



**Ndirangu v Kihara & 2 others (Tribunal Case E085 of 2023)
[2024] KEBPRT 1479 (KLR) (Civ) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1479 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E085 OF 2023
P MAY, MEMBER
OCTOBER 11, 2024**

BETWEEN

PAUL CHEGE NDIRANGU TENANT

AND

MARY WANJIKU KIHARA 1ST RESPONDENT

NGOTHO COMMERCIAL AGENT 2ND RESPONDENT

DAVIS AUCTIONEERING SERVICE 3RD RESPONDENT

RULING

1. The present proceedings were commenced by the tenant through the reference filed on 22nd May, 2023. The reference was premised on the grounds that the landlord had broken into the tenant's business premises and unlawfully confiscated and destroyed the tenant's machinery. The tenant therefore sought orders of mandatory injunction against the landlord and their agents.
2. Contemporaneous with the reference the tenant filed an application under certificate of urgency seeking for the intervention by the Honourable Tribunal pending the determination of the reference. On 26th February, 2024, when the parties appeared before the Tribunal, they confirmed that the tenant had vacated the demised premises thus the only issue that was in dispute was the question of the auctioneer rendering accounts. The auctioneer was therefore summoned to render his testimony and for cross-examination.
3. The auctioneer appeared before the Tribunal on 26/8/2024 whereby he sought to rely on the replying affidavit sworn on 30/7/2023 and the further affidavit sworn on 30/6/2024. The contents of the said affidavits briefly explained is that the auctioneer confirmed that they were instructed by the landlord to levy distress. He stated that he proceeded to the tenant's yard where he proclaimed a tractor and other

machinery. After the expiry of the period indicated in the proclamation notice, he proceeded to attach the property. He then proceeded to advertise the property and subsequently conducted the sale.

4. It was the auctioneer's testimony that they forwarded the rent arrears recovered after the sale to the agent being the total sum of Kshs. 213,000/- He then prepared an itemized fee note which is the subject of this ruling.
5. On cross examination, the auctioneer confirmed that he was licensed to practice. He stated that at the time of carrying out the auction, he did not carry out valuation. He confirmed that he sold the tractor at Kshs. 550,000/- an amount that was sufficient to settle the accrued rent arrears. He maintained that he kept the other items after the sale as they awaited the decision of the Tribunal. He confirmed that his bill was not taxed by the Honourable Court. He further stated that he had to engage services of the police whereby he paid Kshs. 30,000/-.
6. The parties filed submissions in support of their respective positions. I have considered the same and would proceed as follows:
7. The Auctioneer's Act (Cap 526) Section 21 sets out the rules regulating sales by auction. These must be abided by for the auction to result in a legitimate sale. The Section provides:

Section 21. Auction Sales

- (1) The date, time and place of every sale by auction shall be advertised in the prescribed manner and such sale shall take place on the date, at the time and at the place so advertised.
 - (2) Where any movable and immovable property is put up for sale by auction in lots, each lot shall prima facie be deemed to be the subject of a separate contract of sale.
 - (3) It shall be stated in the particulars or conditions of any sale by auction of any property whether such sale shall be subject to a reserve price or not or whether a right to bid is reserved....”.
8. Section 23 of the [Auctioneers Act](#) sets out the duties of an auctioneer. It provides

Section 23 Duties of auctioneers

A licenced auctioneer shall-

- (1) At all times act in a manner befitting an officer of the court and shall ensure that his employees, servants or agents act in like manner;
- (2) Act in accordance with such rules as may be prescribed when repossessing, attaching, storing or selling any property pursuant to the provisions of any written law or contract;
- (3) Maintaining such books, accounts, records or other documents as may be prescribed and furnish the same to the Board at such time and in such manner as may be prescribed....”.

9. An Auctioneer is also bound by the Auctioneers Rules ([LN 120/1977](#) Corr. No. 84/1997, L.N. 144/2009). In the context of this case Rules 12 and 13 are relevant. They provide:

“ 12. Movable other than perishable goods and livestock

- (1) 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 latter of instruction in the register;
 - (b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the 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, the auctioneer shall sign a certificate to that effect;
 - (c) in writing, give to the owner of the goods seven days' notice in Sale form 3 of the Schedule within which the owner may redeem the goods by payment of the amount set for in the court warrant or letter of instruction;
 - (d) on expiry of the period of notice without payment and if the 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 the date of removal of the goods and arrange sale not earlier than seven days after the 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.....”.

10. It is not dispute that the auctioneer sold the tenant's tractor for Kshs. 550,000 and also tenant's lander and gear box for Kshs. 17,000/-. On the auctioneer fee, the tenant stated that the proclamation notice had indicated that the fee was Kshs. 27,000/-. They pleaded that the same was reasonable and sufficient.

11. The following items on the fee note are disputed:

a. Item 4

The tenant has disputed the fee charged of Kshs. 41,500/- as being exaggerated. He stated that the reasonable amount ought to have been 10% of the amount recovered which makes the

amount. According to schedule 4 of the Auctioneer rules, the rates given is 10% for the first 100,000 and 5% of the remainder up to One million shillings. Based on the said assessment, the Tribunal awards Kshs. 33,350/-. A total amount of Kshs. 8150 is taxed off.

b. Item No. 5

The auctioneer has claimed 15,000 to obtain a court order. He has only attached a receipt for Kshs. 1,500. The Tribunal will only award Kshs. 1500 which has been proven. Kshs. 13,500 is taxed off this item.

c. Item No. 7

The auctioneer stated that they had hired 8 police officers. There is no record of the said engagement but the tenant conceded to the said officers being paid Kshs. 8,000. The Tribunal agrees with this position. The sum of Kshs. 22,000 is taxed off.

d. Items No. 8 and 9

As stated by the tenant, there is no evidence of payment for this service. The tenant disputed that the tractor and the other machinery were towed. The items are therefore taxed off.

e. Item No 10

The auctioneer stated that engaged labourers whom they paid Kshs. 30,000/-. They did not however attach any documentation to substantiate the claim. The item is taxed off.

12. Lastly on item number 12, the auction having been undertaken and the amounts due realized, any subsequent storage fee incurred could have been avoided. The auctioneer had an option of either returning the unsold items or commencing interpleader proceedings to mitigate any additional charges that could accrue.
13. The storage charges of Kshs. 214,500 will fall on the same grounds. They were totally unjustified and awarding the same will amount to unjust enrichment.
14. On the advocates costs, the same is premature and costs being discretionary, the Tribunal will not award the same. The auctioneer's actions precipitated the filing of the present proceedings. On the rent that was due, at the time of making an application to break into the premises, the same stood at Kshs.213,000/-. The tenant has not challenged this with proof that they had paid rent for that period. The auctioneer was therefore justified to draw a cheque for the said amount.
15. In the end, the tenant's claim against the auctioneer partly succeeds. They will be entitled to a refund from the amounts taxed off. The auctioneer will forthwith return the unsold items.
16. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF OCTOBER, 2024.

HON. PATRICIA MAY

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the absence of parties

BPRT CASE NO. E085 OF 2023 (NAKURU) 3