



**Eldorosta Construction Co Ltd v Odera & another; Eshikhoni  
Auctioneers (Respondent) (Miscellaneous Application E544 of 2023)  
[2024] KEHC 1557 (KLR) (Commercial and Tax) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1557 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E544 OF 2023  
FG MUGAMBI, J  
FEBRUARY 16, 2024**

**BETWEEN**

**ELDOROSTA CONSTRUCTION CO LTD ..... PLAINTIFF**

**AND**

**DAVID ANANDA ODERA ..... 1<sup>ST</sup> DEFENDANT**

**DELINA ODERA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**ESHIKHONI AUCTIONEERS ..... RESPONDENT**

**RULING**

**Background**

1. The application before the court is brought under order 22 rule 22 and order 51 rule 1 of the [Civil Procedure Rules](#) as well as article 159 of the [Constitution of Kenya](#) . It seeks to have the warrants of attachment and proclamation dated October 3, 2022 issued to Eshikhoni Auctioneers, the 1<sup>st</sup> respondent's appointed agents, lifted and set aside.
2. The applicants additionally pray that this court do issue an order for the parties to take accounts of the moneys so far paid in order to determine the outstanding balance owed to the 1<sup>st</sup> respondent. Thereafter the applicants further seek leave to settle any amount found to be due and outstanding by payments of monthly instalments of Ksh. 50,000/= until payment in full.
3. They further confirm that the matter arose from an arbitral award in which the 1<sup>st</sup> respondent was awarded a sum of Ksh. 16,362,248.41. They maintain that they have paid approximately Kshs.



12,050,783/= of this amount, in several installments. It is their case that at the time of proclamation there had been negotiations and the respondents had agreed to write off the remaining balance which was made up of interest.

4. The applicants aver that the alleged proclamation is in fact a misrepresentation as the 2<sup>nd</sup> respondent did not visit their premises for purposes of proclaiming any goods and further that the decretal amount of Kshs. 20,531,214/= stated in the proclamation is excessive and exaggerated. As far as the applicants are concerned, the amount outstanding from the decree is therefore only Kshs. 4,311,465/ =.
5. The applicants acknowledge that there was a failure by their previous advocates on record to file a consent to come on record after judgment had been entered by this Court. This they term as an inadvertent error that saw their previous application struck out.
6. The application is opposed by way of a replying affidavit sworn by Daniel Andati Okwara, the Managing Director of the 1<sup>st</sup> respondent. He confirms that from the award, the applicants had paid a cumulative amount of Kshs.12,050,783/= with a balance of Kshs.4,311,465/= outstanding, which amount continues to accumulate interest since the date of the award to date. The respondents deny accepting any request from the applicants to waive any amount from the decretal amount.
7. Pursuant to the directions of this court the application was canvassed by way of written submissions. The applicants' submissions are dated September 14, 2023 and the respondents' submissions are dated September 16, 2023.

### Analysis

8. I have carefully considered the pleadings, evidence and written submissions from the rival parties. Before looking into the substance of the application, I wish to consider two preliminary issues that have been raised by the 1<sup>st</sup> respondent.
9. The first of this is whether the annexures to the applicants' affidavit should be expunged. The respondents' challenge is founded on non-compliance with rule 9 of the [Oaths and Statutory Declarations Rules](#), which mandates that all affidavit exhibits be sealed by a Commissioner for Oaths and numbered in sequence. The said rule expressly provides as follows:

“ All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.”
10. The consequence of non-compliance with this provision has been a subject of considerable judicial dialogue. The 1<sup>st</sup> respondent has referred to some of the decisions from this Court including *Bosongo Medical Hospital & another v Mainstream Welfare Association & others*, [2016] eKLR. The court in this decision stated as follows:

“ Although the point was not taken up by the plaintiffs the court has a duty to uphold the sanctity of the record noting that this is a court of record. Before the court is a replying affidavit with annexures which are neither marked nor sealed with commissioner's stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the replying affidavit incomplete and therefore the same is also for rejection as without the annexures it is valueless. This should serve as a wakeup call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to counsels or their assistants lack of attention and due diligence.”



11. The application before this Court is supported by an affidavit sworn by David Ananda Odera, the 1<sup>st</sup> applicant on 3<sup>rd</sup> July 2023. The said affidavit contains annexures marked as ‘DAO 1’ up to ‘DAO 14’. An initial examination of these attachments reveals they have not been sealed by a Commissioner for Oaths, nor have they been serialized. The requirements under rule 9 are mandatory, signified by the use of the word “shall”, highlighting the importance of these requirements.
12. Annexures play a crucial role in an affidavit as they furnish the documentary proof necessary for the Court to make its judgment. The process of sealing attachments is fundamental to ensuring the veracity and integrity of the evidence presented to the Court, making it more than just a procedural formality. The risk of the Court relying on evidence that may not be authentic or verifiable is considerably high.
13. In my view, unsealed documents are no different from arbitrary papers that could be indiscriminately incorporated into an affidavit. The meticulous preparation of evidence, including documentary evidence, is essential in all legal proceedings. Therefore, I agree with this Court’s prior rulings that such oversight is neither trivial nor easily correctable, and cannot be overlooked.
14. I would have been inclined to expunge only those annexures that have not complied with the said requirements. However, after reviewing the arguments presented by counsel for the respondents, to which counsel for the applicant’s made no rebuttal and examining the exhibits in question, I note that none of the exhibits were either serialized or sealed. Consequently, the exhibits are therefore expunged from the record.
15. The effect of this, and I do concur with the respondents is that the affidavit is left with no evidentiary anchorage on which the applicants’ counsel can prove to the court that they are first and foremost properly on record or that they are deserving of the prayers sought herein.

#### **Determination**

17. For these reasons, the application dated July 3, 2023 is struck out with costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY 2024.**

**F. MUGAMBI**

**JUDGE**

