



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO.204 OF 2002**

**LABHSONS LIMITED.....**  
**PLAINTIFF**

**VERSUS**

**MONURA HAULIERS LTD**

**T/A**

**TAUSI TRAVELLERS.....**  
**.....DEFENDANT**

**R U L I N G**

This Chamber Summons, dated 13.7.04, under Order 21 rule 22(1) & (2) and (91) of the Civil Procedure Rules, and Section 3A of Cap. 21, Laws of Kenya, seeks the following order;-

1. )
2. ) Already spent
3. That the court do set aside and discharge the warrants of attachment and sale issued against the Defendant herein.
4. That M/S Trade Point Auctioneers (Mr. Kingara) be ordered to furnish a full statement of Accounts on the attachment and sale of the Defendants goods conducted between April and May 2003.
5. Costs to be provided for.

The application is supported by the Affidavit of Mohamed Ahmed Nur of even date, and on the following grounds: That the Plaintiff/Decree Holder has consequent to the judgment entered herein on 27.9.2002, extracted a Decree and is proceeding with execution for the 2nd time; that the warrants of attachment and sale of property issued against the Defendant/Judgment Debtor, through Kanyekini Auctioneers in execution of the decree are irregular, null and void as the decree is over one year and no notice to show cause was ever taken in accordance with the Civil Procedure Rules; that the decree holder had previously instructed Trade Point Auctioneers to proclaim, attach and sell; no accounts were ever provided which, led to proceedings at the Auctioneers Licensing Board wherein the Auctioneer was convicted; and fined, and that to date, no Accounts have been provided despite conviction; the Defendant/Applicant stands to suffer irreparable damage if execution process continue before cause is shown on what happened to the recovery made in the first execution.

In opposition, the Respondent avers that the application is misconceived, and an abuse of the court process; it is incompetent and incurably defective; that the application is **res judicata**.

On 15/10/04 this court set aside and discharged the warrants of attachment and sale issued against the Defendant/Applicant herein and ordered M/S Trade Point Auctioneers [Michael Wachira Kingara] to furnish, within 14 days from that date, a full Statement of Accounts on the attachment and Sale of the defendant's goods conducted on 5/5/2004.

The reasons, which were to be given on 2/11/04 were not given because what transpired thereafter, following the second order herein, necessitated personal appearance and examination of the auctioneer – Mr. Michael Wachira Kingara – t/a Trade Point Auctioneers. That process did not end, and even then, unsatisfactorily, until 2/12/04.

However, as I ruled on that date this court has given the matter and the auctioneer more than sufficient time and the reasons, plus findings and conclusions pursuant to the interviews of the auctioneer, are long overdue.

In my opinion, and based on both the pleadings herein and the evidence of the auctioneer, under oath, this is one of the darkest events in the occupation of auctioneers in this country.

I begin with the findings that the so called auctioneer herein, violated each and every known rule within the Auctioneers Rules, 1997. He was tried and found guilty, by the Auctioneers Board, of having issued backdated proclamation; having issued defective proclamation with no valuation attached to the goods; of having over attached goods from the complainant – the defendant/Applicant herein; having used expired warrants, and having failed to give the required seven days Notice of Sale to the Judgment/debtor- Defendant. It is of significance to point out, at this stage, that the warrants used expired on 3.3.03. The sale was advertised on Saturday, 3.5.03, and the actual sale conducted on 5.5.03, the following Monday!

In exercise of its powers, the Board suspended the licence. May be the Board did not have the benefit of what was presented to the court and the gravity of what the auctioneer told and disclosed to the court under examination.

From the evidence before me, the auctioneer failed and or refused to comply with this court's order of filing a complete and comprehensive Account of the goods he attached and sold, from the defendant. The record shows that he took 102 items from the Judgment debtor, advertised for only 31 items and in his one page so called statement of account, dated 29/10/04, he shows only four (4) items, all of which fetched Shs.1,250,000/-. He says nothing at all about the other 98 items! That is why the court rejected that piece of paper as in anyway resembling what constitutes accounts as envisaged by Rule 18(4) of the Auctioneers Rules, 1997.

The above sub-rule empowers the auctioneer to remit the proceeds of the sale, less his charges, to the court or the instructing party, as the case may be. Several points arise from the above.

The provision envisages the auctioneer deducting his charges from the sale proceeds. Surely those charges must be arrived at in keeping with the rates set out in the **Fourth Schedule** of the said Rules [actually Rule 55]

From this schedule, and assuming for the moment that the attached and sold goods fetched only Shsl.1,250,000/- the auctioneer was entitled to no more than Shs.18,000/-. However, from the one page Statement referred to herein earlier, and by his own admission, the auctioneer pocketed Shs.90,000/-.

In my view, this was not only a rip off of the Judgment Debtor, but out-right theft for which the auctioneer is accountable if not to the Decree Holder, at least to the Defendant.

I need to state the kind of a person Mr. Michael Wachira Kingara – the Auctioneer – held himself to

be, at least in this Auction Sale. A fraudster who is not content to steal the 98 out of 102 items he attached, but also overcharge on his own fees and charges, notwithstanding the law that authorized him to act as an auctioneer. A person who will state one thing now, and in two minutes time, change and deny the same. For example, in the witness box, he told this court that he had submitted all the sale proceeds to the Decree Holders lawyer – Mr. Gichuki Kingara, who happens to be his own brother – before he got his fees and charges. He had apparently forgotten that he had shown, in his one-page statement, that he had deducted his commissions on sale before sending the money to the decree holder's advocates. A confirmed liar and untrustworthy person who would allegedly issue two different receipts – Nos. 423 on 5.5.03 for Prime Mover Lorry sold at Shs.1,200,000/- to Mr. Sammi Mohamed Dube, and No. 126 for the same item to the same buyer, for the same Prime Mover Lorry.

Clearly this Statement of Accounts is either fictitious or Mr. Kingara thinks he is dealing with imbeciles.

In his Affidavit, Kingara says he sold everything for less than one million shillings. His own statement of accounts – even the one page one shows that even the Prime Mover Lorry alone fetched more than Shs.1million.

Why was the auctioneer not questioned by the Decree Holder's Advocate on both the proceeds and a proper accounting for the items attached. I have already hinted at the relationship between the auctioneer and the Decree Holder's Counsel. I have no doubt that there was a conflict of interest and there is need for investigations to establish: a) how and why the counsel would not question the auctioneers unlawful fees and commissions deducted from the sale proceeds; and b) why was there no statement of account as required by the law from the auctioneer.

Under Section 23 of the Auctioneers Act, 1996, a licensed auctioneer shall: **(a) at all times act in a manner befitting an officer of the court and shall ensure that his employees, servants or agents act in like manner."**

The conduct of Mr. Kingara M.W. in no way reflects what is expected of officers of this court. This court can do with better officers than the caliber of Mr. Michael Wachira Kingara. That is why this court has, without much success, tried to find out how Kingara got licensed as an auctioneer in the first place.

Mr. M.W. Kingara's Counsel, Mr. Langi, has not been of much assistance in this respect. This court is of the strong view that were Mr. Langi not related to the auctioneer through Gichuki Kingara's law firm, he would have assisted this court, as required of all officers – Advocate of this court.

All in all, in terms of the provisions of Section 28(1) of the Auctioneers Act, No. 5 of 1996, I hereby order as follows, with respect to Mr. Michael Wachira Kingara:

1.(a). He pays to the judgment debtor Shs.72,000/- being the difference between what he unlawfully paid himself as fees and commissions and what the law would have given him had he followed the same.

(b). Revoke, with immediate effect, Mr. M.W. Kingara's auctioneers licence. This will protect innocent Kenyans from exploits of such crooks from their midst. The Auctioneers Board to take the necessary steps to ensure compliance with this order.

(c) Mr. M.W. Kingara to comply with this Court's order No. 3 of 2/11/04 within the next 14 days from today's date, failing which he will be in contempt of this court with all the attendant consequences thereto.

2. Further, as Ruled on 15/10/04, it would be total injustice for this court to permit any further execution before full and comprehensive Statement of accounts by the Auctioneer, who was acting on the instructions of the Decree Holder or the Decree Holder's Advocates. The Warrants of Attachment and sale issued against the defendant were set aside and discharged.

DATED and delivered in Nairobi this 7th day of December, 2004.

**O.K. MUTUNGI**

**JUDGE**