



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 340 of 2008

KOMAROCK VIEW LIMITED.....PLAINTIFF

VERSUS

BANK OF BARODA (K) LTD. 1ST DEFENDANT

BUSAM HOLDINGS LTD..... 2ND DEFENDANT

RULING

Chamber Summons dated 23.06.2008 seeking temporary injunction enjoining and restraining the Defendants jointly and severally themselves or their agents from illegally purporting to subdivide and to transfer the Plaintiffs land known as LR. No.1153115, Nairobi and from trespassing or erecting any structures on the suit land pending hearing and determination of this suit on the grounds that the transfer by chargee is illegal, and that Section 52 of transfer of property Act is not complied with in view of existence of several suits proceeding between the various parties in respect of same suit property and were still pending.

When the Defendants proceeded to sell and transfer the suit property, the doctrine of *Lis pendens* was totally ignored.

The applicant admits that there were charges in favour of the first Defendant but says that the exercise of sale was irregular as the charges were invalid. Other grounds are set out in the application. Among the authorities cited by the Applicant the doctrine of *Lis Pendens* is discussed at great length in the judgment of Hon. G. S. Pall dated 10.12.93 at page 4:

“The Defendant claim that they are the registered proprietors of the suit land and under Section 23 of the Act they are absolute proprietors and that the certificate of title is in their favour and must be taken into account by the courts as conclusive evidence of such ownership.

The Plaintiffs on the other hand rely on Section 52 of the transfer of property Act which reads as follows:

“52, During the active prosecution in any court having authority in British India, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the right of the other party thereto under any decree or order which may be made therein except under the authority of the court and on such terms as it may impose.”

A leading case on the subject is *Bellamy –vs- Sabine 1 De J566* in which Lord Justice Turner Said:

“The doctrine of Lis Pendens is not founded upon any of the peculiar tenants of a court of Equity as to implied a constructive notice..... and rests as I apprehend upon the foundation that it would be impossible that any action or suit could be brought to a successful termination if alienation pendent like were permitted to prevail. The Plaintiff would be liable to be defeated by the Defendant alienating before the judgment or decree and would be driven to commence his proceedings denovo subject again to be defeated by the same case.”

In the same case, Lord Cranworth observed:

“Where a litigation is pending between a Plaintiff and a Defendant as with right of a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding not only on the litigating parties but also on those who derived title under them by alienation pending the suit whether such alienees had or had no notice of pending proceedings.”

If that were not so, there could be no certainty that litigation would ever come to an end. A mortgage or sale made before trial decree to a person who had no notice of the pending proceedings would always render a new suit necessary on interminable litigation might be the consequence. This is a leading cause and has been followed by Indian Courts from time to time. It being said that:

“If when the jurisdiction of the court has once attached it could be ousted by the transfer of the Defendants interest there would be no end to litigation and justice would be defeated.” “Also, in the case of Bir Singh –vs-Parmar 1972 E.A. 211 Law J. A. said “The judge’s views on the matter are clear from the judgment. The vendor was under an absolute statutory duty not to transfer the property during the pending of the litigation”

Mulla’s transfer of property Act 6th Edition it is stated:

“The effect of the Maxin is not to annul the conveyance but only to render it subservient to the rights of parties subject to litigation.”

The Court proceeded to state that the Section 52 aforesaid overrides the provisions of Section 23 of the Registration of Titles Act. Judgment was entered in favour of the Plaintiffs holding that the defendants have no right to occupy or remain on the suit property unless with consent of the Plaintiffs.

In the present case there were suits proceedings in courts of Kenya between the 1st Defendant and other parties. Nonetheless the 1st Defendant proceeded to dispose of the suit property in contravention of the provisions of section 52 and the doctrine of *Lis Pendens*.

I am persuaded and I find that in accordance with the judgment in the case of Fredrick Joses Kinyua –vs- G. N. Baird (consolidated) not only in cases of sales - vendor and purchaser but also in cases of chargor and chargee the doctrine applies.

I therefore allow application and grant temporary injunction in terms of prayer 2 of the Chamber Summons. Costs of application shall be to the Applicant.

It is so ordered.

DATED this 10th day of November 2008.

JOYCE N. KHAMINWA

JUDGE