



Musya t/a Makuri Auctioneers v Africa Banking Corporation Limited (Miscellaneous Application 71 of 2018) [2023] KEHC 23139 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23139 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 71 OF 2018
DKN MAGARE, J
SEPTEMBER 20, 2023**

BETWEEN

JOEL TITUS MUSYA T/A MAKURI AUCTIONEERS APPLICANT

AND

AFRICA BANKING CORPORATION LIMITED RESPONDENT

RULING

1. This is a Reference from a Decision on the Auctioneers Bill of Costs. The Instruction fees for the Bill of Costs is said to have been issued on 13/11/2014. The Bill of Costs is dated 27/2/2018. Instructions annexed were issued on 1/2/2017 by the letter dated 31/1/2017 seeking issuance of the 45 days redemption notice.
2. The court below awarded Kshs. 100,000/= as costs ex gratis. The parties appear to have agreed on the cost for sending statutory notices, that is the Redemption notices at Kshs. 7,000/= per Notice.
3. Subsequently the law firm of Kithi & Co. Advocates issued instruction and withdrew the same. They stated that the instructions were erroneously issued by Kithi & Co. Advocates who recalled the instructions on 11/4/2017. That is in less than 24 hours.
4. At the time of withdrawal, it is common ground that the Auctioneers had not advertised for sale or accepted the notices by recording them and informing the instructing client of their acceptance of the instructions.
5. Before advertising and eventually carrying out instructions the Auctioneer is obligated to acknowledge receipt of instructions and record the same.



6. This are the basic procedures under Rule 15 of the Auctioneers Rules. In the said Rule, the Auctioneers is supposed to maintain a register of instructions. The Rule provides as follows; -

“ 6. Register of warrants and letters of instruction An auctioneer shall keep a register of all warrants and letters of instruction passed to him by a client, and shall record in it-

- (a) the number of the case under which the warrant was issued and the name of the court that issued it;
- (b) the name and address of the creditor and the advocate (if any) who issued the letter of instruction;
- (c) the date he received each warrant or letter of instruction;
- (d) the amount he is required by the warrant or letter of instruction to recover; (e) the date of return endorsed upon the warrant;
- (f) an itemised inventory of the property to be sold showing the value to be placed on each lot;
- (g) the amount realised in respect of each item sold;
- (h) the date the warrant was returned to the court;
- (i) the date and amount of the proceeds of any sale forwarded to the court, or to the creditor, or his advocate; and
- (j) the charges levied by the auctioneer.

7. Like all contracts, once instructions are issued, the Auctioneer must accept them. The steps the Auctioneer is required to take are set out in Rule 15 of the Auctioneers Rules as follows: -

“ 15. Immovable property Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property

- (a) record the court warrant or letter of instruction in the register;
- (b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;
- (c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;
- (d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;



- (e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

8. The Auctioneer is required to take steps to ensure the property advertised for sale is valued. Section 97(2) of the Land Act provides as doth: -

“Duty of chargee exercising power of sale. 97.

- (1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.
- (2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a value.”

9. The Auctioneer must make all these enquiries before proceeding. He needs to be satisfied that there is a reserve price based on the valuation. The law on the aspect is well settled. In the case of *JohnKuria Mathenge T/A Aberdare Filling Station v Caltex Oil (K) ltd & Another* [2015] eKLR which held that a chargee owes a statutory care to a chargor to ensure that property sold is subject to a reserve price.

10. In *Harrischa Bhovanbhai Jobanputra & Another v Paramount Universal Bank Ltd & 3 Others* [2011] eKLR the court again held that:

“failure to indicate the reserve price is therefore an express breach of Rule 11 (1)(b)(x) which is couched in monetary terms and which must, therefore, be obeyed in observance. Failure to comply can only denote that no valuation of the property was undertaken contrary to the express requirement of that rule.... The total sum of these irregularities is that it would be procedurally illegal to allow the applicants property to be sold unless and until the legal procedure adhered to...

11. This ipso facto means that the instructions that were withdrawn were inchoate. They were not acted upon and as such there was no duty to pay. I have also noted the Applicant has revisited the payment for statutory notices. The parties agreed on a specific figure. The bank accepted the same. The Auctioneer cannot go back and change the figure. It matters not that it is below the scale. The tragedy is a party accepting instructions below the scale by properly undercutting to get work and then brandishing some scale.

12. Secondly, the bill relates to instructions on 13/11/2014. None of the instruction letters relate to the said date. The instructions were issued and recalled before being acted upon. There is no basis for preparatory work before accepting the work.

13. There is no Bill of Costs for work done between 10/4/2017 when instructions were issued, and then the instructions were recalled. The entire Bill of Costs therefore is improperly before court.

14. Thirdly, even if the Bill of Costs was to relate to the work done between 10/4/2017 and 11/4/2017 the same must be accompanied by real evidence that work was done. A party is entitled to withdraw an offer before it is accepted. It is up to the auctioneer to accept instructions with speed and alacrity, without such acceptance, it cannot be said to exist a contract between the parties.



15. The letter from the advocate was an invitation to treat. The Auctioneer is on duty to offer his terms and by writing a letter acknowledging instructions and parties agreeing on the payment of fees. In so far as the parties were concerned the earlier contract for issuance of redemption notice had been spent.
16. There was absolutely no contract. The consideration was not given. No evidence of any action is on record. I have perused the file and noted that the Bank filed an Application dated 20/7/18 seeking to review and set aside the whole determination made on 14/6/2018. There was another Application for stay of execution of the whole of the determination order made on 14/6/2018.
17. There was another Application filed for stay of execution against the Ruling of 14/6/2018. The Court issued interim orders on 22/6/18.
18. The Auctioneer filed a Replying Affidavit stating that that it was not discussed that a 45 days' redemption notice was given. He stated that a sum of Kshs. 256,302,429.40 was due. He was given instructions as an Auctioneer on 30/1/2017.
19. For the Chamber Summons the Auctioneer filed Grounds of Opposition on the issue of res judicata. The Auctioneer filed a Valuation Report dated 24/10/2017. Submissions were filed on 5/10/2018.
20. In it they reiterate that the Deputy Registrar was in fact overruling the High Court in the case of in Zacharia Barasa =vs= Dubai Bank Ltd (2015) eKLR. In the case it was held as follows: -

“There was no evidence of advertisement for sale which is the commencement of the sale process. The Deputy Registrar was right in his reasoning as to why he disallowed the amount sought by the appellant.”
21. They stated that there was no proof that the Deputy Registrar was shown on compliance with Rule 15 (c) of the Auctioneers Rules.
22. They relied on the case, of John Kimathi Marete =vs= Kenya Wildlife Service Ltd where Justice Majanja stated:-

“The adherence to the principle of judicial precedent or stare decisis is of utmost importance in the administration of justice in the Courts in east Africa and thus to the conduct of the everyday affairs of its inhabitants, it provides a degree of certainty as to what is the law of the country and is a basis which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeals on any question of law, just as in the former day the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decision of the House of Lords, and of course, similarly the Magistrate's courts or nay other inferior court in each State are bound on questions of law by the decision of the Court of Appeal and subject to these decision also to the decision of the High Court in the particular State.”
23. The Applicant stated that there was no value attached to the letters by Kithi & Company Advocates.



24. They relied on the case of Yusuf Abdi Ali Co. Ltd v Family Bank Limited [2015] eKLR, the Honourable Judge held as follows on the issue of valuation;

“Be that as it may, the court wholly agreed with the Plaintiff’s assertions that a charge could not rely on a valuation report that was more than twelve (12) months old. In particular, Rule 11 (b) (x) of the Auctioneers Rules stipulates as follows: -

“the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.”

The defendant did not provide any evidence to demonstrate that it had obtained a Valuation Report that was not more than twelve (12) months prior to the purported sale of the subject property. A perusal of the Valuation Report by M/s Daytons Valuers shows that the same was dated 20th September 2013 while the sale by public auction was scheduled for 29th October, 2014.

In the absence of any evidence by the Defendant to the contrary, the court was more inclined to accept the Plaintiff’s un rebutted affidavit evidence that the Defendant could not purport to sell the subject property and that the sale of the subject when such circumstances were obtaining was clearly unlawful.”

25. On 18/12/2018, the Court allowed the Appeal and referred the matter back to the Deputy Registrar for reconsideration.

26. Before, remitting the matter back for reconsideration the court made specific findings which held to the final verdict that is;

22. It is important to note that under the *Land Act*, the service of notification of sale upon the charger is not by itself sufficient. Subsection (3) must equally be satisfied before a sale can be arranged pursuant to Rule 15 (e).

23. Here there was no material presented to court to show what the auctioneer did between the date of receipt of instructions to sell and the date the instructions were recalled. It would be thus necessary for the court to be furnished with such material even as the Appellant is also availed the chance to avail its own documents so that the court is not shielded from digging the truth from the available material.

27. The Court found and there is no question that before an auctioneer proceeds he must satisfy himself that provisions of Section 96 of the *Land Act* and Rule 15 of the Auctioneers Rules are followed. Section 96 (2) of the Law Act provides as doth:

“Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell”.

28. The safeguards put in place are all meant to protect the equity of redemption.

29. In another document filed under the title Affidavit of steps taken in execution of client’s instructions, the Auctioneer mixes the issue of redemption notice and the other steps after 10/4/2017 on 29/8/2019.



30. The applicant filed submissions. In the submission the auctioneers stated that they issued a redemption notice. They rely on Rule 5 of the auctioneers Rule, which stated: -

“Fees and disbursements payable to an auctioneer.

1. Except as may be provided by any other written law or by contract the fees set out in the Fourth Schedule payable to the auctioneer for the attachment, repossession and sale of movable and immovable property under court warrants or letters of instructions shall be charged in accordance with these Rules.”

31. They rely on the case of Plamay Company Limited vs Consolidated Bank of Kenya Limited [2014] eKLR, quoted with approval the decision of Josiah Kamanja Njenga vs Housing Finance Corporation of Kenya and Another, where Angote J. Stated that: -

“Having analyzed the chronology of events, I take the view that the Auctioneer’s fees is only payable once the Bank gives to the Auctioneer awful instructions.”

32. In the circumstances, they urged that the court to allow their costs as prayed vide submissions filed on 9/9/2019. Respondents stated that the parties agreed on 7,000/= for issuance of 45 days redemption notice which was paid. Instructions were inadvertently issued but recalled.

33. They argued that without there being lawful instructions and without the Auctioneer’s Act being followed, there is need show that there are lawful instructions. They rely on the decision of Mc Foy vs= United Africa Co. Ltd. (1961) 3 ALL ER 1169, where Lord Denning MR stated as follows: -

“If an act is void, it is in law a nullity. It is not only bad but incurably bad. there is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

34. A decision was made on 28 /11/2019. It was the auctioneers turn to file an Application dated 5/12/2019. The Chamber Summons lamented that:-

- a. The court declined to tax the bill as ordered.
- b. Failed to tax the bill despite having found the instructions were issued by the Respondent.
- c. Failing to tax the bill and purported to award the Auctioneers Kshs. 100,000/-
- d. By stating that the 45 statutory notice fees had been agreed.
- e. By holding that the auctioneer is only entitled to fees after sale have disentitle the auctioneer fees which was received upon receipt of instructions.

Redemption of Notice

35. The court cannot find a reason to differ with the court below on instructions on a redemption Notice. The same is evidenced by the Applicants letter dated 3/1/2017. That letter is binding. The instructions on redemption notice was paid. There is no claim even for issuance of the 7 days’ notice. The court was thus correct, in that respect.



Failed to tax

36. The Taxing Master stated that he was unable to tax but could not pay blindly. He therefore awarded instruction fees of Kshs. 100,000/=. I do not agree with the court that it was unable to tax. The Court has no basis to decline to tax.
37. The court therefore sets aside the two findings. That is whether the Court should tax and whether the court should gratuitously award Kshs. 100,000/=. Taxation is not a matter of equity or charity. Taxation is exercise of discretion. The sum of 100,000/= was gratuitous. It is set aside.
38. I shall not refer the bill back for the second time for taxation. I agree with the court that the withdrawal of instructions was complete. It was therefore his duty upon finding that the instructions were withdrawn to also find that, which I hereby do, that from the evidence and submission, there was no compliance with Rule 15(c) of the Auctioneers Rules and Section 96 (5) of the Land Act. This being the case, there were no instructions to sell.
39. There was no evidence produced in court that the instructions were accepted. Therefore, there was no basis for taxing the Bill of Costs. However, given that the Respondent never made any reference, the amount awarded shall be deemed as ex gratia. Otherwise the entire bill ought to have been struck out.
40. Before I pen off, I find it a bit curious for parties who have a tendency to accept less fees and turn round to seek more fees. In any case the Bill of Costs does not relate to any date.
41. After instructions were issued on 10/4/2017 and recalled effectively, a contract was not created by communication that was one sided. There was no protest from the Auctioneer that they had acted on the letter. Having not acted on the same allowing instructions received pursuant to Rule 15 of the Auctioneers Rules, the contract did not materialise.
42. Finally, I did not see any repudiation of instructions to recall. It cannot be that Kithi & Co. Advocates have powers to instruct but not to recall. The giver is also the taker of power.
43. The Applicant finds himself in this position due to his being blinded by mouth-watering numbers. The reference is therefore for dismissal. I hereby do so with cost of 25,000/=.

Determination

44. In the circumstances I make the following orders: -
 - a. The Reference is dismissed with costs of Kshs. 25,000/= to the Respondent.
 - b. The same shall be deducted from the ex gratia payment allowed by the Lower Court.
 - c. File is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF SEPTEMBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Ms Osewe for the Applicant

No appearance for the Respondent



Court Assistant - Brian

