



**CHARTERED INSTITUTE OF ARBITRATORS KENYA BRANCH LIMITED  
SUMMARY CASE LAW**

**MISC APPLICATION E515 OF 2019  
HONDA MOTORCYCLE LIMITED VS GERICK KENYA LIMITED**

**FACTS**

The Bill of Costs dated 28<sup>th</sup> October, 2019 for costs from an arbitration between the parties was filed after the Respondent objected to taxation before the Arbitrator. The Respondent filed a Preliminary Objection dated 10<sup>th</sup> January, 2020 premised under Section 32B of the Arbitration Act (costs and expenses) and submissions dated 2<sup>nd</sup> March, 2020. The Applicant thereafter filed a Replying Affidavit sworn on 3<sup>rd</sup> March, 2020 and submissions dated the same day.

**ISSUES FOR DETERMINATION**

1. Whether the Preliminary Objection raised by the Respondent is sustainable?
2. Whether the said Preliminary Objection has merit and should be upheld?

**RULE OF LAW**

Section 32 of the Arbitration Act

**HOLDING**

The Deputy Registrar held that he lacks jurisdiction and stated that he has to down his tools for this reason.

**RATIONALE**

In determination of this matter, the Deputy Registrar was informed by the case of *Transworld Safaris Limited vs Eagle Aviation Limited and 3 Others* [2012] where the Court held that from the reading of Section 32B of the Arbitration Act, it is clear that the Section has vested the Arbitral Tribunal with the exclusive jurisdiction to determine its costs and expenses and no other body is to make such a determination as this would be acting beyond jurisdiction.

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**MISC. APPLICATION E515 OF 2019**

**HONDA MOTORCYCLE LIMITED .....CLAIMANT**  
**VERSUS**  
**GERICK KENYA LIMITED..... RESPONDENT**

**RULING ON THE PRELIMINARY OBJECTION**

The Bill of costs is dated 28<sup>th</sup> October 2019 for cost from an arbitration between the parties. The Respondents filed a Preliminary objection dated 10<sup>th</sup> January 2020. The Applicant file a replying affidavit to the preliminary objection sworn on 3<sup>rd</sup> March 2020 and submissions dated the same day. The Respondent filed submissions dated 2<sup>nd</sup> March 2020. I have looked at both the submissions and filed affidavit.

In the case of **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696** where their Lordships observed thus:

*“----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 the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.*

In the same case Sir Charles Newbold, P. stated:

*“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 the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.*

**The Matters for determination are:**

- i. Whether the Preliminary Objection raised is sustainable.
- ii. Whether the said Preliminary Objection has merit and should be upheld.

**Analysis**

My understanding is that the bill of costs in this matter was filed after the respondent objecting to the taxation before the Arbitrator. This is subject to cross examination. The Respondents objection is premised under Section 32B of the Arbitration Act.

The section provides as follows

***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).*

*(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.*

**In *Transworld Safaris Limited –v- Eagle Aviation Limited & 3 Others* [2012] eKLR,**  
where the court held as follows:

*“From the reading of this Section (which is now section 32B), 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 rigors 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”*

**Decision**

Clearly, the Deputy Registrar lacks jurisdiction. I will have to down my tools and take no further step.

Dated signed and delivered at Nairobi this **11<sup>th</sup>** day of **May 2020**



C. Wanyama

Deputy Registrar

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In the presence of:-

Claimant                Ndolo h/b Kethi

Respondent            Ndichu h/b Wathita