

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCC NO.E014 OF 2022

MOCHA HOTEL LIMITED PLAINTIFF

VERSUS

KWANZA ESTATES LIMITED DEFENDANT

RULING

(Application for stay of execution pending appeal; principles to be applied; judgment having entered in favour of the plaintiff; stay granted on condition of deposit of decretal sum plus taxed costs in a joint interest earning account)

1. The application before me is that dated 25 September 2025 filed by the defendant, Kwanza Estates Limited. It is an application brought inter alia under Order 42 Rule 6 of the Civil Procedure Rules, 2010, and it seeks orders for stay of execution of the decree herein pending hearing and determination of Kisumu Court of Appeal, Civil Appeal No. E173 of 2025. The application is opposed.
2. By way of background, the plaintiff/respondent occupied certain space in premises constructed in the land parcel Kisii Municipality/Block III/195 which property was charged to HFC Limited. In exercise of its statutory power of sale, HFC Limited sold the premises to the defendant/applicant. The applicant then demanded rent from the respondent which was not forthcoming. What the applicant did was to proceed to proclaim the goods of the respondent for alleged arrears of rent, and although there is a dispute as to whether the goods were sold or retained by the applicant, for purposes of this application I will assume that the goods were sold. The respondent subsequently filed this suit on 22 June 2022 seeking special damages of Kshs. 408,873,435/= comprising of the alleged value of the goods and loss of business. On the other hand, the applicant filed a counterclaim seeking the sum of Kshs. 19, 124, 121.60/= as the balance of outstanding rent arrears after deducting the amount received from the sale of the goods.
3. I heard the case and delivered judgment on 4 June 2025. I was of opinion that the applicant had no right to rent as there did not exist a landlord/tenant relationship between them. I held that it was wrong for the applicant to purport to sell the goods of the

respondent on the basis of levy of distress for rent. I assessed the loss to the respondent in the sum of Kshs. 11,000,000/= to attract interest from the date of the judgment together with costs. I dismissed the counterclaim of the applicant with costs.

4. The plaintiff/respondent filed a notice of appeal dated 4 June 2025 whereas the defendant/applicant filed a notice of appeal dated 12 June 2025. On 4 July 2025 the respondent filed her bill of costs and the same is pending taxation. This application was subsequently filed on 25 September 2025. I have already mentioned that it is an application for stay of execution pending appeal.
5. To oppose the motion, the respondent filed a replying affidavit sworn by Henry Moracha, a director thereof. He avers that this application is a belated attempt to deny the respondent the fruits of the judgment. He also raises issue that the applicant has not demonstrated any irreparable harm and neither has the applicant offered to deposit any security.
6. I have considered the application together with the submissions of both Mr. Konosi, learned counsel for the applicant, and Mr. Mogeni, learned counsel for the respondent.
7. This is an application for stay pending appeal and I stand guided by the principles laid down in Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010, which provides as follows :

(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.

8. From the above, it will be seen that three issues are important. The first is delay, the second is substantial loss, and the third is offer of security.
9. On the issue of delay, the respondent has complained that this application is coming 3 months after the judgment and there is therefore significant delay. The applicant's counsel on the other hands argues that there was no threat of execution before the bill of costs was taxed hence no delay. I am not persuaded that one needs to wait until costs are taxed before filing an application for stay pending appeal, but in the circumstances of this case, I am prepared to hold that the delay is not unreasonable.

10. The other issues touch on substantial loss and security. I have not seen in the replying affidavit any indication that the respondent is liquid and able to make good the decretal sum in the event that the applicant succeeds on appeal. It is not even clear if the respondent is in business at all after her eviction from the suit premises. In light of that, I am prepared to hold that if the monies are paid to the respondent, then the applicant may not be able to get the same back, in the event of success in the Court of Appeal, and will stand to suffer substantial loss.
11. I will thus grant an order of stay of execution pending appeal, but this will be subject to the applicant depositing the judgment sum plus costs, in an interesting earning account in the joint names of counsel for the applicant and counsel for the respondent. I direct that the judgment sum of Kshs. 11,000,000/= be deposited within the next 60 days, and the costs be deposited in the same account within 60 days of taxation. In default, the order of stay will lapse and the respondent will be at liberty to execute.
12. The costs of this application will be costs in the appeal.
13. Orders accordingly.

DATED AND DELIVERED THIS 4TH DAY OF MARCH 2026

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Onyango h/b for Mr. Konosi for the applicant

N/A on part of Mr. Mogeni for the respondent

Court Assistant – Michael Oyuko