



**Black Seal Tawala Limited t/a the Lit Lounge v Olkeju Brands Limited & another;
Taskimhabanos Chill & Grill Limited (Interested Party) (Environment and
Land Appeal E022 of 2025) [2025] KEELC 4998 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4998 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E022 OF 2025
TW MURIGI, J
JUNE 20, 2025**

BETWEEN

BLACK SEAL TAWALA LIMITED T/A THE LIT LOUNGE TENANT

AND

OLKEJU BRANDS LIMITED LANDLORD

AND

ICON AUCTIONEERS LIMITED RESPONDENT

AND

TASKIMHABANOS CHILL & GRILL LIMITED INTERESTED PARTY

RULING

1. This ruling is in respect of the Notice of Motion dated 29th January 2025 in which the Appellant seeks the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of the Intended Appeal, this Honourable Court do grant a stay of execution of the ruling and resultant orders of Hon. Mike Makori delivered on 11th December 2024 in BPRT Cause No. E246 of 2024.
 - d. That the costs be in the appeal.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Charles Mugane advocate sworn on even date.



The Applicant's Case

3. The deponent averred that the Appellant's application in BPRT Cause No. E246 of 2024 was heard and subsequently dismissed vide the ruling delivered on 11th December 2024. That being aggrieved, the Appellant intends to appeal against the decision. The deponent is apprehensive that the appeal will be rendered nugatory if a stay of execution is not granted. In conclusion the deponent averred that the application has been brought without delay and will not prejudice the Respondent if the orders sought are granted.

The 1st and 2nd Respondent's Case

4. The 1st and 2nd Respondents opposed the application through the replying affidavit of Simon Mwangi Joseph, the 1st Respondent's Operations Manager.
5. The deponent averred that the Appellant's application challenging the validity of the distress for rent was dismissed vide a ruling delivered on 11th December 2024. He further averred that the Appellant was ordered to pay the outstanding rent of KShs. 2,038,428.38/= within 60 days as a precondition for returning the proclaimed goods failure to which they would be auctioned to recover the rent arrears.
6. He contended that the Appellant has not met the conditions for the grant of stay of execution pending appeal. In conclusion, the deponent averred that the application and appeal are defective and are brought in bad faith to defeat justice

The Interested Party's Case

7. The Interested Party opposed the application through the replying affidavit sworn by Charles Kilonzi its Operations Manager.
8. The deponent averred that on 19th February 2024 the Interested Party entered into a lease agreement with the 1st Respondent over the suit property where they operate a bar and restaurant.
9. He further averred that in July 2024, the Interested Party became aware of a dispute between the Appellant and 1st Respondent when the former tenant accompanied by police officers attempted to seal off the suit property. He further averred that the suit premises were vacant as at the time when the Interested Party leased the same and added that the Appellant's goods had been carted away by the 2nd Respondent in distress for rent.
10. He contended that the BPRT acknowledged that the Interested Party was rightfully carrying out business on the suit property. He further contended that the application herein does not disclose any reasonable cause of action against the Interested Party.
11. The application was canvassed by way of written submissions.

The Appellant's Submissions

12. The Appellant filed its submissions dated 21st March 2025. On behalf of the Appellant, Counsel outlined the following issues for the court's determination: -
 - a. Whether the Applicant has established a case to warrant the grant of stay of execution pending appeal?
 - b) Who will bear the costs of the application?



13. On the first issue, Counsel submitted that the Court should be guided by the overriding objective set out in Section 1A and 1B of the *Civil Procedure Act* alongside with Order 42 Rule 6 of the Civil Procedure Rules in granting stay of execution pending appeal.
14. Counsel further submitted that the subject matter will not be preserved if stay of execution is not granted and will thereby render the appeal nugatory. It was further submitted that the execution would disrupt the Appellant's business operations.
15. To buttress this argument, Counsel relied on the following authorities:-
 - a) Salome Naliaka Wabwile v Alfred Musinako [2021] eKLR,
 - b) RWW v EKW [2019] KEHC 6523 [KLR].
 - c) Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227.
16. Counsel relied on Order 50 Rule 4 of the Civil Procedure Rules and Section 59 of the Interpretation of Statutes and General Provisions Act to submit that the instant application was filed simultaneously with the appel within the stipulated timelines.
17. Counsel submitted that the Applicant will suffer irreparable loss if stay of execution is not granted as the Respondent will execute to recover the ordered sums.
18. On the second issue, Counsel urged the court to allow the application with costs to the Applicant.

The 1st and 2nd Repondents Submissions

19. The 1st and 2nd Respondents filed their submissions dated 25th March 2025. On their behalf, Counsel submitted that the Applicant has not demonstrated the loss that it is likely to suffer if it settles the rent arrears owed. Counsel further submitted that the 1st Respondent continues to suffer loss of income. It was submitted that the issue before the tribunal was on the procedure of levying distress and not on the rent arrears. Counsel further submitted that the application and the appeal have been brought outside the statutory timelines and without leave of the court.
20. Concluding his submissions, Counsel submitted that the Appellant has not met the threshold for the grant of the orders sought. To buttress his submissions, Counsel relied on the following authorities:-
 - a) Butt v Rent Restriction Tribunal [1979] eKLR,
 - b) James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR, c) Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi [2007] eKLR
 - d)] Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd [2019] KEHC 7586 [KLR] .

Analysis And Determination

21. Having considered the application, the respective affidavits and the rival submissions the issue that arises for determination is whether the Applicant has satisfied the conditions for the grant of stay of execution pending appeal.
22. Order 42 Rule 6 [2] of the Civil Procedure Rules outlines the guiding principles to be met for the grant of stay of execution pending appeal as follows:

“No order for stay of execution shall be made under subrule [1] unless—



[a] the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

[b] such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

23. The power to grant or refuse an application for stay of execution is discretionary. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal gave the following guidelines on how a court should exercise its discretion;

"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."

24. Similarly, in the case of *RWW v EKW* [2019] eKLR the Court held that;

"...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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 the 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 damages."

25. This Court is therefore called upon to balance both the rights of the successful party so as not to hinder it from the fruits of its judgment and those of the Appellant whose Appeal may succeed and be rendered nugatory if stay of execution is not granted.

26. The purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine v 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."

27. The Court will now determine whether the Applicant has satisfied the conditions upon which the orders can be granted.

On the first condition of proving that substantial loss may result unless stay orders are granted, the Applicant should not only state that it is likely to suffer substantial loss, it must prove that it will suffer substantial loss if stay orders are not granted.



28. In the case of Charles Wahome Gethi v Angela Wairimu Gethi [2008] eKLR the Court of Appeal held that;

“...it is not enough for the Applicants to say that they live or reside on the suit land and they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

29. What amounts to substantial loss was expressed by the Court of Appeal in the case of Mukuma v Abuoga [1988] KLR where the Court held that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.

30. In the matter at hand, the Appellant is apprehensive that the appeal will be rendered nugatory if stay of execution is not granted. The Respondents on the other hand contended that the Appellant has not demonstrated that it stands to suffer substantial loss if the orders sought are not granted. They further contended that execution does not amount to substantial loss.

31. The record shows that the Interested Party leased the suit premises where it is operating a bar and restaurant. The Appellant has not adduced any evidence to show that it will suffer substantial loss if stay of execution is not granted. In addition, the Appellant has not denied owing the Respondents a sum of Kshs. 2,038,438.38/= in rent arrears.

32. In an application for stay of execution pending Appeal, an Applicant must also satisfy the Court that the application has been made without unreasonable delay. The Respondents argued that the application and appeal were filed out of time and without leave. As rightly submitted by the Applicant, the stipulated time did not run during the vacation period. I therefore find that the application was filed without delay.

33. On the last condition as to the provision of security for costs, Order 42 Rule 6 [2] [b] of the Civil Procedure Rules is couched in mandatory terms to the effect that the Applicant must furnish security for the performance of the order or decree.

34. In the case of Arun C Sharma v Ashana Rakundalia T/A Raikundalia & Co. Advocates & 2 Others [2014] eKLR, the court held that;

“The purpose of the security under Order 42 is to guarantee 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 applicant 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 a security for the 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.”

35. Similarly, in the case of RWW v EKW [2019] KEHC 6523 [KLR] the court held that: -

“The other condition for granting stay orders is on the security to be offered. The law is that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant.”



36. In the matter at hand, the Appellant has not expressed its willingness to provide security for the due performance of the decree. The Appellant has instead urged the Court to consider the overriding objective of the Civil Procedure Act alongside with Order 42 Rule 6 of the Civil Procedure Rules.
37. In the case of Crescent Construction Limited v Kenya Commercial Bank Limited [2019] KEHC 1153 [KLR] the Court held as follows:
- Further to the above, in Law Society of Kenya v Martin Day & 3 others [2015] eKLR, Justice Aburili under paragraph 40 stated;
- “In Karuturu Networks Ltd & Another v Dally Figgis Advocates, Nairobi court of Appeal CA No. 293/2009 it was held that;
- “The application of the overriding objective principle does not operate to uproot the established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness and that in interpreting the law or rules made there under, the court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution...”
38. The purpose of the overriding objective is to enable the court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it and cannot oust the law.
39. In the end, I find that the Applicant has not met the threshold for the grant of stay of execution pending appeal.
40. The upshot of the foregoing is that the application dated 29th January 2025 is devoid of merit and the same is hereby dismissed with costs to the Respondents.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF JUNE 2025.

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HON. T. MURIGI

JUDGE

In The Presence Of: -

Court assistant – Ahmed

Ms Cherono for the Appellant/Applicant

Micheal Nduli for the Respondent

