



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 1112 OF 2004

BERNADATTE WANGARE MURIU.....PLAINTIFF

VERSUS

**NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEE.....1ST
DEFENDANT**

REGENT AUCTIONEERS(N) LIMITED.....2ND DEFENDANT

CHARLES MAKORI MOGI.....3RD DEFENDANT

RULING

The plaintiff/applicant Bernadatte Wangare Muriu had moved to the seat of justice vide a plaint filed in court on 19th October 2004 directed against National Social Security Fund Board of Trustees and Regent Auctioneers Limited. The plaintiff/applicant initially sought a mandatory injunction compelling the defendants to reinstate the plaintiff back to the suit premises and to give back vacant possession of the suit premises to the plaintiff, damages for trespass and breach of contract and costs. On this plaint, was anchored an interim application seeking an interim relief along the same lines. The plaint was subsequently amended and an amended plaint was filed on the 24th day of November 2004. The amended plaint introduced a 3rd defendant by the name of Charles Makori Mogi. In summary the plaintiff alleged that there was a conspiracy between the defendants to evict her from the suit property namely a house on LR. 69/93. The plaint was further amended on the 27th day of April 2006. This was followed by the filing on 7th April, 2009 of a further amended reply to defence and defence to the counter claim.

The first and second defendants responded vide a defence filed on the 16th day of December, 2004. This was subsequently amended and the amended defence which included a counter claim was filed on the 11th day of May 2006. The plaintiff filed a reply to the amended defence filed on the 27th May 2006 which was subsequently amended by an amended reply to defence and defence to counter claim, filed on the 19th day of May, 2006. The 3rd defendant filed a defence dated 4th day of July, 2006 which was amended by the amended defence filed on 14/7/2006.

Pre trial preliminaries were concluded paving the way for trial. Trial commenced on 15/3/2007 and plaintiff closed tendering of her evidence on the 30/6/2008. The matter was then fixed for the hearing of the defence case. Before the defendants could tender their testimony the court was informed that the 3rd defendant who was alleged to have been the beneficiary of actions complained off against the first and second defendants and during the pendency of the proceedings disposed of the suit property to the interested parties namely Opondo Anindo Everisto and Dorothy Wandia. This turn of events necessitated the plaintiffs moving the court to further amend the plaint to bring on board the said interested parties.

The leave to amend was granted and a further amended plaint was filed on the 17th day of March, 2009. The amendment introduced three major new reliefs:-

“IV A declaration that the contract of tenant purchase agreement entered into between the 1st and 3rd defendants is null and void in view of the existing tenant purchase agreement between the plaintiff and the 1st defendant.

(v) A declaration that the contract entered into between the 1st defendant, 3rd defendant and the interested parties are null and void due to the existing contract between the plaintiff and the 1st defendant herein.

(vi) In the alternative to the above prayers the defendants jointly and severally be condemned to pay the plaintiff the sum of Kshs. 8,100,000/= being the market value of the suit premises as of August 2008 together with interest thereof at the rate of 14% p.a. from September, 2008 till the determination of this suit”

On the strength of the newly introduced reliefs the plaintiff anchored on the further amended plaint an application by way of a chamber summons brought under order XXXIX rules 1,2,8 and 9 order VI a Rules 3,5 and 8 of the CPR and section 3A of the CPA and all other enabling provisions of the law. The application is dated 25th day of February, 2009 and filed the same date. A total of 7 reliefs were sought namely:-

(1) Spent

(2) Spent

(3) That the defendants herein by themselves, their agents and or servants be restrained by this Honourable court from transferring and or dealing with LR. NO.69/93 (Hazina M.54) in any way or manner that interferes with the applicants proprietary interests in LR.No.69/93 (Hazina M.54) until the hearing and determination of this suit.

(4) That this Honourable court be pleased to cancel the purported transfer of the suit premises to one Opondo Anindo Everisto and Dorothy Wandia pursuant to variation of tenant purchase agreement dated 26/8/2008.

(5) That in the alternative to prayer 3 above, this Honourable court be pleased to order that the transfer of the suit premises to Opondo Anindo Everisto and Dorothy Wandia is not valid in view of the pendency and active prosecution of the current suit.

(6) That this Honourable court be pleased to censure and or impose such penalty as may be appropriate to the 1st and 3rd defendants for showing outright contempt to the court by disobeying the orders of this Honourable court to maintain the status quo herein and for perpetrating a fraud by seeking to transfer the suit premises herein to Opondo Anindo Everisto and Dorothy Wandia in total disregard of the said orders of maintaining the status quo herein.

(7) That the costs of this application be provided for.

The said application is grounded on grounds in the body of the application namely the plaintiff initiated these proceedings initially against the first and second defendant; the 3rd defendant applied and was allowed to join the proceedings claiming he had proprietary interests; parties agreed to abandon all the pending applications howsoever filed in favour of the main hearing which was commenced and the plaintiff tendered her evidence and was fully cross-examined and reexamined; that as the defendants were due to tender their testimonies the 3rd defendant fraudulently purported to sell and transfer the suit property to the interested party vide a purported agreement dated 29/7/2008 hence the plaintiffs move to

seek the courts' intervention to protect the suit property; contend that in view of the pendency of the proceedings if no intervening action is taken by this court the proceedings will be rendered nugatory.

The grounds in the body of the application have been fortified by the content of the supporting affidavit deposed by the plaintiff Bernadette Wangari Muriu filed simultaneously with the application. It reiterates the grounds in the body of the application and then added that in view of the pendency of the determination of the suit it is only proper that the subject property be protected; that the first defendants' action of entering into a variation of the tenancy agreement in favour of the interested party in the wake of this court's orders on status quo namely to preserve the subject suit property was fraudulent. The court to deal firmly with the actions complained of on the part of the defendants because they were done in contempt of this court's orders on the preservation of the suit property; that the 3rd defendant's move to divest himself of the suit property is proof that he has no interests in the suit property; the plaintiff still has an interest in the suit property and is keen on preserving the same; the court is urged not to allow the fraudulent illegal actions of the perpetrators to defeat the ends of justice to the plaintiff .

The interested parties were served, they filed a notice of appointment and filed a replying affidavit filed on the 9th day of April, 2009 deposed by Opondo Anindo Everisto. The sum total of the same is that both interested parties are spouses; concede that they indeed entered into an agreement with the defendants to vary the tenancy agreement with regard to the suit property at a consideration; they were not aware of the existence of the pending proceedings or the other parties with interest in the suit property; they have cleared the arrears owed to the defendant; they are innocent purchasers for value without notice and for this reason they should not be enjoined in the manner sought.

The first defendant also filed a replying affidavit on 10th March, 2009 deposed by the first defendant's legal officer Hellen Koech. The sum total of her depositions are that she concedes the interest of the 3rd defendant in the suit property has now been sold and transferred to the interested parties; that the reason why the said interest was brought to an end was because the 3rd defendant fell into arrears; concede that the 1st defendant was aware of the status quo orders but these were not taken into consideration when the 1st defendant acceded to the 3rd defendant's request to sell the property to the interested party, that they apologize to the Honourable court and the 1st and 2nd defendant's counsel for the sale affected property in favour of the interested parties, but dispute that the status quo orders entitled the 3rd defendant to keep the house even after falling into arrears; that what they did with the 3rd defendant is what they did with the plaintiff when she fell into arrears; they have no objection to the granting of the preservative orders sought without admitting any liability; that prayers 4,5, and 6 are incapable of being granted at this interlocutory stage, contend that the plaintiff has been conspiring with the 3rd defendant to embarrass the 1st defendant and force them to compensate the plaintiff either in money or another alternative plot and for this reason this court should not shield this wrong doing.

Parties elected to file written skeleton arguments. Those of the plaintiff were filed on the 20th May, 2009 and stressed that:-

(i) The prayer for the injunction has been conceded by the 1st and 2nd defendant in their replying affidavit deposed by one Hellen Koech on 10/3/2009; the grounds on the basis of which the plaintiff /applicant's application is anchored are undisputed namely that the plaintiff is the lawful owner of the suit property; there are status quo orders in place which means that the suit property cannot be transferred; that the purported move by the 1st and 3rd defendant to purport to transfer the suit property to the interested parties is in contravention of this court's orders on status quo and amounts to the 1st and 3rd defendant's contempt of those orders and for this reason the court is invited to note that the said conduct is meant to frustrate the plaintiff's effort to recover the said property. The court was invited to be guided by the principle in the case of **GIELLA VERSUS CASSOM BROWN (1973) EA 358** and the provisions of section 52 of the ITPA and find that the injunctive relief sought by the plaintiff/applicant is well earned and grant the same.

Those of the 1st and 2nd defendants were filed on the 4th day of June, 2009 and stressed that the 2nd defendant has no answer to make with regard to both the plaintiffs suit as well as the plaintiff/applicants applications because it was merely an agent of the first defendant in the first repossession; contend that repossession by the first defendant from the 3rd defendant upon default was not stopped by the status quo order, that the 3rd defendant defaulted in the mortgage repayment and for this reason the first defendant was entitled to move in the manner done to protect its interests ; contends the status quo order did not give the 3rd defendant lee way not to meet his mortgage installment; contends that transfer has not been effected in favour of the interested parties to the detriment of the plaintiff as that will only be effected after the interested parties have paid off all the outstanding mortgage installments. For this reason the interested parties are not owners but only have a beneficial interest in their favour. Contended further that the plaintiff and the 3rd party are acting in concert to defeat the interests of the first defendant. The court is urged not to grant prayers 4, 5, and 6 at this interlocutory stage.

Submissions for the interested parties were filed on the 29th day of 2009. They reiterate the content of their replying affidavit and stress that an injunctive relief in the manner sought is not available to the plaintiff applicant because she has conceded that the property has been transferred to the interested parties; the suit property is no longer in the hands of the defendants and as such any order of an injunctive nature issued against the defendants will be an order issued in vain; the other orders sought namely of cancellation of the affected transfer cannot be issued at an interlocutory stage. Further that the plaintiff/applicant has not brought himself within the ambit of the ingredients of granting of an injunctive relief as laid down by law because there is no prima facie case with a probability of success; damages will be an adequate compensation. Further that the consent order relied upon by the plaintiffs /applicant as having been entered into between her and the respondents does not shield her as the status quo to be preserved was not spelt out. For this reasons they contend that the status quo if any did not shield the 3rd defendants from fulfilling his obligation of mortgage repayment. Neither did it prevent the 1st defendant from taking action as it deems fit in the event of the 3rd defendant failing to meet his obligation under the mortgage.

This court has given due consideration to the afore set out rival arguments and in its opinion the rival arguments have two fronts to them namely the factual front and the legal front with the exception of the argument made on behalf of the interested parties, the plaintiff/applicant and the 1st, 2nd and 3rd defendants are in agreement on the factual front. The undisputed facts are that:-

1. The plaintiff/applicant had been allocated the subject suit property by the first defendant on a mortgage payment installment basis. She allegedly fell into arrears forcing the first defendant to engage the services of the 2nd defendant to evict her.
2. After her eviction from the suit premises, she became aggrieved and moved to court seeking a reversal of the eviction.
3. It was in the process of so seeking the reversal of the eviction that the 3rd defendant came on to the scene seeking to be enjoined to the proceedings because he had acquired an interest in the suit property. The 3rd defendant was indeed joined into the proceedings.
4. Parties opted to abandon pending applications and opted for a merit hearing to determine which of the competing interests namely those of the plaintiffs/applicant and the 3rd defendant would be protected.
5. The interests afore mentioned in number 4 above were yet to be determined when the interested parties were brought on board prompting the filing of the application subject of this ruling. The sentiments of each side have already been reflected on the record.

Against the afore set out set of facts is to be applied the applicable principles of law. Two of these principles are those dealing with ingredients required to be satisfied before an injunctive relief can be granted and the one dealing with the doctrine of “**Lis pendens**”

With regard to the ingredients governing the granting of an injunctive relief, these have been crystallized by case law in the land mark case of GIELLA VERSUS CASSMON BROWN (1973) EA358 namely:-

- (i) Demonstration of existence of a prima facie case with a probability of success.
- (ii) Demonstration that damages will not be an adequate compensation for the loss to be suffered should an injunction be declined.
- (iii) Where ingredients (i) and (ii) are not applicable, the court will decide the matter on a balance of convenience.

These ingredients have been expanded in other case law that this court has judicial notice of namely:-

- (a) That even where damages are an adequate compensation, the court will none the less issue an injunction where the party against whom an injunction is sought has acted in a high handed and oppressive manner towards his opponent.

As for the doctrine of “**Lis pendens**”, this is enshrined in section 52 of the ITPA (Indian transfer of property Act. It provides:-

“During the active prosecution in any court having authority in British India, or established beyond the limits of British India by the governor-general in council of a contentional suit or proceedings in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the right of any other party thereto under any decree or order which may be made therein except under the authority of the court and in such terms as it may impose....”

This provision has been construed and crystallized by case law and legal texts. See Mulla on the transfer of property Act 1882 ninth Edition Lexis nexus butter worth at page 366 Pr.2, observations on this doctrine runs thus:-

“Pendency of a suit or proceedings shall commence from the date of the presentation of the plaint or the institution of the proceedings in a court of competent jurisdiction and to continue until the suit or proceedings has been disposed off by a final decree or order and complete satisfactory or discharge of such decree or order has been obtained or has become un obtainable by reason of the expiration of any period of limitation preferred for the execution thereof by any law for the time being in force”

At page 369 Pr.3. of the same text of Mulla it is stated:-

“It is intended to strike at attempts by parties to a litigation and prevent them from circumventing the jurisdiction of the court in which the dispute on rights or interests in immovable property is pending. To be prevented are private dealings that may remove the subject matter of litigation from the ambit of the power of the court and prevent the court from deciding a pending dispute or to frustrate its decree.

On case law, there is the case of METHI AND SWANI FARMERS CO. OP SOCIETY LTD VERSUS THE CO-OP BANK OF KENYA LTD & MAKINDI LTD NAIROBI HCCC.2603/95 wherein S.E. Bosire J as he then was now JA held inter alia that:-

“Section 52 ITPA prohibits dealing in property in dispute in civil proceedings....”

The case of MAWJI VERSUS US INTERNATIONAL UNIVERSITY AND ANOTHER (1976) KLR 185 wherein it was held inter alia that:-

“The court has power to prevent a breach of the provisions of section 52 of the transfer of property

Act in proceedings before it in which any right to immovable property is directly and specifically in question by imposing a prohibitory order against the title of the property to prevent all dealings in it pending the final determination of the proceedings except under the authority of the court and upon such terms as it may impose”

There is the case of **FREDRICK Joses KINYUA AND PETER KIPLLANGAT KOECH VERSUS G.N. BAIRD NAIROBI HCCC NO. 4819 OF 1989** as Consolidated with Nairobi **HCCC NO 6587 OF 1991 GEORGE NEIL BAIRD AND WANDIE BAIRD VERSUS FREDRICK Joses KINYUA AND PETER KIPLANGAT KOECH** decided by G.S. Pall, on 10/12/1993. In this case the learned judge as he then was drew inspiration from the case of **BELLAMY VERSUS SABINE IDEJ 566** and then ruled that:-

“The doctrine of Lis pendens intends to prevent not only the defendant from transferring the suit property when the litigation is pending but it is equally binding on those who derive their title through the defendant, whether they had or had not notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of the suit so as to defeat the rights of the other party....

The effect of the maxim is not to annul the conveyance but only to render it subsequent to the rights of the parties subject to litigation”

At pages 15 line 8 from the top the learned judge as he then was went on:-

“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 override, 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...”

At page 16 line 14 from the bottom the learned judge quoted with approval the decision in the case of **MAWJI VERSUS INTERNAITONAL UNIVERSITY (SUPRA)** where it had been observed inter alia 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 a property actually in litigation pendete 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 court has given due consideration to the afore assessed case law and in its opinion since the case law emanates from decisions of courts of concurrent jurisdiction, they are not binding on this court. This court is entitled to revisit the relevant sections, construe it on its own and then arrive at its own conclusion on the matter. The court has done so and in its opinion the afore assessed decisions made a correct construction of the said doctrine or maxim. The principle extracted there from by this court are as follows:-

- (i) The applicability of the doctrine or maxim of Lis Pendens starts right from the time the proceedings are initiated and remains applicable until the initiated proceedings are finally determined and decree issued and executed.
- (ii) It operates to prevent the initiated proceedings from being rendered null and void by protecting and preventing the subject of the proceedings from becoming extinct.
- (iii) It binds not only parties to the litigation but 3rd parties who may acquire an interest in the subject

matter of the proceedings during the pendency of the proceedings irrespective of whether they had notice of the litigation or not.

These extracted principles have been applied to the rival arguments herein and the court proceeds to make the following findings on the reliefs sought:-

1. Prayer 3 of the application filed on the 25th day of February 2009 subject of this ruling is allowed both on satisfaction of the ingredients for granting of an injunctive relief in the first instance and on the grounds of being within the ambit of the application of the doctrine and or maxim of *lis pendens*.

For an injunctive reliefs: This is issued because:-

(i) The plaintiff/applicant moved to the seat of justice because she had initially been allocated the suit property on mortgage installments payments terms. The 1st defendant moved in to repossess which move has been challenged herein which challenge has not been determined yet. The plaintiff/applicant therefore has a *prima facie* case with a probability of success. It is now trite that in order for a plea for *prima facie* case to hold the same must be arguable. Herein the issue of whether the repossession by the 1st defendant was proper or not is arguable because if faulted then the court will have no alternative but to adjudge the plaintiff the victorious party.

(ii) With regard to the 2nd ingredient, the plaintiff/applicant has earned this ingredient because the 1st and 3rd defendants knowing that the 1st defendant move to divest the plaintiff/applicant of the suit property and vest it in the 3rd defendant was under challenge, which challenge had not been determined, their move to vest that interest in the interested parties can be taken to be not only high handed but oppressive which conduct invites the issuance of an injunctive relief even if damages would have been adequate by reason of the property being capable of being valued and paid for in terms of money.

(iii) The last ingredient of balance of convenience also tilts in favour of the plaintiff/applicant because it is only proper that the issue of her entitlement to the suit property be determined before the property can be allowed to move from the 3rd defendant to another party.

On Lis pendens

The plaintiff/applicant is also shielded by this doctrine or maxim because:-

(i) The property is a subject of on going litigation.

(ii) The prime movers of the action complained of namely the first and 3rd defendants are not only parties to the on going pending litigation but are fully aware of the same.

(iii) The interested parties are bound by the said doctrine/maxim irrespective of whether they had notice of the litigation or not.

(iv) The 1st and 3rd defendants could only transact with the interested parties with the sanction of the court which they did not seek prior to involving the interested parties.

2. Prayer 4, 5 and 6 are declined because they are incapable of being granted at an interlocutory stage.

(ii) As for contempt of court orders the plaintiff/applicant is at liberty to initiate appropriate proceedings for an appropriate remedy.

3. The plaintiff/applicant will have costs of the application.

4. The delay in the drafting and delivery of the ruling which is regretted was necessitated by a heavy

work load.

DATED, READ AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY, 2012.

R.N. NAMBUYE
JUDGE OF APPEAL