



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISCELLANEOUS APP. NO.47 OF 2017

FRANCIS MWATHA MACHARIA

T/A FREEMAN AUCTIONEERS SERVICES.....APPELLANT

VERSUS

TATA AFRICA HOLDINGS (KENYA) LIMITED.....RESPONDENT

RULING

1. This is a ruling on application dated 24th May 2017. It sought to stay assessment of Auctioneers' bill of costs dated 3rd March 2017 and the matter be referred to the judge to make a determination that the auctioneers' fees be paid by the debtors **M/S Chemusian Farm Ltd** who was in arrears and indebted to the applicant at the time of instructions to repossess were issued. Further that the applicant be paid costs of this applicant and the court be at liberty to make any further orders that may deem fit in the circumstances.

2. The matter is therefore before me to determine who is to pay auctioneer's fee/charges. Grounds on the face of the application are that the customer issued instructions to the auctioneers to repossess the unit from the customer Chemusian Farm who had defaulted in making repayments for the unit.

3. That instructions were specific that the repossession fee/charges were to be paid by the debtor and no reason has been advanced by the auctioneer as to why he did not get his payment from the debtor. That rule 7 of the Auctioneers rules is clear as to the payment of Auctioneers' charges/fees. That the Auctioneer has failed to disclose full material facts.

4. The application is supported by affidavit sworn by **Dennis Ogola** Musungu an employee of defendant sworn on 24th May 2017. He averred that in November 2016, the respondent issued instructions and authorized the applicant to repossess on their behalf a machinery /tractor model no.6100B 4W of Chassis No.IYR6100BHDB200135 from Chemusian Farm Limited to recover the outstanding sum of kshs.2,966,774.90.

5. That prior to issuance of instructions to the applicant, they unequivocally agreed with the possessors that their fees were to be borne by and/or paid by the debtor and by letter dated 2nd November 2016, they instructed the debtor to settle possessor's charges among other expenses. He annexed the said letter to the affidavit.

6. He further averred that the Auctioneers charges are to be paid by the debtor except in circumstances where the debtor cannot be found or has no goods upon which execution can be levied or where proceeds are insufficient

7. In response the Applicant who is the auctioneer herein filed replying affidavit sworn on 9th June 2017. He averred that on 2nd November 2016, he received instructions from **Tata Africa Holdings (Kenya)** the respondent herein to commence action against their debtor Chemusian Farm Limited. He attached instruction letter. On 8th November 2016 he proceeded to Molo town and issued proclamation on tractor model 6100B 4W of chassis no.IYR6100BHDB200135 which was operating in Chemusian farm limited

8. That on 8th November 2016, the debtor agreed to make full payment after being served with proclamation notice; that he wrote to the respondent advising them to collect kshs 2,966,775 and USD 661.74 together with their fees (auctioneers). He annexed the said letter to the replying affidavit. He averred that the debtor forwarded only kshs.136,465 out of the fees advised in the proclamation notice. He attached payment voucher

9. He further averred that **Rule 7 of Auctioneer Rules** provides that the instructing fee is to be shouldered by the instructing creditor but the creditor collected their dues and failed to collect auctioneers fees. That the mention in the respondent's letter dated 2nd November 2016 that instructions fees shall be met by the debtor does not shift the burden of paying the auctioneers' charges to the debtor as the respondent remain their instructing client and is liable to pay.

10. He averred that the instructing client had responsibility of ensuring that their fees were paid in full and that they are liable to pay their balance of kshs.64,733 as per bill of costs filed in court.

11. Parties herein filed written submissions. Both restated averments in the affidavits filed.

12. Applicant/Respondent submitted that the instruction fee are due to the auctioneer once the goods are proclaimed under Rule 12(b) of the Auctioneers Rules 1997. applicant cited **Misc. Appl. No. 172 of 2009, Trophy Enterprises Vs San Giorgio Limited eKLR** where **Justice Odera** quoted **Judge Ibrahim Mohammed** in **HCC 1818 of 200 National Industrial Credit Ltd Vs Majani Sisal Estate Ltd And 2 others** stated as follows at page 14:-

“I hold that under our laws, once goods or property are proclaimed under rule 12(b) and the prescribed procedure followed the process of attachment takes effect and it does not subsequently matter at what stage it is terminated. Once goods are proclaimed, they become attached and seized by law. The auctioneer from this stage is entitled to charge his Commission under rule 11 paragraph 4.”

13. Applicant submitted that the stage when the auctioneer charges is settled. As to whether the Respondent/applicant is justified to file bill of costs against the instructing creditor, the applicant submitted that the auctioneers costs should be addressed by the instructing principal; that by letter dated 8th November the auctioneer wrote to the instructing creditor advising that them that the debtor had promised to settle the debt in full and asked to be posted once the cheques together with their fees before expiry of the notice which was to expire on 15th November, 2016.

14. That the respondent has not been able to demonstrate whether they kept the auctioneer informed as to their success or failure in recovering their full fee as per proclamation notice.

15. Respondent submitted that the auctioneer was left out on account of omission by instructing principal and the person to direct the fee note of the instructing principal and not the debtor; that the respondent herein had a duty to ensure that the auctioneer was paid in full.

16. Respondent/Applicant submitted that the auctioneer has failed to demonstrate why they failed to collect full payment from the debtor and under auctioneers rules, he was under obligation to demonstrate to court that the payment was insufficient to cover their charges neither has he made additional demand to the debtor for payment of outstanding balance if any. Defendant/Respondent submitted that the general rule is that the auctioneer recovers from the debtor unless unless the proceeds are insufficient as provided by **rule 7 (c) of the auctioneers rules**.

ANALYSIS AND DETERMINATION

17. There is no dispute that the Applicant/respondent herein instructed Auctioneer who is the respondent/applicant herein to recover debt from arrears debt from their debtor Chemusian Farm LTD.

18. It is not also disputed that the auctioneer proclaimed the debtors motor vehicle and upon proclamation, the debtor promised to pay. From decision cited above the auctioneer is entitled to instruction fee once goods or property of a debtor is proclaimed. The auctioneer herein is therefore entitled to instruction fee.

19. In paragraph 7 of the replying affidavit, the Auctioneer admitted having been paid kshs.136,465 by the debtor and indicated in paragraph 11 that a balance of kshs.64,733 is yet to be paid as per the bill filed in court.

20. As to whether the costs already paid is sufficient or not is subject of assessment of bill filed. What I wish to consider is who is to pay the said balance.

21. I have perused the letter dated 2nd November 2016 by the creditor to the debtor. In the said letter, the creditor notified the debtor that it will be their responsibility to settle full repossession fee.

22. By letter dated 8th August 2016 addressed to the creditor by the Auctioneer, he instructs the creditor to collect cheque of 2,000,000 plus his fee. Auctioneer's fee indicated in the proclamation is 200,000. There is no confirmation from creditor that the debt plus fee was paid. Following the promise to pay by debtor, the auctioneer never proceeded with sale since payments were to be made to the creditor as per letter of 8th August 2016.

23. There is no doubt that the creditor gave instructions to the auctioneer to repossess debtor's property. From documents annexed, I have not seen any undertaking between auctioneer and creditor to pursue payment from the debtor. In the event that the sale was to go on, the auctioneer would have recovered his costs from the proceedings of sale but since he could not proceed with the sale, it was the responsibility of the creditor to ensure payment made included full payment of auctioneer's fee, which he could not now recover from proceeds of sale as expected. The auctioneer admitted having been paid kshs.136,465 by the debtor; if the creditor was of the opinion that what was paid was sufficient, then assessment of bill will guide in the amount payable.

24. In view of the fact that the debtor's property was not sold and debt paid to creditor instead, the instructing party should have ensured payments received include full auctioneer's fee and if auctioneer's fee is disputed, it should have been subjected to assessment.

25. From the foregoing, I find that the auctioneer is entitled to payment of costs from the instructing principal. The auctioneer having disputed amount payable, subject the same to assessment by the court.

26. FINAL ORDERS

1. The auctioneer is entitled to instruction fee/charges from the instructing principal.
2. Auctioneer deemed already paid kshs.136,465.
3. Bill of costs to be taxed to determine balance amount payable to the auctioneer.

Ruling dated, signed and delivered at Nakuru this 26th day of Sep. 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jeniffer Court Assistant

No appearance for Counsel for Appellant

Ms. Muthoni Counsel for Respondent