



**Rubis Energy Kenya PLC (Formerly Kenol Kobil Limited) v Downstream Energy Limited;
KCB Bank Kenya Limited & 5 others (Garnishee) (Miscellaneous Application Arbitration
E078 of 2022) [2024] KEHC 5946 (KLR) (Commercial and Tax) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5946 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION ARBITRATION E078 OF 2022**

**FG MUGAMBI, J
MAY 24, 2024**

BETWEEN

**RUBIS ENERGY KENYA PLC (FORMERLY KENOL KOBIL
LIMITED) JUDGMENT DEBTOR**

AND

DOWNSTREAM ENERGY LIMITED DECREE HOLDER

AND

KCB BANK KENYA LIMITED GARNISHEE

STANBIC BANK KENYA LIMITED GARNISHEE

ABSA BANK KENYA PLC GARNISHEE

CO-OPERATIVE BANK OF KENYA GARNISHEE

EQUITY BANK KENYA GARNISHEE

SAFARICOM PLC GARNISHEE

RULING

Background

1. This ruling addresses two applications. The first, dated 25th September 2023, was filed by the decree holder seeking to make the garnishee orders nisi absolute and to apply the monies held in the garnishees' bank accounts toward satisfying the decretal amount. The second, dated 27th September 2023, was filed by the judgment debtor, seeking to stay the execution of the decree issued by this court on 6th July 2023 and for leave to appeal against it.



2. These proceedings are a succession of the arbitral proceedings out of which a final award dated 20th September 2022 was recognized and adopted as an order of this court. A decree was consequently issued on 23rd August 2023. The decree is yet to be satisfied, prompting the garnishee proceedings.

The application dated 25th September 2023

3. This application is based on the acknowledgment that a decree was issued on 23rd August 2023 in favor of the decree holder against the judgment debtor for a sum of Kshs. 27,256,400.07 plus costs, which remains unsettled. The decree holder contends that the judgment debtor holds recoverable funds with the garnishees, which should be attached by this court to satisfy the decree.
4. The decree holder is concerned that unless the funds in the garnishee accounts are attached, the judgment debtor might withdraw them, thus defeating the execution process.
5. The application is opposed through a replying affidavit by Ruth Mabele, sworn on 9th October 2023, and a preliminary objection dated 26th September 2023 filed by the judgment debtor. The judgment debtor argues that this court lacks jurisdiction to determine the application, citing that a similar application filed in Miscellaneous Application No. E799 of 2023 was struck out with costs on 25th September 2023. It was further argued that since the decree holder has not satisfied the order on costs from the previous suit, they do not deserve any orders from this court.
6. The judgment debtor also contends that the application violates the mandatory provisions of Section 94 of the *Civil Procedure Act*, as a pending bill of costs dated 15th August 2023 is scheduled for assessment before the Deputy Registrar on 20th November 2023. The decree holder states that execution proceedings cannot commence until costs are ascertained by the court, in line with Section 94 of the *Civil Procedure Rules*.
7. Additionally, the judgment debtor asserts that the decree relied on for the garnishee orders was obtained irregularly, as they were not given an opportunity to comment on the decree before its issuance. They argue that the decree holder is pursuing wrongful execution and using multiple fronts to execute against the judgment debtor's assets.
8. The fifth garnishee filed a replying affidavit, confirming that the judgment debtor's account held a credit balance sufficient to fully satisfy the decretal sum.
9. On 3rd October 2024, counsel representing the parties appeared virtually before me for directions. During the session, the court discharged all garnishees, except the second and fifth, from any possible attachment of funds.

Analysis and determination

10. The court has considered the pleadings, submissions, authorities, and evidence from the parties.
11. Regarding Misc. Application No. E799 of 2023, section 7 of the *Civil Procedure Act* is very clear that for a matter to be regarded as sub judice an issue must have been heard and finally decided. This court notes that the matter was withdrawn following this court's directions to be filed in this suit, where the relevant decree was issued.
12. The decree holder was ordered to pay costs of Kshs. 10,000/-. Since the application was not heard on its merits, I do not agree with the judgment debtor that it constitutes an abuse of the court process.
13. The next preliminary issue is whether the garnishee application is fatally defective and whether this court has jurisdiction to entertain the said application.



14. The judgment debtor relies on section 94 of the *Civil Procedure Act* which provides as follows:

“Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.” (emphasis mine)
15. It ordinarily follows that an execution process starts once costs have been ascertained. Section 94 provides exceptions to this rule so as to facilitate immediate execution where the court considers it necessary but even then, such a decree must have been passed in the exercise of this court’s original civil jurisdiction.
16. This cardinal point was emphasized in the case of *Equity Bank Limited v Adopt A Light Limited*, [2015] eKLR, where it was held that the High Court, when facilitating the execution of a decree from an arbitral award, is not exercising its original civil jurisdiction. I align with this holding. Since the decree in this matter arose from an arbitral award, the court did not exercise its original jurisdiction.
17. Therefore, it is my finding that section 94 of the *Civil Procedure Act* does not apply, and the court lacks jurisdiction to allow the execution of the decree until taxation is finalized.
18. The court record confirms that the parties appeared before the Deputy Registrar on 19th September 2023 for taxation directions, with a compliance mention set for 20th November 2023. The applicant has not denied that the taxation proceedings are still ongoing.
19. In light of this, the preliminary objection partially succeeds, and the application seeking to make the garnishee orders nisi absolute is struck out as premature.

The application dated 27th September 2023

20. The judgment debtor argues that the court erred in failing to set aside part of the final award dated 19th September 2022 as sought by the judgment debtor. The judgment debtor contends that it has good grounds of appeal which warrant an appeal to the Court of Appeal and on which grounds the applicant ought to be granted leave to appeal the decision of the court made on 6th July 2023.
21. The question that arises is whether the court has the jurisdiction to stay the execution of an arbitral award and whether the applicant is deserving of the orders sought.
22. For context I rely extensively on the provisions of section 10 of the *Arbitration Act*. It provides as follows:

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”
23. The limited scope that exists for court intervention in arbitral processes was equally emphasized by the Court of Appeal in the case of *Anne Mumbi Hinga v Victoria Njoki Gathara*, [2009] eKLR. The court held as follows:

“We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the *Arbitration Act* or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court



or Court of Appeal against an award except in circumstances set out in section 39 of the *Arbitration Act*.”

24. Likewise, in *Erad Suppliers & General Contracts Limited V National Cereals and Produce Board*, No.636 of 2009 the court cited with approval from the holding of Odunga J as follows:

“ ... in light of the provisions of section 10 of the *Arbitration Act*, all the provisions, including the *Civil Procedure Act* and Rules do not apply to arbitral proceedings because Section 10 of the *Arbitration Act* makes the *Arbitration Act* a complete code and Rule 11 of the Arbitration Rules cannot override Section 10 of te *Arbitration Act*. Accordingly, I do not have jurisdiction to intervene in any manner not specifically provided for in the *Arbitration Act*, and that includes entertaining the application seeking to stay proceedings subsequent to the award...It is clear to me that no application of the Civil Procedure Rules would be regarded as appropriate if its effects would be to deny the award finality and speedy enforcement, both of which are the major objectives of arbitration.”

25. The court, in the case above went ahead to state:

“ As Odunga J had rightly pointed out in his ruling of 8th February 2012, the Civil Procedure Rules are only applicable to arbitral proceedings as appropriate and certainly Order 42 of the Civil Procedure Rules is not one of them.”

26. The judgment debtor prayed for an order to stay the execution of the decree of this court that granted the enforcement of the arbitral award and for leave to appeal out of time against it.

27. The application was filed pursuant to Order 42 of the *Civil Procedure Act*. In alignment with the judicial pronouncements highlighted, this court can only intervene in the arbitral process regarding matters expressly allowed by the *Arbitration Act* 1995. The circumstances under Order 42 of the *Civil Procedure Act* are not envisioned by the *Arbitration Act* as grounds for court intervention in the arbitral process.

28. To grant a stay of execution of the arbitral award would be akin to denying the award finality and speedy enforcement which are the core objectives of the arbitration process.

29. On the point raised for leave to appeal, I am guided by the decisions of *Talewa Road Contractors Limited v Kenya National Highway Authority*, [2019] eKLR where the court held the following:

“ Further under section 39 of the *Arbitration Act* the courts are only permitted to intervene against arbitral award through an appeal process where “the parties have agreed” to appeal and the appeal is restricted to determining “any question of law arising in the course of arbitration or out of the award.”

30. I also align myself with the case of *Micro-House Technologies Limited V Co-operative College of Kenya*, [2017] eKLR where the Court of Appeal determined that the right of appeal does not lie under section 39(3) in the absence of leave, which leave ought to be sought and obtained from the Court of Appeal.

31. While I am also guided by the Supreme Court’s reasoning in the case of *Nyutu Agrovet Limited V Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR it is my view that section 39(3)(b) makes it clear that it is upon the Court of Appeal to determine whether to grant leave to appeal upon considering the factors set out therein.



32. For all the foregoing reasons, I am of the view that whether to grant leave to appeal against the decision of the High Court on an arbitral award is a preserve of the Court of Appeal hence this court lacks jurisdiction to entertain the instant Motion. On this basis the judgment debtor's application dated 27th September 2023 not successful.

Disposition

33. The upshot of the foregoing is that the decree holder's application dated 25th September 2023 is struck out with costs to the judgment debtor and the garnishees.
34. The judgment debtor's application dated 27th September 2023 is also dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 24TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

