



**Fredrick Okonji Bukachi t/a The Heart Centre v Guardian Bank Limited
& another (Commercial Appeal 2 of 2020) [2024] KEHC 641 (KLR)
(Commercial & Admiralty) (26 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
COMMERCIAL APPEAL 2 OF 2020**

**A MSHILA, J
JANUARY 26, 2024**

BETWEEN

FREDRICK OKONJI BUKACHI T/A THE HEART CENTRE APPELLANT

AND

GUARDIAN BANK LIMITED 1ST RESPONDENT

JEREMIAH KIARIE MUCHENDU 2ND RESPONDENT

*(Being an appeal of the whole of the Judgment and decree delivered on
13th December, 2019 at the Chief Magistrate's Court at Nairobi by the
Hon. Ms E. Wanjala in the Chief Magistrate's Civil Case No. 522 of 2017.)*

JUDGMENT

Background

1. By a Further Amended Plaintiff filed on 11/02/2019, the Appellant herein sought for judgment as against the Respondents for;
 - a. A declaration that the sale of the medical equipment attached by the 2nd Respondent was unprocedural, unlawful and a nullity.
 - b. An order for setting aside the sale.
 - c. An order directed at the Respondents compelling them to comply with the provisions of the [Auctioneers Act](#) and Rules in relation to the sale of the medical equipment attached on 8th August, 2017.



- d. Any charges including and legal fees levied on the Appellant/Plaintiff's loan account No. 085xxxxxxx held with the 1st Respondent/Defendant from 8th August, 2016 be set aside.
 - e. Any depreciation in the value of the medical equipment attached on 8th August, 2016 by the 2nd Respondent/Defendant from the date of the attachment be borne by the Respondents.
 - f. The 1st Respondent renders true and accurate accounts to the Appellant/Plaintiff in relation to his loan no. 085xxxxxxx and sale of the medical equipment within 14 days of compliance with prayers c, d and e above.
 - g. A declaration that the Appellant/Plaintiff has fully settled the loan advanced to him by the 1st Respondent/Defendant.
 - h. A refund of Kshs. 7,360,312.47 being the difference in the value of the items attached and the amount outstanding as at the time of attachment.
 - i. General damages
 - j. Costs of the suit
2. The Appellant avers that he took a loan facility of Kshs. 9,000,000/= for purposes of purchasing medical equipment from Bank of Africa which loan was approved on 10th April, 2013 and the same was taken over by the 1st Respondent on 7th October, 2013. The said loan was secured by chattels mortgage worth Kshs. 9,589,600/= as at November 2010.
 3. The Appellant defaulted in servicing the loan and on 21/7/2016 the 2nd Respondent proclaimed the medical equipment which was worth Kshs. 16,000,000/= carted it away on the 8/8/2016, together with other chattels not on the list. The 2nd Respondent allegedly sold the medical equipment at Kshs. 850,000/= by way of private treaty which sale the Appellant contends was unlawful. Further that the 1st Respondent on 20/12/2016 submitted the Appellant's name to CRB indicating that he had a debt of Kshs. 9,543,377.88 despite the 2nd Respondent having sold the medical equipment in July 2016 via private treaty. That the amount of Kshs. 850,000/= from the alleged sale by private treaty was deposited on 31/1/2017, 4 months after the sale as such the Appellant should not bear the burden of interest due to the Respondents actions.
 4. The Respondents filed their Defence on 22/03/2017 denying the contents of the Plaint save for the fact that the Appellant was granted Kshs. 9,000,000/= by the 1st Respondent which sum was secured by chattels mortgage which were valued at Kshs. 9,589,600/= as at 26/7/2013. That upon default by the Appellant, the 2nd Respondent repossessed and sold one chattel worth Kshs. 1,760,000/= for Kshs. 850,000/= via private treaty. The Respondents deny that the chattel was valued at Kshs. 16,000,000/= as alleged by the Appellant. The Appellant was said to still be in debt of Kshs. 9,541,485.88.
 5. The matter proceeded to a full hearing. At the conclusion of the trial, the trial court found that the Appellant's claim partly succeeded in terms of prayer 2C of the Further Amended Plaint dated 29/1/2019 to the extent that the 1st Respondent/Defendant renders a true and accurate account to the Plaintiff in relation to the Plaintiff's loan account no. 085xxxxxxx within 14 days from the date of the judgment, the rest of the claims were dismissed.
 6. The Appellant being dissatisfied with the lower Court's judgment has preferred the present Appeal. In his Memorandum of Appeal, he has listed nine grounds of appeal as follows that:



- a. The Learned Magistrate erred in law in failing to make a finding whether the 2nd respondent had authority either in law or under the Chattel's Mortgage to sell the medical equipment by way of private treaty in light of the fact that evidence was led demonstrating that:-
 - i. The medical equipment was proclaimed for sale by way of a public auction and
 - ii. The chattel instrument did not have a provision allowing for sale by way of private treaty.
 - b. The Learned Magistrate erred in law and fact in failing to make a finding on whether the Appellant was obligated to pay interest accruing on the loaned amount from the date of attachment of the medical equipment.
 - c. The Learned Magistrate erred in fact and considered extraneous factors in holding that she was persuaded that the medical equipment carted away are the ones listed in the notification of sale and not the gate pass despite the fact that no evidence to that effect was presented by the auctioneer during trial.
 - d. The Learned Magistrate erred in law and fact in failing to make a finding in relation to the Appellant's assets proclaimed and attached by the 2nd Respondent.
 - e. The Learned Magistrate erred in law and fact and abdicated her responsibility as a judicial officer in attempting to divest herself of jurisdiction of making orders against the 1st and 2nd Respondents' misconduct and non-adherence with the [Auctioneers Act](#) and Rules.
 - f. The Learned Magistrate erred in law and fact and misdirecting herself in directing the Appellant to lodge a complaint against the 2nd Respondent with the Auctioneers Licensing board upon making a finding that there was non-adherence with the [Auctioneers Act](#) and Rules.
 - g. The Learned Magistrate erred in law and fact in failing to award general and punitive damages despite making a finding that there was non-adherence with the [Auctioneers Act](#) and Rules.
 - h. The Learned Magistrate erred in law and fact in failing to make a finding on the issues for determination framed by the parties.
 - i. The Learned Magistrate erred in law and fact in failing to consider the evidence, relevant authorities and submissions by the Appellant thus arriving at a wrong conclusion.
7. The court directed the parties to canvass the appeal by way of written submissions.

Appellant's Submissions.

8. The Appellant submits that it is clear from the evidence that there was no evidence of sale more so by private treaty. The magistrate was said to have failed to adhere to the applicable provisions of the [Auctioneers Act](#) and Rules as such the judgment should be interfered with. Reliance was placed in the case of [Lakeland Motors Limited v Harbhajan Singh Sembi](#) (1998) eKLR. The Appellant submits that the failure by the court to render itself on the effect of the conduct on the execution process and the amount in dispute is an error that should be corrected. Reliance was placed in the case of [John Kirughamio Maganga v Consolidated Bank of Kenya & 2 others](#) (2020) eKLR. He sought for a declaration that the Appellant has fully settled the loan and that the Appellant is entitled to a refund of the amount that is over. The Appellant further submits that he cannot be condemned to shoulder any alleged balance or interest as the Respondents failed to give any account of where the medical equipment was taken after attachment on 6/8/2016. The trial court was said to have made an error



in regard to the assets carted away by the 2nd Respondent. The averments by the 2nd Respondent were said to be mere statements as the 2nd Respondent failed to testify. Reliance was placed in the case of *Elizanya Investments Limited v Energy Solutions* (2021) eKLR. The Appellant submits that the trial court erred when it held that the Appellant had breached the loan agreement as such not entitled to damages. He submitted that the actions by the Respondents caused him mental anguish as such he is entitled to damages of Kshs. 2,000,000/= as the breach of law by the 2nd Respondent was meant to profit the 2nd Respondent.

Respondents' Submissions

9. The Respondents submit that the parties herein intended to enter into a legally binding agreement as such they are bound by the same. It was submitted that the Respondents rightfully sold the machine by way of private treaty as they were not obliged to sell the chattel by way of public auction. Reliance was placed in the case of *Joseph Munyi Githaka & 2 others v Paramount Universal Bank Limited* (2020) eKLR. The Respondents submit that the Appellant had removed one ECG machine with the intention of defeating the realization of the owed amount causing the 2nd Respondent to institute Milimani Miscellaneous Application no. 727 of 2016. The Appellant was said to have failed to produce evidence to demonstrate that the machine was valued at Kshs.16,000,000/- as at the time of sale as such the court should not set aside or nullify the sale. For redress of grievances relating to the conduct of the Auctioneers, it was submitted that the same should be before the Auctioneers Licensing Board as such the Appellant was at liberty to institute any complaint against the 2nd Respondent before the Auctioneers Licensing Board. Reliance was placed in the case of *United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others* (2021) eKLR. It was further submitted that the Appellant cannot use the law to aid his unjust mischief by arguing that he cannot shoulder any interests arising from his default in loan repayment as the Respondents failed to sell the medical equipment at an auction. Reliance was placed on the case of *SharokKher Mohamed Ali & another v Southern Credit Banking Corporation Ltd* (2008) eKLR. It was submitted that the Appellant never produced evidenced that amounted to a valuation report and that the Appellant had purchased and installed a software in the medical equipment as such his allegation that the machine had appreciated to Kshs. 16,000,000/= is a fallacy. In conclusion, the Appellant was said to be in default of Kshs. 16,000,000/= as such the court was urged to dismiss the appeal with costs.

Trial Court's Evidence

10. During the hearing at the trial court, Dr. Fredrick Okonji Bukachi (PW1) a consultant cardiologist at the Heart Centre wished to adopt his witness statement as his evidence. He testified that he sued the 1st Appellant as he took a loan in October 2013 to purchase medical equipment. That in 2016 his account ran into arrears as such he discussed with the bank to have a new repayment plan. He stated that in July 2016, the bank sent an auctioneer to proclaim all the medical equipment. The bank at the time of proclamation was claiming Kshs. 8,603,000/= and that the medical equipment had been valued at Kshs. 16,000,000/=. He stated that he had sought to get information of the sale which was information was never provided. He denied that the auctioneers only carried one item. He prayed for a refund of the difference between the proceeds of the sale and the value of the items, punitive damages and costs.
11. In cross examination he stated that the outstanding debt as at 3/3/2017 was Kshs. 9,541,485.88 and that the value of the items as at the time of proclamation was Kshs. 16,000,000/- as medical equipment had software installed for them to operate. Further, he stated that the balance due to him is Kshs. 8,000,000/-.



12. Karasseri Sahasranman (DW1) wished to adopt his witness statement as his evidence. He stated that the Appellant approached the bank in 2013 for a loan where security was a medical equipment. That the Appellant defaulted and the medical equipment was repossessed. The debt collector was at first denied access and in the second attempt they repossessed the treadmill. He stated that the bank tried to sell the machine to hospitals in vain. The machine whose original cost was Kshs. 1,760,000/= was ultimately sold at Kshs. 850,000/=. The Appellant as at the time of the sale was said to owe the bank Kshs. 16,000,000/=.
13. In cross examination he indicated that the Appellant was loaned Kshs. 9 million and the outstanding arrears amounted to Kshs. 9.7 million as at the time of the auction. The outstanding loan was said to be Kshs. 16,000,000/= as at August 2016.

Issues for Determination

14. Having read and considered the submissions by both parties and the case law relied upon, the issues arising for determination are;
 - i. Whether the sale is unprocedural, unlawful and a nullity.
 - ii. Whether the Appellant is entitled to general damages.

Analysis

15. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another v. Associated Motor Boat Co. Ltd & Others* (1968) EA 123, this principle was enunciated thus:

“...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

Whether the sale is unprocedural, unlawful and a nullity.

16. The Appellant argues that the proclamation by the 2nd Respondent provided for sale by public auction as such sale by private treaty could not apply. In any case the machine was not on hire purchase. The Auctioneer was accused of failing to adhere to the applicable procedure and law as provided for under the *Auctioneers Act* and Rules. The Appellant called for the sale to be declared a nullity.
17. The Respondents argue that nothing shows that they were obliged to sell the chattel by way of public auction as the law also entitles them to sell the attached property by way of private treaty. During trial the Respondents’ witness testified that it was difficult to sell the machine by public auction as hospitals do not buy second hand machines. Rule 12 of the *Auctioneers Rules* provides that:-

“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.”

18. Having perused the trial court record, it is noted that, indeed, the Proclamation by the 2nd Respondent provided for sale by public auction. The machine was however, sold by way of private treaty. The Respondent testified that it was difficult to sell the machine by way of public auction. There is no evidence adduced to support the fact that the Respondents advertised the machines in a local newspaper as required by Rules 12 and 16 of the Auctioneers Rules. Nevertheless, this courts ‘considered view is that failure to advertise does not render a sale invalid if the same is by public auction. The failure to advertise is regarded as a mere irregularity that does not invalidate a sale conducted through a public auction. In *Eric Odindo v National Bank of Kenya Limited & 2 Others* (2008) eKLR, the court stated that;-

“The requirements of Rule 15 of the Auctioneers Rules are obviously mere statutory procedures precedent to the lawful exercise of the statutory power of sale by the chargee non-compliance of which is a mere irregularity which would not ordinarily invalidate an auction.”

- 19. In this instant appeal, sale was by private treaty, the Respondents needed to prove to the court that they made attempts to sell the machine by public auction and the same was not possible. Instead the Respondents just made averments that the machines are not meant for public auction.
- 20. In the circumstances, this court is satisfied, that bearing in mind that the medical equipment was proclaimed for sale by way of public auction and there being no evidence of attempted advertisement, the sale by private treaty as conducted by the Respondents was unprocedural due to the irregularities and as such for all intents and purposes renders the sale as a nullity.
- 21. The trial court in its judgment found the 2nd Respondents had failed to adhere to the Auctioneers Rules when they failed to advertise the machine and instead resorted to sale by private treaty which had not been provided for; having acknowledged the Auctioneers acts of omission the trial court erred in applying wrong principles of law in failing to find that the sale was invalid and a nullity but instead directed the Appellant to pursue redress elsewhere;
- 22. This court is satisfied that there are good reasons that justify interference with the trial courts judgment; this ground of appeal is found to have merit and it is hereby allowed.



Whether the Appellant is entitled to general damages.

23. The next issue is whether the Appellant is entitled to general damages. The trial court found that the Appellant having admitted to be in breach of the loan agreement, is not entitled to damages. This Court is of a contrary opinion.
24. According to the Appellant the value of the machine at the time of the sale was Kshs. 16 million. This was not supported by a valuation report. During trial the Respondents' witness indicated that as at 31/12/2016 the depreciated value of the machine was Kshs. 691,000/= according to infrastructural standards and rates presented by KRA while the same was sold at Kshs. 850,000/=. The original cost of the machine was said to be Kshs. 1,760,000/= as per the seller's invoice.
25. Having considered each parties' submissions in regard to the value of the machine at the time of the sale and considering the fact that the machine was sold at Kshs. 850,000/=; This court having found that the sale is invalid, finds that the Appellant is entitled to general damages for the irregular sale of the machine and is satisfied that the Appellant is entitled to a similar amount of Kshs. 850,000/= as compensation being the amount that was the proceeds of the sale as the Respondents failed to adhere to the *Auctioneers Act* and rules.

Findings & Determination

26. For the forgoing reasons this court makes the following findings and determinations;
 - i. This Court finds the appeal to be partially meritorious.
 - ii. The judgment dated 13/12/2019 dismissing the other claims of the Appellant is hereby set aside and substituted with a judgment as follows;
 - a. The 1st Respondent/Defendant renders a true and accurate account to the Plaintiff in relation to the Plaintiff's loan account no. 085xxxxxxx within 14 days from the date of the judgment.
 - b. The sale of the medical equipment attached by the 2nd Respondent be and is hereby declared to have been unprocedural and irregular and the sale be and is hereby rendered a nullity.
 - c. The Appellant be and is hereby found to be entitled to an award for general damages in the sum of Kshs.850,000/- with interest thereon at court rates from the date of judgment.
 - d. The Appellant shall be entitled to costs at trial in the lower court and on appeal.

Orders Accordingly

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 26TH DAY OF JANUARY, 2024.

A. MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Richu Holding Brief for Anzalla - For the Appellant



Ochieng Holding Brief for Oyatta - For the Respondents

