



REPUBLIC OF KENYA



Equity Bank (K) Limited v Makhulo & another (Miscellaneous Civil Application E064 of 2021) [2022] KEHC 10750 (KLR) (31 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS CIVIL APPLICATION E064 OF 2021**

SN RIECHI, J

MAY 31, 2022

BETWEEN

EQUITY BANK (K) LIMITED APPLICANT

AND

ALEXANDER WAFULA MAKHULO DEBTOR

AND

**DIMONDE OMONDE T/A DIMONDE AGENCIES &
AUCTIONEERS AUCTIONEER**

RULING

1. By a Chamber Summons Application dated 15th September 2021 brought under the provisions of Rule 55(5) of the Auctioneers Rules 1997 and Section 3A of the [Civil Procedure Rules](#), the applicant seeks; -
 1. Spent
 2. That pending the hearing and determination of this appeal inter-parties, the honourable court be pleased to grant an order of stay of execution of the Ruling delivered on 10/9/2021.
 3. Pending the hearing and determination of the instant appeal, this honourable court be pleased to grant an order of stay of execution of the ruling delivered on 10/9/2021.
 4. That this honourable be and is hereby pleased to set aside the ruling delivered on 10/9/2021 awarding the auctioneer Kshs 72, 458/=.
 5. The honourable court be pleased to find that the learned magistrate had no jurisdiction to tax the bill of costs in light of the arbitration agreement between the parties.
 6. The honourable court be pleased to declare that the auctioneer can only be paid upon proof of successful repossession.



7. The court be pleased to set aside and declare null and void the warrants of attachment, warrants of sale and proclamation notices served on the applicant by Dasemy Auctioneers.
 8. In the alternative to prayer 7, the court be pleased to order that Dimonde Agencies and Auctioneers meet the costs of Dasemy Auctioneers.
 9. Costs of the Application.
2. The application is premised on the grounds on the face of the application, the sworn affidavit of Kariuki King'ori, the applicant's legal services manager of even date who depones that the auctioneer filed a bill of costs in Misc. Application 53 of 2020 seeking the applicant to be compelled to pay charges and expenses arising from execution done where the applicant participated in the taxation since it had not retrieved the agreement between the bank and the auctioneer and culminated in the Auctioneer being awarded Kshs 81, 578/= against the applicant.
 3. That upon obtaining the Certificate of Costs, the auctioneer did not serve the bank but instructed Dasemy Auctioneers to proclaim the applicant's assets which he states was in bad faith. Upon discovery of the service level agreement, the applicant filed an application seeking to set aside the ruling so delivered on 10/9/202 acknowledging the agreement but the trial magistrate nonetheless proceeded to re-tax the bill at Kshs 72, 458/=.
 4. He depones that the agreement was explicit that the auctioneer's fees would be payable upon successful repossession which proof would have been called for by the trial magistrate as a condition before taxation of the bill. That the agreement further provided for negotiation and arbitration as the dispute resolution mechanism.
 5. The auctioneer filed a replying affidavit sworn on 21st September, 2021 disputing the fact the applicant did not have the service level agreement at the time of taxation and that since the applicant is seeking a review of the subordinate court ruling, the applicant ought to be ordered to deposit the taxed amount in court.
 6. He depones that the applicant sought a review of the ruling in the subordinate court in lieu of its right to appeal and therefore having reviewed the matter earlier in the subordinate court, it cannot now appeal against the reviewed order. He depones that the applicant entered appearance in the matter in the subordinate court without raising the issue of arbitration which cannot be raised now in this matter.
 7. The auctioneer depones that once goods are proclaimed, they become attached and seized by law and is therefore entitled to charge his commission. That in any case, the process of proclaiming is involving and costly and is therefore straining him economically.
 8. The application was canvassed by way of written submissions. The instructing party raised the following issues for determination;
 1. Whether the learned magistrate had jurisdiction to re-tax the bill of costs in light of the arbitration agreement between the parties.
 2. When should the auctioneer be paid his commission.
 3. Whether the learned trial magistrate erred in law and fact by failing to declare null and void the warrants of attachment , warrants of sale and proclamation notices served upon the bank by Dasemy Auctioneers
 4. Who should meet Desamy Auctioneers costs.



5. Who should meet the costs of this suit.
- 9 On the first issue, counsel submits that when the auctioneer and the applicant executed the agreement, they had intentions to commit to the terms and conditions therein including arbitration in case of dispute. In this regard, Section 6(1) of the *Arbitration Act*, 1995 and the cases of *Kenya Shell Limited V Kobil Petroleum Limited* (2006)eKLR *Kenya Pipeline Company Limited Vs Datalogix Limited & anor.* (2008)2 EA 193 and *Blue Limited Vs Jaribu Credit Traders Limited* (2008) eKLR have been cited.
- 10 The applicant submits that since the auctioneer has not challenged the enforceability of the arbitration clause and the fact that the learned trial magistrate acknowledged the validity and enforceability of the agreement, he ought to have stayed the proceedings and referred the parties to arbitration.
- 11 On the second issue, it is submitted that since the auctioneer did not provide evidence of the value of the attached goods, the learned trial magistrate ought to have requested for such evidence before proceeding to re-tax the bill.
- 12 On the third issue, counsel submits that the trial magistrate having acknowledged the existence of the service level agreement, the learned trial magistrate ought to have declared null and void the warrants of attachment, warrants off sale and the proclamation notices issued by Dasemy Auctioneers for failure to follow the due process before instructing the auctioneer.
- 13 On the fourth issue, the applicant submits that even after obtaining certificate of costs, the respondent did not serve the bank before engaging Dasemy auctioneers contrary to the provision of Section 1A of the *Civil Procedure Act* and the respondent therefore ought to pay Dasemy Auctioneers.
- 14 On the last issue, counsel submits that the respondent acted in bad faith by failing to invoke the arbitration clause in the agreement and is therefore obligated to pay the costs of this appeal and the suit in the lower court.
- 15 The respondent on his part submitted on the following issues;
1. Whether the learned trial magistrate lacked jurisdiction to tax the bill of costs in light of the arbitration agreement.
 2. Whether the respondent successfully repossessed the properties.
 3. Whether the applicants have met the threshold for stay of execution.
- 16 On the first issue, it is submitted that the applicant participated in the taxation process and sought a review after a ruling by the trial court. that the applicant ought to have raised the issue of jurisdiction at the earliest time in line with Section 6 of the *Arbitration Act*, 1995. On this issues, counsel relies on the authority in *owners of Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd* (1989)eKLR, *Samuel Kamau Macharia & another Vs Kenya Commercial Bank Limited & 2 Others* (2012)eKLR.
- 17 On the second issue, counsel relies on the provisions of Section 22(1) of the *Auctioneers Act* which provides for the recovery of auctioneer's charges and Rule 7 of the Auctioneers Rules for the proposition that the respondent was entitled to his fees upon proclamation. Further reliance has been placed on the case of *Francis Mwachha Macharia t/a Freeman Auctioneers Services Vs Tata Africa Holdings (Kenya) Ltd* (2019)eKLR.
- 18 On the third issue, counsel submits that under Order 42 Rule 6(1) of the Civil Procedure Rules, an appeal does not operate as a stay of proceedings. Counsel proceeded to analyze the requirements the applicants ought to meet under the foresaid order. Reliance has been placed on the cases of



Victory Construction Vs BM (a minor suing through a next of friend one PMM) (2019)eKLR, *tropical commodities Supplies limited & 2 others Vs International Credit Bank Bank Ltd (Liquidation)* (2004)2 EA 331, *james wangalwa & another vs Agnes Naliaka Cheseto*(2020)eKLR and *Gianfranco manenthi & another vs Africa Merchant Assurance Company Ltd*(2019)eKLR.

19 Upon careful consideration of the parties' respective case, the following issues will adequately dispose of the matter;

1. Jurisdiction of the court in light of the arbitration clause.
2. Whether the auctioneer is entitled to be paid his commission.
3. The fate of the warrants of attachment, warrants of sale and proclamation notices.
4. Which party ought to pay Dasemy Auctioneers.

20 On the first issue, it is now settled law that jurisdiction is everything. Without it, the court ought to down its tools as such proceedings will be a nullity. See Motor Vessel "Lilian S" vs Caltex Oil (kenya) Ltd (supra).

21 The issue of jurisdiction is premised on the fact that the service level agreement between the applicant and the respondent had an arbitration clause in case of dispute. The respondent on the other hand submits that since the applicant participated in the entire taxation process, it had submitted itself to the jurisdiction of the court. The court has perused the service level agreement and is it is true the agreement contains an arbitration clause under paragraph 8.3.3 which provides;-

If any dispute has not been resolved to both parties' satisfaction, then the dispute, including any question regarding breach, existence, validity or termination or the legal relationships established by this agreement, shall be finally resolved by arbitration.....

22 The process of arbitration in Kenya is governed by the provisions of *Arbitration Act*. Section 6(1) thereof provides;

A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

23 In the instant matter, none of the parties has disputed the existence of the clause only that the parties ought to have raised it at the earliest opportune time in the trial court. This was not done and the issue only emerged in this court. The respondent states that the applicant waived its right to have the matter referred to arbitration when it participated in the matter at the trial court.

24 In Kenya Pipeline Company Limited vs. Datalogix Limited and Another (2008 2 EA 193, it was held that:

It is clear from the reading of section 6(1) that the decision to refer the matter to arbitration is left to the discretion of the court and the court must give effect to the terms of the contract which provide for arbitration and as a matter of course the court has a duty to honour the plea of the parties so as to give effect to the wishes of the parties and their contractual relationship. Arbitration is a modern way of resolving disputes quicker, amicably and in a friendly environment and manner. It is for that reason that the court would always endeavour to encourage parties to resolve their disputes through arbitration. It is against public policy to deprive parties of their choice and hinder their attempt to resolve their disputes through arbitration...Our system of law and dispute resolution should



not countenance the existence and continuation of two parallel processes in respect of the determination of an issue arising between the same parties or parties claiming under them over the same subject matter.

25 Indeed, the respondent does not challenge the validity of the arbitration clause only that his contention is that the applicant waived its right when it participated in the taxation process. The applicant submits that the trial magistrate correctly found that disputes between the parties herein was governed by arbitration as agreed by the parties in the service level agreement annexed to the application.

26 It is this court's view that once the trial magistrate had found so, he ought to stay any court proceedings and refer the matter to arbitration since it was clear that the parties intended to be so governed by the process.

27 As regards the stay of proceedings pending the determination of the matter through arbitration it was held in *Eunice Soko Mlagui Vs. Suresh Parmar & 4 Others* (2017) eKLR, that;

Section 6 of the *Arbitration Act* is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitrating where parties to the dispute have entered into an arbitration agreement. The conditions under which the court can stay proceedings and refer a dispute to arbitration are prescribed by section 6 and in our view, the purpose of that provision is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution.

28 In the circumstance of the matter herein, the court finds that the parties had an agreement in force which clearly outlined the dispute resolution mechanism process and it is therefore important that this court gives effect to this provision by referring the matter to arbitration as contemplated.

29 As such, the proceedings in this matter are stayed pending referral and determination of the dispute through arbitration. Each party to pay its own costs of this application and in the subordinate court.

DATED AT BUNGOMA THIS 31ST DAY OF MAY, 2022

S.N. RIECHI

JUDGE

