



**Kerai Shivji t/a Meena Collection v Hillary Katui t/a Hillkatu Enterprises  
(Civil Appeal E014 of 2024) [2024] KEHC 8825 (KLR) (22 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8825 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E014 OF 2024  
RN NYAKUNDI, J  
JULY 22, 2024**

**BETWEEN**

**KERAI SHIVJI T/A MEENA COLLECTION ..... APPLICANT**

**AND**

**HILLARY KATUI T/A HILLKATU ENTERPRISES ..... RESPONDENT**

**RULING**

1. Before me for determination is a notice of motion application dated 14<sup>th</sup> May, 2024 premised to be brought under the provisions of Order 42 Rule 6, Order 51 Rule 1 and Section 1A, 1B and 3A and 63(e) of the *Civil Procedure Act*. The applicant seeks orders as follows:
  - a. Spent
  - b. That there be stay of sale of the 15 attached motorcycles by Eshikhoni Auctioneers pending the hearing and determination of this application.
  - c. That Honorable Court be pleased to cancel, set aside, recall and lift the warrants of attachments and sale herein pending the hearing and determination of this application.
  - d. That this honorable court be pleased to release the attached motorcycles to the applicant pending the hearing and determination of this application.
  - e. That the applicant be granted leave and/or enlargement of time to deposit the decretal sum of Kshs. 998,383/= vide cheque number 005353 in a joint interest earning account.
  - f. That the auctioneer's costs be provided for.
  - g. Costs of this application be provided for.
2. The application is based on grounds as captured hereunder:



3. The Small Claims court on 15<sup>th</sup> December, 2023 delivered a judgment in Small Claims Commercial case no. E809 of 2023 in favor of the Respondent.
4. The Applicant/Appellant upon being aggrieved by the said judgment filed a Memorandum of Appeal against the whole judgment.
5. Further the Respondent proceeded to place the wheels of execution in progress before the lapse of the 30 days stay of execution period granted by the Court.  
  
As a result of this, the applicant/appellant filed an application for stay of execution dated 23.1.2024 and subsequently a ruling was delivered on the 5.04.2024 whereby the court ordered the applicant to deposit the decretal sum of Kshs. 998,383/= within 30 days in a joint interest account.
6. However, the applicant/appellant did not manage to deposit the decretal sum in a joint interest account in good time due to the fact that the applicant travelled for business and only arrived on the 8<sup>th</sup> of May, 2024.
7. That owing to the business trip, there was a breakdown between the applicant and his counsel.
8. Upon arrival the applicant was informed of the ruling and the directions of the court but due to the limited time of the applicant was unable to raise the entire decretal sum.
9. That the applicant/appellant is committed and ready to deposit the entire decretal sum in a joint interest earning account and as a proof of the same, he has already drawn a cheque number 005353 of Kshs. 998,383/= awaiting the opening of the joint account.
10. That the auctioneer irregularly and maliciously attached the motor cycles without providing the actual and correct market price despite the goods being new and unused.
11. That the applicant would suffer irreparable loss and damage if the attached motorcycles are sold by way of public auction due to the fact that the Auctioneer issued an irregular and malicious certificate of sale form, whereby the prices of the motorcycles were underquoted and chassis or numbers unlisted.
12. That the applicant engages in the business of selling new and imported motorcycles.
13. That the attached motorcycles were new and without registration numbers hence the quoted prices were way below the market price and therefore the attachment was malicious.
14. In response to the application, the Respondent swore a replying affidavit dated 11<sup>th</sup> June, 2024. In it, the Respondent deposed that the application dated 14<sup>th</sup> May, 2024 is an abuse of the Court Process as the applicant had moved the Small Claims court in SCCOMM No. E809 of 2023 vide an application dated 5<sup>th</sup> June, 2024 seeking similar orders.
15. The Respondent averred that that this court granted the applicant interim orders on 20.5.2024 similar to the ones issued by the SCCOMM No. E809 of 2023 on 6.6.2024 hence causing embarrassment to the justice system.
16. That the application dated 14<sup>th</sup> May, 2024 has been fixed for hearing on 14<sup>th</sup> June, 2024 while the current application in the Small Claims Court SCCOMM No. E809 of 2023 dated 5<sup>th</sup> June, 2024 has been fixed for mention on 13<sup>th</sup> June, 2024.
17. The Respondent further averred that the applicant has thus come before this Honorable Court with unclean hands for non-disclosure of material facts hence not deserving the orders sought.



18. That this court cannot therefore entertain the present application as there is a similar one pending before the Small Claims Court.
19. Besides the Replying Affidavit, the Respondent also filed a Notice of Preliminary Objection dated 20<sup>th</sup> May, 2024 highlighting that the application is in contravention of Section 80 of the Civil Procedure Act. Further that the application is in contravention of Order 45 Rule 1 and 2 of the Civil Procedure Rules and as such the application is bad in law.

**Determination.**

20. I have read through the application, the response by way of a replying affidavit with a corresponding Preliminary objection.

The primary issue here is whether the court is clothed with jurisdiction to grant the reliefs in the Notice of Motion application dated 14<sup>th</sup> May, 2024, which essentially is on stay of sale of the attached motorcycles as supported by the annex inventory under paragraph 12 of the application. On the other hand there are attendant orders arising out of the proceedings and rulings in the Small Claims Court Commercial case no. E809 of 2023

21. At a glance from the affidavit filed, it is apparent that the parties are still litigating before the subordinate court on similar issues. This contention by the Respondent in his replying affidavit dated 11<sup>th</sup> June, 2024 has not been controverted by the applicant by way of further supplementary affidavit or any other such evidence for this court to be ceased of jurisdiction as an appellate court.
22. This to me is an issue which can be clearly settled by the principles in the case of R vs Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National super Alliance (NASA) Kenya and 6 Others (2017) eKLR where the court held: “Where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed. According, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
23. Ordinarily, an appellate court does not give consideration to the issues raised below and yet to be fully and conclusively determined. For our procedural scheme contemplate that parties shall come to an appeals forum on matters of facts and law which any one of them takes the view that they were not appropriately, legally, regularly or correctly addressed by the subordinate court. This is essential in order for the parties to exercise the constitutional right of appeal or review on issues which the trial court or tribunal has already determined in the interlocutory stage or with finality by pronouncing the decision on the merits. It is imperative that the primary forum of conveniens be granted leave to exhaust the decision making process as stipulated in the constitution and statute law.
24. The basic reasons which support this general principle applicable to trial courts make it equally desirable that litigants should have an opportunity to offer the best evidence on the general issues involved in the less formal proceedings before a small claims court which is entrusted with the responsibility of fact finding. Simple fairness to those who are engaged in the tasks of adjudication before the small claims court requires as a general rule that an appeals court sitting on appeal or review should not topple over inferior tribunal decisions unless it is shown that a tribunal not only has erred but as erred against the objections made at the time appropriately exercising jurisdiction under Art 50(1) of the Constitution.
25. For example, my reading from the rival affidavits, the small claims court so ruled on some issues which have found its way to this court, not on appeal but on review jurisdiction under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. It is also correct to state from the



appreciation of the record that the Small Claims Court is yet to determine a cluster of other issues on the same subject matter to its final conclusion.

26. It is crystal clear that the applicant has invoked the jurisdiction of this court without taking into account the principle purpose of the exhaustion doctrine. This purpose is advanced so long as the contentions and exception raised on review have been in fact effectively and meaningfully raised before the inferior tribunal to be more precise the Small Claims Court. where the parties to a litigation are expected to develop the issues in an adversarial adjudication proceedings the rationale for requiring issue exhaustion is at its highest. In other words, the strongest case for imposing an exhaustion requirement exist where the tribunal proceedings closely resemble those raised before a superior court on review under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. What is not properly before me despite the applicant's argument to the contrary is for this court being invited to exercise jurisdiction under Art 165(6) and (7) of the Constitution as correspondingly read with Section 80 of the CPA and Order 45 of the CPR.
27. As observed above the exhaustion doctrine serves the purpose of ensuring there is a postponement of judicial consideration of matters to ensure that a party or litigant exhausts his/her primary duty to litigate the subject matter before the first forum of conveniens. (See Owners of Motor Vessel Lillian S. V Caltex Oil Kenya Limited (1989) KLR, Adero & another versus Ulinzi Sacco Society Ltd (2002) 1KLR 577 and Kakuta Maimai Hamisi v. Peris Pesi Tobiko & 2 others (2013) eKLR.)
28. Given the strength of the principles enunciated in the above authorities, the threshold of materiality evidence as deposed by the applicant points sufficiently towards a party who is desirous to override the general rule of exhaustion. The application unfortunately, if allowed to proceed before this court will unduly subject these proceedings to potential confusion likely to occasion prejudice and injustice to either of the parties. It is reflective of the applicant to have first agitated and paid significant attention to the exhaustion principle. That is, the contemplation of the doctrine that a party relinquishes the inferior tribunal's jurisdiction before invoking a superior court's jurisdiction to determine the merits of the impugned decision. In adherence to the law, the application dated 14<sup>th</sup> May, 2024 has shaped fails for reasons of failure for the applicant to comply with the orderly procedure and the requirements of comity in seeking the various reliefs in the motion.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 22<sup>ND</sup> DAY OF JULY 2024**

In the Presence of

Mr. Mukabane & Co. Advocates

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**R. NYAKUNDI**

**JUDGE**

