



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 1715 of 2007

JOSEPH GITAHU GACHAU.....1ST PLAINTIFF

BEATRICE WANGECHI GITAHU.....2ND PLAINTIFF

-VERSUS-

PIONEERE HOLDINGS (A) LIMITED.....1ST DEFENDANT

PIONEER ASSURANCE CO. LTD.....2ND DEFENDANT

EVERLYN WALENGHWA NG'ANG'A.....3RD DEFENDANT

RULING

The Plaintiffs filed this suit on 18th November 2005 simultaneously with a chamber summons application with a certificate of urgency. The chamber summons inter alia sought various orders and the relevant prayer for the purposes of this ruling is prayer No. 2 that sought the following order:

“That pending the interpartes hearing on this application that honourable court be and is hereby pleased to restrain the 1st and 3rd Defendants their servants and/or agents from transferring, taking possession, occupying and/or trespassing into and/or fencing off the suit property (LR No. 1497/49), and finally determined”.

The chamber summons application came up before the Hon. Justice Njagi on 23rd November 2005 when he certified the chamber summons dated 18th November 2005 urgent and further directed the application to be served and heard interpartes on the 7th December 2005. He further made an order for observance of the *status quo* till the hearing dated of the application or further orders of the court.

On 7th December 2005 the matter came up before the Hon. Justice Wendoh for hearing of the application when the plaintiffs sought and were granted leave to file supplementary affidavit with corresponding leave to the defendants to file a further affidavit. In the meantime the Hon. Judge ordered the status quo to be maintained. It is this *status quo* order that has become the subject of contest. The plaintiffs contend that the status quo order was to last until the suit was finally determined while the 1st and 3rd Defendants position is that the status quo order could only last until the application was heard interpartes.

The Hon. Lady Justice Ang'awa heard the chamber summons application interpartes and delivered her ruling on 9th May 2007 giving the following orders:

1. That the plaintiffs application dated 18th November 2005 be and is hereby dismissed with costs to the 1st and 3rd defendants.

2. That by consent this matter be mentioned on 21st May 2007 to record further orders in respect to the order made by Wendoh Judge dated 7th December 2005.

It is not clear what happened on 21st May 2007 when the matter was to be mentioned in court for further directions but the 1st defendant on 15th June 2007 filed a notice of motion application seeking the following orders:

a) That the order given on the 7th December 2005 and issued on 8th March 2006 be discharged and/or set aside.

b) The registrar of titles do cancel entry No. 8 on the certificate of title LR No. 52081 for L.R. No. 14970/49.

c) The costs of and occasioned by this application be borne and paid by the plaintiffs.

The application is supported by the grounds appended to the said Notice of Motion application and on the grounds in the supporting affidavit sworn by Zool Nimji on 13th June 2007.

The 1st plaintiff swore a replying affidavit on 15th November 2010 in opposition to the application by the 1st defendant. The firm of Kairu & Company Advocates filed written submissions on behalf of the 1st and 2nd plaintiffs in support of the plaintiffs opposition to the 1st Defendant's application dated 13th June 2007.

No written submissions were filed on behalf of the 1st Defendant as Mr. Kimani who appeared on behalf of the 1st Defendant on 10th May 2011 before Hon. Justice Mbogholi Msagha elected to make oral submission.

The matter came before me on 21st November 2012 for further hearing when Mr. Mureithi highlighted the 1st and 2nd plaintiffs written submissions and Mr. Kimani made a reply to the submission by Mr. Mureithi.

In the submissions the plaintiff's counsel the principal arguments are that the 'status quo' order as granted by the Hon. Justice Wendoh was not interlocutory but was to last until the suit is finally determined. The counsel further heavily relies on the doctrine of *lis pendens* as embodied in Section 52 of the Transfer of Property Act (now repealed) and which doctrine was further explained and exemplified in the **Court of Appeal case of Festus Ogada vs. Hans Mollin (2009 e KLR)** where the court of appeal observed that "*the doctrine of Lis pendens is meant to maintain the status quo over the property which is the subject matter of a pending suit until after the final determination of the suit or until the suit is in any manner terminated*".

Mr. Kimani in reply to the plaintiffs' Advocates submission countered that the doctrine of *Lis pendens* or indeed Section 52 of the Transfer of Property Act has any application to the transaction involving the 1st and the 3rd defendant. He states that the public auction sale took place before the suit was filed in lawful exercise by the 1st defendant of its statutory power of sale conferred under the charge. He further contends that the status quo order by Hon. Justice Wendoh was interlocutory pending the hearing of the injunction application interpartes.

I have reviewed and considered the application by the 1st defendant and the affidavit in support thereof and the affidavit in reply to the applications and the submissions made on behalf of the parties.

The issue, for determination is whether indeed the 'status quo' order made by the Hon. Justice Wendoh was to last until the determination of the suit finally. The court further has to determine the effect of the order of the Honourable Justice Ang'awa made on 9th May 2007 dismissing the plaintiff's application for injunction.

The application that came before Hon. Justice Wendoh on 7th December 2005 was the plaintiff's application for injunction that had come before the Hon. Njagi on 23rd November 2005 when he made an order for status quo to last till 7th December 2005 when the application was to be heard on 7th December 2005 when the injunction application came before the Hon. Justice Wendoh for hearing the hearing did not proceed since one of the parties sought leave to file further papers. It is my view that unless with the consent of the parties the Hon. Justice Wendoh could not in the face of the prayers sought in the injunction application give an order of interlocutory nature to last up to the hearing and final determination of the suit without hearing and disposing of the injunction application.

Prayer 2 of the plaintiff's chamber summons application sought the injunction in the following terms:-

“that pending the interpartes hearing of this application, the honourable court be and is hereby pleased to restrain the 1st and 3rd defendants, their servants and/or agents from transferring taking possession, occupying and/or trespassing it no or fencing off the suit property (LR No. 14970/49, Nairobi until this suit is heard and finally determined”

In my view the net effect of Hon. Justice Wendoh's order of status quo was that the parties were to observe the status quo until the injunction application was heard and determined interpartes. If that was not the case the listing and hearing of the application interpartes would have been rendered superfluous since already there would have been an order to maintain the status quo until the suit was heard and determined. I do not think that was the case and that is why the application came for hearing interpartes before the Hon. Justice Ang'awa who after hearing the parties gave a ruling on 9th May 2007 dismissing the application for injunction by the plaintiffs. My view is that the status quo order by the Hon. Justice Wendoh could not survive after the order by Hon. Justice Ang'awa dismissing the plaintiff's application for injunction.

As regards the applications of the doctrine of Lis pendens it is my view that it would have no application in the instant case as the 1st defendant had a statutory power of sale conferred under the charge to realise its security provided due process was followed. The application to injunct/restrain the 1st defendant having been denied by the court it is my view that the 1st defendant would be lawfully entitled to complete the transaction that the law allows it to do in compliance with the registered charge instrument.

The 3rd defendant is an innocent purchaser of the suit property and unless there is a valid reason why the transfer to the 3rd defendant cannot be completed the ends of justice would require that the conveyance to her be finalised.

As I have held that the status quo order by the Hon. Justice Wendoh could not have been intended to last up to the final determination of the suit I find the application to have merit and allow it on the following terms: -

- i) That the order given on 7th December 2005 and issued on 8th March 2006 be and is hereby discharged.
- ii) The registrar of Titles do cancel entry No. 8 on the certificate of Title No. I.R 52081 for L.R No. 14970/49.
- iii) Each party to bear its costs for this application.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF FEBRUARY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the 1st Plaintiff

.....for the 2nd Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant

.....for the 3rd Defendant

J. M. MUTUNGI

JUDGE