



**Japheth Mutisia Masila t/a Japhy Commercial Enterprises v Kwale  
International Sugar Co. Ltd & another (Civil Case 245 of 2016)  
[2021] KEHC 270 (KLR) (Commercial and Tax) (25 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 270 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 245 OF 2016  
WA OKWANY, J  
NOVEMBER 25, 2021**

**BETWEEN**

**JAPHETH MUTISIA MASILA T/A JAPHY COMMERCIAL  
ENTERPRISES ..... PLAINTIFF**

**AND**

**HAMISI JUMA GUGU T/A GUGGU & COMPANY AUCTIONEER  
AUCTIONEER ..... 1<sup>ST</sup> DEFENDANT**

**KWALE INTERNATIONAL SUGAR CO. LTD ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect to the application dated 26<sup>th</sup> August 2020 in which the defendant, Kwale International Sugar Company, seeks to set aside an alleged illegal sale of motor vehicles registration numbers KBZ 303B and KBS 614Z that occurred on 14<sup>th</sup> September 2019. The applicant also seeks an order for mandatory injunction to compel the auctioneer to return motor vehicle registration numbers KBZ 303B and KBS 614Z to it. The Defendant further seeks the costs of the application.
2. The application is supported by the grounds set out in the affidavit sworn by Mr. Gibson Kabue and is premised on the following grounds: -
  - a. The Auctioneer on 5<sup>th</sup> July 2019 attached the Defendant's vehicles to wit KBZ 303B and KBS 614Z, both Hilux Double Cabs valued at Kshs. 5,040,000/= {Hereinafter referred to as the "Vehicles"} from the Defendant's site office at Kwale County at the behest of the 3<sup>rd</sup> Defendant pursuant to a decree issued in Milimani HCCC No. 245 of 2016, Jarphy Commercial Enterprises —vs- Kwale International Sugar Company Limited.



- b. That the Defendant has since learnt from the Auctioneers Licensing Board vides their letter dated 18<sup>th</sup> July 2019 that the said firm auctioneers did not have jurisdiction to execute court orders in Kwale county;
  - c. That on 11<sup>th</sup> September 2019 the Plaintiff vides their letter of even date instructed the Auctioneer not to sell the attached vehicles and to return the warrants of attachment to them together with their invoice for payment, which instructions the Auctioneer did not heed.
  - d. That despite the instructions having been revoked by the Plaintiff (Decree Holder) the Auctioneer proceeded without authority allegedly to sell the attached vehicles to unknown third parties on 14<sup>th</sup> September 2019 for a paltry sum of Kshs. 1,300,000/=.
  - e. That the sale of the Defendant's vehicles reeks of illegality since it was done in excess of jurisdiction and without authority of the instructing client, i.e. the Plaintiff/ Decree Holder and thus ought to be set aside forthwith.
  - f. That as at to date the said motor vehicles were yet to be transferred to any third parties.
  - g. That unless the orders sought are granted the Defendant's vehicles are likely to be transferred to third parties and lost and the Defendant will suffer irreparable harm, loss and damage.
  - h) It is in the interest of justice that the orders sought be granted so as not to sanitize the Auctioneer's illegal actions.
3. The auctioneer opposed the application through the replying affidavit of the proprietor Mr. Hamisi Juma Gugu Mwangugu who states that he is a licensed Auctioneer "class B" trading in the name and style of GUGGU & Company Auctioneers having jurisdiction to execute warrants in the counties of Mombasa, Kilifi, Kwale, Lamu and Taita Taveta. He confirms that he received Warrants of Attachment & Sale from the High Court at Milimani in respect to this matter cause after which he proceeded to the Defendant's premises within Kwale County and proclaimed the defendant's vehicles that are the subject of this application.
  4. The auctioneer explains that he advertised the said vehicles for sale in the Star daily newspaper of 14<sup>th</sup> August 2019 but that the instructing advocates Ms. J. Nzioki & Co. Advocates informed him to put the intended sale on hold as parties were exploring negotiations toward settling the decree. He adds that the negotiations did not materialize and that the said Advocates advised him to proceed with the sale which was conducted on 16<sup>th</sup> September 2019 after valuation of the said motor vehicle and a placement of a further advertisement in the newspaper.
  5. The auctioneer avers that he later forwarded the proceeds of the sale to the decree holder's advocates Ms. Philip Muoka & Co. Advocates. He attached the copy of the letter forwarding the cheque as annexure marked "TIJGIVI 10".
  6. The auctioneer refutes the applicant's allegation that he had no jurisdiction to execute warrants in Kwale County and explains that the Auctioneers Licensing Board noted that there was an error in the information that they relayed to the defendant regarding his jurisdiction and clarified that his area of jurisdiction includes Kwale County. He attached a copy of the Auctioneers Licensing Board's letter confirming his jurisdiction as annexure marked "LIJGIVI 13".



7. Regarding the claim that the auction was conducted after the expiry of the warrants, the auctioneer averred that the warrants were extended up to 21<sup>st</sup> September 2019 and added that since the auction took place on 14<sup>th</sup> September 2019, the same was well within the extension period. He maintained that the auction was conducted within the confines of the law cannot be deemed to be illegal as he had already forwarded the cheques to Ms. Philip Muoka & Co. Advocates who never returned the same to him.
8. The Plaintiff filed an affidavit dated 15<sup>th</sup> September 2020 in which he disowns the Auctioneer's actions and avers that he instructed the Auctioneer, to hand over the attached motor vehicles to Ms. Mbeki Auctioneers. The plaintiff avers that the letter was however utterly ignored by the Auctioneer despite the fact that it was duly received.
9. Parties canvassed the application by way of written submissions which I have considered.

#### **The Defendant's Submissions.**

10. The defendant urged this court to allow the application and vitiate the sale of the suit motor vehicles on the basis that the decree holder had prior to the sale, instructed the auctioneer not to sell the motor vehicles which instructions the Auctioneer did not heed but went ahead to sell the said motor vehicles without authority. The defendant's case was that the subject motor vehicles were sold at a gross undervalue of Kshs. 1,300,000/= whereas the value of the two Toyota Hilux Double Cab Pick Ups was Kshs. 5,400,000/= according to the valuation reports dated 26<sup>th</sup> April 2018 that were attached to the application. Reliance was placed on the decision in *Edom Investments Ltd vs. Bank of Baroda (K) Ltd & 2 Others* [2010] eKLR where the court allowed an application for injunction on the grounds that the mortgaged property was sold at gross undervalue. The Court quoted, with approval, the holding in *Mbuthia vs. Jimba Credit Finance Corporation and Another* [1986] 1989 EA 340; [1988] KLR 1 where the Court of Appeal held: -

“A sale made at a fraudulent undervalue will be set aside. But the Court will not set aside a sale merely on the ground that it is disadvantageous, unless the price is so low as to be in itself evidence of fraud.” [Emphasis added]

11. The defendant observed that the auctioneer did not exhibit any evidence of payment of the sale price to him or transfer of the said motor vehicles to the alleged successful bidders and further, that the auctioneer's jurisdiction to execute court warrants in Kwale County was in doubt.
12. Reference was also made to the decision in *Duncan Mwangovya vs Meena Bhagwandas Patel* [2008] eKLR where when faced with a similar situation the sale was vitiated on the basis that it was riddled with by fundamental illegalities/irregularities/defects. It was held as follows: -

“The defects are fundamental not mere irregularities. The auction was a pretended sale. No rights can flow from such an illegal exercise. The auction was null and void ab initio. I am convinced the same should be declared null and void which I hereby order. The public auction held on 23/5/2007 is set aside. The motor vehicle registration No. KAR 650F should be returned to the plaintiff forthwith. Costs of the motion is given to the plaintiff to be paid by Mr. Kiema trading as Veteran Auctioneer. The aforesaid auctioneer and or the defendant should refund to Peter Kinyua Muchendu the purchase price.”

#### **The Auctioneer's Submissions.**



13. The auctioneer submitted that he had jurisdiction to execute warrants in Kwale County at the time in question. He contended that the allegation that he acted without authority is unfounded as he derived his authority from the Court warrants issued on 18<sup>th</sup> June 2019 and extended to 21<sup>st</sup> September 2019. He relied on Rule 8 of the Auctioneers (Practice) Rules which provides that: -

“No auctioneer shall execute instructions explicitly directed to another auctioneer unless the instructing party and the auctioneer to whom the instructions are directed formally amend and countersign the said instructions in the name of the auctioneer whom they wish to execute those instructions”.

14. The Auctioneer argued that since there was no amendment and countersigning of the instructions issued to him by the instructing advocate, the letter of 11<sup>th</sup> September 2019 fell short of the requirement of the cited Rule 8.
15. On whether he complied with the right procedure in conducting the auction, the auctioneer submitted that he properly carried out a valuation of the suit motor vehicles by advertising them for sale, conducting the sale and forwarding the proceeds therefrom to the plaintiff's advocates. He added that he duly exhibited the Particulars of Bids, Memorandum of Sale and Certificate of Sale in the replying affidavits. He argued that it therefore beats logic for the Defendant to seek the reversal of the entire transaction.

#### **Analysis and Determination**

16. I have considered the pleadings filed herein, the parties' submissions and the authorities that they cited. I find that the main issue for determination is whether the defendant has made out a case for the setting aside the sale that was conducted, by the auctioneer on 14<sup>th</sup> September 2019. In determining the main issue, the court will consider whether the auctioneer had jurisdiction to carry out his functions in Kwale County, whether he acted with the plaintiff's authority when selling the subject motor vehicles and whether he followed the proper procedure in conducting the auction. **Jurisdiction**
17. The defendant argued that the Auctioneer lacked the jurisdiction to execute warrants in Kwale County. The Auctioneer however produced annexure marked HJGM 14 to show that the Auctioneers Licensing Board issued him with a license allowing him to practice his auctioneering business and execute court orders within Kilifi, Mombasa, Lamu, Taita Taveta and Kwale. I note that the authenticity of the said license was not disputed by the Auctioneers Licensing Board or the parties. It is thus my finding that the claim that the Auctioneer lacked the jurisdiction to execute warrants in Kwale was not proved.

#### **Authority to Sell**

18. The defendant's case was that the plaintiff had, through a letter dated 11<sup>th</sup> September 2019, instructed the auctioneer to hand over the subject motor vehicles to a different auctioneer and submit his fee note for settlement. The plaintiff swore a replying affidavit to confirm that he had instructed the Auctioneer to immediately hand over the vehicles to a separate auctioneer.
19. The auctioneer did not deny having been served with the letter but argued that his instructions to sell the suit vehicles could only be withdrawn subject compliance with Rule 18 of the Auctioneers (Practice) Rules which requires the instructing party and the auctioneer to whom the instructions are directed to formally amend and countersign the said instructions in the name of the auctioneer whom they wish to execute those instructions.



20. I have perused the plaintiff's said letter dated 11<sup>th</sup> September 2019 and I note that the plaintiff addressed the auctioneer, in part, as follows:
- “We have instructions that you immediately and upon receipt of this letter handover the vehicles to Mbeki Auctioneers (copied herein) and send to us your fees for action on our part”.
21. It turns out that the Auctioneer ignored the instructions and went ahead to conduct the auction on 14<sup>th</sup> September 2019, at least 3 days after receipt of the letter instructing him to pull out from the matter and hand over the brief to a different auctioneer.
22. My finding is that the Auctioneer should have stopped acting in the matter the moment he received the plaintiff's instructions so as to pave way for parties' compliance with the provisions of Rule 18 of the Auctioneers (practice) Rules. It therefore goes without saying that the auctioneer acted without instructions at the time he sold the suit motor vehicles and that his claim that he complied with all the procedures preceding and succeeding the sale cannot therefore be ratified by this court.
23. It however did not escape this court's attention that the plaintiff, who had already instructed the Auctioneer to stop the execution and return the warrants of attachment to court, went ahead to receive the proceeds of the sale from the same auctioneer without any complaint. My finding is that the plaintiff cannot blow hot and cold in the matter by on one hand, withdrawing instructions from the auctioneer and in the same breath, receiving the proceeds of sale from a party whose instructions he had withdrawn. I find that the plaintiff's action is what led to the quagmire that the parties now find themselves in and lends credence to the defendant's claim that there was more than meets the eye in the entire auction process.
24. Be that as it may, the court notes that the instant application was filed in August 2020, almost one year after the auction in question and this ruling will be delivered on 25<sup>th</sup> November 2021, over two years after the auction. No explanation was offered for the late filing of the application. The court was also not informed of the actual status of the suit motor vehicles, in terms of their ownership and condition, as at 26<sup>th</sup> July 2021 when the instant application came up for hearing. Furthermore, the defendant did not indicate if it is able, ready and willing to settle the decretal sum that precipitated the attachment of its motor vehicles in execution of warrants in the first place. In the circumstances of this case, I note that it will be foolhardy and an exercise in futility to order that the sale be set aside and the motor vehicles be returned to the defendant.
25. For the above reasons, the court will defer its final orders in this matter and direct that the parties furnish the following information within 14 days from the date of the ruling: -
- a. The defendant's position regarding the settlement of the decretal sum.
  - b. The current value, condition and ownership of the suit motor vehicles.
  - c. Mention on 14<sup>th</sup> December 2021. The auctioneer to be notified.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020.**

**W. A. OKWANY**

**JUDGE**



**In the presence of: -**

Mr. Mohammed for the Auctioneer.

Mr. Njuru for the Defendant

Court Assistant: Margaret

