



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL CASE NO. 24 OF 2010**

**ALI SHEIKH OMAR .....PLAINTIFF**

**VERSUS**

- 1 NAHYE SAID GUHUM**
- 2 ALNX SHARRIF HASSAN**
- 3 ABDALLA SHARRIF HASSAN**
- 4 AHMED SHARRIF HASSAN.....**

**.....DEFENDANTS.**

**RULING.**

The Notice of Motion dated 8<sup>th</sup> October 2010 is brought pursuant to pursuant of Section 1A, 1B, 3A and all the enabling provisions of the Civil Procedure Act. It seeks that there be an order staying the proceedings in this suit, until the hearing and determination of the counterclaim in Mombasa High Court Civil Case No.269 of 2008 Nahyer Sharrif Hassan Alwi, Housing Finance Company of Kenya Limited. Hiram Majevedia and Mamta H. Magevedia and/or applicant appeals arising therein.

2 That consequential direction as to service and registration of this application and order, preservation of plot No.1656 Malindi, occupation and use of the vacant premises on the suit property, and collection of rent to service the loan account held by the plaintiff's so to prevent waste or further disposal of the same property.

It is premised on grounds that:-

- a) The Mombasa suit is first on time and touches on the rights of the parties herein visa vis the suit property herein, being all the parcel of land amounting 0.515 acres situated at Malindi and known as Plot No.1656 Malindi and registered as CR.1291/1.
- b) The 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the Mombasa suit, dealt with the suit property that is parcel No.1650 Malindi during the pendance of the counterclaim and therein.
- c) The doctrine of *lis pendence* as enunciated in Section 52 of the Transfer of the Property by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant in the Mombasa case to the plaintiff in the Malindi case.
- d) The result of the litigation in the Mombasa case will have a bearing on the Malindi suit, under the doctrine of *lis pendence*, it is in the interest of justice that the suit be stayed pending the determination of

the Mombasa one.

e) The two portions of the suit premises are vacant and they ought to be let out in the interim and the rent accruing there from be applied to service the loan extended to the plaintiff in this suit to acquire the suit property.

The application is supported by the affidavit sworn by Ahmed Alamin Ahmed an Attorney of the applicant having power of attorney dated order exhibit ALA 1. He states that the subject matter of this suit is registered in the name of the plaintiff – a copy of the transfer in favour of the plaintiff is now ALA 2. The sale and transfer of the suit land was undertaken when another suit touching on the same property was pending before the court in Mombasa, being Mombasa HCCC NO.269 of 2008 (a copy of pleadings and ruling by the court stating out the plaintiff's suit is annexed as ALA 3)

The plaintiff instituted these proceedings to protect his interest in the suit property and avoid the running of the limitation period against him in the event that the Mombasa suit and counter suits, took long to determine. The counterclaim by the defendant in the Mombasa case are yet to be dealt with as the court in Mombasa gave them the go ahead to prosecute the counterclaim after the plaintiff's suit was dismissed – a copy of the ruling is annexed as ALA 4. That is why he seeks stay orders. Meanwhile the defendants are in possession of part of the property but two portions are vacant, so to obviate waste and generate income to service the loan advanced the plaintiff when he was purchasing the suit property, he prays to be allowed to let the vacant parts saying this is only fair, just and economically sound. Further that this will ensure defendants are not dispossessed of the property and plaintiff will be able to generate income to service the loan and ensure the bank does not sell the property in the intervening period, on account of default repayments in a demand letter by the bank is annexed as ALA 5.

Applicant explains that when he purchased the property, he anticipated collecting and receiving rent upon transfer of the property, by dint of provisions of Section 8 of the transfer of property Act of India 1882 but he is yet to let out the vacant property of the suit property due to the violent hostility from the defendant, with the result that he has now fallen in arrears in repayment of the loan borrowed to buy the suit property. Should the loan arrears accumulate further, then the property will be sold by the bank, and whether the suit in Mombasa eventually succeeds, or this one the Malindi succeeds, the successful party will only have pyrrhic success as the property will have been lost to a fourth or fifth party.

The applicant proposes that the Defendant retains possession of the part of the property which they presently occupy and allow applicant to rent out the vacant portion so that no party suffers prejudice.

The application is opposed on the following grounds of opposition;

- a) Prayer 3 and 4 of the application are discordant and cannot be granted in the same breath.
- b) The plaintiff filed suit while fully aware of the existence of Mombasa HCCC NO.269 of 2008.
- c) The application herein is part heard and Notice of Motion dated 05.07.10 prays for inter alia orders barring the plaintiff from being heard by this court and to have the plaintiff investigated by the CID for disclosed criminal acts. The plaintiff has cunningly filed the current application with the sole intention of denying this court the choice to deliver itself on the issue.
- d) Under the proper administration of justice, the application dated 05.07.10 ought to have been heard even before the current application was heard.
- e) The application is frivolous and amounts to abuse of court process.

However, Mr. Matini who held brief for Mr. Gikandi on 12.10.10, favoured to this court that the present application dated 8<sup>th</sup> October 2010 was to be heard first.

Mr. Kimani and Mr. Otara appear for the applicant, whilst Mr. Gikandi acts for the respondents.

At the hearing, Mr. Kimani submitted that there are a multiplicity of suits both in Malindi and Mombasa by HCC.269 of 2008, HCC.191 of 2009 and an appeal for a decision HCC.No.269 of 2008. He reiterates what applicant has stated in his grounds as to why the order for stay should issue. He states that without the order being issued, the situation may end up where two courts of concurrent jurisdiction issue conflicting orders on the said property be it in the right of occupation, or interest or ownership of the property. He seeks to rely on the decision in **JADRA KARASAN V. HARINAM SINGH (1953) VOL 23 EACA page 74**. He points out the plaintiff/applicant in this suit has a cause of action accruing to himself and his coming to court in this suit is not an abuse of the court process, all he seeks is to freeze his action while awaiting determining of the other cases. Secondly, it is Mr. Kimani's contention that the principle of *lis pendens* is a principle of public policy and convenience which this court ought to uphold more so because it is a statutory provision Under Section 52 of the Transfer of Property Act of India (IIPA) which provides that during active prosecution of any court then the property should be preserved and prevent bringing Court Process into disrepute. It is further argued that applicant/plaintiff is not seeking circumvent Justice or the jurisdiction of this court, his concern being simply that the outcome of the Mombasa matter is likely to affect the position of the property, and an order for stay will not be prejudicial to the defendant's/respondent's interest. It is also being reasoned out that once the Mombasa matter is finished, parties will still be able to revisit this matter.

Drawing from Mulla on Transfer of Property with regard to the principle of *lis pendens*, Mr. Kimani submits that the question of bona fides on the part of the purchaser for value does not cause – rather the underlying principle is to maintain the status quo, pending determination of a matter, and in this situation, the parties are caught up because an appeal has been lodged after the Mombasa courts declare.

As regards the prayer for consequential directions, it is Mr. Kimani's contention that given the fact that this suit is about real property, then it is necessary that appropriate directions be given as set out in prayer 4 of the application and that these orders flow and are consequential to prayer 3 of the application. The reasons behind this is that the property is in three portions, two are vacant, so if stay is granted the property is exposed to waste, it will serve no purpose.

In response, Mr. Gikandi on behalf of the respondent, submits that Ali Sheikh Omar (The Plaintiff) is not and has never been a party in any of the suits referred to and that the plaintiff could well have applied to join any of the existing suits in Mombasa and ventilate his claims there Mr. Gikandi terms the application as a strange scenario where a party is seeking stay of his own suit because there is a suit involving other parties and contends that this is an abuse of the court process.

The reason for the applicants' behavior (according to Mr. Gikandi) is borne out by virtue of the existence in this matter, of an application by the defendant against the plaintiff dated 5<sup>th</sup> July 2010 – which allege perjury on the applicant's part, so applicant is uncomfortable with the suit going on because he is afraid he will get caught and is avoiding the day of reckoning by cunningly suggesting for stay of proceedings. It is pointed out by Mr. Gikandi, that the matter is already partly heard on an ex parte basis on 19<sup>th</sup> March 2010, having been certified as urgent.

Mr. Gikandi reads mala fides in this application saying if the suit was only filed so as not to get caught up by the statute of limitation, the applicant ought to have come to court at the earliest opportunity and asked the court to stay the proceedings. Instead, he came to court, misled the court and obtained drastic orders, got four police officers to evict the defendants and he cannot now pretend to want to protect the respondent's interest.

Mr. Gikandi urges this court to consider the conduct of the applicant and disallow his application so that justice can take its course instead of allowing applicant to get away with the holding orders he obtained – there ought to be a conclusion to this matter.

Respondents counsel terms the consequential orders sought as even more embarrassing, wondering that in the event of non compliance by the applicant, then what happens? As regards fears that the buyer will sell the property, counsel points out that the letters applicant seeks to rely on in that regards were mentioned in May and June 2010 and if the bank was claiming arrears, it would have taken action and

issued a statutory notice under Section 69 of the ITPA – that has not happened and the letters have no use in this case as no plot number or case number is cited on them.

Mr. Gikandi also refers to the applicants' replying affidavit filed on 13.05.10 by the applicant, in which the paragraph 8 and 9, he stated that HCCC NO.269 of 2008 has no relevance. When the property was transferred to him and counsel wonders how the same case now becomes relevant. Meaning that applicant is blowing hot and cold, approbating and reprobating. Counsel urges this court to be guided by the decision in **RAJPUT VS BARCLAYS BANK OF KENYA KLR (2004 page 393 at page 407) line 10 – 20** which had a scenario similar to the instant case.

He laments that the consequential directions sought are too wide – raising several questions such as what is in the account, what are the arrears, why did they fall into arrears, why was the loan taken in the first place. Here the prayers are a mix of stay orders and restraining orders and counsel states that the principles applied when considering orders for stay are different from those considered when dealing with restraining orders, as the applicant must decide what it is that he wants.

It is submitted that the orders sought are just a short cut towards premature disposing of the suit and justice, will not be done. Mr. Gikandi explains, that whatever happens in Mombasa, has no relevance here because this suit is filed on the basis that plaintiff is the registered owner of the property which the defendants challenge. The parting shot by respondent's counsel is this – that if respondent is being so being as to want the respondent to proceed and finalise the Mombasa matter before this one can be heard – there is no problem, but then it should be restricted to stay orders only.

In reply, Mr. Kimani urges this court to consider the fact the counter claim is awaiting of hearing and determination and that an order of stay would only suspend the plaintiff obligation to prosecute the suit, and the orders ought to issue in the interest of justice.

Further, that although the consequential orders may appear broad, the intention is to preserve the suit property and put it into good use so as to avoid waste.

Mr. Kimani argues that;

1 the process by the bank is not an overnight thing, so the applicant would have to rely on past correspondences to show steps taken by the bank taken towards recovering their money.

2 The fact plaintiff is not a party in the Mombasa matter does not matter because the principle of being *lins pendens* affects a property not a party. Mr. Kimani's argument is that the plaintiff/applicant need not join the Mombasa suit because he bought the property from the defendants who will be bailed by the decree in the matters in Mombasa.

(a) Is the plaintiff/applicant a party in the cases pending before Mombasa High Court?

(b) Is the subject in the Mombasa matter the same one in this matter?

The Mombasa matter no. 269 of 009 involved **NAHYER SHARIFF HASSAN ALWI V HFCK, HITAN C. MAJEVDIA AND MAMTA MAJEVDIA** – the suit by the plaintiff in that case was dismissed by Seron J. on 26<sup>th</sup> February 2009 and the counterclaim filed by the defendants herein allowed to proceed. The applicant here is not a party in HCCC No. 269 of 2008 nor has he applied to be joined in that matter. Nahyer Shariff Hassan Alwi who is sued in the counterclaim has not applied to have the current proceedings stayed. I would have thought she would be more keen on such an application.

In the matter by Mombasa, the suit related to portion No. 1656 Malindi and the counterclaim pleaded that they are bona fide purchasers for value, of the same property and have on several occasions requested the Plaintiff Nahyer (Not the present plaintiff) to vacate the property in vain. Their prayer in the counterclaim is for an order of eviction against the said Nahyer Shariff Hassani Amri (as administrator of the estate of

Shariff Hassan Ahri) whether by herself, her agents, servants and any other person authorized by her to remain on the property.

In the present suit, Ali Sheikh Omar has sued Nahyer Said Alwy (who is not the defendant in the Mombasa counter claim) Alwy Shariff Hassan, Abdalla Shariff Hassani and Ahmed Sharif Hassan, relating to the said parcel No.1659 Malindi which he says he bought from Hitan C. Majevdia and his wife Marita Majevdia and that the Title of that very plot was transferred to him on 18<sup>th</sup> June 2009. His prayers seek for orders to restrain the defendants by themselves and/or servants or agents from interfering, trespassing or constructing on the suit premises and that they “quit occupation.”

I can identify the applicant’s anxiety because of the intersection of the property, that although he is not a party in the Mombasa suit, the property is the same one, and the order that will issue in Mombasa will have effect on the very property. Is there a likelihood that the Mombasa court could give orders which may be in conflict with the present?

That may well be a likely scenario not too farfetched because the defendants here claim right to that very property as long term occupants who have never been informed of the present plaintiff’s ownership while plaintiff here claims right to that property as a bonafide purchaser from the defendants in HCCC No. 269 of 2008 i.e the Majevdias.

If the court in Mombasa finds for the Majevdias in the counterclaim, then the issue that would remain for determination is whether the said couple had capacity (which is the issue in the Malindi matter) to sell and transfer the said property to the plaintiff herein. It is only after the determination of the counterclaim that the Malindi matter can proceed without the risk of an embarrassing conflicting finding. In that regard, I find it prudent that the present main suit be stayed pending determination of the counterclaim in Mombasa HCCc 269 of 2008. I am guided by decision in **JADVA KARSAN V HARNAM SINGH BHOLAL CA NO. 24 OF 1952 pg 76.**

In Mombasa HCC 191 of 2009 NAHYE SAID GUHUM, DAVID NGOGOYO, JANE GIAU, AYUB HAMISI AND PETER MIRAMA had filed suit against HITAN C. MAJEVDIA and MAMTA MAJEVDIA – the pleadings in that suit were not annexed here, only rulings relating to technical matters were annexed. It would however appear that the common feature, even in HCCC 191 of 2009 is the same property under reference in the present case and he 1<sup>st</sup> plaintiff in that case is the 1<sup>st</sup> defendant in the present case. It has also not been disclosed to me what stage the matter has reached, so I can’t peg the stay orders onto HCCC 19/09 due to lack of details surrounding its life and only base it on my earlier observation.

With regard to the consequential orders, it would appear that applicant has been aware of the existence of the other two matters, if what he says about making purchases from the Majevdias is true, then the question is whether his best option would have been to seek to be joined as a party in the HCCC 269 of 2008 or in 1191 of 2009, because by 2009, the property had purportedly already been transferred to him, and any orders in those suits would ordinarily affect his interests. He did not. Instead, he came to this court, obtained adverse orders against the defendants, and now fearing that matters may not be favourable in the Mombasa matter, he now extends an olive branch to the respondents. The doctrine of *lis pendens* rests on the rationale that transfer or dealing otherwise with any property during the pending of a suit should be prohibited because it would otherwise be impossible for any action brought to see a successful termination due to alienations. Would the interest be defeated by defendant’s alienation of the property? Is there a likelihood of the defendants alienating the property? I don’t know – nothing has been presented before court to make me draw such a conclusion – all that is stated is that the defendants can now remain in occupation on one part and applicant to make use of two parts – that is not the essence of *lis pendence* – whether the property is used or not will not result in its alienation – if applicant is apprehensive that the bank will sell the property due to default in repayment, then he ought to file appropriate application to take care of that, instead of this rather convoluted offer he now makes and which infact he had begun by obtaining exparte injunction orders, he now wants to abandon midstream. If he is saying that the defendants actions are likely to alienate the property then what he ought to pray for is

an order for injunction to preserve the property, and prove the recognized – principles for issuing an injunction as was pronounced in the celebrated case of **Giella v Cassman Brown EA (1972) pg 358**. Indeed even section 52 of the ITPA recognizes that one who claims the right, must establish the same before he can enforce it – which is why an application for injunction would be the best pursuant instead of using a short cut baptised “consequential orders” those orders would have to be pegged to certain justified and well supported claims and not just arise as a consequence to the stay orders. Why isn’t applicant keen to pursue his already partly prosecuted application for injunction?

Surely the doctrine of *lis pendens* is intended to strike attempts by parties to a litigation to circumvent the jurisdiction of a court in which the dispute on rights or interest on immovable property is pending by private dealings that may remove the subject matter of litigation from the ambit or power of the court to decide a pending dispute or frustrate the decree. From what applicant states here, his fears are not borne out of what the respondents might do with the property, his fears are borne by what the bank might do with the property because of the defendants alleged hostility.

It is not the defendant/respondent who will be urging the bank to act, MULLA on “the Transfer of Property Act 1882, tenth edition at page 354” states that the broad principle underlying the section is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. Further that an appeal is continuation of the suit, and *lis pendens* continues during the appeal or execution. The applicant so far, has not demonstrated what right he has to the property but simply gone on a discourse about *lis pendens* and to borrow the phrases from Emukule J. in the decision of **RAJPUT V BARCLAYS BANK OF KENYA LTD AND 3 OTHERS;**

***“There is no doubt, the application (for consequential orders in the instant case), is an all cure omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being forward by different rules, is also subject to long established and different judicial principles”***

This is precisely what the applicant has done, having sought and obtained an order for stay of proceeding, he in the same order wishes for orders of injunction of a mandatory nature to issue under a name fashioned and styled “consequential orders”

I find no basis upon which to issue the second part of that application and decline to do so.

Applicant shall bear the costs of this application.

Delivered and dated this 21<sup>st</sup> day of **March 2011** at Malindi.

**H. A. Omondi**  
**JUDGE**