



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 30 OF 2014**

**STANLEY NDIRANGU GITAU.....APPELLANT**

**=VERSUS=**

**PAUL KIRAGU KAMAU..... RESPONDENT**

**JUDGMENT**

On 23<sup>rd</sup> July, 2014, the respondent filed a suit against the appellant at the Senior Principal Magistrate's Court at Kikuyu namely; Kikuyu SPMCC No. 192 of 2014 ("the lower court suit") seeking; a permanent injunction restraining the appellant from entering, being upon, utilizing or in any other way interfering with all that parcel of land known as Nguirubi/Thigio/269 ("the suit property") and an order for the eviction of the appellant from the property. In his plaint, the respondent averred that he was the registered proprietor of the suit property and that the appellant had illegally trespassed on the property and put up a temporary structure thereon. The respondent averred that the appellant's occupation of the suit property was illegal and that the appellant had refused to hand over possession of the property after a demand was made upon him to do so and had instead resorted to issuing threats to the respondent.

The appellant entered appearance and filed a statement of defence on 19<sup>th</sup> August, 2014 which I reproduce below:

**"STATEMENT OF DEFENCE**

- 1. The Defendant avers that the suit is incompetent and misconceived as a matter of law as the land subject matter of the suit is also subject matter of another suit before this Honourable Court, Kikuyu Senior Principal Magistrate's Civil Suit No. 128 of 2012.**
- 2. The suit is an abuse of the court process.**
- 3. That the suit should be struck out or stayed until the Kikuyu Senior Principal Magistrate's Court Civil Suit No. 128 of 2012 is heard and determined.**
- 4. That the costs be awarded to the defendant.**

**DATED at Nairobi this 15<sup>th</sup> Day of August, 2014**

**SIGN**

**E. N. MUGU & COMPANY"**

On 19<sup>th</sup> August, 2014, the appellant filed an application in the lower court by way of a Notice of Motion dated 15<sup>th</sup> August, 2014 seeking an order that the lower court suit be dismissed on the ground that the same disclosed no reasonable cause of action against the appellant. In the alternative, the appellant sought an order staying the lower court suit until the issue of ownership of the suit property was determined in Kikuyu SPMCC No. 128 of 2012 ("the first suit"). The appellant contended that the suit property was sold to the respondent while the first suit which touched on the ownership of the suit property was pending and as such the sale was contrary to the doctrine of *lis pendens*.

The appellant's application in the lower court was opposed by the respondent through a replying affidavit sworn on 13<sup>th</sup> October, 2014. The respondent stated that the appellant's defence to his claim was vague in that it was not clear as to what was admitted and what was being denied. The respondent stated further that he was a bona fide purchaser of the suit property for value. The respondent averred that he was the absolute and indefeasible owner of the suit property and that his title could not be defeated under the doctrine of *lis pendens*. The respondent reiterated that the appellant was a trespasser on the suit property. The respondent averred that the plaint disclosed a cause of action against the appellant. The respondent averred further that there was no basis for staying the lower court suit.

On 5<sup>th</sup> September, 2014, the respondent also filed an application in the lower court by way of a Notice of Motion dated 5<sup>th</sup> September, 2014 seeking the striking out of the appellant's defence and for judgment to be entered for the respondent as prayed in the plaint. The application was brought on the grounds that the appellant's defence raised no triable issue and as such did not amount to a defence in law. The respondent contended further that the defence was scandalous, frivolous and amounted to an abuse of the process of the court.

The appellant did not respond to the respondent's application. The application was therefore not opposed. The appellant's and the respondent's applications were heard together by Hon. A. W. Mwangi (Ag. S.P.M) who delivered a ruling thereon on 11<sup>th</sup> November, 2014 dismissing the appellant's application with costs and allowing the respondent's application as prayed. In the ruling, the lower court found that there was no basis for dismissing the respondent's suit in the lower court or staying the same. The lower court found that Kikuyu SPMCC No. 128 of 2012 which was the basis of the appellant's application concerned different parties and issues although the subject matter was the same as that in the lower court suit. The lower court held that the lower court suit disclosed a reasonable cause of action and that the appellant had not given any reason why he felt that the plaint raised no cause of action. The lower court held that the respondent's suit could not be struck out merely because the subject matter of the suit was also in dispute in another suit involving the appellant and another party.

As concerns the respondent's application, the lower court considered the plaint that was filed by the respondent and the defence by the appellant in response thereto. The lower court noted that the only issue that was raised in the defence was that the appellant wanted the suit struck out or stayed because the subject matter of the suit was also the subject of the first suit. The lower court reiterated that the first suit and the lower court suit were totally different suits although the subject matter was the same. The lower court reiterated that the lower court suit could not be struck out or dismissed on account of the existence of the first suit. The lower court noted that save for the issue of the existence of the first suit, the appellant's defence raised no other issue. The lower court observed that in his defence, the appellant made no reference whatsoever to the respondent's claim. The court noted that the appellant neither admitted nor denied the claim. The court observed that the defence was not even what is normally referred to as a mere denial. It was on the basis of the foregoing that the lower court held that the appellant's defence raised no triable issue that could be allowed to go for trial and proceeded to strike out the same and to enter judgment for the respondent against the appellant.

It is against that decision that the appellant preferred this appeal. In his memorandum of appeal dated 27<sup>th</sup> November, 2014, the appellant challenged the decision of the lower court on 8 grounds which can be summarized as follows;

1. That the lower court failed to appreciate the basis of his application before the court.
2. That the lower court failed to comprehend the import of the doctrine of *lis pendens*.
3. That the lower court failed to appreciate the law and principles on striking out of pleadings.
4. That the lower court failed to appreciate the fact that the appellant's defence raised the issue of *lis pendens*.
5. That the lower court caused grave miscarriage of justice to the appellant.

The appellant urged the court to set aside the ruling and the orders that were made by the lower court and substitute them with an order dismissing the respondents' Notice of Motion dated 5<sup>th</sup> September, 2014 and allowing the appellant's Notice of Motion dated 15<sup>th</sup> August, 2014 in the lower court.

The appeal was heard by way of written submissions. The appellant filed his submissions on 22<sup>nd</sup> January, 2020 while the respondent filed his submissions on 23<sup>rd</sup> July, 2020. In his submissions, the appellant set out the background of the dispute between the parties. The background information given in the submissions was however not pleaded in the appellant's defence in the lower court. The appellant framed three issues that he submitted on namely; whether the doctrine of *lis pendens* applied in the circumstances of the case in the lower court and whether the lower court should have struck out his defence, whether the lower court considered factors which it ought to have considered before striking out the defence and what remedies the appellant was entitled to having been evicted from the suit property. The appellant submitted that where a property which is the subject of judicial proceedings is land, the doctrine of *lis pendens* is applicable. The appellant submitted that under that doctrine, a buyer of land which is a subject of a pending suit has no enforceable right in the land until the pending suit is determined. The appellant submitted that in the circumstances, the lower court should have dismissed the respondent's suit or stayed the same until the first suit was determined. The appellant cited a number of authorities in support of his submissions on this point. On whether the lower court exercised its jurisdiction to strike out pleadings properly, the appellant submitted that the appellant's defence in the lower court raised a triable issue namely; that, there were suits pending in other courts on the same subject matter. The appellant submitted that the lower court should not have struck out the defence which was a very draconian step. The appellant submitted that none of the conditions set out in Order 2 Rule 15(1) for striking out of pleadings was satisfied by the respondent to warrant the striking out of his defence. On the remedies he was seeking, the appellant submitted that the order by the lower court dismissing his application dated 15<sup>th</sup> August, 2014 should be set aside and an order made for his reinstatement on the suit property. He submitted that the court should also make a finding that the respondent is liable to him in damages for destroying his property.

In his submissions in reply, the respondent submitted that the lower court was right in striking out the appellant's defence and entering judgment for the respondent. The respondent reiterated that the appellant's defence in the lower court did not amount to a defence in law and that it did not raise any triable issue. On whether the lower court was right in dismissing the appellant's application dated 15<sup>th</sup> August, 2014, the respondent submitted that the lower court rightly found that the plaint raised triable issues and as such there was no basis for striking it out. On the issue of the doctrine of *lis pendens*, the respondent submitted that the doctrine does not nullify a conveyance but only renders it subservient to the rights of the parties to litigation.

I have considered the record of the lower court, the ruling appealed from, the grounds of appeal and the submissions of counsels. I find no merit in the appeal before me. There is no reason at all put forward by the appellant that would warrant the setting aside of the ruling by the lower court. I am in agreement with the lower court that the plaint that was filed in the lower court by the respondent raised triable issues

and as such there was no basis for striking it out. On stay, again I find no basis for the same. As the lower court rightly pointed out, the first suit did not involve the respondent herein who was the plaintiff in the lower court suit and the issues raised in that suit were different from the issues that were raised in the suit before the lower court. With regard to the respondent's application to strike out the appellant's defence, I am satisfied that the lower court exercised its power under Order 2 Rule 15 of the Civil Procedure Rules properly and arrived at the right decision. I have reproduced above the appellant's defence that was filed in the lower court. There is no doubt that the defence neither denied nor admitted the respondent's claim in the lower court. There is no single statement in the defence as to the right if any that the appellant had in the suit property that could justify his occupation of the same. The history given in the submissions about the appellant having been allocated the suit property in 1980 is nowhere in his defence. The same also applies to his allegation that he occupied the property in 1980s and even buried his wife on the property. The only issue that was raised in the defence was that of *lis pendens*. And even with that, the appellant did not expound on how the doctrine applied to the case that was before the lower court. I have noted that in the first suit which was the basis of the appellant's *lis pendens* argument, the plaintiff was not the appellant but one, Hannah Wathoni Nganga. There is no evidence on record that the appellant filed a defence in that suit or a counter claim. It follows therefore that if any orders were to be made in that suit, the same could only be those that had been sought by the said Hannah Wathoni Nganga. In any event, I am in agreement with the respondent that the doctrine of *lis pendens* *per se* does not nullify a transfer of land.

As correctly submitted by the respondent, the doctrine only makes the transfer subject to the outcome of a suit that was pending when the transfer was made. In Patrick Gathitu Kariuki v Hottensiah Wambui Hinga & Another [2020] eKLR, this court stated as follows on the effect of the doctrine of *lis pendens*:

**“It is not correct as claimed by the plaintiff that the sale transaction between the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant was carried out in breach of a court order issued herein. From the record, the order restraining the 1<sup>st</sup> defendant from among others selling the suit property was made on 15<sup>th</sup> March, 2016 while the agreement for sale between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant was made on 18<sup>th</sup> March, 2015. I am however in agreement with the plaintiff that the transaction was carried out in breach of the *lis pendens* rule. Breach of the *lis pendens* rule *per se* in my view does not nullify a sale transaction. What is does is to make the transaction subject to the outcome of the court proceedings which were pending when the transaction involving the land in question was carried out.”**

The first suit had not been determined in favour of the appellant as at the time the respondent sued him in the lower court. No right had accrued to the appellant in that suit that could be a ground for his *lis pendens* argument. It follows therefore that the doctrine of *lis pendens* was not a triable issue. The appellant had a duty to state in his defence in the lower court what right if any he had in the suit property that could justify his entry and occupation of the property. For the foregoing reasons, the lower court was right in its finding that the appellant's defence raised no triable issue. The court after that finding was also justified in striking out the defence and entering judgment for the respondent.

In the final analysis and for the foregoing reasons, the appeal before me is devoid of any merit. The appeal is accordingly dismissed with costs to the respondent.

**Delivered and Dated at Nairobi this 26<sup>th</sup> Day of November 2020**

**S. OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

**Mr. Mugu for the Appellant**

**Ms. Kirika for the Respondent**

**Ms. C.Nyokabi-Court Assistant**