



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. APPEAL NO. 4 OF 2013**

**AVECO LIMITED.....APPELLANT**

**VERSUS**

**JOHN JOSEPH NDUNGU & PARTNERS LIMITED.....1<sup>ST</sup> RESPONDENT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> RESPONDENT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 27<sup>th</sup> June 2013 in which the Appellant seeks for the following orders:

1. Spent.
2. Spent.
3. That upon hearing this Application interpartes, this Honourable Court be pleased to grant a stay of execution against the ruling delivered by the lower court on 16<sup>th</sup> November 2012 pending the hearing and determination of the appeal preferred therefrom.
4. That cost of this Application be provided for.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of George Odwor Otieno sworn on 27<sup>th</sup> June 2013 in which he stated that he is the Principal Officer of the Appellant. He averred that the Appellant purchased the suit property for value without notice from the 2<sup>nd</sup> Respondent through a public auction. He further averred that the Appellant then proceeded to invest heavily on the suit property by putting up commercial and residential buildings that house their families and other independent tenants. He further stated that on 16<sup>th</sup> November 2012, the lower court delivered a ruling which if executed will dispossess the Appellant of the suit property and that the Appellant has since lodged an appeal against that ruling. He further pointed out that the Appellant is in possession and that the Respondent shall not suffer any prejudice as the suit property is still in its name. He further stated that this Application was brought timeously and that the Appellant is ready willing and able to make good any term that this court may order vis-à-vis security.

The Application is contested by the 1<sup>st</sup> Respondent who filed the Replying Affidavit of its Director, Harilal Shamji Kanji, sworn on 26<sup>th</sup> July 2013 in which he averred that any order of stay pending appeal will be highly prejudicial to the 1<sup>st</sup> Respondent as this would expose it to a suit as the 1<sup>st</sup> Respondent sold and transferred the suit property to Shamji Kalyan Pindoria Limited innocently and in ordinary course of business before it became aware of the suit in the lower court. He further averred that the 2<sup>nd</sup> Respondent has not appealed against the ruling that set aside judgment in default of appearance and defence.

The Application is supported by the 2<sup>nd</sup> Respondent which filed its Grounds of Support dated 27<sup>th</sup> November 2013 in which it stated that the 1<sup>st</sup> Respondent defaulted in its obligations to pay rates on the property known as L.R. No. 9042/105 (herein referred to as the “suit property”) prompting the 2<sup>nd</sup> Respondent to file a suit being CMCC No. 23/08 in which Judgment was issued in its favour, that the suit property was subsequently sold to the Appellant by public auction after the due process of law had been followed, that the legal title to the suit property passed on to the Appellant upon the fall of the hammer making the Appellant a bona fide purchaser for value without notice, that the 1<sup>st</sup> Respondent has no title after the Judgment and that the 1<sup>st</sup> Respondent colluded with a third party to transfer the suit property while knowing very well that the same had been sold at a public auction.

The Ruling appealed against is the one in respect of the 1<sup>st</sup> Respondent’s Notice of Motion dated 14<sup>th</sup> December 2011 which was delivered on 16<sup>th</sup> November 2012 and which set aside the judgment and resultant orders issued against the 1<sup>st</sup> Respondent on 28<sup>th</sup> October 2008 and which permitted the 1<sup>st</sup> Respondent to defend the Appellant’s claim. The Appellant subsequently filed this appeal and Notice of Motion dated 21<sup>st</sup> November 2012 seeking a stay of execution against the ruling delivered on 16<sup>th</sup> November 2012. This Application was dismissed with costs, prompting the Appellant to file the present Application.

The issue I am called upon to determine is whether or not to grant the Appellant stay of execution pending the hearing and determination of this appeal. The Appellant has brought this Application under **Order 42 rule 6(1) and (6)** of the **Civil Procedure Rules, 2010** which states as follows:

**“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”**

**Order 42 Rule 6(2)** provides as follows:

“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.”**

I have considered this Application and make the following findings:

1. It is uncontested that the Appellant has constructed some buildings on the suit property which it occupies alongside independent tenants. In light of this fact, I find that indeed, failure to grant the stay of execution order shall occasion the Appellant substantial loss as they will be evicted from the suit property and the buildings razed to the ground. That would render their appeal nugatory.

2. As concerns the issue of providing security for the due performance of the order appealed against, I am convinced that this is unnecessary where the Appellant is concerned as they have not been demonstrated by the Respondents to be impecunious. For that reason, I will not require the Appellant to provide any security.
3. Thirdly, it is an uncontested fact that the Appellant has brought this Application without unreasonable delay.

With this background, I find no difficulty in allowing this Application. Costs shall be in the cause.

**DELIVERED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY 2015.**

**MARY M. GITUMBI**

**JUDGE**