



**Nairobi City County v Mwangi & 2 others (Environment and Land Miscellaneous Application 75 of 2014) [2024] KEELC 4920 (KLR) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4920 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 75 OF 2014**

**JO MBOYA, J  
JUNE 24, 2024**

**BETWEEN**

**NAIROBI CITY COUNTY ..... PLAINTIFF**

**AND**

**ESTHER NYAMBURA MWANGI ..... DEFENDANT**

**AND**

**PHYLIS WAMBUI KINGORI ..... PURCHASER**

**AND**

**ANNE WARINGA MWANGI ..... APPLICANT**

**RULING**

1. The Applicant herein has filed the application dated the 15<sup>th</sup> May 2024 and in respect of which the Applicant has sought for the following reliefs;
  - i. ....Spent.
  - ii. Pending the hearing inter-partes of this motion, this Honorable court be pleased to enlarge the time granted to the Applicant vide the orders issued on 20<sup>th</sup> March 2024 with a further 7 days.
  - iii. That upon hearing this application inter-partes, this Honorable court be pleased to formally review and vary the orders herein issued by enlargement of the time requisite for the depositing of the security in compliance thereof by a further 14 days.
  - iv. Costs be in the cause.
2. The instant application is premised on various grounds which have been enumerated in the body thereof. Furthermore, the application beforehand is supported by the affidavit of the Applicant [Phyllis



Wamboi King'ori] sworn on even date and to which the deponent has attached two [2] documents inter-alia a copy of the order of the court issued on the 14<sup>th</sup> March 2024.

3. Upon being served with the application beforehand, the Respondent [Ann Waringa Mwangi] has filed grounds of opposition dated the 28<sup>th</sup> May 2024 and a Replying affidavit sworn on the 10<sup>th</sup> June 2024, respectively. Instructively, the Respondent herein contends that the application beforehand has since been overtaken by events and hence the orders sought are legally untenable.
4. Suffice it to point out that the application beforehand came up for hearing on the 29<sup>th</sup> May 2024 when learned counsel for the Respondent intimated to the court that same [learned counsel for the Respondent] required time to file and serve a Replying affidavit. In this regard, the court proceeded to and indeed granted liberty to the Respondent to file a Replying affidavit.
5. First forward, the application came up for hearing on the 11<sup>th</sup> June 2024, whereupon same [Application] was canvassed and ventilated vide oral submissions. For good measure, the submissions by the respective parties are on record.

### **Parties' Submissions:**

#### **a. Applicant's Submissions:**

6. Learned counsel for the Applicant adopted and reiterated the contents of the grounds at the foot of the application beforehand as well as the averments in the body of the supporting affidavit. Furthermore, learned counsel for the Applicant raised and highlighted four pertinent issues for consideration by the court.
7. Firstly, learned counsel for the Applicant submitted that the Applicant procured and obtained a conditional order of stay of execution pending the hearing and determination of an appeal before the court of appeal. Besides, learned counsel contended that the order of stay was conditional to the Applicant depositing the sum of Kshs 1, 000, 000/= only in an Escrow account in the names of the advocates for the respective parties.
8. It was the further submissions by counsel for the Applicant that pursuant to the orders of the court same [Applicant] proceeded to and procured the sum of Kshs 1, 000, 000/= only which was to be deposited into an Escrow account but however, the said monies were procured and obtained after the lapse of the timeline that was prescribed vide the court order issued on the 14<sup>th</sup> March 2024.
9. Be that as it may, learned counsel contended that upon the Applicant procuring the funds same [learned counsel] wrote to the Respondent's advocate and intimated that the funds were available and thus the Respondent's advocates should avail the requisite documents to facilitate the opening and operationalization of the Escrow account.
10. Nevertheless, learned counsel contended that despite sending a letter to the Respondent's advocate, same [Respondent's advocate] failed and/or neglected to respond thereto. Consequently and in this regard, learned counsel for the Applicant posits that same [learned counsel for the Applicant] was obliged to file the subject application.
11. Secondly, learned counsel for the Applicant has submitted that the Application beforehand has been filed timeously and with due promptitude and in any event, the Applicant has explained the difficulties that same [Applicant] underwent in her endeavor to procure the monies at the foot of the order of the court.



12. Arising from the foregoing, learned counsel for the Applicant has therefore submitted that the Applicant has placed before the court plausible and cogent explanation to warrant the extension and/or enlargement of the time for purposes of depositing the security which was decreed vide the court order made on the 14<sup>th</sup> March 2024.
13. Thirdly, learned counsel for the Applicant has submitted that even though same [learned counsel for the Applicant] filed and served the application beforehand before the Respondent proceeded and executed the order, the Respondent nevertheless ventured forward and purported to execute the order albeit on the face of a pending application.
14. Additionally, learned counsel for the Applicant has submitted that the execution of the court order and the eventual transfer of the suit property to and/or in favor of Esther Nyambura mwangi, now deceased, was undertaken contrary to the doctrine of lis-pendens.
15. Finally, learned counsel for the Applicant has also submitted that the actions culminating to the transfer and registration of the suit property in favor of Esther Nyambura Mwangi were carried out and undertaken on the face of an order of the court granting an inhibition, which inhibition had not been varied and/or discharged. In this regard, learned counsel for the Applicant has submitted that the actions that were undertaken by and on behalf of the Respondent amounts to and constitutes disregard of lawful court orders.
16. To this end, learned counsel for the Applicant has invited the court to invoke and apply the inherent jurisdiction and to cancel the transactions that were undertaken contrary to and in contravention of the court order and to restore the position ante by having the suit property registered in the name of the Applicant but subjected to the order of inhibition.

**b. Respondent's Submissions:**

17. Learned counsel for the Respondent adopted the grounds of opposition dated the 28<sup>th</sup> May 2024 as well as the averments in the body of the Replying affidavit sworn on the 10<sup>th</sup> June 2024 and thereafter highlighted three [3] salient issues for consideration by the court.
18. First and foremost, learned counsel for the Respondent submitted that the orders of the court which were issued on the 14<sup>th</sup> March 2024 lapsed and/or expired on the 13<sup>th</sup> May 2024 and hence the orders of stay of execution pending the hearing and determination of the appeal before the court of appeal lapsed and were therefore non-existent
19. Furthermore, learned counsel for the Respondent has submitted that even though learned counsel for the Applicant herein called him on the 14<sup>th</sup> May 2024 the orders of the court had long lapsed and hence the Respondent was not obligated to avail and/or forward the documents that were being sought for by the Applicant's advocate.
20. Secondly, learned counsel for the Respondent has submitted that the Respondent herein has since proceeded to and executed the orders of the court and the suit property has since been transferred to and is now registered in the name of Esther Nyambura Mwangi [now deceased]. In this regard, learned counsel for the Respondent has invited the court to take cognizance of the contents of paragraph 11 of the replying affidavit.
21. Thirdly, learned counsel for the Respondent has submitted that insofar as the orders and decision of the court have been executed and/or implemented, the stay of execution which is at the foot of the current application has therefore been overtaken by events and hence the orders sought are legally untenable.



22. On the other hand, learned counsel for the Respondent has submitted that even though there was an order of inhibition, the suit property was transferred and registered in the name of the deceased prior to and before the variation of the inhibition. Furthermore, learned counsel added that the actions leading to the transfer were not undertaken by his law firm but by a different law firm, for whom same [learned counsel] was not responsible.
23. In a nutshell, learned counsel for the Respondent has submitted that court orders cannot issue in vain and/or in futility and given that the orders have since implemented, the current application ought to be dismissed with costs.

#### **Issues for Determination:**

24. Having reviewed the application beforehand and the responses thereto and upon consideration of the oral submissions that were ventilated before the court, the following issues do emerge [crystalize] and are therefore worthy of determination;
  - i. Whether the Applicant herein has tendered and placed before the court plausible and cogent explanation to warrant the extension of time sought.
  - ii. Whether the transaction and/or the transfer affecting the suit property during the pendency of the application and the orders of inhibition are lawful or otherwise.
  - iii. Whether the court is seized of the requisite jurisdiction to avert a miscarriage of justice or abuse of the due process of the court.

#### **Analysis And Determination**

##### **Issue Number 1. Whether the Applicant herein has tendered and placed before the court plausible and cogent explanation to warrant the extension of time sought.**

25. The Applicant herein has approached the court seeking for extension and/or enlargement of time within which to comply with the deposit of the sum of Kshs 1, 000, 000/= only in an Escrow account in the names of the advocates for the respective parties.
26. Pertinently, the Applicant contends that following the issuance of the orders of the court on the 14<sup>th</sup> March 2024, the Applicant herein commenced the process of procuring the sum of Kshs 1, 000, 000/= only towards complying with the court order. However, it has been contended that the Applicant was unable to procure and obtain the said sum of monies in good time and hence the set timelines lapsed.
27. Be that as it may, learned counsel for the Applicant has contended that the Applicant has since obtained the monies in question namely, the sum of Kshs 1, 000, 000/= only and in this regard, the Applicant is now ready to comply with the deposit of the security pending the hearing and determination of the appeal.
28. Nevertheless, it has been contended that the deposit in question cannot be undertaken insofar as the set timelines have since lapsed and hence the necessity to extend and/or enlarge the timelines.
29. On the other hand, learned counsel for the Applicant has submitted that upon being advised that the Applicant had obtained the monies same [Applicant's advocate] called the advocate for the Respondent and informed same [Respondent's advocate] of the position. Furthermore, it has been contended that the Respondent's advocate was also implored to avail the requisite documentation to facilitate the opening of the Escrow account.



30. On his part, learned counsel for the Respondent concedes that same [counsel for the Respondent] was indeed called by the Applicant's advocates but same ventures forward and contends that by the time same [Respondent's advocate] was being called the set timelines had already lapsed.
31. Having reviewed the totality of the evidence on record, as well as the submissions by the respective parties, it is evident and apparent that the Applicant's advocate made frantic and concerted efforts to reach out to and in favor of the Respondent's advocate with a view to actualizing the escrow account.
32. However, despite being reached out to the learned counsel for the Respondent appears to have been intent on winding-up time and pursuing the execution of the court order, so as to defeat the communication and correspondence between the Applicant's advocate and himself.
33. Be that as it may, I am of the humble view that the Applicant herein has indeed placed before the court cogent and plausible explanation as to why the Escrow account was not operationalized in good time and in any event, prior to the lapse of the scheduled timeline.
34. Furthermore, it is also evident that the application beforehand which seeks for extension of time was indeed filed within one [1] day from the lapse of the 60 day duration which had hitherto been set at the foot of the orders of the court made on the 14<sup>th</sup> March 2024.
35. Taking the foregoing factors and circumstances into account, I am duly persuaded that the Applicant has established and satisfied the requisite ingredients to warrant the extension of time within which to open and operationalize the Escrow account in the names of the advocates of the respective parties.
36. For good measure, it suffices to observe that the application beforehand has been made timeously and with due promptitude and furthermore the Applicant has demonstrated sufficient cause to warrant discretion in her favor.
37. Before departing from this issue, it suffices to point out that the requisite ingredients to be considered by a court of law in determining whether or not to grant extension of time were highlighted and elaborated upon by the Supreme Court of Kenya [the Apex Court] in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* Civil Application 16 of 2014 [2014] eKLR.
38. For coherence, the court stated and observed as hereunder;

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;



6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
39. Simply put, I am persuaded that the Applicant herein has met and satisfied the ingredients [whose details] have been highlighted at the foot of the decision [supra] and hence the same [Applicant] is entitled to partake of the discretion of the Court in terms of the Provisions of Section 95 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

**Issue Number 2. Whether the transaction and/or the transfer affecting the suit property during the pendency of the application and the orders of inhibition are lawful or otherwise.**

**Issue Number 3. Whether the court is seized of the requisite jurisdiction to avert a miscarriage of justice or abuse of the due process of the court.**

40. Having considered and disposed of issue number one herein before, it would have been apposite to venture forward and decree that the timelines for the deposit of security be and are hereby extended and thereafter leave the rest of the matters in the hands of the Applicant's advocate to process and comply.
41. Nevertheless, the matter beforehand portends some sort of difficult, quagmire and conundrum. Instructively, during the pendency of the application beforehand and which was filed on the 15<sup>th</sup> May 2024, the Respondent herein proceeded to and caused the suit property to be transferred and registered in the name of Esther Nyambura Mwangi, now deceased.
42. Pertinently, the transfer and registration of the suit property in the name of Esther Nyambura Mwangi, [now Deceased] was being undertaken contrary to and in contravention of the doctrine of Lis-pendense.
43. As pertains to the extent and scope of the doctrine of lis-pendense, it suffices to take cognizance of the holding of the Court of Appeal in the case of *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR, where the court stated and observed as hereunder;

*Black's Law Dictionary* 9<sup>th</sup> 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 v 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 v 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 v 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.”

44. Other than the fact that the impugned transaction were being undertaken on the face of subsisting proceedings [ pendete lite] and for which the Respondent and her advocate were aware of; it is also important to underscore that this court had also decreed an order of inhibition to be registered on the title of the suit property.
45. For coherence, the aspect of the court order touching on the issuance of inhibition read as hereunder;

“That at any rate, there be and is hereby granted an order of inhibition to be registered against the certificate of title in respect of the suit property pending the determination of the appeal/ intended appeal to the court of appeal”
46. Suffice it to point out that the limb of the order which has been highlighted in the preceding paragraph remains in existence to date. Nevertheless, the Respondent herein still proceeded to and caused the suit property to be transferred and registered in the name of Esther Nyambura Mwangi, now deceased.
47. Consequently, the question that does arise, is whether the transaction that were undertaken on the face of such an order can be countenanced by the court or otherwise.
48. In my humble view, the orders of the court ought to be respected and complied with and where appropriate, it behooves a party to revert back to court and to discharge any court order, prior to and before venturing forward to take whatsoever action that is desired and/or intended.



49. On the contrary, it does not portend [aurgur] well with the rule of law and the general administration of justice for a party [in this case, the Respondent] to disregard lawful court orders and proceed to undertake certain transaction[s] and conveyance irrespective of the orders of the court.
50. Additionally, I hold the view, that where an action and/or transaction is carried out and or undertaken in contravention of an existing court order, which has not been discharged and/or varied, then the court is seized of the requisite jurisdiction to remedy the situation arising out of the illegality.
51. Notably, the court is vested with inherent and intrinsic jurisdiction, whose import and tenor is to ensure that the ends of justice are met and achieved. Furthermore, the inherent jurisdiction provides the court with residual mandate and/or authority to avert injustice.
52. Pertinently, the import, tenor and scope of inherent jurisdiction was elaborated upon by the Supreme Court of Kenya [the apex court] in the case of *Narok County Government v Livingstone Kunini Ntutu* [2018]eKLR, where the court stated thus;

(98) Back home, the Court of Appeal in addressing the point at hand in *Kenya Power & Lighting Company v Njumbi Residents Association & another* [2015] eKLR cited Ouko J (as he then was) In the matter of the Estate of George M'Mboroki, Meru HCSC No 357 of 2004 and aptly put it that;

“... the Court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular, to ensure the observance of the due process of the law, to prevent abuse of process to do justice between the parties”.

(99) Further in *Benjob Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR the Court of Appeal set out the principles to guide the Court in exercising inherent jurisdiction in these words;

“The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection...” (Emphasis added.)

(100) The conclusion drawn from the above citations is that this Court, indeed any other appellate Court, even where there are no specific provisions to do an act, has inherent and/or residual powers to act in a fair or equitable manner in the interest of justice and/or to ensure the observance of the due process of the



law. Therein also lies the power for the Court to act to prevent abuse of Court process by one party so that fairness is maintained between all parties.

53. From the excerpts reproduced in the preceding paragraphs, it is apparent that this court is seized of the inherent and intrinsic jurisdiction to ensure that the ends of justice are met and achieved. In particular, the court ought not to be rendered powerless merely because a party, in this case the Respondent, has decided to act in a manner calculated to defeat pending proceedings as well as an order of inhibition.
54. To my mind, if the conduct displayed by the Respondent and aided by her legal counsel, is not addressed and tamed then the sanctity of the rule of law would be decimated and anarchy shall take root.
55. In the circumstances, I have agonized over the nature of orders that should issue. However, I have come to the conclusion that taking into account the totality of the obtaining circumstances, it would be appropriate, expedient and mete that the status quo ante be restored.

**Final Disposition:**

56. Arising from the exposition [details in terms of the preceding paragraphs] I come to the conclusion that the application dated the 15<sup>th</sup> May 2024, is meritorious and thus deserving of being allowed.
57. Consequently and in the premises, the orders that commend themselves unto the court are as hereunder;
  - i. The timelines for depositing the security, namely Kshs 1, 000, 000/= Only, in the Escrow account in the names of the advocates for the Applicant and the Respondent, respectively which was stipulated at the foot of the order made on the 14<sup>th</sup> March 2024; be and are hereby extended.
  - ii. Consequently, the sum of Kshs 1, 000, 000/= only being the security for the due performance of the decree that may ultimately arise shall be deposited in the Escrow account within 14 days from the date hereof.
  - iii. The order of stay of execution pending the hearing and determination of the appeal and/or intended appeal to the court of appeal hitherto granted at the foot of the orders made on the 14<sup>th</sup> March 2024 be and are hereby reinstated.
  - iv. Nevertheless, the orders of stay herein and the continuation thereof shall be dependent upon the deposit of the security in terms of clause [ii] hereof.
  - v. Furthermore, the entries that were made over and in respect of the suit property albeit during the existence of the order of inhibition issued on the 14<sup>th</sup> March 2024, be and are hereby canceled.
  - vi. For clarity, entry number 12 and which was effected on the 23<sup>rd</sup> May 2024, be and is hereby revoked.
  - vii. The title of the suit property shall remain in the name of the Applicant [Phyllis Wambui King'ori] subject to an inhibition being registered by the Land registrar to safeguard, preserve and conserve the suit property from further alienation, sale, and disposal and/or charge pending the determination of the appeal.



- viii. Nevertheless, in the event of default, by the Applicant to comply with clause [ii] hereof within the set timeline, the order of stay shall lapse and the inhibition at the foot of the order issued on the 14<sup>th</sup> March 2024, shall stand discharged.
- ix. Costs of the Application shall abide the outcome of the appeal.
- x. Either party is at liberty to apply.

58. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE 2024.**

**OGUTTU MBOYA**

**JUDGE**

In the Presence of;

Benson/ Brian; Court Assistant:

Mr. Njugi B. G for the Applicant.

Mr. S. N Otinga for the Respondent.

