Bukhari Parcel Service & General Supply Limited & 2 others v Garissa Maize Millers (Environment and Land Miscellaneous Application E002 of 2025) [2026] KEELC 2462 (KLR) (30 April 2026) (Ruling)

Neutral citation: [2026] KEELC 2462 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E002 OF 2025

SM KIBUNJA, J

APRIL 30, 2026

BETWEEN

BUKHARI PARCEL SERVICE & GENERAL SUPPLY LIMITED 1ST APPLICANT

MOHAMMED MUHUMED KASSIM ..... 2ND APPLICANT

BUKHARI EXPRESS LIMITED ..... 3RD APPLICANT

AND

GARISSA MAIZE MILLERS ..... RESPONDENT

RULING

1. What is before the Court is the Notice of Motion dated 7th August 2025 by the Applicants seeking principally for leave to appeal out of time against the ruling of the Business Premises Rent Tribunal delivered on 17th July 2025 in BPRT Case No. E014 of 2025, and an order of stay of execution of the said ruling pending the hearing and determination of the intended appeal.

   The application is expressed to be brought under Sections 79G and 3A of the *Civil Procedure Act* and Order 42 Rule 6 of the Civil Procedure Rules. The application is premised on the nine (9) grounds set out on its face and is supported by the affidavit of Mohammed Muhumed Kassim, 2nd applicant, sworn on 7th August 2025.

2. The Applicants' case is anchored on a sustained challenge to the jurisdiction of the Business Premises Rent Tribunal. They depone that prior to the impugned ruling of 17th July 2025, they had raised a jurisdictional objection before the Tribunal on several interrelated grounds.

   First, they contend that the proceedings before the Tribunal constitute an abuse of the court process, in that they relate to matters already pending before competent courts. In particular, they refer to Garissa CMCC No. E052 of 2024 and Garissa High Court Civil Appeal No. E004 of 2025, both of which,

according to them, concern the same dispute between the parties. It is their position that the issues in those proceedings revolve around the ownership, control, and internal affairs of the 1st Applicant company, and that the Respondent has improperly duplicated those issues before the Tribunal under the guise of a landlord–tenant dispute.

Secondly, the Applicants assert that the Tribunal lacks jurisdiction because the dispute does not arise from a landlord–tenant relationship as contemplated under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*. They depone that the Respondent has styled himself as a landlord and purported to issue a termination notice dated 25th February 2025, yet the true dispute concerns the Applicants' status in relation to the 1st Applicant company and their entitlement to occupy the premises by virtue of that status.

3. In that regard, the Applicants' position is that one of the parties has claimed to be a co-owner of the 1st Applicant company and to be in occupation of the premises in that capacity, thereby negating the existence of a conventional tenancy relationship. They maintain that the question whether the parties stand in a landlord–tenant relationship is itself contested and cannot be assumed so as to found the Tribunal's jurisdiction.

   Thirdly, the Applicants contend that the Respondent had, prior to the institution of the Tribunal proceedings, taken unilateral steps including issuing a termination notice and locking up the premises. They state that those actions had already prompted the filing of proceedings before the Magistrates' Court, where injunctive relief had been sought. In their view, the subsequent invocation of the Tribunal's jurisdiction amounts to forum shopping and multiplicity of proceedings.

4. The Applicants further place reliance on a judgment of the High Court at Garissa, which they have annexed, in which the Court is said to have characterized the dispute between the parties as one relating to shareholding and commercial interests rather than a landlord–tenant relationship. They specifically rely on passages of that judgment where the Court observed that the dispute concerned recognition as shareholders and the attendant benefits, and that such a dispute does not fall within the jurisdiction of either the Environment and Land Court or the Business Premises Rent Tribunal, but is properly within the remit of the Magistrates' Court.

5. It is against that background that the Applicants state that the Tribunal, notwithstanding the objection on jurisdiction, proceeded to deliver its ruling on 17th July 2025 and issued orders including a mandatory directive requiring them to deposit Kshs. 750,000/= and injunctive orders restraining them from accessing the suit premises.

   The Applicants depone that the said ruling was delivered in their absence and that they were not aware of it until 5th August 2025. They annex a copy of the Tribunal's order and maintain that by the time the ruling came to their attention, the period indicated by the Tribunal for purposes of appeal had lapsed.

6. They state that they are aggrieved by the entirety of the ruling and intend to challenge it on appeal, particularly on the question of jurisdiction and the propriety of the orders issued. They have annexed a draft Memorandum of Appeal which, according to them, raises arguable grounds with high prospects of success.

   They further depone that unless the orders sought are granted, they stand to suffer irreparable and substantial loss. They express their willingness to abide by any conditions as to security that the Court may impose and urge that the application be allowed in the interests of justice.

7. The application is opposed by the Respondent through the replying affidavit of Hassan Ibrahim Ahmed, director, sworn on 17th September 2025, as well as the grounds of opposition dated 19th

September 2025. The Respondent's primary position is that the application is misconceived and an abuse of the process of the Court.

It is deponed that the impugned ruling was delivered on 17th July 2025 and that, by operation of Section 79G of the *Civil Procedure Act* and Section 15 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, the Applicants had thirty (30) days within which to file an appeal. As at 7th August 2025 when the present application was filed, that period had not lapsed. The Respondent therefore contends that there was no delay requiring extension, and that the Applicants improperly invoked the Court's discretion where no basis had arisen.

8. On the question of jurisdiction, the Respondent depones that the issue had already been raised by the Applicants before the Tribunal by way of a preliminary objection and determined in a ruling delivered on 22nd May 2025, in which the objection was dismissed. A copy of that ruling has been annexed. It is the Respondent's position that the Applicants did not appeal against that ruling and cannot now seek to reintroduce the same question through the present proceedings.

   The Respondent further disputes the Applicants' assertion that the ruling of 17th July 2025 was delivered without their knowledge. It is deponed that the date for delivery of the ruling was taken by consent of the parties, and that the Applicants' absence was a result of their own inaction.

9. On the nature of the dispute, the Respondent contends that the Applicants' claim that the matter relates to shareholding is unsupported by any documentary evidence. It is deponed that no share certificates or other company records have been produced, and that the Tribunal was properly seized of a tenancy dispute involving rent arrears.

   With regard to stay of execution, the Respondent avers that the Applicants have failed to demonstrate substantial loss. It is emphasized that the order requiring payment of Kshs.750,000/= is monetary in nature, and that no evidence has been placed before the Court to show that the Respondent would be unable to refund the sum in the event the appeal succeeds.

10. The Respondent also contends that the Applicants have not offered any concrete security for the due performance of the decree, and that their expression of willingness to comply is insufficient, particularly in light of their failure to comply with the Tribunal's orders.

    Finally, it is deponed that the Respondent continues to suffer prejudice due to the Applicants' failure to pay rent arrears and that the present application is intended to delay and obstruct enforcement of lawful orders.

11. The Respondent's grounds of opposition are, in essence, that the present application is premature, misconceived, and an abuse of the process of the Court, having been filed before the lapse of the statutory period for lodging an appeal and therefore without any basis for seeking extension of time.

    It is further contended that the Applicants have failed to demonstrate sufficient cause to warrant the exercise of the Court's discretion under Section 79G of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules.

    The Respondent also takes the position that the application has been brought for the improper purpose of evading compliance with the Tribunal's lawful orders, particularly the directive requiring the deposit of Kshs.750,000/=, and that the interim orders of stay obtained are prejudicial and operate to unjustly shield the Applicants from their obligations.

12. In addition, it is contended that the Applicants have not satisfied the threshold for the grant of stay of execution under Order 42 Rule 6(2) of the Civil Procedure Rules, having failed to demonstrate

substantial loss, promptitude in bringing the application, and provision of security for the due performance of the decree.

Finally, the Respondent invokes the equitable principle that equity aids the vigilant and not the indolent, and asserts that the application is frivolous, vexatious, and lacking in merit, and ought to be dismissed with costs.

13. This Court directed that the application be canvassed by way of written submissions. The learned counsel for the Applicants filed their submissions dated 30th September 2025, identified two issues for determination: whether they have satisfied the conditions for grant of stay of execution, and whether they should be granted leave to appeal out of time.

On the question of stay, counsel submitted that the applicable principles are set out under Order 42 Rule 6(2) of the Civil Procedure Rules, namely that an applicant must demonstrate substantial loss, that the application has been brought without unreasonable delay, and that security for the due performance of the decree has been provided. Counsel placed reliance on the decision of the Court of Appeal in the case of Butt versus Rent Restriction Tribunal (1982) KLR 417.

14. On substantial loss, it was submitted that the Tribunal issued orders of a mandatory and injunctive nature which, if executed, would effectively determine the dispute before the Applicants are heard on appeal. Counsel argued that the effect of the orders is to dispossess the Applicants and disrupt their operations, thereby rendering the intended appeal nugatory.

Reliance was placed on Kenya Shell Ltd versus Benjamin Karuga Kibiru & Another (1986) KLR 410, where the Court emphasized that substantial loss is the cornerstone of the jurisdiction. Counsel submitted that in the present case, substantial loss arises not merely from the monetary component of Kshs.750,000/=, but from the practical effect of the orders which restrict access to the premises and interfere with the Applicants' business.

15. On the question of delay, counsel submitted that the application was brought timeously. It was argued that the Applicants only became aware of the ruling on 5th August 2025 and moved the Court promptly thereafter, demonstrating diligence in protecting their right of appeal.

Counsel further submitted that the Applicants are willing to abide by any conditions as to security that the Court may impose. Turning to the question of leave to appeal out of time, counsel relied on Section 79G of the *Civil Procedure Act* and submitted that the Court has discretion to admit an appeal out of time where sufficient cause is shown.

Reliance was placed on Leo Sila Mutiso versus Rose Hellen Wangari Mwangi (1999) 2 EA 231, where the Court of Appeal stated that:

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary... the matters... are the length of the delay, the reason for the delay, the chances of the appeal succeeding, and the degree of prejudice..."

Counsel also cited the case of Nicholas Kiptoo Arap Korir Salat versus IEBC & 7 Others [2014] eKLR, submitting that the Court should exercise its discretion in a manner that advances substantive justice.

16. It was further submitted that the intended appeal is arguable and raises serious questions, particularly on the jurisdiction of the Tribunal, which go to the root of the dispute.

Counsel relied on Stanley Kang'ethe Kinyanjui versus Tony Ketter & 5 Others [2013] eKLR for the proposition that an arguable appeal need not necessarily succeed but must raise bona fide issues for determination.

Counsel also invoked Articles 47 and 50 of the *Constitution*, submitting that the Applicants were denied a fair hearing and that the impugned orders were issued in breach of their right to be heard. In that regard, reliance was placed on Onyango Oloo versus Attorney General (1986–1989) EA 456 (CAK).

Finally, counsel urged the Court to be guided by Article 159(2)(d) of the *Constitution* and to allow the application so as to enable the dispute to be determined on merit.

17. The learned counsel for the Respondent filed their submissions dated 21st November 2025 and identified four issues for determination, including whether the application is premature, whether the Applicants have satisfied the conditions for stay, whether leave to appeal out of time should be granted, and costs.

On the question of prematurity, counsel submitted that the application is fundamentally defective as it was filed before the lapse of the statutory period for filing an appeal. It was argued that under Section 79G of the *Civil Procedure Act* and Section 15 of Cap 301, the Applicants had thirty (30) days to appeal, and that the present application was filed nine (9) days before expiry of that period.

Counsel relied on the case of Nicholas Kiptoo Arap Korir Salat versus IEBC & 7 Others [2014] eKLR, where the Supreme Court stated:

> " Extension of time is not a right of a party... a party must lay a basis to the satisfaction of the Court."

And submitted that a party cannot seek extension of time for an act they are still legally permitted to perform, and that the application is therefore premature and an abuse of the court process.

18. On the question of stay, counsel submitted that the Applicants have failed to satisfy the requirements under Order 42 Rule 6(2) of the Civil Procedure Rules.

On substantial loss, reliance was placed on Kenya Shell Ltd versus Benjamin Karuga Kibiru & Another (1986) KLR 410, where the Court held that in monetary decrees, an applicant must demonstrate that the respondent would be unable to refund the decretal sum.

Counsel submitted that the order requiring payment of Kshs.750,000/= is purely monetary, and that the Applicants have neither alleged nor demonstrated that the Respondent is incapable of refunding the sum. In the absence of such evidence, it was argued, no substantial loss has been established.

On delay, counsel maintained that the application is either premature or indicative of indolence, as the Applicants failed to file an appeal within time and only approached the Court after enforcement proceedings had been initiated.

On security, it was submitted that the Applicants have not offered any concrete security, and that a mere expression of willingness is insufficient to meet the threshold under Order 42 Rule 6 of Civil Procedure Rules.

19. Turning to the question of leave to appeal out of time, counsel submitted that even if the Court were to overlook the prematurity of the application, the Applicants have not demonstrated sufficient cause.

Reliance was placed on Leo Sila Mutiso versus Rose Hellen Wangari Mwangi (1999) 2 EA 231, as well as Fahim Yasin Twaha versus Timamy Issa Abdalla & 2 Others [2015] eKLR, where it was emphasized that indolence or negligence does not constitute sufficient cause.

Counsel further submitted that the intended appeal is not arguable, as the issue of jurisdiction had already been determined by the Tribunal in its ruling of 22nd May 2025, which has not been appealed.

It was argued that the Applicants are attempting to re-litigate matters that are already settled. Finally, counsel urged that costs follow the event under Section 27 of the *Civil Procedure Act* and prayed that the application be dismissed with costs.

20. The following are the main issues arising from the application for the court's determinations:

    i. Whether the application for leave to appeal out of time is competent;

    ii. Whether the Applicants have satisfied the conditions for grant of stay of execution.

    iii. Who pays the costs?

21. The court has carefully considered the ground on the application, grounds of opposition, affidavit evidence, submissions by the learned counsel, superior court decisions cited and come to the following findings:

    i. On whether the application for leave to appeal out of time is competent, I refer to Section 79G of the *Civil Procedure Act* which provides that:

> " Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
>
> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

    Section 15(1) of the Landlord and Tenant (Shops, Hotel and Catering Establishments) Cap 301 provides for 30 days for appeals from the decision of the Tribunal.

    ii. The principles governing extension of time are well settled. The Court of Appeal in the case of Thuita Mwangi versus Kenya Airways Ltd [2003] eKLR had this to say:

> " Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in Leo Sila Mutiso versus Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus: "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted."

    The above principles were also restated by the Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others [2014] eKLR where the court referred to the Court of Appeal decision in Paul Wanjohi Mathenge

versus Duncan Gichane Mathenge [2013] eKLR the Court laid out the principles to be satisfied in the following terms:

> " .... I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance"

iii. In the present case, the impugned ruling was delivered on 17th July 2025. The application was filed on 7th August 2025, which was within the statutory 30-day period. That finding is dispositive. There was no delay requiring extension of time. The application for leave to appeal out of time is therefore premature and, strictly speaking, misconceived.

iv. However, the Court is enjoined under Article 159(2)(d) of the *Constitution* to administer justice without undue regard to procedural technicalities. The Applicants have demonstrated a clear intention to appeal and have annexed a draft Memorandum of Appeal.

In the circumstances, and in order to facilitate the right of appeal, the Court will regularize the process rather than shut it out.

v. On whether the Applicants have satisfied the conditions for grant of stay of execution, the applicable principles are set out under Order 42 Rule 6(2) of the Civil Procedure Rules. An applicant must satisfy the Court that:

1. Substantial loss may result unless the order is made;
2. The application has been made without unreasonable delay;
3. Security for the due performance of the decree has been given.

On delay, the application was filed within a short period after the impugned ruling. I find no unreasonable delay. On substantial loss, the decretal order includes a monetary component of Kshs.750,000/=. The Applicants have not demonstrated that the Respondent would be unable to refund the sum.

vi. In the case of Century Oil Trading Company Ltd versus Kenya Shell Ltd, Milimani HCMCA No. 1561 of 2007, the High court explained that;

> " Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes when, it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory, and the interest of the respondent who is seeking to enjoy the fruits of his judgement."

Further, in the case of Antoine Ndiaye versus African Virtual University (2015) eKLR, the High court held that;

> " Therefore, in a money decree like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters

not the amount involved as long as the Respondent cannot pay back. The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant, follows after the long age legal adage that he who alleges must prove. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed."

The court has noted that the impugned orders also include injunctive relief restraining access to the premises. These orders affect possession and the Applicants' operations and may alter the substratum of the dispute before the appeal is heard. In the case of Kenya Shell Ltd versus Benjamin Karuga Kibiru & Another (1986) KLR 410, the Court of Appeal stated:

> " Substantial loss is what has to be prevented... If there is no evidence of substantial loss... it would be a rare case where an appeal would be rendered nugatory."

In those circumstances, the Court is persuaded that preservation of the status quo is necessary to avoid rendering the intended appeal nugatory.

On security, the Applicants have expressed willingness to provide security. Given the nature of the Tribunal's order, a deposit of Kshs. 750,000/= would constitutes appropriate security for the due performance of the decree.

vii. Under Section 27 of the *Civil Procedure Act* Chapter 21 of Laws of Kenya, costs follow the events unless otherwise ordered by the court for good reasons. In this instance, I find it fair and just to order that costs abide the outcome of the appeal notwithstanding that the applicants are successful in the application.

22. In view of the foregoing determinations on the notice of motion dated the 7th August 2025, the court finds and orders as follows:

i. That prayer (3) for leave to file the appeal against the orders of 17th July 2025, was premature as the statutory time for lodging an appeal had not lapsed by the time of filing the application.

ii. That as the time has now lapsed, the court hereby extends the time for the applicants to file and serve an appeal out of time within the next fourteen (14) days from today.

iii. That conditional stay of execution is issued staying the execution of the orders of 17th July 2025 issued in BPRT No. E014 OF 2025, pending the hearing and determination of the intended appeal.

iv. That the stay order is issued on condition that the applicants deposits a sum of Kshs. 750,000/= [seven hundred thousand fifty], in an interest-earning bank account in the joint names of the parties' counsel, or with the court within thirty (30) days from today, and in default the stay order to lapse automatically.

v. The costs to abide the outcome of the intended appeal.

It is so ordered.

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

S. M. KIBUNJA

ELC JUDGE

In the presence of:

Applicants – Mr. Bosire

Respondent - Mr. Quctivi

Mohammed - Court Assistant

S. M. KIBUNJA

ELC JUDGE