REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 157 OF 2016

SHIVJI NARAN VIRJI.....PLAINTIFF/APPLICANT

-VERSUS-

OGLA JEMELI BARNG'ETUNY.....DEFENDANT/RESPONDENT

RULING

[NOTICE OF MOTION DATED THE 29TH MARCH, 2021]

1. The Applicant approached the court by way of the notice of motion dated the 29th March, 2021 seeking for the following orders: -

(i) *Spent.*

(ii) ***THAT*** *this Honourable Court do and hereby orders the Deputy Registrar to sign the transfer forms to convey land parcel referenced as* ***Eldoret Municipality Block 13/886*** *to the applicant.*

(iii) ***THAT*** *this Honourable Court do and hereby orders the Deputy Registrar to release the original title of the parcel of the land referenced as* ***Eldoret Municipality Block 13/886*** *to the applicant.*

(iv) ***THAT*** *costs of this application be borne by the respondent.*

The application is based on the four **(4)** grounds on its face that the Respondent has refused to execute the transfer forms in respect of the suit land despite the subsisting orders of this court and the Court of Appeal to that effect; that as a period of eleven **(11)** years has lapsed from the date the Applicant purchased the suit land, the Deputy Registrar should be allowed to sign the required documents to transfer the land to the Applicant. The application is supported by the affidavits sworn by the Applicant on the 29th March, 2021 and the 21st April, 2021 in which she among others depone that the court in its judgment of 29th August, 2016 found in favour of the Applicant, and directed the Respondent to transfer the suit property to her; that the Respondent filed an appeal being ***Kisumu Civil Appeal No. 289 of 2019,*** that was dismissed in favour of the Applicant; that despite the Applicant writing to the Respondent's advocates requesting for the conveyance of the suit property, the Respondent has failed to honor this request; that it is fair and just for the court to direct the Deputy Registrar to sign the transfer forms, and release to her the original title documents over the suit property; that the doctrine of ***lis pendens*** relied upon by the Respondent in the replying affidavit is not applicable in this instance; that there is no subsisting stay of execution, and the undertaking to preserve the suit property cannot be ventilated in this court.

2. The application is opposed by the Respondent through her replying affidavit sworn on the 16th April, 2021 in which she among others depone that the judgement of 29th August, 2019 though in favour of the Applicant, did not direct that Deputy Registrar was to sign the transfer documents; that the court is ***functus officio*** and cannot grant the orders sought; that she has exercised her right to seek certification before the Court of Appeal to enable her to file a further appeal at the Supreme Court; that because the certification application is still pending at the Court of Appeal, this court should not make any orders in the instant application in

view of the doctrine of ***lis pendens;*** that the Deputy Registrar cannot take any action over the suit property when the certification and leave to appeal application is pending in Court of Appeal; and the subject matter of this suit should be preserved as it may disappear while her challenge of the decree to the Supreme Court is still pending.

3. The court gave directions on filing and exchanging replies and written submissions on the 13th April, 2021 and 14th June, 2021 but only the learned counsel for the Applicant filed theirs dated the 22nd April, 2021.

4. The following are the issues for determination by the court;

(a) Whether the filing of an application for certification and leave to file an appeal to the Supreme Court operates as an automatic stay of execution.

(b) Whether the Applicant has shown reasonable grounds for the orders sought to be granted.

(c) Who pays the costs of the notice of motion"

5. The court has carefully considered the grounds on the application, affidavit evidence, submissions filed, superior courts decisions cited and come to the following conclusions;

(a) That the Respondent in her reply to the application appear to posit that the filing of an application to the Court to Appeal for certification and leave to file an appeal to the Supreme Court should entitle her a stay of execution, and that the court should refrain from taking any steps until the matter in the appeal courts has ended in view of the doctrine of ***lis pendens.*** That the Applicant disputes that position and submits that the proper process that should have been used by the Respondent was the filing of an application for stay of execution. 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 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 ***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 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."

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 nihilin novature (during litigation nothing should be changed): see Blacks' Law Dictionary 9th 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."

(b) 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. 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**. Thus, according to the 10th 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.

(c) That in the instant matter, the doctrine does not appear to be applicable, as the rights over the suit property herein have already been determined by two competent courts of law in favour of the Applicant. That the fear that empowering the Deputy Registrar to sign the transfer documents, or to allow the alienation of the suit property as decreed by the courts will threaten the ownership rights of the Respondent to the suit property does not arise in this case, as the two courts have made a finding that the Respondent has no rights in the suit property. That in any case, the application does not seek to transfer the property to third parties who are not already part of the litigation over the ownership of the suit property, but to the one who the courts have actually ruled in favour of, and affirmed her right over the suit property.

(d) That it is noteworthy that appeals to the Supreme Court, more-so through the route used by the Respondent in seeking her matter certified as a matter of general public importance, and for leave to appeal to the Supreme Court that is said to be before the Court of Appeal, is not a matter of right. The Court of Appeal may well reject the application. Even if the application is successful, the Supreme Court retains the power granted under **Article 163(5) of the Constitution** to affirm, vary or overturn a certification granted by the Court of Appeal. The import of this is that appealing to the Supreme Court is an exception rather than the rule, and a party has to demonstrate that he/she/it is deserving of the jurisdiction of the Supreme Court. It cannot be equated to an appeal to the other courts which grant a litigant two appeals as a matter of right. Therefore, with the foregoing position in mind, the Respondent's filing of an application for certification and leave to file an appeal cannot be regarded as a continuation of the litigation that is capable of delaying the transfer of the suit property to the party (Applicant), in whose favour two competent courts have so far ruled on.

(e) This position is buttressed when one considers that in applying for certification to file an appeal to the Supreme Court, a person has to demonstrate that interests beyond those of the Appellant arise in the suit to necessitate the court to exercise its jurisdiction. That position has been taken by the Supreme Court in the case of ***Daniel Kimani Njihia v Francis Mwangi Kimani & Another, Civil Application No. 3 of 2014***, where a two-judge bench had this to say: -

"[This Court had not been conceived as just another layer in the appellate - Court structure. Not all decisions of the Court of

Appeal are subject to appeal before this Court.]"

(f) Therefore, the suit and appeal on the ownership rights over the suit property known as Eldoret Municipality Block 13/886, has been determined with finality. That with that determination not having been successfully challenged, the doctrine of ***lis pendens*** is clearly inapplicable in this matter. That the filing of the application for certification and for leave to appeal does therefore not amount to an automatic stay of execution order. The only way to stop the execution of a decree is in filing an application for stay of execution. That **Order 42 Rule 6 of the Civil Procedure Rules**, specifically provides that;

"(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."

(g) The Court of Appeal declined to stay execution in the matter that it had determined with finality in the case of ***Dickson Muricho Muriuki v Timothy Kangondu Muriuki & 6 Others [2013] eKLR***, when it held as follows;

"20. On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its judgment and pending the hearing and determination of an intended appeal to the Supreme Court, we are of the view that once this Court has pronounced the final judgment, it is functus officio and must down its tools. In the absence of statutory authority, the principle of functus officio prevents this Court from re-opening a case where a final decision and judgment has been made. We bear in mind that in the new constitutional dispensation, most cases will end at the Court of Appeal and it is inadvisable for this Court to be able to issue stay orders after delivery of its judgment. We remind ourselves that the principle of functus officio is grounded on public policy which favours finality of proceedings. If a court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the Supreme Court or the Court may change its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding. The structure of the Kenyan courts is that there must be finality of proceedings at the Court of Appeal in those cases where certification to the Supreme Court has not been granted. Allowing this Court to issue stay orders after judgment would be detrimental to the concept of finality in litigation within hierarchy and structure of the Kenyan courts.…

It is our considered view that subject to the Court of Appeal's jurisdiction to certify matters of appeal to the Supreme Court, the proper forum to seek and apply for stay of execution after judgment by the Court of Appeal is the Supreme Court; and only when leave or certification has been granted. The upshot of the foregoing is that we find that the application in the Notice of Motion under certificate of urgency dated 31st July, 2013 lacks merit and is hereby dismissed with costs to the respondents."

(h) That the question that begs answer from the foregoing is that, if the Court of Appeal on an application for stay of execution of its judgment found that it was *functus officio*, and that only the Supreme Court could issue those orders after an appeal being certified to proceed before it, should an application for certification and for leave to file an appeal amount to an automatic stay of execution before this court" Definitely not.

(i) That the court therefore finds that the Respondent has no legal basis upon which to claim that because she has applied for certification and leave to appeal to the Supreme Court, then an automatic stay of execution should arise. The court agrees with the Applicant and find that the proper process that the Respondent ought to have used to stay the execution of the court's decree, and the Court of Appeal's judgment, was by filing an application for stay of execution in the appropriate court.

(j) That the following decisions cited by the Applicant in their submissions among others, are in one way or the other similar to the circumstances in the instant case, and serve as a good benchmark for the appropriate direction to be taken in the instant matter. These are the cases of ***John Mwangi Ndegwa v Kanyi Gichuhi [2019] eKLR*** and ***Mary Wairimu Gakere v Muiruri Raphael Njuguna [2020] eKLR.***

(k) That further, the court has taken cognizance of **section 98 of the Civil Procedure Act** that forms the basis of the orders sought by the Applicant. The said section provides that;

"Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the Court may, on such terms and conditions, if any, as it may determine, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the Court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it."

That in the instant suit, the Applicant has proved that the Respondent has failed to comply with this court's orders of 5th September, 2019 to execute conveyance documents. She has further proved that she took steps to communicate to the Respondent through the annexed letter of 18th March, 2021 written to the Respondent's advocates, and an email of 19th March, 2021. The Respondent has not denied failing to execute the said transfer of the suit property to the Applicant. The court therefore finds merit in the Applicant's application.

(l) That in terms of **section 27 of the Civil Procedure Act**, that costs should follow the events unless for good reasons ordered otherwise, the Applicant is entitled to costs of the application being the successful party.

6. The upshot of the foregoing is that the Applicant's notice of motion dated the 29th March, 2021 has merit and is hereby allowed in terms of prayers **(2)** and **(3)** with costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 15TH DAY OF DECEMBER, 2021.

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

IN THE PRESENCE OF;

PLAINTIFF/APPLICANT: ABSENT

DEFENDANT/RESPONDENT: ABSENT

COUNSEL:

M/S MARTIN FOR ARUSEI FOR DEFENDANT/RESPONDENT

AND

MR. MWETICH FOR MAINA FOR PLAINTIFF/APPLICANT

ONIALA: COURT ASSISTANT