



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT ATNAIROBI**  
**ELC MISC.APPL. NO. 415 OF 1987**  
**MURAMATI FARMERS CO-OPERATIVE**  
**SOCIETY LIMITED.....JUDGEMENT DEBTOR/RESPONDENT**  
**VERSUS**  
**JASON MUNGAI KABURU.....1<sup>ST</sup> DECREE HOLDER**  
**SIMON NJUGUNA KABARE.....2<sup>ND</sup> DECREE HOLDER /APPLICANT**  
**AND**  
**PHILOMENA NJOKI KABARE.....INTERESTED PARTY/RESPONDENT**

**RULING**

**Background:**

Simon Njuguna Kabare, the applicant herein is a son to Philomena Njoki Kabare, the interested party. The applicant's late father, *Mzee* Kabare became a member of the judgement debtor in 1964 where he bought one share at 650/-. Upon the death of *Mzee* Kabare in 1975, his share in the judgment debtor was transferred to the applicant in 1977 as his official nominee. The judgment debtor had purchased land for its shareholders. After the survey and subdivision of the said parcel of land, the applicant balloted and was allocated land reference number L.R. No. Laikipia/Daiga/Umande Block III (Muramati) 181 (hereinafter referred to as "the suit property"). Later, the interested party applied to the judgment debtor for the share that had been registered in the name of the applicant to be transferred to her name claiming that the said share belonged to her husband, *Mzee* Kabare. The judgment debtor acceded to that application by the interested party and transferred the said share to the interested party without the applicant's authority. By virtue of the said share, the interested party was also registered as the proprietor of the suit property.

The applicant lodged a complaint against the judgment debtor and the interested party at the Co-operative Tribunal (hereinafter "the tribunal") which in an award dated 27<sup>th</sup> July, 1987, ruled in his favour. The tribunal declared the transfer of the applicant's share in the judgment debtor to the interested party null and void and directed that the interested party be refunded transfer and survey fees. That award was adopted as a judgment of this court and a decree dated 18<sup>th</sup> June, 1991 issued.

**The applications before the court:**

What I now have before the court are two Chamber Summons applications brought by the applicant. In

the first application dated 5<sup>th</sup> December, 2002, the applicant is seeking an order that the registrar of the High Court be authorized to sign the necessary transfer documents in his favour with respect to the suit property. The application is premised on grounds that a decree issued in favour of the applicant on 18<sup>th</sup> June, 1991 cannot be executed because the interested party who holds the title to the suit property illegally has refused to sign the transfer forms so that the property may be transferred to the applicant. The applicant has contended that the suit property is equivalent to his share in the judgment debtor which was wrongfully and illegally transferred by the judgment debtor to the interested party.

In the second application dated 28<sup>th</sup> November, 2014, the applicant is seeking an order directing the registrar of lands Nanyuki, Laikipia District to cancel titles for L.R. No. Laikipia/Daiga/Umande Block III (Muramati) 86 (hereinafter referred to as "Plot No.86") and L.R. No. Laikipia/Daiga/Umande Block III (Muramati) 181 (the suit property) which has since been subdivided into 5 parcels namely L.R. No. Laikipia/Daiga/Umande Block III (Muramati) 429-433 and registered in the names of the interested party, Njoroge Kabari Kabogo, Charles Kimani and Joseph Osoro Maoga respectively to avoid further transactions pending the hearing and determination of the application dated 5<sup>th</sup> December 2002 mentioned above.

The application is supported by the applicant's affidavit sworn on 28<sup>th</sup> November, 2014. The applicant has contended that the suit property, L.R. No. Laikipia/Daiga/Umande Block III (Muramati) 181 was transferred to the interested party by the judgment debtor. The interested party subdivided the suit property and transferred portions thereof to herself and to the said Njoroge Kabari Kabogo, Charles Kimani and Joseph Osoro Maoga. The applicant has contended that the said transactions were carried out after judgement had been entered herein against the judgment debtor and the interested party with the intention of defeating the cause of justice. The applicant has averred that the application dated 5<sup>th</sup> December, 2002 was heard and allowed by Lady Justice Okwengu J (as she then was) but the court file disappeared before the orders could be extracted. The applicant has contended that L.R. No. Laikipia/Daiga/Umande Block III (Muramati) 86 is the only remaining asset of the judgement debtor and that the same is held in the name of the Government of Kenya through the judgment debtor's initiative to defeat the decree which was issued herein against it.

The applications were argued by way of written submissions. The judgment debtor/respondent and the interested party did not file a response to the two applications. They did not also file submissions. The applicant filed his submissions dated 15<sup>th</sup> February, 2016 on the same date. The applicant has submitted that pursuant to the award of the tribunal made on 27<sup>th</sup> July, 1987 which was adopted as a judgement of this court on 30<sup>th</sup> May, 1990 and a decree issued on 18<sup>th</sup> June, 1991, the transfer of the applicant's share in the respondent to the interested party was nullified and the applicant was confirmed to be the rightful shareholder of the respondent. The applicant has submitted that the interested party and the judgement debtor were aware of the decree of the court which was to the effect that the suit property which was the product of the applicant's share in the respondent which had been wrongfully and illegally transferred to the interested party would revert to the applicant.

The applicant has submitted that in total disregard of the decree of this court, the interested party refused to sign the relevant transfer documents to effect the transfer of the suit property to the applicant. The applicant has submitted that while the applicant's application dated 5<sup>th</sup> December, 2002 was pending, the interested party caused the suit property to be subdivided into five (5) portions of which two were registered in her name and the rest in the names of third parties. The applicant has submitted that since the said transactions were carried out during the pendency of this suit, the common law doctrine of *lis pendens* is applicable pursuant to section 3(c) of the Judicature Act.

The applicant has cited the cases of Olympic Company Trading Ltd & another vs. Said Mohamed & 4 others (2014) eKLR and Bernadette Wangare Muiu vs. National Social Security Fund Board of Trustees & 2 others (2012) Eklr in support of his submission that the doctrine of *lis pendens* binds not only the parties to the suit but also third parties who may acquire an interest in land during the pendency of legal proceedings irrespective of whether they had notice of the litigation or not. The applicant has submitted that the doctrine of *lis pendens* renders the transfers carried out during the pendency of a suit subservient

to the rights of parties to litigation. The applicant has submitted that since a determination had been made that the suit property belongs to the applicant, the transfer of the suit property and portions thereof to the interested party and the said third parties ought to be revoked.

Determination:

I have considered the applicant's two applications and the affidavits filed in support thereof. In the Chamber Summons application dated 5<sup>th</sup> December, 2002, the applicant has sought an order authorizing the registrar of this court to sign the necessary documents to facilitate the transfer of the suit property, L.R. No. Laikipia/Daiga/Umande Block III (Muramati) 181 to the applicant. While the said application was pending, the interested party in whose name the suit property was registered subdivided the said property into five portions. She retained two portions in her name and transferred three portions to third parties. In the Chamber Summons dated 28<sup>th</sup> November, 2014, the applicant has sought an order directed at the Registrar of Lands, Nanyuki and Laikipia District to cancel the titles for L.R. No. Laikipia/Daiga/Umande Block III (Muramati) 181 (suit property) and the subdivisions thereof and L.R. No. Laikipia/Daiga/Umande Block III (Muramati) 86 (Plot No.86) pending the hearing of the first application dated 5<sup>th</sup> December, 2002. It is not in dispute that pursuant to a decree that was issued herein on 18<sup>th</sup> June, 1991 the transfer of the applicant's share in the respondent/judgment debtor was cancelled. It is also not in dispute that the said share in the respondent entitled the applicant to be allocated the suit property. It is not in dispute that following the illegal transfer of the said share to the interested party, the suit property was allocated to the interested party instead of the applicant. I am in agreement with the applicant that the court having nullified the transfer of the applicant's share in the respondent to the interested party, the same fate befell the allocation of the suit property to the interested party. The respondent and the interested party were bound by the decree of this court and were required in compliance therewith to transfer to the applicant not only the said one share in the respondent but also the suit property. The applicant has contended that the interested party has refused to transfer to him the suit property and that she has gone a head during the pendency of these proceedings and after the issuance of the decree aforesaid to subdivide the suit property and to transfer some portions thereof to third parties. Section 34 of the Civil Procedure Act provides that all questions arising between the parties to the suit in which the decree was passed relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not in a separate suit. Where a party has refused or neglected to comply with the decree of the court requiring him to execute any conveyance or document, section 98 of the Civil Procedure Act gives the court power to order such document or conveyance to be executed by the registrar of the court. It is under this section that the applicant's application dated 5<sup>th</sup> December, 2002 was brought.

I have noted that Plot No. 86 was not the subject of the court decree. The applicant has also admitted that the same is not registered in the name of the respondent or the interested party. I am of the view that the orders sought in respect thereof are misconceived. I have also not understood why the applicant has sought an order for the cancellation of the title for the said parcel of land. With regard to the suit property, L.R. No. Laikipia/Daiga/Umande Block III (Muramati) 181, it is admitted that the same is no longer in existence. The same was sub-divided into five (5) portions. The court cannot therefore make an order for the registrar of the court to execute transfer documents in favour of the applicant for a nonexistent parcel of land. The order could be made if the subdivision of the suit property and the transfer of portions thereof were cancelled. I believe that this is what the applicant had intended to achieve by the second application dated 28<sup>th</sup> November, 2014. The problem at hand is that, Njoroge Kabari Kabogo, Charles Kimani and Joseph Osoro Maoga to whom the interested party transferred three portions of the suit property after the subdivision thereof are not parties to the present application. I am fully in agreement with the applicant's argument that under the doctrine of *lis pendens* these individuals to whom the interested party transferred portions of the suit property while this suit was pending and after the decree herein had been issued are bound by the said decree even if they were not parties to this suit. In the case of Margaret Wairimu Warima vs. Phylis Wanjiru Thairu & 2 others NRB Civil Appeal No. 127 of 2014(2017)eKLR, the court stated as follows on the doctrine of *lis pendens*:

*“Apart from the court orders, which we find were operative at all times material to the suit, there is*

a common law doctrine of *lis pendens* which is unaffected by statute and has been upheld by this Court. The common sense of it was explained by Lord Justice Turner in the case of Bellamy vs. Sabine [1857] 1 De J 566, 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 Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”*

In the case of Mawji vs. US International University & Another [1976] KLR 185, the court stated that:

*“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 overrides, 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.....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 pendente 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.”*

In the case of Emmanuel Ngade Nyoka vs. Kitheka Mutisya Ngata, Malindi Civil Appeal No. 63 of 2016 (2017)eKLR, the court stated that:

*“So that by the time he was subdividing, selling and transferring portions of the suit premises to the interested parties he was well aware that litigation regarding the suit premises was still ongoing in the first appellate court. This state of affairs obviously attracts the application of the *lis pendens* doctrine. It is a doctrine of law and thus it matters not when it is raised. The doctrine simply prohibits a party to a suit from transferring the suit premises to a third party while the suit, with regard to the suit premises is pending. The purpose of the doctrine is of course to preserve the suit premises until the finalisation of the ongoing litigation.....As already stated the appellant was well aware of the pending appeal when he purported to subdivide, sell and transfer to the interested parties portions of the suit premises. This being the case the interested parties cannot be heard to argue that they were innocent purchasers for value without notice. As correctly observed by the learned Judge purchase of a property pendente lite for valuable consideration affects the purchaser in the same manner as if he had notice and will be accordingly bound by the judgment or decree in the suit. It does not matter that at the time of purchase there was no order stopping the selling or subdivision of the suit premises as the interested parties have argued. Nor was there need to tender evidence to show that the interested parties were never parties to any collusion or fraud in their acquisition of portions aforesaid. What is pertinent is that the appellant well knowing of the pending litigation involving the suit premises nonetheless went ahead to mischievously subdivide and transfer portions thereof to the interested parties. In the circumstances the learned Judge did not err in invoking the doctrine.”*

The question that arises and which this court has to answer is whether, applying the said doctrine of *lis pendens*, the court can proceed to cancel the titles held by the third parties to whom the interested party had transferred portions of the suit property. I do not think so. To start with, I am of the view that it would be a breach of the rules of natural justice for the court to condemn the said third parties unheard. Secondly, application of the doctrine of *lis pendens* must be established. I am of the view that the applicant ought to institute fresh suit against the said third parties and establish that the doctrine applies to his case. I am of view that the provisions of section 34 of the Civil Procedure Act are not wide enough to cover disputes involving third parties. It follows therefore that the dispute between the applicant and third

parties must be resolved in separate proceedings. The court cannot cancel the titles held by third parties in the present proceedings.

The material before the court shows that two portions of the suit property, namely, L.R. No. Laikipia/Daiga/Umande Block III (Muramati) 429 and L.R. No. Laikipia/Daiga/Umande Block III (Muramati) 430 are still registered in the name of the interested party. As I have stated earlier in this ruling, the interested party was required under the decree issued herein to transfer the suit property to the applicant. The suit property is no longer in existence. I can see no reason why the court cannot facilitate the transfer of these two parcels of land which are in the name of the interested party to the applicant as he pursues the recovery of the other portions of the suit property held by third parties in another forum.

For the foregoing reasons, the applicant's applications dated 5<sup>th</sup> December, 2002 and 28<sup>th</sup> November, 2014 succeed in part. The same are allowed on the following terms:

1. The 2<sup>nd</sup> decree holder/applicant shall serve upon the interested party a copy of this ruling and the order extracted therefrom and shall file in court an affidavit of service.
2. The interested party shall sign all documents and forms necessary to enable the transfer of all those parcels of land known as L.R. No. Laikipia/ Daiga/Umande Block III (Muramati) 429 and L.R. No. Laikipia/ Daiga/Umande Block III (Muramati) 430 from the interested party to the 2<sup>nd</sup> decree holder/applicant within 60 days of being served with a copy of the ruling and order in accordance with paragraph one (1) above.
3. In the event that the interested party refuses or fails to comply with the order in paragraph two(2) above, the Deputy Registrar of this court is hereby authorized upon being satisfied that the interested party was duly served with the ruling herein and the order extracted therefrom, to execute all the documents and forms necessary to enable the transfer of all those parcels of land known L.R. No. Laikipia/ Daiga/Umande Block III (Muramati) 429 and L.R. No. Laikipia/ Daiga/Umande Block III (Muramati) 430 from the interested party to the 2<sup>nd</sup>decreeholder/applicant.
4. The 2<sup>nd</sup> decree holder/applicant shall have the costs of the two applications to be paid by the respondent/judgment debtor.

**Delivered and Signed at Nairobi this 13<sup>th</sup> day of October 2017**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

No appearance for the 1<sup>st</sup> Decree holder

Mr. Gichigo for the 2<sup>nd</sup> Decree holder/Applicant

No appearance for the Judgment Debtor/Respondent

No appearance for the Interested Party

Catherine Court Assistant