



Board of Management Visa Oshwal Primary School, Nairobi v Shree Visa Oshwal Community Nairobi Registered Trustees; Ministry of Education & 2 others (Interested Parties) (Civil Application E366 of 2023) [2024] KECA 4 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KECA 4 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E366 OF 2023
DK MUSINGA, MSA MAKHANDIA & M NGUGI, JJA
JANUARY 25, 2024**

BETWEEN

**THE BOARD OF MANAGEMENT VISA OSHWAL PRIMARY SCHOOL,
NAIROBI APPLICANT**

AND

**SHREE VISA OSHWAL COMMUNITY NAIROBI REGISTERED
TRUSTEES RESPONDENT**

AND

**MINISTRY OF EDUCATION INTERESTED PARTY
NATIONAL LAND COMMISSION INTERESTED PARTY
ATTORNEY GENERAL INTERESTED PARTY**

RULING

1. The applicant, the Board of Management, Visa Oshwal Primary School, Nairobi filed a Notice of Motion dated 10th July, 2023. The motion was predicated upon rules 5(2)(b) and 43 of the [Court of Appeal Rules](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#).
2. The motion in the main, sought that we be pleased to stay any further proceedings in Milimani ELC No. 176 of 2022, The Board of Management Visa Oshwal Primary School, Nairobi v Shree Visa Oshwal Community Nairobi Registered Trustees & 3 Others.
3. The motion, was supported by the grounds on its face as well as the affidavit of Ephantus Njoroge Ithagu, the Principal of the applicant. It was averred that: after the delivery of the ruling on 24th November 2022, the applicant was dissatisfied and filed a notice of appeal. Further that the ruling on the respondent’s application to strike out the suit on the ground of res judicata was slated for 9th



November 2023. The applicant was therefore apprehensive that the ruling will go against it given the trial court's open and biased comments made during the hearing of that application. That if the order of stay of proceedings is not granted, the substantive appeal will be rendered an academic exercise; that, to settle the issue of the ownership of the suit property on which the school is built, it had filed an appeal in this Court being Civil Appeal No. E008 of 2023 vide a notice of appeal dated 10th December 2022. That though the applicant had appealed the ruling aforesaid, the suit had proceeded and was currently awaiting a ruling on the application to strike out the suit for being res judicata slated for 9th November, 2023. That it would be unfair and unjust for the trial court to deliver the ruling on an issue that it had already taken a stand on. That having taken a stand on a moot issue, it was likely that the application to strike out the suit on account of res judicata will be successful. That the appeal raises questions of great public importance which will affect pupils in the school and their academic year. That the respondent is intent on taking over the public school which will pose a real danger if the suit is struck out. That the academic year, 2023, will be disrupted to the detriment of the pupils as the respondent is intent on taking over the running of the public school.

4. The motion was opposed by the 1st respondent through the affidavit of Jinit Shah, the Chairman of the Management Committee of the 1st respondent. He deposed that the notice of appeal was filed and served outside the prescribed 14 and 7 days' timelines respectively. That the applicant had further not filed or served the record of appeal, thus, stay of proceedings in the trial court will be "vacuous". That the 1st respondent had filed the application for dismissal of the suit in the High Court for being res judicata and the applicant had fully participated in the same and even filed written submissions and all parties were waiting for the ruling slated for 9th November, 2023. That the instant application is premised on mere apprehension that the ruling may be delivered against the applicant without adducing any evidence to back up the apprehension. That the applicant has a right to appeal against the ruling after it has been delivered and therefore it cannot be heard to say that it will be left without any recourse should the application be dismissed. The 1st respondent deposed that the property is registered in its name and its ownership had been affirmed by this Court in Nairobi Civil Appeal No. 126 of 2014. That the applicant had moved the courts several times by filing applications and suits claiming ownership of the suit property, which have all been dismissed.
5. On 29th November 2023, the motion came before us virtually for plenary hearing. Mr. Ingutya, learned counsel appeared for the applicant while Mr. Mwangi, learned counsel, appeared for the 1st respondent. In urging the motion, Mr. Ingutya contended that the applicant's intended appeal was arguable on the grounds whether: the trial court erred in finding that the application for injunction was framed in a manner that sought final orders, prematurely finding that the entire suit was res judicata yet the issue was not before it for determination. Lastly, by declaring that the suit property was private land.
6. As to whether the intended appeal is likely to be rendered nugatory absent stay, it was submitted that if the proceedings are not stayed, the ruling shall be delivered and the suit shall be declared res judicata and struck out. Consequently, the suit property will be seized by the 1st respondent, leaving hundreds of school going children rendered school less and the public property shall vest in the hands of private individuals. If this was to happen, the appeal will be argued and decided in vain.
7. In response, the 1st respondent submitted that the appeal filed was fatally incompetent as the memorandum and record of appeal had never been served on it, and as such, staying valid proceedings on an unfounded appeal would be unrealistic. While relying on the case of *Kenya Ports Authority v Maison* 425 [2014] eKLR and *Okiya Omtatah Okiiti v Central Bank of Kenya*, the 1st respondent submitted that in the absence of a substantive appeal, the orders sought are sought in a vacuum and cannot issue. There was, in the 1st respondent's view, no arguable appeal before the court, especially regarding the ownership of the suit property.



8. On the nugatory aspect, it was submitted that the applicant's apprehension that the ruling pending before the ELC, is likely to go against it is pure speculation. Further, that the applicant had not proffered any cogent reasons in support of its apprehension that the pending ruling shall not be delivered in its favour. Whilst relying on the case of *Pride Inn Hotels & Investments Ltd & 3 Others v Sai Holdings Limited* (2023] KECA 934 (KLR), counsel submitted that the Court cannot stay proceedings based on mere apprehensions of a litigant. Further, that the Court should be slow to stay proceedings, especially given that this is an interlocutory appeal. It thus submitted that the application be dismissed with costs.
9. We have carefully considered the motion, the rival affidavits, submissions, the authorities cited, the law; and the fact that the other parties did not participate in the proceedings to either support or object to the motion.
10. The applicant's motion is brought under rule 5(2)(b) of this *Court's Rules* which provides inter alia:
 - “(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:
 - a. ...
 - b. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”
11. The principles for our consideration in the exercise of our unfettered discretion under the above rule are now well settled. Firstly, an applicant has to satisfy us that he or she has an arguable appeal. However, this is not to say that the said appeal must necessarily succeed, but suffice to state that it is not frivolous and or idle.
12. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles were restated and amplified by this Court in the case of *Multimedia University & Another v Professor Gitile N. Naituli* (2014) eKLR.
13. The applicant asserts that if the case proceeds, the likely result is that the suit shall be struck out on grounds of res judicata, in which event the appeal shall have been rendered nugatory.
14. In our view, and having looked at the grounds of appeal we are not satisfied that the intended appeal is arguable given the various determinations on the question of ownership of the suit property by several courts. However, we do not want to make further comments lest we embarrass the bench that will be eventually seized of the appeal. On the nugatory aspect, the applicant is apprehensive that the ELC court will deliver the ruling against it, resulting in the suit being struck out for being res judicata. This apprehension is said to be based on the trial court's comments during the hearing of the application for injunction. These apprehensions are totally unfounded and purely speculative. Neither are they on record. We are therefore not satisfied that the applicant has demonstrated that the intended appeal would be rendered nugatory. This is because the applicant's apprehension is based on mere speculation and presumption that the trial court will issue orders that are prejudicial to it. Certainly, the Court cannot exercise its discretion based on mere fear, suspicion or speculation of what a party thinks might happen.



15. Accordingly, the applicant has failed to establish the twin principles that would warrant the exercise of our discretion in its favour. Therefore, the application is bereft of merit and is accordingly dismissed. Costs shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

