



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

MISCELLANEOUS CIVIL CASE NO. 238 OF 2003

TRANSWORLD SAFARIS LIMITED.....PLAINTIFF

VERSUS

EAGLE AVIATION LIMITED.....1ST DEFENDANT

KIRAN CHANDUBHAI PATEL.....2ND DEFENDANT

GILBERT MACHARIA KIBE.....3RD DEFENDANT

CHARLES KYALO MUTHAMA.....4TH DEFENDANT

RULING

1. The Chamber Summons dated 31st May, 2010 and filed on 1st April 2010 is brought under Rule 11(2) of the Advocates Remuneration Order and Section 3A of the Civil Procedure Act. The Applicant who is the Plaintiff in this matter seeks an order to set aside the decision of the taxing officer delivered on 14th January 2010 in so far as it relates to taxation of item No.259 of the Plaintiff's Bill of Costs dated 25th May 2009. The Applicant also seeks in the alternative, an order to remit the Party and Party Bill of Costs dated 25th May, 2009 for review and reconsideration by the taxing master in respect of item No. 259. This application is based on the grounds stipulated on the body thereon.

2. Briefly stated, the Applicant filed a bill of costs on 29th May, 2009. The taxing master delivered a ruling on 14th January, 2010, in which he taxed off Ksh.1, 747,274.03/- from the bill which was drawn in the sum of Kshs. 2,137,590. The Bill was thus allowed at Kshs. 390,315/97. A chunk of the tax-off sum was on item No. 259, which is now in contention. The Item relates to Arbitrators fee amounting to Kshs. 1,268,000/= which was allegedly paid by the Applicant following the refusal by the Respondents to pay their share of the Arbitrator's fee. The Applicant was thus aggrieved by the decision of the Taxing Master thus the reference. Mr. Masika, learned Counsel for the Applicant argued that item No. 259 which was in connection with the Arbitrators fees was recoverable as disbursements on account of costs to an Arbitration proceeding in which the Applicant was a successful party. It was further contended that the Arbitrator in the aforesaid proceeding had made a finding that both the Applicant and the Respondents were to share the costs of the Arbitration. However, the Respondents failed to pay their share of the costs which the Applicant settled in order to receive the award from the Arbitrator. The award emanating from

the arbitration was adopted on 31st December 2006 as a decree of this court. Counsel for the Applicant argues that the taxing officer was wrong in principle to refuse to grant those fees reflected in Item 259 as this were costs that were properly incurred in the conduct of the Arbitration. The taxing officer was also faulted for holding that the High Court had no jurisdiction to determine arbitration costs. It is the Applicants contention that the taxing officer misdirected himself when he held that there was no reason why the Arbitrator's fees should not be included in the bill of costs as the same are payable.

3. The 2nd Respondent opposed the Application vide written submissions dated 18th January, 2012. The other Respondents did not participate in the application. Mr. Wafula, learned Counsel for the 2nd Respondent further relied on the 2nd Respondent's submissions dated 3rd September, 2009 before the Taxing Officer more specifically on the issue of the Arbitrator's fees. It was **Nyamu J** (as he then was) had in a ruling dated 19th June 2003 held that the Arbitrator had not made an Award as to costs including his own fees. Counsel for the 2nd respondent also drew the courts attention the ruling dated 18th September 2008 by **Rawal J**, (as she then was) wherein she had held that the arbitrator had no powers to impose a deposit of Kshs. 50,000/=. It was further contended that costs of the successful party in arbitration proceedings as well as those of an arbitrator are determinable only by the arbitrator who conducted the Arbitration proceedings. It was submitted that the aforesaid costs are enforceable in the same way as an arbitral award and neither by the taxing officer nor the court through a reference. That the only reason the Applicant resulted to taxation was due to the fact that the Arbitration costs had not been determined in the Arbitral award.

4. It was further contended that item No. 259 in the Applicant's Bill of Costs dated 28th May 2009 did not lie within the jurisdiction of the taxing Officer to tax. That according to Section 32 (6) of the Arbitration Act, it is the sole preserve of the Arbitrator to make an award as to costs, failure to which would mean that the costs would be split equally between the parties to the Arbitration. In the foregoing, it was submitted that the court can only enforce that which had been awarded by the Arbitrator. In the instant case, counsel for the 2nd Respondent submitted that the order for costs was vague as the Award dated 19th June 2002 failed to determine the costs. If such costs had indeed been made, it was contended that the Applicant would not have resulted to taxation to recover such costs. Mr. Wamalwa therefore urged that the application be dismissed.

5. I have considered the application, the affidavits on record and counsels' submissions and the authorities relied on. This being an application under Rule 11 of the Advocates Remuneration Order the taxing master is given discretion in considering matters of taxation. As in all matters involving the exercise of discretion, it should be exercised judiciously. The decision by the taxing master in this case is challenged by the Applicant and the issue for determination is whether the taxing master properly considered Item No.259 of the Bill of Costs on the Arbitrators fees that the Applicant allegedly paid.

6. Given that the particular item is based on Arbitration, I must add that the High Court is given panoply of powers in an Arbitral process through the Arbitration Act No. 4 of 1995. Such powers include- stay of proceedings; appointment of arbitrators and umpires; assisting with the conduct of a reference such as issuing of subpoenas or compel discovery where the arbitrator had ordered it; enlargement of time for making award; supervisory jurisdiction by removing arbitrators, special cases, allowing appeals, extension of time for commencing arbitral proceedings and refusing to enforce awards that have been improperly obtained; and enforcement of the awards. There is however nothing in the Arbitration Act No.5 of 1995 that indicates that the court has the power to interfere with the issue of costs of arbitration.

7. This then brings me to the crux of the matter, that it is, the issue to do with the Arbitrators fees in which the Applicant herein contends they had paid. It is clear that the Respondents did not pay their share of the Arbitrators costs as expected prompting the Applicant to pay the monies owed in order to get the Award. The question that then follows is, is the Applicant allowed to recover these costs through the taxation process and was the Taxing Master right in his conclusion to tax off the amount rendered as Item No.259 on the ground that he had no Jurisdiction due to Section 32(6) of the Arbitration Act No. 4 of 1995?

8. The principles regarding review of taxation orders by the courts are well settled. In **Premchand Raichand & Anor v. Quarry Services of 4 E.A Ltd. & Others (1972) E.A** it was held that 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 interference that it was based on an error. In this instant, the Applicant contends that there was an error in principle as the Taxing Master misdirected himself by failing to tax Item no. 259 on the Bill of Costs.

9. I have seen the final Award made on 19th July, 2012. Holding No. 6 thereof awarded costs to the applicant. The same was payable by the Respondents jointly and severally. The Arbitrator clearly awarded costs to the applicant. He indicated that such costs were ***“.....as separately communicated to all the parties”***

10. I have also considered Section 32(6) of the Arbitration Act No. 4 of 1995. The same provides:-

“Unless otherwise agreed by the parties-

(a) the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34(5).....or

(b) in absence of an award or additional award determining and apportioning the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for the equal share of the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration”

From the reading of this Section, it is clear that the Section has vested the arbitral tribunal with the exclusive jurisdiction to determine its costs and expenses. No other body is to make such a determination. Going into the exercise of ascertaining whether such costs were incurred in my view, would mean that the Taxing Officer would be acting beyond his jurisdiction. I believe that to avoid this scenario, the issue as to the Arbitration costs should have been included in the award, which the court would then enforce. To go into the rigours of making a determination as to the quantum of costs would mean that this Court would be in essence interfering with the Arbitral Award, which was silent on the issue of the quantum of Arbitration Costs in the first place. Indeed, I agree with the 2nd Respondent's submission, that the Court can only enforce what has been awarded by the Arbitrator. In the Case of **ANNE MUMBI HINGA v VICTORIA NJOKI GATHARA Nairobi Civil Appeal No. 8 of 2009**, the Court of Appeal held:-

“Part VI of the arbitration Act has a heading under the title ‘Recourse to High Court against Arbitral Awards’ and the implication is that the High Court has no other power against an arbitral award outside the provisions of Section 35 and 37 of the Arbitration Act..... the superior court did not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act.”
(Emphasis supplied).

11. I have also considered the extract relied on by the Applicant of the book entitled **“TREATISE ON COSTS IN ARBITRATION PROCEEDINGS, 2ND EDITION 1997 by MICHAEL O'REILLY”** from **Pages 55 to 56**. I take cognizance of paragraph 5.1 which states that;

“where the arbitrator does not determine the recoverable costs, either party may apply to the court for them to be determined”

Whilst this may be a proper statement of law, I am afraid that it is a glaring contradiction to Section 32 of the Arbitration Act No. 4 of 1995, which is very clear on what should happen should such costs not be determined by the Arbitral Tribunal in the Kenyan scenario. The Section does not state that the same should be determined by the court! It directs that the parties are required to each be responsible for the legal and other expenses of either party; and for the equal share of the fees and expenses of the arbitral

tribunal and any other expenses related to the arbitration. Further, the book extract makes reference to English Arbitration Act of 1996 which is significantly different from the Kenyan Arbitration Act.

12. For the foregoing reasons, the application must fail, as it was improper for the Applicant to have included Item No. 259 in the Bill. The taxing master did not err in principle. Accordingly, I dismiss the same with costs to the 2nd Respondent. It is so ordered.

DATED and delivered at Nairobi this 23rd day of November 2012.

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A. MABEYA
JUDGE