



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS JR APPLICATION NO. 116 OF 2011**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR A JUDICIAL  
REVIEW ORDER OF CERTIORARI**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE AUCTIONEERS LICENSING BOARD.....RESPONDENT**

**EX PARTE**

**JOSEPH N. NDERITU (T/A JOGAN DRIES SERVICES)**

**RULING**

On 16<sup>th</sup> May, 2011 the ex parte applicant filed an application seeking leave to apply for an order of certiorari for purposes of removing into this court and quashing the decision of the respondent made on 16<sup>th</sup> March, 2011. He further prayed that the grant of leave aforesaid do operate as a stay of any further proceedings or consequential steps in **Disciplinary Cause No. 13 of 2011** which is scheduled to be mentioned on **18<sup>th</sup> May, 2011**.

In support of the application, the ex parte applicant deposed that sometimes in July, 2008 he received

instructions from **Kilonzo & Company Advocates** to attach and sell by public auction goods belonging to one **Malcom Muratha** in execution of a decree emanating from the **Chief Magistrate's Court at Milimani in CMCC No. 7355 of 2007**. He accepted the instructions and commenced investigations to trace the said judgment debtor. Upon proclamation of the judgment debtor's assets he paid a sum of Kshs.30,000/= with a promise to settle the balance before expiration of the proclamation notice, the ex parte applicant stated. Subsequently, the judgment debtor could not be traced and the ex parte applicant continued to trace him with no success.

On 6<sup>th</sup> January, 2011 Kilonzo & Company Advocates lodged a complaint with the respondent vide an affidavit sworn on 5<sup>th</sup> January, 2011 by Mutula Kilonzo junior Advocate alleging that the ex parte applicant had been paid the full amount and had withheld the same. A copy of the said affidavit was annexed to the ex parte applicant's affidavit. The affidavit discloses, *inter alia*:

- **That the ex parte applicant was given instructions to recover the decretal amount of nearly Kshs.217,950/=. Thereafter he refused, failed and/or neglected to communicate with the instructing firm of advocates despite several reminders.**

- **As a result, on 15<sup>th</sup> January, 2009 the advocates applied for re-issue of the warrants to Makini Auctioneers Agencies.**

- **On 19<sup>th</sup> March, 2009 Makini Auctioneers Agencies informed the said advocates that in the process of executing the warrants they learnt that the judgment debtor had paid to the ex parte applicant a lump sum of Kshs.100,000/= and thereafter had been paying the balance by installments to a bank account as directed by the ex parte applicant. The advocates exhibited receipts issued by the ex parte applicant to the judgment debtor as well as bank deposit slips for payments made by the judgment debtor.**

- **When the advocates wrote to the ex parte applicant on 20<sup>th</sup> March, 2009 bringing to his attention the aforesaid information, he responded vide a letter dated 1<sup>st</sup> April, 2009 and stated, *inter alia*,**

***"It has come to my notice that there was some money which was paid to our office and received by my staff sometimes last year while I was away. This information got me by surprise when I got this letter from yourselves. Kindly I would request your good office to give me time to consult and find out what transpired and promise to let you know soonest possible."***

- **That up to the date of making the complaint the ex parte applicant had not remitted any money to the instructing firm of advocates.**

The ex parte applicant alleged that he was not served with the aforesaid complaint until 15<sup>th</sup> March, 2011 at 3.40 p.m. whereas he was supposed to appear before the respondent on 16<sup>th</sup> March, 2011. When the ex parte applicant appeared before the respondent on the aforesaid date, he sought an adjournment to file a replying affidavit but the application for adjournment was refused. He further alleges that the respondent threatened to suspend his licence as an Auctioneer. For fear of such reprisals, the ex parte applicant consented to paying the money which he was alleged to have collected and failed to remit to Kilonzo & Company Advocates.

The ex parte applicant now argues that the decision of the respondent was *ultra vires* in that the Board had no capacity to make such an order as it went beyond its jurisdiction. The impugned decision is in terms of a letter dated 11<sup>th</sup> April, 2011 addressed to the parties herein by the respondent. The letter reads

as follows:

**“REF: DISCIPLINARY CAUSE NO. 13 OF 2011**

**NOTICE OF THE DECISION OF THE BOARD**

**Whereas the above mentioned disciplinary cause came up for hearing before the Board on the 16<sup>th</sup> March, 2011 and whereas the Auctioneer was present while the complainant was represented; NOW THEREFORE TAKE NOTICE that by consent the Auctioneer was ordered to pay the sum of Kshs.210,000/= within 30 days to the complainant for full and final settlement of the complaint. Matter was stood over for mention on the 18<sup>th</sup> May, 2011 at 9.00 a.m. at Milimani Commercial Court’s Board Room to confirm compliance. The Auctioneer was informed of additional disciplinary measures at the next mention. Take notice that the Board will proceed with the matter your absence notwithstanding and may take action it deems appropriate even to your detriment.**

**(Signed)**

**B.L. KANDET**

**BOARD SECRETARY”**

The ex parte applicant further alleged that subsequent to the making of the aforesaid consent order he established that the judgment debtor had forged his receipts and made the complainant to believe that he had paid all the money to him (the ex parte applicant). He had therefore made a report at Pangani Police Station.

The ex parte applicant accused the respondent of contravention of his constitutional right to a fair trial and breach of the rules of natural justice with the regard to the right to be heard. He added that the respondent became *functus officio* after recording the aforesaid consent order.

It is trite law that judicial review is not an appeal from a decision but a review of the manner in which the decision was made. See **CHIEF CONSTABLE OF THE NORTH WALES POLICE v EVANS [1982] 1 WLR 1155**. In an application for leave to apply for an order of certiorari, the applicant has to demonstrate that there are reasonable grounds for impeaching the decision sought to be quashed. Grant or refusal of such leave is an exercise of the court’s discretion based on the facts and the applicable law as presented by the ex parte applicant.

In this matter, there is no denial that sometimes in July 2008 the ex parte applicant was instructed by Kilonzo & Company Advocates to attach and sell by public auction goods belonging to a judgment debtor with a view to recovering a decretal sum amounting to Kshs.217,950/=. From the affidavit sworn by Mr. Mutula Kilonzo junior and the annexures thereto, it appears that the ex parte applicant received a considerable amount of money from the judgment debtor which money was not passed on to the instructing firm of advocates. When the ex parte applicant was confronted with evidence suggesting that he had actually received payments from the judgment debtor and that he was going to be reported to the Auctioneers Licensing Board if he failed to remit the money by 25<sup>th</sup> March, 2009, in his letter dated 1<sup>st</sup>

April, 2009, the ex parte applicant admitted that indeed some money had been paid to his office. He sought some indulgence from the said advocates. However, he has not stated that he has paid whatever amount may have been paid to him.

When the ex parte applicant appeared before the Board on 16<sup>th</sup> March, 2011 he admitted the charge and agreed to pay a sum of Kshs.210,000/= within 30 days from the said date. Although he alleges that he was threatened that his licence would be suspended unless he admitted the charge, there is no evidence to that effect. The proceedings were not annexed to his affidavit.

The ex parte applicant's allegation that the respondent acted *ultra vires* is also without any merit. The respondent has power to inquire into complaints made against Auctioneers and that is what it did on 16<sup>th</sup> of March, 2011. When he admitted the claim, the Board gave him 30 days to settle the same and the mention scheduled for 18<sup>th</sup> May, 2011 is to confirm compliance.

Having considered the ex parte applicant's affidavit and the brief submissions made by his advocate, I am not inclined to grant leave to apply for an order of certiorari because I am not satisfied that there was any breach of the rules of natural justice on the part of the respondent. If any new evidence has surfaced and the ex parte applicant believes that it is useful in his defence or mitigation, he can request the Board to allow him adduce the same.

The application for leave is dismissed.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF MAY, 2011.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Nazi – court clerk**

**Miss Wanjohi holding brief for Mr. Gachie for the Applicant**