



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 86 OF 2012

GRACE KAMENE.....PLAINTIFF

VERSUS

JOYCE RIGIRI W/O DAVID MBOGORI.....1ST DEFENDANT

JOHN MBOGORI.....2ND DEFENDANT

ASHFORD GERRARD RIUNGU.....1ST INTERESTED PARTY

JENIFFER ITHIRU MUTEGLI.....2ND INTERESTED PARTY

RULING

A. PRAYERS

1. Through an amended notice of motion dated 27.10.2021, the plaintiff/applicant seeks:-

a) Restitution of all parcels that were subdivided and combined while closing titles to L.R No. Nyaki/Giaki/Kiburine/671 and 672 which are Parcel No's L.R Nyaki-Kiburine/1151, 953, 954 and 939, cancellation of the properties and registration of the same in the names of Grace Kamene M'Berece.

b) The court be pleased to issue any other order while executing the Court of Appeal decree dated 29.6.2016 to include and not limited to summoning the land registrar and surveyor Meru Central District for appropriate directions.

The application is supported by an affidavit sworn by Grace Kamene M'Berece sworn on 27.10.2021.

B. GROUNDS

2. The grounds in support of the application are that the Court of Appeal delivered its judgment on 29.6.2016; the defendants are not ready and willing to surrender the original titles to effect the decree; the respondents have frustrated the execution of the decree and cause of justice by further subdividing the suit lands in order to defeat the execution of the decree and obstruct the cause of justice.

3. In the supporting affidavit, the applicant avers the Court of Appeal found she had acquired the suit lands by virtue of adverse possession and that the land registrar was mandated to effect the changes in her favour.

4. Further, she avers she has established the respondents have interfered with the suit land, transferred the land to the 1st interested party on 12.2.2016 who was then their advocate on record in the trial; the land upon transfer was closed on combination to create L.R 1151 now registered in the 3rd interested party's name as per the greed card attached; at the time the changes occurred, there was in existence a stay of execution order granted on 24.11.2015 which the respondents and the 3rd interested party were privy to; that a month before the Court of Appeal judgment the file was closed on 19.5.2016 on subdivisions to create **Parcel No's 953 – 954**; that the green card to **Parcel No. 1151** shows the parcel was created as a result of combination of **Parcel No's 671 and 939** the latter registered in the name of the 2nd interested party; the changes were done intentionally so as to defeat the cause of justice especially with the involvement of the 3rd respondent who as an officer of this court knew the rule of law; the 3rd respondent in utter disregard of the law has filed a suit in the lower court so as to evict the applicant from **Parcel No. 1151** hence the request for restitution of **Parcel No's 671 measuring 2.02 Ha, 672 measuring 4.45 Ha, 473 measuring 5.60 Ha** and they be registered in her names; the land registrar and land surveyor Meru should trace, combine all the subdivisions

emanating from **L.R Nyaki/Giaki – Kiburine 671 and 672** and register them under her name together with 673 without requiring the production of the original title deed since the respondents have declined to cooperate.

5. The 1st interested party replied to the notice of motion through an affidavit in opposition sworn on 22.10.2020 and filed on 15.11.2021 respectively.

6. He admits being the respondents' counsel on record both in the High Court and the Court of Appeal and that after the judgment was delivered on 24.11.2015, the defendants stopped talking to him though he was aware the 1st defendant was deceased.

7. Further, the 1st interested party admits the existence of **Meru CMCC No. 114 of 2019**.

8. In the 2nd replying affidavit, after the notice of motion was amended, the 1st interested party admits he was a bonafide proprietor of **L.R No. Nyaki/Giaki/Kiburine/1151** comprising six acres or 2.429 Ha. and that prayers 2 and 2A of the notice of motion are untenable since the two parcels of land no longer exist and the resultant titles were regularly combined and lawfully acquired.

9. Secondly, it is averred the 1st interested party was not a party to the Environment and Land case.

10. Thirdly, it is stated the transfer of the impugned title was done on 12.2.2016 and 19.5.2016 respectively whereas the Court of Appeal judgment was delivered on 2.6.2016 as per the attached copies of green card.

11. Fourthly, it is averred that the stay of execution granted at the Court of Appeal on 24.11.2015 was purely on payment of damages and eviction of the applicants and that between 22.10.2015 and 2.6.2016, the High Court had created a window for the doctrine of adverse possession to run between when the Court of Appeal revived it by its judgment.

C. WRITTEN SUBMISSIONS

12. With leave of court, Parties opted to canvass the application by way of written submissions.

13. None of the parties filed written submissions as at 20.12.2021 as ordered.

D. THE COMPLAINT

14. The complaint by the applicant is that the subject suit parcels were subdivided and transferred to the 1st and 2nd interested parties while the suit was pending and there was in existence a stay order from the Court of Appeal.

15. The respondents have not challenged the application together with the 2nd interested party.

16. The 1st interested party opposes the application on the basis that he is a bonafide propriety of L.R No. 1159 which he regularly and lawfully acquired.

17. Secondly, the 1st interested party states there was no stay with regard to the suit parcels.

E. CONDUCT OF PARTIES DURING PENDENCY OF A SUIT OR APPEAL.

18. In my understanding, the 1st interested party seems to be saying; in the absence of an inhibition or stay regarding any transaction over the suit parcels, the respondents were at liberty to deal with their parcels regardless of the pendency of the appeal and hence whatever was done was regular and lawful.

19. On the other hand, the applicant takes the view the 1st interested party was not only the respondents' counsel on record at the appeal but also the beneficiary and perhaps a key architect of the transactions.

20. In her view, the conduct of the respondents and the interested parties was done solely to obstruct justice and defeat the decree and for that matter, the appeal which was pending at the time and subsequently makes the decree of the Court of Appeal unenforceable.

F. THE DOCTRINE OF LIS PENDENS

21. In order for the issue of title to land to be determined, there is a common law principle that there is always need to preserve the subject matter of the suit in accordance with the doctrine of **lis pendens**.

22. In Mawji -vs- US International University & Another [1976] KLR 185 Madam J.A stated thus:

“..... Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on the expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matter before the court and in the general interest of public policy and good effective administration of justice

It prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other”

23. In *Naftali Ruthi Kinyua –vs- Patrick Thuita Gachure & another [2021] eKLR*, the court held the doctrine is applicable pursuant to Section 107 of the Land Registration Act.

24. In *Re estate of Solomon Muchiri Macharia [2016] eKLR* quoting with approval, the Supreme Court of India case of *KN Aswathnarayana Setty (D) Tr. LRs. & Others –vs- State of Karnataka & Others [2013] INSC* stated:

“that the doctrine is based on the legal maxim ‘ut lite pendente nihil innovetur’ (During a litigation nothing new should be introduced).

The principle of lis pendens is in accordance with equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee pendente lite is bound by the decree just as much as he was a party to the suit. A litigating party is exempted from taking notice of title acquired during the pendency of litigation.”

25. The court went on to list the ingredients of the doctrine as:-

- a) A litigation should be pending in a court of competent jurisdiction.
- b) The suit must be relating to a specific parcel of land.
- c) The suit should not be conclusive.
- d) The suit should relate to a right in this specific property.
- e) Property should not be transferred or otherwise dealt with.
- f) By a party to the suit.
- g) So as to effect the rights of any party thereto,
- h) Till the final disposal of the case.
- i) A party can only do so with the permission of the court.

26. The court proceeded to invalidate the subdivisions and consolidate the titles as they were prior to subdivisions.

27. In *Anne Jepkemboi Ngeny –vs- Joseph Tireito & another [2021]eKLR* the Court of Appeal held alienation and having properties registered in parties names during the pendency of a litigation process runs afoul of the doctrine of **lis pendens** and it is tantamount to contempt of court.

28. Further, the court held in so doing, such a party is trying to steal a march on the other. It upheld the lower court decision in cancelling the title deeds and ordering the retransfer of the properties.

29. The question is whether the doctrine has any statutory backing in Kenya. **Section 107 (1) of the Land Registration Act provides:**

“Unless the contrary is specifically provided for in this Act, any right interest title, power or obligations acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

30. The other question is whether the mere pendency of a suit triggers the doctrine.

31. In *Josephat Mwangi Moracha & another –vs- HFC Limited [2020] eKLR* the court held in Kenya unlike in India, the practical approach remains that mere institution of a suit does not trigger the doctrine but upon active prosecution of that suit the doctrine automatically sets in.

32. In *Naftali Ruthi Kinyua –vs- Patrick Thuita Gachure & another [2015] eKLR*, the court held the doctrine was applicable in the case which was concerning property dispute where the rights of the suit property were in serious contention.

33. As to the issue of interested parties being bound by the doctrine of **lis pendens**, in *Moonglow Assets Limited –vs- National Land Commission & 4 others, Edward Nzwii & another (Proposed Interested Party/Applicant) [2021] eKLR*, Angote J. held that for one to have interest in land must have either be a legal or beneficial owner of the land. Further the court held there were legal consequences of a party selling land during the pendency of a suit quoting *Carol Silcock –vs- Kassim Sharif Mohamed [2013] eKLR*.

34. Angote J. concluded that such interested parties are bound by the decision of the court without being joined in the suit as parties.

G. DETERMINATION OF ISSUES

35. Having set the principles, parameters and implications of the doctrine of **lis pendens**, the issues for determination is whether the conduct of the respondents and the interested parties offends the doctrine of **lis pendens** and secondly whether the applicant is entitled to the orders sought.

36. There is no dispute that the Court of Appeal granted a stay of execution by the consent of parties on 24.11.2015. There is also no dispute at the time of entering the consent the 1st interested party was acting for the respondents up to the Court of Appeal judgment delivered on 29.6.2016.

37. The appeal was regarding **Parcel No. 671 and 672 and 673**. It is also not in contention that the respondents during the pendency of the appeal caused subdivisions and subsequent transfers in favour of the 1st and 2nd interested parties on 12.2.2016.

38. The applicant avers soon after getting the Court of Appeal decision in her favour, the respondents declined to surrender the original title deeds for the implementation of the Court of Appeal decree and which acts looked into totality amount to obstruction of justice and are also aimed at defeating the implementation of the decree.

39. On the other hand, while not denying the changes and participation in the facts, the 1st interested party states there was nothing stopping the respondents and by extension himself from proceeding with the transactions since the stay was not applicable and secondly there was a window created by the Environment and Land Court. Perhaps if I get the logic correct, allowing the respondents to deal with the properties since time was not running on adverse possession.

40. In my considered view, the 1st interested party was not a mere bystander in the proceedings. He had not only consented to the stay orders but was also representing the interests of his s while at the same time doubling up an officer of the court knowing the law and doctrine's such as **lis pendens** which are binding on him.

41. The 1st interested party knew of the pendency of the appeal; but nevertheless proceeded to participate in a course with his clients, the respondents whose intention was to remove the properties from the reach of the court and by extension the expected outcome of the appeal.

42. The intention of the respondents and the interested parties was not only suspect, but also illegal and unlawful more so since there was a stay of execution and secondly a live appeal before the court. The 1st interested party cannot by any stretch of imagination term himself a bonafide proprietor under the circumstances.

43. The 1st interested party has not attached any transfer forms, land control board forms and or any agreement in line with **Section 3 (3) of the Law of Contract Act Section 38 of the Land Act** and lastly under the **Land Control Act**, for this court to take him as a bonafide proprietor.

44. The 1st interested party knew the acts of his clients and by extension his own acts were undermining the authority of the court and that public policy demands that the court be informed of any transactions involving land that is subject to a pending litigation.

45. **Sections 1A, 1B and 3A of the Civil Procedure Act** places an obligation on counsel acting for a party to help the court to reach and make a just determination of the issue before it.

H. FINAL ORDERS.

46. In the premises and given my finding that the doctrine of **lis pendens** was applicable in the instant case, in the interest of justice parties should revert back to the position they were at when the consent stayed the execution. All subsequent subdivisions and transfers after the date of stay are hereby invalidated and the titles shall revert to **L.R No's 671 and 672**. See **Taita Arap Rotich -vs- Andrea Rotich [2015] eKLR**.

47. The land Registrar and the Land Surveyor are hereby ordered to implement the Court of Appeal decree with an order dispensing with the surrender of the original title deeds and the Deputy Registrar to sign the necessary transfer documents and consents if need be to effect the Court of Appeal decree in favour of the plaintiff.

48. Costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 2ND DAY OF FEBRUARY, 2022

In presence of:

A.G. Riungu for interested parties

Mwanzia for applicant

Respondents – absent

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE