



**Europa Healthcare Limited v IND-Swift Limited; Pharmacy
and Poisons Board (Interested Party) (Civil Case E189 of 2022)
[2023] KEHC 990 (KLR) (Commercial and Tax) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 990 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E189 OF 2022
DAS MAJANJA, J
FEBRUARY 17, 2023**

BETWEEN

EUROPA HEALTHCARE LIMITED PLAINTIFF

AND

IND-SWIFT LIMITED DEFENDANT

AND

PHARMACY AND POISONS BOARD INTERESTED PARTY

RULING

1. Before the court for determination is the Plaintiff's application dated May 30, 2022, *inter alia*, under section 7 of the *Arbitration Act* and Order 40 Rule 1 of the *Civil Procedure Rules*. In the application, the Plaintiff seeks a raft of orders, being in the nature of injunctions, to restrain the Defendant from terminating and/or purporting to terminate the exclusive distribution agreement dated January 1, 2020 ("the Agreement") pending referral of the matter to arbitration. In addition to the main prayers for injunction, the Plaintiffs seeks other ancillary orders restraining the Defendant from effecting removal of its Local Technical Representative ("LTR"), from appointing any other distributor for the distribution of its pharmaceutical products as set out in the Agreement, from generally breaching the Agreement and from making any false or defamatory statements with respect to the Plaintiff.
2. The application is supported by the affidavit of the Plaintiff's Chief Executive Officer, Anantharaman Nagarajan, sworn on May 30, 2022. It is opposed by the Defendant through Grounds of Opposition dated June 3, 2022 and the replying affidavit of its Legal Executive, Ishan Jain, sworn on September 27, 2022. Both parties filed written submissions in support of their respective positions.



3. The Plaintiff's case as set out in the Plaint dated May 30, 2022 is that the parties entered into the Agreement whereby the Defendant appointed it the exclusive distributor and LTR for a period of 5 years. Under the Agreement, the Plaintiff was allowed to use the Defendant's registration and trademarks owned by the Defendant for marketing, selling and distributing the Defendant's pharmaceutical formulations in Kenya. In order to fulfil its obligations, the Plaintiff states that it invested substantial sums of money in marketing the Defendant's products. It also appointed a foreign Country Manager for whom it obtained a work permit and paid substantial benefits and emoluments.
4. The gravamen of the Plaintiff's case is that by a letter dated August 7, 2021 emailed to it on August 9, 2021, the Defendant without any justification purported to issue a Notice of Termination of the Agreement under Article 4.2 of the Agreement with immediate effect and demand for payment of outstanding invoices. It accused the Plaintiff of sub-standard performance, consistent delay in payment and overstocking of inventory. The Plaintiff contests the Notice of Termination and has therefore filed suit seeking interim measures of protection under section 7 of the *Arbitration Act* pending reference of the matter to arbitration in line with Article 16.2 of the Agreement.
5. The Defendant filed its Statement of Defence dated September 28, 2022 in which it admits that it terminated the Agreement by its letter dated August 7, 2021 in the manner contemplated under the said Agreement. It accepts that the matter should be referred to arbitration as provided for in the Agreement as it has already invoked the dispute resolution clause. In addition, it avers that since the juridical seat of arbitration under the Agreement is Chandigarh, India, the matter should be referred to India for resolution under Indian law.
6. I have considered the pleadings and submissions and the only issue for determination is whether the court should grant interim measures of protection in the nature of injunction pending reference of the matter to arbitration under section 7 of the *Arbitration Act*. Having considered the record, it is clear that the court has already dealt with the application by the ruling dated June 6, 2022, where Okwany J, stated as follows:

I have carefully considered the rival arguments presented by the parties respective counsel over the granting of interim orders under s. 7 of the *Arbitration Act* to preserve the subject matter of the intended arbitration. According to the Respondent their Agreement with the Applicant was terminated pursuant to the notice dated August 7, 2021. The Applicant, on its part, maintained that the said notice of August 7, 2021 is invalid as it does not comply with the terms of the contract. The applicant seeks interim orders of this court to restrain the respondent from terminating the contract. My findings is that strictly speaking the interim orders sought in the application will have the effect of tying the Respondent down to an agreement which it had terminated way back in August 2021.

My finding is that at this point in time, the applicant can still pursue it rights under the said contract including the right to damages for unlawful termination without necessarily saddling the respondent to a contract that it no longer wishes to continue with.

For the above reasons, I am not satisfied that the applicant has made out a case for the granting of the interim orders sought.

7. Although the learned Judge thereafter fixed the Plaintiff's application dated May 30, 2022 for interparties hearing, I do not see any reason to depart from the aforesaid findings as it is consistent the



principles outlined in leading case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* Civil Application No Nai 327 of 2009 [2010] eKLR where Nyamu JA., observed as follows;

Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-

1. The existence of an arbitration agreement.
 2. Whether the subject matter of arbitration is under threat.
 3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.
 4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties.
8. In line with the principles outlined above, the parties are agreed that there is in existence an arbitration clause in the Agreement. It is also not in dispute that the Agreement between the parties has been terminated and was indeed terminated in August 2021 which is about 1 year 6 months ago. Under Article 15.1 of the Agreement all rights of granted to the Distributor under the Agreement shall cease. It also provides that the exclusivity agreement together with the rights to registration and trademarks with the Distributor shall cease and the Principal, the Defendant in this case, is entitled to appoint another distributor or any other third party to market, sell or distribute it products. In the circumstances, the court cannot grant an injunction contrary to the express terms of the Agreement. In addition, there are no special circumstances that would warrant the court granting relief particularly in view of the time that has lapsed since the Agreement was terminated. Ultimately whether and to what extent the Plaintiff will be entitled to damages and other reliefs will be determined by the arbitral tribunal.
9. For the reasons I have set out, I must come to the conclusion that the application dated May 30, 2022 lacks merit and is dismissed with costs to the Defendant.

DATED and DELIVERED at NAIROBI this 17th day of FEBRUARY 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Kamau instructed by Anjarwalla and Khanna LLP Advocates for the Plaintiff.

Mr Kipkorir instructed by Muturi S. K. and Company Advocates for the Defendant.

