



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. NO.308 OF 2010**

**TITUS GETHI NDEGWA.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**GICHUHI NDIRANGU MACHARIA..... DEFENDANT/RESPONDENT**

**RULING**

The matter for determination herein is the Plaintiff's/Applicant's *Notice of Motion* application dated **19<sup>th</sup>February 2016**, brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rule 1(a), 2, 4(1) and 9 and Order 51 Rule .... of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

The Plaintiff/Applicant has sought for the following orders:-

- 1. Spent.**
- 2. Spent.**
- 3. This Honourable Court be pleased to issue an order restraining the Defendant, his agents, officers, servants, workmen, employees and.or any other person acting to act and on behalf of the Defendant from giving out possession, transferring, disposing or otherwise dealing in any manner that adversely affects the rights of the Plaintiff to the suit properties known as LR.No.195/143, LR.No.195/144, LR.No.195/145, LR.No.195/146, LR.No.195/147, LR.No.195/148, LR.No.195/149 LR.No.195/150, LR.No.195/151, LR.No.195/152, or any portions thereof, pending the inter parties hearing and final determination of this suit.**
- 4. The Court do grant an early date for purposes of a pre-trial conference.**
- 5. Costs of this application be awarded to the Plaintiff/Applicant.**

Which application is premised on the grounds stated on the face of the application and on the *Supporting Affidavit* of **Titus Gethi Ndegwa** , the Plaintiff/Applicant herein.

The grounds in support are:-

- 1. By an agreement of sale dated 20<sup>th</sup> January 2006, and made between the Plaintiff and the Defendant, the Defendant agreed to sell and the Plaintiff agreed to buy 5.28 acres being plots Nos.195/143 - No.195/152 at the agreed price of Kshs.18,500,000/=.**
- 2. Pursuant to the said agreement the Plaintiff has to date paid a total of Kshs.6,850,000/= and has been ready all along to pay the balance of the purchase once the Defendant complies with his obligations under the Sale Agreement.**
- 3. Owing to default by the Defendant, the Plaintiff commenced the present suit to compel the Defendant to comply with his obligations under the Sale Agreement.**
- 4. The Plaintiff has on 28<sup>th</sup> January 2016, discovered that the Defendant is in the process of giving out possession of the suit properties comprising LR.No.195/143, LR.No.195/144, LR.No.195/145, LR.No.195/146, LR.No.195/147, LR.No.195/148, LR.No.195/149 LR.No.195/150, LR.No.195/151, LR.No.195/152 to unknown third parties, who are erecting tents on the premises, and on terms that are currently being negotiated between themselves to the exclusion of the Plaintiff.**
- 5. The Defendant's actions are in breach of Section 52 of the Transfer of Property Act which applies to the suit property, that during the active prosecution of a contentious suit in which any right to immovable property is directly in question, the property cannot be dealt with so as to affect the rights of any party to the said suit.**

In his Supporting Affidavit, the Plaintiff/Applicant has alleged that during the pendency of this suit, he has discovered that the Defendant/Respondent is in the process of giving out possession of the suit property comprising of **LR.No.195/145 to LR.No.195/152**, to unknown third parties who are erecting tents on the premises and on terms that are currently being negotiated between themselves to the exclusion of the Plaintiff/Applicant. He averred that the said action is contrary to Section 52 of the Transfer of Property Act which applies to the suit property and which states that; "during the active prosecution of a contentious suit in which any right to immovable property is directly in question, the property cannot be dealt with as to affect the rights of any party to the said suit". He averred that it is only fair and just that this Court should grant the orders sought.

The application is opposed by the Defendant/Respondent. He filed grounds of opposition on **14<sup>th</sup> March 2016**, and later a further affidavit. On his grounds of opposition, the Defendant/Respondent averred that the prayers sought have been overtaken by events. He alleged that the titles referred to by the Plaintiff/applicant ceased to exist on **23<sup>rd</sup> November 2006**, when they were all consolidated into one title **No.LR No.195/209** and a new survey plan **Folio No.462 Register No.69** was issued.

He also averred that the Plaintiff/Applicant has failed to complete the payment of the purchase price and that since the Plaintiff/Applicant filed the suit, he has not taken any positive steps to prosecute the same and that the present application is a scheme to further delay the prosecution of this suit and prevent the Defendant/Respondent from use and quiet enjoyment of his property. The Defendant/Respondent also averred that there was no evidence placed before the Court to show that the suit property was in danger of being wasted, damaged and/or alienated by the Defendant/Respondent or wrongful being sold to third parties. The Defendant/Respondent urged the Court to dismiss the Plaintiff's/Applicant's **Notice of Motion** dated **19<sup>th</sup> February 2016**.

The application was **canvassed** by way of **Written Submissions** which this Court has carefully considered. The Court has also considered the relevant provisions of law and the Court renders itself as follows;

There is no doubt that the Plaintiff/Applicant filed this suit against the Defendant/Respondent on **28<sup>th</sup> June 2010**, and sought for various orders among them an order of specific performance, compelling the Defendant/Respondent to consolidate the plots known as **LR No.195/143 to LR No.195/152** into one title

and thereafter execute transfer of the said plot in favour of the Plaintiff/Applicant within **30 days** of the order herein. Subsequent to the filing of the suit, the Defendant/Respondent filed a Chamber Summons application dated **30<sup>th</sup> July 2010**, and sought for stay of proceedings herein pending arbitration. The Ruling in respect of **this Chamber Summons** was delivered on **6<sup>th</sup> December 2013**, and thereafter several other applications were filed.

Before the parties could set down the suit for **Pre-trial Conference**, the Plaintiff/Applicant filed the instant **Notice of Motion** and alleged that the Defendant/Respondent has attempted to give out the possession of the suit property to 3<sup>rd</sup> parties. The Plaintiff/Applicant has alleged that he has paid substantial part of the purchase price and if the Defendant/Respondent is allowed to dispose off the suit property, then the Plaintiff's/Applicant's suit will be rendered an academic exercise. The Plaintiff/Applicant alleged that the Defendant/Respondent's action is in breach of Section 52 of the Transfer of Property Act 1882 (now repealed) which provides that:-

***“During the active prosecution of any court having authority in British India by the Governor General in Council of a contentious 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 rights of any other party thereto under any decree or order which may be made therein except under the authority of the Court or on such terms as it may impose”.***

The above position of law is what is known as principle of *lis pendens* and which is applied in order to preserve the suit property until when the suit is heard and determined.

This doctrine has been adopted in various judicial decisions. In the case of **Carol Silcok..Vs...Kassim Sharif Mohammed (2013) eKLR**, the Court adopted the findings in the case of **Bellamy..Vs...Sabina (1857) 1DeJ 566**, where the Court invoked the principle of *lis pendens* and held that:-

***“It is a doctrine common to the courts both of law and equity and vests 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 Defendants 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”.***

The Plaintiff/Applicant has alleged that though he has a dispute with the Defendant/Respondent over the suit properties, the Defendant/Respondent has given out the suit properties to other third parties in exclusion of the Plaintiff/Applicant. The Defendant/Respondent has not categorically denied that he has allowed other third parties to take possession of the suit property. All that the Defendant/Respondent has alleged is that the Plaintiff's/Applicant's prayers have been overtaken by events and that he has failed to pay the full purchase price. There is indeed a dispute over the suit property between the Plaintiff/Applicant and the Defendant/Respondent. Before the said dispute can be resolved, it is important to preserve the suit property. As has been held variously by the Courts, the purpose of injunction is to preserve the *status quo* and the *status quo* to be preserved is the one that existed before the wrongful act. See the case of **Agnes Adhiambo Ojwang ..Vs.. Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 of 2000**.

The Plaintiff has attached photographs showing tents that have been pitched on an open parcel of land. The Plaintiff/Applicant has alleged that the said tents have been pitched by 3<sup>rd</sup> parties who had been allowed access by the Defendant/Respondent. The Defendant/Respondent had denied the said allegations and stated that the said tents are not on the suit land but on a different land belonging to the **late Dedan Karuga Gichiga**.

However, the Court finds that since there is a dispute over the suit land herein, then the doctrine of *lis pendens* applies and the purpose of this principle is to preserve the suit property until the matter is heard and determined or until further orders of the Court.

For the above reasons, the Court finds that the Plaintiff's/Applicant's

**Notice of Motion** dated **19<sup>th</sup> February 2016** is **merited**. The said application is **allowed entirely in terms of prayer No.3 with costs being in the cause**.

Further, the Court has noted that this is **an old matter** which was filed in the **year 2010**. The Court directs the parties to cease filing further unnecessary interlocutory applications but **instead to set the matter down for hearing** of the main suit.

Consequently, the Court directs the parties herein to comply with Order 11 within a period of **30 days** from the date of this Ruling. Thereafter the matter to be mentioned before the Deputy Registrar for the pre-trial Conference so that the suit can be set down for hearing expeditiously.

It is so ordered.

Dated, Signed and Delivered at NAIROBI this **31<sup>st</sup>** day of **August**, 2017.

**L. GACHERU**

**JUDGE**

**31/8/2017**

In the presence of

M/S Gethi for Plaintiff/Applicant

Mr. Waiganjo for Defendant/Respondent

Catherine - Court clerk.

**L. GACHERU**

**JUDGE**

**31/8/2017**