



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

PETITION CASE NUMBER 7 OF 2019

EMMANUEL WAFULA OUNA.....PETITIONER

VERSUS

THE CHAIRMAN AUCTIONEERS LICENSING BOARD...1ST RESPONDENT

MARGARET ANINDO T/A IGARE AUCTIONEERS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

IN THE MATTER OF DENIAL, VIOLATION AND/OR INFRINGEMENT OF RIGHTS

AND

IN THE MATTER OF THE GOVERNMENT PROCEEDINGS CAP 40 SECTION 131 (2)

AND

IN THE MATTER CONCERNING CHAPTER 4 ARTICLE 20 (1) (2) (3) (a) (b) and (4) and 22(1) (2) (3) (c) (d)

AND

ARTICLE 49 (1) (a) (i) (b) (f) (i) (ii) (g) and (h) of the CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE CHAPTER 526 OF THE AUCTIONEERS ACT SECTION 4 (1) (2) (a) (b) (c) (5) (10) (1) (a) (b) (c) (d)
and Section 17 (1) (a) (b) (2) Revised Edition 2012 (2010)**

J U D G M E N T

The Petitioner Immanuel Wafula Ouna is a resident of Kamasielo village, Kamasielo Sub-location, Kamusinde Location, Kamukuywa Division within Bungoma County.

The 1st Respondent is a board known as Auctioneers Licensing Board established to exercise general supervision and control over the business and practice of Auctioneers with its head office at Re-Insurance Plaza Nairobi. The 2nd Respondent is a female adult trading as Igare Auctioneers while the 3rd Defendant is the Attorney general of the Republic of Kenya.

The petitioner responded to an advertisement and applied for an Auctioneers Licence on 30th May, 2018. On 18th May, 2018 he was informed by the 1st Respondent the his application had been considered and invited for interview on 19th September, 2018 at Milimani Law Court Boardroom. He duly attended the interview which included a written examination while taking the written examination, and before finalizing the same he was called out by the Secretary of the Auctioneers Board. He accompanied the Secretary of the Board to the Boardroom where he was interrogated and later handed over to police officers who arrested him and took him to Kilimani Police Station. The police officer also confiscated several named items and documents from him. He was detained at the police station and next day taken to Milimani Court where he was not charged and returned to the police station. He was later released on cash bail of Ksh.15,000/-. He was directed to attend court on 25th September, 2018 and when he attended court, he was informed that 2nd Respondent Margaret Anindo had

pardoned the petitioner and he was released.

The petitioner avers that as a result of the stated actions by the Respondent, his rights enshrined in the constitution under Article 20 and 49 were violated and he was subjected to arbitrary harsh treatment. Petitioner avers that he had fulfilled all the requirements for grant of the Auctioneers licence and that he was not to be subjected to any examination as the same is not provided for. He, therefore, seeks the several prayers which can be condensed into the following: -

The 3rd Respondent the Hon. Attorney General filed response to the petition denying the contents of the petition and invited the petitioner to strict proof. Further the 3rd Respondent averred that the issues raised by petitioner are civil in nature which need not be elevated and presented as a constitutional issue. He avers that the petition is vexatious, frivolous and abuse of the process of the court. The 1st and 2nd Respondent's did not file response to the petition. Directions were given that the petition be canvassed by way of written submissions.

The petitioner who was acting in person filed petitioners submissions filed on 3rd February, 2020. The petitioner submits that the petitioner being a citizen of Kenya has capacity to file this petition and that the court has jurisdiction to hear and determine the petition. He submits that the facts relied on in the petition took place and they show violation of his rights. He submits that the Respondents are still holding his documents and was arrested and placed in cells. He, therefore suffered and should be compensated by damages of Ksh.250,000/= to cover his expenses and a total of Ksh.25,000,000/- for ejecting him from the examination room, failure to give him an auctioneers licence and retaining his documents. He referred this court to the decision of Kajiado High Court petition No. 14 of 2014.

Mr. Tarus Senior State Counsel for the 3rd Respondent submitted that the petition does not meet the constitution threshold of filing petition as set out in **Anarita Kaari Njeru IKLR 1272** because the petition is just stating articles of the constitution allegedly violated but has not stated clearly how the actions of the 3rd Respondent violated his constitutional rights. Counsel for the 3rd Respondent submits that the petitioner has failed to prove that his fundamental rights and freedom under article 20, 49 (1) (a), f, g, h, 27 and 28 were violated by actions of 3rd Respondent. Finally counsel submits that the petitioner is not entitled to the orders sought as he has failed to prove violation. He urged the court to find that the issues raised can be addressed through filing of action suit for damages for several losses including damaged reputation.

While appreciating that the petitioner who was acting in person his framing of issues was limited, from the petition and submissions the issues that call for determination are as follows: -

- a) Whether the auctioneers licencing Board was in violation of the Auctioneers Act by subjecting the petitioner to an examination before he would be issued with a licence.***
- b) Whether the petitioner's rights were violated by being arrested by police.***
- c) Whether the petitioner is entitled to damages.***

The Auctioneers Act Cap 52 Laws of Kenya is an Act of Parliament aimed at consolidating and amending the law relating to auctioneers. Provide for licensing and regulation of the business and practice of Auctioneers and for connected purposes. Section 3 establishes that Auctioneer Licencing Board and stipulates its membership. Section 4 in establishing the object and function of the board states: -

Section 4 – Object and functions of the Board

“(1) The object and purpose for which the Board is established is to exercise general supervision and control over the business and practice of auctioneers.

(2) Without prejudice to the generality of subsection (1), the Board shall—

- (a) license and regulate the business and practice of auctioneers;***
- (b) supervise and discipline licensed auctioneers;***
- (c) to carry out training programmes for licensed auctioneers.”***

Section 10 of the Act provides for eligibility to be issued with a licence it provides: -

“(1) Subject to subsection (2) of this section and to Section 11, a person who satisfies the Board that he—

- (a) is a Kenyan citizen;***
- (b) has sufficient knowledge and experience in the business and practice of an auctioneer;***
- (c) has not been convicted in the ten years immediately preceding the application of an offence involving fraud, dishonesty or immorality and is otherwise of good character and reputation;***
- (d) is not disqualified under the provisions of this Act from obtaining or holding a licence, may, on application to the***

Board, be licensed to carry on the business of an auctioneer.

(2) Notwithstanding the provisions of subsection (1), a person who—

(a) is a judge or a magistrate or is employed in any capacity as an executive or subordinate officer of a court; or

(b) deleted by Act No. 2 of 2002, Sch.

(c) is an advocate deemed under section 30A of the Advocates Act (Cap. 16) to be practising in his professional capacity or is employed in any capacity by such advocate: or

(d) is a public officer or an officer or employee of any local authority, statutory body or state corporation, shall not be eligible to be licensed under this Act.

(3) A person who is a Member of Parliament or a Councillor shall be entitled to hold a general licence enabling him to realise securities and carry out repossessions in such parts of the country as may be specified therein.

(4) A person who obtains or holds a licence contrary to any of the provisions of this section commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings, or to imprisonment for a term not exceeding two years, or to both.”

Section 17 provides for the Board power to refuse to grant or renew a licence: It provides:

(1) The Board may refuse to grant or renew a licence if it is satisfied that—

(a) the information contained in the application therefor is false or untrue in any material particular;

(b) the applicant does not meet any of the requirements for the issue or renewal of a licence.

(2) Where the Board refuses to grant or renew a licence, it shall forthwith notify the applicant in the prescribed form, specifying the reasons for such refusal.

Section 25 provides for procedure for aggrieved parties to retable or qualification of licence. It provides:

Section 25:

(1) A 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.

(2) The decision of the High Court on an appeal under this section shall be final.

The Auctioneers Act, therefore, is self-sustaining. I provides for criteria for licencing and procedure for aggrieved parties.

The petitioner in this petition submitted that the he qualified to be a licenced auctioneer; he does not state the outcome of the application. Indeed he has not annexed the response of the Auctioneers Licencing Board to his application. Indeed there is nothing to show that his application was rejected and the reason thereof. If his application was rejected, the act provides a clear procedure under Section 25 of the handling of the grievance. Where an act has made provisions for a procedure of disputes settlement a party cannot avoid the same and try to seek the same by way of a petition.

The 2nd issue is whether the petitioner’s rights were violated by being arrested by police. The petitioner submitted that due to a complaint by the 2nd Respondent Margaret Anindo Trading as Igare Auctioneers he was arrested and detained at Kilimani Police station and later released. He stated in his petition that he was released when| the 2nd Respondent indicated that she did not want to proceed with the complaint and forgave him. He submits that due to the arrest and detention, his reputation was damaged, he suffered humiliation at the police station and specifically lost about Ksh.250,000/- being expenses incurred in during the duration.

The petitioner stated that he was arrested on allegations of forgery Contrary Section 345 of the Penal Code by Directorate of Criminal Investigations Kilimani and was on 20th September, 2015 released on a cash bail of Ksh.15,000/-. He was never charged with any offence but later pardoned by the 2nd Respondent who allegedly withdrew the complaint. He now seeks damages for the duration he who held in custody. The respondents did not challenge that the petitioner was arrested, detained at Kilimani Police Station and later released. I note that the petitioner though detained was not charged. The respondent has not contested this assertion. I find the petitioner who held at the police station and no explanation for the same was tendered. I find that he suffered and entitled to damages. I, hereby award the petitioner Ksh.100,000/- general damages against the 3rd Respondent on behalf of the police. No order as to costs as the petitioner was allowed to file without paying fees.

Dated, signed and delivered at Bungoma this 30th day of July, 2020.

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S N RIECHI

JUDGE