

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**MISC. CIVIL APPLICATION NO. E924 OF 2025**

**F.W MUTHEE T/A COMPLIANCE**  
**AUCTIONEERS.....APPLICANT**

**-VERSUS-**

**BIRDI CIVIL ENGINEERING.....RESPONDENT**

**RULING**

1. For determination is the **chamber summons application dated 20/06/2025** filed by **F.W Muthee t/a Compliance Auctioneers** (*hereafter the Applicant*) as against **Birdi Civil Engineering** pursuant to **Rule 55(4) & (5)** of the **Auctioneer Rules** seeking orders: -

a) *That the decision of the Honourable Magistrate delivered on 13/06/2025 in Nairobi MCCC No. 5431 of 2014 on the Applicant's bill of costs dated 02/10/2024 in respect of Items 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 & 39 be set aside and this Court does tax the Applicant's bill of costs as drawn.*

b) *That in the alternative to the above, this Court be pleased to order that the Applicant's bill of costs dated 02/10/2024 in in Nairobi MCCC No. 5431 of 2014 in respect of Items 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 & 39 be set aside and taxed afresh by another taxing master.*

*c) That the costs of the reference be provided for.*

2. The **chamber summons application** is premised on grounds found in the supporting affidavit sworn by **F.W. Muthee, on an even date.**
3. **Birdi Civil Engineering** (*hereafter the Respondent*) opposes the Applicant's motion by way of a **replying affidavit** sworn by **Pritpal Tajinder Singh on 13/10/2025.**
4. Directions were taken on disposal of the chamber summons application by way of written submissions. Only the Applicant complied. Nevertheless, having considered the material on record, the Court postulates that the **issues for determination concern**
  - a) *Whether the Applicant's chamber summons application is merited?*
  - b) *Who ought to bear the costs of the application?*

***Whether the Applicant's chamber summons application is merited?***

5. At the outset, a cursory review of the Applicant's affidavit material, the instant proceedings appear to stem from an auctioneer's bill of costs dated 02/10/2024 that was "assessed" by the learned Magistrate on 13/06/2025. The use of the words "assessed" rather than "taxed" is deliberate and will become apparent later shortly. In presenting the instant application, the Applicant has saliently relied on Rule 55 of the Auctioneers Rules that provides -;
  - (1) .....
  - (2) *Where a dispute arises as to the amount of fees payable to an auctioneer—*

*(a) in proceedings before the High Court; or*  
*(b) where the value of the property attached or repossessed would bring any proceedings in connection with it within the monetary jurisdiction of the High Court, a registrar, as defined in the Civil Procedure Rules (Cap. 21, Sub. Leg.), may on the application of any party to the dispute assess the fee payable.*

*(3) In any other case where a dispute arises as to the amount of fees payable to an auctioneer a magistrate or the Board may, on the application of any party to the dispute, assess the fees payable.*

*(4) An appeal from a decision of a registrar or a magistrate or the Board under subrules (2) and (3) shall be to a judge in chambers.*

*(5) The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar or magistrate.*

6. Indubitably, from the wording of the above provision, determination of payable auctioneer costs emanating from auctioneer instructions, before the subordinate Court, takes the archetypal of “assessment” by a magistrate or registrar, and not taxation. Taxation is a preserve of proceedings before the High Court and a reservation of a registrar within the purport of **Section 2 of the CPA, Order 21 Rule 9(2) & (3)** and Paragraph 10 of the **Advocates Remuneration Order (ARO)**. And ordinarily relates to party & party costs or advocate-client costs, as the case may be.

7. Nevertheless, **Rule 55 (3) & (4)** of the **Auctioneer Rules** above, provides that challenging a magistrate's assessment of auctioneer costs, shall be by way of a memorandum of appeal, that takes the form of a chamber summons, upon which the aggrieved party sets out the grounds of appeal therein.
8. It is discernable from the face of application that the Applicant takes issues with the learned Magistrates assessment of costs with respect to Items 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 & 39 as regards his bill of costs dated 02/10/2024.
9. Here, it necessitates mentioning that, likewise to taxation of an advocate's bill of costs, assessment of an auctioneer's bill of costs draws comparison with regards to the applicable principles, championed in the of-cited decision in Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd [1972] EA 162 with respect to an Auctioneer's bill of costs, mutatis mutandis, it was distilled therein, in assessment of costs that-
10.
  - (a).....,
  - (b)..... a successful litigant ought to be fairly reimbursed for the costs he has had to incur,
  - (c) ..... the general level of remuneration of Advocates must be such as to attract recruits to the profession,
  - (d)so far as practicable there should be consistency in the award made and,

*(e) the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.*

**11.** Principally, the undergirding dictate from the aforecaptioned decision as concerns taxation and or assessment (in this case) of a bill of costs, was 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 is 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.”*

**12.** Further, concerning the applicable principles, the late Majanja J. in the persuasive decision in **St. Elizabeth Academy Karen Limited v Joseph Gikonyo t/a Garam Investments [2022] KEHC 133 (KLR)** succinctly put it that-;

*“A Court dealing with appeal from the 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 Oscar Otieno Odongo t/a Odongo Investment Auctioneers v Sukari Industries Limited MGR HC Misc. Application No. 293 of 2018 [2019] eKLR, First American Bank of Kenya v Shah & Others ML*

- 13.** As earlier noted, the Applicant takes issue with the assessment by the magistrate on Items 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 & 39 with respect to his bill of costs. Ideally, the contestation is that the learned magistrate failed to adhere to established legal principles governing auctioneer's fees pursuant to the Auctioneer's Rules alongside judicial precedent; and overlooked the Applicant's submissions. Specifically, by his affidavit material the Applicant sets out his respective grounds of appeal as against the decision of the learned magistrate.
- 14.** The Respondent's opposition is anchored on its replying affidavit dated 13/10/2023 for the argument that the learned magistrate in assessing the Auctioneer's bill of costs duly considered the rival submissions and thereafter gave a well-reasoned decision in his ruling; and that the learned magistrate did not err or apply wrong principles of law whereas the bill was assessed premised on actual work done while taking due cognizance of applicable provisions of law therefore the Court ought to dismiss the appeal with costs.
- 15.** At this juncture, I find it useful to quote in extenso the relevant facets of the impugned ruling of the Learned Magistrate, as evinced in the Applicant's affidavit as "Annexure FWM3" rendered on 13/06/2025, whereof the learned magistrate proceeded to address himself as follows-;

*"1. ....The bill relates to two separate attachments on warrants dated 21<sup>st</sup> August 2023 from recovery of Kshs.*

2,193,976.68 and warrants dated 30<sup>th</sup> July 2024 for recovery of Kshs. 2,442,655.86. The bill is drawn at Kshs. 289,239.85.

2. The Applicant relies on the bill as drawn and the written submission dated 11<sup>th</sup> March, 2025 while the Respondent relies on the written submissions dated 07<sup>th</sup> May, 2025.

3. Rule 55(1) of the Auctioneers Rules, 1997 provides as follows;

.....

4. I will proceed to tax the bill with due regard to the contested items as follows

- a) In respect to Item 2, I concur with the Respondent's submissions that the fourth schedule does not recognize such an expense, and it is taxed off.
- b) In respect to Item 4, the same is disallowed as the Applicant did not provide any receipt, taken in the context that they already knew the Respondent's registered premises. Item 4 is taxed off.
- c) In respect to Item 5, I find a sum of Kshs. 2,000/- reasonable and tax off an amount of Kshs. 3,000/-
- d) In respect of Item 6, I concur with the Respondent's submission that the fourth schedule does not recognize such an expense, and it is taxed off.
- e) In respect to Item 7, I find a sum of Kshs. 4,000/- reasonable and tax off an amount of Kshs. 4,500/-.
- f) In respect of Item 8, I concur with the Respondent's submission that the fourth schedule does not recognize such an expense as the same is already covered under fees on attachment/repossession/distrain and expenses, and this is taxed off

- g) *In respect of Item 9, I concur with the Respondent's submissions that the fourth schedule does not recognize such an expense, and it is taxed off.*
- h) *In respect to Item 10, I concur with the Respondent's submission that the fourth schedule does not recognize such an expense, and it is taxed off. In any event, no receipts have been provided for the same.*
- i) *In respect to Item 11 and 12, the Auctioneers Rules do not provide for a 'commission' on proclamation, as the auctioneer is already compensated by way of fees on proclamation. These are taxed off.*
- j) *In respect to Item 14, I concur with the Respondent's submission that the fourth schedule does not recognize such an expense and it is taxed off.*
- k) *In respect to Item 16, the same is disallowed as the applicant did not provide any receipt taken in the context that they already knew the Respondent's registered premises. Item 16 is taxed off.*
- l) *In respect to Item 17, I find a sum of Kshs. 2,000/- reasonable and tax off an amount of Kshs. 3,000/-.*
- m) *In respect of Item 18, I concur with the Respondent's submission that the fourth schedule does not recognize such an expense and it is taxed off.*
- n) *In respect to Item 19 and 20, the Auctioneer's Rules do not provide for a 'commission' on proclamation as the auctioneer is already compensated by way of fees on proclamation. These are taxed off.*
- o) *5. Taking into account the amounts taxed off, I tax the bill at Kshs. 32,510/-. Certificate of taxation to issue."*  
(sic)

16. It is apparent from the Applicant's affidavit material and above determination that the Auctioneer's bill of costs "**Annexure FWM1**" was specific to two (2) sets of warrants of attachment dated 21/08/2023 and 30/07/2024. The said bill of cost was vehemently challenged by the Respondent's submissions dated 07/05/2024 "**Annexure FWM2(a)**" and supported by the Applicant's submissions dated 11/03/2025 "**Annexure FWM2(b)**".
17. *Ex facie*, it can be garnered from the face of the above determination that the learned magistrate in rendering his decision duly acknowledged the respective parties' submissions in assessing the Auctioneer's bill. However, it seems that the learned magistrate heavily referenced the Respondent's submissions in assessing various Items not provided for in the bill, with little or no reference to the Applicant's submissions.
18. While it can be equally deduced that the learned magistrate anchored his determination on the **Fourth Schedule** of the **Auctioneer's Rules**, there is an argument that can be made that notwithstanding the forestated, the learned magistrate did not consider the Applicant's submissions despite acknowledging the same. Therefore, it would appear that the Applicant's contestation concerning its submission would appear merited.
19. Regardless, as observed *mutatis mutandis* in **Premchand Raichand Ltd & Another** (supra), an Auctioneer is entitled to fees for work done. Here the work done was with respect to warrants of attachment dated 21/08/2023 and 30/07/2024, to wit, the Auctioneer proceeded to issue and prepare proclamations dated 25/08/2023 and 01/08/2024 respectively.

In essence, the Applicant's chargeable fees ought to have been premised on the latter proclamations dated 01/08/2024, on work duly done.

- 20.** That said, as concerns the warrants of attachment dated 30/07/2024 and the resultant proclamation dated 01/08/2024, the same was Itemized in the Auctioneer's bill of costs from Item(s) 1 to 12 whereas with respect to the warrant of attachment dated 21/08/2023 and the resultant proclamation dated 25/08/2023, the same were encapsulated in Item(s) 13 to 20 of the bill of costs. **"Annexure FWM1"**. It is equally notable from the learned magistrate's determination that he addressed himself to Item(s) 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 17, 18, 19 & 20 of the Applicant's bill of costs
- 21.** With the above in reserve, by the instant chamber summons application, by dint of Section 55(4) & (5) of the Auctioneer's Rules, it constitutes an appeal, whereas notwithstanding the aforestated, the latter can in part be likened to a reference from a decision from a taxing officer. That said, the Court of Appeal in **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR** stated as follows in respect of reference before a Judge;

*"On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In Arthur v Nyeri Electricity Undertaking [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:*

*"where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as*

matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases”.

An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see Arthur v Nyeri Electricity Undertaking (supra) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see Devshi Dhanji v Kanji Naran Patel (No. 2), [1978] KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see - D’Souza v Ferrao [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see Devshi Dhanji v Kanji Naran Patel (No. 2) (supra).

- 22.** Applying my mind to the principle espoused in the aforecaptioned decision regarding **Item(s) 2, 3, 4, 5, 6, 7, 8, 9, 10, 14, 16, 17 & 18** the Court will decline to interfere with the decision of the learned magistrate as the reasons advanced for awarding were within the magistrate’s discretion and was not so erroneous as to constitute a miscarriage of justice or the reason

advanced for assessing were properly premised on the **Fourth Schedule** of the **Auctioneer's Rules**.

- 23.** Concerning **Item(s) 12, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 & 39** the same were assessed off, as they are not provided for in the **Fourth Schedule** of the **Auctioneer's Rules**.
- 24.** With respect to **Item(s) 11 & 19**, it is trite that proclamation and attachment are not synonymous. Further **Part II** of the **Fourth Schedule** of the **Auctioneer's Rules** only provides for fees before attachment or repossession at Paragraph 3 and Fees on attachment/repossession/distrain and expense at Paragraph 4 thereof.
- 25.** I equally note that the wording used in the Auctioneer's bill of costs, is commission on proclamation whereas the **Fourth Schedule** of the **Auctioneer's Rules**, does not provide for the same. Conspicuously, the Court of Appeal in **National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer [2005] KECA 22 (KLR)** held that Auctioneer's charges for attachment should be based on the value of the goods attached and not on the decretal sum.
- 26.** Here, attachment was yet to occur. Therefore, the Applicant would not be entitled to fees under **Paragraph 4** of the **Fourth Schedule** of the **Auctioneer's Rules**. Accordingly, the learned magistrate was in order to assess off the **Item(s) 11 & 19** on the premise of the Applicant having already been compensated under fees before attachment and repossession pursuant to **Paragraph 3**.

**27. In the end, the Applicant's chamber summons application dated 20/6/2025 is without merit. For avoidance of doubt, the decision of the learned magistrate dated 13/06/2025 is upheld.**

**The Respondent is awarded costs of the application, and capped at Kshs. 5000/-**

**Orders Accordingly.**

**Delivered Dated and Signed at Nairobi this 30<sup>th</sup> Day of April 2026.**

**JANET MULWA.**

**JUDGE**