



IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Law V-P, Mustafa & Musoke JJ A)

CIVIL APPEAL NO. 63 OF 1976

BETWEEN

CHRISTOPHER KIPROTICH.....APPELLANT

AND

DANIEL GATHUA.....RESPONDENT

(Appeal from the Judgment of the High Court (Nyarangi J) Dated 6th October 1976 in Civil Case No 58 of 1975)

JUDGMENT

This is an appeal by the plaintiff in a suit filed in the High Court at Nakuru against a “ruling” by Nyarangi J refusing to set aside an order made by him on 7th November 1975. The plaintiff in the suit was for damages for trespass to the plaintiff’s land. By their defence and counter-claim the defendants averred that they had entered on the land as owners, having purchased it from the plaintiff and paid for it, and they prayed, *inter alia*, for an order transferring the title to the land to them. A reply to the counterclaim was not filed in time, and the defendants applied for and obtained judgment *ex parte* against the plaintiff under the Civil Procedure Rules, order XII, rule 6. The judgment so obtained was set aside by this Court [1976] Kenya LR 87. We are informed that the plaintiff then re-entered upon the disputed land and is still in occupation, and that he has successfully applied for a temporary injunction restraining the defendants from interfering with the land pending determination of the suit. On 7th November 1975, before the judgment obtained by them had been set aside by this Court, the defendants applied by notice of motion, stated to be under order L, rule 1, for an order that the plaintiff, described as “plaintiff/ judgment debtor”, be prohibited from transferring or charging the land. Order L, rule 1, is purely procedural, and provides that applications to the Court shall be by motion. The defendants’ notice of motion did not specify the order or rule under which the application was made, nor was this made clear in the arguments of counsel. Nyarangi J allowed the application and ordered the plaintiff, whom he described as “the respondent/plaintiff/ judgment debtor”, not to transfer or charge the land in any way. On the 30th April 1976, this Court set aside the *ex parte* judgment obtained by the defendants. From that moment the plaintiff ceased to be a judgment debtor. On 13th July 1976, the plaintiff applied by chamber summons, stated to be under section 3A of the Civil Procedure Act, for an order that “the prohibitory order made herein on 7th November 1975 be raised”. The judge in his “ruling” dated 6th October 1976 refused to set aside his order of 7th November 1975, and dismissed the plaintiff’s application. It is from this ruling that the plaintiff now appeals. Mr Khanna, for the appellant, submitted that the order of 7th November 1975 was a prohibitory order within the meaning of order XXI, rule 49, which can only be made against a judgment debtor; he pointed to the fact that the defendants’ application of the same date described the plaintiff as “the plaintiff/judgment debtor” and asked that he be prohibited from transferring or charging

the land; and he submitted that when, in consequence of this Court's judgment of 30th April 1976, the plaintiff ceased to be a judgment debtor he was entitled as of right to have the prohibitory order raised, and that the judge erred in dismissing the plaintiff's application.

Mr Waweru for the defendants pointed to the arguments recorded at the hearing of the application of 7th November 1975, from which it appears that he had told the judge of the plaintiff's pending appeal against the *ex parte* judgment, thus making it clear that the defendants were seeking protection whether or not the appeal succeeded. The judge adverted to this matter in his ruling, commenting that the appeal to set aside the *ex parte* judgment was "significant", and Mr Waweru submitted that the judge's order of 7th November 1975, was of a dual nature, intended both as a prohibitory order under order XXI, rule 49, and as an interlocutory preservation order, under order XXXIX, rules 1, 2 and 7.

It is unfortunate, to say the least, that the judge did not specify in his "ruling" of 7th November 1975 whether his order prohibiting the plaintiff from transferring or charging the land was made under order XXI, rule 49, or under order XXXIX, or under both. There is much force in Mr Khanna's argument that the order was on the face of it a prohibitory order made under order XXI, rule 49, as the order was registered by the defendants against the title as provided in that rule. On the other hand, the judge, in his order of 6th October 1976, which is the subject of this appeal, said with reference to his order of 7th November 1975: "The order complained of accords with order XXXIX of the Civil Procedure Code ... The Court had jurisdiction to order as it did". Clearly, the judge was of the view that, in making his order of 7th November 1975, he was not only exercising jurisdiction under order XXI, rule 49, but also under order XXXIX. As to this, Mr Khanna submitted that there was no power under order XXXIX to order a party to a suit, by temporary injunction or interlocutory order, not to charge his land. With respect, we do not agree. Under that order, a Court may, when it is proved that any property in a suit is in danger of being wasted, damaged or alienated, grant a temporary injunction, or make a preservation order, to prevent any action which might have that effect. We think that, in a proper case, such an injunction or order can be made to restrain a party from raising money by a charge on land whose title is in dispute in a suit. Such a charge can only have the effect of diminishing the value of the land, and thus causing wastage or damage to it. In our opinion, the order of 7th November 1975 was intended to have effect under both order XXI, rule 49, and order XXXIX, the Court had jurisdiction to make it, and was entitled in the proper exercise of its discretion to refuse to set it aside. We think that this appeal fails, and order that it be dismissed with costs. We would add that in our view the suit and counterclaim should be tried and disposed of as soon as possible. The delay has already led to two interlocutory appeals, involving the parties in needless expense.

Appeal dismissed with costs.

Dated and Delivered at Nairobi this 11th day of February 1977.

E.J.E.LAW

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VICE PRESIDENT

A.MUSTAFA

.....

JUDGE OF APPEAL

J.S.MUSOKE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR