached on the fenced area. Although no two parcels of land are similar, the appellant ought to accept the reality that he has received according to what he contributed. It is not in doubt that the appellant, in the absence of the respondent or her sister brought Surveyors to the land as a result of which the subdivision was carried out. He was personally present and cannot cry foul now. The letter written by the lands office to the parties requiring them to surrender their titles were not based on the facts pertaining to the acquisition of the original title by the parties. Besides, the land officials did not go to the suit land physically to satisfy themselves as to the respective shares of the parties. I can even conclude that they acted on what the appellant told them about the mix-up in issuing the titles.

After all it is the appellant who had dealt with them previously. For these reasons I find no material placed before me in this appeal to warrant my interference with the decision of the lower court.

It is ordered that this appeal be and is hereby dismissed with costs to the respondent. It is further ordered that the appellant will vacate Kirimara/Kithithina/Block/21 within 60 (sixty) days from the date of this order.

Regarding costs, I find nothing wrong with the lower court awarding costs, even though the respondent did not ask for the same. Costs are discretionary.

DATED AND DELIVERED AT MERU THIS 22ND DAY OF JUNE, 2007

W. OUKO

JUDGE