



**Squishy Drinks Limited v Kevian Kenya Limited (Civil Suit 114 of 2019)  
[2022] KEHC 12050 (KLR) (Commercial and Tax) (12 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12050 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 114 OF 2019  
A MABEYA, J  
AUGUST 12, 2022**

**BETWEEN**

**SQUISHY DRINKS LIMITED ..... PLAINTIFF**

**AND**

**KEVIAN KENYA LIMITED ..... DEFENDANT**

**RULING**

1. Before court are two applications for determination. The first one is dated June 24, 2021. It was brought under section 7 of the Arbitration Act, section 3A of the Civil Procedure Act and order 51 of the Civil Procedure Rules.
2. The application sought four orders; firstly, to bar the respondent from tampering with the registry of trademarks, secondly, to bar the respondent and BMA Associates from registering the deed of assignment with KIPRI or registering or filing any document pertaining to the plaintiff's trademark with the Registrar of Documents, thirdly, to revoke the validity of the documents franked by the registrar of documents, and finally an order directing an expert document examiner from the DCI to confirm the authenticity of the parties' documents.
3. The application was supported by the affidavit of Robert Kanui sworn on June 24, 2021. The grounds were that the applicant was the sole proprietor of trademark No 87240 for the trade name 'Squishy'. That the parties had entered into an asset purchase agreement dated August 30, 2019 for sale of the trademark, but due to the several breaches on the respondent's part, the applicant terminated the agreement on May 2, 2019. That nevertheless, the respondent continued to fraudulently register the trademark under its name and appointed a new agent being BMA Associates thereby revoking the applicant's agent despite the ongoing arbitration between the parties.



4. That in so doing, the respondent allegedly tendered a deed of assignment with forged signatures which did not belong to the applicant and the matter was reported to Kilimani Police Station vide OB No 41/24/06/2021. That the original signed deed was still held by the applicant's advocate as the transaction was never completed. That the respondent also registered the fraudulent deed of assignment at the Register of Documents in violation of the arbitral proceedings.
5. The respondent opposed the application *vide* the replying affidavit of Richard Kimani Rugendo, sworn on July 3, 2021. It was contended that the parties were engaged in arbitration thus the court lacked jurisdiction to hear the issues in dispute before the arbitrator. That the application was an attempt to derail the arbitral proceedings and had done so previously. That the applicant had written to the respondent's suppliers misrepresenting that the court had issued orders restraining the respondent from using the subject trademark. That the applicant had also fraudulently obtained adverse orders against the respondent directing that it be granted access to remove its property from the respondent's premises where it claimed to be a tenant. That in doing so, the applicant caused excessive damage. That the tribunal later condemned the applicant to pay Kshs 1,000,000/= on account of perjury and misrepresentation.
6. The respondent further contended that it was a stranger to the documents produced by the applicants, and that it had received a scanned copy of the deed of assignment from the applicant's advocate. That the DCI demanded that the deponent personally appear before their officer despite pleas from his advocate that the matter under investigation was purely civil and was pending before the arbitral tribunal.
7. That several rulings had been made by different courts directing the matter to arbitration and the applicant was frustrating that process.

### **The Second Application**

8. The respondent on the other hand filed an application dated July 3, 2021 which was brought under articles 22, 23, 50, 159, 258 and 259 of the [Constitution](#), and sections 1A, 1A, 3A and 63 of the [Civil Procedure Act](#).
9. The application sought injunctive orders to restrain the National Police Service (NPS) from conducting investigations over the purchase, transfer or dealings in the trademark 'squishy' between the parties herein; an order restraining the NPS from summoning, interrogating or interviewing the respondent or any of its representatives.
10. The application was supported by the affidavit of Richard Kimani Rugendo sworn on July 3, 2021. The grounds were that; the applicant had engineered an investigation by the police on matters in dispute before the court and arbitral tribunal in an effort to undermine the determination of the dispute in the arbitral proceedings. That the matters in dispute relating to the purchase of the registration of the trademark stemmed from an asset purchase agreement and were thus purely contractual and civil.
11. That the applicant's move to involve the police was intended to intimidate and harass the respondent and its directors who would be summoned to the police station for interrogation and finger printing, and the applicant's sole purpose was to compel the respondent to surrender its rights under the asset purchase agreement.



## Analysis and Determination

12. I have considered the pleadings and evidence before court. On July 27, 2021, the parties were directed to file and serve written submissions on both applications. By the time this court retired to write this ruling, none of the parties had filed their submissions.
13. Peremptorily, the applications could be taken to be unprosecuted but nevertheless the court has to consider them as they are.
14. There are two inter-related issues for determination; whether the conservatory interim measures ought to be made and whether the NPS ought to be restrained from conducting investigations pending arbitration.
15. Section 7 of the *Arbitration Act* provides as follows: -
  - (1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.
  - (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.”
16. It was not denied by either party that the dispute between them was referred to arbitration by the court. The applicant however contended that even as the arbitral proceedings were ongoing, the respondent had taken steps to continue with the registration of the subject trademark in its favour, and there were allegations that in doing so, it tendered a forged deed of assignment.
17. The respondent denied forging the applicant’s signatures and contended that the applicant’s advocate had emailed a copy of the signed deed to it. The respondent was however silent on the allegations that it had proceeded with the registration of the trademark despite the pendency of the arbitral proceedings on the issues in dispute. The respondent only attacked the applicant’s intention in bringing the application, but did not come out clearly to deny that it had taken steps to register the trademark in dispute in its name.
18. Further, the respondent did not deny that it had appointed BMA Associates as its agents for the trademark in dispute, nor did it deny that it had revoked that applicant’s agent pending the determination of the arbitration.
19. From the pleadings before court, it is evident that the trademark ‘Squishy’ is the center of the dispute. There is evidence that the parties had entered into an asset purchase agreement for the aforementioned trademark, and there is also evidence that the applicant terminated the said agreement. Any attempt to continue with its registration would frustrate or render nugatory the arbitral proceedings.
20. In as much as the respondent contended that it had not forged the deed of assignment, it did not directly or indirectly deny that it had relied on that deed of assignment to complete the transfer process. This would be prejudicial to the applicant and to the arbitration.
21. This court is convinced that there is a need to issue interim protective orders pending the arbitration. In so doing, it will be assisting the arbitral tribunal to deal with the parties’ dispute at arms length. In this regard, the court finds the application to be meritorious and grants the conservatory orders sought.



22. However, since this is a civil dispute, the court declines to order the DCI handwriting expert as sought by the applicant. This is so for two reasons, if there is a criminal offence committed, the applicant knows the route to take; secondly, it would be assisting one party to the dispute to gather evidence on its behalf. That won't do. That prayer is accordingly declined.
23. The second application dated July 3, 2021 sought injunctive orders against the NPS from conducting investigations on the allegation of forged signatures.
24. The respondent contended that the matters in dispute relating to the purchase of the registration of the trademark stemmed from an asset purchase agreement and were thus purely contractual and civil.
25. In as much as the purchase and registration of the trademark were a civil and contractual issue, the applicant had raised allegation of forgery which is a criminal offence. It has already reported the same to Kilimani Police Station *vide* OB No 41/24/06/2021. Being a criminal matter, the allegation falls squarely in the jurisdiction of the NPS which has the expertise to investigate the allegations and decide whether or not an offence has been committed.
26. From the respondent's application, this court could read the intention to be uncooperative with the police who needed to sample the deponent's signature and determine whether or not the applicant's allegation were true. If at all, a positive finding for the respondent would aid its case as it contended that it never forged the applicant's representative's signatures as a signed deep poll was sent to the respondent via email.
27. This court's rejects the respondent's reasoning that his advocate's presence was sufficient and that the request for his personal attendance was only aimed at embarrassing him or compelling him to give up his rights under the assets purchase agreement.
28. This court sees no justification to interfere with investigations of a purely criminal nature. The same will not interfere with the ongoing arbitral proceedings which are limited to the party's contractual rights and responsibilities under the assets purchase agreement dated August 30, 2019.
29. The upshot is that that application lacks merit.
30. In the end, the court makes the following orders: -
  - a. The application dated June 24, 2021 is allowed save for the prayer seeking the intervention of the DCI handwriting expert.
  - b. The application dated July 3, 2021 is without merit and is dismissed.
  - c. The defendant will have the costs for both applications.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF AUGUST, 2022.**

**A MABEYA, FCIArb**

**JUDGE**

