



Mundia v Auctioneers Licensing Board; Obure (Interested Party) (Civil Appeal 527 of 2015) [2023] KEHC 3184 (KLR) (Civ) (30 March 2023) (Judgment)

Neutral citation: [2023] KEHC 3184 (KLR)

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

CIVIL

CIVIL APPEAL 527 OF 2015

CW MEOLI, J

MARCH 30, 2023

BETWEEN

JOSEPH KAHORO MUNDIA APPELLANT

AND

AUCTIONEERS LICENSING BOARD RESPONDENT

AND

RISPER A OBURE INTERESTED PARTY

(Being an appeal from the decision of Auctioneers Licensing Board at Nairobi delivered on 22nd September 2015 in the Auctioneers Licensing Board Disciplinary Cause No. 18 of 2015)

JUDGMENT

1. This appeal emanates from the decision of the Auctioneers Licensing Board (hereafter the Board) on 22.09.2015 in the Auctioneers Licensing Board Disciplinary Cause No. 18 of 2015. The proceedings before the Board were commenced by way of a complaint filed on 23.02.2015 by Risper A. Obure the complainant before the Board (hereafter the Interested Party) against Joseph Kahoro Mundia t/a Upstate Kenya Auctioneers, the respondent before the Board (hereafter the Appellant).
2. The Interested Party had averred that she was the Human Resource Manager of Lavington Security Guards Limited who were the 2nd defendants in Nairobi Milimani CMCC No. 4118 of 2013 (hereafter the lower court suit). That the lower court on 05.08.2014 ordered stay to avert execution against her company, which order was duly served on the Appellant. That thereafter the order was extended by the court from time to time, with full knowledge of counsel acting for the plaintiff in the lower court suit. Her complaint was that the Appellant despite having knowledge of the subsisting court order and auctioneer rules breached the same by causing to be illegally attached in execution, the motor vehicle



registration No. KBN 034K (hereafter said motor vehicle) belonging to Lavington Security Guards Limited.

3. That the actions put the said company to embarrassment, damage and financial loss amounting to Shs. 30,000/- daily which was claimed as compensation from the Appellant. It was further averred that, despite requests to release the said motor vehicle, the Appellant failed to comply. The complainant prayed that the Board administer disciplinary action against the Appellant including an order for compensation in respect of losses suffered consequent to the illegal attachment and detention of its motor vehicle.
4. The Appellant filed a replying affidavit on 11.03.2015. Therein, he asserted that he proceeded with execution upon instructions from the plaintiff's advocate in the lower court suit, and advice that the interim orders had lapsed. That despite issuing a notification of sale for the motor vehicle pursuant to valid warrants of attachment and sale, he had subsequently released the said motor vehicle upon advice by the plaintiff's advocates.
5. By its decision, the Board found in favour of the Interested Party and imposed a fine of Shs. 50,000/- against the Appellant while awarding costs in the sum of Shs. 30,000/- to the Interested Party to be paid within thirty days of the said decision. Aggrieved with the outcome, the Appellant preferred this appeal which is based on the following grounds that: -
 - “1. The Auctioneers Licensing Board erred in fact and in law in entertaining a ground which was not among the grounds listed in the complaint filed by the complainant, to wit, that the Appellant attached a motor vehicle not in the proclamation notice.
 2. The Auctioneers Licensing Board erred in law in failing to accord the Appellant an opportunity to respond by affidavit or otherwise to the allegation that he had attached a motor vehicle which he had not proclaimed.
 3. The decision of the Auctioneers Licensing Board was null and void in that it did not comply with Section 6 of the Auctioneers Act in that it was only signed by the Secretary of Respondent in contravention of the Auctioneers Act.
 4. The sentence meted out against the Appellant was excessively harsh.” (sic)
6. The court directed that the appeal be canvassed by way of written submissions. Only the Appellant complied.
7. Addressing grounds 1 & 2 of the appeal, counsel for the Appellant faulted the Board's finding to the effect that the motor vehicle attached was not one of the goods itemized in the proclamation notice yet the complaint before it did not reveal any such grievance. Counsel pointed out that the Interested Party's grievance related to attachment during the subsistence of an order of stay of execution. The decision in HCC No. 383 of 2000 Charles Ambunya Khamala v The Auctioneers Licensing Board was cited in support of the submission that the Board based its decision on an extraneous matter not before it.
8. Concerning ground 3 of the appeal, counsel cited Rule 11 of the Schedule to the Auctioneers Act and the decision in Kakamega HCCA No. 20 of 2006 Manuel Ominde t/a Kuronya Auctioneers v Auctioneers Licensing Board to contend that to be valid, the decision of the Board ought to have been signed by the chairman and secretary of the Board. He asserted that only the secretary appended her signature to the Board's decision that is the subject of the appeal. The court was urged to allow the appeal. Ground 4 of the appeal was apparently abandoned.



9. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

10. It is settled that an appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. The appeal herein turns on the key question whether the Board’s finding was well founded and justified.

11. Pertinent to the determination of the appeal are the pleadings outlined above, which formed the basis of the parties’ respective cases before the Board. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.” (Emphasis added).

12. The Appellant’s grouse against the Board is essentially three pronged. Namely, that the Board’s findings went against the pleadings and issues placed before it for determination; that the Board failed to accord the Appellant an opportunity to be heard; and the Board’s decision did not conform to the statutory requirements.

13. The Board after hearing the respective parties held as follows in its decision;

“



- “ 1. The Board finds that there were valid warrants of attachment issued on 28th July 2014 in CMCC 4118 of 2013 in which the Second Defendant/Judgment Debtor therein is the complainant in this matter.
2. The Board finds that the Auctioneers proceeded to take out a proclamation on 31st July 2014 as per annexure marked JKM2 in the Auctioneers replying affidavit.
3. The Board finds that the court issued an order staying execution of the warrants on 5th August 2014 which were served on 6th August 2014 and remained inforce until 28th November 2014 when the orders were extended indefinitely in the presence of all the parties.
4. The Board finds that on 21st January 2015 Warrants of Attachment were re-issued to the Auctioneer upon request by the decree holder’s advocate in their letter dated 8th December 2014 and filed in the registry on 11th December 2014 notwithstanding that the order for stay of execution were still in force.
5. The Board finds that on 3rd December 2014 the Decree Holder’s advocate had written to the Auctioneer instructing him to proceed with execution purportedly in their view there were no orders of stay.
6. The Board finds that on 2nd February 2015 the Auctioneer proceeded to attach and cart away the Complainants motor vehicle KBN 034K pursuant to fresh warrants of attachment re-issued on 21st January 2015 upon application by the advocate for the Decree Holder.
7. The Board finds however that the aforesaid attached motor vehicle is not one of the goods itemized in the only proclamation attached to the affidavits presented by the Complainant and Auctioneer herein.
8. The Board finds that the court having re-issued fresh warrants, the Auctioneer ought to have issued fresh proclamation to the Complainant which the Auctioneer failed to do.

Boards Decision

1. The Complaint is allowed.
 2. The Auctioneer is find Kshs. 50,000/= and costs of Kshs. 30,000/=
 3. The Auctioneer to comply within (30) days from the date herein. Mention during November 2015 session.” (sic)
14. It is apposite to first deal with the Appellant’s challenge regarding the validity of the Board’s decision. Section 6 of the [Auctioneers Act](#) provides for meeting and procedure of the Auctioneers Board as follows: -

“The conduct and regulation of the business and affairs of the Board shall be as provided for in the Schedule, but subject thereto, the Board may regulate its own procedure.”

15. In addition, Rules 5, 6 and 11 of the Schedule to the [Auctioneers Act](#) provides that; -

“ 5. The quorum for the conduct of a meeting of the Board shall be—



- (a); or
- (b) in the case of a meeting to consider a disciplinary matter, three members:

Provided that in each case at least one member shall be a qualified lawyer.

6. The chairman shall preside at every meeting of the Board at which he is present
(a) but in the absence of the chairman from a meeting, the Board shall elect one of the advocates appointed under section 3(1)(d) who shall, with respect to that meeting and the business transacted thereat, have all the powers of the chairman.

(b) Where the Secretary to the Board is unable to attend a meeting of the Board, the Board shall appoint one of the members appointed under section 3(1)(d) to serve as Secretary with respect to that meeting.

11. All instruments made by and all decisions of the Board shall be signified under the hand of the chairman and the secretary.”

16. A perusal of both the original and record of appeal reveals that the decision of the Board was duly executed on 22.09.2015 by the Acting Chairperson, Henry Ongicho and the Acting Secretary, Lillian R. Omondi respectively. I gather from the Appellant’s contention that his complaint relates to the notification by the Board Secretary dated 01.10.2015 made pursuant to Section 25 (1) of the Auctioneer Act. The foregoing provision provides that:-

“Any person aggrieved by a decision of the Board under this Act may, within thirty days after receipt by him of written notice of such decision, appeal against the decision to the High Court by giving notice of appeal to the Registrar thereof setting out the grounds of appeal within thirty days after the giving by him of the notice”.

17. Evidently, it is the duty of the Secretary of the Board who communicated with the Appellant to duly notify the parties of the decision of the tribunal for the purposes above. The letter by the Secretary of the Board is not the decision of the Board but a notification of the decision of the Board. Consequently, it is the court’s finding that the preliminary issue by the Respondent is not well taken.

18. Moving on to the substantive issues for determination, Rule 10 of the Schedule to the *Auctioneers Act* provides that:-

“All proceedings before the Board shall be deemed for the purposes of Chapter XI of the Penal Code (Cap. 63), to be judicial proceedings and for the purposes of Chapter VIII of the *Evidence Act* (Cap. 80) to be legal proceedings.”

19. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M’Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:



“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280* where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

20. The duty of proving the averments contained in the complaint lay with the Interested Party. The matter proceeded to hearing before the Board on 22.09.2015. The Interested Party was represented by Mr. Masika. Reiterating the contents of the complaint, counsel stated that he had subsequent to the attachment complained of, written a protest letter to the Appellant and his instructing counsel on the matter, before returning to the court on 05.02.2015 to seek orders for the release of the attached motor vehicle. That the resultant order was served immediately and the motor vehicle in question was released on 22.02.2015.
21. The Appellant on his part placed reliance on his affidavit material in response to the complaint. He disputed disobeying the stay order and blamed the instructing counsel for advising him that the orders of stay no longer subsisted. And that on the strength of the advice, he had applied for reissue of fresh warrants of attachment. In a brief rejoinder Mr. Masika emphasized that the Appellant was all along aware of the court order and that on 10.02.2015 the lower court had made an order for the release of the attached motor vehicle.
22. From the material presented before the Board, there was no dispute that pursuant to a decree of the lower court dated 09.07.2014, warrants of attachment dated 28.07.2014 were taken out against Lavington Security Guards Limited and thereafter a proclamation notice dated 31.07.2014 was served. Lavington Security Guards Limited subsequently moved the lower court by a motion dated 04.08.2014 seeking stay of execution. The court granted interim stay of execution and it appears that the interim orders were extended from time to time until on 28.11.2014 when they were extended indefinitely.
23. On 03.12.2014 the Appellant’s instructing counsel wrote a letter to the Appellant instructing him to proceed with execution on the purported fact that the interim orders in respect of the lower court suit had lapsed due to Lavington Security Guards Limited and or its counsel failing to attend court on 28.11.2014. The Appellant thereafter requested for a re-issue of fresh warrants of which were issued on 21.01.2015 and proceeded to proclaim and attach the subject vehicle registration number KBN 034K.. Lavington Security Guards Limited once more moved the court vide a motion dated 04.02.2015 seeking a further stay of execution of the warrants issued on 21.01.2015 and release of



motor vehicle. The said motor vehicle was subsequently released on 25.02.2015. These events formed the basis of the complaint lodged before the Board.

24. The Appellant complains that the Board based its decision on a ground which was not raised in the complaint by the Interested Party and therefore denied him the right to be heard on that score. The finding was that “the aforesaid attached motor vehicle is not one of the goods itemized in the only proclamation attached to the affidavits presented by the Complainant and Auctioneer herein”. Undeniably, the Appellant took out fresh warrants of attachment on 21.01.2015 albeit allegedly on the erroneous advice of the instructing counsel’s letter dated 03.12.2014, the court having on 28.11.2014 indefinitely extended interim orders of stay.
25. Did the Board render determination on issues not canvassed in the Interested Party’s Complaint and thereby deny the Appellant a hearing? It is trite that civil cases are determined on issues raised in the pleadings and evidence of the parties thereon. The Court of Appeal in *North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4 others* [2014] eKLR succinctly put it this way:-

“The complaint running through the submissions by the learned counsel for the appellant in this appeal was that the learned judge wrote and delivered a judgement on issues that were not pleaded in the plaint and which were therefore not before the learned judge for determination.

.....One of the issues for determination on appeal in the case of *Abdul Shakoor Sheikh v Abdul Najeid Sheikh Civil Appeal No. 161 of 1991 (ur)* was the complaint that the trial judge dealt with an issue which was not properly before him as it had not been pleaded in the plaint. It was also contended in that appeal that in making this part of the order dependent on a non-existent appeal the judge grossly erred in that he granted a relief which had not been sought. This court differently constituted agreed and held that a plaintiff is not entitled to reliefs which he has not specified in his statement of claim as pleadings play a very pivotal role in litigation. The court cited a quote from the authors Bullen and Leake (12th edition) page 3 under the rubric Nature of Pleadings:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which the parties can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

26. The Court proceeded to state that:

It was held in the case of *Galaxy Paints Co. Limited v Falcon Guards Limited* [2000] 2EA 385 that the issues for determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgement on the issues arising from the pleadings or such issues as the parties framed for determination. It was further held that unless pleadings were amended parties were confined to their pleadings. This position had been taken in the earlier case of *Gandy v Caspair* [1956] EACA 139 where it was held that unless pleadings were amended parties must be confined to those pleadings. It was further held that to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record.

In a judgement delivered recently by this Court on 14th February, 2014 in *Romanus Joseph Ongombe & others v Cardinal Raphael Ochieng Otieno & others (Kisumu) Civil Appeal No. 20 of 2011 (ur)* it



was held that a judgement whose basis was on issues not founded on the pleadings was a nullity. This Court proceeded in that case to remit the matter to the High Court for retrial.

The position flowing from all the previous judgements we have considered herein is that a judgement must be based on issues arising from the pleadings and the trial judge is not at liberty, as the trial judge in the case leading to this appeal did, to depart from the pleadings or the case before the court to write and deliver a judgement on issues that are not before the court. The difference would of course be where the parties introduce an unpleaded issue in the course of the trial and leave that issue for the court to decide. The court would in that event be entitled to make a necessary finding - See *Odd Jobs Mubia* [1970]EA 476 where it was held that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for a decision.

The appellants complaint in this appeal is basically that the learned judge delivered a judgement on issues that were not pleaded and which were not before the court. We agree. The learned judge adopted a path of doing what she perceived to be “justice” to the parties but in the event she erred by departing from the general rule that issues for determination in a suit generally flowed from the pleadings and the learned judge could only pronounce judgment on the issues arising from the pleadings.” (Emphasis Added).

27. The Interested Party’s complaint before the Board stated inter alia that;-

“ That I am surprised that the said auctioneer herein one Joseph Kahoro Mundia t/a Upstate Kenya Auctioneers has in breach of the court orders still subsisting and the Auctioneer rules, now caused to be illegally removed for sale goods of M/s Lavington Security Guards Ltd including motor vehicle registration number KBN 034K despite the court order as a consequence whereof the Company has suffered embarrassment, financial loss and damages for as long as the motor vehicle in question remains detained. The financial loss is in terms of Kshs. 30,000/- per day and the company fully claims compensation from the auctioneers in question and prays that this honorable Board be minded to order so on the consideration of justice and fairness.” (sic)

28. The broad issue for determination by the Board was the legality of the attachment of the Interested Party’s vehicle during the subsistence of the stay orders. In considering that matter, the Board was well within its remit to consider the relevant circumstances surrounding the attachment including the Appellant’s actions concerning the taking out of fresh warrants of attachment during the subsistence of stay orders and of proclamation, the latter which is ordinarily an integral part of the attachment process. Indeed at the hearing before the Board, the Appellant was at pains to defend the validity of the proclamation notice allegedly re-issued on 23rd January 2015 in relation to the vehicle he subsequently attached.

29. To my mind therefore, the foregoing matters generally flowed from pleaded issues thrown up by the parties for determination by the Board. The court is not persuaded that in dealing with the question relating to proclamation of the subject vehicle, the Board entertained an extraneous matter in departure from the pleaded issues and thereby denied the Appellant the right to a hearing thereon. Ultimately, the court finds no merit in the canvassed grounds of appeal and will dismiss the appeal with no order as to costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 30TH DAY OF MARCH 2023.

**C.MEOLI
JUDGE**



In the presence of:

Mr. Maina for the Appellant

Respondent: N/A

Interested Party: N/A

C/A: Carol

