



Pendens

Section 52 of ITPA, 1882

Oxygen Principle

1. Lis

2.

3.

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 55 OF 2011

CAROL SILCOCK.....PLAINTIFF/APPLICANT

=VERSUS=

KASSIM SHARRIF MOHAMED.....DEFENDANT/RESPONDENT

R U L I N G

1. Before me are the Plaintiff's two Applications dated 24th August, 2012 and 5th September, 2012.
2. The Application dated 24th August 2012 is seeking for the following reliefs.
 - a. **THAT the transfer between the Defendant/Respondent and MADDY WATAMU LIMITED dated 20th December, 2011 or any other such transfer in respect to the suit property being plot number 139 Watamu be declared null and void.**
 - b. **THAT the Registrar of Titles Mombasa Land Registry be ordered to cancel any entry made transferring the suit property into the names of MADDY WATAMU**
3. The Application is based on the grounds that during the pendency of this suit, the Defendant transferred the suit property to Maddy Watamu Limited in contravention of section 52 of the Indian Transfer of Property Act 1882; that as at the time the Defendant was testifying in court, he had already transferred the suit property to Maddy Watamu Limited and that by dint of section 34 of the Civil Procedure Act and Section 52 of the Indian Transfer of Property Act, 1882, this court has the jurisdiction to grant the orders sought.
4. The said grounds have been repeated in the Plaintiff's supporting affidavit which was sworn on 24th August 2012.
5. The Application dated 5th September 2012 on the other hand is seeking for the following relief;

That Maddy Watamu Limited be enjoined in this suit, for purposes of the Plaintiff's Application dated 24th August, 2012 seeking to nullify the transfer of 20th December

2011 between the Defendant and the said Maddy Watamu Limited.

6. The said Application is supported by the Plaintiff's affidavit and on the grounds that the Plaintiff has filed an Application to nullify the transfer of the suit property by the Defendant to Maddy Watamu Limited; and that for the purposes of conclusive ventilation of the issues to be canvassed in the said Application, it would be just and necessary that Maddy Watamu Limited is enjoined for purposes of the Application to nullify the transfer therein.
7. The parties agreed to dispose of the two Applications together.
8. The Defendant filed a Replying Affidavit in respect to the Plaintiff's Applications on 12th October 2012 while the Interested Party, Maddy Watamu Limited filed its Replying Affidavit and Further Replying Affidavit on 24th September 2012 and 27th September 2012 respectively.
9. According to the Defendant, the relief for joinder is not available to the Plaintiff because a Decree has already been issued.
10. The Defendant further deponed that the relief sought by the Applicant to have the transfer of the suit property to Maddy Watamu Limited nullified is a drastic remedy that cannot be granted in these proceedings; that Section 34 of the Civil Procedure Act has no relevance to the matters arising in the suit and that Section 52 of the Indian Transfer of Property Act, 1882 is not applicable because the Act has since been repealed.
11. The Intended Interested Party on the other hand deponed that it entered into an agreement of sale of the suit property with the Defendant on 26th November 2010; that the company immediately took possession of the suit property and started developing it and that by a transfer dated 20th December 2011, the Defendant transferred all his interests to the Intended Interested Party.
12. It is the Intended Interested Party's deposition that during all the time up to the transfer of the suit property, the Defendant did not inform it of any pending litigation over the same property; that the company is an innocent purchaser for value without notice and that the alleged Decree was issued long after the company became the registered proprietor of the suit land.
13. The Interested Party finally deponed that section 52 of the ITPA is not applicable in the instant case; that this court is *functus officio*; that the Plaintiff ought to bring and plead specifically a separate action against the company and that the company stands to suffer irreparably should the orders in the Applications issue as it has a contractor on site who is almost completing the developments on the plot.
14. The parties agreed to dispose of the two Applications by way of written submissions. The Plaintiff's Advocate filed his written submissions on 12th June 2013 while the Intended Interested Party filed his submissions on 25th June 2013. I have considered the said submissions.

BACKGROUND

15. The Plaintiff filed this suit on 20th May, 2011 claiming for an order of specific performance in respect to the Agreement of Sale entered into between the Plaintiff and the Defendant on 16th May, 2008.
16. In the agreement of sale, the Defendant agreed to sell to the Plaintiff plot number 139 Watamu at a consideration of Kshs.3,500,000 which the Plaintiff duly paid.
17. The Defendant filed his defence on 2nd June, 2011 in which he denied the Plaintiff's averments.
18. The matter proceeded for full hearing. The Defendant, DW1 testified on 28th March, 2012. The Defendant did not inform the court that he had transferred the suit property to the Intended Interested Party by way of a transfer dated 20th December 2011. The transfer in favour of the Intended Interested Party was duly registered against the title on 21st December 2011.
19. On 6th July, 2012, Meoli J delivered her judgment in favour of the Plaintiff in the following words.

“ I find that the purported rescission is unjustified and without effect and the original agreement between the Plaintiff and the Defendant is enforceable. There is no evidence that the suit property has changed hands, and clearly DW1 received monies to

facilitate the transfer. I find that the Plaintiff has proved her case on a balance of probabilities. I do enter judgment for her against the Defendant as prayed in the amended plaint.”

20. Unknown to the Plaintiff and the Court, the Defendant had transferred the suit property to the Intended Interested Party during the pendency of the suit.

APPLICATION DATED 5TH SEPTEMBER 2011

21. The Plaintiff is seeking to join the Interested Party for purposes of the Application dated 24th August 2012 which is seeking to nullify the transfer of 20th December 2011 between the Defendant and the Intended Interested Party.

22. It is true, as argued by the Intended Interested Party's Advocate that it will not be procedural to join a party to a suit after Judgment has been delivered. Joinder of parties can only be allowed before the entry of Judgment.

23. However, the circumstances of this case are rather unique and before the court can determine whether the Application for joinder should be allowed or not, those circumstances should be examined and weighed against the applicable principles of the law.

WHETHER SECTION 52 OF THE INDIAN TRANSFER OF PROPERTY ACT, 1882 IS APPLICABLE.

24. The suit property, L. R. NO. Plot No. 139 was registered under the Registration of Titles Act, Cap 281 in the name of the Defendant on 20th August 2010.

25. The Registration of Titles Act, Cap 281 is basically a registration Act, and not a substantive law. The Indian Transfer of Property Act, 1882 was introduced and applied in Kenya as a substantive law by Article 11(b) of the East African Order in Council, 1897 in respect to parcels of land registered under the Registration of Titles Act.

26. The two Acts were repealed by Act number 3 of 2012.

27. Notwithstanding the repeal of the two Acts, they are applicable in respect to the suit property herein because that was the governing law under which the property was registered.

The doctrine of *lis pendens*

28. The Plaintiff's Advocate has submitted that pursuant to the provisions of Section 52 of the Indian Transfer of Property Act, 1882, if a transfer has been effected during the active prosecution of a case, such transfer shall be subjected to the Judgment in such litigation.

29. The Plaintiff's advocate further submitted that the Intended Interested Party, Maddy Watamu Limited, is bound by the Decree herein and that there is no need to file a fresh suit against Maddy Watamu Limited. The Plaintiff's counsel relied on the case of **FREDRICK JOSES KINYUA & ANOTHER VS E. N. BATED, NAIROBI CIVIL CASE NO. 4819 OF 1989** in which Justice G. S. Pall quoted with approval a passage in **Sir H. S. Gaur's Transfer of Property Act, 7th Ed; pg 579:**

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

30. In a nutshell, the Plaintiff is relying on the principle of *lis pendens* to defeat the Intended Interested Party's claim on the suit property.

31. The ***Blacks Law Dictionary, 9th Edition***, has defined *lis pendens* as the jurisdiction, power or

control acquired by a court over property while a legal action is pending.
32. This common law principle, as defined above, is incorporated under section 52 of the Indian Transfer of Property, 1882 (now repealed) This section provides as follows:

“During the active prosecution in any court having authority in British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.”

33. Section 52 of the ITPA 1882 prohibits the transfer of a property to a third party during the pendency of a suit. The converse of this provision therefore is that where a party to a suit transfers the suit property to a third party, such a transfer shall be null and void for being contra statute. Such a transfer cannot affect the rights of a Decree holder.

34. As I stated in **Malindi HCCC No. 63 of 2013,; Abdalla Omar Nabhan Vs The Executor of the Estate of Saad Bin Abdalla Bin Abuod & Another**, the purposes 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. The doctrine of *lis pendens* is founded on public policy and equity.

35. In **Manwji vs U.S. International University and Another (1976-80) KLR 229** Justice Madan, while addressing the purpose of the principle of *lis pendens* adopted the finding in **Bellamy vs Sabine (1857) 1 De J 566, 584** where Turner L J held as follows:-

“ It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendant’s alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceedings.”

36. In the same case, Cranworth L J observed as follows:

“Where a litigation is pending between a Plaintiff and Defendant as to the right of a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigating parties but also on those who derive title under them by alienation pending the suit whether such alienees had or had no notice of the proceedings. If that were so, there could be no certainty that the proceedings would ever end...”

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

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

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

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

39. The Intended Interested Party has relied on the provisions of section 23 of the Registration of Titles Act (repealed) to argue that the transfer of the suit to it can only be reversed and declared null and void if fraud and misrepresentation is proved and the Intended Interested Party is proved to have been a party to it.
40. The Provisions of Section 23 of the RTA viz-a-viz Section 52 of the Indian Transfer of Property Act was considered at length in the case of **Fredrick Joses Kinya** (Supra). The learned judge held as follows:

“I am of the view that the Registration of Titles Act is a statute dealing only with the registration of titles to the properties under the same. It lays down the procedure regarding registration of titles. On the other hand the doctrine of lis pendens under section 52 of the ITPA is a substantive law of general application. Apart from being on the statute, it is a doctrine equally recognised by common law. It is based on expediency of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in general interest of public policy and good and effective administrative of justice. It therefore overrides section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other”.

41. I entirely agree with the above passage. It will be a mockery of justice for the court to subject the Plaintiff to another rigour of litigation as against the Intended Interested Party and prove fraud as against the said party.
42. Everyman, as quoted in the preceding paragraphs, is presumed to be aware of the pending suits, especially litigation involving land governed by the ITPA, 1882. Therefore, 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.
43. The Intended Interested Party's argument that the Plaintiff should file a distinct suit as against it flies in the face of the very mischief that the principle of *lis pendens* is supposed to address.
44. I have cited above the holding by Turner L. J in the **Bellamy** case in which the Judge observed that if alienation *pendente lite* were permitted to prevail, the Plaintiff would be liable in every case to be defeated by the Defendant 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. That is what the Intended Interested Party is suggesting in this case.
45. In the **Abdalla Omar Nabhan** case (Supra), I held as follows:

“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.....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.”

46. That is the unfortunate situation that the Intended Interested Party has found itself in. It does not matter that the said company (Intended Interested Party) was not aware of the pending suit. The fact remains that the suit property was transferred to the company *pendente lite*.
47. Indeed, the doctrine of *lis pendens* is in tandem with the provisions of Sections 1A and 1B of the Civil Procedure Act, which provides for the overriding objectives that should guide the courts in all civil matters, otherwise known as the oxygen principle (O2).
48. As I have shown above, the doctrine of *lis pendens* is necessary for the final determination of the matters before the court and in the general interest of public policy and good and effective administration of justice, which is what the oxygen principle is all about.
49. In the case of **Mradula Suresh Kantaria Vs Surech Nanillal Kaptaria; Civil Appeal Number 277 of 2005**, the Court of Appeal observed as follows:

“In this regard, we believe one of the principles of the double O principle is to enable the court to take case management principles to the centre of the court process in each case coming before it so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap.”

50. In **Caltex Oil Limited Vs Evanso Wanjihia; Civil Application No. Nairobi 190 of 2009**, the Court of Appeal held that the O2 principle had given the courts greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.
51. The Intended Interested Party’s submission that this court cannot entertain the present Applications because it became *functus officio* upon the delivery of the Judgement, in the circumstances of this case, is one of the “past technicalities” that the Court of Appeal had in mind in the **Caltex Oil** case.
52. Having found that the Judgment and Decree that was delivered by the High Court on 6th July, 2012 binds Maddy Watamu Limited, I find and hold that for the attainment of justice in a fair, quick and cheap manner pursuant to the provisions of sections 1A and 1B of the Civil Procedure Act, and Section 3 of the Environment and Land Court Act, 2011, and in view of the provisions of section 52 of the Indian Transfer of Property Act of 1882 and the doctrine of *lis pendens*, I find and hold that the Plaintiff need not file a fresh suit for an order cancelling the transfer of the suit property to the said Maddy Watamu Limited during the pendency of this suit.
53. The order of cancellation of the transfer dated 20th December, 2011 between Maddy Watamu Limited and the Defendant by this court is not an annulment of the conveyance *per se* but is meant to render the said transfer subservient to the rights of the parties in this suit.
54. Having made the above finding, I allow the Plaintiff’s Application dated 5th September, 2012 enjoining Maddy Watamu Limited in this suit for the purposes of the Application dated 24th August, 2012. The said Maddy Watamu Limited filed its Replying Affidavit and submissions in respect to the Application dated 24th August 2012, which response and submissions I have considered.
55. I also allow the Plaintiff’s Application dated 24th August, 2012 in the following terms:
- a. **The transfer between the Defendant and Maddy Watamu Limited dated the 20th day of December, 2011 be and is hereby declared null and void.**
 - b. **The Registrar of Titles, Mombasa, be and is hereby ordered to comply with the Judgment and Decree of this court dated 6th July, 2012.**
 - c. **The Defendant to pay the costs of the Applications dated 24th August, 2012 and 5th September, 2012.**

Dated and Delivered in Malindi this 22nd day of **August**, 2013

O. A. Angote

Judge