



**Odera & 6 others (Suing as their own and on behalf of all other members of the Kogony Community claiming registerable interests in the land known as C/18 Scheme) v Akinyi & 5 others; Oim & 18 others (Interested Parties) (Environment & Land Case 146 of 2012) [2023] KEELC 112 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 112 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 146 OF 2012  
A OMBWAYO, J  
JANUARY 19, 2023**

**BETWEEN**

**CHRISTABEL ACHIENG ODERA ..... 1<sup>ST</sup> PLAINTIFF  
WILSON OGOLA ODENY ..... 2<sup>ND</sup> PLAINTIFF  
CARRILUS OLANDO ODARI ..... 3<sup>RD</sup> PLAINTIFF  
JOSEPH OMOLLO ..... 4<sup>TH</sup> PLAINTIFF  
FLORENCE ATIENO ADERA ..... 5<sup>TH</sup> PLAINTIFF  
JOHN OKONGO OGENDO ..... 6<sup>TH</sup> PLAINTIFF  
MICHAEL JUMA ADEDE ..... 7<sup>TH</sup> PLAINTIFF**

**SUING AS THEIR OWN AND ON BEHALF OF ALL OTHER MEMBERS OF  
THE KOGONY COMMUNITY CLAIMING REGISTERABLE INTERESTS IN  
THE LAND KNOWN AS C/18 SCHEME**

**AND**

**CHRISTOPHER JUMA AKINYI ..... 1<sup>ST</sup> DEFENDANT  
AUGUSTINE GENGA ONDINGO ..... 2<sup>ND</sup> DEFENDANT  
VITALIS OURU AKINYI ..... 3<sup>RD</sup> DEFENDANT  
JANE KAMBAGA ..... 4<sup>TH</sup> DEFENDANT  
COUNTY LANDS REGISTRAR ..... 5<sup>TH</sup> DEFENDANT  
HON. ATTONERY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**AND**



**RULING**

1. The application before me is dated July 6, 2022. The application is made by Raymond Olendo and Maureen Owuor Odeck. The application seeks orders that the honorable court be pleased to join the applicants herein as objectors to execution of the decree or interested parties to the suit. The applicant seeks order that the entire proceedings and judgment delivered in favour of the plaintiff be set aside and the matter to start de-novo. That upon the grant of the above prayer, the applicant be granted leave to file their defence. The application is based on grounds that the 1<sup>st</sup> applicant is the registered owner of Titles number Kisumu/Kogony/5924, 5925 and 5990 which parcels form part of the entire suit property Kogony C-18 Scheme.
2. That 2<sup>nd</sup> applicant is the registered owner of Titles number Kisumu/Kogony/5924, 5925 and 5990 which parcels form part of the entire suit property Kogony C-18 Scheme.
3. That the parcels of land were duly acquired through purchase transaction that was approved and registered by the 5<sup>th</sup> defendant/respondent. That the entire suit and proceedings relate to the above listed parcels of land and affect the proprietary rights of the Applicants and even divest them of such rights.
4. The applicants further state that they were never involved in the proceedings and had no knowledge of the suit until they overheard that there was a decree to be executed against their interest in their parcels of land forming part of the suit property. That in the suit the judgment is against the defendants but also affects the applicant's interests in the property that they genuinely acquired.
5. That the applicants have a strong defence against the plaintiffs and defendants who had knowledge of the transactions when the applicants were purchasing the parcels the Applicants' interests in the land during the proceedings of the suit.
6. That there is a material contradiction on the face of the judgment as to orders (b) (e) which tend to benefit the plaintiffs' twice. That the applicants stand to suffer irreparable prejudice, loss and damages that cannot be compensated by cost nor award in damages if the orders sought for herein are not granted.
7. That the entire proceedings and decisions violates and denies the applicants their Constitutional rights to be heard and defend their proprietary rights and interest. The plaintiffs do not stand to suffer any prejudice, loss or damages if the order sought for herein are granted as they will have their day in court to oppose the applicants' claim
8. That this honorable court is sanctioned by law where necessary to set aside its judgment and proceedings and set the matter for fresh hearing.
9. That it is in the interest of justice that the applicants be joined, decree be stayed, judgment be set aside and the said applicants be allowed to defend their interest in part of the suit property. The supporting affidavit of Raymond Olendo restates the grounds of the application.
10. In the reply Christable Achieng Odera states that this suit was filed on December 20, 2012 against the defendants and proxies. On May 21, 2013 the court granted an order of injunction against the defendants from selling the suit property and therefore, the defendant acted in breach of the court



order by selling part of the suit property to the applicants. The deponent states that the applicants were made aware of the court order and proceedings.

11. The respondents contended that the applicants are deemed to be aware of the case by virtue of the doctrine of “lis pendens”, Moreover, that this court is *functus officio* after delivering judgment. The applicants having filed the suit during pendency of the suit can only claim against the vendors. The applicants filed a supplementary affidavit stating that when the applicants were transacting on the land there was no injunction barring any transaction. The applicant state that they were not parties to the proceedings but were affected by the outcome.
12. According to the applicants the doctrine of lis pendens does not apply as they were not aware of the proceedings and that the court is not *functus officio* as this is an application to set aside.
13. All parties have filed submissions which the court has carefully considered and the same have assisted the court to reach a determination.
14. The facts of this case that are not disputed are that on the December 20, 2012, the plaintiffs/decree holders brought to court the suit herein on the May 21, 2013 and the court granted an interim order of injunction restraining the defendants from transacting on the land until hearing and determination of the application.
15. On November 3, 2015 a temporary injunction was granted pending the hearing and determination of the suit.
16. The applicants acquired the suit properties between October 18, 2013 and March 9, 2017 when the suit was pending hearing and determination and when court orders were subsisting. The applicants have sought an order that they be enjoined in the suit despite the fact that the matter has been determined. The decree holder is in the process of executing the decree.
17. This court is of the view that the order sought to enjoin the applicants cannot be granted because the application is made more than 9 years after the suit was filed and almost the same period after the applicants obtained registration as proprietors of the disputed property. The same was done during the pendency of the suit. The property was transferred to the applicants by one of the defendants Augustine Genga Ondingo . The transfer was done illegally in breach of a court order.
18. The doctrine of lis pendens that 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 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.”



That in the case of *Mauji vs US International University & Another* [1976] KLR 185, Madan, JA 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 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.”

19. Further, in the case of *Bernadette Wangare Muriu vs 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...”

And in the case of *Cieni Plains Company Limited & 2 others versus Ecobank Kenya Limited* [2017] eKLR, Onguto J, stated;

“The doctrine of *lis pendens* often expressed in the maxim *pendente lite nihil in 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.”

20. 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 De J 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.
21. The principle of *lis pendens* 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. 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.

22. In the instant matter the doctrine is applicable. The applicants have demonstrated that they acquired title after purchase from one of the parties whose interest was being challenged in the suit. The applicants have a recourse against the said party.
23. On enjoinder of the applicants as interested parties, I do find that this court has already determined the issues that were raised in the pleadings and evidence before the court. The applicants are intended to introduce a new cause of action as innocent purchasers without notice of the existence of the suit. The plaintiffs may not have a cause of action against the applicants because they purchased the land from the defendants when the suit was pending but the applicants may have a cause of action against the defendants because the defendants sold the applicants suit land despite knowledge that there was a pending court case. In conclusion, the applicants are bound by the doctrine of *lis pendens* and can only seek for a remedy from Augustine Genga Ondingo. The application is dismissed with costs to the respondents.

Ruling dated, signed and delivered virtually at Kisumu this 19th day of January 2023.

**A O OMBWAYO**

**JUDGE**

ELC NO. 146 OF 2012	0
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