



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**E.L.C. APPEAL NO. 22 OF 2017**

**ELECTRICAL MARKETING (WHOLESALE) LTD.....APPELLANT/APPLICANT**

**VERSUS**

**NAIROBI CITY COUNTY.....1<sup>ST</sup> RESPONDENT**

**GOPAL HARISH.....2<sup>ND</sup> RESPONDENT**

**VEKARIA LALJI GOPAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

In the application dated 16/6/2017, the Applicant seeks to stay the execution of orders made by the subordinate court on 29/5/2017 pending hearing and determination of the appeal. It also seeks a preservation order in respect of L. R. No. 209/8323 (“the Suit Property”) to preserve it in its current position, state, and registration status pending the determination of the appeal. The application was filed on 16/6/2017 and is supported by the Applicant’s Advocate’s affidavit stating that the appeal was filed without delay and the Applicant is prepared to furnish security.

The background to this case is that the 1<sup>st</sup> Respondent claims that the Applicant owed it rates amounting to Kshs. 500,932. Proceedings were taken in the First Class Magistrate’s Court in Nairobi in 2011 culminating in a judgment in favour of the 1<sup>st</sup> Respondent. A vesting order was made in **High Court Miscellaneous Civil Application No. 2 of 2013** vesting the Suit Property in the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The Suit Property was transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on 27/6/2013 with the transfer being registered as entry number 17 against the title. Domicile Auctioneer Services conducted the auction at which the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants purchased the property for Kshs. 5 million.

The court notes from the affidavit of the Applicant’s Managing Director, Sunil K. Patel who resides in the United Kingdom, that the Suit Property was charged to Middle East Bank Limited on 18/10/1995 and that the charge was registered as entry number 16 against the title. There is no evidence to show that the charge over the Suit Property was discharged. In the proceedings before the subordinate court, the Applicants challenged the service effected of both the proceedings in the subordinate court and in the High Court when the vesting order was made. The Applicant contends that the company was put under receivership yet the Receiver Manager was not made a party to the proceedings.

The Director of Legal Affairs of the 1<sup>st</sup> Respondent swore the replying affidavit opposing the application. He depones that the 1<sup>st</sup> Respondent sued the Applicant to recover rates due from it and after a successful trial; judgement was entered in its favour. He claims that a notification of sale was served upon the Applicant but it failed to make payment hence a public auction was conducted where the Suit Property

was sold to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who were the highest bidders at the auction. The Director of Legal Affairs claims that the Applicant was aware of the ongoing suit before the Magistrate's court but failed to enter appearance or file defence. He argues that the Suit Property changed hands at the fall of the hammer and that this appeal is therefore a waste of judicial time as it has been overtaken by events. The copy of the title which he exhibited does not contain the page showing entry number 16 showing the title was charged to a bank.

Under Order 42 rule 6 (2) of the Civil Procedure Rules, the court must be satisfied that substantial loss may result to the Applicant if an order for stay of execution is not made. The application must have been made without unreasonable delay and the Applicant must furnish such security as the court orders for the due performance of such decree or order that may be ultimately binding on the Applicant.

The court has considered the submissions of the Applicant and Respondents. The Respondents argue that the application ought to be dismissed since the property has already been transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who are purchasers for value.

After weighing the respective positions of the parties the court is persuaded that it is necessary to preserve the substratum of the appeal to obviate a situation where there may be dealings with the Suit Property which would complicate the matter further and defeat the appeal.

The court allows the application dated 16/6/2017 in terms of prayers 4 and 5 and grants a stay of execution of the orders of the subordinate court made on 29/5/2017 pending the determination of the appeal. A preservation order is issued to maintain L. R. No. 209/8323 in its current position, form, state, and registration status pending hearing and determination of the appeal.

Dated and delivered at Nairobi this 8<sup>th</sup> day of February 2018.

**K. BOR**

**JUDGE**

**In the presence of: -**

Ms. Kosgei holding brief for Mr. Mulekyo for the Applicant

Mr. Dulo holding brief for Mr. Koceyo for the 1<sup>st</sup> Respondent

**V. Owuor- Court Assistant**