



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 637 OF 2017

SAMUEL MUTAHI GATHOGO T/A

VALLEY AUCTIONEERS.....APPELLANT

VERSUS

AUCTIONEERS LICENSING BOARD..... RESPONDENT

AND

WILL DEVELOPERS & CONSTRUCTION LIMITED....INTERESTED PARTY

(Being an appeal from the decision of the Auctioneers Licensing Board received on 31st October 2017 in Disciplinary Cause No. 36 of 2016)

JUDGEMENT

1. The facts leading up to this appeal are as follows; the interested party herein took out a loan facility with Consolidated Bank (herein “the Bank”) and offered land parcels Dagoretti/ Riruta/ 3901; Mavoko Town Block 12/156 Kamulu and Nairobi /Block 116 /1212 as security for the loan. He fell into arrears of a contested sum of Kshs. 47,927,242.15/= and the Bank instructed the appellant to sell the properties in exercise of its statutory power of sale.
2. The appellant advertised the properties and put them up for sale by a public auction which was scheduled for 27th August 2015. On the said day, land parcel Dagoretti/ Riruta/ 3901 was sold for Kshs. 38,750,000/= and land parcel no. Mavoko Town Block 12/156 Kamulu was sold for Kshs. 9,100,000/=
3. The interested party being dissatisfied by the manner in which the auction had been conducted, made a complaint to the Auctioneers Licensing Board through an affidavit sworn on 19th July 2016. The appellant responded to the complaint vide an affidavit sworn on 5th September 2016. The parties’ counsels made brief submissions before the board. In a decision dated 20th September 2017, the members of the Board found the complaint merited. They fined the appellant Kshs. 50,000/=, ordered him to pay costs of Kshs. 20,000 and reprimanded him for his actions. That decision is what prompted the appellant to lodge the present appeal.
4. Directions were taken to canvass the appeal by way of written submissions. Counsel for the appellant and the interested party filed their submissions and highlighted them before me during service week. The respondent did not participate in the appeal despite being duly served.
5. Having considered the parties’ rival submissions and the record of appeal, the following are the issues arising for the court’s determination;
 - a. **Whether the tribunal erred by finding that there was no evidence that the deposit of 25% was paid by the highest bidder;**
 - b. **Whether the tribunal erred by finding that it was not procedural for the auctioneer to amend the terms of his own memorandum of sale; and**
 - c. **Whether the tribunal erred in law and in fact by finding that it was the auctioneer’s duty to ensure payment of the 75% and ensure the completion of the sale.**
6. Counsel for the appellant submits that the interested party has shown through his conduct that he is bent on buying time and dragging the

conclusion of the matter at all costs. He submits that the interested party filed **Wil Developers & Construction Limited, Bronkho Investment Limited, Johnson Mwanzia Wambua, Alice Wangari Mwanzia versus Consolidated Bank HCCC No. 24 of 2015** seeking an injunction to stop the Bank from exercising its statutory power of sale. The court dismissed that application and land parcels Dagoretti/ Riruta/ 3901 and Mavoko Town Block 12/156 were sold by public auction on 27th August 2015.

7. The interested party then filed another application seeking to stop the transfer of land parcels Nairobi /Block 116 /1212 and Mavoko Town Block 12/156 which was similarly dismissed. A subsequent application seeking to stop the sale of Nairobi /Block 116 /1212 was also dismissed. Counsel submits that the complaint lodged by the interested party before the Auctioneers Licensing Board was merely a ploy to defeat justice and is an abuse of court process.

8. On the first issue, counsel contends that the Board erred in finding that there was no evidence that a deposit of 25% was paid by the highest bidder in accordance with the conditions of sale. He submits that there is evidence of the payment of the deposit which is further corroborated by an affidavit sworn by the purchaser David Mureithi stating that he paid the deposit and issued a cheque on the day the auction took place.

9. Counsel also submits that the tribunal erred in fact by finding that it was not procedural for the auctioneer to amend the terms of his own memorandum of sale. The appellant submits that the amendment was made under the instructions of the chargee which had the authority to vary the contract for sale under clause 12 of the charge as follows;

12. The chargee in exercising its statutory power of sale may sell or concur with any person in selling the charged property or any part thereof either subject to prior encumbrances or not and either together in lots, by public auction or private contract subject to such conditions respecting title or evidence of title or other matter as the chargee thinks fit, with power to vary any contract for sale and to buy in at any auction or to rescind any contract for sale and to re-sell without being answerable for any loss occasioned thereby.

10. It is also argued that the amendment did not in any way contravene the duty of care owed by the appellant or any of the provisions of law particularly **section 97** of the **Land Act** which provides for the duties of the chargee in exercising its power of sale. He cited the cases of **Paul Karuga Njuguna v Housing Finance Company of Kenya Limited & another [2016]eKLR; Mbuthia v Jimba Credit Finance Corporation & another [1988]eKLR** and **Murad Ebrahim Murad & Another v Kenya Commercial Bank Limited & another[2018]eKLR** to support the position that parties are allowed to vary the memorandum of sale.

11. Lastly, the appellant contends that the tribunal erred in law and fact in finding that it was the auctioneer's duty to ensure payment of the balance and completion of the sale. He submits that **section 21** of the **Auctioneers Act** and **Rule 17** of the **Auctioneer Rules** which provide the guiding principles for sales by auction and the duty of the auctioneer during and after the bidding respectively, do not provide that it is the auctioneer's duty to ensure payment is completed. Counsel contends that the auctioneer's duties were discharged once the memorandum and certificate of sale were prepared and forwarded to the chargee together with the 25% deposit.

12. In opposing the appeal, counsel for the interested party submits that the dispute before this court relates to the actions of the auctioneer while conducting a public auction. He submits that the dispute between the chargor and the chargee is a distinct matter and this court should not be invited on a dispute before another court.

13. On the first issue, counsel for the interested party submits that the auctioneer was bound by the terms indicated in the advertisement which stated that the highest bidder was to pay a deposit of 25% at the fall of the hammer and the balance within 30 days. He submits that the auctioneer was required to keep records and furnish them to the Board in line with **section 23 (c)** of the **Auctioneers Act** which he failed to do as he was unable to prove that the highest bidder deposited 25% as per the conditions of sale. The interested party submits that the appellant cannot claim that the provision of the conditions of sale did not apply to him as he had prepared the document under oath.

ANALYSIS AND DETERMINATION

14. At the heart of this matter is an advertisement for sale by public auction of land parcels Dagoretti/ Riruta/ 3901; Mavoko Town Block 12/156 Kamulu and Nairobi /Block 116 /1212 issued by the appellant. The advertisement announced the conditions of the sale as follows:

All interested purchasers are requested to view and verify the details as the Auctioneers do no warrant these. A deposit of 25% must be paid in cash or bankers cheque at the fall of the hammer and the balance within 30 days. Viewing of the property can be done between 10:00 a.m. and 4 p.m. and conditions of sale is subject to reserve price.

15. That advertisement was issued pursuant to **rule 16 (1)** of the **Auctioneers Rules** which provides;

16 (1) An advertisement by an auctioneer shall, in addition to any other matter required by the court, contain—

(a) the date, time and place of the proposed sale;

(b) the conditions of sale or where they may be obtained;

(c) the time for viewing the property to be sold;

(d) ...

(e) ...

(f) in case of immovable property all the information required to be contained in the court warrant or letter of instruction except the amount to be recovered and the exact amount of any reserve price.

16. The first issue is whether the highest bidder for land parcel Dagoretti/ Riruta/ 3901 paid the deposit of 25% at the fall of the hammer as advertised. The appellant insists that the deposit was paid. He refers the court to copies of cheques dated 27th August 2015 amounting to Kshs. 9,687,500/= and an affidavit sworn by David Mureithi as proof of this.

17. Having perused the record, I am inclined to come to the same conclusion as the Board that there was no proof that the deposit was paid by the highest bidder at the fall of the hammer.

18. There is evidence that land parcel Dagoretti/ Riruta/ 3901 was sold for Kshs. 38,750,000/=. According to the appellant's correspondence with the Bank, the highest bidder for land parcel Dagoretti/ Riruta/ 3901 was one Dennison Newton Ephantus Maina as opposed to David Muriithi who was the highest bidder for land parcel Mavoko Town Block 12/156 Kamulu.

19. The said Dennison Newton Ephantus Maina did not give evidence or swear an affidavit to the effect that he had paid the deposit at the fall of the hammer. Further, the copies of cheques referred to by the appellant at page 33 to 38 of the record of appeal show that the appellant drew cheques to the Bank for the deposit of Kshs. 9,687,500/= on the day of the auction. This does not however prove that the highest bidder paid the deposit as stipulated in the conditions of the sale. There is no evidence that the highest bidder deposited money in the appellant's account.

20. The appellant referred this court to the case of *Thatia Katia Maria Castanna v Middle East Bank Kenya Limited [2016]eKLR* but that case is distinguishable from the present case as in that case there was evidence that the highest bidder had paid the deposit as stipulated in the conditions of sale on the day the auction took place. In the present case, no such evidence was placed before the Board.

21. The Auctioneers Act provides that a licensed auctioneer is required to comply with the prescribed rules and maintain and furnish documents to the Board when required to do so. **Section 23** of the **Auctioneers Act** provides;

23. A licensed auctioneer shall—

(a) at all times act in a manner befitting an officer of the court and shall ensure that his employees, servants or agents act in like manner;

(b) act in accordance with such rules as may be prescribed when repossessing, attaching, storing or selling any property pursuant to the provisions of any written law or contract;

(c) maintain such books, accounts, records or other documents as may be prescribed and furnish the same to the Board at such time and in such manner as may be prescribed.

22. Among the rules the appellant was required to abide by was **Rule 17 (4)** of the **Auctioneers Rules** which stipulates that *the highest bidder shall be the purchaser subject to compliance with the conditions of sale*. When asked to furnish proof that the highest bidder had complied with the conditions of sale by the respondent, the appellant failed to do so. I cannot therefore fault the respondent for its decision on this point.

23. As for whether the appellant can be faulted for the amendment of the terms of the memorandum of sale and whether it was the auctioneer's duty to ensure completion of the sale, I find that the interested party had no locus to raise a complaint on these issues. He was estopped from doing so by the doctrine of privity of contract which is the relationship between the parties to a contract, allowing to sue each other but preventing a third party from doing so. (See *Black's Law Dictionary 8th edition 1257*)

24. There is no dispute that the appellant received instructions from the Bank to conduct the public auction which it did as an agent for the Bank. As pointed out by the appellant, the Bank had authority from the charge instrument to vary any contract of sale of the security offered. The appellant cannot be faulted for amending the memorandum of sale on the instructions of the Bank. The Bank did not complain that the appellant had failed to follow instructions given which goes to show that the appellant's duties were discharged once the memorandum of sale was executed and the deposit was paid.

25. Since the appellant failed to adduce evidence before the respondent of payment of the deposit for the purchase of land parcel Dagoretti/ Riruta/ 3901 by the highest bidder, I find that the appeal cannot be allowed.

26. The appeal is hereby dismissed but with no orders as to costs.

Dated, Signed and Delivered at Nairobi this 20th day of January, 2020.

A. K. NDUNG'U

JUDGE