

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELCA NO. E027 OF 2025**

**JOSEPH MBILO MALONZO**

**T/A MBILO INVESTMENTS ..... APPLICANT**

**VERSUS**

**THOMAS AQUINAS WASHIKAW MAKOKHA**

**T/A AQUMU OUTFITS ..... RESPONDENTS**

**RULING**

1. By a Notice of Motion dated 13<sup>th</sup> April 2025, Joseph Mbilu Malonzo T/A Mbilu Investments (the Applicant) prays for the following orders:

**a) Spent;**

**b) Leave be granted to the Applicant to lodge an appeal against the entire Judgment and decree delivered in BRPT Tribunal Case No. 127 of 2021;**

**c) This Honourable Court be pleased to extend the time for filing an appeal against the Judgment of the Business Premises Rent Tribunal in BPRT MSA Tribunal Case No. 127 of 2021 delivered on 14<sup>th</sup> March 2025 to 28 days from the date of supply of certified proceedings;**

**d) This Honourable Court be pleased to grant a stay of execution of the Judgment and all consequential orders issued by the Tribunal pending the hearing and determination of the Applicant's intended appeal;**

**e) This Honourable Court do grant the Applicant leave to furnish security in the form of a bank guarantee for the due Performance of the decree in the event the intended Appeal is unsuccessful;**

**f) The costs of this Application abide the outcome of the intended appeal; and**

**g) This Honourable Court be pleased to issue such further or other orders and/or directions as it may deem just and fit in the circumstances.**

2. The application is supported by an affidavit sworn by the Applicant and is premised on grounds inter alia;
- a) That the Applicant is aggrieved by the judgment delivered on 14<sup>th</sup> March 2025 and has instructed Counsel to appeal against the same;**
  - b) That the Applicant wrote to the Executive Officer of the Tribunal on 2<sup>nd</sup> April 2025 requesting for certified copies of the judgment and proceedings;**
  - c) That the judgment was posted on the CTS platform on 9<sup>th</sup> April 2025 and the present application has been filed without undue delay;**
  - d) That the delay in filing the appeal was not deliberate and the Applicant is ready to lodge the appeal within the extended period once proceedings are availed;**
  - e) That the Applicant stands to suffer substantial loss if stay is not granted considering the substantial decretal amount;**
  - f) That the intended appeal raises arguable and substantial questions of law and fact with a high probability of success;**

**g) That the Respondent will not suffer any prejudice that cannot be compensated by costs or appropriate terms and the Applicant is ready to provide such security as the Court may order for the due performance of the decree, if the appeal is unsuccessful;**

**h) That this application has been brought without unreasonable delay and in the interest of justice; and**

**i) That this Honourable Court has discretion to grant stay and extension of time in the interest of justice to preserve the subject matter of the appeal.**

3. Thomas Aquinas Washikaw Makokha T/A Aqumu Outfits (the Respondent) is opposed to the application. In a Replying Affidavit sworn by his Counsel on record, Stephen Jumbale the Respondent avers that the application is incompetent, legally untenable and deserves to be dismissed with punitive costs. The Respondent avers that the Applicant has not adduced any cogent, credible or admissible evidence to support the grant of the orders sought.

4. The Respondent further avers that the Applicant has approached the Court with unclean hands having unlawfully retained the Respondent's tools of trade and business apparatus notwithstanding prior unequivocal directions mandating their immediate restitution to the Respondent hence leading to economic prejudice and operational disruption.
5. I have carefully perused and considered both the application by the Applicant as well as the response thereto by the Respondent. I have equally perused and considered the submissions and authorities placed before me by the Learned Counsels representing the parties.
6. By the application before the Court, the Applicant prays for two main orders, namely leave that he may be allowed to file his Appeal out of time and an order of stay of execution pending the hearing of the intended Appeal.
7. The period within which a party may file an Appeal is provided under Section 79 G of the Civil Procedure Act, Cap 21 Laws of Kenya which provides thus:

**“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.”**

8. In the matter before the Court, the Applicant has gone into great length explaining how he had very early in the day requested for certified copies of proceedings from the Executive Officer of the Court and how the judgment of the Lower Court was only posted on the CTS platform on 9<sup>th</sup> April 2025. It is his case that the delay in filing the Appeal was not deliberate and that he was ready to lodge the Appeal within time once proceedings were availed.
9. It was however not clear to me why the Applicant was of the view that he had delayed in instituting the Appeal. From a

perusal of the record herein, it was apparent that the judgment of the Business Premises Rent Tribunal in the said Mombasa BPRT Case No. 127 of 2021 was delivered on 14<sup>th</sup> March 2025. In the said decision, the Tribunal allowed the Tenant's Reference dated 2<sup>nd</sup> June 2021 as provided for at Paragraph 47 of its judgment.

10. Aggrieved by the said decision the Applicant who was the Landlord instituted this application on 13<sup>th</sup> April 2025 seeking leave to file the Appeal out-of-time and a stay of execution pending the intended Appeal. At paragraph 10 of the Supporting Affidavit the Applicant has annexed a copy of a Memorandum of Appeal dated the same date - 13<sup>th</sup> April 2025.
11. From my calculation of time as provided under Section 79 G of the Civil Procedure Act aforestated, it was clear to me that as at 13<sup>th</sup> April 2025 when he filed the application and annexed a Memorandum of Appeal to it, the Applicant was still very much within the timelines to lodge this Appeal. While the Respondent was of the view that the filing of the Motion before the time lapsed amounted to an abuse of the

Court process, it was clear from the elaborate averments made by the Applicant that he was genuinely laboring under some mistaken notion that the time for filing the Appeal had lapsed.

12. Having filed a copy of the Memorandum of Appeal within time, I think it is only fair that I allow the same to be considered as duly filed subject to the payment of the requisite court fees.
13. Turning to the prayer for an order of stay of execution, Order 42 Rule 6 of the Civil Procedure Rules, 2010 provides as follows:

**“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”**

14. In support of his application for stay of execution, the Applicant avers as follows at paragraph 8 of the Supporting Affidavit to the application:

**“8. That unless stay of execution is granted, I am likely to suffer substantial loss, as I risk execution and enforcement of monetary and injunctive orders arising from the judgment, which would render the intended appeal nugatory.”**

15. As was stated by the Court in ***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.”**

16. From a perusal of the Tribunal’s judgment dated 14<sup>th</sup> March 2025, it was clear that the Respondent had as the tenant moved the Tribunal through a reference dated 2<sup>nd</sup> June 2021 seeking for his reinstatement into the business premises owned by the Applicant. He had also sought for the release of what he called his tools of trade and stock in good and serviceable state together with compensation for loss of business plus costs of the suit. Having considered the matter, the Tribunal came to the conclusion that the removal of the tenant’s properties from the suit premises was illegal as it was not backed by a lawful Court order.
17. In regard to the Respondent’s claim for reinstatement however, the Tribunal came to the conclusion that it could not do so as the premises as earlier demised no longer existed. From the rent inspection report provided to the Tribunal, the Applicant herein had after ejecting the Respondent re-designed the shop into a reception while the

rear wall had been partly demolished and an entrance created leading into the kitchen, restaurant and upstairs room. On that account the Tribunal instead awarded the sum of Kshs. 300,000/= as general damages for loss of tenancy to the Respondent.

18. While the Applicant asserts that the decretal amount was substantial and that it would cause him substantial loss, I was not persuaded that that claim had in itself been substantiated. In ***China City Construction Company Limited & Another -vs- Karisa (Suing as the Administrator and Legal Representative of the Estate of the Late Didlora Mwaka Mwangala) (Civil Appeal No. 105 of 2023 [2024] KEHC 3323 (KLR) (8 April 2024) (Ruling)***, the Court had this to say on substantial loss:

**“On substantial loss, it was the Appellant’s allegation that the decretal amount is substantial, if paid to the Respondent and the appeal succeeds, they may not be able to recover the same. On this principle, Platt, Ag. JA (as he then was) in Kenya Shell Limited v Kibiru [1986]**

**KLR 410, at page 416 expressed himself as follows:**

**“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”.**

**On his part Gachuhi, Ag. JA (as he then was) at 417 held:**

**“It is not sufficient by merely stating that the sum of Kshs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before**

**judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”**

19. In the circumstances of this case, I was not persuaded that the mere fact that the Respondent had been awarded a monetary decree of Kshs. 300,000/= would of itself, upon payment, amount to substantial loss to the Applicant. It was incumbent upon the Applicant to demonstrate the damage he stood to suffer if the order of stay was not granted. That has not been done to this Court's satisfaction and the application for stay is declined.
20. It follows that the Motion dated 13<sup>th</sup> April 2025 only succeeds partially. The Applicant is hereby granted leave to lodge an Appeal against the judgment and decree delivered in Mombasa BPRT Case No. 127 of 2021 as sought under prayer 'b' of the Motion, within 14 days from today.
21. The costs of the application shall abide the outcome of the Appeal.
22. It is so ordered.

**Ruling dated, signed and delivered in open court and virtually at Mombasa this 23<sup>rd</sup> day of April, 2026.**

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**J.O. OLOLA  
JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Ms. Wandera holding brief for Mulago Advocate for the Applicant
- c) No Appearance Advocate for the Respondents

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