

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. 10 of 2020

AUSTIN SALOMON KITOLOLOPLAINTIFF/APPLICANT

VERSUS

HOUSING FINANCE COMPANY LIMITED.....DEFENDANT/RESPONDENT

RULING

1. By his chamber summons dated 18th September, 2024 and brought pursuant to Rule 11(2) of the Advocates Remuneration Order **Austin Salomon Kitololo** (hereafter the Applicant) sought that the ruling dated 14th September, 2023 but allegedly delivered virtually on 11th September, 2024 be set aside and that the party and party Bill of Costs lodged by **Housing Finance Company Limited** (hereafter the Respondent) dated 12th August, 2022 be taxed afresh before any other taxing officer.
2. The reference was supported by the grounds on its face and is grounded on the contention that the learned taxing officer erred both in principle and in fact thereby arriving at an unjust and excessive

award. The Applicant asserts that the contested Bill of Costs was taxed at Kes. 636,460.00, based on improper considerations, particularly with respect to instruction fees, leading to a manifestly erroneous outcome, warranting interference by the Court.

3. The basis of the reference is that the taxing officer assigned an incorrect value of the subject matter in assessing costs. It was contended that the taxation was pegged on a figure of Kes 20,243,443.51 instead of Kes. 11,000,000.00, the latter which was the sum reflected in the consent judgment recorded in settlement of the matter. This misdirection, according to the Applicant, resulted in an inflated computation of costs contrary to established principles governing taxation.
4. Further, the Applicant alleges the improper consolidation of costs arising from two distinct suits, namely, **Kajiado ELC Case No. 819 of 2017**, and this suit despite the two matters involving different parties, separate properties, and advocates. This, it is submitted, led to unjust enrichment of the Respondent.

5. Faulting the taxing officer for failing to appreciate the distinct subject matter of the suit, the Applicant emphasised that the present case was confined to land parcel **LR. No. Ngong/Ngong 2725 (Bulbul plot)**, whereas the **ELC** case related to land parcel **LR No. Ngong/Ngong 14666 (Matasia plot)**, owned by a different party. And that by conflating these properties and their respective transactions, the taxing officer fundamentally misapprehended the scope of the dispute.

6. Additionally, it was contended that the taxing officer failed to consider material facts regarding the settlement of the loans relating to the dispute. The Applicant pointing out that the loan secured by the Applicant's property was settled at Kes. 13,500,000.00 in March 2021, effectively bringing the dispute to an end without the need for a full hearing. Similarly, the separate loan in the other suit had been settled prior to the institution of the present case. According to the Applicant, these factors demonstrating the simplicity and early resolution of the matter, ought to have led to a lower award of costs.

7. The Applicant further complained that the taxing officer disregarded key principles of taxation, including the need to consider the nature,

complexity, and duration of the matter. It was asserted that the suit was straightforward and concluded by consent within a short period, yet the costs awarded did not reflect this reality, thereby rendering the taxation excessive and unjust.

8. Lastly, the reference raised procedural concerns regarding the delay in delivery of the ruling. Although the ruling was dated 14th September 2023, it was only made available to the parties in September 2024, approximately one year later. This delay is cited as further evidence of irregularity in the taxation process.
9. The Respondent in opposing the reference filed a replying affidavit dated 3rd June, 2025, sworn by **Hedayah Malesi**. Asserting that the reference is incompetent, misconceived, devoid of merit, and amounts to an abuse of the court process, she contended that the issues raised were not properly pleaded before the taxing officer and that the reference was not in keeping with the procedural requirements governing taxation references.
10. By way of the background to the present litigation, the deponent stated that the Court upon the suit being settled by

consent, had awarded the costs of the suit to be taxed; and that the Respondent subsequently filed its Party and Party Bill of Costs dated 12th August 2022 which was taxed at Kes. 636,460.00 via the impugned ruling. It is her position that, in arriving at this figure, the taxing officer properly considered all relevant factors including the nature and importance of the case, the value of the subject matter, the interests of the parties, and the conduct of proceedings, and that any assertions by the Applicant to the contrary are unfounded.

11. Contending that the value of the subject matter was correctly determined from the pleadings showing the outstanding loan amount as of 18th June 2020, to be Kes. 20,243,443.51, the deponent disputed the Applicant's reliance on a figure of Kes.13,500,000.00. And asserted that the consent recorded by the parties did not indicate the value of the subject matter. Thus, the taxing master properly exercised her discretion in adopting the outstanding loan amount as the basis for taxation, as supported by the annexed statement of accounts.

12. Regarding the separate case referenced by the Applicant, namely **Kajiado ELC Case No. 819 of 2017**, the deponent stated

that it was irrelevant to the present proceedings as it involved a different subject matter altogether. Hence, the allegation that the taxing master improperly combined or relied on another suit in assessing costs was without basis. In conclusion, she urged the court to dismiss the reference with costs while upholding the decision of the taxing master.

13. The Applicant filed a supplementary affidavit dated 16th October, 2025 stating inter alia that upon receipt of the ruling in September 2024, he promptly instructed his advocates to challenge the same in the midst of threats of execution by the Respondent. He repeated averments that the taxing master relied on an incorrect and inflated value of the subject matter, namely Kes.20,243,443.51, which he asserts relates to a different suit—**Kajiado ELC Case No. 819 of 2017 involving Juliana Muthoni Kitololo**— and not the present matter; that the misdirection resulted in an erroneous assessment of costs; that as demonstrated in correspondence annexed thereto (marked "ASK"), the matter was settled following negotiations and on the loans and properties in issue; that the settlement negotiations included proposals to settle the loan at

approximately Kes. 13,500,000.00 and subsequent agreements leading to a consent order marking the matter as settled. Hence the suit did not proceed to full hearing and was concluded through consent, which should have been a relevant consideration in assessing costs.

14. The affidavit also highlights that two suits relating to the Matasia and Bulbul plots were distinct, involved separate negotiations, redemption amounts, and transactions as shown in the annexed letters and bank communications (pages 12–18). Hence the taxing officer improperly relied on figures and issues from a different transaction. The Applicant concluding by stating that, his reference primarily challenges the value of the subject matter used in taxation and maintains that it is just that it be allowed as prayed.

15. The court directed that the reference be canvassed through written submissions. By his submissions dated 16th October, 2025, the Applicant reiterated his affidavit material. He submitted that the taxation was based on an incorrect value of the subject matter, namely Kes. 20,243,443.51, which neither formed part of the pleadings nor the consent recorded in the matter. Stating that the

suit involved a non-liquidated claim and sought injunctive relief regarding the Bulbul plot, rather than recovery of a specific liquidated sum. Further, it is argued that a substantial portion of the loan—Kes. 11,000,000.00—had already been settled prior to the institution of the suit, and therefore could not properly form the basis of taxation.

16. Moreover, the taxing officer improperly conflated the present matter with **Kajiado ELC Case No. 819 of 2017** involving different parties, properties, and legal representation. Leading to an inflated assessment of costs. Additionally, it is argued that the taxing officer failed to consider material facts, including the fact that the outstanding loan secured against the Applicant's property was settled at Kes. 13,500,000.00, so that the suit was concluded expeditiously by consent, without proceeding to full hearing.

17. Citing the case of **Joreth Limited v Kigano & Associates [2002] eKLR**, where the Court of Appeal held that "*the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case)*" where ascertainable, the Applicant submitted that because the value of the subject matter was not ascertainable

from the pleadings or consent, the taxing officer ought to have exercised discretion instead of relying on an erroneous figure. He also relied on **Kipkorir Titoo Kiara Advocates v Deposit Protection Fund Board [2005] KECA 325 (KLR)**, where the Court emphasized the limited scope for interference with the discretion of the taxing officer.

18. It was asserted that in the present case, the court is entitled to interfere on account of clear errors of principle, particularly in the adoption of the wrong subject matter value and failure to consider relevant factors. Further citing **First American Bank of Kenya Ltd v Gulab P Shah & 2 others [2002] KEHC 1277 (KLR)** for the proposition that a court cannot interfere with the taxing officer's decision unless it is shown that either the decision was based on an error of principle, or that the amount awarded was so manifestly excessive as to justify such inference. Which he contends is the case here.

19. The Respondent in submissions dated 20th August, 2025 addressed the sole question whether the Applicant has met the threshold for setting aside the taxation ruling and for a fresh taxation

of the Bill of Costs. The Respondent highlighted the fact that the suit was settled by consent on 21st September 2021, while the issue of costs was left for determination by the Court, and that costs were subsequently awarded to the Respondent, and taxed. Hence the reference is misconceived, being anchored on an erroneous challenge as to the basis upon which the taxing officer assessed instruction fees.

20. Taking issue with the Applicant's reliance on a figure of Kes. 13,500,000.00 as the value of the subject matter, the Respondent stated that no such amount was reflected in the consent recorded between the parties. The wording of the consent being merely that the matter be marked as settled.

21. Defending the taxing officer's reliance on the value disclosed in the pleadings, namely KES 20,243,443.15 being the outstanding loan amount as at 18th June 2020, the Respondent contended that, in the absence of an ascertainable value from the consent, the taxing officer properly exercised discretion in accordance with established principles. In support of this position, citing **Joreth Limited v Kigano & Associates [2002] KECA 153 (KLR)**. Therefore it was

asserted that the taxing officer acted within the law and properly directed herself in adopting the value discernible from the pleadings.

22. As to whether the court ought to interfere with that finding, the Respondent argued that no error of principle has been demonstrated to warrant the Court's intervention. Here citing **Republic v Ministry of Agriculture & 20 Others Ex-Parte Muchiri W' Njuguna [2006] eKLR** as cited in **Mwaniki Gitau & Co. Advocates v Njoroge [2023] KEHC 18101 (KLR)**. To contend that in the absence of demonstration of any such error, or that the taxed sums were either excessive or based on wrong principles, the court ought not to interfere.

23. And revisiting the reference by the Applicant to **Kajiado ELC Case No. 819 of 2017**, the Respondent asserted that the case was irrelevant as it involved different parties and subject matter and had no bearing on the present proceedings. The court was therefore urged to find that the reference was devoid of merit and to dismiss it with costs.

Analysis and Determination

24. The court has considered the rival affidavit material and submissions of the parties in respect of the reference. The procedure for institution of a reference is found in Rule 11 of the Advocates Remuneration Order (ARO) which provides that :

“(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3).....

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon

giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired".

25. It is not clear in this case whether or when the Applicant first filed his notice of objection as envisaged by the above rule. However, on the face of it the ruling of the taxing officer was made available 12 months after delivery, on 11th September 2024, and the instant reference filed seven days later. The Applicant was at pains to emphasise the delay, which in this instance cannot be blamed on him. No prejudice was shown to have been occasioned to the Respondent due to the delay or the procedure adopted. In the circumstances, nothing turns on the objection by the Respondent concerning the procedure adopted.

26. On the substantive question whether the taxing officer erred in principle while assessing the value of the subject, it is trite that in a reference, this Court will only interfere where an error of principle is demonstrated, or failing that, it is shown that an award is so manifestly excessive or so low as to justify such interference.

27. In **Vipul Premchand Haria vs Kilonzo & Co Advocates [2020] eKLR**, the Court of Appeal stated regarding the exercise of the taxing officer's discretion that;

"Once the client was dissatisfied with the bill, it fell upon the taxing master to tax it. Such taxation, much as it lies in the taxing officer's discretion, is governed by clear principles. In other words, the discretion is a judicial one to be judicially and judiciously exercised. It is not to be exercised whimsically or capriciously in accordance with personal inclination. And the matters the taxing officer takes into consideration should be apparent from the reasons that she gives for her decision. It is those reasons that give an indication whether or not the discretion reposed in the taxing officer was properly exercised."

28. In **Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd [1972] EA 162, Spry, V-P.** stated at p.164 that:

"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, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other."

29. The Court of Appeal in that case proceeded to lay down some principles to undergird the exercise of discretion by taxing officers in the assessment of costs as follows:-

"(a) that costs be not allowed to rise to such a level as to limit access to the courts to the wealthy only;

(b) that a successful litigant ought to be fairly reimbursed for the costs he has had to incur;

(c) that the general level of remuneration of advocates must be such as to attract recruits to the profession; and

(d) that so far as practicable there should be consistency in the awards made."

See also **Rodgers Mwema Nzioka v The Attorney General & 9 Others (2007) eKLR** and **Rogan Kamper v Grosvenor (1978) eKLR**.

30. Taking cue from the above decisions, the High Court has variously expressed itself on the discretion of taxing officers and circumstances in which the Court is justified to interfere. **Ojwang J** (as he then was) in **Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W’Njuguna & 6 others** (supra) observed that:-

“Discretion, as an aspect of judicial decision-making, is to be guided by principles, the elements of which are clearly stated, and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit the assignment of mystical figures of taxed costs... Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for

the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the taxing officer is to provide only for reasonable compensation for work done; the taxing officer should avoid the possibility for unjust enrichment for any party and ought to refuse any claim that ends to be usurious; so far as possible, the taxing officer should apply the test of comparability; the taxing officer should endeavour to achieve objectivity when considering ill-defined criteria such as public policy, interests affected, importance of matter to parties, or importance of matter to the public; the taxing officer should clearly identify any elements of complexity in the issues before the Court – and in this regard should revert to the perception and mode of analysis and determination adopted by the trial judge; the taxing officer ought to describe accurately the nature of the responsibility which has fallen upon counsel; the taxing officer should state clearly the nature of any novel matter in the proceedings; the taxing officer should determine with a measure of

accuracy the amount of time, research and skill entailed in the professional work of counsel.”

31. Similarly **Ringera, J** (as he then was) in **First American Bank of Kenya v. Shah & Others [2002] 1 E.A. 64** at p.69 stated;-

“First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an 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, some of the relevant factors to take into account include the nature and 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. Needless to state not all the above factors may exist in any given case, and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. 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."

32. The Applicant herein contends that the taxing officer erroneously adopted a value of Kes 20,243,443.51 instead of Kes 13,500,000.00 or alternatively treating the value of the subject matter as unascertainable. The record shows that the present suit was settled by a consent whose terms did not expressly state any liquidated sum or value; the compromised figure of Kes.13,500,000/- in correspondence now presented by the Applicant was not part of the terms of the consent. However, the pleadings cited an outstanding loan amount which the taxing officer adopted as the value of the subject matter. In these circumstances, the taxing

officer was entitled to derive the value from the pleadings. The Applicant has not shown how reliance on the pleadings amounted to an error of principle.

33. The Applicant further argued that the matter was simple, settled by consent, and should have attracted lower costs. While these are relevant considerations, taxation is not a mathematical exercise, and the taxing officer retains discretion to consider the importance of the matter, interest of the parties and the amount or value of the subject matter involved. The taxed amount of Kes. 636,460.00 has not been shown to be so manifestly excessive as to represent an error of principle or otherwise perverse. Similarly, the Applicant's claim that the taxing officer improperly relied on values relating to **Kajiado ELC Case No. 819 of 2017** involving a different property appears speculative, and is not supported by a perusal of the text of the impugned ruling by the taxing officer.

34. The Court of Appeal in **Joreth Limited v Kigano and Associates [2002] 1 E.A 92** stated that:

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

35. From the foregoing, it is apparent that the Applicant has not demonstrated any error of principle on the part of the taxing master, or that the taxed amounts were so manifestly high as to represent an injustice. Thus, there can be no justification for the court to interfere with the taxing master’s exercise of discretion. In the result, the reference dated 18th September, 2024 is without merit and is dismissed with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 30TH DAY OF APRIL
2026**



**C. MEOLI
JUDGE**

In the presence of:

For the Applicant: Mr. Kaula h/b for Mr. Ougo

For the Respondent: Mr. Ngugi

C/A: Lepatei

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