



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NO. 16 OF 2013

FREDRICK NGARI MUCHIRA

HOWARD KIPKOECH KORIR & 98 OTHERS.....CLAIMANTS

VERSUS

PYRETHRUM BOARD OF KENYA.....RESPONDENT

AND

GEOFFREY ISHUA KARIUKI T/A DIRECT "O" AUCTIONEERS....INTERESTED PARTY

RULING

1. This ruling is in respect of the Respondent/applicant's application dated 9th December, 2020 filed under certificate of urgency on 10th December, 2020 via the firm of Rodi, Orege & company advocates seeking the following orders;

- 1. THAT this application be certified as urgent and its service be dispensed with in the first instance.**
- 2. THAT this Honourable Court be pleased to issue orders compelling M/s Direct "O" Auctioneers forthwith to return Motor Vehicle Registration No. KAH 721F Toyota Hilux Pickup to the substantive Respondent/Applicant herein.**
- 3. THAT in the alternative this Honourable court be pleased to order M/s Direct "O" Auctioneers to render full accounts following their alleged sale of Motor Vehicle Registration No. KAH 721F Toyota Hilux Pickup through public auction to this Honourable Court and to the substantive Respondent/Applicant.**
- 4. THAT in the alternative this Honourable Court Order M/s Direct "O" Auctioneers to pay the substantive Respondent/Applicant the current market value of the said Motor Vehicle.**
- 5. THAT the costs of this application be provided.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn by **Mr. Joseph W. Muigai**, the managing director of the Respondent/ Applicant on 9th December, 2020 and on the following grounds:

- a. That sometimes in April, 2019, the interested party herein duly instructed by the claimant proclaimed and attached the Respondent/Applicant's Motor Vehicle Registration No. KAH 721F TOYOTA HILUX PICKUP towards recovery of an alleged balance of the decretal sum of Kshs. 7,750,017/=.
- b. That, the Applicant in the bid to satisfy the said decree paid Kshs. 3,476,491/= on 25th July, 2019, Kshs. 4,274,017/= on 16th October, 2019 being the decretal sum and a further Kshs. 350,000/= being auctioneer's fees thus settling the balance on the decretal sum plus the Auctioneer's fees in full.
- c. That, the Auctioneers through a letter dated 12th February, 2020 allege that the vehicle was sold by way of public auction on 17th July, 2020 but the proceeds from the sale of the said vehicle have never been accounted for.
- d. That, several requests to the Claimants' Advocates and Direct "O" Auctioneers to have the subject vehicle returned have proved

futile hence the present application.

e. In the event the said Motor Vehicle was sold by public auction, (which is denied) then the proceeds from the said sale were never factored on the balance of the decretal sum payable when the Auctioneers took out fresh warrants of attachment in September, 2019.

f. The said actions by M/s Direct "O" Auctioneers are purely unfair, unconscionable and punitive to the Applicant who has suffered financial losses for non-user of the Motor Vehicle, their tool of trade, despite having cleared the payments of the decretal sum and the Auctioneers fees.

g. The Applicant used the said Motor Vehicle as a tool of trade for the Pyrethrum flowers collection and general transportation exercise and as a result of the aforesaid acts by Auctioneers, the Applicant has continued to suffer loss and damage.

h. The Auctioneers are yet to either return the motor vehicle to the applicant, or render full accounts following the alleged sale both to this Honourable court and the applicant or compensate the applicant with the equivalent of the value of the Motor Vehicle at the current market rates.

i. The Auctioneers are clearly disrespectful to this Honourable court that had issued them with warrants and has no regard to the applicant whose motor vehicle they had attached and allegedly sold.

3. In opposing the application, the claimants, through one of the claimant, **Howard Kipkoech Korir**, swore a replying affidavit filed in this Court on 4th February, 2021 on the following grounds;

a. The claimant confirmed that it did receive the monies as forwarded by the Respondent. However, no amount forwarded to the Claimants advocates was so forwarded for onward transmission to the auctioneers herein.

b. That, any amount received by the Claimants' advocates over and above the warrant sum is held pending the assessment of costs that were awarded by this court in the judgment of 19th July, 2013.

c. That, the Claimants are not aware of the Respondent's complaints more specifically as regards the stated seizure, carting away and subsequent sale of the Applicant's Motor Vehicle registration No. KAH 721 H, Toyota Hilux Pickup as alleged or at all and are not able to respond to the various allegations of facts as regards the deeds and misdeeds of the auctioneers.

d. That, the Auctioneer did not get back to the Claimants and or their Advocates on record as to the actions taken in respect of the warrants of attachment issued nor did they (auctioneers) account for the receipt of any funds from the alleged public auction or at all.

e. That, the alleged Motor Vehicle was neither brought to the Claimants nor to their advocates attention. Similarly, the sale proceeds were not brought to the Claimants and or our Advocates on record. Therefore, the Auctioneer was not acting within the ostensible authority of the Claimants. Thus Principal-Agent relationship does not hold in the circumstances.

f. The claimant thus sought for dismissal of the applicant application for being frivolous, vexatious and an abuse of Court process.

4. On 23rd February, 2021, the interested party made its response to the averments of the Application herein, vide a Replying affidavit deposed upon by the said auctioneer, **Geoffrey Ishua Kariuki**, sworn on 18th February, 2021, pursuant to a court order of 10th December, 2020 directing the same and stated as follows;

a. That, the Applicant's application is bad in law, incompetent, fatally defective, frivolous, vexatious and as such, the same ought to be struck out and/or dismissed with costs to the Respondents herein.

b. That, on 22nd March 2019, he received instructions from the firm of Millimo Muthomi & Company Advocates (**Claimants advocates**) to levy execution against the Applicant, which firm of Advocates instructed the Court to issue warrants of attachment as per the Court's award dated 7th March 2019.

c. That, on 9th April, 2019, warrants were issued by the Court for attachment and sale of property, for a sum due to the claimants of Kshs. 7,750,017/= which they proceeded to proclaim the Applicant's property and also raised his fee note for the proclamation.

d. That, by an application dated 16th April 2019, the Applicant herein obtained stay of execution orders on 17th April, 2019 but the application was later dismissed vide a ruling delivered by Hon Justice. M. Mbaru on 17th May, 2019 and the Applicant agreed to settle the auctioneer's fees upon an attachment carried out on 18th May, 2019, which was paid but failed to pay the decretal amount until 15th July, 2019 when the Claimants' Advocates instructed the Court to re-issue warrants of attachment and sale.

e. That, on 2nd July 2019, the Court re-issued the warrants of attachment and sale to the auctioneer who proceeded to proclaim the Applicant's property, motor vehicle registration number KAH 721F which had been attached on 18th May, 2019.

f. That, the said vehicle was subjected to valuation which placed the market value at Kshs. 450,000/= and forced value at Kshs. 380,000/=. Consequently, the motor vehicle was advertised on 9th July, 2019 and sold by way of a public auction on 17th July 2019 at a sum of Kshs. 500,000/= which amount only realized part of the auctioneer's fees being proclamation fees of Kshs. 279,800/=,

attachment fee and fees on auction at Kshs. 169,032/= and storage charges of 66,540/= making a total of Kshs. 515,392/=.

g. That, the auctioneers sought to have the warrants re-issued but the Applicant made a part payment of Kshs. 3,476,491/= directly to the Claimants' Advocates on 25th July, 2019 leaving a balance of Kshs. 4,274,017/=.

h. That, the Claimants' Advocates further instructed the Court to re-issue warrants to the auctioneers which were issued on 5th September, 2019 for the sum of Kshs. 4,274,017/s and upon proclamation of the Applicant's property, they agreed to settle the Outstanding balance of the decretal amount of Kshs. 4,274,017/= together with auctioneer's fees of Kshs. 196,689/= through the Advocates for the Claimants.

i. That, upon the expiry of the warrants, it returned the same to Court as fully executed even though are yet to receive their fees from the Claimants' Advocates.

j. That, the interested party herein is an agent acting on the instructions of the Claimants' Advocates and following laid down procedure, and therefore ought to be discharged from any of the reliefs sought by the Applicant in the instant application. Further that the application ought to be dismissed considering the procedure followed that led to the said sale.

k. Further, that the Applicant does not merit to be granted the orders sought as it has not demonstrated with exactitude any non-compliance with laid down procedures under the Auctioneers Act and/or Court procedures to warrant the filing of this Application.

e. The parties herein agreed to canvass this application by way of written submission with the interested party filing on 23rd February, 2021, the applicant filing on 3rd March, 2021, and the claimant filed on 11th March, 2021.

Respondent's submissions.

6. The Respondent/ applicant submitted that, it paid the auctioneers herein its fees by cheque Number. 014392 of Kshs. 350,00 on 30th May, 2019 pursuant to the proclamation carried out on 18th May, 2019 therefore it is curious for the interested party to have allegedly sold the proclaimed motor vehicle in July, 2019 to recover its cost when they had received their costs in May.

7. The Applicant submitted thus, that the auctioneers have not given any iota of evidence inform of proclamation Notice, notification of sale or newspapers advertisement to demonstrate to this Court that it followed due procedure in selling the applicant's motor vehicle via public auction. Further that the alleged warrants of attachment, proclamation notice and fee note marked as annexure **GIK 5** are not attached to his replying affidavit as mentioned.

8. The Applicant argues that it has paid the auctioneers the two fee notes served on 18th May, 2019 and 10th September, 2019 as was confirmed in the auctioneer's affidavit therefore leaving none pending payment to warrant the alleged auction of its motor vehicle and payment of the purported fees of Kshs 515,372/-.

9. The respondent took issue with the denials by the claimants advocates' that the auctioneers herein never informed them of the auction of the respondent's motor vehicle when the auctioneers indicates to this court that they were acting on instructions given to it by the claimants advocates to realize the decretal sum owed to the claimants.

10. The respondent submitted that, it paid the claimants all the decretal sum in addition to the auctioneer's fees of Kshs. 196,689/- which claimant admits holding however claiming that it intends to use the said money to offset its Bill of costs that that has not even been filed in court. Consequently, the respondent argues that the auctioneer herein has admitted that he is aware that the claimant's advocates are holding their fees.

11. The respondent submits that the acts by the claimant in holding the auctioneer's fees is unlawful in light of the fact that there are no garnishee proceedings between the parties. Further that, the holding of the said monies has subjected them to hardship and loss of its tool of trade being motor vehicle registration number KAH 721F.

12. The respondent argues that since there is no Bill of cost that has been taxed by the Honourable Court, the claimant has no basis in withholding the said money as doing so is illegal, they thus urged this court to allow its application as prayed.

Claimant/ Respondents' submissions

13. The claimant maintains that it was not aware of the seizure of the respondent motor vehicle registration number KAH 721F Toyota Hilux pickup, carting away and subsequent sale as they were not informed by the auctioneers of any such actions neither did the said auctioneer account to them after the purported public auction sale.

14. The claimant submitted that, the auctioneer in his replying affidavit admits having auctioned the respondent motor vehicle to recover his costs when the warrants of attachment attached to his affidavit indicate that the warrant were to be executed to recover the decretal sum not auctioneers cost. Accordingly, the claimant argued that the auctioneer acted without any ostensible authority and sought to be discharged from any responsibility occurring as a result of actions of the auctioneer. They relied on the case of **Joseph Korir versus- Race Guards Limited [2009] eKlr** which court addressed the same issues that;

“The Claimant in the reply indicated that only a portion of the decree had been satisfied. The auctioneer in the case acted as if the decree was in his favour and extracted a sum of Kshs. 102,644/- as his charges forwarding a paltry sum to the decree holder who is the Claimant. I ordered the refund of the sum pending this Ruling. After considering the submissions of counsel for the Respondent and the counsel for the Claimant, it is clear that the Respondent dealt with the auctioneer to the exclusion of counsel for the Claimant and ended up making payments in the name of the auctioneer in an effort to release the vehicle. The Claimant was entitled to receive the sum due to him without any deduction by either the Respondent or the auctioneer. The auctioneer is aware of the process of recovery of his costs and has no business extorting a sum that he cannot be awarded on taxation of his bill.”

15. It was thus submitted that the auctioneer acted unlawfully when he sought to recover his cost before the payment of the decretal sum as directed under Order 22 Rule 1 and reinforced in the case of **Rural Electrification Authority –versus John Kiragu Kimani & another[2020] eklr.**

16. The claimant submits that, this application as it stands is overtaken by events, in that the auctioneer has indicated in his replying affidavit that the suit motor vehicle has been sold to a third party who has not been enjoined in this proceedings and is likely to be affected by the order of this Court. Therefore argues that the only way to salvage the issues in the application is for the applicant to file a proper application and enjoin the said third party and relied on the case of **Rural Electrification Authority –versus John Kiragu kimani & another[2020] eklr.**(Supra) where the court held that;

“To the extent that the Applicants claim is for recovery of its motor vehicle, this is a new cause of action which should be brought in the right forum .The rights and liabilities of the Defendant against the auctioneer will be determined in that forum too .That forum will also resolve whether property in the motor vehicle passed to the 3rd party as per receipts attached in the auctioneers responses.

30. These are matters that are outside the jurisdiction of this Court and indeed form an independent cause of action which has no nexus to the suit herein. The Court finds that the application to the extent that it is filed in this Court is incompetent and must fail.”

17. The claimant thus urged this court to dismiss the application herein for being bad in law.

Interested party’s submissions

18. The interested party submitted from the onset that it is entitled to costs as provided for under Rule 7 of the Auctioneers Rules, 1997 and reinforced by the Court in **Joseph Nganga & 2 others versus- Lawrence Muriungi Gichunge & another [2019] eklr.**

19. The interested party maintains that it followed due procedure in putting up the respondent’s motor vehicle for sale and that it was acting under instruction of the claimant’s advocates given by the letter of 22nd March, 2019 and warrant issued by this Court on 9th April, 2019. Further that the sale did not realize the decretal sum but only part payment of its fees of Kshs. 500,000/- leaving a balance of Kshs. 15,372/-.

20. The interested party argued that, the public auction was carried out on 17th July, 2019 before the respondent/ Applicant paid the balance of the decretal sum on 25th July 2019 and cleared on 5th September, 2019, as such the auction was done lawfully without any wrong doing on its part.

21. Accordingly, the interested party argues that it was justified in pursuing and recovering his fees and charges in accordance with section 22 of the Auctioneers Act and Rule 18(4) of the Auctioneers Rules 1997 which mandated the judgment debtor to pay auctioneers in accordance with Rule 7 of the auctioneers Rules, 1997.

22. The interested party, in conclusion urged this Court to dismiss the Applicant Application herein.

23. I have examined the averments of the parties herein. The complaint by the applicants is that the Auctioneers have neither returned the attached motor vehicle nor accounted for it.

24. It is therefore imperative that the auctioneer and the claimant do render a full account of all moneys received from the applicant/respondent and the motor vehicle attached.

25. Those will be the orders of the court.

Ruling delivered virtually this **6TH** day of **MAY, 2021.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Saenyi for Claimants/Respondents present

Kabalika holding brief for Orege for Respondent/Applicant present

Court Assistant - Fred