



**Njoroge v Njoroge; Waweru (Interested Party) (Environment & Land Case 779 of 2017) [2024] KEELC 5645 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5645 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 779 OF 2017**

**JG KEMEI, J  
JULY 30, 2024**

**BETWEEN**

**PAUL NGIGI NJOROGE ..... PLAINTIFF**

**AND**

**EDWARD PETER WAWERU NJOROGE ..... DEFENDANT**

**AND**

**JOSEPHINE NJERI WAWERU ..... INTERESTED PARTY**

**RULING**

1. The Plaintiff and Defendant herein are related by virtue of the fact that they are sons of the late Peter Njoroge Waweru.
2. By a Plaint dated 3/10/2017 the Plaintiff/Applicant herein inter alia sought a declaration that all parcel of land known as L.R No Muguga/Kahuho 408 (hereinafter the suit land) is family land, dissolution of the trust and the land be transferred to family members in equal shares.
3. Opposing the suit, the Defendant/Respondent filed his defence dated 15/12/2017 where he denied the claim of the Plaintiff and contented that he held the land absolutely devoid of any family trust. The matter proceeded for viva voce hearing and upon analyzing the evidence it, this Court entered Judgment allowing the Plaintiff's suit as prayed on 15/6/2020.
4. Aggrieved by the Judgment, the Defendant filed an Application dated 26/11/2020 seeking to set aside the Judgment. That Application was dismissed on 1/11/2021.
5. Determined to enjoy the fruits of the Judgment, the Plaintiff moved this Court vide an Application dated 8/6/2021 seeking in the main an order for the Kiambu County Surveyor to align the suit land boundaries as per the Registry Index Map (R.I.M) and fix the beacons correctly to pave way for its subdivision. The Application was not opposed and was thus allowed on 22/6/2022.



6. It appears that the Plaintiff's quest to enjoy the fruits of his Judgment is far from over in light of his Application dated 5/7/2023, the subject of this Ruling.
7. The Plaintiff seeks Orders that; -
  - a. Spent.
  - b. This Honorable Court be pleased to issue an order that the Title Number Muguga/Kahuho/408 currently registered in the name of Josephine Njeri Waweru be cancelled as per the Court Judgment and Decree dated 15<sup>th</sup> June 2020 and 4<sup>th</sup> December respectively.
  - c. This Honorable Court be pleased to order that Title Number Muguga/Kahuho/408 be transferred to Paul Ngige Njoroge the Plaintiff herein.
  - d. This Honorable Court do authorize the County Surveyor Kiambu do align the boundaries as per the RIM and fix the beacons correctly and also do subdivide it equally among the family members as per the Judgment and Decree dated 15<sup>th</sup> June 2020 and 4<sup>th</sup> December respectively.
  - e. The Honorable Court do order that upon the Title Number Muguga/Kahuho/408 being transferred to Paul Ngige Njoroge the suit land be portioned as follows; the 1<sup>st</sup> House to be held by Edwin Wilson Mungai Njoroge of ID No 3334xxxx – 0.42 Ha, 2<sup>nd</sup> House to Daniel Mbgugua Kiguthi of ID No. 1027xxxx – 0.42 Ha and 3<sup>rd</sup> House to Edward Ndungu Njoroge of ID No. 1018xxxx – 0.42 Ha.
  - f. The Honorable Court do order that the remaining portion of Title Number Muguga/Kahuho/408 after sub-division be apportioned to Paul Ngige Njoroge of ID No. 1018xxxx – 0.10Ha.
  - g. The OCS King'ero Police Station do provide security during the subdivision exercise.
8. The Application is based on grounds that the Defendant is the registered proprietor as trustees of the family of the late Peter Njoroge Waweru for the suit land. That this Court vide a Judgment dated 15/6/2020 canceled the Defendant's title and ordered that the suit land be shared among all family members. That the Plaintiff is unable to execute the said Judgment since the Defendant transferred the suit land to his wife Josephine Njeri Waweru, the Interested Party. The Application is also supported by the Affidavit of even date of Paul Ngige Njoroge wherein he annexed copy of the suit land official search dated 13/6/2022 as PNN1 confirming the Interested Party's registration.
9. The Application was not opposed by the Defendant Respondent.
10. The Interested Party, Josephine Njeri Waweru filed her Affidavit dated 8/11/2023. She deposed that the order for cancellation of the suit land cannot stand because there are no valid grounds to invalidate it. That she and the Defendant have established the root of the suit land title as shown by a copy of the green card annexed as EPWN- 1, 2 & 3. That the suit land was transferred to the Defendant as a gift on 21/7/1976 during the lifetime of Lawrence Njenga S/o Njoroge. That as such the suit land as a gift inter vivos cannot be challenged and urged the Court to strike out the Application.
11. On 12/10/2023 directions were taken and parties elected to prosecute the Application by way of written submissions.
12. The Plaintiff through the firm of Waweru Kiragu & Associates Advocates filed submissions dated 14/11/2023 whilst the Defendant and Interested Party joint submissions are dated 9/11/2023 by the firm of Mwaura Muroki & Co. Advocates.



13. The Plaintiff recounted the background of the suit culminating to the Court's Judgment dated 15/6/2020. That it was until the time of the execution of the Judgment that he realized that the suit land was no longer in the Defendant's name but in an attempt to subvert the cause of justice, the Defendant opted to transfer the suit land to the Interested Party on 27/2/2020 while the case was pending in Court. The Plaintiff highlighted this Court's power to order cancellation of title as provided under Section 80 of the Land Registration Act and as further pronounced by the Court of Appeal in the case of Super Nova Properties Limited & Another v District Land Registrar Mombasa & 2 Others; Kenya Anti-Corruption & 2 Others (Interested Parties) [2018] eKLR.
14. Conversely the Defendant and Interested Party drew two issues for determination to wit; whether the Judgment entered on 15/6/2020 and 4/12/2020 was fair and whether the Plaintiff is entitled to the Orders sought.
15. Answering both issues in the negative, the Defendant and Interested Party posited that the Defendant was not accorded a fair trial as envisaged under Article 50 (1) of the Constitution of Kenya. That his absence in Court during the hearing of the suit was due to the Defendant's illness of Parkinson's disease which causes memory. Further that the Interested Party is a bonafide purchaser for value without notice as was held by the Supreme Court in the case of Dina Management Ltd v County Government of Mombasa [2021] eKLR. That the suit land was gifted to the Defendant by Lawrence Njenga S/o Njoroge on 21/7/1976. That having failed to demonstrate the invalidity of the suit land's title, the Application ought to be struck out with costs.
16. Having considered the Application, the responses and the rival submissions the issues for determination are;
  - a. Whether the Interested Party is competently before the Court.
  - b. Whether the transfer of the suit land runs afoul the doctrine of pendelite.
  - c. Whether the Application is opposed?
  - d. Costs of the Application.

## Joinder

17. The parties to this suit have been the Plaintiff and the Defendant upto the run up to the delivery of the Judgment and the Ruling on 15/6/2020 and 1/11/2021 respectively. According to the record the Interested Party was introduced into this suit in the current Application. I have carefully perused the record and find no instance where the Applicant or the Interested Party sought and obtained leave of the Court to be enjoined to the suit.
18. Though Order 1 rule 9, 10 and 11 of the Civil Procedure Rules has given great latitude to the Court where joinder of a party is sought, the key issue is whether the person being enjoined is a necessary party to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit.
19. It is commonly accepted that the rights of the parties in this suit were determined vide the Judgment rendered on the 15/6/2020. There is no evidence before the Court that that Judgment has been set aside, vacated and or appealed against.
20. The Application before this Court is seeking to cancel the transfer of the suit land which was carried out while the suit was pending in Court. The Court finds that to the extent that the Application is concerned, the Interested Party has not been competently enjoined to the suit.



21. That said Order 1 rule 9 provides that no suit shall be defeated by reason of misjoinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. Even if I were to be wrong on my holding that the Interested Party has not been enjoined with the leave of the Court, I find that the current suit has been determined by the Court. The Interested Party is attempting to introduce a new cause of action in a suit that has already been heard and determined and for which this Court is now functus officio.

### **The doctrine of *lis pendens***

22. This suit was filed on the 5/10/2017 and upon service of summons upon the Defendant, the Defendant filed his defence on the 19/12/2017. According to the record the Defendant failed to attend Court for the hearing but filed written submissions on the 29/1/2020 against the suit of the Plaintiff. Judgement was finally delivered on the 15/6/2020.
23. As it would appear the Defendant while the suit was pending transferred the property to his wife namely Josephine Njeri Waweru while the suit was still pending, actually on 21/2/2020, 4 months before the Judgment was delivered.
24. The question then is whether the transfer run afoul the doctrine of *lis pendens*. The doctrine of *lis pendens* has been addressed by superior Courts in many decisions including in the case of [Ruthi Kinyua v Patrick Thuita Gachure & Another](#) [2015] eKLR, where the Court of Appeal had the following to say;

“[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 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.”

25. 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 ....”



26. In the same case 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 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.”
27. Further, in the case of *Bernadette Wangare Muriu v National Social Security Fund Board of Trustees & 2 Others* [2012] eKLR, Nambuye J, (as she then was) held that;
- “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 ...”
28. And in the case of *Cieni Plains Company Limited & 2 others v Ecobank Kenya Limited* [2017] eKLR, Onguto J, stated;
- “The doctrine of *lis pendens* often expressed in the maxim pendente lite nihil novature (during litigation nothing should be changed): see *Blacks’ Law Dictionary 9<sup>th</sup> Ed*, was until May, 2012 part of our statute law. With regard to real property, section 52 of the now repealed *Indian Transfer of Property Act* 1882 provided that during the pendency in any Court having authority in Kenya of any suit in which the right to immovable property was directly and specifically in question, the immovable property was not to be transferred or dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order that would be ultimately made , except with the authority of the Court and on terms.”
29. The *lis pendens* doctrine was originally a doctrine of common Application to both the Courts of law and equity. It rested on the principle that every suit would simply be defeated once property was disposed of, and the claimant forced to bring a new suit against the new owner only for the latter to dispose of the new suit and the claimant to start all over again: See Turner *LJ in Bellamy v Sabine* [1857] 1 DeJ 566. That were it not for *lis pendens* doctrine being the guiding factor in immovable litigations, no suit in a case where the subject matter is constantly being transferred would ever be successfully prosecuted. That as I understand it, the doctrine of *lis pendens* is based on justice, equity, expediency and good conscience. It is based on sound policy. The concept of the rule of law anticipates fine and fair adjudication. The law does not allow or encourage litigants to give rights which are still under dispute to others who are not litigants and in the process prejudice fellow litigants.
30. According to the *10<sup>th</sup> edition of G. C. Bharuka’s treatise Mulla on the Indian Transfer of Property Act*, the doctrine is intended to avoid conflicts between parties to a suit and innocent purchasers and also to stop those who want to circumvent the Court’s jurisdiction by removing the subject matter from the Court’s grasp. The aim is accomplished by enforcing the decree against any person who acquires property the subject of litigation: See *Bharuka (supra)*. That from the foregoing passages, the doctrine of *lis pendens* can be regarded as one that serves to stop the alienation of land subject to a civil suit by third parties during the pendency of litigation. It serves to preserve the subject matter of a suit pending the determination of the rights of the parties.
31. I have perused the green card and clearly a restriction on the suit land was withdrawn on the 21/6/2017 on the 30/4/2019 while the suit was pending. It has not been explained why the Defendant elected



to file a suit in Kikuyu Principal Magistrate's Court seeking removal of the restriction when he knew very well that this suit was pending at the Environment and Land Court at Thika. Further on the 21/2/2020, the Defendant transferred the suit land to his wife in a clear scheme to defeat or circumvent the Judgement of the Court which was delivered 4 months later.

32. The Applicant has sought orders to cancel the transfer of the land in the name of the Interested Party. In my view it will be a mockery of justice for the Court to leave the transfer made during the subsistence of a suit and subject the Plaintiff to another rigour of litigation as against the Interested Party. Everyman, as quoted in the proceeding paragraphs, is presumed to be aware of the pending suits, especially litigation involving land governed by the ITPA, 1882. In this case both the Defendant and his wife, the Interested Party were aware of the pending suit when they made the transfer of a property actually in litigation pendente lite. The Interested Party just like the Defendant are affected in the same manner as if she had notice and will both be accordingly be bound by the Judgment or decree in the suit.
33. So severe is the doctrine that in the case of Abdalla Omar Nabhan case (Supra), the Court stated 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.”
34. In the instant Application the doctrine is applicable. The Defendant has demonstrated that he transferred the property while the case was pending in Court and consequently no interest in the land was conveyed to the Interested Party.. Mandated by the provisions of Section 80 of the Land Registration Act the Court orders the cancellation of the entry to pave way for the execution of the Judgment of the Court delivered on the 15/6/2020.
35. Further it is trite that Court orders are not made in vain. This Court enjoys inherent powers under Section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the Court. See the decision by Ojwang, J (as he then was) in B v Attorney General [2004] 1 KLR 431 that:
- “The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”
36. The principle is the same internationally. In the Canadian case of Canadian Metal Company Ltd v Canadian Broadcasting Corporation [1975] 48 Dlr, it was held –
- “To allow Court orders to be disobeyed would be to tread the road towards anarchy. If orders of the Court can be treated with disrespect, the whole administration of justice is brought into scorn. If the remedies that the Courts grant to correct, wrongs can be ignored, then there will be nothing left for each person but to take the Law into his own hands. Loss of confidence in the Courts will quickly result in the destruction



37. The totality of my findings are that; no leave was sought and obtained to enjoin the Interested Party; even if the Court will accept the joinder, the cause of action being adverted by the Interested Party is different from the one of the Plaintiff; the rights of the parties were determined and settled by the Court in the Judgement dated the 15/6/2020; the said Judgment has not been set aside vacated and or appealed; the Court being functus officio cannot entertain the new cause of action in the Application; the transfer having been carried out pendelite, no interest or right was conveyed and the transfer is for cancellation.
38. Accordingly, the Application dated 5/7/2023 be and is hereby allowed with costs to be borne by the Defendant and Interested Party.
39. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 30<sup>TH</sup> DAY OF JULY 2024  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Mungai HB Kiragu for the Plaintiff

Mwangi HB Mwaura for Defendant and Interested Party

Court Assistants – Phyllis/Oliver

