



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT ELDORET**

**E & L CASE NO. 520 OF 2012**

**ISAAC KIPKEMBOI CHESIRE.....1ST PLAINTIFF**  
**KIMUTAI CHESIRE.....2ND PLAINTIFF**  
**ISAAC KIMUTAI.....3RD PLAINTIFF**  
**MARY CHEPKOECH CHESIRE.....4TH PLAINTIFF**  
**JONAH KIBIWOTT CHESIRE.....5TH PLAINTIFF**

**VERSUS**

**JOSEPH KIMITEI KWAMBAL.....1ST DEFENDANT**  
**J M S.....2ND DEFENDANT**  
**GROWELL FARM LTD.....3RD DEFENDANT**  
**THE LAND REGISTRAR, UASIN GISHU.....4TH DEFENDANT**

**AND**

**ROSE CHERUIYOT RONO.....1ST INTERESTED PARTY**  
**HENRY BARMAO.....2ND INTERESTED PARTY**  
**KIBET KANGOGO.....3RD INTERESTED PARTY**  
**KIMAIYO RONO.....4TH INTERESTED PARTY**

**RULING**

The application herein is dated 29.2.2016 wherein the applicants who are the 1st and 2nd defendants herein pray for orders that they be granted leave to further amend the amended defence and counterclaim and that the 2nd defendant be substituted with Matilda Rose Sawe his wife. The application is based on grounds that the amendment will allow the court to effectively deal with matters in dispute and that the plaintiff will not suffer any prejudice. Lastly, that the medical condition of the 2nd defendant has deteriorated and he is unable to deal with the case and/or protect his interest. The application is supported by the affidavit of Elijah Momanyi Mogona who states that there is need to further amend the amended

defence and counterclaim and that the 2nd defendant has suffered stroke twice and his mental faculties have been greatly affected to the extent he is unable to protect his interest in the suit matter. He believes that the proposed amendment will meet the ends of justice and that no prejudice will be occasioned to the plaintiffs by the further amendment. He has annexed hereto a copy of the proposed further amended defence and counterclaim and medical report. He believes further that the application and the orders sought is the best interest of justice.

The application is opposed by the 5th plaintiff who states that the said application is based on half-truths and choreographed scheme by the 1st and 2nd defendants to delay the hearing and determination of the suit and obfuscate the real issues before court. That he is advised by their advocates on record whose advice he verily believe to be sound that the application is untenable, bad in law and ill conceived and that the 1st and 2nd defendants principally seeks to make an amendment to purportedly reflect circumstances which were obtaining more than five years ago during the pendency of this suit. It is therefore inexplicable how the 1st and 2nd defendants rested on their laurels for this long. That he is further advised by his advocates on record whose advice he verily believe to be sound that the application in itself does not meet and disclose legal threshold for guardianship on mental health grounds as stated by the Applicants.

The 5th plaintiff further states that this suit was filed on 28th May, 2009 under Eldoret Hccc No. 93 of 2009 before being allocated the current case number upon operationalization of the Environment and Land Court under the new constitutional and special court regime. During the filing of the matter, Parcel No. 44 was intact. That court issued an interim order on 29th May, 2009 restraining the defendants from dealing with the suit property including Parcel No. 44. That the said order, as it can be gleaned from the court records has been routinely extended to date in maintenance of the status quo. That in deliberate violation of the court order and with impunity, the 1st defendant in collusion with the land registry in a skewed, illegal and underhand manner, proceeded to cause sub-division on Parcel 44 to yield fourteen (14) more parcels being parcel Nos. 538 to 551. That the titles in the said parcels were issued on 13th September, 2011 during the subsistence of a court order.

That despite the fact that the said titles were issued in 2011, the same are in contempt of court. The defendants' last filing was the Amended Statement of Defence and Counterclaim filed on 29th April, 2013 and they did not deem fit to include the said amendments. He is advised by his advocates on record whose advise he verily believes to be true that anything done against a court order is a nullity and therefore the said parcels of land are a nullity *ab initio*. Parcel No. 44 therefore still stand.

He is advised by their advocate on record Mr. Moses Chelanga, whose advice he verily believes to be true and learned that the court has inherent jurisdiction to put to an end an illegality committed against express orders of the court and that the court cannot stand helpless and validate contempt of its court orders by allowing the 1st and 2nd defendants' application. The application is brought after the testimony of the 1st and 4th plaintiffs. Allowing the same would therefore have great ramifications and prejudicial to their case as the applications to amend pleadings and substitute parties are being brought mid way. According to the 5th respondent the application is an abuse of court process and not intended to assist the court in reaching at a just determination of the matter before it. Ultimately, he prays that the application be dismissed and allow the matter to proceed.

The 3rd Plaintiff on his part filed a replying affidavit stating that the amendment is sought to validate fraud and disobedience of a court order as there was a valid court order restraining all the defendants by themselves, their agents and/or servants from obtaining title deeds in respect of land No. Kiplombe/Kiplombe Block 10 (Growel) 43 measuring 18.0 acres and/or registration of any dealing in the register for the said parcel of land and/or in any other way interfering with the plaintiffs' use, possession and ownership of the suit land till hearing and determination of the suit.

On the issue of the sickness of the 2nd defendant, the 3rd defendant states that the application does not disclose the legal threshold for guardianship on mental health grounds as stated by the applicants.

In a further affidavit, Mr. Joseph Kimitei Kwambai states that Kiplombe/Kiplombe/Block 10 (Growel)

44, 45 and 310 were properly and legally obtained. Moreover, that the order issued in Hccc No. 23 of 2007 was confined to land reference Number Kiplombe/Kiplombe/Block 10 (Growel) 43 as per the orders issued by Justice Mwera on 16.8.2007. That the issues in this suit revolve around parcels number 43, 44 and the resultant parcels and parcels number 45 and 310 Kiplombe/Kiplombe Block 10 (Growel) Farm. That there was no conspiracy between the defendants, the interested parties and the Land Registrar. The 2nd and 3rd plaintiffs were not parties in Eldoret Hccc No. 23 of 2007 but the issues raised in this case and the said case are identical. The application is therefore merited and brought with utmost good faith and is well conceived. That it is not too late in the day to seek to amend the defence and counterclaim. That when the 2nd defendant suffered a stroke nobody knew that his condition was to go on deteriorating as they expected him to recover but the same did not happen. That the legal threshold for the grant of orders of guardianship in favour of the 2nd defendant has been met. That it is true that when the suit was filed land reference Kiplombe/Kiplombe Block 10 (Growel) 44 was existent. That he has never been served with the court order and that no order issued herein has ever been registered on parcel number Kiplombe/Kiplombe Block 10 (Growel) 44. According to the applicant there is no violation of any court order in this matter by any of the defendants and therefore no impunity in this matter.

He laments that he cannot be held liable for disobeying a court order he was unaware of when the mutations were registered and that he did not conspire with the Land Registrar and Survey Department to have the boundaries to parcels number 44, 45, 309 and 310 redrawn and or moved. No boundaries have been redrawn and or moved.

In his submissions, **Mr. Momanyi, learned counsel for Applicants** argues that the amendment should be allowed in so far as there is no injustice to the respondents and that they can be compensated with costs. The issue of delay is inconsequential so long as there is no injustice according to Mr. Momanyi. Mr. Momanyi submits that there is need for amendment as there was subdivision of the suit parcel of land that led to change of the parcels. He submits that suit No. 44 is non-existent and has given rise to other parcels of land. He argues that the orders issued affected parcel No. 43 and not parcel No. 44. The former parcel belonged to Michael Kiptum Chesire. On the issue of guardians *ad litem*, he argues that it is evident that the 2nd defendant suffered stroke.

**Mr. Isaack Kipkemboi Chesire** appeared in person and argued that the matter is part-heard and that parcel of land No. 44 exists but the same was subdivided to create many parcels. He complains that this matter has taken so long because of the applications.

**Mr. Isaac Kimutai** objects to the application due to the fact that allowing the application means that the existing order would be disobeyed. The order was issued on 29.5.2009 wherein the defendants were restrained from effecting any changes on the land but they went ahead and effected the changes hence changing the status quo.

**Mr. Chelanga learned counsel for the 2nd, 4th and 5th** defendants also opposed the application as it is meant to delay the hearing of the suit. The application is made after the plaintiffs have testified. Moreover that the 1st and 2nd defendants have all along known that the 2nd defendant has been unwell and that the doctor's report is dated May, 2015 and therefore, the application is an afterthought. Moreover, he argues that the application to substitute the 2nd defendant is not merited as the guardian *ad litem* has not been appointed under the Mental Health Act.

On the issue of subdivision, he argues that the parcel no Kiplombe/Kiplombe Block 10 (Growel) 44 was not validly subdivided as there existed a court order and therefore, the resultant subdivided parcels are a nullity. Moreover, to grant the orders sought would amount to condoning disobedience of a court order. In reply, Mr. Momanyi argues *inter-alia* that there is no prejudice likely to be suffered by the plaintiffs in case of amendment.

I have considered the submissions of all counsel and do find that the principles of granting such application for amendment are now well settled. That the said amendment should not prejudice the other party. In this case, I do find that the subdivision were carried on in the year 2011 and therefore, a delay of approximately 4 years is prejudicial to the plaintiffs. The plaintiffs will suffer an injustice as the subject

matter is being changed despite the existence of court order. Furthermore, this court finds that allowing the amendment will be condoning disobedience of a court order which was very unequivocal.

Most importantly the doctrine of Lis pendens applies in this case as it applied in the case of FREDRICK JOSES KINYUA & ANOTHER VS E. N. BATED, NAIROBI CIVIL CASE NO. 4819 OF 1989 in which Justice G. S. Pall quoted with approval a passage in Sir H. S. Gaur's Transfer of Property Act, 7th Ed; pg 579:

*“Every man is presumed to be attentive with what passes in the courts of justice of the state or sovereignty where he resides. Therefore purchase made of 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.”*

The *Blacks Law Dictionary, 9th Edition*, has defined *lis pendens* as the jurisdiction, power or control acquired by a court over property while a legal action is pending. This common law principle, as defined above, is incorporated under section 52 of the Indian Transfer of Property, 1882 (now repealed) This section provides as follows:

*“During the active prosecution in any court having authority in British India by the Governor General in Council, of a contentious suit or proceeding 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 proceeding 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 and on such terms as it may impose.”*

Section 52 of the ITPA 1882 prohibits the transfer of a property to a third party during the pendency of a suit. The converse of this provision therefore is that where a party to a suit transfers the suit property to a third party, such a transfer shall be null and void for being contra statute. Such a transfer cannot affect the rights of a Decree holder. In Manwji vs U.S. International University and Another (1976-80) KLR 229 Justice Madan, while addressing the purpose of the principle of *lis pendens* adopted the finding in Bellamy vs Sabine (1857) 1 De J 566, 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 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 Defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceedings.”*

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...”*

The doctrine of *lis pendens* has also been discussed in the *Treaties by Mulla & Gour on the Indian Transfer of Property Act*. In *Mulla, 5th Edition, page 245 and Gour, 7th edition, Vol.1, Page 579*, the two authors state as follows:

*“Every man is presumed to be attentive to what passes to the courts of justice of the state or sovereignty where he resides. Therefore, purchase made of property actually in litigation, pendente lite, for a valuable consideration, and without any express or implied notice in point of fact affects the purchase in the same manner as if he had such notice, and he will be accordingly be bound, by*

the judgment or decree in the suit.

At page 241 of Mulla's Transfer of Property Act, 6th Edition, the learned author states as follows:

"The effect of the maxim is not to annul the conveyance but only to render it subservient to the rights of the parties subject to litigation."

Lastly, the law on management of an estate of a mentally ill person is enshrined in the Mental Health Act. Orders for the appointment of a person to manage the estate of any person suffering from a mental disorder are provided for under Section 26 of the Mental Health Act, which is drawn as follows :-

**S. 26 Order for custody, management and guardianship**

**(1) The court may make orders—  
(a) or the management of the estate of any person suffering from mental disorder; and  
(b) for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person.**

**(2) Where there is no known relative or other suitable person, the court may order that the Public Trustee be appointed manager of the estate and guardian of any such person.  
(3) Whereupon inquiry it is found that the person to whom the inquiry relates is suffering from mental disorder to such an extent as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency, the court may make such orders as it may think fit for the management of the estate of such person, including proper provision for his maintenance and for the maintenance of such members of his family as are dependent upon him for maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder.**

The import of this section is that the order for guardianship ad litem is to be made by "the court" which is defined at Section 2, as the High Court. It follows that orders for the management of any property of a mentally disabled person can only be made by the High Court. This court finds that it has not been established that Matilda Rose Sawe is the guardian *ad litem* of the estate of John Malan Sawe hence the application for substitution is not well founded. Ultimately, the application is dismissed with costs.

**DATED AND DELIVERED AT ELDORET THIS 29TH DAY OF APRIL, 2016.**

**ANTONY OMBWAYO**

**JUDGE**