



**Gembe t/a Brosis Auctioneers v Nyakango t/a Glovine Motors (Miscellaneous Reference Application E153 of 2022) [2024] KEHC 1620 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1620 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS REFERENCE APPLICATION E153 OF 2022**

**SM MOHOCHI, J  
FEBRUARY 22, 2024**

**BETWEEN**

**GEORGE ODOYO GEMBE T/A BROSIS AUCTIONEERS ..... APPLICANT**

**AND**

**PATRICIA NYAKANGO T/A GLOVINE MOTORS ..... RESPONDENT**

**RULING**

1. This is a reference filed by the Applicant herein *vide* the Notice of Motion dated 22<sup>nd</sup> December, 2022 and lodged on 30<sup>th</sup> December, 2022 brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Rules 11(4) and 12 (b) of [Auctioneers Act](#), Order 51 of the [Civil Procedure Rules](#) and Article 159 of the [Constitution](#).
2. The Applicant has asked this Court to set aside and tax afresh the decision of the Taxing Officer in the Ruling dated 7<sup>th</sup> September, 2022 as to Item No 5 of the Bill of Costs dated 3<sup>rd</sup> March 2022.
3. In support, the Application is supported by the Affidavit of George Odoyo Gembe sworn on even date. He stated that the Taxing Officer erred in awarding all the other items except item No. 5 which was dealing with commission after receiving instructions.
4. He contends that he executed instructions and at the time of removing the items from the premises of the Respondent, the Respondent instructed that she was negotiating with the Debtor. He further stated that he was entitled to his commission since once the instructions were issued, he executed the instructions as directed.
5. The Respondent strongly opposed the Application *vide* the sworn Replying Affidavit of Patricia Nyakango, the Managing Director of Glovine Motors Limited, dated 19<sup>th</sup> January, 2023. She denied instructing the Applicant not to proceed with the attachment on negotiation grounds. That she was surprised that the Applicant had failed to process the vehicle as per the agreement which prompted the institution of Nakuru Chief Magistrate Civil Suit No. 671 of 2022 which is still pending in Court.



6. She added that she was only able to get the subject vehicle pursuant to a Court order dated 22<sup>nd</sup> July, 2021 as Annexure PM-2b.
7. It was her assertion that the Applicant is not entitled to commission since as the instructions were not executed and further that she was not obligated to pay any fee. She sought that the Application be dismissed as she only got the vehicle pursuant to Courts intervention.
8. Parties were directed to file written submissions. The Applicant filed his submission on 20<sup>th</sup> October, 2023 dated 19<sup>th</sup> October, 2023. The Respondent's submissions are not on record.
9. The Applicant submitted that he was entitled to a commission and relied on *Muganda Wasulwa T/ A Keysian Auctioneers vs National Cereals & Produce Board* Misc Application No. 328 of 2012 and emphasis was placed at paragraph 17 of the decision.

### **Analysis and Determination.**

10. Having carefully considered the Application and the spirited opposition the following is the main issue for determination herein:-
  - a. Was the Auctioneer entitled to charge commission and was the Taxing Officer right to disallow the claim for commission?
11. It is not disputed that the Respondent gave the Applicant instructions to reposes property. The Applicant contends that once a proclamation is been served, the Auctioneer is entitled to 100% of the commission as the same was based on the instructions given. The Respondent on the other hand contends that since the Auctioneer did not proceed with attachment, and the vehicle was repossessed by a Court Order, the Auctioneer was entitled to no commission nor any other fees in the circumstances.
12. It is however disputed that the Respondent asked the Applicant to withhold execution so that she could negotiate with the debtor. It is on this basis that the Applicant argues that the process had begun and this entitled to commission.
13. The question that the Court should first strive to answer is at what point does attachment began and what point does an Auctioneer start earning a commission.
14. As to when attachment commences, the Court in *Agricultural Development Corporation v James Onkundi Omakori t/a Lifewood Auctioneers* [2020] eKLR observed as follows;
  7. The respondent has argued that the amount of Kshs 88,324 was proper in the circumstances as the proclamation was as good as attachment since the goods were proclaimed and left under the custody of the applicant.
  8. The applicant on the other hand has argued that the above amount was improper as there was no attachment but only proclamation and it prayed therefore that the said item ought to be set aside.
  9. *Halsbury's Laws of England 10<sup>th</sup> Edition* has defined "Attachment" as follows;
 

“ the seizing of a person’s property to secure a judgement or to be sold in satisfaction of a judgement”
  10. It is clear that the attachment involves actual action of seizing the goods. Proclamation is simply an intention to seize the goods. It means telling the judgement debtor and the whole world for



that matter that the goods or items proclaimed shall be formally taken after a certain period of time, let's say 7 days. The judgement debtor is given a chance to redeem himself for those number of days and in default the goods are collected physically by way of attachment by the Courts bailiffs.

11. In the matter at hand the goods as rightfully submitted by the applicant and indeed admitted by the respondent were proclaimed but not attached. The action of attaching cannot be equated to proclaiming for the simple reason that the two processes are mutually exclusive. The proclamation comes before attachment. The Auctioneer's Rules under Chapter 526 of the Laws of Kenya in the portion dealing with attachment clearly provides separate charges or fees on attachment before and after.
12. The fees chargeable are thus different. Part II item 4 of the auctioneer's rules provide for "fees on attachment /repossession /distrain and expenses"
13. The same part also provides under item 3 for "fees before attachment or repossession".
14. Now that there was no attachment or actual seizure of the appellant's goods the respondent was only entitled to fees under item 3 which in this case was kshs.4000 only and not the amount of kshs. 88,324 as taxed by the registrar.
15. Although the respondent submitted that the proclamation was as good as attachment, the same as indicated above are different."
15. The Applicant submitted that there was proclamation but and only stopped as per the instructions of the Respondent. According to the Applicant that was as good as attachment. As stated in, *Agricultural Development Corporation v James Onkundi Omakori t/a Lifewood Auctioneers* (*supra*) the action of attachment cannot be equated with proclamation. The Court is inclined to hold a similar position.
16. Now therefore is the Applicant entitled to a commission? I have perused the ruling of the Taxing Officer dated 7<sup>th</sup> September, 2022. The Trial Court taxed off Item 5, Kshs 37,550, the commission, because the Applicant admitted that he never attached the motor vehicle.
17. Rule 55(1) of the *Auctioneers Rules* as read with Paragraph 5 and 7 of Part II of the Fourth Schedule provide for the commission due to an Auctioneer upon sale of movable property. Therefore, an Auctioneer was only entitled to a commission upon sale of the subject vehicle. Was there sale by auction? The answer is not in the affirmative. The Respondent availed a Court Order dated 22<sup>nd</sup> July, 2021 in Nakuru CMCCC No. E671 of 2021 where the Court had the vehicle released unconditionally to the Respondent. There was no material presented by the Auctioneer to show that he conducted the sale or that he was about to attach and was stopped by the Respondent.
18. The Court finds that the commission on attachment should be based on the value of the motor vehicle upon sale. Therefore, there was no basis for allowing item 5 the Bill of Costs dated 3<sup>rd</sup> March, 2022.
19. The Court finds that the Applicant has not made out a case for granting of the prayer sought and the Application is thus dismissed with costs to the Respondent.

Orders accordingly.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024.**

**MOHOCHI S. M.**

**JUDGE**

