



Bomas of Kenya Limited v Standard Investment Bank Limited (Miscellaneous Case E230 of 2021) [2023] KEHC 21479 (KLR) (Commercial and Tax) (1 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21479 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

MISCELLANEOUS CASE E230 OF 2021

A MABEYA, J

AUGUST 1, 2023

IN THE MATTER OF THE ARBITRATION ACT, 1995

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IN THE MATTER OF SETTING ASIDE AN ARBITRAL AWARD

BETWEEN

BOMAS OF KENYA LIMITED APPLICANT

AND

STANDARD INVESTMENT BANK LIMITED RESPONDENT

RULING

1. On November 25, 2022, this court adopted the final arbitral award published on May 4, 2020 by Hon Namachanja, arbitrator as a decree of this court. Pursuant thereto, the decree holder extracted a decree on July 11, 2023 for Kshs 108,885,242.53.
2. On July 20, 2023, the decree holder took out a motion on notice of even date for garnishee proceedings under, *inter alia*, orders 22 and 23 of the [Civil Procedure Rules](#). In the motion, the decree holder prayed for a decree nisi against the judgment debtor's A/c Nos 1xxxx8 and 1xxxx0 held at KCB Moi Avenue Branch in order to satisfy the said decretal sum.
3. Other prayers were that a garnishee order nisi do issue against all banks in Kenya in all bank accounts in favour of the judgment debtor. There was also a prayer that KCB does remit all the sums in the subject accounts to satisfy the decree.
4. The grounds thereof were set out in the body of the motion and the affidavit of Job Kihumba sworn on July 19, 2023. It was averred that the decree holder had a decree for Kshs 108,885,242/53 which had not been settled. That a draft decree was set to the Judgment debtor on June 12, 2023 for approval



but there was no response. That the same was finally approved and issued by the deputy registrar of this court.

5. That the judgment debtor had not made any effort to settle the decretal sum notwithstanding having been given time to do so. That the decree holder was apprehensive that the judgment debtor had no intention of satisfying the decree. That in the premises, the funds in the subject accounts should be attached to satisfy the decree.
6. The application was opposed by the judgment debtor *vide* the replying affidavit of Peter Gitaa sworn on July 27, 2023. He complained that the application was premature and made in bad faith. That the decree holder had not engaged the judgment debtor with a view to settling the debt before resulting to execution through a drastic mode of garnishee.
7. The deponent went further to explain that, as a state corporation, the judgment debtor operates within two statutes, the State Corporations Act and the Public Finance Management Act. That under those statutes, the judgment debtor prepares budget estimates which are approved by the parent ministry and treasury for funding. That the judgment debtor is barred from expending any monies not budgeted for. That since the award was adopted as a decree of the court in November, 2022, the judgment debtor had by then forwarded its annual estimates for the year and could not have included the said award in its estimates.
8. The deponent further avers that making any payments from the subject accounts would be in breach of the aforesaid statutes and therefore against the law. He disclosed that the subject accounts held funds as follows: -
 - a. A/C No 1xxxx8 – Kshs 25,312,614/19. The amount was for capital expenditure.
 - b. A/C No 1xxxx0 – Kshs 44,800,864.32. This was meant for salaries and utilities. That paying out these monies would affect the likelihood of over 300 employees as these sums are meant for their July and August, 2023 salaries.
9. The deponent urged that the judgment debtor be given more time to be able to seek funding for the said decretal sum from treasury.
10. I have considered the rival submissions. I have also looked at the decree that was extracted and the averments in the supporting affidavit of Job Kihumba.
11. At pages 69 and 70 of the award, the tribunal made the following orders:-
 - “ 1. The respondent shall pay the claimant the sum of Kenya shillings eighty one million three hundred and thirty –five thousand two hundred and eighty and cents forty (Kshs 81,335,280.40) such payment to be made within thirty (30) days of the date which this award is taken up by either party. Interest will accrue thereon at the simple rate of 13% per annum if payment is not made within the said period until payment in full.
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 4. Costs of the reference assessed in the sum of Kenya shillings five hundred and seventy thousand (Kshs 570,000) inclusive of VAT shall be paid by the respondent to the claimant within thirty (30) days of the date which this award



is taken up by either party. interest will accrue thereon at the simple rate of 13% per annum if payment is not made within the said period until payment in full.

5. The costs of the arbitral tribunal as assessed and notified to the parties separately are to be borne by the respondent in full. Payment of these costs shall be made before taking up the Award. In the event that the claimant has paid in full the costs of the arbitral tribunal or any part thereof, the respondent shall reimburse such amount as shall have been paid by the claimant within thirty (30) days of the date which this award is taken up by either party, failing which interest shall accrue the amount at the simple rate of 13% p.a until the date of reimbursement.”
12. My understanding of the foregoing is that, in order Nos 1 and 4, the liability to pay with interest run immediately after the expiry of 30 days from the date the award was taken up by either party. The rate was simple interest at 13% per annum.
13. Secondly, in order No 5 of the award, the tribunal did not disclose how much costs had been assessed and notified to the parties separately. Its payment was also pegged in 30 days from the date of collection of the award. In default, simple interest at 13% p.a was to apply.
14. The decree issued on July 11, 2023 is lifted word for word from the final orders of the tribunal. The principal award was for Kshs 83,335,280/40. However, the garnishee proceedings are for Kshs 108,885,242/53.
15. In paragraph 8 of the supporting affidavit, Job Kihumba justifies that sum as follows:-
 - a. Award – Kshs 81,335,280/40
 - b. Costs of the reference – Kshs 570,000/=
 - c. Costs of the arbitral tribunal – Kshs 996,500/=
 - d. Simple interest at 13% on (a) (b) (c) above from February 19, 2021 to July 19, 2023 – Kshs 25,983,462.13Total – Kshs 108,885,242.53
16. Firstly, it is not clear where the sum of Kshs 996,500/= came from. When the decree holder came to court for adoption of the award, it did not disclose or file with the said application, evidence of the costs of the arbitral tribunal. The tribunal itself held it as a secret as it did not pronounce the same in the final award. It was incumbent upon the applicant to have disclosed this amount by way of evidence in the application for adoption. Accordingly, springing the figure at the execution stage and subjecting the same to interest won't do.
17. Secondly, in the ruling of this court of November 25, 2022, it was established that the award was collected on February 18, 2021. In terms of the tribunal's pronouncement, payment had to be made within 30 days of that date, to wit, the judgment debtor had upto March 20, 2021 to pay. Upon failure to pay, simple interest of 13% p.a was to apply immediately after the expiry of the grace period given.
18. In this regard, simple interest could only apply from March 21, 2021. In its calculation, the decree holder applied the interest from February 19, 2021. The decree holder has claimed Kshs 25,983,462/13 as interest. That would be excessive having in mind that the 30-day grace period given by the tribunal have not been taken into account. Further, the amount of Kshs 996,500/= alleged to be costs of the arbitral tribunal plus interest thereon has not been accounted for.



19. On the foregoing reasons, I find it difficult to uphold the garnishee order nisi. Let the decree holder get the deputy registrar of this court calculate the interest in terms of the foregoing. Further, the amount of Kshs 996,500/= has to be ascertained and properly accounted for.
20. The foregoing notwithstanding, there are issues sworn to by the judgment debtor, that allowing the application of the funds allocated for identified purposes for settlement of the decree would be breaching certain provisions of the law. I make no pronouncement on that issue in view of the findings I have already made above.
21. Accordingly, the application is not successful. The orders made on July 22, 2023 are hereby discharged. I make no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF AUGUST, 2023.

A. MABEYA, FCIArb

JUDGE

