ONG'ANYA OMBO

ADVOCATES

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About Us

Ong'anya Ombo Advocates (the Firm) specialises in proffering strategic legal services to both natural and juristic persons in the Republic of Kenya, and beyond.

The Firm prides itself as an entity that proffers customised services that addresses a Client's needs by highlighting the direct and indirect factors that have implications to a Client's needs.

Service Portfolio

We have successfully secured the opportunity to proffer our Clients with services concerning Construction Law, Medical Law, Intellectual Property Law, Corporate Law, Securities/ Capital Markets, Anti-Trust/ Competition Law, Government Contracts/ Regulations, White Collar Crimes, Corporate Law, Information Communication Technology & Internet Law, Domain Disputes, Environmental Law, Oil & Gas/ Energy Law, Aerospace Law, Electoral Law, Insurance Law, Product Liability and Fashion & Entertainment Law.

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Our 2018's Highlight

Ultramax Products Ltd v. Anthony Mitchell, Claim Number: FA1712001764052

We, in 2018, advised and prepared documents in favour of Hydromax Products Limited (the Respondent), registered in Nevada, USA, concerning a Domain Disputes claim as per the International Corporation of Assigned Names and Numbers (ICANN) that was filed at ADR Forum P.O. Box 50191 Minneapolis, MN 55426.

Ultramax Products Limited (the Complainant), a company registered in the United Kingdom, filed a complaint on grounds that Hydromax Products Limited did not have legitimate reasons to utilise a domain name entailing the name Hydromax since it was a Trademark owned by the Complainant.

In that regard, the Complainant pleaded with ADR Forum to declare that the Respondent's conduct is in breach of its Trademark based on the three-part test under Uniform Domain Name Disputes Resolution Policy: **Identical and/or Confusingly Similar, Rights or Legitimate Interests, and Registration & Use in Bad Faith**. Therefore, ADR Forum should declare the domain be transferred to the Complainant.

In such cases, it is imperative that the Complainant establishes that the Respondent did violate all the three elements, which are *identical and/or confusingly similar, rights or legitimate interests,* and *registration & use in bad faith*. However, for the Respondent to win, the Respondent will have to establish that any of the three elements has not been established.

In reference to this case, our documents established that the Complainant failed to establish the three elements, therefore, the decision was rendered in favour of the Respondent, our Client.

Practice Notes:

Uniform Domain Name Disputes Resolution Policy

Domain Disputes is a model of specialised legal field that assist individuals or juristic persons protect their respective Trademarks that are breached when a person registers a Domain name that is the same as or similar to their Trademark.

Based on our experience, it is evident that decisions concerning Domain Disputes are not made based on the precedents available but autonomy of the arbiters. As a result, there are high chances that the arbiters will reach different conclusions regardless of the similarity of facts.

Our correspondence with ICANN confirms the position, as we were informed the following:

> *The UDRP does not incorporate a choice of law principle. It requires panellists to decide a complaint in accordance with the UDRP Rules but it also allows them to apply any rules and principles of law they deem applicable. This means that some panellists apply the law of their own jurisdiction which they are familiar with, others consider the law of the jurisdiction where one or both of the parties are domiciled, whereas others choose to apply exclusively the UDRP Rules without turning to trade mark laws for their interpretation.*

In that regard, Domain Disputes have the window for forum shopping as the model on how decisions are made is not standard and that can be influenced by the Legal Systems, personal principles, precedents or lack of the same.

In order to represent a Client effectively, one ought to understand all the available Domain Disputes forums, and model of decisions.

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MERGERS & ACQUISITIONS

Introduction

The Republic of Kenya is on the verge to fully achieve the status of being a financial hub and economic centre not only in Eastern Africa but across Africa. As a result, there are many laws and regulations that are formulated in order to see such access achieved prior to the most talked about Vision 2030.

Currently, many Venture Capital or Equity Firms are interested in acquiring well established entities or those showing strong chance of success that are in the Republic of Kenya.

In that regard, we are going to address Takeovers or Mergers & Acquisitions (M&A) - as per the Companies Act, Competition Act, Capital Markets Act & its subsidiary legislations – since many business entities are or will be interacting with the above laws and or regulations.

partial analysis: Part XXIV of the Companies Act, 2015

The Companies Act, under s 584, defines Takeover as making an offer to acquire shares, if such offer includes any of the conditions under s 584 (2) and (3).

First conditions: whether the offer is to acquire all the shares in a company, or acquisition of one class or all classes of shares - exclusive of shares that might be held by the offeror.

Second conditions: the terms are consistent to all shares, even when there are different classes, to all respective class of shares.

The shares addressed under s 584 (2) & (3) does not include treasury shares. However, that does not limit chances of including treasury shares as under s 584 (5) & (6).

The terms address above are not applicable to shares already held by the offeror or its associates unless where the offerors pre-acquisitions terms extend to such shares as addressed under s 587 (4) and 611 (8) & (9).

The difference occurring, under the terms of offer, as a result of the time of allotment of shares or if the laws of a foreign country preclude certain proposals does not affect the terms as being considered as same as under s 584 (2) & (3).

When making communication of an offer, the offer cannot be deemed as not communicated if a shareholder has no address, it was not sent so as not to contravene a law or published via Gazette. However, the law provides that the stated reasons cannot be inferred as the only reasons to be relied on issues concerning communication of an offer.

If a takeover offer is made and its period elapses that the offer cannot be accepted, the offeror acquires or unconditionally contracts to acquire any of the shares relating to the offer but will not acquire any of the shares of the holders who have not accepted the offer.

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The Companies Act, under the Takeover's part, provides that an associate of the person making offer is the nominee of the offeror; holding company; subsidiary or fellow subsidiary (subsidiary of the same body but not subsidiary of the other); a body corporate that the offeror is substantially interested in; a person or nominee to party to the share acquisition; or, if a human being, the spouse, or any child or step child of the person.

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In reference to this Part, any debentures issued and have voting rights shall be treated as shares, which are only under companies that have voting shares or debentures carrying voting rights.

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Securities of company that are convertible into or allow the holder to subscribe to as shares shall be treated as shares in the company subject to certain conditions.

Takeover Rules

The Companies Act, 2015, as per Part XXIV, provides for an Authority that will address issues pertaining Takeover. In this case, the Authority is the Capital Markets Authority that is formed pursuant to the Capital Markets Act.

The Authority will regulate takeover bids, mergers, any transaction may directly or indirectly affect ownership of control of companies and have the power to impose penalties.

It is important to note the difference on how Takeovers or Mergers & Acquisitions as per Capital Markets Authority, Competition Authority and Sector Specific Competition Regulators. The later refers to Communication Authority, Energy Regulatory Commission, among others.

"Squeeze in" and *"Sell Out"*

These provisions, in reference to squeeze in, allow the offeror to acquire the shares of a minority shareholder who is not agreeable to the takeover bid while the sell out provisions allow the minority shareholder to sell their share to the majority shareholders of the company. However, there are regulations guiding on how the *squeeze in* and *sell out* applies.

For instance, as a start, the Companies Act provides that for SI or SO to take effect, the offeror must acquire at least 90 percent in value of the shares or a given class of shares.

In the event of any challenges, the minority shareholder or offeror can approach the Court to render a decision on manner of acquisition of shares or the disregarding the notice to acquire by the offeror.

partial analysis: The Capital Markets (Takeovers and Mergers) Regulations, 2002

The Takeovers and Mergers Regulations apply to transactions affecting listed companies. Importantly, these regulations apply when a person or group of persons intend to acquire at least 25% of the voting rights. However, the Regulations will not apply if the offeror already holds at least 90% of the voting rights by itself or its associates.

The Regulations apply where a person:

Holds more than 25% shares where by it is 50% less of voting rights and acquires more than 5% voting rights in the company *(should be considered conjunctively).*

Holds at least 50% of the voting shares and acquires addition voting shares *(should be considered conjunctively).*

Acquisition of a company having effective control of a listed company, whether directly or indirectly *(should be considered conjunctively).*

Acquisition of at least 25% of a subsidiary's that contributes at least 50% of the general turnover, in previous 3 years, of the listed company *(should be considered conjunctively).*

There are exemptions that can be allowed, in writing, by the Capital Market Authority (CMA), which include acquisitions concerning strategic investment in a listed company that is struggling with management or any technical support; the buy-out is by majority of employees; restructuring of the company's through a scheme approved by CMA; a company in financial distress; acquisition of effective control arising out of disposal of pledged securities; maintenance of domestic shareholding; and any other reasonable terms approved by CMA.

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One is not required to comply with the Regulations, if at the commencement of the Regulations, the person already holds at least 25% voting shares of a listed company; or at least 25% voting rights in an issuer applying for listing.

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The offeror, within 24 hours of deciding to acquire a company or 24 hours prior to make such resolution, will make communication to the relevant target and bodies regulating that entity.

The offeree, upon receipt of that information, will communicate to the relevant bodies within 24 hours, including two English dailies of national circulation.

The Offeror will within 14 days, upon making communication of the intention, submit its documents to CMA for approval, which will be done within 30 days if all terms are fully complied with. Thereafter, the offeror will serve the approved documents to the offeree in 5 days.

Upon receipt of the offeror's approved documents, the offeree will, within 14 days, circulate the documents to the concerned shareholders – inclusive of the independent adviser circular.

The acceptance period shall be within 30 days service of the approved takeover documents by the offeror – the number of days can be varied.

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The offer will highlight its condition precedent as per the Regulations.

There will be an Independent Adviser (*investment banker or stockbroker licensed by CMA*) appointed by the Board of Directors of the offeree to confirm the pros and cons of the offer. However, in the event of reverse takeover, the offeror will equally need to appoint an Independent Adviser.

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The offeror can withdraw a takeover offer but subject to the approval of CMA which can be due to offeree's shareholders rejecting the offer; failure to obtain other approvals from various regulators; events occur that make it hard for the parties to meet their obligations; or a counter offer is accepted by the offeror.

Practice Notes

As previously highlighted, M&A is an area of law that generally falls within the realm of the Capital Markets Authority and Competition Authority, the former addressing listed companies, or such entities regulated by CMA and the later addresses entities that are not listed.

However, in certain instances, an entity that is not listed will be subject to CMA too and *vice versa.*

In certain circumstances, other regulators, regarded as Sector Specific Competition Regulators will be required in various takeovers or transactions. Therefore, it is imperative to understand the operations of an entity and the law or regulations impacting such an entity prior to effecting takeover processes as under the CMA and or CAK.

Depending on the transaction some of the regulators come before the transaction takes effect fully (***ex-ante***) while the other takes place once the transaction is complete (***post-ante***).

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partial analysis: s 42 of the Competition Act No. 10 of 2010

Introduction

Mergers & Acquisitions, as addressed under Part XXIV of the Companies Act, leans towards listed companies and or entities that are regulated by CMA. It is further pointed out that the jurisdiction of CMA can intertwine with that of other Authorities such as Competition Authority of Kenya (CAK).

Under this part, we are addressing CAK as an entity that heavily regulates M&A between entities that are not listed.

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M&A takes place when an entity establishes control of another entity, directly or indirectly. The Act makes it possible for CAK to extend the definition of what amounts to M&A through its Rules.

The law provides that M&A includes purchase or lease of shares, acquisition of an interest or purchase of assets of an entity; acquisition of controlling interest in a part of a business or conglomerate that can be operated independently; a business under receivership whether in or outside of Kenya; any foreign entity that has controlling interest in a subsidiary in Kenya; vertical integration; exchange of shares that results to substantial change of structure or ownership; or amalgamation, takeover or any of the combination.

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Among the factors highlighted under s 41 (3) of the Competition Act addressing issues of control, the same is further provided for under Companies Act, 2015.

Any payment made in full will be deemed implementation of M&A, however, where the down payment is less that 25% of the consideration, it will not be deemed as M&A yet, as per the Act.

Violation of the Laws and Regulations can result to a conviction to imprisonment for a term not exceeding 5 years or a fine not exceeding KES. 10M or both.

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Parties intending to engage in M&A will notify CAK, thereafter, CAK has a window of 30 days to request for more information as it deems fit.

CAK will have 60 days to render its decision. However, on the first 60 days upon receipt of the documents, CAK can request for more information. In the event of complexities, in reference to time frame, CAK can extend the period but shall not exceed 60 days.

In that regard, the number of days an M&A can be completed, without consideration to any arising challenges, is 90 days while the maximum is 150 days. However, it can be less than 90 days if CAK is not preoccupied.

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Case Brief: ***Albatross Aviation Limited & another v Phoenix of East Africa Assurance Company Limited* [2018] eKLR**

Introduction

Alternative Dispute Resolution (ADR) is considered as one of the vital and timely method for addressing any dispute between parties. To make such provisions quite effective, parties provide various terms in the contract on what method to utilise when a dispute arises.

ADR Clauses can indicate that the Arbitrator's decision will be final or followed by means like MEDARB or ARBMED; or there will be room for appeal to the Court in the event a party or parties is/are not satisfied with the decision of the preferred ADR.

Currently, there is an ongoing debate on whether ADR can be sustained when the matter at hand violates Public Policy of a given country. However, regardless of ADR Clause providing that a certain ADR method is final, there is chance of appeal when the formation of the ADR Panel or the manner in which decision was reached is marred with various factors including corruption.

In this case, we are relying on it to address on when does the 30-day period start to run to allow a party to appeal an Arbitration Decision at the High Court of Kenya. In answering the question, it will highlight when the jurisdiction of the Arbitrator comes to an end.

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In ***Albatross Aviation Limited & another v Phoenix of East Africa Assurance Company Limited (supra)*** the Court, among other issues, was faced with the question on when a party should file an appeal against an Arbitral award.

The Arbitration Act provides that the timelines concerning appeal will be addressed by the rules of the Court of Appeal or High Court. In this case, since the High Court is the forum for appeal, the Civil Procedure Act was relied on by the Court to address the posed question.

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The Sole Arbitrator upon rendering his decision by dismissing the Appellants claim on July 27, 2017, the Appellants were dissatisfied and decided to seek Additional Award – review – from the Arbitral Tribunal as per s 34 (4) of the Arbitration Act on September 18, 2017. The Sole Arbitrator rendered its further decision by dismissing the Appellants claim on December 20, 2017.

The Appellants still being dissatisfied, decided to file an appeal in January 15, 2018 before the High Court pursuant to s 39 of the Arbitration Act.

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The Court decided that by seeking review, ideally Additional Award, it means the matter was still under the Jurisdiction of the Arbitrator. As a result, until when the Arbitrator renders its decision concerning the Additional Award, the matter could not be appealed to the High Court, within 30 days as per s 79G of the Civil Procedure Act.

The Court noted that the time limit to file an appeal should start running when a party receives the Arbitration Award, or if reviewed, the Additional Award.

Practice Notes

Since an appeal majorly focuses on the pleadings before the superior/tribunal/subordinate forum, it is imperative that a party exercises review where necessary for purposes of widening its scope of argument at the appellate Court, should an appeal be an option to go for.

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