

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
HCCOMM NO. E441 OF 2023

ADMAS VENTURES LIMITED.....1ST PLAINTIFF
ERMIAS AYNEKULU BETEMARIAM.....2ND PLAINTIFF
KIDIST ADMAS AMBIE.....3RD PLAINTIFF

-VERSUS-

SAIF PROPERTIES LIMITED.....DEFENDANT

(through the following of its officers or any other of its officers involved in contemptuous actions)

NURDIN ABDIKADIR MOHAMED
(Sole Director/Shareholder).....1ST INTERESTED PARTY
CAROLYN CECILIA WANJIKU
NJOROGE (Company Secretary).....2ND INTERESTED PARTY
CONNIE GUMO.....ARBITRATOR

RULING

1. Before me is a Notice of Motion application dated 5th March 2025 filed by the defendant pursuant to the provisions of Articles 10, 48 & 159 of the Constitution, Sections 1A, 1B & 3A of the Civil Procedure Act, Order 51 Rules 1 & 12 of the Civil Procedure Rules, Sections 10, 32B(3), (4) & (5) of the Arbitration Act and all other enabling provisions of the law. The defendant prays for orders that it deposits into Court the sum of Kshs.1,956,975.00, being its 50% share of the Arbitrator's fees amounting to Kshs.3,913,950.00, within seven (7) days of the Court's order, that the plaintiffs be compelled to pay the balance of the Arbitrator's fees within seven (7) days, or in default, to inform the Court of a reasonable timeline within which they shall comply.

2. The defendant also prays for orders to arrest the delivery of rulings in respect of the plaintiffs' application for Contempt dated 20th September 2024 and the defendant's application dated 3rd July 2024, for the Arbitrator, Ms Connie Gumo, to be directed to forthwith release the Arbitral Award to the parties upon the defendant's deposit of its share of fees into Court and the plaintiffs' payment of the outstanding balance. The defendant further seeks directions from the Court on the determination of the proper fees and expenses payable to the Arbitral Tribunal, including an order that the Arbitrator furnishes a concise and detailed daily time log within seven (7) days, addressing the disputed items raised in the letter dated 17th February 2025, and that the final Award be filed under oath for purposes of assessing the time spent in writing it. It also seeks an order that the Court determines reasonable costs and expenses of the arbitration and order payment out of the sums deposited into Court, and any surplus to be refunded to the parties.
3. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Patrick Mugo, the defendant's Finance Director. Mr. Mugo averred that this Court's Ruling on the plaintiffs' application for contempt dated 20th September 2024 and the defendant's application dated 3rd July 2024 are pending delivery on Notice, but have been rendered moot as the Arbitrator informed the parties herein on 12th February 2025 that the Arbitral Award was ready for collection upon payment of fees. He further averred that under Section 35 of the Arbitration Act, any application to set aside the Award must be filed within 90 days of receipt, meaning time would lapse on 13th May 2025.
4. He contended that the defendant intended to challenge the Arbitrator's assessed fees, initially Kshs.4,035,000/= and later discounted by 3% to Kshs.3,913,950/=, on grounds that the time claimed, particularly, the 216 hours (44.4 days) spent in writing the Award, is excessive, duplicative, and

unsupported by a detailed time log, despite requests made in a letter dated 17th February 2025. Mr. Mugo stated that although the claimants indicated willingness to settle their share, the Arbitrator declined to release the Award until full payment by both parties, pursuant to the provisions of Section 32B (3) of the Arbitration Act, thus the defendant now seeks recourse under Section 32B(4) of the Arbitration Act, seeking this Court's direction on the proper determination of the Tribunal's fees and an order for release of the Award upon payment of the fees into Court. He further stated that the defendant has already placed Kshs.1,956,975/=, being 50% of the discounted fees with its Advocates pending a Court order authorizing deposit into Court.

5. In opposition to the defendant's application, the Arbitrator filed a Notice of Preliminary Objection dated 2nd April 2025 raising the following ground –
 - i) This Honourable Court lacks jurisdiction to determine the manner in which the fees due to the Arbitral Tribunal shall be determined under Section 32B(4) of the Arbitration Act, 1995 because the Tribunal fees have been paid and the Arbitral Award released to the parties.
6. The application herein was canvassed by way of written submissions. The defendant's submissions were filed by the law firm of Wamae & Allen LLP on 15th April 2025, while the Arbitrator's submissions were filed on 14th July 2025 by the law firm of Manyonge Wanyama & Associates LLP.
7. Mr. Allen Gichuhi, learned Counsel for the defendant submitted that the instant application seeks the Court's intervention to determine the proper and reasonable fees payable to the Arbitrator, it is premised on the need for disclosure of detailed time logs before such determination can be made. He further submitted that the parties herein agreed on an hourly rate of Kshs.15,000/= on 12th February 2025, that the Arbitrator notified the parties that the Award was ready for collection upon payment of fees and that by a letter dated 17th February 2025, the defendant challenged the assessed fees of

Kshs.4,035,000/= as unconscionable, excessive, and unreasonable, demanding detailed time logs, which have not been furnished. He argued that the challenge centered on the claim of 288 hours and 23 minutes allegedly spent reviewing pleadings and drafting the Award, which at an estimated 5 hours per day, translated to approximately 44.4 working days solely on drafting-related tasks.

8. He claimed that although the Arbitrator later discounted her fees by 3% to Kshs.3,913,950/=:, she declined to provide the requested time log. Counsel cited the cases of **Popatlal Madhavji & Bros Limited v Purushottam Enterprises Limited & another** [2018] KEHC 2298 (KLR) and **Allen Waiyaki Gichuhi v Tiba Oil Company Limited & Abdijan Petroleum Equipment & Services Limited** [2021] KEHC 4269 (KLR), and asserted that pursuant to the provisions of Articles 10(2) (b), 40 & 48 of the Constitution, Section 32B(4) of the Arbitration Act, and Rule 118 of the Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules, 2020, this Court has the requisite jurisdiction to grant the orders prayed for in the instant application.
9. He relied on the Supreme Court case of **Kenya Airports Authority v Otieno Ragot and Company Advocates** [2024] KESC 44 (KLR), and argued that the principle of access to justice applies equally to arbitration and that fees must not be punitive or impede constitutional rights. Mr. Gichuhi relied on the case of **Kenya Ports Authority v Base Titanium Limited** [2021] KEHC 8741 (KLR), on the necessity of disclosure of time logs. Counsel cited comparative jurisprudence including the English Court of Appeal case of **United Tyre Company v Born** [2004] EWCA Civ 1236, and asserted that the Arbitrator's Preliminary Objection cannot oust the Court's jurisdiction, even if the Award has been released after payment.

10. Mr. Peter Wanyama, learned Counsel for the Arbitrator submitted that by a letter dated 12th February 2025, the Arbitrator notified the parties that the Final Award was ready for collection upon payment of arbitral fees amounting to Kshs.4,035,000/=, attaching a detailed time sheet and fee note. He stated that following a request by the defendant's Counsel in a letter dated 17th February 2025 seeking a reduction of the fees, the Arbitrator responded on 21st February 2025 addressing the concerns raised, including time spent on preliminary review of pleadings, review of submissions and authorities, and drafting of the reasoned Award. He stated that in the said letter, the Arbitrator clarified that her employment status did not impede her ability to conduct research and prepare the Award, referred the defendant to the detailed timesheet already supplied and granted a 3% discount on the invoiced amount.

11. On the issue of jurisdiction, Mr. Wanyama relied on the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd** [1969] EA 696, and submitted that jurisdiction is foundational and must be established before the Court can entertain the matter. He invoked the provisions of Section 32B(4) of the Arbitration Act and asserted that this statutory mechanism is conditional upon prior deposit of the fees in Court and applies only where the Award has been withheld. Counsel argued that this Court lacks jurisdiction because the disputed fees have already been paid and the Award released to the parties, rendering the instant application overtaken by events.

12. He further relied on the case of **Popatlal Madhavji & Bros Limited v Purushottam Enterprises Limited & another** (supra), where the Court declined to entertain a challenge to arbitral fees on the basis that the applicant had failed to comply with Section 32B(4) by depositing the fees in Court and properly invoking the statutory procedure. He contended that the defendant's

failure to deposit the disputed fees in Court, coupled with the fact that the fees have already been settled and the Award released, deprives this Court of jurisdiction to grant the orders prayed for. In the end, Mr. Wanyama asserted that the arbitration was conducted diligently and professionally, that the time sheet accurately reflects the hours reasonably spent reviewing documents, conducting research, and preparing the Award, and that the fees charged are justified and quantifiable.

ANALYSIS AND DETERMINATION.

13. I have considered the application herein, the affidavit filed in support thereof, the Notice of Preliminary Objection by the Arbitrator and the written submissions by Counsel for the parties. The issues that arise for determination are -

- i) Whether the Arbitrator's Preliminary Objection is merited;**
- ii) Whether this Court has the power to direct the Arbitrator to furnish a detailed daily time log and/or file the final Award under oath for purposes of assessing time spent; and**
- iii) Whether the arbitral fees charged (initially Kshs.4,035,000/= and later discounted to Kshs.3,913,950/=) are excessive, unreasonable, or unconscionable.**

Whether the Arbitrator's Preliminary Objection is merited.

14. In order for a Preliminary Objection to succeed, it should raise pure points of law, it should be argued on the assumption that all the facts pleaded by the other side are correct, but it cannot be raised if any fact has to be ascertained or if what is prayed for, is the exercise of judicial discretion.

15. What constitutes a valid Preliminary Objection was considered by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors Ltd** (supra) as follows –

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

16. In the said case, Sir Charles Newbold P., stated as follows:-

“... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is prayed for is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”

17. The Arbitrator claims that this Court lacks jurisdiction under Section 32B(4) of the Arbitration Act to determine the manner in which the Arbitral Tribunal's fees should be assessed, since the Tribunal's fees have already been paid and the Arbitral Award has been released to the parties, thereby rendering the statutory mechanism inapplicable. This Court therefore finds that the issue raised by the Arbitrator is a pure question of statutory interpretation and it has been properly raised as a Preliminary Objection.

18. In the case of the **Owners of the Motor Vessel “Lillian S’ v Caltex Oil (Kenya) Ltd** [1989] KLR 1, Nyarangi, JA., held as follows: –

“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

19. The application herein has been filed pursuant to the provisions of *inter alia*, Sections 32B(3), (4) & (5) of the Arbitration Act. Section 32B of the Arbitration Act provides for costs and expenses. It states that :-

- 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.

20. From the foregoing provisions, it is manifest that Section 32B(3) of the Arbitration Act grants an Arbitral Tribunal a lien over the Award pending payment of its fees, whereas Section 32B(4) of the Arbitration Act provides an avenue for a party who objects to the fees demanded by an Arbitral Tribunal, to first deposit the amount demanded into Court, whereupon the Court shall determine the proper fees and direct payment out of the said fees. This Court is therefore of the view that in order for the provisions of Section 32B(4) of the Arbitration Act to be successfully invoked, there must be a dispute regarding the fees demanded by the Tribunal, the party objecting must deposit the amount demanded into Court, and the Award in dispute is withheld pursuant to the Tribunal's lien.

21. In this case, it is not disputed that the Arbitral Award has already been released to the parties and the arbitral fees have been settled. Although the defendant averred that it had placed its 50% share of the arbitral fees with its Advocates pending a Court order authorizing deposit into Court, no evidence was placed before this Court to substantiate that assertion. Since it is not in contest that the sum demanded by the Tribunal has never been deposited into Court in accordance with the provisions of Section 32B(4) of the Arbitration Act and the Arbitral Award has since been released to the parties, this Court finds that the statutory procedure under Section 32B(4) of the said Act was not invoked in the manner contemplated by the Arbitration Act. Therefore, this Court cannot proceed to entertain the defendant's prayer to have the fees and expenses due to the Arbitral Tribunal determined.

22. It is noteworthy that the defendant urged this Court to adopt a broader constitutional approach grounded on Articles 10, 40 & 48 of the Constitution.

While I fully agree that arbitral fees must be reasonable and not impede access to justice, the Court's jurisdiction in arbitration matters is strictly limited by Statute. Section 10 of the Arbitration Act expressly limits judicial intervention except as provided for in the Act. Therefore, this Court finds that it cannot expand its mandate beyond the clear provisions of Section 32B of the Arbitration Act.

23. In light of the above, I am persuaded that once the Arbitral Award was released to the parties and the arbitral fees settled without compliance with the statutory deposit mechanism under Section 32B(4) of the Arbitration Act, the High Court's jurisdiction contemplated thereunder could no longer be invoked in the manner resorted to, by the defendant herein.

24. In the circumstances, this Court finds that it does not have the requisite jurisdiction under Section 32B(4) of the Arbitration Act to entertain the application herein.

25. The final orders are that: -

- i) The defendant's application dated 5th March 2025 is hereby struck out for want of jurisdiction.**
- ii) The prayer for arrest of the Rulings in respect to the plaintiff's application dated 20th September, 2024 and the defendant's application dated 3rd July, 2024, has been overtaken by events as I rendered a Ruling for the two applications on 5th December, 2025.**

It is so ordered.

DATED, SIGNED and DELIVERED at KIAMBU on this 10TH day of APRIL, 2026. Ruling delivered through Microsoft Teams Online Platform.

**NJOKI MWANGI
JUDGE**

In the presence of :-

HCCOMM NO. E441 OF 2023

Ms Otimbo h/b for Mr Wanyama for the Arbitrator

Ms Khalai h/b for Mr. Barak for the plaintiffs

Mr F. Otieno h/b for Mr. Gichuhi (S.C) for the defendants/applicants

Ms Julia - Court Assistant.

ORIGINAL