

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

**ELC APPEAL No. E035 OF 2025**

**BENEDICT SIMION ONDIEKI NYATANGI**

**T/a**

**BENOM**

**HARDWARE.....APPELLANT/APPLICANT**

**VERSUS**

**HUZEFA AMIRAL,**

**COSMIC**

**CONSULTANTS.....**

**RESPONDENTS**

**RULING:**

1. The Appellant/Applicant filed the Notice of Motion Application dated 10<sup>th</sup> July, 2025 seeking the following orders:-
  - (1) Spent
  - (2) Spent
  - (3) Pending the hearing and the determination of the appeal there be a stay of execution of the decree and judgment delivered in the Business Premises Rent Tribunal in Eldoret BPRT Case No. E044 of 2024.
  - (4) Costs of the application be provided for.
  
2. The Application is premised on the grounds set out on the face of it and on the grounds in the Appellant's Supporting Affidavit of even date. The Appellant deponed that on 1.07.2025 the Business Premises Rent Tribunal (BPRT) delivered a judgment in his reference no. E044 of 2024. That in its judgment, the BPRT found that the tenancy was terminated in August, 2023 despite

the fact that no notice to terminate the tenancy was issued by the landlord.

3. The Appellant averred that since the BPRT found no tenancy existed as at August, 2023 it ought not have heard the reference or granted any reliefs as it only has jurisdiction over subsisting tenancies. However, the BPRT awarded mesne profits and allowed the landlord to levy distress to recover the same. Being aggrieved with the judgment, he has filed an appeal to this court. He claims that he operates a hardware business on the lease premises, but the landlord closed his hardware on 1.02.2024 by welding the entrance doors and the premises remains closed to date.
4. The Appellant averred that he was ready to provide security for the due performance of the decree. The Appellant avers that his appeal is not frivolous but arguable, and that his application has been made without delay. He averred that the BPRT sanctioned the landlord's illegal conduct, and he sought an order of injunction or stop the Respondent from executing the judgment. He deponed that he stands to suffer substantial loss if the orders are not granted, and that his right to pursue his appeal will be frustrated if the judgment of the tribunal is executed.
5. In further support of the Application, the Appellant also filed a Supplementary Affidavit sworn by his Advocate on record, Elijah Momanyi Mogona on 9<sup>th</sup> December, 2025. Mr. Momanyi annexed a copy of the judgment of the BPRT. He also annexed the Decree as extracted in Eldoret CM Miscellaneous Civil Case No. E0271 of 2025.

6. Per the Affidavit of Service sworn by Joyce Nelima Pepela, the Application was served on the Respondent on 24<sup>th</sup> July, 2025 through the firm of Omollo Rotich Barasa & Company Advocates. To date, no response has been filed and the Application is thus unopposed.

**Submissions:**

7. The court directed that the application be canvassed by way of written submissions. The Appellant complied and filed his submissions dated 10<sup>th</sup> December, 2025.

**The Appellant's Submissions;**

8. In the submissions, Counsel submitted that the application sought to stay the judgment of the BPRT, which had been adopted as a decision of the court vide Eldoret Chief Magistrate Court Miscellaneous Application No. E271 of 2025. Counsel submitted that the judgment was delivered on 1<sup>st</sup> July, 2025 while the Appellant's Application was filed on 10<sup>th</sup> July, 2025. Counsel thus argued that the application was made without inordinate delay.
9. Counsel submitted that if the order of stay is not granted, his business will be closed and he will be denied his means of earning a livelihood. Counsel further submitted that the Appellant will have to pay mesne profits, which orders the BPRT lacked jurisdiction to grant, thus he stands to suffer substantial loss. Counsel reiterated that the Appellant is willing to abide by any condition on security for the due performance of the decree. Counsel urged that the Appellant has met the requisite conditions to warrant an order of stay pending appeal.

### **Analysis and Determination:**

10. I have considered the application, the affidavits sworn in support thereof and annexures thereto. I have also given due consideration to the submissions by the learned counsel appearing in the matter. The issue for determination is whether the application is merited.
11. The principles guiding the grant of a stay of execution pending appeal are laid out under the provisions of Order 42 Rule 6 of the Civil Procedure Rules 2010, which provides 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.***

12. From the above provision, the power to grant stay of execution pending appeal is an exercise of discretion. The court can only exercise its discretion aforesaid on satisfaction of the conditions set out for grant of the order of stay. These conditions are 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.*

13. With regard to whether the application was filed without undue delay, the judgment was delivered on 1<sup>st</sup> July, 2025. The Memorandum of Appeal was filed on 8<sup>th</sup> July, 2025 and this Application was filed 18<sup>th</sup> July, 2024 just 17 days from the date of the judgment. In the circumstances, although there was delay in filing the instant application, in my view the same is not inordinate.

14. Turning to the element of substantial loss, on the importance of this condition in ***Kenya Shell Limited vs Benjamin Karuga Kibiru & Another (1986) KECA 94 (KLR)***, 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 cornerstone 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.”***

15. It is trite law that the purpose of stay of execution pending appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the Appellant as the appeal would be rendered nugatory if there is no stay. Therefore, a party seeking an order of stay must prove that they will suffer substantial loss if the orders are not granted. Without such proof, there is no basis for grant of the order of stay or to claim that the appeal would be rendered nugatory.
16. In the present case, the Appellant is apprehensive that substantial loss may result if he is evicted from premises. He has averred that he operates his hardware business therefrom and the eviction would deny him a way of earning his livelihood. It appears that the Appellant’s main concern is that because he operated his business on the suit premises, he should not be evicted due to the pending appeal.
17. However, according to the Appellant’s own admission at paragraph 11 of the Supporting Affidavit, the Respondents already closed his business on 1<sup>st</sup> February, 2024 by welding

the entrance doors and the premises remains welded to date. The issue of closure of the premises was in fact what gave rise to the reference filed by the Appellant before the BPRT. Therefore, even at the date of the delivery of the judgment of the BPRT, the premises were already closed to the Appellant.

18. In essence therefore, the Appellant has effectively already been evicted from the premises and there is nothing for which this court can stay. In my view, this court cannot stay that which has already been done. In fact, one of the reliefs sought before the BPRT was the re-opening of the suit premises. If stay is granted and the premises re-opened, the appeal would have been determined at this interlocutory stage and before the appeal is heard.

19. Moreover, the BPRT must have already considered the fact that he ran his business from the suit premises before making its judgment. For this reason, that alone cannot be the sole basis for grant of stay of execution. In essence, eviction alone cannot justify grant of stay of execution since it is the court that ordered eviction, and it is thus a lawful process. The court in **James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR**, stated as follows:-

***“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, it 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. This is what substantial loss would entail...”***

20. In the circumstances of this case, it cannot be said therefore that the Appellant stands to suffer any prejudice by closure of his business, when the premises have remained closed for approximately two years now. The Appellant has thus failed to demonstrate the existence of the element of substantial loss.
21. The application has failed at the point of lack of substantial loss, which has been held as the cornerstone of issuance of stay of execution orders. Consequently, this court finds that it is not necessary to consider the requirement of security for due performance.

**Orders:-**

22. The upshot is that I find no merit in the application dated 7<sup>th</sup> June 2024 and the same is hereby dismissed. As the Appeal itself is yet to be heard on its merits, the costs of this Application will be costs in the cause.
23. Orders accordingly.

**DATED, SIGNED and DELIVERED** virtually at **ELDORET** on this **19<sup>TH</sup>** day of **FEBRUARY, 2026** vide Microsoft Teams.

**HON. C. K. YANO  
ELC, JUDGE**

In the virtual presence of;

Mr. Momanyi holding brief for Mr. Momanyi for Appellant.  
No appearance for Respondents.  
Court Assistant - Laban.

ORIGINAL