



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 BUNEIRESPONDENTS

(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 HANCOX, JA

There can be no doubt that as at the date of the hearing of the application for the temporary injunction at the instance of the respondents, as defendants in the High Court, on May 16, 1985 the appellant was the registered owner of the suit land at Nandi/Lessos/324, for the certificate of search produced for the first time in this court as Exhibit 1 showed that he was so registered as from March 20, 1984. It is stated in paragraph 8 of the plaint that he was also the registered proprietor of the land at the time the action was filed on February 23, 1983, and this would appear to be in accordance with the letter of consent from the Land Control Board dated December 20, 1979. It does not, however, appear that the appellant was the first registered owner, and Mr Sheth, who argued this appeal from VV Patel J's decision granting the temporary injunction, and, indeed, an eviction order, accordingly did not pursue his submission as to the conclusiveness of his client's title under section 143(1) of the Registered Land Act, cap 300.

It was conceded by Mr Tanui, on behalf of the respondent, that the judge went beyond the terms of the application, and, that the purported eviction order, as it was described, should not have been made. Unfortunately it was not possible for the parties to reach agreement that each could occupy a portion of the land pending the final determination of the suit, because each wants the same ten acre portion of it, on which it seems that appellant (according to paragraph 9 of the First respondent's Affidavit of May 6, 1985) has now planted Maize.

Each party seeks to maintain the status quo, but they differ as to what the status quo was at the material time. Did the appellant forcibly enter the land as Emily described, or was he entitled to be there as the registered proprietor, notwithstanding the allegation that the transfer was procured by fraud as alleged in the defence and counter-claim? As was stated in *Thompson vs Park* [1944] 2 AER 477, a litigant cannot wrongfully and illegally bring about a state of affairs and then apply to the court to preserve that state of affairs as the status quo by way of injunction. In that case Goddard LJ (as he then was) said at p 479:-

“The status quo that could be preserved was the status quo that existed before these illegal and criminal acts on the part of the defendant. It is a strange argument to address to a court of law that we ought to help the defendant, who has trespassed and got himself into these premises in the way in which he has done and say that that would be preserving the status quo and that it would be a good reason for not granting an injunction.”

In the instant case the learned judge made a mandatory order on an interlocutory application for a temporary injunction. That is very rare thing to be done, for it may have the effect of disposing finally of the suit. Indeed this chamber summons seeking the temporary injunction is inconsistent with the affidavit in support, for it assumes that the appellant had not yet taken possession of the land, which is what was sought to be restrained. Whichever the status quo was I entirely agree with the views of Platt Ag JA, whose judgment I have had the advantage of reading in draft, that there was insufficient material for the judge to decide the matter, and he certainly should not, on the available material, have granted an eviction order against a person who was *prima facie* the registered proprietor. Moreover the extract from the register showing the transaction recorded in the proprietorship section should have been produced.

For these reasons I also would allow the appeal, set aside the eviction order and remit the case for proper hearing and determination by the High Court.

As Nyarangi JA also agrees it is so ordered.

I would make no orders for the costs of this appeal, which, in any event, are not sought in the Memorandum of Appeal.

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.

Platt Ag JA. 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 counter-claim, 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,

A.R.W.HANCOX

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JUDGE OF APPEAL

J.O.NYARANGI

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JUDGE OF APPEAL

H.G.PLATT

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR