



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 767 OF 2016

ALIMEX LIMITED.....APPELLANT

VERSUS

STARTRUCK AUCTIONEERS.....RESPONDENT

(Being an appeal from the Ruling of Hon E. Wanjala (Miss), Senior Resident Magistrate (SRM) at

the Chief Magistrate's Court at Milimani in Civil Case No 4171 of 2015

delivered 9th December 2016)

JUDGMENT

INTRODUCTION

1. In her Judgment that was delivered on 9th December 2016, the Learned Trial Magistrate, E. Wanjala (Miss), Senior Resident Magistrate (SRM) dismissed the Appellant's suit with costs to the Respondent on the ground that the Appellant did not prove its case against the Respondent on a balance of probabilities.
2. Being dissatisfied with the said decision, the Appellant filed its Memorandum of Appeal dated 9th December 2016 on 19th December 2016. It relied on two (2) Grounds of Appeal. Its Written Submissions were dated 23rd February 2018 and filed on 26th February 2018.
3. The Respondent's Written Submissions and List of Authorities were both dated and filed on 4th June 2018.
4. When the parties appeared before this court on 7th June 2018, they asked it to render its decision based on their respective Written Submissions which they were relying upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

5. The Appellant's case was that the Respondent, who it had instructed to levy distress against its tenant in September 2014, levied distress and recovered a sum of Kshs 2,500,000/= as against the figure of rent arrears in the sum of Kshs 7,000,000/=. However, the Respondent failed to remit to it the sum of Kshs 200,000/= which it retained as its fees. The sale was on 27th September 2014.
6. It contended that this was contrary to the Auctioneers Act. It also stated that the Fourth Schedule of the Auctioneer Rule Part 2 (4) provides that the fees on attachment where the value is more than Kshs 1,000,000/= is two (2%) percent of the attached and recovered sum, which in this case was Kshs 2,500,000/=.
7. It also averred that it refunded the Purchaser of the distressed goods a sum of Kshs 50,000/=, which the Respondent had asked to be deposited with it, as bid money. It therefore stated that the Respondent ought to have refunded to it the sum of Kshs 50,000/=
8. It contended that the Learned Trial Magistrate erred when she found that it had not proved its case on a balance of probabilities as was envisioned in Section 109 of the Evidence Act Cap 80 (Laws of Kenya).
9. It relied on several cases amongst them **National Industrial Credit Bank Ltd vs S K Ndegwa**, which it did not attach but which this court found not to have been relevant in the circumstances of this case as the holding of the said case was to the effect that the auctioneers

fees are based on the value of the goods attached.

10. It further placed reliance on the cases of Timsales Ltd vs Harun Thuo Ndungu [2010] eKLR and Harun Thuo Ndungu [2010] eKLR and Lucy Nungari & 4 Others vs National Bank of Kenya Ltd & Another [2015] eKLR which generally dealt with how an alleged fact is proven.

11. It therefore urged this court to allow its Appeal.

THE RESPONDENT'S CASE

12. On its part, the Respondent's case was that it was entitled to remit the proceeds of the sale less its charges, accompanied by an itemised account in the case of movable property within fifteen (15) days of the sale.

13. It averred that it had a verbal agreement with the Appellant as regards the payment of its fees and that consequently, this court ought not to interfere with a contract between them because the same was a voluntarily obligation. It was its argument that a contract need not be in writing as was held in the case of Abdukadir Shariff Abdirahman & Another vs Aido Sharif Mohamed [2014] eKLR and that in any event, Section 22 of the Auctioneers Act allowed an auctioneer to charge his fee on contract and deduct his fees from the proceeds of the sale.

14. It was its contention that the Appellant erred by applying a flat two (2%) per cent because the fees were to be calculated cumulatively and that although it was entitled to a sum of Kshs 250,000/=, it had charged the Appellant a lower sum of Kshs 200,000/=.

15. It also argued that the Appellant did not adduce any evidence in court to show that the Purchaser of the attached goods demanded for the return of the bid of Kshs 50,000/=.

16. It therefore urged this court to dismiss the Appellant's Appeal herein with costs to it as the same was not merited.

LEGAL ANALYSIS

17. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

18. This was aptly stated in the cases of Selle vs Associated Motor Boat Company Ltd [1968] EA 123 and Peters vs Sunday Post Limited [1985] EA 424 where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

19. Having looked at the parties' submissions, it was apparent to this court that the only issue that the Appellant had placed before it was whether or not it had proved its case against the Respondent, on a balance of probabilities.

20. Rule 18 (4) of the Auctioneers Rules, 1997 provides that:-

“The auctioneer shall remit the proceeds of sale less his charges to the court or the instructing party, as the case may be, accompanied by an itemised account in the case of movable property within fifteen days of the sale and in the case of immovable property as provided under Order 22, rule 70 of Civil Procedure Rules”.

21. Rule 19 (4) of the Auctioneers Rules also stipulates that:-

“An auctioneer shall pay into a clients' account all clients' money received or held by him and which he is by these Rules permitted or required to pay in”.

22. Section 22 of the Auctioneers Act No 5 of 1996 states that:-

1. A licensed auctioneer making, any sale other than an auction of attached property shall, unless it is otherwise agreed between him and the seller, be entitled to sue for, recover and discharge all sums due in respect of the sale.

2. A licensed auctioneer making any sale, unless it is otherwise agreed between him and the seller, shall be liable to the due payment to the seller of the net proceeds of all sales of property within fifteen days of the sale

23. The following observations can be made from the above provisions of the law relating to payment of auctioneers fees and remitting of client monies:-

1. Both the auctioneer and his client have rights and obligations.

2. Both the auctioneer and his client can agree outside the schedule provided in the Auctioneers Rules regarding the payment of the auctioneers' fees.
3. The auctioneers' fees must be paid within fifteen (15) days from the date of sale.
4. The client is entitled to all monies due to him by the auctioneer.
5. The auctioneer can retain this fees from the proceeds of the sale but must sent to his client an itemised bill of costs within fifteen (15) days from the date of sale.
6. The auctioneers fees are based on the value of the distrained, attached and/or recovered property.
7. The assessment of the auctioneers fees is on a cumulative basis and is not a flat percentage.

24. This court perused the instruction letter dated 11th December 2013 from the Appellant to the Respondent and noted that the Appellant had stated as follows:-

“The tenant should pay you all your distress charges. We believe that your charges have not changed and that they s hould fall within the auctioneers’ scale (emphasis court)”.

25. Although the Respondent’s witness Gerald M Thuita acted correctly in retaining his fees as the procedure is provided for by the law, he went contrary to Rule 18 (4) of the Auctioneers Rules as he failed to forward to the Appellant an itemised account within fifteen (15) days of the sale. Indeed, it was at this point that the Appellant would have objected to the sum of Kshs 200,000/= before the Taxing Master and the issue of the payment of the Respondent’s fees resolved at that level.

26. This court, however, agreed with the Respondent that the assessment of its fees was on a cumulative basis. The Fourth Schedule of the Auctioneers Rules Part II provides as follows:-

4. Fees on attachment/repossession/distrain and expenses	
Kshs 4,001 to Kshs 100,000	10%
Kshs 100,001 to Kshs 1,000,000	5%
Over Kshs 1,000,000	2%

27. The Appellant’s claim was for Kshs 250,000/=. Bearing in mind that the recovered sum was Kshs 2,500,000/=: it was the opinion of this court that the Respondent’s fees were Kshs 88,000/= made up as follows:-

2,500,000/=

100,000/= _____ 10%

Kshs 70,000/=

2,400,000/=

1,000,000/= _____ 5%

Kshs 50,000/=

1,400,000/= _____ 2%

Kshs 28,000/=

Kshs 88,000/=

28. The Respondent therefore ought to refund to the Appellant a sum of Kshs 112,000/=: which was Kshs 200,000/= the Respondent had retained less Kshs 88,000/= the Respondent was entitled to. This court came to the aforesaid conclusion because, save for asserting that there was an oral agreement between the Appellant and the Respondent, the Respondent did not provide proof of the existence of such an agreement. The Appellant’s instructions contained in its letter of instructions dated 11th December 2013 were clear that the Respondent’s charges were to fall within the Auctioneers’ scale of fees.

29. On the issue of the refund of the bid of Kshs 50,000/=: this court came to the conclusion that whereas the said amount was envisaged in Rule 17(1) (c) of the Auctioneers Rules that provides that **“in a venue open to and accessible to the public, provided that it shall be lawful for an auctioneer to charge prospective bidders a reasonable sum for a sale catalogue or other list of lots for sale as a condition precedent to entry to the auction premises”**, there was no indication on how this amount was to be treated after the purchase price of the attached goods were sold.

30. Ideally, the spirit of payment of the bid ought to be that any bid paid during an auction ought to form part of the purchase price if a bidder is successful on his bid and ought to be refunded if the bidder is unsuccessful. However, in view of the lacuna in the law and the fact that the Appellant did not provide documentary proof that it had refunded the Purchaser the bid sum of Kshs 50,000/= or call the said purchaser to prove its assertion, this court was not persuaded that the Appellant had proved its assertion that it refunded the Purchaser the bid sum of Kshs 50,000/= on a balance of probability. Indeed, the onus was on the Appellant to have called the Purchaser as his witness to prove his said assertion. There was no way of this court establishing the veracity or otherwise of the Respondent's assertions that the Purchaser had agreed that the bid of Kshs 50,000/= would be retained as its commission in the sale. This seemed odd but this court will say no more on this issue.

31. It was clear from both parties' submissions that he who asserts a fact must prove it as contemplated in Section 109 of the Evidence Act that states as follows:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

32. Accordingly, having considered the parties respective Written Submissions and the case law they each relied upon, this court was of the opinion that the Appellant was able to prove on a balance of probability, that the sum of Kshs 200,000/= the Respondent had retained was not justified. However, the Appellant did not prove that it was entitled to a refund of the bid sum of Kshs 50,000/= which sum was for a sale catalogue as a condition precedent to entry to the auction premises and consequently its demand for this amount fails.

DISPOSITION

33. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 19th December 2016 was partially successful. In the premises foregoing, this court hereby sets aside and/or vacates the judgment by the Learned Trial Magistrate dismissing the Appellant's suit with costs to the Respondent and replaces the same with an order that judgment be and is hereby entered against the Respondent in favour of the Appellant in the sum of Kshs 112,000/= together with interest thereon at court rates from 12th October 2014, which was fifteen (15) days from the date of the sale when the Respondent ought to have forwarded to the Appellant an itemised account, until payment in full and costs thereon.

34. As the Appellant was not wholly successful on its Appeal, both the Appellant and the Respondent shall each bear its own costs of this Appeal.

35. It is so ordered.

DATED and DELIVERED at NAIROBI this 25th day of September 2018

J. KAMAU

JUDGE