IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & MURGOR, JJ.A.)

CIVIL APPEAL NO. 44 OF 2014

BETWEEN

NAFTALI RUTHI KINYUA……..…..….APPELLANT

AND

PATRICK THUITA GACHURE……..……1ST RESPONDENT

CITY COUNCIL OF NAIROBI…….……..2ND RESPONDENT

(Appeal against the entire Ruling and Orders of High Court of Kenya at Nairobi (Gitumbi, J.) dated 17th May 2013)

in

H.C.ELC. No. 462 of 2011)

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JUDGMENT OF THE COURT

This appeal is in respect of the ruling and orders following an application where the High Court declined to grant an injunction on the basis that the appellant, ***Naftali Ruthi Kinyua,*** did not have a genuine and arguable case to warrant the grant of an injunction.

The facts of the case as can be discerned from the record, are that the appellant sued the 1st and 2nd respondent as the proprietors of a parcel of land known as Land Reference No. 8285/1522 also known a Plot Number 133 Kariobangi Light Industries, Nairobi, measuring 0.0334 hectares or thereabouts ***("the suit property")*** which it was contended was allocated to one Peter Muthaura on or about 5th June 1979. The appellant contended that he had entered into a sale agreement with Peter Muthaura for the purchase of the suit property, which sale Peter Muthaura confirmed in an affidavit of the same date. Subsequent to purchasing the suit property, the appellant notified the 2nd respondent of the purchase, and paid a portion of the stand premium and ground rent as demanded. He later paid the survey and conveyance fees so as to obtain the title documents. The 2nd respondent in return issued the appellant with the Deed Plan No. 328596 dated 9th August 2011 in respect of the suit property.

Whilst awaiting issuance of the title, the appellant learnt that the 1st respondent had entered upon the suit

property, erected a fence with corrugated iron sheets, and dug trenches so as to commence development thereon. The appellant lodged a complaint with the chief at Kariobangi, and submitted copies of the documents relating to his claim over the suit property. The 1st respondent also laid claim to the suit property but did not produce any documents in support of his claim.

The appellant further contended that the 2nd respondent had in breach of the terms of the sale agreement with Peter Muthaura, colluded with the 1st respondent to sell the suit property to him, and to deprive the appellant of the suit property; that the 2nd respondent had accepted payment from the appellant but failed to issue title documents to the appellant. Instead, the 2nd respondent accepted payment from the 1st respondent, and commenced processing title documents in favour of the 1st respondent, whilst misrepresenting to the appellant that his title documents were being processed.

The appellant further stated that the 1st respondent fraudulently colluded to deprive him of the suit property despite being aware that it belonged to him. The appellant concluded that the purported acquisition of the suit property by the 1st respondent was null and void *ab initio*, and sought a declaration that he was the rightful owner of the suit property; an order directing the cancellation of the title documents issued to the 1st respondent by the 2nd respondent, and an order compelling the 2nd respondent to issue title documents for the suit property to him; a permanent injunction to issue against the 1st and 2nd respondents, their agents, servants, employees and accomplices amongst others from encroachment, occupation, trespassing upon, fencing, developing, selling or disposing of the suit property or interfering with him ownership thereof; a mandatory injunction compelling the 1st respondent to demolish the fence erected around the suit property; and general damages for trespass.

In his defence, the 1st respondent generally and without any substantiation, denied all the appellant's averments *seriatim*.

In their defence the 2nd respondent denied allotting, alienating and dispossessing the appellant of the suit property, and contended that the appellant's proprietorship over the allotted land could not be proved by way of rates and rent remittances, but by an examination of the relevant title documents. It further denied collusion and fraudulent dealings with the 1st respondent as well as the existence of a contract with the appellant.

In the appellant's written submissions before the High Court, on the issue of whether the appellant had established a prima facie case, the appellant submitted that he had purchased the suit property from one Peter Muthaura who was lawfully allotted the suit property by the 2nd respondent, and that he notified the 2nd respondent of the sale. He paid the stand premiums, survey and conveyancing fees, as demanded by the 2nd respondent so as to secure the title documents. The appellant submitted that, it was these documents that provided the basis for his claim over the suit property. With respect to whether he would suffer loss or injury if the injunction was not granted, the appellant submitted that at all material times, he was the lawful allottee of the suit property since 1980, and stood to suffer irreparable loss if the 1st respondent was not restrained from taking it over.

On the balance of convenience, the appellant contended that if the trial court was in doubt as to whether he had established a *prima facie* case with a probability of success, and that damages would not be adequate compensation for the loss suffered, the balance of convenience titled in favour of preserving the suit property until the suit was heard and determined.

On whether the principle of first in time was applicable, the appellant argued that his claim over the suit property dated back to 1980, while the 1st respondent's claim arose in 2011. The appellant sought an order under ***section 52*** of the ***Indian Transfer of Property Act (ITPA)*** (now repealed), to prohibit all further registration or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession of a right title or interest should be prohibited during the pendency of the suit. It was submitted that all the ingredients for a grant of orders under ***section 52*** of the ***ITPA*** had been met

which as stipulated in ***Ruaha Concrete***

Co Ltd vs Paramount Bank Ltd High Court Civil Case No. 430 of 2002 were that, firstly, there should be an active prosecution of a suit relating to the disputed property, secondly, a contentious suit was in existence between the parties, and thirdly that a right to immovable property must be specifically in question. On that basis the court should have issued an order for preservation of the suit property, the appellant contended.

In his submissions, the 1st respondent opposed the application and contended that the appellant had not met the requirements that would entitle him to the orders sought for reasons that, firstly, a *prima facie* case had not been established as the appellant has not shown how he acquired the suit property from the 2nd respondent,

while, the 1st respondent had demonstrated through the documents produced including the various clearances obtained from the 2nd respondent, that his claim was legitimate. Secondly, the appellant could always be compensated in damages for the amounts expended on stand premiums, survey and conveyancing fees. See

Humphrey Kilambo Mcharo vs Kenya Commercial Bank Ltd Civil Application

No. Nai. 51 of 2005, where this Court concluded that loss of property could always be compensated in damages. Thirdly, in the 1st respondent's view the balance of convenience tilted in his favour, as he was in possession of the suit property, and had commenced construction, while the appellant could not explain where he had been for 20 years during which time, he (the 1st respondent) had taken over the suit property.

In their submissions, the 2nd respondent submitted that the application for injunctive relief was not properly before the court by virtue of ***section 16 (1) (i)*** of the ***Government Proceedings Act Cap 40*** which expressly prohibited the grant of injunctions against the government and its related bodies. It was submitted that the applicant had failed to establish a prima facie case having failed to produce any document of title to prove proprietorship of the suit property. The appellant had not demonstrated that he had complied with the usual conditions following the allotment so as to acquire a perfected title. The 2nd respondent further submitted that having failed to establish a prima facie case, it could not be shown what irreparable harm the appellant would suffer if the injunctive relief was not granted.

In her ruling the learned Judge denied the injunctive relief sought on the basis that, the appellant had failed to meet the basic threshold set out in ***Giella vs Cassman Brown Co. Ltd [1973] EA 358*** which was that a prima facie case, with a probability of success had not been established. The court concluded that, the appellant was not able to prove his ownership of the suit property since both himself and the 1st respondent had produced similar documents relating to the suit property, which demonstrated that their competing claims were almost equal, and as such the suit could not be conclusively determined at the interlocutory stage.

Being dissatisfied with the ruling of the High Court, the appellant filed a memorandum of appeal advancing eight grounds of appeal, namely that:

i. *the learned judge erred in law and in fact in holding that the appellant had not proved that he is the owner of the land despite the uncontested documents and evidence tendered before her;*

ii. *the learned judge erred in law and in fact in failing to find that although the 2nd defendant had not issued the title document, it had already issued the deed plan to the appellant thus on a balance of probability the appellant's claim of owner ship of the suit land was more probable than that of the 1st respondent;*

iii. *the learned judge erred in law and in fact in failing to consider the principle of first in time in that the appellant had purchased the property known as Land reference number 8285/1522 (previously known as Plot Number 133 Kariobangi Light Industries) in 1980 whereas the 1st respondent's claim of the land is of the year 2011;*

iv. *the learned judge erred in law and in fact in failing to consider the appellant's submissions on the doctrine of lis pendens thereby failing to order the preservation of the land under the doctrine;*

v. *the learned judge erred in law and in fact in failing to exercise her discretion in making an order for preservation of the suit land pending the hearing and determination of the suit;*

vi. *the learned judge erred in law and in fact in holding that the appellant did not have a genuine and arguable case;*

vii. *the learned judge erred in law and in fact in failing to consider all the issues raised by the appellant in both the written and oral submissions made before her;*

viii. *the learned judge misdirected herself in law and in fact in the ruling the way that she did.*

When the appeal came up for hearing, ***Mr. King'ara,*** learned counsel for the appellant submitted in respect of grounds 1, 2 and 3 that the learned Judge was wrong in declining to grant the injunction, as the record showed that the appellant had entered into a sale agreement with Peter Muthaura which agreement had not been disputed by either the 1st or the 2nd respondent. The documents also showed that the appellant paid the 2nd respondent stand premiums and ground rent in March 2007, and the survey and conveyance fees on 28th January 2009. Counsel submitted that, the appellant's allocation was not at any time withdrawn by the 2nd respondent, which it was at liberty to do, and it had not denied the validity of the appellant's ownership documents. In contrast, there was no letter of allotment issued to Samuel Onyango Osowo, in the 1st respondent's documents, and since the 1st respondent's payments of stand premium, survey fees, ground rent and beacon certificate fees, were made to the 2nd respondent after 3rd August 2011, counsel submitted that the first in time claim should prevail. The learned judge should have concluded that the suit property had already passed to the appellant, and that the 2nd respondent did not have any authority to reallocate the suit property to the 1st respondent.

On ground 2, counsel submitted that the learned judge should not have hesitated to make orders to preserve the suit property under the doctrine of *lis pendens*, and on this basis should have issued injunctive orders restraining any further dealings with the suit property until the suit was heard and determined.

With respect to grounds 5 to 8, counsel submitted that the learned judge failed to exercise her discretion judiciously, as the ruling was contradictory, and, it was for the very reason that neither the appellant nor the 1st respondent had a perfected title, that the injunctive orders should have been issued to preserve the suit property. Counsel prayed that this Court does set aside the order of the lower court and issue an injunction as prayed.

On his part, ***Mr. Matwere*** holding brief for Mr. Okindo, learned counsel for the 1st respondent, opposed the appeal, and submitted that, the learned judge rightly found that the appellant did not make out a prima facie case, as the appellant was not in possession of a perfected title conferring ownership rights over the suit property upon him. The appellant was allotted the suit property in 1980, but did nothing to secure the title documents. Counsel further submitted that, the record showed that the 1st respondent purchased the suit property from one Samuel Onyango Osowo, as a purchaser for value without notice. On the doctrine of *lis pendens*, counsel contended that this can only be invoked where there is a perfected title, and not where the title had not been perfected. Counsel concluded that, since the documents of ownership of the suit property were similar, preservation of the suit property was unnecessary, particularly as the court was not satisfied that the appellant had established a prima facie case. Counsel urged the Court to dismiss the

appeal with costs.

Mr. Sitati, learned counsel for the 2nd respondent, informed the Court that the 2nd respondent had not admitted to the proprietorship of the suit property by either the appellant or the 1st respondent, but conceded that the 2nd respondent supported the decision of the High Court.

In reply Mr. King'ara reiterated that the 2nd respondent had not supported the appellant nor the 1st respondent in the High Court, and did not file any documents to clarify the position of ownership of the suit property.

In this appeal we must remind ourselves that this Court is neither minded to interfere with the findings of fact by the trial court unless they are not based on evidence or are a misapprehension of the evidence or that the trial judge is shown to have acted on a wrong principle in arriving at the findings. See ***Ephantus Mwangi & Another vs Duncan Mwangi Wambugu (1982-88) 1 KAR 278***.

Taking into consideration the application, the grounds on the face thereof and the parties' submissions, we take the view that the issues for determination are as follows:

i. *Was the court wrong in finding that the appellant was unable to prove his ownership of the suit property, particularly having regard to the principle of first in time?*

ii. *Was the learned judge wrong in failing to order an injunction on the basis of the doctrine of lis pendens?*

iii. *Did the learned judge fail to exercise her discretion judiciously, and misdirect herself in law and in fact in her ruling?*

We will begin with the issue of whether the High Court was wrong in finding that the appellant had not established a prima facie case as he had been unable to prove ownership of the suit property.

The principles of injunctions are to be found in the case of ***Giella vs Cassman Brown Co. Ltd 1973] EA 358*** where it was held that in order to grant the injunction as prayed the court must be satisfied that,

a. ***The applicant had established a prima facie case with probability of success;***

b. ***The applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and***

c. ***If the court was in doubt, the application would be determined on a balance of convenience.***

With reference to the establishment of a prima facie case, Lord Diplock in the case of ***American Cyanamid vs Ethicon Limited [1975] AC 396*** stated thus,

"If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief."

The High Court concluded that the appellant had not established a prima facie case, having failed to produce a perfected document of title to prove that he owned the suit property. Furthermore, when the learned judge compared the appellant's documents claiming ownership with that of the 1st respondent, she concluded that, given their similarity, the issue of ownership of the suit property could not be determined conclusively.

It is well established that, in order to secure the injunctive relief sought, the appellant must first establish a prima facie case with a high chance of success. In this case, the appellant must show that he owned the suit property, or had a valid claim, which would be capable of defeating a third party claim in respect of

the same property.

The documents show that the appellant acquired the suit property from one Peter Muthaura in 1980. On 16th December 2008, the 2nd respondent confirmed to the appellant that, Peter Muthaura was the initial allottee of the suit property. It is not disputed that a payment in part for ground rent and stand premium was paid by the appellant to the 2nd respondent on 9th March 2007, and later survey fees and conveyance fees were paid on 28th January 2009. Therefore the appellant expected the 2nd respondent to finalise processing of the title in his favour.

The 1st respondent's documents on the other hand show that he purchased the suit property from one Samuel Onyango Osowo ID No. 13597177 on 10th

August 2011. From the correspondence, the 2nd respondent issued a demand on 3rd August 2011 to Sammy Onyango for ground rent of Kshs.5,530 and stand premium of Kshs.36,840 effective 1st January 2004. The 1st respondent paid the stand premium of Kshs.36,870, and further sums of Kshs.15,000 each for Survey Fees and conveyance fees. All payments were made on 10th August 2011.

When the appellant's documents are compared with those of the 1st respondent, what is apparent is that the appellant's attempts to secure proprietorship of the suit property were earlier in time than that of the 1st respondent. It is also instructive that, the appellant's documents explain that the appellant acquired the 2nd respondent's land from an allottee who had been initially allocated the suit property by the 2nd respondent. In the 1st respondent's case, no explanation has been provided by either the 1st or 2nd respondents as to how Samuel Onyango Osowo acquired the suit property in the first instance, or whether it was the appellant who sold the suit property to Samuel Onyango Osowo, who in turn sold it to the 1st respondent. It was not also shown that the appellant's allocation was revoked, and a fresh allocation issued to Samuel Onyango Osowo, who in turn sold it to the 1st respondent.

What is clear is that, neither the appellant nor the 1st respondent were in possession of a title document in respect of the suit property. This being the case, it is evident that the dispute between the parties is a contest as to whose claim over the suit property was superior to the other and, it was incumbent upon the parties to produce such documents as would support their claim in respect of the suit property, to the exclusion of the other.

There is no doubt that both the appellant and the 1st respondent produced various documents in support of their respective claims. The appellant's documents show that he had attempted to register his interest well before the 1st respondent sought to register his interest. Additionally, there is nothing to show that the appellant's allocation was ever withdrawn or cancelled by the 2nd respondent. Bearing this in mind, we consider that it was incumbent upon the learned judge to discern on a balance of probabilities, whether, based on the documents that were before the court, the appellant had established a prima facie case with a probability of success.

In our view, there was sufficient documentation to show that appellant maintained a claim in respect of the suit property, which claim was valid and continued to subsist until otherwise determined. In saying so, we find that the appellant has established a prima facie case with chances of success.

Having found that a prima facie case was established, we must consider whether the other prerequisites in ***Giella vs Cassman Brown Co. Ltd (supra)*** were met, which is, whether the appellant would suffer irreparable loss if the injunction sought was denied and where the balance of convenience lay, in the event that the court was doubtful whether the two conditions had been satisfied.

The appellant submitted that since at all material times he was the lawful allottee of the suit property from 1980, he stood to suffer irreparable loss if the defendant was not restrained from taking over. We agree. If at all any doubt existed in the trial Judge's mind as to whether the two tests above had been met, the

application ought to have been determined on a balance of convenience, which, in view, dictated that the suit property be maintained as it was pending hearing and determination of the suit. That could only be done by granting the orders of injunction as sought.

In the suit before the High Court, there remains the question as to whose claim between that of the appellant and the 1st respondent was superior or superseded the other. We are however satisfied that on the basis of the documents and evidence on record, the appellant demonstrated a prima facie with a likelihood of success. He also established that damages would not be adequate compensation unless the orders sought were granted. As a consequence, we deem it necessary to grant the injunctive relief sought, which we hereby do.

We turn next to the issue of failure by the learned judge to consider the appellant's submissions on the doctrine of *lis pendens,* so as to preserve the suit property.

Despite the appellant having submitted that, the doctrine of *lis pendens* should be applied to this case so as to restrain the respondents from disposing or otherwise dealing in the suit property until the suit was heard and determined, there is no reference to these submissions in the ruling, as the court did not at any time address the issue. In their reply, the 1st and 2nd respondents took the view that the doctrine has no relevance following the enactment of the current Lands legislation.

Black's Law Dictionary 9th edition, defines *lis pendens* as the jurisdictional, power or control acquired by a court over property while a legal action is pending.

Lis pendens is a common law principle that was enacted into statute by ***section 52 Indian Transfer of Property Act (ITPA)***-now repealed. While addressing the purpose of the principle of *lis pendens,* Turner L. J, in ***Bellamy vs Sabine [1857]*** 1 De J 566 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 *pendent lite* ***were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings."***

In the case of ***Mawji vs US International University & another [1976] KLR 185,*** Madan, J.A. stated thus:-

*"**The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration 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…"***

In the same case at page it was 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 pendete 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."***

See also the considered views of Nambuye J, (as she then was) in

Bernadette Wangare Muriu vs National Social Security Fund Board of Trustees

***& 2 Others* [2012] eKLR.**

The necessity of the doctrine of *lis pendens* in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice. Having said that, with the repeal of ***section 52*** of the ***ITPA*** by the ***Land Registration Act (LRA) Number 3 of 2013,*** the question arises as to whether the doctrine remains applicable to the circumstances of the present case. We consider that its applicability must be considered in the light of ***Section 107 (1)*** of the ***LRA*** which provides the saving and transitional provisions of this Act, and which stipulates,

"Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act."

The effect of this provision is to allow for the continued applicability of the rights and interests ensuing from legislation that governed titles of properties established prior to the repeal of such legislation. Given that the concerned property involved land eligible for registration under the Registration of Titles Act (now repealed), having regard to ***section 107 (1)*** of the ***LRA***, it is evident the rights flowing from ***section 52*** of the ***ITPA*** including those under doctrine of *lis pendens* would remain applicable to the circumstances of this case.

Furthermore, *lis pendens* is a common law principle, and in addressing the relevance of common law principles within the Kenyan context, ***section 3 (1)*** of the ***Judicature Act Cap 8*** stipulates that,

"The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with-

a. ***the Constitution;***

b. ***subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;***

c. ***subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date:***

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary."

Similarly, in the light of this provision, the doctrine of *lis pendens* would remain applicable to this case.

As to whether the requirements of the principles of *lis pendens* were met, there is no doubt that the instant case concerns a contested property dispute, where the rights to the suit property are in serious contention.

Given these circumstances, it goes without saying that, the learned judge should not have disregarded the adjudicative support of the doctrine of *lis pendens* in considering the injunctive relief sought, if for no other reason, than for the preservation of the suit property until the suit herein was finally heard and determined. We find that the learned judge fell into error when she failed to consider and apply the doctrine of *lis pendens* to grant the injunctive relief sought.

The final issue is whether the learned judge exercised her discretion judiciously. The position on the exercise of a judge's discretion was stated in the case of ***Mbogo & Another vs Shah [1968] EA*** where, Sir Clement de Lestang, V.P. at page 94 stated thus,

"I think it is well settled that a court will not interfere with the exercise of its discretion of an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or it failed to take into consideration which it should have taken into consideration and in so doing arrived at the wrong conclusion."

Upon applying these principles, we find that the High Court misdirected itself, in declining to grant the injunction, as to begin with, the learned judge reached the wrong conclusion that the appellant had not established a prima facie case. Yet, clearly, the dispute concerned the competing interests of the appellant and the 1st respondent over the suit property, and whose claim superseded the other in the light of the existing documentation. Had the learned judge considered the dispute in the light of the two competing interests, she would have come to the conclusion that, based on the appellant's documentation before the court, a prima facie case had been made out in respect of his claim. Secondly, the learned judge misdirected herself in failing to consider and apply the doctrine of *lis pendens*, to preserve the suit property pending the hearing and determination of the suit.

In the circumstances, we find it necessary to interfere with the learned judge's discretion. We allow the appeal and set aside the ruling delivered by the High Court on 17th May, 2013. The appellant shall bear the costs of the appeal.

DATED and DELIVERED at NAIROBI this 6th day of March, 2015.

R.N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR