



REPUBLIC OF KENYA



Kimwele v Kenya Bankers Association of Kenya & 12 others (Commercial Case E237 of 2020) [2022] KEHC 458 (KLR) (Commercial and Tax) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 458 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E237 OF 2020**

DAS MAJANJA, J

MAY 31, 2022

BETWEEN

DARIUS KIMWELE PLAINTIFF

AND

KENYA BANKERS ASSOCIATION OF KENYA 1ST DEFENDANT
FAMILY BANK 2ND DEFENDANT
NCBA BANK 3RD DEFENDANT
KENYA COMMERCIAL BANK SBM BANK 4TH DEFENDANT
COMMERCE & INDUSTRY 5TH DEFENDANT
KENYA LANDLORD & TENANT ASSOCIATION 6TH DEFENDANT
TARUS & ONYANGO 7TH DEFENDANT
ODUK ADVOCATES 8TH DEFENDANT
MILLERS MOTORS LTD 9TH DEFENDANT
MOMENTUM CREDIT LTD 10TH DEFENDANT
PLATINUM CREDIT LTD 11TH DEFENDANT
ASSOCIATION OF KENYA INSURANCE 12TH DEFENDANT
SBM BANK 13TH DEFENDANT



JUDGMENT

1. It is common ground that the Plaintiff is an association representing the interests of auctioneers whereas the Defendants are entities with interests largely in the finance and banking sector and in the course of their business, engage the services of auctioneers. On 30th June 2020, the Plaintiff filed a suit against the Defendants complaining about misapplication and infraction of the [Auctioneers Act](#), 1996 (“the Act”) by the Defendants and their agents and their relationship with the Plaintiff’s members.
2. According to the Plaintiff, the 1st Defendant’s members have illegally issued instructions, repossessed, advertised and sold loan securities without the involvement of the Plaintiff’s members, prescribed an illegal fees schedule and encouraged undercutting. The Plaintiff also accuse the 7th, 8th, 9th, 11th, 12th and 13th Defendants of having advertised, attached and sold distressed, attached, repossessed and charges goods without the involvement of auctioneers. That they have encouraged illegal fee payments to the Plaintiff’s members and/or encouraged undercutting and malpractice by the auctioneers.
3. For the above reasons, the Plaintiff seeks the following declaratory orders as set out in its Amended Plaint dated 18th August 2020:
 1. All the instructions issued by the Respondents/Defendants, their members, agents or person(s) acting on their behalf must comply with the statutory sale form 1 of the [Auctioneers Act](#) and Rules.
 2. A declaration that the Defendants, their members, agents, officers or persons working under their control should not be allowed to issue illegal instructions, repossess attach and offer for sale chattels, goods, property for sale by any mode of competition otherwise reserved for licensed auctioneers unless allowed by any other written law or court order.
 3. The Defendants their members, agents, officers or person(s) working under them do stick to the fees schedule as provided for under the [Auctioneers Act](#) and that under paying is illegal under the Auctioneers Practice 2009.
 4. The Defendants have been illegally underpaying, advertising for sale, repossessing, storing and dealing with the charges and mortgaged facilities
 5. The landlords, estate agents and persons working under them have no legal basis to distress, store and sell distressed chattels.

5a) That there be Permanent Injunctions restraining the Defendants, its members or agents herein from repossessing, attaching, selling motor vehicles, chattels, goods under the Movable Properties Security Act, the [Land Act](#), [Banking Act](#) and or Any other Act of Parliament, storing and selling the abovementioned without the involvement of the Auctioneers, paying Auctioneers using the un authorized schedule and using instructions that defeats the Section 6 -11 of the [Auctioneers Act](#) and Rules 1997 as amended 2010.
 6. The cost of this suit be provided by the Defendants.



4. The Plaintiff has terminated the case against the 8th, 10th, 11th and 14th Defendants and save for the 7th Defendant. The remaining Defendants have filed defences to the amended Plaintiff, which were in turn replied to by the Plaintiff. The parties also agreed that the suit be disposed by way of written submissions which are on record and which I shall consider when resolving the matter.
5. Before I deal with the substantive matters raised by the Plaintiff, I note that the 12th Defendant had impugned the competence and capacity of the Plaintiff and its Secretary General, Darius Kimwele to institute this suit. While it is true that an entity such as the Plaintiff is not a legal person with capacity to sue or be sued and that a society can only sue or be sued through its due officers, I am satisfied that the Plaintiff is suing through its official who is also doing so on behalf of the Plaintiff's membership as evidenced by the Plaintiff's letter dated 11th June 2020. I therefore hold that the suit is competent and properly before the court.
6. Turning to the substance of the suit, I propose resolve this matter in reference to the prayers sought by the Plaintiff which I have set out in paragraph. 2 above. However, an understanding of the background of the statutory framework that governs the work of an auctioneer which is at the heart of this case is necessary.
7. The Act was enacted to, “consolidate and amend the law relating to auctioneers, to provide for licencing and regulation of the business and practice of auctioneers, and for connected purposes.” Under section 2(1) of the Act, “an auctioneer” means a person licence under section 10”. Section 10 of the Act provides for who may be eligible for a licence while section 12 provides for the manner of application for a licence to the Auctioneers Licensing Board (“the Board”) established under section 3 of the Act. The Board's functions include licencing and regulating the business and practice of auctioneers and supervision and discipline of auctioneers.
8. The nature of the business of an auctioneer is set out in section 2(3) of the Act which deems any person who does the following to be an auctioneer:
 - a. attaches for sale any movable or immovable property in execution of a court order made pursuant to the provisions of any written law or contract;
 - b. sells or offers for sale any movable or immovable property or any interest therein by auction or by any other mode of sale by competition;
 - c. levies distress for rent or distrains under the provisions of any written law;
 - d. carries out evictions under an order of a court;
 - e. repossesses goods from any person pursuant to the provisions of any written law or contract.
9. It can therefore be deduced from section 2(3) that a person who intends to carry out the aforesaid tasks is deemed to be an auctioneer and must apply for a licence. Under section 2(3) of the Act, auction sales under the *Tea Act* (Chapter 333 of the Laws of Kenya) and the *Coffee Act* (Chapter 343 of the Laws of Kenya) are excluded from the provisions of the Act. Section 9 of the Act prohibits any person without a valid licence from carrying on the business of an auctioneer. Such a person commits an offence and is liable to pay a fine of KES. 100,000.00 or two years' imprisonment or both in the event of conviction. Having outlined the aforesaid framework, I now turn to consider whether the Plaintiff is entitled to the prayers sought.
10. In Prayer No. 1 the Plaintiff seeks a declaration that all the instructions issued by the Defendants members and their agents must comply with the statutory sale form 1 of the Act and Auctioneers Rules, 1997 (“the Rules”). As I understand, the Plaintiff complains that the Defendant's members



have issued instructions that offend Rule 11 of the Rules as the same are addressed to auctioneers generally rather than to individual auctioneers. On its part, the 3rd Defendant submits that the Letter of Instructions its issued to its auctioneers complies with the standard format provided and that the Plaintiff has not provided any evidence to the contrary evidence. The 12th Defendant contends that the Plaintiff's accusation on this front is baseless.

11. I entertain grave doubt that the Plaintiff can impugn instruction letters issued by each of the Defendant's members generally. Each auctioneer is issued with instructions and it is upon those instructions that an auctioneer acts or carries out its duties. The Board which exercises disciplinary authority over auctioneers is empowered under section 18 of the Act to revoke an auctioneer's licence, "if the licenced auctioneer does not comply with any provisions of this Act or any rules made thereunder." Every auctioneer is required to comply with the Act and the Rules and an auctioneer who acts otherwise is liable to disciplinary action which may be brought by any person including the Plaintiff. It is for this reason that I do not wish to comment on the disputed letters of instruction. A declaration of the nature sought in prayer No. 1 does not serve any purpose and only goes to restate the law that parties must comply with the law.
12. Since Prayers 2, 5 and 5a of the Amended Plaint deal with the nature of the auctioneer business I shall address them together. Prayer No. 2 seeks a declaration that the Defendants, their members, agents, officers or persons working under their control should not be allowed to issue illegal instructions, repossess attach and offer for sale chattels, goods, property for sale by any mode of competition otherwise reserved for licensed auctioneers unless allowed by any other written law or court order. Prayer 5 prays that landlords, estate agents and persons working under them have no legal basis to distress, store and sell distressed chattels. Prayer 5a seeks a permanent injunction restraining the Defendants, its members or agents from repossessing, attaching, selling motor vehicles, chattels, goods under the Movable Properties Security Rights Act ("the MPSRA"), the [Land Act](#), 2012, [Banking Act](#) (Chapter 488 of the Laws of Kenya) and any other Act of Parliament from storing and selling motor vehicles, chattels, goods without the involvement of an auctioneers.
13. The Plaintiff's complaint in this case is that that the Defendants have been issuing instructions to persons who are not licenced to carry on auctioneer business. It is the Plaintiff's contention that the business of repossession, attachment, repossession and sale of moveable and immovable property by mode of competition is reserved for the licenced auctioneers.
14. On the other hand, the Defendants deny that repossession, attachment, sale of moveable and immovable property is reserved exclusively for auctioneers. They rely on several statutory provisions in which they claim discount the Plaintiff's contention that auctioneers must be involved during repossession. For example, under section 98(1)(d) of the [Land Act](#), 2012, a chargee is entitled to exercise a power of sale by private contract at market value without recourse to an auctioneer. Under sections 67(3) and 75(4) of the MPSRA, a secured creditor may sell a movable asset which it has secured in the event of default while under section 6 (2) of the [Hire Purchase Act](#) (Chapter 507 of the Laws of Kenya), the owner of the goods is entitled to recover them as long as the requirement for registration under the Act has been complied with. The Defendants further state that Rule 5(1) of the Rules provides for attachment and sale of movable and immovable property under warrants of court and letters of instruction from third parties, including distress for rent and repossession, unless otherwise provided by any other written law.
15. The Defendants also advance the position that the Act and the Rules thereto cannot override the provisions of the [Land Act](#), 2016 and MPSRA which permit non auctioneers to carry out certain acts in relation to realising moveable and immovable securities. They further contend that since the statutes



were passed after the Act passed in 1996, they impliedly repeal the provisions of the Act to the extent that the Defendants are permitted to realise security assets.

16. As I have set out above, the Act is a statute of general application in the sense that it regulates the business of an auctioneer while the Land Act, 2016, MPSRA and other statutes deal with the right of the parties in respect of the secured properties. I do not think that those statutes enacted subsequent to the Act intended either expressly or implied to repeal or amend the Act in relation to the auctioneering business. While the security holder has the right to repossess or sell or do all the acts necessary to realise the rights, the process of doing the things enumerated in section 2 of the Act is the preserve of auctioneers. This means that licenced auctioneers will continue to conduct auctioneering business under the Land Act, 2012, the MPSRA and any other written law unless otherwise excluded.
17. Since the Act regulates the business and practice of auctioneers and by dint of section 2(2) thereof, any person who carries out the business enumerated must be licenced unless that person is excluded by the law. The penalty for carrying out illegal instructions is provided for under the Act. Additionally, a person who authorises or permits an unlicenced person to carry out auctioneering business risks the having that transaction declared void for contravening statutory provisions. If the Plaintiff has information and evidence that any person is carrying out the business of an auctioneer without a licence, then it may lay a criminal complaint. A broad declaration, such as the one sought, does not serve any purpose as it merely restates what the law is.
18. Prayers 3, 4 and part of 5a deal with payments to auctioneers for services rendered. Prayer No. 3 seek a declaration that the Defendants and their members do stick to the fees schedule as provided for under the Act and that under paying is illegal under the Auctioneers Practice Rules, 2009. Prayer No. 4 seeks a declaration that the Defendants have been illegally underpaying, advertising for sale, repossessing, storing and dealing with the charges and mortgaged facilities.
19. In my view these declarations seek to declare what the law is since the Auctioneers (Practice) Rules, 2009 provide the manner of charging for services by auctioneers. It provides, in part, as follows:
 1. These Rules may be cited as the Auctioneer (Practice) Rules 2009.
 2.
 - (1) These Rules shall apply and bind all auctioneers.
 - (2) Every practicing auctioneer shall sign, subscribe to and bind themselves to them upon registration.
 3. No auctioneer shall hold or allow himself to be held out, directly or indirectly, and whether or not by name, as being prepared to conduct business at less than the scales laid down by the Auctioneers Fee Schedule for the time being in force.
20. From the above, it is clear that a licenced auctioneer binds himself to charge the statutory fee and therefore has a responsibility to ensure that it abides by the Rules under the Act otherwise it may be subjected to disciplinary proceedings before the Board or court. In that regard, it is for the Plaintiff to take such action where it has evidence of such conduct by the auctioneer. Whether the Defendants and their members have been violating the rule on fees, is a question of fact to be decided on a case by case basis. Each fee note must be examined in order to determine whether it violates the rule. It is thus clear that the declarations of the nature sought in reference to the fees charged do not add anything to settle legal relations and cannot be granted.



21. From the totality of the issues of the I have considered, it is clear that the declarations sought by the Plaintiff cannot be granted.
22. The suit is dismissed but with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 31 ST DAY OF MAY 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

