



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISC. APPLICATION NO. 870 OF 2010

P. NG'ANG'A MBURU T/A VIRMIR AUCTIONEERSAPPLICANT

- VERSUS -

NAIROBI INSTITUTE OF BUSINESS STUDIES LTD.....1ST RESPONDENT

PIONEER HOLDINGS (AFRICA) LTD.....2ND RESPONDENT

RULING

1. It is not in dispute that Nairobi Institute of Business Studies Ltd (Nairobi Institute) was indebted to Pioneer Holdings (Africa Ltd) (Pioneer). The indebtedness arose in Milimani Commercial Civil Case No. 535 of 2005. Pioneer was represented in that case by the Law firm of *Ngatia & Associates* in settlement of the claim. That firm obtained warrants of attachment and sale of the property of Nairobi Institute. Virmir Auctioneers were allocated those warrants of attachment for execution.

2. Pioneer consequent to that execution entered into an agreement with the firm of *Ngatia & Associates*. That law firm by its letter dated **15th July, 2010**, informed the advocates representing Pioneer that they were to settle the Auctioneer's charges. This is partly what *Ngatia & Associates* stated in that letter:

".....it is only just that your client pays to the Auctioneer such charges as are appropriate. We write to request you to commence discussion with the Auctioneer to determine the charges payable."

3. By letter of **2nd August 2010**, *Ngatia & Associates* forwarded to Virmir Auctioneers a cheque of **Ksh 10,000** being payment of Virmir's charges for the execution of the warrants of attachment. In forwarding that payment, which payment had been made by Nairobi Institute, the said advocate indicated that the payment was final settlement of the Auctioneer's fee as agreed with the Advocate for Nairobi Institute. Virmir Auctioneers by its letter dated **5th August 2010**, indicated that it accepted the cheque for **Ksh 10,000** on without prejudice basis and in that letter rejected the assertion of the counsel for Nairobi Institute that the amount of **Ksh 10,000** was the agreed Auctioneer's fee.

4. Virmir Auctioneers presented their bill of costs for taxation for the work undertaken in the execution of the warrants of attachment. Although that bill of costs was taxed it was later set aside to enable this court determine who was liable to pay the costs.

5. The issues before this court for determination is whether Virmir Auctioneers is entitled to claim for a fee over and above **Ksh 10,000** and also which of the parties is liable to pay such a fee.

6. Virmir submitted that the payment of **Ksh 10,000** was the Nairobi Institute unilateral decision to settle its fee at that amount. Virmir denied that it had negotiated that fee but rather stated that it had demanded that its full fee payable for the work undertaken be paid as provided under the Auctioneers Act.

7. The Nairobi Institute submitted in opposition that Virmir Auctioneers were agreed at **Ksh 10,000** and that Virmir having accepted and having banked the cheque of **ksh 10,000** it was estopped from making any further claim on fee.

8. Pioneer similarly argued that Virmir was estopped from claiming further fee. Pioneer relied on the case ***Kenya Re-Insurance Cooperation Versus V.E.Muguku Muriu trading as messrs V.E. Muguku Muriu & Co. [1996] and eKlr***. In that case, the Court of Appeal stated that the firm of ***Oraro and Rachiel Advocate*** were right to refuse to accept payment less than what was in the undertaking because if they had done so, they ran the risk of being told they could not claim any further payment.

9. Pioneer also argued that virmir should not be permitted to approbate and reprobate. That having accepted the cheque for **ksh 10,000** they should not be allowed to claim any further payment.

10. I have considered the affidavit evidence, the submissions and authorities cited by the parties. In respect to the first issue identified above; i find that there was no evidence adduced which proved that virmir accepted the payment of ksh 10,000 in full and final payment of their charges. If indeed there was such an agreement, one would have expected counsel for Pioneer to commit such an agreement in writing. He did not. Instead, he forwarded a cheque in the name of Virmir to Ngatia & Associates on the basis that that was the fee agreed with Virmir. In making that determination, I am of the view that the court of appeal in the case of **Kenya Re-insurance (supra)** on the issue of payment was not intended for general application. I therefore make a finding that virmir Auctioneers is entitled to claim the full auctioneers charges for the attachment they undertook in **HCCC No. 535 of 2005**.

11. Who then is liable to pay those costs? Undoubtedly such costs are payable by Pioneer. The Court of Appeal in the Case **Civil Appeal No. 195 of 2004, National Industrial Credit Bank Ltd Vs. S.K. Ndegwa Auctioneers** decided a similar matter to this one where the court stated:

“under our laws today, once goods or property have been proclaimed under rule 2(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 the law. The auctioneer from this stage is entitled to charge his commission.”

12. Once goods of Pioneer were proclaimed by Virmir Auctioneers, the auctineers charges were payable by Pioneer. Accordingly the liability of virmir auctioner’s fee in respect to attachement carried out by them in **HCCC No 535 of 2005**, fall upon Pioneer Holdings (Africa Ltd).

13. Pioneer is ***hereby ordered*** to pay those costs that shall be determined by the taxing master of this court and shall also pay the ***costs of the Notice of Motion dated 2nd September, 2010*** to Virmir Auctioneers.

14. ***It is so ordered .***

DATED, SIGNED and DELIVERED at NAIROBI this 22nd day of May 2018.

MARY N. KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendant