



Somotex (K) Limited v Powerstar Supermarket Hyper Limited (Civil Appeal E230 of 2024) [2025] KEHC 8524 (KLR) (Commercial and Tax) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8524 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E230 OF 2024**

F GIKONYO, J

JUNE 5, 2025

BETWEEN

SOMOTEX (K) LIMITED APPELLANT

AND

POWERSTAR SUPERMARKET HYPER LIMITED RESPONDENT

JUDGMENT

1. This appeal challenges the judgment of the Small Claims Court at Milimani in SCCOMM No. 4964 of 2024 delivered on 19th July 2024, in which the adjudicator gave the following orders:-
 1. Judgment in favour of the claimant as against the respondent in the sum of Kshs. 135,499.88/-.
 2. Costs of the claim assessed at Kshs. 25,000/-.
 3. Counterclaim dismissed with no order as to costs.
2. Dissatisfied with the decision, the appellant instituted this appeal through a memorandum of appeal dated 7th August 2024. The appellant contends that the adjudicator erred in law by assessing the costs of the claim without due regard to Schedule 7 of the Advocates Remuneration Order (ARO).

Background

3. The applicant's case before the SCC was that on 9th August 2023, the respondent acquired electronic goods and failed to pay an outstanding sum of Kshs. 138,274/-. The respondent filed a response dated 2nd July 2024, stating that it had agreed to sell the appellant's goods and store them for three to six months, provided that more than half of them were sold. If the goods remained unsold, it would discuss with the appellant whether to return the goods or adjust prices through offers to promote sales.



4. The respondent claimed that after six months had passed, its attempts to discuss with the appellant on the way forward were futile. It held on to the invoices and the dead stock, which occupies its space. It counterclaimed for Kshs. 861,300 comprising of Kshs. 772,800/- for dead stock and Kshs. 88,500/- accrued storage charges.

Directions of the court

5. The appeal was admitted to hearing on 4th November 2024. It was canvassed through written submissions. However, the respondent did not file any submissions. During the mention of the matter on 18th March 2025, there was no appearance for the respondent.

Appellant's submissions

6. The appellant relied on Section 27 of the *Civil Procedure Act* to submit that the awarding of costs is subject to the court's discretion. It also relied on the Court of Appeal decision in JMM v GNJ (Civil Appeal (Application) E014 of 2022) 2023 eKLR to submit that the discretion is based on what is fair under the circumstances and guided by the rules and principles of law per enabling statutes. It further relied on the Court of Appeal's decision in Supermarine Handling Services Ltd v Kenya Revenue Authority, Civil Appeal No. 85 of 2006 [2010] eKLR, on the principles guiding an appellate court's interference with the trial court's discretion.
7. The appellant faulted the trial court for not exercising her discretion judiciously, as she did not give a reason or justification for awarding costs at Kshs. 25,000/-. It also argued that the award of costs was given contrary to the ARO, applicable under Order 21 Rule 9D of the Civil Procedure Rules, which ought to have applied.
8. It pointed out that the application of Section 27 is subject to the law at the time being enforced and that the prevailing law applicable was the ARO.

Analysis and Determination

Duty of court

9. I have considered the memorandum of appeal, the record of appeal and the parties' respective submissions. This is an appeal from a judgment of the Small Claims Court. Section 38 of the *Small Claims Court Act* provides that:-
 - “(1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
 - (2) An appeal from any decision or order referred to in subsection (1) shall be final.”
10. The above provision confines this court's jurisdiction on an appeal from the SCC to matters of law only. This means that the court only interferes with issues of fact if they are based on no evidence or wrong principles. See Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others [2014] eKLR
11. The issue for determination is whether the trial court erred by assessing the costs of the claim without due regard to Schedule 7 of the Advocates Remuneration Order (ARO).
12. Section 27 of the *Civil Procedure Act* provides that:-
 - “27. Costs



(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.”

13. The Court of Appeal in *Mbogo & Another v Shah* [1968] E.A. 93 underscored that:-

“An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been an injustice”.

14. The appellant’s claim in the Small Claims Court was for Kshs. 135,499.88/-. The adjudicator assessed the party and party costs of the claims as Kshs. 25,000/-. The appellant has argued that the adjudicator erred by assessing the costs without regard to principle and guidance by the ARO.

15. In *Mulwa v Malutu* (Miscellaneous Case 92 of 2021) [2021] KEHC 214 (KLR) (9 November 2021) (Ruling) the Court noted that:- “subordinate courts have jurisdiction to determine costs payable in cases filed before them and that they also have jurisdiction to assess/tax costs.”

16. In *Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd & Another* [1972] E. A. 162 it was held 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.”

17. In *First American Bank Ltd v Shah & another* [2002] 1 EA 64, it was held as follows:-

“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... it would be an error of principle to take into account irrelevant factors or to omit to take into account relevant factors... some of the relevant factors include the nature and importance of the cause or matter, the amount or value of this subject matter involved, the interest of the parties, the general conduct of proceedings and any direction by the trial judge...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...”

18. Guided by the above, I find that the appellant has not demonstrated that the adjudicator’s decision was based on an error of principle or that the costs are erroneous estimation. Hence, the appeal is found to be unmeritorious.

Conclusion

19. In conclusion, the appeal is dismissed with no order as to costs as the respondent did not file a response.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 5TH DAY OF JUNE, 2025

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F. GIKONYO M

JUDGE

In the presence of: -

1. Otieno for Respondent
2. Ms. Gathoni for Mbabu for Appellant
3. CA Kinyua

