



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL CASE NO. 2 OF 2003**

**ROBERT NJOKA MUTHARA .....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**EVANGELINE WANJIRA NJOKA .....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ELDIMA LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

1. The Plaintiffs/Applicants filed an application dated 8<sup>th</sup> April 2014 seeking an Order of injunction restraining and prohibiting the Defendants/Respondents from advertising, selling, transferring and or interfering with properties L.R. NO. EVURORE/EVURORE/ 1332, NGANDORI/KIRIGI/3408-3411, 3577, 4149-4151, 4159-4165, 4004, 4005, 6044, GATURI/NEMBURE/6045, 3831, EMBU/TOWNSHIP/114, 328.
2. The application is supported by the Plaintiffs' Advocate's affidavit in which he avers that he filed a Notice of Appeal against this Court's Judgment on 19<sup>th</sup> March 2014. At the time of filing this application, he was yet to receive a certified copy of the typed proceedings. He was therefore fearful that the Defendant/ Respondent could sell his properties before the appeal was heard.
3. On 20<sup>th</sup> May 2014 the Defendant/Respondent filed the following grounds of opposition;
  - i. That the Plaintiffs' suit having been dismissed there was no underlying suit upon which an injunction could be granted.
  - ii. That following the dismissal of the suit the Court is *functus officio* and has no jurisdiction to entertain the application.
  - iii. The Plaintiffs have not demonstrated that the appeal will be rendered nugatory if the injunction sought is not granted.
  - iv. The proper forum to agitate for an injunction pending appeal is the Court of Appeal, pursuant to Rule 5(2) of the Court of Appeal Rules and that the present application is an abuse of Court process.
4. Both parties filed written submissions. Mr. Muriithi for the Plaintiffs/Applicants submitted on the issue that the Court was *functus officio* saying it was an erroneous reasoning since a trial Court has jurisdiction to entertain various applications even after Judgment has been delivered for instance, review,

stay of execution and injunction under Order 40, 42 and 45 Civil Procedure Act. He further submitted the Defendants had filed a cross appeal to express dissatisfaction with the said Judgment though they had not disclosed this to the Court. He did not therefore understand why the Defendants were opposed to the appeal yet they were dissatisfied with the Judgment. He cited two cases in support of his submissions;

- i. **NAIROBI HCC NO.288/1990 (O.S)** where the Court held that a party seeking the Court's assistance must present to Court full facts essential for determination of the matter.
- ii. **EXPARTE PRINCESS EDMOND DE POLIGNAC [1917]1 KB 486**

5. Mr. Mbatuto for the Defendants in his submissions reiterated his grounds of appeal. He referred to the following cases;

- i. **RE ESTATE OF THE LATE KIRIMA M'RUTERE (DSD) [2008]e KLR** where the Court held "*The Latin expression *functus officio* to mean an authority, body or person had performed that which his/her office is required to do*".
- ii. **STANELY MUNGA GITHUNURI –VS- JIMBA CREDIT CORPORATION LTD CIVIL APPLICATION NO. NAIROBI 161/1988 (UR)** and **JEAN PIERRE DE-LEU –VS- ADRIAN G. MUTESHI CIVIL APPLICATION NO.169/1995 (UR)** to illustrate that the application for injunction ought to have been made in the Court of Appeal.

6. On the principles applicable in granting an injunction, the Defendant cited the case of **MADHUPAPER INTERNATIONAL LTD –VS- PADDY KERR [1985] KLR 840** where the principles were stated as follows;

- i. **There is a right of appeal.**
- ii. **The appeal is not frivolous and that there is an arguable appeal.**
- iii. **If stay is not granted the appeal will be rendered nugatory.**

The Defendants argue that the appeal is not arguable as its frivolous. The reason being that the Court had determined the suit on merit, and the Plaintiffs had not presented anything new to make the case meritorious. They referred the Court to the case of **MRAO LTD –V- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR 125** and argued that the Plaintiffs had not established that they would suffer any irreparable damage if the injunction is not issued.

7. I have considered all the submissions made plus the supporting affidavit to the application and the grounds of opposition. It is not in dispute that the Plaintiffs/Applicants had sought an order for a permanent injunction in respect of all the properties the subject of this application. In its Judgment this Court dismissed that prayer and the Plaintiff/Applicant has moved to the Court of appeal to challenge that decision.

8. I find the following to be the issues for determination.

- i. Whether the High Court is *functus officio* in this matter
- ii. Whether the application has been filed under the correct provisions of the law.
- iii. If the answer in No.(ii) is yes then whether the Plaintiff/Applicant has fulfilled the conditions required in such an application.

9. Issue No. (i)

The Defendants/Respondents claim that this Court is *functus officio* as it has already delivered the Judgment that is being appealed against. They say that by entertaining the application for injunction, this Court will be sitting on appeal of its own order. In the case of **MADHUPAPER INTERNATIONAL LTD –V- KERR (Supra)** the Court of Appeal held that where a Judge dismisses an application for injunction he may grant the unsuccessful Applicant an injunction pending an appeal against the said dismissal. And that there was no inconsistency in doing so as the purpose of granting the injunction would be to prevent the decision of the appellate Court from being nugatory should the appeal succeed.

10. The MADHUPAPER case can however be distinguished from the present case because of the following;

In the MADHUPAPER case the application for injunction had been made at the interlocutory stage of the suit before the High Court. When the Plaintiff therein went to the Court of Appeal there was still a suit pending before the High Court.

11. The present case is different. The matter before the High Court is already concluded and a Judgment has been delivered on the issue of injunction. There is no pending suit herein. This brings me to issue No. (ii).

12. Order 40(1) Civil Procedure Rules under which this application was brought presupposes a situation where there is a suit pending before the Court. In this case there is none. Secondly the Plaintiff/Applicant would not have applied for stay of execution as there would be nothing to stay as far as the High Court is concerned. This Court dismissed the Plaintiffs/Applicants prayer for a permanent injunction. Not all is lost to the Plaintiffs/Applicants. Since they had invoked the jurisdiction of the Court of Appeal by issuing a Notice of Appeal under Rule 74 Court of Appeal Rules, the Court of Appeal should have been the proper Court for them to file this application. (see **STANLEY MUNGA GITHUNGURI –V- JIMBA CREDIT CORPORATION LIMITED** (*supra*) where the Court of Appeal opined as follows;

**“..... we think this Court’s jurisdiction under Rule 5(2) (b) to grant either a stay of execution, an injunction or stay of any further proceedings arises if a Notice of Appeal has been lodged against the decision or ruling appealed from in accordance with Rule 74. And we are then clothed with jurisdiction to grant any such Orders on such terms as the Court may think just. That rule confers an independent original discretion on us and we have to apply our minds de novo on the suitability or otherwise of the relief sought. It is not an appeal from the learned Judge’s discretion to ours”.**

13. In **JEAN PIERRE DE-LEU –V- ADRIAN G. MUTESHI** (*Supra*) the Court of Appeal held thus;

**“It has long been established that this Court’s jurisdiction to grant Orders for injunction or stay are unfettered by any application (similar) in the superior Court and we feel that it may even be at times prudent for an intended Appellant to come to this Court rather than putting the Judge below in the invidious position of saying “I could be wrong .....”**

14. My finding on issue No.(i) and (ii) is that there is no suit before this Court as per Order 40 Rule 1 Civil Procedure Rules and so this Court lacks the jurisdiction to issue the Orders sought. And having pronounced itself by way of a Judgment on the said matter the best placed Court as has been stated in the **JEANNE PIERRE case** (*Supra*) would be the Court of Appeal before which the Plaintiffs/Applicants have submitted themselves by way of an appeal.

15. The filing of this application under Order 40 Rule 1 Civil Procedure Rules is improper and is not a technicality which can be cured under Article 159 of the Constitution. The Plaintiffs/Applicants should file their application before the Court of Appeal. The first two issues have disposed of this application and I find no need of delving into the 3<sup>rd</sup> issue to determine the merits of an application which is not properly before this Court.

The result is that the application dated 8<sup>th</sup> April 2014 is struck out with costs.

**DATED SIGNED, AND DELIVERED IN OPEN COURT AT EMBU THIS 9<sup>TH</sup> DAY OF SEPTEMBER 2014.**

**H.I. ONG'UDI**

## **J U D G E**

### **In the presence of:-**

Mr. Gacharia for Mureithi for Applicant/plaintiff

Mr. Oraro for Defendant

Mutero/Kirong