

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCLA NO. E026 OF 2026

SHRADAH AGRAWAL1ST

APPELLANT

FUNSCAPES LIMITD2ND

APPELLANT

=VERSUS=

MERCY MUGO

RESPONDENT

RULING

1. This ruling is in respect to the Applicants' Notice of Motion dated **18th February 2026** , seeking, inter alia, a stay of execution of the orders issued by **Hon. Gakuhi Chege** of the Business Premises Rent Tribunal on **9th February 2026** pending the hearing and determination of the appeal herein. The application is supported by the affidavit of **Sanjay Chakraborty sworn on 18th February 2026.**
2. The matter came up for directions on **19th March 2026,** whereupon the Applicants were granted fourteen (14) days to file and serve any further affidavit together with written

submissions. The Respondent was granted leave to file her submissions within a similar period. As correctly observed by the Respondent and confirmed from the Court Tracking System (CTS), the Applicants filed neither a further affidavit nor any written submissions. The Court has accordingly determined the application on the basis of the material properly before it.

3. The Respondent opposes the application through her Replying Affidavit sworn on **1st March 2026** and her written submissions dated **13th April 2026**.
4. The dispute arises from a landlord-tenant relationship between the parties in respect of business premises at Two Rivers Theme Park. The Respondent operates a popcorn vending business on the suit premises, with the popcorn vending machine constituting her primary tool of trade and sole source of livelihood.
5. Proceedings were instituted before the **Business Premises Rent Tribunal in BPRT Case No. E301 of 2025**. On **25th March 2025** the Tribunal issued interim orders, later amended on 22nd April 2025, restraining the Applicants, their servants, agents or employees from

evicting, harassing, intimidating or in any manner interfering with the Respondent's quiet possession of the suit premises pending determination of the reference. The Applicants fully participated in those proceedings and were at all material times aware of the subsisting orders.

6. Despite the interim orders, the Applicants, on or about 5th January 2026, are alleged to have unlawfully entered the Respondent's premises and confiscated the popcorn vending machine. By a letter dated 9th January 2026 issued through their Park Manager, the Applicants expressly admitted taking possession of the machine.
7. The Respondent thereafter filed an application dated **29th January 2026** before the Tribunal. **On 9th February 2026, Hon. Gakuhi Chege** issued orders directing, inter alia, the restoration of the popcorn vending machine to the Respondent. It is the execution of these orders that the Applicants now seek to stay pending appeal
8. The Applicants contend that the Tribunal's order of 9th February 2026 was issued on an ex-parte basis without affording them an opportunity to be heard, thereby occasioning a miscarriage of justice. They assert that the

Respondent is in rent arrears, operates a snack tent adjacent to theirs without authority to sell popcorn, and introduced the popcorn machine contrary to the terms of the tenancy. They maintain that execution of the order would violate the tenancy agreement, gravely affect their business operations and occasion substantial loss. They therefore pray for a stay of execution or, in the alternative, an order maintaining the status quo with respect to the popcorn machine pending the appeal

9. The Respondent opposes the application in its entirety. In her Replying Affidavit she deposes that the Applicants acted in blatant disregard of the subsisting Tribunal interim orders when they forcibly confiscated her popcorn vending machine. She annexes copies of the Tribunal orders **(MM-1(a) and (b), the Applicants' admission letter of 9th January 2026 (MM-2), the Tribunal's restorative orders of 9th February 2026 (MM-3), and proof of rent payment up to February 2026 (MM-4).**
10. She emphasises that the machine is her sole source of livelihood and that its continued detention has deprived her of her means of sustenance.

11. In her written submissions the Respondent argues that the Applicants have failed to meet the statutory threshold for a stay of execution under **Order 42 Rule 6 of the Civil Procedure Rules, 2010.**

12. She submits that they have neither demonstrated substantial loss nor offered security, and that no Memorandum of Appeal or grounds of appeal have been placed before the Court. She further invokes the doctrine of unclean hands, contending that the Applicants' wilful disobedience of prior Tribunal orders and alleged misrepresentation before the Tribunal disentitle them to equitable relief. She urges the Court to find that the balance of hardship tilts decisively in her favour and that the application is an abuse of process.

13. Having considered the application, rival affidavits and written submissions filed by the Respondent, this Court has distilled two main issues for determination:

(i) Whether the Applicant has satisfied the threshold for stay of execution under Order 42 Rule 6(2) of the Civil Procedure Rules;

(ii) What orders should issue as to costs of the application.

14. Stay of execution pending appeal is a discretionary remedy governed by **Order 42 Rule 6 of the Civil Procedure Rules, 2010**. The Rule provides that no appeal shall operate as a stay of execution except in so far as the Court may order, and that no order for stay shall be made unless 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 further that such security as the Court orders for the due performance of the decree or order has been given by the applicant.

15. A central limb of the Applicants' case is their contention that the Tribunal's orders of **9th February 2026** were issued without hearing them. They argue that the order was made pursuant to the Respondent's ex-parte application dated **29th January 2026** and that this constituted a breach of the rules of natural justice.

16. The Respondent, however, explains that the application was necessitated by the Applicants' own

conduct: despite their written admission in the letter of **9th January 2026** that they had taken possession of the machine, they later denied possession before the Tribunal. This denial, coupled with their prior violation of the inter partes interim orders of March and April 2025, prompted the urgent application that led to the restorative orders.

17. While the right to be heard is a fundamental principle of natural justice and procedural fairness must always be observed, this Court, in the context of an application for stay pending appeal, is not seized with appellate jurisdiction over the merits or procedural propriety of the Tribunal's decision.

18. The appropriate forum to ventilate any grievance regarding the manner in which the Tribunal's order was obtained including the alleged lack of hearing is the substantive appeal itself. The Applicants have not placed before this Court the full record of the Tribunal proceedings demonstrating that the Tribunal lacked jurisdiction or that the order was a nullity. The Tribunal was already seized of the matter, had issued prior inter-partes orders in which the Applicants participated, and was acting on the basis of

the Applicants' documented admission of possession together with their subsequent denial.

19. In the circumstances, the order of 9th February 2026 remains valid and enforceable unless and until set aside on appeal. The complaint regarding the ex-parte nature of the order, while arguable to some degree, does not by itself warrant a stay where the other mandatory requirements of Order 42 Rule 6 have not been met.
20. The cornerstone of the jurisdiction to grant a stay remains the requirement of substantial loss. As was held in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR)**, the fact that execution has been put in motion or is likely to be put in motion does not, by itself, amount to substantial loss. Even where execution has been levied and completed, that alone does not suffice.
21. 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's case as the successful party in the appeal. Substantial loss is what has to be prevented by preserving

the status quo, as such loss would render the appeal nugatory

22. This position was reaffirmed in **G.N. Muema P/A (SIC) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another [2018] eKLR**, where the Court observed that substantial loss does not have to involve a large sum of money; it is sufficient if the applicant demonstrates that he or she would have to undergo hardship, such as instituting legal proceedings to recover the decretal sum if paid to the respondent in the event the appeal succeeds, and that failure to recover such sum would render the appeal nugatory.

23. In the present application the Applicants have not demonstrated with any specificity the substantial loss they stand to suffer should the stay be refused. Their supporting affidavit makes general assertions regarding potential miscarriage of justice, interference with their business and alleged rent arrears, but offers no concrete evidence of irreparable harm that cannot be remedied if the appeal ultimately succeeds.

24. On the contrary, it is the Respondent who continues to suffer immediate and irreparable loss through the deprivation of her popcorn vending machine, which is her sole means of livelihood. The balance of hardship therefore tilts overwhelmingly in favour of the Respondent.
25. Furthermore, the Applicants have not provided any security for the due performance of the Tribunal's order, a mandatory requirement under **Order 42 Rule 6(2)(b)**.
26. A further critical consideration is whether the appeal is arguable. A stay of execution is an equitable remedy that requires the applicant to demonstrate a prima facie case or a real prospect of success on appeal.
27. From the evidence availed herein, it appears that the Respondent is still in occupation of the business premises at Two Rivers Theme Park. However, the popcorn vending machine, the subject of the Tribunal's order of **9th February 2026**, continues to be detained by the Applicants.
28. There is no evidence tendered demonstrating that the Applicants have complied with the Tribunal's directive

to restore the machine, thereby depriving the Respondent of her primary tool of trade and sole source of livelihood.

29. Additionally, the Applicants approach this Court with unclean hands. Equity demands that a party seeking discretionary relief must come with clean hands.

30. The evidence before the Court shows that the Applicants acted in disregard of subsisting Tribunal interim orders when they confiscated the Respondent's machine.

31. A party who has wilfully disobeyed binding orders of a competent Tribunal and who now seeks the protection of this Court while continuing to detain the Respondent's property cannot, in the eyes of equity, be heard to complain of prejudice.

32. In all the circumstances, the Applicants have failed to satisfy the threshold set out in **Order 42 Rule 6 of the Civil Procedure Rules, 2010**. The application is devoid of merit and must fail.

33. On costs, it is noteworthy that costs follow the event and are awarded at the discretion of the Court, to be exercised judicially. As was held by the Supreme Court in **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai &**

4 Others [2014] eKLR, the awarding of costs is not intended to penalise the losing party but is a means by which the successful litigant may be recouped for the expenses to which he or she has been put in fighting the action.

34. The Respondent having successfully opposed the application, she is entitled to her costs.

35. In the end, the Applicants' Notice of Motion dated **18th February 2026** is dismissed in its entirety. The Respondent shall have the costs of this application.

Dated, Signed and Delivered Virtually this 21st day of April, 2026.

**E. K. WABWOTO
JUDGE**

In the presence of: -

**Ms. Salmer Watiri h/b for Ms. Githii for the
Appellants/Applicants.**

Ms. Kiprop for the Respondent.

Court Assistants: Mary Ngoira and David Ngoosa.