Equity Bank (K) Ltd v Omonde t/a Dimonde Agencies and Auctioneer (Miscellaneous Application E047 of 2021) [2023] KEHC 2467 (KLR) (20 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2467 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

MISCELLANEOUS APPLICATION E047 OF 2021

DK KEMEI, J

MARCH 20, 2023

BETWEEN

EQUITY BANK (K) LTD ..... INSTRUCTING PARTY

AND

DIMONDEN OMONDE T/A DIMONDE AGENCIES AND AUCTIONEER ..... RESPONDENT

RULING

1. Vide a notice of motion application dated September 19, 2022, the Respondent approached this Court pursuant to section 80 of the *Civil Procedure Act* CAP 21 and Order 45 Rule 1(b) of the *Civil Procedure Rules 2010* and all other enabling provisions and power of the law seeking the following orders:

    i. Spent;

    ii. That the Honourable Court be pleased to review and/or set aside its ruling and Orders issued on February 21, 2022 and in its place the Honourable Court do proceed and dismiss the application dated July 29, 2021.

    iii. That the costs of the application be provided for.

2. The application is predicated upon the grounds set out therein. It is contended that the Honourable Court on February 21, 2022 allowed the Instructing Party/Respondent's application setting aside the taxation proceedings conducted by Hon CAS Mutai SPM on the May 28, 2021 on the strength that the taxing master lacked jurisdiction when the Instructing Party/Respondent had in fact paid the Respondent/Applicant the whole taxed amount of Kshs 2, 095, 675/=in Bungoma CMCC Misc App No 159 of 2021 which fact they never disclosed to the Court; that the Respondent/Applicant received the Bank statement showing the payment from Mako Auctioneers on August 24, 2022 which auction delayed to supply the same on time since she is on the panel of the Instructing Party/Respondent who

joined the same after the ruling in this matter and that it was in the interest of justice that the application be allowed.

3. The application was supported by the affidavit sworn by Dimonde Omonde sworn on September 19, 2022, and filed on June 24, 2022 in which he averred that on February 21, 2022 the Honourable Court allowed the Instructing Party/Respondent's application setting aside the taxation proceedings conducted by Hon CAS Mutai SPM on May 28, 2021 due to lack of jurisdiction, the said ruling was delivered after the Instructing Party/Respondent had already paid the applicant the whole taxed amount of Kshs. 2, 095, 675/= and that the same was not disclosed to the Court. He further deponed that the amount was paid *vide* Mako Auctioneers who had proclaimed the Instructing Party/ Respondent's properties and submitted the amount to its advocate and that since payment of the full amount was done before the ruling then there was nothing to be referred to arbitration.

4. The Instructing Party/Respondent herein opposed the application vide a replying affidavit sworn by Kariuki Kingori dated October 12, 2022 and filed on even date wherein he averred inter alia; that under the service level agreement, the auctioneer and the bank executed a consent dated February 9, 2021 whereby they settled the auctioneer's storage charges at an all-inclusive fee which the bank was paying in piecemeal; that despite the consent and the lack of knowledge of the bank, the auctioneer proceeded to file his bill of costs as Bungoma Misc App No 159 of 2021; that aggrieved by the taxation, the bank filed an application before the taxing master for review on grounds of existence of a consent recorded by the parties but the same was dismissed on grounds that the same was misplaced; that through a ruling by this honourable Court, the taxation proceedings were set aside together with certificate of costs and that the matter was referred to arbitration as is provided in the Service Legal Agreement; that it was evident that the core issue for determination in the ruling was that of jurisdiction in light of the Dispute Resolution clause in the Service Legal Agreement and that the issue of consent or payment of the taxed amount was not paramount and thus did not inform the decision of the Court in referring the same to Arbitration.

5. The present application was canvassed by way of written submissions. The counsels for both parties duly filed and exchanged their respective submissions. I have given due consideration to the application, rival affidavits and submissions and find the issue necessary for determination is whether this application is merited.

6. It is worth reiterating that the terms of engagement between the Instructing Party/Respondent and Respondent/Applicant were reduced into writing through a service level agreement executed on October 12, 2020, by Equity Bank (K) Ltd and on September 28, 2020 by Dimonde Agencies & Auctioneers respectively. A perusal of the agreement showed 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.

7. The moment the matter was heard and determined by the High Court, the Court became *functus officio*. The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. That once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive, as stated in the "Application in Administrative Law," (2005) 122 SALJ 832.

8. Similarly, in the Journal by the University of Queensland on "The Finality of Judicial Decisions", it is stated that, a court becomes functus officio in the following events;

    a) A judicial tribunal, becomes functus officio in respect of decisions made by it before it becomes defunct;

b) The judicial tribunal's powers to revise its own decisions or to re-try any case after decisions made by it in the original trial have been rescinded.

9. In the same vein, the Court of Appeal in the case of; *Telkom Kenya Limited vs John Ochanda* [2014] eKLR, stated that: -

> " Functus officio is an enduring principle of law that prevents the re-opening of a matter before a Court that rendered the final decision thereon...
>
> The doctrine is not to be understood to bar any engagement by a Court with a case that it has already decided or pronounced itself on. What it does bar; is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued."

10. The Respondent/Applicant's answer to the plea of *functus officio* raised by the Instructing Party/ Respondent is that his application raises new issues which have not previously been adjudicated upon. My perusal of the filed submissions clearly shows that it is the same issue that was dispensed with by this Court and that was on the issues relating to the dispute resolution clause particularized as clause 9 which 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:

    i. 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").

    ii. 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.

    iii. Notwithstanding the above clause, the bank shall have the right to go to Court.

11. The Respondent/Applicant avers that since the Instructing Party/Respondent had already paid the whole taxed amount before the ruling in the suit and hence there was nothing to be referred to Arbitration. The Instructing Party/Respondent on the other hand averred that it only paid the

Respondent/Applicant Kshs 1, 350,000/= which was subject to the consent on record and had proceeded to have the certificates of costs set aside, which was declared by this Court.

12. The Respondent/Applicant, in my humble view, has an obligation to breathe life into the dispute resolution clause in the agreement. However, according to the record and pleadings, the Respondent/ Applicant is adamant in trying to convince this Court to venture into the root of a matter that is subject to the provisions under the *Arbitration Act*.

13. This Court shall once again note that there is evidence that 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 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."

14. I am guided by the provisions of the *Constitution* and other legislation which clearly show that this Court has power to refer disputes to alternative methods of dispute resolution. 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)."

15. 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...."

16. 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."

17. 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.

18. 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."

19. It is imperative that the Respondent/Applicant is aware that this Court shall not venture into the root of this matter or deliberate on any evidence whether new or old as it is clear that the arbitration clause 9 in the contract precluded the trial Court from exercising jurisdiction. Clearly, even though the subject matter of the application fell within the trial Court's pecuniary jurisdiction, the arbitration clause in the parties' service level agreement limited the trial Court's intervention as the parties were required to go through arbitration in the event of a dispute. It is instructive that this court vide the ruling now complained of did not venture into the crux of the dispute as it found that the right forum was in arbitration pursuant to the service level agreement. It is therefore an exercise in futility for the applicant herein to try and goad this court to venture into the matter yet the court only dealt with the issue of whether the trial court had jurisdiction to entertain the matter. As to whether there had been some payment made prior to the dispute moving to the trial court, the same should now be within the province of the arbitrator and not the trial court or this court. Since this court did not venture into the question whether payments had been made as the same was to await the arbitrator to determine, the application herein is mischievous and an abuse of the court process as the applicant ought to approach the arbitrator as directed in the ruling.

20. For the above reasons, I find the Respondent/Applicant's application dated September 19, 2022, lacks merit. The same is dismissed with costs to the Instructing party/Respondent.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF MARCH 2023

D. KEMEI

JUDGE

In the presence of:-

Mwanga for Oundo Instructing Party/Respondent

Tawai for Wamalwa Simiyu for Respondent/Applicant

Kizito - Court Assistant