



**Magondu v Chavda Educational Holdings Limited (Environment & Land
Case E301 of 2022) [2023] KEELC 18183 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18183 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E301 OF 2022**

**AA OMOLLO, J
JUNE 15, 2023**

BETWEEN

JANE WANGUI MAGONDU PLAINTIFF

AND

CHAVDA EDUCATIONAL HOLDINGS LIMITED DEFENDANT

RULING

1. The Defendant/Applicant moved the Court Vide its application dated March 30, 2023. The Applicant seeks to be granted the following orders;
 - 1) Spent
 - 2) Spent
 - 3) Spent
 - 4) Pending the hearing and determination of this application, this honourable court be pleased to stay the execution of the Ruling delivered on March 23, 2023 aforesaid and the Order issued therefrom and any consequential orders issued in execution of the said Ruling.
 - 5) Spent
 - 6) Pending the hearing and determination of this suit, an injunction be issued restraining the plaintiff, her agents, servants and/or employees from interfering with the Defendant's quiet possession of the property known as LR No 27398 IR No 103329.
 - 7) Pending the hearing and determination of this suit, the Honourable Court be pleased to visit the site of the Defendant's property known as LR No 27398 IR No 103329 for purposes of ascertaining the claims made by the parties herein and also to establish the correct factual and true reflection on the situation on the ground.



- 8) The Ruling delivered on March 23, 2023 be discharged, varied or set aside unconditionally.
 - 9) Pending the hearing of this application inter-partes, the plaintiff be summoned and cross-examined under oath on his sworn Verifying Affidavit dated September 16, 2022 and her various affidavits in support of the injunction application dated December 5, 2022.
 - 10) Upon cross-examination aforesaid, the court should Rule on whether an order should be issued directing the police to charge the plaintiff with the offence of perjury contrary to Section 108 of the *Penal Code*.
 - 11) Costs be in the cause.
2. The application was supported with several grounds listed on its face inter alia;
 - a) On March 23, 2023, this honourable court delivered a Ruling whereby it allowed the plaintiff's Amended Notice of Motion dated December 5, 2022 in terms of prayer 3.
 - b) Unless the Ruling is stayed, varied or set aside unconditionally, the Defendant/Applicant will suffer irreparable loss set out as follows;
 - i) Loss of colossal income from the school revenue estimated at Kshs 34,400,000.
 - ii) Loss of cost of construction
 - iii) Loss of reputation if the school does not open on it.
 - c) The defendant has learnt through confidential sources that the plaintiff may have been in Kenya when she claimed to swear the said Verifying Affidavit and other Affidavits in support of the injunction application.
 - a) Upon cross-examination aforesaid, the court should Rule on whether an order should be issued directing the police to charge her with the offence of perjury contrary to Section 108 of the Penal Code.
 3. The application is supported further by the affidavit of Amiritlal Velji Chavda who said he is a director and signatory of the Defendant. He deposed that there is a school on the suit property which was to open on March 13, 2023 but was delayed due to the injunction order which lasted until October 6, 2022. Mr. Amiritlal reiterated the losses being suffered by the Defendant as pleaded on the grounds in support of the Motion and urged the court to grant their application.
 4. In opposing the application, the Plaintiff/Respondent swore a replying affidavit dated April 26, 2023. She deposed that the application should be dismissed for being incompetent inter alia for not disclosing any discovery of new matter/evidence (under review), that it ignores the court's finding that LR. Nos. 12672/153 and L.R 27398 refers to the same physical parcel of land.
 5. The Respondent deposes that the plea of the preservation orders causing irreparable loss to the applicant was already considered by the court before issuing the ruling of March 23, 2023 and the Applicant should not be allowed to re-engineer its facts disguised as review or appeal. She added that the Applicant already filed a notice of appeal against the ruling. The Respondent stated that it is preposterous for the Applicant to seek orders of injunction restraining her from interfering with the Defendant's possession of L.R 27398 IR 103329 where there is already in place an order in respect of the property L.R 27398 or L.R 12672/153.
 6. In response to the loss particularised by the Defendant/Applicant, the Plaintiff deposed that the pleadings and order of injunction were serve upon the Applicant when the construction was at the



- commencement stage. That the defendant arrogantly ignored the pendency of this suit and probable consequences and hastened its construction as well as admitting students. She contends that the Defendant/Applicant has not demonstrated any good faith to the court to deserve exercise of discretion in its favour.
7. The plaintiff filed copies of the pages of her passport to affirm that she was and is in Kenya when she signed the affidavits in support of her application in contrasting the allegation of being out of the country. She avers that the Applicant has not laid grounds to warrant her being summoned for cross-examination. She maintained being in quite possession of the suit property from 2001 until when the Applicant invaded it.
 8. The Applicant filed a supplementary affidavit dated April 26, 2023 in which Mr. Amiritlal described the condition of the buildings. He stated thus;
 - i) The pictures clearly show that there is a lot of erosion and flooding of water where the roof is unfinished. However, the last picture at page 8 of the exhibits shows a room which has no erosion of flooding because the roofing was completed.
 - ii) I also noted that the foundation wall is also being affected by the rain water. In addition, I also notice that the retaining wall is being eroded and could cause an accident as it may collapse any time from now as a result of the said erosion.
 - iii) I am also aware that the Kenya Meteorological Department issued an Advisory on April 25, 2023 to the effect that various Counties including Nairobi where the suit property is located shall be experiencing very heavy rainfall from April 25, 2023 to April 29, 2023.
 9. He concluded by stating that the flooding may cause enormous destruction and irreparable loss to the school unless the order of injunction is stayed or set aside to allow immediate completion of construction.
 10. The Defendant/Applicant filed written submissions dated May 19, 2023 and opened by restating the facts pleaded by both sides. The Applicant stated that it relies on the provisions of order 40 rule 7 of the *Civil Procedure Rules* which provide thus;

“An order of injunction may be discharged or set aside by the court on application made thereto by any party dissatisfied with such an order.”
 11. They cited several authorities where courts declined to grant an injunction to stop ongoing construction on the suit property. For instance, in *Afyare Enterprises Co. Ltd. v Gideon Kireman Mugambi & 3 others* (2019) eKLR where the Court of Appeal declined to grant the injunction on the basis that it would be inappropriate since the construction was either completed or was nearing completion. Similar position was taken in the case of *Deepark Harakeb & Another v Anmol Ltd & 4 others* [2018] eKLR.
 12. The Applicant has brought an omnibus application. In one hand, it is seeking to vary and or set aside the ruling of this court rendered on March 23, 2023. On the other hand, it is seeking orders of injunction to restrain the Respondent from interfering with its Land L.R 27398, an order for cross-examination and charging of the Plaintiff if found guilty of perjury, as well as order for this court to visit the suit premises. All the 4 prayers are not dependent on each other.
 13. Starting with the first limb on whether this court can vary or set aside the orders of injunction granted on March 23, 2023, this court affirms that the Applicant is permitted to do so under the provisions of order 40 rule 7 of the *Civil Procedure Rules*. However, the Applicant is under a duty to persuade



this court why such discretion should be exercised in its favour. The applications dated September 16, 2022 and December 5, 2022 were heard on merit before this court arrived on her decision rendered on the March 23, 2023. Consequently, it is my considered opinion that the Applicant could only seek variation and or setting aside of the ruling under the heading of review.

14. The right of review may not be available to the applicant in view of the fact that it already lodged an appeal against the decision to the Court of Appeal as exhibited in the notice of appeal annexed to the Respondent's replying affidavit. However, I will still proceed to consider whether the Applicant met the Criteria to warrant review of the impugned ruling. The grounds for review are set out in section 80 of the *Civil Procedure Act* and Order 45. The grounds include mistake or error apparent on the face of the record or discovery of new important evidence which was beyond the reach of the party at the time the decision was made and or for any sufficient cause.
15. The Applicant did not address the court on any of these headings. Instead, it went at great length to explain the nature and extent of the irreparable loss it is likely to suffer unless the orders are varied or set aside. In its submissions, the Applicant cited cases where the courts declined to issue injunction orders because the buildings were either complete or near complete. In the case before me, the order of injunction is already granted. Whether I was wrong in issuing the order is upon the Court of Appeal to deal with.
16. The cases relied on by the Applicant on the issuance of injunction is inviting me to re-hear the application when the ruling of 23rd March, 2023 has not been set aside or varied. Secondly, the Applicant did not plead or submit that there was new and important evidence that was not within its reach when it responded to the application that resulted in the ruling of 23rd March, 2023. The Respondent deposed that as at the time the initial orders of injunction and STEA were served, the Applicant was at excavation stage. I also found that the construction was still at the preliminary stages. If I reached a wrong conclusion, that is for higher court to determine and subsequently vary or set aside the orders of temporary injunction in place. The Applicant is indirectly inviting me to sit on an appeal over my decision which action is contrary to the law.
17. Nyakundi J. in the case of *St. Patrick Hill School Ltd v Bank of Africa Kenya Ltd.* [2018] eKLR at paragraph 14 said thus;

“This is not a case where I was placing the mortgagee back to possession of the property but in exercise of discretion consistent with the principles laid down by DR SPRY in his book on equitable remedies 6th edition LBC page 447 where he stated thus Interlocutory injunctions concerns with (a) The maintenance of a position that will more easily enable justice to be done when its final order is made and (b) an interim regulation of the acts of the parties that is the most just and convenient in all the circumstances.”
18. In the case *Patrick Hill School Ltd.* supra, Nyakundi J. further observed at paragraph 17 thus;

“It can also be said that a right to a fair hearing and due process of the law is enshrined in our constitution under article 50. In the case of Thomas Edison v Bathock 1912 15 C.L.R. 679 held thus: “There is a primary precept governing administration of justice that no man is to be condemned unheard and therefore, as a general rule, no order should be made to the prejudice of a party unless he has the opportunity being heard in defence, but instance occur where justice could not be done unless the subject matter of the suit is preserved and, if that is in danger of destruction by one party or if irremediable by one party interim orders may issue to give room for the court to determine the dispute on the merits.”



And paragraph 19 thus;

“...The right to obtain interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him which may or may not include a final injunction.”

19. This court already rendered herself that the title document the Defendant is holding and the title document in the hands of the plaintiff refers to the same parcel of land on the ground. The question to be determined during the hearing is who between the two is entitled to the land. The orders of March 23, 2023 was to preserve the suit property so it did not confer any rights to the Respondent to continue with the development.

20. On whether this court can grant injunctive reliefs as prayed in order No 6, I hold the said prayer is res judicata. The Applicant had opportunity to bring the said prayer before the ruling of the March 23, 2023. I am guided by the provision of explanation 4 of section 7 of the Civil Procedure Act which states thus;

“ Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

21. In the event that the prayer for injunction against the plaintiff is not res judicata, the Applicant did not demonstrate how the Respondent is interfering with its land other than the implementation of this court’s order issued on March 23, 2023. In seeking a court order to defeat an existing valid court order is equated to abuse of the court process. I conclude that this prayer is without merit.

22. The Applicant also sought that the plaintiff be summoned for cross-examination. It did not pursue this order before the filing of submissions. The Applicant still reserves the right to cross-examine the plaintiff on the verifying affidavit at the hearing of this case. It is my considered opinion that the prayer for cross-examination on the supporting affidavit to the application of September, 2022 is overtaken by events while cross-examination on the verifying affidavit can be done during the full hearing.

23. The last prayer is for this court to visit the site for purposes of ascertaining the claims made by the parties herein and also to establish the correct factual and true reflection of the situation on the ground. The ascertainment of the claims is the gist of this dispute so that if this court was to make such visit, it would be necessary to include other parties such as the Government Surveyor and Land Registrar to accompany me during such visit. I defer making any orders on this head until at the stage of giving directions on the hearing of the main suit.

24. In conclusion, I decline to grant all the prayers sought in the motion dated March 30, 2023. It is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE, 2023

A. OMOLLO

JUDGE

In the Presence of

Mr Wawire advocate for the Defendant/Applicant



Mr Koyyoko advocate for Plaintiff/Respondent

