



**Republic v Chairperson Business Premises Rent Tribunal & another; Kuria t/
a Mishku Communications Limited (Interested Party); Shah t/a Jaykay Enterprises
Limited (Exparte Applicant) (Environment and Land Judicial Review Miscellaneous
Application E011 of 2023) [2025] KEELC 558 (KLR) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 558 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

**ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E011 OF 2023**

A OMBWAYO, J

FEBRUARY 13, 2025

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL
REVIEW FOR ORDERS OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF ARTICLES 23(3) (F), 40 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF LAW REFORM ACT (CHAPTER 26 LAWS OF KENYA)

AND

**IN THE MATTER OF THE BUSINESS PREMISES RENT
TRIBUNAL ACT (CHAPTER 301 LAWS OF KENYA)**

BETWEEN

REPUBLIC APPLICANT

AND

**THE CHAIRPERSON BUSINESS PREMISES RENT TRIBUNAL 1ST
RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

AND

**ISAAC KURIA T/A MISHKU COMMUNICATIONS LIMITED INTERESTED
PARTY**



AND

NITIN SHAH T/A JAYKAY ENTERPRISES LIMITED ... EXPARTE APPLICANT

RULING

1. This ruling is in respect of the Ex parte Applicant's Notice of Motion application dated 20th December, 2024 which sought the following orders;
 1. Spent.
 2. Spent.
 3. That this Honourable court do grant a stay of execution of the judgment passed on the 21st November, 2024 pending the hearing and determination of the intended appeal against the said judgment.
2. The application is supported by the annexed affidavit of Nitin Kumar Hansraj Shah sworn on 20th December, 2024. He stated that he is the managing director of the Ex Parte Applicant the Landlord in respect of Nakuru/Municipality Block 9/16 the suit property herein. That the Ex parte's application for judicial review was dismissed on 21st November, 2024. That being dissatisfied with the said judgment he lodged an appeal. He stated that there was imminent danger that the interested party may resume execution proceedings any time. He added that the interested party had already extracted the decree and caused Messrs Crater View Auctioneers to serve the Ex parte Applicant with a proclamation of attachment. He added that this was before the stay of execution orders were issued. He stated that the Ex parte Applicant's property was in danger of being seized. He also stated that the Ex parte Applicant will suffer substantial loss and the intended appeal rendered nugatory. He stated that the intended appeal has high probability of success. He went on to state that the Ex parte Applicant had furnished the court wit security for due performance by way of deposit at Diamond Bank Ltd jointly held with the interested party's advocate.

RESPONSE

3. Counsel for the interested party filed his grounds of opposition dated 13th January, 2025 on the following grounds:
 1. That the application is misconceived, grossly incompetent and an abuse of the Court process for which it ought to be dismissed in the first instance.
 2. That the application before Court is a nullity since it seeks to stay negative orders of a judgment which dismissed a Judicial Review application with costs.
 3. That the said application has been brought in bad faith. solely meant to frustrate the Interested Party from enjoying the fruits of its judgment.
 4. That despite conditions for stay being granted pending hearing and determination of the Judicial Review application. subject of the intended appeal. the ex-parte applicant only furnished partial security for performance of the Decree, i.e. Kshs. 1,972,918.34 leaving a balance of Kshs, 540,000 which was to be reimbursed as per the Decree unsecured.



5. That the ex-parte applicant has therefore moved the Court with unclean hands and while concealing material facts in alleging that security for due performance of the Decree has been furnished, which move is devoid of any good faith.
 6. That the ex-parte applicant has not demonstrated that he is likely to suffer any prejudice should the stay orders not be granted, in which case the interested party only interested in costs from the judgment delivered on 21st November 2024
 7. That the ex-parte applicant has not demonstrated that the intended appeal has any probability of success.
4. He urged the court to dismiss ex parte's application dated 20th December, 2024 with costs.

SUBMISSIONS

5. Counsel for the Ex parte Applicant filed his submissions dated 20th January, 2025 where he gave a background of the case and identified one issue for determination, whether the Applicant has met the grounds for stay of execution. On substantial loss, he submits that execution is eminent should the court decline to intervene by granting stay of execution. He submits that in April, 2024, the Ex parte Applicant had been served with a proclamation of attachment of movable property, warrants of attachment and auctioneer's fee note. He relied on the case of Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR and submits that execution will create a state of affairs that would irreparably affect him and negate the essential core of the appeal.
6. He submits that judgment was delivered on 21st November, 2024 and the present application filed on 20th December, 2024. He submits that the same was filed without delay.
7. It was counsel's submission that the Ex parte Applicant already furnished security for the due performance of the decree by way of a deposit account at Diamond Trust Bank in the sum of Kshs. 1,972,918.34/=. He further submits that the Ex parte Applicant is also willing to put up the said balance. He submits that the appeal has arguable points with chances of success and if the stay of execution is denied, the appeal shall be rendered nugatory.
8. Counsel submits that there was no substantive response by the interested party since the grounds of opposition was an unsworn affidavit mischievously presented as grounds of opposition. He added that there were no issues of substance raised and that the issues brought out amount to evidence and ought to have been through a replying affidavit.
9. He relied on the case of Kennedy Otieno Odiyo & 12 Others V Kenya Electricity Generating Company Limited (2010) and submits that negative orders only apply if there was nothing to be stayed. He argues that execution was looming should the court not intervene. He urges the court to allow the application as prayed.

Analysis And Determination

10. The Court has considered the application and the main issue for determination is whether the Ex parte Applicant is entitled to stay orders pending appeal. It is not in dispute that the Ex parte Applicant is seeking to stay a dismissal order of a judicial review application made by this court on 21st November, 2024. It is clear that this order in its nature is a negative order incapable of execution. In the case of Gitundu V Wathuku [2022] KECA 959 (KLR), the court held as follows:

...in this case the Notice of appeal is against the learned Judge's decision striking out the applicant's application on grounds that it was res judicata. There is no Notice of Appeal



before us with regard to the Chief magistrate's decree. We do not, therefore have jurisdiction to grant the orders sought in the application. Additionally, even if we had the requisite jurisdiction, this Court has said time without number that stay orders cannot issue in respect of negative orders, where the court has not ordered any of the parties to perform any task. In this case, the learned Judge merely struck out the applicant's application. The Court cannot stay that striking out."

11. Further, in the case of *Kaushik Panchamatia, Sunrise Hauliers Limited, Risbi Hauliers Limited & Dunga Wholesalers Limited v Prime Bank Limited & Garam Investment Auctioneers (Civil Appeal 72 of 2020)* [2020] KECA 418 (KLR) (7 August 2020) (Ruling) the court held as follows:

...that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants."

12. This court had already rendered itself by dismissing the suit for judicial review and if the Ex parte Applicant is aggrieved then she should move to the next level of court. The upshot of the foregoing is that the application dated 20th December, 2024 is hereby dismissed with costs. It is so ordered.

RULING DATED, SIGNED AND DELIVERED ON THIS 13TH DAY OF FEBRUARY 2025.

A.O.OMBWAYO

JUDGE

