

Introduction

The law relating to Auctioneers, the licencing and regulations of the auctioneering business and the practice of auctioneers is governed by the **Auctioneers Act & the Auctioneer's Rules**. Under the said Rules, the auctioneers' charges for attachment/repossession/distrain and expenses must conform to **paragraph 4 of Part II of the Fourth Schedule**. A perusal of the said paragraph clearly shows that the charges are banded in 3 different categories: **Kshs.4,001/= to Kshs.100,000/= at 10%, Kshs.100,001/= to Kshs.1,000,000/= at 5% and over Kshs.1,000,000/= at 2%**. Additionally, the Auctioneers' charges on sale of moveable property ought to conform to the bands under **paragraph 5- 10% for the first Kshs. 100,000/= and 7% for any amount over Kshs. 100,000/=**. Finally, the Auctioneers' charges on sale of immovable property ought to conform to the bands under **paragraph 6-10% for amounts between 0/= and 600,000/=, 5 % for amounts between Kshs. 600,000/= & 3,000,000/= and 2% for any amount over Kshs, 3,000,000/=**.

Discussion

In the recent past, disputes have arisen relating to the charges under the said paragraphs under the Fourth Schedule. On the one hand, there are those who have argued that an auctioneer ought to charge the rates under the different bands and then accumulate or aggregate the total. On the other hand, there are those who have argued for the position that an auctioneer ought to restrain himself/herself under a specific band.

The Court of Appeal (**Makhandia, F. Sichale & H. A. Omondi, JJ,A.**) recently settled the position in the case of **Garam Investments v Ibrahim Hussein Mahadi & another (Civil Appeal 155 of 2018) [2022] KECA 142 (KLR) (18 February 2022)** (Judgment) as discussed below:**Consents**

As discussed above it is important to obtain all necessary consents before lodging an application for registration of a Charge. Consents are as follows:

1. The crux of the appeal was the application of the different bands set forth in the Fourth Schedule to the Auctioneer's Act.
2. The Appellant sought to set aside the Ruling of the High Court which held that *"an auctioneer charging fees under the Fourth Schedule could not purport to charge the rates on the different bands and then accumulate or aggregate the total. Rather, an auctioneer could only slot himself under one specific band."* The Learned Judge of the High Court reasoned ad further stated that *"an auctioneer must identify the reserve price and place himself in one applicable band and rate, but not split the reserve price to fit the various bands and rates, as this would amount to cumulative and simultaneous approach, which was not the intent of the Fourth Schedule."*
3. The Appellant contended that the bands under **paragraph 4of the Fourth schedule** are to be applied cumulatively and that that has always been the acceptable formula for calculating auctioneer's fees by practice and by statute.

To that end placed reliance on the case of **Alimex Limited v Startruck Auctioneers [2018] eKLR** where the High Court held that *the assessment of the auctioneer's fees is on a cumulative basis and is not on a flat percentage*.

4. The Court of Appeal was called upon to determine the intent of the **Fourth Schedule** to the Auctioneer's Act, that is **whether an auctioneer can charge fees on the different bands and thereafter accumulate the total**. The Court agreed with the reasoning and Ruling of the trial Court that an auctioneer is not entitled to charge from every band as this would defeat the purpose of the Fourth Schedule in breaking down the amount chargeable for the reserve price in the different bands aforementioned. The Court further reasoned that to allow an auctioneer to charge from each band would amount to them benefiting from all scales, which would not only be improper but also amount to unjust enrichment and/or double charging.
5. Therefore, the current position in law in that respect is as follows:
 - a) The auctioneer must identify the reserve price, determine under what band it falls and place himself there and calculate his fees as per that band and percentage the band provides for (band rate).
 - b) The auctioneer is not allowed to charge fees from all the bands under the Fourth Schedule
 - c) If the Auctioneer's Act intended fees to be charged cumulatively under the Fourth Schedule, then it would have stated so expressly.
 - d) The pronouncement of the Court of Appeal therefore overruled the decision of the High Court in the *Alimex Limited case (supra)*.

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