



IN THE COURT OF APPEAL

AT KISUMU

(Coram:platt, Apaloo JJA &Masime Ag JA)

CIVIL APPEAL NO 50 OF 1986

BETWEEN

ACHACHA NYACHIENGA.....APPELLANT

AND

OGOWE S/O OLIECH.....RESPONDENT

JUDGMENT

(Appeal from the High Court at Kisumu, Porter J)

May 3, 1988, Platt, Apaloo JJA & Masime Ag JA delivered the following Judgment.

On July 7, 1980 Scriven J made an uncalled for order outside the pleadings and issues for trial, when he declared that Ogowe Oliech had rights in possession against the whole of the land, such as are capable of definition under the provisions of section 30(g) of the Registered Land Act (cap 300). He was satisfied, he said, that whenever it was that the defendant did take possession he knew of the plaintiff's ancestral claim to the land should he return from Tanzania. The learned judge did not accept the plaintiff's claim to the land on the basis of adverse possession, or a customary or other trust. It was recognized that the plaintiff's ancestral claim to the title of land had failed because the defendant had managed to secure first registration to the land, which the judge could not go behind. He then invoked the overriding interests provision in section 30(g) mentioned above.

Whatever the merits of that decision, which may be judged from a description of overriding interests in *Cheshire's Modern Law of Real Property* (E H Burn's 12th Edition) at pp 772 *et sec.*, and the debate in *Hodgson v Marks*, (1971) 2 ALL ER 684, there has been no appeal. At first the registration of the defendant was cancelled and Ogowe registered in his stead. But by an application for "review," on December 6, 1985, Porter, J ordered the registration of Achacha Nyachienga, the defendant, to be maintained; but Ogowe Oliech was registered as having an overriding interest in possession of the whole plot. This review followed one before Scriven, J himself, in which he refused to alter his judgment. Whatever the propriety of this review after a previous review, it had the signal merit of rectifying the register so as to accord with Scriven, J's judgment.

However, on the basis of that judgment, an application was presented to Porter, to require the defendant to show cause why he should not vacate the land. Porter, J acceded to the application and ordered the defendant to remove himself from the land in 6 months from the date of the order, December 6, 1985.

The appeal against eviction has been taken on unconvincing grounds. The first ground purports to argue

that the judge (Porter J) had been asked to review the order and not grant eviction, (or so it seems). The second ground suggests that Porter, J should not have evicted the defendant because Scriven J had doubts about his order.

The review of the order of Scriven J was not really a review at all. It was directed at rectifying the register, and ought to have been conducted as such, since the defendant, who had applied, got what he wanted in that rectification. Of course, if the register was to be rectified, then the registrar should have been a party. It is not clear what part Ogowe played in these proceedings for review. The record does not show that he took any part. What the defendant may have wanted was to set aside the judgment of Scriven, J declaring an overriding interest. But having failed to achieve that before Scriven, J then he would have to fail before Porter, J.

The second ground is ineffective. It was not that Scriven, J had doubt, so much as that he left it to the registrar how the latter should register the overriding interest. The register having been rectified to show the overriding interest, that is all that can be said.

The defendant who has appealed against the order of eviction, has never appealed against the source of the order. As the learned judge gave the respondent a right in possession to the whole land, that must be respected until set aside. Consequently the order of eviction must stand and will be effective six months from today.

The appeal is dismissed, with costs to the respondent.

Dated and delivered at Kisumu this 3rd day of May, 1988

H.G PLATT

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL

J.R.O MASIME

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AG. JUDGE OD APPEAL

Cases

Hodgson v Marks [1971] 2 All ER 684; [1971] Ch 892; [1971] 2 WLR 1293; 115 SJ 224; 22 P & CR 586; [115 SJ 375; 35 Conv. 225;30 SLJ 31], CA

Texts

Burn, EH. (1976) *Cheshire and Burn's Modern Law of Real Property* London: Butterworths 12th Wdn p 772

Statutes

Registered Land (cap 300) section 30(g)