



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 255 OF 2014

JOHN KINYANJUI KARANJA.....PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT

RULING

1. The plaintiff's application dated 16th June 2014 seeks an injunction to restrain the defendant from advertising for sale, selling by private treaty or howsoever disposing of the motor vehicles which are the subject matter of the suit.
2. The said vehicles bear the registration numbers **KBD 758A; KBN 676 V and KBN 677 V**, whilst their respective trailers bear the registration numbers **ZD 5363; ZD 5365 and ZD 5366**, respectively.
3. The plaintiff contends that on 19th February 2014 he attended an auction which was conducted by **LEAKEY'S AUCTIONEERS**. According to the plaintiff, he did not personally attend the auction, but he had sent his son, **ANTHONY KARANJA**.
4. It is the plaintiff's case that his bid of Kshs. 9,000,000/- was the highest, and that he was then declared the successful bidder.
5. The plaintiff's further case was that he had deposited the sum of Kshs. 1,000,000/- with the defendant, prior to the date of the auction.
6. The said sum was described by the plaintiff as a condition precedent to the advertisement of the auction. The purpose of the condition precedent was to be an attempt to avoid the losses incurred by the defendant whenever they advertised the vehicles for sale, yet such advertisements did not attract any persons who had a serious intention to purchase the vehicles.
7. In his submissions, the plaintiff said that when he had been declared the highest bidder, he phoned the auctioneer, seeking the details of the bank account, to which the plaintiff was to deposit the proceeds of sale. However, as the auctioneer had left town immediately after conducting the auction, the plaintiff was not provided with the requisite account details until 26th of February 2014.
8. This is how the plaintiff stated his position;

“The plaintiff on learning that his bid was successful he immediately called the Auctioneer for the bank account details to enable him forward the balance of the deposit price. The plaintiff only recieved the bank details on 26th February 2014, ten (10) days after the auction, which account details did not even belong to the Defendant, but to a stranger”.

9. Nonetheless, the plaintiff deposited a further sum of Kshs. 1,000,000/-, bringing the payments

made by that date, to Kshs. 2,000,000/-.
10. According to the plaintiff, he had, by then;

“already approached his financier, who were willing to finance the entire remaining purchase price of Kshs. 7,000,000/-”.

11. Notwithstanding the plaintiff’s readiness to pay the balance of the purchase price, the defendant alleged that the plaintiff was in breach of the terms of the auction.

12. It is the plaintiff’s contention that the annulment of the sale by the defendant was unreasonable, unlawful and irregular.

13. The plaintiff expressed the view that the defendant was driven by motives other than those of the defendant’s business interests. That view was premised on the following reasons, as set out in paragraph 17 of the plaintiff’s supporting affidavit;

“a) The said motor vehicles remained unsold for considerable period of time, which was an indication that there were no immediate buyers.

b) Even after purportedly nullifying the auction, the motor vehicles and trailers remain unsold.

c) I had discussed and agreed on the price with the Defendant well before the auction and even paid Kshs. 1,000,000/- before the auction”.

14. The plaintiff submitted that it was the defendant who had frustrated and who continued to frustrate the plaintiff’s efforts to perform his part of the bargain.

15. As far as he was concerned, the plaintiff could not be said to have failed to perform his part of the promise, considering that he had already paid Kshs. 2,000,000/-. Furthermore, the readiness of the financier who was ready to pay the balance of Kshs. 7,000,000/- was described as proof of the ability of the plaintiff to pay the purchase price.

16. Bearing in mind the fact that he had paid Kshs. 1,000,000/- prior to the auction, the plaintiff contended thus;

“...the whole transaction hinges on the deposit made on 7th February 2014, and not the Defendant’s Catalogue, as the Defendant would want the Court to believe”.

17. But at the same time, the plaintiff also submitted in the following manner;

“We urge the Court to find that the Defendant’s insistence on the plaintiff making a commitment fees of Kshs. 1,000,000, long before the advertisement was in bad faith; a move aimed at the Defendant’s unjust enrichment”.

18. The plaintiff also added, in his submissions, that he had already spent Kshs. 604,415.00 in obtaining the loan facility from the financier.

19. In the circumstances, the plaintiff asserted that unless the injunction was granted he would suffer irreparable damage to his reputation and to his business.

20. Pausing at that juncture, I understand the plaintiff to be saying he entered into an agreement with the defendant prior to the advertisement of the auction. It is for that reason that the plaintiff believes that the whole transaction hinges on the deposit made on 7th February 2014, as opposed to the Defendant’s Catalogue.

21. If that contention were to be upheld, it would imply that the auction which was conducted by Leakey’s Auctioneers on 19th February 2014 was an absolute sham. It would amount to nothing

more than a public display of a lie.

22. As the plaintiff confirms that he was an active participant in the process which was calculated to hoodwink everybody, other than the participants, that the vehicles had been sold through a public auction, he cannot pretend to be an honest purchaser for value.

23. Interestingly, the plaintiff wishes to place the entire blame on the defendant, by submitting that the defendant intended to enrich itself unjustly.

24. Assuming for a moment that the defendant had acted in bad faith by demanding the commitment fee, long before the advertisement of the auction, the plaintiff would be equally guilty of bad faith, by playing along with the defendant. He cannot now be heard to seek the assistance of the court in enforcing an arrangement which he admits to have been so tainted.

25. He who comes to equity must come with clean hands. And by the plaintiff's own admission, his hands are far from clean.

26. In the plaint, the court is being asked to declare that the rescission of the contract of sale of the vehicles and trailers was null and void.

27. If the contract in issue was founded on the arrangements made prior to the auction, it would appear that that arrangement was unlikely to be enforceable, because it appears to be tainted with illegality.

28. On the other hand, if the contract was founded on the auction, it would appear that the plaintiff had not complied with the terms and conditions of the auction. He admits that he did not pay the 25% of the purchase price by the close of business on the date of the auction. He also appears to confirm that he did not pay the balance within the prescribed 30 days.

29. Therefore, on a *prima facie* basis, I find that the plaintiff has not demonstrated a case with a probability of success.

30. The possible loss of reputation, which the plaintiff has alluded to in his written submissions, is not one of the issues arising from the plaint.

31. Meanwhile, the expenditure of Kshs. 604,415/- by the plaintiff, on acquiring the loan facility, cannot constitute an irreparable loss or damage, because the same has already been quantified by the plaintiff. Therefore, even if the plaintiff should ultimately succeed in his claim, he could always be compensated for such loss.

32. In the result, I find no merit in the plaintiff's application for interlocutory injunctions. The application is therefore dismissed, with costs being awarded to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd day of February 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Muthoni for the Plaintiff.

N/A for the Defendant.

Collins Odhiambo – Court clerk