



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**JUDICIAL REVIEW APPLICATION NO. 275 OF 2015**

**IN THE MATTER OF THE AUCTIONEERS ACT CAP 5 OF THE LAWS OF KENYA**

**IN THE MATTER OF AN APPLICATION BY JAMES KIMANI NDIRANGU**

**FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE COMPLAINT OF THE AUCTIONEERS LICENSING BOARD OF**

**6TH NOVEMBER 2014 AND THE PROCEEDINGS AND RESOLUTIONS PASSED**

**PURSUANT THERETO ON THE 21ST SEPTEMBER 2015 AND THE FINE**

**AND COSTS MADE ON THE 7TH DECEMBER 2015**

**BETWEEN**

**REPUBLIC OF KENYA.....APPLICANT AND**

**AUCTIONEERS LICENSING BOARD.....RESPONDENT**

**AND**

**SILVA WANJIRU MERIE.....INTERESTED PARTY**

**EX-PARTE**

**JAMES KIMANI NDIRANGU**

**JUDGMENT**

**The Application**

The *ex parte* Applicant herein (herein referred to as “the Applicant”) has filed a substantive application for judicial review orders herein by way of a Notice of Motion dated 6<sup>th</sup> January 2016, in which the is seeking the following orders:

1. An order of Certiorari do issue to bring to this Court for purposes of it being quashed , the Order and decision of the Respondent made on 21st September , 2015 and the communication made on the 11th December , 2015.
2. An order of Prohibition prohibiting the Respondent from continuing, hearing and continue issuing Orders to the applicant pursuant to the Orders and communication issued by it.
3. The costs of this application be provided for.

The Applicant is the director of Cash Gate Auctioneers, a licensed Auctioneer regulated by the provisions of the Auctioneers Act and with jurisdiction in Nairobi, Machakos and Kajiado, while the Respondent is a Board established under the provisions of the Auctioneers Act Laws of Kenya which is mandated to license all the Auctioneers amongst other duties.

From the pleadings filed by the parties, it appears that on 13th November 2015, the Respondent received a complaint by one Silvia Wanjiru Merie, the Interested Party herein, regarding the conduct of the Applicant herein vide Disciplinary Cause No. 85 of 2014. The matter was set down for a hearing on 21st September 2015 , and on that date when the matter came up for hearing before the Respondent, the Applicant herein did not attend neither did he send any representative to represent him.

The Respondent consequently made a decision allowing the Interested Party's complaint and ordered the Applicant to pay a fine of Kshs 100, 000/= as well as Kshs 50,000/= as the Interested Party's costs within 30 days. The Respondent then scheduled the matter for a mention on the 19th day of November 2015 to confirm if the Applicant had complied with the said orders. On 18th November 2015 the Applicant filed an application under Certificate of Urgency before the Respondent, seeking to set aside the decision of 21st September 2015 and to stay compliance of the orders therein, pending the hearing and determination of that application.

According to the Applicant, the Interested Party with the assistance and connivance of the Respondent have threatened not to license the Auctioneer for the year 2016, and that the application for review presented to the Respondent by the Applicant a was met with a lot of resistance and was deliberately ignored and not acted upon by the Respondent. Further, that the Interested Party concealed material facts as she did not inform the Respondent that that the matter in question is still pending before a competent court with jurisdiction.

The Applicant averred that the Respondent purported to have heard both parties on merit and arrived at a decision without giving proper facts of the case, and without effecting proper service to the Applicant as required by Law. Therefore, that the Respondent heard the Interested Party alone without according the Applicant a chance to be heard even after he had applied for review of the orders to accord him the chance to be heard

The Applicant claims that the whole process of trying the complaint by the Respondent was flawed, irregular and contrary to the law, and the Respondent exhibited open bias and malice against the Applicant. In addition that the Applicant was not given an opportunity of being heard contrary to the rules of natural justice, and the Applicant was consequently condemned unheard and unfairly without due process.

The response by the Respondent as stated in the replying affidavit sworn on 15th February 2016 by K.L. Kandet, Secretary to the Auctioneers Licensing Board, is that the complaint by the Interested Party was set down for a hearing on 21st September 2015, and both parties were duly informed of the said date. He annexed a copy of a hearing notice dated 10<sup>th</sup> April 2015. Further, that on 21st September 2015, when the matter came up for hearing before the Respondent, the Applicant herein did not attend despite being duly served with a hearing notice, and upon being satisfied that the Applicant had been duly notified of the hearing date, the Respondent made its decision allowing the Interested Party's complaint.

The Respondent contended that the Applicant then filed an application for review on 18th December 2015, which was one day before the mention date of 19th November 2015 when the matter was scheduled for a mention to confirm his compliance with the Respondent's orders. Further, that when the Applicant's application to set aside the Board's decision of 21st September 2015 came up for hearing on 19th November 2015, the Board directed the Applicant to first comply with the previous orders of the Board pending hearing of that application, as is the normal procedure.

It was also alleged that Applicant did not file any response to the Interested Party's complaint in Disciplinary Cause No. 85 of 2014, and only purported to claim that he had a good defence in his application to set aside the Board's decision of 21st September 2015.

The Respondent's case is that Applicant was accorded a chance to be heard by the Respondent but chose to ignore it. In addition that is deceitful for the Applicant to claim that his application for review was met with a lot of resistance and was deliberately ignored yet the application was dealt with like all other similar applications, as he was directed to serve the application on the Interested Party for hearing *inter partes* since he had filed it *ex parte*. Further, that as in all other similar applications for review, the Respondent directed him to first comply by paying any amount of money ordered to be paid by them pending hearing and determination of the application, and in such cases a party on being successful gets a refund of any monies deposited with the Respondent and/or paid in compliance with the decision of the Respondent.

Lastly, that the Applicant's claims that Respondent was conniving with the Interested Party not to license him for the year 2016; that the process being flawed, irregular and contrary to law; and that the Respondent being biased against him are unsubstantiated and are not supported by any evidence to prove the same.

### **The Issues and Determination**

I have considered the pleadings and submissions by the Applicants and Respondents. There are two issues for determination. The first is whether the Applicant was accorded the right and opportunity to be heard before the Respondent gave its decision on 21<sup>st</sup> September 2016, and secondly, whether the Applicants are entitled to the orders sought.

The Applicant's learned counsel, R.O. Nyamweya Advocate, filed written submissions dated 15th December 2016 in which it was urged that that the Respondent did not conduct proper service before instituting Disciplinary Cause No. 85 of 2014. It was contended that any further proceedings in the matter should therefore be prohibited to prevent further abuse of prosecutorial power. Further, that had the Respondent done proper service, it would not have arrived at the decision to prosecute the Applicant as it would have had the facts that the application in Milimani CMCC NO. 6460 of 2008 had not been determined to pave way for subsequent orders.

According to the Applicant, there was thus a breach of the rules of natural justice and the use of the criminal process to resolve a civil dispute through harassment and intimidation is oppressive, in bad faith, vexatious and an abuse of power vested upon the Respondent. Further, that it is trite law that any prosecution commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose, and as the issues raised in the Civil Suit NO. CMCC 6460 of 2008 were yet to be determined, there was no reasonable and probable cause for mounting a disciplinary prosecution against the Applicant. Reliance was placed on various judicial authorities in this regard by the Applicant.

Joy Maina, a litigation counsel at the Attorney General's Chambers, filed submissions dated 16th October 2016, wherein she contended that the Applicant is seeking an additional relief in his substantive application other than the reliefs for which leave was granted, being the reliefs set out in the Statement of Facts dated 6th January 2016. It was averred that the Applicant in the Statement of Facts dated 6th January 2016 sought the following substantive reliefs from this Court:

a. An order of Judicial Review by way of Certiorari to quash the Respondent's decision dated 21st September 2015 and the communication to the applicant dated 7th December 2015 pursuant to the ex parte proceedings.

b. An order by way of Mandamus to compel the Respondent to retry the whole process as the case may be of Cash Gate Auctioneers and to conduct the proceedings in accordance with the provisions of the Auctioneers Act.

However, that the Applicant in the Notice of Motion application dated 6th January 2016 seeks for an order of Prohibition for which no leave was granted. It is the Respondent's submission that the court ought to consider only the grounds and reliefs as contained in the Statement of Facts and no others. In addition that no leave was sought to include the relief of Prohibition in the Notice of Motion application and as such the same should be disregarded. Reliance was in this regard placed on the provisions of Order 53 Rule 4(1) of the Civil Procedure Rules, and the decision in **Republic vs Kenya Bureau of Standards ex parte Powerex Lubricants Limited, [2016] eKLR.**

The Respondent also submitted that the Applicant has not demonstrated the existence of any grounds to warrant the grant of an order of certiorari and mandamus as sought. The Respondent in this regard contended that the Applicant was afforded an opportunity to be heard but he deliberately chose not to appear before the Respondent. The Respondent referred the Court to the application for review by the Applicant and particularly paragraph 2 of the affidavit in support of the review application, wherein the Applicant alluded to the fact that he was aware of the hearing before the Respondent that was scheduled for 21st September 2015. Further, that at paragraph 3 he alleges that he called the offices of Messrs Rombo & Company Advocates and left a message that he attends the Board hearing on his behalf

It is the Respondent's submission that it discharged its duty in offering the Applicant an opportunity to be heard, and it is therefore did not breach the rules of natural justice. In any event, that the application for review of the Respondent's decision made on 21st September 2015 was not filed within a reasonable time, given that it was filed almost two months after the orders were issued. Therefore, that these proceedings are just an attempt by the Applicant to disobey the Respondent's lawful orders issued on 21st September 2015. Further, that the Applicant has made serious allegations against the Respondent namely that it was biased against him, yet he has not annexed any evidence to prove such allegations.

In making my determination I have regard to the nature and scope of judicial review as was addressed in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd, Civil Appeal No. 185 of 2001** as follows:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”**

Likewise, in **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited, [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.

In the present application, this Court will therefore not delve into the merits or demerits of the Applicant's and/or Interested Party's respective cases in the disciplinary cause before the Respondent or in Milimani CMCC NO. 6460 of 2008, which was the subject of detailed pleadings and submissions by the Applicant.

I will firstly address the preliminary issue raised by the Respondent about leave not having being granted to the Applicant to seek the orders of prohibition. It is notable in this respect that the Applicant in his

Chamber Summons filed in Court on 30<sup>th</sup> December only sought the reliefs of certiorari and mandamus and not prohibition. Under Order 53 Rule 4 of the Civil Procedure Rules, an Applicant is not allowed in a substantive application for judicial review orders to rely on any ground or seek any relief or raise a new plea that was not set out in the statement filed at the leave stage. This Court will therefore only consider the reliefs for which leave was granted namely certiorari and mandamus, and which are also the reliefs sought in the statement of claim by the Applicant dated 6<sup>th</sup> January 2016 which was annexed to his Notice of Motion.

The scope of the judicial review remedy of *certiorari* was in this respect clarified in **Captain Geoffrey Kujoga Murungi vs Attorney General, Misc. App No. 293 of 1993** is as follows:

**"Certiorari deals with decisions already made – so that when issued an order brings up into this Court a decision of an inferior court, tribunal or of a public authority to be quashed. Such an order (certiorari) can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice; or contrary to law."**

The order sought by the Applicant of mandamus is defined in the **Halsburys Laws of England, 4th Edition, Vol 1** at page 111 as follows:

**"The order of mandamus is of most extensive remedial nature and is in the form of a command issuing from the High Court of Justice directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is of the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue to the end that justice may be done, in all cases where there is a specific legal right, and it may issue in cases where although there is an alternative remedy, yet the mode of redress is not convenient, beneficial and effectual."**

The main ground for review relied upon by the Applicant in this regard as regards the process of the proceedings by the Respondent in Disciplinary Cause No. 85 of 2014 held on 21<sup>st</sup> September 2015, was that the rules of natural justice were not observed, as he was not properly served and therefore not given an opportunity to state his case. The Respondent however claims to have served the Applicant with a copy of the hearing notice which it attached. The Respondent also claimed that the Applicant's own pleadings show that he was aware of the hearing.

This Court is alive to the fact that the principle of fairness as a key tenet in administrative and judicial action, and non-observance of this principle is one of the grounds on which a court will intervene to quash decisions made in violation of individual rights and liberties. A fundamental aspect of fairness is that powers should be exercised in accordance with the rules of natural justice, which entail two procedural requirements, namely the right to be heard and the rule against bias.

The rules of natural justice in this regard impose a duty on the body, tribunal or court vested with powers to resolve a dispute to hear both parties and consider both sides of the case before making a decision on the matter. Therefore no man should be condemned unheard. One of the key facets of the right to be heard is that a person is given adequate notice of the case against them and the opportunity to prepare his case and present evidence in support of his case. See in this regard the decision in **R. vs Kenya Medical Training College ex parte James Chepkonga Kandagor (2006) e KLR** .

In the present application, I have perused the hearing notice annexed by the Respondent as Annexure "KLK 1" to its replying affidavit. It is indicated that it was dispatched on 17<sup>th</sup> April 2015. It does not indicate any receipt by the Applicant, and only bears and acknowledgement of receipt by the Interested Party. The Respondent in addition did not annex any affidavit of service of the same on the Applicant. It is therefore not possible to find that the Applicant was served with the said hearing notice, and even if served as his pleadings indicate, whether he was served in good time to prepare his case and attend the hearing. This is for the reason that there is no evidence that the Respondent ever served the Applicant or if there was service, when such service was effected.

It is also notable that section 4(3) of the Fair Administrative Action Act, 2015 now provides as follows:

- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**
- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
  - (b) an opportunity to be heard and to make representations in that regard;**
  - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
  - (d) a statement of reasons pursuant to section 6;**
  - (e) notice of the right to legal representation, where applicable;**
  - (f) notice of the right to cross-examine or where applicable; or**
  - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

The nature of the decision made by the Respondent on 21st September 2015 was that it did affect rights of Applicant. According to the Respondent's decision as indicated in the letters dated 30<sup>th</sup> September 2015 and 30<sup>th</sup> November 2015 that were annexed as Annexure "B" to the Applicant's verifying affidavit sworn on 6<sup>th</sup> January 2016, the Applicant is liable to pay a fine of Kshs 100,000/= and costs of Kshs 50,000/=, and risked not being licenced for the year 2016 in the event of non-compliance. These effects definitely attract the requirements of procedural fairness detailed out in the foregoing.

This Court however for the record finds that there was no evidence provided by the Applicant to substantiate the claims of bias and malice on the part of the Respondent, or the allegations that that Respondent was conniving with the Interested Party not to license him for the year 2016.

This Court therefore finds that the Applicant is entitled to the relief sought of certiorari for the reasons given in the foregoing. In addition as it is not disputed that it is the Respondent that has jurisdiction and duty under the Auctioneers Act to hear and determine complaints against auctioneers under section 24 of the Auctioneers Act, the relief sought of mandamus will also lie.

The Applicants' Notice of Motion dated 6<sup>th</sup> January 2016 is found to have merit, and is and it is accordingly ordered as follows:

- a. That an order of certiorari is hereby issued to remove and bring into the High Court the decision of the Respondent in Disciplinary Cause No. 85 of 2014 made on 21st September 2015, and the communication of the said decision to the Applicant made in its letters dated 30<sup>th</sup> September 2015 and 30<sup>th</sup> November 2015, which decision and communication are hereby quashed.
- b. An order of mandamus is hereby issued compelling the Respondent to hear Disciplinary Cause No. 85 of 2014 *de novo* and to conduct the disciplinary proceedings in accordance with the provisions of the applicable laws.
- c. There shall be no order as to the costs of the Applicants' Notice of Motion dated 6<sup>th</sup> January 2016.

Orders accordingly.

**DATED AND SIGNED AT MACHAKOS THIS 3<sup>RD</sup> DAY OF MAY 2017**

**P. NYAMWEYA**

**JUDGE**