



**Senaca International Limited v Bollore Transport and
Logistics (Kenya) Limited (Miscellaneous Cause E278 of 2023)
[2024] KEHC 10304 (KLR) (Commercial and Tax) (20 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10304 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CAUSE E278 OF 2023**

**PM MULWA, J
AUGUST 20, 2024**

BETWEEN

SENACA INTERNATIONAL LIMITED APPLICANT

AND

BOLLORE TRANSPORT AND LOGISTICS (KENYA) LIMITED RESPONDENT

RULING

1. For determination by the Court is the Notice of Motion dated 20th March 2023, by the applicant. The application is made under Section 32B (1) of the *Arbitration Act* and seeks an order directing that the taxation of the Party and Party Bill of Costs, arising out of an Arbitration between Senaca International Limited and Bollore Transport and Logistics Limited, be taxed in the High Court.
2. The application is based on the grounds on its face, the supporting and supplementary affidavit sworn by the applicant's general manager, Reuel Kariuki respectively on 20th March 2023 and 20th July 2023 and the written submissions dated 25th July 2023.
3. Primarily, the grounds are:
 - i. That a dispute between the applicant and the respondent was referred to Arbitration.
 - ii. That the determination was made in favour of the applicant and an award was delivered on 16th December 2021, subsequently amended on 10th January 2022.
 - iii. That the applicant then applied for assessment of costs and the Hon. Arbitrator ruled that he had the jurisdiction to tax the bill of costs.



- iv. That the applicant then drew and filed a party and party Bill of Costs dated 17th March 2022 and filed on 21st March 2022.
 - v. That the Arbitrator, Hon. J.B. Havelock, is now deceased hence the party and party bill of costs is still pending.
 - vi. That given the circumstances, it is only just and fair that the party and party bill of cost be taxed in the High Court to bring an end to the Arbitral process.
4. In response, the respondent filed a replying affidavit sworn by its legal manager and regional Company Secretary, Jacqueline Onsando on 22nd June 2023 and written submissions dated 12th September 2023. The respondent's case is that prior to amendment of the Final Award, it had settled the sums awarded and the arbitration costs. It argued that the Arbitrator became *functus officio* once he issued the Final Award and it was not challenged pursuant to Section 33 of the [Arbitration Act](#).
 5. It was contended by the respondent that it applied for recognition and enforcement of the award in HC Comm. Misc. Civil Cause No. E031 of 2022 – [Senaca International Limited v Bollore Transport & Logistics \(K\) Ltd](#) and which the applicant herein had opposed by filing a replying affidavit sworn on 9th May 2022, contending, among others, that the Arbitrator was yet to tax its bill of costs. The court in Misc. E031 of 2022, through its ruling of 25th November 2022, rejected that contention and allowed its application. The respondent faulted the applicant for failing to disclose this material fact to the court to depict that the costs were not taxed due to the Arbitrator's untimely demise.
 6. The respondent acknowledged that the applicant had sought taxation of costs by the Arbitrator pursuant to Section 32B of the [Arbitration Act](#) and that the Arbitrator found that he had jurisdiction to do so. However, it maintained that the Arbitrator was *functus officio* and could not purport to tax the costs. It contended that the Arbitrator has jurisdiction to tax costs determined and apportioned in the award or any additional award under section 34(5) of the [Act](#).
 7. The respondent further faulted the applicant for not applying for the taxation of costs as a further award within the timelines set out under section 34 of the [Arbitration Act](#), citing mischief to rob it of an opportunity to challenge the award. It also asserted that the Court has no jurisdiction to deal with a dispute that parties willingly submitted to arbitration.

Analysis and determination

8. I have considered the application, the parties' respective affidavits and submissions. The issue for determination is whether the application is merited.
9. As earlier stated, the respondent's case is that prior to the amendment of the Final Award, it had settled the sums awarded and the arbitration costs. The applicant confirmed that the respondent settled amounts awarded in the Amended Final Award but denied that the respondent also settled a portion of the Arbitration costs paid by it.
10. There is no evidence on record in form of payment slips or cheques to confirm that the respondent paid the costs of the Arbitration and that what is pending is the applicant's Advocates fees. The respondent merely annexed email correspondence requesting for bank details for payment.
11. Section 32B of the [Arbitration Act](#) provides thus:

“ 32B. Costs and expenses



(1) Unless otherwise agreed by the parties, 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).”

12. From the above, it is clear that the arbitral tribunal is vested with the jurisdiction to apportion and determine the costs. Therefore, the respondent’s argument that the Arbitrator lacked jurisdiction to determine costs cannot hold.
13. The record shows that the applicant filed a bill of costs dated 17th March 2022 (amended on 21st April 2022). This was 66 days from the delivery of the amended Final Award, before the lapse of the three (3) months’ timeline.
14. The respondent opposed the taxation of the bill of costs on the ground that the Arbitrator had become *functus officio* when he rendered the amended Final Award on 10th January 2022. The Arbitrator found that he had jurisdiction to tax the bill and directed parties to agree on a suitable date for taxation. Therefore, the respondent’s argument that the Arbitrator is *functus officio* is *res judicata* (See Section 7 of the [Civil Procedure Act](#)).
15. Through an email dated 1st August 2022, the Arbitrator advised the parties to refer the bill of costs to the Registrar of the High Court for taxation as he was indisposed. Again, the Chartered Institute of Arbitrators through a letter dated 30th August 2022 advised that the bill of costs be taxed in the High Court.
16. In the upshot, I find that the application dated 20th March 2023 is merited, and is allowed in the following terms:
 - a. The Party and Party Bill of Costs arising out of an Arbitration between Senaca International Limited and Bollore Transport and Logistics Limited shall be taxed in the High Court.
 - b. Costs of the application of Kshs. 30,000/- are awarded to the applicant.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF AUGUST 2024.

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P. MULWA
JUDGE

