



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

HCCC NO. 64 OF 2007

WILLIAM OLE NABAALA.....PLAINTIFF

VERSUS

1. ATTORNEY GENERA

2. SAMMY NJUGUNA

3. MWANATUMU ATHUMAN ARTHUR

4. RHODA MUGURE NGANGA

5. GRACE NYOKABI GITHOME

6. THE REGISTRAR OF TITLES.....DEFENDANTS

AND

1. ROBERT GATHUA

2. JASON KATHURIMA RUKARIA

3. IBRAHIM M. MOHAMED

4. HENRY GATHUKA CHEWE.....APPLICANTS/PROPOSED DEFENDANTS

R U L I N G

Introduction

1. What is before me is the Application by the proposed Defendants/Applicants dated 18th March 2015 seeking for the following orders:

(a) The Applicants are joined in this suit as defendants with authority to participate in the proceedings and consequential directions on further hearing and necessary amendments of the pleadings as may be necessary, are given [section 3A and Order 1 Rule 10].

(b) Further proceedings herein are stayed in the interests of justice and to prevent abuse of court process, pending the hearing and determination of the other prayers in this application, and/or intended appeal to be preferred to the Court of Appeal by the aggrieved third parties, so as to maintain the status quo ante with regard to the suit property and prevent pyrrhic success on the part of either party to these proceedings [Herman Singh V Mistri (1971) EA122 & Motokov V Auto Garage (1970) EA 249 at 253]].

(c) The court is pleased to set aside or vary the Judgment of court dated 6.3.2015 so as the case is reheard in the presence of the new/proposed defendants.

The Proposed Defendants'/Applicants' case:

2. According to the Affidavit of the 1st Applicant, plot number 1315/III/MN is a sub-division of plot number 592 of Section III Mainland North (the suit property); that he was not aware of this suit until when he was informed that a Judgment had been delivered by this court and that the Judgment of this court nullifying all titles was pronounced without him being heard.
3. According to the 1st Applicant, the Judgment herein nullifies a title which he has litigated over in a separate suit being Malindi ELC No. 158 of 2013.
4. It is the deposition of the 1st Applicant that he is the owner of L.R. NO. 1315/III/MN; that he was not a party to the proceedings herein; that he acquired his interest by purchase from Grace Nyokabi, the 5th Defendant and that the 5th Defendant never informed him of the existence of the suit.
5. According to the 1st Applicant, this court pronounced a Judgment in his favour in ELC No. 158 of 2013 and that there are contradictory proceedings and Judgments in respect to the same land.
6. The 1st Applicant finally deponed that the proceedings herein should be set aside so that he can be heard.
7. The 2nd proposed Defendant/Applicant deponed that he bought a twelve (12) roomed house "without land" which was erected on the suit land from Patrick Charo Kote (deceased); that the sale of the house was with the concurrence of the 3rd Defendant as the owner of the land and that the house he bought was abutting the Plaintiff's house.
8. The 2nd Applicant deponed that while in the process of evicting tenants from the house, the Plaintiff moved in at night with hired goons and demolished the entire house and that the DPP has recommended for the prosecution of the Plaintiff.
9. It is the 2nd Applicant's case that the Plaintiff abused the process of the court by demolishing his house while aware that he had acquired the same from a ground tenant who had authority to build the house from the 3rd Defendant and Juma Omar, the original owners of the suit land.
10. The 3rd Applicant deponed that he purchased parcel of land number 592/III/MN from the 3rd Defendant in 2013; that the vendor did not inform him about the pendency of this suit and that the proceedings herein should be set aside so that he can file a defence and ventilate his case.
11. The 4th proposed Defendant/Applicant deponed that plot number 1350 is a sub-division of plot number 592/III/MN; that he is the registered proprietor of plot number 1350/III/MN and has charged it to Kenya Women Micro Finance Bank Ltd and that he acquired the land from his mother, Rhoda Mugure Ngenya, the 4th Defendant, in 2000 but the transfer was not effected until 2009.
12. It is the 4th Applicant's deposition that this case has been heard and determined without him being heard and yet the Judgment has effectively cancelled his title and that it would appear that his mother dealt with the suit property in ignorance of the suit.
13. According to the 4th Applicant, his mother never appointed an advocate by the name Keviti advocate who purportedly appeared for the 2nd and 5th Defendants at the hearing and that nobody appeared to have brought to the attention of the court the fact that the 2nd Defendant was dead.

The Plaintiffs'/Respondents' case:

14. In his Replying Affidavit, the Plaintiff/Respondent deponed that Malindi ELC No. 158 of 2013 was not a dispute over the validity of title for plot number MN/III/1351; that plot MN/III/1351 belongs to Grace Nyokabi Githome and not the 1st Applicant and that Grace Nyokabi Githome participated in these proceedings.
15. According to the Plaintiff, the 1st Applicant/proposed Defendant is deemed to have been aware of the existence of this case under the doctrine of *lis pendense* when he purported to purchase the land.
16. It is the Plaintiff's deposition that in any event, LR. NO. 1351/III/MN is situated on portion number 592/III/MN that is owned by the third Defendant.
17. It is the Plaintiff's case that the court is *functus officio* and the Applicants' remedy is to file a suit against the 5th Defendant who the court has held did not have a good title to pass.
18. As to the allegation raised by the 2nd Applicant, the Plaintiff has deponed that the 2nd Applicant does not have any interest in plot number 592/III/MN; that the house he purports to have purchased does not exist and that the consent of both parties was required if he intended to build a house on the suit property.
19. As for the 3rd Applicant, the Plaintiff deponed that there was an injunction restricting any dealings in the suit property; that the 3rd Applicant could not register the purported transfer in his favour and that the Applicant does not have proprietary rights in plot number 592/III/MN which is owned by the Plaintiff and the 3rd Defendant.
20. In response to the depositions of the 4th Applicant, the Plaintiff deponed that the 4th Applicant's mother, who is the 4th Defendant, transferred to him plot number 1350 (original 592/4) in 2009 contrary to a court order for status quo and the doctrine of *lis pendense*; that his mother participated in the proceedings and that if he has any claim, he should direct it to the 3rd and 4th Defendants who aptly participated in the proceedings.

Submissions:

21. The advocate of the proposed Defendants/Applicants submitted that all the Applicants have an interest in the suit land; that they have been injuriously affected by the Judgment of the court delivered in March, 2015 and that there were previous proceedings between the Plaintiff and the 3rd Defendant in which partition of the suit land was in issue and which was determined.
22. Counsel submitted that the Applicants have titles which were created from the suit land and have been deprived of their legal rights and ownership without a hearing or prompt compensation.
23. Counsel submitted that the 2nd Defendant died on 23rd August 2007 but the Plaintiff was not amended to formally join the legal representatives of the Estate of the deceased.
24. Counsel submitted that on 22nd September 2014, the Plaintiff's counsel closed the cases for the 4th and 5th Defendants; that it is unclear if the 4th and 5th Defendant's advocate were involved in the taking of a date for defence hearing and that the Defence hearing proceeded in the absence of the 4th and 5th Defendants.
25. The proposed Defendants' counsel submitted that in the interests of justice, and to prevent abuse of court process in honour of the age old rule of natural justice *audi alteram partem*, the court should admit the applicants either as Defendants or as necessary parties.
26. The Plaintiff's/Respondent's advocate submitted that in the instant case, proceedings have already been concluded and the court is *functus officio*; that the power to join a party to the proceedings has been extinguished and that a party can only be added or struck out from the proceedings at any time before trial.
27. The Plaintiff's/Respondent's counsel submitted that all transactions that are sought to be enforced by the Applicants' were done during the pendency of this suit; that all those transactions are subject to the Judgment and decree herein under the doctrine of *lis pendens*; that it will not serve any purpose to join the proposed Defendants who dealt with the suit property *pendete lite* and that the Applicants are bound by the decree of this court.

Analysis and findings:

28. This suit was filed in the High Court in Mombasa in the year 2001.
29. In the amended Plaintiff dated 16th September 2004, the Plaintiff averred that the late Juma Omar Abdalla, together with the 3rd Defendant, were the joint proprietors in equal shares of plot number 592 Section III/MN situated at Mtwapa, Kilifi County (the suit property).
30. It was the Plaintiff's averment that he acquired the suit property through succession from Juma Omar Abdalla who was a joint proprietor with and a cousin of the 3rd Defendant and that on or about 15th July 1988 the 2nd Defendant fenced the land belonging to the late Juma Omar Abdalla and Mwanatuma Ali Ndaro.
31. It was the Plaintiff's averment that the 3rd Defendant was at all times entitled to only half a share of the suit property.
32. The Plaintiff was seeking for a declaration that the subdivision of the suit property carried out at the behest of the 3rd Defendant is null and void and that the suit property should be sub-divided equally and two certificates of titles issued to him and the 3rd Defendant respectively.
33. According to the 3rd Defendant's Defence, the portion of land that she sold to the 2nd, 4th and 5th Defendants was at the time of the sale her property having acquired the same lawfully when the suit property was subdivided into two equal portions with the agreement of the late Juma.
34. In my Judgment of 6th March 2015 I found that the 3rd Defendant formally sold and transferred the plots in dispute to the 2nd, 4th and 5th Defendants after the death of Mr. Juma who was entitled to half a share of the entire land. The plots which the 3rd Defendant sold after the death of Mr. Juma to the 2nd, 4th and 5th Defendants are LR numbers 592/3, 592/4 and 592/5. The court allowed the Plaintiff's suit and declared the sub-division of plot number 592/III/MN null and void. This court also nullified title documents that arose out of the subdivision of plot number 592/III/MN.
35. While allowing the Plaintiff's Plaintiff, this court found as follows:

“Having arrived at the conclusion that the suit property ought to have been shared equally as per the Government Surveyor's sketch plan, I find and hold that the 3rd Defendant did not have a good title to pass to the 2nd, 4th and 5th Defendants or at all before the subdivision of the land into two equal portions could be done and registered.

Considering that the suit property was already registered in the names of the 3rd Defendant and the late Mr. Juma in 1986, the 2nd, 4th and 5th Defendants ought not to have purchased the land from the 3rd Defendant before the dispute between the two was resolved.”

36. The Applicants/proposed Defendants now want to be enjoined in these proceedings and thereafter have the Judgment of this court set aside on the ground that they have an interest in the suit land; that they have been injuriously affected by the Judgment of this court and that the Plaintiff did not make enough disclosure.
37. The first issue that I am required to determine is whether one can be enjoined in a suit after the entry of Judgment.
38. The reading of Order 1 Rule 14 of the Civil Procedure Rules as read together with Order 1 Rule 10 shows that a party can only be enjoined in a suit before trial.
39. But what happens if a suit proceeds in the name of a wrong party, or in the absence of a necessary party and a Judgment is entered which is prejudicial to a party who was not sued?
40. Where a party who should have been sued at the inception of a suit is not sued, with the consequence that his right to be heard is infringed upon, the court, under its inherent powers, should allow such a party in the proceedings by setting aside its Judgment and then begin the matter *de novo*.
41. The court cannot fold its hands in a situation where the Plaintiff, either intentionally or inadvertently fails to sue a party who is likely to be affected by the Judgment of the court and then plead the provisions of Order 1 Rule 14 of the Civil Procedure Rules which require the joinder of parties to be made to proceedings before trial.
42. The next issue that I should determine, in view of my findings above, is whether the Plaintiff

- should have sued the proposed four Defendants/Applicants.
43. When the Plaintiff filed this suit in the year 2001, he was aware that by 14th July 1994, the 3rd Defendant had subdivided the suit property into plot numbers 592/2 (CR 32410), 592/3 (CR 32411), 592/4 (CR 43412), 592/5 (CR 32413) and 592/6 (CR 324/4) (**see paragraph 9 of the Plaintiff**).
44. The Plaintiff's suit principally challenged the subdivision of the suit land by the 3rd Defendant because the Plaintiff was entitled to half a share of plot number 592.
45. In the Plaintiff, the Plaintiff averred that despite being the legal and lawful owner of L.R 592/111/MN, the 3rd Defendant knowingly sold some of the land to the 2nd, 4th and 5th Defendants.
46. According to the Affidavit of the 1st proposed Defendant/Applicant, he acquired his interest in plot number 1351/III/MN (Original No. 592/5) by purchase from Grace Nyokabi, the 5th Defendant.
47. The 1st Applicant did not annex a copy of the agreement that he entered into with the 5th Defendant to enable this court ascertain whether the purchase of the suit property by the 1st Applicant was prior to the filing of this suit or after the suit was filed.
48. The evidence that was placed before this court shows that as at 11th October, 2000, plot number 1351 (original 592/5) Section III/MN was registered in the name of the 5th Defendant.
49. Indeed the Plaintiff produced as PEXB 13 the official search for plot number 1351. It is on the basis of that search that the Plaintiff sued the 5th Defendant and not the 1st Applicant/proposed Defendant.
50. The 5th Defendant filed a Defence on 14th February, 2001 through the firm of Gikandi & Co. Advocates and admitted having purchased LR. 1351 from the 3rd Defendant. The 5th Defendant never alluded in the Defence that he had sold L.R No. 1351 to the 1st Applicant.
51. If the 1st Applicant purchased the suit property *pendente lite*, then his recourse is as against the 5th Defendant who participated in these proceedings by filing a Defence.
52. In the case of **Carol Silcock Vs Kassim Shariff Mohamed, Malindi ELC No. 55 of 2011**, this court discussed at length the applicability of the doctrine of *lis pendens*.
53. This court quoted the case of **Belleny Vs Sabine (1857) I Dej 566, 584 where Turner L. J** held as follows:

“ Where a litigation is pending between the Plaintiff and the 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 alienating pending the suit whether such alienees had or had no notice of proceedings. If that were not so, there could be no certainty that the proceedings would ever end.....

54. In the **Carol Silcock** case (supra), I held that the doctrine of *lis pendens*, which is captured at Section 52 of the Transfer of Property Act (repealed) is in tandem with the provisions of Sections 1A and 1B of the Civil Procedure Act because it provides an avenue for the final determination of the matters before the court and in the general interest of public policy.
55. Consequently, the Judgment of this court binds the 1st Applicant having derived his title from a party who was litigating in this matter. The Plaintiff was not under any obligation to sue him or even enjoin him in the suit because he was not the registered proprietor of plot number 1351 (original 592/5) as at the time the suit was filed.
56. The 5th Defendant was represented in this matter, and should have informed the 1st Applicant about the pendency of the suit and if she failed to do so, the Plaintiff cannot be blamed for failing to inform him or to enjoin him in the suit.
57. The 1st Applicant has also deponed that there are contradictory proceedings and Judgments in respect to plot number 1351 (original number 592/5).
58. I have perused the Judgment in Malindi ELC number 158 of 2013 in which the 1st Applicant sued Mohamed S. Thambuli and 3 others.

59. In that suit, the 1st Applicant herein sued the Defendants and claimed that they have trespassed on plot number 1351. The Plaintiff and the Defendants herein were not parties to that suit.
60. In its Judgment, the court found that indeed the Defendants had trespassed on MN/III/1351. The issue of proprietorship of MN/III/1351 between the Plaintiff and the Defendants herein and the 1st Applicant never arose in ELC NO. 158 of 2013. There are therefore no contradictory proceedings and Judgments as deponed by the 1st Applicant.
61. Considering that this court found as a fact that the 3rd Defendant did not have a good title to pass to the 5th Defendant, and in view of the fact that the 1st Applicant acquired interest in the suit property after the filing of this suit in the year 2001, I find and hold that the 1st Applicant can neither be joined in this suit at this stage nor set aside the proceedings and Judgment of this court.
62. The 2nd Applicant deponed that he bought a twelve (12) roomed house “without land” which was erected on the suit land from one Patrick Charo Kote (deceased).
63. According to the 2nd Applicant, he purchased the “house without land” with the concurrence of the 3rd Defendant and the late Juma Omar.
64. The agreement between the 2nd Applicant and the late Patrick Kote Charo is dated 16th January 2004. By this time, the Plaintiff had filed this suit against the 3rd Defendant. The transaction between the 2nd Applicant and the late Patrick Kote Charo was therefore *pendente lite*. Having purchased a house without land in 2004, the Plaintiff cannot be blamed for having not sued him. The doctrine of *lis pendense* which I have discussed above, also applies in respect to the Agreement that the 2nd Applicant entered into with the 3rd Defendant for the sale of 1 ½ acres of the suit property on 7th April 2011.
65. If the Plaintiff has demolished the house that the 2nd Applicant purchased as claimed by the 2nd Applicant, he has the option of filing a separate suit for damages. He cannot claim for any portion of the suit land from the Plaintiff because he does not have a legal interest in the suit property. His interest is limited to “a house without land”.
66. Indeed, the 2nd Applicant has no standing in law to put up a house on the suit property with or without the approved building plan because he does not have land to put up the said house in the first place. The 2nd Applicant's recourse, as I have stated, lies in damages as against the Plaintiff or the 3rd Defendant. The Judgment of this court has nothing to do with his interests as a purchaser of a house without land.
67. The 3rd Applicant deponed that he purchased the suit property sometimes in 2013. The 3rd Applicant annexed on his Affidavit an undated and an unregistered Transfer for L. R. No. 592/III/MN.
68. Having admitted that he bought the suit property from the 3rd Defendant in the year 2013, the 3rd Applicant can only file a claim as against the said Defendant having sold the suit property during the pendency of this suit.
69. Considering that the 3rd Defendant is entitled to half a share of the suit property, the 3rd Defendant can still enter into an agreement with the 3rd Applicant and sell to him a portion of her land once the Judgment of this court is perfected.
70. The 4th Applicant claims is that he is the registered proprietor of plot number 1350 (original number 592/4) having acquired the land from his mother, the 4th Defendant in 2000, although the transfer was not effected in his favour until 2009.
71. The 4th Applicant has annexed on his Affidavit a copy of the Certificate of Title for plot number 1350 which shows that the property was registered in his favour on 9th September 2009. He then charged it to Kenya Women Micro Finance Bank limited on 20th January 2015.
72. The transactions of 9th September 2009 and 20th January 2015 are of no consequence considering that they were done *pendente lite*.
73. Considering that the 4th Applicant's mother was the 4th Defendant and was represented by counsel, the decision of this court to the effect that the 3rd Defendant had no title to pass to the 4th Defendant is binding on the 4th Applicant.
74. Again, the 4th Applicant's cause of action in this matter is as against the 3rd Defendant who sold to

- his mother the suit property. Having found that the 3rd Defendant did not have a good title to pass to the 2nd, 4th and 5th Defendants, the 4th Applicant should await the division of the suit property into two as ordered by the court and then lay a claim, if at all, on the 2nd Defendant's share.
75. The totality of the above is that the four Applicants have not shown by way of evidence that they were necessary parties when this suit was filed in the year 2001 by the Plaintiff. They all purported to acquire interest in the suit property *pendente lite*. The four Applicants are all caught up by the doctrine of *lis pendens*.
76. The issue as to whether the legal administrators of the Estate of the 2nd Defendant should have been joined in these proceedings can only be raised by the administrators of the Estate of the 2nd Defendant and not the Applicants. Whether it was procedural for the Plaintiff's advocate to close the case for the 4th and 5th Defendants when they failed to defend the suit can also not be raised by the Applicants who were not parties to this suit.
77. For those reasons, I dismiss the Application dated 18th March 2015 with costs.

Dated and delivered in Malindi this 9th day of **October** 2015.

O. A. Angote

Judge