



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(Coram: Platt, Apaloo JJA & Masime Ag JA)**

**CIVIL APPEAL No. 79 OF 1986**

**BETWEEN**

**CHERUIYOT .....APPELLANT**

**AND**

**BARTIONY.....RESPONDENT**

*(Appeal from a judgment of the High Court at Eldoret, VV Patel J)*

**JUDGMENT**

May 20, 1988 **Apaloo JA** delivered the following Judgment.

The respondent is the registered owner of a piece of agricultural land known as Nandi/Sangalo/251 measuring 7.5 acres. In March 1970, he entered into a written agreement to sell it to the appellant at the price of Shs 2,800/=. Apparently, upon receipt of the purchase price, he put the appellant in possession. He is still in possession today.

Being agricultural land, the sale was subject to the consent of the Land Control Board. And the then extant legislation provided that the said consent must be obtained within three months of the agreement of sale. Thereafter, by the peremptory provision of the legislation, the agreement became “void for all purposes”. The Land Control Board consent was sought and given. But it was wholly outside the time limited for such consent by the statute. It was obtained in March 1980 – a period of 12 months from the date of the agreement.

Although the respondent sold and put the appellant in possession of the land, he seems to have had second thoughts about the sale. So he refused to execute a transfer of the title in the appellant’s name. As the parties were unable to compose their differences on this matter, the appellant brought a plaint in the Resident Magistrate’s Court Kapsabet in March 1980 and prayed for judgment against the appellant for:

- (a) Transfer of title to parcel No Nandi/Sangalo/251.
- (b) An injunction to restrain the respondent and his agents from trespassing on the land.
- (c) And costs of the action.

The respondent resisted the suit and set up the invalidity of the sale. And as he gave the appellant possession of the suit land on the faith of the purported sale, he counteclaimed for his eviction therefrom. On the 26th March 1981, the learned Magistrate entered judgment in the appellant's favour for the reliefs sought in the plaint. As the appellant was held entitled to a transfer of the land on the basis of a valid sale, the respondent's counterclaim for the former's eviction could not hold. So the court dismissed it.

The respondent appealed against that judgment to the High Court. That court allowed the appeal and held that as the consent of the Land Control Board was given outside the period ordained by law, the contract of sale was avoided by the mandatory provisions of the statute. As the validity of the sale was the only basis the appellant put up for his continued occupation of the land, it would, in my opinion, have been legitimate for the learned Judge, as a consequential relief, to order the appellant's eviction from the land. The learned Judge omitted to make that order and the dismissal of the counterclaim clearly escaped him. It must be pointed out that when the magistrate validated the sale and ordered the transfer of the suit land to the appellant, this order was obeyed and the land was duly registered in his name. When the High Court decided the issue of title in the respondent's favour, the registrar transferred the land into his name. During the hearing of this appeal the respondent, at our request, showed us his land certificate issued under The Registered Land Act, (Cap 300). It was dated the 2nd May, 1984.

The position which resulted from the respondent's success at the High court was, that although the registered title was in his name the appellant remained in exclusive possession of the land. To regain such possession, he, on the 27th August 1984, applied by chamber summons *ex parte* to the Resident Magistrate for eviction of the appellant. Having read the judgment of the High Court, the learned magistrate granted the application and ordered the eviction of the appellant from the land. As a procedural matter, this application should have been made on notice and the appellant should have been afforded an opportunity of arguing against his eviction. In view of what subsequently transpired, this point of procedure became a barren one.

When the order of his eviction came to his notice, the appellant by counsel moved to set it aside. So rival arguments were addressed to the Court on the legal propriety of making the order of eviction against the appellant. Two points were taken in the appellant's favour. First, it was urged by Counsel that the matter ought not to have been dealt with on an *ex parte* application. That was sound enough. When the argument passed from the procedural to the substantive legal contention, it was urged that although the respondent was successful and had the land transferred in his name, inasmuch as his counterclaim for the appellant's eviction was dismissed and was not affected by the appellate Judge's judgment, it was wrong in law to have acceded to the appellant's eviction from the suit land. This contention did not weigh with the magistrate and he refused to disturb the eviction order against the appellant. His opinion was that in view of the result of the appeal before the High Court which declared the respondent's title, the dismissal by the magistrate of the respondent's counterclaim for eviction did not affect the position.

The appellant took the matter on appeal to the High Court. That court affirmed the ruling of the Magistrate. In the High Court, Counsel for the appellant re-iterated his failed submission that as the respondent's claim for eviction by way of counterclaim was dismissed by the Magistrate and that order of dismissal was not set aside by the High Court on appeal, the order of eviction made against the appellant was wrong. The learned Judge rejected that argument and held that as the only right the appellant asserted for his continued occupation of the land was the purchase from the respondent and as that purchase was held to be invalid, his eviction was rightly ordered, the magistrate's dismissal of the respondent's claim for his eviction notwithstanding.

The appellant brought a further appeal before this court. The only grounds which raise serious questions of law, are framed as follows:

- (1) The learned Judge erred in law in failing to appreciate that the counterclaim of the respondent had been dismissed and no appeal was preferred at all.
- (2) The learned judge erred in law in failing to direct his mind to the fact that once the respondent's counterclaim was dismissed and no appeal was preferred against the dismissal order,

the matter became *res judicata*.

In order to decide on the validity or otherwise of these grounds, it is necessary to decide what was in issue between the parties before the magistrate and what he in fact decided. Clearly the issue was: who was the rightful owner of the suit land? Although it was common ground that the respondent was the original owner, the appellant said he relinquished that ownership to him by reason of the sale. The respondent disputed the sale or its validity and claimed that the appellant was wrongfully on the land and prayed for his eviction. Had the learned Magistrate decided the issue of title in favour of the respondent, the order for the appellant's eviction would have followed as a consequential relief. As he decided the issue of the ownership in the appellants favour, the respondent's claim to regain possession of his land, which he sought by the eviction order, could not validly be made.

The question, who was the rightful owner of the suit land was decided adversely to the appellant in the High Court. It was there held that the purported sale was avoided by the peremptory provision of a statute and that the respondent and not the appellant was in truth the legal owner of the land. That holding was not appealed against and still stands. The result is, if the appellant were to assert today that he was the owner of the land and was, on that account, entitled to maintain his possession, he would properly be met with a plea of *res judicata* by the respondent.

If that would be a valid plea against the appellant, then he has no extant right to the land which he can validly assert against the respondent. And unless he relinquished possession to anyone else, it is the legal owner of land who is entitled to possession against the whole world. As I said, since the decision of the High Court, the ownership of the suit land has been transferred to the respondent under the Registered Land Act (Cap 300).

Section 27 of that Act spelt out the effect of registration as follows:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or appurtenant thereto.”

And it is trite learning, that one of the acknowledged rights of ownership of land, is the right to its possession. It follows that in my judgment, the fact of that the High Court omitted while affirming the respondent's ownership to the suit land, to reverse the magistrate's consequential order dismissing the claim of the respondent for the appellant's eviction, does not affect the legal position. The matter of substance is, that the contest of title joined between the appellant and the respondent finally terminated in the respondent's favour and he is entitled, as a necessary incident of that ownership, to have full and exclusive possession of the suit land as against the appellant.

In my opinion, the concurrent holdings of the two Courts below were right and should be affirmed. I would dismiss this appeal with costs and order that the appellant vacate the suit land and give possession to the respondent six months from today.

**Platt JA.** I have digested the bold judgment of Apaloo JA sweeping aside the technical objections and pronouncing a decision on the merits as he sees them. This is one of those borderline cases where the procedure went away at several points and they have been pointed out by the appellant correctly. On the other hand there is a substratum of registered proprietorship which the appellant will never be able to defeat, however accurately the parties bring their dispute to court.

The substance of the matter is that the appellant has not got registered title and now he cannot achieve it. What has happened is that a counterclaim for the appellant's eviction was by error not granted in the High Court. Secondly the method seeking eviction was quite wrong; and should not have been entertained. But the title to the land was confirmed by the High Court to reside in the respondent and that has been carried into effect. Thus the respondent has judgment in his favour except that eviction was not ordered as the respondent had prayed in his counterclaim.

It is because there is solid ground for proving the title of the Respondent, and that he was let down by the Court which did not automatically grant his counterclaim having dismissed the appellant's plaint, that the error of procedure by the respondent may be excused. But for my part I think that this is the further point that the Court can go.

I do not approve of the procedure adopted, of taking an *ex-parte* application for eviction to put the High Court's omission right. I hope it is never followed again. Had there been no error on the part of the Court, I would not have agreed to the appeal being dismissed. But the Court's error gave rise to the respondent's mistake.

Thus for the reasons given above and by Apaloo JA, I agree that the appeal should be dismissed. I would not award costs to the respondent. His procedure was wrong. Technically the appeal had to be taken. I would order the parties to bear their own costs. As Apaloo JA and Masime Ag JA agree it is so ordered.

**Masime Ag JA.** I have had the advantage of reading in draft the judgments of Apaloo JA and Platt JA. I agree that this appeal should be dismissed with costs and that the respondent be ordered to vacate the suit land within six months from the date of this judgment.

**Dated and Delivered at Nakuru this 20th 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 OF APPEAL**