



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 259 OF 2012

OLYMPIC COMPANY TRADING LTD PLAINTIFF

VERSUS

SAID MOHAMED.....DEFENDANT

AND

ALI SAID OMAR BASABRA (suing as the administrator

of the estate of the late Said Omar

Mohamed Basabra).....PLAINTIFF/APPLICANT

VERSUS

OLYMPIC COMPANY TRADING LTD.....1ST DEFENDANT/RESPONDENT

SOHAIL DEVELOPMENT LTD.....INTENDED 2ND DEFENDANT/RESPONDENT

THE CHAIRMAN NATIONAL LAND

COMMISSION.....INTENDED 3RD DEFENDANT/RESPONDENT

THE LAND REGISTRAR..... INTENDED 4TH DEFENDANT/RESPONDENT

RULING

The Notice of motion dated 10th September 2014 and filed by the Plaintiff in the Counterclaim under Order 1 Rules 2 and 10(1) and (2), Order 8 Rule 3, Order 31, Order 40 Rules 1(a),2(1) and 4(1) and and Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and Section 26 of the Land Registration Act NO. 3 OF 2012 is the subject of this ruling.

The applicant seeks a temporary injunction to restrain the 2nd intended Defendant/Respondents from trespassing, encroaching, constructing, transferring or in any other manner interfering with the property known as LR No. 2/206(original number 2/88/1) Kilimani, illegally and unlawfully converted and now

known as **Nairobi Block 17/318** (herein after referred to as the suit property) and prohibiting the 3rd and 4th Respondents from registering any transfer and or alienation of the suit property pending the hearing and determination of the suit. The applicant also seeks leave to join the intended 2nd, 3rd and 4th Respondents as respective Defendants to the counterclaim as well as leave to amend the defence and counterclaim accordingly as well as an order directing the 3rd and 4th Intended Respondents to revoke and cancel the conversion of title in respect to the suit property.

The application is premised on grounds that the Plaintiff has illegally and/or unlawfully sold and transferred the suit property after illegally converting the same during the pendency of the suit. The applicant states that the conversion, sale and transfer of the suit property was fraudulent and illegal and was calculated to defraud the applicant of the suit property that rightfully belongs to the estate of the late **Said Omar Mohammed Basabra**.

The application is supported by an affidavit sworn by the Applicant on 10th September 2013 as well as a supplementary affidavit sworn by his Counsel, **Mr. Mohamed Munir Chaudhri** on 19th December 2013. The Applicant's case is that he is the executor of the estate of the late **Said Omar Mohamed Basabra** who passed away on 16th April 1992 as evidence by a death certificate dated 8th June 1994 and certificate of confirmation of grant dated 8th April 2008. The applicant's case is that the deceased purchased the suit property from a **Mr. Mohamed Jama Noor** on 12th June 1989 as evidenced by an indenture of the same date. It is alleged that without any notice, court process or order, the Plaintiff descended on the suit property on 18th May 2012 and commenced demolition of buildings and structures on the suit property while at the same time effecting the eviction of the applicant and the applicant's tenants who were at the applicant and the time in occupation of the suit property.

The applicant avers that during the pendency of the instant suit and despite placing a caveat through the print media in regard to the suit property informing the public of the present pending suit, the Plaintiff in contempt of the court proceedings illegally and unlawfully converted the suit property from freehold under the repealed Government Lands Act leasehold under the now repealed Registered Land Act. A copy of a lease dated 16/10/2012 and a transfer of lease dated 26th March 2013 annexed to the Applicant's affidavit and collectively marked "**ASOB9**" attest to the fact of the conversion.

Further, the applicant states that the Plaintiff fraudulently transferred the suit property to the intended 2nd Defendant/Respondent in the counterclaim during the pendency of this suit as illustrated by a copy of a search certificate dated 27th August 2013 annexed and marked "**ASOB10**". The Applicant contends the 2nd intended Defendant having regard to the facts and the attendant circumstances cannot be held to have been an innocent purchaser for value without notice. The Applicant avers that he has a prima facie case with an overwhelming chance of success being the registered owner of **L.R No. 2/206 Kilimani** the original parcel of land that the plaintiff unlawfully and illegally caused to be converted to registration under the Registered Land Act and further, that he stands to suffer irreparable loss which an award of damages cannot sufficiently compensate.

The application was opposed by the Plaintiff through a replying affidavit sworn on 24th September 2013 by **Eddy Peter N. Kimemia**, a director of the Plaintiff. The Plaintiff states that the Defendant was not the registered owner of the suit property as alleged. The Plaintiff contends that the Applicant was not issued with letters of administration or certificate of confirmation of grant and further, that the Applicant had not been enjoined or substituted as a party to this suit and lacked the locus to institute, maintain and depone to the pleadings herein.

It is the Plaintiff's case that the Defendant has not established a prima facie case since no official search was produced to prove ownership of the suit property. The Plaintiff avers that it has been in possession of the suit property until the Defendant trespassed on the same. According to the Plaintiff, the Defendant has no right to place a caveat on the suit property and further, that any restrictions on the suit property can only be lodged at the lands registry and not on the local daily as alleged. Lastly, the Plaintiff averred that the joinder of the intended 2nd, 3rd and 4th Defendants/Respondents is intended to obstruct the cause of

justice.

The 2nd intended Defendant filed a replying affidavit sworn by her director, **Nadeem Iqbal Ahmed** on 24th November 2013. Its case is that towards the end of year 2012, it was shown a vacant plot known and described as **Nairobi/Block17/318** which according to an attached search certificate dated 18th February 2013 was owned by the 1st Defendant. The 2nd intended Defendant has averred that she entered into a sale agreement with the directors of the 1st Defendant to purchase the property at the price of **Kshs 130,000,000/-**, and a copy of the agreement, cash transfer slip for the purchase price as well as a stamp duty pay in slip have been annexed as exhibits to the 2nd intended Defendant's replying affidavit. The intended 2nd Defendant has further availed copies of transfer of lease in her name dated 26th March 2013 and a certificate of lease in her favour over Title number **Nairobi/Block17/318** dated 5th April 2013.

It is the intended 2nd Defendant's case that during the period of purchase, it was not aware or informed of any ongoing litigation over the property whose outcome could materially affect her interest as a bonafide purchaser for value. The intended 2nd Defendant has annexed copies of requisite approvals and consents for development obtained pursuant to issuance of the certificate of lease in her name, avers that she contracted **Mehlam Construction Ltd** to construct 36 apartments at a project cost of **Kshs 346,000,000.00** and has annexed a copy of the construction agreement dated 4th July 2013 together with approved building plans as exhibits. The 2nd intended Defendant further states that as at 19th September 2013, she had incurred costs totaling **Kshs 186,782,375.00** and is apprehensive that in the event of the applicant failing in his counterclaim, he will not be able to compensate her for the substantial damage she continues to incur.

According to the 2nd intended Defendant, the subject matter of this suit is LR No. 2/206 over which injunctive orders were previously issued restraining the Applicant from interfering with the Plaintiff's (1st Defendant in the counterclaim) possession over the said property. It is the 2nd intended Defendant's contention that the doctrine of *pedente lite* is inapplicable to his proprietorship interest since her title has never been subject of any suit. Further, the 2nd intended Defendant has averred that the property having been converted from Government Lands Act to the Registered Land Act, the original title ceased to exist and cannot form a basis of claim save to a claim under section 26(1)(a) and (b) of the Land Registration Act.

The 4th Defendant filed a replying affidavit sworn by **Edwin M. Wafula** on 16th December 2013 who stated that he was a Registrar of Titles in the Ministry of Lands, Housing and Urban Development under the Chief Land Registrar. The 4th Defendant has avers that the records at the Lands Office indicate that at all material times, the suit property known as **LR No. 2/206**(original number 2/88/1) which was subsequently converted to **Nairobi Block 17/318** is and has always been registered in the names of **Sohail Development Ltd.**

It is the 4th Defendant's contention that **Sohail Development Ltd** purchased the suit property from Olympic Trading Company Ltd who was the lessee from the government for a term of 99 years with effect from 1st December 2011 with a revisable annual rent of Kshs 26,000/- with effect from 1st October 2011 as per an annexed copy of lease dated 10th October 2012. The 4th Defendant has exhibited a transfer in favour of **Sohail Development Ltd** dated 26th March 2013 and avers that the defunct Commissioner of Lands undertook the transfer in good faith without knowledge of the alleged fraud. According to the 4th Defendant, the application does not disclose a violation of the applicant's proprietary rights and should therefore be dismissed with costs.

The application was canvassed by way of written submissions and the applicant in submissions dated 19th December 2013 reiterated the facts of the case and argued that since the suit property known as **LR No. 2/206**(original number 2/88/1) was purchased by the deceased Defendant on 12th June 1989, his estate has never alienated, sold and/or transferred the property and still holds title to the same. It was submitted

that during the pendency of this suit, the 1st respondent in contempt of the court proceedings relating to the suit property, illegally and unlawfully converted the suit parcel known as LR No. 2/206(original number 2/88/1) from freehold under the repealed Government Lands Act to leasehold to become **LR No. Nairobi/Block 17/318** registered under the Registered Land Act, Cap 300 laws of Kenya (repealed) Counsel for the applicant stated that the 1st Respondent further proceeded to sell the suit property to the 2nd intended Defendant while the suit was still pending.

It is the Applicant's submission that since the illegal conversion and transfer took place during the pendency of this suit and relates to the subject matter of this suit, the doctrine of *lis pendens* is applicable. Counsel submitted that since the respondents have not substantially disputed the facts save for stating that the 2nd intended Defendant is an innocent purchaser for value without notice, the Applicant has a good case with overwhelming chances of success. Counsel relied on the case of **Mrao Ltd -vs- First American Bank Ltd & 2 others (2003)KLR 123** as cited in **Samuel Ongori Ongori -vs- Yunivalis Nyankeboka Ongori & 4 others** to support his assertion that on the basis of the material presented to the court and the circumstances of the matter a prima facie case had been made out by the applicant to require the Respondent to be called upon to offer an explanation and/or rebuttal of the evidence.

While stating that the 1st Respondent demolished commercial buildings belonging to the deceased's estate and evicted tenants there from resulting in losses of approximately Kshs 200,000,000.00, the applicant stated that he has now been sued as the 1st Defendant in **HC ELC No. 464 of 2012 Defined Property Management Ltd & 11 others -vs- Hassan Said Omar & Olympic Trading Company Ltd**. It is the Applicant's case that the deceased's legal estate has been denied the right to quiet possession and to carry on developments on the suit property thereby infringing on their right to property which cannot be sufficiently compensated by monetary damages.

Counsel contended that the conversion and transfer of the suit property to the 2nd Respondent might render this suit nugatory and any eventual decree ineffective, of no use and vain. The Applicant argued that a mandatory injunction can be granted under the inherent jurisdiction of the court to preserve the status quo that existed before the wrongful acts of the respondents.

Counsel submitted that it was necessary to enjoin the 2nd, 3rd and 4th Defendants, since the 1st Respondent converted the suit property before fraudulently transferring the same to the 2nd Respondent with the sanction of the 3rd and 4th Respondents. Counsel argued that the joinder of the 2nd, 3rd and 4th Respondents is necessary for the conclusive determination of issues. Reliance was placed on the case of **Alice Njeri Mwangi -vs- The Co-operative Bank of Kenya HCCC No. 507 of 2012, Carol Silcock -vs- Kassim Sharrif Mohamed ELC No. 55 of 2011, Abdalla Omar Nabham -vs- The executor of the estate of Saas Bin Abdalla Bin Aboud & anor Malindi HCCC No. 63 of 2013** for the proposition that the principle of *lis pendens* is in tandem with the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules which provides that the court may at any stage order that the name of any person whose presence before the court is necessary for the adjudication of all questions in the suit should be added.

The intended 2nd Defendant filed submissions dated 17th January 2014 where it was argued that the applicant's supplementary affidavit sworn by **Mohammed Munir Chaudhir** on 19th December 2013 was inadmissible and liable for striking out for being contrary to Order 19 Rule 3(1) of the Civil Procedure Rules. Counsel submitted that the affidavit constituted hearsay and dealt with contested facts and reliance was placed on the cases of **Momanyi -vs- Hatimy & anor(2003)2EA 600, Gerphas Alphonse Odhiambo -vs- Felix Adiego(2006)eKLR, Hurry Njubi Ndekei -vs- Ruth Wanjiku Kamau (2005)eKLR** and **Kenya Horticultural Exporters(1877)ltd -vs- Pape(t/a Osirua Estate) (1986)KLR705** where the gist of the finding in the decisions was that an affidavit should not be sworn by an advocate on behalf of a client.

It was submitted that the application is incurably defective since the plaint and the counterclaim are restricted to LR No. 2/206 whose ownership the Plaintiff claims from 20th June 1989 till 18th May 2012 while the intended 2nd Defendant was registered owner of title **Nairobi/Block 17/318** on 5th April 2013.

Counsel argued that the Applicant's title had been extinguished at the time the intended 2nd Defendant obtained her title and therefore, that the only issue before the court was in respect to **LR No. 2/2006**. It was contended that there was no suit in respect of the property held by the intended 2nd Defendant and therefore, that a prima facie case had not been established.

While relying on section 27 of the repealed Registered Land Act, Counsel submitted that absolute ownership was conferred upon the 2nd intended Defendant upon registration. Counsel averred that the 2nd intended Defendant's title over **Nairobi/Block 17/318** enjoys the interests conferred upon registration under section 24 of the Land Registration Act. Further, it was submitted on behalf of the 2nd intended Defendant that pursuant to section 105(1)(c)(ii) and (iii) of the Land Registration Act, title previously issued under the Government Lands Act was inferior to the title held under the Registered Land Act which was held by the intended 2nd Defendant.

Reliance was placed on section 39(1) of the Registered Land Act as well as the case of **Pashito Holdings & anor -vs- Ndung'u & 2 others KLR(E & L)1, 295** and **Attorney Genral -vs- Kenya Commercial Bank Ltd & 3 others (2004)eKLR** for the proposition that the intended 2nd Defendant who had no knowledge of the alleged prior registration was required to conduct no more than a search in the register under the Registered Land Act.

While submitting that the provisions of the Indian Transfer of Property Act and the principle of *lis pendens* were irrelevant, Counsel referred the court to section 26(1) of the Land Registration Act and the cases of **Kampala Bottlets Ltd -vs- Damanico(u) Ltd (1990-1994)EA 141** and **Abiero -vs- Thabiti Finance Company Ltd & anor(2001)KLR 496** for the proposition that the intended 2nd Defendant's title was absolute and indefeasible since there was no proof of fraud against the said Defendant.

In further submission, Counsel reiterated that the title held by the intended 2nd Defendant is not the same title which is subject to the ongoing litigation and therefore, that the invocation of the doctrine of *pendente lite* is irrelevant. In respect to irreparable damage, it was contended that the injunction sought was not available since the only claim the applicant has against the intended 2nd Defendant, if any, is for damages. Counsel relied on the case of **John Wambugu Njoroge -vs- Kenya Commercial Ltd Kisumu CA No. 179 of 1992** as cited in **Abiero -vs- Thabiti Finance Company Ltd & anor (2001)KLR 496** for the proposition that where a party has been wrongfully deprived of his land whose title has been converted to an innocent third party with full proprietary rights, the court can only award damages since the party deprived cannot have a return of his land.

As to where the balance of convenience tilts, it was submitted that the intended 2nd Defendant was in occupation of the suit property carrying on developments where sums amounting to **Kshs 186,782,375/-** have already been expended. Further, it was contended that the intended 2nd Defendant continues to suffer huge losses on interest on the cost of monies committed to the project initially budgeted at **Kshs 358,600,000/-**. Counsel argued that the consequences of an injunction would be to halt the construction despite salaries that will have to be paid to employees as well as damages arising out of the contractual obligations with the contractor.

The intended 2nd Defendant further submitted that delay in continuation of the project arising from an injunction would increase the intended costs of the developments arising from escalation of construction and material costs. It is the intended 2nd Defendant's submission that the extent to which the disadvantages of each party would be incapable of being compensated in damages in the event of succeeding at the trial is a significant factor in assessing where the balance of convenience lies as was held in the case of **American Cynamid -vs- Ethicon Ltd (1975) All ER 504**.

While submitting that injunctive reliefs are equitable in nature and not available to a party who acts unfairly to the court or the other party, it was contended that the applicant failed to exhibit the alleged notification of caveat advertised to the public. The applicant was also accused of failing to serve relevant pleadings on the intended 2nd Defendant to enable her understand the nature of claim against her. Lastly,

it was submitted that this would be a proper case for the court to fix the duration for the injunction if granted and also to require the applicant to deposit security proportional to the losses likely to be incurred by the intended 2nd Defendant under Order 40 Rule 2 (2) of the Civil Procedure Rules.

The intended 3rd and 4th Defendants filed submissions dated 4th February 2014 where they reiterated the facts and contended that section 24 and 25 of the Land Registration Act conferred absolute and indefeasible rights upon the Plaintiff/Respondent who had legally and procedurally purchased the suit property and had been registered as proprietors under section 26 (1) of the Registered Land Act.

It is the intended 3rd and 4th Defendants' submission that the applicant has not furnished any evidence connecting them with alleged fraudulent acts and reliance was placed on the case **of Kent Libiso and anor -vs- Cikrontrust Company Ltd & 2 others** and **Giella -vs- Cassman Brown & Co. Ltd(1973)EA 358** for the proposition that the threshold for the grant of an injunction had not been met. Lastly, it was argued that the grant of the injunction sought which is mandatory in nature would prejudice and occasion injustice on the Defendants as the court would have rendered a final decision on an interlocutory application without hearing the parties at the trial.

Issues for determination

Whether the applicant has locus standi to file pleadings in this matter.

It was submitted by the Plaintiff/Respondent that the applicant had not been enjoined or substituted as a party to this suit and therefore lacks locus standi. Although there is no order enjoining or substituting the applicant to these proceedings, the applicant has contended that he is the administrator of the estate of the deceased Defendant and has exhibited a certificate of confirmation of grant issued in his favour on 8th April 2008. In addition, the applicant contended that LR No. 2/206 original 2/88/1 is registered in the name of the Defendant who died on 16th April 1992 and attached a death certificate dated 8th June 1994 in this respect.

The Plaintiff has not disputed that the Defendant alleged to have died on 16th April 1992 is the same Defendant he has sued. The Defendant was long dead when this suit was instituted in May 2012 and under section 82 (a) of the Law of Succession Act, the Plaintiff should have sued the administrator of the estate of the late Said Mohamed. The plaintiff in the premises it would appear instituted the suit against a party who was deceased and the proper party ought to have been the personal legal representative the Defendant/Applicant herein.

The Applicant being the personal legal representative of the late Said Mohamed is under the law obligated to ensure the estate of the deceased is properly administered. The applicant has tendered evidence showing that the deceased was the registered proprietor of **L.R. NO.2/206** (original **Number 2/88/1**) **Kilimani Nairobi** as at the time the deceased died in 1992 and as at the time the plaintiff instituted this suit. The Applicant in the replying affidavit sworn on 23rd July 2012 annexed the indenture dated 12th June 1989 registered in **Vol N.17 Folio 411/24 file 8854** and various utility bills in respect of water, electricity and land rate payment receipts for as late as October 2011 to illustrate the estate of the deceased was in possession of the suit property as the owners. The court is therefore satisfied the applicant as the administrator of the deceased estate has a real interest in the subject matter of this suit.

Notwithstanding that the Applicant was not joined as a party at the time the suit was filed the court is satisfied that the Applicant is a necessary party in these proceedings to enable the court to effectually and completely to adjudicate upon and settle all the issues involved in the suit. Courts are under the provisions of sections 1A and 1B of the Civil Procedure Act, Cap 21 Laws of Kenya enjoined to facilitate and effectuate the overriding objective of the Act which is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Civil Procedure Act. Section 3(1) of the Environment and Land Court Act NO. 19 of 2011 echos the overriding objective as under section 1A of the Civil Procedure Act whereas section 19(1) of the Environment and Land Court Act enjoins the court to render justice without undue regard to technicalities of procedure.

The court in endeavoring to do justice and to be faithful to the overriding objective as it is mandated to do would in my view be expected to consider what the substantive justice in any matter demands without necessarily being shackled by procedural rules of Procedure in a technical sense.

Indeed article 159(2) (d) of the Kenya Constitution 2010 provides that in exercising judicial authority the court shall inter alia be guided by the principle that –(d) **justice shall be administered without undue regard to procedural technicalities.** Thus the courts having regard to this Constitutional Provision and to the aforesaid sections 1A and 1B of the Civil Procedure Act are enjoined to have due regard to the dictates of doing substantive justice to the parties without unnecessarily paying undue regard to technicalities of procedure.

In the instant case substantive justice would demand that the applicant be enjoined as a party in these proceedings and I accordingly exercise my discretion under Order 1 Rule 10 (2) to have the name of the Defendant (deceased) struck out and instead the name of the applicant who is the personal legal representative of the deceased defendant to be substituted and the pleadings filed by the applicant to be deemed to be properly on record. The court in exercising its discretion to have the applicant enjoined to the suit has placed reliance on the decision of the Court of Appeal sitting in Nyeri in the case of – **Macharia Mwangi Muna & 87 others –vs- Davidson Mwangi Kagiri (2014) & e KLR** where the Judges observed as follows:-

“Article 159 (2) (b) of the Constitution requires that justice should not be delayed. This matter has been in the courts since 1993. The persons or groups interested in the property are individuals of different status in the Kenyan Society.

Article 159 (2) (g) of the Constitution stipulates that justice shall be administered without undue regard to procedural technicalities. This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property”.

In the present case I would say similar issues of equity wrong doing and unjust enrichment arise when one considers the defendant alleges to have been deprived of his property when he was still holding the title to the property and was in possession of the property when persons claiming to be owners descended on the same property, demolished and evicted the defendant together with his tenants. Substantive justice demands that these issues be interrogated and the justice of the matter be determined.

Whether the doctrine of *lis pendens* is applicable to this suit

The applicant has alleged that title known as LR No. 2/206(original number 2/88/1) owned by the deceased Defendant which was a freehold under the repealed Government Lands Act was illegally and unlawfully converted to Nairobi/Block 17/318 which is leasehold under the repealed Registered Land Act during the pendency of this suit. The applicant has contended that the Plaintiff illegally and/or unlawfully sold and transferred the deceased's property during the pendency of this suit and invoked the doctrine of ***lis pendens*** in seeking revocation and cancellation of the illegal conversion.

The ***Blacks Law Dictionary, 9th Edition***, defines ***lis pendens*** as the jurisdiction, power or control acquired by a court over property while a legal action is pending. ***Lis pendens*** is a common law principle which was incorporated under section 52 of the repealed Transfer of Property Act, which provided:-

“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.”

Although the Transfer of Property Act is repealed, the doctrine of *lis pendens* being a common law doctrine is still applicable pursuant to section 3(c) of the Judicature Act. In **Mawji -vs- U.S. International University and another (1976-80)1 KLR 229** Justice Madan cited with approval the findings of Turner L J in **Bellamy -vs- Sabine (1857) 1 De J 566, 584** where he stated that *lis pendens*:-

“ ... 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 denovo, subject again to be defeated by the same course of proceedings.”

Hon. Justice Oscar Angote in the case of **Abdalla Omar Nabhan -vs- The Executor of the Estate of Saad Bin Abdalla Bin Abuod & Another, Malindi HCCC No. 63 of 2013** stated that the purpose of the principle of *lis pendens* is to preserve the suit property until the suit is finally determined or until the court issues orders and gives terms on how the suit property should be dealt with. In **Bernadatte Wangare Muriu -vs- National Social Security Fund Board of Trustee & 2 others [2012] Eklr**, the court cited with approval the case of **Bellamy -vs- Sabine IDEJ 566** as cited in the case of **Fredrick Joses Kinyua & anor -vs- G.N. Baird Nairobi HCCC No. 4819 of 1989** as consolidated with **George Neil Baird & anor -vs- Fredrick Joses Kinyua & anor** where the judge stated:-

“The doctrine of lis pendens intends to prevent not only the defendant from transferring the suit property when the litigation is pending but it is equally binding on those who derive their title through the defendant, whether they had or had not notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of the suit so as to defeat the rights of the other party....

As to whether the doctrine of *lis pendens* would be binding on the intended 2nd Defendant who alleges to have been an innocent purchaser for value without notice, the Court of Appeal in the case of **Bernadatte Wangare Muriu -vs- National Social Security Fund Board of Trustee & 2 others [2012] Eklr** stated that the doctrine binds not only parties to the litigation, but 3rd parties who may acquire an interest in the subject matter of the proceedings during the pendency of the proceedings irrespective of whether they had notice of the litigation or not.

In **Mawji -vs- International University and another (1976-80)1 KLR 250**, the court observed inter alia that:-

“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 **Achut Sitaram Patwardhan -vs- Shivajirao Krishnarao Gaikwad AIR1937Bom244; (1937)39BOMLR224**, the High Court in India stated that the doctrine of *lis pendens* is not based upon notice, but it rests upon the ground that neither party to a suit can alienate the property in the suit pending the suit so as to defeat the rights of the other party. While citing with approval the decision in **Bellamy -vs- Sabine. (1857) 1 De G. & J. 566**, the court stated that it is immaterial whether the *alienee pendente lite* had or had not notice of the suit.

In **Carol Silcock -vs- Kassim Sharrif Mohamed Malindi ELC No. 55 of 2011**, the court stated that a purchase made of a property actually in litigation *pendente lite* for valuable consideration affects the purchaser in the same manner as if he had notice and will be accordingly be bound by the judgment or decree in the suit. A similar finding was arrived at in **Githurai Ting'ang'a & Co. Ltd -vs- Moki Savings Co-Operative Society Ltd & anor Nairobi HCCC No. 2526 of 1991** where the court stated

with approval the case of **Fredrick Joses Kinyua & anor -vs- G.N. Baird Nairobi HCCC No. 4819 of 1989** as consolidated and stated that the doctrine of *lis pendens* intends to prevent not only the Defendant from transferring the suit property when the litigation is pending but it is equally binding on those who derive their title through the Defendant whether they had or had no notice of the pending proceedings.

What is the effect of invocation of the doctrine of *lis pendens*

The court in the case of **Achut Sitaram Patwardhan -vs- Shivajirao Krishnarao Gaikwad AIR1937Bom244; (1937)39BOMLR224** stated that since the mere pendency of a suit will not prevent one of the parties from selling the property the subject-matter of the suit, the purchase does not affect the right of the other party under any decree which may be made in the suit, unless the property was sold with the permission of the Court. According to the court, the effect of the maxim '***But lite pendente nihil innovetur***' is not to annul the conveyance, but only to render it subservient to the rights of the parties to the litigation.

Mulla in his treatise Transfer of Property Act, 5th Edition observes that:-

“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.”

In the case of **Abdalla Omar Nabhan -vs- The Executor of the Estate of Saad Bin Abdalla Bin Abuod & Another, Malindi HCCC No. 63 of 2013** the court held that where a party disposes of a property to a third party in the absence of an injunctive order, the final judgment or order of the court issues as though such a sale or transfer never took place and the judgment shall be binding on the third party.

Having regard to the various authorities that I have referred to hereinabove on the doctrine of *lis pendens* I have no doubt that the doctrine of *lis pendens* has application in the instant case. The 2nd intended Defendant argues that the title that was in litigation between the plaintiff and the Defendant was **L.R.NO.2/206(org. number 2/88/1)** and not Title number **Nairobi/Block 17/318** which is now registered in the name of the 2nd intended Defendant and contends that the two titles are different and that the 2nd intended Defendant's title was never the subject of litigation. The Defendant/Plaintiff in the counterclaim responds that it was L.R.NO.2/206 that the plaintiff unlawfully and illegally converted the title from registration under the Government Lands Act Cap 280 Laws of Kenya (repealed) to registration under the Registered Land Act, Cap 300 Laws of Kenya (repealed).

The property sold to the intended 2nd Defendant by the plaintiff was the same property that the plaintiff had litigation over with the estate of the defendant. At the time the conversion was effected the plaintiff and the estate of the defendant were in active litigation over the same property. In my view therefore it is the same property that was the subject of litigation that the plaintiff transferred to the intended 2nd Defendant in the counterclaim being fully aware that the same property had a suit pending before the court. Considering the attendant circumstances, it is probable that in carrying out what appears to have been a hurried conversion of the title the plaintiff may have wanted to obscure the track record of the subject title. Whereas conversion of the title from the other regimes of Land registration to registration under the Registered Land Act usually involves a process the plaintiff has not furnished any evidence that the due process was followed and thus questions linger as to how the process of conversion was carried out. That perhaps will be a matter to be clarified during the trial.

The Respondents have taken issue with the Defendant Applicant's Advocate **Mr. Mohamed M. Chauri** swearing the Further Affidavit on behalf of the Defendant and argue that the affidavit offends the provisions of Order 19 Rule 3 and that the same ought to be struck out. I have considered the objections and while I agree with the Respondents that a party's Advocate Ordinarily should not swear an affidavit in a contentions matter on behalf of his/her client as situations may arise where the deponent may be required to be cross examined on the contents of the affidavit which could embarrass the Advocate, I have considered the supplementary affidavit sworn by **Mohammed Munir Chaudhri**. On 19th December

2013 and I do not find anything objectionable. The Advocate is deponing to facts that came to his knowledge in the cause of his conduct of the matter on behalf of the defendant and in particular the documents introduced through the further Affidavit are from 3rd parties who could be available to be cross-examined if the need arose. I do not consider that the Further Affidavit contains any matters that could be regarded as hearsay. I therefore rule the supplementary affidavit admissible.

Should the intended 2nd, 3rd and 4th Defendants be joined in these proceedings?

Whereas the applicant stated that it is necessary to join the said Defendants for the proper determination of this suit, the Plaintiff contended that the joinder was meant to obstruct the cause of justice. In my view, since the intended 2nd Defendant would be affected by the outcome of this suit having purchased the property during the pendency of this suit, it stands to be affected by any decree or order the court may issue. Its presence is thus necessary to enable it protect its interests. The 3rd Defendant is a constitutional body whose functions as stipulated under the National Land Commission Act include monitoring the registration of all rights and interests in land. The 4th Defendant is the custodian of land registration documents. These Defendants are necessary to enable the court settle all questions and issues that arise.

Whether a prima facie case has been established

There is no doubt that the indenture dated 12th June 1989 evidencing the deceased Defendant's alleged ownership of the suit property as well as the indenture dated 5th December 1988 showing the Plaintiff's alleged ownership refer to the same property known as **LR No. 2/206**(original number 2/88/1). It is this same parcel that was converted and sold to the intended 2nd Defendant as **Nairobi Block 17/318**. Since the ownership between the Plaintiff and the applicant is highly contested with each party alleging to have been the owner and in possession, there is need to maintain the status quo to enable the court make a determination on the same. The intended 2nd Defendant purchased the suit property from the plaintiff who definitely was aware he had instituted this suit against the Defendant. The plaintiff was duty bound to inform the intended 2nd Defendant of the pending suit. He surely did not imagine merely converting the title to registration under the Registered Land Act would wipe out the case.

The 2nd intended Defendant has urged the court that in the event it grants an injunction to order the Defendant/Applicant to deposit security to cover the costs and expenses that the intended 2nd Defendant has incurred.

As to whether the Defendant/Applicant has demonstrated a prima facie case with a probability of success answer in the affirmative. The Defendant/Applicant has placed evidence before the court showing that the deceased purchased the suit property and had the conveyance duly registered. There is evidence that the deceased was in possession as attested by the payment of land rates, the utility bills for water, and electricity which were in the name of the deceased and/or the Defendant administrator. There is evidence that there was forcible eviction of the defendant and tenants who were in occupation of the suit property in May 2012 when the plaintiff obtained an ex parte order of injunction from the court and used the same to procure the eviction of the Defendant and to demolish the structures that were on the suit property.

The conversion of the registration details from GLA to the RLA does not in my view change the position that the suit property remains the same and the plaintiff ought not to be allowed to hide behind the façade of the new title that it obtained after the process of conversion. Regrettably the intended 2nd Defendant is caught up in the tussle between the Plaintiff on the one hand and the Defendant. I do not think the intended 3rd and 4th intended Defendants would be blameless. They are the persons charged with the registration of instruments relating to land transactions. How is it possible that the plaintiff could be registered as the owner of the same piece of land with the deceased defendant and how was it possible for the plaintiff to cause a conversion of the property yet the deceased defendant's family was in occupation and possession? These are issues that demand answers which can only be availed at the full hearing of the suit.

For a conversion to have been made from GLA to RLA a registry index map (**RIM**) needed to have been prepared and approved by the Director of Surveys. Was this done and was it done for only this property in an area where the majority of the parcels of land are either registered under the Government Lands Act and/or the Registration of Titles Act, Cap 281 Laws of Kenya (repealed)? These are issues and matters that need explanation which can only be had at the trial. It is against this background that I hold and find that the Defendant/Applicant has established a prima facie case within the threshold set out in the case of **Mbao Ltd –VS- American Bank of Kenya Ltd & 2 others (2003) KLR 123** where the court held thus:-

“...A prima facie case in a civil application includes but it is not confined to a genuine and arguable case. It is a case which on material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

The title held by the intended 2nd Defendant and which it states confers on it absolute rights of ownership and is indefeasible in terms of sections 24 and 25 of the Land Registration Act NO. 3 of 2012 is impugned by the Defendant/Applicant on the basis that the same was unlawfully and illegally acquired by the plaintiff. Section 26 of the Land Registration Act provides as follows:-

26(1) The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-

- a. **On the ground of fraud or misrepresentation to which the person is proved to be a party or**
- b. **Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

It is clear that a certificate of title though conferring absolute rights of ownership to the proprietor can be challenged on the limited grounds under section 26(1) of the Land registration Act. The Defendant/Applicant contends that the deceased estate has been the lawful registered owner of the suit property and in case the plaintiff procured any title to the suit property which he transferred to the 2nd intended Defendant the same could only have been unlawfully and illegally acquired and the plaintiff could not pass any good title to the 2nd intended Defendant.

The Kenya Constitution 2010 under Article 40 provides for the protection of right to property of every person. The constitution provides that no person shall be deprived of his property unless in accordance with the law.

Article 40 (3) of the constitution provides:-

40. (3) The state shall not deprive a person of property of any description, or of any interest in or right over, property of any description, unless the deprivation-

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land or title to land in accordance with Chapter five or

(b) is for a public purpose or in the public interest and is carried out in accordance with this constitution and any Act of Parliament that-

(i) requires prompt payment in full of just compensation, and

(ii) allows any person who has an interest in or right over, that property a right of access to a court of law.

Whereas the constitution protects property rights of every individual the constitution exempts from such

protection property that has been unlawfully acquired Article 40(b) of the Constitution provides:-

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired”.

In the instant suit I understand the Applicant to say that the plaintiff unlawfully acquired the title they purportedly sold and transferred to the 2nd intended Defendant. If that fact will be proved then at the trial it would follow that the plaintiff had no good title that they could pass to the intended 2nd Defendant. The court in the premises will be required to interrogate and evaluate the parties competing interests to arrive at a decision and that cannot be done until the parties are heard at the trial and the evidence assessed and evaluated.

I have held that the Defendant/Applicant has demonstrated a prima facie case with a probability of success and in the event he is successful at the trial the 2nd intended Defendants title to the suit property would be liable to be revoked and/or cancelled on the basis that if the plaintiff is proved not to have had a good title to the suit property it would follow that the plaintiff would not have been in a position to pass a good title to the intended 2nd Defendant. I have considered the attendant circumstances of this case as borne out from the facts, evidence and material placed before the court by the parties and I am satisfied that this is a matter where the court should preserve the subject property in the condition that it is in pending the hearing and determination of the suit. I am not persuaded that this would be a proper and fitting matter where I should grant the order of injunction subject to the condition for the deposit of security as urged by the 2nd intended Defendant for the reason that were such a condition to be made the same could unnecessarily fetter the Defendant/Applicant's access to justice it was not possible for the Defendant/applicant to raise the deposit. The overriding objective of the courts under sections 1A and 1B of the Civil Procedure Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes that come before them. While justice looks at both sides I take the view that no party should be shut out of the seat of justice because conditions are imposed that he/she cannot meet and on that account I will not make an order for security deposit as urged by the 2nd intended Defendant.

As to whether damages would be an adequate remedy the Applicant has demonstrated on the basis of the material placed before the court that the suit premises have been occupied by the Defendant's estate and their tenants since the property was purchased by the deceased. In the circumstances of the matter I do not consider that damages would be an adequate remedy.

In the premises and for all the reasons given in the body of the ruling I find the Defendant/Applicants Notice of motion application dated 19th September 2013 to have merit and I grant the orders sought in terms of prayers (3) (4) and (6). Prayer (5) cannot be granted at this interlocutory stage and ought to await the hearing of the suit for the court to determine whether the order is merited.

The Defendant shall have leave to amend the Defence and counterclaim within fourteen (14) days of this ruling and the Defendants shall have corresponding leave of (14) days from date of service of the amended defence and counterclaim to file their replies to defence and/or amended replies to defence and defence to counter claim as the case maybe.

The parties are otherwise directed to move with speed to comply with the provisions of order 11 of the Civil Procedure Rules to expedite the hearing and determination of the suit.

The injunction granted herein will last for a period of 12 months from the date hereof and will lapse at the expiry of that period unless the same is extended by the court following an application made to the court in that regard.

I order that the costs of this application shall be in the cause.

Order accordingly.

Ruling dated, signed and delivered this...8th.....day of...August.....2014.

J.M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

..... For the Defendant