



ORARO & COMPANY
ADVOCATES

LEGAL ALERT

**THE RIGHT TO REQUEST COURT'S ASSISTANCE
IN TAKING EVIDENCE IN AN ARBITRATION**



ARBITRATION & COURT ASSISTANCE

In a recent decision, the High Court declined to issue witness summons in the case of Squishy Drinks Limited v Kevian Kenya Limited (2021) eKLR. In its Ruling the Court held that section 28 of the Arbitration Act, 1995 (“the Act”) only permits an arbitral tribunal to make a request to the High Court for assistance in taking evidence. As such, a party to an arbitration may only make the said request with the approval of the arbitral tribunal.

The dispute arose from Squishy Drinks Limited’s allegation that Kevian Kenya Limited had been passing off its juices in identical packaging bearing its trademark and distributing it to unsuspecting members of the public. The dispute was referred to arbitration, and in its course, Squishy Drinks Limited filed an application before the High Court under section 28 of the Act seeking to compel the Director General of the Competition Authority of Kenya and the Registrar of Trademarks Kenya to appear as expert witnesses before the arbitral tribunal, on the basis that their opinion would be beneficial to the arbitral tribunal.

The Court (Mabeya J) found in favour of Kevian Kenya Limited in light of section 10 of the Act which provides that no Court shall intervene in arbitral proceedings, other than as provided for in the Act. The Court also cited the case of Prof, Lawrence Gumbé & Another vs. Honourable Mwai Kibaki & Others, High Court Miscellaneous No. 1025 of 2004, which held that Courts of law can only intervene in the specific

areas stipulated under the Act, and in most cases that intervention is usually supportive and not obstructive or usurper-like. These instances include stay of legal proceedings; granting of interim measures; appointment and removal of arbitrators; setting aside of an arbitral award; enforcement and recognition of arbitral awards; grounds for retrial of recognition or enforcement, and questions of law arising out of domestic arbitrations.

With regard to seeking Court’s assistance in taking evidence, the general position is that the High Court has the power to provide assistance to arbitral proceedings including the issuance of witness summons. However, the Ruling clarifies that it is the arbitral tribunal which is expressly given the right to request for assistance from the High Court in the taking of evidence, and the parties cannot take it upon themselves to request for such assistance, without the arbitral tribunal’s concurrence.



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This alert is for informational purposes only. If you have any queries or need clarifications, please do not hesitate to contact Noella Lubano (noella@oraro.co.ke) (Partner), Eva Mukami (emukami@oraro.co.ke) (Associate) or your usual contact at our firm, for advice relating to Arbitration matters.



Noella Lubano
Partner
E: noella@oraro.co.ke



Eva Mukami
Associate
E: emukami@oraro.co.ke



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ACK Garden Annex, 6th Floor, 1st Ngong Avenue
P.O. Box 51236-00200, Nairobi, Kenya
Dropping Zone: Room 8, Embassy House Basement
T: +254 709 250 000
E: legal@oraro.co.ke | www.oraro.co.ke



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