REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Appeal 483 of 2001

GRACE NJOKI…….……. PLAINTIFF

VERSUS

LEAH WAITHIRA MWANGI…….…….. RESPONDENT

J U D G M E N T

On 1/8/2001 the appellant herein, Grace Njoki, moved to this court, by way of an appeal, against the judgment of L. Nyambura, Learned Resident Magistrate, Muranga, in Civil Case No. 25 of 1991, which judgment was delivered on 28/8/01, on the following 8 grounds of appeal:

1. The learned Resident Magistrate erred in law in failing to comply with the whole of the provisions of Order 20 rule 4 of the Civil Procedure Rules, hence occasioned a gross miscarriage of justice on the part of the appellant.

2. The learned Resident Magistrate gave a judgment that excluded from consideration vital evidence from the parties.

3. The lower court unnecessarily and erroneously relied on the evidence of surveyors who were guided by registry index map that was not authority on the boundaries

4. The Learned Resident magistrate came to a wrong decision in fact in concluding that the appellant had trespassed onto the Respondents plot whereas the Respondent had admitted that the plot, as shown to the appellant before the survey work and the surveyor who visited the scene admitted, that the area the appellant had put up her structure was 50 feet wide by 100 feet long.

5. The lower court further failed to take into account the evidence at the scene that on the ground, Plot Nos; 3097; 3096; 3095; and 3094 were all 50 feet wide whereas on the survey map it was 46.7feet making the plot smaller than the area purchased. In this regard the courts finding for the Respondent was incorrect and there was a miscarriage of justice.

6. The lower court failed to find against the Respondent for failing to follow the already established mode of occupation by the appellant when carrying out the survey work and reducing the actual plot sizes by changing measurements from the imperial to metric system.

7. The Learned Magistrate erred in fact in not finding that it was the Respondent who was encroaching on the appellants plot by creating boundaries which went over the appellant's plot.

8. The trial Magistrate's judgment was contrary to, or in disregard of material evidence and a miscarriage of justice was occasioned.

Reasons wherefore the appellant prays that this appeal be allowed, the judgment of the trial Magistrate

court be set aside, and the suit be set aside with costs.

From the records in the lower court's file the following facts – matters – are undisputed. That on 29.12.987, the appellant and the respondent herein, entered into a Sale Agreement whereby the appellant agreed to buy and the Respondent agreed to sell Plot No. 3 comprising 0.1 acres from a piece of land known as Loc.14/KIRU/2050 at an agreed price of KShs.50,000/- only. Pursuant to the above Sale Agreement, the appellant was shown his plot Loc.14/KIRU/3097 which is bordering Parcel No. 14/KIRU/3098 belonging to the Respondent. On or about November 1990, the Appellant is alleged to have trespassed on the Respondent's plot by constructing a building over 2/3 of the Respondent's plot and despite demand and intention to sue, the appellant refused to stop the construction and hence this suit.

In her defence, the appellant stated that by the said agreement of 29/12/87 the Respondent agreed to sell and the appellant agreed to buy 0.1 acres [0.04 hectares] to be excised from parcel of land loc.14/KIRU/2050. Then the appellant proceeded to subdivide the said land. During the transfer of the portion excised the Plaintiff unlawfully and fraudulently transferred to the appellant 0.036 of a hectare. Then a survey was carried out by the Respondent in about 1992 and made out the plots. The survey map came after the event – the sale and the appellants possession of the plot sold and shown to the appellant. That is why the lower court concluded that the appellant had trespassed on the Respondent's plot No. 3098 since the boundaries were superimposed on the existing position on the ground.

During the proceedings at the lower court, the Surveyor went to the disputed land, as ordered by the court, and found that the plots on the ground were all 50 ft wide by 100ft. long. But on the map, which the Surveyor was using, the appellant's plot, after conversion showed 46.7ft. wide. This meant that on the map the plot was smaller than agreed and sold between the parties.

On the basis of the above undisputed facts, and the Survey Map put in by the Surveyor, the appellant had encroached on the Respondents plot by 3 metres. The lower court visited the disputed land, with the aid of the Surveyor. In the presence of the court, the Surveyor took the measurements of the adjacent plots – Nos. 3094 to 3097 and 3098. The plots measured, in the presence of all and the court, measured 0.036 of a hectare, as said earlier; but it was found by the court and all present that Plot No. 3097 had encroached Plot No. 3098 by 3 metres.

The above are the facts and the background, from the court records, that led to the judgment, by the lower court, finding the appellant liable in trespass- encroachment on the Respondent's plot.

Turing now to the grounds of appeal, Learned counsel for the appellant grouped the grounds into 4 groups – 1 and 2; 3 and 4: 5 and 6: and 7 and 8.

On grounds 1 and 2, the appellant submitted that the lower court did not adhere to the provisions of Order 20 rule 4 of the Civil Procedure Rules as pertinent issues were not addressed such as the counter-claim and the mode of measurement used.

I have carefully perused the proceedings and the judgment of the lower court, and whereas whole condemnation of non-compliance with Order 20 rule 4 is exaggerated, there are pertinent issues which the lower court did not give sufficient weight and consideration. In my view, such issues include the value of the Survey Map, produced as evidence when such survey was carried out after the sale and the excise of Plot No. 3097; the accuracy of the conversion of 0.1 acres into hectares, i.e. the land sold was in terms of acres, while the map was in metric measurements. Clearly 0.1 acres is not the same as 0.036 of an hectare.

The Surveyor gave 0.1 acres as 0.04 hectares but in the appellant's counter-claim, the Respondent had transferred to the appellant only 0.036 hectares.

This part of the counter-claim and the two different systems of measurements – imperial vis-à-vis metric - were not given sufficient consideration by the lower court. Further, I find that the reason for the court's error lay in not understanding that the appellant had bought the plot prior to the Survey and that

should have been excised at the correct conversion, not to be lumped together with the rest of the plots, which upon measurement in the presence of the court, and all, were 0.036 hectares, not 0.04 as should have been, and was, the size of the appellant's plot as agreed in the sale agreement.

The above findings cover grounds 1, 2, 3 and 4 and partly 5 and 6. This is because, in my view, even the Surveyor's measurements, in the presence of the court, confirmed that the plots on the ground were 50ft by 100ft, but on the map, they were 46.7. by 100ft.

This is where the lower court erred in not properly giving the correct interpretation of the facts before applying the law. Put differently, if the court took the measurements on the ground, and that is what the appellant's case is, as opposed to the superimposed survey map which came up five years later, the court would have found, as a fact, that plot No. 3097 had not encroached onto plot No. 3098. If that was so, and in my view it was, the question of trespass does not arise at all. One cannot trespass on one's own land or property.

If I may ask, what was the value of the court's visit to the site of the disputed plots if not to have a first hand experience and evidence of where the dispute if any, originated?

Finally, the entire appeal turns on whether or not the appellant trespassed – encroached – on to the Respondent's plot.

From the above findings and analysis of the pleadings and evidence on record from the lower court, I hold that the lower court, erred in fact in finding that the appellant – Plot No. 3097 – encroached onto Plot No. 3098. This was an affront to the weight of the evidence before the Learned Magistrate. Arising from the error on the interpretation of the facts, automatically followed a misapplication of the law which was a miscarriage of justice.

All in all, and on the basis of the above reasons and analysis, this appeal succeeds and I set aside the Judgment of the trial court. I also dismiss, with costs, the suit in the lower court and order that the Respondent do pay costs of both this appeal and the suit in the lower court.

DATED and delivered in Nairobi, this 14th Day of November, 2005.

O.K. MUTUNGI

JUDGE