



Gikonyo t/a Garam Auctioneers v Mulli & another (Commercial Miscellaneous Application E237 of 2024) [2025] KEHC 15615 (KLR) (Commercial and Tax) (31 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15615 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E237 OF 2024**

H NAMISI, J

OCTOBER 31, 2025

BETWEEN

JOSEPH GIKONYO T/A GARAM AUCTIONEERS AUCTIONEER

AND

ANNAH ITUMBI MULLI 1ST RESPONDENT

TAMANI CONSTRUCTION LTD 2ND RESPONDENT

RULING

1. The 2nd Tax Respondent has filed Notice of Motion dated 5 July 2024 seeking stay of proceeds in respect of Tax Applicant/Auctioneer's Bill of Costs dated 19 March 2024, pending the hearing and determination of the Objector pProceedings dated 9 December 2021 and filed by Benedetta Mutungi Mulli in Milimani HCCOMM No. E057 of 2019, Tamani Construction Co Ltd -vs- Anna Itumbi. The Application is brought under Order 42 Rule 6(1) of the Civil Procedure Rules and sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*. The same is premised on the grounds on the face thereof and supported by an Affidavit sworn by David Kamau Mburu on 5 July 2024, and a Supplementary Affidavit sworn on 29 October 2024. The Application is opposed by the Auctioneer through a Replying Affidavit sworn on 25 September 2024. The 1st Tax Respondent indicated that she supports the Application, but did not file any formal response.
2. The genesis of this dispute lies in Milimani HCCOMM NO. 057 of 2019, where the 2nd Tax Respondent obtained a judgement against the 1st Tax Respondent. A decree was subsequently issued on 31 May 2019 for the sum of Kshs 20,100,000/= plus interest and costs. When the 1st Tax Respondent failed to satisfy the decree, the 2nd Tax Respondent commenced execution proceedings. Through its investigations, the 2nd Tax Respondent identified an asset, property known as LR NO.



37/254/33 situated along Gandhi Road in Nairobi West, Nairobi County (the suit property) as the only known attachable asset belonging to the 1st Tax Respondent.

3. Consequently, the 2nd Tax Respondent successfully moved the Court in the primary suit, and on 19 May 2021, the Court issued a prohibitory order, restraining the 1st Tax Respondent from transferring or in any way dealing with the suit property. The Court further ordered that the said property be sold to satisfy the decree. The terms of the sale were settled by the Court, and a Notification of Sale was issued on 22 October 2021. It was on the basis of these orders that the 2nd Tax Respondent instructed the Auctioneer on or about 1 November 2021 to proceed with the public auction of the suit property.
4. The 2nd Tax Respondent's efforts to realize the fruits of its judgement were, however, forestalled by two distinct but interconnected legal proceedings. First, on 9 December 2021, a third party, Benedetta Mutunge Mulli, filed Objector Proceedings in HCCOMM No. E057 of 2019. The Objector claimed that the suit property did not belong to the 1st Tax Respondent but was, in fact, an asset of the estate of Henry Nzioka Mulli (Deceased). This led to the issuance of an Order of Stay of Execution on 14 December 2021 by Hon. Mwita, J, halting the intended auction until the objection is heard and determined.
5. Second, the determination of the said Objector Proceedings has itself been held in abeyance. The Court handling the objection directed that it would only proceed to determine the matter after the High Court in Machakos in HCC Succession Cause No 53 of 2017, In the matter of the Estate of Henry Mulli Nzioka (Deceased), lifts a pre-existing temporary injunction issued on 4 June 2019, which preserved all properties listed as belonging to the Deceased's estate, including the suit property. This intricate web of litigation has created a procedural impasse, effectively freezing the execution process indefinitely.
6. The Application was canvassed by way of written submissions.

The 2nd Tax Respondent's Case

7. The 2nd Tax Respondent advances several grounds in support of its Application. First, it contended that the Auctioneer's Bill of Costs is premature. The 2nd Tax Respondent's position is that the Auctioneer's fees and charges are intended to be a first charge recoverable from the proceeds of a successful auction. Since the auction was stayed by a Court order and no funds have been realized, it is argued that the right to tax the Bill has not yet accrued. To proceed with taxation at this stage would be to put the cart before the horse.
8. Second, it is argued that the 2nd Tax Respondent stands to suffer substantial loss and irreparable prejudice if the stay is not granted. As a Judgement-Creditor who has been diligently pursuing its rights since 2019, it has been frustrated by legal processes to which it is not a primary party. To compel it to now pay the Auctioneer's fees, which it estimates at Kshs 774,100/=, out of its own pocket for an execution that was lawfully halted would be oppressive and would amount to penalizing it for the delays of the justice system. It would be a mockery of justice for a successful litigant to be forced to incur further costs before realizing even a shilling from the judgement.
9. Third, the 2nd Tax Respondent raises the issue of uncertainty as to liability for the Auctioneer's costs. It is contended that these costs should, in the final analysis, be borne by the Judgement-Debtor. However, this question of ultimate liability can only be determined with finality once the Objector Proceedings are concluded. Proceeding with taxation against the 2nd Tax Respondent now would pre-empt that determination and unfairly burden it.



The Auctioneer's Response

10. The Auctioneer mounted a robust opposition, contending that it is misconceived, an abuse of the court process and an attempt to unjustly delay the settlement of his earned professional fees.
11. The Auctioneer deponed that upon receiving written instructions from the Applicant's advocates on 1 November 2021, he dutifully embarked on the execution process in strict compliance with the *Auctioneers Act*, 1996 and the Auctioneers Rules. He detailed the steps taken, including inspecting the property, issuing the requisite notices to the Judgement-Debtor and preparing handbills for a public auction scheduled for 15 February 2022. He stated that he was in the process of arranging for the newspaper advertisement when, on 17 December 2021, he received instructions from the Applicant's own Advocate to halt the entire process due to the court-ordered stay of execution. He thus framed himself as a professional who fulfilled his mandate until the process was aborted by factors beyond his control, at the behest of the instructing party.
12. The Auctioneer argued that his entitlement to fees is not a matter of commercial negotiation or contingent upon the success of the auction, but is a statutory right that crystallised at the moment the sale was stayed. He relied on Paragraph 7 of Part II of the Fourth Schedule of the Auctioneers Rules, which provides:

Where requisite notices are served and sale is stayed, or postponed, the Auctioneer shall be entitled to half of fees to which he would have been entitled to after sale, plus expenses
13. The Auctioneer submits that this provision is couched in mandatory terms, leaving no room for judicial discretion to deny or postpone this right. He argued that Parliament foresaw precisely such situations and legislated to protect auctioneers from financial loss arising from the postponement or stay of sales for which they have expended time and resources.
14. Second, the Auctioneer contended that the parallel proceedings in Objector and succession matters are entirely irrelevant to his claim for fees. He is not a party to the suits, and his contractual and statutory relationship is with the 2nd Tax Respondent who instructed him. The legal battles over the ownership of the suit property, while unfortunate for the 2nd Tax Respondent, are extraneous to the Auctioneer's right to be compensated for services lawfully rendered.
15. The Auctioneer argued that the application is both premature and legally misconceived. He drew a critical distinction between the process of taxation and the process of execution. He submitted that taxation is merely the procedural step of quantifying the costs due. The 2nd Respondent's fear of suffering substantial loss only arises at the point of execution of the Certificate of Costs. The 2nd Tax Respondent's remedy, if any, would be to seek a stay of execution of the Certificate of Costs once issued, not to pre-emptively block the taxation process itself. In this, he relied on the case of *NCBA Kenya Ltd -vs- Seaman Building & 3 Others* eKLR, where the Court dismissed a similar application for stay of taxation proceedings, holding that the mere fact of taxing costs is not prejudicial.
16. The Auctioneer invoked the high threshold required for the grant of stay of proceedings. He cited the decision in *Kenya Wildlife Service vs James Mutembei* eKLR, arguing that a stay of proceedings is a grave judicial action that seriously interferes with the right of a litigant to conduct his litigation and should only be granted in exceptional cases. He submitted that the Applicant had failed to demonstrate any exceptional circumstances to meet this stringent test.
17. On the question of liability, the Auctioneer pointed to Rule 7 of the Auctioneers Rules which establishes a clear hierarchy for the payment of his charges. The Rule provides that the debtor shall pay



the charges, but in circumstances where the debtor cannot be found, has no goods or the sale proceeds are insufficient, the creditor shall pay the charges or the deficiency thereof. As the instructing creditor, the 2nd Tax Respondent cannot, therefore, evade its secondary liability by pointing to the unresolved primary liability of the debtor.

18. The Auctioneer relied on Peter M. Mwangi t/a Cash Crop Auctioneers vs Agricultural Finance Corporation eKLR, where the Court held that an auctioneer's right to fees is governed by the Act and its Rules, and that upon issuance of a notification of sale, the auctioneer is automatically entitled to his professional fees without conditions. He submitted that this authority is directly on point and confirms that his statutory right cannot be defeated by subsequent events or contractual clauses to the contrary, let alone the pendency of related litigation.

Analysis & Determination

19. This Application is brought under, inter alia, Order 42 Rule 6(1) of the Civil Procedure Rules. A plain reading of this provision reveals that it governs the stay of execution or proceedings under a decree or order appealed from. It is a provision specifically designed to regulate the legal consequences of an appeal. In the instant case, there is no appeal pending before any Court. The Applicant seeks a stay not pending appeal, but pending the determination of separate, albeit related, proceedings. The reliance on the provision is, therefore, misplaced.

20. Nonetheless, this Court will consider the application on its merits, under its inherent jurisdiction. In so doing, it remains acutely aware of the high threshold that must be met. In the case of Global Tours & Travel Limited –vs-Five Continents Travel Limited [2015] eKLR it was held:

“... Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”

21. This was reinforced in Kenya Wildlife Service vs James Mutembei [2019] KEHC 10478 (KLR), where Hon. Gikonyo, J described a stay of proceedings as a serious, grave and fundamental interruption in the right that a party has to conduct his litigation and a power that ought to be exercised sparingly, and only in exceptional circumstances. The applicant for such a stay must demonstrate compelling reasons why the proceedings should be halted.
22. The central conflict in this Application is between the 2nd Tax Respondent's plea of commercial hardship and the Auctioneer's assertion of a statutory right. The resolution of this conflict lies in a proper construction of the governing statute.
23. The Auctioneer's Act and the Auctioneers Rules create a comprehensive regulatory framework for the auctioneering profession. Paragraph 7 of Part II of the Fourth Schedule creates a specific right for an auctioneer to be remunerated even when a sale is stayed or postponed, provided the requisite notices have been served. The purpose of this provision is to safeguard the professional remuneration



of auctioneers, who are often instructed to act in complex execution matters. It protects them from being left without recourse for work done when the execution process is halted for reasons beyond their control, such as a court order obtained by a third party. To hold otherwise would be to expose auctioneers to the vagaries and delays of the very litigation they are instructed to conclude, a result that would be both unjust and detrimental to the administration of justice.

24. While this Court is a court of both law and equity, its equitable jurisdiction cannot be exercised in a manner that overrides or negates a clear and unambiguous statutory provision. The 2nd Tax Respondent's plea, however sympathetic, is essentially an appeal to equity to suspend the operation of a clear legal right.
25. The decision in Peter M. Mwangi t/a Cash Crop Auctioneers v Agricultural Finance Corporation [2019] KEHC 516 (KLR) is particularly persuasive. In that case, the Court held that an auctioneer's right to fees is governed by the statute and that upon issuance of the notification for sale, the auctioneer becomes automatically entitled to his professional fees, without any conditions.
26. This Court fully associates itself with the finding hereinabove. The right to fees is not contingent on the successful completion of the sale or the outcome of any related disputes. It is a statutory debt that accrues upon the performance of specific actions (serving notices), following by a specific event (the stay of the sale). In this case, both conditions were met. The Auctioneer's right to his fees, therefore, crystallized on 17 December 2021 when he was instructed to halt the auction process.
27. In view of the foregoing, the Application is unmeritorious. The same is hereby dismissed with costs to the Auctioneer.

DATED AND DELIVERED AT NAIROBI THIS 31 DAY OF OCTOBER 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Auctioneer: Mrs. Okullo

1st Tax Respondent: N/A

2nd Tax Respondent: N/A

Court Assistant: Lucy Mwangi

