



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 528 of 2009**

**MODE DEVELOPMENT CO. LIMITED ..... PLAINTIFF**

**- VERSUS -**

**DIPLOMATIC HOUSING &**

**CONSTRUCTION CO. LTD. .... 1<sup>ST</sup> DEFENDANT**

**BALOZI HOUSING CO-OPERATION**

**SOCIETY LTD. .... 2<sup>ND</sup> DEFENDANT**

**AND**

**MENELIK MAKONNEN**

**SAMSON MACHARIA IRUNGU**

**WILSON MUTERO**

**HUDSON ALUVANZE ..... THIRD PARTIES**

**RULING**

1. The Notice of Motion dated **17<sup>th</sup> September 2012** seeks the following orders:-
  - 1) That this application be heard *ex-parte* in the first instance on grounds of urgency.
  - 2) That there be a stay of execution of the partial decree herein.
  - 3) That the orders issued herein on 16<sup>th</sup> July 2012 be vacated, reviewed or otherwise set aside.
  - 4) That the costs of this application be provided for.
2. The application is supported by affidavit of **DR. MARY WAMBUI KIMANI** dated **17<sup>th</sup> September 2012** with its annextures.
3. The application is opposed vide a replying affidavit of **ERICK AGBEKO** dated **21<sup>st</sup> September**

2012.

4. The application seeks to stay execution of Judgement issued on 8<sup>th</sup> December 2011 and subsequent proceedings and consequences including orders issued on 16<sup>th</sup> July 2012.
5. On 16<sup>th</sup> July 2012 this court issued a prohibitory order over L.R. No. 12422/600 (I.R. 88318) registered in the name of the 2<sup>nd</sup> Defendant and allowed the Plaintiff to execute for the partial Judgement forthwith. It is this order which is sought to be stayed.
6. However, the Applicant has not stated why the stay is necessary. It could be that they intend to appeal. If that is so it should also be explained why there has been a delay for more than 9 months before this application was filed.

Under Order 42 Rule (6) of the Civil Procedure Rules this court has the power to grant a stay of execution if the conditions under that order are complied with. The conditions under Order 42 (6) (2) are:-

- *Where the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay.*
- *Where adequate security has been provided by the Applicant.*

7. The Respondent has opposed this application and on grounds that it has been brought after unexplained delay and that the Applicant has provided no security which is a requirement under the law. I agree with the Respondent. Further, in my view I am satisfied that the Applicant will suffer no loss if I do not allow the application. Any loss which may be suffered by the Applicant should the Respondent execute the Judgement must also be considered in the light of the fact that the Respondent has also acquired a right arising from the said Judgement. It therefore follows that as long as the Applicant is not prepared to provide security to the Respondent, the Respondent should not be duly taken in by the loss that the Applicant may suffer should the Respondent execute the Judgement.

8. I am not convinced that the Notice of Motion application dated 17<sup>th</sup> September 2012 is merited. I dismiss it in its entirety with costs to the Plaintiff/Respondent.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 25<sup>TH</sup> DAY OF APRIL 2013**

**E. K. O. OGOLA**  
**JUDGE**

**PRESENT:**

*Njuguna for the Plaintiff*  
*Onyango holding brief for Nyakundi for the Defendants*  
*Osiemo for the 3<sup>rd</sup> Parties*  
*Teresia – Court Clerk*