



**Cooperative Bank of Kenya v Trophy Auctioneers (Civil Suit
133 of 2019) [2023] KEHC 27561 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 27561 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 133 OF 2019
F WANGARI, J
JULY 28, 2023**

BETWEEN

COOPERATIVE BANK OF KENYA APPLICANT

AND

TROPHY AUCTIONEERS RESPONDENT

*((Being an appeal from the Ruling and Orders of the Chief Magistrates Court (Hon. E. Mutunga)
delivered on 14th June 2017 in Mombasa SRM Misc. Civil Application No. 233 of 2016))*

JUDGMENT

1. The Appellant filed this appeal via the Chamber Summons dated 13/3/2019. The main ground of appeal was that the learned Magistrate failed to consider that the Respondent had not complied with Rule 7 of the Auctioneers Rules 1997 while assessing the Bill of Costs.
2. Directions were given that the appeal be disposed of by way of written submissions. Only the Appellant complied by filing the submissions dated 15/2/2023. The Respondent's last appearance in court as far as filing of submissions are concerned was on 14/3/2023, when its counsel sought for 14 days to file their submissions but that was never done.
3. I have considered the pleadings on record and the Appellant's submissions, and the only issue for determination is;
 - a. Whether the Bill of Costs taxed on 14/6/2017 was prematurely filed.
4. The Respondent was instructed by the Appellant to repossess a defaulter's motor vehicle under the Chattels Transfer Act and the *Auctioneers Act*. Their duty was to repossess a vehicle and sell the same on behalf of the bank. The vehicle was repossessed and the Respondent communicated that they were going to advertise the vehicle for sale within seven days from the date of repossession. This has not been done to date. There was nothing stopping the sale.



5. The Respondent without notice to the Appellant took the vehicle to a 3rd Party's yard from time of repossession i.e. 2/7/2014 until 23/11/2016 when they filed a Bill of Costs demanding Kshs. 583,607/= from the Respondent. The bill of costs was opposed on grounds that the Respondent had not complied with Rule 7 of the Auctioneers Rules, and that the Appellant was not aware that the vehicle had been towed to a 3rd Party's yard where it attracted storage charges.
6. In hindsight, there is no impediment to the sale. There was no reason whatsoever given why the vehicle was not sold despite being attached. The vehicle was left to lie idle for some time at the parking yard where it was stored. It was not until when the 3rd Party gave a notice to sell the attached vehicle, under the *Disposal of Uncollected Goods Act* that the Respondent demanded the storage fees from the Appellant.
7. The Appellant stated that there is no reason as to why the auctioneers could not recover their money in terms of Rule 7 of the Auctioneers Rules, which provides as follows: -
 - 7) Payment of auctioneers charges
A debtor shall pay the charges of the auctioneer unless-
 - a. that the debtor cannot be found; or
 - b. he has no goods upon which execution can be levied; or
 - c. the sale proceeds are insufficient to cover the chargesIn which cases the creditor shall pay the charges or the deficiency thereof.
8. The vehicle was available but not sold. The advertisement which was to be done to facilitate sale went into limbo. Without basis for not selling an available vehicle until it accumulated a humongous amount of storage charges we are not even told where the vehicle went. The reason for the foregoing is that others, who caused the delay ought to pay.
9. Without selling the vehicle and without saying there were any difficulties, under Rule 7 of the Auctioneers Rules, the first priority was to be the debtor, the second priority was the sale, and finally the instructing client. Given that the answer appears to be a result of negligence on part of the auctioneers, it is a derelict of duty by the Respondent not to sell a vehicle that was available for over 3 years.
10. I am unable to agree with the magistrate that the auctioneers are entitled to be paid by the bank. I am satisfied that the court below should not have assessed the auctioneers Bill of Costs since there were no fees due from the instructing client, in view of the auctioneer's failure to carry out instructions to sell a motor vehicle they undertook to sell in 7 days after advertising.
11. An auctioneer cannot be rewarded for failing to carry out their duties and the *auctioneers act* left both the bank and the person who was possessed at the great risk of a suit under Section 26 of the *Auctioneers Act*, in relation to a suit for recovery of damages caused by the bank and all of that vehicle.
12. The orders of this nature cannot be issued in circumstances where the sale did not take place due to dereliction of duty. There was actually gross misconduct in holding a vehicle so as to attract a humongous amount of storage charges and then in turn ask for sale of the same to recover the charges that had accumulated, not because of any issue with the bank but because of lack of foresight, lack of competence and failure to do what a responsible auctioneer ought to have done.
13. Since in the first notice, by their own admission they were to advertise the vehicle sale, why was the vehicle still there all these many years later? I find that the appeal is merited.



14. Love-hate relationship between auctioneers and banks will continue for some time. However, it must always be remembered as did the Court of Appeal in the case of Bank of Africa Limited v Juja Coffee Exporters Limited & 4 others [2018] eKLR, that: -

“A bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it.” And so it is in this case

15. I agree that banks do not have their own money. What they have is customers' money. Banks have customers to serve. It should never be that an auctioneer repossesses someone's motor vehicle and let it rot without taking any steps to recover the money owed to a financial institution.

16. The upshot of the foregoing is that I make the following orders: -

- a. I set aside the taxation carried out on 14th June 2017 in Mombasa SRMCC Miscellaneous Application No. 233 of 2016 in toto and in lieu thereof, I substitute with an order striking out the entire Bill of Costs given;
- b. The Appellant shall not be liable pay the auctioneers charges;
- c. Costs to the Appellant

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 28TH DAY OF JULY, 2023.

F. WANGARI

JUDGE

In the presence of:

M/S Cheruiyot Advocate h/b for Kongere Advocate for the Applicant

N/A for the Respondent

Abdullahi, Court Assistant

