



**Ngong Matonyok Wholesalers Limited & another v Kenya Breweries Limited & another;  
Bia Tosha Distributors Limited (Interested Party) (Miscellaneous Application E127 of 2023)  
[2024] KEHC 16189 (KLR) (Commercial and Tax) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16189 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E127 OF 2023  
JWW MONG'ARE, J  
DECEMBER 19, 2024**

**BETWEEN**

**NGONG MATONYOK WHOLESALERS LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**MANARA LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KENYA BREWERIES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**UDV (KENYA) LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**BIA TOSHA DISTRIBUTORS LIMITED ..... INTERESTED PARTY**

**RULING**

**Introduction and Background**

1. The Plaintiffs are in the business of wholesaling and distributing alcoholic beverages and they have been distributors of the Defendants' products having entered into various Distributorship Agreements ("the Agreements") with them as from 2019. As per the Agreements, the Plaintiffs were required to market and distribute the Defendants' products in designated regions, that is, Kiserian, Ngong, Wangige, Magadi, Kitengela, Kajiado, Athi River, Machakos, Bissil, Namanga and Maili Tisa ("the subject regions")
2. By a Complaint dated 21<sup>st</sup> February 2023, the Plaintiffs filed the present suit stating that they are apprehensive that there is an imminent plan to repudiate the Agreements by granting a third-party exclusive distributorship right over the subject regions. That the intended repudiation is a fundamental



breach and repudiation of the Agreements and that unless the court intervenes, the Defendants will proceed with the plan to grant a third party exclusive distributorship rights over the subject regions thereby interfering with or hindering the Plaintiffs' contractual rights. The Plaintiffs aver that this will occasion them irreparable loss, harm and damage and will have the domino effect of triggering breaches of countless contracts between the Plaintiffs and numerous third parties, exposing the Plaintiffs to a floodgate of litigation arising from the said breaches and exposing the Plaintiffs to the risks of forced bankruptcy, insolvency, winding up and wastage of lifelong multi-billion investments.

3. As such, the Plaintiffs seek injunctive orders restraining the Defendants from interfering with their rights to distribute the Defendants' products in the subject regions covered by the Agreements, orders directing the Defendants to indemnify and keep the Plaintiffs fully indemnified for all such third-party contract breach claims and losses as may arise from or be directly attributable to the grant of exclusive distributorship rights to third parties over the subject regions. Together with the Plaintiffs, the Plaintiffs have also filed an evenly dated application seeking an interlocutory injunction restraining the Defendants and their respective servants, agents, privies and proxies from terminating, suspending or in any way howsoever interfering with the Plaintiffs' rights under Agreements. This application is supported by the affidavit sworn on 21<sup>st</sup> February 2023 by the 2<sup>nd</sup> Plaintiff's director, Joseph William Nduva Muli.
4. The application has been responded to by the 1<sup>st</sup> Defendant through the replying affidavit of its Group Legal Director, Nadida Rowlands, sworn on 5<sup>th</sup> March 2023; by the 2<sup>nd</sup> Defendant through the replying affidavit of its Legal Manager, Karen Mate-gitonga sworn on 12<sup>th</sup> May 2023 and by the Interested Party ("Bia Tosha") through the replying affidavit of its Managing Director, Anne-marie Burugu, sworn on 9<sup>th</sup> May 2023. The application was also canvassed by way of written submissions which are on record. As the application mirrors the grounds outlined in the Plaintiffs' that I have summarized above, I will not rehash the same.
5. The Defendants, in response, did not dispute the Agreements between itself and the Plaintiffs. However, they state that Bia Tosha, who is also a distributor of the Defendants' products, initiated proceedings in Petition No. 249 of 2016 before the Court, claiming certain exclusive distributorship rights over specific territories. On 29<sup>th</sup> June 2016 the court, in *Bia Tosha Distributors Limited v Kenya Breweries Limited, UDV (Kenya) Limited, East African Breweries Limited & Diageo PLC* [2016] KEHC 4484 (KLR), issued conservatory orders preserving Bia Tosha's territory which includes the areas: Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong road, Hurlingham, Kawangware, Satellite, Dagoretti, UDV A, UDV B and UDV C ("the conservatory orders")
6. Aggrieved, the Defendants appealed the court's ruling to the Court of Appeal where in a judgment dated 10<sup>th</sup> July 2020 (*Kenya Breweries Limited & UDV (Kenya) Limited v Bia Tosha Limited, Cogno Ventures Limited, East African Breweries Limited, Diageo PLC, Kamabuba Limited & Four Winds Trading Company Limited* [2020] KECA 522 (KLR)) the conservatory orders were set aside and the dispute was to be referred to arbitration. As Bia Tosha was now the dissatisfied party, it appealed the decision to the Supreme Court where the apex court, in its judgment issued on 17<sup>th</sup> February 2023 (*Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* [2023] KESC 14 (KLR)) reinstated conservatory orders and directed the court in Petition No. 249 of 2016 to consider the consequences of any disobedience of those orders. The matter was also remitted to the Court for disposal of the main petition.
7. The Defendants thus urge that the result of the foregoing is that Bia Tosha holds an order allowing it to continue distributing the Defendants' products in some of the subject regions and the Defendants



are awaiting the outcome of those proceedings. They state that as per the Agreements, the Plaintiffs also have rights to distribute the Defendants' products in subject regions over which Bia Tosha now claims exclusive distribution rights. That both the Plaintiffs and Bia Tosha hold documents that allow them to effectively operate within overlapping territories.

8. The Defendants claims that while they do not agree with Bia Tosha's claim of exclusivity over the subject regions, they made their business partners, including the Plaintiffs, aware of the Supreme Court judgment and upon receiving the notice, the Plaintiffs filed the present suit and application, seeking protection of their interests and especially to prevent any interference with the Agreements. That when served with the pleadings by the Plaintiffs, the Defendants informed Bia Tosha of the Plaintiffs' legal action, ensuring transparency and communication among the involved parties. The Defendants further state pursuant to an application for clarification filed before the Supreme Court, on 26<sup>th</sup> May 2023, the Supreme Court delivered its ruling in which it made a number of clarifications. Importantly, that the Plaintiffs in these proceedings were enjoined in the application for clarification before the Supreme Court by Bia Tosha and in the clarification ruling, the Supreme Court expressly held that this Court has the jurisdiction to hear and determine the issues raised by the Plaintiffs in this suit.
9. The Defendants therefore restate that as it stands, both the Plaintiffs and the Bia Tosha are asserting their rights to distribute the Defendants' products in the disputed territories and that while Bia Tosha is claiming exclusive rights over certain areas, the Plaintiffs only seek to protect their existing rights pursuant to valid and pre-existing contracts with the Defendants. The Defendants thus state that they are committed to respecting the rights of all its distributors and to complying with all lawful Court orders.
10. On its part, Bia Tosha depones that on the morning of 23<sup>rd</sup> February 2023, there were newspaper reports to effect that the Plaintiffs had sued and obtained orders from the court barring the Defendants from terminating the Agreements and thereby continued to disobey the orders of the Supreme Court. Bia Tosha accuses the Plaintiffs of deliberate misrepresentation as the application has no mention of the Supreme Court judgment and yet they were aware of the same through the Defendants and they were to immediately cease their operations in Bia Tosha's territory.
11. Bia Tosha urges that the Agreements between the Plaintiffs and the Defendants were entered into in defiance of existing orders as confirmed by the Supreme Court judgment. That this court cannot issue an injunction in respect of a decision of the Supreme Court and as such, any interim orders ought to be vacated and the judgment of the Supreme Court honoured in its entirety.

### **Analysis and Determination**

12. I have carefully gone through the application, the responses and the submissions. The main issue for the court's determination is whether an injunction should issue in favour of the Plaintiffs restraining the Defendants from terminating, suspending or in any way howsoever interfering with the Plaintiffs' rights under the Agreements. It is common ground that for the Plaintiffs to obtain such an order, they ought to demonstrate a prima facie case with a probability of success, they also ought to demonstrate that failure to obtain an injunction will cause them irreparable harm that cannot be ameliorated by an award of damages and if the court is unsure, that the balance of convenience is in the Plaintiffs' favour (see *Giella v Cassman Brown & Co., Ltd.* [1973] E.A. 358)]. If the Plaintiffs are unable to demonstrate a prima facie case, then the court will not determine the other grounds, however if a prima facie case is established, then the other grounds will be considered (see [\*Nguruman Limited v Jan Bonde Nielsen & 2 others\*](#) [2013] KECA 347 (KLR))



13. The Agreements between the Plaintiffs and the Defendants are common ground. The Plaintiffs stated and submit that as per the letters of the Defendants dated 18<sup>th</sup> February 2023 and 20<sup>th</sup> February 2023, there is imminent risk of infringement of their rights embodied in the Agreements. In the said letters, the Defendants advised the Plaintiffs that the Supreme Court Judgement in *Bia Tosha Distributors Limited v Kenya Breweries Limited*(*supra*) could affect or impact the Plaintiffs as the said judgment had the effect of granting Bia Tosha exclusive distributorship rights over the indicated territories to the exclusion of all other distributors and that the 1<sup>st</sup> Defendant was now required to distribute its products in that territory only through Bia Tosha. Going through the Supreme Court’s judgement, I am inclined to agree with this position by the Defendants. At para. 126 of the Judgement, the apex court stated in part that “...we can deduce and establish from the declaration by the superior courts below that there existed continuing business arrangement with the 1<sup>st</sup> and 2<sup>nd</sup> respondents as at February 2, 2016 which the High Court preserved. The status quo orders by the Court of Appeal did not vary this position by the High Court”. This means that the conservatory orders were never varied from the time they were issued in 2016 up to the time of the Supreme Court’s judgment in February 2023 and there is no indication that the said orders have ever been set aside. The Defendants were well and truly aware of this position but still went ahead to enter into the Agreements with the Plaintiffs which was in contravention of the conservatory orders, a fact that was confirmed by the Supreme Court in its judgment where they expressly stated that the Defendants were in contempt of the conservatory orders as follows:

127. It is ingenious for the respondents to now turnaround and raise expiry of contract that was never the subject of the court proceedings and determination. Even if that were to be the case, it is absurd that the 1st, 4th and 5th respondents would on one hand invoke the expiry of the contract to justify noncompliance with the court orders while at the same time relying on the same ‘expired’ contract to refer the matter to the arbitrator. One cannot simultaneously simply approbate and reprobate. Moreover, the order of the Court of Appeal affirms that as at August 11, 2016, when the contract relied upon by the respondents had ostensibly expired, the parties were still trading. This is the trading arrangement that both superior courts below preserved during the pendency of the hearing.
128. This, in our view, points to the fact that there was breach of the status quo orders. This was manifest in the 1st and 2nd respondents’ attempt to terminate the contract with the respondent or otherwise interfere with the said routes as revealed in the position on record taken by the said respondents. In the replying affidavit sworn by Nadida Rowlands in response to the appellant’s application dated August 23, 2016 the 1st and 2nd respondents state that the routes allocated under the two-month agreement were: Hurlingham, Industrial Area, Kenyatta, Langata, Nairobi West, South B and Upper Hill. In the letter dated August 5, 2016 the 1st and 2nd respondents’ advocates request for evidence from the appellant of distribution routes as at February 2, 2006 was in our view mischievous in view of their long-standing partnership. This by extension amounted to contempt of court on the part of the 1st and 2nd respondents and prompted the applications to court by the appellant.
129. Having overturned the Court of Appeal judgment and having established that there was contempt of court, the same should not go unpunished.



14. As Bia Tosha had always had its routes protected by the conservatory orders and the Supreme Court having found that it was contemptuous for the Defendants try and vary their agreements with Bia Tosha on the said routes, I find that on a prima face basis, it was improper for the Defendants to enter into the Agreements with the Plaintiffs over the same routes that had been exclusively protected in favour of Bia Tosha. The court cannot therefore injunct the Defendants from interfering with the Agreements in the presence of the conservatory orders preserving the exclusivity of Bia Tosha's routes. In any event, it is my finding that if at all the Agreements entered into by the Defendants and the Plaintiffs caused any loss to the latter, then the same can be ameliorated by an award of damages. It is also my finding that since Bia Tosha has always had the conservatory orders protecting its territory, the balance of convenience tilts in favour of not granting the injunction as the Defendants can no longer proceed with enforcing and implementing the Agreements with the Plaintiffs, lest they be cited for further contempt.
15. In summary, I find and hold that the Plaintiffs have failed to demonstrate a prima facie case with a probability of success and the odds are stacked against them from obtaining injunctive orders. In light of the dicta in the Nguruman Case (Supra), this marks the end of their quest for the said orders.

### **Conclusion and Disposition**

16. For the above reasons, I find that the Plaintiffs' Notice of Motion dated 21<sup>st</sup> February 2023 is not merited and the same is hereby dismissed with costs. The interim orders in place are hereby vacated and discharged. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 19<sup>TH</sup> DAY OF DECEMBER 2024**

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**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Mr. Ondieki Danstan holding brief for Dr. Thiankolu for the Plaintiff.

Ms. Kyalo holding brief for Mr. Kamau Karori, SC for the 1<sup>st</sup> Defendant/Respondent.

Mr. Ochieng William and Ms. Arora holding brief for Oraro SC for the 2<sup>nd</sup> Respondent.

Mr. Omondi for the Interested Party.

Amos - Court Assistant

