



REPUBLIC OF KENYA



**KENYA LAW**  
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**Grain Bulk Handlers Limited v Alier (Miscellaneous Application 538 of 2015)  
[2022] KEHC 16880 (KLR) (Commercial and Tax) (21 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16880 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION 538 OF 2015  
DAS MAJANJA, J  
DECEMBER 21, 2022**

**BETWEEN**

**GRAIN BULK HANDLERS LIMITED ..... APPLICANT**

**AND**

**PHILLIP BLISS ALIKER ..... RESPONDENT**

**RULING**

1. Between 2008 and 2015, the applicant and Mistry Jadva Parbat & Company Limited were involved in arbitration proceedings. On October 21, 2015, the applicant lodged a challenge against the respondent who was the arbitrator in the said proceedings. On December 8, 2016, the court allowed the challenge and issued orders *inter alia* that

“the arbitrator shall refund one half of total fees and expenses paid to him by GBH in the arbitration” (“the order”).

Following the order, the applicant wrote to the respondent demanding Kshs 5,928,827.00 being the one half of the total fees paid to him. The respondent has refused to settle the demand as it contends that the order is incapable of being executed against him as it is not quantified.

2. The applicant has now filed the notice of motion dated May 19, 2021 made under section 3A of the [Civil Procedure Act](#) (chapter 21 laws of Kenya) and order 21 rule 8 and order 51 rule 1 of the [Civil Procedure Rules](#) seeking orders that the total fees and expenses paid by the applicant to the respondent in the arbitration proceedings be determined as Kshs 5,928, 827.00 and that the terms of the order issued by the court on December 8, 2016 be settled to quantify the total fees and expenses paid by the applicant to the respondent in the arbitration as KES 5,928, 827.00.



3. The application is supported by the affidavits sworn by the applicant's director, Jonathan James Stokes, sworn on May 19, 2021 and June 10, 2022 respectively. It is opposed by the respondent through his replying affidavit sworn on May 25, 2022.
4. The applicant avers that the quantum sought is not contested by the respondent as Kshs 5,928,827.00 was paid to the respondent between March 4, 2014 and November 3, 2015. The applicant seeks the court to clarify the terms of the order issued and give meaning and effect to it to enable the applicant recover it from the respondent.
5. The respondent opposes the application on the ground that it is bad in law and an abuse of the court process. The respondent avers that the order issued is null and void as it was extracted without having a draft shared with the parties for approval contrary to the provisions of order 21 rule 8(2) of the Civil Procedure Rules. That notwithstanding the procedural defect in the extraction of the order, the respondent maintains that the order as extracted is incapable of enforcement because in the absence of the order identifying the entity to whom repayment should be made, the order might mean 12.5% to each of Mistry Jadvā Parbat & Company Limited and the applicant, that is, 50% of 100% of the fees paid by the applicant split between Mistry Jadvā Parbat & Company Limited and the applicant. That alternatively, the order made could mean the repayment of 25% to the applicant or to the respondent, because it is not said to whom the repayment should be made, that is, one-half of total fees paid by the applicant to respondent. The respondent contends that the applicant on the other hand seeks a refund of 100% of the fees paid by the applicant, equivalent to 50% of all fees paid by both parties to the arbitration which, in the respondent's view, is clearly not what the order as extracted provides.
6. The respondent avers that the court lacks jurisdiction to determine the fees and expenses as sought as this would amount to rewriting the ruling of the court delivered on December 8, 2016 without an application for review or clarification of the said ruling and that the terms of the order cannot be settled as sought by the applicant where the order has already been extracted and the order as extracted does not specifically indicate to which party the refund should be made, whether it should be to the applicant, the Respondent or to both parties in the arbitration. Further, that the application is tantamount to asking the court to sit on appeal against the orders of December 8, 2016. For these reasons, the respondent urges the court to dismiss the application

### **Analysis and Determination**

7. As stated, the parties are essentially asking the court to interpret and/or clarify its order of December 8, 2016 where the court stated that,

“the arbitrator shall refund one half of total fees and expenses paid to him by GBH in the arbitration”.

The applicant contends that the respondent ought to refund the applicant, as the successful party in the proceedings, one half of the fees paid during the arbitration. I do not buy this interpretation by the applicant for the reason that the simple definition of ‘one half’ is ‘one of two equal parts of a divisible whole’ and its synonyms include ‘half’ or ‘fifty percent’, that is a half expressed as a percentage. This means that if the applicant paid the respondent Kshs 5,928,827.00, then the applicant was entitled to half of that amount.

8. Since it is not in dispute that the applicant paid the respondent Kshs 5,928,827.00, then it means that the applicant is entitled to a refund of half or 50% of that amount, which is Kshs 2,964,413.50. I also do not agree with the respondent's interpretation that the order was not clear about to whom the refund



was to be made. The refund was to be made to the applicant and which is one half of what it paid to the respondent, which as I have indicated above, equates to Kshs 2,964,413.50.

9. Finally, I do not see any procedural impediment in dealing with the application before the court. This matter has been pending resolution since 2016 when the order was made. The duty of the court is resolve disputes conclusively and finality in line with the overriding objective and duty of the court to determine matters without undue regard to technicalities under article 159(2)(d) of the Constitution.

### **Deposition**

10. For the above reasons, I issue the following orders:

- a. The total fees and expenses paid by the applicant to the respondent in the arbitration between Mistry Jadva Parbat & Company Limited and Grain Bulk Handlers Limited be and is hereby determined as Kshs 5,928, 827.00.
- b. The terms of the orders issued by the Hon Mr Justice E. Ogola dated and delivered on December 8, 2016 be and is hereby settled to quantify the total fees and expenses paid by the applicant to the respondent in the arbitration between Mistry Jadva Parbat & Company Limited and Grain Bulk Handlers Limited as Kshs 5,928, 827.00
- c. The respondent be and is hereby ordered to refund the applicant the sum of Kshs 2,964,413.50 being one half of the total fees and expenses paid by the applicant to the respondent in the arbitration between Mistry Jadva Parbat & Company Limited and Grain Bulk Handlers Limited within 30 days from the date hereof.
- d. The applicant is awarded costs of this application assessed at Kshs 40,000.00

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF DECEMBER, 2022.**

**DS MAJANJA**

**JUDGE**

Court Assistant: Mr M Onyango

Ms Omondi instructed by Coulson Harney Advocates LLP for the applicant.

Mr Gachuhi instructed by Kaplan and Stratton Advocates for the respondent.

Mr Kuria instructed by AB Patel and Patel Advocates for the interested party.

