

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E423 OF 2024

BARON CAPITAL
LIMITED.....APPELLANT

-VERSUS-
OWINO O.

CORNEL.....RESPOND
ENT

(Being an appeal from the Ruling and Order of the Micro and Small Enterprises Tribunal at Nairobi delivered on 6th March 2024 in MSETCL E005 of 2023)

JUDGMENT

- 1.** The Respondent herein sought interim orders before the Micro and Small Enterprises Tribunal (the Tribunal) to restrain the Appellant from attaching and proclaiming motor vehicle registration number KBG 445H, allegedly secured under a loan facility.
- 2.** The Appellant raised a Preliminary Objection dated 2nd January 2024 to the application on grounds that:
 - a) The Tribunal lacked jurisdiction;***
 - b) The dispute was subject to arbitration under Clause 5 of the Loan Agreement;***
 - c) The claim was incompetent and an abuse of process.***

3. The Tribunal delivered a ruling on 6th March 2024 dismissing the Appellant's Preliminary Objection and held that it had jurisdiction to hear and determine the Respondent's claim notwithstanding the existence of an arbitration clause in the Loan Agreement dated 18th February 2022.
4. The Tribunal further found that the arbitration clause was not binding upon the Respondent because the agreement had not been disclosed to him at the time of execution and that the Tribunal had jurisdiction under Section 55 of the Act.
5. Aggrieved by the decision, the Appellant filed the instant appeal where it contends that the Tribunal erred in assuming jurisdiction in the face of a binding arbitration clause and further, that the Tribunal acted outside the statutory limits of Section 55 of the Micro and Small Enterprises Act, No. 55 of 2012.
6. The Appeal was canvassed by way of written submissions which I have considered.

The Appellant's Submissions

7. The Appellant submitted that the Loan Agreement contained a valid arbitration clause compliant with Sections 3 and 4 of the Arbitration Act, 1995.
8. It was submitted that the Respondent executed the agreement voluntarily and is bound by its terms. According to the Appellant, the Tribunal erred in holding that the arbitration clause was not binding and therefore

exceeded its jurisdiction under Section 55 of the Micro and Small Enterprises Act (the Act).

9. It was further submitted that the Tribunal improperly determined substantive issues at a preliminary stage.

10. The Appellant relied on several authorities including the case of **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another (2002) EA 503** where the Court of Appeal held that: -

“This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”

11. The Appellant also cited **Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd [1989] KLR 1**, where Nyarangi JA stated:

“Jurisdiction is everything. Without it, a court has no power to make one more step.”

12. Further reliance was placed on **County Government of Kirinyaga vs. African Banking Corporation Ltd [2020] eKLR**, where the Court held:

“The onus of proving that the matters in dispute fell within a valid and subsisting arbitration clause is on the party applying to

the court for a stay of proceedings; once this burden has been discharged then the burden shifts to the opposing party to show cause why the effect should not be given to the arbitration clause.”

13. It was submitted that once the arbitration clause was shown to exist, the Tribunal ought to have stayed proceedings and referred the matter to arbitration.

14. On jurisdiction under Section 55 of the Act, the Appellant argued that the Tribunal’s jurisdiction is limited to disputes between specified categories of persons (members, associations and the Authority), and does not extend to ordinary commercial disputes between private entities.

The Respondent’s Submissions

15. The Respondent supported the Tribunal’s decision and submitted that the arbitration clause was never disclosed to him at the time of execution as he was not furnished with the loan agreement and only came to learn of the arbitration clause after filing the claim.

16. It was the Respondent’s case that the Preliminary Objection lacked merit and was properly dismissed.

17. On abuse of process, reliance was placed on ***Dawkins vs. Prince Edward of Saxe Weimar (1876) 1 QBD 499***, where the court stated:

“A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting the Court’s time; or (v) when it is not capable of reasoned argument.”

- 18.** On costs, reliance was placed on ***Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others [2014] eKLR***, where the Supreme Court held:

“So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit.”

- 19.** The Respondent submitted that the appeal lacks merit and should be dismissed with costs.

Issues for Determination

- 20.** Having considered the Record of Appeal and the submissions of both parties, I find that the issues that arise for determination are:

- a) Whether the Loan Agreement contained a valid and binding arbitration clause.***
- b) Whether the Tribunal erred in declining to refer the dispute to arbitration.***

- c) ***Whether the Tribunal had jurisdiction under Section 55 of the Micro and Small Enterprises Act.***
- d) ***Whether the Tribunal improperly determined substantive matters at the preliminary stage.***
- e) ***Who should bear the costs of this appeal.***

Analysis and Determination

Validity of the Arbitration Clause

21. Sections 3 and 4 of the Arbitration Act define and regulate arbitration agreements. Clause 5 of the Loan Agreement clearly provides for arbitration in mandatory terms.
22. Clause 5 of the Loan Agreement provided that:
- “All disputes, differences or questions between the Company and the client with respect to any matter or thing arising out of or relating to the loan agreement or guarantees thereof... shall be referred to arbitration... in accordance with the provisions of the Arbitration Act (Cap 49)... The decision shall be final and binding.”**
23. The Respondent does not deny signing the agreement but contends that he was unaware of the clause. In ***National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd*** (supra), the Court of Appeal stated that a court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their

contract unless coercion, fraud or undue influence are pleaded and proved.

24. In the instant case, I note that no evidence of fraud, coercion or misrepresentation was pleaded or proved before the Tribunal. The finding that the agreement was unconscionable was made at a preliminary stage without evidentiary interrogation. This Court finds that the arbitration clause was prima facie valid and binding.

Reference to Arbitration

25. It is trite that where a valid arbitration clause exists, courts are required to give effect to it, subject to statutory exceptions. In ***Euromec International Ltd vs. Shandong Taikai Power Engineering Company Ltd*** [2021] KEHC 93 (KLR) the Court stated that the law requires the parties to honour their contractual obligation to arbitrate. The law also provides for limited judicial intervention in arbitral proceedings.

26. My finding is that the Tribunal ought to have considered whether a stay of proceedings under Section 6 of the Arbitration Act was appropriate rather than delving into substantive contractual validity.

Jurisdiction under Section 55

27. Section 55(1) of the Micro and Small Enterprises Act limits the Tribunal's jurisdiction to disputes between specified categories of parties. The provision is structured

around *persona* (who the parties are) and *materia* (the nature of disputes).

28. In the present case, the Tribunal relied on Section 55(2) to assert jurisdiction broadly. I however find that subsection (2) must be read conjunctively with subsection (1). As stated in ***Owners of the Motor Vessel “Lillian S”*** (supra) ***“Jurisdiction is everything. Without it, a court has no power to make one more step.”***

29. I find that no material was placed before the court to show that the parties herein fall within the statutory categories contemplated under Section 55(1). Accordingly, I find that the Tribunal’s assumption of jurisdiction was legally flawed.

Whether the Tribunal determined substantive issues prematurely

30. My take is that the finding, by the Tribunal, that the agreement was “one-sided and unconscionable” involved factual and evidentiary matters inappropriate for determination at the stage of a Preliminary Objection as defined in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696***, where the Court held:

“A Preliminary Objection consists of a pure point of law which has been pleaded... and which if argued as a preliminary point may dispose of the suit.”

31. I find that the Tribunal ventured beyond a pure point of law into substantive fact-finding.

32. Upon careful re-evaluation of the material before this Court, I find that the Loan Agreement contained a valid arbitration clause and that the Tribunal erred in declining to refer the matter to arbitration. I further find that the Tribunal misapprehended the scope of its jurisdiction under Section 55 of the Act by improperly determining substantive matters at the preliminary stage.

33. I therefore find that the appeal has merit and I hereby allow it in the following terms: -

a) The Ruling of the Micro and Small Enterprises Tribunal delivered on 6th March 2024 is set aside.

b) The Respondent's claim before the Tribunal is stayed and the dispute is referred to arbitration pursuant to Clause 5 of the Loan Agreement dated 18th February 2022.

c) The Respondent shall bear the costs of this appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2026.

HON. W. A. OKWANY

JUDGE

20/02/2026

FOR APPELLANT Ms Cheptoo

FOR THE RESPONDENT No appearance

COURT ASSISTANT Abdraziki

File close

ORIGINAL