The purchaser pendente lite and the issue of notice: the modern approach

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INTRODUCTION

Owning property has always been a part of the dream of the average Nigerian. For decades people go to court to enforce their property right, or to affirm their right to peaceable enjoyment or even quiet title. However problems arise when a party conveys property while litigation regarding that property is pending. The common law doctrine of *Lis pendens* or *pendente Lite* established rules regarding property rights for precisely that situation.

Lis pendens or *pendente lite* literally means "pending suit", action or matter, particularly one relating to land. Ordinarily in equity and in law where a purchaser obtains a legal estate without notice of an earlier equitable encumbrance or equities attaching to the land, the legal title/estate so obtained by the purchaser shall not be disturbed. Thus a bona-fide purchaser for value of a legal estate without notice of prior equitable interest takes free from all prior equities affecting the property.

However the above assertion though trite law, may not hold sway in all situations. One of which is under the doctrine of *Lis-pendens*. As mentioned earlier, *Lis pendens* means pending suit. In other words, the bona-fide purchaser of a legal estate without notice of prior equitable interest may not have his interest affirmed where he purchases a property the subject matter of a pending litigation.

A bona fide purchaser is a purchaser who acted without negligence, without malice and more significantly, without knowledge of the existing prior equitable interest. Notice in equity is synonymous with knowledge in the above context. Notice in the doctrine of bonafide purchaser is not only significant but crucial.

Notice in equity which is knowledge of existing facts, may be actual notice, (that is the notice which has come directly to the purchaser) or constructive notice, that is, the notice which the purchaser would have discovered had he acted diligently or conducted proper investigation or an imputed notice which is the actual or constructive notice of the purchaser's agent or solicitor. The doctrine of notice therefore has its origin in the considerations of prudence and honesty, which guide men, in their ordinary business transactions. It is one of many cases in which equity has placed high premium on substance rather than form. In the accomplishment of its ultimate purpose to do justice, Equity brushes aside, all matters of form or technicalities.

Thus, in equity, the plea of bona fide purchase of a legal estate for value without notice has been described as an absolute, unqualified and unanswerable defence.[1] On the strength of the plea, the court of equity has no jurisdiction what so ever to do anything more than to let such purchaser be in possession of that legal estate, that legal advantage which he has obtained, whatever it may be.[2]

As important as the doctrine of notice is nevertheless, under the doctrine of lis pendens which is examined hereunder notice is immaterial for the invocation of the doctrine which emanated out of necessity and public policy. The doctrine is an ancient one, which predates the court of equity, yet, the operation of the doctrine still holds sway till today. The doctrine binds the purchaser pendente lite though without notice and for valuable consideration. If pendente lite were to be permitted based on the doctrine of bona fide purchaser without notice, then, it would be plainly impossible for any action or suit to be brought to a successful termination because, a mortgage or sale made before a final decree to a person who has no notice of pending proceedings would always render a new suit necessary.

THE BASIS OF THE DOCTRINE

The doctrine of Lis Pendens does not require a person to have actual notice of the litigation; Constructive notice is imputed to him. The doctrine is an ancient one, which predates the courts of equity. It is said to have been first formulated by Sir Francis Bacon in 1618 it is based on public policy and convenience, irrespective of notice. The rule became necessary for the smooth administration of justice to make decisions in a pending suit binding and effective. This is achieved by keeping the subject matter of controversy within the jurisdiction and control of the court until final adjudication; so as to

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[1] See Pilcher v Rawling [1871] Ch. App259 at 268-269 per James L.J.

[2] See Folashade v Durosinmi [1961]1All NLR 87.

preserve the property in question. This doctrine also ensures that the purpose of the pending suit is not defeated by successive alienation and/or transfer of title during the pendency of the suit. The doctrine is regarded as a phase of the law of res judicata. The court would assume that interested parties to the property would monitor the situation and should be aware of pending litigation.

The requirement of constructive notice is implied for invocation of this doctrine, lack of knowledge or notice of the pending suit is of no consequence. The foundation of the common law rule of Lis Pendens is not notice, but public policy and necessity. This forbids a litigant from giving rights to third party on the same property pending the determination of the case, so as not to prejudice the outcome of the proceedings of the court.[3] This doctrine applies not only to purchasers from the defendant but also to purchasers from the plaintiff. It applies to all cases of transfer during the pendency of the suit.

As the Supreme Court of Nigeria put it in *Steven Ono Ebueku v Sunmola Amola*,[4] the Doctrine of Lis Pendens is designed to prevent the vendor from transferring any effective title to the purchaser by depriving him (the vendor) of any rights over the property during the currency of litigation or the pendency of the suit. In *John A. Osagie v. Alhaja S. O. Oyeyinka & Anor*[5] The same court also held that the doctrine of Lis Pendens is not limited in application to a purchaser but also to a mortgagee without notice. It also binds the purchasers Pendente lite though without notice and for valuable consideration.

The Court further held that sales of goods doctrine of 'Nemo dat quod non habet' will also apply to defeat any sale or transfer of such property made during the currency of the litigation.

The facts of the case of *Osagie v. Oyeyinka* are as follows; the second respondent was the owner of the property known as No. 1,2,3rd

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[3] See Words and Phrases, Permanent Edition (1961) West Publishing CO. Volume 25A at p 5
[4] [1988] 2 NWLR (pt75) 128
[5] [1987]3NWLR(pt 59) 144

commentary Road, Benin City and he mortgaged same to his bankers. As he could not pay the mortgage debt, he approached the appellants who made available to him, a total sum of N9,600 to liquidate the debt. The money was paid by the Appellants in two pieces and two receipts were issued by the 2nd respondent.

The receipts were each designated "purchase consideration". After the payment, the 2nd Respondent handed over the key to the premises to the appellant but the title Deeds were not so handed over because they were still with the bank. The 2nd Respondent however gave to the appellant a promise in writing that he will "execute" a conveyance in favour of the appellant when he redeemed the conveyance from the bank.

The 2nd Respondent refused to execute a conveyance in favour of the appellant who then reported the matter to the police. The appellant's complaint to the police was that the 2nd Respondent and the bank had conspired to dupe him. The police then commenced criminal prosecution against the 2nd Respondent. On 23rd October, 1974, the appellant instituted an action to compel the 2nd Respondent to convey the land in dispute to him. The suit lasted from that date to 31st October, 1977.

On 23rd June, 1976 and during the pending suit, the 2nd Respondent sold and conveyed to the 1st Respondent a portion of the land in dispute. The conveyance was tendered in the proceedings as Exhibit B, the appellant then commenced the present proceedings against the 1st and 2nd Respondent for a declaration of statutory right of occupancy over the premises. He also asked for damages for trespass and an injunction.

At the trial, the appellant contended that the money he paid to the 2nd respondent was for the purchase of the premises from the 2nd respondent. The 2nd Respondent however contended that the money was advanced to him as a friendly loan. It was also argued by him that the appellant was estopped from continuing his proceedings because of the report to the police and the earlier criminal prosecution.

The trial judge found as a fact that there was sale of the premises to the appellant but dismissed the claims on the ground that the appellant merely got an equitable interest. Upon appeal to Court of

Appeal, it was held that the appellant did not establish title to the land in dispute and therefore the appeal was dismissed. Being dissatisfied with the judgment, the appellant further appealed to Supreme Court. The Supreme Court unanimously allowed the appeal and held *inter alia* that if the property was in question or dispute in a suit or action, it could not be alienated during the pending suit or action.

THE PRINCIPLES GOVERNING THE DOCTRINE OF LIS PENDENS

Where litigation is pending between a plaintiff and a defendant as to their rights over a particular estate, the decision of the court in the suit is binding not only on the litigation parties but also upon those who derive title under them by alienation made pending the determination of suit whether such purchasers had or had no notice of the pending proceedings. However, it must be shown that before the alienation of the property, the suit was in full prosecution in the sense that defendant must have actually been served with or must be shown to be aware of the existence of the plaintiffs summons[6]

The following must therefore be present and established before the doctrine of Lis Pendens can apply:

(a) That at the time of the sale of the property, the suit in respect of the property was pending.

(b) The action or Lis was in respect of real property.

(c) The object of the action was to recover or assert title to a specific real property.

(d) That the party concerned was aware of, was served with the processes in the pending Lis. All the above must co-exist.[7]

In Barclays bank of Nigeria ltd v Alhaji Adam Badejoko Ashiru & 2 ors[8] the Supreme Court held that the doctrine of Lis Pendens "does not apply to every suit. It applies to a suit in which the object is to recover

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[6] Ikeanyi v African Continental Bank Ltd [1991] 7 NWLR(pt205) 620 at 637

[7] See Ikeanyi v ACB (supra) at 637 at639, Barclays Bank of Nigeria Ltd v Ashiru [1978] 6-7 SC 99,

[8] Supra at 128.

or assert title to a specific property; the property, however, must be real property for the doctrine has no application to personal property. Lis Pendens_ordinarily may not be predicated on an action or suit for a personal or money judgment but applies only to an action or suit which directly affects property. It applies to actions both at law and in equity."[9]

LIS PENDENS AND ISSUE OF NOTICE

As said earlier, the doctrine of Lis Pendens is not founded upon any doctrine of actual or constructive notice, but upon the fact that the law does not give parties in a pending litigation, rights in the property which is the subject matter of the dispute so as not to prejudice the opposite party.[10] The maxim is, "Pendente Little nihil innovetur"–

The rule is that all persons are bound to take notice at their peril of suit affecting the title to property and purchaser pendente lite either, with or without notice, take no better title than their grantor shall be adjudged to have.

The doctrine only relates to and affects voluntary alienations of property pending a suit in respect to it by or from the defendants therein and in no way affect independent parties asserting adverse rights in respect of it. It only operates as a notice requiring rights in the subject-matter of the litigation from any of the parties named therein during the pendency of the suit.[11]

In *Bellamy v Sabine*[12], Turner L.J. said "The doctrine of Lis pendens is:

> "Not, as I conceive founded upon any of the peculiar tenants of a court of equity as to implied or constructive notice. It is, I think, a doctrine common to the court both of law and equity, and rests, as I apprehend, upon this foundation that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendente lite, were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant alienating before the judgement or decree,

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[9] Corpus Juris Secundum op. cit at 577

[10] Barclays Bank of Nigeria Ltd v Ashiru, supra at 123-124.

[11] Words and Phrases op.cit at 10-11

[12] [1857] AC234

> and would be driven to commence his proceeding de novo, subject again to be defeated by the same course of proceeding..."

The Lord Chancellor made his own contribution in the above case in the following words:

> "it is scarcely accurate to speak of Lis Pendens as affecting a purchaser upon the doctrine of notice, although undoubtedly the language of the court often so describes its operation. It affects him not because it amounts to notice but because the law does not allow to litigant parties and give to them pending the litigation, rights in the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant, as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also upon those who derive title under them by alienation made pending the suit, whether such alienees had, or had not, notice of the pending proceedings. If this were so, there could be no certainty that litigation would ever come to an end. A Mortgage or sale made before a final decree to a person who had no notice of pending proceedings, would always render a new suit necessary, and so interminable litigation might be the consequence..."[13]

The doctrine is not actually based on any notice be it actual or constructive one, but the foundation to the doctrine lies on principle of public policy and necessity, thus, lack of knowledge or notice of pending suit is of no consequence.

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[13] Ibid at p801, see also Adaran Ogundiani v O.A.L. Arabe & anor [1978] 6-7 SC at 78-80

ELEMENTS OF A VALID CLAIM OF LIS PENDENS

Three elements are essential to a valid and effective claim of *Lis Pendens* namely:

(a) The property must be of a character to be subject to the rule of *Lis Pendens.*

(b) The court must have jurisdiction both on the person and

(c) The *res,*[14] and

(d) The property or *res* involved must be sufficiently described in the pleadings.

Also, the litigation must be about some specific things or property that will be necessarily affected by the termination of the suit.

Jurisdiction is very important in any action, therefore for the doctrine of *Lis pendens* to apply, the court must have jurisdiction over the subject matter of litigation as well as over the persons or parties. Also, to invoke the rule of *Lis Pendens,* the property involved must be so properly described in the pleadings as to enable a purchaser or other third person to ascertain its identity as the subject of the litigation.

Subject to some exceptions or limitations, the doctrine of *Lis pendens* is applicable to property or interests of any kind in litigation over which the court has acquired jurisdiction, (actual jurisdiction) and not inherent jurisdiction. It applies to real property and it does not apply to personal property. The doctrine as a general rule does not apply to negotiable instruments purchased in good faith, for value and before maturity, particularly where the rights of the holder of such an instrument are specifically controlled by the provisions of Negotiable Investments Act.[15] Ordinarily, the doctrine of *Lis Pendens* is not applicable to personal or money judgment but applies only to action or suit which directly affects real property.[16]

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[14] The issue of jurisdiction is very important because any judgment delivered by a court without jurisdiction is a nullity and therefore void. See Nalsa & Tearn Associates v NNP[1996] 3 SCNJ 50 at 61, Macfoy v U.A.C [1962] AC 152at 160.

[15] This Act applies only in America.

[16] See Corpus Juris Secundum o.cit at 574-578

THE MODERN TREND ON THE DOCTRINE OF LIS PENDENS

The doctrine of *Lis Pendens* under the common law did not require a person to have actual notice of the litigation. The court assumed that people monitored the cases before the courts and would therefore be aware of pending litigation before purchasing property.[17] Therefore, the fact that a case was before the courts was sufficient notice. Later, courts decided that this view of notice was too harsh and narrowed the scope of *Lis pendens.* The doctrine applied only if the property at issue was located within the jurisdiction of the court hearing the case. This relieved a purchaser of the burden of searching the entire state or country for pending litigation that might affect the property in which he or she was interested.

As stated above, notice of any litigation in respect of the land was imputed to the purchaser and the public at large so that the court's eventual decision would not be nullified through the acquisition of intervening rights. However, over time, the cases established that the purchaser and the public did not have knowledge of the litigation by virtue of the mere fact that an action had been commenced.[18]

V Dicastri,[19] Commented on this development in the following words:

> "It may be noted that the doctrine as to the effect of a Lis pendens on the title of an Lienee is not founded on the principles of court of equity with regard to notice but on the ground that it is necessary to administration of justice that the decision of a court in a suit should be binding not only on the Litigant parties but on those who derive title from them pendente lite whether with notice of the suit or not. To ensure this result today and to limit and control the application of the former doctrine, it is necessary

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[17] See Gaugert v Dove, 2001 WL 737375, 4 (Wis2001)

[18] See Peck v Sun Life Assurance Co [1905]1 WLR 302 (SCC), Lefty Ltd v Moffat, 510R 206 (1925) 3 DLR 825; Fraser River Ventures Ltd v Yewdall et.Al (1958) 27 WWR 368.

[19] V. Dicastri, Thorn's Canadian Torrens System 2nd at 674.

> that the plaintiff register a certificate of *Lis pendens* under the statutory provision... But at common law neither the issue of the writ nor the registering of the certificate of *lis pendens* has any effect upon preceding and executed transactions".

Most states in America perceived the Common Law *Lis pendens* presumed notice requirement as too harsh and enacted statutes that modified the doctrine. For example, when Illinois first enacted a statute, it merely codified the common law doctrine that rendered the filing of a complaint sufficient notice to subsequent purchasers of property. Later, the legislature amended the statute to bind subsequent purchasers to a final judgment only if the person claiming an interest in property recorded a notice in each county in which the property is located prior to the purchaser taking title. Similarly, Wisconsin's first *Lis pendens* statute authorized a person to record a notice of a lawsuit with the clerk of the Circuit Court for each county in which the property at issue was located. The legislature later made the notice mandatory and changed the location of the recording to the register of deeds of each country in which the property was located.

Indiana's legislature enacted similar laws that required "a separate written notice of a pending suit be filed with the clerk of the Circuit Court in order for the action to affect the interests of any *pendente lite* claimants"[20].

At present, the right to register a certificate of *lis pendens* is statutory and places on record the historical fact that litigation is pending in respect to a particular parcel of land.[21]

A person claiming an interest in any land, mortgage or encumbrance may, in lieu of filing a caveat or after filing a caveat, proceed by way of an action to enforce his claim and register a certificate of *Lis pendens (CLP)* in a prescribed form.[22]

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[20] See Mid West Federal Saving Bank v Kerlin, 672 NE 2d 82 (Ind Ct app.1997)seegenerallyhttp://www.itgf.com/atgconcept/2002/200202/Lispendens.htmpp1-2

[21] See V. Dicastri, ed Law of Vendor and Purchaser p 432.

[22] The registration of CLP is expressly authorized by section 43 o the Builders Lien Act R.S.A.2000. CB-7 and Section 35 of the Matrimonial Property Act, R.S.A.2000cm-8

Similarly, the state of Delaware, has since 29th June, 1989 abolished the common-law doctrine of *Lis pendens* and by its code provides that no action instituted after June 29, 1989, shall constitute constructive notice to any person unless notice of such action complies with the statutory provisions. The statute provides in part:

> S.1601(a) In any action instituted in any court of this state having civil jurisdiction or in the United States District Court for the District of Delaware, any party asserting a claim, the object of which is to affect the title to, or enforce an equitable lien on, real estate may, after filing of such claim, file in the office of the Recorder of Deeds of any county in which all or any part of the affected real estate is situate a written notice of the pendency of the action, which shall be under oath, and shall set forth:
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> (1) The court in which the action was brought, the caption of the action and the civil action number;
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> (2) The object of the action or the affirmative relief sought;
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> (3) A legal description sufficient to identify the property affected; and
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> (4) A designation of the names of each party against whom notice is directed to be indexed...[23]

The recording of a notice of pendency shall be notice to any person acquiring an interest in the real property identified in the notice from or through any party named in the notice from the time of the recording of the notice. Any person claiming an interest in the real property which is the subject of the notice of pendency is bound by all proceedings taken in the action after such recording and until cancellation or discharge to the same extent as if such person were a party. A notice of pendency shall be effective for a term of three years from the date of recording with the recorder of Deeds. The court may upon motion by the recording party, for good cause shown, grant an extension for additional term. Such extension shall

[23] See http/www.delcode.state.de.us/title25/chapter16.htm p1

be recorded with the Recorder of Deeds before the expiration of the prior term.[24]

A certificate of *Lis pendens* is cancelled upon registration of the followings:

> (a) A certificate under seal of the clerk of the court stating that proceedings for which the certificate was granted are discontinued, or dismissed and the time for appeal has expired and no appeal has been filed or if filed ha been finally disposed of or discontinued.
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> (b) A withdrawal of the certificate of *Lis pendens* in the prescribed form by the person on whose behalf the certificate of *Lis pendens* was registered or by his agent.
>
> (c) An order of the court discharging the document which is the basis of the certificate of *Lis pendens.*

From the totality of the above, one could see that these laws established a central location where a third party could go to determine if the property was subject of ongoing litigation before making the purchase. This is a great innovation on the doctrine of *Lis pendens* in those jurisdiction. Whereas, the above innovations were introduced in some states in the United States of America, the same is not true of the common Law in England. The doctrine of *Lis Pendens* is therefore still sustained on the bases of public policy and necessity rather than registration.

CONCLUSION

The above doctrine of *Lis Pendens* applies to actions or proceedings both at law and in equity. It is not peculiar to court of equity alone, although, the doctrine is sometimes discussed and defined as if it were an equitable rule only. *Lis Pendens* applies in an action at law and equity altogether. No doubt, the doctrine as discussed above has a salutary effect of preventing multiplicity of actions which would

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[24] See67 Del. Law, C.59.S.1

have been the order of the day if, the vendors or parties are allowed to pass their interest to third party during the pendency of the action involving the property.

However, the imputed notice of a pending action on the 'would be purchaser' of the property in litigation is rather a harsh one on the innocent and bona fide purchaser for value without notice. Nevertheless, the harshness has to be compromised and sacrificed in the interest of justice, fairness and public policy which are essential to our judicial system.

In contrast to what is obtainable in some advanced countries such as United States, the Common Law doctrine of *Lis pendens* or *Pendente lite* still hold sway in Nigeria. Nigerians are still trapped with idea of constructive/imputed notice in the operation of *Lis pendens* which has been jettisoned in some developed countries. These states later decided that such assumption was too harsh and they enacted statutes explaining the process of filing *Lis pendens.* These statutes established a central location or registry where a third party could go to determine if the property was the subject of ongoing litigation before making the purchase. Thus, the risk of being caught by the doctrine is reduced to a minimal extent due to the caveat or certificate of *Lis pendens* already filed with the Recorder of Deeds.

It is therefore submitted that Nigeria also needs a similar legislation codifying and improving upon the common law position. A legislation which shall establish a central location where a third party could go to search if the property is subject of any ongoing litigation is therefore necessary. To leave a third party to suffer for no fault of his own by purchasing subject to litigation on the property which he may not be actually aware of until after purchase is inequitable. A law should therefore be put in place which requires a certificate of *Lis pendens* to be filed in Land Registry in the state where the land is situated. Moreso any "would be purchaser" is accustomed to search in Land registry in respect of the property he intends to buy.

This will no doubt bring the doctrine of *Lis pendens* in Nigeria in tune with the modern trend and it will also reduce the present harshness of the doctrine on the bona fide purchaser of the property without notice of a pending litigation.