



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. 435 OF 2013

EQUITY BANK LIMITED.....APPLICANT

VERSUS

ADOPT A LIGHT LIMITEDRESPONDENT

RULING

1. The applicant, **EQUITY BANK LIMITED**, has asked the court to stay execution of the Decree passed on 17th October, 2014 until the court hears and determines the case **EQUITY BANK LIMITED – VS – ADOPT A LIGHT, HCCC No.470 of 2013**.
2. The applicant’s further prayer was for the recall and cancellation of the warrants of attachment and sale, which had been issued to **MORAN AUCTIONEERS** on 25th November, 2014.
3. Apparently, the said auctioneers had utilized the said warrants to proclaim the applicant’s moveable assets on 26th November, 2014.
4. The application was supported by the affidavit of **JOHN NYANJUA NJENGA**, the General Manager of the applicant’s Legal Service Department. By the said affidavit, Njenga disclosed that the Arbitral Tribunal had ordered the applicant to pay to the respondent, the following sums of money;
 - a. *Kshs.30,959,605.48;*
 - b. *Kshs.4,963,846.43 in respect to interest; and*
 - c. *Costs.*
5. Njenga also disclosed that Equity Bank was ordered to pay Ksh.3,556,000/=, which he described as the “costs of the Tribunal”.
6. Equity Bank was aggrieved and sought to have the Award set aside. Meanwhile, the respondent, **ADOPT A LIGHT LIMITED**, sought to have the Award adopted as a Judgment of the Court.
7. The two applications were heard and determined simultaneously by Ogola J.
8. Njenga deponed thus, in relation to the two applications;

“9. I confirm that the two (2) applications were heard simultaneously by the Court. On 17th October, 2013, the Honourable Court, Justice E.K. Ogola delivered a ruling in favour of the

Respondent and ordered that the Arbitral Award dated 25th June, 2013 be recognized and adopted as the Judgment of the Court. The Judge accordingly granted the Respondent leave to enforce the same. The court also ordered the Applicant to pay the costs of the application.”

9. However, in order to give time and opportunity for Equity Bank to pay the sums ordered the court granted an unconditional stay for 30 days.

10. The period of 30 days was to run from 17th October 2013, when the court granted the orders.

11. When the stay had lapsed, **ADOPT A LIGHT LIMITED** applied for the execution of the Decree.

12. Njenga confirmed that on 26th November 2014, the auctioneers proclaimed moveable property belonging to Equity Bank.

13. Before the auctioneers had moved in to attach the property of the Bank, the said bank had, on 30th October 2013, filed a civil case against Adopt A. Light Limited. In that civil case the Bank was demanding the sum of Kshs.20,619,205/12 plus interest.

14. It is the belief of the Bank that it has a good cause of action against the Respondent in the civil case. Therefore, the Bank would wish to have the opportunity to canvass its said claim against the Respondent, before execution could proceed.

15. It was deponed by Njenga that if the court did not stay execution, the Bank would suffer substantial loss, as its operations would be severely disrupted.

16. Secondly, the Bank pointed out that it was wrong for the Respondent to proceed to execution before the taxation of the costs payable by Bank, in respect to the Arbitral Award.

17. In the Bank's understanding, the only way that execution could have proceeded lawfully, before taxation of the costs, would have been if the Respondent had sought and obtained leave of this court to execute the Decree before taxation.

18. Before filing this application the Bank had already filed an application before the Court of Appeal, seeking stay of execution. The application before the Court of Appeal was dated 14th November 2014, whilst the application before the High Court was dated 27th November 2014.

19. The Respondent's contention, in the Replying Affidavit of **ESTHER MUTHONI PASSARIS**, was that the Bank's conduct constituted an abuse of the process of the Court. The conduct in issue was the filing of two separate applications for stay of execution.

20. However, on the date when this application was scheduled for hearing it was preceded with the withdrawal of the Bank's application at the Court of Appeal.

21. When canvassing the application, Mr. Akhulia, the learned advocate for the Bank submitted that the warrants of attachment were issued in breach of Section 94 of the Civil Procedure Act. He pointed out that the Decree-Holder ought to have had its costs taxed before execution. He added that the Decree had ordered that the costs be taxed by the Arbitral Tribunal.

22. As there had been no taxation by the time the execution was levied, the Bank submitted that warrants had been issued irregularly. It was for that reason that the Bank urged this court to cancel those warrants of attachment.

23. The off-shoot of that irregularity of the warrants was said to have rendered the Proclamation Notice, issued by Court Broker, null and void.

24. In the circumstances, the court was asked to order the Court Broker to immediately release the proclaimed goods.

25. Finally, the Bank reasoned that if the execution process were allowed to proceed, the Respondent may be unable to pay the decretal amounts in the other case, which the Bank had filed against the Respondent.

26. In consideration of the orders for stay of execution, the Bank offered to put down any security which the court would order. In particular, the Bank offered a Bank Guarantee as security.

27. When answering to the applicant, Mr. Issa, the learned advocate for the Respondent, pointed out that Ogola J. had already expressly granted leave to the Respondent to enforce the Judgment.

28. In any event, submitted the Respondent, Section 10 of the Arbitration Act only permitted the courts to intervene in the terms provided for by that statute.

Section 10 reads as follows;

“Except as provided in this Act no court shall intervene in matters governed by this Act.”

29. In any event, as there was no way of knowing who would be successful in the other case, the Respondent submitted that there was, therefore, no basis for this court to stay execution because of that other pending case.

30. The Bank replied to the Respondent’s submissions by saying that the execution of a Decree was not governed by the Arbitration Act. It was the view of the Bank that because Decrees from Arbitral Tribunals are executed by the courts, the process of execution was thus governed by the Civil Procedure Rules.

31. In determining this application, I will address the issues pertaining to its merits and, secondly the question of jurisdiction.

32. As regards the merits of the application, I find that the Bank has failed to demonstrate why the existence of the civil suit between the two parties herein should be a basis for staying execution in the case which had been determined.

33. In any event, that civil case was filed after the Arbitral Tribunal had already given its verdict. It could therefore be perceived as a deliberate attempt to place some road-blocks on the Respondent’s route-map to realizing the fruits of the Arbitral Award.

34. The civil case is not before me for adjudication. I cannot therefore assess the strengths or weaknesses in that case.

35. In the result, if the mere existence of the civil case were to be used as a foundation for staying the execution of the final Decree in this case, the court could have set a very dangerous precedent.

36. There is a second limb to the issues pertaining to the merits of the application. The said second limb emanates from the question whether or not a Decree can be executed before taxation of costs.

37. In the case of **BULLION BANK LIMITED – VS – JAMES KINYANJUI AND PARK ENTERPRISES LIMITED HCCC NO.1158 OF 1999**, Kasango J. stayed the execution of the interim Decree because it had flouted the provisions of Section 94 of the Civil Procedure Act. The basis for that holding was that the execution process had been undertaken before taxation of the costs.

38. Section 94 of the Civil Procedure Act 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 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.”

39. When giving consideration to that Section, the Court of Appeal expressed itself as follows, in the case of **LAKELAND MOTORS LIMITED VS SEMBI [1998] LR 682;**

“The exercise of judicial discretion by the superior court under Section 94 of the Act necessarily requires that parties to a decree passed by that court in the exercise of its original civil jurisdiction should be availed an opportunity to be heard before making an order for execution of that decree before taxation.”

40. Both the wording of Section 94 of the Civil Procedure Act and the decision of the Court of Appeal make reference to instances in which the High Court was exercising its “*original civil jurisdiction.*”

41. The question that must therefore be asked is whether the High Court was exercising its original civil jurisdiction when it was facilitating the execution of a Decree emanating from an Arbitral Award.

42. In order to answer that question, it is important to bear in mind the provisions of Section 10 of the Arbitration Act, which reads as follows;

“Except as provided in this Act, no Court shall intervene in matters governed by this Act.”

43. In the case of **PROF. LAWRENCE GUMBE & ANOTHER VS. HON. MWAI KIBAKI & OTHERS, HIGH COURT MISC. NO.1025 of 2004,** Nyamu J. (as he then was), made the following observation concerning that section;

“Our Arbitration Act, Section 10, is based on the United Nations Model Law on Arbitration, and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of Law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented.”

44. I am in full agreement with the learned Judge.

45. In effect, the Arbitral process is autonomous. It cannot be said that when the High Court was facilitating the execution of a Decree which arose from an arbitral process, the court was exercising its original civil jurisdiction.

46. The expansive jurisdiction of the High Court in its civil jurisdiction is expressly constricted by the provisions of Section 10 of the Arbitration Act.

47. In the case of **KENYA SHELL VS KOBIL PETROLEUM LIMITED, CIVIL APPLICATION NO.NAI.57 OF 2006,** the Court of Appeal emphasized that the current Arbitration Act underscores the message of the finality of decisions made by arbitral tribunals, and the severe limitation of access to the courts.

48. The learned Judges of Appeal went on to say the following;

“We think, as a matter of public policy, it is in the public interest that there should be an end to litigation, and the Arbitration Act, under which the proceedings in this matter were conducted underscores that policy.”

49. It is well recognized that one of the primary reasons why parties are encouraged to pursue Alternative Dispute Resolution Mechanisms, such as Arbitration, is that their disputes are resolved at a faster pace than would normally be the case when the disputes are resolved through litigation at the courts.

50. After parties have chosen to go through the route of arbitration and obtain an Award, it would be highly prejudicial if the process of execution then stood in the path of speedy execution.

51. In the case of **ERAD SUPPLIERS & GENERAL CONTRACTS LIMITED –VS- NATIONAL CEREALS & PRODUCE BOARD MISC. CIVIL APPLICATION NO.636 of 2009**; Odunga J. expressed himself thus;

“However, in the light of 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 the 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.”

52. In that case, the applicant had invoked Sections 1A, 1B,3A and 63 of the Civil Procedure Act; together with Order 42 Rule 6 of the Civil Procedure Rules; Rules 3(1) and 3(2) of the High Court (Practice and Procedure) Rules; and Articles 48, 50 and 159 of the Constitution of Kenya.

53. In contrast, the current application cited Section 3A, 63(e) and 94 of the Civil Procedure Act; Order 22 Rules 22 and 25 and Order 51 Rule 1 of the Civil Procedure Rules.

54. The only provisions which the 2 cases have in common are Sections 3A and 63 of the Civil Procedure Act.

55. Nonetheless, that fact does not alter the impact of Section 10 of the Arbitration Act. In other words, it is only those statutory provisions which have been specified as being applicable to the arbitral process which can be imported into and utilized in the said process.

56. Therefore, as the provisions cited by the applicant have not been expressly made applicable to the arbitral process, that would imply that they ought not to be applied to the matter before me.

57. Although that could be the simple and direct answer on the issue of jurisdiction, that cannot be the whole answer. I so find because although the arbitral process determines the issues placed before it, the Arbitration Tribunal must have resort to the High Court when executing the Decree.

58. In those circumstances, and because there are no specific rules or guidelines on how exactly the Decree extracted from the tribunal’s decision would be executed, there must be an acknowledgement, (albeit unstated), that the Rules and Procedures governing execution at the High Court, would be applicable.

59. I also hold the view that the task of taxing a Bill of Costs is not, of itself, a hindrance to the execution of a Decree. It could only become a hindrance if the process was manipulated, so as to give rise to delays.

60. I appreciate the fact that when a Decree is executed before the costs are taxed, that implies that the process of execution cannot have taken into account the costs which are payable by the Judgment-Debtor.

61. In the result, when execution is carried out before taxation, there is likely to a rise a serious practical challenge on how to go about recovering costs.

62. Such a practical challenge could be resolved through seeking leave of the court to execute the Decree before taxation of the Bill of Costs. But that presupposes that Section 94 of the Civil Procedure Act is applicable in cases where the decision of the Arbitration Tribunal was being executed by the High Court.

63. Yet, that statutory provision is not one of those which have been expressly recognized in the Arbitration Act, as being applicable to arbitral processes.

64. Practicability suggests that Section 94 of the Civil Procedure Act ought to apply when a Decree extracted from a decision of an arbitral tribunal was to be executed. However, that fact alone cannot grant jurisdiction to the court, if there was no jurisdiction provided by law.

65. In this case, the applicant's General Manager of the Legal Service Department expressly acknowledged, at paragraph 9 of his affidavit, that;

“.....The Judge accordingly granted the Respondent leave to enforce the same.....”

66. The learned judge had been asked, *inter alia*, for leave to enforce the arbitral award made on 25th June 2013. After giving consideration to that application, Ogola J. granted leave to Adopt A. Light Limited to enforce the award. In those circumstances, I find that the Respondent did not need to seek further leave of the court, before taking steps to execute the Decree.

67. Accordingly, the application dated 27th November 2014 is without merit. It is therefore dismissed. The costs of that application are awarded to the Respondent.

Dated, signed and Delivered at Nairobi this 9th day of February 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Akhulia for the Applicant

Miss Wang'ombe for the Respondent.

Collins Odhiambo – Court clerk