



**Will Developers and Construction Limited v Joel Mwanzia Velela t/
a Betabase Auctioneers & 2 others (Environment and Land Appeal
E020 of 2023) [2023] KEELC 21614 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21614 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E020 OF 2023
EK WABWOTO, J
NOVEMBER 9, 2023
IN THE MATTER OF AUCTIONEERS ACT NO. 5
OF 1996 AND RULES 9 (1-2) OF 2009 AS AMENDED**

BETWEEN

WILL DEVELOPERS AND CONSTRUCTION LIMITED APPELLANT

AND

**JOEL MWANZIA VELELA T/A BETABASE AUCTIONEERS . 1ST RESPONDENT
KENYA TECHNICAL TEACHERS COLLEGE 2ND RESPONDENT
GOVERNMENT OF THE REPUBLIC OF KENYA, PERMANENT SECRETARY,
VOCATIONAL & TECHNICAL TRAINING, MINISTRY OF EDUCATION,
SCIENCE AND TECHNOLOGY 3RD RESPONDENT**

RULING

1. This Ruling is in respect to two Applications. The Appellant’s Application dated 19th September, 2023 and the Respondent’s Application dated 20th September, 2023. The Appellant’s application sought for the stay of execution of the ruling delivered by the Subordinate Court in respect to Milimani Chief Magistrate’s Commercial Court Misc. Application No. E100 of 2023 Joel Mwanzia Veleza T/ A Betabase Auctioneers v Will Developers and Construction Limited and Another. The Application was premised on the grounds that; the Court on the 14th of September, 2023 rendered a decision in which it allowed the Application dated 25th June, 2023 and further granted the Appellant/Applicant care taker 7 days to allow access to the workshop failure of which a breaking order shall be issued, that the breaking order granted by the Court on the 14th September, 2023 amounts to an order of eviction as the orders sought in the Application dated 25th June, 2023 by the Auctioneer was to break in and evict the Appellants care taker and that the orders granted in the High Court in E014 of 2021 adopting



the Arbitral Award did not provide for an eviction order for the Court to entertain the Miscellaneous Application.

2. The Respondent's Application dated 20th September, 2023 sought for orders to set aside the Orders suspending or staying the execution of the ruling delivered on 14th September, 2023 in respect to Milimani Misc. Application No. E100 of 2023. The Application was supported by an affidavit sworn by Dr. Edwin Tarno on behalf of the Respondents and on the grounds that; the application did not offend the provisions of Section 2 of the Auctioneers Act which provides as follows: 2(2) Subject to subsection (3), any person who -
 - a. attaches for sale any movable or immovable property in execution of a court order made pursuant to the provisions of any written law or contract;
 - b. sells or offers for sale any movable or immovable property or any interest therein by action or by any other mode of sale by competition;
 - c. levies distress for rent or distrains under the provisions of any written law;
 - d. carries out evictions under an order of a court;
 - e. repossesses goods from any person pursuant to the provisions of any written law or contract, shall, for the purposes of this Act, be deemed to carry on the business of an auctioneer.
3. The Respondents also contended that the Auctioneer was well within the meaning of Section 2 of the Auctioneers Act to seek for an eviction order through a Miscellaneous Application since the Decree sought to be enforced was pursuant to an enforcement and Recognition of an Arbitral Award issued in a Miscellaneous Application, that the said order was obtained by the Appellant/Applicant without full disclosure of the following issues and facts. That there is a subsisting contract between the parties and further that there is no decree of court capable of execution by way of an eviction order herein, which is not the case herein.
4. It was also argued that by a Contract for the Construction of two proposed mechanical workshops between the applicant and the Respondent dated 9th March, 2011 in which parties thereto agreed at clause 37.1 thereof that any dispute arising from the aforesaid contract would be referred to Arbitration.
5. Pursuant to the directions issued by the Court, both applications were heard simultaneously and by way of written submissions. The Appellant filed written submissions dated 13th October, 2023 while the Respondent filed written submissions dated 27th October, 2023.
6. The Appellant submitted on the following three issues; whether the Court has jurisdiction to entertain the matter, whether the Appellant has satisfied the grant of orders of stay of execution and whether the 2nd Respondent's application is merited.
7. The Appellant submitted that the Orders sought in the MISC Application was requesting the Court to issue a breaking order to Joel Mwanzia Velela t/a Betabase Auctioneers to break the doors of the two electrical and electronics workshops situated at the Kenya School of TVET and evict the 1st Respondent Judgement debtor's caretaker therein. The Orders that were being sort in the MISC Application E100 of 2023 were orders of evicting the Appellant/Applicant from Electronic Workshops. That the Application through disguised as an Application for execution essentially seeks to remove the Appellant/Applicant from the premises by way of eviction evidenced by the orders sought in the Application dated 25th June, 2023.



8. It was submitted that the net effect of the orders that were sought is take over the premises and essentially through the back door terminate the contract between the Appellant/Applicant and the 2nd Respondent dated 9th March, 2011.
9. The Award the 2nd Respondent refers to, of the Tribunal and no where did the Tribunal Award terminate the Contract of the parties. The Learned Magistrate in his ruling made a decision that the Arbitral Award terminated the Contract of the parties which in itself was an erroneous decision. The contract could only be terminated as provided in Clause 33, 33.1, 33.2, 33.3 and 33.4 which the 2nd Respondent has failed to exercise. Seeking an order of eviction in a Miscellaneous Application prompted the filing of the Notice of Preliminary Objection dated 12th July, 2023 that the Court dismissed and forms the basis of the Appeal before this Court as eviction orders are provided under Section 152(A) to 152(H) of the Land Act.
10. It was also submitted that the Jurisdiction of this Court is provided under Article 162(2) b of the Constitution and the Environment and Land Court Act section 13(2) (a)-(e).
11. The Court herein has jurisdiction to entertain this Appeal and Application as the Orders granted were in relation to granting enforceable interest in Land being an Application by way of a Miscellaneous Application seeking orders of eviction.
12. It was further submitted that the Application has been brought under Order 42 Rule 6 as well as order 22 Rule 22. The Civil procedure rules provide that the following conditions be met before they can be granted stay orders:
 - i. "Substantial loss may result to the Applicant unless the order is made.
 - ii. The Application has been made without unreasonable delay; and
 - iii. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the Applicant."
13. The applicant submitted that the principles governing the exercise of Courts jurisdiction are now well settled firstly, the intended appeal should not be frivolous, the Applicant must show that they have an arguable Appeal, and second, this Court should ensure that the Appeal, if successful, should not be rendered nugatory. Reliance was made to the case of RWW v EKW (2019) eKLR where the Court held as follows:

"--the purpose of an Application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of Appeal are safeguard and the Appeal if successful is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her Judgement. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs."
14. It was also argued that the Applicant herein moved the Court as the learned magistrate had only granted 7 days to comply by giving possession of the electronic workshop. The net effect of the order is terminating the contract dated 11th May 2011 and dispossessing the Appellant/Applicant of the site where he is a contractor without payment of his dues by way of eviction of the care taker. The Applicant has demonstrated substantial loss as the order amounts to dispossession and termination of the contract.



15. It was further submitted that the Application was made without unreasonable delay. The Memorandum of Appeal as well as the Application was filed within 7 days of the order Appealed against and that the Applicant has demonstrated that if stay of execution is not granted the Appeal before the Court will be rendered nugatory.
16. It was also contended by the Appellant that the Respondents application is not merited and the same ought to be disallowed with costs to the applicant.
17. The Respondents on the other hand submitted on the following three issues; whether this Court has jurisdiction to hear the matter, the effect of non-disclosure of material facts by the Applicant and whether the Applicant has met the threshold for grant of the reliefs sought.
18. It was submitted that the Applicant has also admitted that the filing of the matter at the Commercial Court was pursuant to adoption of an Arbitral Award issued by the High Court of Kenya, Commercial and Tax Division to wit; Misc. Civil Application No. E014 of 2021, Kenya Technical Teachers College (Now Kenya School of TVET) v Will Developers and Construction Limited v Government of Kenya through PS, Vocational and Training, Ministry of Education, Science and Technology.
19. It was argued that the Appellant had admitted that the subject matter both in the High Court and the Chief Magistrates Court is a contract between the parties for construction of two electronic workshops and that the subject matter herein is not the use, ownership and occupation of land. It is the breach of Contract and execution of the adopted Arbitral Award in the Commercial and Tax Division of the High Court and further if at all the Applicant was aggrieved by the order of court issued on 14th September, 2023, it ought to lodge an appeal within 30 days at the High Court of Kenya, Commercial and Tax Division as this is purely a commercial matter. Reliance was placed in the case of *Phoenix of E.A. Assurance Company Limited v S.M. Thiga T/A Newspapers Service* [2019] eKLR and *Evangeline Nkatha Mugambi v Festus Muriungi Kinoti* [2022] eKLR .
20. On the effect of non-disclosure of material facts, it was submitted that the Applicant is guilty of not disclosing material facts and hence is undeserving of the reliefs sought. Reliance was made to the case of *Halima Haji Sarah v Multiple Hauliers (E.A) Limited & Another* [2022] eKLR .
21. It was further submitted that the Appellant has not met the threshold for grant of the orders sought in the Application dated 19th September, 2023.
22. It was argued that the Appellant has not established that it has an arguable appeal with high chances of success for the following reasons; the Preliminary Objection raised by the Applicant in the subordinate Court as drawn failed to meet the threshold of a Preliminary Objection the grounds raised therein would require examination of the facts by the Honourable Court, the Subordinate Court had jurisdiction to hear and determine the matter for the following reasons:
 - a. The Respondents sought orders through the Auctioneer to evict a caretaker of the 1st Respondent/Judgment-Debtor who remains in the workshops which are in the premises of the Applicant/Decree-Holder.
 - b. The Respondents applied through a Miscellaneous Application in the High Court as required by law for adoption and enforcement of the Award of the Arbitral Tribunal dated 11th May, 2020 that ordered the Applicant to complete the works within 14 days thereof.
 - c. The 2 Respondent wishes to repair the workshops on its own expense and the issue of the value of the initial contract which was terminated by the Arbitral Award that was in favour of the 2nd Respondent does not arise herein.



- d. The 2nd Respondent annexed a letter from the Ministry of Lands, Public Works, Housing and Urban Development, State Department for Public Works dated 21st March, 2023 that expressly that the value of works to be conducted at the premises(workshops) is estimated at Kshs, 3,624,560.00 which is well within the Honourable Court's jurisdiction.
- e. The 2nd Respondent did not go to request the Subordinate Court to enforce the Arbitral Award as misconstrued by the Applicant. Instead, the 2 Respondent having realized that the Applicant has not complied with the order by the Arbitrator to complete the workshops within 14 days of 11th May, 2020, now wishes to complete the works on its own expense, and if need be, pursue the Applicant for compensation and or compliance of the other limbs of the Award.
- f. The Subordinate Court was clothed with the jurisdiction to grant eviction orders and supervisory orders by the police to ensure compliance.

Reliance was placed on the case of *Philip Kithaka v Mercy Karimi Nyaga* [2021] eKLR .

23. Having carefully considered the rival arguments presented by the parties herein, the authorities cited together with the affidavits, the following are the salient issues for determination which will adequately dispose the two applications:
 - i. whether this Court has jurisdiction.
 - ii. What are the appropriate reliefs to grant herein.
24. In the now famous case of *“Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited* (1989) IKLR dealt with a court’s jurisdiction thus:-

“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.

25. The Environment and Land Court is a statutory creation by the *Constitution* of Kenya under the provision of Article 162 (b). Here, the Courts are vested it with original and unlimited jurisdiction. From the preamble of the *ELC Act*, the jurisdiction of the court is defined as

“.....a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes.....”

25. Parties are therefore expected to raise issues of jurisdiction at the earliest. In the instant case, the Ruling by the learned Magistrate on 14th September, 2023 was delivered in respect to an application dated 25th June, 2023 which application sought to enforce an arbitral award and decree adopted by the Commercial Court on 18th February, 2022. The Ruling had the following orders:

“I therefore allow the Applicant’s Chamber Summons dated 21st May, 2021 by making the following final orders:

- a. The Arbitral award dated 11th May, 2020 by Kimani A.G. (FCI Arb) be and is hereby recognized and adopted as a judgment of this Court and leave is hereby granted to the Applicant to enforce it as an order of this Court.



b. The 1st Respondent shall bear the costs of this Application”.

26. Having considered the foregoing, it is worth noting that each court is capable of enforcing its own orders. A party who is aggrieved by such orders ought to have moved the same court that issued the said order. It doesn't matter on the proposed mode of execution or the nature of the orders issued. In the circumstances, it is the finding of this Court that the root of this Appeal having been traced to the orders issued by the High Court (Commercial and Tax Division) on 18th February, 2022, this Court doesn't have jurisdiction to hear and determine the same.
27. On the Second issue as to what are the appropriate reliefs to issue, this Court having found that it doesn't have jurisdiction to hear and determine the appeal, the appropriate action is to down its tools. Without jurisdiction, a Court has no powers to make any step. There would be no basis for continuation of the proceedings herein.
28. In conclusion thereof, the Appeal is not properly before this Court and the same is struck out with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF NOVEMBER, 2023.

E. K. WABWOTO

JUDGE

In the virtual presence of:

Ms. Makori for the Appellant.

Ms. Kamende for the Respondents.

Court Assistant; Caroline Nafuna.

