



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 491 OF 2017

JOVET (KENYA) LIMITED.....PETITIONER

- VERSUS -

SAVARIA N. V.....RESPONDENT

RULING

(Being a reference in respect of the taxation by Hon. Claire Wanyama on 17th October, 2019)

1. The Chamber Summons filed by the petitioner and dated 30th October 2019 seeks to challenge the taxation of party/party bill of costs filed by the respondent dated 5th April 2019. The petitioner seeks by that application the setting aside of that taxation and for an order that the bill be referred to a different taxing master for taxation.

2. The application is based on the grounds that the taxing master failed to consider that this matter was wholly hinged upon constitutional provisions and determination; the transfer of this matter to the Commercial Division did not change the character of the suit; the suit was not converted from a petition to a plaint and; that parties proceed with this matter by way of written submission and consequently no oral hearing proceeded.

3. The respondent has opposed the application on the grounds that parties consented to the transfer of this matter from the Constitutional and Human Rights Division to the Commercial Division; that the said consent to transfer of this matter was based on the ground that it had been filed in the wrong Division; the taxing master observed that this was a constitutional petition which was dealt with as a commercial matter and; that the petitioner failed to show the taxing master applied wrong principle of law or took into account irrelevant matters or failed to take into account relevant matters.

ANALYSIS

4. I have considered parties' submissions and affidavit evidence. There are two issues that present themselves for determination in this matter. The first is whether the taxing master erred in considering this matter as a commercial matter and thereby ascertained the value of the matter from the pleadings. The second issue is whether the respondent was entitled to getting up fees.

5. I will begin, in my consideration of the first issue, by dissuading the petitioner of its understanding of how this matter was transferred to the commercial division. As stated before the petitioner filed this matter in Constitution and Human Rights Division of this court. On 6th December 2017 parties appeared before **Justice E.C. Mwita** in that Division. The respondent's learned counsel in addressing the court on that day informed the learned judge that parties had, by letter dated 16th November 2017, consented to this matter being transferred to the Commercial Division. The petitioner's learned advocate, Mr Wandati, confirmed that consent. It is after that address that this matter was transferred to the Commercial Division. The petitioner by the present application erred to depose that this matter was transferred to the Commercial Division at the direction of **Justice E.C. Mwita**. As will be seen from what I have stated as recorded in the court file, the petitioner's contention is not the factual position of how this matter was transferred to the Commercial Division.

6. Did the taxing master erred in considering the value in the pleading whilst taxing the bill of costs? The taxing master, in respect to the first item of the bill of costs, the instruction fee, was guided by the decision of **Joreth Limited vs Kigano & Associates (2002) 1EA92**. In that case the court of appeal held:

“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 ascertainable

the taxing officer is entitled to use his discretion to assess 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, and direction by the trial judge and all other relevant circumstances.”

7. The petitioner’s case was that it was in the business of beverage distributorship within Kenya. The respondent is a producer of alcohol free and specialty beers in Netherlands. This court by its judgment found that there were 3 issues that needed determination. They were:

- a. Was there a contractual relationship between the Petitioner and the Respondent?**
- b. If (a) above is in the affirmative, did the Respondent breach that contract?**
- c. If (b) is in the affirmative, what remedy is available to the Petitioner?**
- d. Who bears the costs?**

8. The court by its judgment also found that the dispute centered on whether the respondent had appointed the petitioner the sole importer, distributor and marketer, or various alcohol and non-alcoholic drinks. The above in my view undoubtedly establishes that what the petitioner presented before court was a commercial dispute. It follows that the taxing master did not err in finding therefore that the value for the purpose of determining the instruction fee would be found from the pleadings. I do find that the petitioner filed a commercial matter under the cloak of Articles in the constitution. It would be useful to refer to the decision of **Justice M.J. Anyara Emukule** (*as he then was*) in the case **Maggie Mwaiki Mtalaki v Housing Finance Company of Kenya [2015] eKLR**

“47. Secondly, and this is of paramount importance, to litigants and counsel, the Constitution is not to be used as a general substitute for litigating ordinary civil disputes. The petitioner herein is disguised as a Constitutional Petition for the redress of violation of fundamental rights when it is in fact an ordinary civil dispute elevated into a constitutional issue. There is no single constitutional issue raised in the Petition. The question of social-economic right of housing and sanitation is a smokescreen for denial of contractual liability and is therefore both misconceived and misguided as argued the Respondent.”

9. I find no basis whatsoever in the argument of the petitioner that the taxing master erred in regarding this matter as commercial or in determining the value by looking at the pleadings. The petitioner sought judgment in special damages of €7,344,000. That is the amount the taxing master used to determine the instruction fee.

10. The petitioner also faulted the taxing master for awarding getting up fee to the respondent. In the petitioner’s view the taxing master erred in failing to consider that parties proceeded, in this matter, by way of written submissions and their bundle of documents.

11. Getting-up fee is calculated as being at least 1/3 of the instruction fees. This is found in Schedule 6(2) of the Advocates (Remuneration) Order of the Advocates Act Cap 16. That Schedule provides:

“In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation”

12. Justice R. E. Aburili in the case **Ngatia & Associates Advocates v Interactive Gaming & Lotteries Limited (2017) eKLR** made the following finding:

“98. Accordingly, I am persuaded that there is nothing in the Advocates Remuneration Order that disentitles an advocate who has represented his client in a judicial review matter and conducted the hearing in a matter which was defended from being awarded a getting up fee. I also find that the decision in Nguruman Ltd vs Kenya Civil Aviation Authority & 3 Others [2014] e KLR where the taxing master ruled that the fees for getting up was properly charged because the case was heard, and whether the hearing was by way of affidavits only or by viva voce evidence was immaterial, which case on a reference was upheld by Lenaola J, was a sound decision.”

13. I am persuaded by that finding by Justice R. E. Aburili. The fact this matter was heard by submissions and affidavits does not affect the succeeding party’s claim for getting up fee. The taxing master was correct in awarding the getting up fee and doing so was faithful to the Advocates (Remuneration) Order.

14. On the whole the petitioner’s chamber summons dated 30th October 2019 is without merit and it does fail. The costs of the same will be awarded to the respondent.

CONCLUSION

15. The Chamber Summons dated 30th October 2019 is dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 15th day of JUNE 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **15th** day of **June, 2020**.

MARY KASANGO

JUDGE