Fuks v Cotswold Estate Ltd (Land Case Appeal E017 of 2025)
[2026] KEELC 2798 (KLR) (11 May 2026) (Ruling)

Neutral citation: [2026] KEELC 2798 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

LAND CASE APPEAL E017 OF 2025

LL NAIKUNI, J

MAY 11, 2026

BETWEEN

JURGEN FUKS ..... APPELLANT

AND

COTSWOLD ESTATE LTD ..... RESPONDENT

RULING

I. Introduction

1. This Honourable Court is called upon to make the determination the Notice of Motion application dated 15th November 2025 filed by Jurgen Fuks, the Appellant/Applicant herein. The application was premised upon the provisions of Sections 1A, 1B, 3A, and 63(e) of the *Civil Procedure Act*, Cap. 21, Order 42 Rule 6 of the Civil Procedure Rules, 2010 and other enabling provisions of the law. The Appellant seeks an order of stay of execution of the Judgment delivered on 29th October 2025 in BPRT case – "BPRT Case No. E283 of 2024: Jurgen Fuks v Cotswold Estate Ltd, pending the hearing and determination of the appeal lodged herein.

2. Upon service of the application, the Respondent entered appearance and filed a Replying Affidavit sworn by Christel Silvia Matthiessen-Kampa on 15th January 2026, opposing the application. The Respondent contends that the appeal is incompetent for want of a certified decree or certificate of delay, that the Appellant has closed business in the suit premises since February 2024, and that he has not paid rent since March 2020. The Respondent therefore urges the Court to dismiss the application with costs.

3. Both parties not only filed written submissions but were also accorded opportunity orally highlight it by the Learned Counsels of the parties in support of their respective positions. The Appellant relies on authorities including "Butt v Rent Restriction Tribunal [1979] eKLR" and "Peter Nakupang Lowar v Nautu Lowar [2022] eKLR", while the Respondent invokes the principles in "Muchanga Investments

Limited v Habenga Holdings Limited [2025] eKLR" and statutory provisions under Section 79G of the *Civil Procedure Act*, Cap. 21.

II. The Appellant/Applicant's case

4. The Appellant/Applicant's sought for the following orders: -

   a. Spent.

   b. Spent.

   c. That pending the hearing and determination of the appeal filed herein, there be a stay of execution of the Judgement issued in Mombasa BPRT E283 of 2024 Jurgen Fuks v Cotswold Estate Limited.

   d. That the costs of this application be provided for.

5. The application was premised on the grounds, testimonial facts, and averments contained in the 17 Supporting Affidavit of JURGEN FUKS, Sworn and dated 15th November 2025 contemporaneously with the Notice of Motion application. The Appellant averred, inter alia, that:

   a. On 4th August 2021, the Respondent, through its appointed agent Joel Titus Musya t/a Makuri Auctioneers, carried out a distress for rent against the Affiant's business and residential premises in flagrant disregard of the restraining order issued by the "Business Premises Rent Tribunal, Mombasa, in Case No. E014 of 2021: Jurgen Fuks v Cotswold Estate Limited", on 3rd August 2021, which prohibited any interference with the Affiant's property pending the hearing of the said reference. A copy of the said order was annexed and marked "JF–1.".

   b. During the said distress, all the Affiant's movable property was removed, including furniture, equipment, stock, and a Mercedes Benz motor vehicle, registration number KCJ 970G, valued at Kenya Shillings Two Million Two Hundred and Fifty Thousand (Kshs. 2,250,000). A copy of the valuation report of the said vehicle was annexed and marked "JF–2."

   c. Immediately after the said distress, the Affiant compiled a full inventory of all goods removed, estimating the total value at approximately Kenya Shillings Sixty-Four Million (Kshs. 64,000,000). The said inventory included all business and personal property, and to date, the Respondent had not filed any document disputing its accuracy. A copy of the said inventory was annexed and marked as "JF – 3."

   d. The Affiant then filed a formal complaint with the Auctioneers Licensing Board against Joel Titus Musya t/a Makuri Auctioneers, registered as "Complaint No. 50 of 2021: Jurgen Fuks v Joel Titus Musya t/a Makuri Auctioneers", for professional misconduct in the unlawful seizure and removal of the Affiant's property.

   e. On 23rd November 2023, the Auctioneers Licensing Board found the said auctioneer guilty of professional misconduct, suspended him for six months, and directed him to render a full account of the proceeds from the distress. The auctioneer did not appeal the said decision, and neither he nor the Respondent complied with the said order. A copy of the ruling was annexed and marked "JF–4."

   f. Following the said auction, the Affiant filed the civil Case:- "Mombasa CMCC No. 1302 of 2023", seeking to recover the said Mercedes Benz motor vehicle which had been unlawfully seized. The court found the sale of the said motor vehicle to be irregular and awarded the

Affiant the right to recover its value from National Commercial Bank of Africa Limited. A copy of the judgment was annexed and marked as "JF–5."

g. In addition, the Affiant instituted Civil Case of:- "Kwale ELC No. E047 of 2025, vide a Plaint dated 12th June 2025, seeking recovery of the total value of the unlawfully seized goods amounting to approximately Kenya Shillings Sixty-Four Million (Kshs. 64,000,000). The Respondent had not filed any defence in the said matter. A copy of the Plaint was annexed and marked as "JF–6."

h. The Affiant averred that until the determination of the case of:- "Kwale ELC No. E047 of 2025", it was impossible to ascertain the true state of any rent arrears or to determine who owed whom what. Any assertion by the Respondent that the Affiant was in arrears was therefore speculative and could not form the basis for eviction.

i. Despite the ongoing proceedings and the existence of "Business Premises Rent Tribunal Mombasa Case No. E283 of 2024", the Respondent filed parallel proceedings in the case of;- "Msambweni Principal Magistrate's Court ELC Case No. E021 of 2024", seeking to evict the Affiant from the same premises. The Affiant contended that this amounted to an abuse of judicial process. A copy of the plaint was annexed and marked as "JF – 7."

j. The Affiant further averred that the Honourable Tribunal delivered its judgment on 29th October 2025, declining to grant a stay of execution pending appeal. The Tribunal had promised that certified copies of the Judgment and proceedings would be supplied on the same day, but despite the Affiant's written request, no copies had been delivered. A copy of the said application was annexed and marked as "JF – 8." The Affiant stated that the delay was prejudicial to the timely filing of the appeal.

k. The Affiant annexed the Case Tracking System (CTS) printout of the said Tribunal matter, which showed that the Tribunal allowed the notice for eviction from the suit property. A copy of the said CTS report was annexed and marked as "JF–9."

l. The Affiant averred that he had filed a Memorandum of Appeal against the said judgment, raising important questions regarding the illegality of the distress, the Respondent's failure to account for seized property, and the Tribunal's refusal to grant a stay. A copy of the Memorandum of Appeal was annexed and marked as "JF–10."

m. The Affiant contended that if the application was not granted, he would suffer irreparable loss as the Respondent might proceed to evict him, thereby rendering the appeal nugatory. He urged that the Respondent should not be allowed to benefit from its own acts of illegality, as eviction would unjustly enrich the Respondent through its unlawful conduct.

n. The Affiant prayed that the Honourable Court exercise its discretion not to compel him to furnish security, considering that the Respondent already held all his seized assets, including the said Mercedes Benz. He maintained that requiring additional security would be inequitable and would impose an undue burden while the appeal was pending.

o. The Affiant swore the affidavit in support of the application filed herein.

III. The Response to the Application

6. The Respondent responded to the Notice of Motion application by the Appellant through a 12 Paragraphed Replying Affidavit sworn on 1st January, 2026 by CHRISTEL SILVIA MATTHIESSEN – KAMPA , one of the directors of the Respondent who averred that:-

a. The Affiant had read and understood the Memorandum of Appeal, the Certificate of Urgency, and the Notice of Motion dated 15th November 2025 together with the Supporting Affidavit sworn by the Appellant on the same date, as well as the orders issued by this Honourable Court on 17th November 2025. The response was filed on behalf of the Respondent.

b. As a preliminary objection, the Affiant was advised by the Respondent's Advocate, Mr. Kinyua Kamundi, that there was no valid appeal since the Memorandum of Appeal was not accompanied by a certified copy of the order or decree appealed from, nor a Certificate of Delay, as required under the provision of Section 79G of the *Civil Procedure Act*, Cap. 21.

c. In BPRT Case No. 283 of 2024, the Appellant could not testify due to being hard of hearing. His wife and companion, Ms. Gakiria Njoki Mercyline, filed a witness statement on his behalf and testified under the guidance of the Appellant's Advocate. She stated that the Appellant had closed Shakatak Disco, Bar & Restaurant approximately eight months before the Respondent served the Notice to Terminate Tenancy in October 2024, meaning the premises had been closed since February 2024.

d. The Affiant averred that the Appellant's appeal would not be rendered nugatory because he was not carrying on any business in the suit premises, which had remained closed for nearly two years.

e. The Affiant further contended that the Appellant was guilty of non-disclosure of material facts, having failed to disclose to the Court that he had closed the business in February 2024.

f. After this Honourable Court declined to grant an Ex - Parte stay of execution, the Appellant filed the civil case "Kwale Chief Magistrate's Misc. Civil Application No. E020 of 2025" under a Certificate of Urgency dated 9th December, 2025, seeking a temporary injunction restraining the Respondent from filing the Tribunal judgment for execution. He also sought an order that, in the event the Respondent had sought recognition and execution under Section 14 of Cap. 301, the subordinate court should withhold or suspend enforcement of warrants of eviction. A copy of that application and the Supporting Affidavit sworn by the Appellant on 9th December, 2025 was annexed and marked as "CSMK - 1."

g. The Appellant failed to obtain Ex - Parte orders in "Misc. Civil Application No. E020 of 2025" and subsequently filed a Notice of Motion dated 19th December 2025 in Kwale SPM's Misc. Civil Application No. E004 of 2025, seeking stay of execution of the orders issued on 10th December 2025 directing his eviction. The Respondent opposed that application, which was dismissed in a ruling delivered on 14th January 2026. A copy of the said ruling was annexed and marked as "CSMK - 2." Immediately thereafter, the Appellant made an oral application for stay, with the ruling scheduled for delivery on 16th January 2026.

h. The Affiant averred that the Appellant had crossed over to the subordinate courts to seek the same orders he was seeking from this Court, amounting to forum shopping and gross abuse of process.

i. The Affiant further contended that the appeal and the Motion dated 15th November, 2025 were frivolous, vexatious, and a gross abuse of the process of Court. The Affiant listed numerous suits and applications previously filed by the Appellant, including:The Appellant filed the Reference in the Business Premises Rent Tribunal maintaining. that the Respondent is not his Landlord;The Appellant filed Mombasa ELC Constitutional Petition that was subsequently transferred to this Court as Petition No, E004 of 2021 seeking an order to be

registered as the proprietor of the suit premises. The Petition was dismissed with costs which the Appellant has to date not paid;The Appellant then filed Kwale ELC Case No. E078 of 2024 seeking a declaration that the Respondent is not his Landlord. He also filed an application for injunction which this Court dismissed;The Appellant has another suit in this Court, E047 of 2025 against the Respondent and 2 Others litigating over the same subject matter;The Appellant filed Tribunal Case No. E014 of 2021 against the Respondent's Agent and 2 Others arising from the same subject matter;The Appellant had also filed Mombasa HCCC No. 25 of 2022 over the same subject matter and against the Respondent and 2 others which triggered Civil Appeal No. E097 of 2023 by the Respondent and 2 Others. The Appellant withdrew that suit with costs which he has not paid;Following the withdrawal of HCCC No. 25 of 2022 with costs by the Appellant, the Respondent and 2 others withdrew Civil Appeal No. E097 of 2023 with costs to be paid to them by the Appellant which the Appellant has not paid to date;The Appellant had also filed Civil Appeal No. E090 of 2023 in the High Court of Mombasa arising from an order to pay costs in his CMCC Misc. Appl. No. 375 of 2021. He had offered to pay the costs by instalments but he has not paid a single cent;Additionally, the Appellant filed Mombasa CMCC No. E947 of 2021 against the Respondent's Agents which he lost but has not paid the costs;The Appellant had filed against the Respondent's Agents Nairobi BPRT Case No. 68 of 2006 which was similarly dismissed.The Affiant emphasized that the Appellant had not paid rent for the residential apartment atop Shakatak Discotheque for close to six years.

a. The Affiant averred that the Appellant had not paid any rent to the Respondent since March, 2020, almost six years, and therefore could not seek stay orders to continue occupying premises he neither used nor paid for. Any stay of execution would cause severe prejudice to the Respondent, as the Appellant was bankrupt, not engaged in any business activity, and had failed to pay rent and costs in multiple matters before the Tribunal, Magistrates' Courts, the High Court, this Court, and the Court of Appeal.

I. Submissions

7. On 29th January, 2026 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 15th November, 2025 be disposed of by way of written submissions. Pursuant to that they, not did they all obliged but also were accorded an opportunity to orally highlight their submissions. The Honourabe Court was sincerely grateful to Mr. Gikandi and Mr. Kinyua Advocates for executing their duties with great diligence, devotion and dedication befitting the legal profession an aspect to be jealously aped and emulated by all an sundry particularly the younger generation and who continue being mentored by the Senior Counsels or members of the Bar whatsoever.

8. Subsequently, the Honourable Court reserved to deliver its Ruling on 7th May, 2026. Eventually, a ruling date was issued on 11th May, 2026 accordingly.

A. The Written Submissions by the Appellant

9. The Appellant through the firm of Messrs. Gikandi & Company Advocates filed their submissions dated 26th January, 2026. Mr. Gikandi Advocate who as already indicated, also highlighted his submissions orally, submitted that at all material times, the Appellant has been a tenant of the Respondent in respect of a building standing on Kwale/Diani Block/63. The said tenancy was the subject of the determination by the Business Premises Rent Tribunal in Case No. E283 of 2024,

Mombasa, whereby on 29th October, 2025 the said Tribunal ordered the Appellant to vacate the said premises. The Appellant was aggrieved by the said decision and hence filed the appeal herein.

10. The Appellant has actually filed the Memorandum of Appeal which is at pages 103 to 105 of the said Record herein. The said Memorandum of Appeal was served on the Respondent and so far the Respondent has not applied to have the same struck out as being frivolous or not raising triable grounds of appeal. On that fact alone, it is our submission that the appeal herein is deemed as one that raises triable issues. Vide the Respondent's Replying Affidavit filed on 15th January, 2026, the Respondent has by virtue of the annexure marked as "CSMK - 2" demonstrated beyond a shadow of doubt that the Respondent is in a big hurry to evict the Appellant notwithstanding the pendency of the appeal herein.

11. In paragraph 14 of the Appellants Supporting Affidavit, the Appellant has given the basis of how such an eviction will render the said appeal nugatory. Of great importance was annexure marked as "JF-2", which demonstrates the extent of the Appellant's improvement and investment on the suit property. Additionally, in paragraph 8 of the said affidavit, the Appellant refers to the existence of Kwale ELC Case No. E047 of 2025, which is annexure as "JF - 6", where the Appellant claims from the Respondent a sum of over Kenya Shillings Sixty Four Million (Kshs. 64,000,000/=) on account of items that were unlawfully taken away from the Appellant by the Respondent. Now, the same Respondent intended to benefit further by evicting the Appellant from the same premises even before the determination of the said suit. In fact, such an eviction would result in the Appellant losing some vital evidence that was relevant before the court that will hear the said Kwale ELC Case No. E047 of 2025. It appeared that that was why the Respondent was in so much hurry to evict the Appellant so that the Respondent destroys the said evidence soas to further frustrate, subjugate and trample on the right of the Appellant to receive full compensation for the loss of his property as provided in under the provision under Articles 40 and 43 of *the Constitution* of Kenya, 2010.

12. On this point, the Learned Counsel relied on the decision in the case of:- "Peter Nakupang Lowar – Nautu Lowar [2022] eKLR", where Nyagaka J. held that:

> "The purpose of an order for stay of execution pending appeal is to preserve the subject matter of the appeal. If the subject is not maintained before the determination of the appeal, then it would render the appeal nugatory or an academic exercise...It, therefore, means that the court should endeavour to balance the interests of both the successful party in litigation so as not to unnecessarily bar him from enjoying the fruits of judgment and that of the Appellant whose appeal may succeed and be rendered nugatory if a stay of execution is not granted."

13. The Learned Counsel submitted that the above authority reinforces the Appellant's position that unless stay is granted, the substratum of the appeal will be destroyed, thereby defeating the appellate process altogether.

14. They also relied on the Court of Appeal in "Butt v Rent Restriction Tribunal [1979] eKLR", where the Court held that a stay ought to be granted where there is no overwhelming hindrance so as to ensure that an appeal, if successful, is not rendered nugatory. In our view there is no overwhelming hinderance in this matter that would prevent the Court from allowing the application herein.

15. On the issue of security, the court was invited to exercise its discretion judiciously. While the provision for security is intended to safeguard the interests of the decree holder, it must not be applied mechanically. In the present case, the Respondent has already benefited from the unlawful seizure and disposal of the Appellant's assets worth approximately Kenya Shillings

Sixty Thousand (Kshs. 64,000,000/-), including a motor vehicle and business equipment. To compel the Appellant to furnish additional security would amount to unjust enrichment of the Respondent and would perpetuate an existing illegality. They relied on "Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR" where the High Court underscored that the requirement for security under the provision of Order 42 Rule 6 is discretionary and must be applied judiciously, as its purpose is to guarantee due performance of the decree and not to punish the applicant or occasion injustice.

16. They further made reference on the Court of Appeal decision in the case of:- "Mistry Amar Singh vKulubya [1963] EA 408", where the Court held that:

> " Ex Turpi Causa non Oritur actio. This old and well-known maxim is founded in good sense and expresses clear and well recognized legal principle which isnot confided to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality, the court ought not to assist him."

17. Borrowing from the said decision, it was their humble submission that the Respondent should not be allowed to evict the Appellant while this appeal is pending since that would only result in the Respondent benefiting from its own wrongdoing. They submitted that equity cannot assist a party who seeks to benefit from its own wrongdoing.The application for stay was filed timeously and without any delay.

18. The Learned Counsel, reiterated the famous words that were spoken by Brett, LJ in the case of:- "Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459". In the same case, Cotton LJ said at p 458:

> " I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."
>
> Megarry J, as he then was, followed Wilson (supra) in Erinford Properties Limited v Cheshire County Council [1974] 2 All ER 448 at p 454 and also heldthat there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal's decision being rendered nugatory should that court reverse the judge's decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the Attorney General v Emerson and Others 24 QBD (1889) 56 at p 59. The special circumstances in this case are that there is a large amount of rent in dispute between the parties and the appellant has an undoubted right of appeal."

19. Their humble view was that in the circumstances that they find themselves in this matter, they think that it was only for the Court to allow to court the application herein and also direct that the appeal be heard on priority basis since if the Appellant was evicted while the appeal herein is pending, the said appeal would be rendered moot and would be of no use at all. As the court is a state organ, they humbly remind it of Article 10 of *the Constitution* of Kenya, 2010, whereby actions of state organs are required to pass the accountability and credibility test. With utmost respect, if the Appellant is evicted while the appeal is pending, the accountability test would

have failed, for then the eventual judgment of the court (particularly if the court allows the appeal), would be totally unachievable as it would be untenable to expect the suit property to still be in vacant possession or in the same state it is now as at the date of the determination of the appeal.

20. In conclusion and in light of the foregoing, the Appellant had satisfied all the legal thresholds for the grant of an order of stay of execution pending appeal. The interests of justice demand that the subject matter of the appeal be preserved so that the appellate process is not rendered futile.

21. Therefore, the Learned Counsel humbly prayed that this Honourable Court be pleased to grant an order of stay of execution of the Judgment delivered on 29th October 2025 pending the hearing and determination of the appeal, without requiring the provision of security, or on such terms as the Court may deem just. They also urged the Court to award costs ofthe application to the Appellant.

B. The Written Submissions by the Respondent

22. The Respondent through the Law firm of Messrs. Kinyua Muyaa & Co. Advocates field their written submissions dated 28th January, 2026. Mr. Kinyua Advocate who also highlighted their submission averred that in his Motion dated 15th November 2025, the Appellant had sought stay of execution of the judgment of the Business Premises Rent Tribunal in BPRT Case No. E283 of 2024, delivered on 29th October 2025, pending the hearing and determination of the appeal. The main reason advanced was that the Appellant had a pending suit, Kwale ELC Case No. E047 of 2025, against the Respondent and two others claiming a sum of Kenya Shillings Sixty Four Million (Kshs. 64,000,000.00/=); that he had obtained a Judgment against NCBA Bank PLC Kenya Limited and Stephen Kimani Muturi in a Magistrates' Court at Mombasa for the value of his motor vehicle; and that the Auctioneers Licensing Board had rendered a decision in disciplinary proceedings against Joel Titus Musya, Auctioneer, requiring him to account for movable assets seized on distress for rent. A copy of the plaint in Kwale ELC No. E047 of 2025 was annexed at page 58 of the Appellant's Motion, while the judgment of the Magistrates' Court was annexed at pages 54–57, and the decision of the Board at pages 51–53.The Respondent opposed the Motion through the Replying Affidavit of Christel Silvia Matthiessen-Kampa, sworn on 15th January 2026, and relied upon the contents thereof.

23. The Learned Counsel argued that the Motion dated 15th November 2025 was incompetent and a gross abuse of the process of Court, and ought not to be allowed. The Counsel argued that the Appellant had filed an application for similar orders before the Magistrates' Court at Kwale, Misc. Appl. No. E020 of 2025, dated 9th December 2025, after being denied Ex - Parte orders by this Court. The Counsel emphasized that the judicial hierarchy required litigants to commence proceedings in the lower courts and proceed upwards, not to start in a superior court and then appeal to an inferior jurisdiction. A copy of the application filed in the Magistrates' Court at Kwale was annexed to the Replying Affidavit.

24. The Learned Counsel further averred that the Appellant's wife had testified as the sole witness in the BPRT proceedings, stating that the Appellant had closed Shakatak Bar, Restaurant and Discotheque in February 2024. Counsel argued that the Appellant was not conducting any business in the suit premises that would be affected by eviction. He sought stay orders only to remain in premises he did not use and for which he had not paid rent for six years. Counsel contended that the Appellant sought the exercise of discretion but failed to disclose that he had closed his business in the suit premises two years earlier. This non-disclosure of material fact disentitled him to discretionary relief.

25. The Learned Counsel submitted that keeping the Appellant in occupation of valuable premises that he did not use and for which he had not paid rent would amount to arbitrary deprivation of property in breach of the provision of Article 40 of *the Constitution* of Kenya, 2010. On his own admission, the Appellant had not paid any rent since March 2020. Counsel argued that the Appellant's attempt to blame his bankruptcy on the distress levied in 2021 was misplaced, as he was already in arrears of rent before that distress.

26. The Learned Counsel submitted that:-

    i. The Memorandum of Appeal was incompetent as it was not accompanied by a certified copy of the decree or order appealed from, nor a Certificate of Delay as required under the provision of Section 79G of the *Civil Procedure Act*, Cap. 21. The Counsel emphasized that there could be no valid appeal without a certified decree, and that under Section 79B of the *Civil Procedure Act*, this Honourable Court had jurisdiction to summarily reject such an appeal.

    ii. The Learned Counsel further submitted that the Principal Magistrate at Kwale, in her orders given on 10th December, 2025, had enforced the decision of the BPRT under the provision of Section 14 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap. 301 in Kwale SPM's Misc. Appl. No. E004 of 2025. The Appellant had sought stay of execution of that decision, and upon dismissal of his application on 14th January 2026, he filed Kwale ELC Appeal No. E009 of 2026 and obtained an order of stay from this Court on 26th January 2026. Counsel argued that the Appellant therefore had two appeals in which he sought stay of the same orders from the same Judge against the same Respondent in the same cause of action concerning the same property, which amounted to classic abuse of process.

    iii. The Learned Counsel reminded the Court of Kwale ELC No. E078 of 2024, which the Appellant had filed seeking declarations that he was not a tenant of the Respondent in the same premises. That suit had been struck out. The Learned Counsel submitted that the Appellant had now reversed course by filing two appeals seeking stay of execution of the Tribunal's orders duly adopted by the Magistrate as a decree of the Court. The Learned Counsel argued that if the Appellant was not a tenant of the Respondent Learned and had already lost his petition for ownership of the suit premises, there could be no basis for him to continue occupying property he did not use and for which he had not paid rent, given his bankruptcy.

    iv. The Learned Counsel pointed out that in the Replying Affidavit, the Respondent had listed ten suits, petitions, and applications filed by the Appellant against the Respondent in the BPRT at Nairobi and Mombasa, in the Magistrates' Court at Mombasa, in the High Court at Mombasa, and in the ELC at Kwale. Counsel submitted that it would be an absurdity and a violation of the National Values and Principles of Governance under Article 10 of *the Constitution* for the Appellant, a bankrupt person, to expect the Court to keep him in premises he did not use and for which he did not pay rent.

    v. The Learned Counsel stressed that the word "bankruptcy" was not used lightly. In all the cases and Petitions the Appellant had lost, he had not paid a single cent in costs. The Learned Counsel noted that this was why the Respondent had made an application in Kwale ELC No. E047 of 2025 for stay of further proceedings until the Appellant paid the costs he had incurred in the same suit previously filed in the High Court at Mombasa.

27. The Learned Counsel commented on the Appellant's submissions dated and filed on 26th January 2026, stating that:

a. The Appellant had not built the suit premises. He was a bankrupt tenant who had attempted to grab the property by claiming ownership, a question already settled with finality by Lady Justice Dena.

b. The Tribunal had dismissed the Appellant's reference and allowed the Respondent's notice due to the Appellant's persistent failure to pay rent.

c. The Appellant could not rely on the existence of Kwale ELC No. E047 of 2025, as determinations of the BPRT were not challenged through ELC suits. The Appellant had already been in default of rent for many years before the distress that led to that suit. He had filed the suit in the High Court at Mombasa, withdrawn it with costs, failed to pay those costs, and re-filed it in this Court.

d. The argument that eviction would affect evidence in Kwale ELC No. E047 of 2025 was absurd. The premises were not exhibits in that suit, and the Appellant could take photographs if necessary. A tenant could not refuse to vacate premises on the excuse that they were exhibits.

e. The Counsel accepted the decisions in "Peter Nakupang Lowar v Nautu Lowar [2022] eKLR" and "Butt v Rent Restriction Tribunal [1979] eKLR" to the extent that the purpose of stay was to preserve the subject matter pending appeal. However, in this case, the subject matter was a closed business. Any success of the appeal would not be rendered nugatory if the Appellant was evicted, as he had closed his business two years earlier and no longer used the premises.

28. The Appellant had not offered to deposit admitted arrears of rent or future rent. He could not rely on prayers in Kwale ELC No. E047 of 2025, as that suit had not been heard or determined. In any event, the decision being enforced was eviction, not a money decree.

29. The Learned Counsel for the Respondent submitted that:

a. The Appellant's reliance on "Mistry Amar Singh v Kulubya [1963] EA 408" was baffling, as there were no illegal contracts pleaded in the proceedings before the BPRT, before the Magistrate, or in this appeal.

b. The Respondent could not be accused of benefitting from alleged wrongdoing. Counsel argued that there was no wrongdoing when a successful litigant sought to enjoy the fruits of a judgment lawfully obtained.

c. The passage attributed to Megarry J in paragraph 11 of the Appellant's submissions was not applicable. Counsel explained that stay of execution in that case had been granted because there was a large amount of rent in dispute. In the present appeal, however, the Appellant admitted being in arrears of rent, had not paid rent for six years, had closed his business, and there was no dispute regarding the monthly rent payable.

d. The Learned Counsel expressed concern at the threats and attacks directed at the Court in paragraph 11(iii) of the Appellant's submissions, wherein the Appellant suggested that the Court would fail the test of accountability and credibility unless stay was granted. The Counsel submitted that the Appellant had crossed a dangerous line, as parties were not permitted to threaten Judges or accuse them of lacking credibility in the exercise of judicial authority under the provisions of Article 160 of *the Constitution* of Kenya, 2010. Such threats, Counsel argued, could not be justified.

e. The Counsel noted that the Appellant had asked the Court to order unconditional stay of execution without requiring provision of security, despite rent remaining unpaid for six years.

Counsel emphasized that the Appellant was bankrupt, and granting stay to allow him to remain in premises he did not use would be highly prejudicial to the Respondent. Counsel reminded the Court that the Appellant had previously attempted to grab the property through litigation, including Kwale ELC No. E078 of 2024, where he had claimed he was not a tenant of the Respondent. Counsel urged the Court to keep in mind that the Appellant was over 80 years old, had closed his business two years earlier, and had no means to pay rent that he had failed to pay even in his youth.

f. The Counsel opined that the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap. 301 conferred express jurisdiction upon the BPRT to uphold a notice of termination of tenancy if a tenant had not paid rent for two months. The Tribunal had heard and considered the Appellant's evidence that he had not paid rent for five years. The Counsel argued that the Tribunal had properly exercised its statutory jurisdiction and could not have maintained the Appellant in the suit premises so as to encourage further default. Simply put, the Tribunal's decision that the Appellant be evicted for non-payment of rent could not be reversed.

g. The Learned Counsel concluded by urging the Court to see through what he described as the Appellant's tricks. When the Appellant's Petition for declaration of ownership of the suit premises had been dismissed with costs, he and his advocate had nevertheless sought to remain in occupation without payment of rent, hoping that the Respondent would surrender the property out of vexation. The Counsel characterized this conduct as criminal and submitted that the present application was intended to allow the Appellant to remain in the property after losing his petition.

30. For these reasons, the Counsel urged the Court to recall the other matters it had handled relating to the same property between the same parties over the same subject matter, and to find that the appeal and the application were incompetent, a gross abuse of the process of Court, and to dismiss the application with costs.

V. Analysis & Determination.

31. I have carefully read and considered the pleadings herein by the Appellants/ Applicants, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statures.

32. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has six (6) framed issues for its determination. These are:-

a. Whether the Appellant has demonstrated sufficient cause to warrant leave to appeal under the provision of Section 79G of the *Civil Procedure Act*, Cap. 21.

b. Whether the Appellant has met the threshold for grant of stay of execution pending appeal under the provision of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010.

c. Whether the conduct of the Appellant disentitles him from equitable relief.

d. Whether the intended appeal raises arguable grounds with a probability of success.

e. Whether substantial loss has been demonstrated to justify stay of execution.

f. Who should bear the costs of the Notice of Motion application dated 15th November 2025.

ISSUE No. a). Whether the Appellant has demonstrated sufficient cause to warrant leave to appeal under the provision of Section 79G of the *Civil Procedure Act*, Cap. 21.

33. Under this sub-title the Honourable Court shall examine the statutory framework, the factual circumstances presented, and the guiding principles from precedent to determine whether sufficient cause has been shown.The provision of Section 79G of the *Civil Procedure Act*, Cap. 21 provides that appeals originating from the subordinate court should be filed within thirty (30) days from the date of the decree or order appealed against. The provision of Section 95 of the said Act gives the court discretion to extend the time as it deems fit even if the time originally fixed has expired.This discretion must be exercised judiciously.

34. The provision of Section 79G of the *Civil Procedure Act*, Cap. 21 provides as follows:-

> " Every appeal from a sub - ordinate 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."

35. The provision of the provision of Section 95 of the *Civil Procedure Act*, Cap. 21 provides thus: -

> " Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

36. This provision vests discretion in the Court to admit an appeal out of time where "good and sufficient cause" is demonstrated. The principles to be considered in exercising the court's discretion on whether or not to enlarge time to file appeal were set out in the case of "Leo Sila Mutiso v Rose Hellen Wangeri Mwangi Civil Appeal 255/ 1997", the court, in considering the exercise of discretion to extend time, held as follows:-

> " It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted."

37. Further in the case of:- "Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR", the Supreme Court held that extension of time is not a right but an equitable remedy, and the Court must consider:

> " The underlying principles a court should consider in exercise of such discretion include:
>
> 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
>
> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

5. whether there will be any prejudice suffered by the Respondent if the extension is granted;

6. Whether the application has been brought without undue delay.

7. ....."

38. These principles were also reiterated in the case of:- "First American Bank of Kenya Limited v Gulab P. Shah & Others HCC 2255/2000 [2002] IEA 65" as follows: -

1) The explanation if any, for the delay;

2) The merits of the contemplated action, whether the appeal is arguable;

3) Whether or not the Respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.

39. In the case of:- "Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1999] 2 EA 231", the Court of Appeal emphasized that sufficient cause must be shown, and the discretion must be exercised judiciously. This Court will therefore proceed to address each limb of the principles outlined in the cases above and establish whether the Applicant has satisfactorily met each of the said principles.

40. In the present case, the Appellant contended that although judgment was delivered on 29th October 2025, the Tribunal failed to supply certified copies of the Judgment and proceedings despite formal written requests. Annexure as "JF - 8" demonstrated that the Appellant had made such requests. The Appellant argued that this omission prejudiced his ability to lodge the appeal within the statutory thirty days. He nevertheless filed the Memorandum of Appeal on 15th November, 2025, within a short period after judgment, and annexed the same as "JF-10.".

41. The Respondent, on the other hand, submitted that the Memorandum of Appeal was incompetent for want of a certified decree or certificate of delay, and urged the Court to summarily reject it under as Section 79B of the *Civil Procedure Act*, Cap. 21. The Counsel argued that the Appellant was guilty of delay tactics and had engaged in forum shopping.

42. The Court notes that the delay in filing the appeal was not inordinate. The Appellant acted promptly once Judgment was delivered, and the absence of certified copies was attributable to the Tribunal registry rather than to the Appellant's indolence. In the case of:- "First American Bank of Kenya Limited v Gulab P. Shah & Others [2002] 1 EA 65", the Court held that sufficient cause may be established where delay is explained and the intended appeal is arguable.

43. The Memorandum of Appeal raises substantial grounds, including the legality of distress levied in defiance of Tribunal orders, failure to account for seized property, and refusal to grant stay. These are not frivolous issues. Preservation of the right of appeal is a constitutional imperative under the provision of Articles 48 and 50 of *the Constitution* of Kenya, 2010.

44. On balance, the Court finds that the Appellant demonstrated sufficient cause within the meaning of Section 79G of the *Civil Procedure Act*, Cap. 21. The delay was reasonably explained by the Tribunal's failure to supply certified copies, and the Appellant acted diligently thereafter. The discretion of the

Court is, therefore, exercised in favour of admitting the appeal, subject to conditions safeguarding the Respondent against undue prejudice.

ISSUE No. b). Whether the Appellant has met the threshold for grant of stay of execution pending appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010.

45. Under this Sub – title, the main gist of the matter is on whether or not to grant Stay of Execution from a delivered Judgement or Decree of the Court. The law concerning stay of execution pending Appeal is found in the provision of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010 which stipulates as follows:

> " 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 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 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.

46. This provision sets out the three cumulative conditions that must be met before stay or injunctive relief can be granted pending appeal. It is trite law that stay of execution pending appeal is a discretionary power bestowed upon this court by the law. In the initial stages of building Jurisprudence around this legal aspect, the Court of Appeal in the case of "Butt –Versus- Rent Restriction Tribunal {1982} KLR 417" gave guidance on how a court should exercise the said discretion and held that:

> " 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
>
> 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge's discretion.
>
> 3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
>
> 4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there

was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

47. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in the provision of Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21 the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the Overriding Objective (Double "O") in the exercise of its powers under the *Civil Procedure Act*, Cap. 21 or in the interpretation of any of its provisions.

48. The provision of Section 1A (2) of the *Civil Procedure Act*. Cap. 21 provides that "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under the provision of Section 1B some of the aims of the said objectives are:- "the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties."

49. It is trite law that there are four (4) conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which:

i. There was in existence of sufficient cause to be considered for granting the order.

ii. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;

iii. The application is brought without undue delay and

iv. 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.

50. I find issues for determination arising therein namely:

i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of Judgment.

ii. What orders this Court should make?

51. It goes without saying that the purpose of stay of execution is to preserve the substratum of the case. In the case of:- "Consolidated Marine v Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)", the Court held that:-

> " The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory".

52. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.

53. As for the applicant having to suffer substantial loss, in the case of "Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018" the Court of Appeal pronounced itself to the effect 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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay."

54. The Court of Appeal in the case of "Mukuma v Abuoga (1988) KLR 645" where their Lordships stated that:-

> " Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory."

55. The Applicant has a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Applicant to the Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of "Absalom Dora –Versus -Turbo Transporters (2013) (eKLR)"}.

56. As F. Gikonyo J stated in the case of:- "Geoffery Muriungi & another v John Rukunga M'imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR" and which wisdom I am persuaded with: -

> " .....the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as "reducing the successful appellant into a pious explorer in the judicial process". The said state of affairs is what is referred to as "substantial loss" within the jurisprudence in the High Court, or "rendering the appeal nugatory" within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal..."

57. Having established the law and authority as to the grant of stay of execution orders I shall proceed to evaluate if the prayers sought by the Applicant.

58. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under the provision of Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicant.

59. Regarding the pre-requisite conditions evolving from the law is on sufficient cause and substantial loss occurring to the Applicants. The court has already deliberated on this aspect and taken into consideration of it from the case of:- "Kenya Shell Limited (Supra)".The Appellant contended that eviction would occasion irreparable harm, including destruction of evidence relevant to Kwale ELC No. E047 of 2025, and render his appeal nugatory. He annexed inventories and rulings (see annexures JF-2, JF-3, JF-6) showing seizure of assets worth of Kenya Shillings Sixty Four Million (Kshs.

64,000,000/=). In "Kariuki -Versus - Ngaruiya (ELC Misc. E007 of 2026)", the Court reiterated that substantial loss encompasses irreversible prejudice, particularly where land rights are at stake. The Respondent argued that the premises had been closed since February 2024, rent had not been paid for six years, and therefore no ongoing business would be affected. Considering the competing positions, the Court finds that eviction before appeal determination would irreversibly prejudice the Appellant's right of appeal. The risk of losing evidence and property rights constitutes substantial loss.

60. On the time line of the application. From the facts of these proceedings herein, Judgment was delivered on 29th October 2025, and the Appellant filed the Memorandum of Appeal and application for stay on 15thNovember 2025. This was within a reasonable period. The delay was explained by the Tribunal's failure to supply certified copies despite formal requests (annexure as "JF - 8").Guided by the a case of:- "Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR", the Court notes that extension of time and stay are equitable remedies, available only to diligent parties. Technically speaking, I hold that the Appellant acted promptly once Judgment was delivered.

61. On the last condition as to provision of security. I find that the provision of Order 42 Rule 6 (2) (b) of the Civil Procedure Rules, 2010 stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. It is settled practice that where a stay is granted the Court may require an undertaking as to damages or other security to protect the judgment creditor should it be subsequently shown that the stay ought not to have been granted. The form and quantum of security are fact-specific and must be proportionate to the risk of loss. Requiring an undertaking or approved security strikes a fair balance between protecting the Applicant from irretrievable dispossession and protecting the Respondent from uncompensated delay.

62. This provision of the law notwithstanding from the face value, this court is not bound by the type of security offered by an applicant. It can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.

63. In saying so, I seek refuge from the case of:- "Aron C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates" the court held that:-

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the Judgment debtor ... Civil process is quite different because in civil process the Judgment is like a debt hence the Applicants become and are Judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose."

64. The Respondent urged that the Appellant had not offered to deposit arrears of rent or future rent, and that unconditional stay would be prejudicial. The Appellant argued that the Respondent already held his seized assets, including his Motor Vehicle - the Mercedes Benz (See Annexure as "JF - 2"), and requiring further security would amount to unjust enrichment.

65. The Court observed in the case of:- "Gianfranco Manenthi & Another v Africa Merchant Assurance Company Limited [2019] eKLR", thus:-

> "..... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his Judgment in case the appeal fails.
>
> Further, Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the Appellant fails to succeed on appeal there could be no return to status quo on the part of the Plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree. (Underlining mine for emphasis)

66. Requiring an undertaking or approved security strikes a fair balance between protecting the Applicant from irretrievable dispossession and protecting the Respondent from uncompensated delay.The Court finds that while the Respondent already holds substantial property, equity demands that some form of security be imposed to balance the rights of both parties. Security may take the form of an undertaking not to commit waste or a monetary deposit proportionate to the risk of loss.

67. On balance, the Court finds that the Appellant has met the threshold for grant of stay of execution pending the hearing and final determination of the appeal under the provision of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010.

ISSUE NO. c). Whether the conduct of the Appellant disentitles him from equitable relief

68. Under this sub-title the court shall examine whether the Conduct of the applicant disentitles them from equitable relief. Equitable relief, such as injunctions and stays, is not a matter of right but of judicial discretion. The maxim "he who comes to equity must come with clean hands" remains central to the Court's analysis. This principle requires that a party seeking equitable intervention must demonstrate diligence, honesty, and fairness in their conduct. Where a litigant has been indolent, evasive, or has abused the process of the Court, equity will withhold its aid.

69. The Respondent urged that the Appellant's conduct, characterized by multiplicity of suits, forum shopping, and failure to pay rent or costs in numerous matters, disentitled him from equitable relief. The Respondent cited the Appellant's history of filing several suits in the BPRT, Magistrates' Courts, High Court, and ELC, many of which were dismissed or withdrawn with costs unpaid. The Learned Counsel argued that this amounted to abuse of process and demonstrated bad faith.

70. In the case of:- "Muchanga Investments Limited v Habenga Holdings Limited [2015] eKLR", the Court of Appeal observed that multiplicity of suits and forum shopping may amount to abuse of process, but each case must be considered on its own merits. The Court must balance the right of appeal against the need to protect judicial process from vexatious litigation.

71. The Respondent also emphasized that the Appellant had not paid rent since March, 2020, nearly six years, and had closed the business in February 2024. The Counsel submitted that the Appellant sought stay orders only to remain in premises he did not use and for which he had not paid rent.The Appellant, however, contended that his appeal raised serious questions of law and fact, including illegality of distress levied in defiance of Tribunal orders and failure to account for seized property. He argued that eviction would render his appeal nugatory and unjustly enrich the Respondent.

72. The Court takes judicial notice to the fact that while the Appellant's conduct in filing multiple suits and failing to pay rent is troubling, the right of appeal is constitutional under the provision of Articles 25 (c) and 50 (1) & (2) of *the Constitution* of Kenya, 2010. Abuse of process must be weighed against the need to preserve the substratum of the appeal. In the case of:- "Leo Investment Limited - Versus – Estuarine Estate Limited (Supra)", the Court held that procedural lapses or questionable conduct should not automatically defeat substantive justice where arguable grounds exist.

73. On balance, the Court finds that although the Appellant's conduct raises concerns, it does not wholly disentitle him from equitable relief at this interlocutory stage. The Court must safeguard the appellate process while imposing conditions, such as provision of security, to mitigate prejudice to the Respondent. Equity demands that both parties' rights be reconciled rather than one party being unfairly shut out.

ISSUE No. d). Whether the intended appeal raises arguable grounds with a probability of success

74. Under this sub-title the court shall examine whether the intended appeal raises arguable grounds with a probability of success. The Court is enjoined to consider whether the appeal discloses arguable grounds that are not frivolous and which merit preservation of the subject matter pending determination. An arguable appeal does not mean one that must succeed, but one that raises bona fide issues worthy of judicial consideration.

75. In the case of:- "Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR", the Court clarified that an arguable appeal is not one that must necessarily succeed, but one that raises at least a single bona fide issue deserving of full consideration by the appellate court. Similarly, in the case of:- "Wilson v Church (No. 2) (1879) 12 Ch D 454", the Court emphasized that the appellate process should not be rendered nugatory where arguable points exist.

76. The Appellant's Memorandum of Appeal (See Annexure marked as "JF - 10") raises several grounds:

    a. That the distress for rent was levied in defiance of express Tribunal orders (see Annexure marked as "JF - 1").

    b. That the Respondent and its agent failed to account for seized property valued at approximately a sum of Kenya Shillings Sixty Four Million (Kshs. 64,000,000/=) (See annexures marked as "JF-2", "JF - 3", "JF - 6").

    c. That the Tribunal erred in refusing to grant stay despite evidence of irreparable harm.

    d. That parallel proceedings filed in Msambweni Principal Magistrate's Court amounted to abuse of process (See annexure marked as "JF - 7").

77. These grounds raise serious questions of law and fact, including the legality of distress levied in contempt of Tribunal orders, the duty to account for seized property, and the propriety of concurrent proceedings. They are not frivolous.The Respondent argued that the appeal was incompetent for want of a certified decree or certificate of delay under the provision of Section 79G of the *Civil Procedure Act*, Cap. 21. and that the Appellant's conduct of filing multiple suits disentitled him to equitable relief. While these objections are weighty, they do not negate the existence of arguable grounds.

78. The Court is satisfied that the intended appeal raises triable issues with a probability of success. Whether or not the appeal ultimately succeeds is a matter for full hearing, but at this interlocutory stage, the grounds are sufficient to warrant preservation of the subject matter.

ISSUE NO. e). Whether substantial loss has been demonstrated to justify stay of execution

79. Under this sub – title the Court shall examine whether substantial loss has been demonstrated. The requirement of substantial loss is expressly provided under the provision of Order 42 Rule 6(2)(a) of the Civil Procedure Rules, 2010. Substantial loss is therefore the cornerstone of stay jurisdiction. It is not enough for an applicant to allege inconvenience or financial hardship; the Court must be satisfied that unless stay is granted, the applicant will suffer real, irreversible prejudice that cannot be compensated by damages.

80. The cornerstone of the jurisdiction to grant stay of execution pending appeal is the prevention of substantial loss. As the Court of Appeal stated in the case of:- "Kenya Shell Limited – Versus-Benjamin Karuga Kigibu & Ruth Wairimu Karuga (Supra)", substantial loss is the "cornerstone of both jurisdictions for granting stay." Similarly, in the case of:- "Mukuma v Abuoga [1988] KLR 645", the Court held that substantial loss is what must be prevented by preserving the status quo, because such loss would render the appeal nugatory.

81. The Appellant averred that unless stay is granted, he will suffer irreparable harm through eviction from the premises, destruction of evidence relevant to Kwale ELC No. E047 of 2025, and deprivation of property rights already in dispute. He annexed inventories and valuations (See annextures marked as "JF - 2", "JF - 3", "JF - 6") showing seizure of assets worth approximately a sum of Kenya Shillings Sixty Four Million (Kshs. 64,000,000/=), and argued that eviction would unjustly enrich the Respondent by allowing it to benefit from acts of illegality.

82. The Respondent countered that the Appellant closed his business in February, 2024, has not paid rent since March, 2020, and therefore no ongoing business would be disrupted. The Learned Counsel submitted that the Appellant seeks stay only to remain in premises he does not use and for which he has not paid rent, and that continued occupation prejudices the Respondent by denying it the fruits of judgment.

83. The Court must balance these competing rights. On one hand, the decree holder is entitled to enjoy the fruits of Judgment. On the other, the Appellant has a constitutional right of appeal under the provision of Article 50 (1) of *the Constitution* of Kenya, 2010, which must not be rendered nugatory. Eviction before appeal determination would irreversibly prejudice the Appellant, as restoration of possession is rarely achievable once premises are vacated and evidence lost.

84. The Court is persuaded that the Appellant has demonstrated substantial loss. Eviction would not merely inconvenience him; it would extinguish his right to pursue the appeal meaningfully, destroy evidence relevant to pending suits, and irreversibly alter the status quo. The Respondent's prejudice can be mitigated through conditions such as provision of security or undertakings against waste.

85. Accordingly, the Court finds that there exists sufficient cause in the matter. Additionally, substantial loss has been demonstrated to justify stay of execution of the Tribunal's judgment, subject to equitable conditions safeguarding the Respondent's interests.

ISSUE No. f). Who will bear the Costs of Notice of Motion application dated 15th November, 2025.

86. Under this sub title, the Court shall decipher allocation of costs. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court in the case of:- "Jasbir Rai Singh v Tarchalan Singh (2014) eKLR" and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, (2014) eKLR".

87. In the case of:- "Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR", the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

88. In this matter, the Appellant has demonstrated sufficient cause for admission of the appeal under the provision of Section 79G of the Act, and has met the threshold for stay of execution under the provision of Order 42 Rule 6(2) of the Rules. However, the Respondent has also raised legitimate concerns regarding rent arrears, multiplicity of suits, and prejudice suffered by being deprived of the fruits of judgment.

89. Given that the application for stay is allowed, but subject to conditions including provision of security, it would be inequitable to saddle either party with costs at this interlocutory stage. The appeal itself remains pending hearing and final determination by this Honourable Court, and its outcome will determine the ultimate rights of the parties.Accordingly, the Court directs that costs of the Notice of Motion application dated 15th November 2025 shall abide the outcome of the appeal. This ensures that the successful party in the substantive appeal will be compensated, while preserving fairness at the interim stage. I need say no more.

VI. Conclusion & Disposition

90. In long run, from the indepth analysis of the framed issues, the Honourable Court has carefully considered and weighed the conflicting parties' interests as regards the preponderance of probabilities, the balance of convenience, and the statutory requirements under the provision of Order 42 Rule 6(2) of the Rules. Ultimately, in view of the foregoing detailed and expansive analysis of the application dated 15th November 2025, this Court arrives at the following decision and makes the following orders:-

    a. That the Notice of Motion application dated 15th November 2025 be and is hereby found to have merit and is accordingly allowed, subject to the fulfilment of the pre-conditions stated herein.

    b. That this Honourable Court hereby grants leave to the Applicants to file their appeal out of time, and the annexed Memorandum of Appeal shall be deemed duly filed upon payment of requisite court fees.

    c. That an order of stay of execution and injunction is hereby issued restraining the Respondent, its servants, agents, or any persons acting under its instructions from evicting, selling, transferring, leasing, or otherwise interfering with the suit premises pending the hearing and determination of the intended appeal or until further orders of this Court.

d. That the Appellant shall, WITHIN FOURTEEN (14) DAYS from the date of this ruling, file and serve such security in form of an undertaking as to damages in a quantified sum, or furnish alternative security (cash deposit, bank guarantee, or other acceptable form) to the satisfaction of this Court for the due performance of the Decree, to cover any loss the Respondent may establish if it is ultimately determined that the stay and injunctive orders ought not to have been granted. In default of such filing, the stay and injunctive orders granted herein shall lapse AUTOMATICALLY without further order.

e. That the Appellant shall, WITHIN THIRTY (30) DAYS from the date of this ruling, file and serve a well paginated and bound Record of Appeal and take all necessary steps to prosecute the appeal expeditiously, failing which the injunctive orders herein shall stand vacated. A physical copy of the Record of Appeal to be placed on the Court file.

f. That for expediency sake, there be a mention on 22nd September, 2026 for purposes of admission of the Appeal and taking direction on the disposal of the Appeal pursuant to the provision of Section 79B of the *Civil Procedure Act*, Cap. 21 and Order 42 Rules 11, 13 and 16 of the Civil Procedure Rules, 2010.____

g. That the costs of the Notice of Motion application dated 15th November 2025 shall abide the outcome of the intended appeal.

It is so ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 11TH DAY OF MAY 2026.

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HON. MR. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT KWALE

Ruling delivered in the presence of:

a. Mr. Daniel Disi, the Court Assistant.

b. Mr. Gikandi Advocate for the Appellant/Applicant.

c. M/s. Muyaa Advocate for the Respondent.

JUDGMENT: ELCLA NO. E017 OF 2025 Page 12 of 12 HON. JUSTICE L.L. NAIKUNI (ELC JUDGE).