



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, GITHINJI & DEVERELL, J.J.A.)

CIVIL APPEAL NO. 195 OF 2004

BETWEEN

NATIONAL INDUSTRIAL CREDIT BANK LIMITED.....APPELLANT

AND

S. K. NDEGWA AUCTIONEER.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Justice Ibrahim) dated 18th day of November, 2003

in

H.C.C.C. NO. 1818 OF 2000)

JUDGMENT OF THE COURT

The appellant, *National Industrial Bank Limited* (Bank) is aggrieved by the decision of the superior court dated 18th November, 2003 dismissing appeal against the assessment of auctioneer's fees by the Deputy Registrar.

The Bank, being the decree-holder in *H.C.C.C. No. 1818 of 2000* applied to the High Court for execution of the decree by way of attachment and sale of movable properties of M/s. Majani Mingi Sisal Estate Ltd. & 2 Others, the judgment-debtors, to recover the decretal sum of Kshs.75,772,501/20.

The warrant of attachment and sale dated 18th October, 2001 were issued by the Deputy Registrar and served on S.K. Ndegwa, Auctioneer, respondent in this appeal (Respondent) for execution. On 18th May, 2001 the respondent issued **PROCLAMATION OF ATTACHMENT** of judgment-debtor's goods showing that he had attached the movable properties described in the schedule thereto – i.e. a motor vehicle valued at Kshs.500,000/= and all machinery and generators, tractors, vehicles, household goods valued at Kshs.68,335,829/80.

On 21st May, 2001 the superior court granted a temporary injunction restraining the sale of the attached vehicles. Ultimately, the respondent filed a schedule of his charges in court claiming Kshs.1,327,337/50 including disbursements. Under Item 4 of the Schedule he claimed Kshs.1,139,839/50 being commission charges at 1½% of the decretal sum of Kshs.75,772,501/50. This was under paragraph 4 of Part II of the Fourth Schedule to the Auctioneers Rules.

The charges were disputed by the Bank. Thereafter the Deputy Registrar of the High Court, after hearing full submissions, assessed the respondent's fees at Kshs.1,146,212/=. The fees allowed under Item 4 was Kshs.1,000,000/=. Pursuant to **Rule 55(4)** of the Auctioneers Rules 1997, the Bank filed an appeal against the decision of the registrar to a Judge in chambers but the superior court (Mohamed Ibrahim, J.) dismissed the appeal on 18th November, 2003. The learned Judge, however, on application by the counsel for the Bank gave leave to the Bank to appeal, hence this appeal.

The only contentious issue is the fees allowed for proclamation of attachment in Item 4.

The scale of fee for auctioneers on attachment and sale of properties is contained in Part II of the Fourth Schedule of the *Auctioneers Rules 1997* (rules). Items 4 and 5 of Part II provides:-

“4 fees on attachment/repossession distraint and expenses

Kshs.2001 to Kshs.50,000 – 5%

Kshs.50,000 to

100,000 - - 3%

Over Kshs.100,000 – 1.5%.”

Transport, storage, advertising, insurance and the disbursement expenses where attachment or repossessed is stayed or postponed or money tendered after attachment or possession but before sale – attachment or repossession charges in addition to expenses.

5. Fees of sale of movable property

First, Kshs.2,000 – 10,000 10%

Kshs.2001to Kshs.10,000 – 7.5%

Over Kshs.10,000 – 5%

Storage of property - ¼ of the value of property Maximum of 500 per day.

The dispute before the Deputy Registrar, as we understand it, was not about the formula for assessment of the auctioneers fees provided in paragraph 4 of Part II of the Fourth Schedule of the Auctioneers Rules or the quantum of the respondents fees. The dispute was about the legal entitlement by the auctioneer to fees for proclamation. The counsel for the Bank contended before the Judge in chambers that the auctioneer was not entitled to fees under paragraph 4 of Part II of the Fourth Schedule because there was no attachment as envisaged by **Order 21 Rule 38** of the *Civil Procedure Rules* which provides that attachment of movable property:

“shall be made by actual seizure, and attaching officer shall keep the property in his custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof”.

It was further submitted that the auctioneer cannot claim fees on the basis of attachment if there is no possession of the goods, that since the auctioneer merely proclaimed the goods without seizing them such proclamation is not an attachment but a notice and the auctioneer was not therefore entitled to fees for proclamation. The respondent’s counsel, on the other hand, contended in the superior court that the attachment was under the Auctioneers Rules which provide for proclamation before seizure of the goods to give time to the debtor; that the proclamation is seizure and that the goods proclaimed come into the custody of the court.

The learned Judge considered the rival submissions, and concluded:

“I hold that under our laws today once goods or property have been proclaimed under rule 12 (b) and the prescribed procedure followed, the process of attachment takes effect and it does not subsequently matter at what stage it is terminated once goods are proclaimed they become attached and seized by the law.

The auctioneer from this stage is entitled to charge his commission under Rule 11 paragraph 4”. Rule 12 of the Auctioneers Rules referred to in the judgment of the superior court provides:

“Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock:

a. record the court warrant or letter of instruction in the register.

b. Prepare a proclamation in Sale Form 2 of the schedule indicating the value of specific items and condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory auctioneer shall sign a certificate to that effect.

c. In writing give to the owner of the goods seven days notice on Sale Form 3 of the schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction.

d. On expiry of notice without payment and if goods are not to be sold in situ remove the goods to safe premises for auction.

e. Ensure safe storage of the goods pending their auction.

f. Arrange advertisement within seven days from date of removal of the goods and arrange sale not earlier than seven

days after first newspaper advertisement and not later than fourteen days thereafter.

g. Not remove any goods under the proclamation until the expiry of the grace period.

Rule 14 prohibits the removal, interference or alienation of any goods comprised in the proclamation.

The prescribed Sale Form 2 referred to in the rule is headed PROCLAMATION OF ATTACHMENT/REPOSSESSION/DISTRAINT OF MOVABLE PROPERTY. It notifies the judgment-debtor, among other things, that the movable goods described in the schedule to the proclamation have been attached and left in his custody for 7 days.

Mr. Namachanja, learned counsel for the appellant reiterated his submissions in the superior court and submitted that the learned Judge erred in equating proclamation to attachment; that a proclamation is merely a declaration that something is about to be done and that it would amount to enriching the auctioneer if he gets fees for proclamation under paragraph 4 of Part II of Fourth Schedule and fees for sale under paragraph 5.

Mr. Gatonye, learned counsel for the respondent, on the other hand, submitted, that **Order 21 Rule 38 Civil Procedure Rules** encompasses the old procedure for attachment while the Auctioneers Act introduces a more civilized way of attachment giving the judgment-debtor time to pay thus avoiding seizure and carting away of the seized goods; that seizure does not necessarily mean the taking away of goods from the possession of judgment-debtor. He supported the finding of the learned Judge that proclamation is part of attachment; that is the reason the Fourth Schedule does not provide fees for proclamation. He submitted that the auctioneer need not complete the attachment to be entitled to fees.

It is true that the manner and the procedure of attachment stipulated in **Order 21 Rule 38 Civil Procedure Rules** appear to be in conflict with the procedure prescribed in **Rule 12** of the Auctioneers Rules. However, it is clear that the Auctioneers Act is a modern statute and the procedure contained in **Rule 12** of the Auctioneers Rules is indeed intended to be a reform of the old procedure contained in **Order 21 Rule 38** of the *Civil Procedure Rules* which clearly needs to be amended to remove any inconsistencies.

The actual words used in the two rules is not decisive of whether an attachment has taken place. One has to consider the essence and purpose of the attachment. The purpose of the attachment is the execution of the decree. The essence of the attachment is to remove the goods from the possession of the judgment-debtor and place them in the custody of the law so that they can be sold to satisfy the judgment debt if the judgment-debtor does not pay the debt. To place the goods in the custody of the law it is not necessary, as Mr. Gatonye correctly submitted, that the goods must be carried away from the premises of the judgment-debtor. In the commentary to **Order 21 Rule 43** of the Indian rule which is in *pari materia* to **Order 21 Rule 38**, the authors of Mulla, *The Code of Civil Procedure* 16th Edition state in part at page 2667:

“where a warrant of attachment is executed by affixing it to the out door of the warehouse in which goods belonging to the judgment debtor are stored, it amounts to “actual seizure” within the meaning of the present rule”.

It is clear from **Rule 12** as read with **Rule 14** of the Auctioneers Rules and the contents of the prescribed form, that is, Sale Form 2 that the proclamation of the movable goods is legally and effectively an attachment. From the moment the goods are proclaimed, the judgment-debtor is deprived of the legal possession and physical control of the goods and instead the goods are placed in the custody of the law and the court through the auctioneer. The judgment-debtor can only redeem them by the payment of the debt. If the judgment-debtor fails to pay the auctioneer moves to the second stage of conducting the sale of the attached goods.

We are satisfied that the learned Judge correctly construed the word “proclamation” in the context in which it is used in the Auctioneers Rules and reached the correct decision that the auctioneer was entitled to fees for attachment prescribed in paragraph 4 of Part II of the Fourth Schedule.

Mr. Namachanja, however, contended, quite correctly in our view, that paragraph 4 of Part II of the Fourth Schedule does not indicate on what value the specified percentages are to be based. He asked rhetorically:

“what value are we talking about? the value of the property attached? or the value in the proclamation? or the value of the decretal sum?”.

Section 30 (f) of the Auctioneers Act authorizes the Chief Justice to make rules to provide for, inter alia, the remuneration of licensed auctioneers. **Rule 55 (1)** of the Auctioneers Rules merely provides that the fees payable to the auctioneer are the fees set out in the Fourth Schedule.

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 cases, 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 the construction of statutes, that, if possible a statute should be construed in a manner which makes it operative and that where a statutory provision 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 auctioneer's charges 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. That is the meaning we give to paragraph 4 of Part II of the Fourth Schedule in order to make it operative. We are, however unable to assess the auctioneers fees since there is no or not sufficient evidence of the value of the goods attached. We think that, it is appropriate that the fees of Shs.1,000,000/= assessed under Item 4 of the respondent's schedule of charges should be set aside and the matter remitted to the Deputy Registrar to assess the auctioneers fees on the basis of the value of the properties attached.

For those reasons, we partly allow the appeal to the extent that the auctioneers fees assessed under item 4 at Shs.1,000,000/= on the basis of the decretal sum is set aside. The assessment of the auctioneers fees is remitted to the Deputy Registrar for re-assessment on the basis of the total value assessed by him of the properties described in the proclamation by the respondent. The appeal against the award of fees for attachment is otherwise dismissed.

As both parties have partly succeeded in this appeal, we make no orders as to the costs of this appeal.

Dated and delivered at Nairobi this 21st day of December, 2005.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR