



**Oscar Otieno Odongo t/a Odongo Investment Auctioneers v Credit Bank Limited  
(Civil Appeal E052 of 2024) [2025] KEHC 3526 (KLR) (10 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3526 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E052 OF 2024  
DKN MAGARE, J  
MARCH 10, 2025**

**BETWEEN**

**OSCAR OTIENO ODONGO T/A ODONGO INVESTMENT  
AUCTIONEERS ..... APPELLANT**

**AND**

**CREDIT BANK LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This Judgment is in respect of the Chamber Summons dated 25.3.2024. The Application arose from the taxation of Bill of Costs dated 30.10.2023 which is said to have arisen from Kisii MCCC MISC Application No. E084 of 2023 in which the Respondent instructed the Appellant as an auctioneer.
2. The Appellant seeks an Order setting aside the Taxing Officer's ruling dated 30.10.2023 and taxing the Bill of Costs afresh. The Appellant contends that the Taxing Officer erred in assessing low costs. The Appellant averred that the taxing officer erred in assessing item number 3, fees/commission, which he assessed at Ksh 40,819/=.
3. The taxing officer awarded Ksh. 68,819/=. On item 6, the court found that there was no proof. Item No. 6 related to the investigations of attachable, and the Appellant sought Ksh. 10,000/=.
4. On item 8, there was no evidence of travel for proclamation. On item 8, the taxing officer awarded Ksh. 10,000/=. The taxing master awarded Ksh 3,000/= for item 9. The entire bill dated 30.10.2023 was assessed at Ksh. 68,819/=.

**Submissions**

5. The Appellant submitted that the method used to arrive at the fees was wrong. The auctioneers were entitled to commission on attachment. The Appellant submitted that it was in error for the court to apply the figure in the warrants of attachment in calculating the auctioneer's commission.



6. On the part of the Respondent, it was submitted that the finding of the taxing officer was correct.

### **Analysis**

7. The issue is whether the learned taxing officer erred in her taxation of the Appellant's Bill of Costs. The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles were laid down in the case of *First American Bank of Kenya v. Shah and Others* [2002] 1 EA 64, as follows:
- (1) that 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 of principle, or the fee awarded was manifestly excessive as to justify an inference 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 Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;
  - (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise is to 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 and the amount of the increase or reduction is discretionary; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;
  - (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;
  - (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary.

Assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject..."

"...The law gives the taxing master some leeway but like all discretions, it must be exercised judicially and in line to the material presented before court."

8. According to the above guide, a bill of costs should reimburse the services reasonably rendered and not enrich a party. This principle applies to the advocate's fee just as it applies to the auctioneers' fees.
9. The Appellant's Bill of Costs dated 30.10.2023 arose from warrants of attachment and sale in Kisii CMCC No. 142 of 2023. The decretal amount therein was Ksh. 505,000/= and it is not in dispute that attachment was done but execution did not happen thereafter.
10. The Appellant raised a bill for Ksh. 224,273.80. The taxing officer noted that the Appellant just proclaimed but did not attach the goods for sale.



11. The bill of costs had a major philosophical difference. The Appellant based it on the value of goods attached/proclaimed, while the Respondent based it on the value of goods on the warrant, that is Ksh 2,040,967.06. They get 2% thereof. The court taxed it based on the value of the warrants.
12. The proclamation indicates that the goods attached were valued over Ksh. 6,200,000/=. A cursory look at the proclamation, shows clearly that the same is an exaggeration. For example, one ATM was said to be valued at Ksh. 1,500,000/=. This was not a fitting but a fixture, which cannot be proclaimed as a movable asset. The contents of the ATM were not proclaimed. Where the value was gotten from is still a matter of conjecture and surmise.
13. Consequently, the taxing master cannot base the fees or commission on a fictitious amount. It must be recalled that had the Respondent challenged the proclamation, they would easily have succeeded. The attachment must be done on site. Purporting to proclaim in Kisumu and Kisii at the same time is cavalier and illegal. A proclamation must be for goods found. Each of the goods must relate to time and space. How many were proclaimed in Kisii or Kisumu? When was this done?
14. When faced with fictitious figures, the court has the option of using the amount recovered, the amount on the warrant, or a reasonable amount.
15. The Appellant's submission that the Appellant was entitled to fees based on the value of the property when the property was not attached or sold as such upon service of the proclamation under paragraph 4 of the 4th Schedule of the Auctioneers Rules, 2009. In matters of this nature, fees are to be proportional to the services rendered. In the Court of Appeal case of National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer [2005] eKLR, the court held: -

“The respondent based his fees on the decretal sum and the Deputy Registrar assessed the fees on the basis of the decretal sum. The wording of paragraph 4 of Part II of the Fourth Schedule does not say that the percentages stated apply to the decretal amount. It would be unjust to base the fee on attachment on the decretal amount because in some case, the value of the attached goods may be many times less than the decretal amount shown in the warrant of attachment and sale.

The values indicated in paragraph 4 of Part II of the Fourth Schedule on the basis of which the fees for attachment are assessed are no doubt obscure. Nevertheless, it is a canon of construction of statutes, that if possible a statute should be construed in a manner which makes it operative and that where a statutory has several meanings even though there is little to choose between them, the courts must decide what meaning the statute is to bear, rather than reject the provision as a nullity. (See Paragraph 582 Halsbury's Laws of England Vol. 36, 3rd Edition).

The main object of paragraph 4 is clear. It is intended to provide values on the basis of which the auctioneers should be assessed. We think that it is reasonable that the auctioneer's charges for attachment should be based on the value of the goods attached and not on the decretal sum. It is to be remembered that the auctioneer is to be remunerated for the actual work done and not on the basis of what he could have done had he attached goods equivalent in value to the decretal sum. This is the meaning we give to paragraph 4 of Part II of the Fourth Schedule in order to make it operative.....

16. In the case of Oscar Otieno Odongo t/a Odongo Investment Auctioneers v Sukari Industries Limited [2019] KEHC 9116 (KLR), the court, A. C. Mrima, posited as doth, regarding the duty of the High Court in addressing the auctioneer's fees:



11. A Court dealing with a reference on assessment or taxation of costs must exercise caution since the assessment or taxation is based on exercise of discretion on the part of the assessing or taxing officer. Such assessment or taxation can only be interfered with when it is demonstrably shown that the decision was based on an error of principle or the fee awarded was manifestly high as to justify an interference. (See *First American Bank of Kenya v. Shah & Others Nairobi (Milimani) High Court Civil Case No. 2255 of 2000*, *Behan and Okero v. Pan African Insurance, Kisumu High Court' Misc. Case No. 229 of 2003*, *Bank of Uganda v. Benco Arabe Espanol (1999) 2 EA 45*, *Zacharia Barasa v. Dubai Kenya Limited (2015) eKLR*).
13. The Schedule speaks for itself, and there is no need to introduce any uncalled-for mathematical calculations. The fees are clearly provided for. The argument by the Appellant that, for instance, fees chargeable in respect of attached goods worth Kshs. 1,500,000/= ought to be calculated through the three bands is foreign to the Schedule. According to the Appellant, such a sum will be calculated as follows: 10% for the first Kshs. 100,000/=:, 5% for the next Kshs. 900,000/= and 2% for the balance of Kshs. 500,000/=. This formula yields the Auctioneer fees for proclamation of the goods worth Kshs. 1,500,000/= at Kshs. 65,000/= whereas on the other hand the 2% of Kshs. 1,500,000/= will result to Kshs. 30,000/=. It is hence clear that the proposal by the Appellant is intent on sustaining the urge to unjustly enrich the Auctioneer. This Court is under a duty to ensure that costs of litigation are possibly minimized since uncushioned high such costs can impede access to justice. (See Article 48 of [the Constitution](#)).
14. I, therefore, find and hold that Auctioneer Fees on proclamation must be pegged on the relevant single percentage provided for in Part II of the Fourth Schedule of the Rules and should not be worked through the various bands with different percentages. The court was hence right and the Appellant's contention fails.
17. The question before me is not which amount to use but whether the taxing master exercised his discretion judiciously. I must remember that I cannot set aside the discretion of an inferior court simply because I will have given a different figure. Even where the parties use different figures, the taxing master is entitled to adjust the same to a reasonable figure to avoid impeding access to justice. I am guided by the decision of *Mbogo and another v. Shah [1968] EA 93* where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
18. In this case, we have a speculative value on the proclamation. We do not have goods which were attached. However, the auctioneer postulates that he should be paid on the basis of proclaimed goods. This is incorrect. The law is that if the auctioneer attaches less than the decretal sum, then the fees be based on the actual work done. However, should he find goods in abundance, he must limit himself to the maximum of the value of the decretal sum. This is to avoid the auctioneers carting away unnecessary goods, simply to inflate their bills. This philosophically helps to reduce the need to cause unnecessary suffering. In other words, the auctioneers are paid for goods recovered, subject to the maximum being the decretal sum. That is why, where no goods are recovered, there is a very specific provision on what the auctioneer is to do. I need not address the same now, as it is not ripe.



19. Consequently, the court is unable to fault the taxing master in the exercise of his discretion. The Appellant was not entitled to full fees on proclamation when the attachment was not completed. Reliance on the warrants was generous as the goods found were fictitious.
20. The net effect is that the appeal fails. The next question is costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:
  - (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
  - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
21. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

“It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.
22. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
  - “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
23. Consequently, the appeal is not merited and is dismissed with costs of Ksh. 30,000/=.



## **Determination**

24. In the upshot of the foregoing is that I make the following orders:-

- a. The appeal is not merited and is dismissed.
- b. The Respondent will have costs of Ksh. 30,000/=.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 10<sup>TH</sup> DAY OF MARCH, 2025.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

No appearance for the Appellant in person

Ms. Ashitiva for the Respondent

Court Assistant – Michael

