



**Bank (K) Ltd v Kituyi & another (Miscellaneous Application
E028 of 2022) [2022] KEHC 13818 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 13818 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS APPLICATION E028 OF 2022**

DK KEMEL, J

MAY 26, 2022

BETWEEN

EQUITY BANK (K) LTD APPLICANT

AND

MARY NAFULA KITUYI 1ST RESPONDENT

**DIMONDE OMONDE T/A DIMONDE AGENCIES AND
AUCTIONEERS 2ND RESPONDENT**

(Being an Appeal from the taxation of the Honourable C.A.S Mutai, Senior Principal Magistrate made on 4th February, 2022 at Bungoma in Misc. App No. 499 of 2021)

RULING

1. Vide chamber summons dated March 4, 2022 and filed in court on March 7, 2022 the instructing party/applicant brought an application pursuant to rule 55 (5) of the *Auctioneer's Rules* 1997 and section 3A of the *Civil Procedure Act* and all other enabling provisions of the law wherein it sought the following orders:
 1. Pending the hearing of this applications interpartes, this honourable court be pleased to grant an order of stay of execution of the warrant of attachment, warrant of sale and proclamation by Pawaba Auctioneers.
 2. This honourable court be and is hereby pleased to grant leave to the applicant to file this appeal out of time.
 3. Upon leave being granted, this honourable court be and is hereby pleased to admit this appeal for hearing.



4. Pending the hearing and determination of this appeal, this honourable court be pleased to grant an order of stay of execution of the warrant of attachment, warrant of sale and proclamation by Pawaba Auctioneers.
 5. This honourable court be and is hereby pleased to set aside the taxation proceedings for February 4, 2022 and the certificate of costs dated March 2, 2022 for Kshs 169,815/-.
 6. The honourable court be pleased to find that the taxing master had no jurisdiction to tax the bill of costs in light of the arbitration agreement.
 7. In the alternative to prayer 6, the court be pleased to refer the matter for fresh taxation upon service of the bank auctioneer.
 8. The honourable court be pleased to set aside and declare null and void the warrants of attachments, warrants of sale and proclamation notices served on the applicant by Pawaba Auctioneers.
 9. In the alternative, to prayer 8, the court be pleased to order that Dimonde Agencies and Auctioneers meet the costs of Pawaba Auctioneers.
 10. Costs of the application.
2. The application is predicated upon the grounds set out therein. It is contended that the applicant was neither served with the taxation notice, certificate of costs nor bill of costs from which the decree issued on February 4, 2022 emanated from. The applicant was unaware of the taxation proceeding and could not file the appeal within the seven days provided for, and failure to serve the applicant with the certificate of costs meant the respondent was entirely responsible for the costs of Pawaba Auctioneers. It is further contended that the respondent failed to inform the taxing master that there existed a service level agreement between Equity Bank and Dimonde Agencies and Auctioneers setting out the terms and conditions of engagement between the parties and applying to services rendered by the auctioneer. Finally, in the event of any disputes, the service legal agreement provides for settlement of disputes through arbitration, hence the taxing master lacked jurisdiction to entertain the bill of costs.
 3. The application was supported by the affidavit sworn by Kariuki Kingo'ri sworn on March 4, 2022 and filed on March 7, 2022 in which he averred that the respondent failed to inform the taxing master of the service level agreement between Equity Bank and Dimonde Agencies and Auctioneers. He attached a copy of the service level agreement marked 'KK2'. He deponed that the auctioneer failed to serve the bank first before engaging the services of Pawaba Auctioneers to proclaim the assets of the bank. He attached a copy of the certificate of costs marked 'KK4'.
 4. The auctioneer/respondent herein opposed the application vide a replying affidavit sworn by Dickson Omonde on March 18, 2022 and filed on March 21, 2022. He averred *inter alia*; that the application is a ploy to circumvent the court order issued in court on March 2, 2022 where the applicant had properly been served; that the applicant has not met the requisite grounds of stay of execution pending appeal; that the respondent is apprehensive that despite the applicant drawing the service level agreement clause, it never engaged; that the respondent is well aware that the scope of the level agreement does not limit him nor the bank from seeking redress from the court as an arbiter. He attached a copy of the service level agreement marked 'DO-4 (see clause3).
 5. In response to the respondent's replying affidavit, the applicant filed a further affidavit dated January 14, 2022 and filed on January 16, 2022 wherein it was averred *inter alia*; that the respondent is aware of the service level agreement and is even in possession of it; that it will be prejudiced if the applicant is made to pay the auctioneers outside a valid agreement.



6. The present application was canvassed by way of written submissions. The counsels for both parties duly filed their respective submissions. I have given due consideration to the application, rival affidavits and submissions and find the following issues necessary for determination: -
 - i. Whether the parties had entered into an agreement containing an arbitration clause?
 - ii. Whether a dispute has arisen between the parties?
 - iii. Whether this court can exercise its discretion to set aside orders of the trial court and make orders for arbitration?
7. It is noted that the terms of engagement between the applicant and respondent were reduced into writing through a service level agreement executed on August 21, 2017 by Dimonde Agencies & Auctioneers. The said agreement was marked as KK2. A perusal of the agreement shows that parties agreed on various terms and rules relating to, *inter alia*, the duties of the firm, fees, termination, variation, guarantee and indemnity, file storage, confidentiality, waiver & amendment and dispute resolution.
8. The dispute resolution clause particularized as clause 9 provided for an alternative dispute resolution mechanism as follows:
 1. Any concerns, complaints or disputes that the bank may have arising out of any services provided by the firm or the firm has arising out of the relationship with the bank will be raised and discussed between the approved Instructors and the person in the firm who is leading or supporting the relevant engagement. A response to such concern, complaint or dispute shall be promptly responded to and in any event not later than 48 hours after it is communicated.
 2. In the event of any dispute, controversy or claim relating to any engagement instruction or these terms (“dispute”), the bank and the firm agree that an approved instructor and a partner of the Firm shall negotiate in good faith in an attempt to resolve such dispute. If such dispute has not been resolved to the parties’ mutual satisfaction within twenty (20) days after initial notice of the dispute (or such longer period as the parties may agree), then a senior executive on behalf of each party shall negotiate in good faith in an attempt to resolve such dispute amicably for an additional ten (10) days (or such longer period as the parties may agree).
 3. 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. It is agreed that: If after the period for settlement of disputes as set out herein above is not resolved, it shall be referred to arbitration in accordance with the provisions of the *Arbitration Act* 1995 for determination by the arbitration of a single arbitrator to be appointed by mutual agreement of the parties or, if the parties cannot agree upon the appointment, by the Chairman for the time being of the Chartered Institute of Arbitrators of Kenya Chapter (the “Institute”). Such arbitration shall take place in Nairobi and shall be conducted in accordance with the rules of arbitration of the Institute, each party shall bear its own costs in the arbitration. Notwithstanding the above clause, the bank shall have the right to go to court.
9. There is no disposition in the affidavit sworn by the respondent on whether any attempts were made to resolve the dispute arising under the relevant clause 9 of the service level agreement.
10. The respondent, in my humble view, had an obligation to breathe life into the dispute resolution clause in the agreement. However, according to the record and pleadings, the applicant has raised the fact that the respondent withheld this critical piece of information concerning the dispute resolution



clause from the taxing master and hence no order was made by the taxing master to refer this matter to arbitration.

11. This court also notes that there is evidence from the trial court's pleadings that a dispute arose from the terms of the said agreement. The parties agreed that all disputes and claims arising out of or in connection with the service level agreement would be subject to the dispute resolution clause 9. The question now is whether the respondent was justified in non-disclosure and ignoring the arbitration clause, and if not, whether this court should enforce the arbitration clause and refer the matter to arbitration.
12. The procedure and authority for referring matters to arbitration is provided for under section 6 of the [Arbitration Act](#) which stipulates as follows:

"6 (1) A court before which proceedings are brought in a matter which is 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 proceedings is sought, stay the proceedings and refer to arbitration unless it finds:

 - a. That the arbitration agreement is null, inoperative or incapable of being performed or
 - b. That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
13. The affidavits sworn by the applicant shows that a dispute arose during the performance of the contract. In my humble opinion, the arbitration clause's provisions had garnered insufficient attention. The clause binds the parties to the agreement to opt for arbitration in the event of a dispute and explicitly provides the steps to be taken to resolve it.
14. Though the applicant filed chamber summons application against the respondent, the pleadings clearly show that the Applicant seized the first opportunity to raise the issue of arbitration in his supporting affidavit.
15. I find that failure of full disclosure of the existence of the service level agreement clause 9 by the respondent was at the detriment of the Applicant. This may result in the discharge of any order made upon ex-parte application.
16. The facts as deponed in the affidavits of the applicant show that the court's jurisdiction was limited by the existence of the arbitration clause 9. I am guided by the provisions of the [Constitution](#) and other legislation which clearly show that the court has power to refer disputes to alternative methods of dispute resolution.
17. Article 159 (2)(c) of the [Constitution](#) of Kenya provides as follows: -

"In exercising judicial authority, the courts shall be guided by the following principles: -
alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3)."
18. Under section 59 C of the [Civil Procedure Act](#) cap 21 (Laws of Kenya), it is provided that: -

"1. Any suit may be referred to any other method of dispute resolution where the parties agree or the court considers the case suitable for such referral.



2. Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the court may in its discretion order....”

19. In addition, under order 46 rule 20 (1) of the Civil Procedure Rules, 2010, it is stipulated as follows: -

“Nothing under this order may be construed as precluding the court from adopting and implementing of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.”

20. It is evident that this court is mandated by the Constitution of Kenya, 2010 to promote the use of alternative dispute resolution mechanisms and that it is also vested with power in civil cases to refer any matters it deems suitable for resolution by such appropriate methods for the attainment of the overriding objective contemplated under sections 1A and 1B of the Civil Procedure Rules, 2010. In the instant application, the parties voluntarily agreed to subject themselves to arbitration should any dispute arise between them.

Section 10 of the Arbitration Act states as follows:

“Except as provided in this Act, no court shall interfere, in matters governed by this Act.”

21. In my opinion, the arbitration clause 9 in the contract precludes this court from exercising jurisdiction. Clearly, even though the subject matter of the application falls within this court's jurisdiction, the arbitration clause in the parties' service level agreement limits this court's intervention.

22. For the above reasons, the applicant's application dated March 4, 2022 has merit. The same is allowed in the following terms:

- a. The taxation proceedings conducted before Hon CAS Mutai SPM conducted on February 4, 2022 together with the judgement, decree and certificate of costs dated February 2, 2022 made in Miscellaneous Civil Application No 501 of 2021 are hereby set aside as the taxing master lacked jurisdiction to tax the bill of costs in light of the arbitration agreement.
- b. The dispute be and is hereby referred to arbitration in line with clause 9 of the parties service level of agreement.
- c. The warrants of attachments, warrants of sale and proclamation notices served on the applicant are hereby set aside and declared null and void.
- d. The costs of this application shall abide the outcome of the arbitral proceedings.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF MAY, 2022.

D. KEMEI

JUDGE

In the presence of:

Miss Wanyama for Ouma for Applicant

Miss Natwati for Wekesa for Respondent

Kapkota Court Assistant

