



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**MISCELLANEOUS CIVIL APPLICATION NO. 76 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR**  
**ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE AUCTIONEERS ACT**

**BETWEEN**

**JOSEPH KIARIE WATENGA T/A FRONT BENCH**  
**AUCTIONEERS...APPLICANT**

**-VERSUS-**

**THE CHIEF MAGISTRATE COURT KIAMBU.....1<sup>ST</sup> RESPONDENT**

**SOPHIA WANJA RUNO..... 2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**Introduction**

[1] In his Motion brought on Notice dated 23<sup>rd</sup> February, 2016, the *ex parte* applicant herein, **Joseph Kiarie Watenga (Trading as Bench Auctioneers)**, seeks the following orders:

**(1) THAT an Order of Prohibition and Certiorari do issue directed at the Chief Magistrate Court Kiambu to quash its proceedings and the ruling delivered on 18<sup>th</sup> November 2015.**

**(2) THAT the costs of this application be provided for.**

**Ex Parte Applicant's Case**

[2] According to the Applicant, he is a licensed Class B Auctioneer trading as Front Bench Auctioneer. Sometimes in April 2009, he was issued with instructions by **Kimani Charagu & Company Advocates** on behalf of **Anderson Karongo Munyui** to levy distress against the 2<sup>nd</sup> Respondent herein. He averred that he managed to levy distress against the 2<sup>nd</sup> Respondent on 19<sup>th</sup> June 2009 and the entire distress

process was supervised by police officers from Karuri Police Station after which the attached goods were eventually sold at Public Auction sometimes in October 2009.

[3] The Applicant averred that the 2<sup>nd</sup> Respondent lodged a complaint against him before the Auctioneers Licensing Board on 15<sup>th</sup> June 2010 claiming that the applicant had exceeded his jurisdiction while carrying out the distress to which complaint the applicant responded and the matter was heard before the Auctioneer's Licensing Board on 17<sup>th</sup> May 2011. Thereafter the Board on 6<sup>th</sup> June 2011 gave its decision.

[4] According to the Applicant, after paying the 2<sup>nd</sup> Respondent a total sum of Kshs. 49,100/=, she was still not satisfied and she again applied to the Board for a review of the decision on 9<sup>th</sup> August 2011 in which she claimed that the applicant had used a forged licence and that the fine imposed on the applicant was too lenient. The Board proceeded to hear the review application on 13<sup>th</sup> March 2013 and on 8<sup>th</sup> April 2013 ruled that there was no evidence that the applicant had used a forged licence and went ahead and advised the 2<sup>nd</sup> Respondent to engage the police to investigate the allegations.

[5] To the applicant, the 2<sup>nd</sup> Respondent was not done yet and filed another application before the Chief Magistrate Court wherein she again raised the issue of the forged licence against the applicant. Which application the applicant opposed by raising a preliminary objection on a point of law that the matter was *res-judicata*. However, the objection was overruled and the court proceeded to find that the applicant had used a forged licence. Following the hearing of the matter, on 18<sup>th</sup> November 2015 the Court ruled that the applicant had used a forged license to levy distress against the 2<sup>nd</sup> Respondent and he was summoned to Show Cause why his license should not be revoked or suspended.

[6] It was disclosed by the applicant that he filed an Appeal on 24<sup>th</sup> November 2015 and on 30<sup>th</sup> November 2015 filed an application for stay of the summons to show cause but on 13<sup>th</sup> January 2016 the Chief Magistrate Court dismissed his Application for stay. Being dissatisfied with the said ruling, the applicant applied for stay before the High Court on 19<sup>th</sup> January 2016 and on 1<sup>st</sup> February 2016, the High Court ruled that the Applicant's appeal was lodged without leave of the Court and went ahead to dismiss the application on that basis. The applicant averred that he had no option but to withdraw the appeal after which he commenced these proceedings.

[7] According to the applicant, his rights have been violated in that he has been subjected to a process that had been determined by a competent tribunal and he is now on the verge of losing his licence which according to him was a valid licence issued by the Auctioneers Licensing Board on 26<sup>th</sup> January 2009, and there is no way he could have forged the licence. To the applicant, the Chief Magistrate Court Kiambu acted in excess of its jurisdiction in that it acted as an investigator, a prosecutor and a judge in a matter that it ought to have been a witness. It was the applicant's position that the Police Criminal Investigation were unable to find any evidence of a fake or a forged licence and it was the 2<sup>nd</sup> Respondent who ought to have been questioned on where she obtained a fake licence dated 29<sup>th</sup> January 2009 when in actual facts the applicant had a valid licence issued on 26<sup>th</sup> January 2009.

### 1<sup>st</sup> Respondent's Case

[8] In opposition to the application the 1<sup>st</sup> respondents filed the following grounds of opposition:

**(1) THAT the Notice of Motion application as drawn and taken out has no merit and is based on a misconception of the law.**

**(2) THAT the applicant has not advanced any grounds in his Statement of Facts dated 17<sup>th</sup> February 2016 to warrant the grant of the judicial review orders of Certiorari and Prohibition as sought.**

**(3) THAT the present application is an attempt by the applicant to appeal against the ruling**

of the 1<sup>st</sup> Respondent albeit disguised as a judicial review application.

(4) THAT the present application is also an attempt by the applicant to circumvent the 1<sup>st</sup> Respondent's directive that he appears in court to show cause why his auctioneer's licence should not be revoked and/or suspended.

(5) THAT the 1<sup>st</sup> Respondent acted within jurisdiction in delivering the impugned Ruling on 18<sup>th</sup> November 2015 and was within his mandate in overruling the applicant's objection that the matter was not *res judicata*.

(6) THAT the application as drawn is incompetent and should be struck out.

(7) THAT the present application is clearly an abuse of the court process and should be dismissed forthwith with costs to the Respondents.

[9] Based on Order 53 rule 4(1) of the *Civil Procedure Rules*, the 1st Respondent submitted that the court ought to consider only the grounds (if any) and reliefs as contained in the Statement of Facts dated 17<sup>th</sup> February 2016 and no others since no leave was sought to include the additional grounds in the Notice of Motion. In support of this submission the 1st Respondent relied on **Republic vs. Kenya Bureau of Standards ex parte Powerex Lubricants Limited [2016] eKLR.**

[10] It was further submitted that there are no grounds advanced to warrant the grant of judicial review remedies as sought and that the applicant only sought for an order of Certiorari in his Statement of Facts dated 17<sup>th</sup> February 2016 and cannot therefore purport to seek for an order of Prohibition in his Notice of Motion application since no leave was obtained for the same.

[11] According to the 1st Respondent, even if fact no. 23 in the Statement of facts dated 17<sup>th</sup> February 2016 was presumed to be a ground, the 1<sup>st</sup> Respondent acted within jurisdiction in delivering the impugned Ruling on 18<sup>th</sup> November 2015 and was within his mandate in overruling the applicant's objection that the matter was not *res judicata*. To the 1st Respondent, the applicant has not even made the slightest attempt to demonstrate how the 1<sup>st</sup> Respondent acted in excess of its jurisdiction. It was its position that the present application is an attempt by the applicant to circumvent the 1<sup>st</sup> Respondent's directive that he appears in court to show cause why his auctioneer's licence should not be revoked and/or suspended.

[12] It was contended that the applicant herein is just forum shopping since if he was aggrieved by the High Court's ruling not to grant him stay on 1<sup>st</sup> February 2016, he would have appealed against the said order at the Court of Appeal. Additionally, the applicant ought to have appealed against the ruling dated 18<sup>th</sup> November 2015 and the present application is a veiled attempt to do so albeit disguised as a judicial review application. In support of this submission the 1<sup>st</sup> Respondent relied on **Republic vs. Public Procurement Administrative Review Board & Another ex parte Gibb Africa Ltd & Another [2012] eKLR, Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited [2008] eKLR, Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another [2014] eKLR and Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 [2002] eKLR.**

[13] It was further submitted that these proceedings were wrongly intitled as they have not been brought in the name of the Republic. To the 1st Respondent, the applicants in judicial review applications are always the Republic rather than the person aggrieved by the decision sought to be impugned as was held in the case of **Farmers Bus Service & Others versus Transport Licensing Appeal Tribunal [1959] EA 779** and **Rahab Wanjiru Njuguna versus Inspector General of Police & Another [2013] eKLR.**

[14] This Court was therefore urged to find that the present application is an abuse of the process of this honourable court, is incompetent and unmeritorious and the same ought to be struck out with costs.

## 2<sup>nd</sup> Respondent's Case

[15] According to the 2<sup>nd</sup> Respondent, it is not true that the Chief Magistrate's Court acted in excess of jurisdiction while entertaining the case before it by deciding a matter that had been concluded by the Auctioneers Licensing Board. To the contrary, the Chief Magistrate considered all the underlying issues relating to the case and the various fraudulent and illegal activities committed by various parties relating thereto including the Applicant before issuing a notice to show cause against the Applicant as to why his auctioneering license should not be revoked and or suspended which facts the Applicant has wilfully withheld from this Honourable Court.

[16] According to the 2<sup>nd</sup> Respondent, under section 26 (1) of the *Auctioneers Act*, Cap 526 laws of Kenya it is clearly provided that subject to the provisions of any other written law a person who suffers any special or general damages by the unlawful or improper exercise of any power by a licensed Auctioneer shall be entitled to recover any damages directly suffered by him/her from the auctioneer hence there was therefore nothing wrong in law for her to sue the Applicant. It was the 2<sup>nd</sup> Respondent's case that there was no violation of the law committed by the Chief Magistrate and relied on section 28(1) of the *Auctioneers Act*. The 2<sup>nd</sup> respondent then proceeded to set out the history of the dispute that led to these proceedings.

### Determinations

[17] I have considered the issues raised herein. In his application for leave, the ex parte applicant herein sought the following orders:

**(1) THAT the applicant JOSEPH KIARIE WATENGA be granted leave to apply to the High Court for orders of prohibition and Certiorari directed at the Chief Magistrate Court Kiambu to quash its proceedings and the ruling delivered on 18<sup>th</sup> November 2015.**

**(2) THAT the grant of the said leave do operate as a stay of the chief magistrate court ruling and or order given on 18<sup>th</sup> November 2016 wherein the Applicant is required to appear before the said court on 2<sup>nd</sup> March 2016 to show cause why his Auctioneers licence should not be revoked or suspended.**

**(3) THAT the costs of this application be provided for.**

[18] Whereas it is true that the Statement of Facts was not complete as to the orders the applicant intended to seek, a reading of the statement, the application for leave and the Notice of Motion clearly show the nature of the orders the applicant intended to seek. Whereas its true that in an application for leave, the Statement of Facts accompanying the same ought to be very precise as to the orders the applicant intends to seek, where it is clear from the leave the orders which he applicant intends to seek and those are the same orders sought in the Motion, it would be too drastic for the Court to disallow the Motion on the ground that the prayers are not precise in the Statement. It would however be different where the prayers in the Chamber Summons and in the Statement are at variance with those sought in the Motion.

[19] It is however clear that the applicant did not set out the grounds of his application as required under Order 53 rule 1(2) of the *Civil Procedure Rules*. The only grounds however appear in paragraphs 21 to 24 of the Statement which in summary challenged the jurisdiction of the 1<sup>st</sup> Respondent and its findings. Nowhere in the Statement has the applicant raised the issues relating the alleged usurpation of the DPP's powers by the 1<sup>st</sup> Respondent as the applicant contended in his submissions. In my view a party is not entitled to raise issues in the submissions which are not grounded on the Statement.

[20] With respect to the issue of jurisdiction it was contended that the Auctioneers Board having made a determination on the complaint, the 1<sup>st</sup> Respondent had no jurisdiction to entertain the issue of the

applicant's use of fraudulent licence. This issue calls for the determination of the jurisdiction and powers of the Auctioneers Board vis-à-vis the Court. The **Auctioneers Act**, as its preamble expressly states is:

***An Act of Parliament to consolidate and amend the law relating to auctioneers, to provide for the licensing and regulation of the business and practice of auctioneers, and for connected purposes.***

[21] It is therefore clear that the **Auctioneers Act** is not the Act that deals with payment of damages but is an enactment which is primarily concerned with the licensing and regulation of business and practice of auctioneers. In other words the Act is mainly concerned with the manner in which the auctioneers carry out their business. Accordingly, its primary purpose is not the indemnity of the person who suffers as a result of the actions of the auctioneers. In my view where the Act provides for compensation it is geared more towards punitive measures against the Auctioneer as opposed to restitution to the person who has suffered loss and damages.

[22] Therefore a distinction must be made between disciplinary proceedings and actions for damages. This in my view was the position adopted by **Warsame, J** (as he then was) in **Equip Agencies Limited vs. Credit Bank Limited Nairobi HCCC No. 773 of 2004** where he held that:

**“The purpose of the punitive and disciplinary powers of the court’s jurisdiction over advocate is not for the purpose of enforcing legal rights but for enforcing honourable conduct among them in their standing as officers of the court by virtue of section 57 of the Advocates Act, Chapter 16 Laws of Kenya.”**

[23] It is similarly my view that the primary purpose of the disciplinary proceedings undertaken by the Board is for the purpose of enforcing discipline amongst the auctioneers and not the reparation. My view is reinforced by the existence of two distinct provisions of the **Auctioneers Act** being sections 24 and 26. Section 24 provides as follows:

***24. (1) A complaint against a licensed auctioneer of misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an auctioneer, may be made to the Board by any aggrieved person within a period of one year after the occurrence of the event giving rise to the complaint.***

***(2) Where a person makes a complaint under this section, the complaint shall be by affidavit by himself setting out the allegations of misconduct which appear to arise on the complaint, and shall be forwarded to the Board together with the prescribed fee.***

***(3) The Board shall give the licensed auctioneer against whom the complaint is made an opportunity to file an affidavit in reply to the allegations and to appear before it, and shall furnish him with a copy of the complaint, and of any evidence in support thereof, and shall give him an opportunity of inspecting any relevant document not less than seven days before the date fixed for the hearing:***

***Provided that where in the opinion of the Board the complaint does not disclose any prima facie case of misconduct, the Board may at any stage of the proceedings, dismiss the complaint without requiring the licensed auctioneer to whom the complaint relates to answer any allegation made against him and without hearing the complaint.***

***(4) After hearing the complaint and the licensed auctioneer to whom the complaint relates, if he wishes to be heard, and considering the evidence adduced, the Board may order that the complaint be dismissed or if it is of the opinion that a case of misconduct on the part of the auctioneer has been made out, the Board may order***

***(a) that the licensed auctioneer be admonished; or***

***(b) that the auctioneer’s licence be suspended for such period, not exceeding six months as the Board thinks fit; or***

***(c) that the auctioneer ’s licence be revoked; or***

***(d) that such condition or conditions as it deems appropriate be attached to the auctioneer ’s licence; or***

***(e) that the licensed auctioneer pay a fine not exceeding one hundred thousand shillings; or***

***(f) that the licensed auctioneer pay compensation not exceeding one hundred thousand shillings to the person damnified by his misconduct; or***

***(g) that the auctioneer be disqualified from holding an auctioneer’s licence for such period as the Board thinks fit; or***

***(h) such combination of the above orders as the Board thinks fit.***

***(5) The Board may make such order as to the payment by any party of any costs or witness’ expenses and as to the expenses of the Board or the members thereof in connection with the hearing of any complaint as it may think fit.***

***(6) Any order of the Board may be filed with a subordinate court and shall, upon service of the notice of filing thereof upon the licensed auctioneer, be enforceable in the same manner as an order of the subordinate court to the like effect.***

[24] By limiting the amount that can be awarded against the auctioneer to Kshs 100,000.00, is clearly indicative of the fact that the “compensation” under this section is not a remedy for the actual loss suffered by the person wronged.

[25] Section 26 on the other hand provides as follows:

***(1) Subject to the provisions of any other written law, a person who suffers any special or general damages by the unlawful or improper exercise of any power by a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer by action:***

***Provided that nothing in this section shall***

***(a) prevent the auctioneer from claiming contribution or indemnity from any other person;***

***(b) limit the damages recoverable under any other written law.***

[26] In my view, this is the provision that deals with an award of damages for the loss suffered.

[27] It is therefore my view that the mere fact that an aggrieved party has invoked the Board’s disciplinary powers, he is not thereby prevented from moving to Court for damages for actual loss suffered.

[29] Apart from the issue of jurisdiction the applicant challenged the factual findings made by the 1<sup>st</sup> respondent with respect the authenticity of his licence. In my view that is an issue that go to the merits of the decision as opposed to the process of arriving at it hence is a matter that properly belonged to the jurisdiction of an appellate tribunal. This was appreciated in **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR**, where it was held that:

**“...it must be remembered that the function of this court sitting in judicial review is not**

concerned with the merits of the decision...I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or 'wrongness' or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in *Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others*, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter..."

[29] In my view it is not for this Court to determine the issue of the authenticity of the applicant's licence as that is a matter for the trial Court and the 1<sup>st</sup> appellate Court whose jurisdiction the applicant invoked but his appeal came to nought.

### **Order**

[30] I therefore find that these proceedings are unmerited and the same are dismissed with costs.

[31] It is so ordered.

**Dated at Nairobi this 21<sup>st</sup> day of September, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Miss Muturi for Mr Kimani for the Applicant***

***Ms Runo the 2<sup>nd</sup> Respondent in person***

***Cc Mwangi***