IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OUKO & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 227 OF 2007

BETWEEN

MEDLINE WANJERI NJUGUNA….....APPELLANT

AND

1. FREDRICK NJUGUNA NDORO

2. HENRY G. MBOTE

3. BAHATI P.C.E.A. SECONDARY SCHOOL ….....RESPONDENTS

(An Appeal from the judgment of the High Court of Kenya at Nakuru delivered by (Visram J.) on the 24th day of July, 2007 at Nairobi

in

CIVIL SUIT NO. 128 OF 1999)

****

JUDGMENT OF THE COURT

In April 1979, the former President Moi visited Bahati PCEA Primary and Secondary School. The headmaster at the time, Kingstone Karunga Kimani sought the assistance of the former President regarding the difficulty the school faced due to lack of land for expansion. Upon confirming that the adjacent parcel of land NAKURU/MENENGAI/2 belonged to Jimna Njuguna, the former President asked Jimna to surrender 10 acres of his land in exchange with a parcel double the size of that to be surrendered. It was left to the provincial administration to identify and allocate the alternative land to Jimna.

As it will emerge later in this judgment, following meetings convened by the provincial administration and the church that ran the school as well as letters exchanged between various parties, the alternative land was identified at Kirengero Settlement Scheme. For instance the PCEA Church Committee in which Jimna sat as a member met on 18th April, 1979 and observed, according to the minutes produced in evidence that;

"Min.2/79.. the meeting was called urgently to discuss the issue of plot allocation to the PCEA

Church by His Excellency the President of Kenya, Hon. D. Moi on exchange basis with Mr. Jimna Njuguna who is a member of our church...."

<u>Min.3/79</u> Mr. Jimna Njuguna agreed and confirmed in our meeting that <u>he will surrender the plot to the church soon he is allocated Kirengero Plot.</u>

<u>Min. 4/79</u> The meeting was informed that the President called in over school compound on 16/4/79 when he directed the Deputy PC, Rift Valley to allocate Mr. Jimna Njuguna a settlement plot at Kirengero Scheme so that the church could get enough place to build its secondary school in church compound.

<u>Min. 5/79</u> the PC informed the meeting that, Ministry of Lands & Settlement have been informed and they are taking the necessary action..." (emphasis ours)

In attendance at the meeting, as should be clear from the last minute -5/79 above, was the Provincial Commissioner A. N. N. Njuguna Ndoro who is the son of Councillor F. N. Ndoro, the Chairman of the Committee and the 1st respondent in this appeal. Jimna also attended as did the area chief (Subukia Location), Chief S.K. Waweru.

Two months after this meeting, on 5th June, 1990, Benjamin K. N. Ogol, the District Commissioner, Nakuru wrote to Jimna, making reference to another meeting in his office between the School Committee on the one side and Jimna and one Elijah Mwangi on the other hand in which it was resolved or reaffirmed that Jimna would receive 20 acres of land at Kirengero Settlement Scheme in Subukia Location in exchange of 10 acres. The letter concluded that:-

"...<u>you will be shown the land as soon as possible.</u> Meanwhile, the land which was not planted with crops at the moment could be utilised by the school committee for buildings." (emphasis supplied).

On 7th June, 1981, a meeting of the School Parent's Association was convened and attended by Parent's Association Committee members, including Jimna and 80 parents . The meeting ended with the following statements:-

<u>"MIN 10/81: SCHOOL COMPOUND</u>

Mr. Jimna Njuguna confirmed that he was issued with a settlement plot at Kirengero S.F.T Scheme and the church can now take over the plot as per the President (sic) directive..."

The church proceeded to take possession of the 10 acres for the school expansion. But before the land could be transferred to the church and the alternative land available, Jimna died on 16th August, 1985.

Again from the record, it is evident that some time in 1986, the Ministry of Lands, Department of Land, Adjudication & Settlement offered to Jimna's wife, the appellant, Medline Wanjeri Njuguna, who was the administratrix of his estate, PLOT NO. 145 KIRENGERO SCHEME. It is apparent she accepted the offer and the Ministry on 20th September, 1987, conveyed to her the following terms;

"...<u>Plot No. 145 Kirengero Settlement Scheme</u>

This is to inform you that you are required to pay Kshs. 24,115/= as loan repayment for the above plot. You will first pay Kshs. 2,396 as plot deposit and the rest will be paid in installments.

By a copy of this letter I am requesting the Director of Land Adjudication & Settlement to prepare legal documents in your name as you were appointed the heiress of the deceased..."

A month after this letter, the appellant addressed a letter on 11th November, 1987 to the Chairman Board of Governors, Bahati (PCEA) Secondary School as follows:-

"REF: EXTENSION OF SCHOOL: BAHATI PRIMARY /SECONDARY SCHOOL.

After longly (sic) awaiting for any document concerning ownership of PLOT NO. 145 - KIRENGERO SETTLEMENT SCHEME, the District Settlement Officer sent a letter reference DSO/NKU/529/145/5 of 30th September, 1987.

The letter stated that I am required to pay Kshs. 24,115/= as loan repayment.

By a copy of this letter I am requesting you to take any necessary step as concerns this matter because I learnt that I will not be exempted from repayment of the loan. Since I do not possess any document, may you finalise the matter in minimum time possible..." (emphasis supplied)

The letter was copied to the District Settlement Officer, Director of Land Adjudication and Settlement, the Senior Chief, the D.O. Bahati division and the District Commissioner Nakuru, for the obvious reason that they had been involved in the matter.

Since this dispute turns on the contents of this letter, we shall revert to it shortly. Apparently there was no reaction to the letter either by the School Board or any of the offices to which it was copied.

Later in response to a letter from the Secretary of the School Board the District Land Adjudication and Settlement Officer, confirmed as follows in his letter dated 17th February, 1997,

"Refer to your letter Ref: No. B/2/1/2/97 of 14th February, 1997.

...According to records held in this office, the above plot (NO. 145 KIRENGERO SETTLEMENT SCHEME) belongs to Jimna Njuguna. He was allocated with (sic) the plot in 1985. He (sic) was discharged on 24th March, 1995 in the name of Medline Wanjeri Njuguna ID/NO. 3622655/66..."

This dispute arose in 1999 following a flary of letters, the issue being the failure of the School Board to keep its word on the alternative property and the appellant's adamant demand for the return of his ten acres. Left with no alternative, the appellant instituted the action from which this appeal has risen.

In the suit she asked the Court to make a declaration that the 10 acres on which the School stood is her private property, that she was entitled, in the alternative to compensation at the current market value in lieu of transfer and a declaration that NO. 145 KIRENGERO is not the parcel earmarked for the appellant's compensation.

The respondents filed a defence and counter-claim in which they deposed that the plaint did not disclose any cause of action and that it is the appellant who ought to transfer the 10 acres to the respondents, the former having been allocated 20 acres at Kirengero in exchange.

The case was heard by Visram, J. (as he then was). The appellant and her son gave evidence to the effect that the School Board having failed to avail an alternative property the appellant was entitled to retain or recover the 10 acres from the school; that the Kirengero property was the appellant's own personal property acquired with her own resources. On behalf of the Board, the former Board Chairman and the area former chief were categorical that the appellant's late husband (Jimna) was compensated as agreed, yet the appellant had refused to transfer the 10 acres; that the school has developed the 10 acres. For the reason that the appellant got 20 acres at Kirengero Settlement Scheme instead of the normal five in the area, they testified that, that in itself was evidence that the allocation had been done in accordance with the agreement for compensation.

The learned Judge considered the evidence presented by both sides and preferred the respondent's version because:-

i. **They had absolutely nothing to gain from the suit land as it was donated for the benefit of**

the community.

ii. **The appellant's evidence was self serving, made up after Jimna's death to "squeeze" more from the respondents.**

iii. **The appellant and her son contradicted themselves on whether or not Jimna was a member of the School Board.**

iv. **There was evidence that Jimna was compensated.**

With that the appellant's suit was dismissed with costs and the respondent's counter-claim allowed in terms of prayers (a), (b) & (c), namely that the 10 acres out of NAKURU /MENENGAI/2 is owned by the School, that it be transferred to the School by the appellant; and costs of the counter-claim and interest to the borne by the appellant.

Against that decision, the appellant has brought this appeal on several grounds which we have summarized as follows:-

i. **That the learned Judge erred in failing to consider that PLOT NO. 145- KIRENGERO SCHEME was not compensation as had been intended.**

ii. **The learned Judge erred in disbelieving the appellant's case.**

iii. **That there was no basis for the Judge holding that merely because the appellant had 20 acres in the scheme, that was evidence that the land was compensated.**

iv. **The Judge failed to appreciate the circumstances under which Jimna was made to give up his 10 acres of land to the school.**

These grounds were argued *exparte* as the respondents, although duly served with the hearing notice, either by themselves or by counsel failed to attend Court.

In our view, the only issue before the trial Court and indeed in this appeal is whether PLOT NO. NAKURU/ KIRENGERO/SCHEME 145 was compensation to Jimna for donating 10 acres of his land to the school.

The promise to compensate Jimna for the 10 acres was made in 1979. At the time of his death in 1985, six years later, the issue had not been resolved. He had been specifically promised that the alternative land would be at KIRENGERO SETTLEMENT SCHEME.

From the concatenation of the events outlined in the previous paragraphs, we are satisfied that during the period in question the provincial administration, acting on the instructions of the former President identified PLOT NO. NAKURU/ KIRENGERO/145 measuring 20 acres as compensation to Jimna. That fact is clear from the letter we have made reference to, from the District Land Adjudication and Settlement Officer, Nakuru dated 30th September, 1987, just two years after the death of Jimna, asking the appellant to make payment toward the settlement of the loan in the sum of Kshs. 24,115 in respect of PLOT NO. NAKURU KIRENGERO /145. The letter further intimates that the title documents would be issued in the appellant's name as the administratrix of the estate of Jimna.

We have also said earlier that this appeal turns on the appellant's letter dated 11th November, 1987, being a reaction to the above letter. It was addressed to the Chairman of School's Board of Governors demanding to know whether the Board would pay the loan of Kshs. 24,115 demanded by the District Land Adjudication & Settlement Officer, Nakuru, in his aforesaid letter. The appellant's letter concludes thus:

"...by a copy of this letter I am requesting you to take any necessary step as concerns this matter

because I learned that I will not be exempted from repayment of the loan. Since I do not possess any document, may you finalize the matter in minimum time possible..."

The appellant did not have relevant documents in respect of the property. Secondly she expected the School Board or the provincial administrators (the D.O and the P.C.) to whom the letter was copied to take up the loan re-payment because that was the understanding. We draw a nexus between this letter, the previous letters and minutes of various meetings. According to a copy of minutes of the meeting held on 16th August, 1981 and attended by Jimna, it was confirmed that he had been allocated 20 acres of land (4 plots) at Kirengero Scheme. This position was confirmed at a subsequent meeting on 18th August, 1981, once again, attended by Jimna. These minutes and letters were not contested by either side. It follows that they constitute evidence that, with the efforts of the provincial administration the land at Kirengero Scheme was identified. But the provincial administration and the school, in accordance with the agreement were expected, not only to identity the property but they were also required to pay all the expenses and to transfer it to Jimna free of encumbrances.

After taking possession of the 10 acres, the school and indeed the Provincial Administration abandoned Jimna and later his widow, the appellant. We are satisfied that from copies of the receipts and statement of the loan account that the appellant ended up paying all the 56 half-yearly installments to the Settlement Fund Trustees upto the point the title deed was issued to her on 24th March, 1995.

The land in question was granted to the appellant by the Settlement Fund Trustees, a body corporate established in 1963 by the Kenya (Amendment of Laws) Agriculture Regulations a legal Notice Number 352/1963, pursuant to section 167 of the Agriculture Act, now repealed by the Agriculture Fisheries and Food Authority Act, 2013. The Settlement Fund Trustee as a body corporate had the power donated by section 169 aforesaid to, among other things, make advances to settlers, co-operative societies or to such other persons as may be approved by the Trustees. It could also defray any expenses incurred by the Government for any purpose connected with any of its functions. With the approval of the Trustees, the Settlement Fund Trustees could make any payment for any purpose.

This Court in **Boniface Oredo –V- Wabumba Mukile,** Civil Appeal No. 170 of 1989 eKLR 1992 summarized the functions of the Settlement Fund Trustees as follows:-

"...The interest of the Settlement Fund Trustee is really that of a chargee. It lends money for development to persons to whom it has allocated land and the repayment of such money is secured by a charge upon the property..."

From our analysis of the evidence and the law, we are unable to reach the same conclusion as the learned trial Judge. In our view, the School Board and those that set out to help it acquire the 10 acres of the appellant's land failed to keep their side of the gentleman's bargain. In as much as the respondents were taking the 10 acres for free the appellant likewise ought to have taken the 20 acres at Kirengero Settlement Scheme for free. In fact, to do so the respondents sought to take for free private property. The acquisition of the appellant's parcel of land by the respondent in the circumstances of this case amounts to an arbitrary acquisition of private property outside the legal framework of compulsory acquisition.

As mentioned above, a true exchange envisaged in the bargain involved the giving of 10 acres from PLOT NO. NAKURU/MENENGAI/2 by the appellant and receiving by the latter from the School Board of 20 acres at Kirengero Scheme. The appellant was to be compensated by an allocation of the latter for her loss of the former. There was no consideration from the respondents and they cannot be allowed to have their cake and eat it.

Like any other person with land in Kirengero Settlement Scheme, the appellant has complied with the terms of the charge with no favours or special treatment extended to her. As a matter of fact none of the letters or the charge from the Settlement Fund Trustees alluded to any role by the School Board or the provincial administration. To us it was a case of the provincial administration telling the Trustees:-

"...Here is a person in need of land and the Head of State has directed that he be settled...."

Appreciating the school's needs being a member of its Committee and the fact that the school had developed the 10 acres in question, the appellant offered to sell it at Kshs. 3m to the School Board after it failed to compensate him. We are of the view, that the appellant, having benefited from the identification of the Kirengero land by the provincial administration on behalf of the Board ought to have pressed only for the refund of the amount of the loan and other charges that she paid to the Settlement Fund Trustees.

This appeal for the reasons given must succeed. We accordingly allow it and set aside order of the learned Judge dismissing the appellant's suit, substitute it with the prayers in the plaint and order that:-

i. The respondent compensates the appellant in the sum of Kshs. 46,499/= being a refund of the funds expended by the appellant to settle the Settlement Fund Trustee loan, plus interest at court rate from the date of filing of the suit, to be paid within ninety (90) days from the date of this judgment.

ii. The appellant shall have the costs of this appeal as well as the costs in the High Court.

Dated and delivered this 7th day of February 2014.

R. N. NAMBUYE

….....

JUDGE OF APPEAL

W. OUKO

….....

JUDGE OF APPEAL

J. MOHAMMED

….....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR
/mgkm