



**South Eastern University College v Ukamba Agricultural Institute Ltd (Civil Application E230 of 2023) [2023] KECA 1477 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1477 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E230 OF 2023  
F TUIYOTT, A ALI-ARONI & PM GACHOKA, JJA  
DECEMBER 8, 2023**

**BETWEEN**

**SOUTH EASTERN UNIVERSITY COLLEGE ..... APPLICANT**

**AND**

**UKAMBA AGRICULTURAL INSTITUTE LTD ..... RESPONDENT**

*(An application for stay of execution from the judgment of the Environment and Land Court of Kenya at Nairobi (O.A. Angote, J.) delivered on 11th May 2023 in ELC Case No. 136 OF 2009)*

**RULING**

1. The dispute before the Environment and Land Court (ELC) concerned ownership of property known as LR No 209/10350 situated in Upper Hill Nairobi (the suit property) in which the Court (O.A. Angote, J), in a decision delivered on May 11, 2023, found in favour of Ukamba Agricultural Institute Limited, the respondent. Ultimately, the learned trial judge made several orders, one of which was a declaration that the suit property is the exclusive property of the respondent and not subject to Legal Notice 102 of 2008 and therefore was not transferred and/or vested in South Eastern University College, the applicant.
2. Aggrieved by that decision, the applicant lodged a notice of appeal evincing an intention to challenge that decision before this Court and is now before us on a notice of motion dated May 30, 2023 seeking to stay execution of that judgment and a temporary injunction restraining the respondent whether by themselves, agents, successors, servants or themselves from alienating, selling, transferring and/or dealing in any manner whatsoever with the suit property.
3. In an affidavit in support of the motion sworn on May 30, 2023, by Prof. Francis N. Wachira, the Acting Vice-chancellor of the applicant university, set up some 13 grounds in a bid to demonstrate that the intended appeal is arguable. He also deposes that the applicant is in imminent danger of



suffering irreparable loss of the property which is public land as it is being utilized by the respondent for commercial purposes and is purporting to change use from education to commercial.

4. In resisting the application, Stephen Ndambuki Muli, the chairman of the respondent company, swore an affidavit on June 20, 2023. This Court is told that the motion is incurably defective for omitting Nairobi City Council, the 2<sup>nd</sup> defendant at trial; the applicant is yet to file a memorandum of appeal within timelines stipulated under Rule 82 of the *Court of Appeal Rules*; the applicant's representation is irregular by dint of Rule 22 of this Court's Rules; and there is nothing to be stayed in so far as the order sought to be stayed was a dismissal of a counterclaim.
5. Regarding the merits of the intended appeal, the respondent contends that it is a non-starter because the applicant's entire case rested on a gazette notice conferring ownership upon it. It is further argued that as the respondent is in possession of the suit property, the grant of the orders sought would have the effect of interfering with both the respondent's rights of ownership and possession.
6. Counsel for the parties regurgitated these respective positions in the written submissions, and which were highlighted at the plenary hearing.
7. Before delving into the substance of the application we deal with the preliminary issues raised by the respondent. It is true that at the ELC there was a 2<sup>nd</sup> defendant, the City Council of Nairobi.  
  
While no orders were made against the council and it appeared to be a peripheral party, it is unclear why it has not been included as a respondent in the intended appeal and the current application. It is argued by the respondent that this renders the entire application defective.
8. Our jurisdiction to deal with the application was properly invoked when the notice of appeal was duly filed by the applicant. Whether or not the intended appeal is defective is not a question before us and will have to await a full interrogation on another occasion. This holds true as well for the argument that the applicant is already in breach of the timelines prescribed for lodging an appeal. On the material before us, the alleged defects are not so plain and obvious, and may require protracted arguments that a striking out motion affords.
9. Rule 22(2) of our rules read:  
  
    "22(2) A corporation that is a party to any proceedings in the Court may appear by advocate or by a director, manager or secretary thereof appointed by resolution under the seal of the company, a sealed copy of which resolution shall be lodged with the Registrar."
10. We understand the requirement for lodging of a sealed copy of a resolution to be where appearance for the corporation is by a director, manager, or secretary of a corporation and not where the corporation is represented by an advocate. The objective is that the corporation would be formally communicating to Court that a certain director or official, who may be a layperson, will be representing it in court unlike where appearance is by an advocate, in which event it is presumed that the corporation has adhered to internal mechanisms in regard to appointment of such advocate. Here, the objection in regard to Rule 22(2) fails as the applicant university is represented by an advocate, Nicole K. Nyamai.
11. Turning to the merit of the application, for it to succeed the applicant is required to satisfy the twin requirements; that the intended appeal is arguable, and that it will be rendered nugatory if not granted. Nugatory, taking a more expanded meaning to include worthless, futile, invalid, and trifling (see *Reliance Bank Ltd vs. Norlake Investments Ltd* (2002) 1 EA 227 at p.232)



12. Emerging from the judgment is that the applicant's case was hinged on legal notice No 102 of 2008 of July 15, 2008 under which it was established and which vested upon it all rights, liabilities, and assets held by an entity called Ukamba Agricultural Institute. One of the findings of the trial court was that the entity is distinct from the respondent herein, Ukamba Agricultural Institute Limited, and use of the notice to appropriate the suit land to the applicant would be unlawful taking of property. We think that the argument made by the applicant that in the circumstances of the case, the respondent was in truth, the same entity as Ukamba Agricultural Institute, a public institution, is not frivolous and is one that deserves consideration at appeal.
13. As to whether the appeal will be rendered nugatory if stay is not granted, it is common ground that it is the respondent which is in possession of the property. What the applicant is concerned about is that it will lose the property if the order sought is not granted. It is apparent from reading the judgment of the trial court (see paragraph 20) that the respondent had the intention of selling the suit property to Dubai Bank which had paid a 10% deposit of Kshs.38,000,000.00. If that sale or a similar disposition was to take place, then it may have the effect of placing the property beyond the reach of the applicant who will find itself in considerable difficulty should its appeal prevail.
14. What commends itself to us is to grant an order which, although not disrupting the respondent's possession of the property, nevertheless preserves it. The Notice of Motion dated May 30, 2023 is granted in terms that the respondent is restrained by way of injunction from selling, charging or in any other manner disposing of the property pending the hearing and determination of the intended appeal. Costs of the motion shall be in that appeal.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF DECEMBER, 2023.**

**F. TUIYOTT**

.....

**JUDGE OF APPEAL**

**ALI-ARONI**

.....

**JUDGE OF APPEAL**

**M. GACHOKA CIArb, FCIArb.**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

