



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCA NO. 29 OF 2018

ALFRED WESONGA OREMBO

T/A MADUME AUCTIONEERS.....APPELLANT

VERSUS

ROBERT OCHIENG.....RESPONDENT

FROM

THE AUCTIONEERS LICENSING BOARD

DISCIPLINARY CAUSE NO. 20 OF 2017

ROBERT OCHIENG VS ALFRED WESONGA OREMBO T/A MADUME AUCTIONEERS

JUDGMENT

The Appellant, **ALFRED WESONGA OREMBO** Trading As **MADUME AUCTIONEERS**, has challenged the decision which the **AUCTIONEERS LICENSING BOARD** made on 3rd April 2018.

1. His main complaint is that the Board heard the Respondent's complaint exparte, having deprived the Appellant of his right to be heard.
2. It was the Appellant's case that he was never notified that the case against him would be heard on 20th March 2018.
3. In any event, the Board is said to have been mistaken when it held that the items listed in the Proclamation had not been valued.
4. He pointed out that in both the Sale Form 3 and in the Notification of Sale dated 10th February 2017, the requisite values of the attached goods were specified.
5. The Appellant also faulted the Tribunal for failing to take note of several other matters which were pending against the Respondent, at the said Tribunal.
6. In particular, the Appellant drew my attention to the Order made by the Tribunal on 24th March 2017, in **Tribunal Case No. 14 of 2017**.
7. The said Order was to the effect that the Respondent should pay

Kshs 20,000/= to **NYANDO MILLERS LIMITED**.
8. The Appellant believes that the Respondent had an obligation to bring the Order to the attention of the Tribunal.
9. He also said that if he had been served, he would have brought the Order to the attention of the Tribunal.
10. As regards the sum of money paid to him, the Appellant said that whilst he was paid Kshs 51,000/=, the Tribunal erroneously concluded that he had been paid Kshs 58,000/=.
11. Furthermore, the Appellant expressed the view that the fee of

Kshs 20,000/= was on the lower side, when it is borne in mind that he incurred expenses when paying police officers and also on the application.

12. In respect to the Tribunal's Order that the attached goods be released to the Respondent, it was the Appellant's view that that order was wrong, as the Respondent was still in arrears of rent.

13. In any event, the Appellant says that the Respondent was ordered to pay Kshs 20,000/=: together with the costs of the recovery. That order is said to have been made on 24th March 2017.

14. On the issue of the order requiring the Appellant to repay

Kshs 15,000/= to the Respondent, it was the Appellant's opinion that that order was made in error, as there were still some cases which were pending between the Respondent and Nyando Millers.

15. The fact that the Tribunal imposed fines on the Appellant for

Kshs 100,000/= and Kshs 50,000/=: respectively, was deemed to be manifestly excessive. That was considered to be wrong because the Appellant did not have an opportunity for mitigation.

16. In effect, the Appellant reiterated that the Tribunal had violated the **Rules of Natural Justice**.

17. In answer to the appeal, the Respondent pointed out that a Proclamation was put on his door.

18. The said Proclamation indicated that the sum owed was

Kshs 23,000/=: whilst the approximated Auctioneer's fee was cited at Kshs 20,000/=:.

19. I have verified that fact from the Proclamation which is at Page 38 of the Record of Appeal.

20. The Respondent told the court that he paid to the Appellant a total of Kshs 58,000/=:.

21. The breakdown of the payments allegedly adding up to

Kshs 58,000/= were said to be as follows;

a) Receipt dated 14th February 2017 (at Page 41) is for Kshs 27,000/=:;

b) Kshs 24,000/= paid by Mpesa, directly to the Appellant, (at Page 52);

c) Kshs 7,000/= paid to the Appellant, as acknowledged by him in his own handwriting (at Page 49).

22. Notwithstanding those pieces of evidence, the Appellant insisted that he had only received Kshs 51,000/=:.

23. As the Appellant did not dispute any of the evidence tendered, I hold the view that the Respondent proved having paid Kshs 58,000/=: . In effect, the finding by the Tribunal concerning the quantum of money paid to the Appellant, was well founded.

24. But even if it is assumed that the Appellant received not more than

Kshs 51,000/=:, that amount would still be in excess of the amounts cited on the face of the Proclamation.

25. As the Proclamation cited a total of Kshs 43,000/= as being payable by the Respondent, the Appellant was not entitled, in law, to seek to recover more than that sum, using that particular process.

26. Assuming that there were other cases which were still pending before the Tribunal, the Appellant had no legal basis for undertaking the process of execution, to incorporate such pending cases.

27. It is only after a case has been determined that the process of execution can be commenced.

28. On the issue about the hiring of security and Police Officers, there are clear Rules governing Court Brokers and Auctioneers.

29. In this case, the Appellant applied for authority to enable him break into the Respondent's premises. In effect, the Appellant's actions were under his control.

30. It would therefore follow that when he cited the sum of

Kshs 20,000/= as the approximation of his costs, the Appellant must be deemed to have incorporated into that sum, the costs of the security or police officers whom he needed to hire. The hire costs were not a spontaneous un-expected expense.

31. Whilst the application was still ongoing, the court encouraged the parties to try and resolve the entire dispute.

32. The Appellant offered to release the attached goods. However, the Respondent rejected the goods which the Appellant offered, saying that those were not his goods.

33. As the Appellant stated, the Proclamation is the document which embodies information about the process of attachment or of levying distress.

34. This case emanates from the Proclamation dated 17th January 2017. The said Proclamation indicates that the Appellant was instructed by a letter of Instructions dated 17th January 2017.

35. Therefore, the Appellant cannot introduce into the case, matters which allegedly date back to September 2015.

36. Having given due consideration to the submissions made by the parties, I find that the decision of the **AUCTIONEERS LICENSING BOARD** dated 3rd April 2018, appears to be well founded.

37. However, I also find that there is no proof that the Appellant was given Notice about when the complaint against him would be heard.

38. In the absence of proof of service of the Hearing Notice, I find that the Appellant was not accorded an opportunity to be heard. That means that the Appellant was condemned unheard.

39. In the circumstances, even though the Board's decision appears well-founded, it cannot be allowed to stand because nobody can predict what the Appellant could have said if he had been accorded a hearing before the decision was made.

40. Accordingly, the appeal is allowed, and the decision dated 3rd April 2018 is set aside in its entirety.

41. I order that the Board shall set a date when it will hear the two parties, on the complaint which the Respondent had made against the Appellant.

42. The Respondent bears no blame for the actions of the Board, and I therefore do not condemn him to pay the Appellant's costs of this appeal.

43. On the issue of the costs, I order that the same shall abide the decision of the Board, after it will have re-heard the complaint.

44. If the Appellant is successful, he will also be awarded the costs of this appeal.

45. But if the Appellant is unsuccessful at the fresh hearing of the complaint, the costs of this appeal shall be awarded to the Respondent.

DATED, SIGNED and DELIVERED at KISUMU this 30th day of January 2019

FRED A. OCHIENG

JUDGE