National Bank of Kenya Limited v Ecobank Kenya Limited & another (Civil Appeal (Application) E341 of 2020) [2025] KECA 1131 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1131 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E341 OF 2020

F SICHALE, JA

JUNE 20, 2025

BETWEEN

NATIONAL BANK OF KENYA LIMITED ..... APPELLANT

AND

ECOBANK KENYA LIMITED ..... 1ST RESPONDENT

PESA PRINT LIMITED ..... 2ND RESPONDENT

(Being a Reference on Taxation from the Ruling of the Deputy Registrar of the Court of Appeal (Hon Wambilyanga), dated 31st July 2024)

RULING

Corrigenda Ruling

1. On 20th June 2025, this Court sitting as a Single Judge delivered a Ruling in which it allowed the 2nd respondent's reference by way of notice of motion application dated 2nd August 2024, in which the 2nd respondent had the following orders:

> "i. This Honourable Court be pleased and do hereby refer to a judge to make addition as will render the 2nd respondent's Bill of Costs as taxed by Hon J.N Wambilyanga at Kshs 765,534 in a taxation ruling dated 31st July 2024 which is in all circumstances manifestly inadequate, reasonable.
>
> ii. Upon grant of prayer 1, the Honourable Judge be pleased and do hereby uphold the 2nd respondent's bill of costs dated 6th June 2024 for a total amount of Kshs 38,883, 107 or any other reasonable amount that is reasonable and justifiable.

iii. Any other or further relief which this Honourable Court deems fit and just to grant.

iv. The costs of this application be provided for."

2. Vide a letter dated 8th July 2025, by the Firm of Igeria Ngugi & Company Advocates who have the conduct of this matter on behalf of National Bank Limited (the appellant herein), it was brought to the attention of the Court that the Court appears to have only addressed and allowed the 2nd respondent's reference, yet the appellant had equally filed a reference vide a Chamber Summons Application dated 6th August 2024, seeking inter alia the setting aside of the entire ruling of the Taxing Master dated 31st July 2024, in reference to the 2nd respondent's Bill of Costs dated 6th June 2024.

3. The gist of the reference was inter alia that the Taxing Master misdirected himself (sic) and erred in holding that the 2nd respondent herein was entitled to receive the instruction fees amounts stated in his (sic) ruling or any other costs from the appellant, despite there being a Settlement Agreement which was executed by all the parties in the suit including the 2nd respondent.

4. I have looked at the appellant's reference dated 6th August 2024 and I note that the same is unopposed. I also note that both the appellant and the 2nd respondent herein are both challenging the ruling of the Taxing Master dated 31st July 2024.

5. In the premises and in view of the above, the orders issued on 20th June 2025, allowing the 2nd respondent's reference by setting aside the Taxing Master's ruling dated 31st July 2024, and remitting this matter back for re-taxation by a Taxing Master other than Hon. Wambilyanga, shall apply mutatis mutandis to the appellant's Chamber Summons Application dated 6th August 2024.

6. For the avoidance of doubt, the appellant's Chamber Summons application is allowed in terms of prayer 1 only.

7. This ruling has been delivered in accordance with Rule 37 of the Court of Appeal Rules 2022 which provides:

"37. Correction of orders

1. A clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission may, at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court, either of its own motion or on the application of any interested person so as to give effect to the intention of the Court when judgment was given.

2. An order of the Court may be corrected by the Court at any time, either of its own motion or on the application of any interested person:-

a. If it does not correspond with the judgment it purports to embody; or

b. Where the judgment has been corrected under sub-rule (1), if it does not correspond with the judgment as so corrected."

8. The ruling dated 20th June 2025, is hereby amended accordingly.

Dated and delivered at Nairobi this 11th day of July, 2025.

F. Sichale

.....

Judge of Appeal

I certify that this is a true copy of the original.

Signed

Deputy Registrar.

Ruling

1. By the motion on notice dated 2nd August 2024, brought pursuant to the provisions of Rule 117 of the Court of Appeal Rules, 2022 and all enabling provisions of the Law, Pesa Print Limited ("the applicant/2nd respondent " herein) has invoked the jurisdiction of this Court sitting as a Single Judge seeking the following orders:

    " i. This Honourable Court be pleased and do hereby refer to a judge to make addition as will render the 2nd respondent's Bill of Costs as taxed by Hon J.N Wambilyanga at Kshs 765,534 in a taxation ruling dated 31st July 2024 which is in all circumstances manifestly inadequate, reasonable.

    ii. Upon grant of prayer 1, the Honourable Judge be pleased and do hereby uphold the 2nd respondent's bill of costs dated 6th June 2024 for a total amount of Kshs 38,883, 107 or any other reasonable amount that is reasonable and justifiable.

    iii. Any other or further relief which this Honourable Court deems fit and just to grant.

    iv. The costs of this application be provided for."

2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Felix Mutua Ndeke an advocate of the High Court of Kenya who has the conduct of this matter on behalf of the applicant who deposed inter alia that the gist of the dispute between the parties herein was that through a letter of offer dated 6th December 2017, the 1st respondent had agreed to extend a credit facility of USD 3,500,000/= to the 2nd respondent which facility was utilized to provide operational capital to the 2nd respondent for the supply, delivery, installation and maintenance of second hand generation smart card driving licenses where the appellant was the lead consortium partner.

3. He further deposed that the 1st respondent filed the Originating Summons dated 3rd October 2019, majorly raising the question for determination as to whether payment to the 1st respondent by the appellant was dependent on the appellant receiving payments from NTSA or upon the lapse of 150 days upon receipt and stamping of Tax Invoice Number 00229 and vide a judgment delivered on 2nd September 2020, the High Court in Nairobi High Court COMM No. E335 of 2019, allowed the 1st respondent's Originating Summons which had the effect of compelling the appellant to pay an amount of USD 3,681,924.64/= to the 1st respondent's accounts.

4. That, being aggrieved with the aforesaid judgment, the appellant filed an appeal to the Court of Appeal vide a Memorandum of Appeal dated 23rd October 2020, which appeal was dismissed on 12th May 2023, with costs to the respondents, pursuant to which the 2nd respondent filed party and party Bill of Costs dated 6th June 2024, seeking a total of Kshs 38,883,107.00/=, which bill vide a taxation ruling dated 31st July 2024, was taxed at Kshs 765,534/= in complete disregard to the principles of taxation to wit; the subject matter, importance of the matter, the complexity and interests of the parties at stake.

5. He thus deposed that the 2nd respondent was heavily aggrieved with the impugned ruling hence this Reference and that the findings of the Registrar were manifestly erroneous and if left undisturbed, would occasion great injustice on the 2nd respondent based on the fact the Registrar awarded an amount that was manifestly low and completely ignored the principles of taxation.

6. In opposition to the instant motion, the appellant (National Bank of Kenya Limited) equally filed another Reference vide a Chamber Summons application dated 6th August 2024, seeking inter alia the setting aside of the entire ruling of the Taxing Master dated 31st July 2024, in reference to the 2nd respondent's Bill of Costs dated 6th June 2024.

7. It was submitted for the 2nd respondent that the Honourable Taxing Master shockingly stated that the instruction fee as sought by the 2nd respondent was excessive on the basis that the decretal amount will be considered by the Taxing Officer in the high court yet the 2nd respondent had not been awarded any costs in the High Court.

8. It was thus submitted that in essence, therefore, she admittedly did not consider the subject matter while taxing the 2nd respondent's Bill of Costs in contravention of Rule 116 (1) and (2) and clause 9 (2) of the Third Schedule of the Court of Appeal Rules 2022, yet the same was ascertainable.

9. It was further submitted that considering the nature and importance of this matter and complexity of the transactions leading to the case necessitating the representation of two Senior Counsels on top of advocates on record, Kshs 25,000,000 instructions fee which was just 5% of the subject matter as sought by the 2nd respondent was very reasonable but the Taxing Master taxed the 2nd respondent's bill of costs at a paltry Kshs 700,000/= against undisputed subject matter of Kshs 486, 014, 052/= without any justifiable reason

10. On the other hand, it was submitted for the appellant that in the present case, the parties; including the 2nd respondent, voluntarily executed a binding settlement agreement which expressly compromised the judgments in both the High Court and the Court of Appeal including costs and that further, the agreement not only revised the decretal sum from USD 3,681,924/= to USD 3,000,000/= in full and final settlement but also addressed the issue of legal costs which were expressly reserved for the 1st respondent only.

11. It was thus submitted that the Taxing Officer's failure to consider the settlement agreement constituted a fundamental error of law, as the agreement formed the operative framework for resolving all claims and therefore had binding legal effect on the taxation process.

12. As to whether the amount taxed was manifestly excessive, it was submitted that a Court may interfere with the decision of a Taxing Master where the amount awarded is so manifestly excessive or so low as to amount an error in principle. For this proposition, reliance was placed in the case of Pius Kimaiyo Langat v Cooperative Bank of Kenya Limited [2017] KECA 152 KLR.

13. It was therefore submitted that in the present matter, the Taxing Master awarded instruction fees of Kshs 700,000/=, which amount was manifestly excessive in light of the terms of the agreement and the specific exclusion of the 2nd respondent from any cost entitlement and that as such, the award was not only without legal foundation but manifestly excessive.

14. I have carefully considered the reference, the grounds thereof, the supporting affidavit, the appellant's chamber summons application dated 6th August 2024, the rival submissions by the parties, the cited authorities and the law.

15. In the instant case, it is indeed not in dispute that the 2nd respondent had filed a party and party bill of costs dated 6th June 2024, seeking a total amount of Ksh 38,883,107.00/= which bill was taxed at Kshs 765,534/=, by the Deputy Registrar (Hon Wambilyanga), on 31st July 2024 at Kshs 765,534/=.

16. It was the 2nd respondent's contention that the same was grossly and manifestly inadequate, in complete disregard to the principles of taxation namely; the subject matter, the importance of the matter, the complexity and interests of the parties at stake and that further, the Taxing Master had stated that the instruction fee as sought by the 2nd respondent was excessive, on the basis that the decretal amount will be considered by the Taxing Officer in the High Court yet the 2nd respondent had not been awarded any costs in the High Court.

17. In Premchand Raichand Ltd v. Quarry Services of East Africa Ltd. (No. 3) [1972] EA 162, the former Court of Appeal for Eastern Africa identified some of the principles of taxation of costs to include:

    i. That costs should not be allowed to rise to such a level as to confine access to the courts to the wealthy.

    ii. That a successful litigant ought to be fairly reimbursed for the costs that he or she has had to incur;

    iii. That the general level of remuneration of advocates must be such as to attract recruits to the profession; and

    iv. That so far as practicable, there should be consistency in the awards made.

18. It is now trite law that the courts will only interfere with the award of the Taxing Master in exceptional circumstances, for example, where the Taxing Officer has made an error of law or principle or where the taxed costs are manifestly excessive or manifestly inadequate.

19. In Steel & Petrol (EA) Ltd v. Uganda Sugar Factory Ltd. [1970] EA 141, Spry, JA stated the principle as follows:

> " An appellate court will not interfere with an assessment of costs by a taxing officer, unless the taxing officer has misdirected himself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference."

20. I have carefully considered the ruling on taxation by the Taxing Master where as regards the instruction fees, she stated inter alia that the same was excessive considering the fact that the decretal amount will be considered by the Taxing Master in the High Court.

21. I have also looked at the judgment of the Superior Court and note that costs were only awarded to the plaintiff (the 1st respondent herein), the Taxing Master therefore clearly fell into error when she stated inter alia that the decretal amount would be considered by the Taxing Master in the High Court.

22. On the other hand, it was contended by the appellant that despite the judgments in this appeal and the Superior Court, the parties had entered into a settlement agreement to compromise both decisions which was executed by the appellant and the respondents and that the agreement did not provide for any costs to be paid in favour of the 2nd respondent.

23. Additionally, save for the Taxing Master generally stating in her ruling that she had considered the nature of the appeal and the amount of work involved she did not state how she arrived at the figure of 700,000/= as the instruction fee.

24. Additionally I note that vide a judgment delivered by the Court of Appeal (Omondi, Laibuta & Gachoka JJ.A), on 12th May 2023, the appellant's appeal was dismissed with costs to the respondents.

25. Accordingly, I am persuaded that the learned Taxing Master made a clear error of principle which warrants interference with her exercise of discretion.

26. In the premises, I allow the applicant's reference, set aside the Taxing Master's ruling dated 31st July 2024, and remit this matter back for re-taxation by a taxing officer other than Hon. Wambilyanga.

27. Each party will bear its own costs of the reference.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE, 2025.

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR