

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND AT MILIMANI**  
**ELCLA NO. E055 OF 2025**

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**KEMSON HOLDINGS AFRICA LIMITED -**  
**APPELLANT/APPLICANT**

**VS**

**JANE NJERI KARIUKI**  
**PHILLIP MBUGU**  
**MARY PAULINE WANJIRU KAMAU**  
**NAHASHON NGERU MWANGI**  
**FREDRICK MUHIA MWANGI**  
**PHILIP NJENGA**  
**PAUL KAHENYA T/A**  
**GOLDEN MAPLE ENTERPRISES -**  
**RESPONDENT**  
**VIRMIR AUCTIONEERS -**  
**RESPONDENT**

**1<sup>ST</sup>**

**2<sup>ND</sup>**

**RULING**

**(In respect of Appellant's application dated 19/3/2025)**

1. What is coming up for determination is the Appellants' application dated 19/3/2025 expressed to be brought under the provisions of Section 3 and 3A of the Civil Procedure Act, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Appellant substantively prays for the following orders;
  - a. That this Honourable Court be pleased to grant an order stay of execution of the Ruling and order issued against the Appellant/Applicant, delivered by the Honourable Mike Makori, Member of the Business Premises Rent Tribunal, on the 17/02/2025

and all consequential orders arising therefrom pending the hearing and determination of the Appeal filed herein.

b. That costs be provided for.

2. The application is based on the grounds on the face of it and further supported by the Affidavit of Steven Nzaku, the Appellant's Director, sworn on 19/03/2025. The deponent states that the Appellant is dissatisfied with the Ruling delivered on 17/02/2025 by the Tribunal and has filed an appeal via the Memorandum of Appeal submitted herein.
3. The deponent states that the Hon. Tribunal ordered the Appellant to return the original furniture and fittings provided by the Landlord at the time of occupying the building within 30 days, without any evidence being presented by the Respondent. Further, the Tribunal ordered that the monthly rent be deducted from the amount paid by the tenant, which is Kshs. 1,022,000/=. Additionally, it was ordered that a joint assessment of the rent payable for the suit property be conducted to determine the rent due, without considering the terms of the Tenancy Agreement.
4. He contends that the Learned Member of the Tribunal made the orders in total disregard of the Tenancy Agreement and the fact that the Appellant had paid 2 years' rent and amenities bills. Further, the Respondent did not adduce any evidence in support of the assertion that they had availed furniture and fittings at the time and period of occupancy on the suit property. That the Honourable Member is further faulted for not considering the Reference resulting in the impugned decision.
5. The deponent asserts that the Respondent is threatening the Appellant with contempt proceedings if the said orders are not duly complied with. He states that the appeal raises serious issues for determination, and the appeal will be rendered nugatory if the orders sought are not granted. He further states that the Respondent does not stand to suffer any prejudice if the orders sought are granted. He also notes that the

application has been made without any unreasonable delay. Consequently, he urges the court to grant the orders sought.

### **The Responses**

6. The 1st Respondent opposes the application, as stated in the Replying Affidavit sworn by one of its proprietors, Mary Pauline Wanjiru Kamau, dated 1/04/2025. The Respondent argues that the Memorandum of Appeal herein was filed outside the 30 days as required. She states that the Appellant has not sought leave of the court; therefore, the appeal and the application should be struck out.
7. The deponent further submits that the Supporting Affidavit was commissioned by Mr. Eric Kinaro, who is a Director of the Appellant. She claims this violates the provisions of Section 4 of the Oaths and Statutory Declaration Act; therefore, the application is fundamentally flawed.
8. She states that even if the application were to be decided on merit, the impugned Ruling was well reasoned, and the Tribunal recognised that the Appellant's Directors may have committed fraud in producing the purported Lease Agreement. Due to conflicting positions in the tenancy agreement, the Tribunal ordered a rent assessment without prejudice to either party. The Tribunal also ordered the Appellant to return the furniture taken from the Respondent. The Letter of 13/03/2025 was intended to advise the Appellant to comply with the Tribunal's orders.
9. The deponent states that the appeal does not raise any significant issues for determination and has little chance of success. She affirms that the 1st Respondent continues to suffer prejudice caused by the fraud carried out by the Appellant's Directors. She mentions that the Appellant did not pay rent for two years after allegedly manipulating the agreement. Based on this, the Respondents' Advocates wrote to the Appellant's Advocates on 13/03/2025, instructing them to comply with the court's orders.
10. The deponent alleges that the genuine Agreement, which they signed, required the Appellant to pay a monthly rent of Kshs. 90,000/= . However, the Appellant presented a different Agreement, a matter they

only became aware of when the Appellant approached the tribunal after seeking unpaid rent. She states that the last page was removed and the initial pages were altered.

11. The application was canvassed through written submissions. Parties were directed to submit their respective written arguments. Parties complied accordingly. The Appellant/Applicant's submissions are dated 10/06/2025, whereas the Respondent's submissions are dated 20/06/2025. The Court has reviewed the submissions from both parties and considered them in its decision.

### **Analysis and Determination**

12. The Court has read and considered the Application, the Affidavits and the annexures thereto as well as the rival submissions, the issues that fall for determination are as follows;
  - a. Whether there is a competent appeal before this court.
  - b. Whether the prayer for stay of execution pending hearing and determination of the Appeal is merited.
  - c. Who should bear the costs of the application?

### **Whether there is a competent appeal before this court.**

13. Section 79G of the Civil Procedure Act provides that an Appeal should be filed within a period of 30 days from the date of the Judgement. However, the proviso to the said Section provides that the court may grant leave or an extension of time to file an Appeal out of time, but the delay must be explained. The above section states as follows:

"79G. Time for filing appeals from subordinate Courts

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 to the Appellant 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.”

14. Section 16A of the Environment and Land Court Act mirrors Section 79G of the Civil Procedure Act, which defines the statutory period of 30 days within which an aggrieved party can lodge an appeal to the Environment and Land Court.
15. The Ruling that the Appellant seeks to appeal was delivered on 17/02/2025. The Appellant then filed the Memorandum of Appeal before this Court on 18/03/2025. That is on the thirtieth day after the delivery of the Ruling. The application was therefore within the statutory 30-day period. There is, therefore, a competent appeal for determination before this court.

**Whether the prayer for stay of execution pending hearing and determination of the Appeal is merited**

16. It is trite that no Appeal can operate as a stay; therefore, an application for a stay must be made to the court by the party seeking it. The principles under which a stay of execution pending appeal may be granted are now well established from the rulings of this court and other superior courts. Generally, a stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules as follows:

(1) 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, an 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.

(2) No order of stay of execution shall be made under Sub-rule (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 undue 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.”

17. In considering an application for stay of execution, I am guided by the decision in the case of **Butt -vs- Rent Restriction Tribunal (1982) KLR 417**, where the Court of Appeal gave the following guidelines: -

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

18. The Court is therefore called upon to balance the rights of the successful party to enjoy the fruits of judgment and those of the Appellant, whose appeal may succeed and become meaningless if a stay of execution is not granted.

19. The purpose of a stay of execution is to preserve the foundation of the case. The Court will now decide whether the Applicant has met the conditions necessary for granting the orders sought.
20. Regarding the first condition of proving that substantial loss may occur if an order of stay is not granted, the Applicant must not only state that he is likely to suffer substantial loss, but also demonstrate that he will suffer such loss if stay orders are not issued.
21. Substantial loss was clearly explained in the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR: -**

"No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish 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 the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."
22. The Applicant asserts that it will suffer irreparable harm if the stay orders are not granted. The Applicant claims that, in complete disregard of the Tenancy Agreement and despite having paid two years' rent and an amenities bills, the tribunal ordered the Applicant to return the furniture and fittings taken during occupancy of the suit property. The Applicant states that the Respondent is threatening the Appellant with contempt proceedings if these orders are not properly complied with.
23. In this case, the court has found that the Applicant has provided sufficient evidence that it is likely to suffer substantial loss if the

application is not granted. The orders of stay of execution must prevent the irreparable damage.

24. Regarding whether the application was made without unreasonable delay, the Ruling against which the Appellant seeks to appeal was delivered on 17/02/2025. The current application was filed on 19/03/2025, which is thirty (30) days after the delivery of the Ruling. It is therefore my considered view that a delay of thirty (30) days is not excessive. Consequently, the application was filed within the appropriate time.
25. On the third condition of Security of costs, the purpose of security was explained in the case of **Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR** the court stated: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

26. In this case, the Applicant has not provided any security nor demonstrated willingness to do so if directed by the Court. The Court must consider the overriding objective and balance the interests of both parties while addressing the issue of security to be offered. The law states that when an applicant intends to exercise their undeniable right of appeal, and if they are ultimately successful, they should not face a situation where they cannot recover their money. Similarly, the Respondent, who has a favourable decree, should not find it difficult or

impossible to realise that decree if the applicant's appeal fails. This principle underpins the requirement for security.

27. Although the Appellant has not met this condition, this Court, in dispensing justice, is of the considered opinion that the Applicant faces a disadvantage if stay orders are declined before the hearing and determination of the Appeal. The Court therefore exercises its discretion and directs that the Appellant pays a sum of Kshs. 50,000/=.

28. Considering all relevant factors and in order not to render the appeal illusory, I do grant stay of execution of the decree herein on condition that;

- a. The Appellant/Applicant do deposit into a joint-interest earning account of both counsels a sum of Kshs. 50,000/= as security of this Appeal.
- b. This condition is to be met within 30 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
- c. The costs of this Application will be in the cause.

29. It is so ordered

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2025**

**J G KEMEI**

**JUDGE**

**In the presence of;**

1. Ms Sharon Okeyo HB Mr Naeku for the Applicant

2. Mr Elkington HB for Mr Kamwaro for the Respondents
3. Ms Yvette - CA

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