



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL APPEAL NO 4 OF 2013

AVECO LIMITEDAPPELLANT

=VERSUS=

JOHN JOSEPH NDUNGU MWENJA

& PARTNERS LTD.....1ST RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

RULING

1. This is the Notice of Motion dated 21st April 2020 brought under order 9 rule 9 and 10, order 22 rule 22, order 42 rule 6 and order 43 of the Civil Procedure Rules and all the provisions of the law.

2. It seeks orders:-

1. Spent.

2. Spent.

3. Spent.

4. That this honourable court be pleased to grant the Applicants stay of execution of the orders made on 27th February 2020 pending the hearing and determination of the appeal.

5. That the cost of this application be provided for.

3. The grounds are on the face of the application and are:-

1. That the applicant has already filed an appeal through the filing and service of the Notice of Appeal.

2. That the previous advocates have duly granted consent to the firm of M/S Osoro Mogikoyo & Co. Advocates to take over the conduct of this matter on behalf of the applicant.

3. That the applicants are apprehensive that the respondent is likely to forcefully evict them from the suit premises.

4. That the applicants have done extensive developments on the suit premises pursuant to their purchase of the suit property at a regularly conducted public auction.

5. That the applicants have an arguable appeal with chances of success.

6. That the applicants are in possession of the suit premises.

7. That the respondents will not be prejudiced in any way if the orders sought are granted.

4. The application is supported by the affidavit of George Odwor Otieno, one of the Directors of the Appellant/Applicant, sworn on the 21st April 2020.

5. The application is opposed. There is a replying affidavit sworn by the director of the 1st respondent, on the 11th May 2020.

6. On the 18th March 2021, the court with the consent of parties directed that the notice of motion be canvassed by way of written submissions.

The Appellant's/Applicant's Submissions

7. They are dated 7th April 2021. The Applicant has already filed a Notice of Appeal signifying its intention to appeal against the court's order dated 27th February 2020. The Notice of Appeal together with the request for proceedings and ruling were filed by M/S Ngugi B. G & Co. Advocates who were previously handling the matter on behalf of the applicants.

8. The subject matter of the suit is a parcel of land which the applicant purchased at an auction conducted by the 2nd respondent. The regularity or otherwise of the auction has not been challenged at all. There was a proper advertisement for sale of the suit property as required by the law, the applicant's attended the auction, placed their bid which was the highest and were therefore declared the buyer. Soon after the auction the applicant took possession and have done substantial developments on the suit property.

9. The suit property in the lower court has not been fully heard and determined. What was set aside were ex parte orders. The applicant has not been heard on merit.

10. A stay of the orders of the court dated 27th February 2020 ought to be made by this court to preserve the status quo until the appeal is heard and determined and the suit in the lower court is heard and determined.

11. The respondents will not suffer any prejudice if stay is granted. The applicant is in possession. It prays that the application be allowed.

The 1st Respondent's submissions

12. They are dated 26th April 2021. The applicant has not satisfied the conditions for stay of execution under order 42 rule 6 of the Civil Procedure Rules. They have put forward the cases of **Vishram Ravji Halai vs Thornton & Turpin Civil Application No Nai 150 of 1990 [1990] KLR 365; Kamu Ventures Ltd vs Paul Mungai Mwangi [2019] eKLR.**

13. The appellant has not demonstrated how its appeal will be rendered nugatory as no substantial loss has been demonstrated. No documents have been annexed to prove substantial loss. This application is brought in bad faith and aimed at delaying the 1st respondent's case. This court ought to consider the interests of the 1st respondent. They have put forward the case of **Joel Nderitu Ndiang'ui vs Ann Kabura Chomba [2000] eKLR.**

14. The Appellant has been in possession of land that does not belong to it since 2012. They pray that the application be dismissed with costs.

The 2nd Respondents Submissions

15. They are dated 23rd March 2021. The sale under public auction was completed at the fall of the hammer. It has put forward the case of **Century Oil Trading Co. Ltd vs Kenya Shell Ltd, Nairobi (Milimani) HCMCA No 1561 of 2007.**

16. The 1st respondent had no title after the judgment which it could lawfully pass to a third party. The appellant/applicant is an innocent purchaser for value without notice and has to be protected by law. A third party cannot derive a better title than what the 1st respondent had which at the time of the purported transfer was extinguished.

17. This application is an abuse of the court process and waste of precious judicial time. The same should be dismissed with costs to the 2nd respondent.

18. I have considered the notice of motion and the affidavit in support. I have also considered the replying affidavits. I have considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

(i) Whether the appellant's/applicant's, application meets the threshold for grant of orders of stay of execution pending appeal.

(ii) Who should bear costs of this applicant?

19. The principles guiding the grant of orders of stay of execution pending appeal are well settled. **Order 42 rule 6(2)** of the Civil procedure provides that:-

“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.”

20. It is clear from the above provisions that for an order of stay of execution pending appeal to be granted, specific conditions must be met by the applicants.

21. I have considered the notice of motion herein and I find that it has been brought after a long delay. This court delivered its Judgment on 27th February 2020. This application is dated 21st April 2020. The same was filed two months after the delivery of the said judgment. There is no explanation for the delay.

22. This court considered the appeal and dismissed it with costs to the respondents. In essence it means the default judgment having been set aside, the parties are free to litigate the issues before the lower court. It has been more than one year since the judgment was delivered. The matter pending before the lower court ought to have proceeded by now.

23. From the foregoing, I am not satisfied that the appellant/applicant has demonstrated substantial loss if these orders are not granted.

24. All the parties herein ought to do is to proceed with the trial before the lower court.

25. I find this application to be an abuse of the court process. The same is not merited and it is dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 22ND DAY OF JULY 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Mogikuyo for the Appellant

No appearance for the Respondent

Phyllis - Court Assistant