



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL CASE NO. 34 OF 2019

PETER M. MWANGI T/A CASH CROP AUCTIONEERS.....APPELLANT

VERSUS

AGRICULTURAL FINANCE CORPORATION.....RESPONDENT

(Being an appeal from the Ruling of the Hon. M.W. Murage (MS), SRM

delivered on the 16th day of January 2019 in misc. App. No.1106 of 2018

at Milimani Commercial Courts Nairobi).

JUDGMENT

1. Peter M. Mwangi T/A Cash Crop Auctioneers, the appellant herein, took out the motion dated 8th November, 2018 before the Chief Magistrate's court, Milimani whereof he sought to have the Auctioneers Bill of Costs taxed against Agricultural Finance Corporation, the Respondent herein. The Respondent opposed the application by filing the Replying affidavit of Mainga Evans. Hon. Murage, learned Resident Magistrate heard the application and eventually had it dismissed.

2. The appellant being aggrieved, preferred this appeal and put forward the following grounds:-

i) **THAT the learned Magistrate erred in Law and fact in finding that the appellant was not entitled to any professional fees after having been duly instructed by the Respondent herein.**

ii) **THAT the learned magistrate erred in law and fact in failing to find that after the appellant actually held two unsuccessful auctions he was entitled to his professional fees.**

iii) **THAT the learned magistrate erred in law and fact in relying in her ruling on a Clause in the letter of instruction which clause is clearly in violation of the express provisions of the Auctioneers Act and which clause was to the extent of the violation null and void as being illegal and unlawful.**

iv) **That in the interest of Justice the learned Magistrates Ruling aforesaid ought to be vacated and set aside as it sets a dangerous precedent for professional conduct of affairs where professional fees are hinged on the outcome of the professional service rendered.**

v) **THAT the learned magistrate misdirected herself in Law and fact in failing to consider the submissions by the Appellant.**

vi) **THAT the learned Magistrate erred in law and fact in arriving at the Ruling aforesaid.**

3. When the appeal came up for hearing, this court issued orders directing the appeal to be distorted of by written submissions.

I have re-evaluated the arguments presented before the learned Resident Magistrate. I have also considered the rival written submissions. The Appellant's case before the trial court is that on 12/2/2018 he received instructions from the respondent to issue a 45 days notification of sale of LR No. Kwale/Diani/1694 to Peter Ngugi Kareri. The appellant stated that he issued the aforesaid notice on 22/2/2018 and had the property advertised for sale after the lapse of 45 on 19/4/2018. He claimed that on 10/5/2018, he

conducted an auction for the sale of L.R no Kwale/Diani/1694 in Mombasa and only received an offer of Kshs. 750,000/- as the highest bid which the Respondent declined to accept the same as being too low.

4. The appellant said he requested for a current valuation report of the property from the Respondent which so far has not been given to him. He thereafter filed his bill of costs.
5. The respondent contested the Appellant's application stating that payment of the auctioneer's fees shall be made upon a successful sale and no payment can be made in cases of non-bids or failed auctions or bids below the reserve price. The respondent also stated that it was a condition precedent that before advertising the security for sale, the auctioneer should have evidence that there are potential serious buyers of the property. It was pointed out that the Appellant had intimated to the Respondent vide his letter dated 8/2/2018 that he had serious interested buyers who were ready and willing to buy the security parcel at an auction.
6. The Respondent stated it sent two representatives to attend the auction scheduled for 19/4/2018 at the time stated in the Daily Nation Newspaper only to discover that the auctioneers did not turn up hence the auction did not take place. It was argued that the appellant surreptitiously re-advertised the property for sale on 5/6/2019 without obtaining prior instructions from the Respondent after which he purported to request for a current valuation report.
7. The appellants responded to the Respondent's averments by filing a further affidavit to controvert the averments in the Replying affidavit.
8. The learned resident magistrate took it to account the rival averments and arguments, and came to the conclusion that the Appellant signed and accepted the terms set out in the letter of appointment given by the Respondent which expressly shielded the respondent from being liable to paying auctioneers fees for auctions which do not attract bidders or failed or where bids below the reserve price are made. For the above reason, the appellant's motion was dismissed.
9. On appeal, the appellant urged this court to reverse the dismissal order. It's the appellant's submission that an auctioneer is entitled to his professional fees under Rule 15 of the Auctioneer's Rules of 1995, in that upon issuance of the notification of sale on the strength of the letter of instructions from the instructing client, the auctioneer automatically becomes entitled to his fees. The appellant stated that he strictly complied with the aforesaid rule.
10. The respondent is of the submission that the appellant is not entitled to be paid since the respondent is not liable as per the letter of instruction which shielded the Respondent from being liable in an auction which failed for attracting a bid below the reserve price.
11. The Respondent further argued that the payment of auctioneer's fees after a successful auction has always been the practice as stated in the letter of appointment which was duly signed by both parties. It is the respondent's submissions that the appellant willfully refused to attend the public auction sale and thus should not be entitled to any fees.
12. Though the appellant put forward a total of six grounds of appeal, the main ground which commends itself for determination is whether the learned Resident Magistrate erred in basing her decision on a clause on the letter of instruction which shielded the Respondent from liability. I have already set out the arguments put forward by both sides.
13. It is not in dispute that the Appellant and Respondent executed the letter of appointment dated 7th September, 2018 issued by the Respondent to the appellant. Paragraph 14 of the aforesaid letter provides as follows:-

“Take notice that the corporation shall not be held liable to pay any fees to your firm in case of non-bids/failed auction or bids below the reserve price.....”
14. The above clause is what the learned Resident Magistrate used to dismiss the Appellant's claim.
15. The appellant was also issued with a letter of instructions by the Respondent dated 9th February, 2018 over the sale and advertisement of L.R No. Kwale/Diani/1694. Paragraph 4 of the aforesaid letter provides in part as follows:-

***“Any action taken pursuant to these instructions should be in strict adherence to our terms and conditions enumerated in our letter of appointment and rule 15 of the Auctioneers rules (Legal Notice No. 120 of 1997) as contained in the Auctioneers' Act (Act No. 5 of 1996)*”**
16. The question is whether the auctioneer was entitled to charge fees in the circumstances of this case. With respect, I am persuaded by the appellant's submission that the auctioneer's right to claim fees is governed by the Auctioneers Act and the Rules therein. The statutory provisions and the subsidiary legislation cannot be ousted by agreements or letters executed by the parties.
17. Rule 15 of the Auctioneers Rules of 1997 provides as follows inter alia:-

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

a) Record the court warrant or letter of instruction on the register

b) Prepare a notification of sale of the property in the form prescribed in the sale from 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 immovable property on the owner or on adult members of the family....

d) Give in writing to the owner of the property a notice of not less than forty five days within which the owners may redeem the property by payment.

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.”

18. It is clear in my mind that upon issuance of a notification of sale on the strength of a letter of instructions, the auctioneer is automatically entitled to his professional fees.

19. In this appeal, the Respondent commenced the whole process by issuing a letter of instruction. The conditions contained in the letter of instructions purporting to shield the Respondent from liability cannot be countenanced by law. In a nutshell, the attachment of immovable property commences upon issuance of a notification of sale and it therefore follows that the auctioneer is entitled to his fees at that stage without any conditions.

20. In the end the appeal is found to be meritorious hence it is allowed. Consequently, the order dismissing the Appellants motion of taxation 8th November, 2018 is set aside. The auctioneer’s Bill of costs is reinstated to be taxed by another magistrate of competent jurisdiction other than Hon. Murage. The appellant is awarded costs of this appeal.

Dated, signed and delivered at Nairobi this 13th of December, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent