



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 22 OF 2014

HELLENA WAKINA MAURICIO.....DEFENDANT/APPLICANT

VERSUS

REUBEN KAMWOCERE.....PLAINTIFF/RESPONDENT

HENRY NJERU KINYUA.....INTERESTED PARTY

JULIANA WERUMA IRERI.....INTERESTED PARTY

IRENE MUTHONI MURITHI.....INTERESTED PARTY

RULING

1. By a notice of motion dated and filed on 30th May 2017, the Defendant/Applicant sought the following orders;

a. That this application be certified as extremely urgent and it be heard ex-parte in the first instance.

b. That pending the hearing and determination of this application, this honourable court be pleased to place an order of inhibition on land parcel Nos Gaturi/Nembure/13578, 13579 and 13580.

c. That this honourable court be pleased to enjoin Henry Njeru Kinyua, Juliana Weruma Ireri and Irene Muthoni Murithi to this suit as interested parties.

d. That this honourable court be pleased to nullify the transfers and/or cancel the titles to land parcel No's Gaturi/Nembure/13578, 13579 and 13580 currently in the names of the interested parties herein.

2. The said application was based upon the grounds shown on the face of the application and supported by an affidavit sworn by the Defendant on 30th May 2017. The gist of the application was that the Plaintiff/Respondent had mischievously transferred the said properties to the interested parties during the pendency of the suit. The Plaintiff appears to have lost in the litigation all the way to the Court of Appeal.

3. It was stated in the Defendant's supporting affidavit that during the pendency of litigation in the Court of Appeal there was an order of stay issued at the instance of the Plaintiff. Although it was not stated exactly when the Plaintiff sub-divided and transferred the suit property to the interested parties, it would

appear that it was done after delivery of the Court of Appeal judgement. The Defendant therefore asked the court to grant the said application and nullify the transfers to the interested parties.

4. Neither the Plaintiff nor the interested parties filed any replying affidavit in response to the Defendant's said application. However, the Plaintiff filed a notice of preliminary objection dated 10th July 2017 in response thereto. The objection stated that the Defendant's said application should be dismissed pursuant to the provisions of Order 3 Rule 1 of the Civil Procedure Rules and section 26 of the Land Registration Act.

5. When the said application came up for hearing on 18th July 2017, the court granted prayer (c) thereof and allowed the interested parties to be joined so that they are accorded an opportunity of being heard. An interim order of inhibition had been issued earlier in terms of prayer (b) thereof. The rest of the prayers were stood over to 27th September 2017 for hearing.

6. When the matter was listed on 27th September 2017, it was agreed by consent of counsels for the Plaintiff and the Defendant that the said application be disposed of through written submissions. The interested parties did not attend court despite service. The parties later on filed their respective submissions and the court fixed the matter for ruling on 1st February 2018 without the input of the interested parties.

7. In his submissions, the Defendant's counsel submitted that the provisions of Order 3 Rule 1 of the Civil Procedure Rules were not applicable to the instant case because the notice of motion dated 30th May 2017 is merely an application within an existing suit and not a fresh suit as contemplated by Order 3 Rule 1 of the Civil Procedure Rules. Order 3 Rule 1 provides that every suit shall be instituted by presenting a plaint to court or in such other manner as may be prescribed by the Rules.

8. It was further submitted that section 26 of the Land Registration Act provided for cancellation of a title if it was obtained illegally, unprocedurally or through a corrupt scheme. It was the Defendant's case that the Plaintiff's alienation of the suit property after losing his case in the Court of Appeal squarely fell within that section. Section 26 provides that a certificate of title shall be *prima facie* evidence that the person named as proprietor is the absolute and indefeasible owner and his title shall not be challenged except as provided for thereunder.

9. The Defendant relied upon the case of **Carol Silcock Vs Kassim Sharrif Mohamed [2013] eKLR and Mradula Suresh Kantaria Vs Nuresh Nanillal Kaptaria Civil Appeal No. 277 of 2005**. The Defendant asked the court to disregard technicalities of procedure and apply the overriding objective of the Civil Procedure Act to dispense justice.

10. The Plaintiff submitted that the Defendants' said notice of motion was fatally defective because the procedure adopted by the Defendant was not intended for determination of complex issues such as cancellation of title. The Plaintiff cited the case of **Ngomeni Swimmers Ltd Vs Commissioner of Lands and 25 others [2031] eKLR and Wakf Commissioners Vs Mohammed Bin Umeya Bin Abdulmajid Bin Muijabu [1984] KLR 346** in support of that submission. The Plaintiff was of the view that the Defendant should have commenced a new suit by way of plaint.

11. The Plaintiff did not make any submission on the application of section 26 of the Land Registration Act or how it had been contravened by the Defendant. The court shall, therefore, not deal further with this aspect of the preliminary objection.

12. My understanding of the Plaintiff's objection is that the Defendant has come to court to seek a remedy by invoking the wrong procedure. In other words, that she moved the court by notice of motion instead of filing a plaint under **Order 3 of the Civil Procedure Rules**. Even if the court were to agree that the plaint was the proper mode of moving the court, the use of a wrong procedure would not render the proceedings fatally defective in view of the provisions of **Article 159 (2) of the Constitution of Kenya** and **section 19 (1) of the Environment and Land Court Act 2012** which obligates this court to dispense justice

expeditiously without undue regard to procedural technicalities.

13. The court is further of the view that on the authority of the case of **Boyes Vs Gathure [1969] EA 385** legal proceedings cannot be invalidated merely on the basis of employment of the wrong procedure unless it is fundamental and it goes to the jurisdiction of the court to entertain the proceedings. In the said case, the Respondent had approached the High Court through a chamber summons instead of an originating summons. It was held that the use of the wrong procedure did not invalidate the proceedings because it did not affect jurisdiction and no prejudice had been caused to the Appellant.

14. In the circumstances of this case, the court does not hold the view that the Defendant should have filed a fresh suit in her pursuit for justice. The court fully agrees with the decision of Angote J in **Carol Silcock Vs Kassim Sharrif Mohammed (supra)** that there would be no end to litigation if a successful litigant were required to file a fresh suit every time a mischievous defendant alienated the suit property in the course of litigation.

15. In view of the foregoing, the court finds no merit in the Plaintiff's notice of preliminary objection dated 10th July 2017 and the same is hereby dismissed.

16. Turning to the merits of the Defendant's notice of motion dated 30th May 2017, the court finds that its factual foundations and factual averments in the supporting affidavit remain unchallenged in the absence of any affidavit to the contrary. The fact that the Plaintiff lost in the Court of Appeal is not disputed. It is not disputed that the suit property was alienated during the pendency of the litigation between the parties.

17. The court takes the view that the circumstances of this case are similar to those in the case of **Silcock (supra)**. The court is aware that in said case, the court was dealing with property registered under the **Registration of Titles Act, (RTA) (now repealed)**. The **Indian Transfer of Property Act, 1882 (ITPA)** had codified the doctrine of *lis pendens*. The court is further aware that both RTA and ITPA were repealed when a new regime of land laws were enacted in 2012. However, the doctrine of *lis pendens* was recognized at common law as well. The court observed in the Silcock case that;

“35. In Mawji Vs US International University and Another [1976] KLR 229 Justice Madan while addressing the purpose of the principle of lis pendens adopted the finding in Bellany Vs Sabime [1859] De. G & J 556, 584 where Turner L J held as follows:

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

36. In the same case, Cranworth L.J observed 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 on 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 so, there could be no certainty that the proceedings would ever end...”

18. The court is satisfied that the above quotations represent a sound statement of the law. The court is satisfied that on the material on record that the Plaintiff alienated the suit properties in order to defeat the course of justice. The court consequently finds merit in the Defendant's notice of motion dated 30th May 2017 and the same is hereby allowed in terms of prayer (d) thereof.

19. In the result, the court makes the following orders:

- a. The Plaintiff's notice of preliminary objection dated 10th July 2017 is hereby dismissed with costs to the Defendant.
- b. The Defendant's notice of motion dated 30th May 2017 is hereby allowed in terms of prayer (d) thereof.
- c. The Plaintiff shall bear the costs of the application dated 30th May 2017.
- d. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 1st day of FEBRUARY, 2018.

In the presence of Ms Beth Ndorongo holding brief for Mr Kamunya for the Plaintiff and the Defendant in person and in the absence of the interested parties.

Court clerk Njue/Leadys.

Y.M. ANGIMA

JUDGE

01.02.18