



**General Salvation Army Registered Trustees (Western Kenya Territory) v Onyango & 3 others (Civil Appeal E176 of 2024) [2025] KEHC 1089 (KLR) (31 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 1089 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E176 OF 2024  
SM MOHOCHI, J  
JANUARY 31, 2025**

**BETWEEN**

**GENERAL SALVATION ARMY REGISTERED TRUSTEES (WESTERN KENYA TERRITORY) ..... APPLICANT**

**AND**

**PHILLIP ODHIAMBO ONYANGO ..... 1<sup>ST</sup> RESPONDENT  
THE SALVATION ARMY ..... 2<sup>ND</sup> RESPONDENT  
FANUEL MARUBE SORE ..... 3<sup>RD</sup> RESPONDENT  
GENERAL SALVATION ARMY REGISTERED TRUSTEES (KENYA EAST TERRITORY) ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. This weaponized litigation emanates from a small claim where such matters are not anticipated for appeals. In this instance the Applicant is clearly on a backfoot there being a valid default judgment that was set aside upon conditions which the Applicant contends are unfair and in this regard a condition that a motor vehicle already attached be detained pending hearing of the case inter-partes and an order of kshs 30,000/- throw away costs awarded to the 1<sup>st</sup> respondent.
2. Without satisfying the conditions granted by the adjudicator then the judgment entered ex-parte is automatically restored.
3. The Applicant preferred a Post-Judgment Appeal against ruling by filing a Memorandum of Appeal dated 9<sup>th</sup> August 2024. This was in being aggrieved that the learned Adjudicator in allowing an unopposed application dated 31<sup>st</sup> May 2024, to set-aside an ex-parte judgment dated 25<sup>th</sup> January 2024 and imposed conditions to be met, including;



- a. All parties shall have leave to file their various defences out of time.
  - b. The matter shall be mentioned for pretrial direction on the 15<sup>th</sup> August 2024.
  - c. The Applicants shall jointly and severally pay the Claimant/Respondent throw away costs of Kshs 30,000/- before the next mention date failure to which judgement shall be re-instated.
  - d. Since Motor Vehicle registration number KBV 505U is contested by both the Objector and the Interested Party, the status quo shall obtain pending the hearing and determination of the claim.
  - e. In default judgment shall be reinstated.
4. Before me are two Notice of Motion Applications one dated 13<sup>th</sup> August 2024 and the one dated 17<sup>th</sup> September 2024, the Applicant is seeking the following unspent reliefs;
- a. That this Honourable Court be pleased to grant an Ex-Parte Order of Stay of Execution of the whole Ruling delivered by Hon. Oboye in Nakuru SCCC No E700 of 2023 on the 31<sup>st</sup> July 2024.
  - b. That this Honourable Court be pleased to grant an Ex-Parte Order for the Unconditional release of Motor Vehicle KBV 505U, from the custody of Betabase Auctioneers pending the hearing and determination of the Appeal.
  - c. That this Honourable Court be pleased to grant an Order that the Decretal Sum be deposited by the Applicant in a joint interest earning account pending the hearing and determination of the Appeal.
  - d. That costs of this Application be provided for.
- The two motions were consolidated on the 16<sup>th</sup> September 2024 now constituting the substantive reliefs sought in (a),(b) and (c) above.

### **Applicant's Case**

5. It was the Applicant's case that, the Trial Court delivered a Rulling in Nakuru Small Claims Court Case Number SCCCMM No. 700 of 2023 on 31<sup>st</sup> July 2024 wherein the Adjudicator, Hon. Oboye granted conditional leave to the Appellant to file its defence out of time.
6. That, one of the conditions was that, Motor Vehicle KBV 505U remains in the custody of Betabase Auctioneers pending the hearing and determination of the main suit.
7. That, the Motor Vehicle KBV 505U does not form part of the subject matter of the suit pending before the Small Claims Court.
8. The Appellant was never served with the notice of judgment neither was it ever served with the decree save for the warrants of attachment and sale.
9. That, this fact notwithstanding, the Adjudicator proceeded and ordered the same to remain in the custody of Betabase Auctioneers thereby pre-empting his own judgment and punishing the Appellant without being heard.
10. That, the continued withholding of Motor Vehicle KBV 505U attracts costs and auctioneer fees consequent to which the entire litigation becomes costly and unjust. Further, the vehicle is on the



verge of serious depreciation in value and is wasting away following the continuous withholding at the auctioneer's yard.

11. That, this particular condition as given by the Adjudicator is unjust and unfair as it is an apparent breach of the right to fair hearing as protected under Article 50 of *the Constitution* of Kenya 2010 thereby condemning the Appellant unheard.
12. That, the release of the Motor Vehicle KBV 505U does not affect any of the parties in the suit pending before the Small Claims Court as it was unlawfully obtained by the 1<sup>st</sup> Respondent's auctioneers in a bid to satisfy an interlocutory judgment which has already been set-aside.
13. That, the Appellant is willing to deposit the decretal sum Kenya Shillings Two Hundred and Sixty-Four Thousand, Five Hundred and Eighty-Seven (Kshs.264,587/=) in a joint interest-earning account in order to secure the release of the Motor Vehicle KBV 505U.
14. That, the Adjudicator directed that failure to comply with the conditions in the Appeal shall culminate in the reinstatement of the impugned Interlocutory judgement.
15. That, the Adjudicator ordered the payment of throw-away costs of Kenya Shillings Thirty Thousand (Kshs.30,000) by the Appellant, the 2<sup>nd</sup> and 4<sup>th</sup> Respondents to the 1<sup>st</sup> Respondent.
16. That, all the conditions as given by the Adjudicator are unjust and unfair as they are an apparent breach of the right to fair hearing as protected under Article 50 of *the Constitution* of Kenya 2010 thereby condemning the Appellant unheard.
17. That, it is for the reasons above that, the Appellant has preferred an appeal against the whole Ruling having filed a Memorandum of Appeal.
18. That, the matter before the Small Claims Court is scheduled for pre-trial directions on 15<sup>th</sup> August 2024.
19. That, unless this application is heard and ex parte orders prayed for issued and determined expeditiously, the Appellant is apprehensive to suffer irreparable harm as the Appellant shall be subjected to an exercise of unfair hearing which highly prejudices the Appellant as it will be condemned unheard.
20. The Applicant laments of the conditional leave setting aside the impugned judgement and the self-trigger inbuilt mechanism to automatically reinstate the ex-parte judgment should the Applicant fail or default in fulfill all the conditions set and that unless the Court grants stay of proceedings in the Small Claims Court, there is a high likelihood that the condition to reinstate the impugned judgement shall be actualized by the learned Adjudicator, ultimately rendering the Appellant's Appeal nugatory and a mere academic exercise.
21. Reliance is placed on the considerations for grant of stay as elaborated in the case of William T. Abira & 12 others v Kenya Civil Aviation Authority [2016] eKLR reiterating the guidelines in Butt Vs. Rent Restriction Tribunal [1982]
22. That Appellant shall suffer irreparable harm if this Court does not grant the order staying execution of the Ruling delivered in the Small Claims Court on 31 July 2024 by Hon. Oboge.
23. The Appellant submits that, the impounded motor vehicle KBV 505U was attached in execution of an ex-parte judgment already set-aside and there is no basis for continued withholding of the said motor vehicle which continues to accumulate storage charges at the expense of the Appellant making the cost of litigation very expensive by the time the matter is concluded.



24. Besides the cost implications of the continued withholding of the motor vehicle, the vehicle continues to depreciate every other day and there is a high likelihood that by the time the claim shall be concluded, the value of the motor vehicle shall be way below the market value as when it was impounded. The Appellant has been denied the access and use of the said motor vehicle and shall eventually suffer the blow of depreciation of the motor vehicle. This cannot be purported to be done in the interests of justice as a party cannot be condemned unheard.
25. The Applicant contends that demonstrating substantial loss does not require a mathematical formula as was held in the case of Antoine Ndiaye Vs African Virtual University [2015] eKLR, that cited with approval the findings in the case of Tropical Commodities Suppliers Ltd and Others vs International Credit Bank Limited (in liquidation) E.A 331 where the Court held that;
- “Substantial loss does not represent any particular mathematical formula. Rather it is qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”
26. The Applicant submits that, it is further required to furnish security of the decretal sum as the Court may direct pending the hearing and determination of the Appeal. That in the Application of 3<sup>rd</sup> September 2024, one of the Orders sought is the depositing of the decretal sum of Kenya in a joint interest earning account pending the hearing and determination of the Appeal and it is ready and willing to furnish the Court with security in conformity with Order 42 Rule 6 (2) pending the hearing and determination of the Appeal.
27. That the Appellant has complied with the Rules and guidelines on stay of execution and is ready and willing to comply with the condition of security subject to the directions if the Court.
- As to whether the Court should order unconditional release of Motor Vehicle KBV 505U from Betabase Auctioneers pending the hearing and determination of the Appeal?
28. The Applicant submits that, that the prayer for the unconditional release of motor vehicle KBV 505U shall be conclusively determined by the order to stay execution of the impugned Ruling delivered in the Small Claims Court on 31 July 2024.
29. The Applicant reiterates that the motor vehicle in question does not form part of the subject matter of the suit pending before the Small Claims Court. The same is being held illegally as it was impounded in execution of a judgment that has since been set aside for lack of proper service. The vehicle is not being put into its rightful use and it continues to depreciate and attracts storage fees at the expense of the Appellant thus the burden to be borne amounts to being condemned unheard and contravenes the Rules of Natural Justice.
- As to whether the Court should order the Appellant to deposit the decretal sum in a joint interest earning account pending the hearing and determination of the Appeal?
30. The Applicant submits that it has demonstrated its willingness to deposit the decretal sum of Kenya Shillings Two Hundred and Sixty-Four Thousand Five Hundred and Eighty-Seven. (Kshs 265,587) in a joint interest-earning account, pending the hearing and determination of the Appeal. This is security for the decretal sum which should warrant the release of motor vehicle KBV 505U.
31. That the relief was sought to demonstrate the Appellant’s willingness to provide security for the decretal sum and deposit the said amount in a joint interest-earning account pending the hearing and determination of the appeal pursuant to the Civil Procedure Rules as a conditional precedent for the grant of the order of stay of execution. This should secure the release of the motor vehicle KBV 505U if



at all the same is being held, albeit wrongly, as security for realization of the decretal sum and is therefore merited and should be allowed in the interests of justice.

32. The Applicant submits that costs follow the event and as such should be awarded costs of the Application.
33. In conclusion the Applicant asserts in submission that it has demonstrated that;
  - i. That, it shall suffer irreparably if the Order staying proceedings in the Small Claims Court and staying execution of the Ruling delivered by Hon. Oboge in SCCOMM E700 of 2023 on 31<sup>st</sup> July 2024 is not allowed.
  - ii. That, the Application was brought within the reasonable time in line with the Civil Procedure Rules 2010.
  - iii. That the motor vehicle KBV 505U is being held illegally in execution of the judgement that was set aside and the same should be released unconditionally from Betabase Auctioneers in the interest of justice.
  - iv. That the Applicant is ready and willing to deposit the decretal sum in joint interest earning account to secure the release of motor vehicle KBV 505U and in fulfilment of the condition precedent for grant of stay of execution.
  - v. That the Application is merited and costs should be awarded in its favour.
  - vi. The Applicant thus prays for the reliefs sought

### **Respondents Case**

34. It is noteworthy that, the Applicant and 3<sup>rd</sup> Respondents had common representation by the firm of M. Kiveu Advocates and the 3<sup>rd</sup> Respondent was thus not opposed to the motion, the 2<sup>nd</sup> and the 4<sup>th</sup> Respondent supported the application generally urging the Court to grant the reliefs.
35. The Application was opposed by the 1<sup>st</sup> Respondent who submits that on the 27<sup>th</sup> of November 2023, he lodged a Small Claim Suit at the Nakuru Small Claims Court for recovery of Material Damage Claim against the Appellant/Applicant, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, for the total sum of Kshs. 210,948.00/ being the total sum expended by the 1<sup>st</sup> Respondent's Insurer, AIG Insurance Company Limited for the repair of the 1<sup>st</sup> Respondent's Motor Vehicle Registration Number KBM 194K, that was hit by the Appellant/Applicant's, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent Motor Vehicle Registration Number KBX 977S.
36. That, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were duly served with Claim Pleadings under Order 5 Rule 22 (B) of the Civil Procedure Rules 2010 in the NAKURU SCCC NO E700 OF 2023 on the 3<sup>rd</sup> December 2023 but they failed to enter appearance and/or respond to the Claimant's Statement of Claim.
37. That, the matter came up for 1<sup>st</sup> Mention on the 14<sup>th</sup> of December 2023 but the Trial Court did not sit and a further Mention was issued for the 25<sup>th</sup> January 2024 to confirm whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had entered appearance and/or filed response to the Claimant's Statement of Claim.
38. That, the 1<sup>st</sup> Respondent informed the Trial Court that, despite having served the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents with copies of the Claimant's Statement of Claim and other supporting documents as well through their Advocates M/s Kiveu Advocates, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had failed to enter appearance nor put in responses to the Claimant's Statement of Claim and he prayed for and the Court entered Judgment (Default) being a liquidated claim for the sum of Kshs. 210,948.00/ plus costs and interest. Further, the Trial Court issued the Claimant (1<sup>st</sup> Respondent) with a DECREE dated the



28<sup>th</sup> of March 2024 granting the Claimant (1<sup>st</sup> Respondent) go ahead to execute Judgment as against the Respondents who FAILED to enter appearance in the matter.

39. That, the 1<sup>st</sup> Respondent's Insurer proceeded to appoint Auctioneers (Beta Base Auctioneers) to proceed with the process of execution and after tracing the Appellant/Applicant's Motor Vehicle Registration Number KBV 505U, the said Motor Vehicle was seized by the 1<sup>st</sup> Respondent Insurer's Auctioneers.
40. That feeling aggrieved by this move, the Appellant/Applicant filed a Notice of Motion Application before the Trial Court dated 26<sup>th</sup> April 2024 under a Certificate of Urgency vide the firm of M/s Kiveu & Company Advocates seeking a Stay of Execution of the Decree issued by the trial Court allowing the 1<sup>st</sup> Respondent's Insurer the right to dispose by sale, the Appellant/Applicant's Motor Vehicle Registration Number KBV 505U, in a bid to recover the outlay expended by the 1<sup>st</sup> Respondent's Insurer towards the repair of his Motor Vehicle.
41. That the Appellant/Applicant proceeded to file a separate Notice of Motion Application under a Certificate of Urgency dated 11<sup>th</sup> May 2024 vide the firm of KWEW Advocates LLP and under protest objecting to the sale of the Motor Vehicle.
42. That, the Appellant/Applicant vide firm of M/s Kiveu Advocates filed a Notice of Motion Application dated the 4<sup>th</sup> of June 2024 to cease acting for the 2<sup>nd</sup> Respondent.
43. That on the 1<sup>st</sup> July 2024, the 1<sup>st</sup> Respondent Advocates received communication from the firm of KWEW Advocates LLP informing the 1<sup>st</sup> Respondent that a fresh Notice of Motion Application under a Certificate of Urgency dated 31<sup>st</sup> May 2024 had been filed where the Appellant/Applicant sought leave to be granted to the General of Salvation Army Registered Trustees (Kenya West Territory) to be enjoined as an Interested Party pending hearing and determination of their Application and further seeking to set aside Judgment delivered in the trial Court in favour of the Claimant (1<sup>st</sup> Respondent). This Application was filed by the firm of Immaculate & Company Advocates.
44. That, on the 4<sup>th</sup> of June 2024, the 1<sup>st</sup> Respondent appeared in the Trial Court to take directions on the Objector's Application to which the 1<sup>st</sup> Respondent had already filed his Replying Affidavit and Grounds of Opposition. The Trial Court proceeded to direct that the matter would be mentioned on the 10<sup>th</sup> of July 2024 to confirm filing of written submissions to all the Applications filed so far.
45. That, the Trial Court informed parties on the 10<sup>th</sup> of July 2024 that it would issue a Ruling to all the Applications filed on the 31<sup>st</sup> July 2024. To date, the Applicant/Appellant, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent have failed to comply with the following directions issued by the Trial Court on the 31<sup>st</sup> of July 2024.
  - a. All the Applicants shall have leave to file their various defences out of time.
  - b. The matter shall be mentioned for pre-trial directions on the 15<sup>th</sup> of August 2024,
  - c. The Applicants shall jointly and severally pay the Claimant/Respondent throw away costs of Kshs. 30,000/ before the next mention date failure to which Judgment shall be reinstated.
  - d. Since Motor Vehicle Registration Number KBV 505U is contested by both the objector and the interested party, the status quo shall obtain pending the hearing and determination of the claim
  - e. In default, Judgment be reinstated.



46. That the Applicant is of unclean hands and reliance is placed on the case of *James Wangalwa & Another v. Agnes Naliaka Cheseto* 120121 eKLR where Gikonyo (J) stated:

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal... the issue of substantial loss is the cornerstone of both jurisdictions, Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”.

47. That the Appellant/Applicant, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are attempting to coerce this Court to comprehend the leadership and the functions of the different branches (territories and corps) when this issue is NOT in contention and that the Motor Vehicle Registration Number KBV 505U, belongs and is registered to the Salvation Army Church which serves all the branches, territories and/or corps as their branch churches are known.

48. That the Appellant/Applicant, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent is attempting to deceive this Court by claiming that the Motor Vehicle Registration Number KBV 505U serves a particular branch, territory or corps.

49. The 1<sup>st</sup> Respondent submit that, the involvement of both the General of the Salvation Army Registered Trustees (Kenya West Territory) and the General of the Salvation Army Registered Trustees (Kenya East Territory) in this suit chasing similar interests implies that the Motor Vehicle Registration Number KBV 505U that is registered under the Salvation Army serves the interest and activities of all branches, territories and corps associated with the Salvation Army in the Republic of Kenya.

50. In the alternate it is submitted that, since the Appellant/Applicant, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are chasing similar interests in this suit, the purported rightful party to this suit ought to have filed suit without the involvement of the other parties if indeed Beta Base Auctioneers obtained and/or possessed the wrong Motor Vehicle.

51. That the Appellant/Applicant's consolidated Application for the diverse dates of 13<sup>th</sup> August 2024 and 17<sup>th</sup> September 2024 are vexatious, frivolous, misconceived, devoid of merit and ought to be dismissed with costs and interest from the date of delivery of Ruling on the 31<sup>st</sup> of July 2024.

### **Analysis and Determination**

52. Upon considering the Application dated 13<sup>th</sup> August 2024, the supporting Affidavit by Lt. Col. Samwel Opuka, the Applicants Written Submissions dated 21<sup>st</sup> October 2024, the Applicants Written Submissions filed by M. Kiveu Advocate dated 15<sup>th</sup> November 2024 the 3<sup>rd</sup> Respondents replying Affidavit dated 27<sup>th</sup> September 2024, the 3<sup>rd</sup> Respondents Written Submissions filed by M. Kiveu Advocate dated 15<sup>th</sup> November 2024, the Affidavit in opposition by Godfrey Isolio dated 26<sup>th</sup> September 2024, 4<sup>th</sup> Respondents Lt David Musyoki's replying Affidavit in support dated 7<sup>th</sup> October 2024, 1<sup>st</sup> Respondent written submissions dated 9<sup>th</sup> December 2024 and the 4<sup>th</sup> Respondents Written submissions dated 8<sup>th</sup> November 2024

53. A Small Claims Court is a specialized Commercial Court created by statute with specific duties and powers designed to provide a judicial determination involving small amounts of money. World over,



the Courts are characterized by simplicity of procedure, cost effectiveness and speedy resolution of disputes thereby enhancing access to and expeditious delivery of justice.

54. The Court was established by the Small Claims Act 2016, that was assented to on 1st April 2016 and later amended by the Small Claims Court (Amendment) Act, 2020 (the Act). The Court was gazetted vide Gazette Notice No. 3791 of 2021 with the objective guaranteeing the right to access justice as envisioned under Article 48 of *the Constitution* of Kenya, 2010 through:
- i. timely disposal of all proceedings before the Court;
  - ii. using the least expensive method and reasonable Court fees;
  - iii. equal opportunity to access judicial services;
  - iv. reduction of case backlog;
55. The Jurisdiction of the Small Claims Court is anchored in Section 12 of the Act specifies that the Court has jurisdiction to determine any civil claims (whose value does not exceed Kenya Shillings One million, KES 1,000,000) relating to:
- a. A contract for sale and supply of goods or services;
    - i. A contract relating to money held and received;
    - ii. Liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
    - iii. Compensation for personal injuries; and
    - iv. Set-off and counterclaim under any contract.
56. Section 13 of the Act goes on to expressly exclude certain matters from the jurisdiction of the Small Claims Court. Those matters include claims which the cause of action is founded upon defamation, libel, slander, malicious prosecution or is upon a dispute over a title to or possession of land, or employment and labour relations. Worthy to note, no dispute pertaining to tenancy relationship shall be heard and determined by this Court.
57. The operationalization of the Small Claims Court is intended at the creation of a people centric approach to access to justice by affording the citizenry justice services that are accessible, inclusive, efficient, timely and responsive to specific access needs of particular groups likely to suffer from social and economic disadvantage. It goes without say that, hefty Court fees, legal representation fees, complexity of procedures and delays in determination of cases contributes to barriers to access to justice more so to the marginalized, vulnerable and those with complex needs. The Small Claims Court was therefore designed to contribute towards achieving equality, poverty reduction and social inclusion by ensuring that all persons have equal access to fair and timely justice.
58. I have read the ruling dated 31<sup>st</sup> July 2025, and the entire Memorandum of Appeal dated 9<sup>th</sup> August 2024. Some of the issues raised are issues of fact. This Court has no jurisdiction to raise issues of fact. Indeed, for Small Claims Court, even raising issues on the *Evidence Act*, is futile as the Court is not bound by rules of evidence. Section 32 of the *Small Claims Court Act* provides as doth:
- “ 32. The Court shall not be bound wholly by the Exclusion of strict Rules of evidence. Rules of evidence. Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible



or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.

- (2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.
- (3) Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
- (4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.
- (5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.
- (6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.
- (7) An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration.

59. The effect of the foregoing is that, unless there is gross breach of rules of natural justice, an appeal over evidence is an appeal on fact. The only two issues were raised herein. This being an appeal from that Court, this Court has jurisdiction to hear and determine the matter from small claims on points of law. This is equivalent to the Court of appeal's duty as a second appellate Court. In *Charles Kipkoech Leting v Express (K) Ltd & another* [2018] eKLR, the Court of Appeal stated as follows: -

“This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina versus Mugiria* [1983] KLR 78, *Kenya Breweries Ltd versus Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of *Martin versus Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate Court has loyalty to accept the findings of fact of the lower Court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate Court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

60. The long title of the Small Claims Court, No. 2 of 2016 is said to be: -

“An Act of Parliament to establish a Small Claims Court; to provide for the jurisdiction and procedures of the Court and for connected purposes.”



61. Section 32 (4) of the Small Claims Act provides that;
- “The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require”
62. The guiding principles objective of the Act under in Section 3 of the Act provides;
- (1) In exercise of its jurisdiction under this Act, the Court shall be guided by the principles of judicial authority prescribed under Article 159(2) of *the Constitution*.
  - (2) The parties and their duly authorized representatives, as the case may be, shall assist the Court to facilitate the observance of the guiding principles set out in this section, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of that Court.
  - (3) Without prejudice to the generality of subsection (1) the Court shall adopt such procedures as the Court deems appropriate to ensure—
    - (a) the timely disposal of all proceedings before the Court using the least expensive method;
    - (b) equal opportunity to access judicial services under this Act;
    - (c) fairness of process; and
    - (d) simplicity of procedure.
63. The *Civil Procedure Act* provides the Court with the procedure to summarily dismiss or reject an Appeal under Section 79B of the *Civil Procedure Act*, which states that: -
- “Before an appeal from a subordinate Court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”.
64. From the reading of Section 79B of the *Civil Procedure Act*, the decision to summarily reject an Appeal from the subordinate Court is a discretion that is vested with this Court.
65. In the Court of Appeal case of Michael A O Mashere –vs- Rotas Makokha Walusala [1987] eKLR, the Court held: -
- “.... But the essence of the observations is that the power to summarily reject appeals must be sparingly used and only in the clearest cases. A sparing use can indeed only refer to rejection in the clearest cases of fact or law. So the spectrum is narrow. In this case, during an interlocutory ruling, this Court said that the power to reject is a power which should be sparingly exercised. That then is the basis on which this Court has already approached this problem, and it would be invidious now to depart from that standard...”
66. Further, under Section 79B of the *Civil Procedure Act*, this Court can only summarily reject an Appeal after the judge has perused it and finds that there are no ample reasons to interfere with the decision of the Subordinate Court.
67. I have read the entire impugned ruling and perused the Memorandum of Appeal with a whopping eleven grounds of Appeal none of which raises matters touching on the judicious exercise of discretion



when ordering the attached motor vehicle be retained pending hearing of the suit. All grounds numbers 1-6 raises matter of evidence running afoul to Section 32 of the Small Claims Act while Grounds 7-11 are issues of fact of facts comingled with matters of evidence.

68. In simple language the Applicant failed to defend a suit in the Small Claims Court, an adverse judgment was entered, execution commenced, he moved to the same Court to set aside the judgment, file a defense and be heard and was successful albeit with conditions.
69. Section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules set out decrees/orders that are appealable as a matter of right. Under Section 75 of the *Civil Procedure Act*, an appeal shall lie as of right from the following orders: -

“An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the Court making such order or of the Court to which an appeal would lie if leave were granted—

- (1) (a) an order superseding an arbitration where the award has not been completed within the period allowed by the Court;
- (b) an order on an award stated in the form of a special case;
- (c) an order modifying or correcting an award;
- (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- (e) an order filing or refusing to file an award in an arbitration without the intervention of the Court;
- (f) an order under section 64;
- (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- (h) any order made under rules from which an appeal is expressly allowed by rules.
- (2) No appeal shall lie from any order passed in appeal under this section.”

70. On the other hand, Order 43 of the Civil Procedure Rules lists those orders from which appeals would lie as a matter of right. The Order provides:

- “1. An appeal shall lie as of right from the following Orders and rules under the provisions of section 75 (1) (h) of the Act—
- (1) (a) Order 1 (parties to suits);
  - (b) Order 2 (pleadings generally);
  - (c) Order 3 (frame and institution of suit);
  - (d) Order 4, rule 9 (return of plaint);
  - (e) Order 7, rule 12 (exclusion of counterclaim);
  - (f) Order 8 (amendment of pleadings);



- (g) Order 10, rule 11 (setting aside judgment in default of appearance).
  - (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);
  - (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
  - (j) Order 19 (affidavits);
  - (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
  - (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
  - (m) Order 24, rules 5, 6 and 7 (legal representatives);
  - (n) Order 25, rule 5 (compromise of a suit);
  - (o) Order 26, rules 1 and 5(2) (security for costs);
  - p. Order 27, rules 3 and 10 (payment into Court and tender);
  - q. Order 28, rule 4 (orders in proceedings against the Government);
  - (r) Order 34 (interpleader);
  - s. Order 36, rules 5, 7 and 10 (summary procedure);
  - t. Order 39, rules 2, 4 and 6 (furnishing security);
  - u. Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions);
  - v. Order 41, rules 1 and 4 (receivers);
  - (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
  - (x) Order 45, rule 3 (application for review);
  - (y) Order 50, rule 6 (enlargement of time);
  - (z) Order 52, rules 4, 5, 6 and 7 (advocates);
  - (aa) Order 53 (judicial review orders).
- (2) An appeal shall lie with the leave of the Court from any other order made under these Rules.
- (3) An application for leave to appeal under section 75 of the Act shall in the first instance be made to the Court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.
- (4) Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refusing such relief.”

71. An appeal against a conditional order in a ruling must be with leave and no leave has been demonstrated as having been sought from the adjudicator and no application for review was filed before the



adjudicator which to this Court leads to the rational conclusion that the Applicant does not desire to defend his case as allowed in the Lower Court.

72. The Small Claims Court proceedings are time-bound and to entertain such an appeal on an issue that would have been reviewed on the spot by the Trial Court shall be counter-productive in the efficient administration of justice and ultimately negate the purpose and intent of the *Small Claims Court Act*.
73. All in All, the Applicant moves this Court seeking equitable reliefs and as such is expected to demonstrate the highest bonafide and clean hands, of which this Court unfortunately observes is lacking. The sheer multitude of interlocutory applications before the Subordinate Court and in this Court is indicative of legal craftsmanship and weaponization of litigation that does not further the ends of justice. Had the Applicants complied with the conditional leave then the primary suit would be concluded in under sixty (60) days.
74. Unfortunate for the Applicant is an execution process that has already commenced. An appeal against a ruling where judicial discretion is the basis of grant of an equitable relief then the appellant must demonstrate injudicious exercise of the discretion.
75. The entire Appeal against ruling has been couched as an Appeal on one main ground but seeks an open-ended unconditional order to defend a suit in which judgment had been entered. A litigant cannot set the rules of play in a case and as a party seeking an equitable relief the Appellant was beseeching an exercise of discretion.
76. The default Judgment of the Adjudicator remains valid until the Applicant complies with the post judgment ruling dated 31<sup>st</sup> July 2024.
77. I am constrained to find no merit in the Notice of Motion dated 13<sup>th</sup> August 2024 and the one dated 17<sup>th</sup> September 2024, dismiss the same with costs to the 1<sup>st</sup> Respondent.
78. I do find that there is no sufficient ground for interfering with the ruling or order appealed against, notwithstanding Section 79C, and reject this appeal summarily.
79. To ensure the Applicant access justice, this Court orders the Applicant to fully comply with the Ruling dated 31<sup>st</sup> July 2024 within the next 7 days from the date hereof for a priority hearing of the SSCC E700 of 2023.
80. I shall not award costs on the Rejected Appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 31<sup>ST</sup> DAY OF JANUARY, 2025.**

**MOHOCHI S.M.**

**JUDGE**

