



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 60 OF 2018**

**JOSPHAT MBOGO KAGUONGO.....1<sup>ST</sup> PLAINTIFF**

**PETER KARANI KAGUONGO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**GEOFFREY MURIUKI KIMONDO.....1<sup>ST</sup> DEFENDANT**

**JANE MUTHONI KARANI.....2<sup>ND</sup> DEFENDANT**

**FREDRICK MIANO MURIUKI.....3<sup>RD</sup> DEFENDANT**

**JOSEPH KINYUA MURIUKI.....4<sup>TH</sup> DEFENDANT**

**RULING**

The Applicants/Plaintiffs filed the Notice of Motion dated 7<sup>th</sup> March 2019 brought under **Order 40 Rules 1 & 2 CPR** seeking the following orders:

**(1) Spent.**

**(2) That this Honourable Court be pleased to grant temporary injunction orders against the Defendants/Respondents herein restraining them from interfering with the Plaintiffs quiet possession, use and enjoyment of land parcels Nos. MWERUA/KANYOKORA/937, 938, 939 and 940 pending the hearing and determination of this suit.**

**(3) That this Honourable Court be pleased to grant temporary injunction orders against the Defendants/Respondents herein restraining them from interfering with the plaintiff's quiet possession, use and or enjoyment of land parcels Nos. MWERUA/KANYOKORA/937, 938, 939 and 940 pending the hearing and determination of this suit.**

**(4) That costs of the application be provided for.**

The application is supported by an affidavit of Josphat Mbogo Kaguongo and grounds apparent on the face thereof. The said affidavit is further supported by documents annexed thereto. On 20/3/2019, the 3<sup>rd</sup> defendant filed grounds of opposition and a replying affidavit in opposition to the said application. On 15/3/2019, the plaintiffs/applicants filed a supplementary affidavit in response to the replying affidavit. When the application came up for hearing on 21/3/2019, the parties agreed by consent to dispose the same by affidavit evidence and written submissions.

**APPLICANTS CASE**

According to the applicants, they are biological brothers and the defendants/respondents are nephew and nieces to one Monica Njoki Ndegwa who was wife to Johana Ndegwa who was the original registered owner of land parcel No. MWERUA/KANYOKORA/117. The plaintiffs/applicants further contend that the said Johana Ndegwa and the plaintiff's late father one Kaguongo Nyaga were step brothers and that land parcel Number MWERUA/KANYOKORA/117 which was a clan and ancestral land was registered in the name of the eldest son Johana Ndegwa Nyaga to hold in trust for the step brother Kanjagua Nyaga. They stated that despite being aware of the existence of this customary trust, the late Johana Ndegwa Nyaga transferred land parcel No. MWERUA/KANYOKORA/117 to his wife who later subdivided the land into land parcel Nos. MWERUA/KANYOKORA/938, 939 and 940 and transferred the same to the defendants/respondents who are her nieces and nephew. The applicants further stated that the said sub-division and transfer was done during the pendency of High Court Case No. 14 of 1991 between Monicah Njoki Ndegwa Vs Mary Njeri Kaguongo & 2 others which was ruled on 6<sup>th</sup> July 2007 that the land be shared between the 2 step brothers families.

## DEFENDANTS/RESPONDENTS CASE

The 3<sup>rd</sup> respondent opposed the application and stated that at the time this suit was filed in December 2018, the plaintiffs sought and obtained a temporary injunction as was issued on an Ex-parte basis at which time they ought to have brought forth all the information regarding this suit before the Court and made all material disclosures which they failed to do so and are now seeking to steal a march against the respondents. The 3<sup>rd</sup> respondent also stated that the applicants failed to disclose that the land which is the subject of this suit and the subdivisions thereof are the subject matter of ELC No. 56 of 2016 (Nyeri) (formerly Nyeri HCCC No. 114 of 1991) which is still pending before the said Court and that the matters being canvassed in this suit have been dealt with in a former suit and that the judgment and decree has not been executed and/or set aside. The 3<sup>rd</sup> respondent contends that none of the applicants occupies or has ever been in occupation of his portion of land or any part thereof and that the application is therefore mischievous, misconceived and lacks basis.

The 3<sup>rd</sup> respondent stated that he is in exclusive possession and occupation of his portion which he acquired as a purchaser for value. He sought the application to be dismissed with costs.

## REJOINDER BY THE APPLICANTS

The applicants filed a supplementary affidavit sworn on 15/3/2019 as a rejoinder to the 3<sup>rd</sup> respondent's replying affidavit and stated that whereas a previous suit was filed between Monica Njoki Ndegwa Vs Mary Njeri Kaguongo, Peter Karani Kaguongo and Ben Mary Mwenje over the same parcel No. MWERUA/KANYOKORA/117 being formerly HCC No. 114 of 1991 (Nyeri), the Court gave judgment and decree directing that the suit land be shared equally between the plaintiff, Monica Njoki Ndegwa and the 1<sup>st</sup> defendant (Mary Njeri Kaguongo) who is the plaintiff's mother. They contend that by the time judgment was delivered on 6/7/2007, the plaintiff thereon had already sub-divided the suit land into land parcels Nos MWERUA/KANYOKORA/937, 938, 939 and 940 and transferred to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively. They stated that following the change of matrix in the former case, the judgment could not be executed as the suit property had already changed hands hence this suit. The applicants stated that there are no pending interlocutory applications or any other pleadings in respect of the suit property and that the issues which are now being canvassed in the present application were not in issue in the previous suit and that this suit is therefore not res-judicata.

## ANALYSIS AND DECISION

I have considered the application dated 7<sup>th</sup> March 2019, the replying affidavit and the supplementary affidavit. I have also considered the grounds of opposition, the submissions by the parties and the applicable law. The principles for the grant of temporary injunction orders was set out in the celebrated cases of *Giella Vs Cassman Brown Co. Ltd (1973) E.A 358* as follows:

- (a) The applicant must establish a prima facie case with probability of success.**
- (b) The applicant stands to suffer irreparable loss which cannot be compensated by an award of damages and;**
- (c) If the Court is in doubt, the application may be determined on a balance of probabilities.**

My careful consideration of the affidavit evidence and the annexures points to the weighty interests between the two competing parties. The applicants are claiming customary interest against the respondents who are registered proprietors of the disputed parcels of land. The question that remains to be answered is whose claim between that of the applicants and the respondents is superior or supersedes the other? Where a dispute cannot be resolved by the application of a law cited by an applicant, the Court may apply any other appropriate law in the interest of justice. In this case, the doctrine of lis pendens comes to mind. The Black's Law Dictionary 9<sup>th</sup> Edition defines lis pendens as the jurisdictional power or control acquired by a Court over property while a legal action is pending. It is a common law principle that was enacted into statute by *Section 52 Indian Transfer of Property Act (ITPA) – (now repealed)*. The application of that doctrine was aptly put by *Turner L.J, in Bellamy Vs Sabine (1857) 1 De J. 566* where he held 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, pendent 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 the case of *Mawji Vs Us International University & another (1976) K.L.R 185, Madam, J.A.* stated 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 recognized by common law. It is based on expedience of the Court. The doctrine of lis pendence 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 others.....***

***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 pendent 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”.***

This doctrine of lis pendens in my view is applicable in the circumstances of this case considering the submissions by the applicant that there is another suit being formerly HCCC no. 114 of 1991 (Nyeri) where judgment was issued only to realize that the suit subject property has

been sub-divided and transferred to third parties.

Applying these principles, I find and hold that the Notice of Motion dated 7<sup>th</sup> March 2019 is merited and the same is allowed on the doctrine of lis pendens pending hearing and determination of this suit. The costs shall abide the event.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 30<sup>th</sup> day of April, 2020.**

.....

**E.C. CHERONO**

**ELC JUDGE**

*In the presence of:*

1. Ms Wangechi Munene for Plaintiffs
2. Ms Makworo holding brief for Ms Kibe for 3<sup>rd</sup> Defendant
3. Mbogo – Court clerk