



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 114 OF 2019**

**BETWEEN**

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

**AND**

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

**RULING**

**Introduction and background**

1. This decision concerns a challenge to the appointment of the Arbitrator under **sections 13 and 14** of the *Arbitration Act* (“the Act”). The facts leading up to the application are not in dispute and are set out in the depositions filed by the parties and Arbitrator. The issue for resolution is whether the Plaintiff has made out a case for removal of the Arbitrator.

2. When this suit was filed, the Defendant raised a preliminary objection on the ground that the Asset Purchase Agreement, the subject of the dispute, provided an alternative mode of dispute settlement. Kasango J., allowed the preliminary objection by the ruling dated 4<sup>th</sup> December 2019 and observed that;

[21] Further having perused the asset purchase agreement, in particular clause 9, parties had agreed on the mode of resolving their dispute, that is through mediation and if that failed through arbitration. KKL’s preliminary objection, in that regard, succeeds. The fact that there is in existence an arbitration clause was recognized by SDL’s then advocate who by their letter dated 15<sup>th</sup> May 2019 issued a Dispute Notice and proposed the names of three arbitrators for consideration by KKL.

3. The learned Judge thereafter granted the following orders:

i. The interim orders of injunction granted to Squishy Drink Limited are hereby vacated and set aside.

ii. For 90 days from this date hereof an injunction directed at Squishy drinks Limited is issued restraining it whether by its Directors, its servants or agents from interfering in any manner with Kevian Kenya Limited’s manufacturing, packaging and distributing of products under the trademark SQUISHY.

iii. The Notice of Motions dated 15<sup>th</sup> May and 6<sup>th</sup> September 2019 are dismissed with costs to Kevian Kenya Limited.

iv. Kevian Kenya Limited is awarded the costs of the Notice of Motion dated 4<sup>th</sup> June and 26<sup>th</sup> September, 2019 and the preliminary objection dated 4<sup>th</sup> June 2019. [Emphasis mine]

4. Article 9 of the Asset Purchase Agreement provided that the Chairperson of the Chartered Institute of Arbitrators (“the Institute”) would appoint a single arbitrator to arbitrate the dispute if the parties fail to agree on an arbitrator. The Chairperson appointed Mr Antony Njogu as arbitrator (“the Arbitrator”). The parties attended a preliminary meeting before the Arbitrator who set out the terms of engagement in an Order for Directions No. 1 dated 17<sup>th</sup> February 2020.

5. The Plaintiff relies on two letters annexed to the deposition in support of its application to support its case. Upon receipt of the Order for Directions No. 1, the plaintiff's counsel on record wrote to the Arbitrator a letter dated 26<sup>th</sup> February 2020, *inter alia*, on the following terms:

We reply to your letter dated 17<sup>th</sup> February referenced AN/CI Arb. Upon further consultations with Squishy Drinks Ltd (herein referred to as 'our client') regarding referring the matter for Arbitration, our instructions are that the price quoted is too high. Our client is thus unable to afford the arbitration process.

We will be writing to the Chartered Institute of Arbitrators for appointment of a different arbitrator within our client's affordability range.

6. The other letter which the Plaintiff relied on was the response to the Arbitrator's letter dated 14<sup>th</sup> April 2020. Counsel for the plaintiff addressed the letter dated 14<sup>th</sup> April 2020 to the Arbitrator stating, in part, as follows:

[The Arbitrator]

Attached to this letter is a letter written to your office dated 26<sup>th</sup> February 2020 and received and stamped by your office, in which letter we indicated the inability of our client to raise the Arbitrator's fee. We thus were in intense anticipation that you would humbly address the said issue.

Nonetheless, it has been our understanding that once appointed, parties would still need to sign minutes and documents formerly ratifying your appointment. This exercise was deferred after our initial meeting to enable counsel correspond with our various clients. It is on this basis that vide our letter dated 26<sup>th</sup> February 2020 we indicated our inability to pay on behalf of our clients.

Further, as per our initial meeting at your office, you directed that parties pay a deposit equivalent to at least 10 hours each before the process would officially begin. From your letter to the parties dated 14<sup>th</sup> April 2020, it is not clear as to whether or not the deposit has been waived, since it seems that the process is almost taking off, with applications and reply etc.

We kindly request the Honourable Arbitrator to address these pertinent issues before any other arbitral proceedings continue, with a binding financial effect on our clients.

(signed)

### The Application

7. Thereafter the plaintiff moved the court by a Notice of Motion dated 21<sup>st</sup> April 2020 made, *inter alia*, under **section 14** of the **Act** seeking the following substantive order:

[3] THAT the Sole Arbitrator, Mr. Anthony Njogu, be disqualified and be removed from continuing to preside over the arbitral proceedings in the Matter of an Arbitration between Kevian Kenya Limited and Squishy Limited.

8. The application is based on the grounds set out in the face of the application and the affidavit of Robert Kaniu Wainaina, the Plaintiff's director, sworn on 21<sup>st</sup> April 2020. In summary, the Plaintiff contended that when the court referred the matter for arbitration on 4<sup>th</sup> December 2019, it directed that the matter be determined within a period of 90 days which have since lapsed. The Plaintiff complained that though the parties agreed to the appointment of the Arbitrator, he quoted an exorbitant fee which it could not afford and despite raising this concern, the arbitrator failed to respond and continued with the proceedings. The Plaintiff also complained that it has not received any application served on it and that the Arbitrator has indicated that he will proceed with the matter on the basis of the Defendant's pleadings. The Plaintiff asserts that it is apprehensive that the Arbitrator is incapable of conducting the proceedings before him with the required impartiality.

### Plaintiff's Case

9. In his written and oral submissions, counsel for the Plaintiff raised two issues for determination. First, whether or not the arbitral proceedings are valid, not having commenced within the time frame set out by the court in the ruling dated 4<sup>th</sup> December 2019. Second, whether or not the conduct of the Arbitrator raises justifiable doubts as to impartiality and independence.

10. On the first issue, counsel submitted that since the court directed that the arbitration commences within 90 days of the ruling, the time had lapsed on 3<sup>rd</sup> March 2020 with the parties only having attended a preliminary meeting. In the circumstances, he contended that the orders having lapsed, there was no basis for the arbitration. Counsel cited ***Trishcon Construction Company Limited v Mohamed Salim Samshudin and Another NRB CA Civil Appeal No. 28 of 2013 [2019] eKLR*** where the Court of Appeal applied **Order 45 rule 8** of the ***Civil Procedure Rules*** and held that the parties must consent to the extension of time for making an award when the time stipulated in the order or by agreement of the parties has lapsed.

11. In regard to the complaint that the Arbitrator's pre-arbitration conduct raised justifiable doubts as to his impartiality and independence, counsel for the Plaintiff submitted that after the preliminary meeting held on 14<sup>th</sup> February 2020, he wrote to the Arbitrator on 26<sup>th</sup> February 2020 informing him that the Plaintiff had challenges raising the initial fees. Counsel submitted that to this extent, it had submitted the challenge within 15 days in accordance with **section 14(2)** of the **Act**. The plaintiff added that despite this challenge, the Arbitrator proceeded to give directions and entertain an application by the Defendant before his deposit was even paid. Counsel maintained the failure to deal with

the concerns raised by the Plaintiff and the Arbitrator's subsequent conduct raised doubts as to his partiality.

### **Defendant's Case**

12. The Defendant opposed the application through the replying affidavit of Kimani Rugendo, its director, sworn on 4<sup>th</sup> June 2020. Counsel for the Defendant pointed out that the arbitration was premised on an arbitration clause in the Asset Purchase Agreement and therefore pursuant to **section 22** of the **Act**, the arbitration clause having been invoked, the arbitral process had already commenced.

13. Substantively, the counsel for the defendant adopted a three pronged attack to the Plaintiff's case in his oral and written submissions. First, that the application for removal of the Arbitrator does not conform to the procedure for challenge of an arbitrator set out in **section 14** of the **Act** hence any reason for challenging the Arbitrator is premature. Second and in the event the procedure is correct, the Plaintiff has not demonstrated any grounds for challenging an arbitrator provided in **section 13** of the **Act**. Counsel contended that the issue raised by the Plaintiff related to fees charged by the Arbitrator appointed by the Institute and that it was not the role of this court to re-write the contract between the parties but to ensure that the parties acted according to their agreements. Counsel maintained that by agreeing to have the arbitration conducted under the auspices of the Institute, the parties agreed to be bound by its rates.

14. Lastly, the Defendant submitted that the arbitration proceedings should continue uninterrupted in accordance with the arbitration agreement as the Plaintiff has not raised any grounds that raise justifiable doubts to the Arbitrator's impartiality, that the Arbitrator possesses the qualifications agreed upon by the parties and that he is physically and mentally capable of conducting the proceedings before him.

### **The Arbitrator**

15. Under **section 14(4)** of the **Act**, the arbitrator is entitled to appear and be heard before the High Court determines the application. In this regard, the Arbitrator filed a Replying Affidavit detailing the course of proceedings before him.

16. On the issue of fees, the Arbitrator stated that he shared with the parties the standard charge rates provided by the Institute. He confirmed that he received the Plaintiff's advocate's letter dated 25<sup>th</sup> February 2020 indicating, amongst other issues, that the fees charged were too high. The Arbitrator stated that he responded to the plaintiff's advocates letter by his letter of 12<sup>th</sup> March 2020 which he explained the basis of his charges. He also proposed how to resolve the issue as he was of the view that the proceedings had moved too far and a tentative hearing date had been fixed. He stated that the counsel for the Plaintiff did not respond to that letter. In the meantime, the Defendant's advocate informed the Arbitrator by the letter dated 18<sup>th</sup> March 2020 confirming that he was ready to proceed with the matter. Since no opposition had been raised on the issue of fees, the Arbitrator wrote to the parties a letter dated 2<sup>nd</sup> April 2020 requesting them to confirm the schedules for filing of the pleadings so that he could issue a new Order for Directions. The Defendant proceeded to file its Statement of Claim on 3<sup>rd</sup> April 2020 together with an application for interim measures of protection pending the hearing of the reference as against the plaintiff.

17. By letter dated 6<sup>th</sup> April 2020, the Arbitrator confirmed receipt of the application and the Statement of Claim and directed the Plaintiff to file its responses to the application within 3 days noting the urgency of the application. The arbitrator also requested the Plaintiff to indicate when it would be able to respond to the Statement of Claim so that a new Order for Directions could be issued. On 13<sup>th</sup> April 2020, the Arbitrator received a letter dated the same date from the Plaintiff's advocates indicating they had not been served with the application and stating the Plaintiff was unable to continue with the arbitration due to inability to financially bear the arbitrator's fee. It also claimed that no direction had been given on the same. The Arbitrator stated that he responded by letter on 12<sup>th</sup> March 2020 as aforesaid giving options for proceeding with the matter, including the appointment of another arbitrator and requested parties to respond to the same. The Plaintiff did not do so.

18. On 14<sup>th</sup> April 2020, the Arbitrator wrote to the parties indicating the trail of correspondence, the opportunities given to the Plaintiff to address the issues of fees and confirming his mandate to hear and determine the reference and requested the Plaintiff's advocates to confirm when they would file the response to the Statement of Claim. In its response letter dated 14<sup>th</sup> April 2020, the Plaintiff's Advocates again invited the Arbitrator to address the matter of the Plaintiff's inability to pay the fees notwithstanding the fact that the Arbitrator had offered his proposal in his aforementioned letter of 12<sup>th</sup> March 2020 which the Plaintiff had not responded to.

19. On the issues raised by the Plaintiff, the Arbitrator stated that in so far as the application was made under the provisions of **section 14 (3)** of the **Act**, the Plaintiff has not made a challenge to the arbitrator under **section 14 (2)** of the **Act** and the Arbitrator has not ruled on such a challenge. In his view, the invocation of **section 14(2)** of the **Act** was a prerequisite to an application made under **section 14 (3)** and the grant of the orders under **sections 14 (5),(7) and (8)** of the **Act**.

20. In response to the Plaintiff's submissions that the Arbitrator ought to be removed because there are doubts as to his impartiality and independence, the Arbitrator stated that the plaintiff has not disclosed facts to justify a finding that there is bias or prejudice by the Arbitrator.

21. He also stated that the plaintiff has not shown that the Arbitrator does not possess qualifications agreed to by the parties or that he is physically or mentally incapable of conducting the proceedings; or that there are justifiable doubts as to his capacity to conduct the proceedings. Finally, the Arbitrator denied that he had not continued the arbitration proceedings without the plaintiff who through its advocates has been involved in the proceedings and he had copied in all his correspondence issued to the parties. He communicated to and responded to the plaintiff's counsel and that he charged his fee in accordance with the standard rates provided by the Institute.

### **Determination**

22. The main issue for consideration is whether the Arbitrator should be removed. Before I deal with this issue I propose to deal with the

Plaintiff's argument that the arbitration order has lapsed in view of the orders made by Kasango J., since the arbitration has not commenced.

23. The arbitration between the parties was pursuant to the arbitration clause contained in the Asset Purchase Agreement and not by the order of the court pursuant to **Order 45** of the **Civil Procedure Rules**. The arbitration was therefore governed by the **Act** which at **section 22** deals with commencement of arbitral proceedings and provides as follows:

22. Unless the parties otherwise agree, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent.

24. I therefore find and hold that the arbitral proceedings had commenced once the request for the dispute to be referred to arbitration was received by the Plaintiff and that the same have not lapsed as urged by the plaintiff. This is consistent with this position taken by the court when it upheld the Defendant's preliminary objection (see para. 2 above). Moreover, it is not correct to state that the court referred the matter to arbitration as the arbitration was commenced in accordance with the agreement and the **Act** when the Defendant was requested to concur to the appointment of an arbitrator. I therefore hold that the provisions of **Order 45** of the **Civil Procedure Rules** and the authorities cited by the plaintiff do not apply.

25. It follows therefore that the arbitration has not lapsed as contended by the Plaintiff. The learned Judge did not refer the matter to arbitration but recognised the fact that the arbitral process in the agreement had already been invoked. As the orders, which I have set out at para. 3 above show, the court did not order that the arbitration would lapse in 90 days. The order merely limited the interim relief granted to the Defendant for that period.

26. The substantive question for resolution is to be determined by reference to **sections 13** and **14** of the **Act**. The former deals with grounds for the challenge of the arbitrator and the latter the procedure to be adopted. These sections provide as follows:

13. (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

(2) From the time of his appointment and throughout the arbitral proceedings, an arbitrator shall without delay disclose any such circumstances to the parties unless the parties have already been informed of them by him.

(3) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed to by the parties or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment that party has participated, only for reasons of which he becomes aware after the appointment.

14. (1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.

(4) On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application.

(5) The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.

(6) The decision of the High Court on such an application shall be final and shall not be subject to appeal.

(7) Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

(8) While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.

27. Since there was no procedure for the parties to challenge the arbitrator, then under **section 14(2)** of the **Act**, the Plaintiff was required to send to the Arbitrator the written reasons or grounds of challenge within 15 days of becoming aware of the circumstances in **section 13(3)** of the **Act**. The Plaintiff's contention is that the letter dated 26<sup>th</sup> February 2020 addressed to the Arbitrator constitutes the grounds of the challenge.

28. Even if I accept that the letter was written to the arbitrator within the time limit challenging the Arbitrator under the **Act**, whether or not it constitutes a challenge within **section 13(3)** of the **Act** is a matter for the Arbitrator to decide and the court can only intervene or express a

view thereon where the challenge had been determined under **section 14(3)** of the **Act**. Likewise, the claim that Arbitrator, by his conduct, has acted in a manner that raised doubt as to his partiality is a matter squarely within the jurisdiction of the arbitrator. I therefore decline to comment on whether the grounds raised by the plaintiff fall within the purview of **section 13(3)** of the **Act**.

29. Since any grounds for challenge ought to have been addressed to the Arbitrator for his resolution under **section 14(2)** of the **Act** and this has not been done, I find that recourse to this court on that issue is premature.

**Disposition**

30. For the reasons I have set out above, I dismiss the Notice of Motion dated 21<sup>st</sup> April 2020 with costs to the defendant.

**DATED and DELIVERED at NAIROBI this 27<sup>th</sup> day of JULY 2020**

**D. S. MAJANJA**

**JUDGE**

Mr Abenga instructed by Begi's Law Offices and Chambers Advocates for the plaintiff.

Mr Marete instructed by Kithinji Marete and Company Advocates for the defendant.