



**Omar v Muigai (Commercial Arbitration Cause E005 of 2021)
[2023] KEHC 1635 (KLR) (Commercial and Tax) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1635 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL ARBITRATION CAUSE E005 OF 2021
DO CHEPKWONY, J
FEBRUARY 28, 2023**

BETWEEN

FATUMA MOHAMMED OMAR APPLICANT

AND

EDWARD NGIGI MUIGAI RESPONDENT

RULING

1. This dispute arose from a lease agreement between the parties where the applicant was required to pay deposit of Kshs 5,450,000.00 and monthly rent of Kshs 150,000.00. The applicant defaulted and a dispute arose which was referred to arbitration the same was finalized through an award dated April 17, 2020. This was followed with an application dated February 23, 2021 by the respondent seeking the award to be recognized, adopted and enforced as decree of the court which was allowed April 28, 2022.
2. The respondent proceeded to issue warrants of attachment dated May 16, 2022 which were served upon the applicant on May 20, 2022 through Ms Little Vineyard Auctioneers for realization of the sum of Kshs 4,475,813.53 together with auctioneer fees. These warrants have given rise to two applications by the applicant one dated May 24, 2022 under order 22 rule 51 and 52 both of the *Civil Procedure Rule* for objection on any interference with motor vehicle registration number KCY 394T and KCR 293D. The court allowed this application on May 31, 2022.
3. The second application is the one dated May 25, 2022 which is now the subject of this ruling. It is filed under sections 3A and 63(e) both of the *Civil Procedure Act* “CPA” and order 21 rule 12 and order 22 rule 22 both of the *Civil Procedure Rules 2010* “CPR”. The application is supported by the affidavit of Edward Nguni Muigai, the applicant, herein sworn on May 25, 2022. The application seeks the following orders:
 - a. Spent;



- b. Spent;
 - c. That this honourable court be pleased to declare the proclamation of the respondent/ applicant's goods by M/s Little Vineyards Auctioneers dated May 16, 2022 null and void;
 - d. That this honourable court be please to set aside and to recall the warrants of attachment and sale of the defendants' moveable properties dated May 16, 2022;
 - e. That the honourable court be pleased to issue a declaration that the respondent/applicant is not entitled to settle the auctioneer's fees;
 - f. That this honourable court be pleased to issue an order allowing the respondent/applicant to pay the balance of the outstanding amount being Kshs 2,861,344.52 in instalments of Kshs 250,000/- per month;
 - g. That costs be in the cause.
4. The application is based on the following grounds:
- a. This honourable court on the May 16, 2022 issued warrants of attachment and sale of the respondent/ applicant's moveable property to M/s Little Vineyards Auctioneers in execution of a decree in favour of the applicant/respondent herein for the realization of the sum of Kshs 4,475,813.53.
 - b. On the May 20, 2022, the said firm of auctioneers proceeded to the respondent/applicant's premises where they proclaimed goods worth Kshs 1,386,000/= and notified the respondent/applicant that after the expiry of 7 days from the date of proclamation aforesaid, the said proclaimed goods would be removed from the respondent/ applicant's custody to the auctioneer's premises and sold by public auction or through private treaty, unless the amount of Kshs 4,475,813.53 together with Kshs 184,116.26 being the estimated auctioneer's fees are paid in the meantime.
 - c. There is a grave error in the tabulation of sums owed to the applicant/ respondent by the respondent/applicant and therefore the amount of Kshs 4,475,813.53 captured in the warrants of attachment and sale dated May 16, 2021 is incorrect and if the applicant/respondent is allowed to proceed with execution for the sum aforesaid the same will amount unjust enrichment of the applicant/respondent for the following reasons: -
 - i. The applicant/respondent has purposefully failed to disclose to this honourable court that the respondent/applicant has already paid her the amount of Kshs 1,158,806/- since the award was made by the arbitrator. Therefore, the outstanding balance as at May 20, 2022 is Kshs 2,861,344.52 inclusive of interest.
 - ii. The auctioneer's fees are pegged on the erroneous outstanding decretal amount. It would therefore be oppressive and prejudicial to the respondent/ applicant to be compelled to pay those exaggerated fees.
 - iii. The 7 days' notice aforesaid expired on the May 26, 2022 and there is real and imminent danger that if the respondent/



applicant does not pay the amount of Kshs 4,475,813.53 together with Kshs 184,116.26 being the auctioneer's fees and making a total of Kshs 4,659,929.79 as demanded by the said firm of auctioneers, the respondent/applicant's goods will be removed from the respondent/applicant's premises and sold by public auction, an act which will greatly prejudice the respondent/applicant who is being forced to pay Kshs 1,798,585.27 more than what is actually due.

- iv. This honourable court has the inherent powers and/or discretion to recall the warrants of attachment aforesaid for purposes of recalculation and re-issuance once the correct outstanding amount is determined.
- v. The respondent/applicant has already paid a substantial amount of the decretal amount to the applicant/respondent and has shown willingness to pay the correct outstanding amount being Kshs 2,861,344.52. However, owing to the economic hardship occasioned by the Covid-19 pandemic, he is unable to pay the said outstanding amount in one (1) fulltime payment.
- vi. It is in the interest of justice that this application is allowed.

The Applicant's Case

5. The applicant holds that he has already paid Kshs 1,158,806.00 since the award was published on diverse dates between 2019-April 11, 2022 and therefore the amount demanded is erroneous. The applicant wishes to have the court recall the warrants of attachment for the purpose of recalculation and reissuance once the amount has been ascertained. The applicant holds that he is ready and willing to settle the required balance but cannot do it in one instalment but monthly instalments of Kshs 250,000.00 per month until full payment.

The Respondent's Case

6. The respondent filed her response sworn on June 14, 2022. She states that the award was for payment of Kshs 3,996,500.00, Kshs 450,000.00 being a refund of the 3 month's rent deposit, together with costs and interest. The respondent admits that the sum of Kshs 450,000.00 had already been included in the sum of Kshs 3,996,500.00. The respondent further admits that the applicant has paid diverse sums to her being Kshs 42,000 on December 31, 2020, Kshs 100,000.00 on January 29, 2022 and Kshs 650,000.00 on April 11, 2022 and holds that the balance as at May 31, 2022 was Kshs 4,167,065 which has not been paid.
7. The respondent holds that the applicant has always made proposals to settle the amount in instalments but has never actualized the proposal and therefore she is not agreeable to the payments in instalments since the sum paid so far is only Kshs 792,000.00. The respondent however holds that she would be agreeable to a monthly payment of Kshs 1,500,000.00, until payment in full.
8. The applicant filed his supplementary affidavit sworn on September 22, 2022. He states that in addition to the payments acknowledged by the respondent, he also made payments of Kshs 55,000.00 through bank transfer on July 31, 2019 and set off invoice No 2221 of Kshs 311,806.00 on September 21, 2020 which all make a total of Kshs 1,158,806.00 and not Kshs 792,000.00 as stated by the respondent.



He adds that the balance inclusive of interest as at May 31, 2022 is Kshs 3,792,929.74 and not Kshs 4,167,065.00.

9. The applicant states that since May 31, 2022 he has paid Kshs 2,350,000.00 on diverse dates and the only balance remaining is Kshs 545,694.00 which he seeks to settle in two instalments of Kshs 272,847.00 in October and November, 2022. The applicant holds that the respondent should not seek interest since under Islamic Law as this is Haram.

The Submissions

10. The applicant reiterates his position that the amount demanded by the respondent is erroneous since the respondent failed to take into account two payments of Kshs 55,000.00 and Kshs 311,806.00 making a total of Kshs 366,806.00 and therefore the balance ought to be Kshs 2,895,694.00 and not Kshs 3,204,500.00. The applicant states that the warrants ought to be recalled and relied on the case of *Kenya Tea Development Agency Ltd v Lee Kimathi* [2017] eKLR which states:-

“To therefore proceed and execute against an amount that is erroneous and inclusive of amounts and sums not awarded is to go contrary to lawful orders of the court. The set out amount of Kshs 449,994.00; Kshs 281,073.00 as having been paid by the claimant and the sum of interest on decretal sum at Kshs 343,571.00 are amounts not awarded to the respondent. To include such in the decree as due and proceed to proclaim claimant’s goods on this basis lack justification.”

11. The applicant states that the only balance owed as at September 21, 2022 is Kshs 545,694.00. The applicant states that the respondent ought not to charge interest since under Islamic Law which she professes, since it is forbidden. The applicant wants the application allowed and the warrants of attachment and sale recalled since they are based on erroneous figure.
12. The respondent in her submissions, holds that the amount owed stands at Kshs 1,554,560.00 as at October 31, 2022 after he paid Kshs 2,350,000.00 against the expected Kshs 2,861,344.52. She adds that the applicant cannot state that interest being charged on the principal is haram since this was a determination by the arbitrator in the final award which was adopted as decree of the court and therefore the court cannot interfere with the terms of the award. The respondent prays that the application be dismissed with costs since it lacks merits and seeks the applicant to pay the remaining amount of Kshs 1,554,560.00 and in the event he fails to execution should follow.

Analysis

13. To determine the application dated May 25, 2021, I have read and taken into consideration the respective cases set out by each party in their respective affidavits for and against the applications, the submissions filed by each one of them alongside the cited cases and statute law.
14. I find it is common ground that the dispute in this case relates to the payment of monies to the respondent. The applicant claims that he has made some part-payments and the outstanding balance is only Kshs.545,694.00 without adding interest which he holds is against the Islamic faith. On the other hand, the respondent acknowledges some of the part-payments and holds that as at October 31, 2022, the balance owed is Kshs.1,554,560.00 since the same has accrued interest as determined by the arbitrator in the final award adopted as a decree of this court, hence it cannot be interfered with.
15. It is not in dispute that the applicant has shown effort to clear the balance owed from the time the award was published to date, a fact acknowledged by the respondent. What is in dispute is the outstanding balance owed by the appellant. I agree with the respondent that the order for interest was made by the



arbitrator in the final award which was adopted as a decree of the court. Therefore, the court lacks the mandate to alter or interfere with the award of interest at this stage.

16. It is noteworthy that the two parties have given different figures in relation to the balance owed, and hence the prudent thing to do is to issue orders for accounts to be taken so as to have a consensus on the balance left, the interest to be charged and the auctioneer fees, which will go a long way to assist the court in determining the matter with finality.
17. Since it is common ground that the applicant has already made some payments and therefore the figure quoted in the said warrants of attachment ought to have reduced. The application dated May 25, 2022 partially succeeds to the extent that the warrants of attachment and sale dated May 16, 2022 are hereby set aside.
18. The court in the case of *Peris Nyambura Kimani v Dalbit Petroleum Limited* [2016] eKLR stated:-

“Noting the above, the decretal amount now agreed upon, the same being Kshs 5, 240,940.00 and not otherwise, for the auctioneer to received instructions on erroneous figures and computation, to move with attachment or estimate their costs on an error makes the process a nullity”.

In this case proceeding with the execution would a null and void exercise since the decretal sum owing has not been ascertained.

19. On the aspect of the declaration of the auctioneer fees this will be determined during the taking of accounts exercise. At this juncture, for the court cannot make orders for the applicant to pay the balance in instalments of Kshs250,000.00 as prayed until the balance owed is ascertained.
20. I therefore make the following orders:
 - a. The parties shall agree on and appoint an independent Certified Public Accountant within 14 days to take those accounts and file a report on the amount due to the respondent within 45 days of the date of that appointment.
 - b. In default of such agreement each party to appoint an accountant and the two accountants to appoint an umpire and the three to prepare a report of the amount due to the applicant within 45 days of the appointment of the umpire.
 - c. Where parties are unable to agree as directed in (a) or (b) above, the chairperson of the Institute of Certified Public Accountants of Kenya to appoint a single accountant to take accounts and report on the amount due to the respondent within 45 days of appointment.
 - d. The parties be at liberty to apply for further and other directions.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Mbaji counsel for Applicant

Mr. Kaaya counsel for Respondent

