

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT MILIMANI**  
**ELCA NO. E089 OF 2025**

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**MAKIYI PROPERTIES LIMITED** - **APPELLANT**

**VS**

**SALVATION HEALING MINISTRIES** - **RESPONDENT**

**RULING**

(In respect of Appellant's application dated 27/5/2025 and the Respondent's Preliminary Objection dated 23/6/2025)

1. What is coming up for determination is the Appellants' application dated 27/5/2025 and the Respondent's Preliminary Objection dated 23/6/2025. The Appellant's application is expressed to be brought under the provisions of Sections 1A, 1B, and 3A of the Civil Procedure Act, Order 42 Rule 6 and Order 51 of the Civil Procedure Rules, 2010. The Appellant substantively prays for the following orders;
  - a. That pending the determination of the appeal, this Honourable Court be pleased to issue an interim Order of stay of execution of the Ruling delivered on 17/4/2025 by the Honourable Andrew Muma in **Nairobi BPRT Case No. E572 of 2024- Salvation Healing Ministry versus Makiyi Property Limited**
  - b. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it and further supported by the Affidavit of Boniface Ndege Kirigia, one of the Appellant's Directors sworn on 27/5/2025. The deponent avers that the Appellant and the Respondent entered into a Lease Agreement dated 1/6/2021 for a term of 3 years for a portion of a parcel of land known as Plot No. 5908/9-2. That the Respondent thereafter took possession of the

land and set up a church. He avers that the Respondent defaulted in rent payment and other utility bills leaving the Appellant with no option but to levy distress for the rent arrears.

3. The deponent avers that the Respondent then filed an Application and a Reference to the Tribunal both dated 15/5/2024 being Nairobi BPRT No. E572 of 2024. That upon hearing the application on 28/5/2024, the Tribunal directed the Respondent to pay rent to the Applicant. However, the Tribunal dismissed both the Reference and the Application on 25/6/2024 for non-compliance with its orders. That subsequent to the said dismissal, the Appellant's Auctioneers moved the court vide Miscellaneous Application No. E1800 of 2024 for break in orders to seize the proclaimed goods for auction to recover the outstanding rent of Kshs. 3, 368,640/=.
4. He states that during the pendency of the suit before the Tribunal, a judgment was entered by the Environment and Land Court, which declared a portion of the land as part of the estate of Gerishon Kamau Kirima. The appellant, however, approached the estate of Gerishon Kamau Kirima and purchased the land through the Agreement of Sale dated 9/12/2024.
5. He asserts that after executing the said Agreement, the Respondent claimed that the Appellant had no right to levy distress for rent against it and requested the release of goods attached by the Appellant. The Tribunal, in its Ruling delivered on 17/4/2025, found that it lacked the jurisdiction to hear and determine the matter on the basis that the dispute was no longer related to a landlord-tenant relationship but was instead a purely land matter. The Tribunal then directed the Respondent to release the attached goods and maintain the status quo while seeking redress from the appropriate forum. The Applicant contends that the attached goods have accrued storage charges, attachment costs, and other incidentals. The Ruling is the subject of this appeal.

6. The Applicant asserts that there is an imminent threat of execution against it as well as being cited for contempt of court. He contends that the Applicant stands to suffer substantial loss and damage if the orders sought herein are not granted. He claims that permitting the return of the attached goods is an affront to justice and exposes the Applicant to significant loss. He argues that the substratum of the pending appeal would be rendered nugatory, hence a mere technical exercise. He states that the Respondent would not suffer any form of prejudice if the orders sought are not granted. It is in the interest of justice that the orders sought be granted.
7. In response to the application, the Respondent filed a Preliminary Objection, a Replying Affidavit both dated 23/6/2025 and Grounds of Opposition dated 25/6/2025.

### **The Preliminary Objection**

8. The Respondent contends that this court lacks jurisdiction to entertain this appeal on the grounds that;
  - a. The Appeal has been filed out of time.
  - b. The Appellant has not sought leave of the court to file the Appeal outside the stipulated 30 days' period from the date of the ruling contrary to Section 79G of the Civil Procedure Act.
  - c. The claim is incompetent, misconceived and otherwise an abuse of the due process of the Honourable court.

### **The Replying Affidavit**

9. In its Replying Affidavit sworn by Victor Mwangi, the Respondent contends that there is no competent appeal before this court as the impugned ruling was delivered on 17/4/2025 and the instant appeal was filed on 19/5/2025, which is out of time and without leave of the court.
10. In further response thereto, the deponent avers that the Appellant fraudulently duped the Respondent into entering a Lease Agreement

over a non-existent parcel of land. That the Appellant received monthly rent and a deposit of Kshs. 1,200,000/= for a property that did not belong to it. That the Respondent paid a sum of Kshs. 2,000,000/= on 1/6/2021, being rent for 4 months and a deposit.

11. The deponent states that the ELC Court later determined that the land belonged to the Estate of Gerishon Kamau Kirima through the judgment delivered on 23/10/2023, and ordered the parties unlawfully occupying the land to vacate. After developing the suit property and facing imminent eviction, the deponent approached the estate of Gerishon Kirima, which agreed to sell the property to him and others via the sale agreement dated 9/12/2024 for Kshs. 9,141,132.84. He then informed the appellant that he would no longer pay rent, as the property was under new ownership. He asserts that he has since paid the full purchase price and is in possession of the suit premises. Therefore, if the appellant has any claim, it should be directed to the estate of Gerishon Kirima rather than the respondent. Demanding rent from the respondent equates to the respondent paying rent for its own property.
12. He states that he was shocked when the Appellant sent auctioneers to levy distress for rent of Kshs.1,100,000/=. This prompted him to seek the Tribunal's intervention through the reference dated 15/5/2024 to quash the rental claim. His reference was dismissed by the Tribunal, and the Appellant, despite knowing that the rent claim was moot, unlawfully obtained break-in orders and attached the church's property, allegedly for rent arrears of Kshs.3,000,000/=.
13. The deponent states that the Respondent then approached the Tribunal seeking to overturn the unlawful attachment of its property. It was at that point that the Tribunal issued the orders of 17/4/2025, directing the Appellant to release the attached goods and to maintain the status quo, as they sought an appropriate remedy before another forum. He claims that the Appellant did not immediately comply with these orders, which prompted him to intervene and collect the goods at his own expense, as

the items were deteriorating and incurring additional storage charges. The Appellant's Auctioneers issued a release letter dated 30/5/2025, subject to the payment of storage fees, which he paid.

14. He argues that the Appellant only filed this appeal after learning that the Respondent had collected the goods. The appeal was lodged after more than two months and without the court's leave. He maintains that the Appellant would incur no loss except to reimburse the Respondent for transportation and storage costs related to the items, as execution had already been carried out. He urges the court to dismiss the application with costs to the Respondent.

### **Grounds of Opposition**

15. In the grounds of opposition, the Respondent states that the application is untenable due to non-compliance with Order 42 Rule 6 of the Civil Procedure Rules. The Respondent also asserts that the Appellant has not demonstrated that it will suffer substantial loss if the stay orders are not granted, nor any damage it has incurred since the Respondent executed the court's orders.
16. The Respondent further contends that the Tribunal's finding was based on the fact that the Respondent was unable to pay rent for a property it owns, and that the appeal is frivolous and lacking merit, intended to frustrate the Respondent from enjoying the benefits of the orders issued by the Tribunal.

### **Applicant's Further Affidavit**

17. In its Further Affidavit sworn by Boniface Ndege Kiriga dated 14/7/2025, the Applicant avers that the Tribunal had jurisdiction to determine the dispute before the date of execution of the Agreement hence the orders for payment of rent arrears as well as attachment of the Respondent's goods to recover outstanding rent arrears. That the Tribunal's jurisdiction ceased upon execution of the Agreement for sale. He

contends that the Ruling delivered on 17/4/2025 by the Tribunal vacating its previous orders were invalid for want of jurisdiction instead of downing its tools.

18. The deponent claims that the Agreement of Sale presented by the Respondent is not genuine, as it has not been verified. Furthermore, the estate of Gerishon Kirima has not been called upon to confirm that payment was indeed made as alleged. The Applicant maintains that the return of attached goods by its Auctioneers does not make the Appeal null and void.
19. Regarding the timelines for filing an appeal as provided under Section 79G of the Civil Procedure Act, the Applicant asserts the appeal was intended to be filed on 20/5/2025 but was actually filed on 19/5/2025, one day before the expiry of the 30-day period. As a result, it was not necessary to seek leave before filing the appeal. He urges the court to grant the orders sought.

#### **The written submissions**

20. The application and the preliminary objection were canvassed through written submissions. Parties were instructed to file their respective documents. They complied accordingly. The Court has considered the submissions and taken them into account in its decision.

#### **Analysis and determination**

21. The Court has read and considered the Application, the preliminary objection, the grounds of opposition as well as rival 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 there is a competent appeal before this court.
  - 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 there is a competent appeal before this court.**

22. Section 79G of the Civil Procedure Act, provides that an Appeal should be filed within a period of 30 days from the date of Judgement. However, the proviso to the said Section provide that the court may grant leave or extension of time to file Appeal out of time, but the delay must be explained. The above section states as follows:

“79G. Time for filing appeals from subordinate Courts

Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the Appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.”

23. Section 16A of the Environment and Land Court Act mirrors Section 79G of the Civil Procedure Act which sets out the statutory timeline of 30 days upon which an aggrieved party can file an appeal to the Environment and Land Court.

24. The Ruling which the Appellant seeks to appeal against was delivered on 17/4/2025. The Appellant then filed the Memorandum of Appeal before this Court on 19/5/2025. That is, twenty-eight days after the delivery of the Ruling, considering the Easter holiday and Labour Day holidays. The appeal was therefore lodged within the statutory 30-day period. There is thus a competent appeal for determination before this court.

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

25. It is trite that no Appeal can operate as a stay; hence, an application for stay shall be made to the court by the desiring party. The principles upon which stay of execution pending appeal may be allowed are now well

settled from the authorities of this court and from the superior courts. Generally, 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.”

26. 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."

27. 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."

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

29. The purpose of a stay of execution is to preserve the substratum of the case. When the first condition requires proving that substantial loss may occur if a stay is not granted, the Applicant must not only state that they are likely to suffer significant loss, but must also demonstrate that they will indeed suffer substantial loss if stay orders are not granted.

30. 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."

31. It is clear that the Respondent has already collected the attached goods from the Applicant's Auctioneers. Therefore, there is no significant loss likely to be suffered that could prejudice the appeal.

32. 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 myself on the other conditions

**33. Final orders for disposal**

a. The conclusion is that the Appellant's application dated 27/5/2025 and the Respondent's Preliminary Objection dated 23/6/2025 are unmerited.

b. They are both hereby dismissed with no order as to costs.

34. It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MARCH 2026 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**  
**JUDGE**

**Delivered Online in the Presence of:**

1. Ms Nasambu HB for Mr Mbaabu for the Appellant
2. N/A for the Respondent
3. CA- Ms. Merylynn Nyanchama

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