



**Equator Bottlers Limited v Stanley Kegode Suguvi t/a Kirinda Distributors & another  
(Miscellaneous Application E72 of 2021) [2022] KEHC 3346 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 3346 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS APPLICATION E72 OF 2021**

**WM MUSYOKA, J**

**MAY 27, 2022**

**BETWEEN**

**EQUATOR BOTTLERS LIMITED ..... APPLICANT**

**AND**

**STANLEY KEGODE SUGUVI T/A KIRINDA DISTRIBUTORS .... 1<sup>ST</sup>  
RESPONDENT**

**PHYLLIS WANGWE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application for determination is the Motion dated June 11, 2021. It seeks a variety of orders, among them, setting aside of an interim award issued on May 28, 2021 to affirm the appointment of the 2<sup>nd</sup> respondent as sole arbitrator. It also seeks to uphold the applicant's challenge, and to remove the 2<sup>nd</sup> respondent as sole arbitrator. The application also seeks stay of the arbitral proceedings.
2. It is brought at the instance of Equator Bottlers Limited, who I shall refer to as the applicant. The affidavit in support is sworn by Mshai Ngulo. The principal complaint is about the appointment of the 2<sup>nd</sup> respondent as sole arbitrator without the consent or involvement of the applicant. The facts are that the 1<sup>st</sup> respondent had initially appointed a Melly Kennedy Kipkoech, as sole arbitrator, and a letter to that effect had been written to the applicant, dated November 9, 2020. The applicant asserts that it was shocked to learn that the 2<sup>nd</sup> respondent had been appointed as sole arbitrator, by a letter dated November 27, 2020, which purported that the appointment of the 2<sup>nd</sup> respondent took effect immediately. The 2<sup>nd</sup> respondent then wrote on November 30, 2020, to say that she had accepted her appointment as sole arbitrator as far back as November 11, 2020, even before she was appointed. The applicant then wrote letters to challenge that appointment. It is averred that the appointment of the 2<sup>nd</sup> respondent as sole arbitrator was contrary to laid down procedure.



3. The 1<sup>st</sup> respondent responded to the Motion, by his affidavit, sworn on June 25, 2021. He avers that the soda distributorship between him and the applicant had an arbitration clause. He invoked that clause on March 10, 2020, and after service of a notice, dated March 10, 2020, the applicant did not respond or take steps to appoint an arbitrator. He identified one, and appointed him, Kennedy Kipkoech Melly, and notified the applicant of the same. The applicant did not respond to the notice nor appoint its arbitrator. Subsequently, Kennedy Kipkoech Melly declined the appointment by SMS, and he was forced to engage another arbitrator. He issued a notice, dated November 27, 2020, informing the applicant of the substitution of Kennedy Kipkoech Melly, with Phyllis Wangwe, as arbitrator, and he subsequently appointed her as sole arbitrator, by a letter dated November 30, 2020, pursuant to section 12(3) of the *Arbitration Act*, cap 49, Laws of Kenya. On December 1, 2020, he served a notice of change of arbitrator, dated November 27, 2020, on the applicant. The 2<sup>nd</sup> respondent accepted the appointment by appending her signature to the letter dated November 27, 2020. She also returned the letter dated November 30, 2020, having endorsed the same with her signature, on December 11, 2020. She thereafter commenced business as arbitrator in the dispute, and meetings were held which were attended by the applicant's Advocates. After a number of sessions, the applicant then challenged the composition of the arbitral tribunal, on March 1, 2021, through a notice of even date. A trial was conducted on the challenge and a ruling was delivered on May 28, 2021. The 1<sup>st</sup> respondent asserts that the 2<sup>nd</sup> respondent was properly appointed.
4. The 2<sup>nd</sup> respondent has also filed a replying affidavit. She avers that she received a letter on December 11, 2020, dated November 30, 2020, from the 1<sup>st</sup> respondent confirming her appointment as sole arbitrator. She communicated her acceptance on the same date. She thereafter invited the parties to a preliminary meeting, which was attended by both sides.
5. Directions were taken, for disposal of the matter by way of written submissions. All three sides filed written submissions, which I have read through, and noted the arguments made.
6. Having read through the application, affidavits and written submissions, I find that there is only key issue for me to determine, and that is whether the 2<sup>nd</sup> respondent was properly appointed as sole arbitrator, by way of replacement or substitution where the previous appointee withdrew.
7. The law on appointment of arbitrators is stated in section 12 of the *Arbitration Act*, whose relevant provisions state as follows:

“12.

Appointment  
of (1)  
arbitrators

No person shall be precluded by reason of that person's nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators and any chairman and failing such agreement—

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the arbitrator;

(b) in an arbitration with two arbitrators, each party shall appoint one arbitrator; and



- (c) in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.
- (3) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party (“the party in default”)—
  - (a) has indicated that he is unwilling to do so;
  - (b) fails to do so within the time allowed under the arbitration agreement; or
  - (c) fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party),  
the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.
- (4) If the party in default does not, within fourteen days after notice under subsection (3) has been given —
  - (a) make the required appointment; and
  - (b) notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.
- (5) Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.
- (6) The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.
- (7) The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator.
- (8) A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.
- (9) The High Court in appointing an arbitrator shall have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and,



in the case of a sole or third arbitrator, shall take into account the advisability of appointing an arbitrator of a nationality other than those of the parties.”

8. The soda distributorship agreement between the parties hereto , dated January 1, 2015, has an arbitration clause, at Clause 14, which provides:

“In case of any dispute between the Company and the Distributor which cannot be amicable (sic) resolved both the party (sic) shall be entitled to appoint Arbitrator (sic) of their choice and decision (sic) of both the Arbitrators shall be binding to both parties.”

9. Under Clause 14, both parties are at liberty to appoint an arbitrator of their own choice, which suggests that in the event of any dispute, there would be two arbitrators, unless the parties agree otherwise. In the absence of such agreement, and by virtue of section 12(3) of the *Arbitration Act*, where one of the parties fails or is unwilling to appoint arbitrator, that appointed by the other side would be the sole arbitrator, subject to the notices provided for in section 12(3)(4) being complied with. What are these notices? The first notice is under section 12(3), and applies where one of the parties defaults in appointing an arbitrator, then the complying party, having duly appointed an arbitrator, may notify, in writing, the other party, that it proposes to appoint its arbitrator as sole arbitrator. The other notice issues under section 12(4), where the defaulting party fails, after the notice under section 12(3), to act, by making the required appointment and notification of the same to the complying party, within fourteen days, it may appoint its arbitrator sole arbitrator, and that appointment shall be binding on all the parties. Under section 12(5), where a sole arbitrator is appointed under section 12(4), the defaulting party may, with notice to the other party, apply to the High Court, within fourteen days to have the appointment set aside.

10. I shall consider the appointment of the 2<sup>nd</sup> respondent against that background.

11. The 2<sup>nd</sup> respondent was appointed following the withdrawal of the previous arbitrator that the 1<sup>st</sup> respondent had appointed, called Kennedy Kipkoech Melly. Withdrawal of arbitrators on their own volition is provided for under section 15 of the *Arbitration Act*, which provides:

“15. Failure or impossibility to act

(1) The mandate of an arbitrator shall terminate if—

(a) ...

(b) he withdraws from his office; or

(c) ...

(2) ...

(3) ...

(4) ...”

12. Section 16 provides for what should happen, after an arbitrator withdraws. Under that provision, a substitute arbitrator is appointed in accordance with the procedure that was applicable to the appointment of the arbitrator being replaced. The provision states:

“16. Termination of mandate and substitution of arbitrator



- (1) Where the mandate of an arbitrator is terminated under section 14 or 15, a substitute arbitrator shall be appointed in accordance with the procedure that was applicable to the appointment of the arbitrator being replaced.”
13. The effect of section 16, to the instant matter, is that upon the termination of the appointment of Kennedy Kipkoech Melly, by his voluntary withdrawal, the appointment of the 2<sup>nd</sup> respondent had to comply with section 12 of the Arbitration Act. Did it? The applicant was notified of the withdrawal of Kennedy Kipkoech Melly as arbitrator and of the appointment the 2<sup>nd</sup> respondent as sole arbitrator by a letter dated November 27, 2020, which was said to be pursuant to section 12(3) of the Arbitration Act. The 2<sup>nd</sup> respondent herself was appointed as sole or single arbitrator by the 1<sup>st</sup> respondent vide a letter dated November 30, 2020, which was purported to be made under section 12(3) of the Arbitration Act. She accepted the appointment on November 11, 2020, by signing the acceptance column in the letter of appointment of November 30, 2020, and, in addition, by writing a letter to that effect to the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent then took up the roles of her office by writing a letter on December 16, 2020, inviting both sides to a preliminary meeting.
14. Several things ought to be clear here. One, the letter of November 27, 2020 did not appoint the 2<sup>nd</sup> respondent as sole arbitrator. It was not addressed to her and it did require her to accept any appointment. Two, the letter of November 27, 2020 was communication to the applicant of the intent by the 1<sup>st</sup> respondent to appoint the 2<sup>nd</sup> respondent as sole arbitrator. Three, the letter that appointed her as sole arbitrator is dated November 30, 2020, as it was addressed to her and it was on this letter that she signified her acceptance by signing on it. Four, the two letters indicate that the appointment was under section 12(3) of the Arbitration Act. Five, the two letters purport the appointment to be that the 2<sup>nd</sup> respondent was to act as sole or single arbitrator under section 12(3) of the Arbitration Act.
15. Section 12(3) applies where the complying party has already appointed an arbitrator, and the defaulting party has not. In such case, the party who has appointed one, may, after expiration of fourteen days, from the date it had made its appointment, give notice to the defaulting party that it would appoint its arbitrator to act as a sole arbitrator. The question is, had the 1<sup>st</sup> respondent appointed the 2<sup>nd</sup> respondent as its arbitrator, after the withdrawal of Kennedy Kipkoech Melly, before it invoked section 12(3) of the Act to appoint her as sole arbitrator? I do not think so. Section 16(1) of the Act requires that the substitute arbitrator should be appointed in accordance with the procedure that was applicable to the appointment of the replaced arbitrator. The provision is in mandatory terms. That procedure is that set out in section 12: That the parties appoint their respective arbitrators, but in the event of one defaulting, the one complying proposes in writing, after fourteen days, from the date it had appointed its arbitrator, to have their arbitrator appointed to act as sole arbitrator.
16. The appointment of the 2<sup>nd</sup> respondent did not comply with section 12(3), as read with section 16(1), of the Act. After Kennedy Kipkoech Melly withdrew, the process, by dint of section 16(1), should have commenced afresh, with the parties appointing their respective arbitrators, and in the event of one of them defaulting, the complying party could have its arbitrator appointed to act as sole arbitrator. In the documents placed on record, I have not seen any that appointed the 2<sup>nd</sup> respondent, in the first instance, as an arbitrator, and not sole arbitrator, for appointment as sole arbitrator has to be preceded by appointment as arbitrator. The letters of November 27, 2020 and November 30, 2020 purport to appoint her as sole arbitrator, before she cleared the first hurdle. There is no evidence that she was appointed arbitrator in the first instance, then the applicant failed or defaulted in appointing its arbitrator, for section 12(3) to be invoked for her appointment as sole arbitrator. The 1<sup>st</sup> respondent, therefore, jumped the first part or stage of appointing arbitrators, by appointing the 2<sup>nd</sup> respondent directly to act as sole arbitrator, without default on the part of the applicant or without its



concurrence to her being appointed sole arbitrator. The applicant might have defaulted with respect to the appointment of Kennedy Kipkoech Melly, but that became water under the bridge once Kennedy Kipkoech Melly withdrew; the process had to be repeated, strictly in accordance with the provisions of section 12 of the Act. The default when Kennedy Kipkoech Melly was being appointed was of no consequence with respect to the appointment of the 2<sup>nd</sup> respondent, and it did not count.

17. Consequently, it is my finding that the 2<sup>nd</sup> respondent was not properly appointed as sole arbitrator, for she had not been appointed arbitrator at the time she was appointed to act as sole arbitrator. She could only be appointed sole arbitrator after she had already been appointed arbitrator. There was an attempt to comply with section 12(4), by giving the notice to appoint the 2<sup>nd</sup> respondent to act as sole arbitrator, but that compliance amounts to naught as long as the person purported to be made sole arbitrator had not been appointed arbitrator in the first instance. I note that the letter of November 27, 2020 is couched in language that suggests that the 2<sup>nd</sup> respondent had by then been appointed arbitrator, and the letter of November 27, 2020 was communicating intention to appoint her as sole arbitrator. However, nothing has been placed on record to show the appointment of the 2<sup>nd</sup> respondent as arbitrator prior to her appointment as sole arbitrator.
18. I believe the determination above substantially disposes of the application. The 2<sup>nd</sup> respondent is not properly in office, and has no jurisdiction to handle the dispute at hand. The application dated June 11, 2021 is allowed in terms of prayer 2 of the application. The applicant shall have the costs of the application. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 27<sup>TH</sup> DAY OF MAY, 2022**

**WM MUSYOKA**

**JUDGE**

Mr. Erick Zalo, Court Assistant.

Mr. Wathuta, instructed by Kiragu Wathuta & Company, Advocates for the applicant.

Mr. Kraido, instructed by Kraido Advocates, for the 1<sup>st</sup> respondent.

Ms. Maina, instructed by Wangwe & Company, Associates, Advocates for the 2<sup>nd</sup> respondent

