



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Civil Appeal 20 of 2006

MANUEL OMINDE T/A KURONYA AUCTIONEERS APPELLANT

V E R S U S

AUCTIONEERS LICENSE BOARD RESPONDENT

J U D G E M E N T

On 17th January 2006 the Auctioneer's Licensing Board imposed a fine of KShs.50,000/= on the appellant. The said penalty was imposed on the appellant after the Board had made the following findings;-

- (a) *The proclamation was irregular as the auctioneer did not issue a certificate under Rule 12 (b).*
- (b) *The Auctioneer overcharged his costs.*
- (c) *The Auctioneer collected the decretal sum by way of installments and remitted less than the decretal amount.*
- (d) *There was total lack of any form of advertisement of the sale of the animals.*

Being aggrieved with the decision of the Board, the appellant of lodged an appeal to this court.

Ground 1.

In ground 1 of his appeal, the appellant contends that the decision of the Board was a nullity as it did not comply with the provisions of sections 6 of the

Auctioneers Act. The decision is said to have been signed only by the chairman, whereas the secretary ought to have also been a signatory.

Ground 2

The Board is said to have erred in holding that the appellant had overcharged, whereas there was no bill placed before the Board. In any event, if there had been a dispute over the quantum of the fees payable to the auctioneer, he believes that the respondent ought to have made an application that the fee be assessed either by the magistrate or by the Board.

In this instance, the appellant faults the Board for failing to determine the sum constituting the over-charge.

Ground 3

The appellant submitted that the handbills issued by him constituted advertisements, in accordance with Rule 16 (2) of the Auctioneer's Rules.

Ground 4

The appellant issued a proclamation, which was not signed by the person whom he found at the home of the respondent. As the said person refused to sign the proclamation, the appellant submitted that the proclamation constituted a certificate pursuant to Rule 12 (b).

In any event, as the attached goods were livestock, the appellant submitted that Rule 12 (b) had no application. If anything, it is Rule 13 which was applicable to the matter before the court.

The appellant then proceeded to fault the Board for being malicious. His view is that the malice was portrayed by the fact that whilst the Board's letter forwarding their decision is dated 15th February 2006, the Board had purported that they forwarded their decision on 14th February 2006. Furthermore, the said letter was an instrument by the Board, and should have, in the opinion of the appellant, been signed by both the Chairman and Secretary of the Board.

Finally, the appellant submitted that the Board was wrong to have imposed on him, a fine of KShs.50,000/=, yet he had complied with all the rules applicable.

In answer to the appeal, the learned state counsel, Mr. Muiruri, submitted that the appeal was incompetent for failing to place before this court, the formal decision of the Board, which was being challenged. As far as the respondent was concerned, the appellant had only provided a copy of the proceedings, and a letter from the Board, which was notifying the appellant about the Board's decision.

In my reading of the record of appeal, the decision of the Board is clearly a part of the proceedings. In the record of the proceedings, there are the following:-

- (a) A preliminary objection and a ruling thereon;***
- (b) Submissions by the complainant and submissions by the auctioneer;***
- (c) The Board findings; and***
- (d) The Board's Decision on the complaint; and***
- (e) Proceedings subsequent to the decision being appealed against.***

If Mr. Muiruri, learned state counsel, was of the view that the appellant needed to extract a formal order, then I am afraid I have found no such requirement in the Auctioneers Act, nor was I referred to any provision which contains such requirements. I therefore find and hold that the appeal is not incompetent.

As regards ground 2, the respondent submitted that the Board's finding that the auctioneer had overcharged the complainant was based on sound facts.

In my considered opinion even though the fees payable to an auctioneer are not limited to the commission only, in this case, the appellant readily conceded that some of the heads under which he raised a fee, were not provided for at all. In the light of that concession by the auctioneer, I find that the Board was right to have concluded that the appellant did overcharge on his fees. There cannot be any doubt that by adding to the fee note (or bill) items which he was not entitled to charge for, the auctioneer ended up charging

more than he was entitled to. He overcharged in respect of the following;

- (i) ***Fees before attachment;***
- (ii) ***Taking inventory;***
- (iii) ***Security on attachment; and***
- (iv) ***Insurance***

Advertisement

The Board held that there was a total lack of any form of advertisement about the sale of the animals which were attached by the appellant.

Rule 12 (f) of the Auctioneer's Rules provides as follows;

“arrange advertisement within seven days from the date of removal of the goods and arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter.”

That rule provides specifically for newspaper advertisement. However, as the parties before me both said, the said rule was inapplicable to the appeal before me, because it applied to *“moveables other than perishable goods and livestock.”*

Livestock are to be handled in the manner spelt out in rule 13. Under that rule, the owner of the attached goods is supposed to be given a forty-eight hours notice to redeem the goods. The rule specifically says that the owner;

“may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction.”

Pursuant to **rule 13 (d)**, the auctioneer may remove the perishable goods or livestock, on expiry of the notice period.

In my understanding, the auctioneer did not strictly comply with that requirement, as it appears that he removed the livestock, and then waited for the 48 hours notice period to lapse. However, as that was not an issue that was canvassed before the Board or before me, I will say no more on it.

It is evident that pursuant to rule 13 of the Auctioneers Rules, there is no express requirement that an auctioneer should advertise the sale of perishable goods or livestock, in a newspaper.

However, a reading of rule 16 (2) will make it crystal clear that there ought to be an advertisement in a newspaper unless the court dispenses with the requirement. The rule stipulates as follows;

“Except as may be ordered by a court, advertisement by an auctioneer of a sale by auction of any property, movable or immovable, shall be by way of an advertisement in a newspaper, provided that in the case of perishable goods and livestock advertisement in a newspaper may be dispensed with if adequate notice to prospective bidders in all the circumstances can be achieved by radio or television announcement or handbills or posters or other means of communication.”

Such advertisements relate to moveable properties, other than perishable goods and livestock, in respect of which there should be;

- (a) ***adequate notice to prospective bidders;***

(b) such notice may be by radio or television announcement, or handbills or posters or other means of communication;

(c) the adequacy of the notice will be assessed on the basis of all the circumstances.

In my understanding, the auctioneer could only dispense with advertisement over the newspapers by showing that in the circumstances of this case, he gave adequate notice to prospective bidders through one or more of the mediums specified in rule **16 (2)**.

Assuming that the auctioneer did give a notice to the Judgement-Debtor on 12th February 2005, as he has said, the auctioneer says that the period within which the said notice expired ended on 14th February 2005.

The time endorsed on the notification of sale dated 12th February 2005 is 9.00 a.m.

By an undated "Handbill" the auctioneer indicated that the livestock would be sold by auction at 10.00 a.m. on 14th February 2005. In effect, by his own evidence, the auctioneer sold off the livestock an hour after the expiry of the time he allowed the Judgement-Debtor to redeem the livestock.

The auctioneer did not tell the Board or this court, when the Handbills were prepared by him, or when or where the same were distributed. In the absence of such information, I find that the auctioneer did not discharge his obligation of either advertising or otherwise showing that, in the circumstances prevailing, he did enough to warrant dispensing with the requirement for an advertisement.

Certificate of service

Pursuant to **rule 12 (b)** of the Auctioneers Rules, an auctioneer who has received a court warrant or a letter of instruction in case of movables other than goods of perishable nature or livestock is required to;

"prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where the person refuses to sign such inventory the auctioneer shall sign a certificate to that effect."

As the parties before me are in agreement that rule 12 was inapplicable to this appeal, I need not determine whether or not the endorsement which the auctioneer made on the proclamation could also satisfy the requirement of a certificate, when the owner of the attached goods refuses to sign the inventory.

However, it is evident that under the Auctioneers Act, there is no particular format for the certificate.

Considering that the "Sale Form 2" is described as a proclamation, and that it doubles up as an inventory of the attached goods, I find no reason why it cannot also constitute the certificate, provided that the auctioneer states in it that the owner of the goods declined to sign the proclamation. The auctioneer should then sign against the information in that respect.

Rule 11 in the Schedule

The Schedule to the Act embodies the rules that govern the proceedings of the Auctioneers Licensing Board. Rule 11 provides as follows:-

"All instruments made by and all decisions of the Board shall be signified under the hand of the chairman and the secretary."

However, in this instance, the decision of the Board was only signed by the chairman. The secretary to

the Board did not sign the said decision.

In MANUEL OTIANGALA t/a KURONYA AUCTIONEERS Vs. AUCTIONEERS LICENSING BOARD, BUSIA HIGH COURT – CIVIL APPEAL NO.40 OF 2000, Ringera J. (as he then was) held that a decision that was not signed in accordance with the requirement of the law, was a nullity. I do concur.

In the result, the decision of the Board herein was a nullity. Therefore I do now allow the appeal. I quash the findings of the Board, and I also set aside the decision to impose a fine on the appellant. If the appellant had paid the said fine, the same should be paid back to him.

Finally, as regards the costs of the appeal, I order that each party will bear his own. I so order because, in principle, the findings of the Board and the decision to impose a fine on the appellant were justifiable. The Board's only mistake, and which was fatal, was that the findings and the decision were signed only by the chairman.

Dated, signed and Delivered at Kakamega, this 22nd day of January 2009

FRED A. OCHIENG

J U D G E