



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)**

**CIVIL APPLICATION NO. 73 OF 2016**

**BETWEEN**

**THE COUNTY GOVERNMENT OF UASIN GISHU ..... 1<sup>ST</sup>  
APPLICANT**

**THE C.E.C LAND HOUSING & PHYSICAL PLANNING**

**UASIN GISHU COUNTY ..... 2<sup>ND</sup>  
APPLICANT**

**AND**

**RAVINDRA RATILAL TAILOR..... 1<sup>ST</sup>  
RESPONDENT**

*(Suing as the Trustee of Uasin Gishu Arts Society of Eldoret)*

**DAYA SINGH LAHB KALSI ..... 2<sup>ND</sup>  
RESPONDENT**

*(Suing as the Trustee of Uasin Gishu Arts Society of Eldoret)*

**NARINDER SINGH LOCHAB ..... 3<sup>RD</sup>  
RESPONDENT**

*(Suing as the Trustee of Uasin Gishu Arts Society of Eldoret)*

**UASIN GISHU ARTS SOCIETY OF ELDORET ..... 4<sup>TH</sup>  
RESPONDENT**

*(Suing as the Trustee of Uasin Gishu Arts Society of Eldoret)*

***(Being an application for Stay of Execution of Orders made by (Ombwayo, J.) on 18<sup>th</sup> August, 2016  
and stay of proceedings in***

**ELDORET ENVIRONMENT & LAND COURT NO. 220 OF 2016**

## **RULING OF THE COURT**

1. The applicants have moved this Court under Rule 5(2)(b) of the Rules of the Court to stay an order made by the Environment and Land Court at Eldoret on 18<sup>th</sup> August 2016 in Eldoret E&LC Case Number 220 of 2016 reinstating possession of the property known as Title Number Eldoret Municipality Block 13/22 to the 4<sup>th</sup> respondent prior to hearing the parties inter partes on a motion to that effect. The applicants also seek an order to stay proceedings in that suit pending the hearing and determination of the intended appeal.

### **Background**

2. The 1<sup>st</sup> to 3<sup>rd</sup> respondents say that they are the trustees of the 4<sup>th</sup> respondent (the Society). Their case before the ELC is that the Society was the registered proprietor as lessee of the property known as Title Number Eldoret Municipality Block 13/22 of a lease for a term of 49 years from 5<sup>th</sup> May 1959 and that the Society has been in possession and occupation since that time; that upon expiry of the lease the Society applied for renewal of the lease with the approval of the District Physical Planning Officer, Uasin Gishu; that the application for renewal of the lease is pending before the National Land Commission; that meanwhile the applicants advertised its intention to acquire the property but the respondents informed them of their legitimate interest in the land; that on Saturday the 6<sup>th</sup> August 2016 the applicants “forcefully took possession of the said property, destroyed the [Society’s] structures, locked the buildings erected thereon and placed its guards to prevent the [Society]...from accessing or utilizing the property.”

3. The respondents sought a declaration of the court that they have “a legitimate pre-emptive right to renewal of the lease” in respect of the property; and a permanent injunction to restrain the applicants from interfering with the Society’s possession and use of the property.

4. With that suit, the respondents filed a motion under certificate of urgency dated 9<sup>th</sup> August 2016 seeking an interlocutory order to restrain the applicants from interfering with the respondents’ possession, use and enjoyment of the property.

5. The applicants’ case, on the other hand is that the respondents’ interest in the property ceased when the term of its lease expired; that after the expiry of the lease in favour of the Society, it applied to be issued with a lease over the property and its application in that regard was approved by the National Land Commission and by the Uasin Gishu County Land Management Board on 27<sup>th</sup> April 2016.

6. The respondents’ motion for interlocutory injunction dated 9<sup>th</sup> August 2016 came up before Munyao Sila, J. on 10<sup>th</sup> August 2016 who, on being requested by counsel for the respondents to issue an order to compel the applicants to vacate the premises declined to do so. That Judge however made orders as follows:

***“At this juncture, I do note that the defendants are already in the property. I would be hesitant to order an eviction at this stage without hearing them first. However, there may be need to preserve the property. I therefore issue the following orders;***

***(i) The defendants and/or their servants/agents are hereby restrained from demolishing any buildings or interfering with the structures on the suit property Eldoret Municipality Block 13/22 formerly L. R NO. 6619/35 or erecting any new structures or in any other way wasting the said property pending inter parties hearing.***

***(ii) The defendants and/or their agents are hereby stopped from removing any items, articles or objects or any other material from the suit property pending inter parties hearing.***

**(iii) The application be served within 3 days.**

**(iv) Inter parties hearing on 17.8.2016 in Eldoret Environment and Land Court.”**

7. Thereafter, the matter was placed before A. Ombwayo, J. who, after hearing oral representations by counsel, delivered the impugned ruling on 18<sup>th</sup> August 2016 and made an order in these terms:

***“Without pre-empting the outcome of the inter partes application the court finds that this is a matter where status quo ante eviction should be maintained as the respondents forcefully changed the status quo by evicting the plaintiffs without coming to court. Thus the Plaintiffs are hereby put back in possession of the premises temporarily pending interparte (sic) hearing of the application.***

***The upshot of the above is that the defendant should immediately vacate the premises and allow the plaintiffs to continue with their business temporarily pending interparte hearing.”***

8. Aggrieved by that order, the applicants lodged a notice of appeal dated 25<sup>th</sup> August 2016 on the strength of which they have now moved this Court to stay that order and the proceedings before the ELC pending the hearing and determination of the intended appeal.

### **Submissions by counsel**

9. Learned counsel for the applicants, Mr. Richard Kamau, referred us to the draft memorandum of appeal on record and submitted that the applicants have an arguable appeal; that considering that another judge had declined to order the applicants to vacate the property before the application was heard inter partes, it was wrong for the learned Judge to make the order; that in effect the Judge did not have jurisdiction to make the order; that there was no prayer for a mandatory injunction before him and a mandatory injunction could not in any event be granted at that stage. In that regard, counsel referred us to the case of **Alex Wainaina t/a John Commercial Agencies vs. Janson Mwangi Wanjihia [2015] eKLR** among other decisions.

10. Opposing the application, learned counsel for the respondents, Mr. C. F. Otieno, referred us to the respondents’ replying and further replying affidavits; he took us through the history of the matter and pointed out that counsel for both parties were indeed heard before the impugned orders were granted; that it was within the power of the court to make the orders that it did, having regard to Section 13 of the Environment and Land Court Act.

11. Citing a decision of this Court in **Aguthi Enterprises Limited v Hussein Ibrahim Nuni [2015] eKLR**, counsel submitted that the applicants have not established that they have an arguable appeal; that the applicants are less than candid regarding how they obtained possession of the property from the Society; and that the parties should pursue the inter partes hearing of the application pending before the ELC. According to counsel, the applicants have also not demonstrated how complying with the order given by the court will render the intended appeal nugatory.

### **Determination**

12. We have considered the application and the submissions by learned counsel. In an application of this nature, the applicant needs to demonstrate that the intended appeal is arguable and that if we decline to grant the orders the applicants seek, the intended appeal will be rendered nugatory. In the case of **Ishmael Kagunyi Thande v HFCK Civil Application No Nai 157 of 2006** this Court stated that:

***“Two principles guide the Court in the exercise of that jurisdiction [under rule 5(2)(b) of the Rules of the Court.] These principles are now well settled. For an application 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.”***

13. We are conscious that the respondents' interlocutory application dated 9<sup>th</sup> August 2016 seeking interlocutory order restraining the applicants from interfering with the respondents' possession, use and enjoyment of the property is pending hearing inter partes before the lower court. We must therefore be guarded in the views that we express in this ruling.

14. Whereas we do not consider that the intended appeal is frivolous,<sup>[1]</sup> the applicants have not demonstrated to us how the intended appeal will be rendered nugatory if we decline to grant the orders sought. In our view, rather than stay the proceedings before the ELC, the interests of justice demand that the pending application before that court, and indeed the suit, should be heard and determined expeditiously. We therefore decline to grant the orders sought. The motion dated 21st September 2016 is hereby dismissed with costs to the respondents.

Orders accordingly.

**Dated and delivered at Eldoret this 16<sup>th</sup> day of February, 2017**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

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**DEPUTY REGISTRAR**

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[1] We bear in mind that an arguable appeal is not one that must necessarily succeed but simply one that is deserving of the Court's consideration. [See **Dennis Mogambi Mong'are vs. Attorney General & others [2012] eKLR**]