



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO. 53 OF 2015**  
**IN THE MATTER OF TAXATION OF AUCTIONEERS BILL OF COSTS**  
**AND**  
**IN THE MATTER OF THE AUCTIONEERS ACT**  
**BETWEEN**  
**FAMILY BANK LIMITED.....APPELLANT**  
**VERSUS**  
**KENNEDY MORURI MOKUA T/A MOCO AUCTIONEERS.....RESPONDENT**

**JUDGMENT**

1. The respondent herein Kennedy Moruri Mokua t/a Moco Auctioneers was the applicant in Kisii CM Misc. Miscellaneous Civil Application No. 4 of 2015 in which he sued the appellant herein (then the respondent) through a Notice of Motion dated 9<sup>th</sup> January 2015 brought under Rule 7 and 55 of the Auctioneers Rules 1997 wherein he sought the following orders:

- 1. The Honourable court/taxing officer be pleased to assess/tax the annexed auctioneers Bill of Costs.**
- 2. Consequently to prayer(1) herein above being granted, the Honourable court be pleased to issue certificate of taxation in respect of the Auctioneers Bill of costs herein.**
- 3. Consequently to prayer(2) hereinabove being granted the Honourable court be pleased to enter judgment in favour of the Applicant in terms of the certificate of taxation.**
- 4. Costs of this application be borne by the respondents.**
- 5. Such further and/or other orders be made as the court may deem fit and expedient.**

2. The application was supported by the respondent's affidavit dated 9<sup>th</sup> January, 2015 in which he averred that on 24<sup>th</sup> August, 2010 he (respondent) received a letter of instructions (marked "KMM001") from the appellant to repossess certain business assets after which he, on the same day (24<sup>th</sup> August 2010) travelled to the home area of the debtor in Kakamega County and proclaimed his properties as listed in the proclamation which was marked as "KMM 002".

3. He stated that after the said proclamation, the debtor made arrangements with the appellant on how to pay the outstanding loan balance but left out the respondent's bill thereby necessitating the filing of the application and Bill of Costs for assessment before the lower court. The bill of costs was attached to the affidavit and marked as "KMM-003". He prayed that the bill of costs be assessed and a certificate thereafter be issued. The respondent also prayed that, upon assessment of his bill of costs, the court directs the appellant to make good the payment thereof.

4. The appellant herein, Family Bank, opposed the application vide a replying affidavit sworn by Centric Kilungya Mutheki, an employee of the appellant in charge of debts collection and recoveries department who stated as follows:

**1. This honourable court does not have jurisdiction to hear and determine the application as the respondent purportedly received instructions to "undertake repossession of business assets" which he purportedly undertook "in Kakamega County".**

**2. No legal basis exists for filing of the instant application in Kisii Law Courts.**

**3. The application before the court is misconceived to the extent that this honourable court has been requested to enter judgment consequent upon issuance of a "Certificate of taxation" (sic).**

**4. The bank did not instruct the applicant to undertake repossession. Other than the exhibited schedule marked "KMM 001", no such instruction letter has been exhibited to the application.**

**5. There is no nexus between the attached schedule and the bank.**

**6. Despite the reference to the bank as a decree holder the bank has never obtained or held a decree as against the purported judgment debtor on the basis of which the respondent could purport to "proclaim" the debtors properties.**

**7. The respondent is aware that he had no basis in law upon which he could purport to "proclaim" the debtor's properties.**

5. He contended that the respondent and the appellant had on 1<sup>st</sup> October, 2009 executed a Service Level Agreement which at clause 8 thereof provided that all disputes arising out of or in connection with the contract would be referred to arbitration. He attached a copy of the Service Level Agreement marked as "FBL-01".

6. He further contended that Rule 55 of the Auctioneer's Rules, 1997 only provides for instances where fees is payable to an Auctioneer for attachment, repossession and sale of movable and immovable property under court warrants or letters of instructions and that Rule 55 excludes the application of the Fourth Schedule of the Auctioneers Rules, 1997 in determining fees payable to an Auctioneer in respect of "other written law or contract."

7. It was thus the appellant's case that repossession could have been possible if properties to be repossessed had been the subject of **Chattels Transfer Act Cap 28 of the Laws of Kenya**, which was not the case in the said application as there was no property to be subjected to repossession and hence he sought the striking out of the respondent's application.

8. On the 5<sup>th</sup> of May 2015 the trial court upon considering the application by the respondent, the replying affidavit by the appellant and each parties' respective written submissions made the following orders:

**1. The respondent's bill of costs be and is hereby assessed in the sum of Kshs. 63,269.90 only.**

**2. There be a stay of execution for 45 days.**

**3. Leave to appeal be and is hereby granted to the respondent.**

9. The appellant was aggrieved by the said ruling of the trial court and has appealed to this court vide a Chamber Summons application dated 11<sup>th</sup> May 2015 pursuant to rule 55(4) and 55(5) seeking the following reliefs:

**a. The ruling delivered by the Chief Magistrate's Court in Kisii CM Miscellaneous Civil Application No. 4 of 2015 be and is hereby vacated and in lieu thereof there be and is hereby made an order dismissing Kisii CM Miscellaneous Civil Application No. 4 of 2015.**

**b. Costs of Kisii CM Miscellaneous Civil Application No. 4 of 2015 and of this appeal be borne by the respondent in any event.**

10. The appeal was supported by the affidavit of Centric Kilungya Mutheki. The appellant comes to court on five main grounds namely:

**I. That the trial court lacked jurisdiction under Rule 55 of the Auctioneers Rules.**

**II. That the Fourth Schedule to the Auctioneers Rules was not applicable in the matter at hand.**

**III. That the appellant stands deprived of the benefit under contract with respondent ( vide Service Level Agreement)**

**IV. That the appellant was awarded costs without discharging "the legal burden of proof" on his application.**

**V. That the court arrogated itself a jurisdiction not prescribed by law.**

11. The respondent on his part opposed the above appeal through grounds of opposition dated 30<sup>th</sup> June 2015 and filed in court on 3<sup>rd</sup> July 2015 stating that:

**1. The appeal herein is misconceived, frivolous, vexatious and otherwise an abuse of the due process of the court.**

**2. An appeal under Rule 55 of the Auctioneers Rules can only be limited to the matter of quantum of auctioneers charges assessed and neither jurisdiction, contract nor instructions.**

**3. In any event:**

**a. Pursuant to section 6 of the Arbitration Act in force; the appellant brought (actually meant "lost") his claim to arbitration as per the alleged Services Level Agreement between the parties when the appellant filed its replying affidavit in the court below, hence the subordinate court had jurisdiction.**

**b. A contract thereof which is contrary to law is null and void to the extent of the contradiction as to give way to the said law.**

**c. Accordingly, as per the appellant's alleged Service Level Agreement provided for Auctioneers fees lower than the scale, the agreement was null and void for contradicting Rule 3 of the Auctioneers (Practice) Rules, 2009 hence unenforceable.**

12. When the appeal came up for hearing before me on 25<sup>th</sup> October, 2016, the parties agreed, that the findings of the instant appeal be adopted as the decision in other related matters being; Civil Appeal 54,55,56,57 and 58 of 2015 and that the present appeal be canvassed by way of written submissions. The

advocates for both parties have filed their respective submissions and I have perused them. I determine the issues for determination to be as follows:-

- a. Whether the parties had entered into an agreement containing an arbitration clause?**
- b. Whether a dispute has arisen between the parties?**
- c. Whether this court can exercise its discretion to set aside orders of the trial court and order for arbitration?**

13. From the pleadings and replying affidavit filed by the appellant, the terms of engagement between the appellant and respondent were reduced to writing through a Service Level Agreement dated 1<sup>st</sup> October, 2009. The said agreement was marked as FBL-01. 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, indemnity, confidentiality, Waiver & Amendment and Dispute Resolution.

14. The dispute resolution clause particularized as clause 8 provided for an alternative dispute resolution mechanism as follows:

**8.1 Any dispute arising out of or in connection with this agreement shall be referred to and finally settled by arbitration under the Rules of Conciliation and Arbitration of the Chartered Institute of Arbitrators (Kenya Chapter).**

**8.2 Arbitration shall be by one arbitrator agreed between the parties or (failing which) appointed accordance with those Rules.**

**8.3 The place for arbitration shall be Nairobi in the Republic of Kenya and the Arbitration Act shall apply in so far as it is not inconsistent with those Rules.**

**8.4 The language of arbitration proceedings shall be in English.**

15. There is no disposition in the affidavit sworn by the respondent on whether any attempts were made to resolve the dispute arising under the clause 8 of the Service Level Agreement.

16. The respondent, in my humble view, had an obligation to breathe life into the into the dispute resolution clause in the agreement. However, from the record and pleadings the appellant raised the dispute resolution clause in his replying affidavit in the trial court but no order was made to refer this matter to arbitration by the trial court.

17. This court also notes that there is evidence from the pleadings before the trial court that a dispute had arisen from the terms of the said agreement. According to the parties' agreement, all disputes and claims emanating from or in connection with their agreement were to be subjected to the dispute resolution clause 8. The question which then arises at this point therefore is whether the trial court was justified in overlooking the said arbitration clause and if not whether this court should enforce the arbitration clause and refer the matter to arbitration.

18. 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.**

19. The affidavit sworn by the applicant (now respondent) shows that a dispute had arisen in the course of performance of the contract. In my humble view, not enough attention had been directed to the provisions of the arbitration clause. The clause binds the parties to the agreement to resort to arbitration in the event that a dispute arises and lays down the steps to be undertaken to resolve the same.

20. Though the applicant (respondent herein) filed a Notice of Motion application against the respondent (appellant herein) the proceedings show that the appellant seized the first opportunity to raise the issue of arbitration in his replying affidavit though ideally the same ought to have been raised by way of a preliminary objection. However, by the dint of the provisions of Article 159 of the Constitution which frowns up in procedural technicalities, the right and duty of this court to refer this matter arbitration has not been extinguished. The Court of Appeal, when faced with a similar scenario had the following to say in the case of **Kisumuwalla Oil Industries Ltd Vs. Pan Asiatic Commodities PTE Ltd & Another CA No.100 of 1995(unreported):-**

***" In view of the reasons I have endeavoured to state above, and in light of the clear provisions of Section 6 of the Arbitration Act, unless the defendant waives his right to rely in such a clause he would be obliged to apply for a stay of proceedings."***

21. I find that even though the appellant did not seek for stay of proceedings in the trial court, he filed a replying affidavit in which clause 8 of the Service Level Agreement on dispute resolution was invoked. Under those circumstances, the trial court should have stayed the matter before it pending the outcome of the arbitration in line with clause 8 of the Service Level Agreement. The facts as deposed in the affidavits of both the applicant and respondent show that the court's jurisdiction was limited by the existence of the arbitration clause. 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.

**22. 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)."**

23. 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 (emphasis court).**

**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. .."**

24. 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 (emphasis court) **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."****

25. It is evident that the court is mandated by the supreme law 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 case, 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."**

26. In my humble view, the feature of arbitration clause in the contract prevents the courts from exercising jurisdiction. Clearly therefore, even though the subject matter of the case is within the jurisdiction of the court, the arbitration clause in the parties' Service Level Agreement limits court's intervention.

27. For the above reasons this appeal succeeds and is allowed in the following terms:

- 1. The proceedings and orders made in Miscellaneous Civil Application No. 4 of 2015 are hereby set aside.**
- 2. The dispute be and is hereby referred to arbitration. In line with clause 8 of the parties Service Level of Agreement.**
- 3. The costs of this appeal shall abide the outcome of the arbitral proceedings.**
- 4. This decision be adopted as the judgment in other related appeals being Kisii HCCA Nos 54, 55, 56, 57 and 58 of 2015.**

**Dated, signed and delivered in open court this 28<sup>th</sup> day of February, 2017**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Ochwangi holding brief for Nyamurongi for the Appellant
- N/A for the Respondent
- Omwoyo court clerk