



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 110 OF 2009

NANCY NYAWIRA.....1ST PLAINTIFF

RICHARD WAMBUGU NGIBUINI.....2ND PLAINTIFF

VERSUS

ARCHER DRAMOND MORGAN LTD.....DEFENDANT

AND

CHIEF LAND REGISTRAR.....1ST INTERESTED PARTY

KENYA POST OFFICE SAVINGS BANK.....2ND INTERESTED PARTY

RULING

1. In the Notice of Motion dated 29th August, 2019, the 2nd Interested Party is seeking for the following orders:

- a) That the 2nd Interested Party/Applicant be joined as an Interested Party forthwith.*
- b) That this Honourable Court do issue a stay of execution of the Court Orders of 5th July, 2019, pending the hearing and determination of this Application.*
- c) That this Honourable Court do set aside all proceedings and the Ruling of Hon. O. A. Angote of 5th July, 2019 and all Consequential Orders arising therefrom.*
- d) That this Honourable Court do issue an interim injunction restraining the Plaintiffs whether by themselves, employees, servants or agent from selling, alienating, transferring, disposing, trespassing or otherwise dealing or interfering with all that Property being Masionette (with servant quarters) known as unit No. 8 Phase 1 on L.R. 27317 Hillcrest Park off Mombasa Road.*
- e) That the Plaintiff, defendant the 1st Interested party be compelled to serve upon the 2nd Interested Party, all pleadings filed thus far, consequent to the joinder orders.*
- f) That this Honourable Court be pleased to re-open the proceedings afresh on a priority basis and grant the 2nd Interested Party an opportunity to file out of time all requisite documents to defend itself in the Suit.*
- g) That the costs of this application be in the cause.*

2. The Application is supported by the Affidavit of the 2nd Interested Party's Company Secretary who has averred that on 1st October, 2010, the Defendant offered for sale to Crispin Eustace Musundi the Maisonette indicated as Unit number 08 on L.R. 27317 in phase 1 of Hillcrest Park (the suit property) at a price of Kshs. 5,650,000.

3. According to the 2nd Interested Party's Company Secretary, he learnt of the existence of this suit on 22nd August, 2019 when the said Crispin Eustace Musundi, who is a staff member of the Interested Party, was informed by a Court Bailiff from the High Court, Machakos, that his Tenant was to be evicted from the suit premises.

4. The 2nd Interested Party's Company Secretary deponed that the said Crispin Eustace Musundi is the registered proprietor of the suit

property; that he charged the suit property to the 2nd Interested Party for Kshs. 5,600,340 on 19th September, 2011 and that the Plaintiff has no proprietary interest in the suit property.

5. The 2nd Interested Party's Company Secretary deponed that the court should intervene and protect the 2nd Interested Party's legally vested interest over the suit property and that the 2nd Interested Party has a strong and plausible case with a high probability of success.

6. The 2nd Interested Party finally averred that the arbitration proceedings by their nature are confidential; that the 2nd Interested Party was a stranger to the proceedings; that the 2nd Interested Party was not a party to the initial contract that mandated the Plaintiffs and the Defendant to refer the dispute to arbitration and that there is no way the 2nd Interested Party would have known of the existence of the Arbitral Award dated 16th December, 2009.

7. The Plaintiffs filed Grounds of Opposition in which they averred that the transfer of the suit property by the Defendant to Crispin Eustance Musundi, who later charged it to the 2nd Interested Party, was done on 19th July, 2011 while this suit was pending and that the transfer and subsequent charging of the suit property contravenes the doctrine of *lis pendens*.

8. The 1st Plaintiff deponed that the arbitrator who determined the dispute between the Plaintiffs and the Defendant issued an Award on 16th December, 2008 whereby he directed the Defendant to complete the registration of the transfer of the suit property in favour of the Plaintiffs and that the Defendant acted fraudulently in purporting to transfer the suit property to Crispin Eustance Musundi when the arbitral Award had already been made.

9. The Plaintiff finally averred that the Ruling dated 15th February, 2012 which adopted the Arbitrators Award has not been challenged and that this court does not have jurisdiction to order a party to join proceedings as an Interested Party after delivery of the Judgment.

10. In his submissions, the 2nd Interested Party's Advocate submitted that when the current proceedings commenced, the 2nd Interested Party was not a party to the proceedings; that the 2nd Interested Party only became aware of these proceedings when their staff, Crispin Eustance Musundi, was threatened with eviction in August, 2019 and that the Judgment of this court should be set aside *ex debito justitiae*.

11. Counsel submitted that the suit property was acquired by Crispin Eustance; that the suit property was not acquired by way of fraud; that the 2nd Interested Party did not enter into any agreement with the Plaintiffs and that an enforcement of the Award as against the 2nd Interested Party would amount to the 2nd Interested Party being condemned unheard hence against public policy and the rule of natural justice. Counsel relied on several authorities which I have considered.

12. The Plaintiffs' counsel submitted that the trial in this matter commenced on 20th April, 2009 when the court referred the matter to an arbitrator; that the said arbitration was heard and an Award was issued on 16th December, 2009 in favour of the Plaintiffs and that the Award was adopted by this court on 15th February, 2013.

13. It was submitted that as at the time of the transfer of the suit property to Crispin Musundi, there existed an active prosecution of this suit; that the Defendant was therefore, by dint of the doctrine of *lis pendens*, restrained from transferring the suit property and that the actions of the Defendant in transferring the suit property to a third party, while the suit was pending, was not only unlawful, but a mockery of the court process.

14. Counsel submitted that the issues raised by the 2nd Interested Party have already been dealt with conclusively; that this court is *functus officio* and that the court has no jurisdiction to determine the present Application. Counsel relied on numerous Authorities which I have considered.

15. This suit was commenced by way of a Complaint dated 20th April, 2009. In the Complaint, the Plaintiffs alleged that the Defendant offered to them a Maisonette (*with a servant quarter*) known as Unit No. 8 erected on L.R.No.27317 (*the suit property*); that the Plaintiffs agreed to buy the suit property and that after signing the Agreement, the Defendant purported to terminate the same.

16. In the Complaint, the Plaintiffs sought for an order of Specific Performance to issue compelling the Defendant to discharge its obligations under the Agreement and transfer the suit property to them. At some point, this court file, together with all the proceedings disappeared. However, the file was reconstructed by the Plaintiffs.

17. According to the record, on 5th May, 2009, the Plaintiffs and the Defendant's advocate entered into the following consent.

By consent:

a) The suit herein be referred to arbitration by the Chairman, Chartered Institute of Arbitrators(K);

b) The orders issued on 20/04/2009 be extended pending arbitration;

c) The Arbitral award, be filed in court within 60 days from the date of filing of this consent.

18. The dispute was taken up by an arbitrator as per the said consent. The dispute was decided by the Arbitrator, whose Award was adopted by Ngugi J. on 15th February, 2012 as follows:

- a) *Judgment in the suit is entered in terms of the Arbitral Award dated 16/12/2008,*
- b) *The Arbitral Award dated 16/12/2009 is adopted as a decree of this court; and*
- c) *Costs of this Application and the suit are awarded to the Plaintiffs.*

19. I have perused the Arbitral Award dated 16th December, 2009. In the said Award, the Arbitrator held as follows:

- a) *The Vendor to perform the specific action of this contract and deliver to the purchaser possession of Unit No.8 of Phase 1 Hillcrest Park on L.R. No. 27317, off Mombasa Road and the contract be completed in accordance with the Agreement for sale.*
- b) *The Respondent to pay the Costs of this Arbitration and the cost of the Award.*

20. After the Award was made on 16th December, 2009, the Defendant herein did not lodge an Appeal pursuant to the provisions of the Arbitration Act. However, by way of an Application dated 8th May, 2015, the Defendant sought for leave to file and serve the Notice of Intention to Appeal and to lodge an Appeal out of time in respect of the Ruling of Ngugi J dated 15th February, 2012. That Application was dismissed by this court on 5th July, 2019.

21. In the current Application, the Applicant's Company Secretary has deponed that the Defendant herein sold to a member of staff of the 2nd Interested Party, Crispin Eustance Musundi, the suit property and a Lease was drawn and registered to that effect. According to the 2nd Interested Party, it charged the suit property by way of a charge dated 19th July, 2011.

22. I have perused the Lease document that was entered into between Crispin Musundi and the Defendant on 19th July, 2011. The said Lease shows that the Defendant sold the suit property to Crispin for Kshs. 5,650,000. The Lease was registered in favour of Crispin on 19th September, 2011 and charged to the 2nd Interested Party on the same day.

23. It is obvious that the Defendant herein sold the suit property during the pendency of the suit. Indeed, the Defendant sold the suit property to Crispin after the Arbitrator had already ruled in favour of the Plaintiffs.

24. This court has had an occasion to discuss in detail the consequences of a party selling land during the pendency of a suit. In the case of *Carol Silcock vs. Kassim Shariff Mohamed [2013] eKLR*, this court quoted with approval the decision in *Mawji vs. United States International University and Another [1976-80] KLR* which quoted *Turner L. J in Bellamy vs. Sabine [1857] I D J 566, 584*, who defined the principles of *lis pendens* 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 Defendant's alienating before the Judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceedings.”

25. In the same case of *Bellamy vs. Sabine [1987] De J 566, (Vanwarth L J)* stated as follows:

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

26. The rationale of the doctrine of *lis pendens* have been given by “*Mulla on the Indian Transfer of Property Act, 1882, 5th Edition, page 245* as follows:

“Every man is presumed to be alternative to what passes 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 on point of fact affects the purchase in the same manner as if he had such notice; and he will be accordingly be bound, by the Judgment or decree in the suit.”

27. The doctrine of *lis pendens* is meant to bring litigation to an end. As already observed above, if parties are allowed to sell property during the pendency of a suit, then litigation would never come to an end because, like a vicious circle, the court will keep on re-opening the case just because one party sold to a third party the subject matter during the pendency of the suit.

28. As was held by this court in the *Carol Silcock case (supra)*, it will be a mockery of justice for the court to subject the Plaintiffs to another rigour of litigation just because the Defendant, who was aware of the pending suit, hurriedly sold the suit property to Mr. Musudi who charged the same in favour of the 2nd Interested party. In the case of *Abdalla Omar Nabhan vs. Executor of the Estate of Saad Bin Aboud & 2 Others [2013] eKLR*, this Court held as follows; -

“55. In the absence of an injunction order, a party may dispose of a property to a third party but the final Judgment or order of

the court shall issue as though such a sale or transfer never took place and the Judgment shall be binding on the third party. The court shall not be concerned with the developments or investments that such a third party would have put in the property because everybody is presumed to have known about the existence of a suit in respect to such a property.”

29. The Defendant sold the suit property notwithstanding the fact that the Arbitrator had made an Award directing him to transfer the suit property to the Plaintiffs in the year 2009. The law and equity frowns upon those whose actions are meant to defeat the course of justice. The Defendant in this case acted unlawfully, and neither party can derive from the unlawful acts of the Defendant.

30. The purported transfer of the suit property to Crispin Eustance Musundi during the pendency of this suit, and after the Award of the Arbitrator, is null and void. The subsequent charge of the suit property to the 2nd Interested Party is equally null and void. That being the case, the 2nd Interested party cannot set aside the proceedings of this court, or the Award of the Arbitrator.

31. In any event, even if the proceedings of this court are set aside; what will the 2nd Interested Party tell the court? The issue of ownership between the Plaintiffs and the Defendant were settled by the Arbitrator, and adopted by the Court. The 2nd Interested Party will therefore have nothing to say, even if these proceedings are re-opened.

32. The only recourse that the purchaser, Crispin Eustace Musundi, and the chargee of the suit land, the 2nd Interested Party, have is to sue the Defendant for damages. However, the suit property legally passed to the Plaintiffs the moment the Arbitrator's Award was adopted by the Court. What Crispin Eustance Musundi and the 2nd Interested Party are holding are mere of papers that cannot confer any proprietorship interest on either of them.

33. For those reasons, the Application dated 29th August, 2019 is dismissed with costs to the Plaintiffs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE