



**THE REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO 414 OF 2017**

**(FORMERLY NAIROBI ELC CASE NO 578 OF 2012)**

**WILLIAM KIBERA WAIGANJO (Suing as Legal Representative and  
Guardian of LEAH WACHU WAIGANJO).....PLAINTIFF**

**VERSUS**

**NJERI MUCHANGIRU.....DEFENDANT**

**RULING**

1. This court (Mbugua J) rendered a judgment in this suit on 2/5/2019. She identified the following as the single issue falling for determination in the primary suit and in the defendant's counter claim:

***“Whether the two titles registered in the name of Leah Wachu, the same being Ruiru/Ruiru East Block 2/97 and Ruiru East Block 2/98 were obtained fraudulently.”***

2. The court made the following disposal orders:

***a) The counter claim of Njeri Muchangiru is hereby dismissed, which means that the titles of Leah Wachu Waiganjo have not been found wanting and William should hence continue to occupy the land.***

***b) Each party to bear their own costs of the suit.***

3. More than 16 months later, the defendant brought an application dated 14/8/2020 seeking the following orders:

***a) Spent***

***b) This honourable court be pleased to issue an order for restriction on the suit property Title Number Ruiru/Ruiru East Block 2/97 & 98.***

***c) The costs of this application be provided for.***

4. The application was expressed as brought under Order 36 rules 2, 4, 8 and 10; Order 51 and rules 1, 3, 4 and 10 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The said application is the subject of this ruling.

5. The application was supported by the defendant's affidavit sworn on 14/8/2020 in which she deposed that she had filed an appeal against the judgment rendered by Mbugua J and that the Court of Appeal had directed parties to file written submissions. She added that it had come to her notice that the plaintiff intended to dispose off the suit properties. She added that her attempts to lodge a caution against the titles had failed because the Land Registrar had advised that he could only act on a court order. She added that she stood to "encounter great loss" and her appeal would be rendered nugatory if the above order is not granted.

6. The plaintiff opposed the application through a replying affidavit sworn on 14/10/2020. He deposed that the application lacked merit and was incompetent because the court having rendered a final judgment it had become *functus officio*. She added that the application was, in essence, a plea for review of the judgment rendered by Mbugua J. He further deposed that he stood to be prejudiced by the orders sought by the defendant because the court had already determined the dispute on merits. He added that this court did not have jurisdiction to entertain

the application.

7. The application was canvassed through written submissions dated 10/12/2020, filed through the firm of *Njeru Nyaga & Co Advocates*. Counsel submitted that the essence of a caution or caveat was to act as a stop gap measure to enable the cautioner or caveator to initiate action to establish his or her interest. Counsel added that the defendant's appeal stood to be rendered nugatory if the suit properties were disposed. Counsel relied on paragraph 32 of this court's Practice Directions which grants this court discretion to issue an order of status quo pending the hearing and determination of a suit, bearing in mind the overriding interest of justice.

8. The plaintiff filed written submissions dated 11/2/2021, through the firm of *Bwogo Manoti & Chepngeno Associates*. Counsel submitted that the single issue falling for determination in the application was whether this court had jurisdiction to grant the orders sought in the application. Counsel submitted that this court having rendered a final judgment in this suit, it did not have jurisdiction to entertain the application. Counsel added that the application was an application for review brought after the defendant had exercised his right of appeal by filing an appeal in the Court of Appeal. Counsel urged the court to reject the application.

9. I have considered the application; the plaintiff's response; and the parties' respective submissions. I have also considered the law cited by the applicant and the relevant jurisprudence. The single issue falling for determination in this application is whether, this court having rendered a final judgment in this suit, there is jurisdiction on part of the court to grant the post judgment injunctive orders sought.

10. The tenor and import of the substantive prayer in the application is that the defendant is inviting this court to grant an injunction in form of an order restricting dealings on the suit properties Title Numbers Ruiru/Ruiru East Block 2/97 and 98. The defendant has invited the court to exercise the above jurisdiction under Order 36 rules 2, 4, 8 and 10 and Order 51 rules 1, 3, 4 and 10 of the Civil Procedure Rules. The said frameworks do not confer jurisdiction on this court to issue a post judgment injunctive relief. Order 36 provides the framework on summary judgment. Order 51 provides the general framework on applications.

11. Our superior courts have been unequivocal on the source of the jurisdiction they exercise. In **R v Karisa Chengo (2017) eKLR**, the Supreme Court of Kenya defined jurisdiction as follows:

*“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”*

12. In **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others (2012) eKLR**, the Supreme Court of Kenya outlined the following jurisprudential principle on the source and scope of jurisdiction of a court:

*“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”*

13. In the present application, this court [Mbugua J] heard the parties fully and rendered a final judgment determining the parties' rights. The court found that the defendant had failed to prove his counterclaim. Further, the court upheld the titles held by the plaintiff. Lastly, the court upheld the plaintiff's right to continue occupying the suit properties.

14. In my view, the court having rendered a final judgment in which it pronounced itself on the parties' rights, Order 40 of the Civil Procedure Rules - which is the platform on which jurisdiction to grant interlocutory injunctive reliefs, is no longer available. The only available platform on which the defendant can seek an interlocutory injunctive relief is Rule 5(2)(b) of the Court of Appeal Rules. The court seized of jurisdiction to grant an injunction under Rule 5(2) (b) of the Court of Appeal Rules is the Court of Appeal, not this court.

15. The decision in the English case of **Erinford Properties Ltd v Cheshire County Council [1974] 2 All ER 448** which was subsequently adopted by the Court of Appeal in **Madhupaper International Ltd v Kerr [1985] eKLR** related to suits that were pending hearing and determination in the trial courts. The courts held that the respective trial courts had proper platform on which to exercise jurisdiction to grant the interlocutory injunctive reliefs. In the present suit, the parties' rights have been determined through a final judgment on merits. Only the Court of Appeal can, in the circumstances, give an injunctive Order under Rule 5(2)(b) once the requisite criteria is satisfied.

16. For the above reasons, it is the finding of this court that it has no jurisdiction to grant a post-judgment injunctive order against the plaintiff who has a judgment in his favour in this suit. The net result is that the defendant's application dated 14/8/2020 is dismissed. The defendant shall bear costs of the application.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 30TH DAY OF NOVEMBER 2021**

**B M EBOSO**

**JUDGE**

**In the presence of: -**

Mr Njuguna for the Plaintiff/Respondent

Court Assistant: Lucy Muthoni