REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 1089 OF 2010

L'OREAL …….....APPELLANT

- **VERSUS -**

INTERCONSUMER PRODUCTS LIMITED ….....RESPONDENT

RULING NO. 2

1. The respondent seeks to impeach the decision of Dominica Nyambu D.R., the taxing master of this Court, made on 10th May 2013. The reasons are set out at length in the deposition of Jomo Nyaribo annexed to the chamber summons dated 22nd May 2013. The attack is four-pronged: first, that the award of Kshs 100,000 for instruction fees was inordinately low; secondly, that the taxing master applied the wrong principles in her taxation; thirdly that she misapprehended the facts and the law in taxing off items 8, 15 and 37 of the respondent's party and party bill of costs; and, lastly that she did not pay heed to the written submissions of the parties.
2. The application for review is contested. In a nutshell, the appellant's case is that no plausible grounds have been put forth to justify interference with the discretion and decision of the taxing master. Those arguments are buttressed further in the replying affidavit of Cosima Wetende sworn on 17th October 2013.
3. On 13th November 2013, the parties agreed that the chamber summons be determined on the basis of the depositions and the written submissions of the parties. The respondent, who is the applicant, filed its submissions on 27th November 2013. Those of the appellant were lodged in court on 20th December 2013. On 20th January 2014, the learned counsels for the parties appeared in Court and addressed me briefly on the import of a decision of S. Okato D.R., relied on by the taxing master in her impugned taxation. I have considered the summons, depositions and rival submissions.
4. 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).

5. 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.
6. 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".

7. 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:

'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."

8. Those remarks are apt in the present case. When you unpack the respondent's case, it is saying that the *value* of the subject matter was *substantial*; that the litigation over the trademark was not *sufficiently* remunerated by the taxing master. Did the taxing master apply *wrong* principles? Is the award of Kshs 100,000 *manifestly low* in the circumstances? That is the crux of the matter on the item of instruction fees. The taxing master D.W. Nyambu D.R. delivered herself as follows:

"This was an appeal against the decision of the Assistant Registrar of Trademarks seeking orders to set aside the ruling delivered on the 27th September, 2010. The Respondent/Applicant to the bill seeks instruction fees of Kshs. 3,000,000. Being an appeal the applicable scale with respect to instruction fees is Schedule 6a paragraph (I) (m) of the Advocates Remuneration Order 2006 which provides for a minimum fee of Kshs. 6,300. The respondent urged the court to increase the fee to Kshs. 50, 000. A ruling by the late Hon. Okato in HC Misc. No. 15 of 2009 was cited. I have considered rival submissions in respect to instruction fee. The matter was of great importance to the parties and a lot of time may have been expended in preparation for the appeal. I will therefore increase instruction fees from Kshs. 6,300 to Kshs. 100,000. Kshs. 2,900,000 is taxed off in Item 1".

9. It is clear that the pecuniary value of the subject matter could not be ascertained from the pleadings or judgment. The taxing master correctly found that the matter was an appeal and that the applicable schedule was 6 (a) paragraph (I) (m) of the Advocates Remuneration Order 2006. The minimum amount was Kshs 6,300. But applying the other parameters I discussed earlier, she considered the importance of the matter and expended time. She enhanced the amount to Kshs. 100,000. I may have a different view on quantum but I should not substitute my discretion with that of the taxing master. *Premchand Raichand Limited & another Vs Quarry Services of East*

Africa Limited and another [1972] E.A 162 , *Arthur Vs Nyeri Electricity Undertaking* [1961] E.A 492, *First American Bank of Kenya Vs Shah and others* [2002] E.A.L.R 64, *Joreth Limited Vs Kigano and Associates* [2002] 1 E.A 92. In particular, I am unable to say the taxing master employed the *wrong principles* or that the amount awarded for instruction fees was *manifestly low*. That aspect of the review is thus devoid of merit.

10. Regarding item 8 of the bill of costs, the applicant contends it was entitled to further instruction fees for opposing the notice of motion dated 21st December 2010. The proceedings in the High Court were an *appeal* from the decision of the Assistant Registrar of Trade Marks made on 27th September 2010. The proceedings were commenced *solely* on that notice of motion. The applicant here was opposing the appeal in the High Court. The appeal was dismissed. The taxing master correctly observed as follows:

"Item 8 is taxed off. Instructions to oppose the Notice of Motion are included in Item 1. This is because proceedings herein were in respect to an appeal against the decision of the Assistant Registrar of Trademarks which was by way of a Notice of Motion".

If the applicant were to get further instructions for opposing that motion, it would amount to unjust enrichment.

11. Regarding items 15 and 18 of the bill, the applicant claimed the value of four copies of pleadings and documents. This appeal had only two parties. Accordingly, the taxing master correctly found that *"it [was] not necessary to make four copies of documents filed in court when only three copies [were] required*". The applicant contends that it needed a fourth copy for its private file. The first original copy of pleadings goes to the Court file, the second to the opposing party and the third one to the applicant. That was sufficient because there were only two parties to the appeal. The additional fourth copy cannot surely then be a *necessary* copy to be billed in a party and party bill of costs. It was a cost certainly, but one freely incurred at the cost of the instructing client.
12. Lastly, regarding item 37, I find the taxing master was justified to refuse the item for want of documentation: the payment receipt. Taxation of a bill of costs, like all other aspects of litigation, is based largely on evidence. Where there is a special claim, the process requires proof of the expenditure. The submission by the applicant that the taxing master should have taken judicial notice of court payments is prosaic. It is not one of the matters a court can take judicial notice of under section 59 of the Evidence Act. Since the bill was contested, the item fell outside the realm of discretion of the taxing master. In that regard, the applicant is the author of its own misfortune.
13. For all the above reasons, the Court finds that the decision of the taxing master on the taxation cannot be impeached. The respondent's chamber summons for review dated 22nd May 2013 is thus devoid of merit. It is dismissed with costs to the appellant.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 13th day of February 2014

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance for Respondent/Applicant instructed by Muthaura, Mugambi, Ayugi & Njonjo Advocates.

Mr. P. Njeru for Ms C. Wetende for Appellant/Respondent instructed by Kaplan & Stratton Advocates.

Mr. C. Odhiambo, Court clerk.