



**Lazaro t/a Makwa Shop v Miyaji & another (Environment and Land  
Appeal E002 of 2024) [2024] KEELC 4678 (KLR) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4678 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E002 OF 2024**

**LL NAIKUNI, J**

**JUNE 3, 2024**

**BETWEEN**

**LAZARO T/A MAKWA SHOP ..... APPLICANT**

**AND**

**YASIN ABDULLA MIYAJI ..... 1<sup>ST</sup> RESPONDENT**

**MOHAMMED MUNIR MIYANJI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**I. Introduction**

1. What is before the Honorable Court for its determination is the Notice of Motion application dated 3<sup>rd</sup> January, 2024 by Lazaro T/A Makwa Shop, the Applicant herein. It was brought under the provision of Order 42 Rules 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21.
2. Upon service of the application to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, they responded through filing of a Replying Affidavit dated 30<sup>th</sup> January, 2024. The Honourable Court will be dealing with the issues raised thereon at a later stage of this Ruling.

**II. The Applicant's case**

3. The Applicant sought for the following orders:-
  - a. Spent.
  - b. Spent.
  - c. That this Honourable court be pleased to order stay of execution of the ruling delivered Ruling delivered on 4<sup>th</sup> December, 2024 by Hon. Mike Makori, in



Mombasa Business Premises Rent Tribunal case E226 OF 2023; Mohammed Munir Miyanji & Yasin Abdulla Miyanji vs Lazaro T/a Makwa Shop pending the hearing and determination of the present appeal herein.

d. That the costs of this Application be provided for.

4. The application was premised on the grounds, testimonial facts and averments made out under the 14<sup>th</sup> Paragraphed Supporting Affidavit of –Lazaro Kobia, the Applicant herein sworn and dated 3<sup>rd</sup> January, 2024 with four (4) annexures marked as ‘LK – 1 to 4’ annexed thereto. The Applicant averred that:

- a. The Respondent had filed a Notice of Motion application dated 8<sup>th</sup> September, 2023 where upon which they opposed the said application by filling a Notice of Preliminary Objection and a Replying affidavit dated 12<sup>th</sup> October, 2023 in response to the said application. (Annexed herein was a copy of the Respondents application and the Applicant's Notice of Preliminary objection and Replying Affidavit dated 12<sup>th</sup> October, 2023 and marked as “LK -1”)
- b. Vide a Ruling delivered by the Mombasa Business Premises Rent Tribunal (Hereinafter referred to as “The Tribunal”) in “the case number E226 OF 2023 - Mohammed Munir Miyanji & Yasin Abdulla Miyanji – Versus - Lazaro Kobia t/a Makwa Shop whereby the tribunal ordered, inter-alia, that the Applicant grants the Landlords vacant possession of the premises within 30 days failure to which the Landlord was at liberty to reclaim the suit premises. (Annexed herein was a copy of the ruling delivered on 4<sup>th</sup> December, 2023 and marked as “LK - 2”).
- c. As it is settled law that where there was a preliminary objection it was always neater to determine the objection first before embarking on considering the main suit, the Tribunal declined to determine the preliminary objection and proceeded to determine the main suit hence ordering that he should be evicted from the suit premises.
- d. Being dissatisfied with the decision of the tribunal, he preferred an appeal, to wit, Mombasa Environment and Land Court Appeal No. E002 of 2024; Lazaro Kobia t/a Makwa Shop vs Mohammed Munir Miyanji & Yasin Abdulla Miyanji against the Ruling/decreed delivered on 4<sup>th</sup> December, 2024, of Hon. Mike Makori, In Mombasa Business Premises Rent Tribunal case E226 OF 2023; Mohammed Munir Miyanji & Yasin Abdulla Miyanji VS Lazaro T/a Makwa Shop. (Annexed herein was a copy of Memorandum of Appeal dated 2<sup>nd</sup> January 2024 marked as “LK - 3”).
- e. The 30 days period granted by the trial court on 4<sup>th</sup> December, 2024 during the delivery of the aforesaid Judgment was set to lapse on 3<sup>rd</sup> January, 2024.
- f. Unless this application seeking stay of execution pending appeal was heard urgently and stay granted, the appeal herein shall be rendered nugatory thereby occasioning substantial loss and prejudice to the Appellant.
- g. He was apprehensive that unless this court urgently gives an order of stay of execution, the Respondent would proceed and execute the ruling. He would be evicted from the suit property anytime thereby occasioning substantial loss.
- h. The Intended execution exercise would render the appeal filed herein totally nugatory and he would thereby suffer irreparable and substantial losses once he evacuated because of the following reasons:
  - i. He had an arguable appeal with good prospects of success.



- ii. Further he would be severely prejudiced and the whole substratum of the appeal rendered nugatory if the Respondent was allowed to proceed with the execution of the Ruling and evict the Appellant.
- i. He honestly believed that it was his fundamental right to be heard while the subject matter of the appeal was intact and for that reason he prayed that this application be certified as urgent.
- j. In earnest preparation of the appeal, he had moved made an application requesting for certified copies of the proceedings and the ruling hence no party would suffer prejudice if the stay was granted. Annexed herein was a copy of the letter dated 2<sup>nd</sup> January, 2023 requesting for the proceedings and marked as “LK - 4”.
- k. He honestly believed that the said appeal raised serious allowed to go for full hearing.
- l. It was in the interest of justice and fairness that the interim order of stay sought herein be granted to so that if his appeal succeeded, the success did not become a pyrrhic victory.

### III. The Respondent’s case

5. The 2<sup>nd</sup> Respondent opposed the Notice of motion application dated 3<sup>rd</sup> January, 2024 through a 13<sup>th</sup> Paragraphed Replying Affidavit sworn by Yasin Abdulla Miyanji, the 2<sup>nd</sup> Respondent herein with two (2) annexures marked as “YM - 1 and 2 (a) to (d)” annexed thereto. The deponent averred as follows:-
  - i. In response to the averments made out under Paragraph 4 of the said supporting affidavit. The Applicant herein was not being sincere when he stated that the court declined to determine the preliminary objection and proceeded to determine the main suit.
  - ii. On 16<sup>th</sup> October, 2023 when the matter came up for directions before the trial court it was agreed that both the application and the Preliminary objection be heard concurrently and parties were given timelines within which to file submissions on both the Application and the Preliminary Objection and parties were given 3<sup>rd</sup> November, 2023 to highlight the submissions. Attached in the affidavit and marked as “YM – 20 (d)” were the parties (Applicants and Respondents’ submissions on both the Application and the Preliminary Objection.
  - iii. The Applicant herein never came to court with clean hands. He was aiming at denying the Respondents’ herein of their right to enjoy the fruits of the court’s determination.
  - iv. Without prejudice to the foregoing, the Respondents were the owners of shop no. 2 erected on plot Number Mombasa/BlockXVII/914 wherein the Applicant herein/Tenant operated a retail business.
  - v. They served the Applicant herein with a notice on the ground that they intend to use the premises for a period more than one year hence they required vacant possession of the premises to enable the them occupy and carry out their activities.
  - vi. From the said termination notice, they gave the Applicant (Tenant)period of two months to vacate the premises in compliance with the provision of of Section 4(2) of the Landlords Tenant (Shops, Hotels and Catering Establishment) Act, Cap. 301.



- vii. The Applicant herein for reasons best known to himself chose not to notify neither them nor their Advocates on record of his unwillingness to comply with the notice hence the Application to vacate the premises.
- viii. On receiving such notice, the Applicant herein ought to have notified the Respondent of his unwillingness to comply with the terms of the notice under provision of Section 4 (5) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301 which was not done.
- ix. A tribunal to which a reference was filed ought to be informed within 7 days the requesting party concerned of such reference which notice the Respondents never received to date.
- x. The instant application was a non - starter, an abuse of the court process. The same should be dismissed with cost.

#### **Iv. Submissions**

6. On 7<sup>th</sup> February, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 31<sup>st</sup> July, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged. On 13<sup>th</sup> March, 2024 a ruling date was reserved for 14<sup>th</sup> May, 2024 by Court accordingly. However, due to unavoidable circumstances, including the misplacement of the Court file at its safe keeping place, it was eventually delivered on 3<sup>rd</sup> June, 2024.

#### **A. The Written Submissions by the Appellant/Applicant**

7. The Appellant/Applicant, through the Law firm of Messrs. Mutisya Mwanzia & Odeng Advocates filed their written submissions dated 28<sup>th</sup> February, 2024. M/s. Gatimu Advocate commenced the submission by stating that what is before the Honourable Court was a notice of Motion application dated 3<sup>rd</sup> January, 2024 supported by an affidavit sworn by Lazaro Kobia of even date. The Application is opposed by a Replying Affidavit dated 30<sup>th</sup> January, 2024. The Applicant sought for the above set out orders. The Learned Counsel provided Court with a brief background of the matter. According to the Learned Counsel, the genesis of this application was that, vide a ruling delivered on 4<sup>th</sup> December, 2023 in Mombasa Business Rent Tribunal case no. E226 OF 2023; Mohammed Munir MiyANJI & Yasin Abdulla MiyANJI vs Lazaro Kobia T/A Makwa Shop, the court ordered inter-alia that the Applicant (tenant) grant the landlord(Respondent) vacant possession of the premises within 30 days failure to which landlord was to be at liberty to reclaim the suit premises. The Appellant being aggrieved by the said decision and with intention to appeal the said decision filed a memorandum of Appeal dated 2<sup>nd</sup> January, 2024. Thereafter, filed this application for stay of execution of the Judgment/Decree delivered on the 4<sup>th</sup> December, 2023 pending determination of the current appeal.
8. As a result of the said ruling, the Applicant was apprehensive that the Respondent was about to execute the said judgment and/or decree issued in his favour despite the pendency of the appeal before this court. Such act would render the appeal nugatory the Judgment delivered herein hence the purpose of this application.
9. On the issues for determination, the Learned Counsel relied on two (2) issues:-
  - i. Whether this honorable court has jurisdiction to hear the application for stay of execution of the judgment/decree, and;



- ii. Whether the Appellant has met the prerequisite for grant of stay of execution of the judgment and/ or decree pending appeal before this Honourable Court.

10. On analysis, the Learned Counsel submitted that the principles upon which the court may stay the execution orders appealed was well settled under Order 42 Rule 6 of the Civil Procedure Rules, 2010. The Learned Counsel averred that under the provision of Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010 do this Honourable court have jurisdiction to hear and determine the application for stay of execution of Judgment/decree delivered by the Tribunal? By virtue of the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010, the Court to which the appeal was preferred was at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just. Therefore, this honorable court has jurisdiction to determine this application and to make such orders as may to it seem just. Nevertheless, the court having jurisdiction has to exercise its own discretion to grant stay of execution upon the appellant showing sufficient cause. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the court that (1). Substantial loss may result to him unless the order is made; (2). That the application has been made without unreasonable delay; and (3). The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
11. On whether a substantial loss may result to the appellant unless the order is made, the Learned Counsel submitted that in the matter of “Amoke Otieno Pascal – Versus - Melvin Anyango Owuor [2022] eKLR” highlighted the issue of substantial loss, by citing the Court of Appeal case of “Kenya Shell Limited – Versus - Kibiru & Another(1986)KLR 410”, which held that “Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”
12. In the present case, the Respondent was in verge of commencing the process of executing the Judgment and/or Decree by evacuating the Applicant from the suit premises despite the pendency of the Applicant/Appellant’s appeal before this court. Therefore, the Appellant, being evacuated from the suit premises, herein the Judgment subject matter, stood to suffer substantial loss as he may not be in a position recover the vacant possession of the suit premises. Such act would render the appeal nugatory and prejudice the Appellant’s right to prefer an appeal against the decision delivered by the tribunal on the 4<sup>th</sup> December, 2023. Furthermore, the Respondent stood to suffer no prejudice if stay pending appeal was granted since he would still be entitled to his Judgment if the appeal did not succeed and further any delay occasioned may be compensated to him by way of costs.
13. On whether the application was made without unreasonable delay. The Learned Counsel submitted that on 4<sup>th</sup> December, 2023, the Tribunal delivered a Judgment against the Appellant and thirty (30) days right of appeal was granted. The appellant filed the application expeditiously given that the Memorandum of Appeal was filed on 3<sup>rd</sup> January, 2024. This was within the time limit of the right to appeal. Therefore, the application was filed timeously.
14. On the issue on the applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him. The Learned Counsel argued that these principles were enunciated in “Butt – Versus - Rent Restriction Tribunal [1979]” the court of appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. According to the Learned Counsel, it was evident that this Honourable court could order security of costs upon application by either party or on its own motion. However, they did submit that the appeal was based on the issue of non-compliance of the court orders of vacating the suit premises, circumstances which never called for security of cost. The merits of the Appeal were not a factor to consider when determining an application for stay of execution under the provision of Order 42 Rule



6 of the Civil Procedure Rules, 2010. The Learned Counsel submitted that the appeal was highly arguable and meritorious with a very high chances of success.

15. In conclusion, the Learned Counsel submitted that in light of the above, they believed that they had said enough to demonstrate that this application herein was merited. It was in the interest of justice that this Honorable court determines it in favour of the Applicant for the orders of stay sought herein.

## **B. The Written Submissions by the Respondents**

16. The Respondents through the Law firm of Messrs. Sidinyu Njau & Company Advocates filed their written submissions dated 7<sup>th</sup> March, 2024. M/s. Sidiyu Advocate stated that up for consideration was the Applicant's Notice of Motion Application dated 3<sup>rd</sup> January, 2024 seeking stay of execution of the ruling delivered on 4<sup>th</sup> December, 2023 by Honourable Mike Makori in Mombasa Business Premises Rent Tribunal case E226 of 2023. On the issue for consideration, the Learned Counsel relied on two issues. These were:-
  - i. Whether the Applicant has satisfied the conditions precedent for the orders of stay of execution to be allowed
  - ii. Whether the Applicant comes to court with clean hands.
17. On whether the Applicant had satisfied the conditions precedent for the orders of stay of execution to be under the provision of Order 42 Rule 6(2) provides for conditions precedent to the issuance of orders of stay of execution as follows: (a) that substantial loss may result to the applicant unless the order is made. (b) that the application has allowed, the Learned Counsel submitted that been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
18. According to the Learned Counsel, none of the conditions above had been fulfilled by the Applicant herein. The application never established any factor which showed that the execution would create a state of affairs that would irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. The Applicant herein had been renting and/or conducting business at the Respondents' property or shop for a period more than five (5) years and owing to the economic hardships being faced in the country, the Respondents and their family thought it wise to take back the shop and utilize it for income by the non - employed members of the family. Owing to the aforesaid the Respondents herein served a two months' notice upon the Applicant as required by the law. However for reasons best known to him he did not notify the Respondent of his un-willingness to vacate the said premises.
19. The Learned Counsel asserted that the Respondents' herein were the proprietors of the suit property. Thus, taking it back for their own use could not be prejudicial to Applicant in any way. The Learned Counsel relied on the case of "Siaya High Court Civil Appeal No. E 003 OF 2022; Nicholas Stephen Okaka & Another – Versus - Alfred Waga Wesonga [2022] eKLR", the Honourable court observed and/or stated as follows:-
  21. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now



enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.

22. Section 1A (2) of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
23. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6 (2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.
24. As to what substantial loss is, it was observed in *James Wangalwa & Another – Versus - Agnes Naliaka Cheseto* [2012] eKLR, that:

“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.”
27. The court, in *RWW – Versus - EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
20. On whether the applicant comes to court with clean hands. The Learned Counsel contended that the Applicant herein was not being sincere when he stated that the court declined to determine the preliminary objection and proceeded to determine the main suit. On 16<sup>th</sup> October, 2023 when the matter came up for directions before the trial court it was agreed that both the application and the Preliminary objection be heard concurrently and parties were given timelines within which to



file submissions on both the Application and the Preliminary Objection and parties were given 3<sup>rd</sup> November, 2023 to highlight the submissions.

21. It was the Learned Counsel's submission that the Applicant herein never came to court with clean hands. He was aiming at denying the Respondents' herein of their right to enjoy the fruits of the court's determination. In light of the foretasted it was the Learned Counsel's submission that this Application was aimed at frustrating the Respondent's from enjoying the fruits of the Judgement hence the same should not see the light of day.
22. In conclusion, the Learned Counsel urged the Honourable Court to find that the Application lacked merit and the same be dismissed with cost.

#### **V. Analysis & Determination.**

23. I have carefully read and considered the pleadings herein by the Applicant (The Tenant) and the Respondent (The Land - Lord), the comprehensive written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.

24. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-

- a. What are the fundamental legal principles to consider on the application for granting stay of execution or not.
- b. Whether the parties were entitled to the reliefs sought.
- c. Who will bear the Costs of Notice of Motion application dated 3<sup>rd</sup> January, 2024.

IssueNo. a). What are the fundamental legal principles to consider on the application for granting stay of execution or not.

25. The main substratum in the subject matter ids whether to grant the stay of execution or not against a decision by the Tribunal. The law concerning stay of execution pending Appeal is found in under the provision of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010 which stipulates 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.

(2) No order for 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 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.



26. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. While building jurisprudence on this matter at the initial stages, the Court of Appeal in the case of “Butt –Versus - Rent Restriction Tribunal (Supra)” gave guidance on how a court should exercise the said discretion and held that:
- “ 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge’s discretion.
  3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
  5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
27. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in the provision of Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21 the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act*, Cap 21 or in the interpretation of any of its provisions.
28. The provision of Section 1A(2) of the *Civil Procedure Act*, 2010 provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under the provision of Section 1B some of the aims of the said objectives are:- “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
29. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which:
- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
  - ii. The application is brought without undue delay and
  - iii. 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.
30. I find issues for determination arising therein namely:



- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of judgment pending Appeal.
  - ii. What orders this Court should make
31. The purpose of stay of execution is to preserve the substratum of the case. In the case of “Consolidated Marine – Versus - Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)”, the Court held that:-
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
32. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.
33. As for the applicant having to suffer substantial loss, in the case of “Kenya Shell Limited – Versus - Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018” the Court of Appeal pronounced itself to the effect that:
- “It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”
34. The Court of Appeal in the case of “Mukuma – Versus - Abuoga (1988) KLR 645” where their Lordships stated that;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
35. The Applicant has a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Applicant to the Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of “Absalom Dora –Versus -Turbo Transporters (2013) (eKLR)”}.
36. As F. Gikonyo J stated in “Geoffery Muriungi & another – Versus - John Rukunga M’imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR” and which wisdom I am persuaded with; -
- “...the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”



37. That is as far as the fundamental principles of law on whether to grant stay of execution is concerned. ISSUE No. b). Whether the parties are entitled to the reliefs sought.
38. Now turning to the application of these principles to the instant case. The Applicant herein filed an application dated 3<sup>rd</sup> January, 2024 seeking stay of execution of the ruling delivered Ruling delivered on 4<sup>th</sup> December, 2023 by Hon. Mike Makori, in Mombasa Business Premises Rent Tribunal case E226 OF 2023; Mohammed Munir Miyanji & Yasin Abdulla Miyanji vs Lazaro T/a Makwa Shop pending the hearing and determination of the present appeal. Annexed is a copy of Memorandum of Appeal dated 2<sup>nd</sup> January 2024 marked as “LK - 3”. The 30 days period granted by the trial court on 4<sup>th</sup> December, 2023 during the delivery of the aforesaid Judgment is set to lapse on 3<sup>rd</sup> January, 2024. Unless this application seeking stay of execution pending appeal is heard urgently and stay granted, the appeal herein shall be rendered nugatory thereby occasioning substantial loss and prejudice to the Appellant.
39. He is apprehensive that unless this court urgently gives an order of stay of execution, the Respondent will proceed and execute the ruling and he will be evicted from the suit property anytime thereby occasioning substantial loss. The Intended execution exercise would render the appeal filed herein totally nugatory and he would thereby suffer irreparable and substantial losses once he evacuated because of the following reasons:
- i. He had an arguable appeal with good prospects of success.
  - ii. Further he would be severely prejudiced and the whole substratum of the appeal rendered nugatory if the Respondent is allowed to proceed with the execution of the Ruling and evict the Appellant.
40. The Respondent had filed a Notice of Motion application dated 8<sup>th</sup> September, 2023 where upon which they opposed the said application by filing a Notice of Preliminary Objection and a Replying affidavit dated 12<sup>th</sup> October, 2023 in response to the said application. (annexed is a copy of the Respondents application and the applicant's Notice of Preliminary objection and replying affidavit dated 12<sup>th</sup> October, 2023 marked as “LK – 1”). Vide a Ruling delivered in Mombasa business premises Rent tribunal case number E226 OF 2023; Mohammed Munir Miyanji & Yasin Abdulla Miyanji vs Lazaro Kobia t/a Makwa Shop whereby the tribunal ordered, inter-alia, granting the landlords vacant possession of the premises within 30 days failure to which the landlord be at liberty to reclaim the suit premises. (Annexed is a copy of the ruling delivered on 4<sup>th</sup> December, 2023 marked as “LK-2”).
41. As it is settled law that where there was a preliminary objection it is always neater to determine the objection first before embarking on considering the main suit, the Court decline to determine the preliminary objection and proceeded to determine the main suit hence ordering that he should be evicted from the suit premises. Being dissatisfied with the decision of the tribunal, he had preferred an appeal, to wit, Mombasa Environment and Land Court Appeal No. E002 of 2024; Lazaro Kobia t/a Makwa Shop vs Mohammed Munir Miyanji & Yasin Abdulla Miyanji against the Ruling/decreed delivered on 4<sup>th</sup> December, 2024, Hon. Mike Makori, In Mombasa Business Premises Rent Tribunal case E226 OF 2023; Mohammed Munir Miyanji & Yasin Abdulla Miyanji VS Lazaro t/a Makwa Shop. (Annexed is a copy of memorandum of appeal dated 2<sup>nd</sup> January 2024 marked as “LK-3”).
42. The Respondents on the other hand argued that the Applicant herein is not being sincere when he stated that the court declined to determine the preliminary objection and proceeded to determine the main suit. On 16<sup>th</sup> October, 2023 when the matter came up for directions before the trial court it was agreed that both the application and the Preliminary objection be heard concurrently and parties



were given timelines within which to file submissions on both the Application and the Preliminary Objection and parties were given 3<sup>rd</sup> November, 2023 to highlight the submissions Attached in the affidavit and marked as “YM – 20 (d)” were the parties (Applicants and Respondents) submissions on both the Application and the Preliminary Objection. The Applicant herein does not come to court with clean hands he is aimed at denying the Respondents’ herein of our right to enjoy the fruits of the court’s determination. d. Without prejudice to the foregoing, the Respondents were the owners of shop no. 2 erected on plot Number MOMBASA/BLOCK XVII/914 wherein the Applicant herein/ Tenant operates a retail business. They served the Applicant herein with a notice on the ground that they intend to use the premises for a period more than one year hence they required vacant possession of the premises to enable the them occupy and carry out our activities

43. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicants unless stay of execution is granted; and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicant. I find the reasons advanced by the Applicant to be sufficient for the grant of stay of execution pending appeal.
44. Regarding the pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the Applicant, the court has already referred the consideration to be made in the case of “Kenya Shell Limited –Versus - Benjamin Karuga Kigibu & Ruth Wairimu (Supra)”. I find that the Applicant has proved that he will suffer substantially if the orders for stay of the execution are not granted as prayed.
45. The second issue to determine is where the application for stay of execution was made without inordinate delay. From the record, the ruling being appealed against was delivered on 4<sup>th</sup> December, 2023 and the application herein was filed on 3<sup>rd</sup> January, 2024, the draft memorandum of appeal on 2<sup>nd</sup> January, 2024. This application was filed after about 1 month after the ruling. In this Honourable Court’s opinion, the application was made timeously without any delay. The application was therefore made and filed expeditiously and without undue delay.
46. On the last condition as to provision of security. I find that the provision of Order 42 Rule 6 (2) (b) of the Civil Procedure Rules, 2010 stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. Has made no provisions for security in his application.
47. However, this court can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.
48. In the case of “Aron C. Sharma – Versus - Ashana Raikundalia T/A Rairundalia & Co. Advocates” the court held that:

“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 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.”



49. Stay of execution is exactly what it states; it is an order of the court barring a decree holder from enjoying the fruits of his judgment pending the determination of some issue in contention. It matters not whether the issue in contention is the amount awarded in the judgment debt, or liability or legality of the extracted warrants as in this case. Where a party seeks to stay execution, the Court must be guided by the parameters set out in Order 42 Rule 6. This Court observes that the appeal is based on the issue of non-compliance of the Court orders of vacating the suit premises, which is agree with the Appellant/ Applicant does not call for the security of cost.
50. The Court observed in “Gianfranco Manenthi & Another – Versus - Africa Merchant Assurance Company Ltd [2019] eKLR”, thus:-
- “... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.
- Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree. (Underlining mine for emphasis)
51. As already demonstrated in “James Wangalwa & Another vs. Agnes Naliaka Cheseto (supra)” the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Applicant herein, though they brought this Application without undue delay and adequately demonstrated the substantial loss that they would suffer as stipulated by sub-rule 2b.
52. According to the Respondents none of the conditions above have been fulfilled by the Applicant herein. The application does not establish any factor which shows 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 Applicant herein has been renting and/or conduct business at the Respondents' property or shop for a period more than five years and owing to the economic hardships being faced in the country, the Respondents and their family thought it wise to take back the shop and utilize it for income by the non-employed members of the family. Owing to the aforesaid the Respondents herein served a two months' notice upon the Applicant as required by the law however for reasons best known to him he did not notify the Respondent of his un-willingness to vacate the said premises.



53. The end result is that I proceed to find that the Notice of Motion application dated 3<sup>rd</sup> January, 2024 seeking to stay execution of the ruling delivered on 4<sup>th</sup> December, 2024 by Hon. Mike Makori, in Mombasa Business Premises Rent Tribunal Case E226 of 2023 pending the hearing and determination of the Appeal is merited.

ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 3<sup>rd</sup> January, 2024.

54. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).

55. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion in not awarding costs.

## VI. Conclusion & Disposition

56. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-

- a. That the Notice of Motion application dated 3<sup>rd</sup> January, 2024 is found to have merit is hereby allowed in its entirety.
- b. That this Honourable Court do hereby issue an order to stay the execution of the Ruling delivered on 4<sup>th</sup> December, 2023 by Hon. Mike Makori, in Mombasa Business Premises Rent Tribunal case E226 OF 2023; Mohammed Munir Miyanji & Yasin Abdulla Miyanji VS Lazaro t/a Makwa Shop pending the hearing and determination of the present appeal herein.
- c. That the Appellant herein granted 21 days leave to have compiled and served the Record of Appeal.
- d. That for expediency sake, there be a mention on 22<sup>nd</sup> July, 2024 for purposes of taking direction on the disposal of the appeal pursuant to the provisions 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 failure to adhere with the directions of this Court set out in this Ruling, the stay of execution orders will stand vacated automatically.
- f. That there shall be no orders as to costs.

It is so ordered accordingly.

**RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, MEANS, SIGNED AND DATED AT MOMBASA THIS .....3<sup>RD</sup> .....DAY OF .....JUNE.....2024.**

.....  
**HON. MR. JUSTICE L. L. NAIKUNI,**



**ENVIRONMENT AND LAND COURT AT  
MOMBASA**

**Ruling delivered in the presence of:**

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. No appearance for the Appellant/Applicant.
- c. M/s. Sidiyu Advocate for the Respondents

