



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 43 of 2012

FAMY CARE LIMITED PETITIONER

AND

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD..... 1ST RESPONDENT

KENYA MEDICAL SUPPLIES AGENCY..... 2ND RESPONDENT

AND

PHARMACY & POISONS BOARD 1ST INTERESTED PARTY

ANGELICA MEDICAL SUPPLIES LTD 2ND INTERESTED PARTY

PFIZER LABORATORIES LIMITED..... 3RD INTERESTED PARTY

PFIZER INC 4TH INTERESTED PARTY

RULING

Introduction

1.The 2nd interested party is the applicant in the chamber summons application dated 29th November 2012 which is a reference under **Rule 11** of the **Advocates (Remuneration) Order, 2009** from the decision of the learned Deputy Registrar acting as the taxing master. The applicant is dissatisfied with the decision of the Deputy Registrar concerning the taxation of its party and party bill of costs dated 10th May 2012. The applicant challenges the decision of the Deputy Registrar reducing the instruction fee from Kshs 7,229,168/00 claimed to Kshs 200,000/00.

The arguments

2.The petitioner's case concerned an international tender floated by KEMSA for the supply of the drug known as *Depo Provera*. The petitioner duly submitted its proposal and after evaluating the tenders, KEMSA did not award the petitioner the contract for the supply of the drug. Aggrieved by this decision the petitioner moved the Public Procurement Appeals Review Board ("PPARB") for review but its application was not successful. Thereafter the petition was lodged to challenge the PPARB decision. The petitioner prayed for the following orders;

(i) This matter be certified as urgent and service of the petition be dispensed with in the first instance;

(ii) The applicant be granted leave to commence judicial review proceedings herein and that cognizant of the provisions of Article 159(2)(d) the petition be deemed to be the pleadings in connection with the orders for judicial review sought herein and in particular-

(a) An order of prohibition directed at the Kenya Medical Supplies Agencies prohibiting it from implementing a decision made on 27th January 2012 by the Public Procurement Administrative Review Board.

(b) An Order of Certiorari to remove into the High Court and quash the aforesaid decision of the Public Procurement Administrative Review Board delivered on 27th January 2012 awarding the tender for supply of injectables to Angelica Medical Supplies Limited.

(c) An Order of Certiorari to remove into the High Court and quash the decision of the Kenya Medical Supplies Agency delivered on a date unknown to the petitioner but communicated to the petitioner by a letter dated 23rd December 2011 but delivered on 28th December 2011 to award the tender for supply to injectables in Tender No. KEMSA01T60/2011-2013 to Angelica medical Supplies Limited.

(d) An Order of Mandamus directed at Pharmacy and Poisons Board to compel it to discontinue the marketing, importation and/or distribution of the drug registered under certificate 0782 by the said Angelic Medical Supplies Limited for supply to the Kenyan market for so long as the said drug does not meet the requirements of the WHO with regard to storage conditions unstable for tropical areas;

And upon hearing of this petition, the said orders to issue;

(iii) An injunction do issue directed at the respondents, their agents, servants, employees or any person acting under their directions and or with their cooperation from executing implanting or getting into any contract within the Republic of Kenya involving the supply or provision of the drug offered by the 2nd interested party whether under said in Tender No. KEMSA01T60/2011-2013 or at all.

(iv) A declaration that the said drug supplied by the 2nd interested party branded "Depo Provera" or under any other name supplied pursuant to the 1st interested party's Registration No. 0782 or any subsequent registration issued under storage conditions of 25 degrees centigrade is unsuitable for the tropical conditions in Kenya as contained in the WHO classification for Zone IV/A and by reason of such non-conformity with the said classification condition is likely to breach the provisions of Article 43(a) as read with Articles 46(1) and 46(3) of the Constitution of Kenya.

(v) A permanent injunction prohibiting the importation, sale, marketing, distribution and/or otherwise offering to the public of "Depo Provera" or under any other name supplied pursuant to the 1st interested party's registration No. 0782 or any subsequent registration issued under storage conditions of 25 degrees centigrade in the Republic of Kenya.

(vi) A declaration that the award of Tender No. KEMSA01T60/2011-2013 by the respondents is a breach of the applicant's constitutional rights and that the said tender be awarded to the Applicant.

(vii) Costs of this petition and of the proceedings before the 1st respondent being public procurement Administrative Review Board Application No. 57 of 2011.

3. After hearing the matter, I dismissed the petition by a judgment dated 19th April 2012 as I found that the petitioner had not made out a case warranting relief under **Article 23** of the Constitution. I awarded costs of the petition to the 2nd, 3rd and 4th interested parties.

4. The applicant now seeks to review the award of the learned Deputy Registrar on the ground that she

erred in principle as she proceeded to tax the bill of costs under the wrong schedule. According to the applicant, she ought to have proceeded under **Schedule VI 1(b)** of the **Advocates (Remuneration) Order** which provides that taxation shall be based on the value of the subject matter and which provides as follows; “to sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defence or other denial of liability is filed; where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties.” Instead she applied **Schedule VI 1(j)** which provides a basis for determination of fees for applications for prerogative orders. It stipulates thus; “Prerogative orders-To present or oppose an application for a Prerogative order; such sum as may be reasonable but not less than 28,000.”

5.The applicant contends that the petitioner was not only seeking prerogative orders but it also wanted the tender awarded to it and in the circumstances the matter was simply a commercial matter whose value was clear from the pleadings. Counsel for the applicant contended that the judgment of the court discounted the fact that the matter was one seeking orders of judicial review. The applicant relies on the part of the judgment where I stated as follows, “[120] .. **but this is not a case where the petitioner has sought orders of judicial review, it has sought leave to commence judicial review proceedings an application for leave to commence judicial review proceedings is ordinarily made under Order 53 of the Civil Procedure Rules pursuant to the Civil Procedure Act [124] It follows that the court cannot grant leave to commence judicial review proceedings.**” The applicant therefore submits that the matter could not be taxed under **Schedule VI(1)(j)** and that the decision of the learned Deputy Registrar ought to be set aside and the direction be given that the bill be taxed in accordance with the **Schedule VI(1)(b)**.

6.The petitioner, on its part, denied that there was any error in the decision which would entitle the court to set it aside. The petitioner contended that it was seeking prerogative orders against the respondents. Counsel submitted that the petitioner was challenging the procurement process and seeking to enforce their fundamental rights and freedoms and that the learned Deputy Registrar was correct to apply **Schedule VI(1)(j)** of the **Advocates (Remuneration) Order**.

Determination

7.Whether the instruction fee ought to have been assessed under **Schedule VI(1)(b)** or **VI(j)** of the **Advocates (Remuneration) Order** is a matter I had the opportunity to consider in the case of **Brampton Investment Limited v Attorney General & 2 others, Nairobi Petition No. 228 of 2011 (Unreported)**. In that case I observed that, “*this issue ought to be approached on the basis of substance rather than form. In my view, prerogative orders can now be sought in the form of a petition as provided in Article 23 of the Constitution. A respondent should not be disadvantaged by costs merely because the petitioner chose to commence proceedings in a different form, in this case a constitutional petition when the orders sought could also have been granted through proceedings of judicial review under Order 53 of the Civil Procedure Rules.*”

8.In the case of **Orion East Africa Limited v Permanent Secretary, Ministry of Agriculture and Another Nairobi Petition No. 100 of 2012 (Unreported)** where I once again considered the issue, I continued, “*My reasoning is fortified by the fact that the petitioner in this matter invoked the provisions of Article 47(1) of the Constitution which deals with the right to fair administrative action. It states that, “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.” The effect of Article 47(1) is that judicial review of administrative action contemplated under Order 53 of the Civil Procedure Rules is now placed on a constitutional footing and whether one invokes the Order 53 procedure or the Article 22 procedure, the same result is achieved. Indeed prerogative orders are expressly recognised as one of the reliefs the court is entitled to grant in an application to enforce fundamental rights and freedoms.*”

9.Does this case fall within the principle I have elucidated in the two cases I have cited? I think so. The gravamen of the petitioner’s case was one where the decision of the PPARB was challenged hence the petitioner applied for leave to commence judicial review proceedings in order to set aside the decision. Although I found that the petitioner could not apply for leave, the issue of whether the petitioner

had made out a case for breach of **Article 47(1)** was considered at paragraphs 140 – 148 of the judgment and I held that it had not made out a case to warrant grant of the orders sought. At paragraph 158 of the judgment I stated that, *“For all intents and purposes, the proceedings were geared towards reversing the decision of the procuring entity and securing the tender. Furthermore, the application for leave was intended to secure the right to apply for judicial review under section 100 of the PPDA.”*

10. My view is that the proceedings in the matter were, as I stated geared towards reversing the decision of the procuring entity and therefore in the nature of prerogative orders. Granting the prayers sought in the petition would be in effect granting prerogative orders. All the other reliefs were consequential upon a finding that the tender was flawed and had to be set aside. I have no reason to conclude that the learned Deputy Registrar erred in principle in proceeding on the course she adopted.

11. I now turn to the second issue that is whether the taxing master erred in principle in awarding the sum of Kshs. 200,000/00 as the instruction fee. In the case of ***Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No. 3) [1972]EA 162*** the Court outlined the principles of taxation as follows;

- (a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy,
- (b) that a successful litigant ought to be fairly reimbursed for the cost he has had to incur,
- (c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession and
- (d) so far as practicable there should be consistency in the award made and
- (e) The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.

12. In the case of ***Joreth Limited v Kigano and Associates [2002] E.A. 92*** the court set out various factors that are to be considered in determining the instruction fee. These factors include the importance of the matter, general conduct of the case, the nature of the case, time taken for its dispatch and the impact of the case on the parties.

13. I have considered the decision and reasons for taxation dated 15th November 2012 issued by the learned Deputy Registrar and although I find that she properly addressed herself to the principles governing taxation that I have alluded to above she did not apply those principles to the facts of the case. After citing the various decisions and the principles, the learned Deputy Registrar at the relevant part of the decision stated as follows;

I find that the 2nd interested party has not stated the complexity of the matter, the novelty of the same or responsibility or research undertaken in the matter.

It is the duty of this court to award a reasonable sum taking into account the principles stipulated in the cases referred to herein.

In my opinion, Kshs. 200,000/= will go a long way towards meeting the applicant’s reasonable instruction fees considering there was no complexity in the brief.

14. In the case of ***Ochieng, Onyango, Kibet & Ohaga Advocates v Adopt a Light Limited, Milimani HC Misc. Cause No. 729 of 2006 (Unreported)***, Warsame J., stated as follows: *“The law gives the taxing master some leeway but like all discretions it must be exercised judicially and in reliance to the material presented before court. The taxing master must consider the case and labour required in the matter, the nature or importance of the matter. More so the amount or value of the subject matter involved, the interest of the client in sustaining or losing the benefit and the complexity of the dispute. In assessing an*

*amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject. And when the subject matter is unknown, the court is empowered to make what is available as a point of reference. In my view the point of reference is the figures proposed to and accepted by Mombasa Municipal Council. The law is that matters of quantum are regarded as matters with which the taxing master is particularly fitted to deal and the court sitting on appeal will intervene only in exceptional circumstances.” (See also **First American Bank of Kenya Ltd v Gulab P Shah & Others [2002]1 E.A. 61** per Ringera J.).*

15.I find and hold that the learned Deputy Registrar failed to explain how she took into account the various factors that led her to conclude that the sum of Kshs. 200,000/00 was reasonable in the circumstances.

16.For the reasons I have set out above, I set aside the amount awarded by the Deputy Registrar on account of the instruction fee. I direct that the instruction fee in the applicant’s bill of costs be taxed before another Deputy Registrar.

17.As the applicant has partly succeeded, it shall have half the costs of the reference.

DATED and **DELIVERED** at **NAIROBI** this 30th day April 2013.

D.S. MAJANJA
JUDGE

Mr Ayisi instructed by Muthaura, Mugambi, Ayugi & Njonjo Advocates for the petitioner.

Mr Senteu instructed by Migos Ogamba and Company Advocates for the 2nd interested party