



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MISCELLANEOUS APPLICATION NO.E287 OF 2019**

**SIMON SAILI MALONZA.....ARBITRATOR/APPLICANT**

**-VERSUS-**

**GASPRA INTERNATIONAL LIMITED.....CLAIMANT/RESPONDENT**

**RULING**

1. Through the Originating Summons dated 28<sup>th</sup> June 2019, **Simon Saili Malonza**, the arbitrator/applicant herein seeks the following orders:

- 1. That the Honourable court be pleased to order the claimant/respondent to pay Honourable Simon Saili Malonza, FCI Arb (Sole Arbitrator) his fees and expenses in respect of services duly rendered under the Arbitrator's Terms of Engagement dated 3<sup>rd</sup> October 2018 executed between the Claimant and the Arbitrator, amounting to Kshs 190,820.00.**
- 2. That in the alternative to prayer one above, the Honourable court be pleased to determine the quantum of the arbitrator's fees/expenses for services duly rendered under the Arbitrator's Terms of Engagement dated 3<sup>rd</sup> October, 2018.**
- 3. That the claimant/respondent does bear the costs of this summons.**
- 4. That the honourable court do make such further orders as it may deem fair and just.**

2. The application is brought under Section 16A (1) (b) of the Arbitration Act and is supported by the applicant's affidavit dated 28<sup>th</sup> June 2019. The application is premised on the grounds that:

- i. On 20<sup>th</sup> September 2018, the Chartered Institute of Arbitrators (Kenya Branch) nominated the applicant to arbitrate on a dispute that had arisen among the respondent's Directors which nomination the applicant accepted by inviting the disputing parties to attend a preliminary meeting scheduled for 3<sup>rd</sup> October 2018.**
- ii. One of the Directors of the Claimant/Respondent, a Mr. Timothy Ndalegwa Okombo, indicated vide a letter dated 1<sup>st</sup> October 2018 that he would not be party to the arbitration proceedings under the Applicant's guidance and neither would he attend to the arbitration proceedings.**
- iii. The applicant responded to the said correspondence on 5<sup>th</sup> October 2018, directing parties to raise their objections on his appointment as Arbitrator by making a formal application to the Tribunal while affording the other party opportunity to respond.**
- iv. The claimant/respondent acceded to the applicant's nomination and appointment by signing/executing an Agreement on Arbitrator's remuneration charges (set at an hourly rate of Kshs 15,000/-) and attended the scheduled preliminary meeting on 3<sup>rd</sup> October 2018 when the applicant issued Procedural Order No. 1 on the conduct of the arbitration proceedings.**
- v. The Agreement on Arbitrator's appointment and remuneration provided that parties shall be jointly and severally liable for the Arbitrator's fees and expenses.**
- vi. On 27<sup>th</sup> November 2018, the respondent Mr. Timothy Ndalegwa Okombo, reiterated again that he would not be party to the arbitration proceedings under the Applicant's guidance and that he would not bear the costs pertaining to the arbitration**

process.

vii. *The applicant directed the Claimant/Respondent on 29<sup>th</sup> November 2018 to respond to the respondent's allegation above.*

viii. *Following a considerably long period of time of non-response and non-compliance by the parties, the applicant on 8<sup>th</sup> February 2019, issued a Peremptory Order directing the parties to comply with the Tribunal's Procedural Order No. 1.*

ix. *In response to the Peremptory Order, the Claimant/Respondent wrote to the applicant on 29<sup>th</sup> March 2019 withdrawing its claim.*

x. *Subsequent to the withdrawal of the claim, the Claimant/Respondent requested the applicant for a review of the applicant's invoice dated 5<sup>th</sup> October 2018.*

xi. *The revised invoice was forwarded vide a letter dated 17<sup>th</sup> April 2019 enclosing the Arbitrator's Order for the termination of the arbitral proceedings and the Arbitrator's tabulation for Arbitration fees, in the sum of Kshs 190,820.00.*

xii. *The Claimant/Respondent has totally declined to settle the Arbitrator/Applicant's fees despite the services rendered.*

xiii. *Demand for the applicant's fees was made on 3<sup>rd</sup> June 2019 in accordance with Section 32B of the Arbitration Act and Rule 7 (9) of the Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules, 2012.*

xiv. *It is in the interests of justice that directions be given by the honourable court on the payment of the Arbitrator/Applicant's fees and /or costs.*

3. The respondent did not file any response to the application and did not attend court for the hearing.

4. At the hearing of the application **Mr. Walela**, learned counsel for the applicant, submitted that the applicant discharged his mandate as an arbitrator in line with the terms of duly executed Agreement on Arbitrators remuneration and confidentiality of arbitration proceedings as shown in annexure marked "SSM5".

5. The applicant relied on the decision in *Clear Water Industries Limited v Electrowatts Limited & Another* [2018] eKLR wherein the court gave directions on the arbitrator's entitlement to fees under similar circumstances.

6. I have considered the application herein and the arguments presented by the applicant. I note that the applicant annexed the following documents in the affidavit in support of the application.

*a) A copy of his letter of appointment by the Chairman Chartered Institute as an arbitrator.*

*b) A copy of his letter of acceptance of the appointment.*

*c) Copies of correspondence between the applicant and the respondent's Director's advocates.*

*d) A copy of the duly executed Arbitrator's Terms of Reference dated 3<sup>rd</sup> October 2018.*

*e) Copies of order terminating the arbitral proceedings, the final invoice and tabulation of costs.*

*f) A copy of the applicants demand letter.*

7. I have perused the agreement I note that Clause 3 of the Agreement on Arbitrators appointment and remuneration stipulates that parties shall be jointly and severally liable to the Arbitrator's fees and expenses.

8. Section 32 of the Arbitration Act and Rule 7 (9) of the Chartered Institute of Arbitrators (Kenya Branch) Arbitrators Rules 2012 stipulates as follows: -

Section 32B Arbitration Act; -

*(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) 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)*

*(2) Unless otherwise agreed by the parties, in the 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 an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.*

*(3) The arbitral tribunal may withhold the delivery of an award to the parties until full payment of the fees and expenses of the arbitral tribunal is received.*

*(4) If the arbitral tribunal has, under subsection (3), withheld the delivery of an award, a party to the arbitration may, upon notice to the other party and to the arbitral tribunal, and after payment into court of the fees and expenses demanded by the arbitral tribunal, apply to the High Court for an order directing the manner in which the fees and expenses properly payable to the arbitral tribunal shall be determined.*

*(5) The fees and expenses found to be properly payable pursuant to such an order shall be paid out of the moneys paid into court and the balance of those moneys. if any, shall be refunded to the applicant.*

*(6) The decision of the High Court on an application under subsection (4) shall be final and not subject to appeal.*

*(7) The provisions of subsections (3) to (6) have effect notwithstanding any agreement to the contrary made between the parties.*

**Rule 7(9) of the Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules**

*(9) If a party fails to nominate an arbitrator in accordance with either paragraph (8) (a) or (b), the appointment shall be made by the Centre.*

9. As I have already stated in this ruling, the present application was not opposed by the respondent. I am therefore satisfied that the applicant has demonstrated that he was properly appointed as an arbitrator in the dispute pitting the directors of the respondent and that he is entitled to his remuneration.

10. Consequently, I allow the instant application as prayed with costs to the applicant.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 11<sup>th</sup> day of June 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Mutua for the DH/Respondent

No appearance for Nyaaga for the applicant in the objection proceedings

C/A – Sylvia