



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NUMBER 562 OF 2015**

**SAMUEL GAKIRIA KINGORI. .... APPELLANT**

**VERSUS**

**WINES & SPIRIT (K) LTD. .... 1<sup>ST</sup> RESPONDENT**

**LUCY WAITHERA KIMANGA. .... 2<sup>ND</sup> RESPONDENT**

**R U L I N G**

By a Notice of Motion dated 7<sup>th</sup> December, 2015, the Appellant/Applicant moved the court under Certificate of Urgency for the following orders.

- a. That pending the inter partes hearing of the Application or until further orders there be a stay of the orders made on the 7<sup>th</sup> December, 2015 and all consequential orders thereof.
- b. That the orders made therein on 7<sup>th</sup> December, 2015 dismissing the Appellant's Application dated 25<sup>th</sup> November, 2015 be and are hereby set aside and the said Application as well as the court orders granted on the 25<sup>th</sup> November, 2015 be reinstated for inter partes hearing.
- c. The costs of the application be provided for.

The Application is based on the following grounds: -

- i. That the Appellant's Application dated 25<sup>th</sup> November 2015 was on the 7<sup>th</sup> December, 2015 dismissed for the Advocates non-attendance.
- ii. The said non attendance was occasioned by a traffic snarl-up just outside the court precincts.
- iii. The Advocate stepped into the court when the matter had just been called out and dismissal orders made.
- iv. The Appellant is innocent and risks eviction from the suit premises which he has occupied for a long time.
- v. There are sufficient reasons warranting the granting of the orders sought herein.

The Application is supported by the annexed Affidavit of Paul Nyaga Advocate, the contents of which basically support the grounds on the body of the Application.

When the Application came up for hearing the court gave directions that the same be disposed off by way of written submissions. The Advocate for the Appellant applied for interim orders in terms of prayer 2 of the said Application which was opposed by the Advocate for the Respondent. The parties made

submissions on the issue of interim orders only and the ruling herein is limited to that particular issue.

Legal arguments were made by both parties. Mr. Nyaga Advocate submitted that if interim orders are not granted, the Appellant is bound to suffer imminent eviction by the Respondent from the suit premises on L.R. Number 209/588 where he has been carrying on business since the year 2003.

He further submitted that the court had on the 25<sup>th</sup> November 2015 granted interim orders which were to last until the 7<sup>th</sup> December, 2015 but unfortunately due to inadvertence on the part of the Advocate handling the matter, the Application was dismissed for non-attendance and interim orders vacated.

He told the court that the counsel who is handling the matter has sworn an Affidavit explaining why he was not in court on time and by the time he stepped into the court room the matter had just been dismissed. He asked the court not to visit the mistake of an Advocate on a client and that no prejudice will be suffered by the Respondent if the interim orders are granted.

On his part Mr. Hassan for the Respondent submitted that though the court has discretion to grant the orders, the same should be exercised judiciously. He told the court that there was a reference pending before the Tribunal and that the appellant has not told the court what prejudice he will suffer if the reference is heard and determined.

He further submitted that justice demands that a party should not appear to delay the disposal of a matter. He urged the court to consider if the Appellant has a right of Appeal. He submitted that the Appellant did not tender evidence to prove that he was threatened with eviction and that the Appeal does not have a probability of success.

In his Reply, Mr. Nyaga submitted that at this juncture the court ought not to address itself to the merits of the Appeal but the circumstances that lead to the dismissal of the Application dated 25<sup>th</sup> November, 2015.

The court has considered the rival submissions made by the parties herein. It is true that court had granted interim orders on the 25<sup>th</sup> November, 2015 when the Application dated 25<sup>th</sup> November, 2015 came before it which were to last until 7<sup>th</sup> December, 2015 when the Application was scheduled to be heard inter partes. On the material day, the counsel for the Applicant/Appellant arrived in court late and found the Application had been dismissed for non-attendance and the orders had been vacated.

The Advocate for the Appellant filed the present Application timeously on the same day the Application dated 25<sup>th</sup> November, 2015 was dismissed. He has given the reason for his lateness which he said was due to traffic snarl-up outside the court precincts. His client is a tenant in the suit premises on L.R. No. 209/588 owned by the Respondent where he has carried out business since the year 2003 and if the interim orders are not granted he faces the risk of eviction from the premises.

Though Mr. Hassan, Advocate for the Respondent submitted that the Appellant has no right of Appeal all what the court is supposed to consider at this point is why there was no attendance on the part of the Appellant on 7<sup>th</sup> December, 2015, the Application before the court being that of reinstatement.

Similarly whether the Appellant has an arguable Appeal or not is an issue to be considered when arguing an Application for stay of execution and not at this stage.

Having considered all the arguments put forth by the parties, my humble view is that failure to grant the interim orders will occasion more prejudice to the Appellant than to the Respondent in that he risks being evicted from the suit premises. Though there is no evidence of that imminent danger, I will give him the benefit of doubt and hereby grant him an interim order of stay of execution pending the inter partes hearing on a date to be fixed at the registry on priority basis.

**Dated and delivered at Nairobi this 10<sup>th</sup> day of December, 2015.**

.....

**L. NJUGUNA**

**JUDGE**

**In the presence of**

..... *for the Appellant.*

..... *for the Respondent.*