



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 71 OF 2008

SAMUEL NDIBA NJUHO.....PLAINTIFF

- VERSES-

JUSTUS KISEMER KEBOI & 23 OTHERS.....DEFENDANTS

RULING

What is before me is the Notice of Motion application dated 16th March, 2018 in which the plaintiff has sought several reliefs. Most of the reliefs sought in the application have been granted by the court. The only relief that was contested and which is the subject of this ruling is the relief sought in prayer (c) of the application in which the plaintiff has sought a temporary injunction restraining the 2nd and 5th to 24th defendants from selling, transferring, charging or dealing any manner with L.R Nos. Kajiado/Kisaju/ 1549, 1550, 13222 to 13226, 13881, 14085 to 140102 pending the hearing and determination of the suit. The application was supported by the affidavit and supplementary affidavit sworn by the plaintiff on 16th March, 2018 and 7th March, 2019 respectively.

The application was brought on the grounds that the plaintiff brought this suit on 4th March, 2008 against the 1st to 4th defendants seeking the cancellation of the registers in respect of L.R Nos. Kajiado/Kisaju/1537, 1538, 1539, 1540, 1541, 1542,1543, 1544,1545,1548, 1549 and 1550 (hereinafter referred to only as Plot Nos. 1537, 1538, 1539, 1540, 1541, 1542,1543, 1544,1545,1548, 1549 and 1550). The plaintiff averred that Plot No. 1549 was fraudulently transferred from the plaintiff to the 2nd defendant while Plot No. 1550 was fraudulently transferred from the plaintiff to the 1st defendant. The plaintiff averred that while this suit was pending, the 1st defendant fraudulently transferred Plot No. 1550 to the 5th defendant who thereafter subdivided the same to give rise to L.R Nos. Kajiado/Kisaju/13222, 13223, 13224, 13225 and 13226(hereinafter referred to only as "Plot Nos. 13222, 13223, 13224, 13225 and 13226"). The plaintiff averred that the 5th defendant sold Plot No. 13222 the 6th and 7th defendants, Plot Nos. 13223 and 13224 to the 8th defendant and Plot No. 13225 to the 9th defendant while retaining Plot No. 13226 in his name. The plaintiff averred that the 8th defendant amalgamated Plot Nos. 13223 and 13224 into L.R No. Kajiado/Kisaju/13881 which he subdivided to give rise to L.R Nos. 14085 to 140102(hereinafter referred to as Plot Nos. 14085 to 140102).

The plaintiff averred that the 8th defendant sold Plot Nos. 14085, 14086, 14087,14088, 14089, 14090, 14091, 14092,14093,14094, 14095,14096 and 14097 to 11th to 23rd defendants respectively. The plaintiff averred that the 9th defendant charged Plot No. 13225 to the 10th defendant to secure a loan of Kshs. 4,000,000/- that was advanced to him by the 10th defendant while the 11th to 23rd defendants charged their parcels of land aforesaid to the 24th defendant to secure loans of various amounts that were advanced to them by the 24th defendant. The plaintiff averred that the 5th to 24th defendants were necessary parties to the suit and that it was necessary for them to be joined in the suit as parties. The plaintiff averred further that it was also necessary that a temporary injunction be issued against the 5th to 24th defendants so as to preserve the said properties which are registered in their names pending the hearing of the suit.

The plaintiff's application was opposed only by the 10th defendant. The 1st defendant filed a replying affidavit on 11th September, 2018 in which he essentially supported the application. In its replying affidavit sworn by its legal officer, Jack Kimathi on 16th May, 2019, the 10th defendant opposed the application on several grounds. The 10th defendant averred that on 24th October, 2016 it advanced to the 9th defendant a loan facility in the sum of Kshs. 4,000,000/- on the security of a Legal Charge over L.R No. Kajiado/Kisaju/ 13225. The 10th defendant averred that the said loan was to be repaid by the 9th defendant by monthly instalments over a period of 36 months. The 10th defendant averred that it conducted due diligence before taking L.R No. Kajiado/Kisaju/ 13225(Plot No. 13225) as security for the said loan. The 10th defendant averred that after the due diligence, it established that the 9th defendant was the bona fide registered owner of Plot No. 13225. The 10th defendant averred that it was a stranger to the plaintiff and that the orders sought by the plaintiff if granted would be prejudicial to it.

The application was argued by way of written submissions. I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the 1st and 10th defendants' affidavits filed in reply to the application. Finally, I have considered the

submissions on record. As I mentioned at the beginning of this ruling, the only relief left in the plaintiff's application dated 16th March, 2008 for the court's consideration is that seeking a temporary injunction pending the hearing of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. As was stated in Giella v Cassman Brown & Co. Ltd. [1973] E.A 358, an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR the court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited v First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

As I have mentioned earlier, the plaintiff's application was only opposed by the 10th defendant. For that reason, I will only consider the plaintiff's case as against the 10th defendant. The 10th defendant's interest in Plot No. 13225 was derived from a charge that was created in its favour by the 9th defendant who acquired the property on 13th August, 2015 from the 5th defendant. It is not in dispute that Plot No. 13225 is a sub-division of L.R No. Kajiado/Kisaju/1550(Plot No.1550). From the uncontroverted evidence placed before the court by the plaintiff, Plot No. 1550 was at all material times registered in the name of the plaintiff. The plaintiff was registered as the proprietor of Plot No. 1550 on 14th June, 1995. Plot No. 1550 was transferred to the 1st defendant on 12th January, 2006. When the plaintiff brought this suit on 4th March, 2008, the plaintiff claimed among others that Plot No. 1550 was fraudulently transferred to the 1st defendant through a fraudulent and illegal court order that the 1st defendant obtained at the Senior Magistrates' Court at Kajiado on 29th December, 2005. In his plaint, the plaintiff sought among others an order that Plot No. 1550 belonged to him and the rectification of the register in respect of Plot No. 1550 by cancellation of registration of the 1st defendant as the owner of the property and the reinstatement of the name of the plaintiff as is the owner of the property.

The 1st defendant transferred Plot No. 1550 to the 5th defendant on 27th February, 2015 during the pendency of this suit. The 5th defendant thereafter subdivided the plot into five portions on 16th July, 2015. One of the subdivisions was Plot No. 13225 which the 5th defendant transferred to the 9th defendant on 13th August, 2015. The 9th defendant then proceeded to charge Plot No.13225 to the 10th defendant on 17th November, 2016. All these transactions took place while this suit was pending. Since Plot No. 1550 was the subject of an active suit, it was not proper for the 1st defendant to deal with the same in a manner that was likely to prejudice the suit. The transfer of Plot No. 1550 by the 1st defendant to the 5th defendant was against the doctrine of *lis pendens*. In his affidavit sworn on 10th September, 2018 in response to the present application, the 1st defendant contended that the transfer of Plot No. 1550 from the name of the plaintiff to the name of the 1st defendant and the subsequent transfer of the property to the 5th defendant was the work of the 5th defendant. The 1st defendant denied that he transferred Plot No. 1550 to the 5th defendant or that he received any payment for the same.

In Margaret Wairimu Warima v Phylis Wanjiru Thairu & 2 others [2017]eKLR, the court stated as follows on the doctrine of *lis pendens*:

“Apart from the court orders, which we find were operative at all times material to the suit, there is a common law doctrine of *Lis pendens* which is unaffected by statute and has been upheld by this Court. The common sense of it was explained by Lord Justice Turner in the case of Bellamy vs. Sabine [1857] 1 De J 566, as follows: -

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

In Mawji v US International University & Another [1976] KLR 185, the Court stated that:

“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 recognized by common law. It is based on expedience of the court. The doctrine of *lis pendens* is necessary for final adjudication of the matters before the court and in the general interests 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.....Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore purchase made of a property actually in litigation pendente lite for a 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.”

In Emmanuel Ngade Nyoka v Kitheka Mutisya Ngata, [2017]eKLR, the court stated that:

“So that by the time he was subdividing, selling and transferring portions of the suit premises to the interested parties he was well aware that litigation regarding the suit premises was still ongoing in the first appellate court. This state of affairs obviously attracts the application of the *lis pendens* doctrine. It is a doctrine of law and thus it matters not when it is raised. The doctrine simply prohibits a party to a suit from transferring the suit premises to a third party while the suit, with regard to the suit premises is pending. The purpose of the doctrine is of course to preserve the suit premises until the finalisation of the ongoing litigation.....As already stated the appellant was well aware of the pending appeal when he purported to subdivide, sell and transfer to the interested parties portions of the suit premises. This being the case the interested parties cannot be heard to argue that they were innocent purchasers for value without notice. As correctly observed by the learned Judge purchase of a property *pendente lite* for valuable consideration affects the purchaser in the same manner as if he had notice and will be accordingly bound by the judgment or decree in the suit. It does not matter that at the time of purchase there was no order stopping the selling or subdivision of the suit premises as the interested parties have argued. Nor was there need to tender evidence to show that the interested parties were never parties to any collusion or fraud in their acquisition of portions aforesaid. What is pertinent is that the appellant well knowing of the pending litigation involving the suit premises nonetheless went ahead to mischievously subdivide and transfer portions thereof to the interested parties. In the circumstances the learned Judge did not err in invoking the doctrine.”

In Kawaljeet Singh Rekhi v Peter Wainaina Kamau & 2 others MBSA Civil Appeal No. 21 of 2016 [2016] eKLR, the court stated that:

“...Mulla and Gour in their treatises on the Indian Transfer of Property Act explain the doctrine further that:

“... Every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. Therefore, purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree on the suit”.

The doctrine therefore bars dealing with landed property under litigation to the detriment of the parties to the pending litigation. A transfer, if undertaken in those circumstances will really amount to nothing, and this is the case here.”

The issue as to whether or not the 1st defendant acquired Plot No.1550 fraudulently from the plaintiff is yet to be determined by the court. The court cannot determine the issue in this interlocutory application although the 1st defendant has already owned up and denied any involvement in the transaction. If the court finds at the trial that Plot No. 1550 was transferred to the 1st defendant fraudulently, it will follow that the 1st defendant did not acquire a valid title over Plot No. 1550. The subsequent transfer of Plot No.1550 to the 5th defendant, the subdivision thereof and the transfer of the sub-plots which included Plot No. 13225 to various persons including the 9th defendant would all be null and void on account of the invalidity of 1st defendant’s title. If the 9th defendant’s title to Plot No. 13225 is found to be null and void, no valid charge could be created over the title in favour of the 10th defendant. On account of the doctrine of *lis pendens*, the titles and interests acquired by the 5th, 9th and 10th defendants which have their roots in the 1st defendant’s title over Plot No. 1550 will have to give way to the plaintiff’s title if the 1st defendant’s title is found to be null and void.

With the 1st defendant’s admission that he is not aware of the circumstances under which Plot No. 1550 was transferred to his name from the name of the plaintiff, and the 5th defendant’s failure to respond to the present application, I am satisfied that the plaintiff has established a *prima facie* case with a probability of success against the 5th, 9th and 10th defendants. I am also satisfied that the plaintiff is likely to suffer irreparable harm that cannot be compensated with an award of damages if the orders sought are not granted. Since the other defendants did not oppose the application, I am satisfied that a case has been made out for the grant of the orders sought as against all the defendants.

In conclusion, I hereby allow the Notice of Motion application dated 16th March, 2018 in terms of prayer (c) thereof. The plaintiff shall have the costs of the application to be paid by the 10th defendant.

Dated and Delivered at Nairobi this 5th Day of May 2020

S. OKONG’O

JUDGE

Ruling read through Microsoft Teams Video Conferencing platform in the presence of;

N/A for the Plaintiff

N/A for the Defendants

Ms. C. Nyokabi-Court Assistant