

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT GARISSA**  
**ELCA NO. E011 OF 2025**

**ABDI MOHAMMED AHMED**, (Chairman  
Taajir Youth Group) .....

**APPLICANT**

**VERSUS**

**J.K. NGULI**, (Manager  
Dadaab Refugee Camp) ..... **1<sup>ST</sup>**

**RESPONDENT**

**HASSAN MOHAMMED HASSAN** ..... **2<sup>ND</sup>**

**RESPONDENT**

**HAMDI MOHAMMED ALI** ..... **3<sup>RD</sup>**

**RESPONDENT**

**RULING**

***[Notice of Motion dated 22<sup>nd</sup> July 2025]***

1. This ruling concerns the applicant’s Notice of Motion dated 22<sup>nd</sup> July 2025, that principally seeks for the setting aside, variation, and/or discharge of eviction and break-in orders issued on 20<sup>th</sup> May 2025 by the subordinate court. He also seeks injunctive relief restraining the respondents from interfering with his occupation and business activities within the suit premises, pending and upon determination of the application.

The application is premised on the sixteen (16) grounds set out on its face and is supported by the applicant's affidavit sworn on 22<sup>nd</sup> July 2025.

2. The applicant's case in summary is that the impugned orders were obtained without service, in breach of the rules of natural justice, and have since been used to threaten his eviction and disrupt the operations of a youth group on whose behalf he occupies the premises.

That he is a member of the Taajir Youth Group, a welfare association, formed by refugees within Dagahaley Refugee Camp. He avers that the group, comprising largely unemployed persons, sought and obtained assistance from CARE International, which allocated them a room within the Dagahaley Social Hall for purposes of conducting business. According to the applicant, this allocation was not subject to any fixed or limited period.

3. The applicant states that on 20<sup>th</sup> January, 2023, he received a notice requiring the group to vacate the premises within fourteen days on the basis that their occupation was illegal. He challenges this notice as unlawful, contending that the Taajir Youth Group was singled out despite the presence of other refugee groups operating within the same community centre under similar arrangements.

He asserts that the notice was issued not on account of any lawful justification, but to pave way for another group to take over the premises. That the group has operated from the premises for over seven years, and that eviction would not only occasion substantial financial loss but would also destroy the members' sole source of livelihood, thereby exposing them and their families to severe hardship.

4. The applicant avers that he initially sought redress before the **Business Premises Rent Tribunal in BPRT/E110/2023**, where interim injunctive relief was granted. However, in a ruling delivered on 4<sup>th</sup> September 2023, the Tribunal declined jurisdiction and directed that the dispute be pursued before the appropriate forum. He states that a subsequent application was filed before the Tribunal seeking clarification of that ruling.

According to the applicant, the respondents have since misinterpreted and misapplied the Tribunal's ruling as a basis for eviction, notwithstanding the absence of any express eviction order. He maintains that his occupation of the suit premises remains lawful and is undertaken not in his personal capacity, but on behalf of the Taajir Youth Group.

5. The applicant further deposes that the respondents instituted **Miscellaneous Application No. MCCC MISC/E001/24** seeking eviction orders against him, but

that he was never served with the said application. He avers that despite this lack of service, the Court issued orders on 20<sup>th</sup> May 2025 directing that he vacates the premises within fourteen days, failing which eviction would ensue at his cost. He contends that neither he nor his advocates on record were served with any pleadings or notices relating to those proceedings.

6. He challenges the legality and procedural propriety of the orders issued on 20<sup>th</sup> May 2025, including the eviction and break-in orders, contending that they were obtained through non-disclosure, misinformation, and in violation of the rules of natural justice. In particular, he faults the issuance of break-in orders before the expiry of the fourteen-day notice period, terming the same as irregular and contrary to law.

The applicant further avers that although the Court had directed that the application be served and heard inter partes on 10<sup>th</sup> June 2025, those directions were never complied with, as he was not served at all.

He also points to a subsequent application dated 16<sup>th</sup> July 2025, which he characterizes as an attempt by the respondents to regularize earlier irregular orders, despite break-in orders already having been issued.

7. It is his case that the respondents have since weaponized the orders issued on 20<sup>th</sup> May 2025 to harass, intimidate, and interfere with the operations of the Taajir Youth Group, thereby disrupting their business and threatening their continued livelihood. He contends that the cumulative effect of these actions is to subject him and the group to irreparable harm.

Finally, the applicant asserts that he and the members of the Taajir Youth Group have been condemned unheard, in violation of the principles of natural justice, particularly the right to be heard. He maintains that the impugned orders are irregular and ought to be set aside *ex debito justitiae*, and that it is in the interest of substantive justice that the Court grants the reliefs sought.

8. The respondents opposed the application through grounds of opposition dated 30<sup>th</sup> July 2025, in which they urge the Court to dismiss the application with costs. Their position is that the eviction and break-in orders issued by the Magistrate's Court at Dadaab on 20<sup>th</sup> May 2025 were lawful, valid, and the product of due process, having been made after the applicant persistently remained in occupation of the premises despite the lapse of a statutory notice and an earlier thirty-day stay.

They further contend that the applicant has failed to make full and frank disclosure, particularly that his claim before

the **Business Premises Rent Tribunal in BPRT Case No. E110 of 2023** was dismissed, and that the Tribunal's decision was subsequently adopted as an order of the Magistrate's Court.

It is their case that the applicant has not met the legal threshold for setting aside court orders as set out in **Shah versus Mbogo (1967) EA 116**, and that the present application is in substance an attempt to re-open matters already determined and to obtain a stay of execution without satisfying the requirements under **Order 42 Rule 6 of the Civil Procedure Rules**. They maintain that no substantial loss has been demonstrated, that the premises in question constitute public property intended for the benefit of the Dagahaley youth association rather than private occupation, and that the application is an abuse of the court process aimed at delaying compliance and perpetuating unlawful possession.

9. In addition to the Grounds of Opposition, the respondents filed a replying affidavit sworn on 8<sup>th</sup> August 2025 by the 3<sup>rd</sup> respondent on behalf of the others. He deposes that following the termination of the applicant's occupation, a formal notice of eviction dated 28<sup>th</sup> January 2023 was duly issued and served.

In response, the applicant moved the **Business Premises Rent Tribunal in BPRT Case No. E110 of 2023**. During

those proceedings, it was established, according to the respondents, that the premises had been formally allocated by the Ministry of Interior and National Administration, through the Department of Refugee Services, to the Dagahaley Youth Association on 14<sup>th</sup> December 2022, and subsequently handed over through the Dadaab Refugee Complex. He avers that the allocation was strictly for group use and not for individual benefit, and that the applicant's continued occupation amounted to a misrepresentation of that purpose.

He further states that the applicant's claims before the Tribunal, including allegations regarding the eviction notice, were found to be unsubstantiated, and that the Tribunal ultimately dismissed the matter for lack of merit.

10. The 3<sup>rd</sup> respondent further deposes that following the dismissal, the applicant neither appealed nor sought review of the Tribunal's decision. Instead, the respondents instituted **Miscellaneous Civil Suit No. E001 of 2024** before the **Dadaab Magistrate's Court**, where the Tribunal's ruling was adopted as an order of the Court, and eviction orders were subsequently issued.

He states that the applicant was granted a thirty-day stay of execution from 9<sup>th</sup> April 2025, which lapsed without compliance. He avers that the applicant has since left his property in the premises, thereby denying the Dagahaley

Youth Association access and use of the facility, and necessitating an application for break-in orders to facilitate access and removal of the goods under police supervision.

According to the respondents, that application was duly served but not opposed. He contends that the present application is an afterthought, intended to obstruct the execution of lawful court orders and to perpetuate unlawful occupation, and urges the Court to dismiss it with costs.

11. This Court directed that the application be canvassed by way of written submissions. Both parties complied and filed their respective submissions, which this Court has duly considered.
12. The issues arising for the court's determination in the application are as follows:
  - a. Whether the eviction and break-in orders issued on 20th May 2025 were obtained in breach of procedural fairness, particularly for want of service upon the applicant;*
  - b. If so, whether the applicant has met the threshold for setting aside those orders;*
  - c. Whether the applicant is entitled to the injunctive reliefs sought.*
  - d. Who pays the costs?*

13. The court has considered the grounds on the notice of motion, grounds of opposition, affidavit evidence, submissions by the learned counsel and come to the following determinations:

a. The jurisdiction of a court to set aside its own orders arises in two distinct situations.

Firstly, where an order is regularly obtained, the court exercises a discretionary jurisdiction to set it aside upon such terms as may be just.

Secondly, where an order is irregularly obtained, most commonly where there has been no service or a denial of the right to be heard, the court is under a duty to set aside such an order as of right.

This distinction has been settled, and in the case of **Pithon Waweru Maina versus Thuka Mugiria [1983]eKLR**, the **Court of Appeal** held as follows:

***“a) Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just...The main concern of the court is to do justice to the parties, and the court will***

***not impose conditions on itself to fetter the wide discretion given it by the rules. Patel versus EA Cargo Handling Services Ltd [1974] EA 75 at 76C and E***

***b). Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967]EA 116at 123B, Shabir Din versus Ram Parkash Anand (1955) 22 EACA 48.***

***c). Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has***

**been misjustice. Mbogo versus Shah [1968]EA 93.**

b. This line of authority applies to regular orders. In contrast, where an order is obtained without service or in breach of the rules of natural justice, the court does not act on discretion but on obligation. In such cases, the order is said to be liable to be set aside *ex debito justitiae*, a Latin phrase meaning “as a matter of right or of justice owed.” The principle is that a party who has been condemned unheard is entitled, as of right, to have the resulting order vacated.

This position has been consistently affirmed by the courts, including in the case of **Mureithi Charles & Another versus Jacob Atina Nyagesuka [2022] KEHC 1805 (KLR)**, where it was emphasized that a decision reached in breach of the right to be heard cannot stand. The Court in this matter held that:

**“I agree with the position holding of the Supreme Court of India which stated in Sangram Singh vs. Election Tribunal, Koteh, AIR 1955 SC 664, at 711 cited in the case of Gerita Nasipondi Bukunya & 2 others v Attorney General [2019] eKLR that:**

***“[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”***

- c. With that legal framework in mind, the Court turns to the first issue of whether the impugned orders were obtained in breach of procedural fairness, particularly for want of service. The applicant asserts that neither he nor his advocates were served with the application leading to the orders of 20<sup>th</sup> May 2025, and that despite directions for an inter partes hearing, no such hearing took place.

The respondents, on the other hand, maintain that the application was duly served but not opposed. That assertion, however, must be tested against the record.

- d. Service is a matter of proof, not presumption. It is ordinarily demonstrated by an affidavit of service

setting out when, how, and upon whom service was effected. In the present case, no such affidavit has been placed before this Court to substantiate the respondents' contention.

Equally, the applicant has pointed to directions issued by the subordinate court requiring service and an inter partes hearing, which he maintains were not complied with. In the absence of evidence demonstrating compliance with those directions, the Court is unable to find that the applicant was afforded an opportunity to be heard.

- e. The nature of the orders issued, of eviction and break-in, heightens the need for strict compliance with procedural safeguards. Such orders carry serious consequences, including dispossession and interference with property, and cannot properly issue without affording the affected party a hearing. In the circumstances, this Court is satisfied that the process leading to the impugned orders fell short of the requirements of procedural fairness.
- f. Having so found, the legal consequence would follow; that the impugned orders, having been obtained in breach of the right to be heard, would be irregular and liable to be set aside *ex debito justitiae*, that is, as a matter of right. In that regard, the respondents' reliance on the case of ***Shah (supra)*** is

misplaced, as that authority governs the setting aside of regular orders in the exercise of discretion, whereas the present case concerns an alleged denial of a fundamental procedural right.

g. I have noted that this application herein was initially filed on 24<sup>th</sup> July 2025 at the **High Court Garissa** as **“Civil Suit No. HCCC NO. E012 of 2025.”** Filed contemporaneously with the application is a document headed *“Grounds of Appeal”* dated 22<sup>nd</sup> July 2025. The suit was subsequently transferred from the High Court on 31<sup>st</sup> July 2025 to this court, and given the reference **ELCLA No. E011 of 2025.**

In view of the fact that what is being challenged is the decision and orders of the lower court of 20<sup>th</sup> May 2025, then this matter should have been commenced as an appeal and not a civil suit. the respondent has not taken any objections in the manner the matter was initiated, and as both sides appear in their subsequent filings to be aware it was an appeal and not a civil suit, no prejudice has been or is likely to be occasioned.

h. The notice of motion dated 22<sup>nd</sup> July 2025 has in its heading invoked **Sections 1A, 1B, 3, 3A of the Civil Procedure Act, Orders 40, 42, 51 Rule 1 of Civil Procedure Rules** [though not indicated],

**Articles 47, 48, 50, 159 (2) (a) (b) & (e) of the Constitution. Order 42 of the Civil Procedure Rules**, especially **Rule 6** that provides for stay pending appeal is in my view the more relevant one, as I gather what the applicant seeks is to stop the eviction and break-in pending the hearing and determination of their appeal.

Though stay is not specifically sought the court has a duty under **Sections 1A, 1B, & 3A of the Civil Procedure Act and Article 159 of the Constitution** to do substantive justice, facilitate the just, expeditious, affordable resolution of the civil disputes before it in an efficient manner. An order of stay of execution of the lower court orders pending the hearing and determination of the appeal will issue in the interest of justice serve the purpose in this matter.

- i. Turning to the second issue, once an order is found to be irregular, the court is under a duty to set it aside. That, however, does not determine the substantive rights of the parties in relation to the suit premises. Those issues, particularly the nature of the applicant's occupation, the effect of the proceedings before the Business Premises Rent Tribunal, and the respondents' claim that the premises are public property allocated to the Dagahaley Youth Association, remain live and unresolved.

- j. In those circumstances, and in order to preserve the subject matter pending proper adjudication, it is appropriate that the status quo be maintained. The injunctive relief sought is therefore justified, not as a final determination of rights, but as a temporary measure to prevent actions that may render the dispute nugatory before it is heard on its merits. In the result, and for the foregoing reasons, the Notice of Motion dated 22<sup>nd</sup> July 2025 succeeds.
- k. Under **Section 27 of the Civil Procedure Act, Chapter 21 of Laws of Kenya**, costs follow the event unless where for good cause the court directs differently. In this instance, I find it fair and just for the costs to abide the outcome of the appeal.
14. Flowing from the above determinations, the court finds and orders as follows:
- a. That the notice of motion dated the 22<sup>nd</sup> July 2025 has merit and is allowed in the following terms:***
- i. That stay of execution of the subordinate court orders of eviction and break-in issued on 20<sup>th</sup> May 2025 is hereby issued***

***pending the hearing and determination of the appeal,***

***ii. The costs in the application to abide the outcome of the pending appeal***

***b. That so as to fast track this matter, the appellant/applicant is directed to file and serve the record of appeal in sixty (60) days.***

It is so ordered.

**DATED, SIGNED, VIRTUALLY DELIVERED ON THIS 30TH DAY OF APRIL 2026.**

**S. M.**

**Kibunja**

**ELC**

**JUDGE**

**In the presence of:**

Applicant/Appellant – M/S Khamala

Respondents – M/S Nasibo

Mohammed - Court Assistant

**S. M.**

**Kibunja**

**ELC**

**JUDGE**