



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CIVIL APPEAL NO. 176 OF 2015**

**ROBERT MUTHAWA.....APPLICANT**

**VERSUS**

**ELIUD MUNYIKA JAMES.....RESPONDENT**

**R U L I N G**

1. **Robert Muthawa**, the Applicant approached this Court by way of Notice of Motion dated **23<sup>rd</sup> March, 2016** seeking review and/or variation of the Ruling made by the Court as there is an error apparent on the face of the record.
2. The application is supported by an affidavit deponed by the Applicant where he states that he filed a Bill of Costs for Taxation and sought to be issued with a Certificate of Taxation in the sum of **Kshs. 24,205/=**. The Respondent filed grounds of opposition. The Respondent's Appeal was dismissed for want of Prosecution.
3. He averred that he retained services of a part time Advocate that he paid **Kshs. 4,200/=**. He paid **Kshs. 3,000/=** to effect service. However, the Bill of Costs was taxed at **Kshs. 2,619/=** which he believes was erroneous.
4. In a response thereto the Respondent stated that the application is an abuse of Court process and should be dismissed.
5. At the hearing the Applicant asked the Court to review and/or vary the Ruling dated **1<sup>st</sup> March, 2016** as there is an error apparent on record made by the Taxing Officer.
6. In response the Respondent stated that the Applicant did not have any supporting documents therefore the application is an abuse of the Court process which calls for dismissal.
7. This is a matter where the Respondent Appealed against an award of **Kshs. 60,000/=** to the Applicant as damages by **Kitui Senior Resident Magistrate Hon. B. M. Kimemia**. The Appeal was dismissed for want of Prosecution and the Applicant was awarded costs.
8. On the **31<sup>st</sup> November, 2015** the Applicant wrote to the Taxing Officer requesting for assessment of costs and issuance of a Certificate of Taxation. He sought a total sum of **Kshs. 24,205/=**. The Respondent opposed/refuted particularized items that the claim was not supported by evidence and/or provided for in law.
9. The Taxing Officer has the discretion in taxing bills and circumstances in which the High Court can

interfere with the discretion have been stated now and again. The principles laid down are that:

1. The Court cannot interfere with the Taxing Officer's decision on taxation unless it is shown that either the decision was based on an error or principle, or the fee awarded was manifestly excessive as to justify that it was based on an error of principle.

2. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of parties, the general conduct of proceedings and any discretion by the trial Judge;

3. If the Court considers that the decision of the Taxing Officer discloses errors in principle, the normal practice is remit it back to the Taxing Officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

4. It is within the discretion of the Taxing Officer to increase or reduce the instruction fees .....  
**(See First American Bank of Kenya vs. Shah and Others (2002) 1 EA 64).**

10. In the case of **Republic vs. Ministry of Agriculture and 2 Others Exparte Muchiri Wanjunguna and 6 Others (2006) eKLR Ojwang J.** (As he then was) expressed himself as follows:

*“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat is too high or too low; it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other.....”*

*The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error or principle, or the fee awarded was manifestly excessive as to justify an interference that is based on error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors, and according to the Advocates (Remuneration) Order itself, .....*”

11. Having considered the authorities cited and the Ruling of the Taxing Officer which is well considered, it is apparent that the Taxing Officer used her discretion, she stated reasons which made her come up with the decision. She considered item by item and relied on schedule 6 of the Advocates (Remuneration) Order. She granted what was due to the Applicant. Where there was no evidence of the Applicant having incurred the expenses allegedly incurred. She declined to award the sum sought.

12. In the premises I have absolutely no reason to interfere with the Ruling of the Taxing Officer. The application is therefore dismissed with no orders as to costs.

13. It is so ordered.

**Dated, Signed and Delivered at Kitui this 23<sup>rd</sup> day of February, 2017.**

**L. N. MUTENDE**