



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 368 OF 2014

**IN THE MATTER OF APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS FOR
JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND MANDAMUS**

AND

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER THE LAW
REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA**

AND

**IN THE MATTER OF THE DECISION OF THE AUCTIONEERS LICENSING BOARD
REVOKING THE LICENCE OF COSMAS MBUVI MUTHAMA TRADING AS NEXUS
AUCTIONEERS**

BETWEEN

REPUBLICAPPLICANT

AND

THE AUCTIONEERS LICENSING BOARD..... RESPONDENT

EX-PARTE: COSMAS MBUVI MUTHAMA

(TRADING AS NEXUS

AUCTIONEERS)

JUDGEMENT

Introduction

1. In his Motion brought on Notice dated 10th October, 2014 the *ex parte* applicant herein, **Cosmas Mbuvi Muthama (Trading as Nexus Auctioneers)**, seeks the following orders:
1. **An Order of Certiorari to removing into this honourable court the decision of the Respondent vide its letter dated 21st August 014 to revoke the Applicant's Auctioneers Licence and quash the said decision.**
2. **An order of Mandamus directed at the Respondent through its board known as the Auctioneers Licensing Board to reinstate the Applicant's Auctioneers License.**

3. **Stay of the Respondent's decision vide its letter dated 21st August 2014 revoking the Applicant's Auctioneers Licence pending the hearing and final determination of the substantive application for judicial review.**
4. **Costs of this application be provided for.**

Ex Parte Applicant's Case

2. The said Motion was based on the following grounds:

1. **That the Respondent is a public body with public officers who are subject of this honourable court's supervisory power.**
 2. **That the actions of the Respondent is not permitted in law and amounts to abuse of process, is prejudicial to the Applicant, is without power and authority and is null and void.**
 3. **That the actions of the Respondent breached the principle of memo judex in re causa sua (no man can be a judge in his own cause) when the Respondent acted as prosecutor and judge with regard to the Applicant as there was no complainant.**
 4. **That the Respondent having apparently made up its mind to revoke the Applicant's Auctioneers Licence before hearing the Applicant was biased and prejudicial to the Applicant.**
3. According to the applicant, having qualified to work as an Auctioneer under the Section 10 of **Auctioneers Act**, Chapter 526 of the Laws of Kenya (hereinafter referred to as "the Act"), he made an application dated 26th June 2014 for an Auctioneer's Licence which application was duly filled in and witnessed by the recommenders who included an Advocate of more than 10 years in practice, an Auctioneer trading as High Class Auctioneers and the Acting Chief Magistrate of Milimani Commercial Court. He also made payment of the prescribed fees.
 4. Having qualified and satisfied the Auctioneers Licensing Board, the Respondent herein (hereinafter referred to as "the Board") required threshold to work as an Auctioneer. He was subsequently issued with an Auctioneer's licence under "Class A" dated 14th May, 2014.
 5. However, by a letter dated 10th March 2014 was written to the Board and copied to the Chief Executive Officer of Fidelity Commercial Bank Limited, Kenya Bankers Association and Anti-Corruption Commission by **Paul Kitheka** of Machakos but bearing no address or the contact details of the complainant, a complaint was raised to the effect that the applicant worked for Fidelity Commercial Bank Limited which according to the author would tarnish the image of the Banking Sector and the Board.
 6. On 20th March 2014, the Chief Executive Officer of Kenya Bankers Association wrote a letter dated the same day to the Chief Executive Officer of Fidelity Commercial Bank Limited and copied to the Secretary of the Board seeking an update on the bank's position, pertaining to applicant, being a licensed auctioneer to which the Chief Executive Officer of Fidelity Commercial Bank responded vide a letter dated 25th March, 2013 confirming that the applicant was their employee in the position of a Paralegal Assistant and not an Auctioneer, and that he was unaware that the applicant had undertaken and passed an auctioneers licence exam and that there were no intentions of the bank giving the applicant auctioneering work to avoid any conflict.
 7. The Board subsequently summoned the applicant vide its letter dated 1st April, 2014 to appear before the said Board to clarify the contents of the letter by **Paul M. Kitheka** which summons the applicant honoured and he was forced to proceed before the Board without Legal representation as he did not have an advocate. He however, proceeded and clarified the contents of the aforementioned letter and subsequently wrote to the secretary of the Respondent a letter dated 19th June, 2014 requesting for the proceedings of the day.
 8. The applicant averred that the Board issued him with a notice of intended revocation of licence and a correspondence dated 5th June, 2014 in which it was alleged that the applicant did not have sufficient experience required in the auctioneering industry. To the applicant, this was a clear sign that the said Board had made up its mind to revoke his auctioneers licence before hearing him.
 9. The applicant added that he appointed the firm of Messrs Muma & Kanjama Advocates to represent me in the matter which said firm subsequently filed on 9th July, 2014 Notice of

Appointment of Advocates dated 3rd July, 2014. On 23rd July, the applicant appeared before the Board with his advocate, **Mr. Kanjama** who made oral submissions and clarified the applicant's position pertaining to the applicant's qualifications and work experience. The said advocate also orally requested the Respondent to review its proceedings of 21st May, 2014 which had failed to accurately capture the applicant's oral submissions but the Board did not effect the said amendments, thus manifesting an appearance of bias.

10. The Board, it was averred issued its decision vide a letter dated 21st August 2014 and a notice to the public revoking the Applicant's Auctioneer's license dated 14th May, 2014.
11. The applicant clarified that the letter from Fidelity Bank only showed that he was their employee and not that he was not engaging in auctioneering work and more precisely, the letter stated that the applicant was not involved in auctioneering work on behalf of the bank. According to the applicant, High Class Auctioneers have never received any instructions of any form from Fidelity Bank.
12. To the applicant, although he was engaged with Fidelity Bank, his employer had never had a problem with him getting part time employment elsewhere as long as it did not compromise his employment with the Bank. Resultantly, he got engaged, on an on and off basis, with High Class Auctioneers sometime in 2011 and in mid 2013 it was regularized. He disclosed that the Bank employed personnel drawn from various professions including lawyers, accountants and the like. He therefore denied that he misrepresented material facts as alleged by the respondent and that in any case nothing in the Act precludes him from obtaining a license by virtue of the fact that he is employed by a bank.
13. The applicant maintained that the disciplinary process was not fair and impartial in that:
 - a. Each party has the right to a fair hearing before an impartial tribunal, failing which an adjudicator's decision will not be enforceable. Breaches of natural justice by the adjudicator may include procedural irregularity, failing to act impartially or the existence of bias or apparent bias.
 - b. He was charged on the basis of a complaint in which the alleged complainant simply wrote a disparaging letter about him and failed to prosecute the claim yet a complaint against an auctioneer under the Act ought to be by affidavit sworn by the complainant and which attract requisite fee.
 - c. Moreover, the Act further provides that as the auctioneer, he ought to have filed an affidavit in reply to the complaint upon being furnished with a copy of the same yet nothing of the sort ever happened.
 - d. Furthermore, the Disciplinary Committee, in conducting the hearing, prosecuted its own case in the absence of a complainant or even an affidavit from the complainant which would subsist as evidence, therefore violating the principle of *nemo iudex in re causa sua*. This exposed him to bias.
 - e. The Respondent is guilty of substantive *ultra vires* with regard to the charges leading up to the revocation of his licence as there was no basis whatsoever for the said charges in the Act.
 - f. The Respondent's actions against him were procedurally *ultra vires* as he was not allowed the opportunity to challenge his accuser contrary to the rules of natural justice.
 - g. Further, he was led to believe that the Respondent had summoned him to clarify a few issues and at no point during the said interrogation was he informed that it was part of his disciplinary hearing.
 - h. He was not given an opportunity to call witnesses to defend himself at his disciplinary hearings and was not allowed to present evidence showing that he had in fact not breached any of the rules.

- i. The Respondent based its decision on the findings of an investigative process which acted solely at its direction.
 - j. The Respondent reached a decision that was based on improper investigations and was prejudicial to him.
 - k. The purported investigation and the subsequent revocation of his licence was in contravention of the rules of natural justice.
14. To the applicant, even if he was found to have substantively run afoul of the Act, his application herein relates to the breach of the rules of natural justice on the part of the Respondent during his hearing and once the Respondent's decision has been quashed, it will have opportunity to retry him according to the set down procedure.
15. In his submissions the applicant while acknowledging that under section 25 of the Act, he had the option of appealing against the Respondent's decision within thirty days to the High Court, he instead opted to file these judicial review proceedings which was the best avenue to seek certiorari and mandamus.
16. According to the applicant under section 24 of the Act complaints against licensed auctioneers are made by way of an affidavit by the complainant setting out the allegations giving rise to the complaint. In this case the basis of the complaint was just a mere letter.
17. It was submitted that the refusal by the Respondent to amend its earlier proceedings as requested was a manifestation of bias. Further by issuing a notice of revocation of the applicant's licence was an indication that the Respondent had already made up its mind before hearing the applicant.

Respondent's Case

18. In opposition to the application the 1st respondents filed a replying affidavit sworn on 18th December, 2014 by **K L Kandet**, the Board's Secretary.
19. According to him, the orders of Certiorari and Mandamus are not justifiable as the auctioneers Licensing Board exercised its mandate as prescribed by Law.
20. He averred that the Applicant herein applied for a licence on 26th June, 2014 and was issued with the same No. 3486 and that the Applicant was trading in the name and style of Nexus Auctioneers. The cause of action according to him, originated pursuant to a letter dated 10th March, 2014 addressed to the Board alleging that the Applicant was working with Fidelity Commercial Bank while doing auctioneering work hence in conflict of interest. Kenya Banker's Association wrote to Fidelity Commercial Bank seeking clarification to which Fidelity Bank confirmed that the Applicant was its employee but was not doing auctioneering work hence there was no conflict of interest.
21. The applicant was then summoned and indeed appeared before the Board on 21st May, 2014 and clarified to the board that he was an employee of the bank and High Class Auctioneers and the issue of conflict of interest was fully settled. However, during the board meeting on 21st May, 2014 it emerged that there was some misrepresentation of material facts in the application form as the Applicant had misrepresented to the Board that he had worked under High Class Auctioneers for the required period of three years, in compliance with Rules 3(1) (g) of the **Auctioneers Rules** 1997. After the board interrogated the proprietor of High Class Auctioneers, one **Elisha Ishmael Esikote**, he confirmed that the Applicant was engaged to procure work for him for a period of one and a half years only yet as per the Auctioneers Act and Rules the Applicant was required to have worked under an Auctioneer for a minimum period of three years. The Board thus discovered that the Applicant qualified for issuance of an Auctioneers licence by furnishing false information about his experience and that he had not gained the requisite three years working experience with High Class Auctioneers.
22. In view of matters set out above the Board found the Applicant ineligible to hold a licence under the **Auctioneers Act** and specifically under Section 18(1) (b) thereof and therefore his licence was revoked.
23. It was contended that the Applicant was served with a Notice of Intended Revocation of License

- under Section 18(1)(a) of the Act, where he appointed the firm of Muma & Kanjama Advocates to represent him an indication that the Applicant was given a chance to defend and explain to the board what transpired.
24. To the deponent, the Applicant ought not to have been issued with a licence in the first place as he was and is still not qualified to be issued with an auctioneering licence and the one issued now revoked was issued fraudulently after misleading the Board which is mandated to issue and revoke licences as well as regulate and punish individuals who contravene the provisions of the Act.
25. According to the Respondent, the revocation of the licence was not as a result of the complaint of conflict of interest between the Applicant and Fidelity bank but rather as result of qualification issues.
26. Based on section 18(1) of the Act and Rule 3(2) of the *Auctioneers Rules*, it was submitted on behalf of the Respondent that since the applicant was not eligible to hold a licence under the Act due to his misrepresentation to the Board, the Respondent was empowered to revoke his licence.
27. It was submitted that the applicant was duly afforded a hearing at which he was represented by his advocate. Based on *inter alia* **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)** and **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** it was submitted that the applicant had not proved the grounds which justify the grant of judicial review orders.

Determinations

28. I have considered the application, the affidavits, the submissions and authorities cited herein.
29. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was held:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

30. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury’s Laws of England 4th Edition Vol (1)(1) Para 60*.
31. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** and held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality...Irrationality is when there is such gross unreasonableness in the decision taken or

act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

32. From the letter dated 21st August, 2014, it is apparent that the reason for the revocation of the applicant's licence was not the letter dated 10th March, 2014 from the said **Paul Kitheka** though the applicant's tribulations seems to have been triggered by the said letter. The ultimate decision however was based on the Board's findings that the applicant in his application for the licence misled the Board into believing that he was possessed of the necessary qualifications when he was not. The finding whether the applicant was duly qualified was clearly a finding of fact which the Court does not ordinarily interfere with in judicial review proceedings unless the finding is *Wednesbury* unreasonable in the sense that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Circumstances when a decision may be said to be irrational is for example when the same is arrived at without evidence. However where there is evidence on the basis of which the authority would have made a decision either way, a judicial review court does not interfere merely on the basis that had it been the one hearing the matter it would have arrived at a different decision. That is the role of an appellate court. Therefore the mere fact that the Respondent found based on the facts before it that the applicant did not meet the relevant qualifications even if unmerited does not justify this Court in quashing the said decision. Such a decision can only be overturned on the said ground where the applicant files an appeal pursuant to section 18 of the Act, an option which the applicant appreciates was available to him.
33. In this case, it was deposed that the information relied upon was received from the proprietor of the High Class Auctioneers with whom the applicant purportedly worked for three years who stated that the applicant was only engaged to procure the work for him for a period of one and a half years. The law however is that mere allegation of sufficiency of evidence will not suffice. Similarly, the mere fact that the evidence favourable to a party was not considered will not be a ground for quashing a decision if there was material on record which would have warranted a finding to the contrary. See **Meixner & Another vs. Attorney General [2005] 2 KLR 189.**
34. The applicant contended that he was not availed the opportunity of cross-examining the complainant. However as already stated herein above the decision to cancel the applicant's licence was made pursuant to section 18(1)(a) of the Act which provides:

(1) In addition to the powers of the Board under section 24, the Board may revoke a licence if

(a) it discovers that the licensed auctioneer made a statement in or in connection with the application therefor which he knew to be false or untrue in any material particular.

35. Therefore the provisions of section 24 of the Act which the applicant alleges were not complied with were clearly inapplicable. It is conceded that the applicant was represented by counsel when he was required to show cause under section 18(3) of the Act. The said representations of the applicant were considered and the Board, as it was entitled to, made findings adverse to the applicant. I am unable to find any evidence of bias in arriving at the said decision apart from bare allegations.
36. Having considered the material placed before me in this application I find no merit in the allegations, made by the applicant.

Order

37. Consequently the Notice of Motion dated 10th October, 2014 fails and is dismissed with costs to the Respondent.

Dated at Nairobi this day 29th of July, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Anyona for Mr Kanjama for the Applicant

Mr Munene for the Respondent

Cc Patricia