



**Comacon Limited v Musa & another (Civil Case E330 of 2023)  
[2024] KEHC 4756 (KLR) (Commercial and Tax) (19 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4756 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E330 OF 2023  
A MABEYA, J  
APRIL 19, 2024**

**BETWEEN**

**COMACON LIMITED ..... PLAINTIFF**

**AND**

**ABDIRAHMAN MUSA ..... 1<sup>ST</sup> DEFENDANT**

**JEREMIAH KIARIE MOCHENDU T/A ICON AUCTIONEERS .... 2<sup>ND</sup>  
DEFENDANT**

**RULING**

1. This is an application dated 26/7/2023. It was brought under section 7 of the *Arbitration Act*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 45 Rule 1 of the *Civil Procedure Rules* and Article 159 of the *Constitution*.
2. The application sought the restoration of the applicant's goods back to its business premises and that upon such restoration, the goods to remain in its possession/custody until the dispute between the parties is heard and determined by the arbitrator.
3. The grounds for the application were set out on the face of it and in the supporting affidavit of Cosmas Onyango Akeyo sworn on 26/7/2023. It was contended that the parties had entered into a lease agreement and the 1st respondent later instructed the 2nd respondent to proclaim and attach the applicant's goods over alleged rent arrears and the applicant's goods indicated in the notice of attachment and inventory of items were attached. That the lease agreement had an arbitral clause but a party could move this court for conservatory orders pending the arbitration.



4. That the 1<sup>st</sup> respondent had frustrated the applicant's efforts to commence arbitration and the attached goods needed protection before commencement of arbitration and the 1st respondent could not be allowed to keep the goods indefinitely.
5. It was also contended that the 2<sup>nd</sup> respondent, while acting on the instructions of the 1st respondent, obtained breaking orders fraudulently and the orders were set aside by the lower court thus the defendants were not acting in good faith. It was thus prayed that the application be allowed as there was no need for the defendants to continue keeping the goods.
6. The 1st respondent opposed the application vide the replying affidavit of Abdirahman Musa sworn on 4/8/2023. It was averred that the lease agreement was rendered void due to the applicant's default in paying rent. That the applicant was in occupation of L.R. No. 2035 which it had sublet to other people but failed to pay rent due. That in the premises, the 1st respondent was justified in issuing instructions to the 2nd respondent accordingly.
7. It was averred that the applicant's goods were illegally sold by auction by the 2nd respondent on 15/9/2022 and the applicant was aware that there were no goods to be returned and the property had already been leased to a third party. That though the 2nd respondent was initially acting under the 1st respondent's instructions, it exceeded such instructions and went rogue when it illegally sold the applicant's goods and never gave the 1st respondent the proceeds of the auction nor accounted for the sale and the 1st respondent was not bound by such rogue actions.
8. It was further averred that in the ruling delivered on 16/1/2023 in MCMISC E1069 of 2022, the court found that the goods had already been sold and could not be returned and the auctioneers were condemned to bear the costs of the application.
9. It was therefore contended that any claim ought to have been brought against the 2nd respondent and the prayers sought could not be performed. That a similar application had already been determined in MCMISC E1069 of 2022 and ELC Appeal No. 17 of 2022 which was withdrawn with costs. That the application was also an abuse of court process as the applicant talked about arbitration yet had filed a plaint before this court seeking damages.
10. The 1st respondent also filed a notice of preliminary objection dated 4/8/2023 on grounds that this Court lacked jurisdiction to entertain the plaint dated 26/7/2023 as the applicant's cause of action was for return of goods thus the suit related to the use or occupation of land which ought to have been heard in the Environment and Land Court.
11. The applicant filed submissions dated 9/8/2023 whereas the 1<sup>st</sup> respondent's were dated 18/9/2023. I have considered those submissions alongside the pleadings and evidence on record. The main issue for determination is whether the conservatory orders ought to be issued pending arbitration, and whether the preliminary objection is merited.
12. I will first determine whether what was raised by the 1<sup>st</sup> respondent amounts to a Preliminary Objection. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 to be a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.



13. In *Oraro v Mbaja* (2005) 1 KLR 141, where it was held that: -
- “Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.
14. The preliminary objection was grounded on the fact that this Court lacks jurisdiction to hear and determine the suit. The determination on this ground alone may dispose of the suit preliminarily, thus the objection meets the ingredients aforesaid.
15. It was contended that this Court lacks jurisdiction to hear and determine the instant claim as the claim related to the use or occupation of land and ought to have been filed in the Environment and Land Court.
16. I have considered the claim and application before Court. The same emanates from a lease agreement between the applicant and the 1<sup>st</sup> respondent. It seeks the restoration of the goods attached by the 2<sup>nd</sup> respondent on the 1<sup>st</sup> respondent’s instructions. The application therefore sought conservatory orders pending arbitration. To the extent that it is based on a commercial transaction between the parties, the claim is commercial in nature and this Court is vested with jurisdiction to hear and determine the same.
17. The preliminary objection is therefore without merit and is hereby dismissed.
18. As regards the application dated 26/7/2023, I note that the same was brought under section 7 of the *Arbitration Act* which provides thus: -
- (1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.
  - (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.”
19. It was the applicant’s case that he had entered into a lease agreement with the 1<sup>st</sup> respondent for the lease of his property. That while acting under the instructions of the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent proclaimed the applicant’s goods which remained in the respondents’ possession. That the lease agreement had an arbitral clause but the arbitral proceedings had not commenced due to the 1<sup>st</sup> respondent’s delay.
20. On the other hand, the 1<sup>st</sup> respondent contended that in MCMISC E1069 of 2022 had already determined the issue of restoration of goods and found that the goods had been sold thus the order for restitution could not issue. The 1<sup>st</sup> respondent also contended that the 2<sup>nd</sup> respondent acted ultra vires his instructions in illegally selling the goods and any claim ought to have been against the 2<sup>nd</sup> respondent directly.
21. I have seen the ruling dated 16/1/2023. Among the orders sought by the applicant in those proceedings was that the 2<sup>nd</sup> respondent be ordered to restore the applicant’s goods back to the yard. That court addressed itself to the issue raised before this Court. That court found that upon the 1<sup>st</sup> respondent contending that the goods had already been sold by auction on 15/9/2022, the applicant did not dispute that contention in its supplementary affidavit and the deposition remained uncontroverted.



The court therefore found that the goods attached had been sold and could not be returned back to the yard.

22. In light of that finding, any attempt to determine the issue of restoration of goods again will amount to contravention of the principle on *res judicata* which is set out in the [Civil Procedure Act](#) at Section 7 as follows: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

23. The issue of restoration of goods was therefore heard and determined before a competent court involving the same parties before this Court and cannot be relitigated. In the circumstances, the application cannot succeed.
24. Though the 1st respondent submitted that the applicant’s suit was an abuse of court process due to the filing of the plaint herein and also the intention to pursue arbitration, I note that the 1st respondent himself pleaded that the lease agreement had already been voided, the applicant’s goods had been illegally sold by the 2nd respondent, and the lease premises had already been leased out to another third party.
25. Should the plaint be struck out, the applicant would be forced to go through arbitration proceedings and if successful, obtain an award that cannot not be executed against the 2nd respondent who was not a party to the lease. The circumstances have gone beyond the scope of arbitration as there is a claim against the 2nd respondent for damages arising from illegal attachment of the goods and such a claim cannot be entertained by an arbitral tribunal due to issues of privity of contract. I thus find that the plaint is properly before this Court considering that the value of goods sought is Kshs. 84,394,404.25 as per the applicant’s inventory attached to the application.
26. In the end, I find that the applicant’s application dated 26/7/2023 and the 1<sup>st</sup> respondent’s preliminary objection dated 4/8/2023 are both unmerited and are both hereby dismissed.
27. Each party shall bear own costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF APRIL, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

