



**Nakuru Automobile House Limited v Mwangi & another (Civil Application
E005 of 2021) [2021] KECA 35 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 35 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E005 OF 2021
AK MURGOR, M NGUGI & JW LESSIT, JJA
SEPTEMBER 23, 2021**

BETWEEN

NAKURU AUTOMOBILE HOUSE LIMITED APPLICANT

AND

LAWRENCE MAINA MWANGI 1ST RESPONDENT

DISTRICT LAND REGISTRAR, NAKURU 2ND RESPONDENT

*(An application for injunction against the Judgment of the
Environment and Land Court at Nakuru (D.O. Obungo, J.) dated
18th January, 2021 in Environment and Land Case No. 204 of 2014)*

RULING

- 1 By way of Notice of Motion dated 26th January, 2021, Nakuru Automobile House Limited, the applicant, seeks an injunction to restrain Lawrence Maina Mwangi, the 1st respondent, his servants, employees or agents from entering selling, mortgaging, transferring, constructing, evicting or interfering with LR No. Nakuru Municipality Block 9/110 (the subject property), or intimidating or harassing the applicant in its quiet possession of the subject property pending the hearing and determination of the intended appeal.
- 2 The motion was brought on the grounds that the applicant was dissatisfied with the trial court's judgment dated 18th January, 2021 that dismissed its suit. The applicant's grievance against the decision is that the trial judge failed to interrogate the legality of the two competing titles to the subject property, and failed to consider the overwhelming evidence of fraud and forgery that gave rise to the 1st respondent's title; that though neither party was in actual physical possession of the subject property, the applicant was apprehensive that the 1st respondent intends to dispose of it to the applicant's detriment; that a disposal of the subject property will remove it from this Court's remit which would render the intended appeal nugatory.



- 3 The applicant concluded by asserting that the 1st respondent will not suffer any prejudice were this Court to grant the orders sought. The motion was supported by an affidavit in support sworn by Vijay Morjaria on 25th January, 2021 and the applicant's written submission.
- 4 In a replying affidavit sworn on 4th May, 2021 by the 1st respondent and in written submissions, it was averred that the intended appeal did not raise any arguable issues; that the subject property was allotted to him earlier in time than the applicant's allotment, and that his lease and Certificate of Lease were issued on 9th July, 1997, while the applicant's title was issued on 30th March, 1998. He asserted that he had demonstrated the root of his title to the satisfaction of the trial court which the applicant had failed to do.
- 5 On the nugatory aspect, the 1st respondent deponed that the applicant did not demonstrate that it was in possession of the subject property, while he had shown that he had been in possession since 1996 when it was allotted to him. It was further deponed that sometime in 2020, the County Government of Nakuru had illegally trespassed onto the subject property and established a public transport terminus; that aggrieved by the acts of trespass, the 1st respondent had instituted proceedings against the County Government in Nakuru ELC No. 27 of 2020 and that the applicant had instituted similar proceedings in Nakuru ELC Petition No. 6 of 2020, which suits were pending before the court. That given that the County Government and not the applicant was in possession of the subject property, the applicant's claim that it risked being evicted, which would render the intended appeal nugatory, was unfounded.
- 6 In so far as applications filed under Rule 5 (2) (b) of this Court's rules are concerned, the threshold requirements to be satisfied as exemplified in the case of *Republic vs Kenya Anti-Corruption Commission & 2 others* [2009] eKLR, are that;
- “The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”
- 7 Is the intended appeal arguable? The applicant's contention is that the trial judge failed to properly interrogate the validity of the 1st respondent's title before arriving at its decision. As such, what the applicant is saying is that the court failed to properly evaluate the evidence. If indeed this is the case, we find this to be an arguable matter.
- 8 As to whether the intended appeal would be rendered nugatory, though the applicant claims to be in possession of the subject property, it has not produced any evidence in support of this assertion.
- 9 This notwithstanding, the averments are clear that neither the applicant nor the respondent are in possession. The two suits, that is, Nakuru ELC No. 27 of 2020 and Nakuru ELC Petition No. 6 of 2020 filed against the County Government of Nakuru seem to evince the occupation of the subject property by the County Government following its establishment of a public transport terminus.
- 10 Since the circumstances do not point to the applicant as being in possession of the subject property, there is nothing upon which to base a finding that the intended appeal would be rendered nugatory.
- 11 As such, the applicant having failed to satisfy the threshold requirements for grant of orders under Rule 5(2) (b) of this Court's rules, the Notice of Motion dated 26th January, 2021 is unmerited and is dismissed.
- 12 Costs in the intended appeal.



Dated and delivered at Nairobi this 23rd day of September, 2021.

A.K. MURGOR

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR

