



REPUBLIC OF KENYA



**Techville Company Ltd v Mafi East Africa Ltd (Arbitration Cause E044 of 2021)
[2023] KEHC 123 (KLR) (Commercial and Tax) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 123 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E044 OF 2021
A MABEYA, J
JANUARY 20, 2023**

BETWEEN

TECHVILLE COMPANY LIMITED CLAIMANT

AND

MAFI EAST AFRICA LIMITED RESPONDENT

RULING

1. This is a ruling on the applicant's notice of motion dated February 16, 2022. The same was brought under article 159(2) of the *Constitution of Kenya 2010*, section 4 & 6 of the *Contempt of Court Act*, section 1A, 1B, 3A & 100 of the *Civil Procedure Act*, order 39 (1), (2) & (3) and order 51(1) of the *Civil Procedure Rules 2010*.
2. The applicant sought that the respondent and its two directors be found to be in contempt of court for disobedience of the court order issued on February 2, 2022. It also sought that the respondent and its directors be fined and the latter be committed to civil jail for not less than 6 months for the said contempt.
3. Lastly, the applicant prayed that the respondent and its directors ought not to be heard by this court or participate in these proceedings until they purge their contempt to the satisfaction of this court.
4. The grounds for the application were that the dispute between the parties was referred to arbitration and the sole arbitrator, Hon Chacha Odera delivered the final arbitral award dated August 31, 2021 in favour of the respondent for Kshs 32,976,935.62. in exchange for the respondent to release the applicant's goods and equipment it holds.



5. The honoured the said award by transferring the aforementioned sum to the respondent on November 8, 2021. However, the respondent and/or its directors have failed to release the applicant's goods and equipment in their possession.
6. The arbitral award was adopted as a judgment and decree of the court on February 2, 2022 and that therefore, the refusal of the respondent and its directors to release the goods amounts to contempt of court.
7. In opposition to the instant application, the respondent filed a replying affidavit sworn on May 18, 2022 by its director.
8. It was averred that the applicant had failed to demonstrate the four elements that must be proved to make a case for civil contempt. That the duty to pay the arbitral sum was not conditional to the respondent's duty to release the stock and equipment in its custody as alleged; that the stock and equipment referred to was not in the custody of the respondent but of the court's after being seized by an auctioneer, an officer of the court, pursuant to court process.
9. It was further contended that this is a matter pending before a court of coordinate jurisdiction in which both the parties are parties therein. That therefore, this matter should be reserved for that court.
10. That the duty of the respondent to release the goods has been extinguished because the goods are no longer in its custody. That the applicant took time to settle the arbitral award upon being published. That the applicant agreed to settle the arbitral award subject to the issuance of a professional undertaking from the respondent's advocates that they would retain the arbitral award amount of Ksh 32,976,935.62 until the applicant collected its goods which may have been in the respondent's custody.
11. That the said professional undertaking dated September 17, 2021 was issued by the respondent's advocates and the applicant was to pay the arbitral award amount on or before September 24, 2021. However, the applicant failed to comply with its obligation under that professional undertaking by not settling the arbitral amount by September 24, 2021 thereby causing the professional undertaking to lapse on the said September 24, 2021.
12. That because of the delay in settling the arbitral award in time, the aforesaid stock and equipment were attached and sold by the respondent's landlord albeit in an illegal manner.
13. In the premises, the respondent pleaded that it had not acted in breach of the terms of the order and prayed that the application be dismissed with costs.
14. The applicant filed a further affidavit sworn on August 10, 2022 by its director in response to the respondent's averments. It was averred that the applicant had demonstrated the elements required for contempt of court in civil cases. That the duty to pay the arbitral award was conditional for the respondent to release the stock and equipment in its custody.
15. That the applicant is not a party to the dispute between the respondent and its landlord and its only prayer is in relation to the disobedience of the court order of February 2, 2022. That the applicant having fully complied with the arbitral award, the respondent and its directors ought to be held in contempt.
16. It is undisputed that a dispute ensued between the parties and that a sole arbitrator heard and determined the dispute. An arbitral award dated August 31, 2021 was made. It directed the applicant to pay the respondent a sum of Kshs 32,976,935.62.



17. In paragraph 4.5 of the award, the tribunal stated: -
- “I further direct that upon satisfaction of the award by the respondent, the claimant does release to the respondent all its stock and equipment which may be in the claimant’s custody.”
18. The award was adopted as an order of the court by consent on February 2, 2022. A copy of the decree was produced as ‘PB4’ in the applicant’s supporting affidavit.
19. The applicant’s case is that the respondent and its two directors are in contempt of court for disobedience that decree by refusing to release the applicant’s stock even after the satisfaction of the award.
20. The respondent on the other hand argues that the duty to pay the arbitral sum was not conditional to the respondent’s duty to release the stock and equipment in its custody as alleged. That the stock and equipment referred to was not in the custody of the respondent anymore but of the court’s after being seized by an auctioneer pursuant to court process. That an undertaking given by its advocates lapsed on 24/9/2012 when the applicant failed to settle the arbitral sum.
21. The record shows that the applicant paid the arbitral sum on or about November 9, 2021. By that time, all of the goods in the respondent’s premises had been attached by its landlord in distress for rent.
22. The manner in which the landlord attached the goods is subject of an appeal in HCCA E101/2021 as shown at pages 22-25 of exhibit ‘FO-1’.
23. It would seem that the delay in settling the arbitral amount had led to other intervening processes that affected the arbitral award. There was the levying of distress on the goods and the equipment, the subject of the award. The question would be whether or not the respondent brought this to the attention of the applicant at the time for it to lodge an objection or not. Or, whether the respondent took any steps to safeguard those goods. Obviously, those are issues which this court cannot delve into. They should be resolved by the court handling the distress matter.
24. In light of the above, I find that the respondent did not willingly disobey the court order of February 2, 2022. This is so because, by the time the applicant honoured the terms of the award and consent, the respondent could not be able to comply with the terms thereof as the goods hitherto held by it were no longer in its custody.
25. As such I find that the respondent is not guilty of contempt as pleaded.
26. I would like to point out one issue here. One of the provisions under which the motion was made under is the *Contempt of Court Act, 2016*. I think this Act was declared unconstitutional on November 9, 2018 and is therefore not in force. This was in the case of *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR.
27. The application lacks merit and is therefore dismissed with costs to the respondent.
28. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY, 2023.

A. MABEYA, FCI Arb

JUDGE

