

KENYA / JUDGMENT

Simple Pay Capital Ltd v Owitti

[2026] KEHC 13712 (KLR)

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COURT

High Court

BEFORE

BW Murunga

CASE / FILE NUMBER

Civil Appeal E015 of 2023

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Simple Pay Capital Ltd v Owitti (Civil Appeal E015 of 2023) [2026] KEHC 13712 (KLR) (Commercial and Tax) (17 September 2026) (Judgment) Neutral citation:

[2026] KEHC 13712 (KLR) Republic of Kenya In the High Court at Nairobi (Milimani Commercial Courts) Commercial and Tax Civil Appeal E015 of 2023 BW Murunga, J September 17, 2026 Between Simple Pay Capital Ltd Appellant and Sylvester Okello Owitti Respondent (Being an Appeal against the Ruling of the Milimani Chief Magistrates Court at Nairobi, Hon. B. M. Cheloti, PM, dated 11th August 2023 in MCCC No. E893 of 2023; Sylvester Okello Owitti v Simple Pay Capital Ltd & Another)

Judgment

Introduction and Background 1. This is an appeal against the ruling of Hon. B. M. Cheloti, Principal Magistrate, delivered on 11 th August 2023 in Milimani Commercial Case No. E893 of 2023. The appeal arises from proceedings instituted by the Respondent against the Appellant and Ultimate Auctioneers, the 2 nd Defendant before the subordinate court. 2. The dispute arose from a Loan Agreement dated 17 th October 2022 between the Respondent and the Appellant. Under the agreement, the Appellant advanced the Respondent a loan of Kshs. 3,159,650, with motor vehicle registration number KCZ 141W Franklin Dump Truck Tipper being provided as security. The agreement contained a dispute resolution clause providing that claims and disputes arising under it would be referred to arbitration. 3. Following an alleged default in repayment, the Appellant commenced the process of repossessing and selling the motor vehicle. The Respondent consequently filed a Complaint and Notice of Motion dated 28 th February 2023 before the subordinate court. Among other reliefs, he sought an injunction restraining the Appellant and the 2 nd Defendant from selling or otherwise dealing with the motor vehicle, an order for its release, and provision of the loan agreement and a reconciled statement of account. 4. On 6 th March 2023, the subordinate court granted interim injunctive orders restraining the Defendants from selling, offering for sale, advertising, threatening to sell or otherwise disposing of the motor

vehicle pending the hearing of the application. 5. The Appellant subsequently filed a Notice of Preliminary Objection dated 28 th March 2023. The objection challenged the jurisdiction of the subordinate court on the basis of the arbitration clause contained in the Loan Agreement. The Appellant contended that the suit was premature, incompetent and an abuse of the process of the court because the dispute ought first to have been referred to arbitration. 6. The Appellant thereafter filed a Replying Affidavit sworn by Rashesh Adhyaru dated 29 th March 2023 in opposition to the Respondent's application. The proceedings in the subordinate court show that the matter was subsequently directed to proceed by way of written submissions. 7. In its ruling delivered on 11 th August 2023, the learned Magistrate stated that the Preliminary Objection would have been upheld on account of the arbitration clause. However, she found that the Appellant had subsequently filed the Replying Affidavit and held that the Preliminary Objection had thereby been overtaken by events, making arbitration no longer a viable option. 8. The learned Magistrate consequently allowed the Respondent's application and issued orders restraining the Defendants from dealing with the motor vehicle, directing its release to the Respondent and requiring the Appellant to furnish the loan agreement and reconciled statement of account. 9. Aggrieved by that decision, the Appellant lodged the present appeal. Its Memorandum of Appeal raises the five grounds below: i. That the Learned trial Magistrate misdirected herself on several matters of law. ii. That the Learned trial Magistrate erred in law and fact by failing to appreciate that the Jurisdiction of the trial Court was prematurely invoked and ceased by dint of existence of an arbitration clause in the impugned contract. iii. That the learned trial Magistrate erred in law by failing to take into account legal and fact that the Preliminary Objection was filed at the time of filing the Memorandum of Appearance as provided for under section 6(1) of the Arbitration Act , 1995. A replying Affidavit was only filed later during the pendency of the Preliminary Objection pursuant to Court directions. The Appellant complied with Court's directions on filing of responses to demonstrate apogee obedience of court directions and the attendant need to preserve and conserve court's precious time and resources. The Appellant cannot therefore be punished for that. iv. That the Learned trial Magistrate erred in law by failing to take cognizance of the legal fact that hearing and determining the matter without jurisdiction is a nullity bereft of any force of law. v. That the Learned trial Magistrate erred in law by rewriting the contract between the parties, an act the law frowns upon. Appellant's Submissions 9. The Appellant submitted that the parties were bound by the arbitration clause contained in clause 15 of the Loan Agreement. It relied on section 6(1) of the Arbitration Act and submitted that its Preliminary Objection was filed contemporaneously with its Memorandum of Appearance and therefore at the earliest possible opportunity. 10. The Appellant relied, among others, on Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, Alison Jean Louis v Rama Homes Limited [2020] eKLR, County Government of Kirinyaga v African Banking Corporation Ltd [2020] eKLR and Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR. It submitted that once parties have agreed to arbitration, the court ought to give effect to that agreement. 11. On the filing of the Replying Affidavit, the Appellant submitted that the affidavit was filed subsequently and pursuant to directions of the subordinate court. It contended that compliance with the court's directions could not amount to a waiver of the right to arbitration or submission to the jurisdiction of the

court. 12. The Appellant further relied on *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* [2021] KEHC 93 (KLR) and *EPCO Builders Limited v Lemna International INC & another* [2018] KEHC 2930 (KLR), submitting that the court could not rewrite a contract freely entered into by the parties. It therefore urged the Court to allow the appeal and strike out the suit. Respondent's Submissions 13. The Respondent opposed the appeal. He submitted that section 6 of the Arbitration Act requires a party seeking reference to arbitration to make the application not later than the time of entering appearance or acknowledging the claim. He contended that the Appellant did not make an application for stay and reference to arbitration but instead filed a Preliminary Objection and thereafter a substantive Replying Affidavit. 14. The Respondent relied on section 6 of the Arbitration Act and the decisions in *Olive Hills Surgical Centre Limited v BOM National Health Insurance Fund* [2025] KEHC 4328 (KLR), *Muruthi & 3 others v Thiongo & another* [2025] KEHC 3423 (KLR), *Mt. Kenya University v Step Up Holding (K) Ltd* [2018] eKLR and *Niazsons (K) Ltd v China Road Bridge Corporation Kenya* [2001] eKLR. 15. The Respondent submitted that the filing of the Replying Affidavit constituted a substantive procedural step and amounted to acknowledgement of the court's jurisdiction. It was therefore his position that the learned Magistrate correctly found that the Preliminary Objection had been overtaken by events. He urged that the appeal be dismissed with costs. Issues for Determination 16. Having considered the Memorandum of Appeal, the record of the proceedings before the subordinate court and the parties' respective submissions, I consider that the following issues arise for determination: i. Whether the Appellant validly invoked the arbitration agreement under section 6 of the Arbitration Act before submitting to the jurisdiction of the subordinate court; and ii. Whether the learned Magistrate erred in dismissing the Preliminary Objection and proceeding to determine the Respondent's application.

Analysis and Determination

17. Regarding the first issue, an analysis of Section 6(1) of the Arbitration Act is necessary. It states: “A court before which proceedings are brought in a matter which is the 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 of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds — (a) that the arbitration agreement is null and void, 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.” 18. The provision therefore contemplates two matters. First, there must be an arbitration agreement covering the subject matter of the proceedings. Second, and of equal importance, the party seeking to invoke the arbitration agreement must apply for stay of the proceedings and referral to arbitration not later than the time when that party enters appearance or otherwise acknowledges the claim. 19. In the present case, there is no dispute that the parties entered into the Loan Agreement dated 17th October 2022 and that it contains an arbitration clause. Clause 15 provides: “All claims and disputes whatsoever arising under this Agreement shall be referred to Arbitration in accordance with the provisions of the Arbitration Act of Kenya...” 20. The existence of that

clause, however, does not by itself resolve the issue before this Court. The question is whether the Appellant properly invoked section 6(1) and did so within the time prescribed by the statute. The Court must therefore consider the manner in which the Appellant approached the proceedings before the subordinate court and, in particular, whether its subsequent conduct amounted to an acknowledgment of the claim or otherwise disentitled it from seeking a stay and referral to arbitration. 21. The party relying upon an arbitration agreement must apply for stay and reference to arbitration not later than the time of entering appearance or otherwise acknowledging the claim. X b 22. The Court of Appeal considered the proper procedure under section 6 in *Yooshin Engineering Corporation v AIA Architects Limited* [2020] KECA 266 (KLR). The Court observed “ How should a party move the court to stay proceedings under section 6(1) of the Act? Although the section does not expressly prescribe the mode of moving the court, we do not think that a Notice of Preliminary Objection is the ideal tool. In our view, such a party should file a formal application. Rule 2 of the Arbitration Rules, 1997 states that: “ Applications under sections 6 and 7 of the Act shall be made by summons in the suit.” 23. The significance of the decision is that a party seeking to invoke section 6 is required to positively move the court for the statutory relief of stay and reference; merely raising the existence of an arbitration clause does not, without more, amount to the application contemplated by section 6. 24. The Appellant argues that its Preliminary Objection was filed at the time of entering appearance and therefore preserved its right to arbitration. Even assuming that contention to be correct, the matter does not end there. Section 6 does not merely require prompt invocation of the arbitration agreement. It also prohibits the party seeking stay from having otherwise acknowledged the claim or taken steps inconsistent with the request for arbitration. 25. In *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] eKLR, the Court of Appeal identified the matters relevant to an application under section 6 and held as follows: - “ Whether or not an arbitration clause or agreement is valid is a matter the court seized of a suit in which a stay is sought is duty bound to decide. The aforequoted section does not expressly state at what stage it should do so. However, a careful reading of the section leaves no doubt that the court must hear that application to come to a decision one way or the other. It appears to me that all an applicant is obliged to do is to bring his application promptly. The Court will then be obliged to consider three basic aspects. First, whether the applicant has taken any step in the proceeding other than the steps allowed by the said section. Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Third, whether the suit indeed concerns a matter agreed to be referred.” 26. More significantly, in *Yooshin Engineering* (supra), the Court of Appeal dealt with circumstances where a party had filed a Preliminary Objection challenging jurisdiction and thereafter filed a Replying Affidavit. The Court considered the filing of the Replying Affidavit as a procedural step inconsistent with the invocation of arbitration. The principle is that a party cannot simultaneously participate substantively in the court proceedings and reserve the right to insist that those very proceedings should not be before the court. 27. The record before this Court demonstrates precisely that sequence. The Appellant filed the Preliminary Objection dated 28 th March 2023. It subsequently filed

the Replying Affidavit sworn by Rashesh Adhyaru dated 29 th March 2023 in opposition to the Respondent's application. The subordinate court expressly considered that subsequent filing and found that it had overtaken the arbitration objection. 28. I am unable to accept the Appellant's submission that the Replying Affidavit should be disregarded merely because it was filed pursuant to directions of the subordinate court. The Appellant was not compelled to abandon its objection to jurisdiction. Having elected to participate substantively in the interlocutory proceedings by filing a Replying Affidavit addressing the merits of the Respondent's application, it took a procedural step in the proceedings. 29. The fact that the step may have been taken pursuant to a court direction does not alter its legal character. Indeed, the record shows that after the filing of the Replying Affidavit, the parties proceeded with the application by way of written submissions. The Appellant's own submissions before the subordinate court substantively addressed the arbitration clause and urged the court to strike out the suit. The matter had therefore moved beyond a mere invocation of the arbitration agreement and into active participation in the court proceedings. 30. The Appellant places considerable reliance on Article 159(2)(c) of the Constitution , which requires courts, in exercising judicial authority, to promote alternative forms of dispute resolution, including arbitration. That constitutional command is important. It does not, however, relieve a party from complying with the procedure prescribed by section 6 of the Arbitration Act . 31. Article 159(2)(c) does not operate as a substitute for section 6. Rather, the two provisions operate together. Where a party properly invokes an arbitration agreement in accordance with section 6, the court gives effect to the parties' chosen dispute resolution mechanism. Conversely, where the party has taken steps inconsistent with that choice, the court is not required to permit the party to resile from its conduct and revive an arbitration process that it has itself rendered unavailable. 32. I also do not find merit in the contention that the learned Magistrate rewrote the contract. The learned Magistrate did not invalidate or alter clause 15 of the Loan Agreement. On the contrary, she expressly recognised the arbitration clause and stated that the Preliminary Objection would have been upheld. Her conclusion was based on the Appellant's subsequent conduct in the proceedings. 33. A party's contractual right to arbitrate and the statutory procedure for enforcing that right are distinct considerations. The Court is bound to respect the parties' contract, but it is equally bound to apply section 6 of the Arbitration Act . Contractual freedom cannot be invoked to circumvent a statutory procedural requirement. 34. The Appellant further contends that the subordinate court lacked jurisdiction and that all proceedings undertaken without jurisdiction were a nullity. That proposition, as a general statement of law, is uncontroversial. However, it presupposes that the court was in fact deprived of jurisdiction. The existence of an arbitration clause does not automatically render every proceeding before the court a nullity. The party seeking a stay must properly invoke section 6. Where it fails to do so, or takes steps inconsistent with that statutory right, the court is not divested of jurisdiction merely by reason of the existence of the arbitration clause. 35. I therefore find that the learned Magistrate did not err in holding that the Appellant's Preliminary Objection had been overtaken by its subsequent conduct. The finding was consistent with section 6 of the Arbitration Act and the applicable

jurisprudence. 36. There is a further matter which warrants emphasis. The relief sought by the Appellant before this Court is not merely an order staying the proceedings and referring the dispute to arbitration. It seeks that the subordinate court's ruling be set aside and substituted with an order dismissing the suit. That is not the ordinary consequence of section 6. Where section 6 is properly invoked and its requirements are satisfied, the statutory relief is a stay of proceedings and reference to arbitration. The provision does not contemplate dismissal of the suit merely because an arbitration clause exists. 37. This position was upheld in *Lorcan Byrne v Frontier Services Group East Africa Ltd* [2019] KEELRC 2157 (KLR) where the court stated: - “Where an Applicant proceeded to enter appearance, they agree to be subject to the Court’s jurisdiction and the only remedy they have is a stay of proceedings pending the hearing and determination of the arbitral process.” 38. Thus, even if the Appellant had successfully demonstrated that the arbitration agreement remained available to it, the relief sought in the Memorandum of Appeal would not follow automatically from section 6. The statutory mechanism is stay and reference, not dismissal of the substantive suit. 39. On the material before the Court, therefore, the Appellant has not demonstrated any error of law or fact warranting interference with the decision of the subordinate court. The learned Magistrate correctly appreciated the effect of the Appellant's subsequent participation in the proceedings and was entitled to proceed with the Respondent's application. Disposition and Orders 40. In the result, I find as follows: a. The Appeal lacks merit and is hereby dismissed. b. The Ruling of the Milimani Chief Magistrates Court delivered on 11 th August 2023 in CMCC No. E893 of 2023 is upheld. c. The Respondent shall have the costs of this Appeal. d. For avoidance of doubt, the proceedings before the subordinate court shall proceed in accordance with the orders of that court and the applicable law. Orders accordingly. DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17 TH DAY OF SEPTEMBER 2026. MURUNGA, J Delivered on virtual platform in the presence of: Ms Ndunga for the Respondent Kevin Babu - Court Assistant

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