



**Benard Muriuki Gaturuku t/a Bensure Auctioneers v Vision Afrika Sacco Limited
(Miscellaneous Civil Application 310 of 2022) [2024] KEMC 55 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEMC 55 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
MISCELLANEOUS CIVIL APPLICATION 310 OF 2022**

PA NDEGE, SPM

JULY 4, 2024

BETWEEN

**BENARD MURIUKI GATURUKU T/A BENSURE
AUCTIONEERS APPLICANT**

AND

VISION AFRIKA SACCO LIMITED RESPONDENT

RULING

1. I have gone through at the Bill of Costs presented for assessment in the application herein. I have also gone through the Replying Affidavit by the Respondent herein. From the outset, I find most of the averments in the Replying Affidavit to be hearsay and hence unreliable. They basically refer to averments contained in another affidavit of a third party who is not a party or a witness to the cause herein. This therefore leaves the applicant’s evidence as largely uncontroverted.
2. Be that as it may, it is not that every such application must be allowed as a matter of cause. As I court of law, I still have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any such application, the court will as a matter of cause grant the sought orders. As held by the Supreme Court of Kenya in *Gideon S. Konchellah Vrs Julius L. Sunkuli And 2 Others* (2018) e KLR, it behoves the court to be satisfied that prima facie, with no objection, the application is meritorious and prayers may be granted.
3. It is evident herein that the sale was stayed. From the documents annexed to the affidavit the auctioneer received the order staying execution after he had issued the notification of sale (the proclamation). Other than that, the auctioneer did no more because approximately 3 months later he was served with an order staying execution. What the auctioneer was entitled to in addition to fees for receipt of court warrant or letter of instructions (Kshs. 1000/=) and fees before attachment or repossession (Kshs. 4,000/=) were attaching charges in addition to expenses whose assessment is provided in paragraph 4 of the scale.



4. The manner in which an auctioneer's charges are assessed was settled by the Court of Appeal in the case of *National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer* [2005] eKLR where the court held: -

The respondent based his fees on the decretal sum and the Deputy Registrar assessed the fees on the basis of the decretal sum. The wording of paragraph 4 of Part II of the Fourth Schedule does not say that the percentages stated apply to the decretal amount. It would be unjust to base the fee on attachment on the decretal amount because in some case, the value of the attached goods may be many times less than the decretal amount shown in the warrant of attachment and sale.

The values indicated in paragraph 4 of Part II of the Fourth Schedule on the basis of which the fees for attachment are assessed are no doubt obscure. Nevertheless, it is a canon of construction of statutes, that if possible a statute should be construed in a manner which makes it operative and that where a statutory has several meanings even though there is little to choose between them, the courts must decide what meaning the statute is to bear, rather than reject the provision as a nullity. (See Paragraph 582 Halsbury's Laws of England Vol. 36, 3rd Edition).

The main object of paragraph 4 is clear. It is intended to provide values on the basis of which the auctioneers should be assessed. We think that it is reasonable that the auctioneer's charges for attachment should be based on the value of the goods attached and not on the decretal sum. It is to be remembered that the auctioneer is to be remunerated for the actual work done and not on the basis of what he could have done had he attached goods equivalent in value to the decretal sum. This is the meaning we give to paragraph 4 of Part II of the Fourth Schedule in order to make it operative....

5. According to the proclamation annexed by the auctioneer the value of the proclaimed parcel was Kshs. 2,400, 000. In view of the decision of the Court of Appeal the fees of the applicant herein ought to have been assessed based on the value of the proclaimed land which as I have stated is Kshs. 2,400,000/= . Paragraph 4 of Part II provides that for anything over Kshs. 1,000,000/= the auctioneer is entitled to 2% meaning 2% of the value of the proclaimed parcel hence 2% of 2,400,000/= = 48,000/=.
6. To this add the auctioneer's expenses which in his bill are listed as items 5, 6, 7, and 8 hence a total of Kshs. 57,000/= . Add the Kshs. 1,000/= under paragraph 1 and Kshs. 4,000/= under paragraph 3 and then 16% VAT and you get Kshs. 71, 920/= . The auctioneer's Bill of Costs dated 14th December 2022 is hereby assessed at Kshs. 71,920/= . As the appellant has succeeded only partially he shall be entitled to only half of the costs of this application. It is so ordered.

RULING SIGNED, DATED AND DELIVERED AT NAKURU ELECTRONICALLY VIA MICROSOFT TEAMS THIS04th.....DAY OFJuly..... 2024.

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Applicant's Counsel: N/A

Respondent's Counsel: Kanyi Ngure

Applicant:

Respondent:



K. Nguere: Seeking 30 days stay as I organize payments

CT: 30 days stay granted

