



**Hudson Kariuki Njiru t/a Vision Auctioneers v Kanyi (Civil Appeal
E877 of 2022) [2024] KEHC 11847 (KLR) (Civ) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11847 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E877 OF 2022**

TW OUYA, J

SEPTEMBER 30, 2024

BETWEEN

HUDSON KARIUKI NJIRU T/A VISION AUCTIONEERS APPELLANT

AND

FRED NDUNGU KANYI RESPONDENT

*(Being an Appeal against the decision of the Auctioneers Licensing Board
delivered on 27.05.2022 in Nairobi Disciplinary Cause No. 60 of 2021)*

JUDGMENT

Background

1. At the onset, Fred Ndungu Kanyi (hereafter the Respondent) lodged a complaint with the Auctioneers Licensing Board (the Board) vide the affidavit sworn on 3.11.2021 against Hudson Kariuki Njiru T/ A Vision Auctioneers (hereafter the Appellant) in Disciplinary Cause No. 60 of 2021 (the Cause) arising from the Appellant's alleged forceful eviction of the Respondent together with his family, from their rental residence situated at Kasarani Dream House (the subject premises), and attachment of the Respondent's household and related belongings, without following the due legal process.
2. Upon being notified of the complaint, the Appellant swore an affidavit on 11.01.2022 in response thereto.
3. Upon considering the evidence on record, the Board by way of its decision rendered on 23.05.2022 found that the proclamation notice and the notification of sale failed to meet the minimum threshold stipulated in the law, since they both lacked basic information pertaining to the collection of the attached goods and the estimated costs thereof. The Board similarly found that the Respondent's



personal effects were exempt from attachment. Consequently, the Board determined that the Respondent's complaint succeeds and proceeded to make the following orders:

- a. The auctioneer to return the attached goods;
- b. The auctioneer be fined Kshs. 50,000/-; and
- c. The auctioneer to pay costs of Kshs. 50,000/- to the complainant.

The Substratum Of The Appeal

4. The Appellant moved this court by way of the memorandum of appeal dated 19.07.2022 to challenge the aforementioned decision, on the following grounds:
 - i. That the learned Board erred in law and in fact by proceeding with the matter without the appellant yet it had issued a wrong address in the hearing notice served to the appellant.
 - ii. That the learned Board misdirected itself in finding that the respondent should return the goods distressed yet the same had been sold to third parties at an auction and thus cannot be complied with.
 - iii. That the learned Board misdirected itself in failing to consider that the appellant proclaimed the goods and issued a statutory notice of sale to the respondent.
 - iv. That the Honourable Board erred in law and fact in that it found that the respondent had not made an advert yet the same was annexed to the respondent's replying affidavit.
 - v. That the Honourable Board erred in law and fact by failing to consider the catalogue of sale indicating the sale had been conducted and returns made to the instructing party.
 - vi. That the Honourable Board misdirected itself in finding that the applicant, respondent herein, paid Kshs.10,500/- yet the applicant's affidavit states that he paid the money to the house agent and not the appellant.
 - vii. That the Honourable Board erred in ordering the appellant to pay the respondent Kshs. 50,000/- yet the sale was conducted and catalogue of sale filed herein.
 - viii. That the Honourable Board did not consider the matter fully by hearing the appellant and the fine and costs ordered in its judgment is excessive and unmerited. (sic)

Orders Sought

5. The Appellant therefore seeks the following orders:
 - i. The appeal be allowed.
 - ii. The Judgment of the Honourable Board, the Auctioneers Licensing Board, delivered on 27.05.2022 be set aside.
 - iii. The costs of the appeal be provided for.

Submissions On The Appeal

6. Directions were given for the appeal to be canvassed by way of written submissions. On his part, the Respondent neither participated in the appeal nor filed written submissions thereon. In the circumstances, this court proceeded to consider the submissions filed by the Appellant.



7. The Appellant submits that the Board erred in making a finding that the advertisement in respect of sale of the attached goods did not meet the required standard and yet the advertisement annexed to his replying affidavit contained relevant details including the date, time and place of auction, pursuant to Section 16(1) of the *Auctioneers Act*, Cap. 526 Laws of Kenya (the *Auctioneers Act*). The Appellant further submits that he was not given an opportunity to defend himself given that the hearing notice in respect of the complaint indicated that the said hearing would proceed at Reinsurance Plaza, 4th floor on the 23.05.2022 and instead the actual hearing took place at Milimani Law Courts.
8. The Appellant similarly faulted the Board for finding that the procedure for levying distress had not been properly followed and yet the Appellant was acting under the instructions of the agent, pursuant to Section 3(1) of the *Distress for Rent Act*, Cap. 293 Laws of Kenya (the *Distress for Rent Act*) which provides that: “any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the common law of England in a similar case.”
9. According to the Appellant, the procedures in place were followed prior to and until such time as the sale of the attached goods was effected. The Appellant contends that he sold the said goods by way of a public auction and upon doing so, provided the proceeds of sale in accordance with the provisions of Section 18 of the *Auctioneers Act*. That consequently, the Board erred in finding otherwise. For all the foregoing reasons, the Appellant urges this court to allow the appeal and in so doing, to set aside the impugned decision by the Board.

Analysis And Determination

10. This court has considered original record, record of appeal and the submissions on record plus the authorities cited. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Limited* (1958) EA 424; *Selle and Another v Associated Motor Boat Co. Limited and Others* (1968) EA 123 and *Williams Diamonds Limited v Brown* (1970) EA 1. The Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278 stated that:

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

11. Having set out the foregoing, I find that the eight (8) grounds of appeal can be condensed into two (2) key issues for consideration and determination, namely:
 - a. Whether the Appellant was accorded a fair opportunity to defend himself on the complaint; and
 - b. Whether the proclamation notice and notification of sale issued by the Appellant in respect of the Respondent’s goods were procedural and lawful.

Whether the Appellant was accorded a fair opportunity to defend himself on the complaint

12. As earlier set out in his submissions on appeal, the Appellant argues that the Board; whilst issuing a hearing notice pertaining to hearing of the complaint herein, set out a wrong address for the same; namely, that the hearing was scheduled to take place on 23.05.2022 at Reinsurance Plaza, 4th floor only for the Appellant to later discover that the hearing took place at a different venue, being Milimani Law



Courts. That in the process, the Appellant; being unaware of the change of venues, was absent and thus denied an opportunity to defend the Cause.

13. Upon re-examination of the record of appeal, particularly the typed proceedings before the Board, it is apparent that on the aforementioned 23.05.2022 the Respondent was present while the Appellant was notably absent. Consequently, the Board proceeded with the matter ex parte, before proceeding to deliver its decision immediately thereafter. The said proceedings do not set out in specific detail the venue in which the hearing took place.
14. Suffice it to say that, upon further re-examination of the record, I observed that the Appellant did not annex a copy of the relevant hearing notice to his record of appeal, to enable this court ascertain or confirm the veracity of his arguments raised on appeal. In the premises, I am unable to make a conclusive determination as to whether the hearing notice served upon the Appellant contained a wrong address from that in which the hearing eventually took place. As it stands therefore, there is no credible evidence on record to support the Appellant's argument that it was denied the right to defend the Cause, as a result. In any event, it is apparent from the record that in rendering its decision, the Board considered the replying affidavit sworn by the Appellant together with its annexures, alongside that sworn by the Respondent.

Whether the proclamation notice and notification of sale issued by the Appellant in respect of the Respondent's goods were procedural and lawful

15. This issue in particular forms the crux of the present appeal. Going by the record, the Respondent on the one part averred by way of his affidavit sworn on 3.11.2021 that he and his family resided in the subject premises at all material times but that due to financial challenges, he was unable to make payment on his rent dues for a few months. The Respondent averred that consequently, the agent of the subject premises instructed the Appellant to proclaim his goods. That on 29.09.2021 the Appellant arrived at the subject premises and carried away all personal and household items belonging to the Respondent, including but not limited to his children's school uniforms and school related items. That soon thereafter the Respondent paid the respective sums of Kshs. 8,000/- and a total of Kshs. 12,450/- to the agent and the Appellant, respectively. That notwithstanding, the Appellant never released the attached goods to him. That his attempts at contacting the Appellant with a view to recovering his goods proved futile, thereby causing him to seek redress from the Board on the grounds that the agent and the Appellant colluded to forcefully evict him from the subject premises whilst simultaneously attaching his goods without following the due process.
16. In retort, the Appellant by way of his affidavit sworn on 11.01.2022 averred that upon receiving instructions from the agent to the subject premises (Mukuru Agencies) on 14.09.2021 he proceeded to the subject premises where he served the Respondent with a 14-day statutory notice of his intention to levy distress for rent in the event that the latter failed to clear his rent arrears. The Appellant further averred that upon lapse of the 14-day notice period on 29.09.2021 he proceeded to seize the proclaimed goods belonging to the Respondent and later sold them by way of a public auction which was held on 9.10.2021, following an advertisement published on 1.10.2021. That subsequently on 5.11.2021 the Appellant remitted the proceeds of sale to the agent, less his expenses and commission.
17. In its decision, the Board reasoned that both the proclamation and notice of sale pertaining to the attachment of the Respondent's goods, failed to meet the minimum threshold set out in the law since they did not list the details of the attached goods and their estimated costs. Furthermore, the Board reasoned that the Respondent's personal effects which were likewise attached, are exempted from attachment. On those grounds, the Board allowed the Cause and granted the orders already set out hereinabove.



18. From a consideration of the foregoing circumstances, it is apparent that the focal issue lies in whether the notice and proclamation of sale issued by the Appellant are regular, which will in turn answer the question whether the sale by way of a public auction arising therefrom, was regular or not.
19. Upon my perusal of the material on record, it is not in dispute that the Respondent fell back on his rent for a few months, thereby triggering the action by the agent to the subject premises, to engage the professional services of the Appellant in a bid to levy distress for rent arrears allegedly to the tune of Kshs. 39,750/- as at 14.09.2021. The Appellant annexed a copy of the letter of instructions dated 14.09.2021 to his affidavit as Annexure HK-2, indicating the above position. Consequently, the right to levy distress for rent was available to the agent/landlord of the subject premises, pursuant to Section 3 of the *Distress for Rent Act*, which expresses thus:
- “(1) Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the common law of England in a similar case.
- (2) No distress shall be levied between sunset and sunrise or on any Sunday.”
20. Further to the foregoing, I did not come across any credible material or evidence at all by the Respondent to support the averment that he paid any or all of the sums alleged to have been remitted to the agent and/or the Appellant, referenced earlier above.
21. Turning to the notice and proclamation of sale dated 14.09.2021 and annexed to the Appellant’s replying affidavit as Annexure HK-3, I observed from a perusal of the same, that it sets out the description and estimated value of the goods to be attached, and further gives the 14-day notice period stipulated under Section 4 of the *Distress for Rent Act*, which reads as follows:
1. Where any goods or chattels are distrained for rent reserved and due upon a grant, demise, lease or contract, and the tenant or owner of the goods or chattels so distrained does not, within fourteen days after distress has been made, and notice thereof (stating the cause of the making of the distress) left on the premises charged with the rent distrained for, pay the rent together with the costs of the distress, or replevy them, with sufficient security to be given to the licensed auctioneer according to law, the person distraining may lawfully sell on the premises or remove and sell the goods and chattels so distrained for the best price which can be obtained for them, towards satisfaction of the rent for which they are distrained, and of the charges of the distress, removal and sale, handing over the surplus (if any) to the owner.
22. Concerning the procedure for issuance of a proclamation notice for sale, Rule 12 of the Auctioneer Rules *Legal Notice 120 of 1997* provides thus:
- “(1) Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—
- (a) record the court warrant or letter of instruction in the register;
- (b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect;



- (c) in writing, give to the owner of the goods seven days notice in Sale Form 3 of the Schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction;
 - (d) on expiry of the period of notice without payment and if the goods are not to be sold in situ, remove the goods to safe premises for auction;
 - (e) ensure safe storage of the goods pending their auction;
 - (f) arrange advertisement within seven days from the date of removal of the goods and arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter;
 - (g) not remove any goods under the proclamation until the expiry of the grace period.
- (2) If on the expiry of the period of notice, the auctioneer finds that there are other goods belonging to the judgement debtor—
- (a) which were not pointed out by the decree holder and proclaimed earlier in his proclamation; or
 - (b) which have been removed by the judgment debtor, or cannot be found, the auctioneer shall file an application in court seeking leave of the court to be allowed to attach any other movable properties of the judgement debtor pointed out by the decree holder.
- ...”

23. From my consideration of the above provisions alongside the proclamation notice dated 14.09.2023 prepared under Sale Form 2, it is apparent that the following were the goods listed in the description for attachment therein:

- i. Sofa set (estimated value of Kshs. 3,500/-)
- ii. TV plus a TV stand (estimated value of Kshs. 4,000/-)
- iii. Gas cylinder and a cooker (estimated value of Kshs. 2,000/-)
- iv. Table (estimated value of Kshs. 500/-)
- v. Music system (estimated value of Kshs. 1,000/-)
- vi. Fridge (estimated value of Kshs. 5,000/-)
- vii. Microwave (estimated value of Kshs. 500/-)
- viii. Carpet (estimated value of Kshs. 500/-)

24. The proclamation notice for sale listed the condition of the abovementioned items as ‘used’ and was signed by the Appellant and an unidentified witness. The said notice indicated that the Respondent had declined to append his signature thereon. The Appellant; it would appear; also signed a certificate



on the said notice, to the effect that the Respondent/caretaker of the subject premises, had declined to sign the proclamation notice despite receipt of the same, pursuant to Rule 12(1)(b) (supra).

25. Suffice it to say that, turning to the notifications of sale which were subsequently issued on 29.09.2021 and marked as Annexure HK-4 to the Appellant's replying affidavit, it is apparent from a study thereof, that the said notifications included several items in addition to those listed hereinabove and featuring in the proclamation notice, which items were listed as being 'used.' It is also apparent that the estimated value of the items listed was not set out in the respective notifications of sale. Be that as it may, I did not come across any legal provision posing a mandatory requirement that the notifications for sale ought to equally set out the estimated value of the attached goods.
26. It is apparent from the record that the listed items were advertised by sale in the People Daily Newspaper dated 1.10.2021 and subsequently sold by way of a public auction held on 9.10.2021 with the Appellant receiving proceeds of Kshs. 44,000/- out of which the agent to the subject premises received a sum of Kshs. 11,718/- vide the cheque dated 3.11.2021 upon the Appellant deducting his fees and related costs. It is also apparent that the Respondent only moved the Board sometime on or about 3.11.2021 by which time the proclaimed goods had already been sold. Moreover, the Respondent did not deny service of any of the respective notices upon him, prior to the sale by way of a public auction.
27. Nonetheless, I equally considered the question whether all the items listed in the proclamation/ notification of sale were available for attachment. On its part, the Board found that the Appellant had included certain items which were exempt from attachment, such as the Respondent's beddings.
28. The relevant provision in this regard is Section 44 of the Civil Procedure Act which reads as follows:

“(1) All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree:

Provided that the following shall not be liable to attachment or sale—

- (i) the necessary wearing apparel, cooking vessels, beds and bedding of the judgment-debtor and of his wife and children, and those personal ornaments from which, in accordance with religious usage, a woman cannot be parted;
- (ii) the tools and implements of a person necessary for the performance by him of his trade or profession;
- (iii) where the judgment-debtor is an agriculturalist—
 - (a) the first ten thousand shillings in value of his livestock, if any; and
 - (b) the first five thousand shillings in value of all implements, tools, utensils, plant and machinery used in connection with stock or dairy farming or in the production of crops or plants; and



- (c) the first one thousand shillings in value of agricultural produce necessary to enable him to earn his livelihood;
- (iv) books of accounts;
- (v) a right to sue in damages;
- (vi) a right of personal service;
- (vii) stipends and gratuities allowed to pensioners of the Government, or payable out of a service family pension fund notified in the Gazette by the Cabinet Secretary, and political pensions;
- (viii) two thirds of the salary of public officer or other person in employment;
- (ix) a contingent or possible right or interest, including an expectancy of succession by survivorship;
- (x) a right of future maintenance;
- (xi) any fund or allowance declared by law to be exempt from attachment and sale in execution of a decree.”

29. From my re-examination of the record, it is apparent that among the goods attached by the Appellant were beds and bedding, and a few cooking vessels, which would ordinarily be exempt from attachment as seen in the above proviso. The following are the items I identified as falling in the category of exempt goods, according to the catalogue of goods sold at the public auction:

- a. Pink double decker - Kshs. 5,100/-
 - a. White bed - Kshs. 1,100/-
 - a. Metal box containing blankets and duvets - Kshs.400/-
 - a. 3 brown mattresses - Kshs.3,000/-
 - a. 1 black metal bed - Kshs. 500/-
- Total - Kshs. 10,100/-

30. In view of all the foregoing circumstances, I concur with the finding by the Board, only to the extent that the Respondent’s personal items such as bedding and cooking vessels, would be exempt from attachment and thus ought not to have been attached and sold. Any sale in that respect was unlawful.

31. It is however noteworthy that in view of the fact that the public auction long took place, it would not be probable for an order of return of the unlawfully sold goods to be made, a fact which the Board ought to have taken into account in making its finding. These factors have since been overtaken by events.

Disposition

32. In the end therefore, the appeal partially succeeds. Consequently, I hereby set aside the Board’s decision made on 23.05.2022 and substitute it with an order to the effect that the Respondent’s complaint succeeds on the following terms:



- a. The Appellant/Auctioneer shall refund the sum of Kshs. 10,100/- to the Respondent/Complainant being the proceeds of sale in respect of the exempt goods sold by way of the public auction held on 9.10.2021.
- b. The Appellant/Auctioneer shall pay costs of Kshs. 50,000/- to the Respondent/Complainant.

In the circumstances of the appeal, each party shall bear his own costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF SEPTEMBER, 2024

HON. T. W. OUYA

JUDGE

For Appellant Otieno

For Respondent N/a

Court Assistant Martin Korir

ROA 14 days.

