



Gikonyo t/a Garam Auctioneers v Sidian Bank Limited; Kamuthi Housing Co-op Society (Interested Party) (Miscellaneous Application 329 of 2017) [2023] KEHC 21561 (KLR) (Commercial and Tax) (27 June 2023) (Ruling)

Neutral citation: [2023] KEHC 21561 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 329 OF 2017**

DO CHEPKWONY, J

JUNE 27, 2023

IN THE MATTER OF TAXATION OF AUCTIONEER'S COSTS

BETWEEN

BETWEEN

JOSEPH GIKONYO T/A GARAM AUCTIONEERS AUCTIONEER

AND

SIDIAN BANK LIMITED RESPONDENT

AND

KAMUTHI HOUSING CO-OP SOCIETY INTERESTED PARTY

RULING

1. This Ruling relates to the Reference filed through Chamber Summons Application dated January 25, 2022 filed by the Applicant “the Auctioneer” seeking the following orders:
 - a. That the ruling of the Deputy Registrar Hon. Emily Nyakundi delivered herein on December 22, 2021 in the matter of taxation of Item No 12 of the Auctioneer’s Bill of Costs dated July 26, 2017 between Joseph Gikonyo T/A Garam Investments, Sidian Bank Limited and Kamuthi Co-operative Society be and is hereby varied and or set aside.
 - b. That this application be deemed to have been filed timeously given that this Honorable Court’s vacation ended on January 13, 2022 and that the Applicant only received a copy of the ruling on January 24, 2022.



- c. That this Court be pleased to order that item 12 of the Auctioneer's Bill of Costs dated July 26, 2017 be and is hereby placed before another Taxing Officer for taxation.
 - d. That the Honourable Deputy Registrar erred in principle when assessing the Auctioneer's cost by basing the same on the loan amount and not on the value of the property attached.
 - e. That this Court does find that the Hon. Deputy Registrar erred in-principle and in law by applying the rate of 14% for VAT instead of the rate of 16%.
 - f. That the cost of this application be provided for.
2. The Application is based on the grounds on its face and the Supporting Affidavit of Joseph Gikonyo sworn on the same date of January 25, 2022. It has been opposed through Replying Affidavit of Eliud Perminus Njoroge as the Secretary of the Interested Party sworn on March 17, 2022.
 3. The Auctioneer holds that it was instructed by the Respondent to realize its security by public auction of a property in the name of the Interested Party. The Auctioneer holds that it then filed its Bill of Costs dated July 26, 2017 was first taxed at Kshs 1,452,636/= by Honourable SA Opande on March 27, 2018 save for Item 12 which was taxed at Kshs 20,955,600.00 by Hon Claire Wanyama on July 2, 2018.
 4. Being aggrieved with the ruling of July 2, 2018, the Auctioneer/Respondent filed an application dated July 11, 2018 seeking to set aside the decision of the Taxing Officer. Lady Justice Muigai heard the application and ordered the matter to be remitted back for taxation on Item No 12 and to determine whether the auctioneer fees should be based on the value of the suit property or the loan amount.
 5. The Auctioneer holds that the Deputy Registrar in a ruling of 22nd December, 2021 taxed the amount at Kshs 3,780,878.17 which was based on the loan amount and not on value of goods attached thereto. And in doing so, taxed off Kshs 17,177,221.83. The Auctioneer holds that the value of the property is Kshs 1,800,000,000/= which was what the fees should have been based on. Further, the Auctioneer argues that the Deputy Registrar erred in using VAT rate of 14% instead of 16% since the 14% was only applicable in April-December, 2020 yet the cause of action herein arose in 2017.
 6. The Auctioneer therefore seeks to have the ruling of the Deputy Registrar set aside and the matter to be remitted back to the scene of gravity for taxation purposes.
 7. In opposing the said application, the Interested Party filed its Replying Affidavit sworn by its Secretary Perminus Njoroge on January 25, 2022 opposing the application on the basis that it was filed out of time and that the Deputy Registrar exercised its discretion and based the instruction fees on the value of the loan and not the value of the property. The Interested Party holds that the Auctioneer is seeking unjust enrichment by stating that its fees ought to be based on the value of the property.
 8. With directions of court, the Reference was disposed of by way of written submissions. In reading through the Auctioneer's Submissions dated May 13, 2022 raised two issues being whether the Auctioneer merits the prayer for the extension of time to file appeal and whether the Appeal has merits so did, the Interested Party's Submissions dated May 31, 2022.

Analysis and Determination

9. To determine the reference, I have gone through the respective affidavits



sworn by the parties together with the submissions filed and this Court adopts the issues raised by the Applicant and Respondent in their respective submissions which this court shall adopt in its determination.

Whether there should be an extension of time

10. The Auctioneer admits that under Rule 55(5) of the *Auctioneer Rules*, an appeal from a decision of the Deputy Registrar should be filed within 7 days of the decision. He argues that the impugned Ruling was delivered on December 22, 2021 which was during the High Court Vacation and time stopped running until January 13, 2022. Under Order 50 Rule 4 of the *Civil Procedure Rules*, the Auctioneer argues that in this case, time lapsed on January 21, 2022 and he filed the Reference on January 25, 2022 which was four days' date. He attributes the four days' delay to the court registry for failing to avail him the certified copy of the ruling on time. The Auctioneer holds that courts have discretionary powers to extend time and relied on the case of *Stanley Kaiyongi Mwenda vs Cyprian Kubai* [2000]eKLR.
11. On its part, the Interested Party argues that the Auctioneer has admitted to filing the Reference out of time which ought to be filed within 7 days from
the date of ruling under Rule 55 (5) of the *Auctioneer Rules*. It contends that the Auctioneer has not sought leave for extension of time to file the appeal only that the appeal to be deemed properly filed and therefore the court cannot grant what has not been asked for and therefore the application ought to be struck off. It relied on the case of Misc Appln No 21 of 2016, *Ezekiel Kiminza TA Auto Land Auctioneers vs Mistry Valji Naran Mulji*.
12. It is trite law that an appeal of the decision of taxing Officer is provided for under Rule 55 (5) of the *Auctioneers Rules* which states,
“The Memorandum of Appeal, by way of Chamber Summons setting out the Grounds of Appeal, shall be filed within 7 days of the decision of the Registrar or Magistrate.”
13. The court in the case of *Sino Hydro Corporation Limited vs Tumbo t/a Dominion Yards Auctioneers* (Civil Appeal E105 of 2021) [2022] KEHC 15545 (KLR) (17 November 2022) (Ruling) held,
“Where an appeal or proceeding is filed outside the stipulated timeliness in law, the only cure would have been for the appellant to file a substantive application seeking for leave of court to file the appeal out of time or to admit the appeal out of time.”
14. In this case, the Auctioneer has on the Reference sought to have it deemed to
have been timeously filed which this court finds to be sufficient. Further, the reason for the delay has been explained well and the since there was unreasonable delay this Court will exercise its discretion and deem the Reference to have been timeously filed.

Whether the Reference has merits

15. It is trite that the court should not interfere with the discretion of taxing officer unless where there is an error in principle in assessing the costs. This was the decision in the case of *Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board* [2005]eKLR, where the Court observed;



“On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.”

16. In this case, the item in contention is Item No 12 of the Bill of costs. The Auctioneer holds that his fees should be based on the value of the property and not the loan amount whereas the Interested Party holds that the fees should be for the value of the loan amount. In her ruling, the Deputy Registrar held that:-

“The use of forced sale value of Kshs 1.8 Billion to calculate the charges for the auctioneer is unjust in the long run. The same is not fair to the borrower. The borrower will end up incurring more debt/ As such the court will base its calculation on the loan amount as that was what the auctioneer was to recover from the sale if the action was to proceed and the surplus would have been remitted back to the borrower.”

17. The Auctioneer holds that Paragraph 7 of the Part II of the Fourth Schedule of the *Auctioneer Rules* 1997, states:-

“Where requisite notices are served and sale is stayed, or postponed the Auctioneer shall be entitled to half (1/2) of fees to which he would have been entitled to after sale plus expenses.”

18. The Auctioneer further cited several authorities such as *Garam Investments V Investments vs Mabadi & Another* Civil Appeal No 155 of 2018, *Victoria Commercial Bank Limited vs Jovan Kariuki T/A Moran Auctioneers* [2021] and *Ostrich Lion Auctioneers vs Paul Muchiri* [2007]eKLR which all hold that the auctioneer’s fees should be based on the value of the goods to be or attached.

19. The Court in the case of *Ostrich Lion Auctioneers vs Paul Muchiri* [2007]eKLR which referred to *National Industrial Credit Bank Ltd vs S.K. Ndegwa Auctioneers* which provided as follows;

“The Fees claimed by the Auctioneer and as awarded by

Deputy Registrar were calculated upon the decretal sum, not upon the value of the property attached. Schedule IV of the *Auctioneers Rules*, 1997 under which an Auctioneer’s charges are calculated is silent on whether they ought to be calculated based on the decretal sum or on the value of the property attached. But the Court of Appeal has held that the Auctioneers fees ought to be calculated based on the value of properties attached.”

20. In that regard, this Court finds that the Deputy Registrar erred in assessing the auctioneer costs on the loan amount and not the value of the properties. Accordingly, this Court hereby orders the matter to be remitted back to another Deputy Registrar other than Hon. Claire Wanyama for:-

- a. Re-taxation of Item No 12 of the Bill of Costs; and,
- b. To address the issue of the VAT rate whether it ought to be 14% or 16%.

21. The upshot is that the Chamber Summons Application dated January 25, 2022 is merited and the same is allowed as prayed.

It is so ordered.



**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 27TH DAY OF
JUNE, 2023.**

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Githanga for Mrs Okuku for the Auctioneer/Applicant

No appearance for Respondent

No appearance for the Interested Party

Court Assistant - Martin

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