

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION –MILIMANI
CIVIL CASE NO. 1094 OF 2002**

**TULAGA CO-OPEATIVE SOCIETY
LTD:.....:1st PLAINTIFF**

**ABERDARE MULTI- CO-OPERATIVE SOCIETY
LTD :.....:2nd PLAINTIFF**

VERSUS

ABERDARE CREAMERIES LTD :.....: DEFENDANT

W.M. KARIUKI T/A WISKAM AGENCIES:.....: AUCTIONEER

RULING

This Application dated 17th March 2005 primarily seeks two orders. These are that the purported sale/auction of the Defendant/Applicant's goods on 2nd September, 2004 in execution of the decree herein be set aside and that the auctioneer be ordered to pay damages to the Defendant/Applicant for loss incurred so far by reason of purported sale/auction of the Defendant/Applicant's attached goods. The grounds are that the purported sale/auction of the Defendants/Applicant's goods by the auctioneer was illegal, irregular, null and void; that the purported sale/auction of the Defendants'/Applicant's goods was fraudulent and ought not to stand, that the auctioneer acted on his own motion in disregard of clear and express instructions not to proceed with the sale/auction and that the said sale/auction was self serving meant to unjustly enrich the auctioneer while unlawfully depriving the Defendant/Applicant of his attached goods. There is an affidavit in support of the Application sworn by one Njoroge Wa Kairo the Managing Director of the Defendant.

The Respondent i.e. the auctioneer opposed the application stating in his grounds of opposition that the application is incurably bad in law and form and contravenes the rules on pleadings; that it is an abuse of the process of the Court and it lacks bona fides. The auctioneer did not file a replying affidavit. This was despite the fact that grave allegations were made against him in the supporting affidavit of the said Njoroge Wa Kairo which supporting affidavit had 6 exhibits.

The Application was canvassed before me on 20th April, 2005 by Mr. Nyariki Learned counsel for the Defendant/Applicant and Mr. Ogesa Learned Counsel for the auctioneer. The gist of the Defendant's case was that summary judgment was entered against it for the sum of Kshs 4,270,314/= in favour of the Plaintiff. The Plaintiff through the auctioneer proclaimed the Defendant's goods/assets. After expiry of seven (7) days the auctioneer took away the Defendant's proclaimed goods/assets. On 30th August 2004 the Plaintiff's Counsel and the Defendants Counsel recorded a consent order for the Defendant to pay the decretal sum by monthly installments and for the Defendant to pay the auctioneers charges which were to be agreed or taxed before the goods were to be released. The auctioneer was informed of the consent order by Counsel for the Plaintiff, who directed the auctioneer to postpone the auction which had been scheduled for 2nd September, 2004. In the event there was no agreement on the auctioneer's charges nor did the auctioneer tax this charges. Instead he purported to sell the attached goods in an auction purportedly held on 2nd September 2004. The Defendant believes no auction took place at all. The basis of its belief is that its Managing Direct was at the auctioneer's office as early as 9.00 a.m. on 2nd September, 2004 for purposes of negotiating the auctioneers charges but the auctioneer was away on business and advised the said Managing Director of the Defendant that the auction scheduled for 2nd September, 2004 had been called off. At that time Motor vehicle registration No. KAL 272k Mitsubishi F.H. which was one of the properties attached was parked at Githunguri Total Service Station with deflated tyres and not at the advertised place which was outside National Bank of Kenya Nakuru Branch.

From the auctioneer's office the Defendant's Managing Director went to the place advertised for the auction at the appointed time on 2nd September, 2004 but no auction took place.

The Defendant has backed its case by documentary evidence including affidavits sworn by one Lucy W. Gathuo, the proprietor of Githunguri Total Service Station and another sworn by one Joel M. Mundati an employee at the said Githunguri Total Service Station. These affidavits confirm that indeed the said motor vehicle registration No. KAL 272k Mitsubishi F.H. was parked at the said petrol station from 21st August 2004 to 4th November, 2004 when it was released to one Murithi. The Defendant has also annexed to the supporting affidavit aforesaid copies of two letters from and an affidavit by the Plaintiff's Advocates. These documents confirm that the auctioneer was duly informed of the consent order referred to above by the Plaintiff's Advocates. In the above premises the Defendant seeks the orders referred to above. The Managing Director of the Defendant has also deponed that the said motor vehicle was valued at Kshs 1.5 million and the purported auction sale for Kshs 415,000/= was far below its market value and was a manifestation of fraudulent intent on the part of the auctioneer.

The auctioneer chose not to challenge the factual position as presented by the Defendant. He was satisfied with the Grounds of Opposition already referred to above. I am afraid, the Grounds of Opposition are not an answer to the Defendant's allegations. I have not been shown in what way the Defendant's application is incurably bad in law. I do not also detect any abuse of the process of the Court by the Defendant. The Defendant has invoked the Courts inherent jurisdiction. It has also invoked Order XXI Rule 79 of the Civil Procedure Rules. In my view Orders XXI Rule 79 is inapplicable but this done does not defeat the Defendant's application. I would think Section 34 (1) of the Civil Procedure Act would cover the situation we have here. The facts that have clearly emerged from the material presented by the Defendant show that the auctioneer did not carry out any auction on 2nd September, 2004. Indeed in my view he could not have done so as he was expressly instructed not to do so by Counsel for the Plaintiff. The affidavit of Kihoro Cerere sworn on 29th November, 2004 is categorical that on 31st August 2004, he informed the auctioneer by telephone that the consent order referred to above had been recorded and advised him to defer the auction which had been scheduled for 2nd September, 2004 until further advised. The said advocate confirmed the telephone conversation in his letter dated 7th October 2004 and cautioned the auctioneer of the consequences of failing to comply with his instructions in his letter dated 29th October, 2004.

Besides the express instructions given by the Plaintiff's advocates, the auctioneer himself by telephone confirmed to the Managing Director of the Defendant that the auction/sale which had been scheduled for 2nd September, 2004 had been called off. There is in addition the Managing Director's uncontroverted statement, that he availed himself at the auctioneer's office on the day of the scheduled auction but did not find the auctioneer. He then went to the place advertised for the auction at the time advertised on 2nd September, 2004 and confirmed that there was no auction. Finally there is also the uncontroverted evidence of the proprietor of Githunguri Total Service Station and her employee that motor vehicle registration No. KAL 272 K was on the day of the auction parked at the said petrol station which is further evidence that no auction could have at the same time taken place outside the National Bank of Kenya Nakuru Branch. It is also significant that at no time has the auctioneer disclosed to whom he purported to sell the said motor vehicle. There is however, the uncontroverted statement by the Defendants' Managing Director that the said motor vehicle is still registered in the name of the Defendant and a copy of records held by the Commissioner of Motor Vehicles confirms that as at 31st December, 2004, the motor vehicle was so registered in the name of the Defendant jointly with Imperial Bank Ltd. The upshot of the above is that I am satisfied that the Defendant has demonstrated that the auctioneer did not carry out any auction on 2nd September, 2004 or on any other date. The purported sale/auction of the Defendants' goods on 2nd September 2004 in purported execution of the decree herein is set aside.

The Defendant has further sought damages for the loss it has incurred by reason of the purported sale/auction. I am afraid it is not prudent to make this kind of claim in an application of this kind. In any event no basis has been laid by the Defendant for damages. This prayer is accordingly rejected.

The auctioneer shall pay costs of this application.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY 2005.

F.
JUDGE

AZANGALALA

Read in the presence of:-