



REPUBLIC OF KENYA



**Joseph Gikinyo t/a Garam Investment Auctioneers v Wambaa (Commercial Case E177 of 2021)
[2022] KEHC 16088 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16088 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E177 OF 2021
DO CHEPKWONY, J
NOVEMBER 24, 2022**

BETWEEN

JOSEPH GIKINYO T/A GARAM INVESTMENT AUCTIONEERS ... PLAINTIFF

AND

LEMMY NJOROGE WAMBAA RESPONDENT

RULING

1. For determination before the court is a chamber summons application dated January 17, 2022 filed by Joseph Gikonyo T/A Garam Investments seeking for the following orders:-
 - a. That the ruling of the deputy registrar Hon Claire Wanyama delivered herein on January 10, 2021 be and is hereby varied and or set aside.
 - b. That this honourable court be pleased to order that the auctioneer's bill of costs dated March 11, 2021 be and is hereby placed before another taxing officer for taxation.
 - c. That the deputy registrar erred in law and in principle when assessing the auctioneers costs by basing the same on the loan amount and not the value of the property attached.
 - d. That the costs of this application be provided for.
2. The applicant's case is reproduced in the grounds both its face and the affidavit he swore in support thereof on January 17, 2022 wherein it is averred that, whereas he was instructed to sell the respondent's parcel of land known as LR No Dagoretti/Kinoo/738 so as to recover the loan arrears of Kshs 713,125.70, the property's Forced Sale Value was Kshs 72,000,000/= and the Taxing Officer erred in assessing the auctioneer's fees on the loan amount instead of the forced sale value. The Applicant avers that it in turn faces loss of its fees in the sum of Kshs 845,013.46 which was taxed off, hence the orders



sought ought to be allowed and re-taxation based on the value of the property ordered in tandem with paragraph 7 part II of the Fourth Schedule of the [Auctioneers Rules 1997](#).

3. The Respondent opposed the application vide his Replying Affidavit sworn on February 25, 2022. In his view, the Taxing Officer did not err in principle or law so as to warrant this court's interference as sought. Further, that after the taxation, he drew a cheque for Kshs 82,185.68 being the amount awarded to the Applicant and the Applicant accepted the cheque. Therefore, having accepted the cheque, the Applicant is estopped from making a reference application to this court, since its right to challenge the decision was lost. In the Respondent's view, the Applicant is simply seeking to have its and eat it, hence frustrate the Respondent for having instituted a complaint against the Applicant before the Auctioneers Complaint's Commission.
4. Directions were issued that the application be canvassed by way of written submission for which the parties have filed. The Applicant's submissions are dated June 17, 2022, whereas the Respondents are dated July 6, 2022. I have read through those submissions and I will reproduce the relevant parts thereof in my analysis and determination.

Analysis and Determination

5. I have perused the pleading filed and the record in relation to the taxation of the Auctioneer's Bill of Costs dated March 11, 2021. I am of the view that only two issues arise for determination, which are:
 - a. Whether by accepting payment of Kshs 82,185.68/= the Auctioneer/Applicant is estopped from appealing against the Taxing Officer's decision delivered on January 10, 2022; and,
 - b. Whether the Taxing Master was wrong in assessing the auctioneer's fees based on loan amount, as opposed to the value of the subject property.
- a) Whether the Applicant is estopped from making the present application
6. The Respondent submitted that after taxation, he drew a cheque in the Applicant's favour, so that having accepted the sum of Kshs 82,185.68 then the Applicant lost the right to appeal and is thus estopped from filing the instant application. The Respondent submitted that the doctrine of estoppel precludes a person from asserting something contrary to what is implied by a person's action. In this case, since the Applicant failed to reject the payment, and therefore it should only be inferred that he intended not to appeal against the same. On the other hand, the Applicant was of the view that the right of appeal as enshrined under Rule 55(4) of the [Auctioneers Rules, 1997](#) is as of right and is not extinguished or fettered by settlement of a decretal sum where the dissatisfied party feels the same was law.
7. In my understanding, estoppel by waiver implies a situation where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. Therefore, where a person is entitled to rely on a stipulation existing either in a contract or a statutory provision, may waive and/or abandon it in such a way that the other party is entitled to plead such abandonment and or avoidance if the right is thereafter asserted. Thus, I would wish to respectfully distinguish myself from the decision in [Consolata Muthoni Kariuki v Martin Mutembei Kaburu](#) (supra) to add that a party may as well be considered to waive a right it is entitled to under a statute if with knowledge of the circumstances voluntarily and intentionally fails to pursue a course of conduct manifesting an intention to waive such right. Therefore, where one has collected and satisfied a money decree with knowledge of all material facts he/she is precluded to pursue an appeal to reverse it. Such party, having voluntarily accepted the benefits of the Judgment in question cannot afterwards prosecute an appeal therefrom. The rationale behind that view is the emphasis to



have an end to litigation coupled with the interest to protect a party who has performed the terms of the Judgment from facing repetitive litigation over the same subject matter.

8. The above having been said, it is this court's conclusion that while being aware of his right to appeal under Rule 55(4) of the [Auctioneers Rules 1997](#), the Appellant voluntarily accepted the payment of the amount taxed and awarded vide the Taxing Master's ruling dated January 10, 2022. Therefore, the Appellant/Applicant voluntarily relinquished its right of appeal. And in this court's view, to constitute a waiver of the right to appeal, it ought to be shown that payment as dictated in the Judgment was made and accepted voluntarily and intentionally with the knowledge of the circumstances, as it was in the present case.
9. Consequently, for the above reasons, this court declines the Appellant's/ Applicant's Chamber Summons application dated January 17, 2022 and proceeds to dismiss it but with no orders as to costs.
10. Each party shall bear its own costs.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

D O CHEPKWONY

JUDGE

In the presence of:

M/S Githaiga holding brief for M/S Okullo counsel for Auctioneers/Applicant

M/S Kariuki counsel for Respondent

Court Assistant - Sakina

