



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 16 OF 2016

SULEIMAN MOHAMED SAID SULEIMAN AL-BUSAIDY

**ALI MOHAMED SAID SULEIMAN AL-BUSAIDY (SUING AS THE LEGAL REPRESENTATIVES
OF THE ESTATE OF THE LATE M. S. S. ALBUSAIDY.....PLAINTIFFS/RESPONDENTS**

-VERSUS-

SHELL CO. OF E. A. (NOW KENYA SHELL LTD).....1ST DEFENDANT

VIVO ENERY KENYA LIMITED.....2ND DEFENDANT

NATIONAL OIL CORP OF KENYA LTD.....3RD DEFENDANT

RULING

1. The application for determination is the notice of motion dated 10th May 2018 seeking orders of stay of execution of the judgment and decree pending determination of the 3rd defendant's appeal. The application is supported by the facts deposed to in the affidavit of Gladys Koletit sworn on 10th May 2018.

2. The motion was argued by filing of detailed written submissions by both parties discussing the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules which govern the grant of stay of execution. I do not need to repeat the provisions of the rules.

3. The Respondent submitted that the Applicant has not shown that it will suffer substantial loss unless the stay is given. The Court's role is therefore determine whether or not the applicant will suffer substantial loss if the stay is not given. The Respondent cited the holding in the case of **James Wangalwa & Another vs Agnes Naliaka (2012) eKLR**, where Gikonyo J while quoting the finding in the case of **Silverstain vs Cheson (200) IKLR 867** had this to say;

“That execution process by itself does not amount to substantial loss. That what a party must establish is other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party in the appeal.”

This finding aptly summarises what I should consider in answering the question I have posed above.

4. In this case, it is not disputed that the Applicant is currently in possession and carrying on its business in the suit premises on the strength of the original lease agreement dated 1st April 1937. In my judgment, I found that the 3rd Defendant/Applicant was in breach of this lease thus the Plaintiff/Respondent was entitled to terminate it and give and or surrender vacant possession. The decree if executed before the appeal to the Court of Appeal is heard and determined then the determination of some of the issues such as whether or not the Applicant was in breach of the lease would become an academic exercise and the Applicant will have been removed from the subject property. This may have the effect if negating the essential core of the Applicant as a successful party in the appeal. See also the decision in the case of **Selected Ltd vs Goldrock Development**.

5. The Respondent submitted that the Applicant ought not to be allowed to retain a position of advantage that it obtained through misrepresentation and non-disclosure. That is not for this Court to deal with now but forms part of arguments during the hearing of an appeal and not for application for stay of execution (see case of **Mangugu vs NBK Ltd (2007) E A 285**. At this stage, the law only allows me to consider issue of security that would cushion the Respondents against any prejudice they may suffer as a consequence of the granting of the orders of stay of execution.

6. In paragraph 7 of the affidavit in support of the motion, the 3rd defendant stated that it is willing to give an undertaking that it will not transfer any interests in the suit property to any third party that may render it difficult for the plaintiffs to regain possession in the unlikely event the intended appeal is dismissed. Further in paragraph 8 of the same affidavit, the applicant agreed to continue paying rent until such time as the appeal may be disposed of one way or the other. The applicant also deposed that it is capable of paying damages that may ultimately become due to the Respondents. The Applicant has thus demonstrated its willingness and ability to offer security and there has been no contrary argument presented.

7. Having been satisfied that the Applicant will suffer substantial loss unless the orders are given and taking into consideration the proposals for offer of security made by the Applicant, I do grant the orders for stay of execution pending hearing and determination of the intended appeal on the following terms;

- i. The Applicant shall not part with possession and or transfer its interest on the subject matter pending determination of the appeal.
- ii. The Applicant shall within 7 days of this ruling deposit with the plaintiff's advocate the accrued rents as per the terms of the lease dated 1st April 1937 and to continue paying any such due rents until the appeal is heard & determined. The said sum shall be held as security for the continued use and possession of the suit premises by the Applicant.
- iii. The Respondent is awarded the costs of this *application to abide the outcome of the intended appeal*.

Dated, signed & delivered at Mombasa this 23rd Nov. 2018

A. OMOLLO

JUDGE