



Karim H. P. & 12 others v Hwaok IM & another; National Environment Management Authority (Interested Party) (Environment & Land Petition E027 of 2021) [2024] KEELC 1752 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 1752 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E027 OF 2021**

**AA OMOLLO, J
APRIL 11, 2024**

BETWEEN

**NABATKHANU KARIM H. P. 1ST PETITIONER
SHRIKESH GHEEWALA 2ND PETITIONER
KAMLESH V. GOHIL 3RD PETITIONER
NAGIB POPAT 4TH PETITIONER
PIUSH PATEL 5TH PETITIONER
SHAMIT SHAH 6TH PETITIONER
NAWAZ GULAMHUSSEIN C. P. 7TH PETITIONER
TRUSHA PATEL 8TH PETITIONER
PANKAJ PATEL 9TH PETITIONER
SHEMZIN SHUJA D. 10TH PETITIONER
HAMIDA SHUJA D. 11TH PETITIONER
SUSHMA SHAH 12TH PETITIONER
NAMISH SHAH 13TH PETITIONER**

AND

**HWAOK IM 1ST RESPONDENT
INTERNATIONAL CHRISTIAN KINDERGARTEN 2ND RESPONDENT**

AND



NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED PARTY

RULING

1. The Petitioners/Applicants brought the notice of motion dated 13th September, 2023 under the provisions of Article 10 of the Constitution, Section 3 of ELC Act, Section 1A, 1B & 3A of Civil Procedure Act and Order 42 Rule 6 (b) of the Civil Procedure Rules. The Applicants sought the following orders;
 1. Spent
 2. Spent
 3. Spent
 4. That, pending hearing and determination of the appeal against the Decree of this Court issued on 11th July, 2023 in Nairobi, Court of Appeal Civil Appeal No. E614/2023, an order of injunction to prevent, stop, discontinue or restrain the Respondent and or anyone claiming under her from establishing, operating, carrying on any school and such school related activities whether as International Christian Kingergarten School or otherwise school establishments including but not limited to infrastructural changes or constructions of school learning facilities or school related user activities on House No. 49 on LR No. 209/8349 or any infrastructural changes, activities such as opening more gates into the said property for the above stated school establishment.
 5. That costs of the application herein be provided for.
2. The application is supported by the affidavit of Nabatkhanu Karim Hassanali and also the following grounds;
 - i. The Applicants have an arguable appeal against the decree of this Court and the same will be rendered nugatory unless this Application is granted.
 - ii. Subsequent to service of the Appeal, the Respondents have on 4th September, 2023 offloaded construction materials and on 12th March, 2023 brought excavators on site in readiness to commence construction and infrastructural changes and activities on the suit property and substantial loss to the Applicants.
 - iii. The Respondents threatened activities will violate the Applicants right to clean and healthy environment and the effects of the said activities are irreversible.
3. Ms. Karim Hassanali deposes inter alia that on 8/08/2023, she was informed by their advocates on record of receipt of the certified typed record and Decree of this Court and they lodged a record of appeal at the Court of Appeal at Nairobi in Civil Appeal Number E614/2023 and duly served the record of appeal on the Respondents. She annexed a copy of the Court receipt for payment of Court fees and security of costs by the Court of Appeal at Nairobi in Civil Appeal Number E614/2023. She deposes that the Applicants have an arguable appeal against the decree of this Court and the same will be rendered nugatory unless this Application is granted.
4. The Respondents opposed the application vide a Replying Affidavit sworn on 29th September, 2023 by Hivaock I M who deposed inter alia that the prayers 2 and 4 of the motion are res judicata the ruling



of this court dated 16th November, 2021 and the judgment delivered on 9th June, 2023. She also averred that the two prayers amount to an appeal from the decision of this court.

5. The Respondents depose that the Applicant are guilty of undue delay and have neither set reasonable grounds to warrant an injunctive relief for the reasons that;
 - a. The Applicants' are calling upon this Honourable Court to sit in an appellate capacity on its own judgment which amounts to a re-trial of the suit.
 - b. The Honourable court in its judgment of 9th June 2023 held that it had no jurisdiction entertain the matter and proceeded to strike out the Applicants' Petition on the basis that the Applicants ought to have in the first instance sought redress before the tribunal mandated by law to entertain such matters.
6. They added that they acquired the relevant permits to renovate the property and have undertaken to ensure the right to a clean and healthy environment is upheld in the course of the project. They urged for the dismissal of the application with costs.
7. The application was argued by way of written submissions. The Applicant filed their submissions dated 5th December, 2023. The Applicant submitted that their present application is not res judicata because it is distinguishable on face value and substance from the ruling of the court dated 16th November, 2021 and are pegged on the different provisions of the law as it is premised on the provisions of Order 42 Rule 6 of the *Civil Procedure Act*.
8. In support of the arguing that it is not res judicata the Applicants relied inter alia on the case of *Peter Njoroge Ngabu v. Tebi Housing Co-op. Society* (2012) Eklr where the Court of Appeal observed thus;

“From the above authorities then if you take the broader view that the issue of stay has been determined then the issue before the court is res judicata but if you take the narrow view that the issue of stay pending appeal has never been placed before the court then the matter is not res judicata.

In the interest of justice I take the view that the court has not exercised its judicial mind and come to a decision on the issue of stay pending appeal and therefore the preliminary objection by the Respondent on the issue of res judicata is dismissed with no order as to costs.”
9. On merit of the application the Applicants cited the case of *Patricia Njeri & 3 Others v National Museum of Kenya* (2004) eKLR which the principles governing the grant of temporary injunction pending appeal to include;
 - i. It is discretion which will be exercised against an applicant whose appeal is frivolous.
 - ii. The discretion would be refused where it would inflict great hardship than it would avoid.
 - iii. The Applicant must show that to refuse the application would render the appeal nugatory.
 - iv. The court be guided by the principles in *Giella v Cassman Brown* (1973) E.A 358.
10. It is the Applicants' submissions that their memorandum of appeal annexed raises an arguable appeal as they seek the protection of their right to a clean and healthy environment whose irreversible violation



is threatened by the 1st and 2nd Respondents. They relied on the case of *Kamau Muchuba v the Ripples Ltd* Civil App. No. 186 of 1992 where the court stated thus;

“In application for injunction pending appeal, it may well be that the intended appeal is frivolous but the court does not have to decide whether the judge was right or wrong since the determination will be made at the hearing of the appeal itself.”

11. On whether they shall suffer irreparable injury, the Applicants referred the court to the photographs at pages 26 – 31 of its bundle showing the Respondents had on 12th September, 2023 brought excavators on site in readiness to commence construction and infrastructural changes and activities on the suit property. That the Respondents have failed to deny or address the issue of the ongoing construction thus confirming the fears of the Applicants.
12. The Applicants cited the case of *Isaac Gatobo and 2 Others v Director General, NEMA & Another* (2017) eKLR which held that if the Respondent was allowed to carry on with the construction then the appeal would be rendered nugatory. The Applicants concluded that the balance of convenience tilts in their favour because their exposure to hazardous materials from the construction if the injunction is not issued is far more harmful as compared to the inconvenience suffered if the construction is halted for the time before the appeal is heard and determined. They added that the application was filed without undue delay and urged that the orders sought be granted.
13. The Respondents filed their written submissions dated 1st February, 2024 and submitted inter alia that this court lacks jurisdiction to entertain the application. They quoted the provisions of Order 42 rule 6(b) to submit that this court can only exercise discretion in its appellate jurisdiction over the matter. In support of this provision, they cited Meoli J. in the case of *Crossland Travellers Ltd. & Another v. Molo Group Shuttle Ltd* (2016) eKLR for the proposition that no appeal shall operate as a stay of execution of proceedings under a decree or order.
14. They submitted that the application is res judicata and the recourse for the Applicants is to seek redress before the Court of Appeal. To buttress their argument, the Respondents cited *inter alia* *Charles Mwangi Gilundu v. Charles Wanjohi Wathuku* (2021) eKLR.
15. On the merits of the application, the Respondents averred that the application does not meet the principles for granting injunction pending appeal as set out by the Court of Appeal in the case of *Venture Capital & Credit Ltd v. Consolidated Bank of Kenya Ltd* Nairobi Civ. Application No. 349 of 2003 (UR). It is also their assertion that the Applicants have not demonstrated a prima facie case and there is no appeal pending before this court. That the Applicants have not demonstrated any illegality in the approval process. Lastly that as owners of the suit property, the Respondents are protected by article 40 of the *Constitution*.
16. Following the summaries and analysis of the pleadings and the submissions rendered in support of and against the notice of motion application, I adopt the two issues raised by the parties for determining the motion. The two issues are;
 - i. Whether or not the applicant is *res judicata*
 - ii. Whether the application meets the threshold for principles set in granting injunction pending appeal.
17. This court on 9th June, 2023 struck out the Petition for want of jurisdiction which amounts to a negative order. Consequently, by virtue of the negative order, the Applicants could not move the court under the provisions of Order 42 rule 6(2) of the *Civil Procedure Act* for stay of execution of



the judgment pending an appeal lodged to the Court of Appeal. There is already filed a Notice of Appeal and therefore it is a misrepresentation of facts and law by the Respondent while relying on the provisions of order 42 rule 6(b) in stating that there is no appeal from which this court can exercise discretion.

18. On the question of res judicata, I hold that the application is not res judicata because there has been no application for injunction pending appeal determined by this court. I am persuaded by the observation in the case of *Spedag Inter Freight Kenya Ltd. & Another v. Joyoti Structures Ltd & Another* (2022) EKLK at paragraph 29 thus;

“Having analysed the two applications, I draw the conclusion that they are not similar as the first one sought stay of execution pending determination an application to set aside ex parte proceedings, judgement and the decree entered in favour of the Plaintiffs. While the present application seeks stay of execution pending appeal of the ruling delivered on 30th November 2020. The principles to be considered in either case is different.”

19. Both parties have cited case law which have discussed principles governing granting the Orders of injunction pending appeal and which I have mentioned in the paragraphs herein above. Order 42 rule 6(b) of the *Civil Procedure Rules* gives this court power to grant a temporary injunction. It states as follows;

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

20. Thus, the Rules require of the Applicants to comply with the procedures for instituting an appeal from a subordinate court or tribunal. In this instant, the requisite compliance is filing a notice of appeal as provided for under Order 42 rule 4 and which the Applicants have satisfied. So, would granting the orders inflict great hardship than it would avoid? The prayers under number 4 wants the court to (1) stop the running of the school on the suit property. (2) forestall infrastructural changes and construction of a school/learning facilities on the suit property.

21. The Applicants aver that the exposure to the hazardous materials from the construction works will cause them irreversible harm compared to the inconvenience caused by delaying the construction pending determination of their appeal. They added that the Respondents have not denied going on with the construction works. In rebuttal, the Respondents argued that they had requisite licenses and as owners of the suit property, their rights are protected under article 40 of the *Constitution* hence the orders should not be granted.

22. There is no dispute that the Respondents own the suit property and have put it to use of running a school. There is also no dispute that they have licenses for the works/projects they are doing on the suit property. However, the Applicants are contending that the manner the property has been put to use is infringing on their rights to a clean and healthy environment which violations are particularized to include exposure to hazardous waste and noise pollution.

23. It is my considered view that the Applicants have demonstrated a prima facie case for purposes of this application by virtue first, of appealing the decision that struck out their petition and which petition had raised violation of several of their rights. This court constituted differently had on 16/11/2021 granted them conservatory orders pending determination of the Petition. Further, their appeal challenges the infrastructural changes that are going on in the suit property. In order not to



render their appeal an academic exercise, I will allow the application but vary the orders in balancing the interests of both parties.

24. Therefore, the application is granted in terms of prayer 4 in part, that an order of temporary injunction pending appeal is issued restraining the Respondents, their agents and or servants from continuing with any construction works on the suit property. The costs of the application to abide the winner of the appeal before the Court of Appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL, 2024

A. OMOLLO

JUDGE

