



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1837 OF 2011**

**MINNIE MBUE.....CLAIMANT**

**VERSUS**

**JAMII BORA BANK LIMITED.....1<sup>ST</sup> RESPONDENT**

**CHARLES MWANGI KAMANDE T/A**

**CHAKA & COMPANY AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 22<sup>nd</sup> March, 2019)

**RULING**

The 1<sup>st</sup> respondent filed an application on 19.07.2018 through Wamae & Allen Advocates. The application was under section 1A, 1B, 3A, 44(1) (ii) and (iv) of the Civil Procedure Act; Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016; section 28 of the Auctioneers Act, 1997; Rule 55 of the Auctioneers Rules 1997; Order 40 Rules 1, 2, 3, 4, 10 and 11; Order 42 Rule 6 and Order 50 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of law. Prayers 1, 2, and 3 in the application were determined by the ruling delivered on 31.07.2018. The residual prayers in the application were for:

- a) The proclamation by Charles Mwangi Kamande t/a Chaka & Company Auctioneers dated 17.07.2018 be nullified.
- b) Charles Mwangi Kamande t/a Chaka & Company Auctioneers be ordered to refund Kshs. 1, 500, 000.00 together with interest at the bank's commercial rates from 9<sup>th</sup> July 2018 until payment in full.
- c) An order be issued summoning Charles Mwangi Kamande t/a Chaka & Company Auctioneers to be cross-examined on the proclamation dated 17.07.2018 and further explain why he demanded and was paid Kshs.1, 500, 000.00 before proclamation and whether the applicant obstructed it from executing the warrants on 18.07.2018.
- d) The Court to issue appropriate orders against Charles Mwangi Kamande t/a Chaka & Company Auctioneers pursuant to section 28 of the Auctioneers Act.
- e) The Court be at liberty to make any further orders in the interests of justice.
- f) Costs to be paid by the 2<sup>nd</sup> respondent on a full indemnity basis.

The application was based on the supporting affidavit of Christine Wahome, the respondent's Legal Manager and attached to the application.

The 2<sup>nd</sup> respondent opposed the application by filing on 24.07.2013 the replying affidavit of Charles Mwangi Kamande t/a Chaka & Company Auctioneers through A.I. Onyango & Company Advocates.

The Court has considered the material on record. The circumstances of the payment of Kshs.1, 500,000.00 to the 2<sup>nd</sup> respondent by the applicant, the 1<sup>st</sup> respondent were as follows. The 2<sup>nd</sup> respondent was instructed on 09.07.2018 by counsel (Sharpley Barret & Company Advocates) for the claimant, the decree holder, to attach the applicant's (judgment debtor) moveable property. The 2<sup>nd</sup> respondent moved to the applicant's premises and prior to the proclamation, the applicant engaged the 2<sup>nd</sup> respondent with a view of settling the decretal sum of Kshs.36, 890, 997.00 in 10 monthly instalments of Kshs.3, 689,997.00 until payment in full. The applicant issued a letter to the claimant's

advocates in that regard and the claimant's advocates wrote providing details of the bank account at Commercial Bank of Africa for purposes of settling the agreed settlement by instalment. The 2<sup>nd</sup> respondent's case is that the claimant's counsel having accepted the settlement, counsel informed the applicant to pay the 2<sup>nd</sup> respondent's fee directly to the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent states that he negotiated his fees with the applicant through the applicant's Legal Manager and the agreed fee was Kshs.1, 500, 000.00 and was paid forthwith. To confirm the agreement on fee paid, the 2<sup>nd</sup> respondent relies on the letter by the applicant's Legal Manager dated 09.07.2018 exhibit CK 2 thus, **"We further undertake to directly negotiate and thereafter settle the Auctioneers' fees within due course and confirm that we shall remit the first payment in settlement of the decretal sum to yourselves on or before the afore-stated date of 18<sup>th</sup> July, 2018."** Again in exhibit CK 4 the Legal Manager wrote that the applicant had negotiated the auctioneers' fee directly with them and was proceeding to settle the same. Further in exhibit CK6 the Legal Manager wrote, **"On the said date of 9<sup>th</sup> July, 2018 after a lengthy discussion with the undersigned wherein it was explained that the Bank would settle the decretal sum, the Bank not only wrote a letter to the claimant's Advocate with an indication of when the first payment would be received but also as a show of good faith, immediately settled your fees after which you proceeded to leave the Bank premises without proclamation."**

The applicant's case is that the 2<sup>nd</sup> respondent's fee was to be assessed on the basis of the value of goods attached and not the decretal sum as was held in **National Industrial Credit Bank Ltd –Versus- S.K Ndegwa Auctioneer, Civil Appeal No. 195 of 2004**. It is urged for the applicant that the proclamation not having taken place on 09.07.2018, the 2<sup>nd</sup> respondent illegally received the Kshs.1, 500,000.00 in auctioneers' fee. The applicant further submits that section 26 of the Auctioneers Act provides for the right to recover damages from auctioneer by persons who suffer any special or general damages by the unlawful or improper exercise of any power by licensed auctioneer and such person is entitled to recover any damages directly suffered by him from the auctioneer by action.

The Court returns that the present application is not an action as envisaged in the cited section 26 of the Auctioneers Act. Further, the material before Court and in particular the exhibits on the replying affidavit confirm that the applicant and the 2<sup>nd</sup> respondent voluntarily agreed upon the auctioneers' fee of Kshs.1, 500, 000.00 and there being no established ground to interfere with that agreement, the Court will respect the parties' contractual position and returns that it was validly paid. The Court finds accordingly.

The applicant urged that subsequently there was a proclamation on 17.07. 2018. The 2<sup>nd</sup> respondent stated that the proclamation occurred due to pressure from the claimant's advocates and after that proclamation the claimant's advocates withdrew instructions from the 2<sup>nd</sup> respondent. The Court has considered that withdrawal of instructions and the applicant's unchallenged case that the goods or movable property proclaimed included computers, laptops, photocopying machines, cabinets, and printers being the applicant's books of trade and tools and implements of the applicant in the performance of its trade or profession as excluded from proclamation and attachment in section 44 (1) (ii) and (iv) of the Civil Procedure Act. Accordingly, the Court returns that the proclamation of 17.07.2018 is amenable to nullification as prayed for.

The 2<sup>nd</sup> respondent filed a preliminary objection on 23.07.2013 that the application dated 18.07.2018 had already been determined and the Court was **functus officio** because the Court had rendered the judgment in the suit. As submitted for the applicant matters of satisfaction of a decree do not amount to a fresh cause of action as they are properly determined by the Court which gave the judgment and decree. The preliminary objection will therefore fail.

Finally, as submitted for the applicant, there is no offence disclosed in the present proceedings against the 2<sup>nd</sup> respondent that would justify action against the 2<sup>nd</sup> respondent as envisaged in section 28 of the Auctioneers Act. Thus the 2<sup>nd</sup> respondent's licence will not be liable to suspension or revocation as urged for the applicant.

The Court has considered the parties' margins of success and returns that each party will bear own costs of the application and the preliminary objection.

In conclusion the preliminary objection filed on 23.07.2018 for the 2<sup>nd</sup> respondent; and the residual application as filed for the 1<sup>st</sup> respondent (applicant) on 19.07.2018, are hereby determined with orders:

- a) That the proclamation by Charles Mwangi Kamande t/a Chaka & Company Auctioneers dated 17.07.2018 is hereby nullified.
- b) The preliminary objection is dismissed.
- c) Each party to bear own costs of the application and the preliminary objection.

**Signed, dated and delivered** in court at **Nairobi** this **Friday 22<sup>nd</sup> March, 2019**.

**BYRAM ONGAYA**

**JUDGE**