



**Sheth v Ahmaduna Housing Properties Limited (Civil Application
E035 of 2023) [2023] KECA 984 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 984 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E035 OF 2023
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
JULY 28, 2023**

BETWEEN

DEVENDRA JAKUMAR SHETH APPLICANT

AND

AHMADUNA HOUSING PROPERTIES LIMITED RESPONDENT

*(An application for an injunction pending an appeal arising from the
judgment of the Environment and Land Court at Mombasa (S. M. Kibunja
J.) delivered on 26th April 2023 in Mombasa ELC Civil Case No. 10 of 2023)*

RULING

1. On April 26, 2023 the Environment and Land Court (ELC) at Mombasa (Kibunja J) delivered a ruling in Mombasa ELC Case No 10 of 2023 - Devendra Jakumar Sheth vs Ahmaduna Housing Properties Limited striking out a suit and application for injunction filed by the Applicant herein, on the ground that the jurisdiction to hear the suit was reposed in the National Environment Tribunal. Devendra Jakumar Sheth, who was the Plaintiff in the ELC suit and is the Applicant herein, has now brought an application before this Court by a Notice of Motion application dated May 3, 2023, in which he seeks an order of injunction pending appeal to restrain the Respondent from carrying out construction works on Plot No Mombasa/ Block XVII/ 70. The application is supported by the grounds on the face of the motion and the supporting affidavit sworn on even date, by the Applicant.
2. The Applicant was dissatisfied with the said ruling and lodged his Notice of Appeal on April 28, 2023. It was his assertion that the appeal raised critical questions of law which ought to be given an opportunity to be fully ventilated in the Court of Appeal. The Applicant annexed their proposed grounds of appeal and stated that the Trial Court directed him to pursue the remedy and procedure set out in section 57 to 61 of the *Physical & Land Use Planning Act* and abdicated its responsibility to hear the dispute herein by preferring that the said dispute be determined by the Mombasa County Liaison Committee, yet the Committee had not been set up or operationalized. Therefore, that his



- appeal raises a jurisdictional question, and if the ruling is allowed to continue to stand would prejudice the fundamental rights of Kenyans to obtain appropriate reliefs from the trial Court in matters relating to degradation of the environment and of its use.
3. The Applicant averred that the Respondent may proceed to carry out construction works of a high rise building on Plot No Mombasa/Block XVII/70 which would cause the Applicant to suffer a lot of inconvenience and damage of an irreparable nature to his property, being Plot No Mombasa/Block XVII/69, which is adjacent to the construction site, and which has resulted in his mother and a tenant relocating from the property. In particular, that the Respondent has not shielded the ongoing constructions site, and a lot of dust particularly from the cement would be released to the neighbouring properties; heavy objects would fall into his property and cause serious injuries to him and his family; the Respondent's building had consumed all available space and any construction would entail storing and using parts of the Applicant's property and to this end had destroyed his perimeter fence; and that the Applicant's house had developed huge cracks which he attributed to the ongoing works by the Respondent.
 4. The Respondent in opposition filed a Replying Affidavit sworn on May 19, 2023 sworn by Sheikhnur Muhumed Mohamed, who deponed that the appeal had no chance of success in light of the concession and admission by the Applicant through the letter dated May 2, 2023 and pleadings filed in Nairobi National Environmental Tribunal Appeal No E003 of 2023 - Devendra Jakumar Sheth vs National Environmental Management Authority & 2 others that this dispute ought to have been initiated before the Tribunal in the first instance and not the Court. Further, that the intended Appeal was an abuse of Court process as the Applicant was seeking the same reliefs as was being sought in Nairobi National Environmental Tribunal Appeal No E003 of 2023 - Devendra Jakumar Sheth vs National Environmental Management Authority & 2 others. Therefore, that the Applicant should simply pursue the claim before the Tribunal and avoid multiplicity of Court actions.
 5. Lastly, the Respondent averred that it had all the required licenses to undertake the ongoing construction works, and exhibited the licenses and approvals by the National Environment and Management Authority and the County Government of Mombasa. Further, that it would suffer substantial and irreparable losses if the construction was stopped for the reasons that: the approval and licenses granted for the construction had timelines within which the construction was to be done and completed and failure to comply with the said timelines would mean that the Respondent would be penalized; the costs for undertaking the development will rise significantly as employees, engineers and contractor will have to continue getting their salaries despite the fact that the construction will have stopped; and that the construction materials that have already been procured and on site will be turned to waste if they are not used immediately and they are exposed to adverse weather conditions.
 6. We heard the application on the Court's virtual platform on June 6, 2023. Learned counsel Mr Gikandi Ngibuini was present appearing for the Applicant, while learned counsel Mr Mark Mwanzia appeared for the Respondent. The counsel highlighted their respective submissions dated May 16, 2023 and May 19, 2023. The principles applicable in the exercise of the Court's unfettered discretion under Rule 5(2) (b) to grant an order of stay or injunction are well settled. Firstly, an applicant has to satisfy that he or she has an arguable appeal. 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 have been restated and amplified by this Court in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR*.
 7. On the requirement of an arguable appeal, Mr Gikandi placed reliance on the decisions in the cases of *Joseph Gitahi Gachau & another vs Pioneer Holdings (A) Limited & 2 others, Civil Application No 124 of 2008* and *Damil Mandavia vs Sara Lee Household & Body Care (K) Limited, Civil Appeal No 345 of 2004* to urge that for an appeal to be arguable, it is sufficient if a single bona fide arguable ground is



- raised. The Applicant reiterated that there are a number of arguable grounds of appeal demonstrated and this was not a frivolous appeal.
8. Mr Mwanzia likewise reiterated the averments made in the Respondent's replying affidavit to submit that the Applicant does not have an arguable appeal in light of his initiation of a similar case before the National Environment Tribunal and the settled principle of law that where there is a clear procedure for redress of a particular grievance prescribed by the Constitution of an Act of Parliament, then the procedure should be followed strictly as held in Speaker of the National Assembly vs Karume (1972) KLR 22.
 9. We have considered the arguments by both counsel, and the guiding principle that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court and is not frivolous. The Applicant has in this respect raised the issue of the jurisdiction of the Environment and Land Court, and the circumstances when such jurisdiction can and cannot be ceded to the National Environment Tribunal, which we find to be an arguable issue and not frivolous. The fact that the Applicant is already litigating before the Tribunal does not in our view detract the issue, especially in light of the fact the Applicant alleges that there are aspects of the suit he filed in the ELC that the Tribunal has no powers to determine.
 10. On the nugatory aspect, Mr Gikandi submitted that if the application is not granted, the Respondent will proceed post haste and construct the high rise building on Plot No Mombasa/Block XVII/70, and the Applicant will be expected to suffer the nuisance on a daily basis yet he may win the Appeal, and that the constant breathing in of dust from the building site on a daily basis may lead to extreme serious medical conditions especially of a respiratory nature. Therefore, that this Court is under duty to preserve the substratum of the intended appeal so as not to render it nugatory. Reliance was placed on the holding in the case of Dari Limited & 5 others v East African Development Bank [2020] eKLR that the integrity of the Appellate process needs to be preserved so as not to render any eventual success a mere pyrrhic victory.
 11. Mr Mwanzia on his part submitted that in addition to the averments made in the Respondent's response on the prejudice it would suffer, the Applicant had applied for an order of injunction pending the hearing and determination of the matter is pending in Nairobi National Environmental Tribunal Appeal No E003 of 2023, Devendra Jakumar Sheth vs National Environmental Management Authority & 2 others, and the grant of the order herein would therefore amount to interference with the subject matter of the dispute which is before the National Environmental Tribunal.
 12. A number of factors persuade us that the nugatory requirement has not been met by the Applicant. Firstly, the Applicant can obtain interim relief at the National Environmental Tribunal, and the Applicant has in this respect not contested the Respondent's averments that he has already filed a suit and an application for such interim relief in the Tribunal. Secondly, the Applicant in his pleadings averred that his mother and her tenant vacated their property, and therefore the risk of injury to life and limb he claims is no longer in issue. Lastly, we are persuaded that damages will be an adequate remedy in the circumstances.
 13. We accordingly find that the Applicant has not met the threshold for grant of an injunction, and his Notice of Motion application dated May 3, 2023 is hereby dismissed with costs to the Respondent.
 14. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023.

S. GATEMBU KAIRU, FCIArb



.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

G.V. ODUNGA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

