



Matalang'a t/a Rheemat Auctioneers v Auctioneers Lisencing Board & another (Civil Appeal E769 of 2021) [2024] KEHC 12957 (KLR) (Civ) (24 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12957 (KLR)

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

CIVIL

CIVIL APPEAL E769 OF 2021

JN NJAGI, J

OCTOBER 24, 2024

BETWEEN

HENRY SISHIA MATALANG'A T/A RHEEMAT AUCTIONEERS . APPELLANT

AND

AUCTIONEERS LISENCING BOARD 1ST RESPONDENT

JOSHUA SINDIGA OMBOGI 2ND RESPONDENT

(Being an appeal against the judgment and decree of Auctioneers Licensing Board dated 28th October 2021 and dispatched on 8th November 2021 in Disciplinary Cause No. 50 of 2020)

JUDGMENT

1. The 2nd Respondent herein brought a complaint against the appellant before the Auctioneers Licensing Board after the appellant who trades as an auctioneer distressed for unpaid rent on the 2nd respondent's goods and sold his household goods that had not been proclaimed prior to being sold. The Board held that the auctioning of goods not proclaimed was in contravention of Section 12(1) of the *Auctioneers Act*. Consequently the Board fined the appellant a sum of Ksh.100,000/=, ordered him to return all the carted away goods or the value thereof as per the Notification for Sale and the record and to pay the 2nd respondent costs of Ksh.100,000/=. The appellant being dissatisfied with the judgment and decree of the Board dated 28th October 2021 and dispatched on 8th November 2021 filed a memorandum of appeal dated 22nd November 2021 based on the following grounds:

1. That the Honourable Board erred in fact and in law by holding that no proper proclamation was done for reasons that the items in the Proclamation Notice were more than the items in the Notification of sale yet the Auctioneers Rules, Under Rule 12(2) allows the Auctioneer to



attach other goods not previously proclaimed and hence it is not the law that the items only proclaimed should the one to be attached.

2. That the Honourable Board erred in fact and in law by holding that the ‘carting away’ of the attached goods by the appellant in carrying out his amounted to eviction of the 2nd respondent from the premises and that the same is unprocedural for want of a court order for eviction to that effect.
 3. The Honourable Board erred in fact and in law by holding that there was no evidence of advertisement for sale by the respondent yet the same was duly produced by the appellant and the same was in his replying affidavit and the same was marked as annexure “HSM4” hence the same was clearly part of the record.
 4. That the Honourable Board erred in fact and in law in relying on m-pesa transaction evidence as produced by the 2nd respondent and making a finding that the appellant was trying to rectify the fault occasion to the 2nd respondent yet such evidence, which is electronic evidence is not admissible as the same as subject to mandatory provisions governing the admissibility of such evidence as provided under Section 106B of the *Evidence Act* and the same was never adhered during the trial which proceeded by way of Affidavit evidence and submissions.
 5. That the Honourable Board erred in fact and in law in holding that the appellant was rectifying his fault by sending money to the 2nd respondent by M-pesa yet there is no nexus established as regard to the m-pesa transaction that purportedly was meant to rectify the appellant’s fault.
 6. That the Honourable Board erred in fact and law by considering the 2nd respondent bare averments in the affidavit while totally rejecting the appellant’s version of uncontroverted evidence thus demonstrating open bias and prejudice against the appellant.
 7. That the Honourable Board erred in law by openly exhibiting partiality in favour of the 2nd respondent and enthusiastically attacking the appellant’s case throughout its entire judgment and which attack was not supported by the 2nd respondent’s evidence whatsoever or at all.
 8. That the Honourable Board erred in law and fact by failing to analyze the submissions of the appellant addressing the issues raised together with the evidence tendered thereby misleading itself on the findings derived therein.
 9. That the Judgment of the Honourable Tribunal as a whole is characterized by a lack of appreciation of evidence tendered and misapplication of the law which has occasioned a great miscarriage of justice condemning the appellant to pay a colossal sum of Kshs. 700,000/= which included a fine of Kshs. 100,000/=, costs to the 2nd respondent of Kshs. 100,000/= and all the carted away goods or the value thereof per the notification of sale thus occasioning great injustice to the appellant.
 10. That the Honourable Board erred in law and fact and the decision of the Board is a nullity for failure to comply with the provisions of Rules 11 of the auctioneers’ rules.
2. The appellant urged the court to set aside the orders of the Board dated 28th October 2021 and allow the appeal with costs.
 3. The Appeal was disposed of by way of written submissions of counsels appearing for the parties.



Appellant's Submissions

4. The appellant submitted that the impugned judgment by the Auctioneers Board was invalid as it failed to comply with Rule 11 of the Auctioneers Rules which provides that all instruments made by and all decisions of the Board shall be signified under the hand of the chairman and secretary.
5. According to the appellant the impugned decision was only signed by one person under the title of Board/Secretary hence in breach of the said rule. Reliance was placed in the case of Manael Ominde t/a Kuronya Auctioneers v Auctioneers License Board (2009) eKLR and Nathan Mema Amkoa T/A Ongumwe Auctioneers v Auctioneers Lisencing Board (2010) eKLR wherein the High Court invalidated decisions for having been signed by the Chairperson alone.
6. It is not disputed that some of the goods in the Notification of sale dated 13/10/2020 were not listed in the Proclamation Notice dated 4/8/2020. On whether the appellant can attach goods not previously proclaimed, the appellant submitted that Rule 12(2) of the Auctioneers Rules allows the auctioneer to attach other goods that were not included in the proclamation notice. Counsel referred this Court to the authority in in the case of David Njuguna Ngotho vs. Family Bank Limited & another (2018) eKLR for the proposition that the notification of sale was the prima facie evidence of goods removed from the premises and Stephen Kenyere Manoti vs. Oscar Otieno Odongo T/A Oscar Odongo Investment Auctioneer (2021) eKLR for the proposition that the essence of attachment is to remove the goods from the possession of the judgment debtor and place them in the custody of the law so that they can be sold to satisfy the judgment debt.
7. It was submitted that the removal of the goods from the premises cannot amount to eviction since the law on levy distress allows the appellant as the auctioneer to remove the goods proclaimed for purpose of sale in recovery of defaulted rent arrears. Reliance was placed in the case of Hezron Getuma Onsongo t/a Hegeons Auctioneers vs. Jeremiah Nyangwara Matoke (2020) eKLR, Royal Hospital vs. Wbrahim Omenyi Ambwere & another (2018) eKLR, Power Pack Hydraulics Limited vs. Jacinta M. Ndegwa T/A Jarmat Enterprises Limited (2020) eKLR and Parkirestephen Munkasio & 14 others vs. Kedong Ranch Limited & 8 others (2016) eKLR in justification of the decision to remove the goods from the premises.
8. The appellant submitted that it did not participate in the advertisement for lease of the suit property as its instructions was only to levy distress in recovery of rent arrears amounting to Kshs. 560,000/=
9. The appellant denied that he had reached out to the 2nd respondent in a bid to settle the matter out of court. That the only evidence was the M-pesa transaction which was inadmissible since it contravened section 106B of the Evidence Act for lack of a certificate of electronic evidence.
10. Reliance was placed in the case of Jusus Kilonzo Musyoka v Leonida Mueni & 4 others (2018) eKLR, Joseph Karisa Baya vs. Cefis Giorgio & another (2020) eKLR and Order 21 Rule 4 to submit that the board had failed to give reasons for its decisions.

2nd Respondent's Submissions

11. The 2nd respondent on the other hand submitted that the appellant did not comply with the Auctioneers Act in distress for rent. That the disparity in the proclamation notice and the notification of sale all dated 3/8/20 were proof that the appellant did not follow the law while distressing for rent. That the Appellant concedes that he proclaimed the 2nd Respondents property and issued the proclamation notice on 3/8/20. That he concedes that he proceeded to attach the 2nd ARespondents property during which time he attached extra items which were not previously proclaimed. That this was in



contravention of Rule 12 of the Auctioneers Rules as the appellant proclaimed 8 items as per the proclamation notice but the notification of sale listed a total of 25 items. That the Appellant did not seek leave of the court before proceeding to attach additional items as required by Rule 12(2) of the Auctioneers Rules. In the premises the Appellant did not comply with the law while distressing for rent. Therefore, that the decision of the board and this issue cannot be faulted.

12. The 2nd Respondent submitted that the board was correct in its finding that the fact of carting away of goods amounted to eviction of the 2nd Respondents from the premises as the same was unprocedural for want of court order for eviction. He submitted that it is trite law that before evicting a tenant, a landlord must obtain a court order. The case of *Jacob Kaliunga M'Mwirabua v Warda Said Abud Msalam & Another* (2021) eKLR was cited in this respect. That in view of the fact that all household goods were attached and sold by the appellant, the appellant constructively evicted the Appellant.
13. The 2nd Respondent submitted that failure by the chairman to sign its decisions did not affect the substance of the hearing and all legal proceedings taken by the Board.
14. The 2nd Respondent submitted that the total sum payable to him pursuant to the decision of the Board is Kshs 853,000/= plus costs to the proceedings.

Analysis and Determination

15. I have considered the grounds of appeal and the submissions. The issues for determination are:
 - a. Whether the impugned judgment satisfied Rule 11 of the Auctioneers Rules;
 - b. Whether the appellant could attach goods not previously proclaimed; and
 - c. Whether the distress amounted to eviction;
16. It was submitted that the decisions of the Board must be signed by the Chairman and the Secretary. That in the instant case, the decision of the Board was only signed by one official under the title of Board/Secretary. Therefore, that there was no compliance with Rule 11 of the Schedule to the *Auctioneers Act* cap 526 on Meetings and Procedure of the Board which provides that: -

“All instruments made by and all decisions of the Board shall be signified under the hand of the chairman and the secretary.”
17. It was submitted that the extracted decree equally contains the signature of one person under the title of Board and Secretary. The appellant consequently submitted that the decision of the Board was a nullity for lack of signatures of the two designated officials.
18. I have looked at the ruling of the Board appearing at pages 202- 204 of the Record of Appeal. The same is certified to be a true copy of the original ruling. However, the same is not signed by the Board Secretary, Hon. K. Cheruiyot and the Board Chairman, Hon. P. Gesora.
19. The original file in the Board's Disciplinary Cause No.50 of 2020 was forwarded to this court for purposes of this appeal. I have perused the original hand-written ruling of the Board. There are two signatures at the end of that ruling with the date of delivery being 27/10/2021. No reference was made by the parties to the hand-written ruling. No argument was placed before this court that the signatures appearing on the hand written ruling are not those of the Board Chairman and the Secretary to the Board. The handwritten ruling being the decision of the Board, I am unable to agree with the appellant that the decision of the board did not comply with Rule 11 of the Schedule to the *Auctioneers Act*. What was sent to the appellant as appears on page 196-197 of the Record of Appeal and as captured on its heading is a “Notice of decision of the Board ruling”. The Notice is signed by the Board Secretary.



Clearly that was not the decision of the Board but only a notice to inform the appellant of the decision of the board. There was no requirement for such Notice to be signed by both the Chairman and the Secretary of the Board. In Manuel Otiangala t/a Kuronya Auctioneers Case that was cited by the appellant it is the decision of the Board that was not signed by both the chairman and the Secretary for that reason the decision was declared a nullity. In this case the ruling was signed by both the chairman and the secretary. The argument by the appellant that the ruling of the Board was not signed by the Chairman and the Secretary of the Board is thereby dismissed.

20. The second issue is whether the appellant could attach goods not previously proclaimed. The Board held that no proper proclamation was done for the reason that the Proclamation dated 3rd August 2020 indicated that 8 items were proclaimed but the Notice of Sale captured 25 items. Therefore, that no proper proclamation was done.
21. The appellant however argued that Rule 12(2) of the Auctioneers Rules allows an auctioneer to attach other goods not previously proclaimed. The said rule provides as follows: -
 - “If on the expiry of the period of notice, the auctioneer finds that there are other goods belonging to the judgement debtor—
 - (a) which were not pointed out by the decree holder and proclaimed earlier in his proclamation; or
 - (b) which have been removed by the judgment debtor, or cannot be found, the auctioneer shall file an application in court seeking leave of the court to be allowed to attach any other movable properties of the judgement debtor pointed out by the decree holder.
22. It is clear that the above rule empowers an auctioneer to attach more goods that had not been pointed out or discovered earlier. However, this must be done with the permission of the Court. It is clear from the evidence that the Notification of sale contained other goods that were not contained in the Proclamation Notice. The appellant was supposed to seek leave from Court through an ex-parte motion to attach the other goods which had not been proclaimed. He never did this. In the premises I agree with the decision of the Board that the appellant was not allowed to attach further goods without leave of the Court. The sale of unproclaimed goods was illegal. I thereby uphold the finding of the Board on that issue.
23. On the third issue on whether the distress amounted to eviction, the appellant relied on rule 12(1) of the Auctioneers rules to submit that distress does not amount to eviction. Rule 12(b) of the Auctioneers Rules, provides that:
 1. Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—
 - a. Record the court warrant or letter of instruction in the register;
 - b. Prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory, the auctioneer shall sign a certificate to that effect...”
24. From the above provision, it is clear that an Auctioneer is empowered to distress for rent upon being issued with official instructions or a court Order. Distress is a right the Landlord is granted by the law



to enable him recover rent that is in arrears. It therefore does not amount to an eviction. If it is not done in accordance with the law, the landlord is liable to consequences as provided by the law. The Board erred in holding that the appellant evicted the respondent from the premises.

25. The Board made a finding that there was no evidence of advertisement for sale by the respondent as required by the law. The appellant however annexed a notice of advertisement that appears on page 129 of the Record of Appeal. The Board thereby erred in holding that there was no advertisement in the sale of the goods.
26. In the upshot, the appellant unlawfully sold the 2nd respondent's un proclaimed goods. The ruling of the Board is therefore upheld on that ground. Consequently, I find no merit in the appeal and the same is dismissed with costs to the 2nd respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF OCTOBER 2024.

J. N. NJAGI

JUDGE

In the presence of:

Mr Wafula for Appellant

Mr Mburu holding brief Mr Opiyo for 2nd Respondent

Court Assistant: Amina

30 days Right of Appeal.

