



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**CIVIL CASE NO.63 OF 2013**  
**(Formally Mombasa HCCC No.511 of 1994)**

**ABDALLA OMAR NABHAN.....PLAINTIFF**

**=VERSUS=**

**1. THE EXECUTOR OF THE ESTATE OF SAAD BIN ABDALLA BIN ABOUD**

**2. AHMED MBARAK EL HINDWAN.....DEFENDANTS**

**AND**

**ALI RIMA POINT LIMITED.....INTERESTED PARTY**

**R U L I N G**

1. I should start by admitting that this is one of the oldest suits in our registry, the suit having been filed in the Mombasa District Registry on 25<sup>th</sup> August 1994.
2. For one reason or the other, the suit has never proceeded for hearing, a situation which this court should not allow to continue. For that reason, this suit must be heard and determined within six months from the date of this Ruling.
3. Before me are three Applications. The first two Applications dated 25<sup>th</sup> February, 2013 and 18<sup>th</sup> April, 2013 were filed by the Plaintiff while the third Application dated 13<sup>th</sup> May, 2013 was filed by Ali Rima Point Limited, the interested party. The parties agreed to argue the three Applications together.

**The Plaintiff's Applications:**

4. The Plaintiffs Application dated 25<sup>th</sup> February, 2013 is seeking for two substantive orders which I will summarise as follows:
  - a. **THAT for the effectual determination of the issues in dispute in this suit, the owners of subdivisions created from plot 2091, Zulfiker Haiderali Khimji, Ingrid Feltrin and Tropicgel East Company Limited be joined as Defendants in this suit and the Plaint be amended accordingly to enable the Plaintiff invoke the principle of lis pence against the said parties, and to afford them an opportunity to answer the plea;**
  - b. **An order of injunction or preservation and maintenance of status quo of sub-divisions do issue pending the hearing and determination of the suit.**

5. After filing the Application dated 25<sup>th</sup> February, 2013, the Plaintiff discovered that one of the sub-divisions created from Plot 2091 Malindi, being plot number 2091/6, also known as portion number 4157, had further been transferred from **Tropicgel East Company Limited** to **Adolf Spinola** and **Giuseppe Spinola**. The Second Application dated 8<sup>th</sup> April 2013 seeks to join the “latest” registered owners of subdivision number 4157 to the suit and for injunctive orders to issue against them.
6. The two applications have been opposed by the Defendants and the Interested Party, Ali Rima Points Limited.
7. The Interested Party, Ali Rima Point Limited, filed the third Application dated 13<sup>th</sup> May, 2013 in which it is seeking to be joined as a party to the suit for the purpose of opposing the Plaintiff's two Applications.
8. The Plaintiffs' two Applications are based on the same grounds, which are:
  - (i) **That this court has already issued an injunction with regard to parcel sub-division number 4157 (original number 2091/6), as per the Ruling of the court delivered by Wambiliangah-J in his Ruling of 17<sup>th</sup> October 1995.**
  - (ii) **That the Defendants would appear to have dealt with some or all of the sub-divisions created from plot number 2091 Malindi in contravention of section 52 of the Transfer of Property Act of India, 1882, and consequently the doctrine of lis pendence applies to the facts of this case;**
  - (iii) **That it is fair, meet and just to have all the parties who may be affected by the order of the court with regard to any sub-division created from the said land, before the court with permission to participate in these proceedings so that they may be bound, as much as the Plaintiff, by the judgment of court, hence the prayer for their joinder;**
  - (iv) **That an inhibition or preservation order may act in rem, but the actual owner of the sub-division are necessary parties in the event, like here, that an injunction is issued.**
9. The Plaintiff's Application dated 25<sup>th</sup> February, 2013 is supported by the Affidavit of the Attorney of the son of the original Plaintiff.
10. The Plaintiff's Attorney deponed that according to the Certificate of Postal Search of February 2013, portion number 4155 (original number 2091/4 Malindi) is registered in the name of Zulfiker Haiderali Khimji; subdivision number 4156 (original number 2091/5 Malindi) is registered in the name of Ingrid Feltrin while an indenture that he came across showed that sub-division number 4157 was registered in the name of Tropicgel East Company Limited.
11. It is the Plaintiff's Attorney's depositions that he has established that there were developments going on over what was formerly plot number 2091 Malindi, which has since been sub-divided into nine plots, including the three that have been mentioned above and the development was being undertaken by Ali Rima Point Limited.
12. The Plaintiff's Attorney has further deponed that the development of Plot numbers 4155, 4156 and 4157 (original number 2091) Malindi during the pendency of this suit, would be contra-statute and intended to defeat and render nugatory the order of injunction, if not the entire suit, that was issued in the presence of the Defendants.
13. It is the Plaintiff's contention that all the parties who dealt with the three plots in which the original Plaintiff in this suit had acquired an inchoate interest by purchase had notice of the caveat registered by the Plaintiff to protect his interests and that all the dealings with the land which was and is still subject of court process are illegal because the indentures were back dated to defeat the proceedings touching on the same land.
14. The Plaintiff's Attorney finally deponed that unless the court interposes by way of an injunction or an order to preserve the status quo so as to stop further development, the Plaintiff and his estate stand to suffer irreparable damage as the construction activities are permanent fixtures on the suit

land.

15. The only new issue that the Plaintiff introduced in the second Application dated 8<sup>th</sup> April, 2013 was the fact that according to the Certificate of Postal Search as on 27<sup>th</sup> February, 2013, plot number 4157 Malindi was registered in the name of Adolf Spinola and Giuseppe Spinola, the proposed Defendants.

### **The Respondents' Case:**

16. The 1st Respondent filed his Replying Affidavit on 10th May, 2013 while the Interested Party, Ali Rima Point Limited, filed its Replying Affidavit on 7<sup>th</sup> June, 2013.

17. According to the 1<sup>st</sup> Defendant/Respondent, the Plaintiffs' Applications are an abuse of the court process as they are being brought 19 years after the suit was filed and the same ought not to be entertained.

18. The 1<sup>st</sup> Defendant/Respondent deponed that on 17<sup>th</sup> October 1995, Hon Justice Wambilyangah granted an injunction to the Plaintiff; that according to the Ruling, all the original sub-divisions except one had been disposed of and that the injunction was granted in respect to sub-division number 4157 (original number 2091/6).

19. The 1<sup>st</sup> Defendant/Respondent further deponed that as at the time of the grant of the said injunction, plot number 4157 had already been transferred to some third parties whom the Plaintiff did not bother to join as parties to the suit nor was the order of injunction served upon the said parties; that the Plaintiff was well aware that all the other sub-divisions had already been transferred to other parties as shown in the Certificate of Postal Search dated 7<sup>th</sup> December 1994 and that the said parties cannot be joined in this suit 19 years later.

20. According to the Ali Rima Point Limited's Notice of Motion dated 13<sup>th</sup> May, 2013, the Interested Party would like to be joined as a party to this suit for the purpose of opposing the Plaintiff's two Applications only, and more importantly for the purposes of setting aside the interim injunctive order and in the alternative for an order that the Plaintiff do deposit Kshs.350, 000,000 as security.

21. In the Application, Ali Rima Point Limited stated that it is the registered owner and proprietor of plot numbers 4153, 4154, 4157 and 4158, Malindi, having purchased them for value without any notice of defect in the title or claim by any third party including the Plaintiff.

22. Mr. Ali Sigara Mohamed, the Interested Party's director, deponed that after the purchase of the properties, he consulted architects with a view of developing the said properties and that he obtained approvals from the Municipal Council of Malindi to construct and set up a water fall center.

23. The Interested Party, it was deponed, entered into a contract with the developers who are supposed to develop the waterfall center at a cost of Kshs.96,120,000; that the said construction had already commenced but stopped by this court and that the Interested Party is suffering penalties from the contractor due to the delay in the works.

24. The Interested Party's director further deponed that it had already entered into a contract with Knight Frank Kenya to market the property; that it carried out searches in respect to the suit properties before purchase and that there were no encumbrances against the titles.

25. The Interested Party's director finally deponed that it was a purchaser for value without any notice of any defect, restriction or encumbrance; that no privity of contract exists between the Plaintiff and the Interested Party and that it had applied for change of user in July 2012 and that there was no objection to the said change of user; that this suit has not been prosecuted since 17<sup>th</sup> October, 1995 and that it is unjust for the Interested Party to be affected by the suit filed 17 years before it was incorporated.

26. The Plaintiff's Attorney respondent to the Interested Party's Application by way of a Replying Affidavit filed on 31<sup>st</sup> May 2013.

27. The Plaintiff deponed that indeed the Interested Party should be enjoined in the suit as a Defendant or Plaintiff so that it may be bound by the orders of the court and not for the limited purpose of contesting the injunctive orders granted herein.

28. The Plaintiff further deponed that at the beginning of the year 2013, the registered owners of the suit land were Adolf and Giuseppe Spinola and not Ali Rima Point Limited; that the price stated in the agreement for sale and the consideration stated in the transfer differ significantly and that the

Interested Party and their predecessors in title were aware of the pending suit and none of them can claim to be an innocent purchaser for value without notice of the suit or the Ruling by the court.

29. The Plaintiff finally stated that the delay in prosecution of the suit was occasioned by the death of the original Plaintiff, and later the prolonged ailment and ultimate demise of his advocate.

30. Mr. S. M. Kimani, counsel for the Plaintiff and Mr. Kiarie, counsel for the Defendants and the Interested Party appeared before me on 7<sup>th</sup> June, 2013 and made oral submissions. I have considered the submissions by the learned counsels and the authorities that they relied on.

### **Background:**

31. The Plaintiff sued the Defendants in this matter by way of a Plaint filed on 25<sup>th</sup> August 1994 for specific performance of the agreement dated 9<sup>th</sup> October 1979 and for an injunction restraining the Defendants from alienating the sub-divisions which the defendants had agreed to sell to the Plaintiff.

32. According to the Plaint, the sub-divisions which the Plaintiff bought from the Defendants at an agreed price of Kshs.30,000 were plot numbers 2091/4, 2091/5 and 2091/6.

33. As invariably happens in almost all suits pertaining to land, the Plaintiff filed an Application for a temporary injunction pending the hearing of the suit. The Application was heard by Wambilyangah J and a Ruling was delivered on 17<sup>th</sup> October 1995.

34. In the Ruling, the Judge, after hearing the evidence of the Coast Province Lands Investigation Officer found as follows:

***(a) Plot Number 2091 was originally plot 422/R. In November 1987 plot 2091 was subdivided into 9 subdivisions, I.e number 2091/1 to 2091/9.***

***(b) On 30<sup>th</sup> November 1988, the Plaintiff lodged a caveat in respect to plots 2091/4, 2091/5 and 2091/6.***

***(c) Oddly the Land Registrar flagrantly floated the caveats and proceeded to register the transfer instrument in respect of plot number 2091/4 in the name of Zulfikar Haidaral Khimji and the one in respect of plot 2091/5 in the name of one Faruk Ahmed Elyesi who are not parties to the suit.***

***(d) Plot number 2091/6 is still registered in the name of the defendant. It has not been transferred to a 3rd party.***

35. The Judge concluded his Ruling as follows:

***“For all these reasons and in the face of the principles of Giella VS Cassman Brown Ltd (1973) EA 358, it is eminently sensible that I allow the Plaintiff's Application for an injunction to issue to restrain the defendant from alienating in any way plot number 2091/6 also known as plot number 4157. There shall thus be an inhibition registered against the title.”***

36. The Judge refused to issue an injunction in respect to plot numbers 2091/4 (4155) and 2091/5 (4156) because, firstly the plots had already been transferred to third parties (the same parties that the Plaintiff is seeking to enjoin in the suit) and secondly because those third parties were not parties to the suit.

37. According to the Ruling of Wambilyangah-J, plot number 2091/4 (also known as portion number 4155) and plot numbers 2091/5 (also known as portion number 4156) had already been transferred to Zulfiker Haiderali Khimji and Faroule Ahmed Elyesi respectively by the time the suit was filed.

38. The Plaintiff has annexed a Certificate of Postal Search on his Affidavit in support of his Application dated 25<sup>th</sup> February 2013 as at 1<sup>st</sup> February 2013 which shows the registered proprietor of porting number 4155 (original number 2091/4) Malindi as Zulfiker Haiderali Khimji.

39. The Plaintiff has also annexed a search which shows that as at 8<sup>th</sup> February, 2013, the registered owner of portion number 4156 was Ingrid Feltrin.
40. According to the indenture annexed on the Plaintiff's Supporting Affidavit, portion number 4157 was transferred to Tropicgel East Company by Said Bin Abdulla Bin Saad, the 1<sup>st</sup> Defendant on 20<sup>th</sup> January 2006 at 11:00 AM, way after the Ruling of Wambilyangah J had been delivered.
41. Portion number 4157 was subsequently transferred to Adolf Spinola and Giuseppe Spinola by Tropicgel. Adolf Spinola and Giuseppe Spinola sold the same portion of land to Ali Rima Point Limited, the Interested Party, on 31<sup>st</sup> December 2012. Ali Rima Point Limited have stated that they intend to develop the said land. Ali Roma Point Limited also purchased portion numbers 4155 and 4156.
42. In view of the above transactions in respect of portions number 4155, 4156 and 4157, it is the Plaintiff's contention that the Defendants and the Interested Party have dealt with the suit properties in contravention of section 52 of the Transfer of Property Act of India, 1882 (now repealed) and consequently the doctrine of *lis pendence* should apply.
43. The ***Black's Law Dictionary, 9th Edition*** has defined *lis pendence* as the jurisdiction, power or control acquired by a court over property while a legal action is pending. This principle, as defined above, was incorporated under section 52 of the Transfer of Property Act, 1882 (now repealed) which 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.”**

44. The purpose of the principle of *lis pendence* 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. The doctrine of *lis pendence* is founded on public policy and equity.
45. In **Manwji vs U.S. International University and Another (1976-80) KLR 229** Justice Madan, while addressing the purpose of the principle of *lis pendence* adopted the finding in **Bellamy vs Sabine (1857) 1 de G E J 566, 584 where Turner L J** in which it was 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.”**

46. The learned judge also adopted a passage in the ***Treaties by Mulla & Gour on the Indian Transfer of Property Act. Mulla, 5th Edition, page 245 and Gour, 7th edition, Vol.1, Page 579*** states 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.**

47. In the Indian case of **Jagan Sign (Deed) through LRS VS Dhanwanti & Another, Civil Appellant Jurisdiction Civil Appeal No. 2469 of 2005** (see Supreme Court Reports) the Supreme Court of India held that the broad principle underlying section 52 of the Transfer of Property Act is to maintain status quo unaffected by the act of any party to the litigation pending its determination.

48. The Supreme Court of India also upheld the findings in **Krishenaji Pndharinath VS Anusayabai Air (1959) Born 475** where the sale of the suit property took place before the appeal was filed. The High Court held as follows:

***“In section 52 of the Transfer of Property Act, as it stood before it was amended by Act XX of 1929, the expression active prosecution of any suit or proceedings was used. That expression has now been omitted, and the explanation makes it abundantly clear that 'lis' continues so long as a final decree or order has not been obtained and complete satisfaction thereof has not been rendered.”***

49. The above analysis of the principle of *lis pendence*, which is applicable to portion numbers 4155, 4156 and 4157 Malindi, by virtue of the provisions of sections 52 of the ITPA, 1882, clearly shows that any Judgment or order of this court in respect to the three parcels of land shall bind the subsequent purchasers. It is therefore imperative that all the persons who have dealt with portion numbers 4155, 4156 and 4157 should be joined in these proceedings.
50. The principle of *lis pendence* 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 may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions in the suit, should be added.
51. I therefore do not agree with Mr. Kiarie's submissions that because Ali Rima Point Limited, the current registered owner of portion number 4155, 4156 and 4157 is an innocent purchaser for value without notice of default, it should not be involved in this suit and neither should it be enjoined from developing the same.
52. If that were the position, then the jurisdiction, power or control by the courts over a property while a legal action is subsisting will be lost every time a party sells a property while the suit is pending.
53. In the circumstances, and for the reasons I have given, I shall allow the joinder of all the parties who have owned portion numbers 4155, 4156 and 4157 at any particular point.
54. Of course, the preservation of a property until the suit is finally determined does not mean that a party cannot deal with such a property in the manner he deems fit in the absence of an injunctive or preservative order.
55. In the absence of an injunctive order, a party may dispose of a property to a third party but the final judgment or order of the court shall issue as though such a sale or transfer never took place and the judgment shall be binding on the third party. The court shall not be concerned with the developments or investments that such a third party would have put in the property because everybody is presumed to have known about the existence of a suit in respect to such a property.
56. It is because of this reason that a party who purchases a property and invests in it while a suit is pending, does so at his own risk notwithstanding the absence of an injunctive order duly registered against the title.
57. The Plaintiff in this matter has moved this court to issue an injunctive or a preservation order against the Defendants and the subsequent purchasers of portion numbers 4155, 4156 and 4157.
58. An Application for injunction in respect to the above three parcels of land was filed and argued before Wambilyangah J.
59. The Judge declined to issue injunctive orders in respect to portion numbers 4155 and 4156. He however issued an injunctive order in respect to portion number 4157 on 17<sup>th</sup> October 1995 and restrained the Defendant from alienating in any way plot number 2091/6 also known as plot number 4157.
60. Before setting aside the said Ruling, the Defendants transferred plot number 4157 to Tropicgel East Company Limited on 20<sup>th</sup> January 2006. Tropicgel East Company Limited transferred the same parcel of land to Adolfo Spinola and Giuseppe Spinola. The Spinolas transferred the property to Ali Rima Point Limited, the Interested Party on 4<sup>th</sup> February 2013.
61. Mr. Kiarie, Counsel for Ali Rima Point Limited and the Defendants submitted that the Plaintiff did not register the order of the court against the title for portion number 4157; that there was no notice to everybody; that an injunction is never issued as against the whole world and that the Plaintiff cannot rely on the doctrine of *lis pendence*.
62. Wambilyangah J, while granting the injunctive order in respect of portion number 4157 noted that the defendant had not transferred the property to third parties. Indeed, as I have found above,

- portion number 4157 was transferred to Tropicgel East Company Limited on 20<sup>th</sup> January 2006.
63. Even if the order was not registered against the title, it was wrong and contemptuous on the part of the Defendant to transfer portion number 4157 to a third party before setting aside the Ruling of the court.
64. The Defendant was aware of the Ruling because he was represented by an advocate when the Ruling was delivered.
65. An advocate is an agent of a litigant and the litigant is presumed to be aware of all court orders when he is represented by counsel. He cannot feign ignorance of an existing court order just because he was not personally served with it or that the order was not registered against the parcel of land in question.
66. In the circumstances, and considering that the court had found that the Plaintiff had satisfied the conditions for granting an injunctive order in respect of portion number 4157, I shall reiterate that position by injuncting the Interested Party from dealing with portion number 4157 until the suit is heard and determined.
67. I will therefore not consider whether the Plaintiff has established a prima facie case with chances of success or whether the Plaintiff should deposit security of Kshs.350,000,000 as submitted by the Defendants' advocate.
68. I shall however not grant any injunctive orders in respect to portion number 4155 and 4156 because a court of competent and concurrent jurisdiction dealt with that issue and declined to issue an injunction that the Plaintiff had sought.
69. For the reasons I have given above, I dismiss the Interested Parties Application dated 13<sup>th</sup> May, 2013 with costs and allow the Plaintiff's Applications dated 25<sup>th</sup> February, 2013 and 8<sup>th</sup> April, 2013 with costs in the following terms:
- a. **For the effectual determination of the issues in dispute in this suit, Zulfiker Haiderali Khimji, Ingrid Feltrin, Tropicgel East Company Limited, Adolf Spinola, Giuseppe Spinola and Ali Rima Point Limited be joined in this suit as Defendants and the Plaintiff be amended accordingly within 14 days from the date of this Ruling.**
  - b. **The Defendants and Ali Rima Point Limited or their agents, servants or any person acting under them be and are hereby restrained from developing and constructing structures of whatever description or alienating, transferring, charging or dealing in any manner whatsoever with portion number 4157 (original number 2191/6), Malindi, pending the hearing and determination of this suit.**
  - c. **The injunctive order shall remain in force for a period of six (6) months from the date of this Ruling within which time this suit should be heard and determined**

Dated and Delivered in Malindi this 26<sup>th</sup> day of July, 2013

**O. A. Angote**

**Judge**