



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Bukhari Parcels Services and General Supplies Limited v Ahmed & 2 others (Civil Appeal E016 of 2024) [2024] KEHC 14281 (KLR) (15 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14281 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E016 OF 2024
JN ONYIEGO, J
NOVEMBER 15, 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 genesis of this suit is that vide a notice of motion dated 20-08-24, the applicant /appellant 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 in 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 in 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 was 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 -Vs- 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 -Vs- 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. After canvassing the application, the court delivered its ruling on 23-09-2024 thus directing as follows;
 - 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 -Vs- Hassan Ibrahim Ahmed & Anor delivered on the 30th August, 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.
10. Despite service of the said orders more particularly the order to reopen the premises, the respondents/ defendants refused to comply. In fact, the respondents wrote a letter dated 26-09-24 addressed to the deputy registrar categorically telling the court that they were not ready to comply with the court order owing to change of circumstances in that they had already leased the premises to a new tenant hence the order has been overtaken by events.



11. As a consequence, the applicant/appellant filed the application dated 3rd October 2024 pursuant to Order 51, Order 40 rule 1,2 and 3 of the civil procedure rules and the *judicature Act* seeking the following orders;
 - a. Spent
 - b. That this court be pleased to find that the respondents are in contempt of the court order issued on the 25th September 2024 requiring them to re-open the premises known as GRS/block 190 social hall buildings along kismayu road to allow the applicant go about its business peacefully.
 - c. That this court be pleased to order that the above-mentioned respondents be committed to civil jail for a term not exceeding six months or that they be denied audience until they purge the said contempt.
12. The application is anchored on grounds particularized on the face of it and further amplified by the affidavit sworn on 3rd October 2024 by the applicant herein one Mohamed Muhumed Kassim who averred that the respondents having been duly served with the court order had no choice but to comply. That as a consequence of the said disobedience, he had suffered loss of business hence prejudiced.
13. In response, Hassan Ibrahim the 1st respondent and also the director of the 3rd respondent filed an affidavit sworn on 08-10-2024 stating that prior to the issuance of the lower court orders of 30-08-2024 allowing temporary opening of the premises for seven days, the applicant had been arrested and charged of a criminal case no MCCR/E443/2024 for creating disturbance in the said premises thus an order of the court directing the respondent not to step foot on the said premises.
14. That on 01-09-2024, the applicant removed his items from the said premises thus paving way for leasing out of the said premises on 02-09-2024. It was deponed that by the time the appeal herein was lodged on 04-09-2024, a new lease had already been signed by a third party.
15. It was further averred that the applicant was in rent arrears of Kes 690,000 and still wants to continue staying in the subject premises without paying rent.
16. In his rejoinder, the applicant filed a further affidavit sworn on 12th October 2024. He averred that the question of rent arrears is the subject of proceedings before the lower court hence the premises were not free for leasing to any third party during the pendency of the suit herein. That even if there were lower court orders, high court order supersedes those of the subordinate court. He further deposed that there were no orders from the lower court barring the applicant from accessing the subject premises.
17. That the 7days order by the lower court to temporarily open the premises for 3rd parties to collect their items was to lapse on 06-09-2024 hence there was no order to reopen the premises by the lower court. It was deposed that the respondent was deliberately disobeying the court order without any colour of right. That closure of the applicant's business in blatant disobedience of the law is unacceptable and total abuse of the court process hence a short cut to rendering the appeal useless.
18. During the hearing, both counsel reiterated the content of their respective affidavits whose content I have already summarized as above.
19. I have considered the application herein, response thereof and oral submissions by both counsel. The only issue for determination is whether the respondents are in contempt of the order made on 23-09-2024 and issued on 25-09-2024.



20. Before I proceed to determine the issue at hand, it is worth noting that the contempt Act was declared unconstitutional by the high court in the case of Kenya Human Rights Commission v Attorney General & Another [2018] eKLR.
21. I am therefore obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court Act to avoid a lacuna in the enforcement of Court orders. It was in this respect observed in Republic v Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008, that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in its application.
22. The Court of Appeal in Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applicable by virtue of Section 5(1) of the Judicature Act which provides that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”
23. There is no dispute that the orders in question were made and served upon the respondents. It is trite that an applicant in contempt proceedings must prove the existence of; a lawful and clear court order; that the order has been brought to the knowledge of the contemnor; that the contemnor has disobeyed the order and; that the disobedience is deliberate.
24. In Katsuri Limited v Kapurchand Depdor Shah [2016] eKLR, citing Kristen Carla Burchell v Barry Grant Burchell (Eastern Cape Division Case No. 364 of 2005) it was stated that “in order for an applicant to succeed in civil contempt proceedings, the applicant has to prove –
 - i. The terms of the order,
 - ii. Knowledge of these terms by the Respondent,
 - iii. Failure by the Respondent to comply with the terms of the order.
25. Upon proof of these requirements, the presence of willfulness and bad faith on the part of the respondents would normally be inferred or that the respondents could rebut this inference by contrary proof on a balance of probabilities.
26. There is no dispute that the applicant/appellant was the one who moved to the lower court seeking a mandatory injunction compelling the respondents to reopen his business premises on the ground that he was an equal partner in business with the 1st and 2nd respondents in the 3rd respondent company. It is also clear that on 30-08-2024, the lower court allowed the respondents to temporarily open the premises for 7 days to enable 3rd parties collect their parcels from the premises and then close the same until further directions from the court.
27. Although the premises were reopened, there was no order to continue reopening beyond 6th September 2024 when the 7 days were to lapse. That notwithstanding, the appellant appealed on 04-09-2024 seeking stay of the lower court orders and an order to reopen the business as the closure was irregular. This court allowed the application and directed on 23-09-2024 for the premises to be reopened.
28. Unfortunately, the respondents defiantly wrote a letter to the deputy registrar expressing that the orders could not be obeyed as there was already a new tenant in the premises. In their replying affidavit



to this application they reiterated the same adding that the applicant was facing criminal charges through which the trial court directed him not to enter those premises.

29. From these conversations through correspondence and response via affidavit, it is clear that the respondents were aware of this court's unambiguous orders. It is also clear that there was deliberate defiance by not obeying the order.
30. Was there justification? The first reason for non-compliance is the claim that there was a new tenant already in place. From the tenancy agreement filed in court, the respondents brought on board the new tenant on 02-09-2024. This was two days after 30-08-2024 when the lower court ordered for the subject premises to be opened temporarily for 7 days to enable the applicant to access the premises for the release of 3rd parties' items and thereafter remain closed until further orders.
31. After the expiry of 7 days which was on 06-09-2024, the premises were to remain closed until further directions. To bring on board a new tenant on the disputed premises while there were active pending proceedings is to say the least disobedience to a court order. The respondents had no legal capacity to engage another party to the same premises which had an on-going case before a court of law.
32. Secondly, even after the high court issued an order to reopen the premises which had had been closed without any court order, the respondents remained defiant arguing that there was a lower court order in respect of criminal case No. E443 of 2024. No such order was tendered before this court. In any event, even if there was one, the high court order would prevail. This is not therefore an excuse as this court had clearly advised the respondents as such.
33. For the respondents to deliberately ignore court orders and proceed to put anew tenant in the premises while there is an pending dispute over the same premises is to say the least a clear disregard of court's authority and the rule of law. The respondents' action is meant to circumvent the order of the court and subsequently render the appeal and the lower court proceedings useless. The new tenant must have known. They deliberately entered into an irregular tenancy agreement knowingly with the intention of defeating the court order. The purported new tenant can not cry foul when he is a partaker in disobeying the court order.
34. In GULABCHAND POPATLAL SHAH & ANOTHER CIVIL APPLICATION NO. 39 OF 1990, (unreported), the Court of Appeal had this to say-

“...It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors ...”

35. In HADKINSON –V- HADKINSON (1952) 2 All ER. 567, it was held that:

“It is plain and unqualified obligation of every person against or in respect of, who an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”



36. In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya; Communications Commission of Kenya (Miscellaneous Application 1640 of 2003)* [2005] KEHC 1767 (KLR) (Civ) (5 May 2005) (Ruling) it was held that;

“Where an application for committal for contempt of court orders are made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance, an alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious – a contemnor would have no right of audience in any court of law unless he is punished or he purges the contempt. So, the court is obliged to hear the application for committal first before any other matter. This is a general rule which must be applied strictly”.

37. It is trite law that a court order however bad it may be viewed to be by the aggrieved party, it has to be obeyed until it is set aside. To exert court’s authority and the rule of law, court orders must at all times be obeyed regardless what. The respondents have persistently disobeyed the court order even on their own admission albeit excuses which are untenable.

38. Having taken the totality of the circumstances under which the contempt proceedings arose, it is clear in my mind that the application is merited and the same is allowed with orders that

- a. The respondents herein are guilty of contempt of the court order made on 23-09-2024 and issued on 25-09-2024.
- b. The respondents are hereby granted 7 days within which to purge the contempt and honour the subject court order by reopening the premises in question as directed by this court
- c. This court’s order shall supersede any other lower court order if any in so far as it affects negatively the applicant’s access to the subject premises.
- d. The respondents shall have no right of audience until the contempt is purged
- e. The respondents shall physically appear before this court on 22-11-2024 to confirm compliance in default the court shall proceed to punish them in the manner it may deem appropriate.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 15TH DAY OF NOVEMBER 2024

J. N. ONYIEGO

JUDGE

