



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**LAND AND ENVIRONMENTAL LAW DIVISION**  
**ELC CASE NO. 101 OF 2007**

**KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF**

**VERSUS**

**INDUSTRIAL COLLABORATIVE LTD.....DEFENDANT**

**RULING**

The defendant **Industrial Collaborative Limited** is the applicant and has taken out the Notice of Motion dated 31<sup>st</sup> December 2010 which was filed in court on 18<sup>th</sup> Janua **KENYA ANTI-CORRUPTION COMMISSION v INDUSTRIAL COLLABORATIVE LTD 2011** and heard by this court on 17<sup>th</sup> January 2012. The applicant prays that there be stay of the execution of the court's ruling of 9<sup>th</sup> November, 2010 pending the hearing and determination of the intended appeal on the grounds that if stay of execution is not granted the applicants good and arguable appeal will be rendered nugatory. The other grounds are that the application was brought without delay and the applicant is ready and willing to abide by any order as may be ordered by the court.

The affidavit in support of the application is sworn by one **Simon Ndungu** described as director of the defendant/applicant authorized to so swear and he deposed that the defendant applicant has a very strong and arguable appeal with high chances of success. He adds that the applicant would suffer loss and damage if stay is not granted.

The application is opposed and Counsel for the Respondent has sworn a Replying Affidavit describing the application as fatally defective and an abuse of court process and urges the court to dismiss it at the first instance, with costs. He adds that the conditions to be met before stay can be granted have not been met and so the application should be refused.

The conditions that must be met before stay of execution is granted are set forth in Order 42 Rule 6 Subrule 2 of the Civil Procedure Rules as follows:-

**“Order 42 Rule 6(2) – No order for stay of execution shall be made under Subrule (1) unless: \_**

**(a)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; and**

**(b)such security as the court orders for the due performance of such decree or order as may**

**ultimately be binding on him has been given by the applicant”**

The above conditions must be met, all the conditions, before any orders of stay are granted. The order is couched in mandatory terms. The Ruling complained of is that dated 9<sup>th</sup> November 2010 ordering a consolidation of several suits. The application under consideration was brought on 31<sup>st</sup> December 2010 and to that end there really cannot be said to have been unreasonable delay in bringing the application. Thereby the second limb of Order 42(6) 2(a) is fulfilled. How about substantial loss? What substantial loss has the applicant shown that it would suffer by having the suit consolidated with the others and heard together? Apart from the averment in the affidavit, which averment is to suffering loss and not substantial loss, nothing more was given as constituting loss. The court was therefore left in the dark as to what loss- substantial loss- that the applicant would be put to in the consolidation of the suits in question. The result is that the applicant has not satisfied the requirement to prove substantial loss.

There is no basis given as for the granting of the orders sought and hence the court need not consider any orders as to security. I find that the refusal of the orders sought cannot render the appeal nugatory.

This application is clearly without merit and the same is dismissed with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2012.

**P.M. MWILU**

**JUDGE**

In the presence of:-

..... Advocate for Defendant/Applicant  
..... Advocate for Plaintiff/Respondent  
..... Court Clerk

**P.M. MWILU**

**JUDGE**