



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC. APPEAL CASE NO. 11 OF 2016**

**KETAN MANSUKHLAL SHAH.....1<sup>ST</sup> APPELLANT**

**ASHIT MANSUKHLAL SHAH.....2<sup>ND</sup> APPELLANT**

**NIHAL MANSUKHLAS SHAH T/A**

**WATERSYS PROPERTIES.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**GULF MANPOWER RECRUITING**

**AGENCY LIMITED.....RESPONDENT**

**RULING**

Coming up before me for determination is the undated Notice of Motion filed on 11<sup>th</sup> September 2015 in which the Appellants/Applicants seek for an order of stay of execution of the Ruling delivered on 9<sup>th</sup> September 2015 by Hon. M. Chesang in **CMCC No. 1710 of 2015** (hereinafter referred to as the “Ruling”) pending the hearing and determination of this Appeal.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the 1<sup>st</sup> Plaintiff/Applicant, Ketan Mansukhlal Shah, sworn on 11<sup>th</sup> September 2015 in which he averred that the Respondent obtained an order of injunction in **CMCC No. 1710 of 2015** against a company known as Watersys Properties Limited which is non-existent. He further averred that after extracting the injunction order, the Respondent purportedly served it upon their caretaker by the name Joseph Karanja Muturi. He averred that the said Joseph Karanja Muturi denied such service by way of his sworn affidavit dated 16<sup>th</sup> April 2015, a copy of which he attached. He asserted that the injunction order was obtained through misrepresentation of service as the Respondent had never served them with any court order. He further averred that when they filed their Notice of Motion dated 16<sup>th</sup> April 2015 seeking to set aside the impugned injunction order, the Respondent amended its plaint by removing Watersys Properties Limited which is the legal entity they obtained the impugned injunction order against. He added that the ruling for their application to set aside was scheduled for delivery on 11<sup>th</sup> June 2015 but has not been delivered to date. He further averred that the Respondent is in rent arrears which it undertook to pay by way of installments as per the consent letter dated 10<sup>th</sup> March 2015, a copy of which he attached. He further

averred that the Respondent filed an application to commit them to civil jail on 18<sup>th</sup> June 2015 whereupon orders for their committal to civil jail were issued on 9<sup>th</sup> September 2015. He added that this is the time they filed this Appeal and Application. He stated that their freedom will be curtailed unless the order of stay of execution of the Ruling is granted.

The Application is contested. The Respondent filed the Replying Affidavit of Jeremiah M. Kisangau, a director thereof, sworn on 18<sup>th</sup> September 2015 in which he averred that a misdescription of the landlord as Watersys Properties Limited does not change the position of the order of injunction because the Appellants/Applicants were aware of its existence having filed an application to have it set aside. He maintained that the injunction order did not lapse with the amendment of the plaint. He added that while the court order was still in force and in total disobedience of the same, the Appellants/Applicants proceeded to instruct auctioneers to levy distress for rent against on 18<sup>th</sup> May 2015. He asserted that this went to show that the Appellants/Applicants deliberately, consciously and flagrantly ignored and disobeyed the court order of injunction. He added that the Appellants/Applicants should have obeyed the injunction order as they waited for the ruling on their application to set aside rather than obey it. On those grounds, he sought for the dismissal of this Application.

The issue for determination is whether or not to issue an order of stay of execution of the Ruling.

The applicable law on this issue is **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.”***

On the issue of whether the Appellants/Applicants stand to suffer substantial loss if the order of stay is not granted, I rely on the position taken by the court in **Machira t/a Machira & Co vs. East African Standard No.2 (2002) 2 KLR 63** where it was held that:

***“It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an award or decree or order, before disposal of the applicant's business (eg appeal or intended appeal)”***

In this Application, the Appellants/Applicants have stated that if stay of the Ruling is not granted, they

stand to be committed to civil jail. I consider this to amount to “substantial loss” and do find that this condition has been satisfied.

Was this Application made without unreasonable delay? I believe the answer to that question is in the affirmative when one considers that the Ruling was delivered on 9<sup>th</sup> September 2015 and this Application was filed 2 days later on 11<sup>th</sup> September 2015.

The final item to consider is the issue of security. The law cited above refers to “*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*”. In this particular case, the Respondent is the tenant to the Applicants and it is alleged that the tenant is in arrears of rent in the Applicant’s premises which are the suit premises. I consider that this being the case, it is not necessary to request the Appellants/Applicants to furnish any form of security.

In light of the foregoing, this Application is allowed. Costs in the cause.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup>**

**DAY OF MARCH 2017.**

**MARY M. GITUMBI**

**JUDGE**