



**Ecobank Kenya Limited v Sadique Enterprises Auctioneers
(Civil Appeal E196, E197, E133 & E132 of 2022 (Consolidated))
[2023] KEHC 23698 (KLR) (Civ) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23698 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E196, E197, E133 & E132 OF 2022 (CONSOLIDATED)
AN ONGERI, J
OCTOBER 19, 2023**

BETWEEN

ECOBANK KENYA LIMITED APPELLANT

AND

SADIQUE ENTERPRISES AUCTIONEERS RESPONDENT

(Being consolidated appeals from the Auctioneering Licensing Board Miscellaneous applications no. 1, 3, 7 and 8 of 2019 delivered by the Auctioneering Licensing Board on 30/7/2021)

JUDGMENT

1. This is an appeal against the decision of the Auctioneering Licensing Board delivered on 30/7/2021 which awarded the respondent costs in Auctioneering Licensing Board Miscellaneous Applications no. 1, 3, 7 and 8 of 2019 as follows;
Appl. No. 1 of 2019 - 5,000 plus VAT 15%
Appl. No. 3 of 2019 - 89,900
Appl. No. 7 of 2019 - 40,089.84
Appl. No. 8 of 2019 - 10,000 plus VAT 16%
2. The appellant appealed against the said cost on the grounds that the respondent did not recover costs from the debtors in application no. 1, 3 and 8 of 2019.
3. The appellant also raised the ground that the claims were statute time bars being raised over 6 years after the contract was entered into.



4. The appellant also raised the ground that as per rule 7 of the Auctioneers Rules, 1997, auctioneer's costs are recoverable from the debtor and not the appellant and that unless the respondent proved that the debtor was at large or that they had no attachable assets or that the sale proceeds from the recoveries were insufficient, then the costs pass on to the appellant.
5. The parties filed submissions as follows; the appellant submitted that the letters of instruction clearly and concisely stipulated the services to be rendered by the Respondent and the terms of compensation. In that regard the said terms and conditions of the letter became a binding agreement between the Appellant and Respondent. The subjective expectations and the unexpressed reservations of the Respondent on the amounts they initially agreed to are of no consequence whatsoever in contract law, they ought to have been ventilated at the negotiation stage not during performance. That therefore, based on said terms, the Respondent ought to have pursued its costs from the Debtors. More so, for the debtors which it was unable to recover from, it was barred for making claims against the Appellant based on the terms of the contract.
6. The appellant argued that having established that the relationship between the Appellant and Respondent was contractual, it naturally follows that any claims based on such contract are subject to the limitations of time imposed by the Limitation of Actions Act. The instructions were issued to the Respondent in August 2012. The Respondent proceeded to execute the said instructions with no success. On various dates (still in 2012), the Appellant then withdrew the instructions based on the Respondent's inability to perform.
7. The Respondent did not act then when the cause of action arose. For the instructions which the Respondent was successful in recovery, the recovered vehicle was sold at auction in October 2012, and the Respondent remitted part of the sum owed to the Appellant. The Respondent in keeping Kshs. 125,319.41 cannot then claim for payment, in the event that they do, the same accrued back in 2012 and ought to have been recovered within six years of the same.
8. The appellant further submitted that Taxation of costs arising from professional services rendered under a contract are subject to the limitation laws. Therefore, the Board erred in both law and fact in entertaining the application for taxation yet the same was in contravention of Section 4 (1) (a) of the Limitation of Actions Act.
9. The appellant submitted that the Respondent has not proved the deficiency by the debtors to settle their costs. Therefore, they cannot purport to impose the same costs on the Appellant. The Board erred in ignoring these provisions of Rule 7 of the Auctioneer's Rules, 1997 which is categorical on how the Auctioneers charges are to be recovered. It provides that:

“ A debtor shall pay the charges of the auctioneer unless—

- (a) that debtor cannot be found; or
- (b) he has no goods upon which execution can be levied; or (c) the sale proceeds are insufficient to cover the charges, in which cases the creditor shall pay the charges or the deficiency thereof”



10. The respondent on the other hand submitted that the instruction letter introduces illegal instructions that cannot be enforceable. The last paragraph of the instruction letter is lacking a legal basis and therefore offends *Auctioneers (practice) Rules 2009* Rule (3) which states as follows:

“No Auctioneer shall hold out or allow himself to be held out, directly or indirectly, and whether or not by name, as being prepared to do Professional business at less than the scales laid down by the Auctioneer’s Fees Schedule for the time being in force”

11. The respondents argued further that one of the tenets of any instructions more so a contract is that it must be done in good faith and second is that it has to be reasonable. After termination of the instruction letter by the Appellants, the Respondent did engage them in negotiation and correspondences a fact that the Board established. That moreover all communication, correspondences, addendums and commitments done in the cause of the contractual agreement affect the terms and conditions. This includes its extension either expressly or impliedly.

12. The respondent submitted that the principle of reasonableness in any contract embraces equity and that means that one ought not to take advantage of a technicality to the disadvantage of the vulnerable party. The bill of cost was filed within reasonable time and if there was any delay, it was caused by protracted negotiation and correspondences that were done in bad faith unreasonably. The conduct of parties to a contract also extends the contract.

13. The issues for determination in this appeal are as follows;

- i. Whether the claims are statute time barred.
- ii. Whether the respondent is entitled to costs.

14. On the issue as to whether the costs are barred by time, I find that the said issue was raised before the Auctioneering Licensing Board and the board found that there was correspondence between the parties and therefore the claims are not time barred.

15. On the issue as to whether the respondent is entitled to the costs he was awarded by the board, I find that there is no dispute that the appellant instructed the respondent to recover the costs as alleged.

16. The costs awarded by the Auctioneering Licensing Board are reasonable and merited in the circumstances. The Board considered all relevant factors before awarding the same.

17. I dismiss the appeals herein and uphold the decision of the Auctioneering Licensing Board in applications no. 1, 2, 7 and 8.

18. Each party to bear its own costs of this appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF OCTOBER, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... For The Appellant

..... For The Respondent

