



Bukhari Parcels Services and General Supplies Limited v Ahmed & 2 others (Civil Appeal E016 of 2024) [2024] KEHC 11118 (KLR) (23 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11118 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E016 OF 2024
JN ONYIEGO, J
SEPTEMBER 23, 2024**

BETWEEN

**BUKHARI PARCELS SERVICES AND GENERAL SUPPLIES
LIMITED APPELLANT**

AND

**HASSAN IBRAHIM AHMED 1ST RESPONDENT
AHMED SHEIKH HUSSEIN 2ND RESPONDENT
GARISSA MAIZE MILLERS LIMITED 3RD RESPONDENT**

RULING

1. The brief background of this case is that vide a notice of motion dated 20-08-24, the applicant / appellants herein moved to Garissa CM'S court in civil case No. E052 of 2024 seeking orders that;
 - a. spent
 - b. Pending the hearing and determination of this application interpartes and or until further orders of this honourable court, the respondents are hereby directed to reopen the demised premises known as social hall building along Kisimayu Road, and, by themselves, and by their agent and caretaker, restrained from closing the demised premises, disconnecting electricity supply and from interfering with any manner whatsoever with the peaceful possession, and with the plaintiff's peaceful occupation and use of the same.
 - c. Pending hearing and determination of this suit, or till further orders of this honourable court the defendants / respondents are hereby directed to reopen the demised premises known as Social Hall buildings along Kisimayu Road, and, by themselves, and by their agent and caretaker, restrained from closing the demised premises, disconnecting electricity supply and



from interfering with any manner whatsoever with the peaceful possession, and with the plaintiff's peaceful occupation and use of the same.

- d. The OCS Garissa Police station to enforce this order
 - e. The court to issue any order it may deem fit to grant.
 - f. Costs of the suit to be borne by the defendants/respondents.
2. The basis of the application before the lower court was that the appellant/applicant had been in occupation of the subject premises pursuant to a long-standing mutual agreement between him and the 3rd defendant (a legal person) together with the 1st and 2nd respondents as its directors. That without any colour of right nor notice, the defendants closed the premises in question thus causing him to incur loss of business and withholding of 3rd parties' parcels including medicines and other perishables which needed to be released urgently.
 3. The applicant further claimed that during the closure of the premises, the respondents vandalized and carted away some items and cash in excess of Kshs 350,000/=. The applicant sought court's intervention to order the premises reopened and power reconnected.
 4. In response, the respondents opposed the application on grounds that the premises in question otherwise known as GRS/Block 190 is the property of the 3rd respondent having leased the same from the County Government of Garissa. That the 3rd respondent entered into a tenancy agreement sometime the year 2020 with the applicant/plaintiff to operate business in one of the commercial spaces within the premises at a monthly rent of Kshs 15000/=. It was averred that around 2021, the applicant started defaulting paying rent citing poor business due to the Covid pandemic.
 5. The respondents denied ever entering into any business partnership with the applicant nor mutual agreement for the applicant to occupy the premises in question. They averred that on 20-08-24, the applicant mobilized goons to attack and destroyed the 3rd respondent's business premises thus causing extensive damage leading to the arrest of the applicant and subsequent arraignment in court for prosecution vide Cr. Case No. E443 of 2024 Garissa CM's court. They therefore claimed that they had a right of lien to close the premises to compel the applicant to pay rent.
 6. After canvassing the application, the trial court delivered its ruling dated 30-08-24 thus directing that;
 - a. Pending the hearing and determination of the suit, the defendants are hereby ordered to temporarily reopen the premises known as Social Hall buildings along Kismayu road for a period of seven days commencing today to retrieve the goods belonging to the 3rd parties at risk of spoiling and loss.
 - b. Pending the hearing and determination of the suit, the defendants are hereby restrained whether by themselves, their agents, family members, relatives and /or any other person acting under their instructions howsoever from dealing with the premises social hall buildings in the said period of seven (7) days. For avoidance of doubt the seven days period will lapse on the 6th September 2024.
 - c. Matter to be mentioned for pre-trial directions at a date to be set after delivery of this ruling.
 7. Aggrieved by the said ruling, the applicant filed a memorandum of appeal dated 4th September 2024 challenging the said ruling.



8. Contemporaneously filed with the memorandum of appeal is a notice of motion dated 4th September 2024, brought pursuant to sections 1A,1B and 3A of the *Civil Procedure Act*, orders 42 rule 6 and 51 rule 1 of the *CPRS*, Articles 50 and 169 of the *Constitution*, seeking orders as hereunder;
 - a. That this honourable court be and is hereby pleased to certify the instant application as urgent and the same do proceed exparte in the first instance during the current court vacation.
 - b. That this honourable court be and is hereby pleased to order stay of execution the ruling and or orders issued in CMCC No. E052 of 2024 *Bukhari Parcel Services and General Supply Limited v Hassan Ibrahim Ahmed & Anor* delivered on the 30th August, 2024 by Hon. Shadrack Otuke (RM) pending the hearing and determination of this application.
 - c. That this Honourable Court be and is hereby pleased to order stay of execution of the ruling and or orders issued in CMCC E052 of 2024 *Bukhari Parcel Services and General Supply Limited v Hassan Ibrahim Ahmed & Anor* delivered on the 30th August, 2024 by Hon. Shadrack Otuke (RM) pending the hearing and determination of this appeal.
 - d. That this Honourable Court be and is hereby pleased to issue such orders that it may deem just and fit to grant.
 - e. That the costs of this application be provided for.
9. The application is anchored on the grounds set out on the face of it and further amplified by the content contained in the affidavit in support sworn on the 14th September 2024 by Ahmed Muhumed Kassim a director of the applicant/appellant.
10. It is the applicants' contention that the premises were irregularly and illegally closed as due process was not followed before closure. That the rules of equity demand that the orders sought should be granted lest the illegality continues. That unless the stay order is granted, the intended appeal will be rendered nugatory. It was further contended that the applicant has an arguable appeal with high chances of success. He urged the court to apply its discretion to grant the orders sought and that the respondents will not suffer any prejudice should the premises be opened.
11. In response, the respondents filed a replying affidavit sworn on 11-09-24 by Hassan Ibrahim Ahmed a director to the 3rd respondent stating that the respondent does not have an arguable appeal. That there is no proof of the existence of a mutual agreement between the 3rd respondent and the applicant allowing the applicant to occupy the 3rd respondent's premises for free. He averred that the applicant has already enjoyed the benefits of the court order for 7 days and has removed all his properties from the premises. He further deposed that the applicant will not suffer any prejudice should the court not grant the orders sought.
12. During the hearing, counsel relied on the content contained in their respective affidavits to make their oral submissions.
13. I have considered the application herein, response thereof and counsel's oral submissions.
14. The only issue for determination is whether the applicant has met the threshold for grant of the stay order sought.
15. On the question of stay of execution, order 42 rule 6 of the civil procedure rules is clear to the extent that, the applicant must establish that; the application has been filed timeously; substantial loss might occur unless stay is granted; the applicant is ready to furnish security for due performance of the decree



or for any other sufficient cause. This position was also held in the case of *Halai and another v Thornton and Turpin (1963) Limited* (1990) KLR 365 where the court expressed itself that:

“Thus, the Superior court’s discretion is tethered by three conditions. firstly, the appellant must establish sufficient cause; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay, and thirdly the applicant must furnish security”.

16. It trite that stay is not an absolute right of the party seeking the same. It is a matter of discretion of the presiding court. Such discretion must however not be exercised capriciously or whimsically. See *Butt vs Rent Restrictions Tribunal* C.A. No Nai.6 of 1979 where the court held that a court should exercise its discretion in an application for stay in such a manner that its orders do not prevent the preservation of the subject appeal.
17. On the question of filing the application in time, it is clear that the impugned orders were made on 30-08-24 and the instant application filed on 04-09-24 translating to a period of 5 days. In my view, the application was filed in time.
18. Regarding the issue whether substantial loss is likely to accrue as a result of closure of the business premises, the court is duty bound to assess the nature of business being undertaken in the premises and the impact of closure of such business. Obviously, the abrupt closure of the premises without notice will amount to loss of business and customers. According to the applicant, he was handling parcels and delivery of other items. The amount of loss likely to be suffered may not easily be compensated in monetary terms hence substantial loss.
19. It is worth noting that substantial loss does not have to be loss of a lot money perse but also the rigorous process involved in recovering what has been lost. This position was succinctly held in the case of *G.N. Muema P/A(sic)Mt. View Maternity and nursing home v Miriam Maalim Bisbar & Another* (2018) eKLR.
20. As to whether there is need for the applicant to furnish security, none of the parties addressed the issue. Although parties are not in agreement as to the legal capacity in which the applicant was in occupation of the premises in question, the fact remains that the owner of the premises is the 3rd respondent who claims that the applicant has been its tenant.
21. The respondent urged that the applicant has been in rent arrears since 2021 amounting to Kshs 350,000/=. On the other hand, the applicant denied ever entering into a tenancy relationship with the 3rd defendant and instead claimed that he is in occupation by virtue of a mutual agreement entered with the 3rd respondent as a partner in business.
22. Since the relationship between the applicant and the 3rd respondent is in dispute, it will be safer to shield the monetary interest of the respondent in the event the court dismisses the appeal. In that regard, it is hereby ordered that the applicant does deposit in court a sum of Kshs 200,000/= as security for costs as well as due performance of the decree upon conclusion of the appeal.
23. As to whether the appeal is arguable with high chances of success, courts have time and again held that an arguable appeal need not be that which must succeed but a case with reasonable chances of success. It is actually a matter of exercise of reasonable discretion by the trial court. This discretion is hinged on the fact that the right to be heard is not only constitutionally entrenched but it is also the cornerstone of the rule of law. See *Kiu & another v Khaemba & 3others* (Civil Appeal (Application)E270 of 2021(2021)KECA318(KLR)(17 December 2021).



24. Given that the legality of closing the premises unilaterally without following due process has been raised, the appeal in my view has raised reasonable ground worth entertaining and if the orders sought are not granted, the appeal will be rendered nugatory. I do not find any prejudice that will be suffered by the respondents if the orders sought are granted and the premises reopened pending hearing of the main appeal. The worst that can happen at the end of the day is recovery of the rent arrears if any and an eviction order if found appropriate under the current circumstances.
25. Having held as above, it is my finding that the applicant has met the threshold for grant of stay of execution of the trial court's order of 30-08-24 and the subsequent order sustaining the said order in so far as it recognizes the closure of the premises in question. To that extent, I am inclined to make the following orders;
- a. That this honourable court be and is hereby pleased to order stay of execution of the ruling and or orders issued in CMCC No. E052 of 2024 *Bukhari Parcel Services and General Supply Limited v Hassan Ibrahim Ahmed & Anor* delivered on the August 30, 2024 by Hon. Shadrack Otuke (RM) pending the hearing and determination of the pending appeal.
 - b. That the respondents be and are hereby directed to re-open the subject premises herein other wise known as GRS/block 190 social hall building located along Kismayu road
 - c. That the applicant shall deposit in court a sum Kshs 200,000/= being security for costs and due performance of any decree that may arise against them upon conclusion of the appeal.
 - d. That the reopening of the premises shall be executed immediately after the applicant complies with order Number (c) above.
 - e. That the applicant to file record of appeal within 7 days
 - f. That the DR. to call for the lower court record (file) for purposes of admission
 - g. That the lower court proceedings shall remain stayed pending the hearing and determination of the pending appeal.
 - h. That costs shall be in the course.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 23RD DAY OF SEPTEMBER 2024

J. N. ONYIEGO

JUDGE

