REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 17 OF 2000

SICILY MURANGI KIURA…….. APPELLANT

VERSUS

CYPRIANO GICHOBI NDAMBIRI…… RESPONDENT

JUDGEMENT

1. The Appeal herein was argued at length by Mr. Muciri, Learned Counsel for the Appellant and Mr. Mucira Learned Counsel for the Respondent.

2. Before getting to the Grounds of Appeal, it would be worthwhile to restate the facts in summary; the Appellant, **Sicily Murangi Kiura** is the wife of one **Francis Kiura Njeru** (deceased). She filed Succession Cause No.84/99 seeking to be granted letters of Administration to Administer the estate of her late husband. Letters aforesaid were issued on 20th August 1999. In February 2000, she applied the grant of letters of Administration to be confirmed and listed the assets and beneficiaries thereto. Apparently and before the Summons for Confirmation of Grant was even filed, one **Cypriano Gichobi Ndambiri,** the Respondent, on 15.9.1999, filed an Affidavit of Protest to the manner of distribution of the estate of the deceased. His Protest was based on the fact that he had bought one (1) acre of parcel number Baragwe/Kariru/950 from one **Stanley Mureithi Paul** who had sold the land to him pursuant to a sale Agreement executed on 16.1.1990. The said **Stanley Mureithi** Paul had no title to the one (1) acre which he claimed to have bought from the deceased sometime in 1985. The deceased did not transfer the one (1) acre to **Stanley** during his lifetime but Stanley upon the death of **Kiura,** sued his wife, the Appellant, in ***RMCC NO. 150/87*** and the matter was referred to arbitration of the District Officer, Gichugu. On 13.7.1988, the award was adopted as a decision of the Court and a Consent Order recorded to the effect that Stanley would receive the one (1) acre aforesaid.

3. The Protest by the Respondent was heard by P.K. Sultan (Miss), Resident Magistrate and she came to the conclusion that the Respondent had properly bought the one (1) acre from Stanley who himself had properly been seized of it by fact of the Consent Order above and she ordered that the Appellant do cater for the Respondent in respect of that portion of Baragwe/Kariru/950. The Appellant was dissatisfied and filed this appeal.

4. The Grounds of Appeal and, my findings thereto are;

(i) that the learned trial Magistrate erred in that she relied on a Sale Agreement to which the Respondent was not a party. I agree. The purported Sale Agreement between Stanley and the deceased could not itself be a basis for the Respondent, a stranger to the Agreement and the land, to lodge his protest and succeed.

(ii) as a corollary to the above, that it was erroneous for the learned trial Magistrate to rely on the Agreement between Stanley and the deceased as the same is null and void for want of Land Control Board Consent. That being the case it could not confer any interest on Stanley capable of being transferred to the Respondent. In answer, Counsel for the Respondent argued that the Appellant freely conceded that the Respondent had obtained an interest and had been in occupation since 1990. In any event, he argues further, no challenge was made to the Agreement in either of the suits before the Lower Court. I would myself find that the Sale Agreement without Land Control Board Consent is void and the only remedy left for the purchaser party (Stanley and therefore his Successor, the Respondent) is a refund of the purchase money. As was said in Richard Kamiri Gachwe Kahia –vs- Edward Kamau Ng'ang'a C.A. 61/2001 (unreported);-

"There can be no dispute that the sale transaction required the Consent of the Land Control Board and in the absence of the Consent the Agreement for sale became void for all purposes". Since it is conceeded that no Consent was obtained and yet it was necessary, the Agreement became void and Stanley had no interest whatsoever, let alone one that he could capably transfer to the Respondent. As to the argument that the matter should have been raised at the Lower Court, it was held in KCB –vs- Oisebe [1982] LLR 66 CAK that a claim that a matter is a nullity can be raised on Appeal even if it was not raised earlier as a nullity makes all proceedings flowing from it exactly that; a nullity!

iii) Following on point (ii) above, Counsel for the Appellant argued that since Stanley had not acquired any transferable interest, the Respondent was not entitled to any Orders in his favour. I agree because Stanley had nothing to hold and he had nothing to transfer as a consequence and the purported sale to the Respondent was a sham and an illegality to which no benefit can accrue.

iv) Regarding the Consent Order dated 13.7.1988 adopting the decision of the District Officer Gichugu and his panel of elders, Counsel for the Appellant argued that the Order was improperly entered because there were no proceedings from the panel to authenticate the alleged Consent. Further, the Appellant had no basis for entering into a Consent with regard to the suit land as she had not been appointed the legal representative of the deceased's estate at that time. Counsel for the Respondent on the other hand argued that the point is moot because it was not raised anywhere before this Appeal. In any event, even if no Letters of Administration had been issued, the Appellant held herself out as having authority to represent the deceased's estate. That she even appeared in Court on 13.7.1988 to authenticate the Consent reached before the District Officer.

5. For my part, the point is really not difficult at all; it is agreed that at time of the Consent Order, the Appellant had not received Letters of Administration to the estate of her late husband. The title to the suit land was still in the name of the deceased. It does not matter that she passed herself off as having the legal standing to transact any business in the name of her deceased husband. Any purported Consent to transfer one (1) acre of land to the Respondent was illegal and again the Respondent cannot benefit from an illegality. Period. In ***Ibrahim Okoyana –vs- Ziporah Musi and Another (1982 – 1988) 1 KAR 1074 , it was held that "no distribution of the estate could validly take place until it was decided who should have the grant of Letters of Administration".*** The facts in that case bear a resemblance to those in this appeal and the holding thereof applies aptly to this case as well.

6. There were two other matters that featured in this appeal during submissions by Counsel: One was the argument by Counsel for the Respondent that the Order dated 20.6.2000, the basis of the Appeal was not extracted and made part of the record and therefore in breach of Order XLI Rule 8B (4) (f). That Rule provides that the Judgment, Decree or Order should be on record before the Appeal goes for hearing. I have checked the record and have confirmed that save for the proceedings in the Lower Court, the extracted Order has not been filed. I am however satisfied that when the parties took directions, they were in agreement that there was sufficient material before the Court to enable it make a fair determination of the matter. That is why they consented to a supplementary record of Appeal being filed prior to the hearing thereof. Failure to extract the Order is not fatal to the Appeal and no Authority to the contrary has been cited. I shall rest the matter there.

7. The other matter was that the Respondent was entitled to the land by fact of adverse possession and

therefore the Appellant has no claim to the one (1) acre of land possessed of the Respondent. I note that the Appellant took occupation of the land in 1990. Twelve (12) years would have lapsed in 2002. Without belabouring the point, during the period 1987 to-date, a period of seven (7) years the parties were engaged in litigation on the same parcel of land. Time cannot run during that period, so that adverse possession cannot be a basis to sustain the Respondent's claim ***(see the decision in William Gatuhi Murathe –vs- Gakuru Gathimbi C.A. NO. 49/1996)*** (unreported)

8. On the whole, I should allow the Appeal but need to add one more thing; the Respondent's remedy lies not in the way he is pursuing it viz holding onto the land when he has no title to it neither did the person whom he purportedly bought it from. His remedy lies in the refund of the consideration even if he has made substantial improvements on the land. ***(see Kariuki –vs- Kariuki [1983] KLR 225 at 227 per Law J.A. and Cheboo –vs- Gimunyigei C.A. No. 40 of 1978 [Kisumu]).***

9. The Appeal herein succeeds with costs to the Appellant. Orders accordingly.

Read in open Court this 11th Day of February 2005.

I. LENAOLA

JUDGE

In the presence of;

Mr. Muchiri for Appellant

N/A for Respondent

I. LENAOLA

JUDGE