REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL MISC. APPLN NO. E079 OF 2025

CAROLINE ATIENO OWINO ..... APPLICANT

- VERSUS -

AMON MAHINDI GITHINJI ..... 1ST RESPONDENT

GEORGE ATIENO ..... 2ND RESPONDENT

R U L I N G

1. By Chamber Summons dated **12/5/2025**, the applicant applied to set aside the decision of the taxing officer made on **25/4/2025** on a bill of costs dated **1/3/2025**. The Summons was made under ***sections 1A, 3B & 3A of the Civil Procedure Act, Rule 11 of the Advocates Remuneration Order*** and ***Order 21 Rule 9A of the Civil Procedure (Amendment) Rules 2020 (Legal Notice 22)***.

2. The grounds for the Motion were set out in the body thereof and the supporting affidavit of **Caroline Atieno Owino** sworn on **12/5/2025** as well as her further supplementary affidavit sworn on the **4/9/2025**. These were that the taxing officer disallowed items 15, 16, 17 & 18 citing lack of proof of the said disbursements despite oral and documentary evidence adduced before her.

3. There is no record before this court that the summons is opposed by the respondents.

4. The reference was disposed by way of written submissions but only the applicant had filed submissions as at the time of writing this ruling. It was submitted that items 15, 16, 17 & 18 were proved by the oral testimony of the necessary witnesses who confirmed payment of the claimed disbursements. That her

application as unopposed and ought to be allowed as prayed as was held by the Supreme Court in **Tullow Oil PLC & 3 Others v PS Ministry of Energy & 15 Others [2020] eKLR**.

5. 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."***

6. 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."

7. 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."

8. In the present case, the only issue for consideration is whether the taxing officer erred in disallowing the disbursements claimed as Items 15, 16, 17 & 18. The applicant contended that the oral testimony of **Pw2,** the police officer, **Pw3**, the records officer Kipkelion Hospital and **Pw4** Dr. Obed Omuyoma confirmed

payment of the said disbursements. That the application is unopposed and ought to be allowed as prayed.

9. It is not enough to assert that an application is unopposed thus it ought to be allowed, the party who wants a court to grant a decision based on his/her assertions must prove the existence of the facts he/she is alleging. This is the spirit of ***section 107 of the Evidence Act.***

10. The applicant produced a receipt from Dr. Obed Omuyoma for **Kshs. 20,000/-**. As to oral testimony, the proceedings were not produced before this Court but since the averments were on oath and never denied or challenged, the evidentiary burden of proof was discharged.

11. Accordingly, I find that the reference has merit and I allow the same as prayed.

It is so ordered.

DATED and **DELIVERED** at Kisumu this **28th** day of **November**, **2025**.

A. MABEYA, FCI Arb

JUDGE