IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, SHAH, JJ.A. & BOSIRE AG. J.A)

CIVIL APPEAL NO. 31 OF 1996

BETWEEN

LIVINGSTONE NKURRUNA...…..……APPELLANT

AND

PATRICK SEKI ……..……..…….RESPONDENT

(Appeal from the Ruling and order of the High Court of Kenya at Nairobi (Mr. Justice Khamoni) dated the 9th day of October, 1995

IN

H. C. C. C. NO 1749 OF 1995)

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JUDGEMENT OF THE COURT

On the 9th day of October, 1996, the superior court (Khamoni, J.) declined to grant to the appellant (plaintiff in the superior court) an injunction to restrain the respondent from denying the appellant "his right of way" and from digging a road on a disputed property until the determination of the suit in the superior court or until further orders. The appellant has appealed to this court and seeks reversal of the learned judge's orders.

According to the plaint filed in the superior court on 5th June, 1995 by the respondent, the respondent had, allegedly on 26th April, 1995, dug a 20-meter trench along the middle of the appellant's road making it impossible for him to pass the same either by road or car. The appellant pleaded (in the plaint) that the road in question passes through some two and a half acres of land which land is the subject-matter of the dispute between the parties in H. C. C. C. NO. 1210 of 1994(O. S)

It is common ground that the disputed piece or parcel of land is registered in the name of the respondent. It is also common ground that the plaintiff is seeking to have the said disputed parcel of land transferred to his name.

The appellant has created for himself a situation form which, at this stage, he may find himself unable to retract. If he insists n claiming an easement or right of way through the disputed land then he impliedly admits that the said land belongs to the respondent. This is a situation which the appellant does not wish

to accept as it would obviously militate against him in the suit which he has filed claiming title to the disputed land. To put it simply the appellant wants to have his cake and also eat it. Despite the court pointing out the problems the appellant was leading himself into, the appellant insisted on claiming the easement or right of way and relied heavily upon the provision in sections 27, 28, 29, and 30 of the Registered Land Act (cap. 300)

(the Act).

Section 27 of the Act refers to the interest conferred by registration in favour of the proprietor of the land, namely absolute ownership or in case of a proprietor as a lessee the leasehold interest in the land.

Section 28 of the Act grants to such proprietor indefeasible rights subject only to overriding interests referred to in section 30 of the Act.

Until such time as the superior court decides the issue of proprietorship of the disputed land the appellant's application (and this appeal) does not help the appellant. It is a problem which the appellant, acting in person, cannot understand or it is possible that he does not wish to understand it.

What was in issue before the learned judge was whether or not the appellant was entitled to the interim relief he was seeking. Such a relief as claimed by the appellant was a matter in the discretion of the judge and unless the judge exercised that discretion wrongly, or on some misapprehension of the law causing injustice an appellate court will not interfere with the exercise of such discretion.

The learned judge considered the matter before him with some care. He said:

> "On both maps the road being claimed by the plaintiff is not included. The only road of access shown on the map as serving the plaintiff's parcel No. 10861 is that one serving parcel No. 8931. I say parcel No. 8931 is partly served by that road because the other end of that parcel reaches a main road, I think on the northern side of the parcel, so that even the if the road serving Nos. 10861 and 10862 were not there, parcel 8931 would still have its access road the main road"

The learned judge then went on to consider the partitioning of land parcel No. 3488 into two, the respondent getting land parcel No. 4109 and the appellant getting land parcel No. 4110, both of which were fronted by a main road. The learned judge observed that the appellant subdivided his parcel and sold some of the land to others and the sold land was next to the main road and as a result of that the appellant was given the access road which serves parcel No. 10862. The trial court will have to determine whether the situation that the appellant now finds himself in is of his or of the respondent's making.

The learned judge considered, quite correctly, the principles governing the grant of interim injunctions and came to the conclusion that it would be eventually a matter for the trial court to go into facts. Having observed that the appellant had not put up a prima facie case with a probability of success, the learned judge considered the issue of irreparable harm, it any, and came to the conclusion that the appellant had not shown that he was likely to suffer irreparable harm. As a matter of abundant caution the learned judge also went into the issue of balance of convenience which he found tilting in favour of the respondent registered owner of the disputed parcel of land.

In all the circumstances of this case we cannot find fault with the ruling of the learned judge and this appeal is therefore ordered dismissed with costs.

Dated and delivered at Nairobi this 28th day of May, 1997.

R. S. C. OMOLO

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

S. E. O. BOSIRE

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AG. JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR