Thairu & 2 others v Gitari & 2 others (Environment and Land Appeal 20 of 2020) [2022] KEELC 12733 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12733 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT AND LAND APPEAL 20 OF 2020

JO OLOLA, J

SEPTEMBER 28, 2022

BETWEEN

HENRY KIMANI THAIRU ..... 1ST APPELLANT

IRENE WANGECHI MWANGI ..... 2ND APPELLANT

CHRISTOPHER MURAYA MWANGI ..... 3RD APPELLANT

AND

WANGAI NDIRANGU GITARI ..... 1ST RESPONDENT

PAUL MAINA MWANGI ..... 2ND RESPONDENT

CO-OPERATIVE BANK OF KENYA LIMITED ..... 3RD RESPONDENT

JUDGMENT

1. This is an appeal arising from the ruling and order of the honourable NW Kariuki – senior resident magistrate issued on 25th June, 2020 in Nyeri MCL&E Case No 200 of 2018.

2. The Four appellants herein suing as the legal representatives and administrators of one Francis Mwangi Kabure had by a plaint dated November 12, 2015 instituted Nyeri ELC Case No 276 of 2015 against Wangai Ndirangu Gatari (the 1st respondent herein) praying for:

   (a) An order for cancellation of the registration of the defendant from the register of Aguthi/ Gatitu/807 and rectification of the same to read the name of the 2nd to 4th (plaintiffs); and

   (b) Costs of the suit and interest thereon.

3. That suit was subsequently on July 3, 2018 transferred to the Chief Magistrate Court Nyeri and given the reference MELC Case No 200 of 2018. Upon hearing the plaintiff's and in a judgment rendered on April 26, 2019, the honourable NW Kariuki – senior resident magistrate gave Judgment for the

appellant and ordered the cancellation for the name of the 1st respondent, who had failed to enter appearance, from the register of the suit property. The learned trial magistrate further directed that the register be rectified to read the names of the 2nd and 4th appellants herein.

4. Subsequently and by a notice of motion application dated October 25, 2019, the appellants sought orders before the trial court to the effect that:

   (a) The application be certified urgent and (be) heard on a priority basis;

   (b) The court be pleased to enjoin Paul Maina Mwangi and Co-operative Bank of Kenya Limited as necessary parties to (the) suit;

   (c) The court be pleased to order for the service of the application in the aforesaid parties for inter-parties hearing;

   (d) The entries made on December 8, 2016, December 9, 2016 and March 27, 2017 in (the) register of the suit parcel Aguthi/Gatitu/807 be cancelled for being made lis pendens this suit.

   (e) The court does give necessary directions to effectuate the decree and order of this court; and

   (f) The costs of (the) application be provided for.

5. The appellants application was premised on the grounds that:

   (i) The suit was filed way back on November 13, 2015;

   (ii) An order was specifically issued on February 9, 2016 restricting entries against the title to the suit parcels;

   (iii) In spite of the registration of the said restriction entries were illegally, fraudulently and irregularly made during the pendency of the case;

   (iv) The court has decreed that the registration of the defendant as the proprietor of the suit property had been obtained fraudulently, was null and void, therefore there was no property to pass;

   (v) The impugned entries against the title were done during the pendency of this suit, hence of no legal effect: and

   (vi) It is just and mete to cause the cancellation to effectuate the decree herein and restore the dignity of the court.

6. The application was opposed by the intended 2nd and 3rd defendants who respectively filed grounds of opposition and a replying affidavit in opposition thereto. Having considered both the application and respective responses, the learned trial magistrate in the impugned ruling rendered on June 25, 2020 dismissed the application having determined that the court having rendered Judgment was now functus officio and that to allow the application would amount to re-opening the case contrary to the functus officio principle,

7. Aggrieved by the said determination the appellants moved to this court and lodged their memorandum of appeal dated July 9, 2020 urging this court to set aside and appropriately review the decision of the lower court on the grounds that:

   1. The learned trial magistrate erred in fact and in law in misapprehending the import of the application before the court thereby arriving at the wrong conclusion;

2. The learned trial magistrate erred in fact and in law in misapprehending (and) misdirecting herself on the application of the doctrine of lis pendens as was applicable to the circumstances of this of this case;

3. The learned trial magistrate erred in fact and in law in taking into account irrelevant matters in order to arrive at the right conclusion in the circumstances of this case; and

4. The learned trial magistrate erred in fact and in law in failing to address the fact that there had been findings of null and void thereby lending credence to nullities that had been occasioned by entries made during the pendency of the matter before her (and) in so doing sanitizing criminal conduct.

8. As the first appellate court, this court has a duty to re-evaluate, re-analyse and reconsider the evidence and to proceed to draw its own conclusions bearing in mind that it had not seen the witnesses testify first had. I have accordingly carefully examined the Record of appeal. I have similarly perused and considered the rival submissions and authorities placed before me by the appellants on the one hand and the 2nd and 3rd respondents on the other. Just like in the lower court, the 1st respondent did not participate in these proceedings.

9. From the record, it is apparent that the appellants had accused the 1st respondent herein of causing himself to be registered as the proprietor of all that parcel of land known as Aguthi/Gatitu/807 by way of fraud. It was the appellants case that sometime in the year 1974, the 1st appellant sold the said property to the deceased Francis Mwangi Kabure who was the father of the 2nd to 4th appellants herein. Despite the sale, the parties did not complete the registration and transfer as the deceased was taken ill for a long period of time.

10. It was further the appellants' case that sometime in the year 2011, the 2nd appellant sought a Certificate of Official Search for the suit property whereupon he discovered that the same had been registered in the name of the 1st respondent. When the 2nd appellant informed the 1st appellant of the said discovery, they both proceeded to launch a criminal complaint against the 1st respondent who was thereby charged with the offence of obtaining registration to the land by false pretences.

11. The applicant told the court the 1st respondent was thereafter on 30th September, 2013 convicted of the offence and sentenced to serve two years imprisonment. The said conviction and sentence were upheld by the High court when the 1st respondent appealed the same.

12. It was further the appellants case that they then lodged the suit in the lower court in the year 2015 seeking to have the 1st respondent's name deleted and for the names of the 2nd to 4th appellants to be inserted in the register. When they did institute the case, the court issued an order on February 19, 2016 restricting any registration of any dealings with the suit property pending the hearing and determination of the case.

13. The appellants had further told the court that upon receipt of the restriction order they did on February 25, 2016 register the restriction on the register for the suit property. A receipt issued by the department of lands for kshs 500/- paid for the registration of the order appears at Page 49 of the record.

14. On the basis of that evidence and the 1st respondent having failed to appear and/or file a Defence the learned trial magistrate did correctly in my view enter Judgment for the appellants as sought in the plaint.

15. The appellants were however faced with an obstacle when they tried to execute the court's orders. As it turned out, some 6 months after the order of restriction was registered, the 1st respondent is said to

have transferred the suit land to the 2nd respondent who in turn proceeded to charge the same to the 3rd respondent to secure a loan of kshs 7,000,000/- on March 27, 2013.

16. In their response to the appellant's application, the 2nd and 3rd respondents assert that they did due diligence on the property before buying and charging the same to secure the loan. It is in particular the 3rd respondent's case that they hired an advocate who did an official search on the suit properties and that the same did not disclose any encumbrances as alleged by the appellants.

17. Explaining the doctrine of lis pendens in *Mawji -v- US International University & another* (1976) KLR 185, Madan JA observed as follows:

> "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 recognised by the common law. It is based on the expediency of the court. The doctrine of lis pendens is necessary for the final adjudication of the matters before the court and in the general interest 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."

18. While the Indian Transfer of Property Act to which his Lordship was referring in the above case is now repealed, the doctrine remains applicable under section 106 of the *Land Registration Act*, 2012. Referring to the applicability of the doctrine under the said section 106 of the *Land Registration Act* in *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* (2015) eKLR, the Court of Appeal stated thus:

> "The necessity of the doctrine of lis pendens in the adjudication of land matters pending before the court cannot be gain said, 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) No 3 of 2013, the question arises as to whether the doctrine remains applicable to the circumstances of the present case. We consider that the applicability must be considered in the light of section 107 (1) of the *LRA* which provided the saving and transitional provisions of this Act ...
>
> The effect of this provision is to allow 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 the doctrine of lis pendens would remain applicable to the circumstances of this case."

19. In the matter before me, it was not disputed that the property was purportedly sold by the 1st respondent to the 2nd respondent during the time the suit was pending before the court and after an order restricting any further dealings with the land were already issued and registered on the title. The same applies to the registration of the charge in favour of the 3rd respondent.

20. As Turner LJ stated in *Bellamy -v- Sabine* (1857) 1 DC J 566:

> "Every man is presumed to be attentive to what passes in the courts of Justice of the State or sovereignty where he resides. Thereof purchase made of a property actually in litigation pendente lite for 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.

21. By their application dated October 25, 2019, the appellants had clearly laid out the salient features of the doctrine of lis pendens and invoked the court's jurisdiction to determine that the disputed entries had not only been made during the existence of a restriction order issued by the court but also when the matter was pending determination by the court.

22. In this regard I am in agreement with the appellants that the trial court wrongly misdirected itself in its finding that the court was functus officion. To uphold that position would amount to the court sanitizing the unlawful and irregular conduct of the respondents acts of disregarding the court orders.

23. It follows that I am persuaded that there is merit in the appeal. Accordingly, the orders of the trial court issued on June 25, 2020 are hereby set aside. The same are substituted by orders allowing the appellants application dated October 25, 2019 in the following terms.

    1. The court hereby enjoins Paul Maina Mwangi & Co-operative Bank of Kenya Limited as necessary parties to the suit.

    2. The entries made on December 8, 2016, December 9, 2016 and March 27, 2017 in the register of the suit parcel Aguthi/Gatitu/807 be and are hereby cancelled for being made lis pendens the suit in the ower court;

    3. The land register is hereby directed to rectify the register for the said Parcel No Aguthi/Gatitu/807 to reflect the names of the 2nd to the 4th appellants herein as the proprietors thereof; and

    4. The appellants shall have the costs of the appeal.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN court AT NYERI THIS 28TH DAY OF SEPTEMBER, 2022.

In the presence of:

Ms Miriti holding brief for Nderi for the appellant

Mr. Odhiambo for the 3rd respondent

No appearance for 1st and 2nd respondent

court assistant - Kendi

…….

J. O. Olola

JUDGE