REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC APPLICATION NO. 15 OF 2016

IN THE MATTER OF TAXATION OF COSTS

BETWEEN

NGATIA & ASSOCIATES ADVOCATES.....APPLICANT

- VERSUS -

INTERACTIVE GAMING & LOTTERIES LIMITED.....RESPONDENT

RULING

1. NGATIA & ASSOCIATES ADVOCATES (hereinafter the advocate) filed advocate/client bill of costs dated 28th January 2016. In the item under instruction fees, in that bill of cost, the advocate narrated:

> **"To receiving instructions to act for the client's premium Rate Service Provider (PRSP) Flint East Africa Limited following an impending raid on their premises by the police in connection with the client's public lottery "Mzalendo bora".**
>
> **To receiving instructions from interactive Gaming & Lotteries Limited regarding the relationship between the client and Flint East Africa Ltd who were the service provider."**

2. The respondent to the advocate/client bill of costs is **INTERACTIVE GAMING & LOTTERIES LIMITED** (hereinafter the respondent).

3. By Notice of Preliminary Objection dated 20th April 2016 the respondent raised the following objection to the bill of costs;

> **"That their (sic) exists no Advocate-client relationship between the Applicant and the Respondent.**
>
> **That in the absence of retainer, the court lacks requisite jurisdiction to tax the Bill of costs."**

4. It needs to be noted that the bill of costs reflects that the advocate acted on behalf of Premium Rate Service Provider (PRSP) Flint East Africa Limited. The costs were however sought to be taxed against Interactive Gaming and Lotteries Limited (the respondent).

5. The respondent's preliminary objection was dismissed by this Court's Ruling dated 29th November 2018. Being aggrieved by that dismissal, and after obtaining the leave of the court to file an appeal, the respondent filed a Notice of Appeal on 3rd December 2018. The taxation of the bill of costs was however not stayed.

6. It is in that background that the respondent filed the Notice of Motion application dated 29th August 2019. The respondent seeks, by that application, the prayer for striking out the bill of costs for want of retainer. That application is based on the grounds that the taxation of the advocates/client bill of costs can only proceed if there is no dispute on retainer; the present bill of costs relates to instructions of an entity other than the respondent and; the preliminary objection was rejected on technicality.

7. The application is opposed by the advocate through the advocate's replying affidavit. By that affidavit the advocate stated that there existed an advocate/client relationship between the advocate and the respondent whereby the respondent in the year 2011 instructed the

advocate to institute judicial review proceedings on behalf of its service provider, that is, Flint East Africa Limited against the Communication Commission of Kenya.

ANALYSIS

8. As stated before the respondent filed preliminary objection to the bill of costs and this court on 29th November 2018 made a Ruling dismissing that objection. The respondent has presently a pending appeal before the court of appeal.

9. The advocate has raised as one of his objection to the application that the respondent, by that application, seeks to reintroduce the argument rejected by this court's Ruling of 29th November 2018. What I understand the advocate to state is that the respondent's application is res judicata. That doctrine is summed up in Section 7 of the Civil Procedure Act which states:

> **"7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by court."**

10. One might ask, does the doctrine apply the applications. It has been a settled position in law that indeed the doctrine does apply where the issues raised are in an application. This was well stated by the court of appeal in the case **NJUE NGAI V EPHANTUS NJIRU NGAI & ANOTHER (2016) eKLR,** thus:

> **"..there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that section 89 of our Civil Procedure Act caters for.**
>
> **The word "suit" is defined in section 2 of our Civil Procedure Act as:**
>
> **"Means all civil proceedings commenced in a any manner prescribed."**
>
> **Also the word "prescribed" has been defined to mean "prescribed by rules" and "rules" are defined to mean "rules and forms made by the Rules Committee to regulate the procedure of the courts". What stands out as most important here is that section 89 of our Civil Procedure Act makes it mandatory to follow the procedure provided in the Act makes it mandatory to follow the procedure provided in the Act(sic)to all proceedings in any Court of Civil jurisdiction. That can only mean that interlocutory proceedings come within the purview of the word "suit" for the purpose of the issue of res judicata by virtue of section 89 of our Civil Procedure Act"…….. "We have no hesitation whatsoever in saying that the general principles of res judicata cannot be limited by section 7 of the Civil Procedure Act and that the section (Section 7) is not exhaustive." (Emphasis added)**

11. Although the respondent justifies the filing of the present application on the ground that the dismissal of the preliminary objection was on technical basis and therefore the doctrine of res judicata does not apply I beg to differ with the respondent.

12. The reason for differing with the respondent is because the respondent's preliminary objection was to the effect that there was no basis of taxing the advocate/client bill of costs because there existed no advocate/client relationship between the advocate and the respondent. That is to say there was absence of retainer.

13. By the Ruling of 29th November 2018 the court dismissed the preliminary objection of the respondent. The present application raised exactly the same issue raised in the preliminary objection. It would seem to me that on its face the orders granted by the Ruling of 29th November 2018 make the application to be res judicate. It would also seem that the respondent was of the same view because in seeking leave to appeal, by its application before this court dated 4th December 2018, the respondent deponed in his affidavit that one of the grounds of its appeal against that Ruling was:

> **"That the learned judge of the superior court erred in law and fact in finding the respondent's preliminary objection incompetent yet proceeded to make a determination that there was a retainer without affording the respondent an opportunity to properly place the issue before the court by way of a substantive application."**

14. In other words the respondent before the court of appeal seeks to argue that this court by Ruling of 29th November 2018 made a determination on retainer. One would then ask, how can the respondent seek a second determination of that same issue by this very court.

15. But perhaps and more importantly the application will fail because the respondent, in filing the application, is abusing the process of the court. The abuse is because the respondent has pending before the court of appeal an issue on whether this court erred in determining there was a retainer and by the present application seek for this court to decide on that very issue, that is whether there was retainer.

16. In my view the application is without merit and is also an abuse of the court process and it therefore must fail with costs.

CONCLUSION

17. The Notice of Motion application dated 29th August 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