



Kipchirchir v Eshikoni Auctioneers & 2 others (Miscellaneous Civil Application E097 of 2024) [2024] KEHC 9169 (KLR) (22 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CIVIL APPLICATION E097 OF 2024
RN NYAKUNDI, J
JULY 22, 2024**

BETWEEN

ELIJAH KIPCHIRCHIR APPLICANT

AND

ESHIKONI AUCTIONEERS 1ST RESPONDENT

MANANI LILAN MWETICH & CO ADVOCATES 2ND RESPONDENT

DONALD C CHEPCHIENG 3RD RESPONDENT

RULING

1. I have before me for determination a notice of motion application dated 29th February, 2024 premised to be brought under the provisions of Section 1, 1A, 3A & 79A of the *Civil Procedure Act*, Order 51 of the *Civil Procedure Rules* Article 165 (6) of the *Constitution*, 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 the Honorable Court be pleased to issue a declaration that the judgment entered in Eldoret Small Claims Court No E213 of 2023 Donald C. Chepchieng V. Elijah Kipchirchir was unlawful, unenforceable, irregular and null and void ab initio for want of jurisdiction of the issuing court.
 - c. Further the honorable court be pleased to issue a declaration that the decree and any other consequential orders and the execution emanating from the aforementioned judgment entered in Eldoret Small Claims Court E213 of 2023 Donald C. Chepchieng versus Elijah Kipchirchir was unlawful, unenforceable, irregular and null and void ab initio for want of jurisdiction of the issuing court.



- d. That the Honourable court be pleased to issue an order directing the Respondents herein jointly and/or individually to refund the applicant herein the sum of Kshs 244,000/= being the unlawful Decretal sum emanating from the impugned judgment of the court in Eldoret Small Claims Court No E213 of 2023 Donald C. Chepchieng versus Elijah Kipchirchir.
 - e. Costs be provided for.
2. The application anchored on the following grounds:
- a. That the 3rd Respondent herein, the claimant in Eldoret Small Claims Court No E213 of 2023 Donald C. Chepchieng versus Elijah Kipchirchir instituted a claim against the applicant herein for alleged rent arrears and an ex-parte judgment was entered.
 - b. That the applicant herein filed an application to set aside the aforementioned ex-parte judgment which was allowed and the case was set down for hearing.
 - c. That the aforementioned 3rd Respondent herein and/or his advocates on record, using the said impugned ex-parte judgment, issued instructions to auctioneers to execute against the applicant herein and they proceeded to do so and recovered Kshs 244,000/= from the Respondent.
 - d. That subsequently the applicant herein paid a sum of Kshs 244,000/= as well as auctioneer's fees of Kshs 21,000/=.
 - e. That subsequently that Honourable Court suo moto vide its ruling dated 7.11.2023 declared that it lacked jurisdiction to hear and determine that matter since it revolved around a land matter on enforcement of rent arrears and the matter was struck out for want of jurisdiction.
 - f. That in the circumstances, the execution premised on the impugned ex-parte judgment became a nullity upon the suit being struck out given that any order or judgment issued by a court without the requisite jurisdiction is null and void ab initio and lacks the force of law.
 - g. That in the circumstances it is manifestly clear that the Respondents herein, either individually or jointly, ought to refund the amount paid by the Applicant herein since they acted on a judgment and decree that lacked the force of law yet in that matter the Honorable Court lacked jurisdiction to issue any orders.
 - h. That should the Respondents be allowed to remain with the said money it would amount to unjust enrichment on their part.
 - i. That in the circumstances it would only be right, fair and just that the Respondents be ordered to refund the said amount of Kshs 244,000/= to the applicant herein plus costs of this application.
3. From the record, the Respondent have not filed their response, implying that the application is unopposed. Nonetheless I shall to interrogate the application and determine its correctness.

Determination

4. The instant application invites this court to invoke the Supervisory jurisdiction of the Court under Section 165 (6) of the *Constitution* of Kenya. The basis for invoking the jurisdiction of the court is that the circumstances of the case are of an execution premised on an impugned ex-parte judgment, which became a nullity upon the suit being struck out for the lower court's lack of jurisdiction.



5. In *Alice Sisina v Land Registrar Kajiado & another* [2015] eKLR the court states as follows:

“ 13. In exercising inherent supervisory powers under Article 165 (6) and (7) of the *Constitution*. The proceedings and orders granted cannot be allowed to stand the test of legality and propriety. There is therefore constitutional and statutory necessity to set aside the orders against the respondent.”

6. The power of superintendence conferred by Article 165 (6), as pointed out by Harries, C.J. in *Dalmia Jain Airways Ltd. v Sukumar Mukherjee* AIR 1951 Cal.193 is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of the *Constitution* to interfere (see *D.N. Banerji v P.R Mukherji* 1953 S.C 58).
7. This court has been urged to allow the instant application as prayed given that it is duty bound not to entertain or allow an illegality to remain uncorrected and unchecked where such an illegality offends salient provisions of the law. As rightly noted in the *D.N. Banerji (supra)* case, the duty on this Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner.
8. Having appreciated the circumstances of the instant case, I am of the considered view that upon the lower court in making a determination that it had no jurisdiction to handle the case, it properly downed its tools in consonant with the principles in the *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR.
9. Consequently, the judgment and order of the small claims court was unlawful, unenforceable, irregular, null and void *ab initio* for want of jurisdiction. The modified effect is that the applicant is entitled for a declaration that the decretal sum paid out of a defective judgment is absolutely recoverable from the Respondents jointly and severally with costs.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 22ND DAY OF JULY 2024

In the Presence of

Mr. Songok & Company Advocates

Manani Lilan & Co. Advocates

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R. NYAKUNDI

JUDGE

