



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 224 OF 1990

NJENGA KUBUTHA..... PLAINTIFF

VERSUS

JANE NGINA KUKAN

ANTHONY PERMERES LILIAH

(Sued as administrators of JASON KUKAN LILA(deceased).....DEFENDANTS

AND

BEMWA REALTORS LIMITED.....INTERESTED PARTY

RULING

On 6th June, 1988, the plaintiff entered into an agreement for sale with Jason Kokan Lila, deceased (hereinafter referred to as “the deceased”) under which the deceased agreed to sell to the plaintiff a portion measuring 40 acres of all that parcel of land known as L.R No. 10029/33-KITENGELA FARM(L.R No.14760) at a consideration of Kshs. 140,000/- and on other terms and conditions which were set out in the said agreement for sale. The plaintiff filed this suit against the deceased on 17th January, 1990 seeking the following reliefs:

- i. An order compelling the deceased to withdraw an objection he had lodged with the Central Authority Board.
- ii. An order for specific performance against the deceased in terms of the consent that had been issued by Masaku/Donyo Sabuk Land Control Board.
- iii. Costs of the suit.
- iv. Any other relief the court may deem fit to grant.

On 27th December, 1996, the court made an order on an interlocutory application by the plaintiff on the following terms:

“THAT the Commissioner of Lands be and is hereby ordered not to register any changes in subdivision or ownership of L.R No. KITENGELA 14760/4”

The said order was registered against the title for L.R No. KITENGELA 14760 as entry No. 10. The suit

was heard by Philip J. Ransley, Commissioner of Assize who entered judgment on 27th November, 2001 in favour of the plaintiff. Following that judgment, a decree was issued on 11th February, 2002 on the following terms:

1. *THAT the defendant do execute valid transfers within 30 days from today and in default the Registrar of this court do execute transfer in the defendant's stead.*
2. *THAT the Registrar of Title to register the said transfer and issue a new title to the land to the Defendant(sic).*
3. *THAT if the mutation forms are required the Defendant do deliver them to the plaintiff within 30 days failing which the Registrar will issue duplicate to the plaintiff.*
4. *Costs to the plaintiff.*

The deceased did not comply with the terms of the said decree. In accordance with the terms of the decree, the plaintiff's advocate presented to the Deputy Registrar of the court on 13th March, 2002, an instrument of transfer of all that parcel of land known as L.R No. 14760/4 (I.R No. 48992/1) measuring 8.084 hectares (hereinafter referred to as "the suit property") from the deceased to the plaintiff. The said instrument of transfer was duly executed by the Senior Deputy Registrar on behalf of the deceased in accordance with the decree of the court. After the execution of the said instrument of transfer by the court as aforesaid, what was left was for the plaintiff to present the same to the Registrar of Titles for registration and issuance of the title.

At all material times, the plaintiff was represented by G.O. Okach advocate of Okach & Company Advocates while the deceased was represented by the firm of G.M. Muhoro & Company Advocates. While the said instrument of transfer was awaiting registration by the Registrar of Titles, the deceased died on 29th March, 2006. On 29th August, 2006, the defendants herein were appointed as the legal representatives of the estate of the deceased. On 27th November, 2012, the defendants who had appointed a new firm of advocates, S.N. Thuku & Associates to represent them in this suit applied through an application dated 26th October, 2012 to be substituted in the suit in place of the deceased. While that application was pending, the defendants brought another application dated 24th January, 2013 on 5th February, 2013 seeking an order that this suit be reinstated.

On 12th April, 2013, S.N. Thuku & Associates Advocates filed in court a consent letter dated 8th March, 2013 signed by S.N. Thuku & Associates Advocates on behalf of the defendants and purportedly by Okach & Company Advocates on behalf of the plaintiff. The consent letter provided as follows:

"By consent:

1. *The Notice of Motion Applications dated 24th January 2013 and 26th October 2012 be and are hereby allowed as prayed.*
2. *The court order given on 27th December 1996 and registered on L.R No. KITENGELA 14760 as entry No.10 to the title be and is hereby vacated.*
3. *No order as to costs."*

When the defendants two applications dated 24th January 2013 and 26th October 2012 came up for hearing before Waweru J. on 16th April, 2013, Mr. Githui advocate who held brief for Mr. Thuku informed the court that the parties had reached a consent on the two applications which had been reduced into writing and filed in court on 12th April, 2013. There was no appearance for the plaintiff. Mr. Githui asked the court to grant orders in terms of the said consent which the court did. A formal order was thereafter extracted on 23rd April, 2013 allowing the two applications and lifting the court order of 27th

December, 1996 which had been registered against the title of the suit property.

As I had mentioned earlier in this ruling, the order of 27th December, 1996 had restrained the Commissioner of Lands from registering any changes in the sub-division or ownership of the suit property. With the lifting of the order, the defendants who were the administrators of the estate of the deceased were at liberty to deal with the suit property. As at this time, the plaintiff had not succeeded in having the transfer that had been executed by the court in his favour in respect of the suit property registered by the Registrar of Titles.

The court order of 16th April, 2013 raising the caveat that had been placed against the title of the suit property was registered against the title of the suit property by the defendants on 30th April, 2013. On 29th May, 2013, the Grant of Letters of administration issued in favour of the defendants in respect of the estate of the deceased was registered against the title of the suit property followed on the same day by the registration of an assent by the defendants transferring the suit property to Amos Kinyanjui Kukan, Mercy Seila Kukan, Jane Ngima Kukan and Anthony Parmeres Leliah as the beneficiaries of the estate of the deceased. On the same day, namely, 29th May, 2013, Amos Kinyanjui Kukan, Mercy Seila Kukan, Jane Ngima Kukan and Anthony Parmeres Leliah were issued with a certificate of title in respect of the suit property.

As at the date of death of the deceased in the year 2006, the court had already issued a decree that the suit property be transferred by the deceased to the plaintiff and the court had in fact executed a transfer of the property to the plaintiff. The property did not therefore in my view form part of the estate of the deceased. With the full knowledge that the suit property had been decreed to belong to the plaintiff, the defendants and the other beneficiaries of the estate of the deceased set out to dispose of the property without any regard to the judgment and decree of the court.

I have seen in the court file, a letter dated 12th June, 2013 filed in court on the same day from Sichangi Partners Advocates to the Deputy Registrar. In the said letter, the said firm of advocates indicated that they were acting for one, Azim Deen who was interested in purchasing the suit property from the beneficiaries of the estate of the deceased, Amos Kinyanjui Kukan, Mercy Seila Kukan, Jane Ngima Kukan and Anthony Parmeres Leliah. The said firm of advocates stated in the said letter that they had been informed of the existence of this case and as such they wanted copies of the pleadings filed in this suit. It is not clear as to the decision that was taken by the said advocates on the sale of the suit property to their client after they were supplied by the court with the pleadings. The sale did not however take place as will be seen below.

In order to remove all obstacles that would have stood on their way in their quest to sell the suit property, the defendants came back to court on 20th September, 2013 with a Notice of Motion application dated 3rd September, 2013 this time round seeking an order that the suit be marked as settled because 12 years had lapsed since the date of judgment in the suit. When the said application came up for hearing on 8th October, 2013, Mr. Thuku advocate who appeared for the defendants was directed by Nyamweya J. to effect service of the application upon the plaintiff personally. The judge fixed the application for hearing on 27th November, 2013 when Mr. Thuku advocate did not show up to inform the court whether he had effected service or not. The said application was never prosecuted.

On 12th March, 2014, the defendants and the other beneficiaries of the estate of the deceased transferred the suit property to the interested party herein, Bwemwa Realtors Limited at a consideration of Kshs. 25,000,000/- thereby completely extinguishing the interest of the plaintiff in the property and rendering useless the judgment and decree of this court.

What is now before me is the Notice of Motion application dated 29th August, 2014 brought by the plaintiff seeking among others, the following orders:

1. THAT the law firm of Muniyalo Muli & Company Advocates be placed on record forthwith as acting for the plaintiff in place of Okach & Company Advocates.

2. THAT Bwemwa Realtors Limited be joined in these proceedings.
3. THAT the orders granted on 16th April, 2013 by Waweru J. and all consequential orders be vacated forthwith.
4. THAT in the alternative, the Registrar of Lands be ordered to rectify the register to restore the status of the of the suit property obtaining as at 31st December, 1996.
5. THAT all entries entered on the register of the suit property pursuant to the said order of 16th April, 2013 by Waweru J. and the resultant title in favour of Bwemwa Realtors Limited be annulled, cancelled and/or voided and the Registrar of Lands be ordered to Register the plaintiff as the proprietor of the suit property with immediate effect.
6. THAT costs be provided for.

The application was brought on the grounds that judgment was delivered in this suit on 27th November, 2001 pursuant which the suit property was vested on the plaintiff. The plaintiff contended that the defendants misled the court into lifting an order that had been given to preserve the suit property and caused the property to be transferred to third parties. The application was supported by affidavit and further affidavit sworn by the plaintiff on 29th August, 2014 and 3rd July, 2015 respectively. The plaintiff's case is that in the course of his endeavors to have the suit property registered in his name, he came to learn that the court order that was made on 27th December, 1996 to preserve the suit property had been vacated through a purported consent between the defendants' advocates and his former advocates, Okach and Company Advocates. The plaintiff has denied that he instructed Okach & Company Advocates to enter into the said consent. The plaintiff has contended that the said consent is a forgery in that the same was not signed by Okach & Company Advocates. The plaintiff has contended further that the sole practitioner in that law firm of Okach & Company Advocates, George Owino Okach did not have a practicing certificate at the time the purported consent was executed by him and as such he had no legal capacity to act on the plaintiff's behalf.

The plaintiff has contended that George Owino Okach advocate had disowned the purported consent. The plaintiff has contended that he had not registered the transfer that had been executed in his favour by the court because the deed file for the suit property had disappeared from the Land Office from the year 2002. The plaintiff has contended that he had paid stamp duty for the transfer and presented a deed plan for the suit property to the Director of Survey. The plaintiff has contended that the defendants used the deed plan that he had submitted to the Director of Survey to obtain a certificate of title for the suit property. The plaintiff has contended that the defendants did not acquire any title to the suit property which they could pass to third parties. The plaintiff has contended that the defendants caused the order of 27th December, 1996 to be lifted and had the suit property transferred to their names, while the judgment of the court in his favour was still in force.

The application was opposed by the defendant and the third party. The defendants opposed the application through grounds of opposition dated 12th September, 2014 and a replying affidavit sworn by the 2nd defendant, Antony Parmeres Leliah on 14th January, 2015. The defendants have contended that the plaintiff's application is incompetent and an abuse of the process of the court. The defendants have contended that the suit property has been sold to third parties for value. The defendants have contended that the orders dated 27th December, 1996 complained about by the plaintiff were interim in nature as such the same lapsed when judgment was given in the matter on 27th November, 2001. The defendants have contended further that the consent order which was made on 16th April, 2013 was valid. The defendants have denied that the consent letter dated 8th March, 2013 on the basis of which the said order was given was a forgery.

The defendants have contended that the said consent letter was signed by George Owino Okach advocate in the presence of the defendant's advocate Mr. Samuel Ngari Thuku. The defendants have contended that

whether or not George Owino Okach had a practicing certificate at the material time was inconsequential. The defendants have denied that the order of 16th April, 2003 was obtained through deceit and concealment of material facts. The defendants have contended that as at the time the said consent order was made by the court, the judgment that was made in favor of the plaintiff was more than 12 years old and as such had abated.

The interested party opposed the application through a replying affidavit sworn by Wallace Mwaura on 30th November, 2015. The interested party's case is that the interested party purchased the suit property from the defendants and the other beneficiaries of the estate of the deceased on 8th November, 2013 after conducting due diligence and ascertaining that they were the registered owners of the suit property. The interested party has contended that it is a stranger to the allegations contained in the plaintiff's application. The interested party has contended that it is an innocent purchaser for value of the suit property without notice of this case and the conflict the plaintiff had with the defendants over the suit property. The interested party has contended that it has sub-divided the suit property and sold portions thereof to other persons and as such the suit property is no longer in existence. The interested party has contended that the orders sought by the plaintiff if granted would be prejudicial to the interested party as they will not only affect it adversely but will also affect other innocent people who have purchased portions of the suit property from the interested party.

The application was argued by way of written submissions. I have considered the application together with the affidavits filed in support thereof. I have also considered the grounds of opposition and the affidavits which were filed by the defendants and the interested party in opposition to the application. Finally, I have considered the submissions by the parties and the authorities cited in support thereof. From the application, the responses thereto by the respondents and the submissions by the parties, the following in my view are the issues that arise for determination by the court:

1. Whether the orders made herein on 16th April, 2013 by consent of the parties were obtained by the defendants through fraud and concealment of material facts and as such should be set aside?
2. Whether the registration of the suit property in the name of defendants and the subsequent transfer of the said property by the defendants to third parties including the interested party herein were unlawful and as such should be reversed and cancelled?
3. Whether the plaintiff is entitled to the prayers sought in the application?

The first issue:

In the case of, Wasike –vs- Wamboko (1988) KLR 429, it was held that;

“A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out.”

In the case of, Brook Bond Liebig (T) Ltd –vs- Mallya [1975] E. A 266, the court stated that:

“The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani –vs- Kassam [1952] 19 E. A.C.A 131, where the following passage from, Seton on Judgments and orders, 7thEdn. Vol. I, p 124 was approved:

“prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement.”

Applying the foregoing principles to this case, the question that I need to answer is whether the plaintiff has established valid grounds that would justify the setting aside of the consent order made herein on 16th April, 2013. Has the plaintiff established that there was fraud or collusion or mistake or misapprehension or ignorance of material facts or any other reason that would justify the setting aside of an agreement in relation to the said consent order? The plaintiff has contended that the consent letter dated 8th March, 2013 on the basis of which the order of 16th April, 2013 was made was not signed by the firm of Okach & Company Advocates who were on record for him at the material time. The plaintiff has contended that the signature in the said consent letter purporting to be that of George Owino Okach Advocate (hereinafter referred to as “Mr. Okach”) of the firm of Okach & Company Advocates was forged by the defendants’ advocate S.N. Thuku & Associates. The plaintiff has contended that Mr. Okach has disowned the said consent. The plaintiff has contended further that even if it is assumed for argument sake that the consent was signed by Mr. Okach of the firm of Okach & Company Advocates, he had not instructed the said firm of advocates to enter into the said consent which was prejudicial to his interest and legitimate expectation. The plaintiff has contended further that in any event, at the time when the said advocate signed the purported consent, he had no practicing certificate and as such he had no legal capacity to bind him in any respect.

I am not satisfied on the material before me that the firm of Okach & Company Advocates did not sign the consent letter dated 8th March, 2013 and that his signature in the said document was forged by S.N. Thuku & Associates. Mr. S.N. Thuku advocate of S.N. Thuku & Associates has stated in his affidavit dated 13th January, 2015 filed in opposition to the present application that Mr. Okach signed the consent in his presence. He denied that the signature of Mr. Okach in the said consent was forged. Mr. S.N. Thuku has stated in the said affidavit that the plaintiff had raised the issue of the alleged forgery of Mr. Okach’s signature with the Law Society of Kenya in a complaint against him (Mr. S.N. Thuku) and he(the plaintiff) was advised to report the alleged forgery to the Director of Criminal Investigations for appropriate action.

The burden was upon the plaintiff to prove that the said consent was not signed by Mr. Okach. What I have on record is conflicting affidavit evidence on the issue from the plaintiff and the defendants. The court is not a handwriting expert. After the defendants denied that the signature of Mr. Okach in the consent was forged, the plaintiff had a duty to place before the court expert evidence or any other relevant evidence showing that the signature in the said consent is not the signature of Mr. Okach. The denial by Mr. Okach of the said signature is not sufficient. The specimen signatures of Mr. Okach which the plaintiff has placed before the court are also of no assistance to the plaintiff’s case. As I have already mentioned above, the court has no expertise in handwriting or document examination. To the naked eye, there is no difference in the specimen signatures placed before the court by the plaintiff and Mr. Okach’s alleged signature in the consent in dispute. This supports the defendants’ contention that the consent was signed by Mr. Okach.

Forgery is a serious criminal offence. The plaintiff has not told the court of what became of the complaint that he lodged at Mavoko Police Station over the alleged forgery of Mr. Okach’s signature. Due to the foregoing, I find no basis for the plaintiff’s contention that the consent in question was not signed by Mr. Okach of Okach & Company Advocates.

On the issue as to whether or not the plaintiff had given the firm of Okach & Company Advocates instructions to enter into the said consent, it is settled as a general rule that an advocate duly instructed by a client to act for him in a matter has ostensible authority to bind the client in the matter. The authority must however be exercised within the confines of the law and in the interest of the client. The authority cannot be used for criminal purposes or contrary to the express instructions of the client or against the client’s interest. There is no doubt in this case that the firm of Okach & Company Advocates acted against the plaintiff’s interest. The said firm of advocates conducted the hearing of this case on behalf of the plaintiff and obtained judgment in favor of the plaintiff. In the said judgment, the court directed the deceased to transfer the suit property to the plaintiff. The deceased refused to execute the instrument of transfer in favour of the plaintiff and the said firm of Okach & Company Advocates prepared an instrument of transfer of the suit property from the deceased to the plaintiff and presented the same to the

Deputy Registrar for execution. It is the same firm of advocates who collected the instrument of transfer for registration by the Registrar of Titles in favor of the plaintiff.

The said firm of advocates was aware that the order of 27th December, 1996 was made by the court to preserve the suit property pending the determination of the dispute between the plaintiff and the deceased over the said property. The said firm of advocates was aware that if the order was lifted, the suit property stood the risk of being alienated by the deceased or the defendants. When the said firm of advocates signed the consent lifting the said order, it did so at the instance of the defendants. The said firm of advocates must have been aware that the plaintiff had not managed to have the transfer that was executed by the court in his favor registered. Even if he was not aware, he had an obligation to inquire from the plaintiff if at all the Registrar of Titles had registered the said transfer. By agreeing to lift the said order at the instance of the defendants before the transfer of the suit property in favour of the plaintiff had been registered, the firm of Okach & Company Advocates acted against the interest of the plaintiff and in the interest of the defendants who had planned to dispose of the suit property the judgment of the court in favour of the plaintiff notwithstanding.

In the case of Republic –vs- District Land Registrar Nandi & Another ex parte Tegerei & Another [2005] 1 KLR 521 Musinga J. (as he then was) stated that:

“Although an advocate has ostensible authority to compromise his client’s case, employment of such authority cannot be upheld where counsel consents to orders which are diametrically opposed to the express instructions which he has been given by a client in the matter. Where a consent order completely negates the interests of an instructing client and it is shown to the satisfaction of the court that the client was not even aware of the application that gave rise to the consent order, in the absence of any satisfactory explanation by counsel who is accused of entering into the consent order in question, a court of law would be entitled to conclude that there was fraud or collusion involved and will not uphold the consent order issued.”

I am entirely in agreement with this statement. The firm of Okach & Company Advocates acted completely against the interest of the plaintiff who was its client. The consent the said firm entered into conferred a benefit or advantage upon the defendants as against the plaintiff and negated the interest that the court had conferred upon the plaintiff. Okach & Company Advocates had some explanation to do with regard to the circumstances under which they entered into the consent in question.

Mr. S. N. Thuku advocate has claimed in his affidavit that the consent was executed “*after intense negotiations with Mr. Okach*”. Mr. Thuku has not elaborated on the nature of negotiations that he held with Mr. Okach over this suit which had already been determined in favor of the plaintiff. For Mr. Okach advocate, by the time the application herein was brought, he had been struck off the roll of advocates over a disciplinary issue. He disowned the consent and maintained that he did not sign the same. Considering the circumstances under which the consent in question was signed and filed in court and what ensued thereafter, I am convinced that there was collusion between the defendants’ and the plaintiff’s then advocates, Okach & Company not only to defeat the plaintiff’s interest in the suit property but also to defeat the cause of justice. The order that was made on 16th April, 2013 was therefore tainted with collusion and was against public policy as such cannot be upheld by a court of law.

In view of the conclusion that I have reached above, it is not necessary for me to consider the effect of Mr. Okach not having had a practicing certificate when he signed the purported consent. The much I can say in passing is that, the law on the issue was settled by the Supreme Court in the case of National Bank of Kenya Ltd. vs. Anaj Warehousing Limited, Supreme Court Petition No. 36 of 2014. In that case, the Supreme Court held that failure by an advocate to have a practicing certificate does not invalidate documents drawn by such advocate. It follows therefore that the mere fact that Mr. Okach did not have a practicing certificate when he executed the consent in question would not invalidate the said consent. In view of the foregoing, my answer to issue number one is in the affirmative.

The second issue:

It is not in dispute that judgment was entered for the plaintiff against the deceased on 27th November, 2001. It is not disputed that pursuant to the decree that was issued by the court following the said judgment, the deceased was required to transfer the suit property to the plaintiff. It is also not disputed that the deceased failed and or refused to execute the instrument of transfer in favour of the plaintiff and the same was executed by the Deputy Registrar of the Court in the year 2002. As I have stated earlier in this ruling, the deceased died on 29th March, 2006. As at this date, the suit property had already been decreed in favour of the plaintiff and the plaintiff already had in his possession an instrument of transfer that was only awaiting registration. The plaintiff had already paid stamp duty on the transfer and presented a deed plan for the suit property to the Director of Survey. What was remaining was only for the transfer to be registered so that the plaintiff could be issued with a certificate of title for the suit property.

As I have mentioned above, I am of the view that the court having made an order that the suit property be transferred to the plaintiff, the property did not form part of the estate of the deceased for distribution to its beneficiaries. The defendants were well aware of the court judgment when they caused themselves to be registered as administrators of the estate of the deceased against the title of L.R No. 14760 on 29th May, 2013 and caused the suit property to be transferred into their names and the names of other beneficiaries by way of an assent. With the full knowledge of the said judgment and decree of the court and in defiance thereof, the defendants and the said beneficiaries of the estate of the deceased caused the suit property to be transferred to the interested party.

I am not in agreement with the defendants' contention that when they caused the suit property to be registered in their names, the judgment issued herein had expired or abated by operation of law. The life of a judgment is 12 years from the time it is delivered. The judgment herein was delivered on 27th November, 2001. The last date on which it could be executed was 27th November, 2013. It follows that the defendants caused themselves to be registered as the owners of the suit property several months before the said judgment became time barred. In any event, the judgment had been executed in part. A transfer had already been executed by the court in favor of the plaintiff. Registration of the said transfer was a mere formality and did not require further action from the court.

Since the suit property did not form part of the estate of the deceased and the defendants caused themselves to be registered as proprietors thereof in defiance of a court judgment and decree, the defendants did not acquire a valid title over the suit property which they could transfer to third parties. In the case of Clarke and Others vs. Chadburn & others [1985]1 All ER (PC) 211, it was held that:

“An act done in willful disobedience of an injunction or court order was not only a contempt of court but also illegal and invalid act which could not therefore effect any change in the rights and liabilities of others”.

The defendants have contended that the suit property has been transferred to a third party and as such the same is now beyond the reach of the plaintiff. I am of the view that the defendants cannot benefit from their own wrong. In the case of, Nabro Properties Ltd. vs. Sky Structures Limited and 2 others [2002]2KLR 299, Gicheru JA. while quoting *Brooms Legal Maxims* stated as follows at page 312;

“...the author of a wrong who has put a person in a position in which he has no right to put him, shall not take advantage of his own illegal act, or, in other words, shall not avail himself of his own wrong.”

I have a lot of sympathy for the interested party who parted with a substantial sum of money to the defendants and other beneficiaries of the estate of the deceased in a purported purchase of the suit property. The interested party's interest in the suit property must however be balanced as against that of the plaintiff. As I have already stated, the defendants and other beneficiaries of the estate of the deceased had no valid title to the suit property which they could pass to the interested party. The interested party acquired an invalid title which cannot be upheld by the court. The interested party's recourse is against the defendants and the other beneficiaries of the estate of the deceased. The transaction between the

defendants and the interested party would also be defeated by the doctrine of *lis pendens*. 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 that:

“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.”

For the foregoing reasons, my answer to issue number two is also in the affirmative.

The third issue:

In the final analysis, I am satisfied that the plaintiff’s application dated 29th August, 2014 has merit. I hereby grant prayer 6 limited only to order No. 2 in the court order made on 16th April, 2013 and issued on 23rd April, 2013. I also grant prayers 7 and 8 of the application. The Plaintiff shall have the costs of the application as against the defendants only.

Delivered and Dated at Nairobi this 3rd day of November, 2017

S. OKONG’O

JUDGE

Ruling read in open court in the presence of:

Mr. Ouma holding brief for Mungu for the Plaintiff

Mr. Gomba holding brief for Thuku for the Defendants

No appearance for the Interested Party

Kajuju Court Assistant