



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU
(Coram: Hancox & Nyarangi, JJ A & Platt, Ag JA)

CIVIL APPEAL NO 73 OF 1985

BETWEEN

KIBIY ARAP YEGO APPELLANT

AND

EMILY TUIYA w/o TIROP ARUSEI

KIPRUTO ARAP BUNEI RESPONDENTS

(Appeal from the ruling of the High Court of Kenya and Eldoret (VV Patel, J)

dated May 16, 1985

In

Civil Case No 29 of 1983)

JUDGMENT OF NYARANGI, JA

I agree. The respondents applied for a temporary injunction, an equitable remedy; against the appellant, his agents and workmen so that no alienation, ploughing or fencing or possession of land could take place until after the suit is heard and determined. The injunction sought and expected could not finally determine the dispute; it was intended to restrain as might suffice: Preston Luck [1884] 27 Ch D 497, to stop the mischief complained of, and to keep things as they were at the time the application was filed. The High Court (Patel, J) was urged to make an order to restrain the appellant from doing an act but not to do a particular act e.g to vacate the land. The respondents asked for a remedy of an equitable nature which could not run with the land which would appear to be the effect of the eviction order: A-G v Birmingham, Tame and Rea Drainage Board [1881] 17 Ch D 685. The status quo which the respondents reasonably expected is the status quo which existed before the respondents found it necessary to make the application under order 39 rule 1. The pleadings and the affidavit evidence do not clearly disclose which status quo existed before May 16, 1985.

I agree with the order proposed on costs.

Delivered at Nakuru this 21st day of February, 1986.

JO Nyarangi

Judge of Appeal

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JUDGMENT OF PLATT AG J A

It does not appear that the actual situation on the land in question is clear enough for this court to pronounce judgment on this appeal, one way or the other.

On February 23, 1983, Kibiy arap Yego sued Emily Tuiya, the wife of Tirop Arusei and Kipruto arap Bunei, claiming a declaration that Emily and Kipruto were trespassers, and an order for their eviction. Kibiy arap Yego claimed that he had occupied a portion of plot no 324 in the Lessos Settlement Scheme, in July 1976, which had been allotted earlier to Emily, in consideration for the payment of arrears of loan instalments, owed by Emily to the Settlement Fund Trustees. Then in December 1979, Kibiy arap Yego, the plaintiff, bought the whole plot. The Tinderet Land Control Board gave consent and the land was transferred and registered in the plaintiff's name. Nevertheless Emily continued to live on the land and invited Kipruto to do likewise.

Emily set out, in her defence, denials of the allegation that in 1976 the plaintiff had been allowed to occupy a portion of the land or that in December 1979, she had sold plot No 324 to the plaintiff. She alleged that the consent of the Land Control Board was obtained falsely. The plaintiff's registration was equally false. In her counterclaim, she claims that Kipruto had been allotted the plot together with Emily's deceased husband, Tirop Arusei. Accordingly, Emily and Kipruto prayed for a declaration that the land devolved upon Emily as successor to Tirop, and Kipruto in his own right. The plaintiff's claim

for evicting them should be dismissed in consequence.

It would appear then that both parties were in possession at least of a part of the land. But dissension arose over a certain ten acres. On May 5, 1983, the plaintiff Kibiy arap Yego sought to restrain the defendant from keeping cattle and grazing them on the land. On May 6, 1983 the defendants / respondents with a summons asking for a temporary injunction against Kibiy arap Yego, his agents and workmen, for alienating, ploughing, fencing and taking possession of the land. It was one thing to prevent the registered owner from using any further the land in his possession. It was another thing to evict him. It appears from the affidavits that both parties want to cultivate the same 10 acres of the land.

The learned judge ordered the plaintiff to vacate and deliver up vacant possession of the land, even though he is the registered owner.

It will be seen that this exceeded the terms of the summons. The judge was asked to prevent the plaintiff from taking possession of the land. At this interlocutory stage, it would have been a bold person to ask for a mandatory injunction to order the plaintiff to vacate.

Order XXXIX rule 1 of the Civil Procedure Rules does not sanction such a step. But it is not clear what the position is. Is the situation that the plaintiff had taken possession of the land earlier, and he was to be prevented from extending his occupation, or had he not taken possession as yet? The affidavit suggest that the summons was designed to comply with order XXXIX, although the argument addressed to the court went far beyond it.

The plaintiff has appealed to this court, advancing the submissions that the plaintiff's right as registered owner was ignored, as the defendants are mere trespassers. The order, it is said, was too harsh in the circumstances.

In argument before this court, Mr Sheth and Mr Tanui agreed that the order of eviction was wrong, because it went beyond the prayers in the summons. The *status quo* should be preserved. That situation, however, was obscure, and could not be agreed. There was not sufficient evidence upon the record to decide what the *status quo* was. As subtle questions sometimes arise on this point, I would say that the best course to adopt would be to set aside the eviction order, and remit the matter to the High Court, so that the parties can file fresh affidavits, if necessary, to set out the situation that existed or that now exists. It may be necessary to visit the land or get sketch maps prepared.

I would therefore allow the appeal to the extent that the eviction order be set aside and the matter be re-considered to ascertain what the *status quo* really is, pending the hearing of the suit. But the learned judge is to be free to exercise his discretion judicially. It may assist to consider Thompson vs Park [1944] 2 ALL ER 477; but he may take any authority into account. It may well help the parties if the learned judge can give them an early hearing date.

Delivered at Nakuru this 21st day of February, 1986.

HG Platt

Ag Judge of Appeal

I certify that this is a true copy of the original.

DEPUTY REGISTRAR