

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU Civil Appeal 53 of 1999

ELIAS KIRUJA.....APPELLANT

VERSUS

JOSEPH KIBITHE SIRONGA.....RESPONDENT

(An appeal against the judgment and decree of the learned SRM Ndugu

in CMCC No. 147 of 1997 at Meru delivered on 7th December 2004)

JUDGMENT

A claim was filed in the lower court by Joseph Kibithe Sironga. The said Joseph by the time the case came up for hearing at Chief Magistrate's Court Meru, he was deceased. His claim was made on behalf of the estate of Sironga Master ole Kasu. The said Kasu was the deceased's father of Joseph. In the plaint filed in the lower court, Joseph sought for orders of specific performance of an agreement entered into between Kasu and the defendant who now is the appellant over parcel Timau S.F.T. Scheme No. 016. The appellant and Kasu were said to have entered into an agreement whereby Kasu was to buy and the appellant was to sell that property. The agreement was dated 18th February 1982. Joseph also made a claim for general damages for breach of contract. The appellant denied the claim and in his counter claim he prayed for the eviction of Joseph his servants and agents. As stated before, by the time the case came up for hearing before the learned magistrate P.M. Ndungu, Joseph had died. The case was prosecuted by the brother of Joseph. He stated that at the time he was giving evidence which was 30th March 1999 he had not obtained a grant of representation in respect of the estate of Kasu and Joseph. There was no evidence that was led with regard to the dates of death of both of them. Section 82 of the Law of Succession Act gives power to personal representatives to enforced suits for on behalf of deceased's estate amongst other powers. In the absence of a grant being issued, no one is entitled in law to deal with the estate of the deceased. The question then that arises is, how could the brother of Joseph prosecute this case when Joseph was already death? I find that I am in agreement with the appellant's argument that the learned trial magistrate erred in law in entertaining an action of a deceased person when it was being prosecuted by one who was not a holder of a grant of letters of administration. On that ground alone, this appeal would succeed. On the issue of whether the lower case claim offends the Land Control Act, I would begin to say that the evidence on records clearly show that the suit property was the subject of that Act. The agreement exhibited in evidence did not bear the date reflected in the plaint. The plaint was seeking to enforce by way of specific performance the agreement dated 18th February 1982. I have perused all the exhibits contained in the record of appeal and I could not trace such an agreement. The agreement pleaded in the plaint indicated that Kasu was purchasing 9 acres of the suit land. There is an agreement which is dated 18th October 1982 which also indicates that Kasu was purchasing 9 acres. If that is the agreement which the lower court's claim is based upon, then the consent submitted in the lower court dated 5th May 1983 was obtained beyond the period provided under the Land Control Act Section 8. That Section provides that a consent must be obtained in respect to transactions over agricultural lands within 6 months of the agreement. The consent exhibited in court was obtained a year after the date of the agreement. In my view, it was invalid and could not be of assistance to Joseph to have the land transferred. The lower court's claim will also fail because the pleadings were seeking to enforce an agreement that was not produced in evidence before court. I have considered the proceedings of the lower court, the judgment of the learned magistrate and the submissions made by the parties. I am of the firm view that the learned trial magistrate erred in law and fact for giving judgment to a party who was not before the court and who did not adduce evidence. That party was said to have been deceased and

there was not evidence that he had been substituted in that action. As stated before also, the agreement, the subject of the specific performance was not produced. The learned magistrate in enforcing an agreement which did not have a valid consent did an act that is criminalized by section 22 of the Land Control Act. I can find no basis for supporting the lower court's judgment. In my view, the appellant's appeal does succeed. I make the following judgment.

1. The judgment of P.M. Ndungu in Chief Magistrate's court No. 147 of 1997 delivered on 4th May 1999 is hereby set aside and is substituted with an order dismissing the said suit with costs being awarded to the appellant.

2. The appellant is not entitled to judgment as prayed in his counter claim at the lower court because if judgment was granted in the terms he sought it would be tantamount to an action being pursued against a deceased person without substitution of that deceased person.

3. The appellant is awarded costs of this appeal.

Dated and delivered at Meru this 30th day of October 2009.

MARY KASANGO

JUDGE