



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

HCCC NO. 29 OF 2019

DALU COMPANY LTDPLAINTIFF

DAVID KABUBII KURIA.....PLAINTIFF

LUCY MUTHONI KURIA.....PLAINTIFF

VERSUS

I&M BANK LTD.....DEFENDANT

PURPLE ROYAL AUCTIONEERS.....DEFENDANT

RULING (2)

BACKGROUND

The Plaintiffs filed application on seeking injunction vide Notice of Motion of 29th January 2019. On 31st January 2019, parties through their respective Counsel appeared in Court and amicably agreed to resolve the matter. The application was compromised, a Consent was filed on 31st January 2020 by the parties and duly executed by their advocates on record.

The Plaintiff/Applicants filed 2 applications of 11th & 22nd February 2019 respectively seeking to set aside the Consent of 31st January 2019.

After hearing and determination of the applications, the Court delivered Ruling on 27th September 2019, whose gist was that the Consent was a valid agreement by parties and since the Plaintiff's made efforts to defray the loan facility, they would be accorded opportunity to negotiate restructuring of the loan facility pending hearing of the suit.

The parties and the Parties advocates agreed by consent dated 31st January 2019 that;

- a) The 1st Plaintiff/Applicant, Dalu Company Limited shall pay to the 1st Defendant, the sum of Ksh 12,000,000 (Twelve Million only) within 7 (seven) days of this consent.
- b) The auction of the suit premises scheduled for today 31st January 2019 be and is hereby suspended.
- c) The Plaintiffs shall pay the Auctioneers fees and costs, to be agreed or assessed, which costs were incurred in the auction scheduled for 31st January 2019 within 14 days of this consent.
- d) In default of Order (i) above, the Defendants shall be to liberty to exercise the statutory power of sale.

Dated 31st January 2019

Signed by :-

Charles Gitonga & Prestone Wawire

Counsel for the Plaintiffs/Counsel for the 1st 2nd Defendants

Applicants

APPLICATION

The parties and Counsel were unable to agree on Auctioneers Fees.

They made oral application that the Court determines the question of Auctioneers as they failed to agree.

On 6th & 13th February 2020 Counsel for parties sought to file written submissions if they failed to come to a consensus on Auctioneers Fees.

On 25th May 2020, the Respondent filed written submissions in form of Bill of Costs as instructed by the Court in default of consent on Auctioneers Fees.

The Plaintiffs advocates did not file submissions, but the matter was placed before the court by Deputy Registrar Commercial & Tax Division. On record, the court found a letter containing the Plaintiffs issues with regard to payment of Auctioneers fees.

The Plaintiff's advocates Mwamba & Javan wrote a letter dated 27th March 2019 to the Defendants' Advocates, Wamae & Allen Advocates as hereunder;

“We refer to your letter dated 28th March 2019, wherein you forwarded to us the Auctioneer’s charges totaling to Ksh 1,446,799.

We wish to respond as follows;

- 1. We have no objection to the payment of the auctioneers’ charges twice.***
- 2. In relation to the issue of Ksh 52,725,000 being the reserve price, we note that both advertisements for sale of the suit premises did not disclose any reserve price (we attach copies of the advertisements for ease of reference).***

Rule 16 (1) of the Auctioneers Rules 1997 states;

(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.***

Halsbury’s Laws of England (Auction, Volume 4 (2011) at para 483 states that:

“The particulars or conditions of sale by auction of any land must state whether such land will be sold without reserve or subject to a reserve price or whether a right to bid is reserved.

It is clear that if the sale is at a reserve price, the same must be declared in the advertisement without indicating the exact amount of the reserve price. In both advertisements of sale of the suit premises, there was no indication or declaration that the sale was subject to auction at reserve.

We also draw your attention to the case of Ibrahim Hussein Mahadi & Another versus Gulf African Bank HCCC 285 of 2017 (unreported) where the late Justice Onguto stated as follows;

“The Fourth schedule to the Auctioneers Act states that where a sale is stopped then the prescribed scale fees is to be halved. To this is to be added the actual expenses. The Fourth schedule also anticipates a situation where the sale is actually successful. It states that on the sale of an immovable property [the auctioneer’s] charge shall be based upon the amount realized where a sale is stopped. However, the minimum amount which could have been realized is what must then be reasonably taken into account. The minimum amount set to be realized in any intended sale must be the ‘reserve price’, if any is provided (our emphasis)”

Our client, therefore, does not understand and agree to use of Ksh 52,725,000 as the reserve price, the same having not been indicated or provided in the advertisements for sale as is required by Rule 16(1) (f) of the Auctioneers Rules, 1997.

We also make reference to the notification of sale dated 26th October 2018 (copy attached for ease of reference) wherein the auctioneer provided “estimate fees” as “Ksh 350,000” if stopped by the Bank or Court Order.

Clause 7 of part II of the 4th Schedule of the Auctioneer’s Rules 1997, on Auctioneer’s charges provides that where requisite notices are served and sale is stayed or postponed, the auctioneer’s charges shall be half of what he would have been entitled to. In the current case, since no reserve price is indicated, and the estimated fee is Ksh 350,000, we propose the payment of Ksh 175,000 as auctioneer’s commission for each of the intended auctions.

Otherwise, we accept the other auctioneers’ charges as detailed in the fee notes provided by the auctioneer, together with the combined commission of Ksh 350,000 all totaling to Ksh 434,379.

Yours faithfully

CHARLES GITONGA

For Mwamba and Javan Advocates”

The Defendants submitted and tabulated that the Auctioneers Fees for both Sales on the suit property held as security to the Loan Account where the Plaintiffs defaulted.

The Plaintiffs/Applicant did not file submissions but the letter dated 27th March 2019 by Plaintiffs’ advocates to the Defendants’ advocates is instructive as outlined above.

The provisions of Rule 7 of the Auctioneer Rules which provides;

“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”

DISPOSITION

The Debtor pays Auctioneers Fees in 2 statutory power of sales, Although, the debtors do not contest that 2 sales were conducted to recover amounts due and owing, they contest the figure used to calculate the actual Fees payable. The Court will not delve into the issues as it considered its jurisdiction in taxing Bills of Costs, by virtue of **Section 10 & 11 of the Advocates Remuneration Order**; all taxation of Bills is by the Taxing Officer. Thereafter, an aggrieved party may file a reference to the Court on the Ruling of the Taxing Officer. At this point and in line with the statutory provisions, I direct parties through Counsel appear before the Taxing Officer /Deputy Registrar Commercial Division to ventilate on the Taxation of the Bill of Costs of Auctioneers Fees in 2 sales that were conducted but halted midstream to facilitate amicable settlement of the claim and payment thereafter.

DELIVERED SIGNED & DATED IN OPEN COURT ON 6TH NOVEMBER 2020 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. WAWIRE FOR THE RESPONDENT

MWAMBA AND JAVAN ADVOCATES FOR THE APPLICANT – N/A

COURT ASSISTANT- TUPET