



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRLATY DIVISION
CIVIL SUIT NO 370 OF 2013

UNILEVER KENYA LIMITED.....PLAINTIFF

VERSUS

PROCTER & GAMBLE1ST DEFENDANT

INTERNATIONAL OPERATIONS SA.....2ND DEFENDANT

PROCTER & GAMBLE SERVICES LIMITED.....3RD DEFENDANT

SCANGROUP LIMITED.....4TH DEFENDANT

RULING

INTRODUCTION

1. A brief background of this matter is that the Plaintiff filed an Amended Notice of Motion application dated 9th September 2012 in which it had sought injunctive orders to restrain the Defendants herein from flighting an advertising campaign of its Ariel product. The court granted temporary injunctive orders on 17th September 2013 and issued directions on how parties were to file their respective responses and written submissions. The 1st and 2nd Defendants were required to file their Replying Affidavit by 1st October 2013 and their written submissions by 7th November 2013. Parties were thereafter required to appear for a mention before the court on 11th November 2013 with a view to confirming compliance and/or for further orders and/or directions.
2. However, instead of filing their papers within the time lines that had been given by the court, the 1st and 2nd Defendants filed a Notice of Motion application dated 30th September 2013 on the same date in which they sought the referral of the dispute for resolution by the Advertising Standards Committee (hereinafter referred to as “ the ASC).
3. The said application was brought under the provisions of Sections 1A, 1B, 3A, 59C and 63 (e) of the Civil Procedure Act, Order 51 of the Civil Procedure rules and the inherent powers of the court and all enabling provisions of the law. The same sought the following orders:-
 - a. **THAT in the alternative an urgent date be set aside for the *inter partes* hearing of the said application in priority to the Notice of Motion application dated 9th September 2013.**
 - b. **THAT the suit commenced by Plaintiff dated 27th August 2013 and amended on 9th September 2013 be stayed and the dispute between the parties herein be referred to the Advertising Standards Committee established in accordance with the Code of**

Advertising Practise and Direct Marketing.

- c. **THAT the order for interim injunction issued on 17th September 2013 restraining the 1st and 2nd Defendants by themselves, their agents, employees or advertising agents from running, flighting or airing the Ariel One wash campaign advertisements in its current form at all media houses and all forms of print and electronic media pending the mention on 11th November 2013 when this matter was to mentioned with a view to confirming compliance and/or for further orders and/or directions by the court be vacated or discharged forthwith.**
- d. **THAT the court be pleased to issue such further order or directions for the expeditious hearing and determination of the dispute it shall deem necessary.**
- e. **THAT the costs of the application be awarded to the 1st and 2nd Defendants.**
4. The grounds upon which the 1st and 2nd Defendants relied upon in support of their application were generally:-
 - a. **THAT the Civil Procedure Act and the Constitution of Kenya recognised the need to promote alternative forms of dispute resolution and therefore gave the courts the discretion to require parties to avail themselves to any other method of alternative dispute resolution.**
 - b. **THAT the suit and application for injunction had been filed in complete disregard of the alternative mechanism of resolving disputes as had been set out in the Code of Advertising Practice and Direct Marketing (hereinafter referred to as “ the Code.”)**
 - c. **THAT the Plaintiff had acknowledged the existence and jurisdiction of the Advertising Standards Board (hereinafter referred to as “the ASB.”)**
 - d. **THAT it was clear that the present dispute could be best resolved through the self-regulatory alternative dispute resolution forum established under the Code to which both the Plaintiff and the Defendants ascribed to and hence, it was in the interests of justice and the overriding objective of the court that the application be heard and granted in its entirety.**
5. In response thereto, on 4th October 2013, the Plaintiff filed Grounds of Opposition dated 3rd October 2013. The same were as follows:-
 - a. **THAT the application was fatally defective/incompetent and that the same should be dismissed *in limine*.**
 - b. **THAT the application was without any admissible factual or legal basis.**
 - c. **THAT the 1st and 2nd Defendants were in gross violation of an express court order which amounted to direct and/or constructive contempt of court.**
 - d. **THAT the application was designed to enable the 1st and 2nd Defendants circumvent the orders and directions of the court.**
 - e. **THAT there was no valid challenge to the jurisdiction of the court and the court having been seized of the matter, the alleged purported Advertising Standards Committee had no jurisdiction and that in any event, it was incompetent to deal with the serious and constitutional issues that had been raised in this matter.**
 - f. **THAT the facts submitted for adjudication had not been controverted by the 1st and 2nd Defendants and having been admitted, there was no dispute capable of referral to alternative dispute resolution.**
 - g. **THAT parties could not contract or otherwise oust the jurisdiction of this court.**
 - h. **THAT the application was an affront to the dignity of the court and a classic example of abuse of court process,**
 - i. **THAT the 1st and 2nd Defendants were guilty of material non-disclosure.**
6. In its ruling of 30th September 2013, the court directed that the 1st and 2nd Defendants serve their application upon the Plaintiff for further directions on 7th October 2013. Upon application by the 3rd Defendant, the court excused it from the participating in the pending applications until such further orders of the court.
7. On the 7th October 2013, the court directed the parties to proceed to the ASC to attempt resolution of the dispute herein. It is this direction by the court that aggrieved the Plaintiff leading it to file its Notice of Motion application dated on 10th October 2013 on the same.

8. The said application was brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rules 1 and 15 of the Civil Procedure Rules, 2010, the inherent powers of the court and all enabling provisions of the law. Prayer Nos (1) and (2) of the said application are spent. The Plaintiff also abandoned its Prayer No (3) which had sought to have this court to recuse itself from hearing this matter on the ground that the court had already predetermined the case in favour of the 1st and 2nd Defendant herein. The application therefore sought the following remaining prayers:-

- a. Spent.
- b. Spent.
- c. **THAT this Honourable Court be pleased to set aside/ discharge the orders directions issued by this Honourable Court on 7th October 2013.**
- d. **THAT the Honourable Court be pleased to make and/or issue any other orders it deems appropriate.**
- e. **THAT the costs of this application be provided for.**

9. The Plaintiff relied on several grounds seeking the recusal of this court. However, having abandoned that prayer, the court finds the relevant grounds in support of its prayers that have been placed for its determination to have been generally as follows:-

- a. **THAT during the *inter partes* hearing on 7th October 2013, the court directed that parties proceed for determination of the dispute to ASC without affording the Plaintiff an opportunity to be heard in opposition and as a result, it was unlawfully deprived and/or denied its inalienable right to access to the court.**
- b. **THAT the said application was brought timeously, that no prejudice would be occasioned to the Defendants if the said application was allowed and that it was in the interests of justice that the said application be allowed.**

10. The said application was supported by the Affidavit of Inviolata Oriwo, the Plaintiff's Company Secretary. It was sworn on 10th October 2013. It contained several averments that were geared to asking this court to disqualify itself from hearing this matter due to its alleged bias for having failed to certify its two (2) Notice of Motion applications dated 9th and 17th September 2013 as urgent but certified the 1st and 2nd Defendant's Notice of Motion application dated 30th September 2013 as urgent when its counsel was out of the country. As the Plaintiff had abandoned its prayer for the court's recusal in this matter, the court will only deal with those facts that support the Plaintiff's prayer for the setting aside of the orders issued on 7th October 2013.

11. She stated that the Plaintiff's counsel had indicated to the court that it was not willing to have the dispute resolved by ASC, a fact that the court dismissed and directed that parties attend court on 22nd October 2013 when they were to inform the court on the issues framed for determination by the "Tribunal." She deposed that the court had in effect granted the 1st and 2nd Defendants the prayers sought in their application without giving the Plaintiff an opportunity to be heard. It was the deponent's view that the court had already predisposed its mind to allowing the matter to the said ASC irrespective of the opposition that was raised by the Plaintiff's counsel.

12. It was her contention that the Plaintiff had been directed to appear before a Committee which she referred to as an *ad hoc* body whose impartiality was in serious and obvious doubt. She averred that the said Committee was impartial for the reasons that:-

- a. **Mr Brian Mylo, one of the associates at Mr Ohaga's firm who was leading the counsel for the 1st and 2nd Defendant was a member of the Advertising Standards Body of Kenya which comprised of the Advertising Standards Board and Committee.**
- b. **Mr Ohaga had admitted that he was a member of the Standards Appeals Council, the appellate body for all decisions emanating from the said Committee.**

13. The deponent further contended that the effect of assigning the task of issuing matters to an *ad hoc* body contradicted ASC's own constitutive documents which already prohibited it from dealing with a matter already filed in court. It therefore urged the court to set aside its orders issued on 7th October 2013 so that the 1st and 2nd Defendant's application could be determined on merits.

14. In its written submissions dated 21st January 2014 and filed on 22nd January 2014, the Plaintiff indicated that the 1st and 2nd Defendants opposed its Notice of Motion application dated and filed on 10th October 2013 by filing Grounds of Opposition dated 18th October 2013. The court was not able to trace the same in the court file.

LEGAL SUBMISSIONS BY THE 1ST AND 2ND DEFENDANTS IN RESPECT OF THEIR NOTICE OF MOTION APPLICATION DATED 30TH SEPTEMBER 2013

15. The 1st and 2nd Defendant's written submissions in respect of the Plaintiff's application were dated and filed on 11th December 2013. It was their argument that the order issued by the court on 7th October 2013 to refer the matter to ASC had not been set aside. They stated that the ASC did not fall within the provisions of Article 159 (3) of the Constitution and that as such, there existed no reason before the court why the matter ought not to be referred to the said Committee.

16. They argued that Article 159(2)(c) of the Constitution provided that all forms of alternative dispute resolution mechanisms shall be promoted subject to clause (3) which provides that traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights, if it is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality; or is inconsistent with the Constitution or other written law. They added that the Civil Procedure Act and Civil Procedure Rules, 2010 also provided for alternative dispute resolution as could be envisaged under Section 59 C of the Act and Order 46 Rule 20 of the said Rules.

17. They were emphatic that the dispute herein should be referred to ASC as it was the proper and most appropriate forum for the resolution of the dispute. They stated that the ASC was established by the Code and that the same bound the **“advertiser, the practitioner of advertising, the facilitator in the creation of advertisements and providence of data, statistics and information to be relied upon for the production of advertising and the medium involved in publication or broadcasting of the advertiser's message to the public.”**

18. Preamble 11 of the said Code provided as follows:-

ASB procedures are designed in such a way as to assist any person who wishes to complain about an advertisement. Adherence to these procedures will ensure effective and timely resolution of complaints. The procedures are designed to grant all concerned a fair and equal opportunity to be heard without fear or bias. The Procedural Guide to the Code forms an integral part of the Code.”

19. The 1st and 2nd Defendants relied on several cases whose common thread was that the Civil Procedure and the Constitution of Kenya empowered the courts to refer parties to engage in alternative forms of dispute resolution and that the said methods had been elevated to a constitutional level as a result of which courts were mandated to promote the said methods and not to stifle them.

20. It was their contention that the Plaintiff had in fact submitted itself to the jurisdiction of ASC when it wrote to the 2nd Defendant asking it to treat its letter of 26th August 2013 as a formal notification of its complaint of the matter that was to be referred to the ASC. They argued that by copying the said letter to the ASC, the Plaintiff was in effect complying with the provisions of Clause 4.3 of the Code which provided that correspondence could be copied to it though it would not take any action until a formal complaint was lodged.

21. They pointed out that the Plaintiff had made reference to the Code (pp 115-314 of the Plaintiff's Bundle of Documents filed on 27th August 2013) in its letter dated 17th July 2013 (pp 41-43 of the Plaintiff's Bundle of Documents) and to the Kenyan Advertising Standards Committee in the letter of 6th August 2013 by one Prnil Hagroo (pp 102-104 of the Plaintiff's Bundle of Documents) which in effect, it said, showed that the Plaintiff had acknowledged the existence of ASC as the body to handle such disputes.

22.They contended that they were keen to have the dispute resolved in a confidential manner at the ASC because of what they said was sensitive information relating to what was likely to be divulged if the matter was heard in court. They therefore urged the court to allow their application to have the dispute herein resolved by ASC.

LEGAL SUBMISSIONS BY THE PLAINTIFF IN RESPECT OF THE 1ST AND 2ND DEFENDANT'S NOTICE OF MOTION APPLICATION DATED 30TH SEPTEMBER 2013

23.The Plaintiff's written submissions were dated 21st January 2014 and filed on 22nd January 2013. It filed a Notice of Preliminary Objection dated 3rd March 2014 and filed on 4th March 2013 in respect of the 1st and 2nd Defendants' submissions in Reply dated 17th February 2014. The grounds were as follows:-

- a. **THAT the submissions were based on matters of fact not set out in any pleading filed on or before the 1st and 2nd Defendants.**
- b. **THAT there was no dispute before this court owing to the Defendant's failure and/or refusal to file the pleadings in rebuttal to the Plaintiff's claim.**
- c. **THAT the 1st and 2nd Defendants had by their submissions sought to blur the lines between the Plaintiff's identity and other entities not before this court.**
- d. **THAT the 1st and 2nd Defendants had repeatedly sought to introduce evidence by way of submissions.**
- e. **THAT the 1st and 2nd Defendant's submissions in Reply were a flagrant abuse of the court process.**

24.It argued that there was no dispute in view of the fact that the 1st and 2nd Defendants had not filed their affidavit in support of its application for injunctive orders. It said that the facts as it had set out had not been controverted by the 1st and 2nd Defendants and as a result there was no dispute that was capable of being referred to alternative dispute resolution as had been held by various courts. It relied on the case of **HCCC No 41 of 2012 Safaricom Limited vs Kenya Data Networks Limited (unreported)** in this regard.

25.It contended that Article 163 of the Constitution of Kenya clothed this court with jurisdiction to deal with the dispute herein and parties could not contract to oust the jurisdiction of the court, which it said was the case with the 1st and 2nd Defendants' application. It stated that the ASC was at best an *ad hoc* body that could neither exercise judicial or quasi-judicial powers and that it would be a dereliction of the court's duty to refer the matter to an unknown *ad hoc* body when it was properly seized of the matter. It placed reliance on the case of **Halsey vs Milton Keynes General NHS Trust & Others [2004] EWCA Civ 576** where the court's holding was to the effect that to refer parties to mediation when they were unwilling to do so would be to impose

26.It said that the ASC itself recognised a party's right to seek redress from court and that the 1st and 2nd Defendants had failed to demonstrate to the court the ASC was the proper forum for the resolution of the dispute to the exclusion of the High Court. It referred the court to Clause 5.2 of the Code which provided as follows:-

“ Where the complainant has lodged a complaint or dispute, or instituted any action with any other regulatory body or in a court of law, either within or outside the jurisdiction of the ASC and where the subject matter of the complaint is essentially the same, the ASC shall await conclusion or termination of this process.”

27.As regards the competence of the 1st and 2nd Defendants' application, the Plaintiff submitted they had made several references which were of a factual nature in the grounds in the face of the application and that the same was not supported by any affidavit. It contended that Order 51 Rule 4 of the Civil Procedure Rules, 2010 stipulates that any party who intends to rely on any evidence should introduce or place the same by way of an affidavit. It referred the court to several

authorities to buttress its point that an application with no supporting affidavit was incurably defective.

28. The Plaintiff was emphatic that the 1st and 2nd Defendants were in contempt of the court when they failed to file their responses as had been directed by the court on 17th September 2013. It also pointed out that the 1st and 2nd Defendants were precluded from relying on unpleaded issues that it would not be able to respond to. It also supported its last two (2) arguments with authorities which were to the effect that it would be improper to draw inferences adverse to one party on unpleaded issues.

LEGAL SUBMISSIONS BY THE 1ST AND 2ND DEFENDANTS IN RESPONSE TO THE PLAINTIFF'S LEGAL SUBMISSIONS

29. In its written submission dated and filed on 17th February 2014 which were in response to the Plaintiff's written submissions aforesaid, the 1st and 2nd Defendant submitted that nothing precluded them from requesting this court to refer the dispute herein to ASC. They contended that they filed their Notice of Motion application dated and filed on 30th September 2013 to forestall the filing of affidavits as had been directed by the court on 17th September 2013.
30. They said that the filing of the said affidavit was awaiting the resolution of the issue in the right forum and ought not to be construed as disinterest on their part. It was also their submission that it would be prejudicial for them if filing a Reply was deemed to be mandatory as it would not be able to present its case in a confidential manner within the appropriate forum. They emphasised that referral of the dispute to the ASC would definitely narrow down the issues.
31. They took issue with the Plaintiff for approbating and reprobating on the existence of ASC as the proper forum of resolving an advertising dispute. It was their submission that just as members of the Marketing Society of Kenya (MSK) were contractually bound to adhere to the Advertising Standard Code, so was the Plaintiff's contractual obligation to submit itself to the ASC. They pointed out that courts would intervene in very limited cases where there was an arbitration cause and placed reliance on the case of **Alliance Media Kenya vs Monier 2000 Limited [2005] eKLR** in this regard.
32. They also relied on several cases from other jurisdictions where the courts held that where there were authorities to deal with advertising disputes, the same ought to be dealt with in those fora.
33. They distinguished the case of **HCCC No 41 of 2012 Safaricom vs Kenya Data Networks Limited** (Supra) in which the court therein found that there had been no dispute that was capable of referral to arbitration as the debt therein had been admitted. They reiterated that the court had inherent jurisdiction to refer matters to alternative dispute resolution and that there was a dispute that was capable of being referred to ASC.
34. On the issue of the competence of their application, they argued that it was not mandatory for them to file an affidavit to support an application as could be seen in Order 51 Rule 4 of the Civil Procedure Rules, 2010. It was their argument that the instances in which the filing of affidavits was mandatory were strictly provided by the Civil Procedure Rules, 2010 and that an application such as theirs was not one of those applications.
35. They urged the court not to consider the authorities that had been relied upon by the Plaintiff on the aspect of filing of affidavits as they were not persuasive or binding on this court. As the court understood it, the 1st and 2nd Defendants were urging that under Section 3 (1) of the Judicature Act Cap 8 (laws of Kenya) limited to the binding nature of such cases to the procedure and practise in courts of England.
36. As regards the submission on contempt of court, they argued that no proceedings had been taken out in accordance with the provisions of the Judicature Act and that in any event, the directions of the court had been overtaken by the nature of the orders that they had sought in their application. It was their submission that the directions issued by the court on 17th September 2013 were mere directions which could not sustain an action for contempt of court and that, if anything, the Plaintiff could also be said to have breached the court's directions by failing to submit itself to the jurisdiction of the ASC.

37.They also argued that they were entitled to rely on the grounds on the face of the application which did not in any way attempt to make factual arguments. It was their averment that the grounds were extracted from the documents that had been relied upon by the Plaintiff. They urged the court to refer the matter to the ASC as the Plaintiff was insisting on the court determining the matter with a view to obtaining highly confidential and strategic secrets from the 1st Defendant.

LEGAL SUBMISSIONS BY THE PLAINTIFF IN RESPONSE TO THE 1ST AND 2ND DEFENDANT’S REPLY DATED 17TH FEBRUARY 2014

38.The Plaintiff filed further written submissions dated 11th March 2014 on the same date. It reiterated that there was no dispute capable of being referred to the ASC or any other tribunal and that this court had the jurisdiction to hear and determine this matter. It argued that the fact that it had declined to go to the ASC did not now imply that a dispute had arisen between the parties. It was categorical that factual issues could only be put across by way of pleadings and as the 1st and 2nd Defendants had failed to do so, they were deemed to have admitted the facts that had been set out by the Plaintiff. It was its contention that the 1st and 2nd Defendants could not insulate themselves from the court process.

39.It was its argument that a party could not introduce evidence by or through submissions as the 1st and 2nd Defendants had attempted to do in paragraph 9 of their submissions, a paragraph the Plaintiff asked the court to expunge from the court record. They referred the court to the case of **Philip Mukwe Wasike vs James Lusweti Mukwe & 2 Others [2013] eKLR** where the court therein came to the same conclusion.

40.It was also emphatic that a party could not be compelled to submit to a body it did not wish to appear before in view of the principle of party autonomy. It argued that the 1st and 2nd Defendants had not furnished the court with any contract to show that the Plaintiff’s membership to MSK contractually enjoined it to refer any advertising dispute to the ASC which had no statutory underpinning whatsoever.

41.It submitted that only the court had power or jurisdiction to interpret or determine the existence of constitutional issues which the ASC could not do. It was also its contention that the 1st and 2nd Defendants were contemptuous in referring to the directions given by the court on 17th September 2013 as “mere directions.”

42.Further, it stated that the Plaintiff had an unfettered right to access this court pursuant to Article 50 of the Constitution of Kenya. It said that the ASC was not the unbiased and appropriate forum that was envisaged under the said Article. It therefore requested the court to expunge paragraphs 44 and 45 of the 1st and 2nd Defendants’ submissions filed on 17th February 2014. It also asked that paragraph 41 of the said submissions be expunged from the court record as the 1st and 2nd Defendants could not purport to identify and frame issues for determination.

43.It therefore urged the court to allow its application and disallow that of the 1st and 2nd Defendants.

LEGAL SUBMISSIONS BY THE PLAINTIFF IN RESPECT OF ITS NOTICE OF MOTION APPLICATION DATED 10TH OCTOBER 2013

44.In respect of its application dated and filed on 10th October 2013, the Plaintiff filed written submissions dated 21st January 2014 and filed on 22nd January 2014. It set out in detail what transpired in court on 7th October 2013. It pointed out that the court did not ask the parties to argue the 1st and 2nd Defendants’ application dated 30th September 2013 but that instead it invited off the record discussions from the parties on having the matter resolved by the ASC. It contended that despite the Plaintiff’s counsel’s protestations that the 1st and 2nd Defendants’ lead counsel in this matter, John Ohaga, sat on the Appellate body of the decisions of ASC and an associate in the

- said counsel's firm, the said Brian Mylo, was a committee member of the ASC, the court nonetheless directed the parties to appear before the ASC.
45. It was adamant that the ASC would not be a good forum for the dispute to be referred to. It argued that as it had filed its Grounds of Opposition to the 1st and 2nd Defendants' said application, directing the parties to go the said forum without parties arguing the said application was tantamount to condemning it unheard.
46. It pointed out that the court had revised its orders of 7th October 2013 on 14th October 2013 upon realising that the body the 1st and 2nd Defendants had wished the dispute referred to was not the statutory tribunal that was envisaged in the Competition Act, 2012. It opined that had the court known that the ASC was not the statutory body that it had envisaged it to be when it sent the parties for resolution of the dispute, it would never have made the orders that it did on 7th October 2013.
47. It was therefore its submission that the order of 7th October 2013 was issued in error as was not afforded an opportunity to be heard by the court. It contended that the order extracted by the 1st and 2nd Defendants was therefore erroneous and/or in error. It was emphatic that the said forum would be partial for the reasons shown in Paragraph 12 hereinabove and submitted that it was in the best interests that the orders issued on 7th October 2013 be set aside for the matter to be heard and determined by the court.
48. It referred the court to authorities which were cited in the said submissions to buttress its argument that it was entitled to a right to be heard. The court did not set out the citations of the cases and the holding therein as they were numerous but it did note that their common thread was that every party ought to be given an opportunity to be heard by the court because as they had explained hereinabove, the ASC was not the proper forum for the dispute to be heard and determined.

LEGAL ANALYSIS

49. Having perused the bulky documentation that was placed before the court, it does appear that it was being called upon to make findings in respect of the following issues:-
- a. **Whether the 1st and 2nd Defendants were in contempt of the court's directions issued on 17th September 2013;**
 - b. **Whether there was a dispute capable of being referred to ASC;**
 - c. **Whether the said 1st and 2nd Defendants' application dated and filed on 30th September 2013 was an abuse of the court process;**
 - d. **Whether or not the 1st and 2nd Defendants' application dated and filed on 30th September 2013 was competent as filed;**
 - e. **Whether the court had power to refer the dispute between the Plaintiff and the 1st and 2nd Defendants to ASC;**
 - f. **Whether the Plaintiff and the 1st and 2nd Defendants were obliged to submit themselves to the jurisdiction of the ASC;**
 - g. **Whether this court had the jurisdiction to hear this matter.**
50. The issues herein are intertwined. However, in view of the voluminous nature of the documentation and the arguments that were advanced by the parties herein, the court found it more manageable to address the distinct issues under the different heads which appear hereunder.

I. CONTEMPT OF COURT

51. As was seen hereinabove, the Plaintiff was very emphatic that the 1st and 2nd Defendants were guilty of contempt which they ought to purge first before they could be heard. It was their argument that the 1st and 2nd Defendants' referral of the directions by the court given on 17th September 2013 as "mere directions" was contemptuous necessitating the court to take action to reign in on their conduct. It submitted that Section 5 of the Judicature Act empowered the High Court to punish for contempt of court, the principle being to uphold the dignity and integrity of the court.

52.As has been seen hereinabove, the court gave directions detailing the time-lines within which parties were to file their respective affidavits and written submissions. However, the 1st and 2nd Defendants filed their Notice of Motion application seeking orders for the referral of the dispute between them and the Plaintiff for resolution to ASC, a day before they were to file their Replying Affidavit. Consequently, the court issued fresh directions for the parties to attempt settlement at the ASC.

53.The effect of orders once discharged by the court was an issue that was considered by Romer J in the case of Hadkinson vs Hadkinson [1952] 2 ALL ER 567 relied upon by the Plaintiff and alluded to in the case of HCCC No 757 of 2012 CMC Holdings Limited & Another vs Jaguar Land Rover Exports Limited (unreported). In the Hadkinson vs Hadkinson case, the said learned judge stated as follows:-

“It is plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or even void...”

54.By coming to court a day before they were to comply implies that the implications of not complying with the said directions were very much alive to the 1st and 2nd Defendants. The 1st and 2nd Defendants were in effect not in contempt of the court orders by the time they filed their said application. The court acceded to their request to resolve the matter out of court. Once the court gave new directions in this regard, the directions of the court that had been given on 17th September 2013 stood suspended.

55.It is therefore the conclusion of this court that although the 1st and 2nd Defendants may not have complied with the court’s directions issued on 17th September 2013, which they were to do by 1st October 2013, they were not in contempt of the court orders once the court gave fresh directions.

II. DISPUTE CAPABLE OF REFERRAL TO ASC

56.Turning to the issue of whether or not there was a dispute capable of being referred to the ASC, the court noted the Plaintiff’s submission that the failure by the 1st and 2nd Defendants to file their documentation in response to its suit and to its application of 10th September 2013 meant that its facts were uncontroverted meaning that there was therefore no dispute that was capable of being referred to ASC, the 1st and 2nd Defendants having failed to show the court that there was such a dispute.

57.The Plaintiff had persuaded the court to disregard the 1st and 2nd Defendants’ submissions to the effect that they were only willing to deal with the matter through ASC because their trade secrets would be revealed but rather urged the court to find that the same had no basis and that the only reason why they had failed to file any response was because there was no dispute that was capable of being referred to the ASC.

58.In clause 13 of the Preamble of the said Code, it is stated as follows:-

“ASB procedures are designed in such a way to assist any person who wishes to complain about an advertisement (consumers, competitors, agencies, industry, bodies and associations etcetera). Adherence to these procedures will ensure effective and timely resolutions of complains.”

59.The contentious nature of the proceedings herein was proof that there was indeed a complaint by the Plaintiff against the 1st and 2nd Defendants. It is evident from the pleadings before the court that there was a dispute regarding the manner in which the 1st and 2nd Defendants were fighting their Ariel One Wash Campaign. It was for that very reason that the Plaintiff came to court. It was also for the same reason that the Plaintiff in its letter dated 17th July 2013 (pp 41-43 of the Plaintiff’s Bundle of Documents) informed the 1st and 2nd Defendants of its complaint.

60.This complaint amounted to a dispute that was capable of being referred to the ASC with a view it

determining the parties' assertions of whether or not the said campaign conformed to the basic principles of advertising to ensure that its content did not violate the national laws as was contemplated in the said Code. It was irrespective that the 1st and 2nd Defendants had not filed formal responds to the Plaintiff's claim in respect of the said campaign.

61. In **Ellerine Bros vs Klinger [1982] 1WLR 1375**, Templeman LJ said that if letters were written making some request or demand and the defendant did not reply, there was a dispute. It was held that it was not necessary for the defendant to write and say that he did not agree. An analogy of this is when a party sends the other a demand letter. The fact that the party to whom the demand letter was sent does not respond does not in itself mean that there is no dispute or matter that is capable of determination by any mechanism of dispute resolution.
62. Bearing in mind the holding in the case of **Ellerine Bros vs Klinger** (Supra), which this court approves and adopts, the failure by the 1st and 2nd Defendants to respond to the Plaintiff's application of 7th September 2013 did not necessary mean that there was no dispute as their request for referral of the dispute to the ASC ostensibly acknowledged that there existed a dispute between them and the Plaintiff that required resolution.
63. A complaint to the ASC by the Plaintiff was sufficient and for all purposes and intent, the court finds that there was indeed a dispute or matter that was capable of being referred to the ASC.

III. ABUSE OF THE COURT PROCESS BY THE 1ST AND 2ND DEFENDANTS

64. As has been stated hereinabove, there was a complaint that was capable of being referred to the ASC. However, the same could only be referred there by a complainant, who in this case, was the Plaintiff herein. The 1st and 2nd Defendant could not initiate the process as they were not the complainants. It was therefore not out of line for the 1st and 2nd Defendants to have filed their application dated and filed on 30th September 2013 seeking assistance of this court to have the matter referred to the ASC for resolution. The court therefore finds that their application was not an abuse of the court process as was alleged by the Plaintiff or at all.

IV. COMPETENCE OF THE 1ST AND 2ND DEFENDANTS' APPLICATION

65. The gist of the Plaintiff's submission was that the 1st and 2nd Defendants' application was defective for not having been supported by an affidavit. On the other hand, the 1st and 2nd Defendants argued that it was not mandatory for applications under Order 51 Rule 4 of the Civil Procedure Rules, 2010 to be supported by affidavit evidence. They cited the example of an application under Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010 where affidavit evidence was not required to be adduced. In particular, Order 51 Rule 4 of the Civil Procedure Rules, 2010 provides as follows:-

“ Every notice of Motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”

66. A reading of the said provision shows that an applicant can exercise the option of serving an affidavit to support his application or not to depending on whether or not his motion is grounded on evidence by affidavit. Setting out of the grounds is, however, mandatory. Its compliance is couched in mandatory terms. The 1st and 2nd Defendants opted to rely on the grounds only. An applicant who opts to rely on grounds only must be able to make out his case based on those grounds only without alluding to facts that would need to be supported by evidence. The grounds must therefore be sufficient to support the prayers that he seeks in his application.
67. The contentions that the alternative mechanism of resolving disputes had been set out in the Code, that the Plaintiff had acknowledged the existence of the ASB and that the dispute was best resolved through the self-regulatory alternative dispute resolution mechanism established under the Code required some form of basis. They could only be introduced by way of affidavit evidence. The 1st and 2nd Defendants introduced the said Code in their written submissions dated

and filed on 17th September 2013 and in fact attached a copy thereof to the said written submissions.

68. This was highly irregular and unprocedural and in this regard, the court wholly concurs with the Plaintiff's submissions and the finding of the court in the case of **Philip Mukwe Wasike vs James Lusweti Mukwe & 2 Others** (Supra). The 1st and 2nd Defendants said application ought to have been supported by an affidavit to bring out those factual issues which could not be introduced by or through written submissions. The court would have concurred with the Plaintiff's submissions that the 1st and 2nd Defendant's application was bad in law in its entirety on the ground that it was without factual or legal basis but for the fact that it contained a ground to the effect that the Civil Procedure Act and the Constitution of Kenya recognised the need to promote alternative forms of dispute resolution.
69. The two (2) pieces of legislation gives courts the discretion to refer parties to submit themselves to alternative dispute mechanisms *suo moto* without them adducing any affidavit evidence. This is a legal issue that the court could take judicial notice of and did not require any affidavit evidence. To this end, the court finds that the 1st and 2nd Defendants' application was saved by that one (1) limb and can therefore be sustained.

V. POWER OF THE COURT TO REFER DISPUTE TO THE ASC

70. The Plaintiff's application dated and filed on 10th October 2013 was premised on the ground that it was not given a right to be heard and it did not wish to appear before the ASC for the reasons given in Paragraph 12 hereinabove. It was apprehensive that it would not receive a fair hearing in the said forum. As has been stated above, the ASC had the mandate to hear the dispute between the Plaintiff and the 1st and 2nd Defendants. The question that now arises is whether the court has power to refer the said dispute to ASC. The answer to this question lies both in the Constitution of Kenya and the Civil Procedure Rules, 2010.
71. Article 159 (2)(c) of the Constitution of Kenya provides as follows:-

“ In exercising judicial authority, the courts shall be guided by the following principles:-

alternative forms of alternative dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3).”

72. Under Section 59 C of the Civil Procedure Rules Cap 21 (laws of Kenya), it is provided that:-

“1. Any suit may be referred to any other method of dispute resolution where the parties agree or the court considers the case suitable for such referral.

2. Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the court may in its discretion order. ..”

73. Under Order 46 Rule 20 (1) of the Civil Procedure Rules, 2010, it is stipulated as follows:-

“Nothing under this order may be construed as precluding the court from adopting and implementing of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under Sections 1A and 1B of the Act.”

74. It is clear that the court is mandated by the supreme law to promote the use of alternative dispute resolution mechanisms and that it is also vested with power in civil cases to refer any matters it deems suitable for resolution by such methods for the attainment of the overriding objective contemplated under Sections 1A and 1B of the Civil Procedure Rules, 2010. The answer as to whether the court could refer the matter to ASC or any other body for resolution of the dispute is therefore in the affirmative.

75. The Certificate of Urgency dated 26th August 2013 attached to the Plaintiff's Notice of Motion application of the same date was based on the grounds that:-

- a. **The Applicant is the manufacturer of Omo Hand washing powder (hereinafter referred to as "Omo") the leading and most widely used stain removing powder detergent in Kenya in terms of market share.**
- b. **The Respondent has begun and is running an advertisement campaign for Ariel, its hand washing powder detergent in print and electronic media, bill boards and point-of-sale materials which disparages Omo. As a result, the Applicant has suffered and continues to suffer irreparable damage due to *inter alia*, loss of consumer confidence owing to the incorrect and unsubstantiated depiction of its product as inferior.**
- c. **The Applicant was apprehensive that the Respondent could take advantage if the time it would have taken the application to be filed to be heard in the normal manner, to further escalate publication of the impugned advertisements and thereby render the outcome of the application and the suit, otiose."**

76. In another Certificate of Urgency dated 9th September 2013 and attached the a Notice of Motion application dated 3rd September 2013 and filed on 10th September 2013, the Plaintiff stated as follows:-

"The Respondents have been running an advertisement campaign in the print and electronic media, billboards and point-of-sale materials which falsely depict the Applicant's products as inferior. By so doing, the Respondents are improperly and illegally disparaging the Applicant's product, Omo, indisputably the most widely used hand washing detergent. Unless the advertisements complained of are stopped forthwith pending the hearing of the application *inter partes*, the Applicant will continue to suffer irreparable damage due to the incorrect and unsubstantiated depiction of its product as inferior."

77. The affidavit in support of the Notice of Motion application dated 26th August 2013 and filed on 27th August 2013 sworn by Inviolata Oriwo alluded to Nielsen research data which showed that Omo commanded 28.2% of the market share, the Plaintiff's use of enzymatic stain removal technology in the manufacture of Omo, Ariel Micro Cleaning Boosters and use by the 1st and 2nd Defendant of visual depictions and verbal statements in its campaign to impute that Ariel is superior to the **"Other leading brand,"** which was Omo.

78. A perusal of the scope of the Code showed that it included Commercial Advertising. Clause 1.1 of the said Code provided as follows:-

"This Code shall primarily regulate commercial advertising. Its provisions shall be in respect of, except as expressly provided for hereafter, advertisements for the supplies of goods or services or provision of facilities by way of trade, and also to advertisements other than those for specific products which are placed in the course of trade by or on behalf any person or entity involved in commercial advertising. "

79. Clause 1.4 of the Code further stipulated as follows:-

"The Code shall also apply to any advertisement to the extent that it is controversial in that it expresses an opinion which is the subject of divided societal opinion or controversy, and that such divided opinion or controversy involves issues within the areas of public policy and practice."

80. Clause 3 of the Code provided that it shall apply to:-

"3.1.1. Advertisements in television, radio, newspapers, magazines, brochures, leaflets, circulars, mailing, fax, transmissions, catalogues, follow-up, literature and other electronic or printed material.

3.1.2. Posters, billboards, outdoor and other promotional media in public places..."

81. In arriving at the decision to refer the matter for resolution out of court, the court had noted the contested nature of the matter herein. The Plaintiff had accused the Defendants in depicting the wrong picture to the consumers of hand washing powders which the 1st and 2nd Defendants had not responded to. The Code was intended to meet the exigencies of the market. It is evident that the issues in dispute were more of a technical nature in the advertising and marketing industry. It is the considered view of this court that the dispute herein would have best been dealt with in a forum where policies of advertising practise had already been set and. In view of the legislation currently in place, the court had power to refer the dispute to the ASC and acted correctly when it directed the parties to attempt settlement of the same at the said forum.

VI. PARTIES' SUBMISSION TO THE JURISDICTION OF THE ASC VIS-À-VIS THE COURT

82. Having found that the dispute could have been adequately addressed in the ASC, the court will now address the issue of whether or not the Plaintiff could be compelled to submit itself to the jurisdiction of the ASC. The court noted the Plaintiff's submissions that it did not want to submit itself to the jurisdiction of the ASC for the reason that Mr John Ohaga was a member of the Appeal division of the ASC while Brian Mylo was a member of the ASC therefore making the ASC partial. To understand whether this was so, the court found it necessary to look at the composition of the ASB.

83. In the preface of the Code, it is stated that:-

“ 4. This Body (ASB) is an independent body set up by the marketing and advertising industry to ensure that its system of self-regulation works in an efficient and sufficient manner and that its principle activities do not work in any way whatsoever, against the public interest.

5. The management of the Body shall be vested in the ASB which shall be nominated by a joint sitting of the MSK and Association of Practitioners in Advertising (APA) councils and shall comprise of:-

- a. **Five members nominated as above by virtue of their knowledge and experience in matters relating to marketing, advertising, media and/or the wider communication industry.**
- b. **Two members nominated by reason of their professional expertise in matters relating to administration, banking, law or accounting who shall be of no less than seven (7) years standing in their field of expertise.**
- c. **The Board shall at its first elect a Chairman and appoint Secretary amongst its members.**

6. The ASB shall have all powers for the performances of its function under this Code and shall serve for terms of one (1) year at a time...”

84. In Clause 2 of the Procedural Guideline annexed to the Code, it provided for the establishment of the ASC. It stated as follows:-

“This committee shall consist of two (2) ex-officio members, three (3) nominated members and a legal secretary and shall be appointed by the ASB.”

85. Clause 8 of the said Procedural Guidelines stipulated as follows:-

“8.1 There shall be a Standards Appeal Council (SAC) convened from time to time to receive, consider and decide appeals by aggrieved parties to a decision of ASC.

8.2 The advocate for the time being appointed as the lawyer representing the ASBK, who shall be an advocate of the High Court of Kenya of not less than ten (7) (sic) years standing who shall sit in the position of the Chairman of the SAC.

8.2.2 One (1) member appointed by virtue of having been a former chairperson of either the APA or MSK.

8.2.3 Three (3) other members of not less than ten (10) years standing in their individual fields of expertise.”

86. In the mind of this court, the Plaintiff's reasons for not submitting to the jurisdiction of ASC were not convincing at all. The Plaintiff's fears that the ASC was partial or would be partial appear to have been unwarranted for the reason that a cursory look at the said composition of the members of the three (3) organs does not seem to suggest that Mr John Ohaga or Brian Mylo would have been able to influence all the members in the ASB or the ASC. The membership of organisations that submitted themselves to the jurisdiction of the ASB also appeared to have been varied.

87. Be that as it may, it is the view of the court that the Plaintiff could not be compelled to submit itself to the jurisdiction of the ASC. Firstly, there was no dispute resolution clause in the Code that would have bound it to submit itself to its jurisdiction. The 1st and 2nd Defendant did not provide proof of such a binding clause. The Plaintiff did not wish to have its dispute resolved at the ASC. It is the only party that could have lodged a complaint at the forum but it did not wish to do so. The court therefore agrees with the Plaintiff that in the absence of such a clause, its submission to the jurisdiction of ASC could only be optional.

88. The position of the court would, however, have been different if there was a dispute resolution clause or if the referral of the dispute was an arbitration. In Kenya, how, when and to whom arbitration can be referred to is governed by the Arbitration Act, 1995. Indeed, Section 6 of the Arbitration Act, 1995 gives the court power to stay proceedings in the High Court and refer parties to arbitration provided that the same is in accordance with the Arbitration Act.

89. Secondly, the ASC could not deal with a matter where it had been lodged or instituted in any other regulatory body or in a court of law, either within or outside the jurisdiction of the ASC. In particular, Clause 5 of the Procedural Guideline provided as follows:-

“5.1. The ASC will decline to consider and deal in a parallel process to determine or resolve a dispute between the parties.

5.2 Where the complainant has lodged a complaint or dispute, or instituted any action with any other regulatory body or in a court of law, either within or outside the jurisdiction of the ASC and where the subject matter of the complainant is substantially the same, the ASC shall await conclusion or termination of this process.”

90. Thirdly, although the provisions of the Constitution of Kenya and the Civil Procedure Rules, 2010 provide that the court should promote alternative dispute resolution mechanisms, parties cannot be compelled to appear in such fora due to lack of a legislative framework detailing the penalties of failing to submit to such a mechanism.

91. As the Code acknowledges that disputes could be resolved in any fora such as a regulatory body or the court other than the ASC which had to await the determination of that other fora, the Plaintiff must be given the opportunity to present its case in court. Its right to access the court is enshrined under Article 50 of the Constitution of Kenya, 2010. The court therefore agrees with the Plaintiff's submissions in that it was quite in order when it referred the matter herein for determination by this court.

VII. DETERMINATION OF THE 1ST & 2ND DEFENDANTS' NOTICE OF MOTION APPLICATION DATED AND FILED ON 30TH SEPTEMBER 2013

92. For the reasons that there is no legislation that empowers the court to stay proceedings in court so as to refer a matter to any other alternative dispute resolution mechanism other than arbitration, the court finds its hands tied and is unable to grant prayer No (3) of the 1st and 2nd Defendants' application which had sought to stay the proceedings herein and have the dispute referred to the

ASC.

93. As the Plaintiff was and still is entitled to access the court for any relief, the court is not at this point in a position to vacate and/or set aside the injunctive orders that were issued on 17th September 2013. The said orders were issued pending the hearing and determination of the Plaintiff's Notice of Motion application dated 9th September 2013 and cannot be set aside and/or vacated until the court hears the said application *inter partes*. The 1st and 2nd Defendants' argument on whether or not the said injunctive orders ought to be set aside and/or vacated will have to await the hearing of the Plaintiff's application dated 9th September 2013.
94. The directions issued by the court on 17th September 2013 have not been set aside. Parties will therefore be required to file their respective documentation to move this matter forward. The court will therefore not grant Prayer No (5) of their application as the same was pegged on its success in respect of Prayer Nos (3) and (4) therein.

VIII. DETERMINATION OF THE PLAINTIFF'S NOTICE OF MOTION APPLICATION DATED AND FILED ON 10TH OCTOBER 2013

95. Whereas the Plaintiff had indicated that it had abandoned its prayer asking this court to recuse itself, it did not withdraw its Affidavit in support of its application. Its prayer for setting aside the orders issued by the court on 7th October 2013 was hinged on averments contained therein. The court will therefore address the same as they still remain as part of the court record.
96. It does appear to this court that the Plaintiff did not peruse the court file before it filed its application to stay the orders of 7th October 2013. The order extracted on 15th October 2013 alludes to the fact that parties were to proceed to the ASC to attempt (emphasis court) resolution of the dispute. The verbatim record of the order of the court was as follows:-

“I hereby direct that parties proceed to Advertising Standards Committee to attempt (emphasis court) resolution of the dispute herein. However, parties to attend court on 22nd October 2013 to advise the court on the issues that will have been framed for determination by the said tribunal. The court will give its further orders and/or directions on that day. The 3rd Defendant is hereby excused from the proceedings herein until further orders of the court. Orders accordingly.”

97. The court's decision was informed by the fact that the matter had become highly contentious with accusations and counter-accusations following the flighting of the Ariel advertisement and the Billboards that had been mounted in respect of Ariel soap.
98. Mr Kamau Karori had informed the court that he was travelling out of the country. Whilst the court was well aware that he would not be available on 22nd October 2013, there was nothing untoward in it directing parties to attempt (emphasis court) an out of court settlement. In view of the powers vested in the court by law, it could give the said directions even without hearing the 1st and 2nd Defendants' application *inter partes*. Indeed, no party would have suffered any prejudice in attempting (emphasis court) an out of court settlement.
99. The matter was to be mentioned on 11th November 2013 for the court to confirm compliance of the filing of the parties' respective documentation in respect of the Plaintiff's Notice of Motion application dated 9th September 2013 and/or for further orders and/or directions. The date when the parties were to appear before court on 22nd October 2013 was carefully calculated as the court was aware that the substantive matter was to be mentioned next on 11th November 2013.
100. So as to allow parties adequate time to attempt to resolve the matter at the ASC before 11th November 2013, it was necessary that the court list the 1st and 2nd Defendants' application immediately as the same had sought to have parties have the dispute resolved at the ASC. The insinuation that the court had already pre-determined the 1st and 2nd Defendants' application by taking a position that was favourable to them was therefore unfounded.

101. Following the Plaintiff's Notice of Motion application filed on 10th October 2013, the court made comments the effect that it had thought that the body to which the dispute was to be referred to was the tribunal envisaged by the Competition Act, 2010. The court's reaction was based on the fact that Mr Tom Macharia, counsel for the Plaintiff had indicated to the court that the ASC was a committee that was set out by "peers" to look at advertising issues.
102. Having now considered the matter and all the material placed before the court, it is its view that Mr Tom Macharia was less than candid. Indeed, the body that was envisaged by the 1st and 2nd Defendants was the ASC. It is evident that from the code of which had been initially attached to the Plaint filed on 27th August 2013 and which this court had the opportunity to consider was not just a committee set out between peers to look at advertising issues. If at all that was the case, the Plaintiff did not provide any evidence to demonstrate that the peers would be partial or unbiased.
103. It was irrespective that the court thought at one time that the body to which the dispute was to be referred was the said tribunal under the Competition Act, 2010 for the reason that the composition of the ASB, ASC or the SAC seemed to suggest that the organs were independent. The court still holds the view that it acted well within its mandate to refer the dispute to the ASC for parties to attempt (emphasis court) resolution of the dispute.
104. There is no doubt in the mind of this court that the dispute could probably have been attended to by the ASC by now. Indeed, it is almost a year since the substantive application herein was filed and the same is yet to be heard. A forum like that of the ASC would have the ability to guarantee confidentiality of the process as opposed to the dispute playing out in the public domain, which could have a negative impact or harm parties if litigation becomes long drawn or contentious. The court, however, wishes to point out that this is a general observation of how matters can impact negatively on parties and is not intended to prophesy anything about this matter and/or cast doubt on the parties' abilities to advance and/or prove their respective cases in this court.
105. It is the view of this court that the Plaintiff's application dated 10th October 2013 was unwarranted as it had just been asked to attempt (emphasis court) settlement at the ASC. It was not necessary for it to have filed the said application basing it on the grounds that the court had proceeded erroneously or without justification. Had the Plaintiff appreciated the role of the court in promoting or encouraging the use of alternative dispute resolution mechanisms as has been provided under Article 159 (2)(c) of the Constitution of Kenya, 2010, it would probably not have filed the application of 10th October 2013.
106. The court never abdicated its duty of hearing the matter herein. It did not also direct parties to have their dispute resolved by the ASC. Rather, it directions were merely to request parties to attempt settlement. It remained an attempt and no more.
107. Alternative resolution mechanisms are voluntary and consensual in nature. The court would not have forced or compelled the Plaintiff to resolve the matter out of court if it felt so strongly about it. Indeed, the court did still allow the parties to have some discussions while the matter was still pending hearing and determination of the Plaintiff's substantive application and was flexible and could have accommodated the parties' wishes so as to see a quick resolution of this matter.
108. It will be an academic exercise to set aside the orders issued by the court on 7th October 2013 as the same have now been overtaken by events, the court having found that the Plaintiff could not be compelled to appear before the ASC and that this court has jurisdiction to hear the dispute herein. It is the Plaintiff's case and it ought to be afforded an opportunity to present its case in a forum that it feels will be impartial. The Plaintiff ought to be given its day in court. This is despite the fact that Article 50 of the Constitution of Kenya, 2010 guarantees parties the right to be heard before another independent and impartial tribunal or body, other than a court. The long and short of this court's holding is that the Plaintiff cannot be compelled to submit itself to a forum that it has expressed its reservations regarding its impartiality.

DISPOSITION

109. The court did not reproduce the holdings of the cases relied upon by the parties *verbatim* as they were numerous. It nonetheless considered the same. Accordingly, having considered the pleadings, written and oral submissions and all the case law in support of the respective parties' cases, the court has come to the conclusion that the 1st and 2nd Defendant's Notice of Motion

application dated 30th September 2013 and Plaintiff's Notice of Motion application dated and filed on 10th October 2013 had no legal basis on which the court could grant the orders sought therein. In the circumstances foregoing, the same are hereby dismissed. Each party will bear its own costs. 110. It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of June 2014

J. KAMAU

JUDGE