Kegode t/a Kirinda Distributors v Equator Bottlers Limited (Civil Case E003 of 2023) [2025] KEHC 1769 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1769 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL CASE E003 OF 2023

RPV WENDOH, J

FEBRUARY 27, 2025

IN THE MATTER OF THE ARBITRATION ACT 1995

AND

IN THE MATTER OF ARBITRATION BETWEEN STANLEY SUGUVI KEGODE T/A KIRINDA DISTRIBUTORS AND EQUATOR BOTTLERS LIMITED

BETWEEN

STANLEY SUGUVI KEGODE T/A KIRINDA DISTRIBUTORS ..... APPLICANT

AND

EQUATOR BOTTLERS LIMITED ..... RESPONDENT

RULING

1. Stanley Suguvi Kegode t/a Kirinda Distributors, the applicant herein, by the Originating summons dated 10/5/2023, seeks the following orders against Equator Bottlers Limited (the Respondent)
    1. Spent
    2. That the court do appoint the 3rd Arbitrator to act as the presiding arbitrator in the dispute between the applicant and the Respondent.
    3. That the Honourable court be pleased to vest the authority to appoint the 3rd Arbitrator in the Chairman of the Chartered Institute of Arbitrators Kenya Branch.
    4. Costs of the application to be provided for.
2. The Originating summons is premised on grounds found in the body of the application and affidavit sworn by Stanley Suguvi Kegode on 10/5/2023 and supplementary affidavit dated 27/10/2023,

3. He deponed that he had been running a soda distributorship for the Respondent; That on 1/1/2015, the applicant and Respondent renewed a soda distributorship Agreement and on 29/10/2015, referred to as "Resumption of Operations in Mbale (Marked SSK (2) a and (b)); that the said clause thereof provided for resolution of disputes exclusively by arbitration; that a dispute arose on 10/3/2020 and he invoked the arbitration clause (see SSK 3,) in terms of the demand letters; that after back and forth, each party managed to appoint an arbitrator; that the applicant's Arbitrator is Phyllis Elaine Wangwe while the Respondent appointed Zachary Alex Kimanthi as Arbitrator, to act as co-arbitrators; that the Kenya Revenue Authority has been pressuring the applicant over unremitted taxes for the period the Applicant has managed the Respondent's business and has allowed him time to finalize the arbitration but due to the delay, his accounts were garnished (SSK6); that their arbitrators have been notified of the delay (SSK 7(a)- (e)); that his Counsel has advised him that the tribunal is not properly constituted with only two arbitrators; that due to the stalement between the two arbitrators which has hindered appointment of a 3rd arbitrator; that as a result, he has been out of business since March, 2020 when the dispute arose.

4. The application was opposed through the replying affidavit of Julius Gicheha, dated 27/10/2023. He denied that there is any contractual relationship between the applicant as described, and the Respondent because the names in the purported agreement are different. He also deponed that there is no legal basis for this dispute and that if there exists any contractual relationship, the same is governed by the *Arbitration Act* No. 4 of 1995; that the same has already been determined by the Arbitral Tribunal, appointed by both parties; that under clause 14 of the agreement, it provides for appointment of two arbitrators and their decision is binding on both parties; that before this application Phyllis Wangwe and Alex Kimanthi had commenced arbitration proceedings; that the applicant raised the issue of a third arbitrator in his letter of 9/2/2023 but the two Arbitrators in their letters dated 10th February 2023 and 17/2/2023 indicated that they had unanimously made a decision that the tribunal was duly composed with two arbitrators (J4 2-4); that under the doctrine of Kompetenz – Kompetenz, arbitrators determine their own jurisdiction; that under section 17 of the Act, if the applicant wished to challenge the decision of the arbitration, they should have done so within 30 days from 10/2/2023; that the applicant proceeded with the arbitral process without objection. The Respondent further deponed that the application is contrary to Article 159 (2) (c) which provides for alternative dispute resolution and also contravenes sections 10,11,12 of the *Arbitration Act*; that the challenge to Phylis Wangwe's appointment as an Arbitrator is raised in within the Arbitral proceedings and is yet to be determined as the Respondent fears that the said Phylis is likely to be partial due to a pending case between her and the Respondent in Miscellaneous Application E072 of 2021 Equator Bottlers –V- Stanley Kegode and Phyllis Wangwe. It is also the Respondent's contention that under sections 11(3) and 12 the court lacks jurisdiction to appoint a third arbitrator and that if granted, the orders would offend Article 159(2) (c) 50,40,28(1) of the *Constitution*. Lastly, it is contended that the applicant has come to court with unclean hands because he failed to disclose all the material facts.

5. The parties filed written submission. The applicant identified two issues for determination

    a. Whether a third arbitrator should be appointed to act as the presiding arbitrator;

    b. Whether the court should intervene in the appointment of the 3rd arbitrator by vesting the authority to appoint in the Chairman of the Chartered Institute of Arbitrators, Kenya Branch.

6. The applicant relies on sections 11 and 12 of the *Arbitration Act* (the Act) which provides for the composition and jurisdiction of the arbitral tribunal and urged that under clause 14 of the agreement, two arbitrators were appointed under section 12 (2) (b) which is subject to section 11(3); that once the two arbitrators were appointed, in September,2022 they were mandated under section 11(3) of

the Act to appoint a third arbitrator as presiding arbitrator but that has not happened due to the uncooperative position taken by the Respondent and hence the arbitratoral proceedings remain in limbo. It was submitted that from September, 2022 to May 2023, when the instant application was filed, nothing had taken place; that though section 10 of the Act bars intervention in Arbitration by the court, the intervention relates to section 11 & 12 and Article 159 (2) c which provides for promotion of alternative forms of dispute resolution; that this application is brought for the court's intervention to avert the Respondent's delaying tactics and relying on the excuse that the contract of 1/1/2015 is void and so is the arbitration agreement in clause 14; that the court is being called upon to restate the principle of autonomy in the case of Harbour -V- Kansa, that the arbitration agreement is independent (autonomous) of the main contract; that the issue of the validity of the Soda Distribution Agreement being a jurisdictional question, should be resolved by the Arbitral Tribunal under the doctrine of Kompetenz -v- Kompetenz; that since the parties cannot agree on appointment of a third arbitrator, and the agreement did not specify the appointing authority, the same should be left to the Chartered Institute of Arbitrators of Kenya Branch which maintains a list of specialized list of arbitrators and it will ensue transparency in the appointment of a suitable third arbitrator.

7. The applicant also submitted that a decision of the tribunal has to comply with section 30(1) of the Act and that the decision of the two arbitrators cannot align with the said section.

8. Lastly, the applicant invoked Article 50 of the *Constitution* which guarantees the right to hearing before a court of law or tribunal; that the claim against the Respondent is a colossal sum standing at Kshs.1,230,621,019 as at 8/9/2022 and it is only fair that the orders be granted to avoid any more delay.

9. The Respondents in their submissions identified two issues, being, (1) whether court should intervene by appointing a third arbitrator; and

   (2) who bears the costs of the application. The Respondent started on the premise that the arbitral process is autonomous as envisaged by section 10 of the Act and the court may only interfere where the Act specifically stipulates it. Counsel relied on the decisions in Synergy Industrial Credit Ltd -V- Cape holdings Ltd (2020) eKLR and Prof. Lawrence Gumbe & Another -V- Hon. Mwai Kibaki & others HC. Misc 1025/2004.

10. On whether the Act provides for appointment of Arbitrators, Counsel considered Section 12 of the Act which stipulates how parties may appoint arbitrators and if there be a stalemate in appointment then Section 12(3) to 9 are applicable Counsel relied on the case of Mulinge -V- County Government of Mombasa and Another Misc. Application E038/2023 where the judge observed that under section 12 of the Act, the High Court may intervene with a view to facilitating the appointment of an arbitrator where parties have disagreed or either party is unwilling to co-operate in appointment of arbitrator. See also re Application of Arbitrator Misc. App. E018/20222 and Wanjala & others -V- Registrar of Companies & others Okoa Finance Ltd.

12. It was therefore Counsel's submission that there is no stalemate in this matter as both parties have appointed arbitrators and the need for 3rd arbitrator was ruled out in HC misc.72/2021; that the two arbitrators indicated by a letter dated 10/02/2023 that the agreement did not provide for a 3rd arbitrator and that the issue of a third arbitrator was already considered and put to rest in HCC 4/2020 and HC Misc.App.E.12/2021 and by the unanimous decision of the arbitral tribunal.

13. Whether the applicant seeks to set aside the arbitral award, Counsel relying section 32A of the Act, submitted that the award is final and binding on all parties except as provided for under section 35 of the Act; that an application to set aside can be made in the High Court on grounds of composition of the tribunal or arbitral procedure and Counsel relied on the decision of Nyutu Agrovet Ltd -V- Airtel Networks K. Ltd; Chartered Institute of Arbitrators Kenya Branch Petition 12/2016

14. Whether the applicant challenges a preliminary decision on jurisdiction of the arbitral tribunal; it was submitted that Section 17 of the Act which recognizes the doctrine of Kompetenz – Kompetenz, founded on UNCITRAL Model Law, on International Commercial Arbitration, empowers an arbitral tribunal to rule on its own jurisdiction and or any other objection relating to validity of the agreement and if any party is aggrieved by such ruling, then they must apply to the High Court within thirty (30) days; that the tribunal rendered its preliminary decision on 10/2/2023 which was confirmed on 17/2/2023 and so far, no application has been made to set it aside under Section 17(6) of the Act. Counsel relied on the decision in University of Nairobi -V- Nyoro Construction & Another Arbitration Cause E011/2021 which considered section 17(6) of the Act. Counsel also invited this court to consider the doctrine of exhaustion as espoused by the Court of Appel in Speaker of National Assembly -V- Karume (1992) eKLR 21 Counsel further considered section 11 and 12 of the Act and urged that, in this case, the parties intended that the Arbitral Tribunal would be constituted by two Arbitrators and that the court is bound by the intention of the parties. Counsel relied on the following authorities.

    1. Euromec International Limited -V- Shandong Taikai Power Engineering Company Limited HC. Civil Case No. E527 of 2020;

    2. Riverside Square offices Limited – V – Crje East African Limited OS 261/2023

    3. National Bank of Kenya Limited -V – Pipelastic Samkolit (K) ltd & Another (2000) e KLR

15. As regards costs, Counsel urged the Court to comply with Section 27 CPC and award them to the Respondent as it is the applicant who has dragged the Respondent to court and urged the court to dismiss this application.

16. I have duly considered the application, affidavits filed and the oral submissions of Counsel, it is important that I lay out the history of the dispute herein. It is not in dispute that the applicant invoked the arbitration clause No. 14 of the Soda distribution Agreement dated 1/1/2015 between the applicant and respondent by filing Kakamega HCC 4/2020 and the said suit was stayed by Judge Muzyoka following a preliminary objection raised by the Respondent under Section 6 of the Act and the said suit was stayed pending the arbitration proceedings.

17. By letter dated 27/11/2020, the applicant purported to appoint Phyllis Wangwe as the sole arbitrator but the same was challenged by the Respondent in Kakamega E072/2021 where the court found the appointment to be irregular.

18. By a letter dated 2/9/2022, the applicant appointed Phylis Wangwe as its arbitrator while the Respondent by letter dated 16/9/2022, appointed Zachary Alex Kimanthi as their arbitrator.

19. The applicant filed the instant application dated 10/5/2023 alleging a stalemate in the arbitral proceedings because a 3rd arbitrator had not been appointed by two arbitrators.

20. The court will therefore go ahead to consider whether the court can intervene and direct the appointment of a third arbitrator.

21. Section 10 of the Act provides to what extent the court can intervene in matters governed by the *Arbitration Act*. It reads

    " Extent of court intervention; except as provided in this Act, no court shall intervene in matters governed by this Act".

22. In considering the above provision the Court of Appeal in Synergy Industrial Credit Limited Supra said;

> " One of the significant features of the *Arbitration Act* is the principle of party autonomy, which entitles parties to have their disputes resolved by the forum and in the manner of their choice. For that very reason, the instances when the court may intervene in arbitral proceedings or interfere with an arbitral award are not at large; they are few and only those specified by the Act"

23. Again in Prof. Lawrence Gumbe (supra) the court said;

> " 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...."

24. Sections 11 and 12 provide for composition of the arbitral tribunal and appointment of arbitrators. The two sections provide as follows; -Section 11,12.

11. Determination of number of arbitrators

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be one.

(3) Where an arbitration agreement provides that the reference shall be to two arbitrators, then, unless a contrary intention is expressed in the agreement, the agreement is deemed to include a provision that the two arbitrators shall appoint a third arbitrator immediately after they are themselves appointed. [*Act No. 11 of 2009*, s. 7.]

12. Appointment of arbitrators

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

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

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

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

(c) in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed. (3) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default") —

(a) has indicated that he is unwilling to do so;

(b) fails to do so within the time allowed under the arbitration agreement; or

(c) fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed

by a party), the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

(4) If the party in default does not, within fourteen days after notice under subsection (3) has been given

(a) make the required appointment; and

(b) notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.

(5) Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside. (6) The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time. CAP. 49 Arbitration [Rev. 2012] [Issue 1] A20-10

(7) The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator.

(8) A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.

(9) The High Court in appointing an arbitrator shall have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account the advisability of appointing an arbitrator of a nationality other than those of the parties.

25. The applicant seeks this court's intervention based on the above sections. Since the applicant alleges a stalemate in the arbitral process, Section 12 (3-9) provide for the procedure to be followed and this was buttressed by the court in Mulinge case (supra).

> " My understanding of the impugned Law (section 12) is that the High Court may intervene with a view of facilitating the appointment of an Arbitrator where the parties disagree or either party is unwilling to cooperate in the process leading to the appointment of the Arbitrator".

26. It means that a court can only intervene in appointment of arbitrators where the parties have disagreed or one is uncooperative Judge Majanja elaborated on the application of section 12 when he said in Wanjala & others (Supra) "the *Arbitration Act* proceeds from the position that the arbitration process is consensual and court intervention is only necessary to assist the parties carry out their stated intention crystallized in the arbitration agreement. Hence section 12 of the *Arbitration Act* dealing with appointment of arbitrators, does not supplant the parties right to appoint or prescribe the mode of appointment of the arbitrator but only sets out a default procedure for the court to intervene should the parties either fail to comply with the contractual provisions for appointment of an arbitrator. The court can only intervene in matters appointment if the agreement provides for appointment and either party fails to comply with the agreement"

27. The court clarified that this court can only intervene on appointment of an arbitrator if the agreement provides for it and either party fails to comply with the said agreement.

28. In this matter, each party has appointed an arbitrator as per clause 14 of the agreement. There is no disagreement or uncooperativeness on the part of either party.

29. When the applicant raised the issue of appointment of a 3rd arbitrator vide the letter dated 9/2/2023 the two arbitrators who had been appointed responded vide two letters; The one dated 10/2/2023 is as follows;- "we wish to clarify that there is no stalemate whatsoever as alluded to in your under reply. In fact, the arbitrators have extensively deliberated the issue of constitution of the tribunal and unanimously conclude and rightly so, that the relevant agreement does not allow appointment of a third arbitrator;" and a further letter of 17/2/2023 as follows; "please be advised that the position proffered in our letter dated 9th February, 2023 is the considered and unanimous decision of the tribunal" (SSK7d).

30. The two arbitrators gave a unanimous decision that the agreement at Paragraph 14 did not provide for appointment of a 3rd arbitrator.

31. Paragraph 14 of the agreement provides as follows;

> " 14 Arbitration
>
> In case of any dispute between company and Distributor, which cannot be amicable resolved, both the party shall be entitled to appoint Arbitrator of their choice and decision of both Arbitrators 'shall' be binding to both parties."

32. The parties were clear on their intention, that they wanted two arbitrators to determine any dispute between them and the decision was binding on both parties. They did not intend section 11(3) of the Act to apply. As clearly submitted by the respondent's counsel that the construction of the Arbitration clause must be clear. In the case of Euromec International Limited (Supra) the court had this to say on construction. "In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory Law"

33. Again, in Riverside Square Offices Limited (supra) the court said "in the subject clause, the parties used the term 'shall' denoting the mandatory nature of the obligation to have the dispute resolved by the Kenyan Chapter of the Chartered Institute of Arbitrators. It is that Chapter that was to be the appointing authority. That was the agreement of the parties, period."

34. Paragraph 11(3) of the Act would have been applicable if the parties merely appointed two arbitrators and did not mention the effect of their decision on the parties. In the subject case, the parties were clear and used the term ".... The decision of both the Arbitrators shall be binding on both parties" the applicants cannot run away from that provision.

35. The courts are clear on their mandate when it comes to interpreting contracts that a court of law cannot rewrite a contract between the parties. In National Bank of Kenya Ltd (supra) the court said

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved"

See also Pius Kimaiyo Langat -V- Co-operative Bank of Kenya Limited (2017) e KLR.

36. In the instant case the intention of the parties is clear, that is, to have two Arbitrators determine their dispute. The issue that the applicants have raised touches on the jurisdiction of the arbitral tribunal. As observed earlier, by the time the applicant raised the issue of appointment of a 3rd arbitrator, the two arbitrators had been appointed and an arbitral tribunal had been constituted. They two arbitrators determined the question of their jurisdiction in the two letters dated 10/2/2023 and 17/2/2023. If at all the applicant was aggrieved by the said decision, his recourse was to move the High Court for setting aside of the said award as provided under section 32A and 35 of the Act.

37. The Sections provide as follows.

Section 32 A & Section 35 of the Act.

32A. Effect of award Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.

35. Application for setting aside arbitral award

(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

(2) An arbitral award may be set aside by the High Court only if— (a) the party making the application furnishes proof—

(i) that a party to the arbitration agreement was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or [Rev. 2012] Arbitration CAP. 49 A20-21 [Issue 1]

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the award is in conflict with the public policy of Kenya.

(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

38. Section 35(2) of the Act of the allows an aggrieved party to move to the High Court to set aside an arbitral tribunal's award on grounds of composition of the tribunal or procedure adopted. That, the applicant did not do.

39. As ably submitted, Section 17 of the Act recognizes the doctrine of Kompetenz -Kompetenz, a doctrine founded on UNCITRAL MODEL LAW International Commercial Arbitration that empowers the tribunal to rule on its own jurisdiction and any objections in respect of the validity or existence of the agreement. The Arbitral Tribunal ruled on its jurisdiction and if the applicant was aggrieved by that ruling contained in the letters dated 10/2/2023 and 17/2/2023, he should have applied for setting aside under section 17(6) of the Act. This position is buttressed by the decision in University of Nairobi -V- Nyoro (Supra) where the court said "once the arbitral tribunal had ruled on its jurisdiction, section 17(6) of the Act provided for recourse by the aggrieved party to the High Court. Section 17 of the Act was applicable in the circumstances of the instant case. Therefore, in as much as the applicant sought to set aside the ruling under section 35 of the Act, It could not run away from the ambit of section 17 which provided that it ought to have filed its application within thirty days after the notice of the ruling. Whether the decision of January 22, 2021, was referred to as an award was immaterial since the substance of the impugned decision was on the question of jurisdiction and fell within the ambit of section 17 of the Act. The court's jurisdiction to interfere in arbitral proceedings was circumscribed by section 10 of the Act which provided that, except as provided in the Act, no court would intervene in matters governed by the Act.

40. The mode of intervention by the court in a ruling on jurisdiction was by way of an application to the High Court within thirty (30) days as provided by section 17(6) of the Act. Had the issue of jurisdiction been reserved for and dealt with in the award on merits, then the party aggrieved would be entitled to apply to set aside the award under section 35 of the Act. Section 35 was not applicable to the facts and circumstances of the instant case"

41. In the end, I find that the application dated 10/5/2023 is unmerited as clause 14 of the Arbitration Agreement is clear on appointment of two arbitrators whose decision is binding on both parties and

is final. This court has no jurisdiction to intervene. The Application is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED ON 27THDAY OF FEBRUARY, 2025.

HON. R. WENDOH

JUDGE

Ruling delivered virtually in the presence of

Applicant – Mr. Kraido

Respondent – Ms. Gicheru

Juma/Hellen- Court Assistants