



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 142 OF 2012

ANNE NJOKI MURANI.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

SAVINGS & LOANS KENYA LIMITED.....2ND DEFENDANT

MUSA NYAKWAYE.....3RD DEFENDANT

JUDGEMENT ON THE 3RD COUNTERCLAIM DEFENDANT

INTRODUCTION

1. The Plaintiff had instituted her claim against the Defendants in her **Amended Plaintiff** filed on **15th June 2012**. The hearing of the matter had been severally adjourned by the Plaintiff, and on 9th March 2015, the Court directed that the matter would not be further adjourned and set down the hearing date for 21st April 2015. On the aforementioned date, the Plaintiff however, did not attend the hearing of the matter, following which the 3rd Defendant made an oral application for the suit to be dismissed against himself and the other two (2) Defendants, and to allow his Counterclaim filed on 9th July 2015 to proceed for hearing. The Court allowed the 3rd Defendant's application, which was predicated upon the provisions of Order 12 Rule 3 of the Civil Procedure Rules, and dismissed the Plaintiff's suit against the 1st, 2nd & 3rd Defendants. The Court further allowed the 3rd Defendant to proceed with the hearing of his Counterclaim.

THE COUNTERCLAIM

2. The 3rd Defendant's Counterclaim raised several issues for determination, which were tacitly set out in its Defence dated 9th July, 2012. It was the 3rd Defendant's contention and further relying on his Witness Statement of even date, that he saw an advertisement for the property sometime on 10th January, 2012 and called upon the auctioneers to verify on the details of the said auction. On 31st January, 2012 after viewing the property and being issued with a valuation report, the 3rd

Defendant attended the auction where he was declared the highest bidder, paid 25% deposit of the bid price and on 6th February, 2012 paid the balance of the purchase price to the 1st Defendant. On 8th March, 2012 the 1st Defendant duly executed the transfer documents and on 14th March 2012, lodged the documents at the land registry for subsequent transfer and registration of the property in his name.

3. The 3rd Defendant contends that the Plaintiff's tenants who are in occupation of the property have refused and or neglected to move out of the suit property, and have continued to pay monthly rent to the Plaintiff, thereby depriving him of his rightful ownership and occupation of the property. Therefore the 3rd Defendant's claim against the Plaintiff is for the eviction of the Plaintiff, her tenants, servants and/or agents from the property, monthly rental income of Kshs 20,000/- per month from 14th March 2012, mesne profits, interest at 25% per annum from the aforementioned 14th March 2012 and costs of the suit and counterclaim. He relied on his witness statement and bundle of documents dated 9th July 2012.

THE PLAINTIFF'S RESPONSE

4. The Plaintiff filed her response dated 23rd July, 2012 to the 3rd Defendant's Counterclaim. In seeking to have the Counterclaim struck out, the Plaintiff averred that the auction was marred with procedural illegalities and flaws, and that therefore, no good title would have passed to the 3rd Defendant on the basis of the impugned sale. Further, she contended that the transfer and subsequent registration of the property to the 3rd Defendant violated the provisions of **Section 52** of the Transfer Property Act (sic) and that the transfer was conducted during the pendency of the suit and contrary to the order of the Court for the maintenance of "*status quo*".
5. Before the instant action was set down for hearing, the Plaintiff had filed an application dated 9th March, 2012 seeking an injunction barring the 1st and 2nd Defendants from proceeding with the disposal of the suit property. The 1st and 2nd Defendants at the preliminary hearing of the application on 20th March, 2012 sought for orders to maintain the "*status quo*" pending the filing of their response to the application. The Court issued orders for the maintenance of the "*status quo*" until 26th April 2012, which orders were further extended by the Court to 14th May, 2012. Therefore, the Plaintiff's contention is that pending and during the subsistence of the "*status quo*", the 1st and 2nd Defendants proceeded to sell and transfer the property to the 3rd Defendant, which was in violation of the provisions of Section 52 of the Indian Transfer of Property Act (now repealed) and violated the principle of *lis pendens*.

ANALYSIS

6. I have considered the 3rd Defendant's Counterclaim dated 9th July, 2012, his witness statement and bundle of documents of even date and the Plaintiff's response thereto as well as the 3rd Defendant's written submissions dated 25th May 2015 and filed on even date. Having done so, I take the following view of the matter.
7. The 3rd Defendant's claim is that the Plaintiff and her tenants be evicted from the suit property and that he be awarded monthly rent of Kshs. 20,000/= per month and mesne profits to be assessed by Court. The Plaintiff vehemently opposed the counterclaim on the grounds that the auction was marred with illegalities and that the transfer and subsequent registration of the suit property to the 3rd Defendant during the pendency of this suit was impeachable as it offended the provisions of Section 52 of the Indian Transfer Property Act (ITPA). The said section provides for the doctrine of *lis pendens*.
8. The Court of Appeal in **Civil Appeal No 44 of 2014 Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another; (2015) eKLR**, had the following to say on the doctrine of *lis pendens*;

“Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in Bellamy vs Sabine [1857] 1 De J 566 held as follows:-

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

In the case of Mawji vs US International University & another [1976] KLR 185, Madan, J.A. stated thus:-

“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

In the same case it was observed inter alia that:-

“Every man is presumed to be attentive to what passed in the Courts of justice of the state or the sovereignty where he resides. Therefore purchase made of a property actually in litigation pendete lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”

See also the considered views of Nambuye J, (as she then was) in Bernadette Wangare Muriu vs National Social Security Fund Board of Trustees & 2 Others [2012] eKLR.

The necessity of the doctrine of lis pendens in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice. Having said that, with the repeal of section 52 of the ITPA by the Land Registration Act (LRA) Number 3 of 2013, the question arises as to whether the doctrine remains applicable to the circumstances of the present case. We consider that its applicability must be considered in the light of Section 107 (1) of the LRA which provides the saving and transitional provisions of this Act, and which stipulates,

“Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

The effect of this provision is to allow for the continued applicability of the rights and interests ensuing from legislation that governed titles of properties established prior to the repeal of such legislation. Given that the concerned property involved land eligible for registration under the Registration of Titles Act (now repealed), having regard to section 107 (1) of the LRA, it is evident the rights flowing from section 52 of the ITPA including those under doctrine of lis pendens would remain applicable to the circumstances of this case.”

9. From the foregoing determinations, it is clear that the principle of *lis pendens* is still applicable and that as such, a party may seek relief following the violation of the reliefs as stated therein in the provisions of the ITPA. Therefore the applicability of Section 52 of the ITPA, as read together with Section 107(1) of the Land Registration Act is manifest in this instance where the learned

- Judge issued orders for the preservation of the “*status quo*” pending the determination of the Plaintiff’s injunction application of 9th March, 2012. The questions that arise at this juncture are whether the 1st and 2nd Defendants were in breach of the ‘status quo’ orders of the Court issued on 20th March 2012, and whether the subsequent sale and transfer of the suit property could be deemed as illegal and impeachable as it was in breach of the provisions of section 52 of the ITPA.
10. At the time the Court issued the order for maintaining the “*status quo*”, the suit property had already been sold and transferred to the 3rd Defendant. There was no order stopping or barring the 1st and 2nd Defendants from exercising the statutory power of sale. The Plaintiff had admitted that as at 14th May, 2012 when the application had been set down for hearing, the 1st and 2nd Defendants had already sold and transferred the property to the 3rd Defendant. The orders for maintaining the “*status quo*” had been issued by the Court at the behest of the Defendants’ counsel on 20th March 2012 and which had been extended from time to time.
 11. The said orders were issued after the property had already been sold and transferred to the 3rd Defendant, and therefore the “*status quo*” that was to be maintained was that the property as sold and transferred to the 3rd Defendant be maintained, pending the hearing and determination of the application. The contention by the Plaintiff therefore that the auction was conducted contrary to the orders of the Court issued on 20th March, 2012 cannot stand. Subsequently, it cannot be deemed that the sale and subsequent transfer of the property to the 3rd Defendant was impeachable on the grounds of *lis pendens*.
 12. Further, the Plaintiff failed to establish what procedural flaws and irregularities had been committed in the auction process, save to state that it was the onus of the 3rd Defendant to prove as much. It is trite that he who alleges must prove. Therefore, the Plaintiff cannot be heard to impute that it was the onus of the 3rd Defendant to prove that the auction was conducted in an irregular manner and that there had been procedural flaws. In the circumstances, this Court can only conclude that the auction conducted on 31st January 2012 was regular and the same was not marred with procedural flaws.
 13. Having established that there was no irregularity on the part of the 1st and 2nd Defendants in conducting the auction, it would therefore follow that the 3rd Defendant was a bona fide purchaser for value of the suit property. The said property had been sold lawfully and transferred to the 3rd Defendant, who by such transfer and subsequent registration acquired all rights and privileges pertaining thereto. The 3rd Defendant has demonstrated, and indeed established, that he is the rightful owner of the suit property, and that the Plaintiff, and her tenants had denied him the right of exclusive possession as enunciated under Section 25 of the Land Registration Act and quiet enjoyment of his property by failing to vacate the same property and by the Plaintiff continuing to obtain rent from the tenants. In that regard, the Plaintiff is deemed to have trespassed on the 3rd Defendant’s property, and therefore the Plaintiff and her tenants should be evicted forthwith from the suit property.
 14. Is the 3rd Defendant entitled to mesne profits? The 3rd Defendant claims that he is entitled to mesne profits and that the same are to be assessed by Court. He also claims that he is entitled to monthly rent of Kshs. 20,000/= from 14th March 2012. There is proof that the 3rd Defendant was indeed the registered owner of the suit property at that time. The Title deed attached to the 3rd Defendant’s bundle of documents dated 9th July, 2012 is evidence that the 3rd Defendant became the registered owner of the suit property on 14th March, 2012. What are mesne profits?
 15. The **Black’s Law Dictionary 9th Edition** defines mesne profits as: - “*the profits of an estate received by a tenant in wrongful possession between (2) two dates.*” The **Concise Oxford English Dictionary 12th Edition** defines mesne profits as: - “*the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord.*” It therefore appears to the Court that the monthly rent of Kshs. 20,000/- from 14th March, 2012 as claimed by the 3rd Defendant amounts to mesne profits. Therefore prayer (a) and (b) in the 3rd Defendant’s counterclaim can be lumped as one.
 16. Mesne profits are deemed to accrue from the time that demand for vacant possession was made to the Plaintiff until the time of delivery of vacant possession to the 3rd Defendant.

17. It is however, incumbent upon the 3rd Defendant to prove before the Court how the figure of Kshs 20,000/- as rent per month was arrived at before a determination on the mesne profits can be made. Such determination was made by the Court of Appeal in **Civil Appeal No 26 of 2004 Peter Mwangi Mbuthia & Another v Samow Edin Osman; (2014) eKLR** in which the learned Judges reiterated thus;

“Apart from the reference in the demand letter before action that was exhibited to the respondent’s affidavit in support of the summary judgment application, there was not the slightest indication how that figure was arrived at. Indeed counsel for the respondent had difficulty defending that amount merely stating that the figure was not challenged. We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at.” (Emphasis added).

18. No such evidence has been placed before this Court to show how the rent of Kshs. 20,000/= was arrived at, and it would therefore be improper for the Court to award mesne profits on figures that are unsubstantiated. In the case of **Njeri Kimani vs Joseph Njoroge Murigi and others HCCC. 819 of 2009 (unreported)**, it was held;

“A claim for mesne profits is in the nature of special damages, which require to be pleaded and strictly proved”.

19. The amount of Kshs. 20,000/= has not been strictly proved. In this case, the 3rd Defendant did not provide any receipts or demonstrate in any way how he arrived at the figure of Kshs. 20,000/=. The Court therefore, being unable to either award mesne profits or rental income at the amount specified by the 3rd Defendant, it follows that no interest can be awarded on either. The Court would however award the 3rd Defendant costs for the suit and the counterclaim.

DISPOSITION

20. The upshot of the foregoing is therefore that the 3rd Defendant’s counterclaim dated 9th July, 2012 and filed on even date is hereby allowed in the following terms:-

- a. ***The Plaintiff, her tenants, servants and/or agents be forthwith evicted from the suit property Ngong/Ngong/20254.***
- b. ***The costs for the suit and the counterclaim shall be for the 3rd Defendant.***

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Maloba holding brief for Akoto for Plaintiff

Mr. Khasiani holding brief for Nyakiangana for 3rd Defendant

Teresia – Court Clerk