REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION 3 OF 2013

DESAI, SARVIA & PALLAN ADVOCATES…….……APPLICANT

- **VERSUS -**

JAMBO BISCUITS (KENYA) LIMTIED …….....RESPONDENT

RULING

1. The applicant prays that its bill of costs filed on 15th January 2013, and taxed on 3rd July 2013, be allowed in the sum of Kshs 132,669,804.36. The applicant prays for interest at the rate of 14% per annum and for value added tax (VAT) on the amount. Although there is no such prayer, the applicant is in essence seeking to impeach the decision of Dominica Nyambu, D.R, the taxing master of this Court, made on 3rd July 2013. The applicant has not prayed for the bill to be remitted back for re-assessment: it pleads with the High Court to *assess* the bill as claimed for Kshs 132,669,804.36.
2. The attack on the decision of the taxing master is six-pronged: first, that she applied the wrong principles by calculating instruction fees on the value of Kshs 150,000,000 as the subject matter; secondly, that items 1 to 5 of the bill were not separate or several claims on instruction fees but for *different instructions arising in the matter as it proceeded;* thirdly that she failed to appreciate the complexity of the matter; fourthly that what was before her was not a party and party bill of costs; fifthly, that she erred by not assessing fees for two counsels; and, lastly that she failed to award interest and VAT as prayed in items 10 and 11 of the bill.
3. The review is opposed by grounds of opposition dated 24th September 2013. In a synopsis, the respondent's case is that no plausible grounds have been laid to interfere with the discretion and decision of the taxing master.
4. On 10th February 2014, the parties agreed that the application be determined by written submissions. The applicant's submissions were filed on 24th February 2014; those of the respondent on 24th February 2014. Both parties have attached authorities in support of their cases. I have considered the summons, the grounds of opposition and rival submissions.
5. The legal parameters within which the Court can interfere with the taxing master's decision are well settled. In *First American Bank of Kenya Vs Shah and others* [2002] E.A.L.R 64 at 69, Ringera J (as he then was) delivered himself thus;

> *"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".*

See also *Steel Construction Petroleum Engineering (E.A) Ltd Vs Uganda Sugar Factory* [1970] E.A 141, *Khan & Katiku Advocates Vs Pamela Chepchumba Rechenbach* Nairobi High Court Miscellaneous 23 of 2011 (unreported).

6. The views of Ringera J (as he then was), were not entirely novel: They were to be found in the old Court of Appeal decisions in *Premchand Raichand Limited & another Vs Quarry Services of East Africa Limited and another* [1972] E.A 162 and *Arthur Vs Nyeri Electricity Undertaking* [1961] E.A 492. The principles were also re-affirmed by the Court of Appeal in *Joreth Limited Vs Kigano and Associates* [2002] 1 E.A 92.
7. There is thus a general caveat on judicial review of quantum of taxation *unless* there is a clear error of principle or the sums awarded are either *manifestly* high or low as to lead to an injustice. This last element was well explained in *Premchand's* case (supra):

> *"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".*

8. In *Joreth Limited Vs Kigano* (supra) the Court of Appeal stated that where the value of the subject matter cannot be discerned from the pleadings or judgment, the taxing master has discretion to assess it weighing a number of parameters:

> *"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 assets 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. That is what CK Njai Esq did when he said:*
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> *'As we do not know the capital value of the property in dispute; one I believe is left to determine the matter on the general discretion donated to the taxing officer to tax a bill, based on the importance of the matter to the parties, complexity and the responsibility placed on shoulders of Counsel."*

9. I stated earlier that the applicant has not prayed that the bill be remitted for re-assessment by a taxing master: the applicant has asked this court to do so and allow the bill as drawn. That is not the true province of a Judge. See *First American Bank of Kenya Vs. Shah and others* [2002] E.A.L.R 64. Whereas a Judge has discretion to re-tax a bill, the proper course is to remit it back to the taxing master. If the bill is to be re-assessed on different principles, it should be placed before a different taxing master. *Steel Construction & Petroleum Engineering (E.A.) Ltd Vs. Uganda Sugar Factory Ltd* [1970] E.A 141, *D'souza Vs. Ferrao* [1960] E.A 492. I thus decline the invitation by the applicant to reassess the bill or to allow it in the proposed sum of Kshs 132,669,804.36 or at all.
10. I will then return to the impugned decision of the taxing master made on 3rd July 2013. On the item of instruction fees, she delivered herself as follows:-

> *"Items 1, 2, 3, 4 and 5 all relate to instruction fees. It is not clear why the applicant has charged instruction fees several times with respect to the same suit. In the celebrated case of Joreth Limited Vs. Kigano and Associates C.A. No. 66 of 1999 cited by the respondents herein the Court of Appeal stated that "instruction fees is a static and independent item charged once only and is not affected or determined by the stage the suit has reached….".*
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> *In the present matter the parent file was settled by consent of the parties at Kshs. 90,000,000. However in the ruling by Justice Koome dated 6th November 2009 it is stated*

that the respondent has at that time paid Kshs. 60,000,000 as ordered by the court. The decretal amount is therefore Kshs. 150,000,000. That is the figure that I will use to calculate instruction fees".

11. When you unpack the applicant's chamber summons, it is simply this: that it had broken down instruction fees into five distinct heads to reflect the different stages of the litigation or in the counterclaim and to show how the figure was rising. As a result, the aggregate sums in the pleadings rose to 1,027,994,967.50 excluding the claim for general and punitive damages. I do not agree with the applicant. The value of instruction fees can be determined from the pleadings or settlement. The amounts in the pleadings are not the sole basis of the value of the subject matter. *Lubullelah & Associates Vs. N.K. Brothers Limited* High Court, Nairobi Misc. case 52 of 2012 [2014] e KLR. The final settlement in this case was in the deed of compromise and settlement in the parent suit for Kshs 90,000,000. To that figure, one must add the Kshs. 60,000,000 that had been paid and reflected in the order of Koome J (as she then was) on 6th November 2009. The taxing master was thus *correct* in finding that the true and reasonable *value* of the subject matter was in the *final settlement* for Kshs. 150,000,000.
12. There was also some lurking danger of duplicity in the instruction fees: In item 1, the bill sought instruction fees generally, in item 2 it sought instructions fees in the amended plaint, at item 3 for defending the counterclaim, at item 4 for instructions to file further amended plaint and at item 5 for instructions to file a defence against the further counterclaim. The correct principle is that instruction fees are given in a suit to defend it or prosecute it to the end. It is a stand-alone item that should be billed as a single item. The amendments to the plaint or the instructions to file defence to the counterclaim were in the same suit. Instruction fees cannot be affected by the stage the suit has reached *Joreth Limited Vs. Kigano & Associates* [2002] 1 E.A. 92. The taxing master also employed the correct schedule; Schedule VI of the Advocates Remuneration (Amendment) Order 1997. I am thus unable to impeach the decision of the taxing master on items 1 to 5 of the client-advocate bill of costs.
13. I am not satisfied from the pleadings or proceedings in the parent suit that this was a *complex* matter that called for enhancement of instruction fees. It was simply a highly contested *commercial* suit that ended in a *settlement*. The applicant in item 7 had claimed fees for a second counsel, Harit Sheth, of Kshs. 38,123,507. There is no contest that Mr. Harit Sheth appeared with the applicant in the suit. True, this was not a party and party bill of costs. But even assuming it was, the trial court had not certified fees for two counsels. In the advocate–client bill of costs, it then behoved the applicant to convince the taxing master to award the additional fees. The taxing master taxed off the entire sum on the premise of Rule 59 (1) of the Advocates Remuneration Order. But having exercised her discretion to tax off the amount, I cannot substitute it with my own view of quantum. I have stated that this was not a complicated litigation. I am not persuaded that the claim for fees of second counsel was justified.
14. Item 6 of the bill was an omnibus claim for Kshs. 5,000,000 to cover "*all applications, attendances, perusals, drawings, copies, services and all other items of chargeable work"*. No date was provided for those services. The taxing master stated the following –

> *"My understanding of Rule 13 (i) of the Advocates Remuneration Order is that advocate [sic] can render his bill to his client in a block form however when the bill is then filed before court it ought to be itemized and drawn in the manner provided for in Rule 69 of the Advocates Remuneration Order. It does not matter how long the bill is or the resources that are available to me as the taxing officer. It makes it easier for the taxing master to tax the bill when it is itemized as opposed to drawing a block bill then asking the taxing master to calculate the fee based on the documents filed. The respondent has proposed a sum of Kshs. 5,000,000 in item 6. I think Kshs. 100,000 would be reasonable and I allow this amount. Kshs. 4,900,000 is taxed off".*

15. Taxation of a bill of costs, like all other aspects of litigation, is based largely on *evidence*. It is also an *adversarial* process. As the bill was contested, it behoved the applicant to present to the taxing master all documents and materials in support of its claim. Having shirked that responsibility in the litigation, the applicant cannot shift the blame to the umpire. In the

circumstances, the applicant was the author of its own misfortune. See *L'Oreal Vs Interconsumer Limited (No. 2)* Nairobi, High Court, Miscellaneous Application 1089 of 2010 [2014] e KLR. See also *Ochieng', Onyango, Kibet & Ohaga Advocates Vs. Meyer Enterprises Ltd* Nairobi, High Court Misc. App. 489 of 2012 (unreported). The applicant was nevertheless awarded Kshs. 100,000 on item 6. I would not then say that the taxing master misdirected herself on that item.

16. The entire bill was allowed in the sum of Kshs. 4,158,600. Considering the value of the subject matter was Kshs. 150,000,000 and the other considerations by the taxing master, it is a reasonable quantum of fees. I cannot say that the award was manifestly high or low. I thus decline to disturb the findings of the taxing master.
17. Lastly, the applicant contends that the taxing master did not award VAT. Nothing can be further from the truth. Her decision at page 3 granted the applicant 16% VAT totaling to Kshs. 573,600. What the taxing master failed to award was interest prayed for at item 10 of the bill of costs being 14% of the taxed sum. With respect, the applicant is entitled under the Advocates Remuneration Order to interest now pegged at 14% on the taxed amount and until payment. I would thus allow the review only to the extent that the applicant shall have interest at the rate of 14% p.a. on the sum taxed from 3rd July 2013 till full payment. The respondent in its submissions concedes as much. The only matter I would add *obiter* is that such interest is usually granted in execution under the certificate of costs or for proceedings taken out under section 51 of the Advocates Act. In a sense then, the lamentations by the applicant are premature.

18. In the result the applicant's chamber summons dated 29th August 2013 succeeds narrowly on the item of interest only. The remainder of the application has no merit and is dismissed. As both parties have succeeded in part, the appropriate order to make is that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 25th day of March 2014.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. S. Sarvia for the applicant instructed by Desai, Sarvia & Pallan Advocates.

Mr. N. Kibanya for the respondent instructed by Kibanya & Kamau Associates.

Mr. C. Odhiambo, Court clerk.