



First Assurance Company Limited v Muchendu t/a Icon Auctioneers (Civil Appeal E606 of 2024) [2025] KEHC 10040 (KLR) (Civ) (1 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10040 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E606 OF 2024

JM NANG'EA, J

JULY 1, 2025

BETWEEN

FIRST ASSUARANCE COMPANY LIMITED APPELLANT

AND

JEREMIAH KIARIE MUCHENDU T/A ICON AUCTIONEERS RESPONDENT

(Being an Appeal against the Decision of the Auctioneers Licensing Board in Disciplinary Cause No. 12 of 2022 delivered on 20th November, 2023.)

JUDGMENT

1. This is an appeal that arose from the decision of the Auctioneers Licensing Board (“the Board”) that followed the Appellant’s Complaint lodged with the Board on 3rd March, 2022 against the Respondent in Disciplinary Cause No. 12 of 2022. Based on the record, the Appellant had complained that the Respondent irregularly proclaimed and attached its property and further falsely obtained a sum of Kshs. 1,900,000 purported to be Auctioneers’ fees. The Appellant’s Assistant Legal Manager (Sophie Omolo) deposed that on 16th June 2021 the Appellant obtained an order of stay of execution of judgement entered against it upon a Civil Suit No. 6039 of 2019 filed by its insured client (Shoko Molu Beko) before the lower court. The ex-parte stay order was to subsist for 30 days from the stated date pending hearing of the stay of execution application inter-partes. Notwithstanding, the Respondent proclaimed the Appellant’s property on 18th June 2021 before the lapse of the stay order.
2. The Appellant further deposes that this court later on 26th October 2021 ordered stay of execution of the impugned judgement pending appeal, on condition that the Appellant paid out Ksh. 4,000,000 to its insured client and deposit the balance of the Judgement sum of Ksh. 5,222,509 into a joint interest- earning account in the names of both parties. According to the Appellant, the period within which this order was to be complied with was to lapse on 26th November 2021. The Respondent is,



however, said to have proceeded to attach the Appellant's property on 30th November 2021 instead of only proclaiming the same first as is legal procedure. The Appellant further avers that it successfully obtained an order staying the attachment from the lower court, but at the time the order was issued the Respondent had already taken away the attached property. Upon negotiating with the Respondent, the Appellant agreed to pay the sum of Kshs. 4,000, 000 to satisfy the terms of the stay order adverted to above and its property was released upon payment of the sum.

3. The Appellant continues to contend inter alia that the Respondent subsequently coerced it to pay a sum of Ksh. 1,900,000 claimed to be Auctioneers fees. Then on 2nd December 2021 the Appellant's advocates wrote to the Respondent seeking to be provided with an itemized Bill of Costs.
4. Despite the foregoing, the Respondent's agents are said to have returned to the Appellant's premises on 7th December 2021 in possession of break-in orders obtained from the lower court yet this court had ordered maintenance of status quo until 20th January 2022. On learning about this illegality the lower court is said to have reprimanded the Respondent in its ruling delivered on 10th December 2021.
5. The Respondent in his Replying Affidavit sworn on 18th July, 2022 denies the allegations. It is contended that by the time of proclamation of the Appellant's property, the Respondent was unaware of stay of execution orders, none having been served upon them. Further, the Respondent deposed that the High Court stay orders, in any event, lapsed on 26th November 2021 as confirmed by the Appellant and so they were not barred from levying attachment. According to the Respondent, the Appellant had not also complied with this court's conditions for grant of stay orders pending appeal alluded to hereinabove. The Respondent therefore denies committing any illegalities, adding that the itemized Bill of Costs the Appellant refers to had already been sent to them and was the basis for payment of the Auctioneers fees of Kshs. 1,900,000.
6. In his Supplementary Affidavit sworn on 18th November, 2022, the Respondent claims that the sub judice rule was breached since there were proceedings in Milimani Commercial Civil Suit No. 6039 of 2019 touching on the same subject and the same parties.
7. The Complaint was heard by way of written submissions with the parties filing their respective submissions. After consideration of the Complaint, the Board in its Ruling delivered on 27th November, 2023 found that the Respondent obtained orders seeking police assistance in breaking into the Appellant's premises from the Magistrate's Court, without disclosing material facts as noted in the Magistrate's Ruling of 10th December 2021. For that reason, the Board admonished the Respondent for the professional misconduct.
8. The Appellant, aggrieved by the said decision, lodged this appeal setting out five (5) grounds in its Memorandum of Appeal dated 19th May, 2024 to wit:
 - a. That the Auctioneers Licensing Board grossly misdirected itself in treating the evidence and the submissions on the complaint before it and consequently coming to a wrong conclusion on the same;
 - b. That the Auctioneers Licensing Board grossly misdirected itself in ignoring the principles applicable and relevant authorities on the Complaint cited in the written submissions presented and filed by the Appellant;
 - c. That the Auctioneers Licensing Board proceeded on wrong principles when admonishing the Auctioneer and failing to appreciate that the 1,900,000 paid to the Auctioneer/Respondent was done under duress and coercion and it failed to apply precedents and tenets of the law applicable;



- d. That the Auctioneers Licensing Board erred in failing to appreciate the fact that the Auctioneer/Respondent served proclamations upon the Appellant irregularly despite the subsistence of a Court Order and as such occasioning miscarriage of justice;
 - e. That the Auctioneers Licensing Board failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision that was unsustainable.
9. The Appellant is therefore seeking that the Appeal be allowed, the judgement and order of the Board made on 27th November, 2023 be set aside, costs be awarded to the Appellant and the Court be pleased to make such further and other orders it deems just in the circumstances.
 10. The Court directed that the appeal be canvassed by way of written submissions.

Appellant's Submissions

11. The Appellant in its submissions dated 24th June, 2024 through Counsel maintains that the contentious Proclamation was irregular. The Court had granted stay orders on 16th June, 2021 and the same were served on the insured's advocates but the insured proclaimed the Appellant's property on 18th June, 2021 while the stay orders were subsisting.
12. It is Counsel's submission that the Respondent should have proclaimed the Appellant's property first before going to the Appellant's premises on 30th November, 2021 to attach the property. Reliance in this regard is placed on the judicial pronouncement in [Ruto Kimngetich Arap Cheruiyot v Peter Kiprof Rotich](#) [2006] eKLR.
13. It was further the Appellant's submission that the Respondent intimidated the Appellant by attaching its properties and refusing to cease attachment unless the payment of Kshs. 1,900,000 in Auctioneers' fees was paid. It was contended further that the impugned orders from the Magistrates Court were unlawful as the Respondent failed to disclose the existence of High Court orders in contravention of Section 23 of the [Auctioneers Act](#).
14. The Appellant further submitted that the Respondent was not entitled to the Kshs. 1,900,000 since the entire process was irregular and no party is entitled to benefit from an illegality. Reference is made to the decision in [Savanna International Limited v Leonard Wanyonyi Karani](#) [2010] eKLR where the Court is said to have found execution in similar circumstances to be irregular there being stay orders in existence. Case law in [Karuri Store Pharmaceutical Ltd & Another v Acacia Medical Centre Limited](#) [2021] eKLR is also said to be relevant as the Court found that an Auctioneer was not entitled to any charges out of an illegal and unlawful attachment

Respondent's Submissions

15. The Respondent in opposing the Appeal filed submission dated 5th July, 2024 through his legal Counsel arguing that the Board properly applied its mind to the evidence and the law in reaching the impugned decision.
16. It is also submitted that the by admonishing of the Respondent, the Board was acting in accordance with Section 24 (4) of the [Auctioneers Act](#) and the appellant should have instead filed a Judicial Review application if it felt aggrieved.
17. As regards the payment of the Kshs. 1,900,000 as Auctioneers' fees, the Respondent asserted that he was entitled to the fees having regularly proclaimed and attached the Appellant's property procedurally. It was the Respondent's argument that the Appellant on their own accord made the payment and there was no proof of duress or coercion.



18. Further, there was no proof of service of the stay orders and therefore the proclamation was in accordance with Rule 12 of the *Auctioneers Act*, adds the Respondent.
19. The Respondent therefore accuses the Appellant of wrong doing for forum shopping and non-compliance with the conditions of stay imposed by Court.

Analysis and determination

20. I have considered the Record of Appeal, the proceedings on record, the evidence as well as the rival submissions. This is a first Appeal and by dint of Section 25 of the *Auctioneers Act*, the final appeal. This Court is duty bound to re-evaluate the evidence presented before the Board and reach its own independent conclusions. In *Paramount Bank Limited v First National Bank Limited & 2 others* [2023] KECA 1424 (KLR) it was held *inter alia* that:-

“...A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the Civil Procedure Act, a first Appellate Court can appreciate the entire evidence and come to a different conclusion...”

Whether the proclamation was regular

21. The main issue for determination by the Board was the legality of the proclamation during the subsistence of the stay orders of 16th June, 2019 and attachment of the Appellant’s property based on that proclamation.
22. The Appellant maintains that the Proclamation was irregular as the same was done when the orders of 16th June, 2021 were subsisting. The Respondent insists that he was never served with the stay orders and had therefore lawfully proceeded to proclaim the Appellants’ property.
23. It is not in dispute that the Appellant had obtained stay orders against execution of the decree issued in CMCC No. 6039 of 2019. The Respondent served the Proclamation on 18th June, 2021. The Appellant does not state when the Respondent’s advocates were served with the stay orders.
24. Nonetheless, from the Ruling of the Board it appears that the Order was served on the 23 June, 2021. The Board noted that:-

“The Order annexed as SO-2 was served on the 23rd of June, 2021 at 12.20 pm...”

25. With no evidence to support the assertion that the Respondent was aware of the existence of the order, I find no reason to disagree with the finding of the Board. The proclamation was thus regular in the circumstances.

Whether the sum of Kshs. 1,900,000 was obtained by coercion or duress

25. The Appellant has argued that the Auctioneer’s fees were not warranted as the process was an illegality from the onset, and further in the face of the intimidation by the Auctioneer.



26. In *Mohammed Ahmed Aboun & Another v Mini Bakeries (MSA) Limited* [2017] eKLR, the court in defining duress stated as follows:-

“..... Duress is broadly defined in Black’s Law Dictionary, 8th edition as: “a threat of harm made to compel a person to do something against her will or judgment” and strictly, as”“the physical confinement of a person or the detention of a contracting party’s property...”

27. Having regularly proclaimed the property, there was nothing to stop the Respondent from proceeding with attachment. On 26th October, 2021, the Appellant was issued with conditional stay orders lapsing on 26th November, 2021. Once again there was nothing to stop the Respondent from proceeding with attachment thereafter. The Appellant complied with part of the conditional stay orders on the day the Respondent proceeded to its premises and attached its property.

28. This Court has already found that the proclamation and attachment were regular. The claim that payment of the Auctioneers’ fees was procured under undue pressure does not therefore arise. This issue is thus determined in the negative.

Whether the decision of the Board should be set aside

29. As regards the Appellant’s Complaint, Section 24 (4) and (5) of the *Auctioneers Act* provide for the Orders that the Board can make to wit;

“(4) After hearing the complaint and the licensed auctioneer to whom the complaint relates, if he wishes to be heard, and considering the evidence adduced, the Board may order that the complaint be dismissed or if it is of the opinion that a case of misconduct on the part of the auctioneer has been made out, the Board may order—

- a. that the licensed auctioneer be admonished; or
- b. that the auctioneer’s licence be suspended for such period, not exceeding six months as the Board thinks fit; or
- c. that the auctioneers licence be revoked; or
- d. that such condition or conditions as it deems appropriate be attached to the auctioneer’s licence; or
- e. that the licensed auctioneer pay a fine not exceeding one hundred thousand shillings; or
- f. that the licensed auctioneer pay compensation not exceeding one hundred thousand shillings to the person damnified by his misconduct; or
- g. that the auctioneer be disqualified from holding an auctioneer’s licence for such period as the Board thinks fit; or
- h. such combination of the above orders as the Board thinks fit



(5) The Board may make such order as to the payment by any party of any costs or witness' expenses and as to the expenses of the Board or the members thereof in connection with the hearing of any complaint as it may think fit.”

30. Auctioneers charge their fees in conformity with Paragraph 4 of Part II of the Fourth Schedule of the Auctioneers Rules. Any departure from that may amount to unjust enrichment. The Appellant contended before the Board that the Respondent failed to give an itemized Bill of Costs and this amounted to arm twisting them into making the payments. The Board does not appear to have addressed this complaint. As the Board rightfully noted, however, unless a Bill of Costs is raised and challenged there is no way of establishing whether or not the amount charged by the Auctioneer is excessive. The Appellant is at liberty to lodge an appropriate application before the Board or the lower court for proper assessment of the Bill. As it is, no specific remedy over this particular complaint is sought in the appeal. The lower court has in fact given redress to some of the complaints the Appellant raises herein in its Ruling of 10th December 2021.

31. This Court therefore finds no basis on which to fault the Board for only admonishing the Respondent as that is lawful exercise of its powers under Section 24 (4)(a) of the *Auctioneers Act supra*.

32. In the end I find and hold that the appeal is without merit and is dismissed with no orders as to costs.

J. M. NANG'EA

JUDGE.

JUDGEMENT DELIVERED VIRTUALLY ON THIS 1ST DAY OF JULY 2025 IN THE PRESENCE OF;

The Appellant's Advocate, Mr Ndumo for Mr Ochieng.

The Respondent's Advocate, Mr Kithure.

The Court Assistant, Jeniffer.

J. M. NANG'EA,

JUDGE.

