



**Co-operative Bank of Kenya Limited v Mutiso & 11 others (Commercial Appeal E068 of 2024)
[2025] KEHC 14637 (KLR) (Commercial and Tax) (9 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14637 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E068 OF 2024
BK NJOROGE, J
OCTOBER 9, 2025**

BETWEEN

CO-OPERATIVE BANK OF KENYA LIMITED APPELLANT

AND

ISAAC MUSILA MUTISO 1ST RESPONDENT

**KENYA NATIONAL SOCIETY OF PROFESSIONAL AUCTIONEERS 2ND
RESPONDENT**

ONYANGO & TARUS ADVOCATES 3RD RESPONDENT

C.G NDIRANGU & CO ADVOCATES 4TH RESPONDENT

E AUCTIONS/ INNOVEX SOLUTIONS 5TH RESPONDENT

NCBA BANK 6TH RESPONDENT

STANBIC BANK 7TH RESPONDENT

KENYA COMMERCIAL BANK 8TH RESPONDENT

MOGO AUTO LIMITED 9TH RESPONDENT

HELLEN KELLER INTL 10TH RESPONDENT

GET GARI 11TH RESPONDENT

BARAKA CREDIT LIMITED 12TH RESPONDENT



JUDGMENT

1. This is a Judgement arising from an Appeal against the Ruling of the Auctioneers Licensing Board delivered on November, 2023 in Disciplinary Case No. 13 of 2023.

Background Facts

2. The 1st and 2nd Respondents lodged a complaint dated 7th February 2023 before the Auctioneers Licensing Board against the Appellant (among 10 other Respondents) for allegedly conducting auctioneering without a valid license. This was said to be contrary to Section 4(2) of the [Auctioneers Act](#) and arose from an auction advertisement published in the Daily Nation on 9th February 2023. The Appellant challenged the complaint through a Preliminary Objection, arguing that the Board lacked jurisdiction. That the matter should have been pursued criminally under Section 9(2) of the [Auctioneers Act](#). It was also submitted that the complaint was an abuse of process, and it was also res judicata based on a prior Court decision. The Board, in its ruling of 20th November 2023 dismissed the Preliminary Objection, paving the way for the hearing of the dispute on merits. Dissatisfied with the ruling, the Appellant filed this instant Appeal.
3. The Co-operative Bank Of Kenya Limited, the Appellant herein, filed the Memorandum of Appeal dated 20th March 2024 to appeal against the whole of the said decision on the following grounds:
 - a. The Auctioneers Licensing Board erred in law and fact in failing to dismiss and/or strike out the Complaint with costs.
 - b. The Auctioneers Licensing Board erred in law and fact in failing to analyse the issues raised in the submissions as filed by the Appellant and make a determination on the same.
 - c. The Auctioneers Licensing Board erred in law and in fact by holding that the Complaint had locus before the Board.
 - d. The Auctioneers Licensing Board erred in law and in fact by holding that the Complaint was not res judicata.
 - e. The Auctioneers Licensing Board erred in law and in fact by holding that the Complaint lay within the mandate of the Board.
 - f. The Auctioneers Licensing Board erred in law and in fact by finding that it had jurisdiction to entertain the Complaint before it and dismissing the Preliminary Objection raised by the Appellant.
4. The Appellant prayed for the following orders:
 - i. That the Appeal be allowed;
 - ii. That the Ruling of the Auctioneers Licensing Board, dated and delivered on 20th November 2023 be set aside;
 - iii. The Appellant's Notice of Preliminary Objection dated 9th May 2023 be allowed;
 - iv. The 1st and 2nd Respondents' Complaint dated 7th February 2023 be dismissed with costs.
 - v. The costs of this Appeal be awarded to the Appellant



Issues for Determination

5. The Court having carefully considered the Appeal and the submissions by the respective parties, frames the following issues for determination;
 - i. Whether the Auctioneers Licensing Board has jurisdiction to determine the Complaint.
 - ii. Whether the Complaint is res judicata.

Analysis

6. This Appeal calls into question the powers of a specialized Tribunal relating to professional associations, bodies and professions like the Engineers, Doctors, Lawyers, Teacher, Psychologist, Estate Agents and so on. The question being one whether persons who are not members of those associations, bodies or professions, can submit themselves to the jurisdictions of such Tribunals.

Whether the Auctioneers Licensing Board has jurisdiction to determine the Complaint.

7. It was the Appellant's submissions that the Board lacks jurisdiction to determine the Complaint. The Board derives its mandate and jurisdiction from the *Auctioneers Act*. The Appellant submits that Section 4(2)(b) of the Act grants the Board power over licensed auctioneers only. In the instant case, the Appellant, which is the subject of the Complaint, is a Bank regulated by the Central Bank of Kenya and is therefore not subject to the Board's mandate and jurisdiction. It holds out that it is neither an Auctioneer nor does it carry out Auctioneering business.
8. The 7th Respondent supports the Appeal. Similarly, the 7th Respondent argued that it is a duly licensed financial institution regulated under the *Central Bank of Kenya Act*, the *Banking Act*, and does not fall under the licensing framework or regulatory scope of the *Auctioneers Act*. Accordingly, it falls outside the regulatory purview of the *Auctioneers Act*. Hence it cannot lawfully be subjected to disciplinary or supervisory action by the Auctioneers Licensing Board.
9. In contrast, the 1st and 2nd Respondents submitted that the Appellant engaged in activities explicitly reserved for licensed auctioneers. This included publicly advertising auction sales and conducting repossession exercises, thus bringing itself within the jurisdiction of the board.
10. The functions of the board are provided under Section 4 of the *Auctioneers Act* as follows (underlined emphasis ours);

Object and functions of the Board

- (1) The object and purpose for which the Board is established is to exercise general supervision and control over the business and practice of auctioneers.
- (2) Without prejudice to the generality of subsection (1), the Board shall—
 - (a) license and regulate the business and practice of auctioneers;
 - (b) supervise and discipline licensed auctioneers;
 - (c) develop and facilitate adequate training programmes for licensed auctioneers;
 - (d) conduct routine inspections and visits of the auctioneer's premises;



- (e) set, maintain, and continuously improve the standards of learning, professional competence, and professional conduct for the provision of auctioneering services in Kenya; and
- (f) determine, maintain, and enhance the standards of professional practice and ethical conduct and learning for the auctioneering profession in Kenya.

11. Further to the above, the 9th Respondent submitted that the procedure prescribed under section 24(1) of the *Auctioneers Act*, as provided by the 1st and 2nd Respondent in their complaint, is solely for licensed auctioneers and not against an unqualified person carrying out the business of an auctioneer under Section 2(2). That section states as follows;

Subject to subsection (3), any person who—

- (a) attaches for sale any movable or immovable property in execution of a court order made pursuant to the provisions of any written law or contract;
- (b) sells or offers for sale any movable or immovable property or any interest therein by auction or by any other mode of sale by competition;
- (c) levies distress for rent or distrains under the provisions of any written law;
- (d) carries out evictions under an order of a court;
- (e) repossesses goods from any person pursuant to the provisions of any written law or contract, shall, for the purposes of this Act, be deemed to carry on the business of an auctioneer.

12. Section 24 of the *Auctioneers Act* 1996 sets out against whom a complaint may be brought before the Board and the nature of the conduct of proceedings. It provides (underlined emphasis ours):

“A complaint against a licensed auctioneer of misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an auctioneer, may be made to the Board by any aggrieved person within a period of one year after the occurrence of the event giving rise to the complaint.”

13. Who is a licensed auctioneer? Section 10 of the Act prescribes who qualifies to be a licensed auctioneer as follows;

10. Eligibility for licence

- (1) Subject to subsection (2) of this section and to section 11, a person who satisfies the Board that he—
 - (a) is a Kenyan citizen;
 - (b) has obtained sufficient knowledge and experience for a continuous period of not less than three years under or from a reputable licensed auctioneering firm;
 - (c) has not been convicted in the ten years immediately preceding the application of an offence involving fraud, dishonesty or immorality and is otherwise of good character and reputation;
 - (d) is not disqualified under the provisions of this Act from obtaining or holding a licence, may, on application to the Board, be licensed to carry on the business of an auctioneer.



14. A reading of Section 24 leaves no doubt that it provides for disciplinary proceedings against licensed auctioneers. It is therefore clear that the Board's jurisdiction is limited to dealing with persons within the auctioneering profession who have been licensed under the Act. Thus, a complaint can only be lodged against a licensed auctioneer.
15. The Court notes that the Complaint dated 7th February, 2023, was anchored on purported auctioneering by unqualified persons which is criminal in nature and attracts penal sanctions pursuant to Section 9 of the *Auctioneers Act*. Section 9(1)(2) of the *Auctioneers Act* provides as follows:
 9. Prohibition against unlicensed auctioneers
 1. No person shall, in Kenya, carry on the business of an auctioneer unless he holds a valid licence issued by the Board under this Act.
 2. A person who contravenes the provisions of subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings, or to imprisonment for a term not exceeding two years, or to both.
16. A plain reading of Section 9(2) above makes it a criminal offence for any person to carry out auctioneering business without a license and the recourse lies in initiating criminal proceedings and not filing a complaint before the Board. In other words, the Auctioneers Licensing Board has no jurisdiction to determine the Complaint. It lacks the policing powers to enforce the prosecute transgressions against Section 9(2) of the Act.
17. The Tribunal held as follows

“The first thing to note from the various sections of the Act highlighted by the parties is the unlimited scope of the Boards mandate defined in Section 4(1) as follows;

“...exercise general supervision and control over the business and practice of auctioneers...”

The said ‘business and practice of auctioneers’ entails the matters set out in section 2(2) above which also provides that any person who engages in the matters set out therein is without more and by operation of law, ‘an auctioneer’.

In Kenya therefore one becomes an auctioneer by dabbling in any of the matters set apart or ring-fenced by section 2(2) of the Act to be the exclusive business of an auctioneer.

In our view anybody who acquires the characterization ‘auctioneer’ by virtue of operation of law is immediately thrust into the regulatory purview of the Board”
18. The Court finds fault in this kind of reasoning by the Board. The *Auctioneers Act* that establishes the Board has a very restricted mandate. It is over Auctioneers. In the preamble it is stated as follows’

An Act of Parliament to consolidate and amend the law relating to auctioneers, to provide for the licensing and regulations of the business and practice of auctioneers, and for connected purposes
19. This Act would not apply to Teachers or Doctors or Lawyers, Mama Mboga and Boda Boda traders and by extension to persons who are not qualified and licensed as Auctioneers.
20. By way of analogy, an unlicensed person purporting to practice or render legal services cannot be presented before the Advocates Disciplinary Tribunal (ADT) or the Advocates Complaints Commission (ACC). An unqualified person purporting to offer Estate Agency Business cannot be disciplined by the Estate Agents Registration Board (EARB). An unqualified person purporting to offer medical services cannot be disciplined by the Disciplinary and Ethics Committee (D & EC) of



the Kenya Medical Practitioners and Dentists Council (KMPDC). Closer home an unqualified person purporting to sit and render judgements as a “judge” or “magistrate” cannot be hauled and dignified with an appearance for disciplinary proceedings before the Judicial Service Commission (JSC).

21. This does not in any way preclude the person offending the provisions of the Act, especially Section 2(2) from being prosecuted. However, that criminal prosecution cannot be before the Board or the Tribunal. When the Board pronounced itself on its powers as being all encompassing and extending to the Appellant and the other Respondents who are not registered or licensed Auctioneers, it erred. This Court is therefore entitled to interfere and does interfere with the decisions of the Tribunal.

Whether the Complaint is res judicata.

22. The second issue is on whether the complaint is res judicata. It is the Appellant’s further submission that the subject of the complaint and contention between the parties and the remedy sought before the Board is res judicata as the same was determined by the Court in *Kimwele v Kenya Bankers Association of Kenya & 12 others* (Commercial Case E237 of 2020) [2022] KEHC 458 (KLR) (Commercial and Tax) (31 May 2022) (Judgment).

23. According to the 1st and 2nd Respondents, the Appellant wrongly invokes the doctrine of res judicata in an attempt to evade responsibility. They stated that the Board’s ruling of 20th November 2023 conclusively held that: (a) The parties in the Kimwele case and the present matter are not the same. (b) The complaint relates to fresh violations occurring in February 2023, which cannot be barred by res judicata. (c) No prior complaint had been adjudicated by the board on the same matter, rendering the res judicata defense baseless

24. The Supreme Court in *John Florence Maritime Services Limited & Another V Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] EKLK in dealing with what amounts to res judicata stated;

“We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action”

25. In the Kimwele case, the Plaintiff was representing the interests of auctioneers, whereas the Defendants were entities with interests largely in the finance and banking sector who in the course of their business, engaged the services of auctioneers. The parties in this suit still fit the same descriptions.

26. Subject matter - The Plaintiff’s complaint was that the Defendants have been issuing instructions to persons who are not licensed to carry on auctioneer business. It is the Plaintiff’s contention that the business of repossession, attachment, repossession, and sale of moveable and immovable property by mode of competition is reserved for the licensed auctioneers. In the present suit the complaint still revolves around unlicensed auctioneers.



27. The Court in *Kimwele v Kenya Bankers Association of Kenya & 12 others*(supra) determined with finality that a complaint against unlicensed persons undertaking the business of auctioneering is by way of criminal complaint under Section 9(2) of the *Auctioneers Act*. This Court reiterates what the Court had already stated;

“If the Plaintiff has information and evidence that any person is carrying out the business of an auctioneer without a licence, then it may lay a criminal complaint. A broad declaration, such as the one sought, does not serve any purpose as it merely restates what the law is.”

28. The Court is thus persuaded to allow this Appeal.

29. As to Costs, the Court notes that the same lie at the discretion of this Court. Ordinarily costs do follow the event. In this case the Court will apply a wider view on this dispute between the parties. The issue as to whether the Appellant and the 3rd to 12th Respondents can continue to render services that are exclusively reserved for Auctioneers (as held out by the Kenya National Society of Professional Auctioneers) still largely remains unresolved. It is a question that will continue to vex the licensed Auctioneers while causing anxiety and apprehension to parties who render the services that the Auctioneering body complains of.

30. The Courts exist for rendering decisions that clear or provide clarity to such festering disputes. The Court need not say more.

31. The Court is persuaded that the 1st and 2nd Respondent were pursuing a public interest on behalf of their members. This is a bread-and-butter issue. On the other hand, the Appellant was defending a commercial interest that affects a large number of players in that particular market. The fair order is let each party bear its or his own costs of the Appeal as well as before the Board.

Determination

32. The Appeal is allowed in the following terms;

- i. That the Ruling of the Auctioneers Licensing Board, dated and delivered on 20th November 2023 is quashed and set aside in its entirety;
- ii. It is replaced with an order allowing the 4th Respondent Cooperative bank of Kenya Limited's Notice of Preliminary Objection dated 9th May 2023 and thus striking out the 1st and 2nd Complainants Complaint dated 7th February 2023 with no orders as to costs.
- iii. Each party to bear its/his own costs of this Appeal.

33. It is so ordered.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 09TH DAY OF OCTOBER, 2025.

NJOROGE BENJAMIN K.

JUDGE

In the presence of;

Mr. Emmanuel Ole Ntome for the Appellant.

Mr. Cheruiyot for the 7th Respondent.

Miss Mwangi holding brief for Mr. Turunga for the 9th Respondent.



Mr. Peter Wabwire - Court Assistant.

