

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CIVIL MISC. APPLN NO. E358 OF 2024**

**JAMES M. MCTOUGH ..... APPLICANT**

**- VERSUS -**

**AMIN HASSAN ALI ..... RESPONDENT**

**R U L I N G**

1. By Chamber Summons dated **11/11/2024**, the applicant applied to set aside the decision of the taxing officer made on **4/11/2024** on a bill of costs dated **17/11/2022**. The Summons was made under **sections 1A, 3B & 3A of the Civil Procedure Act and Rule 11 of the Advocates Remuneration Order**.
2. The grounds for the Motion were set out in the body thereof and the supporting affidavit of **Bruce O. Odeny** sworn on **11/11/2024**. These were that; the party and party bill of costs was taxed at **Kshs. 186,260** which was excessive and exaggerated. That the applicant was aggrieved by the decision on taxation on items 9,10, 43 and 45 – 57 as the taxing officer failed to take into consideration his submissions and thus the decision of the taxing officer was arrived at in error.
3. The summons is opposed vide the replying affidavit sworn on the **30/09/2025** by **Winnie Anuro**, the respondent’s advocate who deposed that the application was incompetent as it did not identify any particular item in the bill of costs which it considers to have been taxed wrongly. That no sufficient material was placed before court to show that the sum taxed was grossly excessive.
4. The reference was disposed by way of written submissions but only the applicant has filed submissions as at the time of writing this judgement. The

applicant submitted that items 9 and 10 were opposed as the same were wrongly taxed as they related to attendances for mentions which is chargeable at Kshs. 1,400/- as per schedule 7 rule 6.

5. That items 45 – 57 are opposed as they ought to be supported with receipts to prove actual costs incurred. That items 50, 52, 53 and 57 ought to have been taxed off since they relate to filing of affidavits of service which are not chargeable. The applicant urged the court to allow his application.
6. I have considered the record. I have also considered the submissions on record. This is a reference. The principles applicable in such an application are well settled. In **Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR**, the Court of Appeal held: -

***“The learned judge like the taxing officer was exercising judicial discretion when he allowed the reference. This Court cannot interfere with the exercise of that discretion unless it is shown that the learned judge acted on the wrong principles of law. The appeal to this Court from the decision of a judge on reference from a taxing officer is akin to a second appeal and should be governed by Section 72 (1) of the Civil Procedure Act. In our view, such an appeal can only be allowed on any of the three grounds specified in Section 72 (1) of the Civil Procedure Act, that is to say, if the decision is contrary to law or some usage having the force of law; or the decision has failed to determine some issue(s) of law or usage having the force of law or where there is a substantial error or defect in the procedure provided by law which may possibly have produced error or defect in the decision on the case upon merits.”***

7. Further, in **Peter Muthoka & another v Ochieng & 3 others [2019] eKLR**, the Court of Appeal held: -

*“It is not lost to us ... that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so the High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, to borrow the holding in MBOGO -vs- SHAH (Supra), then the decision though discretionary, may properly be interfered with. See also ATTORNEY GENERAL OF KENYA -vs- PROF. ANYANG’ NYONG’O & 10 OTHERS, EACJ App. No. 1 OF 2009.”*

8. And in **Republic v Competition Authority Ex Parte Ukwala Supermarket Ltd & Anor [2017] eKLR**, the court held: -

*“25. 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 are,*

*(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 practice 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. These principles were stated in the case of *First American Bank of Kenya vs. Shah and Others* [2002] 1 EA 64."*

9. It is evident that there were errors in the awards for attendances under items 9,10 and 43 as in some cases the said attendances related to necessary application to or attendance on Magistrate in court or chambers **Kshs 1,400/-** as provided under schedule 7 rule 6.
10. Items 9 & 10 are thus taxed down to **Kshs. 1,400** each and Item 43 is taxed down to **Kshs. 2,800**. Further, it is not clear how the sum of **Kshs.75/-** was allowed for the filing of a verifying affidavit under item 48 when **Kshs. 39,815/-** had already been allowed for filing of a defence and counterclaim under item **46**. Item **48** is thus taxed off.
11. The consequence of the aforementioned is that I find that the taxing officer erred in her assessment of the bill of costs dated **17/11/2022** and the ruling dated **4/11/2024** is hereby set aside. Since the Court has proceeded and identified what should have been awarded and therefore taxed the bill, the same is hereby taxed at **Kshs. 181,985/-**.

It is so ordered.

**DATED** and **DELIVERED** at Kisumu this **31<sup>st</sup>** day of **October, 2025**.

**A. MABEYA, FCI Arb**

**JUDGE**