



Degisat Services Limited v Hirani (Environment and Land Appeal E011 of 2024) [2025] KEELC 3256 (KLR) (2 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3256 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND APPEAL E011 OF 2024**

LL NAIKUNI, J

APRIL 2, 2025

BETWEEN

DEGISAT SERVICES LIMITED APPELLANT

AND

MAVJI HIRANI RESPONDENT

RULING

I. Introduction

1. What is before the Honourable Court for its determination are two (2) applications. They are all filed by Degisat Services Limited, the Appellant/Applicant herein against the Respondent. The first one is the Chamber Summons application dated 16th August 2024 and the second one is the Notice of Motion application dated 20th August 2024 respectively.
2. Upon service, while opposing the applications, the Respondent, Mavji Hirani filed Grounds of Opposition and the Replying Affidavit dated 30th August, 2024. The Honourable Court shall be dealing with it in depth at a later stage of this Ruling.

II. The Chamber Summons applications dated 16th August, 2024 by Appellant/Applicant.

3. The chamber summons is filed pursuant to the provisions of Sections 3A, 75, 78, 79G of the *Civil Procedure Act*, Cap. 21 and Order XLII Rule 1[3] of the Civil Procedure Rules and all other enabling provisions of the law. The Appellant/Applicant sought for the following orders:-
 - a. That the court be pleased to grant leave to the Applicant to appeal out of time against the ruling made by Hon. Cyprian Mugambi Chairperson of the Business Premises Rent Tribunal on 12th March 2024.
 - b. That the said leave do operate as stay of proceedings.



- c. That the costs of application be provided for.
4. The application was premised on the following grounds:-
 - a. That the Hon Cyprian Mugambi delivered a ruling on the 12th March 2024
 - b. That only the Tenant/Applicant managed to hear the ruling because their advocate had interrupted internet connectivity and as such the applicant was not properly briefed on the contents of the ruling until a copy of the same was obtained
 - c. That upon the ruling being delivered that a copy of the ruling was uploaded on the 24th of July 2024 which was over 4[four] months after the ruling was delivered and this despite numerous request to have it earlier
 - d. That meanwhile the time for an appeal ran out
 - e. That it is in the interest of justice that the Defendant be allowed to appeal this ruling as delay in getting a copy of the ruling necessary for advocate to get the content and appeal accordingly
 - f. That the Defendant/Respondent will not be prejudiced if the said leave is granted.
5. The application is further supported by an affidavit sworn by Nicholas Zani the director of the Appellant. The contents thereof reiterate the grounds listed above on the face of the application.

At paragraph 8 of the same, it was averred that numerous requests had been made for the ruling to be availed on the portal but the same was uploaded 4 months later. That the same was the cause for delay in the appeal. The court is urged to allow the application to file an appeal out of time.

III. The Notice of Motion application dated 20th August, 2024 by the Appellant.

6. The second application is brought pursuant to the provisions of Order 42 Rule 6 and Order 22 Rule 22 of the Civil Procedure Rules, 2010, Sections 3A of the Civil Procedure Act, Cap. 21 and all other enabling provisions of the law. The Applicant sought for the following orders:-
 - a. That the court issues a temporal restraining order as against the Landlord/Respondent, Makini Auctioneers agencies /agents / any other auctioneers/assignees/servants from any proclamation, attaching items, carting away items from the suit premises advertising or in any way executing the purported proclamation notice pending hearing and determination of this application.
 - b. That the court issues a temporal restraining order as against the Landlord/Respondent, Makini Auctioneers agencies /agents / any other auctioneers/assignees/servants from any proclamation, attaching items, carting away items from the suit premises advertising or in any way executing the purported proclamation notice pending hearing and determination of the appeal.
 - c. That the court issues a permanent restraining order as against the Landlord/Respondent Makini Auctioneers agencies /agents / any other auctioneers/ assignees/ servants from any proclamation, attaching items, carting away items from the suit premises advertising or in any way executing the purported proclamation notice against the tenant/applicant
 - d. That the Landlord/Respondent herein Makini Auctioneers agencies/any other auctioneer's/ landlords agents, assignee/hirelings be restrained from interfering in any way with the tenant's quiet enjoyment of the suit premises and peaceful tenancy and occupation of the same pending the hearing and determination of the application.



- e. That the Landlord/Respondent herein Makini Auctioneers agencies/any other Auctioneers/ landlords agents, assignee/hirelings be restrained from interfering in any way with the tenant's quiet enjoyment of the suit premises and peaceful tenancy and occupation of the same pending the hearing and determination of the appeal
 - f. That the Landlord/Respondent, Makini Agencies any other Auctioneers/ landlords agents, assignee/hirelings be restrained from interfering in any way with the tenant's quiet enjoyment of the suit premises and peaceful tenancy and occupation of the same
 - g. That this honourable court be pleased to issue an order for stay of execution for the part of ruling/order with respect to only the second application dated 7/2/2024 in the Business Premises Rent Tribunal Case No E244 of 2023 pending the hearing and determination of this application
 - h. That this honourable court be pleased to issue an order for stay of execution of any proclamation or execution of the same as instructed by the Respondent/Landlord pending the hearing and determination of this application
 - i. That there be a stay of further court proceedings at the business premises rent tribunal case no E244 of 2023 pending the hearing and determination of this appeal
7. The application is set upon grounds listed on its face and the supporting affidavit of NICHOLAS ZANI the director of the Appellant. He stated as follows:-
- a. That they have been paying a monthly rent inclusive of service charge of a sum of Kenya Shillings Fourty Thousand (Kshs 40,000/-)
 - b. That the rented premise is inclusive of an external room which the Appellant had been using for 'storage until recently when the Respondent took the key in February 2023.
 - c. The said action caused the rent dispute before the tribunal. The Respondent apparently sent auctioneers to distress for rent for the 3rd room which had already been taken up by a third party.
 - d. That the auctioneers were proclaiming the Appellant's motor vehicle which they believed was his but the same was being financed by Platinum Credit Limited.
 - e. That the amounts being proclaimed were erroneous and not inclusive of several sums that had been sent to the Respondent already.
 - f. The court was urged to grant leave to allow the Appellant lodge an appeal out of time against the ruling of Hon. C Mugambi chairperson of the tribunal issued on 12th march 2024 in the Business Premises Rent Tribunal Case no E244 of 2023.

IV. Respondents case

i. Respondents grounds of opposition dated 30th January 2025

- 8. In opposing the chamber summons, the firm of Kamoti Omollo for the Respondent filed grounds of opposition raising the following grounds:-
 - a. That the application is misconceived and incompetent



- b. That the delay in filing the appeal from the decision of the business rent tribunal of 7th February 2024 is unreasonable, contumelious, and no proper explanation has been given by the applicant for the said delay.

V. Respondents Replying Affidavit

9. In response to the Notice of Motion application dated 20th August 2024, the Respondent filed a 6 Paragraphed Replying Affidavit sworn by the Respondent Mavji Karsan Hirani. It was averred that:
 - a. On 12th July 2024, the Respondent as a landlord levied distress for rent against the Applicant to recover rent arrears in terms of the proclamation attached.
 - b. The Applicant then filed an application at the Business Rent Premises Tribunal at Mombasa being tribunal case no E174 of 2024 which is still pending hearing. The Respondent stated that no decision had been made on the Applicant's application dated 18th July 2024 and this courts appellate jurisdiction was thus not to be exercised.
 - c. Having an application before this court and the tribunal was an abuse of the court process.
 - d. The amount of rent arrears was well known and had been quantified and an injunction would not be a remedy as the Applicant could be easily compensated in damages.

VI. Supplementary Affidavit

10. In a brief rejoinder to the averments raised in the respondents replying affidavit above, the Applicant filed a supplementary affidavit sworn by its director Nicholas Zani. He averred that:-
 - a. The appeal before this court was with respect to BPRT E244 of 2023 and not BPRT E174 of 2024.
 - b. At the time of the alleged illegal proclamation, the tenant had infact overpaid as per the tenant's computation and the issue of the disputed rent occasioned by the repossessed room had been sorted out via operation of the unopposed tenants notice to obtain reassessment of rent.
 - c. The dispute in BPRT 244 of 2023 was never heard but a ruling was rendered over the same and which is the subject of the instant appeal.
 - d. The tenant maintained that it was not in any arrears and has infact overpaid the rent as of July 2024 and the alleged attempted eviction by the Respondent was illegal.
 - e. The rent account dispute was further ventilated at the BPRT site visit and which allegations of the repossessed room by the landlord were unopposed by the landlord representative
 - f. The Appellant speaks to the unopposed notice for reassessment of rent and which has since taken effect.

VII. Submissions

11. On 30th January 2025 in the presence of Counsels for both parties in this suit, the Court directed to have the twin Notice of Motions applications dated 16th and 20th August 2024 disposed of by way of written submissions. It should be noted that only the Applicant complied with the courts directions.
12. Pursuant to that, a ruling date was reserved for 24th March, 2025 by Court accordingly but due to unavoidable circumstances the same has been delivered on 2nd April, 2025'.



A. The Written Submissions by the Appellant/Applicants.

13. The Applicant filed written submissions are dated 23rd October 2024. Mr. Matende Advocate commenced his submissions by stating that it with regards to both applications filed before court. On the application dated 16th August 2024, it was submitted that the courts have laid down factors when determining an application for extension of time. He made reference to the holding in the case of:- “Paul Wanjohi Mathenge - Versus - Duncan Gichane Mathenge [2013] eKLR where the court discussed the factors which include the period of delay, the reasons for delay and the degree of prejudice to the Respondent and interested parties if the application is allowed.
14. The Applicant contended that the delay in acquiring a copy of the ruling caused the delay in filing the appeal. That the oversight on the part of the judiciary should not be visited upon the Appellant. That the intended appeal is an arguable one and no prejudice will be visited upon the Respondent.
15. The Appellant referred to “Leo Sila Mutiso - Versus - Hellen Wangari Mwangi Civil Application No NAI 255 of 1997 [unreported]” where the court held that the decision to extend time for appealing was clearly a discretionary one and considered the length of delay, reason for delay and the success rate of the appeal.
16. On the 2nd application dated 20th August 2024, on whether the court should grant temporal injunctive orders, it was submitted that the tenant/applicant satisfies the threshold set in the case of “Giella - Versus - Cassman Brown & Co Ltd [1973] EA 358”.
17. On a prima facie case it was submitted that the dispute herein stems from alleged harassment from the Respondent/Landlord who gave an illegal notice to vacate. That the Respondent further tried to increase rent and service charge and forcefully repossessed one of the three rooms in possession of the Applicant/Tenant.
18. The Counsel submitted that the Applicant had filed a reference and Notice of Motion application dated 18th July 2024 with respect to the proclamation notice and was granted a temporary injunction against it. The Land - Lord had challenged the jurisdiction of the BPRT to grant the injunctive orders but the preliminary objection raising this issue was yet to be determined.
19. That the BPRT made a finding in favour of the Appellant and the dispute that remains unresolved is the rent difference that the landlord is proclaiming. That the Appellant filed a notice to obtain reassessment of rent which was served upon the Landlord/Respondent but the same was not contested.
20. The Appellant stated that a prima facie case has been established as was laid down in the case:- “Mrao Limited Versus First American Bank Limited [2003] KLR 125. The Appellant makes further reference to the cases of “Habib Bank Versus Eugene Marion Yakub Civil Application Number 43 Of 1982, Shimmers Plaza Ltd Versus National Bank of Kenya Cape Suppliers Ltd & Another [2014] eKLR and Francis Jumba Enziano & Others - Versus - Bishop Philip Okeyo and Others Nairobi High Court Civil Case No 1128 of 2001[unreported].
21. On irreparable harm, it was submitted that the Applicant had heavily invested in the premise that was the subject matter. that with the current economic situation the tenant will suffer irreparable harm with minimum to no chance of recovery.
22. On the balance of convenience, it was submitted the BPRT in their determination with respect to the notice to vacate ruled in the Applicants favour and with that the balance of convenience automatically tilts in favour of the Applicant/Tenant. The Applicant urged the Court to allow the application and grant the prayers as sought with costs.



VIII. Analysis and Determination

23. I have considered the Applications, the affidavits in support and opposition to them, the grounds of opposition and all the annexures thereto and the submissions on record. I have further considered the relevant provision of *the Constitution* of Kenya, 2010 and law relied on by the parties. In order to make a well-reasoned, logical and persuasive decision on the issues raised, I find four (4) issues for determination in this matter. They are:
- a. Whether the court should exercise its discretion to grant the Applicant leave to file his appeal out of time;
 - b. Whether the proceedings before the BPRT ought to be stayed pending the hearing and determination of the appeal
 - c. Whether the Applicant satisfied the principles to be granted orders of temporary injunction.
 - d. Who to bear the costs of the Applications and what orders to issue.

ISSUE No. a). Whether the court should exercise its discretion to grant the Applicant leave to file his appeal out of time;

24. Under this sub heading, the issue for determination by the Court is on whether to enlarge time to file an appeal. This principle of law is governed under the provision of Section 79G of the *Civil Procedure Act*, Cap. 21 states:-

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

25. The Supreme Court in the case of “Nicholas Kiptoo Korir Arap Salat – Versus - IEBC and 7 Others [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that: -

“The underlying principles a court should consider in exercise of such discretion should include: -

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.



26. According to the Appellant, the ruling subject of the intended appeal was delivered on 12th March 2024. However efforts to have a copy of the ruling proved futile as the same had not been posted online. The Appellant states that the ruling was posted 4 months later after time to lodge an appeal on the same had lapsed. Thus, according to the Applicant, the blame on delay is squarely placed on the tribunal.
27. From the copy of notices attached to the Appellant's affidavit and which showed the numerous requests to have the ruling availed, I am confident of the fact that the Appellant made all diligent effort in obtaining a copy of the ruling. I find that the Appellant has made a valid case for grant of extension to time to file its appeal.
28. Regarding the prayer for stay of proceedings pending the hearing and determination of the appeal. The law on stay of proceedings is provided for in Section 6 of the *Civil Procedure Act*, Cap 21 to the effect that where an issue is directly and substantially in issue in proceedings between the same parties, another court ought to stay its proceedings in respect of such suit. See *Timothy Kisina Kithokoi v Elijah Kitele & another* [2022] eKLR
29. In the case of "David Morton Silverstein – Versus - Atsango Chesoni [2002] eKLR, the Court of Appeal citing *Kenya Commercial Bank Ltd – Versus - Benjoh Amalgamated Ltd & Another* [1998] eKLR held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts
30. In the case of "Kenya Wildlife Service – Versus - James Mutembei (2019) eKLR, Gikonyo J held that:
"Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent".
31. Gikonyo J further quoted Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, that:
"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."
32. I have quoted several authorities above in a bid to demonstrate the seriousness and nature of the orders being sought by the Applicant. Stay of proceedings directly has an impact on the nature of the courts business which is the daily dispensation of justice in a timely and efficient manner. In dispensing justice, courts have a timeline within which matters ought to be heard and concluded in order to save time and resources. It is only under certain circumstances which I will term special, that a court can stay proceedings. Has the Applicant herein demonstrated these circumstances?
33. The Appellant states that an appeal has been preferred over the ruling rendered by the BPRT in cause no E244 of 2023. That in the interest of justice the court ought to stay the proceedings at the tribunal pending determination of the appeal. Having looked at the nature of the prayers sought, I think it will be an exercise in futility and a total of waste of Judicial resources to have the matter proceed at an appeal stage while still going on before the tribunal. The same will be akin to having parallel proceedings ongoing in two separate courts over the same subject and a clear abuse of the court process.



34. The Appellant has in my opinion demonstrated sufficient reason for stay of proceedings before the BPRT.

ISSUE No. b). Whether the application by the Applicant meets the threshold to grant the temporary injunctive orders sought

35. The court is tasked with making a determination on whether or not to grant the injunction orders sought. The law regarding grant of interlocutory injunctions is found in Order 40 Rule 1 of the Civil Procedure Rules which provide as follows:

“Where in any suit it is proved by affidavit or otherwise:

- (a) That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree;
- (b) That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further order.”

36. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of “Giella – Versus - Cassman Brown & Co Limited (1973) EA 358”, where it was stated: -

“First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

37. The three conditions set out in “Giella (supra)”, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR”: -,

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.



The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.

38. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in the famous case “MRAO Limited – Versus - First American Bank of Kenya Limited & 2 others (2003) KLR 125” of: -,

“So, what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

39. In the case of “Mbuthia – Versus - Jimba credit Corporation Ltd 988 KLR 1”, the court held that;

“In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party’s cases.”

40. Similarly, in the case of “Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Limited” the court held that;

“In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”

41. In the present case, from the stated facts the Applicants have demonstrated a prima facie case with a probability of success at the trial as enunciated in the case of “Giella - Versus - Cassman Brown & Co. Limited (Supra)”.

42. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Applicants might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in the case of:- “Nguruman Limited (Supra)”, held that:-

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

43. On the issue whether the Applicants will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.



44. The judicial decision of:- “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR” provides an explanation for what is meant by irreparable injury and it states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

45. Equally, I have looked at the final orders made by Hon C Mugambi at the BPRT. I note that an order of injunction was issued against the Respondent from terminating the tenancy between him and the applicant and further from evicting the applicant from the suit premises. Infact the notice to terminate the tenancy was declared invalid. The respondent was further enjoined from illegally increasing the rent and the Applicant was asked to continue with payment of the service charge. In my humble view, the appellant has not clearly come out on what they intend to appeal in the said decision as from the contents of the ruling, all aspects were fairly dealt with by the BPRT.

46. However, the duty of this court is not to dictate to the litigants on the nature of orders that ought to be appealed against. It is the wearer of the shoe that understands where it pinches them most. The court at this stage is not required to determine the merits and demerits of the Applicant’s claim. The court is only required to determine whether the Applicant has established a prima facie case. The Applicant is apprehensive of the proclamation made over his motor vehicle and of an impending execution, thus a prima facie case has been established by that.

47. In the case of Silvester Momanyi Marube –Vs- Guizar Ahmed Motari & Another (2012) eKLR, Odunga J. held that: -

“In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the court cannot find conclusively who is to be believed or not, the court is not excluded from expressing a prima facie view of the matter and the court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.”

48. The second parameter the court needs to consider before granting an order for injunction is whether the Applicant stands to suffer irreparable loss if the order is not granted. In the case of “JM – Versus - SMK & 4 others (2022) eKLR, Justice Odunga defined irreparable loss as follows:-

“The equitable remedy of temporary injunction is issued to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their mount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount will never adequately remedy”.

49. The proclamation of the motor vehicle will cause the Applicant irreparable harm. According to the Applicant, the motor vehicle is still registered in the names of the financier platinum credit limited meaning the same is yet to be transferred to the applicant who is probably still paying for the same.



to attach the motor vehicle with the eventuality of its disposal is surely bound to cause the applicant irreparable harm. I believe the second aspect for grant of the injunctive orders has been proved.

50. Thirdly, the Plaintiff has to demonstrate that the balance of convenience tilts in their favour. In the case of “Paul Gitonga Wanjau –Versus - Gathuthis Tea Factory Company Limited & 2 Others (2016) EKLK, the court dealing with the issue of balance of convenience expressed itself thus: -

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right...Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

51. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them. I am also persuaded that the Plaintiff has made out a prima facie case with chances of success. They may also suffer irreparable harm if the motor vehicle is sold. I also find it fit to stay the execution of any proclamation as instructed by the Respondent/Landlord pending the hearing and determination of the appeal.

ISSUE d). Who will bear the costs of the two applications?

52. It is trite that the issue of costs are at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of the legal action or proceedings in any litigation.
53. The proviso under the Section 27 (1) of the *civil procedure Act*, cap. 21 holds that costs follow an event. By the event it means the result or outcome of the legal action.
54. However basing on the facts and circumstances that have been outlined in the pleadings, it is proper for each party to bear its own costs.

VI. Conclusion & findings.

55. Ultimately, upon causing an in-depth analysis to the framed issues herein, the Honourable Court based on the Principles of preponderance of probabilities and the balance of convenience proceeds to make the following orders:-
- a. That the two applications namely the Notice of Motion application the Chamber Summons application dated 16th August 2024 and the Notice of Motion application dated 20th August 2024 be and are hereby allowed in the following terms:-
 - i. The intended appeal be filed and served within 30 days from the date of this ruling.
 - ii. There be a stay of proceedings in the BPRT in cause no E244 of 2023 is hereby issued pending the hearing and determination of the appeal.
 - b. That an order for temporary injunction be and is hereby issued restraining the Landlord/ Respondent, Makini Auctioneers agencies, agents, any other auctioneers, assignees, servants



from any proclamation, attaching items, carting away items from the suit premises advertising or in any way executing the purported proclamation notice pending hearing and determination of the appeal.

- c. That there be an order of stay of execution of any proclamation as instructed by the Respondent/Landlord pending the hearing and determination of the appeal.
- d. That for expediency sake there be a mention on 26th June, 2025 for purposes of admitting the appeal and taking directions on the disposal of the Appeal pursuant to the provision of Section 79B of the Civil Procedure Act, Cap. 21 and Order 42 Rules 11, 13 and 16 of the Civil Procedure Rules, 2010.
- e. That each party to bear its own costs.

It is ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 2ND DAY OF APRIL 2025

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**HON. MR. JUSTICE L.L NAIKUNI,
ENVIRONMENT & LAND COURT AT KWALE.**

Ruling delivered in the presence of: -

- a. Mr. Daniel Disii, the Court Assistant.
- b. Mr. Matende Advocate for the Appellant.
- c. Mr. Omollo Advocate for the Respondent.

