REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO 57 OF 1985

JOSEPH NYAMOTI …….…….. ……. …….. PLAINTIFF

versus

HELLEN NYAMBASORA)

YUVENALISH MAOBE ……..……DEFENDANT

JUDGMENT

This suit concerns a part of parcel Central Kitutu/Daraja Mbili/184 registered in the name of the first defendant Hellen Nyambasora who is the mother of the second defendant. The plaintiff Joseph Nyamoti claims that by written agreement between him and the first defendant he purchased two portions of the said land measuring 110 x 20 paces each in 1976 and 1978. The plaintiff claims he was put into possession of the first portion he purchased and commenced to develop it by cultivation and growing of crops; when the tried to take possession of the second portion the second defendant chased away his worker.

The plaintiff gave evidence of the two separate agreements of sale and produced into evidence a hard cover book Exhibit 11 where the agreements and acknowledgement of the payments by the defendant are recorded. He also put into evidence Exhibit 1 which is a duly signed and witnessed agreement signed on the day when the sale was first negotiated. Final payment in respect of the first transaction was made on December 4, 1976. The defendant No 1 was selling the said land to enable her son raise dowry and when the money so raised proved inadequate the defendant 1 offered to the plaintiff another portion of her land equivalent to the first, at the same price; the plaintiff paid the purchase price in respect of this later portion in cash and in kind as shown in Exhibit 2.

PW 2 and PW 3, PW 4 and PW 5 all gave evidence that they each witnessed the first transaction and the payment made pursuant thereto; PW 5 in addition was a witness to the second sale. These witnesses identified their signatures in Exhibits 1 and 2. PW 6 gave evidence that he is a worker of the plaintiff and that during 1984 the second defendant chased him from the suit land as he tried to work thereon for the plaintiff. Finally PW 7 gave evidence that a report of the dispute between the parties was made to him as clan elder; he tried to resolve the dispute but because of threats of violence from the defendant 2 he and his group of elders were unable to resolve the problems. That was the plaintiff's case.

For the defendant the first defendant contended that she merely leased her land to the plaintiff for a period of five years which the plaintiff had exceeded. According to her the plaintiff and all his witnesses were just lying against her when they alleged a sale by her to the plaintiff. She admitted that the plaintiff has planted bananas, cypress trees and napier grass on the land. She said when the plaintiff trespassed onto her land she reported to the authorities but they merely mocked her.

Defendant 2 gave evidence that his mother told him the plaintiff merely leased the land and his lease had expired; that was why entered the land and chased away the plaintiff's worker who knew nothing about the agreement.

I have carefully considered the evidence led by the parties. I am satisfied that the defendant 1 voluntarily sold to the plaintiff two portions of her land Central Kitutu/Daraja Mbili/184 measuring each 110 x 20 paces during 1976 and 1978, the plaintiff duly paid to the defendant No 1 and her children the agreed purchase price of Kshs 3,000 for each portion and the defendant 1 or her sons duly acknowledged receipt in Exhibit 1 and 2. The two agreements for the sale of each portion were duly witnessed by witnesses who have given evidence in this case. I therefore order specific performance of the agreements for sale and order that the defendant shall effect a transfer of the said portions of land to the plaintiff failing which the necessary papers shall be executed by the Deputy Registrar of this court.

I am also satisfied that the second defendant trespassed onto the land sold to the plaintiff by his mother and destroyed property thereon worth Kshs 1,250 as special damages. I award to the plaintiff the sum of Kshs 1,250 as special damages. The plaintiff shall have the costs of this suit.

Dated at Kisii this 15th day of August, 1986.

J R O MASIME

RESIDENT JUDGE

The plaintiff I must admit was not very clear as to where their father had lived during emergency. In his examination-in-chief he said that the defendant during emergency had been living with their father in Ndeiya Karai/Karai/73 which was their father's land. He said that this land was given to their father before emergency. Then he added land was not being registered in any one's name at that time. However, immediately the land was allocated to his father before the emergency the plaintiff's wife started cultivating in this land which was their father's. During cross-examination however, he said that he did not know when his father was given this land which was not surveyed adding that one could cultivate on any size or area of land. This was government land and that his father was not paying any rent first. He also agreed earlier during his cross-examination that their father was a *muhoi* – that is he was landless, and that he used to graze animals in government land in Ndeiya. During emergency their father was too old to do any work except that of looking after animals.

He however maintained that he and the defendant had divided the land. Each cultivated his own share. When the land consolidation started he immediately re-started his own personal visits to his share of land.

The plaintiff claimed that registration started during land consolidation. The emergency had not finished yet. When registration started the suit property were not registered in their father's name because he was an old man and did not have an identity card. The father then decided to have the suit property registered in the name of the defendant in trust. The defendant was by then grown up and was nearer to the suit property while the plaintiff who lived and had a house in Uthiru could not have gone home during emergency. So when the elders told their father to have the land registered in the name of one of his sons that was done in the name of the defendant for the above reasons.

The plaintiff continued that he and the defendant continued paying the annual rent of Kshs 60 each paying his half share. Then later the defendant told him that the council had discontinued the rent arrangement and that one had now to buy the land from the council. Their father was dead by now. The defendant told him that the purchase price was Kshs 2,400. They both agreed to purchase the suit property. The plaintiff got Kshs 1,200 and gave Kshs 1000 to the defendant on January 3, (he did not remember the year) and asked him to look for the balance of the purchase price. A month later he paid Kshs 200 to the defendant's son Kaiganira with instruction to pay the sum to his father. The defendant paid the balance of the purchase price. During the time when he paid the defendant Kshs 1000 he heard that the suit property owned a loan. The defendant told him that he had obtained a loan from the council in order to buy a cow. It was mandatory to have one. He called the defendant to his house to sort out the loan issue. He gave the

defendant Kshs 140 as an instalment towards the repayment of Kshs 3,000 loan which had been needed to buy a cow and a water tank. On another occasion he gave Kshs 60 to defendant's son Kaiganira at Kiambu where he was then working. He paid another Kshs 400 towards repayment of loan. In all he paid Kshs 600 while the defendant paid the remaining Kshs 2,400 of the loan.

It was after the completion of the payment of purchase price that the plaintiff asked the defendant for the land to be subdivided. The defendant told him that he, the plaintiff, had no land. The plaintiff called a family meeting. The family awarded him 5 acres and the defendant 7 acres. The defendant told the family that he was agreeable to sub-division. Later when the plaintiff went with his son to the defendant who was with his son Kaiganira the defendant said that he would give the plaintiff only one acre because he was his brother, otherwise he would not have given him any land. The plaintiff's report to the chief bore no fruit and he then filed this suit.

The defendant's evidence was that he left his employment with NTD at Kabete after four years and came back to Ruthigiti. That was the time when the Kiambu African District Council started leasing plots of land. Like all who were leased these plots he also renounced the Mau Mau oath and also showed his identity card. Thereafter on September 17, 1957 he was granted the lease on payment of Kshs 21 and at an annual rent of Kshs 60. The lease was renewable annually. To clear the ground he allowed certain people, about seven in number, to cultivate free of charge on certain portions of land. These included the plaintiff and Alfred Hinga (DW 3). Later, about 8 years before he eventually purchased the property, he got all these squatters to vacate the plot because he now wanted to cultivate and develop the plot in accordance with the agricultural officer's instructions. By this time he had already constructed a house on the plot. He had to obtain permission from the Kiambu African District Council to construct the house (certificate to build a house Ex C dated January 9, 1959) He had likewise to obtain permission from the Kiambu African District Council for members of his family and his parents to occupy the dwelling houses in the plot (certificate to occupy homestead Ex C dated July 23, 1959).

When the Kiambu County Council decided to sell the Karai plots the first option to purchase was given to the lessees. The purchase price was Kshs 2,400 for each plot. At that time the defendant's son Kaiganira had completed his schooling and was employed at Kiambu land office. The defendant had money from the sale of milk of his cows. He first paid Kshs 1,200. He produced six official receipts for payment of Kshs 2,400 from January 24, 1972 to December 11, 1972 (Ex A). Thereafter he was registered the owner of the suit premises.

The defendant continued that after he had been leased the plot he also obtained a loan of Kshs 2,000 from the Council to enable him buy a cow and a water tank. The water tank was bought from a European. The loan was repaid after five years but before the purchased the plot. After he had purchased the plot in 1973 he obtained a loan of Kshs 2,400 which he repaid from proceeds of sale of four calves. He denied categorically that the plaintiff had paid him any sum at all either towards the annual payment of rent or towards the payment of purchase price or towards repayment of loan.

From the evidence before me I have no hesitation on balance to conclude that the father of the parties was never allocated any land in Ndeiya either before or during emergency but that like others he was merely grazing animals free of charge on government land and that likewise the cultivation that the plaintiff's and the defendant's wives did in Ndeiya was done by them on plots picked up by them in this government land free of charge; I am satisfied that such cultivation did not give any right to any one to any part of government land in Ndeiya wherein the suit property were also situated.

It is not disputed that in early 1957 the Kiambu African District Council decided to rent out plots of land to various people. According to DW 4 James Kamau Munyira it was in September, 1957, that the Kiambu African District Council decided to lease out the plots. They leased out 341 plots each of 12 acres in Karai, I accept that.

It is common ground that before a person could be considered for the grant of the lease he had to satisfy that he was landless, that he had renounced the Mau Mau oath, and that he possessed an identity card. PW 4 had said that even a woman who satisfied the above requirements was entitled to apply and rent land.

He cited the case of one Serah Niademena whose husband was killed during emergency, being leased one of these plots. Although PW 4 said in crossexamination that these plots were given to those who had been grazing animals in Karai I would not accept that as a strict condition because earlier he had admitted that only about half of the people who were given these plots he knew positively had been in Karai. And of course the woman lessee Serah Niademena had come from outside Karai. I would accept that although this scheme was primarily meant for people who had been grazing animals in Karai any other person from outside Karai could also under special circumstances be considered provided he was able to satisfy the three essential conditions relating to landlessness, oath of renunciation and possession of identity card.

The plaintiff had not renounced the Mau Mau oath. There is no evidence as to whether or not he had an identity card at that time but it may be reasonably presumed that as he had been in the employment of a European and also that he had built a house in Uthiru village or trading centre he must have been in possession of an identity card. The court does not know whether the fact that he owned a house in Uthiru would preclude him from being considered as a landless person but the plaintiff conceded during cross-examination that no one living in Uthiru was given land in Karai and that no one from Uthiru would have been given land in Karai. It would therefore appear that the plaintiff might not have qualified for a lease of a plot in Karai in September, 1957.

I have already said that I am not at all persuaded to accept that plaintiff's claim that their father had at any time prior to September, 1957, been allocated any land. But he had been grazing animals in that area. But the evidence is that by the time the plots were being leased he was far too old to be able to do any farm work at all. On the other hand there is overwhelming defence evidence that the plot after being cleared by the lessees were to be cultivated, planted and developed in accordance with the instructions of the agriculture office of the area. To my mind the father was not physically capable of doing any type of work that was required of an intended lessee of the plot. I do not accept the plaintiff's claim that the plot was not leased in their father's name because he did not have an identity card and that therefore he had got it leased in the name of the defendant. The man was physically incapable of doing any clearing or development work on the plot and I very much doubt if the allocation committee would ever have entertained an application for a plot from him before even calling upon him to satisfy the requirements as to oath of renunciation and possession of identity card. On balance I am satisfied that there was no factor that favored a reasonable probability of success in the event of an application by the father to have a plot leased to him. He had a son who had a home at Uthiru who could have, if need arise, given him shelter. Likewise the defendant having lived with him at Ruthigiti, where the father also had a house of his own, would have given him shelter. The fact that he had grazed animals alone would not have, to my mind, entitled him at his age and capability to lease a plot.It might have helped the defendant's case for a plot but that could not have meant that the defendant had applied for the plot in order to hold it in trust for his father or his father's sons. I reject the plaintiff's claim as far as it is based on the allegation that the plot was their father's or had been allocated to him or that the father had got it leased in the name of the defendant because he, the father, was not the holder of an identity card.

The only point now left is whether or not the plaintiff paid any sums to the defendant and if so were they meant as the plaintiff's share of the purchase price or repayment of loan or were these payments mere loans to the defendant. As regards the fact that the parents are buried in the suit premises I do not attach any value to that. It is hardly likely for a son to have allowed his landless parents in such circumstances to be buried anywhere else.

The plaintiff to my mind had no clear idea as regards the history of the suit premises. Just because their father had been grazing animals in government land in Ndeiya free of charge before emergency he had laid the claim that their father had been allocated that land. Later he started speaking about annual rent for the land and his sharing in the payment thereof. But he clearly had no idea of whether the land was being held on a leasehold for a fixed period at an annual rent or whether it was a year to year lease. He did not have a single receipt for payment of annual rent in his possession although this rent had been paid for 15 years. Likewise there is no evidence that he ever attempted to build any structure on the half share of the plot which he claimed was his, during these 15 years when the land was held on annually renewable lease in the defendant's name. I am not in the least impressed by the plaintiff's claim that he was in any case involved as a co-lessee of the suit premises from September, 1957. I have already pointed out that there

was no evidence that the plaintiff had ever renounced the Mau Mau oath which was one of the three pre-requisites before a person would qualify as a lessee. I reject the plaintiff's claim that he was ever a co-lessee or that his wife had ever cultivated in the suit property except in the manner as stated by the defendant who said that the plaintiff was one of those whom he had allowed to cultivate on a portion of the suit property in order to help in clearing the plot.

The plaintiff said that he paid the defendant Kshs 1,000 on January 3 (year not known to him) in secret so that the money might not be stolen and that he then had accompanied the defendant to Kiambu to ensure that the money was paid. Yet he did not deem it fit to obtain any receipt from the defendant. A sum of Kshs1,000 at that time amongst people of a social and financial standing of that of the parties to my mind was a substantial amount at that time. It was only a little less than half the amount of purchase price of a 12 acre plot in Kiambu area. I therefore find it surprising that the plaintiff should have parted with this amount or with Kshs 200 which he said he gave to the defendant's son without doing so in presence of witnesses or even obtaining receipts for them.

As regards the evidence of Eunice Wambui (PW 2) the sister of the parties I do not attach any value to it. Her evidence was completely unreliable and hearsay. She maintained that the council had allocated this land to their father before emergency. The emergency was agreed between the advocates as having started in 1952 and to have lasted up to the end of 1959 and a consent order was recorded to that effect. I have already found that land at Ndeiya was government land on which people were allowed to graze animals and cultivate free of charge and that it was in September 1957 that the African District Council started leasing plots on yearly basis. PW 2 therefore had no idea of what she was talking when she claimed that the Council had allocated this land to their father before emergency. Further during cross-examination she agreed that she had never lived with her parents in Ruthigiti village where they were moved during emergency.As soon as her parents were moved to Ruthigiti she came over to Nairobi presumably to her second husband who hailed from Muranga and whom she had married before the emergency started and from whom she had never lived away after marrying. She also admitted that no payment of money by the plaintiff was made in her presence. To my mind her evidence was valueless.

The ex-chief James Njuguna Kioko (PW 4) was in detention from 1952 to 1960. He clearly had no first hand knowledge of the circumstances under which the lease was granted to the defendant in September, 1957. As regards the complaint that the plaintiff laid before him against the defendant in 1979 he admitted that the proceedings were aborted and nothing conclusive emerged therefrom.

Coming now to the family meeting which the plaintiff claimed awarded him 5 acres of land the plaintiff said during cross-examination that the members of family that he called were his sister Wambui (PW 2), his own daughter Wangui and his daughter-in-law Jane Ndichu. He also called an outsider Mr Walter Muigai (PW 3) who had land at Karai. The plaintiff referred to the aforesaid as his elders. To my mind the group merely constituted a delegation. The picture given by the plaintiff's witnesses is unclear as to what transpired when they met the defendant. The plaintiff maintained that the family awarded him 5 acres and that the defendant agreed to that and also to sub-divide the land accordingly. But when the plaintiff went with his son to see the defendant the latter told him that he would give him one acre only and that too because he was his brother otherwise he would not have given him anything at all.

Wambui, PW 2, who was a member of this delegation surprisingly gave no evidence on this issue. PW 3 Mr Walter Mungai, an educated 46 years old employee of Kenya Post and Telecommunications hailing from Uthiru who had bought land in Karai in 1974, said that he had been invited by the plaintiff to join the family members when they went visiting the defendant at his home on December 12, 1978. According to him at the meeting at which there were members of defendant's family also the plaintiff first related how he had paid the money for the land. The defendant did not deny the payment of money by the plaintiff but said that the land would not be sub-divided and that he would repay the money. After a long discussion the members decided that as that money had not been borrowed by the defendant it was a payment of the land which he, the witness, understood was their father's. The conclusion of the discussion was that the land should be divided into two parts – the plaintiff to get 5 acres and the defendant to keep 7 acres.The defendant said that he would settle the matter with his brother without interference from the other members of the family. During cross-examination PW 3 said that the

defendant was not claiming that the land had come from their father.

The defendant's version was that the plaintiff came with his family members and PW 3 suddenly without any appointment and demanded the piece of land that belonged to their father. They did not know how much land they wanted. Later he added that although they wanted 5 acres of land there was no such decision that the plaintiff should get 5 acres. He denied that he told them that he would decide with the plaintiff without interference from other members of the family. In cross-examination he said that he never admitted that he had taken Kshs 1,200 from plaintiff or that he would repay any money. The defendant denied that the plaintiff had paid him any money towards purchase price or towards repayment of loan.

I have given a very careful consideration to this issue. I reject the plaintiff's claim that the defendant agreed to a decision, if there was any, that the plaintiff should have 5 acres of the land. But I must admit that I was impressed by the evidence of PW 3. Mr Walter Mungai Muigai. I am satisfied that the defendant admitted on that day the he had received Kshs 1,200 from the plaintiff but I find that the defendant's stand was that the would repay the money although the members (it is not clear from PW 3's evidence as to whether that meant all the members or merely the members of the plaintiff's family) had decided that the money was not a loan but a payment for the land. I also find that the defendant told the meeting that he would settle the matter with his brother without interference from other members of the family. In fact that may well have been the reason why the plaintiff later went with this son to see the defendant. I accept the plaintiff's evidence on that point and find that the defendant did tell the plaintiff that he would give him one acre only because he was his brother.

I have already said that I was not much impressed on account of lack of independent or documentary evidence to prove the payment of Kshs 1,000 and Kshs 200 by the plaintiff. The defence laid a great stress on the fact that although the plaintiff had claimed that he had gone with the defendant to see to it that Kshs 1,000 given by him to the defendant was paid by defendant to the Kiambu County Council yet there was no receipt acknowledging payment of Kshs 1,000. But there is a significance in the fact that the plaintiff said that he paid Kshs 1,000 on January 3, to the defendant and then a month later a sum of Kshs 200 to the defendant's son Kaiganira (whom the plaintiff pointed out in court). The official receipt for Kshs 1,200 is dated January 24, 1972. In view of the lapse of time it would not be unreasonable to expect an old and completely illiterate person refer to a period of 3 or 4 weeks as a month. In view of the evidence of Mr Walter Mungai Muigai (PW 3) I accept and find that at the time of the purchase of the suit property the plaintiff paid the defendant during January, 1972, a sum of Kshs 1,000 and further sum of Kshs 200. I reject the defendant's claim that the plaintiff did not pay him any sum at all in relation to the suit property.

The plaintiff said that later when his brother told him that the Council had discontinued the rent arrangement and that one had now to buy the land from the Council he asked his brother what was the purchase price .The defendant told him it was Kshs 2,400. The plaintiff continued that they decided that they would not let this land go and that each would look for money. I accept that and I am satisfied that the plaintiff enquired about the purchase price only because he was interested in being a purchaser. It is very unlikely that he would have advanced a sum of Kshs 1,200 which was half the purchase price merely as a loan in order to help his brother acquire the sole ownership or that the defendant would have felt the need to inform him of the purchase scheme if he had sufficient funds with him at the time. I find that the plaintiff contributed a sum of Kshs 1,200 towards the purchase price of the suit property. I am satisfied that he is entitled to a share of the land. However I am far from persuaded that the plaintiff is entitled to half of the plot or even to 5 acres of the plot as his members of the family had demanded. In deciding how much of the land it would be fair to award the plaintiff I cannot ignore the following factors and must give due weight. The land did not belong to their father. The plaintiff, I have already found, was not at all involved in any way in the acquirement of the lease in 1957. It was the defendant's sole effort and action that resulted in his acquirement of the lease. It was the defendant who got the land cleared. The plaintiff not having been a leaseholder was not favourably placed to have succeeded in purchasing the land from the Kiambu County Council. It was the defendant who as a lessee had earned the first option to purchase. In my view for the amount of effort and work put in by the defendant in the suit property for a period of over 14 years from September, 1957, to January, 1972, it would be fair and just that the defendant keeps

nine acres of the land and that the plaintiff gets three acres of the land. I therefore declare that the defendant holds three acres of land in the suit premises in trust for the plaintiff and I give judgment for the plaintiff as prayed in prayers a, b, c and d of the plaint subject to the above finding in respect of the plaintiff's share in the suit premises.

A M COCKAR

JUDGE