

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELCA NO E096/2025

MOTORHUB LIMITED -

APPELLANT/RESPONDENT

VS

**THE TRILLIUM PROPERTIES (K)
LIMITED** -

RESPONDENT/APPLICANT

RULING

(In respect of the Appellant's application dated 29/5/2025)

1. For determination before this court is the Appellant's application dated 29/5/2025. The application is said to be brought under the provisions of sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules. Rehashing the application, the Applicant prays for orders that;

- a.** Pending the hearing and determination of this Application, an interim order of injunction do issue restraining the Respondent/Landlord, whether by itself, its agents, employees, servants, or any other person acting on its instructions, from intermeddling with, disconnecting water and electricity supply, levying distress, proclaiming, evicting, leasing the premises to a third party, or in any way interfering with the Applicant/Tenant's peaceful occupation and enjoyment of the suit premises, pending the hearing and determination of this Application and/or Appeal.
- b.** The Officer Commanding Station (OCS), Runda Police Station, do ensure

compliance with this Honourable Court's orders and maintain peace and order at the suit premises.

c. This Honourable Court be pleased to issue an interim order of stay of execution of the Ruling and/or orders delivered by the Honourable Tribunal, Hon Patrick Kitur, in BPRT/E140/2025 on 7/5/25 pending the hearing and the determination of this application.

d. Pending the hearing and determination of this Application and/or Appeal, this Honourable Court be pleased to stay the execution and enforcement of the ruling and orders issued on 7th May 2025 by the Business Premises and Rent Tribunal in BPRT/E140/2025, which inter alia directed the Applicant to vacate the business premises on or before 31st May 2025 and allowed the Respondent to repossess the premises by force with police assistance.

e. The grant of the orders sought herein be conditional upon the Applicant

complying with such terms and/or conditions as the Honourable Court may

deem fit, including but not limited to the deposit of half of the decretal amount

within sixty (60) days, or as otherwise directed by the Court.

f. This Honourable Court be pleased to issue an order of stay of execution of

The said Ruling and orders of 7th May 2025 delivered by the Honourable Tribunal, Hon Patrick Kitur, in BPRT/E140/2025 pending the hearing and final determination of this appeal.

g. The costs of this application be provided for.

2. The application is premised on the grounds set out on the face of it, as well as the Supporting Affidavit of Edward Karau Gachani, the Appellant's Director, of even date. The deponent avers that the Appellant

is aggrieved by the Tribunal's Ruling in BPRT/E140/2025, which ordered the Appellant to pay alleged rent arrears by 25/5/2025 and to hand over vacant possession of the premises by 31/5/2025. Failure to comply would authorise the Respondent to evict the Appellant, and distress for rent would be levied with the assistance of Runda Police Station. The Appellant argues that the impugned Ruling is riddled with legal and factual errors, including a misapprehension of material facts, a contradiction of undisputed documentary evidence, and a disregard for valid court orders of 6/2/2025 and 18/3/2025 that restrained the Landlord from interfering with the Applicant's access to the premises.

3. The deponent avers that the Appellant is a tenant under a fixed-term Lease valid until 14/9/2027. That, pursuant to Clause 9(h) of the Lease, the premises may be used as a car sales and car service centre, contrary to the Tribunal's finding that there was a change of user.
4. The Applicant avers that on 21/3/2025, the Respondent unlawfully blocked access to the leased premises using debris/soil, in defiance of subsisting court orders. The deponent maintains that he has at all times complied with his obligations, including maintaining signage, security, CCTV, and the perimeter wall, and ensuring that all utilities were paid for. He therefore faults the Tribunal for failing to address the Respondent's blatant disobedience of its own orders and instead allowing the Landlord to benefit from its own contempt, to the prejudice of the Appellant.
5. The Applicant contends that, unless a stay of execution is granted, the Appellant stands to suffer irreparable harm, including imminent eviction and disruption of its commercial operations, destruction of its business goodwill, and financial losses from frustrated vehicle sales. The appeal stands to be rendered nugatory unless the sought orders are granted, and the balance of convenience tilts in favour of preserving the tenancy relationship pending final adjudication.

6. The Applicant avers that, unless a stay is granted, it stands to suffer substantial loss, as the Tribunal's ruling requires it to hand over vacant possession of its principal business premises, a car yard and sales outlet that have been operated continuously for over 10 years. The closure and eviction would devastate the Applicant's business, cause the loss of customer goodwill, breach multiple sale and financing contracts, and render over 100 employees jobless. This application has been made without unreasonable delay, as the ruling was delivered on 7/5/2025 and made available to the Applicant on 12/5/2025.
7. The deponent avers that the Applicant is willing and ready to comply with any terms the Court may impose, including depositing half the decretal amount within sixty (60) days, or within any other timeline the Court may consider just, as security for the due performance of the decree. That the Respondent shall not suffer any prejudice if the status quo is preserved pending appeal, and that the Applicant is ready and willing to furnish security or to abide by any reasonable conditions the Court may impose. That it is in the interests of justice that the orders sought be granted.
8. The Respondent vehemently opposed the application, vide the Replying Affidavit of its Director, Steve W. Gitau, sworn on 3/7/2025. The deponent avers that the parties entered into a Lease Agreement dated 22/12/2022 over the property known as LR No. 27/69, Kiambu Road, the suit property herein. Pursuant to Clause 7 of the Agreement, rent was to be paid on or before the 5th day of every month. The rent payable was agreed at Kshs. 245,000 per month, with a 10% annual escalation, commencing 13/6/2023. Further, pursuant to Clause 12 of the Agreement, the Lease could be terminated by either party for whatever reason upon issuance of a four-month termination notice.
9. The deponent accuses the Applicant of repeatedly breaching the agreement by failing to pay rent as agreed and further issuing bad cheques that bounced and were dishonoured by the Bank. The

Applicant's conduct substantially affected the Respondent's financial stability and jeopardised its commercial interests.

10. The deponent avows that the Applicant's breach was the reason the Respondent terminated the Agreement. The Respondent first issued a demand notice dated 15/5/2024 in the sum of Kshs. 616,217/= because the Applicant failed to pay rent for April and May 2024. However, the Applicant sought the Respondent's indulgence, which the Respondent considered. Due to the Applicant's consistent non-compliance, the Respondent issued a notice of termination on 20/5/2024. The Applicant then sought the Respondent's indulgence to vacate the premises on 1/11/2024, which the Respondent accepted. Later, the parties agreed that the Applicant could vacate on 31/1/2025.
11. It is averred that the Applicant voluntarily commenced vacating the suit premises on 20/1/2025 and completed the process on 5/2/2025. The Applicant removed all its operational assets from the premises, leaving behind debris and unusable items rather than removing or disposing them.
12. That, to the Respondent's dismay, the Applicant filed a Reference at the BPRT No. E140 of 2025, alongside an application for an injunction dated 5/2/2025. That the Tribunal issued interim injunction orders dated 6/2/2025, restraining the Respondent from regaining lawful possession of the suit property. In response, the Respondent also filed an application to set aside the ex parte orders. That the Tribunal considered both applications and directed that it shall conduct a site visit to establish the actual occupation of the suit premises.
13. However, in an effort to defeat the purpose of the site visit, the Applicant began planning to return its wares and operational assets to the suit property. This was communicated to the Respondent, who then filed an application dated 21/3/2025 seeking to bar the Applicant from forcibly returning its wares and operational assets to the suit property. The Tribunal issued status quo orders on the same day.

14. Subsequently, a site visit was conducted, and the Tribunal established that the Applicant had vacated the premises before filing the Reference on 5/2/2025. The Tribunal then delivered its Ruling on 7/5/2025, declaring the Tenancy between the Applicant and the Respondent terminated. The Applicant was directed to deliver vacant possession of the suit property to the Respondent by 31/5/2025 and to pay rent arrears of Kshs. 825,739.00/= and other incidental amounts. That Ruling is the subject of this Appeal, which was initially filed in the High Court and struck out for want of jurisdiction.
15. The Respondent contends that the Applicant misled the court by using a false Affidavit, forged documents and untruthful averments, which led to the issuance of the interim orders staying execution on 17/6/2025. It therefore seeks that the said orders be discharged.
16. The deponent states that, following the High Court's dismissal of the initial appeal and in the absence of stay orders, the Respondent regained possession of the suit premises on 1/6/2025 in accordance with the Tribunal's Ruling. The Respondent is now in full possession, control and occupation of the suit property, and the Applicant's application is therefore overtaken by events. As to the assertion that it placed debris on the suit premises, blocking the Applicant's access, the Respondent avers that it requested the Kenya National Highway Authority [KENHA] to redevelop the frontage of the suit property for use as an access road. The materials thereon are, in any event, on a road reserve. The Respondent has been issued with a licence to redevelop the suit premises, as evidenced by the approval dated 10/2/2025 from KENHA.
17. That based on the foregoing, the application fails to meet the threshold for the grant of orders of stay of execution hence the application ought to be disallowed.
18. On 30/7/2025, the court directed that the application be canvassed by way of written submissions. Parties were directed to file their written submissions within 14 days. Both parties complied. The Applicant filed

its submissions dated 9/11/2025, whereas the Respondent's submissions are dated 10/11/2025.

19. The court has had occasion to read the said submission and considered it in its determination. In any event, the filed submissions now form part of the court record. I also note that the Applicant has made extensive submissions on the Respondent's application dated 17/7/2025. The said application was, however, withdrawn on 10/11/2025, with costs in the cause, in the presence of Mr. Mwangi, Counsel for the Appellant. The submissions on the said application are therefore of no value to the court.

Analysis and Determination

20. The Court has read and considered the Application, the Affidavits and the annexures thereto, as well as the rival submissions. I am of the view that the issues for determination are as follows.

- a. Whether the applicant in this case has satisfied the test for the grant of an order of interim injunction pending appeal.
- 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 the applicant in this case has satisfied the test for the grant of an order of interim injunction pending appeal.

21. Before delving deeper into the issue, and with all due respect to the Applicant's Counsel, the application, as drafted, is superfluous and an omnibus application. I say so because some of the orders sought are repetitive, and others, although substantive, have the same effect.

22. In the persuasive case of Denis Ahairwe -vs- Standard Chartered Bank (U) Ltd High Court of Uganda at Kampala Commercial Div. Miscellaneous Application No. 1851 of 2023 Arising from Civil Suit No. 757 of 2018 faced with an omnibus application seeking to set aside a

judgement and stay of execution had this to say in its ruling delivered on 19/12/23; -

‘it is trite that an omnibus application may be brought where applications are of the same nature, have effect of mitigating a multiplicity of suits, one is a consequence of the other or where no injustice would be occasioned by handling both applications.....As long as the omnibus application is brought before a court with jurisdiction to grant both reliefs, and in a procedure that can accommodate both applications, then the same is proper and should be entertained. Where however the court is not empowered to grant all the remedies sought or the procedure cannot accommodate all the applications then the court should entertain and dispose the portion of omnibus application that is rightly before it and decline to grant the rest of the application/reliefs, referring it to the appropriate court or procedure.’

23. In *Murithi Wanjao (T/A Wanjao & Wanjau Advocates) -vs- Samuel Mundati Gatabaki & Another* (2015) eKLR the court referred to a decision of Ringera J [as he then was] where the said learned judge held that omnibus applications are for striking out, F. Gikonyo J chose to determine the application on merit.

24. The Supreme Court, in the case of *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 Others* [2018] eKLR stated that;

“Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter. We see no such

jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this Court.”

25. Substantively, the Applicant seeks both an interim injunction pending appeal and a stay of execution of the orders of the BPRT pending determination of the appeal. The effect of both orders is the same. This makes the application an omnibus application. However, since the court has jurisdiction to grant both orders, I will determine the application on its merits rather than striking it out.
26. Turning back to the first issue, the grant of the interim injunction, Justice Visram J (as he then was), while considering a similar application in the case of Patricia Njeri & 3 others vs National Museum of Kenya (2004) eKLR, set out the principles to be followed in considering an application for an interim injunction pending appeal. He stated that the court's power to grant any order of temporary injunction is discretionary. Discretion must, however, be exercised judicially and not in a whimsical or arbitrary fashion.
27. The exercise of that discretion should be guided by certain principles as follows: -
 - a) The discretion will be exercised against an Applicant whose appeal is frivolous.
 - b) The discretion should be refused where it would inflict greater hardship than it would avoid.
 - a) The Applicant must show that to refuse the injunction would render his appeal nugatory.
 - b) The court should be guided by the principles in *Giella vs Cassman Brown & Company Ltd* (1973) EA 358.
28. It is important to note that this court is yet to hear and determine the appeal. The court will therefore be constrained at this juncture to avoid prejudicing the outcome of the appeal.

29. In the case of *Giella vs. Cassman Brown* [1973] EA 358, the court stated the conditions for grant of interlocutory injunctions as follows;

“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience.”

30. A prima facie case was defined in the case of *Mrao Limited vs. First American Bank of Kenya & 2 Others* [2003] e KLR as follows;

“A prima facie case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

31. The Applicant avers that it is a legitimate tenant of the suit property pursuant to the Lease Agreement dated 22/12/2022, executed between the parties herein. The Applicant contends that the Respondent blocked its access to the premises to its detriment, despite the Applicant having duly performed its obligations under the contract. On the face of it, the Applicant is entitled to protection as a Tenant.

32. Secondly, the Applicant has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo -vs- Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

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

33. It is evident from the evidence adduced herein that the Applicant is no longer in possession and/or occupation of the suit property. On 17/6/2025, Counsel for the Appellant confirmed to this court that the Respondent had taken over possession of the suit property. There is therefore no irreparable harm that the Applicant is likely to suffer that cannot be compensated by way of damages.
34. Consequently, the prayer for an interim injunction is not merited. All three conditions set out in *Giella vs. Cassman Brown* [1973] EA 358 have not been met in sequence.

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

35. It is trite that no appeal can operate as a stay; hence, an application for a stay shall be made to the court by the party seeking it. The principles upon which a stay of execution pending appeal may be allowed are now well settled by the authorities of this court and the superior courts. Generally, a stay of execution is provided for under Order 42, Rule 6 of the Civil Procedure Rules, which provide 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.”

36. In considering an application for stay of execution, I am guided by 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.”

37. The grant of an order of stay of execution is a discretionary one. In the case of RWW -vs- 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.”

38. The Court is therefore called upon to balance the rights of the successful party, so as not to hinder him from enjoying the fruits of the judgment, and those of the Appellant, whose Appeal may succeed and be rendered nugatory if a stay of execution is not granted.

39. The purpose of a stay of execution is to preserve the substratum of the case. Under the first condition, namely that substantial loss may result unless a stay is granted, the Applicant should not only state that he is likely to suffer substantial loss; he must prove that he will suffer substantial loss if a stay order is not granted.

40. 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.”

41. As previously noted, the Respondent has taken possession of the suit property. There is no substantial loss likely to be suffered that would prejudice the appeal.
42. As already demonstrated in James Wangalwa & Another -vs- Agnes Naliaka Cheseto (supra), the three (3) conditions for granting a stay of execution pending appeal must be met simultaneously. They are conjunctive. I need not address the other conditions.
43. It is my finding that the Appellant's application is not meritorious and is hereby dismissed with costs.
44. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2026 VIA MICROSOFT TEAMS.

J. G. KEMEI
JUDGE

Delivered Online in the Presence of:

1. Mr Mwangi HB for Mwenda Njagi for the Appellant
2. Mwenda for the Respondent
3. CA- Ms. Yvette Njoroge