



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Revenue Authority v Hemed & another (Civil Appeal (Application)  
34 of 2008) [2023] KECA 453 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KECA 453 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 34 OF 2008  
DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA  
APRIL 20, 2023**

**BETWEEN**

**KENYA REVENUE AUTHORITY ..... APPLICANT**

**AND**

**HABIMANA SUED HEMED ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for stay of execution of the Judgment and Decree  
of the Court of Appeal at Nairobi (W. Karanja, P. M. Mwilu & F.  
Azangalala, JJ.A.) delivered on 31st July 2015 in Civil Appeal No. 34 of 2018)*

**RULING**

1. On 31<sup>st</sup> July 2015, this Court (W. Karanja, P. M. Mwilu & F. Azangalala, JJ.A.) delivered its judgment on appeal from the judgment and decree of the High Court of Kenya at Nairobi (Osiero, J.) delivered on 27<sup>th</sup> February 2006 in HCCC No. 364 of 2001. Dismissing the applicant's appeal, the Court ordered the applicant to pay to the 1<sup>st</sup> respondent the following:

- “ 1 US\$ 60,000 per month or its equivalent in Kenya shillings with an exchange rate for the dollar to the shilling as per the date of the judgment of the High Court calculated from the 28th October 1998 to August 2002 when the trucks were released;
2. The award of 5,000,000 is left undisturbed given that the 1st respondent had not claimed any punitive or exemplary damages, which would have been merited given the circumstances surrounding this matter.
3. Order 1 shall attract interest at 18% from the date of filing the suit till payment in full;



4. Order 2, to attract the same interest of 18% with effect from the date of judgment of the High Court, until payment in full.
  5. The appellant will pay the 1st Respondent 70% of the costs of this appeal and before the High Court.
  6. The appeal against the 2nd Respondent is dismissed in its entirety with costs to the 2nd Respondent.”
2. It is noteworthy that no review of the judgment and orders of this Court is hereby sought, and neither are they the subject of any application for leave or certification to appeal to the Supreme Court. Put differently, the Court’s judgment and orders aforesaid remain unchallenged.
  3. Notwithstanding the foregoing, the 1<sup>st</sup> applicant, Kenya Revenue Authority(KRA), moved this Court on notice vide its application dated 2<sup>nd</sup> November 2021 pursuant to rules 47, 48 and 53 of the Court of Appeal Rules, 2010 praying for orders directing , inter alia: that there be stay of this Court’s judgment delivered on 31<sup>st</sup> July 2015; that there be stay of accrual of interest on the decretal sum pursuant to the judgment aforesaid; that there be stay of accrual of further interest on the decretal amount pending conclusion of investigations by the Directorate of Criminal Investigations into the alleged fraudulent disbursements of the amounts awarded in the appeal; that there be stay of further payment of the amounts awarded to the respondent pending conclusion of the investigations aforesaid; that the DCI do fast-track the investigations and submit a complete report on the suspected fraudulent claim made by the respondent; and that costs of the application be provided for.
  2. The 1<sup>st</sup> applicant’s Motion is supported by the annexed affidavits of Twahir Alwi Mohamed, an advocate and the in-house counsel for the 1<sup>st</sup> applicant, and IP Catherine Kiome, a crime investigator at the DCI (with the authority and on behalf of the 2<sup>nd</sup> applicant), both sworn on 2<sup>nd</sup> November 2021. The Motion is also anchored on a whopping 24 grounds, to which we need not address ourselves presently.
  3. In support of the 1<sup>st</sup> applicant’s Motion, learned counsel for the 1<sup>st</sup> applicant, Mr. George Ochieng, filed written submissions dated 15<sup>th</sup> November 2021 citing 10 judicial authorities generally upholding the inherent power of this Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court pursuant to rule 1(2) of the Rules of this Court. In further support, the 2<sup>nd</sup> applicant filed written submissions dated 26<sup>th</sup> November 2021 highlighting one judicial authority on the principle that public resources should be safeguarded by all institutions, including courts. They urged us to allow the Motion.
  4. The applicants’ Motion is opposed vide the replying affidavit of David Kariuki Muigua, learned counsel for the 1<sup>st</sup> respondent (Habimana Sued Hemed), sworn on 22<sup>nd</sup> November 2021. In addition, the 1<sup>st</sup> respondent swore a further affidavit on 10<sup>th</sup> March 2023. In our view, no useful purpose would be served by replicating the narrative in those affidavits in this Ruling.
  5. In addition to the two affidavits, learned counsel for the 1<sup>st</sup> respondent filed two sets of written submissions dated 22<sup>nd</sup> and 29<sup>th</sup> November 2021 setting out the factual background of the matters leading to the Motion before us. According to learned counsel, the 1<sup>st</sup> applicant’s Motion is moot because it is not an appeal. They contend that the orders sought by the applicants are conservatory in nature, seeking to interfere with a final judgment of the Court; that such orders can only be granted where there exists a substantive appeal or intended appeal before this Court or other superior court, which is not the case here; and that, therefore, this Court has no jurisdiction to grant the orders sought. Counsel urged us to dismiss the Motion with costs.



6. The decisive question is whether the 1<sup>st</sup> applicant’s Motion is properly before this Court; and whether this Court has jurisdiction to entertain applications of the nature presented by the 1<sup>st</sup> applicant. We hasten to observe that the appellate jurisdiction of this Court is as conferred by Article 164(3) of *the Constitution*. That jurisdiction is exercised in accordance with sections 3, 3A and 3B of the *Appellate Jurisdiction Act* (Cap. 9) and the *Court of Appeal Rules*. To our mind, none of these provisions are invoked in the Motion, and neither is it made pursuant to rule 42, which governs certification or leave to appeal to the Supreme Court. In effect, the applicants have failed to demonstrate the basis on which this Court is moved. Moreover, having delivered its judgment and orders aforementioned, this Court remains functus officio, and has no jurisdiction to entertain the 1<sup>st</sup> applicant’s Motion.
7. On the authority of the Supreme Court decision in *Samuel Kamau Macharia & Another Vs. Kenya Commercial Bank Limited & 2 Others*, [2012] eKLR, the general rule is that a court can only exercise that jurisdiction that has been conferred upon it by either *the Constitution* or legislation, or by both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Jurisdiction is, in the end, everything, since it goes to the very heart of a dispute. Without it, the court cannot entertain any proceedings, and must down its tools (See *The Owners of the Motor Vessel Lilian ‘S’ vs. Caltex Kenya Limited* (1989) KLR 1).
8. In the same vein, this Court in *Adero & Another Vs. Ulinzi Sacco Society Limited* [2002] 1 KLR 577, sufficiently summarised the law on jurisdiction as follows:

- “ 1. ... ..
2. The jurisdiction either exists or does not ab initio and the non constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.
3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.
5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.
6. ....
- 7 ” (Our emphasis).

9. We have time and again stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings, and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:

“ ... at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself - provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard” (See *All Progressive Grand Alliance (APGA) vs. Senator Christiana N.D. Anyanwu & 2 others*, LER [2014] SC. 20/2013 Supreme Court of Nigeria). We agree with these authorities and hold that the question of jurisdiction was



properly raised before this Court because, as they say in Latin, ex nihilo nihil fit (out of nothing comes nothing).”

10. The orders sought in the 1<sup>st</sup> applicant’s Motion amount to a plea for administrative intervention that goes beyond the Court’s jurisdiction. The orders are neither sought on appeal from a lower court nor on application for review of the Court’s own decision. Such orders cannot, by any stretch of imagination, fall within the scope of rules 5(2) (b) or 42 of the *Rules* of this Court. In view of the foregoing, we find that the 1<sup>st</sup> applicant’s Notice of Motion dated 2<sup>nd</sup> November 2021 is incompetent and is hereby struck out with costs to the 1<sup>st</sup> respondent.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF APRIL, 2023.**

**D. K. MUSINGA (P)**

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**JUDGE OF APPEAL**

**H. OMONDI**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

