



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**HIGH COURT CIVIL CASE NO. 44 OF 2017**

**GEORGE ARUNGA SINO T/A MAYWOOD ACTIONEERS.....RESPONDENT**

**VERSUS**

**NATIONAL INDUSTRIAL CREDIT BANK KENYA PLC.....APPLICANT**

**RULING**

1. By a notice of motion dated 4.7.18, the applicant prays for orders**THAT**: -

**1. The court does give directions on appointment of an arbitrator pursuant to the Ruling delivered on 12.4.18 or in the alternative, if the respondent is not interested in the arbitration process, the Honourable Court does order the Auctioneers bills be taxed by the Deputy Registrar of this Honourable Court**

**2. Costs be provided for**

2. The application is based on the grounds among others that the court did order on 12.4.18 that the auctioneer's costs be subjected to arbitration but the respondent has shown no interest in the arbitration process.

3. On 24.7.18, the appellant/respondent filed a Preliminary Objection dated 20.7.18 where it contends that the application herein is misconceived and legally untenable and that the court is *functus officio* having determined the appeal between the parties.

4. The court record shows that by an order dated 12.4.18; the respondent's appeal was dismissed and the court directed that the dispute between the parties be referred to arbitration in line with clause 12 of their Service Level Agreement.

5. Clause 12 of their Service Level Agreement vests the power to appoint an Arbitrator on the parties, failure to which the appointment is done by the Chairman for the time being of the Kenyan Branch of the Chartered Institute of Arbitrators (of the United Kingdom), on the application of either party.

6. Clause 12 of their Service Level Agreement unequivocally outs this court's jurisdiction to appoint an arbitrator to arbitrate on the dispute between the parties herein. It is trite that court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract. (See **Eslon Plastics Of (K) Limited v National Water Conservation and Pipeline Corporation [2014] eKLR; Gatobu M'ibuutu Karatho v Christopher Muriithi Kubai [2014] eKLR** and **National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) Ltd & Another (2002) EA 503.**)

7. I agree with the appellant/respondent that the application herein is misconceived and legally untenable and that the court is *functus officio* having rendered its decision on the issue of arbitration.

8. Consequently, the Preliminary Objection is upheld and the Notice of Motion dated 4.7.18 is struck out with costs to the appellant/respondent.

**DATED AND DELIVERED IN KISUMU THIS 18th DAY OF October, 2018**

**T.W. CHERERE**

**JUDGE**

**Delivered in open court in the presence of-**

**Court Assistant - Mr Arua**

**For the Applicant - Ms Barasa/Mr Abande**

**For the Appellant/Respondent - Kiarie/Mr Onyikwa**