



Kifedha Limited v Kinuthia t/a Immediate Auctioneers & another (Civil Appeal E899 of 2022) [2024] KEHC 9313 (KLR) (Civ) (18 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9313 (KLR)

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

CIVIL

CIVIL APPEAL E899 OF 2022

AB MWAMUYE, J

JULY 18, 2024

BETWEEN

KIFEDHA LIMITED APPELLANT

AND

**GEORGE MBAGU KINUTHIA T/A IMMEDIATE AUCTIONEERS 1ST
RESPONDENT**

RYAYAN OCHIENG KANYADONG 2ND RESPONDENT

JUDGMENT

1. The Small Claims Court in Nairobi SCCOMM No. E3234 of 2022 found that the Appellant was liable to pay the 1st Respondent the sum of Kes. 608,361.00 plus costs arising from the 1st Respondent's performance of auctioneering services against the 2nd Respondent as instructed by the Appellant.
2. The Appellant faults the lower court for finding that the Appellant was liable to pay the auctioneers' fees. In the Appellant's Written Submissions dated 16th May, 2024 the Appellant contends that the lower court misinterpreted and misapplied Rule 7 of the Auctioneers Rules, 1997. The Appellant argues that none of the three grounds upon which the auctioneer's charges are to be paid by the creditor (the Appellant) and not by the Debtor (the 2nd Respondent) were proved before the Trial Court, namely:
 - a. That the Debtor could not be found; or
 - b. That the Debtor had no goods upon which execution can be levied; or
 - c. That the proceeds of the sale were insufficient to cover the auctioneer's charges.



3. The Appellant further argues that the 1st Respondent is himself to blame for the situation that was before the lower court. The Appellant points to the Auctioneer's Letter dated 19th May, 2020 in which the 1st Respondent stated to the 2nd Respondent that the 2nd Respondent would have to clear the auctioneer charges and costs before the 2nd Respondent's motor vehicle could be released to him. The Appellant also relies on its letter dated 3rd March, 2020 addressed to the 1st Respondent in which it advised the auctioneer to ensure that any costs or charges are recovered by the auctioneer before the release of any goods to the 2nd Respondent.
4. With the 2nd Respondent not participating, the only rebuttal offered against the Appellant's position is by way of the 1st Respondent's Written Submissions dated 23rd May, 2024. In those written submissions, the 1st Respondent disagrees with the Appellant's interpretation of Rule 7 and seeks to extend the ambit of Rule 7(c) to cover instances where no sale took place. The 1st Respondent contends that where the intended sale of repossessed or attached assets of a debtor are not sold by public action due to the express instruction of the creditor to the auctioneer, then it is the creditor as the instructing party who should bear the auctioneer's costs and charges.
5. The 1st Respondent cited and relied on two High Court decisions in support of his contention; that of Okwany J in *Kenya Oil Company Limited V Jovan Kariuki T/A Moran Auctioneers* and that of Ngetich J in *Francis Mwatha Macharia T/A Freeman Auctioneer Services V Tata Africa Holdings (Kenya) Limited*.
6. The impugned judgment of the Small Claims Court dated 3rd October, 2022 made clear on what basis judgment was entered. The Learned Adjudicator made clear that the Small Claims Court was enforcing the Auctioneers Licensing Board Ruling in Taxation Cause No. 03 of 2022 in which the Board taxed the Auctioneer's Bill of Costs dated 17th January, 2022 at Kes. 608,361.00. I agree with the Learned Adjudicator that the issues being raised by the Appellant herein in should have been raised before the Board, or on appeal from the decision of the Board; and that the Small Claims Court role was limited to enforcement of the finding of the Board.
7. The Appellant is not arguing that it had no notice of the Board's decision. That the Appellant was notified of the Board decision was a claim made during examination-in-chief by CW1 before the lower court, who testified that after obtaining the ruling the 1st Respondent informed the Appellant vide a letter dated 5th April, 2022 which was delivered on 12th April, 2022 but not responded to. This claim was not addressed in cross-examination nor was it rebutted during the Appellant's case before the lower court. Thus, it was an still is an undisputed fact, and the Appellant should have moved to the High Court under Section 25 of the *Auctioneers Act* within thirty days of the 12th of April, 2022. The Statement of Claim was dated 27th May, 2022 and was filed after the lapse of the appeal window.
8. This position holds true despite Paragraph 4 of the Memorandum of Appeal dated 2nd November, 2022 stating that the Appellant was not served with the proceedings of the Board or made aware of the matter pending before it, and that it also was not privy to the ruling of the Board. While the Paragraph 3(c) of the 1st Respondent's Response to the Claim which was dated 4th July, 2022 avers that the Appellant was a stranger to the assertion in the Claim that it had been notified of the Board's decision, this was not satisfactorily canvassed by the Appellant at the trial stage and it was not brought up during cross-examination of the 1st Respondent at the trial or in the Appellant's case at the trial stage. Indeed, that argument is entirely missing from the Witness Statement of Abackson Nduma dated 12th July, 2022; which was adopted without cross-examination on 30th September, 2022.
9. On the contrary, the Appellant has included at pages 16 to 17 of the Record of Appeal a Demand Letter dated 5th April, 2022 addressed to it and drawn by the law firm of Makuno Gacoya & Associates acting



for the 1st Respondent. In the third paragraph of that Demand Letter, the 1st Respondent's Advocates state as follows:

“That our client prepared and served you with an Auctioneer's Bill of Costs dated 17th January 2022 and presented the same for assessment/taxation by the Auctioneers Licensing Board and the bill was taxed at Kshs. 608,361 as per the certificate of costs issued by the Board dated 20th January 2022 a copy of which is enclosed herewith.”

10. The Appellant should have moved to the High Court under Section 25 of the *Auctioneers Act* within thirty days of receiving the written notice of the Board's decision which was dated 20th January, 2022. It did not. The present Appeal is not against the decision of the Board but rather of the Small Claims Court, which cannot be faulted for its judgment because what was presented before it was by that time a case fait accompli whose determination was inevitable in only one direction.
11. On appeal, this Court cannot reopen the question of whether costs should have been awarded against the Appellant, as that should have been done under Section 25 of the *Auctioneers Act* and within thirty days of being notified of the Board's decision; and not under Section 38 of the *Small Claims Court Act* which is the basis of the present Appeal.
12. The Appellant did not raise an objection to the jurisdiction of the Small Claims Court to hear and determine the claim before the Small Claims Court by contending that the Small Claims Court has no jurisdiction to hear and determine a claim under contract which originates from taxation by the Auctioneers Licensing Board and neither was such an argument made before this Court. It remains the position that the Appellant's entire appeal is based on the assertion that the Small Claims Court should have found the 2nd Respondent solely responsible for the 1st Respondent's costs and charges and that it was the 1st Respondent's own fault that his costs and charges were not paid since he released the 2nd Respondent's motor vehicle without having been paid in full.
13. However, even that argument by the Appellant has no merit. RW1 made clear during his testimony on 30th September, 2022 that he wrote the letter dated 3rd March, 2022 instructing the 1st Respondent to release the 2nd Respondent's motor vehicle after the 2nd Respondent had made some payment to the Appellant. By doing so, the Appellant removed the situation from the ambit of Rule 7 of the Auctioneers Rules and became contractually liable for the costs, charges, and fees of the 1st Respondent.
14. When an instructing debtor such as the Appellant instructs an auctioneer such as the 1st Respondent to return a repossessed and attached asset of a creditor such as the 2nd Respondent herein, the instructing creditor assumes the duty that would devolve to the debtor under Rule 7 of the Auctioneers Rules; namely, to pay the costs and charges of the Auctioneer. In the present situation, this responsibility was heightened by the fact that the Appellant instructed the release of the motor vehicle after having received some payments from the 2nd Respondent; and at that juncture the Appellant should have settled its accounts with the auctioneer it instructed and whose actions yielded some fruits.
15. Either of the above two limbs would have been sufficient in of itself to consign this Appeal to dismissal with costs, in light of the factual circumstances that led to the lower court case as well as the nature of the appeal brought before this Court. Consequently, the Appeal herein is dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF JULY, 2024.

BAHATI MWAMUYE

JUDGE



In the presence of:

Mr. Bore Counsel for the Appellant

Mr. Gachimu Counsel for the 1st Respondent

2nd Respondent has not been participating

Mr Guyo, Court Assistant

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