IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram:Madan, Law and Potter JJA)

CIVIL APPEAL NO. 2 OF 1980

BETWEEN

NJUGUNA.....APPELLANT

AND

NJAU.....RESPONDENT

JUDGMENT

Madan JA The appellants were the holders of the following decree in the High Court Civil Case No 631 of 1967 which was a suit between them as the plaintiffs and the respondent and one Njau Margia (we are not concerned with him any more) as the defendants for the specific performance of an agreement made between the parties in 1958 for the sale of Farm No 535 Ndarugu/Gathaite/Kiambu, or the return of Kshs 20,000 and damages for breach of contract, ie:

"1. That the defendant Chege Njau do within three months from the date of this decree (September 25, 1968) proceed to effect an alteration in the Register of Lands relating to the freehold known as No 535/Ndarugu/Gathaite/Kiambu so that in accordance with the agreement between the parties it is registered in the names of the plaintiffs and the defendants in this action and not solely in the name of the second defendant.

2. That in default of the alteration aforesaid within the period appointed the defendants shall pay the sum of Kshs 20,000 to the plaintiffs, being the money expended by the plaintiffs on the said land.

3. That the defendants do pay to the plaintiffs their costs of this suit to be taxed and certified by the Taxing Master of this Court."

The appellants on January 16, 1979 moved the court below for orders "that the land known as Ndarugu/Gathaite/535 be registered in the names of the appellants and the second defendant (respondent) as tenants in common in equal shares, and the Deputy Registrar be authorised to sign a transfer on behalf of the second defendant."

The appellants' have foregoing application was dismissed by Scriven J in precisely the following words:

"In view of delay quite inequitable to enforce decree in manner prayed. Now motion dismissed."

The appellants have appealed. They say that equity had no ground to hold in this case because they were entitled to execute the decree within the statutory period of twelve years from its date under the

provisions of Section 4(4) of the Limitation of Actions Act which reads:

"(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered ..."

The respondent's advocate submitted no, that it was not so because execution proceedings are not included in the body of "action" within the definition of subsection (4). Me thinks the respondent's advocate is mistaken. In Section 3 of the Interpretation and General Provisions Act the definition of "action" is:

"'action' means any civil proceedings in a court and includes any suit as defined in Section 2 of the Civil Procedure Act;"

I agree with Chanan Singh J who held in *Mohamed v Sardar* [1970] EA 358 that the word "Action" in Section 4(4) includes execution proceedings.

In *Clarke v Bradlaugh* [1881] 7 QBD 38 at p 50 Brawell LJ said:

"I am not sure that it would not be reasonable to hold that the word 'action' is a sort of nomen general which includes every sort of legal proceedings."

And Lush, LJ said (ibi p 57):

"the word action is a generic term and may be used as a general term"

In *Re Carter smith, Exp Taxation Comrs* [1908] 8 SRSW 246, Street J said at p 248 that the word action:

"When used by the legislature it must … be construed according to its true legal meaning unless it is apparent upon the face of the Act in which it is used that it is intended to bear a more restricted meaning."

I say that in the context of Section 4(4) of the Limitation of Actions Act the word "action" is not intended to bear a restricted meaning and it includes all kinds of legal including execution proceedings, and the time limit for the execution of a judgment is twelve years.

The respondent's advocate also submitted that because of the terms of paragraph one of the decree the appellants were not entitled to an alteration in the Register of Lands after the expiry of three months from the date of the decree but only to the payment of Kshs 20,000.

Again , I think the respondent's advocate is mistaken. I read the purport of the first paragraph of the decree differently, I read it the other way round. I think it is plain that the appellants were precluded from executing the decree for three months; if they had tried to do so they would have been met by a successful barrier that their action was premature. They became entitled to execute the decree after the expiry of three months, and at their option either by way of specific performance or by demanding payment of the amount decreed in their favour.

As far as the equity of the matter is concerned I consider it is wholly in favour of the appellants. The first appellant deponed in his affidavit in support of the motion that they had been on the land with the respondent and made developments thereon since 1958. Thus they have lived on the land for about twenty two years. They have been on the land for about twelve years since the date of the decree. How can it possibly be inequitable to enforce the decree. The learned judge decidedly erred in refusing the motion. Equity was in favour of the appellants. I would set aside the order of the High Court and substitute therefore an order granting the appellants' application for execution, with costs both here and in the court below.

Law JA. I have had the advantage of reading in draft the judgment prepared by Madan JA. I agree with it in every respect and I concur in the order proposed.

Potter JA. I also, having had the advantage of reading in draft the judgment of Madan JA, agree with that judgment and with the order proposed.

Dated and Delivered at Nairobi this 6th day of June 1980.

C.B.MADAN

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JUDGE OF APPEAL

E.J.E.LAW

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR