



**THE REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 570 OF 2017**

**JANE WAMBUI & ROBERT KAGUNYA KAMAU**

**(Suing as the Administrators of the Estate of**

**EMMA WANGUI KAMAU-Deceased).....PLAINTIFF**

**=VERSUS=**

**BERNARD HERMAN KARANJA.....1ST DEFENDANT**

**TELEPOSTA PENSION SCHEME TRUSTEES.....2ND DEFENDANT**

**RULING**

1. This court [Gacheru J] heard this suit and rendered a judgment dated 8/10/2021. The court made the following disposal orders:

*1. That an order of specific performance be and is hereby made compelling the 1st defendant to do all that is necessary to facilitate the transfer of Plot Number Thika Municipality Block 9/301 from the 2nd defendant to the plaintiffs and or in the alternative the 2nd defendant be and is hereby ordered to transfer the said subject Plot into the names of the plaintiffs.*

*2. That the costs of this suit will be borne by the 1st defendant.*

2. On 3/12/2021, the 1st defendant brought a notice of motion dated 3/12/202 seeking the following verbatim orders:

*1. That this application be certified as urgent and heard ex-parte in the first instance.*

*2. That leave be granted to the firm of M/s Kithinji Marete & Company Advocates to come on record on behalf of the applicant herein.*

*3. That pending the hearing and determination of the application inter-partes, there be a stay of execution of the decree and judgement delivered by the honourable court on 8th October 2021 and all consequential orders.*

*4. That the court be pleased to grant a temporary injunction restraining the respondents, its servants, officers, workmen, employees and agents or any other person from occupying, selling leasing, transferring, charging, pledging, alienating, tempering with, altering or otherwise howsoever dealing with the property known as Thika Municipality Block 9/301 in any manner that is prejudicial to the applicant pending the hearing and determination of the appeal.*

*5. That the costs of this application be provided for.*

3. The said application came up for hearing before me today and is the subject of this ruling. The application was supported by the 1st defendant's affidavit sworn on 3/12/2021, in which he deposed that being aggrieved with the Judgment of Gacheru J, he had decided to prefer an appeal in the Court of Appeal at Nairobi against the said Judgement. He added that he had filed **Civil Application No NAI E423 of 2021** seeking an order of the Court of Appeal enlarging the time within which to file and serve a notice of appeal, among other prayers. He further deposed that his intended appeal was arguable and had very good chances of success. The 1st defendant further deposed that his failure to file and serve a notice of appeal was inadvertent and was occasioned by the fact that he got to learn about existence of the Judgment on 11/11/2021. He added that the decree-holder had moved with alacrity to commence execution proceedings.

4. Canvassing the application in the virtual court this morning, Mr. Muriithi, counsel for the applicant, submitted that the applicant had been in occupation of the suit property for long and had developed the suit property. He contended that the applicant stood to suffer substantial loss if an order of stay of execution was not granted. He urged the court to grant the prayers sought in the application.

5. Mrs Purity Mbabu, counsel for the 2nd defendant, submitted that the 2nd defendant had no interest in the suit property. She drew the attention of the court to the fact that no appeal had been preferred and that in the absence of a pending appeal, the court was being invited to grant stay orders in a vacuum.

6. I have considered the application together with the parties' submissions. Before I focus on the key issue(s) falling for determination, I will briefly examine the prayers sought in the application. Prayer 1 is a plea for an order certifying the application as urgent. It is at this point spent. Prayer 2 is a plea for leave to be granted to the 1st defendant to effect a change of advocates post-judgment. There is no proper reason why such leave should not be granted. Prayer 3 is a plea for an order of stay of execution pending the hearing and determination of the present application. The tenor and import of this prayer is that, as at the point of finishing to read this ruling, the prayer will be spent. Consequently, what remains to be considered in the present application is prayer 4.

7. Prayer 4 is a plea for a post-judgment temporary injunction order by the trial court. A key question to be answered when considering this prayer is whether this court is the proper forum where the plea for post-judgment injunction order should be canvassed. **Rule 5(2)(b)** of the Court of Appeal Rules vests in the Court of Appeal jurisdiction to grant an injunction pending the hearing and determination of an appeal before it. On the other hand, the jurisdiction of this court to grant a temporary injunction when exercising its jurisdiction as a trial court is donated by **Order 40** of the **Civil Procedure Rules**. That jurisdiction is exercised by this court pending the hearing and determination of a suit; not after a final judgment has been rendered.

8. Judgment was rendered in this suit on 8/10/2021. That Judgment determined the rights of the parties to this suit. This court cannot, at this stage, as a trial court, exercise jurisdiction to grant a temporary injunction under Order 40 as sought by the 1st defendant because it has already determined the rights of the parties over the suit property through a final Judgment. Only the Court of Appeal can grant a temporary injunction, in the present circumstances, under **Rule 5(2)(b)**.

9. I have in the past observed that the decision in the English case of **Erinford Properties Ltd v Cheshire County Council [1974]2 All ER 448** which informed the view that a trial court which had declined to grant a temporary injunction would nonetheless grant it pending an appeal related to distinct circumstances. It related to a scenario where the suit was still pending determination by the trial court; not where the trial court had rendered a final judgment determining the rights of the parties such as in the present suit.

10. Even if this court had jurisdiction to grant a temporary injunction at this stage, I have doubts that, in the present circumstances where the time for lodging an appeal has lapsed and there is no pending appeal, the court can properly grant the plea. From the materials presented to the court, there is no pending appeal. What is pending in the Court of Appeal is an application for an order enlarging the time for lodging an appeal by the 1st defendant.

11. The result is that the notice of motion dated 3/12/2021 is declined for the above reasons.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 17TH DAY OF JANUARY 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Muriithi for the 1st Defendant

Mrs Mbabu for the 2nd Defendant

Court Assistant: Phyllis Mwangi