



**Investments v Mahadi & another (Civil Appeal 155 of 2018)
[2022] KECA 142 (KLR) (18 February 2022) (Judgment)**

Neutral citation: [2022] KECA 142 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 155 OF 2018
MSA MAKHANDIA, F SICHALE & HA OMONDI, JJA
FEBRUARY 18, 2022**

BETWEEN

GARAM INVESTMENTS APPELLANT

AND

IBRAHIM HUSSEIN MAHADI 1ST RESPONDENT

MAHADI ENERGY 2ND RESPONDENT

JUDGMENT

1. the High Court delivered on 7th February, 2018, by which the learned Judge held that; ‘an auctioneer charging fees under the Fourth Schedule could not purport to charge the rates on the different bands and then accumulate or aggregate the total. Rather an auctioneer could only slot himself under one specific band; and seeks that part of the ruling to be set aside as it is not satisfied with the amount’s awarded as its charges pursuant to a sale.
2. The ruling was based on an issue raised by the appellant vide an application dated 3rd November, 2017, challenging the amounts awarded as its professional charges. The trial court as already held that the appellant could not accumulate his charges under paragraph 4 of the Fourth Schedule to the [Auctioneers Act](#); that the auctioneer charging fees under the Fourth Schedule could not purport to charge the rates on a different band then aggregate the total, but rather that an auctioneer could only put himself under one band.
3. A short background of this case is that Ibrahim Hussein Mahadi, the 1st respondent, executed a letter of offer dated 21st September, 2012, which provided that he be issued with a facility of Kshs.36,000,000/= by Gulf African Bank Ltd, (“the bank”) secured by existing securities which included a charge over property L.R. No. 209/5081 South C, in Nairobi (“the suit property”). He defaulted in repayment of the debt, and the Bank initiated the recovery process by exercising its statutory power of sale.



4. The respondents filed a suit against the appellant and the Bank seeking inter alia, a permanent injunction restraining the appellant and the Bank from attaching, selling, disposing of, alienating, repossessing and/or transferring the suit property which had secured a loan facility.
5. The court issued an order on 17th July, 2017, suspending the sale of the suit property for a limited period of 15 days on condition that the Bank be paid a sum of Kenya Shillings Nine Million (Kshs.9,000,000). However, the 1st respondent failed to comply with the order and the court ordered that the sale of the suit property proceeds. The respondents thereafter filed an application dated 17th August, 2017, seeking to have the stay of the sale of the suit property. The court issued an order on 21st August, 2017, directing that the sale of the suit property be suspended for a limited period of 45 days on condition that the 1st respondent pays to the Bank the balance of the outstanding loan. On both occasions when the sales were stopped, the court made orders that costs of the auctioneer appurtenant to the stopped sales be met by the respondents. Such costs were to be agreed on by the parties in default assessed by the court.
6. The parties did not agree on the costs payable to the auctioneer on the stopped sales and on 31st July, 2017, the appellant and the bank went to court for taxation of the auctioneer's costs awarding the appellant Kshs.508,426/= stating that the bands outlined under paragraph 6 of the Fourth Schedule were not to be applied cumulatively.
7. Dissatisfied with the said ruling, filed an application dated 3rd November, 2017, seeking to have the same reviewed or set aside on the grounds that there were mistakes and errors apparent on the face of the said ruling.
8. In his ruling of 7th February, 2018, the learned Judge reiterated his sentiments in the ruling of 29th September, 2017, where he was specific that the Fourth Schedule could not be applied cumulatively. According to the learned Judge, an auctioneer could not purport to charge the rates on the different bands and then accumulate or aggregate the total, but rather that an auctioneer could slot himself under one specific band.
9. The learned Judge further stated that an auctioneer must identify the reserve price and place himself in one applicable band and rate, but not split the reserve price to fit the various bands and rates, as this would amount to cumulative and simultaneous approach which, in the Judge's mind was not the intent of the Fourth Schedule.
10. The crux of this appeal is the application of the different bands set forth in the Fourth Schedule. That is whether an auctioneer can charge fees on the different bands and thereafter accumulate the total. The appellant challenges the ruling of the court on 3 grounds which all boil down to one issue, i.e. the Intent of the Fourth Schedule to the Auctioneer's Act namely:
 - a. Can an auctioneer charge under different bands then aggregate the total sum?
or
 - b. Is an auctioneer required to slot himself under one specific band?
11. The appellant disagrees with the trial court's decision that an auctioneer charging fees under the Fourth Schedule could not purport to charge the rates on the different bands and then accumulate or aggregate the total and could only slot himself under one specific band. The appellant contends that the bands under Paragraph 6 of the Fourth Schedule are to be applied cumulatively, and relies on the case of *Alimex Limited v Startruck Auctioneers [2018] eKLR* where the High Court held that the assessment of the auctioneer's fees is on a cumulative basis and is not on a flat percentage.



12. This being a first appeal it is this Court's primary duty to re-evaluate the evidence on the record in order to arrive at its own independent conclusion on the evidence and the law, as per Rule 29 (1)(a) of the Court of Appeal Rules. The main issue this Court is taxed with determining is the intent of the fourth Schedule to the Auctioneer's Act.
13. The appellant's main argument is that it should be allowed to charge for fees under the different band set out in the Fourth Schedule to the Auctioneer's act, and not under one specific band as was the trial court's ruling. The appellant submits that this has been the acceptable formula of calculating auctioneer's fees by practice and by statute.
14. The appellant contends that costs should have been assessed as follows under the Fourth Schedule:
- a. Kshs. 0 to 600,000.00 10% Kshs.60,000.00
 - b. Kshs.600,001.00 to 3,000,000.00 5% Kshs.150,000.00
 - c. Over Kshs.3,000,000.00 2% of remainder of Kshs.33,900,000.00
Kshs.678,000.00
- Total Kshs.888,000.00
Reduce by Half Kshs.444,000.00
Add VAT Kshs.71,040.00
Add Disbursements Kshs.73,426.00
Total Kshs.588,466.00
Add costs for the 2nd Stopped sale Kshs.588,466.00
Grand Total Kshs.1,176,932.00
15. A perusal of the Fourth Schedule clearly shows that it is banded in 3 different categories, Kshs.4,001/= to Kshs.100,000/= at 10%, Kshs.100,001/= to Kshs.1,000,000/= at 5% and over Kshs.1,000,000/= at 2%. What the appellant is submitting is to the effect that for a charge of its fees, say the fees was Kshs.1,000,000/=, then the appellant would be entitled to charge from every band until Kshs.1,000,000/=. Whereas the schedule makes provision for a charge of fees of Kshs.1,000,000/=.
16. That in our view, and in agreement with the trial court would be improper, as it would then defeat the purpose for the Fourth Schedule in breaking down the amount chargeable for the reserve price into the different three bands. Indeed, to hold otherwise would in effect amount to benefiting from all scales. We are satisfied that the auctioneer must identify the reserve price and place himself in one applicable band and rate, and not all of them. That would amount to unjust enrichment or double charging as it were.
17. It is our considered view that the Alimex Limited case quoted by the appellant is not applicable in this case as the High Court erred in the principle it used in calculating auctioneer's fees under the Fourth Schedule as it is the finding of this Court that an auctioneer must identify the reserve price, determine under what band it falls under and calculate as per that band and percentage the band provides for.
18. The appellant argues that fees are to be calculated cumulatively as is per practice and statute. We hold that if the Auctioneer's Act intended fees to be charged cumulatively under the Fourth Schedule it would have expressly stated so.



19. We therefore agree with the trial court's ruling in its entirety and accordingly find that the appeal has no merit and the same is dismissed. The costs of the appeal shall be borne by the appellant

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

