



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. CIVIL APPLN. NO. E631 OF 2020

WESTMINSTER COMMERCIAL AUCTIONEER.... RESPONDENT

VERSUS

DIAMOND TRUST BANK KENYA LIMITED.....APPLICANT

R U L I N G

1. In Ewaso Ng'iro North Development Authority v. Jovan H. Kariuki t/a Moran Auctioneers [2019] Eklr, the court held:-

“I agree that operating outside the purview of the licence would render such execution null and void. In the case of Jeska Taak Wanyonyi v. Esther Opondo [2007] Eklr, the court held thus:

The said auctioneers repossessed the said motor vehicles from possession of the respondent at Nakuru. It is apparent that the said Madume Auctioneers repossessed the said motor vehicles from Nakuru when they clearly did not have territorial jurisdiction to do so. There is no evidence to suggest that the said Madume Auctioneers had obtained an order of the court to enable them execute a repossession order out of their area of jurisdiction. The said Madume Auctioneers therefore repossessed the said motor vehicle contrary to the provisions of the Auctioneers Act and the licence issued to them by the Auctioneers Licensing Board”.

2. Vide a Letter of Instruction dated 5/2/2019, the applicant instructed the respondent to trace and repossess motor vehicles registration nos. **KBS 446X, KBW 124L, KBX 783F, KBX 784F, KBX 785F, ZE 4709, ZE, 4710, ZE 4711, ZE 4712** and **ZE O436**, respectively. The respondent was also instructed to recover from the hirer of the said vehicles a total sum of Kshs. 33,423,399/08 which was the loan outstanding.

3. Pursuant thereto, the respondent carried out investigations and confirmed that the said vehicles had been spirited out of Kenya and were operating in Uganda. The applicant was briefed of that fact and it wrote to the Officer in Charge, Interpol Nairobi requesting that the respondent be assisted in recovering the said vehicles from Uganda.

4. Interpol Kenya liaised with Interpol Uganda and with the assistance of the Uganda Police, the respondent was able to recover motor vehicles **KBX 783F, KBX 785F, KBW 124F, ZE 4712, ZE 4709** and **ZE 4711** respectively. The said vehicles were later auctioned for a total sum of Kshs. 5,400,000/-.

5. Pursuant thereto, the respondent raised his fee note for Kshs. 2,258,200/- which was negotiated downward to Kshs. 1,654,000/-. Despite as aforesaid, the applicant refused to settle the negotiated fee note whereby, the respondent lodged in the subordinate court **Milimani CMCC No. 7721 of 2019 Westminster Commercial Auctioneers v. Diamond Trust Bank Kenya Limited.**

6. On being served, the applicant filed a defence and pleaded as follows: -

“2. The Defendant avers that the Plaintiff’s suit is premature, fatally defective and bad in law as the same has been commenced in violation of the mandatory provisions of Rule 55(3) of the Auctioneers Rules No. 5 of 1996. The Defendant shall at an appropriate time, notice whereof is hereby given, apply to have the Plaint struck out and/or the suit dismissed with costs.

3. ...

...

7. WITHOUT PREJUDICE to the foregoing, the Defendant further avers that if at all the Plaintiff executed its instructions as required by the Defendant and if at all there was a dispute as to the auctioneers' fees payable to the Plaintiff, the Plaintiff should have filed a Bill of Costs for this Honourable Court to assess the Auctioneer's fees payable in accordance to Rule 55(3) of the Auctioneer's Rules No. 5 of 1996. Accordingly, having failed to do so, the Plaintiff is in breach of the mandatory provisions of the Auctioneers' Rules".

7. Rule 55(3) of the Auctioneer's Rules provides: -

“In any other case, where a dispute arises as to the amount of fees payable to an auctioneer, a magistrate or the Board may, on the application of any party to the dispute, assess the fees payable.”

8. Faced with such a defence, the respondent drew and filed an Auctioneers Bill of Costs dated 28/2/2020 supported by his affidavit sworn on the same day. When that bill of costs came up for taxation before the taxing master, **Hon. S. A. Opande**, the applicant raised a preliminary objection thereto on the basis that *‘the contract to carry out auctioneering work was done outside Kenya, predominantly Uganda’*.

9. The applicant contended before the taxing master that reference of a dispute as to fees under **Rule 55 of the Auctioneers Rules** can only relate to work that was carried out in Kenya and not outside.

10. In his considered ruling made on 14/10/2020, the taxing master dismissed the objection on the grounds that the applicant had participated in what it termed as an illegality and benefited therefrom. That in the words of the Court of Appeal in **John Njue Nyaga v. Nicholas Njiru Nyaga & Another [2013] Eklr**, the applicant had come to court with unclean hands and was undeserving of the remedy it was seeking. The taxing master proceeded to tax the bill at Kshs. 1,896,789/-.

11. It is against that decision that the applicant took out the reference before Court by way of Summons in Chamber dated 19/10/2020 in respect of which this ruling is. The Summons was brought under **Rule 55(4) and (5) of the Auctioneers Rules**. The applicant sought that the decision of the taxing master made on 15/10/2020 dismissing its preliminary objection dated 25/8/2020 be set aside and the objection be allowed.

12. Alternatively, the applicant sought that the impugned decision be set aside and the taxation be remitted back for taxation by a different taxing master.

13. The grounds for the application were contained in the body of the Summons and the supporting affidavit of **Robert Oloo** sworn on 19/10/2020. These were that, the taxing master erred by failing to hold that the respondent operated outside the purview of his licence, that the court failed to hold that it could not enforce an illegal contract, that the court erred in applying the principles of equity and wrongly shifted the burden of proof to the applicant. Finally, that the taxing master erred in holding that he could tax items that arose in Uganda.

14. I have considered the depositions and submissions of the parties. It is clear from the record that this is an unfortunate scenario. The applicant set out on a course whose consequences it well knew. It instructed the respondent to seek and repossess the subject vehicles. When the respondent pointed out to the applicant the whereabouts of the subject as being in Uganda, the applicant sought the intervention of Interpol Kenya and implored it to assist the respondent to follow the vehicles there. From the respondent's efforts, the applicant realized Kshs. 5,400, 000/-. There was a benefit that inured to the applicant as a result of the respondent's sweat.

15. I have always known this Court to be a Court of both law and equity. Equity will not suffer a wrong without a remedy. The applicant engaged the respondent and made him undertake duties that extended beyond the latter's jurisdiction. The applicant not only encouraged the respondent to undertake the assignment, but it also represented to him that it would pay for the services whereby the respondent reviewed his charges downwards.

16. It is at the point of payment that the applicant sought to avoid its obligations. A party cannot be allowed to benefit from his/her own wrongdoing. The applicant cannot have only woken up after the respondent had undertaken the exercise for it to realize that the contract it had entered with him was illegal. Upholding such a position would not only be immoral but illegal. It would be to assist a fraudulent litigant to reap from wrongdoing.

17. In **Macharia Mwangi Maina & 87 others v. Davidson Mwangi Kagiri [2014] Eklr**, the court held: -

“This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive justice rather than technical and procedural justice”.

18. In the present case, what is being alleged is that the contract was illegal. I do not see any illegality. At the commencement of the contract, the address given to the respondent where the hirer was to be found was within the respondent's jurisdiction, **“Plot No. 209/975/1. Hevea Court 15 Eldama Ravin Road Off Peponi Road, Westlands”**. When it was discovered that the hirer had spirited the vehicles away from the jurisdiction, it was the applicant who wrote to Interpol Kenya to assist the respondent pursue the vehicles in Uganda. The applicant cannot now turn around and say “sorry the contract was illegal and we are not bound.”

19. The case of **Ewaso Ng'iro North Development Authority v. Jovan H. Kariuki t/a Moran Auctioneers** relied on by the applicant, in my view is not applicable. It is distinguishable. In that case, the Auctioneer acted illegally from the beginning. In the present case, the work

began within jurisdiction but extended outside the jurisdiction of the respondent with the active participation, effort and encouragement of, or at the instance of the applicant.

20. In any event, one cannot approbate and reprobate at the same time. The applicant, having stated in its defence in the **Milimani CMCC No. 7721 of 2019 Westminster Commercial Auctioneers v. Diamond Trust Bank Kenya Limited** that the respondent should file a bill of costs, cannot now turn around and allege that the same was illegal. I see no illegality here. I reject that contention.

21. Having disposed of that issue what remains is whether the taxation was proper. In **National Industrial Credit Bank Limited v. Ndegwa Auctioneer [2005] Eklr**, the court held: -

“The main object of paragraph 4 is clear. It is intended to provide values on the basis of which the auctioneer’s charges should be assessed. We think that it is reasonable that the auctioneer’s charges for attachment should be based on the value of the goods attached and not on the decretal sum. It is to be remembered that the auctioneer is to be remunerated for the actual work done and not on the basis of what he could have done had he attached goods equivalent to the decretal sum”.

22. The taxing master quoted the above holding and held that the value of the subject matter was Kshs. 5,400,000/-, the amount which the vehicles were sold. I see nothing wrong with that holding. That was the value of the work done and benefit received by the applicant.

23. In the premises, I find that the application has no merit and dismiss the same with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH, 2021.

A. MABEYA, FCI Arb

JUDGE