



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO 538 OF 1998

ALFRED KIMANI NJOROGE.....PLAINTIFF

VERSUS

FREDRICK NJUGUNA KAMAU.....1ST DEFENDANT

PATRICK MBURU GITAU.....2ND DEFENDANT

AND

MARGARET MIHANGO KAMAU.....INTERESTED PARTY

VIRGINIA WANJIRU MUKIRI..... INTERESTED PARTY

CATHERINE WAMBUI NDIRANGU..... INTERESTED PARTY

PHYLLIS NYAMBURA MWANGI..... INTERESTED PARTY

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated and filed on 20th March 2014 was brought under the provisions of Sections 50, 51 and 52 of the Land Registration Act, Order 51 Rules 1 & 4, Order 40 Rules 1 & 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all the enabling provisions of the law. It sought the following orders:-
 1. Spent.
 2. Spent.
 3. **THAT pending the hearing and determination of this application, prohibitory orders be issued against Land Titles Numbers Loc5/Githunguri/40 and Loc5/Kagumoini/1225 to forbid any further dealings in these properties to protect the Plaintiff's interest as a judgment creditor.**
 4. **THAT the registration of the 1st and 2nd interested parties together with the one Zephania Mbugua Njuguna as owners of Land Title Number Loc5/Githunguri/40 be nullified and ownership be reverted back to the 1st Defendant.**

5. **THAT the 1st Defendant, 1st and 2nd interested parties be declared as being in contempt of court for contravening orders issued by this Honourable Court on 25th July 2013 pursuant to a ruling delivered by Hon (DR) D. W. Nyambu on 25th July 2013.**
 6. **THAT the costs of this application be provided for.**
2. The application was predicated on several grounds which can be summarised as follows:-
1. **THAT in a ruling by Hon (DR) D. W. Nyambu on 25th July 2013, it was ordered that the 1st Defendant's share in Land Number Loc5/Githunguri/40 (hereinafter referred to as "the subject property") be determined to allow it to be attached and sold in satisfaction of the decree.**
 2. **THAT before the share of the said subject property could be determined, the 1st Defendant prayed for more time from the Plaintiff to pay but he failed to honour the payments.**
 3. **THAT upon conducting a search on 21st February 2014, the Plaintiff discovered that the said subject property had been transferred to the 1st and 2nd Interested Parties and one, Zephania Mbugua Njuguna on 6th August 2013 barely two (2) weeks after the court had issued its orders.**
 4. **THAT the transfer and subsequent registration of the subject property was malicious, illegal, fraudulent and unlawful and was done in contravention of orders issued by this Honourable Court and with the intention of defeating the Plaintiff's claim.**
 5. **THAT the 1st Defendant, 1st and 2nd Interested Parties should be punished for contempt of the court for disobeying its orders in effecting change of ownership of the subject property.**
 6. **THAT the unlawful change in ownership of the subject property should be nullified to protect the Plaintiff's interests in addition to upholding the integrity of the court.**

AFFIDAVIT EVIDENCE AND GROUNDS OF OPPOSITION

3. The application was supported by the Plaintiff's Affidavit sworn on 17th March 2014. He reiterated the grounds set out in the application and urged the court to issue prohibitory orders against the subject property to protect his interest as a judgment creditor as well as on L.R. No Loc 5/Kagumoini/1225, which he had identified as having been registered in the 1st Defendant's name, as he wanted to attach the same.
4. The 1st Defendant and the Interested Parties filed their Grounds of Opposition dated 8th April 2014 and filed on 14th August 2014. The same were generally as follows:-
 - a. **THAT the application was incompetent and fatally defective as no leave to file contempt proceedings was obtained from this court.**
 - b. **THAT the ruling on 25th July 2013 and the penal notice were not served upon the 1st Defendant and the Interested Parties.**
 - c. **THAT the application was unmeritorious and devoid of any grounding in law and fact and commended itself to dismissal for being an abuse of the court process.**
5. In his Replying Affidavit sworn on 8th April 2014 and filed on 14th April 2014, the 1st Defendant deposed that he applied for the lifting of the caveat which had been lodged by the 1st Interested Party to prevent the Plaintiff from procuring the sale of the subject property and thereafter obtained consent to transfer from the Kandara Land Control Board on 25th April 2013.
6. It was his averment that the process commenced about three (3) months before the court delivered its ruling on 25th July 2013. He further stated that he was never served with any order of the court and could therefore not be said to have been in contempt of the court's orders.
7. In his Supplementary Affidavit sworn on 24th May 2014 and filed on 25th May 2014, the Plaintiff disclosed that the 1st Defendant and the Interested Parties were his cousins and that they had never commenced succession proceedings following the demise of their father about 25-30 years ago. He further stated that since the transfer was effected when his application of 24th September 2013

was pending before the court, he would not pursue the contempt of court proceedings at this juncture. He asked that the transfer to the 1st Defendant and the Interested Parties be declared null and void as he had sought.

LEGAL SUBMISSION BY THE PLAINTIFF

8. The Plaintiff filed his undated written submissions on 25th April 2014. He submitted that it was evident from the 1st Defendant's Replying Affidavit that the consent to transfer the suit property was obtained on 25th April 2013 and the said property transferred to the 1st and 2nd Interested Party and one Zephania Mbugua Njuguna on 6th August 2013. He stated that the court gave its orders on 25th July 2013. However, as the said orders were extracted on 21st August 2013 he pointed out that he would not be pursuing Prayer No (5) which had sought to have the 1st Defendant and the Interested Parties cited for being in contempt of the court orders.
9. The only substantive prayer that was pending for determination was Prayer (4) therein. He submitted that the transfer of the subject property during the pendency of court proceedings was contrary to the principle of *lis pendens* and was thus not valid. He submitted that the court had the authority to preserve the subject property pending any orders that it would issue with regards to the same.
10. He relied on the *dicta* of Angote J in the case of **Carol Silcock v Kassim Sharrif Mohamed [2013] eKLR which at pg 4**, where he quoted with approval, the definition of the term *lis pendens* as per the Blacks' Laws Dictionary, 9th Edition, where the term refers to jurisdiction, power or control acquired by a court over a property while a legal action is pending.
11. In reiterating the court's authority over the suit property, he relied on the decision of Havelock J in **Ann Njeri Mwangi v Co-operative Bank of Kenya [2012] eKLR** in which the learned judge adopted the position of *lis pendens* taken by Nambuye J (as she then was) in the case of **Bernadette Muriu v National Social Security Fund Board of Trustees & 2 Others [2012] eKLR**.
12. He relied on several other cases which showed that the principle of *lis pendens* under Section 52 of the Indian Transfer of Property Act (ITPA), 1882 (now repealed) was a substantive law of general application which was recognised both under the statute and common law, that the aim was to preserve the suit property until the court issued orders, that the orders were equally binding on those who derived title through a party who transferred the property directly and specifically in question during the pendency of the suit, whether or not he had notice of the pending proceedings and that the principle was founded in public policy, equity and good administration of justice with a view to protecting and preventing the subject matter from being extinct.
13. He emphasised that although the ITPA (now repealed) was not applicable to properties registered under Registered Lands Act (now repealed) Cap 300 (laws of Kenya) by virtue of Section 164 of the Registered Land Act (now repealed), the doctrine of *lis pendens* was one of general application even if the same was not incorporated in any statute. Notably both statutes have since been repealed and replaced with the Land Registration Act No 3 of 2012.
14. He placed a lot of reliance on the holding of Angote J in the case of **Carol Silcock v Kassim Sharrif Mohamed** (Supra) to the effect that the doctrine of *lis pendens* was in tandem with the provisions of Sections 1A and 1B of the Civil Procedure Rules Cap 21 (laws of Kenya). It was this submission he had applied for the determination of the share of the 1st Defendant to facilitate attachment and subsequent sale to settle the decretal amount but that although the said order was granted, he could not effect the same as the said subject property was unlawfully transferred to the 1st and 2nd Interested Parties and one Zephania Mbugua Njuguna during the pendency of his application dated 24th September 2012 and filed on 26th September 2012.
15. He referred the court to Section 50 of the Land Registration Act which provides as follows:-

“The court may order that any interest in private land acquired or received under or through certain prejudicial dispositions of those interests in private land made by a debtor, or the value of those interests in land, be restored for the benefit of unsecured creditors and the order made under this section shall not increase or prejudice the value of any security held by a creditor over the

interest in land of the debtor.”

16. Section 51 of the Land Registration Act which the Plaintiff also referred the court to, stipulates as follows:-

“(1) A disposition under this Act shall be deemed to prejudice a creditor if—

(a) the person making the disposition is unable to pay all their debts without recourse to that private land or any interest in it; and
(b) the disposition hinders, delays or defeats or is intended to hinder, delay or defeat the exercise by a creditor of any right of recourse to land or any interest in land in respect of which that disposition has been made in order to satisfy in whole or in part any debt owed to the creditor by the person making the disposition, subject to subsection (2).

(2) A disposition shall not be deemed to prejudice a creditor if it is made with the intention of preferring one creditor over another.

17. It was his argument that Section 52 of the Land Registration Act empowers the court to set aside prejudicial dispositions. It states thus:-

“(1) A creditor, public officer, national or county government or public entity charged with the responsibility for collection of money owing by any person to the national or county government or any part of may apply to the court under this section for an order of the court to set aside a prejudicial disposition.

18. He contended that the subject property was transferred during the pendency of court proceedings touching on it and therefore prayed that prohibitory orders sought in Prayer No (3) be granted until further orders of the court so as to prevent the 1st Defendant from disposing the subject property with a view to defeating his interests.

19. It was his averment that the 1st Defendant had been colluding for a long time with his sisters to defeat his interests in the subject property and that succession proceedings had not yet been commenced to have the property subdivided.

LEGAL ANALYSIS

20. Although the 1st Defendant and the Interested Parties opposed the present application, they did not file any written submissions. The court will therefore consider the said application based on the Plaintiff's written submissions already on record. Though undated, the court will consider the same in view of the provisions of Article 159 (2)(d) of the Constitution of Kenya, 2010 that mandates courts to determine matters without undue regard to procedural technicalities.

21. It is evident from the facts of this case that Mbaluto J (as he then was) pronounced his judgment on 15th April 1999 after hearing the case on merit. The judgment was pronounced in accordance with Section 25 of the Civil Procedure Act. A final decree was subsequently drawn on 2nd May 2013. It was final as its adjudication completely disposed of the suit. The decree in effect conclusively determined the rights of the parties regarding all the issues in controversy in the suit.

22. Section 2 of the Civil Procedure Rules defines decree as including the judgment. As provided in the interpretation section of the Civil Procedure Act, the Plaintiff was a decree holder as there was a decree that had been passed in his favour. The order issued by the court on 25th July 2013 was not a decree but a formal expression of the court that was capable of execution. In the absence of any order from the Court of Appeal setting aside or overturning the said judgment or the order issued by the court on 25th July 2013, the Plaintiff was thus entitled to proceed with execution proceedings herein in any of the execution modes stipulated under the law.

23. Under Section 38 of the Civil Procedure Act, it is provided as follows:-

(1) Subject to such conditions and limitations as may be prescribed, the court may, on the

application of the decree-holder, order execution of the decree -

(a) by delivery of any property specifically decreed;

(b) by attachment and sale, or by sale without attachment, of any property; (emphasis court)

(c) by attachment of debts;

(d) by arrest and detention in prison of any person;

(e) by appointing a receiver; or

(f) in such other manner as the nature of the relief granted may require:

Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons to be recorded in writing, is satisfied -

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree-

(i) is likely to abscond or leave the local limits of the jurisdiction of the court; or

(ii) has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law, or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree; or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

(2) An application made under this section shall—

- a. specify the land to which it relates;
- b. specify the disposition alleged to be prejudicial;
- c. be served on—

- i. the person who has made the disposition;
- ii. the person in whose favour the disposition has been made;
- iii. any other person involved in the disposition from whom compensation is sought.

24. Further, Section 44 (1) of the Civil Procedure Act clearly provides that:-

“ property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree:

25. It is clear that the court can under Section 38 (1) (b) of the Civil Procedure Act can order by attachment and sale, or by sale without attachment, any property or execution in such other

- manner as the nature of the relief granted may require as has been stipulated in Section 38 (1) (f) of the Civil Procedure Act. Evidently, the court can also make adverse orders against a party who has made a prejudicial disposition or dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property.
26. The court agrees with the Plaintiff's submissions that by virtue of Section 164 of the Registered Land Act (now repealed), the ITPA (now repealed) did not apply to the said Act that the doctrine of *lis pendens* was a substantive law of general application under common law. Indeed, Section 38 of the Civil Procedure Act and Sections 50, 51 and 52 of the Land Registration Act addresses and recognise the implications of prejudicial dispositions.
27. In particular, Section 52 (3) of the Land Registration Act provides that:-

Subject to section 53, on being satisfied that an applicant has been prejudiced by a disposition to which this Part applies the court may order—
(a) any person who acquired or received land under that disposition or through a person who acquired or received land under such a disposition—
(i) to pay any amount of compensation within any time to the applicant which the court shall specify;

(ii) to re-assign a land or a derivative right to the person who has made the prejudicial disposition; or

(iii) to take any other action which the court may specify; or
(b) the debtor who made the prejudicial disposition—
(i) to hold the restored land through the re-assignment of land or derivative right under subsection (3) (a) (ii) as a trustee for debtor's creditors; and

(ii) to deal with the land so held only in accordance with any orders that the court may issue.

28. In addition, Section 53 of the Land Registration Act stipulates as follows:-

(1) If a person acquires or receives land in respect of which the court could make an order for restoration or for the payment of reasonable compensation, the court shall not make that order against that person if that person proves that the land was—

(a) acquired or received in good faith and without knowledge of the fact that it has been the subject of a disposition to which this part applies, or
(b) acquired or received through a person who acquired or received it in the circumstances set out in paragraph (a).

(2) Reference to knowledge in this section shall include actual, constructive and imputed knowledge.

29. In his application filed on 25th September 2012 and filed on 26th September 2012, the Plaintiff had sought orders under Order 22 rule 48 (1) of the Civil Procedure Rules, 2010. The same provides as follows:-

“Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.”

30. A perusal of exhibit marked “FNK 3” attached to the 1st Defendant's Replying Affidavit showed that he obtained consent to transfer the said property from the Kandara Land Control Board on 25th April 2013. The subject property was transferred to the 1st and 2nd Interested Parties and

Zephania Mburu Njuguna on 6th August 2013 as shown in the certificate of search, exhibit marked "1" attached to the Plaintiff's Supporting Affidavit.

31. Notably, the Interested Parties filed their Chamber Summons application dated 22nd November 2012 on the same date seeking to be enjoined as Interested Parties herein, an application that was allowed. It is indisputable that by the time the court issued its orders on 25th July 2013, they were parties to the suit herein and were at all material times aware of the pendency of the Plaintiff's Notice of Motion application in which he had sought the determination of the 1st Defendant's share in the subject property which was to be attached and sold to satisfy the judgment issued by the court on 15th April 1999.
32. It is irrespective that they were not aware of the ruling of the court of 25th July 2013 by the as they had knowledge that the said property was subject of court proceedings. They ought not to have made changes to the proprietorship of the said property. Indeed, the subject property was registered in the 1st Defendant's name on 29th May 1981 as seen from exhibit marked "1" and his transfer of the subject property to the 1st and 2nd Interested Parties and Zephania Mbugua Njuguna, who were the Plaintiff's cousins in 2013. As they were aware that there was an application pending in court, this was proof enough that the said transfer was effected to defeat the ends of justice.
33. It is the finding of this court that the disposition by the 1st Defendant to the 1st and 2nd Interested Parties and Zephania Mbugua Njuguna was intended to hinder, delay or defeat or was intended to hinder, delay or defeat the exercise by the Plaintiff, of his right of recourse, to the subject property.
34. The Plaintiff had, in his application of 25th September 2013, sought to examine the 1st Defendant as to his other properties which could be applied to satisfy the decretal sum. This was in accordance with Order 2 of Civil Procedure Rules, 2010. There is no evidence that he has acted on this order. The Plaintiff did not demonstrate that the attachment and sale of the subject property would not satisfy the decretal sum necessitating the prohibition of further dealings in respect of L.R. No Loc5/ Kagumoini/1225 so as to protect his interests. The examination of the 1st Defendant regarding his other assets is yet to be completed.
35. A prohibitory order would have been necessary as the 1st Defendant had demonstrated bad faith. However, issuance of prohibitory orders pursuant to Order 22 Rule 48 (1) of the Civil Procedure Rules, 2010 with a view to preventing the transfer of the subject property to other third parties which would have the effect of delaying the realisation of the decretal sum by the Plaintiff would have been necessary if the court was not granting Prayer No (4) of the application herein.
36. The court is of the view that once Prayer No (4) was granted, no prohibitory orders would be necessary as the end result that was sought by the Plaintiff was the nullification of the title that had been registered in the names of the 1st and 2nd Interested Parties and the said Zephania Mbugua Njuguna. In any event, the court does not have the mandate to issue orders that had not been sought by an applicant. Evidently, the Plaintiff had sought prohibitory orders issued in respect of the subject property pending the hearing and determination of the application herein. The same were granted on 24th March 2014 and have now lapsed upon the delivery of the ruling herein.
37. Bearing in mind that the 1st Defendant was shown in Exhibit "1" to have been the sole proprietor of the subject property, it would not have been necessary to have had his share determined. However, the order issued by the court on 25th July 2013 directing the determination of that share has not been set aside. This court cannot therefore interfere with the same. The Plaintiff will therefore proceed appropriately with a view to recovering the decretal sum from the 1st Defendant herein.
38. To enable him proceed with execution proceedings against the 1st Defendant herein, the court hereby orders that the transfer of the property to the 1st and 2nd Interested Parties and the said Zephania Mbugua Njuguna be cancelled, nullified and re-assigned to the 1st Defendant.
39. Accordingly, having carefully considered the parties' pleadings, the Plaintiff's undated written submissions and the case law he relied upon, the court finds that the Plaintiff was able to demonstrate that the 1st Defendant's disposition to the 1st and 2nd Interested Parties and the said Zephania Mbugua Njuguna was prejudicial to his interests as a decree-holder of the judgment

delivered herein. It was malicious and well calculated to defeat the Plaintiff's interests.

DISPOSAL

40. For the aforesaid reasons, the court finds the Plaintiff's Notice of Motion application dated and filed on 20th March 2014 was merited and the same has been granted in terms of Prayer No (4) therein. The 1st Defendant and the 1st and 2nd Interested Parties shall bear the costs of the Plaintiff's application.

41. Orders accordingly.

DATED and DELIVERED at NAIROBI this 28st day of July 2014

J. KAMAU

JUDGE