



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL CASE NO. 22 OF 2002**

**DANSON MUNENE KIBETU ..... PLAINTIFFS**

**VERSUS**

**SOLOMON JACOB MUREU ..... DEFENDANT**

**RULING**

The subject matter of this ruling is the motion dated 14<sup>th</sup> July 2010 in which Solomon Jason Mureu, the 2<sup>nd</sup> Defendant herein, has prayed for the following orders:

1. *That this honourable court be pleased to certify this application as urgent.*
2. *That service of the application be dispensed with owing to the urgency of the matter.*
3. *That this honourable court be pleased to order that Pauline Muthoni Munene be joined as an interested party herein.*
4. *that the said Pauline Muthoni Munene be restrained by herself, her servants and agents from selling, transferring, charging, or otherwise dealing with the suit property, Kabare/Mikarara/657 pending the hearing and determination of this application.*
5. *That the said Pauline Muthoni Munene be restrained by herself, her servants and agents from selling, transferring, charging, or otherwise dealing with the suit property, Kabare/Mikarara/657 pending the hearing and determination of the 2<sup>nd</sup> Defendants appeal.*
6. *That this honourable court be pleased to declare that the title Kabare/Mikarara/657 held by Pauline Muthoni Munene is null and void pending the hearing and determination of the second defendant's appeal.*
7. *That costs of this application be proved for.*

The motion is supported by the affidavit of the 2<sup>nd</sup> Defendant sworn on 14<sup>th</sup> July 2010. Danson Munene Kibetu (plaintiff) and Pauline Muthoni Munene (interested party), each filed a replying affidavit to oppose the motion. At the ex parte stage, prayers 1, 2 3 and 4 were granted hence what is before this court is the determination of prayers 5, 6 and 7 of the motion.

The 2<sup>nd</sup> Defendant herein urged this court to grant him prayers 5 and 6, because the Plaintiff acted in bad faith when he caused L.R. No. Kabare/Mikarara/657 to be transferred to the interested party while he knew that there was a pending appeal and that he had even deposited the requisite sum of Kshs. 400,000/- in compliance with this court's order of 11<sup>th</sup> June 2010. The Plaintiff on his part opposed the motion stating that he committed no illegality since he caused the title to be transferred to the interested party in compliance with this court's decree. It is further argued that the principle of Lis pendens does not apply where the act committed was in furtherance of a court decree where there was no order for stay.

I have considered the submissions of learned counsels from both side. I have also considered the

material placed before this court. There is no dispute that on 14<sup>th</sup> May 2009 this court delivered judgment in favour of the Plaintiff in which the Plaintiff was ordered to interalia transfer the parcel of land known as L.R. No. Kabare/Mikarara/657 in the name of Pauline Muthoni Munene, the interested party herein. The 2<sup>nd</sup> Defendant was unhappy with the aforesaid judgment hence he filed a notice of appeal on 21<sup>st</sup> May 2009 to challenge the decision in the court of Appeal. On 25<sup>th</sup> May 2009, he filed an application for stay of execution of the decree pending appeal. The record shows that an interim order of stay was given on 8<sup>th</sup> June 2009 which order was subsequently extended on 3<sup>rd</sup> July 2009. The application was finally fixed for interpartes hearing on 14<sup>th</sup> December 2009 when the parties recorded a consent order to have the same disposed of by way of written submissions. The application was listed for oral highlights on 8<sup>th</sup> February 2010 and then deferred to 17<sup>th</sup> May 2010. While the application for stay was pending hearing the Plaintiff transferred the suit property to the interested party on 26<sup>th</sup> February 2010. It is interesting to note that when the parties appeared for oral highlights on 17<sup>th</sup> May 2010, the Plaintiff did not disclose to this court nor the 2<sup>nd</sup> Defendant that the decree had already been executed. This court delivered its ruling on 11<sup>th</sup> June 2010 in which it gave a conditional stay of execution of the decree. The court basically ordered the 2<sup>nd</sup> Defendant to deposit a sum of Kshs. 400,000/- in an interest earning account in the joint names of the advocates as a condition for stay. The Plaintiff's advocate declined to cooperate in opening the account. He informed the 2<sup>nd</sup> Defendant's advocate that the decree had already been executed hence the order for stay served no useful purpose. I have already stated that as of now, the 2<sup>nd</sup> Defendant is only seeking for the following orders.

1. ***That the said Pauline Muthoni Munene be restrained by herself, her servants and agents from selling, transferring, charging, or otherwise dealing with the suit property, Kabare/Mikarara/657 pending the hearing and determination of the 2<sup>nd</sup> defendant appeal.***
2. ***That this honourable court be pleased to declare that the title Kabare/Mikarara/657 held by Pauline Muthoni Munene is null and void pending the hearing and determination of the second defendant's appeal.***
3. ***That the costs of this application be provided for.***

Let me start by determining prayer 6. In her judgment delivered on 14<sup>th</sup> May 2009, the honourable Lady Justice Kasango, issued an order directing that a new title in respect of L.R. No. Kabare/Mikarara/657 be issued in the name of Pauline Muthoni Munene (interested party). On 26<sup>th</sup> February 2010, the aforesaid order was executed and title to the aforesaid suit land was issued to the interested party. I have now been urged to reverse the transaction by declaring that the title held by Pauline Muthoni Munene is null and void pending the hearing and the determination of the 2<sup>nd</sup> Defendant's appeal. I have a problem with this sort of a prayer. This court had already made an order directing that a new title be issued in the name of Pauline Muthoni Munene. That order was executed. This court cannot go back and make a contrary order since it is already functus officio. The court may issue the order perhaps if the applicant had made an application for contempt. Of course the applicant could not have made an application for contempt because no order for stay of execution had been issued against the Plaintiff. The record shows that a temporary order of stay was issued on 8<sup>th</sup> June 2009 which order was to subsist until 3<sup>rd</sup> July 2009. The interim order for stay was extended and ordered to last until the next hearing date on 3<sup>rd</sup> July 2009. Nothing happened in regard to the application until 19<sup>th</sup> October 2009, when the advocates appeared at this court's registry whereupon the application was fixed for interpartes hearing on 14<sup>th</sup> December 2009. Come that date, learned counsels from both sides recorded a consent order to have the application disposed of by written submissions. The order for stay issued on 3<sup>rd</sup> July 2009 was not extended hence by the time decree was executed on 26<sup>th</sup> February 2010, there was no order staying execution of the decree. The order issued on 3<sup>rd</sup> July 2009 was to last until the next hearing date which in this case was 14<sup>th</sup> December 2009. Perhaps the 2<sup>nd</sup> Defendant appreciated this fact and that is why he did not institute contempt proceedings against the Plaintiff. For the above reasons I am of the view that prayer 6 cannot be granted. With respect I agree with the submissions of the Plaintiff that the principle of Lis pendens does not apply in respect of land transferred in execution of the decree. Having disposed of prayer 6, let me now turn my attention to prayer 5 of the motion which the 2<sup>nd</sup> Defendant seeks to have the interested

party restrained by an order of injunction from selling, transferring and on charging the suit property pending appeal. When dealing with an application for injunction or stay pending appeal, the guiding principle is that the court ought to exercise its discretion in away so as to prevent the appeal being rendered nugatory. There is no doubt the 2<sup>nd</sup> Defendant has intimated his intention to challenge this court's judgment before the court of Appeal. That appeal is yet to be heard. The interested party having received proprietary rights of a registered proprietor of L.R. No. Kabare/Mikarara/657 is entitled to deal with the property in any manner like selling, bequeathing as a gift, charging etc. The copy of the certificate of search attached to the affidavit of Solomon Jacob Mureu shows that interested pledged the suit property as security for a loan of Kshs. 500,000/-from Kenya Women Finance Trust Ltd on 5<sup>th</sup> July 2010. It is therefore possible that she may even part with her proprietary interest to an innocent third party thus making the property unavailable upon the conclusion of the appeal. I am convinced I should grant the order for injunction to preserve the suit property pending appeal. I have stated that the property has already been charged with Kenya Women Finance Trust Ltd who has not been made a party to these proceedings. The law protects the interest of such a party as against the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant has sought for an injunction to restrain the interested party from charging the property. The order cannot be granted since the act of charging the property sought to be halted has already taken place. What it means is that if the interested party defaults to settle the amount borrowed, there is nothing that can prevent Kenya Women Finance Trust Ltd from realizing the security to settle the debt. Before I pen off let me make a few comments about the manner in which the Plaintiff and his counsel conducted themselves. The Plaintiff and his counsel were aware of the pendency of the application for stay of execution pending appeal dated 25<sup>th</sup> May 2009. They were also aware that at some stage interim orders of stay were given which lapsed on 14<sup>th</sup> December 2009. It is upon the lapse of the stay orders that the Plaintiff moved to execute the decree. The Plaintiff's move was obviously calculated to render the application for stay of execution useless. As of the time of delivery this ruling the Plaintiff and his advocate had already caused that decree to be executed hence the orders for stay became useless. The Plaintiff's learned advocate was aware that the decree had been executed on 26<sup>th</sup> February 2010 when he appeared before this court on 17<sup>th</sup> May 2010 and that is why he did not bother to file his written submissions. He did not bother to be candid to this court as required under S. 14(3) of the Civil Procedure Act. I cannot comprehend why the learned advocate being an officer of this court chose to be economical with the truth thus making this court issue orders in vain and to waste its scarce valuable time in hearing and rendering its ruling. This court deprecates such conduct from its officers. The court expects learned advocates to be truthful by making a full disclosure of his client's case even when it is not in his favour. In so doing we maintain the dignity and credibility of our courts. In court there are no cards hidden under the table. This is one of those unfortunate cases which must not be repeated. In this case, the Plaintiff in collusion with his advocate attempted to steal a match from the 2<sup>nd</sup> Defendant. Let me conclude this issue by quoting the remarks of the Hon. Justice D.P. **Uniyal** an eminent High Court Judge of India. At page 377-8, The Art of A Lawyer, Art of cross-examination Advocacy, courtmanship ***"Equally important is the obligation of counsel not to make a misstatement of fact or utter a half truth so as to mislead the court. Any departure from this salutary rule amount to a conduct unworthy of the profession of law. An advocate resorting to such unfair practices is bound to lose the good opinion and forfeit the confident of the court, and however much he may try, his reputation will be ruined for ever"***

In the end, I allow the motion in terms of prayer 5 save for the order against charging with costs to the 2<sup>nd</sup> Defendant.

Dated and delivered this 20<sup>th</sup> day of June 2011.

**J.K. SERGON  
JUDGE**

In open court in the presence of Macharia holding brief Nderi for Plaintiff and no appearance for the firm of Kamau Kuria & Co. Advocates.

