REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 2387 OF 1975

RUTH NYAMBURA ALFRED ……..PLAINTIFF

Versus

HEZRON NGENGA ……. DEFENDANT

JUDGMENT

The various aspects of this case arise out of a sale of land. The plaintiff widow Mrs Ruth Nyambura Alfred, I usually referred to as "Nyambura" sold a portion of her land to the defendant Hezron Njenga, usually referred to as “Njenga.” The plaintiff's land was registered as Dagoretti/Thogoto/440 containing 5.7 acres or 2.28 hectares. The plaintiff sold one sixth undivided share to the defendant according to a transfer dated July 16, 1965 (Ex 1) and that would amount by calculation to 0.95 of an acre or 0.38 of a hectare. According to the plaintiff's evidence she thought that she was selling an acre of land. The difficulty for the parties was that the plaintiffs land was bisected by the Nairobi-Kikuyu tarmac Road, which was widened during the cause of this dispute. The general question is whether the plaintiff sold all the land on one side of the road to the defendant which by calculation would be about 1.23 acres, or 0.64 hectares, or only a portion on that side; so that the plaintiff retained her 5/6th on the other side as well as a step of land on the defendant's side.

The plaintiff claimed in her plaint that the portion has verbally agreed to partition the defendant's side of the land, so that the defendant would have that portion furthermost from the Dagoretti/Nairobi and Kikuyu Road measuring 0.95 acres. To understanding the pleading I will interpose here a description of the land.

It will be as well to took at the Mutation forms Ex 18(a) & (b) and especially the sketch (Ex 18(b) in conduction with the map Ex A. The original plot 440 is divided of the Kikuyu Road. The first position was that the plaintiff's land on her side was measured 491 and the defendant's side was 492. Those numbers were changed to the present number 497 and 498 respectively this is explained by Land Registrar's letter of April 17, 1975 (Ex 26), the defendant: “Re PARCEL NO DAGORETTI/THOGOTO/ 491.

You are aware that the sub-division of your original No 440 was given a No Thogoto 491 & 492. Unfortunately these two new numbers were wrong and have been ignored as the correct parcel numbers. However, some other new correct ones have been issued.

You are therefore requested to bring back the Land Certificate which you collected on September 16, 1974 in respect of the above named.”

This is not a very accurate letter. Number 440 was owned by the plaintiff and No 491 was also the plaintiff's property but the idea is clear enough. The letter also suggests that there had been some earlier

activity upon the land, upon which the defendant acquired his land certificate of September 16, 1974. The defendant indeed claimed that there had been a surveyor in September 1973 and Ex 20 a boundary summons, was that the portion were together on the land on September 24, 1973. The mutation form is dated August 9, 1973 (Ex 18a). The sketch however is of June 29, 1974 (Ex 18b). There was a further survey on June 19, 1975 which caused a great deal of trouble.

It seems that the first parcel numbers were given in connection with the first survey No 491 and 492 and that the second parcel numbers were 497 and 498 were allocated in connection with the 1975 survey. I am aware of cause in saying so that the plaintiff denies that there was only survey in 1973 as the defendant claims. I will have to take that into consideration later on, at this description stage the finding I have made stands. There is also another matter which affected the claims of the parties namely the survey traces (small parcel showing that ownership of land continued such as road). That will also have to be considered later. The plaintiff lives in her portion now numbered 497 across the Kikuyu Road stands as the junction of Muhuri Road and Kikuyu Road. Coming from Naivasha one matches Muhuri Road, the plot No 498 is on your left and No 497 is on the right. The Kikuyu road was made up to a wider tarmac road in about 1971. The defendant was paid Kshs 2,112 compensation for the crops of 0.22 acres and the plaintiff was paid compensation of Kshs 708 for the loss of 0.28 acres of land. It follows that both plots No 497 and 498 cost some postage space land (Ex P & MF1B). The defendant was further paid Kshs 1,400 when the widening and improving of Muhuri Road took place the land was sold, this road was a murram road. Its site has changed and it has become a tarmac road (Ex 13). The land as originally sold can not now be traced.

Therefore Kikuyu Road is at one end of plot no 498 on one side in Muhuri Road and at the end opposite to Kikuyu Road is the road on way to the Coffee Nursery. On the side opposite to Muhuri Road is another plot No 442. There is one more aspect to describe. The Kikuyu Road is a divisional boundary on the side of plot No 497, there is Thogot which comes under KIambu and the Kikuyu Land Control Board, on the side of No 498 there is Ruthimitu Dagoretti, which comes under Nairobi and the Nairobi Land Control Board. There was much dispute in the case as to which of these administrative centres the parties should go and which had jurisdiction. It is understood here if they went to both.

To continue now with the plaint when the plaintiff says that the defendant was to leave his land further most from the Dagoretti-Kikuyu Road, it would be a portion adjacent to the road or way to the coffee Nursery. Muhuri Road and plot No 442 but would not reach the Kikuyu Road. Thus whatever land was taken by Government for widening of Kikuyu Road from plot No 498, would possibly belong to the plaintiff's and secondly the plaintiff would likewise have a small claim to the land taken from plot No 498 for the Muhuri Road.

The plaintiff alleged that the property was subdivided in June 1975 but the defendant objected to the subdivision. The defendant wanted the whole part of the land beyond Kikuyu Road as No 498 which would be 0.64 hectares instead of 0.38. The defendants objection was noticed by the letter of July 2, 1975 addressed to the District Surveyor Kiambu by the Land Registrar Kiambu. The defendant was bent on citing a larger portion of land than he was sold and therefore unreasonably reported to the Police that the plaintiff had trespassed on his land. Thereafter the defendant maliciously prosecuted the plaintiff for the offence of trespass. Act (Cap 294). The steps taken in their prosecution are set out in plaint Criminal Case No 655 of 1975 was mentioned for plea in the Kikuyu District Court on June 17, 1975. The plaintiff was released on bond until June 30, 1975; when again she was released on the same bond to attend Court on July 12, 1975. The case was withdrawn under sec 204 of the Criminal Procedure Code.

From time to time from June 12, 1975 until the day of her release on July 12, 1975 the plaintiff was falsely imprisoned. Apart from this, the defendant had trespassed on to the plaintiff's portion on the side of No 498 and destroyed crops and plants there. Then again the plaintiff reclaims the compensation paid to the defendant.

The plaintiff's claim are as follows:

(a) The recovery of the sum of Kshs 100 being the balance outstanding on account of the purchase price.

(b) Refund in full of all monies received by the defendant from the Government of Kenya for the acquisition of part of the property for the purpose of expansion of the Kikuyu Dagoretti Road.

(c) Exemplary damages - general damages for trespass by the defendant on the plaintiff's part of the property.

(d) Damages for destruction of the plaintiff's crops.

(e) Exemplary - general damages for causing the plaintiff to suffer indignity by causing her to be falsely imprisoned and maliciously prosecuted.

(f) A declaration that the defendant is only entitled to 0.38 of hectare being the one sixth portion of the property.

(g) An injuction restraining the defendant from trespassing on the plaintiff's portion of the property in question.

(h) interests on (a), (b), (c), (d) & (e).

The original defence was concerned with denying the propositions in the plaint. But the amended defence filed by Mr Joshi carried the argument in the reclaim of the limitation of actions. The amended defence is based on the general allegation that the plaintiff's action is time barred by virtue of Section 4(1)(a) of the Limitation of Actions Act (Cap 22).

As to the sale, the defendant states that it was 0.64 hectares that was sold and not a 1/6fh part, for a piece of Kshs 1,800 the whole of which price was paid. In any event Kshs 100 charged to be the balance is time barred.

As to the transfer where there was an agreement to partition, it was not agreed that only part of land on the side of No 498 was to be subdivided. At my site the plaintiff must seek a declaration as it was time barred made under Section 4 of (Cap 22) as above.

It is agreed that the land Registrar actuated the Surveyor of 1975 by his letter of May 30, 1975, but the defendant contends that the land had already been surveyed on September 24, 1973 and he denies that the defendant had entered into arrangement for the sub-division of the property on June 12, 1975.

The defendant denied every allegation of trespass, malicious prosecution or false imprisonment, as well as liability to refund the compensation for the land requisitions. The plaintiff's reply was that the transfer document bound the plaintiff and there was no talk of 0.164 of a hectare. The limitation of actions act did not apply at all.

As the matter had dragged on for sometimes until the suit was brought on November 11, 1975 and so expelled the rights of the points at the time, it will be convenient to observe whether any point of the claim are obviously barred under Section 4 of Cap 22: claim (a) for the recovery of Kshs 100 on the purchase price that was a debt and time barred after six years. The plaintiff says she has lost the written memorandum of acknowledgement and the verbal acknowledgement is disputed. That is too contradictory a matter upon which to place reliance. I hold that that claim is time barred; claim (b) for the recovery of the money paid by the Government of Kenya for land acquisition. Here the claim is that the defendant took money belonging to the plaintiff. The Government allegedly owed money to the plaintiff and the defendant. The defendant therefore converted the money to his own use. This is time barred after three years. The payment was made in October, 1971. The claim would be barred after October 1974 - no documents MF1B, Milligan letter of May 11. 1976 and Oguto notice and the award signed by the plaintiff Ex 12 (all accepted documents by the parties as to production) take the date on October 29, 1971 for payment to the plaintiff and equally to the defendant. That matter as time barred, unless the plaintiff can show that time should be extended.

claim (c) damages for trespass. Mr Joshi in argument did not press limitation here. It would be a period of three years.

claim (d) the same consideration applies to damage for crops of the destruction complained occurred in 1972 or at any time before that. If it occurred in 1975 as it appeared to be the same it would not be time barred.

claim (e) this claim for malicious prosecutions and false imprisonment are not now pressed as being time barred and there is no ground for that defence, since all that allegations occurred within the year that the suit was brought.

claim (f) the declaration that the defendant is only entitled to 0.38 of an hectare. Here the plaintiff is not suing to declare the transfer void. She supports the transfer as dead. It is the defendant who denies the transfer. That denial leave the dispute in 1975 when the survey of that year took place. That part of the suit is not therefore time barred. claim (h) is not time barred ie the injunction.

The suit started with a single issue proved. How much land was sold? There were two subsidiary issues, if the case termed out as the plaintiff claimed, what claims had she got; on the other hand if it termed out as the defendant claimed what rights had he got? This is the issues of the case of course, understanding that the difficulty for the parties was to know the boundary.

No doubt there was a valid sale with the consent of the Land Control Board. They have both signed the transfer forms (Ex 1). The plaintiff stands by that instrument. The defendant says that the shares were not put on the transfer when he signed it. Now how could that be true? The whole point of the document is to specify what was being transferred from Nyambura Alfred to Hezron Njenga. This proportion of 1/6th to the defendant Njenga was carried through into the abstracts of title (Ex 15A and B). I have no doubt that this proportion was shiot put on afterwards. But I have doubt also that the translation on to the ground of that 1/6th share, was out of which that old friend finally fell into this dispute.

What was a 1/6th share - did letter by them realise in 1968 exactly what that would mean? I doubt it. The plaintiff spoke (and her recollections were never too good unfortunately) at our stage of selling a quarter of her land with, she said, if this transfer said one sixth, then that was correct. She said she wanted to sell an acre. 1/6th or 0.95 of an acre is rather close. The land on the side of the No 498 is just over an acre. The defendant said that the plaintiff was not more of acreages likely for people are. It is difficult to ascertain them, even the Registered Land Act allows for variations in acreages and adjustments of boundaries. However, one acre as not with one sixth; it is more than 1/6th if the plaintiff's land is 5.7 acres in all. That 1/6 was no doubt a mathematical calculation in the land office. It was explained by the officials that one would say that one was selling one acre or a proportion of one's land. Both parties have now put their land to the transfer, they thought the result of the 1/6th share on the ground that is what has been transferred and I hold that they are both bound by it.

Where was this 1/6th portion on the ground? The plaintiff claims that she showed the defendant a part of the land on the side of No 498 having herself a steep of land postage along the Kikuyu Road, she sold from the Coffee Nursery Road up to a tree, no one knew where the tree is. The defendant said that the plaintiff sold all the land on the side of No 498.

It would be easy to see which one of them is right by the way things acted after their agreement and transfer but it is unfortunately not so easy. There are the confessions; as to which official the parties should approve to; whether there was one survey in 1975 or two surveys one in 1973 and another in 1975. Whether the plaintiff objected to land acquisition compensation being paid to Njenga and whether Njenga was wrong to report the plaintiff for trespassing in 1975.

Each party gave evidence supporting the pleadings in general; but neither side was entirely borne out by documents on some points or the events there on and the official made a few blunders as well.

I start with the portion that the burden of proof lies on the plaintiff and prove her case on the balance of

probabilities. First, the marks of the land sold in 1965; according to the plaintiff only the plaintiff and defendant where present when those first land boundaries were established by the plaintiff. It is impossible now to realize that position; the trial no longer there, as the plaintiff does not know where it is and the two roads have changed from their position to other positions and so have changed the then existing boundaries.

After the purchase, the defendant never lived upon the land as his main home. He used the land. There is evidence that he built a wooden house near the Kikuyu Road and cultivated the land. The plaintiff says she never saw any house she could not see the defendants land from her house.

Both her witness, chief Wangu (3 PW) and Eliud Mara (5 PW) say that Njenga did build a house but is no longer there. It seems to have been moved during land acquisition or road postage from the widening of the road. On the other hand one of the defendant's witnesses said one could not see the defendant's place when one was at the plaintiff's house. This was a policeman Geoffrey Kimani (4 PW). But otherwise the witnesses for the defendant testified that when they visited the plaintiff her attitude was that she had sold the whole of the plot on the side of No 498. Then with the evidence of Chief Wangu that the defendant had built there, the conclusion seems misproportion that the defendant had occupied the land right up to the Kikuyu Road. That is the conclusion also from the payment of compensation for the widening of the Kikuyu Road. The plaintiff received compensation for the land on the side she owns and the defendant received his for his side of the road. It was 1971. It is conceivable that if the plaintiff owned the land on the other side of the road as well that she would not have claimed? There is some suggestions that she did not know the defendant for compensation or perhaps there was some suggestion of none. I do not see any evidence of either state of mind. The procedure adopted for paying compensation is in the evidence of Mr Bhati (PW 2). There had been inquires. Hundreds of people were paid. I can not believe that the plaintiff did not know what was happening. At first she says she did not complain, she says she complained afterwards when she knew. Her early action would only confirm the defendant in his belief that the land belonged to him on his side of the road.

There was the survey in 1973. The plaintiff did not see it. She complained (Ex 3) later she was a sick woman for four years. Perhaps she did not see it. The witnesses say she did. The defendant witnesses went to her house and took tea with her when she signed the forms. The plaintiff’s witness like chief Wangu did not know if the survey came but the Mutation forms (Ex 18) and boundaries summons (Ex 20) merely show that there was one. Here one comes to the braces on these forms. One has to compare Ex 17(a) with Ex 18(b). On August 9, 1973 there were braces joining both sides of the road. On June 29, 1974 there are no braces. I think that the explanation is that on August 9, 1973 other No 440 is there. In that case the braces are correct, because 440 did cover the whole area. But then there was no 491 and 492 which was deleted and No 498 was put as if No 498 covered the area on the side of 498 and some No 497, indeed No 497 is not marked at all. It is clearly an inaccurate sketch. The sketch on Ex 18(b) is correct as to numbers I would place no weight on Ex 18(a) as being accurate and I would certainly not place weight on the braces on Ex 18(a). The correct near number appear on the abstract of title on from 1975. So I think that the second survey finally clarified the position of the numbers which had apparently audited from June 29, 1974 (Ex 18b).

Then there is the evidence of the surveyor Mr Edward Singa who carried out the second survey. He showed the court the situation of the Mutation form he received. Now the position is as the plaintiff states. No 497 crosses the road and No 498 is on the near part of the land across the road. The braces marks the crossing on No 497. Apparently, the land Registrar had put on the red lines showing this situation (See sketches on pages 65 & 66 of the original record). Then the defendant objected. The Registrar wrote saying that the surveyor should withhold the survey (Ex 4 of July 2, 1975). The surveyor refused how does that prove? I think merely that by 1975 the plaintiff had made her claims clear. But my impression from the evidence is that the plaintiff had allowed the defendant to be in possession for about ten years and he had acted as the owner of the whole acres. I find accordingly.

Naturally the defendant was incensed when a boundary was put across the land on June 1, 1975. He complained and the plaintiff had all the trouble that she explained at the District Court. Her evidence bears out the plaint. By this time the confusion was complete. The defendant had obtained one title. He

has been paid compensation. It is clear that he thought that the plaintiff was opening up maths a new of bringing officials on to his land to dispossess him at least he was in occupation of the land otherwise there would have been no trouble. The defendant says that he got no notice of the officials coming. It seems that Mr Eliud Koinange Mara (5 PW) did not tell the defendant what was happening. He left before the defendant arrived. It was merely an unwise way of proceeding. At any rate it is clear that the defendant thought his right to the land was clear. He complained. The authorities treated the matter as criminal trespass 1/s 5 Cap 294. Eventually the proceedings were withdrawn. (See Ex 8) The magistrate gave a conditional withdrawal. But he had no right to do so. The proceeding ended in the plaintiff's favour; which is merely as I have said before that problem was the misunderstanding where the boundary was. But the defendant was quite justified in no stand he took as he had long been in possession. If the plaintiff claimed his land she should have brought the present case before she interfered with his land. In my view the defendant had movable and possible cause in complaining as he did (See Clesh Hidrll in Tout from 1208 and 1721 12th Ed) I have listed Ex the argument of counsel and considered the case they have acted. But although the transfer did not apparently transfer all the land on the side of No 498 to the defendant, he reasonably thought that he could occupy the portion he did for reasons I have stated above. On just view of it he occurred on the last ten years why the defendant should believe that his occupation of the road postage was wrong and doubtful. For my self I would plan to place no reliance on the plaintiff's statement that a certain unspecified and unascertainable tree was the boundary; in view of his action was the compensation. It is my view therefore her boundary up to 5/6 and should have taken the proper steps such as those made Section 21 of the Registered Land Act (Cap 300). All parties would then have been aware of the situation. The Court has no jurisdiction in such a case (See 21(4) the same goes from the case of trespass damages to crops. The right of the plaintiff should have been established before she wanted and entitled on to the acre occupied by the defendant. This problem arose when the surveyor went there in 1975. It occurred after long possession by defendant. The answer to the issue framed is that is found that 1/6 of the land was sold according to the transfer, but that it is not clear whatever this 1/6th was located on the ground.

The answer to the claim is

a. This claim is time barred

b. This claim is time barred

c. These claims have not been abstracted up to the relevant standard of proof

f. this claim was not proved because the defendant had reasonable cause

g. The plaintiff is entitled to the declaration that the defendant is only entitled of Order XXXVIII of hectare being ½ portion of the original property

h. An induction can not be issued until it is settled, where the 1/6 portion exists, the parties will still have to settle that point

i. No interest arises

I leave costs to be argued.

HG Platt

Judge

19/5/82