



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CASE NO. E471 OF 2019

ALEXANDER MUGO MTETU.....1ST APPLICANT
JACOB WAMITI 2ND APPLICANT
PHASITY WANJIRU WACHIRA3RD APPLICANT
SAMUEL KAMAU ELIUD.....4TH APPLICANT
CATHERINE WANJIRU GATERI.....5TH APPLICANT
HERMAN MWAURA SAMMY.....6TH APPLICANT

VERSUS

KENYA BREWERIS LIMITED.....1ST RESPONDENT
EAST AFRICAN BREWARIES LIMITED2ND RESPONDENT

COMPETITION AUTHORITY

OF KENYA 3RD RESPONDENT
INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT
ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. By a plaint dated 23/12/2019, the plaintiffs sued the defendants and alleged that the 1st and 2nd defendant were dominant under takings in beer industry in Kenya.
2. That the said defendants had engaged in actions of buying bottles which have a universal shape and embossing them with their unique initials with a view of limiting production and market access of other beer producers who use the same shape of universal bottles for their products.
3. The plaintiffs further alleged that the defendants had caused police officers to harass, intimidate and arrest their workers for selling Keroche Breweries Ltd beer which is in bottles with universal shape thereby causing them loss and damage.
4. As a result, the plaintiff prayed for a raft of declarations, including, that the 1st and 2nd defendant were a dominant undertaking in Kenya; that the said defendants had abused their said position and therefore liable to be punished under the law; that the 3rd, 4th and 5th defendant had jointly breached their legal duty by failing to remedy the actions of the 1st and 2nd defendant. They further prayed for an injunction to restrain further harassment and damages.
5. Together with the plaint, the plaintiffs filed a Motion on Notice of even date wherein they prayed for injunctive orders against the

defendants to refrain them from abusing their dominant positions and from embossing any beer bottle with any exclusive mark and/or unique initials until the suit is determined.

6. This matter progressed and several rulings were issued. On 16/11/2020, the matter came up for directions before me and I gave detailed directions in preparation for the hearing. This and another matter, which **Mr. Karori** advocate for the 1st and 2nd defendant indicated is related to this one, were then fixed for hearing on 3rd and 5th May, 2021. The Court then fixed the matter for mention on 20/1/2021 for compliance.

7. On said 20/1/2021, **Mr. Walukwe**, Advocate for the 3rd defendant insisted that he needed to be heard on his client's Preliminary Objection dated 4/3/2020. The Court then directed the parties to argue out the same by way of written submission.

8. The parties filed their respective submissions which the Court has considered. This then is the ruling on that preliminary objection.

9. The preliminary objection was directed at both the Motion dated 23/12/2019 and the plaint. It was to the effect that; both the application and plaint were filed prematurely before exhausting the statutory options provided in the **Competition Act (No. 12 of 2010)**. That consequently, this court has no jurisdiction to hear and determine the current proceedings before the statutory avenues of dispute resolution provided for in law are exhausted.

10. It was the 3rd defendant's submission that, on account of the provisions of the **Competition Act (No. 12 of 2020) ("the Act")**, this Court lacks jurisdiction to hear and determine the suit before the statutorily prescribed avenues of dispute resolution have been exhausted.

11. That where there is an alternative remedy provided by an Act of Parliament, such as in this case, a Court ought to ensure that the dispute is resolved in accordance with the relevant statute. This in particular, is applicable where the Court's jurisdiction is prescribed in the statute as being appellate in nature.

12. According to the 3rd defendant, the dispute before Court is a complaint against the 1st and 2nd defendant's alleged dominant position and their abuse of the same. That the 3rd defendant's inclusion in the suit was solely because of its alleged torpor in remedying the alleged abuse.

13. In the premises, the 3rd defendant submitted that, the issue and remedy of abuse of dominant position is well legislated in the Act in **sections 31 through to 36 and section 40**. That the 3rd defendant was better placed to impartially investigate the complaint. That if the suit is dismissed, there would be no prejudice to be suffered as the plaintiffs have recourse to the 3rd defendant, the Tribunal then back to this Court.

14. That it is against public policy for litigants to by-pass the 3rd defendant and Tribunal which are established at the tax payer's expense, and directly invoke the jurisdiction of this Court in matters that are squarely within the purview of the said state organs.

15. In rebuttal, the plaintiffs submitted that the nature and circumstances of this case warranted the application of the exception under **section 9(4) of the Fair Administrative Actions Act No. 4 of 2015**.

16. That the fact of the 3rd defendant, upon whom the duty of dispute resolution lies, is party to the dispute is in itself an exceptional circumstance that warrant the invocation of the jurisdiction of this Court under **section 9(4) of the Fair Administrative Actions Act No. 4 of 2015**. That it is also an exceptional circumstance that the Authority handled the issue with a careless abandon.

17. The plaintiffs further submitted that they had filed a formal complaint with the 3rd defendant and relied on a document referenced; *'Memorandum on the Request for Statement of Monopolistic tendencies by the East African Breweries Limited (EABL) in beer packaging issued by the Competition Authority of Kenya on 16th November 2020.'*

18. That in any event, the 3rd defendant had failed to conduct fully, its process under **section 31 to 36 of the Act** to its logical conclusion. Consequently, the jurisdiction of the 3rd defendant could not be invoked as there was no decision to appeal from. In the premises, the plaintiff's had no other forum to seek redress from other than this Court.

19. The Court has carefully considered the record, the depositions and the submissions and authorities relied on by Learned Counsel.

20. The 3rd defendant is established under **section 7 of the Act**. Its functions are set out in **section 9 of the Act**. One of them is to receive and investigate complaints from legal or natural persons and consumer bodies.

21. **Part III of the Act** provides for Restrictive Trade Practices. In particular, **Section 24** provides for abuse of dominant position and abuse of buyer power. **Section 31** empowers the Authority to carry out investigations on its own initiative or upon receipt of a complaint, into any conduct which is alleged to constitute an infringement of

a) prohibitions relating to restrictive trade practices,

b) prohibitions relating to abuse of dominance, or

c) Prohibitions relating to abuse of buyer power

22. **Sections 31 - 40 of the Act** provide an elaborate procedure to be followed from the moment once the Authority receives a complaint or lodges an investigation on its own initiative. **Section 35** specifically provides for oral representations (hearing) if need be, and gives an opportunity for parties to have advocates at the hearing should they require assistance.

23. **Section 36** provides for the various measures that the Authority may take after investigations which include;

- a) declare the conduct which is the subject matter of the Authority's investigation, to constitute an infringement of the prohibitions contained in **sections A, B or C** of that part;
- b) restrain the undertaking or undertakings from engaging in that conduct;
- c) direct any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof,
- d) impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertakings in question, or
- e) grant any other appropriate relief.

24. **Section 37 of the Act** provides that the 3rd defendant is empowered to grant interim relief for the purpose of preventing serious, irreparable damage to any person, and protecting public interest. **Sections 40 and 48 of the Act** allow any person aggrieved with the decision of the 3rd defendant to appeal against such decision to the **Competition Tribunal** established under **section 71**. An appeal therefrom lies to this Court by virtue of Act.

25. From the foregoing, it is evident that the Act provides a very elaborate process to be followed should a person have a complaint on infringement of any of the prohibitions under the Act. Indeed, the Act provides for various reliefs to be granted to an aggrieved party, including interim reliefs in urgent cases. There is also a very elaborate appellate system in place under the Act.

26. The issues raised in the application and plaint, which include abuse of dominance, squarely fall within the mandate of the 3rd defendant. In **Okiya Omtatah Okoiti & Another vs Kenya Power and Lightning Company Limited (KPLC) & 4 others [2020] Eklr**, it was held:-

“It is trite that where procedures and processes exist for resolution of disputes such processes must be exhausted first, before a party can approach court.

...

I am satisfied that in cases under the Competition Act, the relevant body that is mandated to deal with complaints and investigate restrictive trade practices is the Competition Authority of Kenya. It is a port of first instance in complaints of breaches of its provisions”.

25. In **Geoffrey Muthinja Kabiru & 2 others vs Samuel Munga Henry & 1756 others (2015) Eklr**, the Court of Appeal held: -

“It is plain to see then, that the Church did have in place a rather elaborate system for dispute resolution which the applicants in the various suits ought to have had recourse to, and exhausted, before litigating in court. We concur with the learned Judge's categorical finding at paragraph 75 of his judgment thus;

“That though the court has jurisdiction to deal with the applicants' complaints it is premature as they did not strictly follow the Church Constitution, providing for dispute resolution mechanism.”

We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution”.

27. The applicants submitted that this suit raised exceptional circumstances and invoked the application of **section 9(4) of the Fair Administrative Actions Act No. 4 of 2015**. **Section 9 of that Act** provides the procedure for Judicial Review, which is not the case in this suit. In this regard, that provision is not applicable in the circumstances of this suit.

28. **Section 9(4) of that Act** provides: -

“Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice”.

29. There is an obligation under that sub – section for an applicant who wishes to be exempted from following the alternative dispute resolution to apply to this Court for exemption. There was no such application in this matter.

30. The applicants submitted that the 3rd defendant was slow, or failed to act upon their alleged complaint. There was no such evidence on record. The document relied on showed that the complaint was laid after the present proceedings had been commenced. That in deference to the *sub – judice rule*, the 3rd defendant refused to make any findings on its investigations.

31. There is a constitutional imperative that courts should be guided by the principle in **Article 159(2) (c) of the Constitution** that decree the promotion of alternative dispute resolution mechanisms.

32. While I do not hold that this Court does not have jurisdiction to entertain the matter before it, this Court will strictly apply the principle of alternative dispute resolution envisaged in both **Article 159(2) (c) of the Constitution** and the **Competition Act (No. 12 of 2020)**.

33. The reason why the doctrine of exhaustion is held in deference is because of the right to access to justice. First, it promotes alternative dispute resolution mechanisms. Secondly, it reduces the litigation in our courts and thirdly it affords the parties an additional layer of forum where the parties can air their grievances. That expands the right to access to justice.

34. In the present case, under the Competition Act, the expertise of the 3rd Defendant would enable full and professional investigation to be undertaken. The evidence gathered will enable the Court on appeal to make an informed decision unlike where a party directly comes to Court as a first point of call.

35. Accordingly, I uphold the preliminary objection and strike out the application and plaint. I direct that the 3rd defendant continue with the process it had commenced in respect of the complaint touching on the complaint herein and deal with it as per the law provided. Such investigations be concluded within 120 days.

36. Since this was a matter that touched on serious public interest, I will order that each party do bear own costs.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 22nd day of April, 2021.

A. MABEYA, FCI Arb

JUDGE