



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GATEMBU, M'INOTI & MURGOR, J.J.A)

CIVIL APPLICATION NO. 12 OF 2018

BETWEEN

PIONEER INTERNATIONAL

SCHOOLS LIMITED.....APPLICANT

AND

DELMONTE KENYA LIMITED.....1<sup>ST</sup> RESPONDENT

GOSHEN GARDENS LIMITED.....2<sup>ND</sup> RESPONDENT

DAVID KIGWE.....3<sup>RD</sup> RESPONDENT

PETER KAHARA MUNGA.....4<sup>TH</sup> RESPONDENT

CONSOLIDATED WITH CIVIL APPLICATION NO. 13 OF 2018

PETER KAHARA MUNGA.....APPLICANT

DELMONTE KENYA LIMITED.....1<sup>ST</sup> RESPONDENT

GOSHEN GARDENS LIMITED.....2<sup>ND</sup> RESPONDENT

DAVID KIGWE.....3<sup>RD</sup> RESPONDENT

PIONEER INTERNATIONAL

SCHOOLS LIMITED.....4<sup>TH</sup> RESPONDENT

*(Being an application for stay of execution and/or of any further proceedings*

*in the High Court of Kenya of the Ruling, Orders, and decision of 8<sup>th</sup>*

*December, 2017 (Okong'o, J) pending the hearing and determination of the*

*intended appeal*

*in*

**ELC NO. 1245 OF 2015)**

## RULING OF THE COURT

1. By its ruling delivered on 8<sup>th</sup> December 2017 in ELC 1245 of 2015, the Environment and Land Court (the ELC) found Pioneer International Schools Ltd and its Director and/or trustee Peter Kahara Munga guilty of contempt of court of an order made by that court on 17<sup>th</sup> December 2015. They were both granted 120 days within which to purge their contempt and a date was fixed for an appearance before the court on 10<sup>th</sup> April 2018 for purposes of sentencing.

2. Intending to appeal that decision, Pioneer International Schools Ltd and Peter Kahara Munga have by their respective applications, being Civil Application No. 12 of 2018 and Civil Application No. 13 of 2018 applied before this Court for orders of stay of execution and stay of proceedings pending the hearing and determination of the intended appeals.

3. As both applications arise from the same ruling of the ELC, an order for consolidation of the two applications was granted by consent at the commencement of the hearing on 19<sup>th</sup> March 2018 and Civil Application No. 12 of 2018 adopted as the lead file. Consequently, this ruling relates to both applications.

4. The application in Civil Application No. 12 of 2018 is supported by the affidavit of John Gitogo, the Finance Director of Pioneer International Schools Ltd (Pioneer) while the application in Civil Application No. 13 of 2018 is supported by the affidavit of Peter Kahara Munga (Munga). In opposition to the applications, the 1<sup>st</sup> respondent, Delmonte Kenya Limited (Del Monte), filed replying affidavits sworn by its legal counsel Harry Odondi.

5. Briefly, the background is as follows: Del Monte instituted suit before the ELC in December 2015 seeking a permanent order against the 2<sup>nd</sup> respondent, Goshen Gardens Ltd,(Goshen) restraining it from trespassing, transferring, leasing, subletting, interfering or dealing with the Del Monte's property known as L. R. No. 12157/2 (the property) including operating a school or other business on the property in any other manner; a permanent injunction restraining Pioneer from transferring possession of the property; a mandatory injunction compelling Goshen and Pioneer's school to vacate the property and to take away, pull down or otherwise remove their assets from the property and to deliver the possession of the property to Del Monte.

6. Alongside that suit, Del Monte filed a motion dated 4<sup>th</sup> December 2015 before the ELC under Order 40 of the Civil Procedure Rules(CPR) and Section 63 of the Civil Procedure Act (CPA) seeking interim temporary orders to restrain Goshen and Pioneer from trespassing on the property or transferring or dealing with the property pending the hearing and determination of the main suit.

7. That motion was certified as urgent and placed before the Judge on 17<sup>th</sup> December 2015. On that date, and in the presence of counsel for the parties, the motion was scheduled for inter partes hearing on 20<sup>th</sup> January 2016. At the same time, Goshen and Pioneer were granted leave to file replying affidavits within 14 days. Del Monte was granted leave to file a supplementary affidavit within 14 days from the date of service of the replying affidavits by Goshen and Pioneer, and pending the hearing of the motion *inter partes*, the court granted Del Monte two prayers as follows:

*“(a) Pending the hearing and determination of this application inter partes, a temporary injunction be issued restraining the 2<sup>nd</sup> Defendant whether by itself or its agents and/or employees or otherwise whomsoever from trespassing, continuing to trespass, transferring, leasing, subletting, interfering and/or otherwise dealing with plaintiff's property being a portion of the property known as L. R No. 12157/2 situated within Gatanga Sub-County of Muranga County (the suit property) including operating a school and/or any other business on the suit property or in any other manner howsoever interfering with the plaintiff's rights over suit property.”*

*(b) Pending the hearing and determination of this application inter partes, a temporary injunction be issued restraining the 1<sup>st</sup> Defendant whether by itself or its agents and/or employees or otherwise whomsoever from transferring possession of plaintiff's property being a portion of the property known as L. R No. 12157/2 situated within Gatanga Sub-County of Muranga County to the Defendant or any other third party.”*

8. On 31<sup>st</sup> December 2015, Goshen moved the ELC by an application dated 30<sup>th</sup> December 2015 seeking, among other reliefs, orders to vary, set aside and or discharge the interim orders given on 17<sup>th</sup> December 2015. On the same date, Pioneer also applied to the ELC to stay the orders given on 17<sup>th</sup> December 2015 and for interim orders to restrain Del Monte from interfering with possession, occupation and its operations on the property as well as an order to discharge the orders made on 17<sup>th</sup> December 2015.

9. As those two applications by Goshen and Pioneer were pending before the ELC, Del Monte filed a notice of motion dated 12<sup>th</sup> January 2016 seeking orders:

***“1. This application be heard urgently and in priority over the Defendants' applications dated 30<sup>th</sup> December, 2015.***

***2. Mr. David Kigwe of the 1<sup>st</sup> Defendant and Mr. Peter Munga of the 2<sup>nd</sup> Defendant be arrested under warrants of arrest to be issued by this Court and be committed to prison for a term not exceeding six months for disobeying the order made on 17<sup>th</sup>***

December 2015.

3. **The Officer Commanding Ngali Police Station be directed to enforce the warrants of arrest to be issued by this court.**

4. **The court do grant any other appropriate order as it may deem fit in the circumstances of the case.”**

10. That application was based on the grounds that Goshen and Pioneer had disobeyed the orders made on 17<sup>th</sup> December 2015 in that Pioneer “is in possession of the suit property and has started running a school by the name “Pioneer Girls School”.

That application was supported by the affidavit of Harry Odondi, Del Monte’s legal counsel who claimed that Goshen and Pioneer had disobeyed the orders given on 17<sup>th</sup> December 2015.

11. The ELC considered Del Monte’s notice of motion dated 12<sup>th</sup> January 2016, the affidavits in support and in opposition to the application as well as the submissions by counsel and delivered its ruling, the subject of the intended appeal, on 8<sup>th</sup> December 2017. In that ruling, and as already indicated, the ELC found Pioneer and Munga guilty of contempt of the order given on 17<sup>th</sup> December 2015 and made further orders that:

**“(a) In view of the nature of the business which the 2<sup>nd</sup> defendant is carrying out on the suit property which involves education of children, the 2<sup>nd</sup> defendant and the said Peter Munga are granted one hundred and twenty**

**(120) days from the date hereof within which they shall purge their contempt.**

**(b) The Deputy Registrar shall issue summons to be served upon Peter Munga to appear before this Court on 10<sup>th</sup> April, 2018 to address the Court in mitigation before a sentence is passed against him.**

12. Apprehensive, Pioneer and Munga (the applicants) have, by their applications presently before the Court moved to arrest the impending sentence on 10<sup>th</sup> April 2018.

13. To succeed, the applicants must demonstrate that the intended appeal is arguable and that if the orders they seek are not granted, the intended appeal will be rendered nugatory. There are many authorities that speak to the applicable principles. For instance, in **Ishmael Kagunyi Thande v Housing Finance of Kenya Ltd Civil Application No. Nai 157 of 2006** this Court stated:

**“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”**

14. Have the applicants fulfilled those requirements? Learned counsel Mr. C. Waweru Gatonye teaming up with C. N. Kihara for the applicants submitted that the intended appeal is not only arguable but has overwhelming chances of success. Drawing our attention to the draft memorandum of appeal, counsel argued that the decision by the lower court will be challenged in the intended appeal on grounds that it was made without jurisdiction; that there is the question whether the matter was properly before the court; that where an issue of competence or jurisdiction of a court is raised, it must be determined first before addressing the question whether contempt is established; and that the judge wrongly determined that there was no point in interrogating the issues regarding jurisdiction that were raised. Citing the decision of **Econet Wireless Kenya Ltd vs Minister of Information & Communication of Kenya & another [2005] eKLR**, counsel argued that jurisdiction must first be determined before dealing with the application for contempt.

15. According to counsel, there is also the grievance that an order of injunction was granted for a period longer than permitted under the Civil Procedure Rules with the result that the order the applicants are alleged to have breached was a nullity from the outset and cannot found a complaint for contempt. In that regard, counsel cited the decision of the Court in **Omega Enterprises (Kenya) Limited vs KTDC & 2 others [1988] eKLR**.

16. It was also contended that there was no application before the ELC for contempt against Pioneer, yet the Judge made orders against it. Furthermore, counsel submitted, the orders the subject of the contempt application were mandatory orders issued before an inter partes hearing.

17. As to whether the intended appeal will be rendered nugatory unless we grant the orders sought, counsel submitted that the main prayer by Del Monte is for committal of Munga to jail; that a finding of contempt has already been made and that sentencing is scheduled for 10<sup>th</sup> April 2018; that beyond Munga’s personal liberty that is at stake, the fate of the school and the students enrolled therein is at risk.

18. The application was opposed strenuously by learned counsel for Del Monte Mrs. Kashindi. Underscoring the importance of obeying court orders, and on the strength of a decision in **Rose Detho vs Ratilal Automobiles Ltd 6 others [2007]eKLR**, **Hadkinson vs Hadkinson [1952]2ALL E R 567** and **A.B & another vs. R. B. [2016]EKLR** counsel submitted that the applicants applications should not be entertained as they have not made any attempts at purging the contempt.

19. According to Mrs. Kashindi, the intended appeal is not arguable; there is no question of a controlled tenancy; there is no relationship at all between Del Monte and Pioneer on the basis of which Pioneer can occupy the property; and that Pioneer is indeed a trespasser on Del Monte's property. Counsel submitted that it is instructive that by the time the orders were given by the ELC on 17<sup>th</sup> December 2015, Pioneer was not operating a school on the property but went ahead to start the school on the property in flagrant disregard of the court order.

20. As to whether the intended appeal will be rendered nugatory, counsel relied on the decision of this Court in Reliance Bank Ltd vs Norlake Investments Ltd [2002]1 EA 227 and submitted that the competing claims of the parties must be weighed and that in the circumstances of this case the relief should be declined.

21. Ms Ochieng learned counsel for Goshen, left the matter to the Court on the basis that her client was not affected by the contempt of court application.

22. We have considered the applications, the affidavits, the rival arguments and the authorities cited by counsel. To start with, it is not correct, as argued by counsel for Del Monte that there is an absolute bar from hearing a contemnor who has not purged the contempt. The case of Rose Detho vs Ratilal Automobiles Ltd & 6 others [2007] eKLR to which we were referred stands for the proposition that each case must be decided depending on its own circumstances. See also A. B. & another vs. R. B. [2016] eKLR.

23. As to whether the intended appeal is arguable, the applicants say that some of the complaints they will pursue in the intended appeal include complaints that temporary mandatory orders should not have been granted without a hearing; that orders given were made without jurisdiction. We are persuaded that the intended appeal is not frivolous. It is arguable. As the Court stated in Fatima Ali Mohamed vs Harbans Singh Soor [2007] eKLR:

*“We think, with respect, that the issue of jurisdiction which is intended to be argued in the appeal is not a frivolous one. Jurisdiction as this Court has stated before, is everything. Without it no court or tribunal can make any valid orders.”*

24. As to whether the intended appeal will be rendered nugatory, we think it will if we do not grant the orders sought. The intended appeal will not have been heard by 10<sup>th</sup> April 2018 when sentencing is scheduled. See Justus Kariuki Mate & another vs Martin Nyaga Wambora [2014] eKLR. For now, it will suffice to echo the words of the Court in Commissioner of Mines & Geology & 2 others vs Stema Alloys Enterprises Ltd [2015] eKLR where the Court stated that:

*“Deprivation or threat to deprivation of personal liberty is a serious constitutional issue. Where personal liberty is threatened in a case where the applicant has challenged or intends to challenge on appeal the very basis of such threats, the court will be inclined to grant an order of stay because liberty once lost, even for a second, cannot be reversed.”*

25. In conclusion therefore, there is merit in the applications. We grant prayers 2 and 3 of the application dated 23<sup>rd</sup> January 2018. We further order that the applicants shall file and serve the record of appeal within 30 days of delivery of this Ruling failing which the orders we have granted herein will stand discharged.

26. The costs of the applications shall abide by the outcome of the intended appeal.

Orders accordingly.

Dated and delivered at Nairobi this 23<sup>rd</sup> day of March, 2018.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

**DEPUTY REGISTRAR**