



REPUBLIC OF KENYA



**KENYA LAW**  
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**Optica Kenya Limited v Aya Limited (Environment and Land Appeal  
E008 of 2025) [2025] KEELC 7025 (KLR) (16 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7025 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND APPEAL E008 OF 2025**

**CK YANO, J**

**OCTOBER 16, 2025**

**BETWEEN**

**OPTICA KENYA LIMITED ..... APPELLANT**

**AND**

**AYA LIMITED ..... RESPONDENT**

**RULING**

1. By Notice of Motion dated 27<sup>th</sup> February, 2025, the Appellant/ Applicant seeks:-
  1. Spent
  2. This Honourable Court be pleased to grant a stay of execution for the orders in the judgment dated 24<sup>th</sup> February, 2025 pending the hearing and determination of the Appeal.
  3. Any further orders the Tribunal may deem just.
  4. Costs and interest of this application be dispensed with
2. The Application is premised on the grounds on the face of it and on the grounds in the Supporting Affidavit sworn on 25<sup>th</sup> February, 2025 by the Appellant's Director, Wazeem Mohamed. He deponed that the Appellant was aggrieved with the judgment delivered on 24<sup>th</sup> February, 2025 and has lodged an appeal with high chances of success, which will be rendered nugatory if a stay is not granted. He deponed that the Appellant will be greatly prejudiced as eviction from the suit premises would disrupt its business and occasion it business loss. That similarly, the consumers of their business would also be prejudiced, thus it is in the interest of the public that the order be granted.
3. Mr. Wazeem Mohamed also deponed that the business permit produced by the Respondent to show the intended purpose or need to use the suit premises was false as they relate to EMC Block 782 and 783, whereas the suit premises is on Eldoret Municipality Block 7/6. He alleged that the Respondent will not be prejudiced as the Appellant will dutifully continue to pay rent as required, and that the



balance of convenience tilts in favour of granting the order. He averred that the Appellant would abide by any reasonable conditions imposed by the Court.

4. The Respondent opposed the Application through the Replying Affidavit sworn on 4<sup>th</sup> March, 2025 by its Director of Operations, one Isaac Njoroge, who termed the Motion frivolous and unmeritorious for not annexing the Appeal being referenced. He deponed that the Appellant will not suffer any loss since he was served with a Notice of Termination of Tenancy over a year ago. He explained that the Respondent's plan to expand its business is likely to be prejudiced.
5. Mr. Njoroge further averred that the Appellant was ordered to pay KShs. 50,000/- and is in contempt for not having paid it to date, but is intent on depriving the Respondent of the fruit of its judgment. He added that the Appellant had not shown how it would meet costs of the suit should the purported Appeal fail. He accused the Appellant of choosing documents in isolation so as to seek stay of execution, and also faulted them for failing to provide a copy of the judgment they sought to be stayed. He asked that the Application be dismissed with costs.

#### **Submissions:**

6. The court directed that the Application be canvassed by way of written submissions and the parties complied.

#### **Appellant's Submissions;**

7. The Appellant's submissions in support of the Motion are dated 30<sup>th</sup> April, 2025. The Appellant's advocate submitted that a party seeking stay of execution pending Appeal must satisfy the conditions set out at Order 42 Rule 6 of the Civil Procedure Rules. Counsel submitted that these principles were further enumerated in *Butt vs Rent Restrictions Tribunal (1979) KECA 22 (KLR)*, *Antoine Ndiaye vs African Virtual University (2015) eKLR* and *RWW vs EKW (2019) eKLR*. Counsel submitted that the Appellant had made the application without undue delay just 3 days after the judgment.
8. Counsel argued that if the stay is not granted, the Appellant will be evicted from the suit premises rendering the Appeal nugatory and result in its customers losing the essential services it offers. Counsel also submitted that while it stands to suffer prejudice, the Respondent will not suffer any prejudice as the Appellant will continue paying rent, thereby preserving the value of the suit premises. Further, should the appeal fail, the Respondent will still be able to enforce the judgment. On this issue, Counsel relied on *Tropical Commodities Suppliers Ltd & Others vs International Credit Bank Ltd (in liquidation) (2004)2 EA 331* and *James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) KEHC 1094 (KLR)*.
9. Counsel reiterated the Appellant's willingness to abide by any conditions that may be imposed by this court. Counsel opined that the Appeal is arguable, hence the need for the stay to preserve the status quo of the subject matter pending the determination of the Appeal. On costs, Counsel stated that they follow the event, and asked that they be awarded to the Appellant. He urged that the principles of equity and proportionality favour the grant of stay.

#### **Respondent's Submissions;**

10. The Respondent's submissions on the other hand are dated 7<sup>th</sup> May, 2025. In the said submissions, Counsel for the Respondent submitted that the Appellant has not met the conditions for grant of stay set out at Order 42 Rule 6 and the application should be dismissed. Counsel argued that the Tribunal's judgment was sound, thus the Appellant had no arguable Appeal and that the Appeal had no chance



of success. He relied on *Law Society of Kenya vs Deynes Muriithi & 34 Others* (2015) eKLR, stating that the Appellant had not shown substantial loss.

11. Counsel pointed out that the Appellant had not paid the assessed costs of KShs. 50,000/-, which was not challenged in his Appeal, and could not be trusted to commit to depositing any security pending the Appeal. Counsel explained that the suit premises is a business premises that the Respondent intends to use for its personal business, proof of which had been presented at trial, but the Appellant insists on occupying it to date. That the Respondent is likely to incur penalties and at its own and costs.
12. On costs of the Application, Counsel decried the tragedy of the Respondent having been dragged to court by the Appellant, and the Appellant's failure to honour the directives of the Tribunal, including payment of assessed costs. Counsel pointed out that under Section 27 of the *Civil Procedure Act*, the court has discretion on the award of costs and asked that the Application be dismissed with costs.

### **Analysis and Determination:**

13. I have considered the Motion and responses thereto as well as the submissions and authorities filed by the Parties. The only issue for determination is whether the Court should order stay of execution pending the hearing and determination of the appeal.
14. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) & (2) of the Civil Procedure Rules as follows:-
  6. Stay in case of appeal [Order 42, rule 6]
    - (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, 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 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.
15. The Appellant ought to satisfy the Court on the following conditions before they can be granted the stay orders:
  - a. Substantial loss may result to the applicant unless the order is made.
  - b. The application has been made without unreasonable delay, and;
  - c. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.



16. The first element that the Appellant needs to establish is that it stands to suffer substantial loss. As to what constitutes Substantial loss, in *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR, the court observed that:-

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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma vs Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

‘... 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.’

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above.

17. Further, in *Kenya Shell Limited vs Benjamin Karuga Kibiru & Another* (1986) eKLR, the Court of Appeal held 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 a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”

18. What then is to be prevented in this suit? The Appellant has deponed and submitted that it stands to suffer substantial loss if the order of stay of execution is not granted. This court has not seen the judgment of the Tribunal. However, the Appellant claims that it was essentially ordered to vacate from the suit premises. Thus, if execution is allowed to proceed, its business will be disrupted and it will suffer business losses as a result. It is also alleged that it has an arguable appeal, and if evicted at this point, the Appeal will be rendered nugatory. The Respondent has not denied the intended eviction arising out of the impugned judgment, but it has explained that it intends to use the premises to expand its own business.
19. It is evident that if Respondent evicts the Appellant, it will renovate the premises as can be seen in the Approval granted by the County vide its letter of 8<sup>th</sup> May, 2024. If the Appeal succeeds and the Respondent has already taken over the premises and started its business thereon, it is unlikely that the Appellant will be able to move back in. Since the suit premises and the occupation thereof by the Appellant is the subject matter of the Appeal herein, indeed, evicting the Appellant at this point will render the Appeal nugatory. This is what the stay of execution sought herein is meant to prevent.
20. The second consideration is whether the Application was made without undue delay. The Judgment of the Tribunal was delivered on 24<sup>th</sup> February, 2025. The Appeal as well as the Application herein



was filed on 27<sup>th</sup> February, 2025 a mere three days later. The instant Application was therefore made without undue delay.

21. The final consideration is security for the due performance of the decree. In *Arun C Sharma vs Ashana Raikundalia T/A Rairundalia & Co. Advocates* (2014) eKLR the Court explained the purpose of security, holding 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.”

22. It is the Court which determines the type and manner of security as it deems sufficient to secure the performance of the decree. However, in *Focin Motorcycle Co. Limited vs Ann Wambui Wangui & Another* (2018) KEHC 8358 (KLR), the court explained that:-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

23. The Appellant has deponed that it is ready and willing to abide by any conditions that this court may impose with the order of stay. This willingness in my view is therefore sufficient to satisfy this requirement.

24. In the end, I am satisfied that the Appellant has met all the conditions for the grant of an order of stay of execution pending the hearing and determination of the appeal herein.

**Orders:**

25. Accordingly, the application dated 27<sup>th</sup> February, 2025 is allowed in the following terms:-
- a. An order be and is hereby issued staying the execution of the orders in the judgment dated 24<sup>th</sup> February, 2025 in Eldoret APRT E032 of 2024 pending the hearing and determination of the Appeal.
  - b. The Appellant is hereby directed to deposit the amount of Kshs. 50,000/- being the undisputed assessed costs of the suit at the tribunal into court within 14 days of this ruling, failure to which the order of stay granted herein shall automatically lapse.
  - c. The costs of this Application shall be costs in the Appeal.
26. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 16<sup>TH</sup> DAY OF OCTOBER, 2025 VIDE MICROSOFT TEAMS.**

**HON. C. K. YANO**



**ELC, JUDGE**

In the virtual presence of;

Ms. Rotich for the Respondent.

Mr. Muoki for the Appellant.

Court Assistant - Laban.

