



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

CIVIL APPEAL 802 OF 2003

PAULINE MWAI APPELLANT

VERSUS

DAVIES NYAMU NJOKA T/A

NJOKA & NJOKA AUCTIONEER RESPONDENT

**(An Appeal from the Decision of the Auctioneer Licensing Board
in Disciplinary Cause No. 41 of 2003
delivered on 30th October, 2003).**

JUDGMENT

This is an appeal from the decision of the Auctioneers Licensing Board (hereinafter referred to as “the Board”) made on 30th October, 2003. The historical background of the case is as follows:

The Appellant lodged a complaint with the Board on 28th May, 2005. The complaint was against the Respondent who is an auctioneer. From the Complaint, it appears that the matter leading to the same took place on 17th July, 1998. On 21st August, 2003 the Respondent filed a Notice of Preliminary Objection to the Complaint on the ground that the same was in conflict with the provisions of Section 24 (1) of the Auctioneers Act (Act No. 5 of 1996) as amended by legal Notice NO. 49 of 2002 which provides that a person who wishes to file a complaint to the Board against an auctioneer must do so within a period of one year after the occurrence of the event giving rise to the complaint. This particular provision came into force on 7th June, 2002.

After hearing the rival submissions on the point, the Board decided in favour of the Respondent on 23rd September, 2003 holding that the Appellant was guilty of “inordinate and unreasonable delay in filing the complaint”. The Appellant was aggrieved by the decision of the Board and appealed to this Court. The appeal is based on 7 Grounds of Appeal set out in the Memorandum of Appeal as follows:

“1. THAT the learned Auctioneers Licensing Board erred in failing to appreciate that a Notice of Preliminary Objection is a demurrer and a matter of the law only and does not give rise to the exercise of any discretion.

2. THAT the Preliminary Objections are based on the decision of the Court of Appeal in Mukisa Biscuit Manufacturing Company Limited vs Westend Distributors Limited 1969 EA 696 in that a Preliminary Objection is by way of a demurrer and assumes that all the facts are not in dispute and that an interpretation of the law only results in the matter being conclusively determined.

3. THAT the Preliminary Objection is the effect that the Complaint is time barred by reason of the amendment to Section 24 (1) of the Auctioneers Act which arose from Act No. 2 of 2002 and came into force on 7th June, 2002 in that the Complaint was filed by the aggrieved person more than 1 year after the occurrence of the event giving rise to the Complaint.

4. THAT Kenya jurisprudence does not permit retrospective enforcement of legislation unless it specifically says so and does not infringe provisions of the Kenyan Constitution. The subject matter of the Complaint arose before 7th June, 2002 i.e. 17th July, 1998, and therefore the Preliminary Objection in law cannot stand as it cannot operate retrospectively.

5. THAT a demurrer is strict law and no discretion is available and consequently the finding of the Auctioneers Licensing Board that the Preliminary Objection is upheld as there was inordinate and unreasonable delay in filing of the Complaint cannot lie as it is an exercise of discretion and not an interpretation of the amending legislation.

6. THAT in contravention of the Rules provided in the Schedule to the Auctioneers Act (made under Section 6 of the said Act) Rule 11 thereof requires all instruments made by and all Decisions by the Board to be signified under the hands of the Chairman and the Secretary. In this case the Decision of the Board is only signified under the hand of the Secretary and is therefore invalid and the Decision should be set aside.

7. THAT the costs of the Appeal and the thrown away costs of the Preliminary Objection be awarded to the Appellant in any event.”

The parties agreed to file written submissions which I referred to in coming to the decision in the appeal.

Based on the submissions filed, the question which comes out clearly is whether the Board was right in finding that the Appellant’s Complaint was out of time in the circumstances.

According to Mr Osmond, for the Appellant, the Board was in error in holding that the complaint was out of time since the provisions of law relied on by the Respondent came into force after the event leading to the Complaint. The law could not, it was argued, be applied retrospectively. For this proposition, he referred me to the case of **F. S. S. Grain Millers Ltd vs The Attorney General Milimani HCCC No. 874 of 2000** in which the Court (The Hon. Lady Justice Ondeyo) held that subsidiary legislation was only effective from the date of publication and not before.

In justifying the decision of the Board, Mr Mogeni, for the Respondent, on his part argued that the amendment in issue took effect immediately and applied to all Complaints lodged after the amendment. For the proposition, he referred me to the Court of Appeal decision of **Ruaha Concrete Co. Ltd vs Middle East Bank of Kenya Ltd Civil Appeal (Application) No. 149 of 2002** in which the Court of Appeal was considering the effect of amendments to Rule 80 of the Court of Appeal Rules where the Court said as follows:

“As provided by Section 27 (1) of the Interpretation and General Provisions Act (Cap 2) the new Rule 80 came into operation on 30th August, 2002 when Legal Notice No. 152 of 2002 was published in the Kenya Gazette. Further as provided by Section 22 of Cap 2 since Rule 80 was deleted wholly and replaced by a new Rule, the old Rule 80 could only have remained in force until the new Rule came into operation ...”

Although the two propositions are correct in their own right, I think what one has to look to is the point when the time should run. For myself, I think time should be calculated from the date when the subsidiary legislation came into effect. Any other interpretation would cause unintended grief. I say this because, take for example, assuming the period introduced by the new subsidiary legislation had elapsed for a particular party when the legislation came into force, would he be precluded from seeking redress based

on the new position when he was not aware of it in the first place? I, therefore, agree with Mr Osmond that subsidiary legislation cannot be applied retrospectively. In this case, the Appellant filed the Complaint within one year of the coming into operation of the new provisions. It does not matter that the complaint was lodged about five years after the event since there was no time limit for doing so before. The Board was therefore wrong in debaring the Appellant on account of delay when there was no obligation upon her to do so within a prescribed period.

In the result, I allow the appeal by setting aside the Board's decision of 23rd September, 2003 upholding the Respondent's Preliminary Objection and substitute it with an Order dismissing the Preliminary Objection with costs to the Appellant. I hereby direct the Board to hear and determine the Complaint dated 21st May, 2003 on its merit. The Appellant will also have the costs of the appeal.

Dated and delivered at Nairobi this 12th day of October, 2005.

ALNASHIR VISRAM

JUDGE