



REPUBLIC OF KENYA



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**Chavda Educational Holdings Limited v Magondu (Civil Appeal (Application)
E509 of 2023) [2024] KECA 122 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 122 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E509 OF 2023
P NYAMWEYA, A ALI-ARONI & PM GACHOKA, JJA
FEBRUARY 9, 2024**

BETWEEN

CHAVDA EDUCATIONAL HOLDINGS LIMITED APPELLANT

AND

JANE WANGUI MAGONDU RESPONDENT

(An application to stay the injunction orders in the Ruling of the Environment & Land Court at Nairobi (A. Omollo J) dated and delivered on 23rd March 2023 pending the hearing and determination of the appeal against the ruling of the Environment & Land Court at Nairobi (A.Omollo J) dated 15TH June 2023 in Environment & Land Case No. E301 of 2022)

RULING

1. Chavda Educational Holdings Limited, the Applicant herein, seeks two substantive orders in its Notice of Motion application dated 11th July 2023 as follows:
 - a. The injunction orders granted by the Environment & Land Court (ELC) on 23rd March 2023 (A. Omollo J.) in ELC Case No. E 301 of 2022 - Jane Wangui Magondu v Chavda Educational Holdings Limited, barring the Applicant from constructing, and/or continuing with construction, charging, transferring, trespassing, or otherwise interfering with the property known as L.R No. 27398 I.R No. 103329 be hereby stayed pending the hearing and determination of its appeal.
 - b. Pending the hearing and determination of the appeal, a mandatory injunction be issued allowing the Applicant to complete the construction of the school on the property known as L.R No. 27398 I.R No. 103329.
2. The Applicant is in this respect aggrieved by the ruling of the ELC delivered on 15th June 2023 dismissing its application that had sought to discharge, vary or set aside earlier orders of injunction dated 23rd March 2023, restraining the Appellant from completing the construction of the school



- on the property known as L.R No. 27398 I.R No. 103329, and stated that it had filed and served a Notice of Appeal against the said ruling on 16th June 2023. The Applicant avers that it has an arguable appeal which stands overwhelming chances of success, for reasons that the learned judge relied on Order 45 of the Civil Procedure Rules instead of relying on Order 40 Rule 7 of the Civil Procedure Rules which permitted her to set aside the said orders, and erroneously held that the construction was at a preliminary stage. Further, that the Applicant has constructed a school on the suit premises and will suffer colossal financial loss, prejudice and hardship if the order of injunction is not set aside which will render the appeal nugatory.
3. The particulars of the loss in terms of loss of income, of additional construction, contractor and consultancy costs, loss of reputation, and teachers costs were particularised in the affidavit in support of the application sworn on 11th July 2023 by Amritlal Velji Chavda, a director of the Applicant. The said deponent also filed a further affidavit on 3rd August 2023 in which he restated the parties' respective cases in the ELC and disputed the Respondent's title to the suit premises.
 4. These averments are reiterated in submissions dated 31st September 2023 filed by Wamae & Allen Advocates, the Applicant's advocates on record, who further submitted that the order for the Respondent to file an undertaking as to damages shall not cure the irreparable loss the Applicant has suffered and continues to suffer if the injunction is not lifted because the Respondent did not demonstrate in the lower court that she could compensate the Applicant should it succeed in its appeal, and in the circumstances, the Respondent is incapable of honouring any undertaking filed, which shall be in vain and only aimed to defeat justice.
 5. The application is opposed by the respondent, Jane Wangui Magondu, through a replying affidavit sworn on 24th July 2023. It is the respondent's averment that she is the registered proprietor of all the parcel of land known as No. L.R. No. 12672/ 153 IR No. 85236 situated in Runda Nairobi, and after detailing the proceedings in the ELC, averred that despite notice of her claim to the suit premises and interim injunction orders, the applicant hastened its construction works thereon. Further, that the substantive appeal herein is against the order of 15th June 2023 which was a refusal to set aside the injunction order issued on 23rd March 2023, which is a negative order and there is therefore nothing to stay. In addition, that the Applicant has not lodged any appeal against the orders of injunction issued on 23rd March 2023 and cannot hide behind the appeal against the orders of 15th June 2023 to stay the orders of 23rd March 2023.
 6. The Respondent further averred that the Applicant has not made out an arguable appeal since the primary basis on which the injunction order was issued on 23rd March 2023 was that the Respondent's title L.R. No.12672/ 153 I.R. 85236 and the Applicant's title L.R. No. 27398 I.R. 103329 refer to the same parcel of land; the root of the Applicant's title is fraudulent; the Applicant has not faulted the exercise of the learned Judge's discretion in refusing to set aside the injunction order; and that the Applicant has not accounted for its own inequitable conduct in the predicament it now finds itself in. Lastly, that the Applicant's appeal will not be rendered nugatory if the injunction order is not issued in that the Applicant has ably particularized and quantified its likely losses, has overlooked the likely consequence of having to demolish its developments should the court find in the Respondent's favour, and the Respondent has filed an undertaking as to damages as ordered by the court, and owns a number of properties and is therefore not impecunious. In addition, that likely colossal loss alone cannot be the basis for setting aside an injunction order, and the Applicant has not demonstrated any harm, or damage that has occurred since the grant of the injunction orders in March 2023.
 7. Wagara Koyyoko & Company Advocates, the Respondent's advocates on record, filed submissions dated 8th September 2023 in which it was additionally submitted, while relying on the decision in



- George Ole Sangui v Kedong Ranch Limited*, Civil Appeal No. Nai 55 of 2015 as cited in *County Secretary of Kaijado & 47 Others v SRC & Another* [2021] eKLR that the dismissal order issued on 15th June 2023 is a negative order, is not amenable to stay as it cannot be enforced, and is not capable of execution, and the appeal cannot therefore be rendered nugatory. In any event that the earlier orders of injunction serve to preserve the subject matter of the suit and the Applicant is not at risk of having its appeal defeated in any way. In addition, the effect of the order of mandatory injunction sought by the Applicant would be to countermand the earlier orders of injunction, against which no appeal has been filed.
8. We heard the application on 17th October 2023 on the Court's virtual platform, when learned counsel Mr. Preston Wawire appeared for the Applicant and learned counsel Mr. Bernard Koyokko appeared for the respondent. The learned counsel made oral highlights of the submissions set out in the foregoing, with Mr. Wawire confirming that the Applicant did not file a Notice of Appeal with respect to the ruling of 23rd March 2023.
 9. We have duly considered the application before us, the affidavits and the submissions of the parties. For an applicant to make out a case for the orders sought herein, two principles must be established, namely, that the appeal is arguable and that if the orders sought are not granted, the appeal will be rendered nugatory. The jurisprudence surrounding the exercise of the discretionary power of this Court to grant stay orders was succinctly expounded in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
 10. As regards whether the intended appeal arguable, we are alive to the fact that even a single ground of appeal that deserves the consideration of this Court renders the appeal arguable, and we have considered the grounds of appeal pleaded by the Applicant in the body of its application. The Applicant has annexed a Notice of Appeal with respect to the ruling dated 15th June 2023 that declined to review and set aside earlier orders of injunction of 23rd March 2023, and among the grounds of appeal are that the learned Judge of the superior Court relied on the wrong provisions of the law, and did not consider the status of the suit property. In our view, we find this are issues that could warrant a relook by this Court with respect to the appeal as against the ruling of 15th June 2023.
 11. However, as regards staying the orders of 23rd March 2023, the Applicant's counsel conceded that no appeal has been filed against the said ruling of 23rd March 2023, and to this extent, not only is there no arguable appeal demonstrated as regards the said ruling and orders, in addition, the prayer to stay the said orders is also not properly before us, since Rule 5(2)(b) of the Court of Appeal Rules requires a notice of appeal to have been filed as against the said orders, and it was confirmed by this Court in *Nguruman Limited v Shompole Group Ranch & Another* [2014] eKLR that there can no stay of execution of an order with respect to which there is no notice of appeal. We also agree with the Respondent that allowing the orders of mandatory injunction sought by the Applicant will have the effect of overturning the earlier orders of injunction granted by the ELC on 23rd March 2023, against which no appeal has been filed. To this extent the prayer for a mandatory injunction is also in abuse of the process of court.
 12. On the second limb as regards whether the Applicant's appeal will be rendered nugatory, the Applicant cites and has particularised the colossal loss that it is likely to incur if the orders of 23rd March 2023 are not stayed or set aside or if the mandatory injunction sought is not granted. We however note that the orders that are the subject of the Applicant's appeal, which are those granted on 15th June 2023, are negative orders which did not require any positive action from either party. As was stated in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* (supra) the relevant factors to be considered is whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether



damages will reasonably compensate the party aggrieved. The appeal will therefore not be rendered nugatory as the ruling of 15th June 2023 requires nothing to happen. In addition, in the event the appeal succeeds, the Applicant can be compensated by way of damages, and the Respondent has averred that she has provided an undertaking in the ELC to this effect and that she is a woman of means.

13. The upshot of the foregoing is the instant application fails to meet the threshold for grant of stay orders. Consequently, the Notice of Motion application dated 11th July 2023 is found to be without merit and is hereby dismissed with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024

P. NYAMWEYA

JUDGE OF APPEAL

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ALI –ARONI

JUDGE OF APPEAL

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M. GACHOKA CIArb, FCIArb

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

