



Sanpac Limited v Stanbic Bank Kenya Limited (Civil Appeal (Application) 320 of 2018) [2024] KECA 1765 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KECA 1765 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 320 OF 2018
FA OCHIENG, JA
DECEMBER 6, 2024**

BETWEEN

SANPAC LIMITED APPLICANT

AND

STANBIC BANK KENYA LIMITED RESPONDENT

RULING

1. The appellant herein, Sanpac Limited, being dissatisfied by the ruling of the taxing officer dated 20th May 2024, filed a reference dated 23rd May 2024. The ruling was with respect to the respondent’s party and party bill of costs dated 30th November 2023. The appellant’s contention was that the taxing officer did not rightly exercise her discretion in determining the instruction fees.
2. The reference was dispensed with by written submissions.
3. In its written submissions dated 7th October 2024, the appellant relied on the provisions of the Third Schedule and Rule 9(2) and
 - (3) of the Court of Appeal Rules, and the case of Joreth Limited vs Kigano & Associates [2002] 1 E.A. 92 in submitting that the appeal, in this case, was not the subject matter. Its view was that the subject matter was the refusal of the court to reinstate the suit after it was struck out.
4. The appellant pointed out that the appeal was dismissed on a preliminary point of law, following the appellant’s failure to obtain leave to appeal.
5. The appellant submitted that the award of Kshs.500,000 as instruction fees was manifestly excessive and exorbitant. The appellant faulted the taxing officer for failing to take into consideration, the minimal level of work done, and the short duration taken in disposing of the appeal. While relying on the case of the University of Nairobi & Another vs Moses [2022] KECA 45 KLR, the appellant pointed out that discretion must



be exercised judiciously, and based on cogent grounds. It urged that the award be set aside.

6. Opposing the reference, the respondent in its written submissions dated 28th October 2024, submitted that the appeal was with respect to the reinstatement of the suit which sought orders in the sum of Kshs.138,879,010.53. The respondent pointed out that it had sought instruction fees of Kshs.2,200,000 but the taxing officer in her discretion awarded Kshs.500,000.
7. The respondent submitted that the taxing officer exercised her discretion judiciously, having considered the nature and importance of the matter, the complexity of the issues raised, the novelty of the questions raised, and the time expended by counsel.
8. The respondent further submitted that the reference did not disclose any error of principle that required the reassessment of the taxed amount. Therefore, the court cannot interfere with the taxing officer's discretion, unless an error of principle is proven. The respondent submitted that this Court should not upset
taxation merely because a lower amount would have been awarded. It urged that the reference be dismissed.
9. I have carefully considered the reference, the submissions by the parties, the authorities cited, and the law. The issue for determination is whether the taxing officer rightly exercised her discretion in the ruling dated 20th May 2024.
10. It is evident that the taxing officer clearly captured the facts leading to the taxation. She noted that:

“It is common ground that the primary suit before the trial court was dismissed for want of prosecution and thereafter, the trial court refused to reinstate the suit. That refusal to reinstate was the basis of this appeal. The court of appeal subsequently struck out this appeal. I am persuaded that the appeal was not on the substance of the subject matter as submitted by the Respondent but was on the refusal to reinstate the primary suit. Therefore, this matter was neither determined on merits either in the High Court or by this Court. I have considered the nature of this appeal.”
11. The taxing officer further stated that she had considered the nature and importance of the appeal, the difficulty and complexity involved, the interests of the parties, and the general conduct of proceedings in exercising her discretion to award instruction fees of Kshs.500,000.
12. Paragraph 9(2) of the Third Schedule of the Court of Appeal Rules provides that:

“The fees to be allowed for instructions to appeal or oppose an appeal shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances.”
13. It is common ground that the subject matter of the appeal herein was discernible. The appeal originated from an application for the reinstatement of the primary suit. However, the rejection of an application for the reinstatement of the suit had no discernible monetary value. Therefore, the taxing officer was entitled to exercise her discretion in assessing the instruction fees.



14. In the case of Peter Muthoka & Another vs Ochieng & 3 Others [2019] eKLR this Court held that:

“It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just

bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.”

15. In this case, the appeal was disposed of by way of preliminary objection. It was struck off because the appellant had not obtained leave. In those circumstances, I find no room for the taxing officer to have been called upon to give consideration to matters such as the nature and importance of the appeal, and the interests of the parties. The single issue was whether or not the appeal could be allowed to stand, having been filed without leave.

16. The Supreme Court in the case of Non-Governmental Organizations Coordination Board vs EG & 5 others [2023] KESC 102 KLR stated that:

“A certificate of taxation would be set aside, and a single judge could only interfere with the taxing officer’s decision on taxation if:

- a. There was an error of principle committed by the taxing officer.
- b. The fee awarded was shown to be manifestly excessive or was so high as to confine access to the court to the wealthy;(and conversely, if the award was so manifestly deficient as to amount to an injustice to one party).
- c. The court was satisfied that the successful litigant was entitled to fair reimbursement for the costs he had incurred, (and the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party).
- d. The award proposed was so far as practicable, consistent with previous awards in similar cases.
- e. There was no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances.
- f. Although the taxing officer exercised unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically.



g. The single judge would normally not interfere with the decision of the taxing officer merely because the judge believed he would have awarded a different figure had he been in the taxing officer's shoes."

1. I find that by indicating that; "As required under the Rules, I have also considered the nature and importance of the appeal, the difficulty/complexity involved, and interests of the parties herein as well as the general conduct of proceedings, and all other relevant factors."; The taxing officer took into account irrelevant factors, and by so doing, made an error of principle by awarding an amount which was inordinately high in the circumstances.
2. In the case of Kamunyori & Company Advocates vs Development Bank of Kenya Limited [2015] KECA 595 KLR, this Court held that:

"It is now an accepted principle that a Judge will normally remit the matter to the Taxing Officer for reconsideration where there is an error of principle. Spry, Ag. P. held in Nanyuki Esso Service v. Touring Cars Ltd [1972] EA 500 that an error of principle can be inferred where an award is manifestly excessive unless, in the opinion of the Judge, it has not materially affected the assessment."

19. I find that the taxing officer erred in principle, which therefore calls for the intervention of this Court. Accordingly, I set aside the sum awarded as instruction fees, and I remit it back for fresh taxation. The said fresh taxation shall be undertaken by a taxing officer other than Hon. L.D. Ogombe.
20. As costs follow the event, the costs of this reference are awarded to the appellant.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

F. OCHIENG

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JUDGE OF APPEAL

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

SIGNED DEPUTY REGISTRAR.

