



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIV APP 383 OF 00

CHARLES AMBUNYA KHAMALLAAPPELLANT

VERSUS

THE AUCTIONEERS LICENCING BOARDRESPONDENT

JUDGMENT

This appeal is against the decision of the Auctioneers Licensing Board made on 17th May 2000 in which it was resolved that the licence of the appellant Charles Ambunya, trading as Wambura Investments be revoked under Section 24(4) of the Auctioneers Act and/or that it be not renewed.

The decision arose from complaints made by a firm of lawyers known as Kipkorir Titoo and Kiara Advocates, firstly in an affidavit sworn on 19th January, 2000 by one of the partners of the firm known as Donald B. kipkorir and filed in court on 29th February, 2000 and secondly in the submissions made before the Board by the said Kipkorir on 17th May, 2000, aforesaid.

The complaints related to instructions given to the appellant firm of auctioneers in Nairobi High Court Civil Case No. 739 of 1999 and Nairobi Resident Magistrate's court Civil Case No. 7640 of 1998. Two (2) complaints were raised in respect to the High Court case, namely: The firm of auctioneers;

- (a) failed to remit any money or at all realized in the auction,
- (b) failed to surrender motor vehicle registration number KAG 211 H.

As regards the Resident Magistrate's court case, the auctioneers were accused of having:-

- (a) failed to remit the full sum received from the judgement debtor, and
- (b) failed to disclose how much they received from the sale of the attached goods.

A third complaint was that in both cases the firm of auctioneers had failed to reply substantively or at all to the advocates' letters. The appellant swore two affidavits on 16th May, 2000 to deny any wrong doing in respect to instructions given on both cases. In respect to each case, he blamed the delay on objections filed after execution by attachment had been carried out and lack of cooperation on the part of the firm of instructing lawyers.

At the Board on 17th May, 2000, Kipkorir laid out the case for the complainant while Mr. Namada submitted for the respondent. What Kipkorir said was that in respect to the High Court case, the appellant did not come back to the lawyers after warrants of attachment were issued to them to say whether any attachment had been carried out. That it was by letter dated 24th August, 1999 that the appellant got back

to the advocate but remitted no money.

By this letter the appellant informed the advocate that motor vehicle registration number KAG 505 peugeot had been attached and sold at Kshs.80,000/= but that the instructing lawyer thought this price was too low and instructed the appellant to refund the money and return all the goods. That after these instructions, contained in a letter dated on 16th August, 1999, there had been no response from the firm of auctioneers despite more correspondence to them in relation to this matter. As regards the Resident Magistrates court case, Kipkorir complained that after the firm of auctioneers got the warrants, they never got back to the instructing lawyer to say whether or not the execution had been carried out. That the auctioneer only sent the lawyer Kshs.60,000/= which was forwarded to the client. That that lawyer's letters to the auctioneer inquiring as to what goods were attached, the proceeds of sale or auctioneers bill of costs went unanswered.

That he wrote to say he had sold a computer for Kshs.25,000/= but that when the lawyer told him to pay over the money, there was no reply. That the firm of auctioneers had not responded to numerous correspondence written to them or given particulars of attachment or a breakdown of their charges. Namada for the appellant referred to the replying affidavits and the annexures in both the High court and the Resident Magistrate's court cases.

According to counsel, after the objection was lifted in the High Court matter, the attached goods were sold and the lawyer appraised of the matter at every stage of execution. That details of the goods attached was given to the lawyer as well as the amount realized at the auction. That it was when the lawyer instructed that the goods already sold be restituted and the money refunded that this problem started. Counsel for the appellant stated that this was obviously a difficult task as it entailed the auctioneer looking for the buyers and persuading them to return the property bought.

That only the purchaser of the motor vehicle was traced but that even then, he refused to return the motor vehicle except on resell. That though he had bought at Kshs.80,000/= he resold it to the auctioneer at Kshs.150,000/=. Counsel tried to show that out of Kshs.196,900/= received on account of the property auctioned, the auctioneer used Kshs.30,000/= to repair the vehicle which was found to be in a bad state of repair when retrieved from the buyer and that a balance of Kshs.16,000/= was used to reimburse the auctioneers for the expenses incurred at the auction and tracing the motor vehicle for restitution.

Counsel submitted further that the main dispute between the parties here arose when the advocate requested that the restituted motor vehicle be surrendered to him and the appellant refused. That all along the complaint advocates were aware of what was going on or why there was no remittance in the High Court Case. That in respect to the Resident Magistrate's Courts Case, instructions were given by the complaining advocate for the appellant to auction the attached goods but that in between there was another firm of advocates who intervened.

That it was during this time that a sum of Kshs.60,000/= was paid and the auction held in abeyance pending payment of instalments.

That the auctioneer wrote to the complainant – advocate to tell him he had declined a bid for Kshs.25,000/= for the computer but the complainant told him to accept the offer, but that the bidder did not come back to buy the computer. That out of this attachment Kshs.10,000/= was sent to the complainant and another Shs.10,000/= used to offset the auctioneers charges.

The Boards decision, after hearing both sides was as follows:-

1. The auctioneer executed in Eldoret while Auctioneer had jurisdiction only in Nairobi.
2. Executed expired warrant.
3. Failing to return executed warrants to court.

4. Failing to account for the proceeds of attachment.
5. Failing to respond to Decree-holders instructions.
6. Bought back an auctioned vehicle with proceeds of the auction sale and keeping it for personal use.

Resolved:

1. To reject the application for reviewal of his licence,
2. Licence Revoked under S. 24© of the Auctioneer's Act.

This decision gave rise to the appeal filed herein in a memorandum of appeal dated 27th July, 2000 and filed in court on 31st July, 2000. It had 6 grounds of appeal, namely, that:-

- (1) The Board (respondent) erred in law and in fact in going a head to make a determination on matters that did not form part of the complaint;
- (2) The Board (respondent) erred in law by convicting/condemning the appellant on matters he had not been given a chance to be heard;
- (3) The Board erred in law and fact by failing to consider the evidence adduced by the appellant in arriving at its decision.
- (4) The Board erred in law and fact by finding that the appellant did not perform his duties as per the law and instructions received.
- (5) The Board contradicted itself in its findings and ruling.
- (6) The Board acted and meted out an excessive ruling thus erred in law and fact in revoking the appellants licence in the circumstances.

The appeal was heard by this court on 18th November, 2002 when only counsel for the appellant appeared and submitted on it. Counsel for the respondent, though served with a hearing notice did not turn up, hence the appeal was heard exparte. Counsel submitted on this appeal on the basis of the replying affidavit and repeated verbatim the submission made before the board.

In respect of the High Court case, Counsel submitted that there was a statement when the advocate complainant told the appellant to surrender to him the attached motor vehicle which the auctioneers declined to do and that this gave rise to the first complaint. That in respect to the Resident Magistrate's court case, after the judgement debtor paid Kshs.60,000/= to the auctioneer, who forwarded it to the complainant – advocate, he was writing to readvertised the auction when the second complaint was lodged.

According to counsel the Board made decisions on matters which were not part of the complaint and on which he was not given an opportunity to be heard. That the appellant did not fail to account for the proceeds of the auction and that the complainant – lawyer had been kept informed of the proceedings of the auction. That buying back the motor vehicle subject of an earlier auction was with express instructions of the complainant – lawyer and that the auctioneer had performed his duties well and as per the law. He said the decision to revoke the appellant's licence was wrongful punitive and excessive. He prayed that this appeal be allowed and the decision of the Board set aside with costs. These are the submissions made before this court and the Board and from which the court should make a finding one way or the other.

As regards the complaint over the High Court Case, the documents attached to the complaint were a preliminary decree, the application for execution, a letter dated 2nd September, 1999, a letter from the appellant dated 26th October, 1999 and another dated 10th December, 1999 from the respondent.

The letter dated 2nd September, 1999 wanted the fee note from the auctioneers based on the amount realized at the auction and queried why motor vehicle registration number KAG 211H was sold for only Kshs.80,000/=. The appellant's letter of 26th October 1999 was a reply to the complainant's letter dated 4th October 1999 (not attached) informing the latter that the motor vehicle had been reclaimed. The letter of 10th December 1999 sought an explanation in terms of the meeting between the parties on 7th December, 1999 and remission of sums held by the auctioneer by 17th December, 1999 failing which a complaint would be lodged with the Auctioneers Board.

This meeting must have been held on request by the complainant in their letter dated 2nd December, 1999. The notes taken down, if at all, of the meeting of 7th December, 1999 were not attached hence this court could not tell what the discussions were all about. But from the letter of 7th December, 1999 the appellant must have been asked to explain the sale of motor vehicle registration number KAG 211H and/or the remission of the moneys received following the auction in that case. I do not see this explanation anywhere on the lower court record or in this appeal.

As regards the Resident Magistrate's case No. 7640 of 1998, there was a letter dated 19th May 1999 seeking to know the status of the auction; another dated 8th June 1999 to find out if execution had been carried out, another dated 13th August, 1999 giving notice that if no response was received in this matter the warrants would be recalled, another dated 5th October 1999 finding out if the attached goods had been sold or whether the judgment debtor had paid Kshs.97,000/= or Kshs.60,000/= to the appellant in that case. There was also a letter dated 10th November, 1999 asking the appellant to remit any sums held by them to the complainant, reminding the former about the requirement of rule 18 of the Auctioneers Rules. All the latter correspondence show no replies attached and, may be, this is the reason why the complainant complained that in either case the appellant did not reply to any correspondence or that he did not remit the monies received from the auctions.

However, in a replying affidavit by the appellant, he attaches a letter from the complainant which required that the attached goods in the auction in respect to the High Court Case No. 739 of 1998) be returned, "wherever they may be and that you reimburse the money to all the purchasers." The appellant attaches memorandum of sale of motor vehicle, it is not indicated which vehicle, at Kshs.80,000/=, proclamation's for motor vehicle number KAG 211H and an inventory of the goods attached in that case.

In regard to the Resident Magistrate's court case, an inventory of the attached goods was attached, a letter dated 26th October 1999 showing sale of television set at Kshs.10,000/= and decline to sell the computer at Kshs.25,000/= which the complainant later authorized the appellants to do in their letter dated 29th October 1999. Much as the appellant in each case attempted to respond to the complainant's correspondence, they avoided to respond to those requiring remittance of the sale proceeded to the complainant. And indeed the appellants remitted no money to the respondent. All the amounts received were said to have been expended on the auctioneer's so called charges.

Of course when the complainant instructed the appellant to retrieve the goods attached and sold in High Court Civil Case No. 739 of 1998 and to refund the purchase price he created more problems and expenses for the former who had to go round looking for the purchasers of the motor vehicle to retrieve it. I am not aware of any provision in the Auctioneers Act No. 5 of 1996 for the kind of exercise the complainant engaged the appellants in.

But the Auctioneers Act and rules require that once an execution by attachment is carried out and the goods in respect thereof auctioned, all the proceeds should be remitted to the decree holder with a fee note of the auctioneers charges. Yet there is a habit formed by auctioneers selling attached property and simply making a return to show that all the proceeds have gone towards offsetting the expenses of the auction and this is the mode employed by the appellant herein by implication. In the High Court case he received Kshs.196,900/= and said he used Kshs.150,000/= to repurchase the motor vehicle, Kshs.30,000/= to attempt to repair the motor vehicle and Kshs.16,000/= to offset costs which went with the auction.

If the motor vehicle KAG 211H was sold at Kshs.80,000/=: a very unrealistic price for a vehicle of that class, make and model, why use money from the other sales to repurchase and repair the same? And

where did the appellant get authority to repurchase and repair that motor vehicle. These must have been the questions the appellants were required to explain in the complainant's correspondence but which they avoided doing.

As regards the Resident Magistrates case, there was some explanation about the sale of the computer but not sufficient explanation about the sale of the television set. In any event, after the first bidder allegedly failed to come and complete the exercise the appellant seems not to have taken any positive step to complete this sale not were there produced before the Board any document to confirm alleged sales, repurchase and/or expenses. In cases before the court or a quasi-judicial tribunal as the Board herein, submissions and the decision must be based on pleadings.

In the complaint subject to this appeal, there was no complaint about the execution of warrant's outside the jurisdiction of the auctioneer's scope of work. Even if this were so, then I would not say if the appellant was solely to blame for this oversight. There was no complaint either about the execution of expired warrants, though the complaint attempted to feature it in the submissions.

I am not even convinced that there was a complaint about the return of the warrants to court or rebuying the auctioned vehicle with proceeds of the auction sale and keeping it for personal use. It would then seem the boards decision on all these matters was superfluous. However, there was ample evidence and/or submissions to show that the appellants failed to account for the proceeds of attachment and also failed to respond sufficiently to the decreeholder's correspondence or instructions. The punishment to be meted out to the auctioneer in the event of being found "guilty" of misconduct is found in Section 24(4) of the Auctioneers Act.. It is eight (8) fold namely:-

- (a) The auctioneer can be admonished,
- (b) His licence can be suspended for a period not exceeding six (6) months,
- (c) His licence can be revoked
- (d) Such condition or conditions as the Board deems appropriate can be attached to the auctioneers licence.
- (e) He can be ordered to pay a fine not exceeding Kshs.100,000/=.
- (f) He can be ordered to pay compensation not exceeding Kshs.100,000/= to the person demnified by the auctioneer's misconduct,
- (g) That he can be disqualified from holding a licence for such period as the Board thinks fit and
- (h) Such combination of the above orders as the Board thinks fit .

To my mind the order to revoke the auctioneers licence must be the harshest measure the Board should take and more so when the auctioneer has become impossible to reform.

In the complaint subject to this appeal the previous record of the appellant was not availed to show he deserved this, otherwise very severe punishment. There was no record that this auctioneer had once been warned or suspended. In the circumstances, the punishment imposed upon the appellant was excessive and that I do hereby set it aside and direct that the period of 2 years 5 months the appellant has been in the cold be constituted as suspension of his licence.

In addition, the appellant do pay to the Board a fine of Kshs.80,000/= upon payment of which his licence to be restored. To this extend the appeal stands allowed.

Delivered this 27th day of November, 2002.

D.K.S. AGANYANYA

JUDGE