



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 114 OF 2019**

**SQUISHY DRINKS LTD.....PLAINTIFF**

**-VERSUS-**

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

**RULING**

1. Before me is a Notice of Motion dated 28/10/20 by the plaintiff made under *section 3 of the CPA, Order 51 Rule 1 of the CPR and section 28 of the Arbitration Act*.

2. In the Motion, the plaintiff sought that summons be issued to the **Director of Competition Authority of Kenya** and the **Registrar of Trade Marks Kenya** to appear as expert witnesses before an arbitrator. The grounds upon which the motion was premised were set out in the body thereof and the supporting affidavit of **Elvis B. N. Abenga**, Advocate sworn on 28/10/20.

3. The grounds were that; the aforesaid persons were required to testify as experts on behalf of the plaintiff before the arbitral tribunal; that the said persons were alive to the issues before the arbitral tribunal and their opinion would be beneficial to the arbitrator ;and that the plaintiff would be prejudiced if the orders sought are not granted.

4. The Motion was opposed by the defendant vide the replying affidavit of **Richard Kimani Rugendo** sworn on 30/11/2020. It was contended by the defendant that the arbitral tribunal had not sought the assistance of any expert opinion; that the plaintiff had not demonstrated that the public servants required were necessary in a private proceeding between the parties. That the issue before the arbitral tribunal was in respect of the performance of an asset purchase agreement dated 18/8/2018 on which **Kasango J** had pronounced herself in a ruling dated 4/ 12/19. That in the premises the application was unwarranted and should be dismissed.

5. As at the time of writing the ruling, only the defendnat had filed its submissions. The plaintiff had filed none. I have carefully considered the record, the depositions by the parties and the submission of Learned Counsels.

6. *Section 10 of the Arbitration Act, 1995* (hereinafter “the Act”) provides:

***“Except as provided in this Act, no court shall intervene in matters governed by this Act.”***

7. The effect of the foregoing provision is that unless the Act specifically provides for it, the High court has no jurisdiction whatsoever to deal with arbitral matters. This is to give deference to the principle of freedom of contract to parties as well as the constitutional imperative in Article 159(2).

8. There is a long line of jurisprudence along this position. In **Monique Oraro V AAR Insurance Co. Ltd [2019] EKLR** the court held:

**“In the case of; Prof, Lawrence Gumbe & Another vs.Honourable Mwai Kibaki & Others, High Court Miscellaneous No. 1025 of 2004. Nyamu, J. Held that:**

**“Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation-oriented...”**

**The Act provides these instances as;**

- a) Section 6-stay of legal proceedings;
- b) Section 7-Interim measures by the court;
- c) Section 12-Appointment of Arbitrators;
- d) Section 35-Setting aside Arbitral award;
- e) Section 36-Enforcement & recognition of arbitral award;
- f) Section 37-Grounds for retrial of recognition or enforcement;
- g) Section 39-Questions of law arising in domestic arbitration.”

9. The present application was predicated upon **section 28 of the Act**. That section provides as follows:

***“The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the High Court assistance in taking evidence, and the High Court may execute the request within its competence and according to its rules on taking evidence.”***

10. It is clear from the said provision that, it is the arbitral tribunal which is given the right to request from the High Court assistance in taking evidence. A party can only make such request on the approval of the arbitral tribunal. The said provision does not give any party a right to seek the compelling of witnesses to give evidence as the plaintiff has sought herein. There is no evidence that the plaintiff had sought and obtained the approval of the arbitrator.

11. In view of the foregoing, it is clear that the prayers sought by the plaintiff are not available to it. The application is therefore unmeritorious and the same is hereby dismissed with costs.

It is so ordered

**DATED and DELIVERED at Nairobi this 20th day of January, 2021.**

**A. MABEYA, FCI Arb**

**JUDGE**