



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO. 147 OF 2011**

**KENYA COMMERCIAL BANK.....APPELLANT**

**-VERSUS-**

**JOSHUA OTIENO OWAME.....1<sup>ST</sup> RESPONDENT**

**DAVID OKIKI ODHIAMBO.....2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from judgment delivered on behalf of Honourable Barasa (Mr.) RM on 29<sup>th</sup> July 2011 in Nakuru CMCC No. 388 of 2009)*

**JUDGMENT**

1. The appellant was directed by the trial court to refund a sum of Kshs.320,000/= paid to it through its agent, Vigilant Auctioneers by the Respondents for a purported sale of two properties namely **Nakuru Municipality Block 24/1094 and 1095** by public Auction that never took place, and if it did the plaintiffs never participated in the said public Auction as evidence abound that the appellant agents illegally sold and received the said sum from the plaintiffs before the public Auction took place on the 23<sup>rd</sup> May 2006.

2. That being so, the trial court made findings that the appellant should not be allowed to benefit twice at the expense of other respondents and having been satisfied that the respondents had paid Kshs.320,000/= to its agents Vigilant Auctioneers ordered a refund of the said sum with interest from date of filing of the suit and costs.

3. The above findings precipitated filing of this appeal.

I have carefully considered the grounds put forth by the appellant, counsel submissions as well as the cited authorities and all the proceedings and pleadings before the trial court.

4. In my considered opinion, the issues that arise for determination are three fold. They are interrelated and will be dealt with together.

***(1) Whether the Appellant instructed Vigilant Auctioneers to sell by public auction the suit properties, and if so, whether the said agents, vigilant Auctioneers conducted a sale by public auction, and if so, whether the Respondents participated in the sale and were declared the highest bidders.***

***(2) At what point in time did the Respondents pay to the Appellants agents the purported purchase price of the plots in question.***

***(3) Whether the Appellant is entitled to reliefs it seeks.***

5. The background to the primary suit is fairly straight forward. I need not re write it here but suffice that I have considered and re-evaluated the same – **Kenya Ports Authority -vs- Kuston (Kenya) LTD (2009) 2 EA 212.**

6. The following materials facts are not in dispute.

That vigilant Auctioneers were duly authorised agents of the Appellant to sale by **Public Auction** the charged properties, under its chargees power of sale, being **Nakuru Municipality Block 24/1094, Block 24/1095, Block 24/1097 and Block 24/1098.**

The appellants advocates were **Kipkenda, Lilan & Co. Advocates**(PExt 4). The sale was advertised by the Auctioneers to take place on the 18<sup>th</sup> May 2006 at its premises, together with the conditions of sale, being payment of 25% of the purchase price at the fall of the hammer and balance within 30 days from the date of the Auction to be paid to the chargees advocates.

7. David Okiki Odhiambo the 2<sup>nd</sup> Respondent appears to have been the highest bidder in respect of **Nakuru Municipality Block 24/107 – PExt 5(b)**.

8. In the special conditions of sale dated 18<sup>th</sup> May 2018 the balance of the purchase price was to be paid within 60 days of the Public Auction – contrary to the advertisement, I alluded to above which was within 30 days.

The auctioneers signed this document as well as the purchasers. For clarity purposes this document is shown to have been drawn by the appellant's advocates and witnessed by one Josiah O. Okumu advocate on the 18<sup>th</sup> July 2007 – well over a year from the purported Public Auction conducted on the 18<sup>th</sup> May 2006.

9. It is also not disputed that on the 23<sup>rd</sup> May 2006 another Public Auction of the same properties took place a week after the initial purported auction.

The Respondents do not appear to have participated in the auction as other four parties were declared the highest bidders.

**10. The question then that arises is whether there was a public auction of the properties on the 18<sup>th</sup> May 2006 or on the 23<sup>rd</sup> May 2006?**

The evidence on record is that the Appellant's agents Vigilant Auctioneers sourced the Respondent privately, caused them to pay to them Kshs.320,000/= for the purchase of two of the properties **Nakuru Municipality Block 24/1094 and 1095** well before the Public Auction, as demonstrated by the 1<sup>st</sup> Respondent's evidence that he was told by one Osoro of Vigilant Auctioneers that:

*“----- the auction was a formality --- and gave me a sale certificate dated 25<sup>th</sup> July 2006 ---that as at 18<sup>th</sup> May 2006, I had complied with the conditions of sale --- I paid the deposit to the Auctioneers and cleared the balance within 60 days as required.”*

11. The above evidence was not controverted as nobody from the Auctioneers firm testified.

12. On its part the Appellant's Credit Manager (**DW1**) was categorized that the mode of sale was by Public Auction, payment of 25% on the fall of hammer and balance in 60 days as stated in the Newspaper advertisement on 18<sup>th</sup> May 2006. This manager could not confirm the date of sale as two different reports were presented to it by its Agents (the Auctioneers) one stating that the Respondents participated in the Auction and the date when such alluded auction took place – PExh 3b, c.

13. What is clear is that the Respondents paid the sum of Kshs. 320,000/= before the Auction, whether on the 18<sup>th</sup> May 2006 or the 25<sup>th</sup> May 2006 to the Auctioneers but could not confirm the purpose for the payments, hence his evidence that:

*“-----those payments cannot be said to be regular for the bank to be held liable --- the blame should lie with the Auctioneers.”*

14. On cross examination, **DW1** testified that a certificate of sale proves that the person attended the auction and paid the 25% purchase price. He denied that payments by the respondents were received by the Bank within the time set out.

15. The Respondents too did not sufficiently demonstrate that the said sum was paid and received by the Bank at anytime. I have seen a copy of a Bankers cheque dated the 27<sup>th</sup> October 2006 in favour of the Appellant Bank for Kshs.393,750/= drawn from Equity Bank Ltd. It was forwarded vide an Advocate's letter of even date, in respect of unnamed purchases of **Nakuru Municipality/Block 24/1096, 1097, 1098, 1094 and 1095**, as being the balance of the purchase price.

16. This cheque in my view does not demonstrate whether the Respondents are among the purchasers or not.

I am not satisfied that the payment was in respect of the plots in question – the respondent (**PW1**) having testified that the respondent (**PW1**) having testified that the only money they paid for the plaintiffs was Kshs.320, 000/=.

17. Coupled with **DW1**'s evidence that the appellant did not receive the money allegedly paid for the two plots by the respondents, then, it follows that it cannot be held liable to refund that which it denies having received, and when it has not been strictly proved that such money was paid to the appellant in respect of the subject plot stated in the respondents' plaint.

18. A party cannot be allowed to lead evidence that does not support the averments in its pleadings or that is different from the pleadings.

19. I have made a finding that the respondents testified to have paid Kshs.320,000/= for the purchase of two plots, being Block 24/1094 and Block 24/1096 which the 1<sup>st</sup> respondent stated clearly was the ones they were interested in. However in their pleadings, they refer to **Plot Nos. Nakuru Municipality Block 24/1094 and Block 24/1097**. The official searches produced in court (PExt 1 and 2) referred to **Block 24/1095 and Block 24/1096**.

20. I agree that the respondents may have paid deposits to Vigilant Auctioneers on the purchase of the two plots irregularly, and outside the express instructions of the Bank.

Further, having confirmed in this evidence (**PW1**) that there was no prior sale agreement or Memorandum of sale signed by both parties, then the purported sale stands null and void – See **Leo Investment Ltd Estuarine Estate Ltd (2017) e KLR**, and **Section 3(3) Law of**

## **Contract.**

21. To the above extent, if any money was paid to the Auctioneers by the Respondents in the sum of Kshs.320,000/= or Kshs.393,750/= as stated in the plaint in respect of the two stated plots, then that matter lies for a suit for recovery, against the Auctioneers as the same was not only illegal but also tainted with fraud.

22. The business of Auctioneers is regulated under the Auctioneers Act, 1996. They ordinarily act on express instructions by an undisclosed or disclosed Principle. It is their duty to strictly follow instructions as given.

23. In this instant matter, I have not seen any demonstration of any instruction that the subject properties were to be sold by any other manner save by Public Auction – notice of such sale having been advertised in the Daily Nation Newspaper dated the 8<sup>th</sup> May 2006.

24. Evidence adduced shows that no such public auction was conducted on the said date, but at a later date, the 23<sup>rd</sup> May 2006 when the properties were sold to third parties without participation by the respondents. It seems that this public Auction was not advertised in any newspapers, and if it was, none was produced to the court. Nevertheless the properties were sold and certificates of sale issued to 3<sup>rd</sup> parties to the exclusion of the Respondents.

25. Any unlawful act done by an Auctioneer outside the express instructions by the principle, from which damage or loss is occasioned to a party, the Auctioneer must be held liable, and must carry the blame as professionals are liable for professional misconduct and/or negligence - **David Ngugi Ngaari -vs- KCB (2015) e KLR** – where the court held:

*“-----indeed professionals carry professional liability to the developer and so they should be sued and held liable as such ---*

*The said professionals and contractor are not parties to the suit and it will be against the law to make any findings of liability against them---”*

26. In the matter of realization of charged properties by a chargee, an auctioneer is under a duty to strictly follow the chargees' express instructions as failure may result to massive losses and damages to either of the parties – **ELC NO. 43 of 2017 Asis Hotel Ltd -vs- I and M Bank Ltd.**

When the Auctioneer decides to deviate from such instructions he can not say that the principle ought to be held liable. Any loss thus occasioned must be met by the Auctioneer personally.

27. **Section 24 of the Auctioneers Act** permits a complainant to lodge a complaint against any licensed auctioneer to the Auctioneers Board. Under **Section 26** thereof, a complainant may recover damages from such Auctioneer personally, and not suing the principle, unless it is proved that both the principle and the Auctioneer acted procedurally or where involved in a corrupt scheme or fraud – **Jacob Ochieng Mugunda -vs- HFCK HCCC No. 1436 of 1999 (Nairobi).**

28. For the foregoing, I find the trial courts conclusion in its judgment that the appellant having been paid a sum of Kshs. 320,000/= by the respondents, can not keep the said money when the land parcels were transferred to third parties. The evidence on record does not support such findings and I have stated the reasons for my findings.

29. I am persuaded that the trial Magistrate erred both in law and fact by failing to apply the legal principles that govern the relationship between an Auctioneer and a disclosed or undisclosed principle when such auctioneer blatantly fails to comply with express instructions.

30. The upshot is that I find the Appeal merited. I proceed to set aside the trial court's judgment dated the 29<sup>th</sup> July 2011 and substitute it with an order of dismissal of the respondents suit – **Nakuru CMCC No. 388 of 2009** with costs to the appellant. Costs of this appeal are awarded to the appellant.

**Dated, signed and delivered this 28<sup>th</sup> Day of November 2018**

**J.N. MULWA**

**JUDGE**