REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 79 OF 2016

MOHAN MEAKIN (K) LTD...APPLICANT

VERSUS

THE ATTORNEY GENERAL ....RESPONDENT

J U D G E M E N T

1. **MOHAN MEAKIN KENYA LTD** the Plaintiff in this case is a limited liability company duly registered under Companies Act and brought this suit against the Attorney General of Kenya sued for the acts by the then Vice President and Minister for Finance of exempting Kenya Wine Agency Ltd from the provisions of the Restrictive Trade Practices Monopolies and Price Control Act.

2. It is the Plaintiff's case that it carried on the business of distillery of spirits and glass plant for the Kenyan market and that its major competitor in the business of distillery of spirits was Kenya Wines Agency Ltd.

3. It further claims the two competing companies were both subjected to the Restrictive Practices Monopolies and **Price Control Act No. 14 of 1988** (hereinafter to be referred to as the Act for ease of reference) which was enacted by an Act of Parliament in 1988 and became operational on 1st February 1989.

4. The Plaintiff claims that on or about 30th July 1990 despite protests from the Plaintiff the Vice President and Minister of Finance acted ultra vires the Act and exempted Kenya wine Agency Ltd a private enterprise as per the provisions of the **Act (Section 5(b).**

5. The Plaintiff further claim that exemption given to Kenya wine Agency Ltd created serious problems to it as it restricted their markets and could not sell without express permission or consent from Kenya wine Agency which gave the latter sole monopoly in the business upto 25th March 1992 when the Minister for Finance revoked the exemption.

6. The Plaintiff claims against the defendant is that as a result of the Minister's action it suffered and continues to suffer losses which it has quantified at **Kshs.1,464,837,167/-** with the following itemized particulars.

a) Projected sales of the Plaintiff's products for the period;

1st August 1990 to 31st December 1990 as per its feasibility study:- **Kshs. 22, 296.080/-**

Actual sales for the above period - Kshs.8, 432,731.00

Loss of sales Kshs.13,863,351.00

Less expenses directly attributant to lost sales. 9,169,777

Net loss of profit 4,693,574

b) Projected sales of the Plaintiff's products for the period 1st January 1991 to 31st December 1991 according to the aforesaid feasibility study; **Kshs. 60,064,000.00**

Actual sales for above period - Kshs.2,624,357

Loss of sales - Kshs.33,820,943

Less expenses - Kshs. 22,697, 826

Net loss of profit - Kshs.11,123,117

c) Projected sales of plaintiff products for the period 1st January 1992 to 25th March 1995 according to aforesaid feasibility study; - Kshs.16,099,923

Actual sales for above period - Kshs.7,570,617

Loss of sales - Kshs.8,529,306

Less expenses - Kshs.5,683,440

Net loss for the period 1/8/1990 to 25/3/1992 Kshs.18,662,557.

7. The Plaintiff further claims that due to the exemption given by the said Minister for Finance, it faced financial problems forcing it to dispose 16 of its plots in Athi River below their market value and suffered loss of Kshs.199,412,307. The Plaintiff testifying through its Chief Accountant John Kamau Mwangi (PW1) the Plaintiff stated that they received letters from KCB and that is what prompted the company to sell its properties at prices below their fair value. He tabulated the loss as follows:-

i. True market value of 16 plots - 261,934,813

ii. Forced sale value - 62,522,506

Loss suffered - 199,412,307

8. The Plaintiff has pleaded that as a result of the above losses, it was deprived of monies tabulated above and as a result forced to pay extra interests to meet its obligation to financial institutions and suffered loss amounting to **Kshs.36,851,180.**

9. The Plaintiff has further pleaded that had it not lost the amount of monies as calculated above it would have it a surplus of Kshs.78,510,439 which sum in their view would have interests at the rates payable then on 91days Treasury Bills for the period 1st August 1990 to 31st December 2002 which cumulatively amounted to Kshs.1,209,911,167 which amount it now claims from the defendant. In total the plaintiff claims special damages of 1,464,837,137 as set out in its amended plaint dated 30th June 2003. It has also claimed general damages and a declaration by this court the exemption given by the vice president and Minister for Finance exempting Kenya Wine Agency Ltd From the Act and communicated to the Plaintiff vide the Commissioner for monopolies and price commission in a letter dated 30th July 1990is ultra-vires the Minister's powers and therefore null and void. The plaintiff is also praying for costs and interests of

this suit.

10. In its written submissions done through Ms Omondi Ogutu and Associates, the Plaintiff has submitted that it had since 1986 engaged in the business of distillery and glass plant with Kenya wine Agencies Ltd (KWAL) being their biggest competitor and they were both subject to the Act. Section 5 of the Act provides as follows under:-

> ***"The following trade practices are exempted from the provisions of this Act;***
>
> (a) Trade practices which are directly and necessarily associated with the exercise of exclusive or preferential trading privileges conferred on any person by an Act of Parliament or by an agency of the Government acting in accordance with authority conferred on it by an Act of Parliament.
>
> (b) Trade practices which are directly and necessarily associated with the licensing of participants in certain trades and professions by agencies of the Government acting in accordance with authority conferred on them by an Act of Parliament.

11. The Plaintiff contends that the KWAL acted on exemption issued to them under part 5(b) above and threatened agents/distributors in the market from dealing, displaying or selling any commodities manufactured by the Plaintiff and that it further drafted various trade restrictions agreement meant to further frustrate and stall the operations of the plaintiff by demanding that they must be consulted before any product manufactured by the plaintiff is sold in the market.

12. The Plaintiff contends that granting exemption to KWAL was drastic and draconian as it affected its business causing it to suffer financial losses which forced it to reduce workforce to less than a third of its 1500 employees. The plaintiff contends that it had borrowed a loan of Kshs.90,000,000 from financial institutions to set up its business and that it was reparing the same at 19%interest p.a but owing to financial depravity , it was unable to pay that loan forcing it to sell 16 of its plots at forced value causing it to suffer the losses as pleaded above.

13. The Plaintiff contends that it lodged a complaint with the then Vice President and Minister for Finance and the exemption was revolved by the same Minister on 25th March 1992. The plaintiff contends that it suffered substantial losses between the period 30th July 1990 to 25th March 1992 when the exemption was in force. It is on that basis that it seeks general damages, special damages of Kshs.1,464,837,167 (1 billion, four hundred sixty four million, eight hundred thirty seven thousand, one hundred sixty seven) and a declaration that the exemption given to KWAL by the Vice President and Minister for Finance was ultra vires, null and void.

14. The Plaintiff submits that aconsent on liability was entered between it and the defendant and that it has proceeded for formal proof on the damages it seeks. The plaintiff claims that it has tendered evidence which was not challenged by the defendant and that the defence filed did not contain any specific and justified denial on the sums pleaded as special damages.

15. The Plaintiff contends that it produced balance sheet detailing loss, statements of accounts from Development Bank of Kenya and statements of account from KCB Ltd and statement on loss suffered from sale of properties by bank.

16. The plaintiff submits the balance of probabilities shifts in its favour because in its view it incurred special damages as pleaded and the defendant has not rebutted the evidence presented to this court.

17. On general damages, the plaintiff contends that this is a discretionary matter and has urged this court to consider the nature and gravity of the loss incurred. It has cited a decision in ***Daniel Waweru Njoroge & 17 others –vs- AG [2015] eKLR*** that noted that damages must not be inordinately high or too low but should be commensurate to the injury suffered aimed at restoring the victim to his previous position and not aimed at enriching him and that awards in previous matters should be used as a guide though each case depends on its own facts. It has also cited the Court of Appeal decision in ***Obongo & Another –vs-***

Municipal Council of Kisumu (1971) EA 91 where court may take into account the conduct of the defendant in claims for aggravated or exemplary damages.

18. The Plaintiff claims for loss of revenue and business as a result of unfair trade practices and the exemption of KWAL for a period of two years. It claims that the same is akin to a claim for damages for pain and suffering in personal injury litigation and that in ***Edward Akingo Oyugi and 2 others –vs- AG [2019] eKLR*** the court awarded general damages of Kshs.20 million observing that the injury suffered was a result of injury suffered due to discrimination, harassment and inhumane treatment and that the same did not possess tangible physical or financial consequences. It has further cited the decision in ***Koigi Wamwere –vs- AG [2015] eKLR*** where ***the Court of Appeal*** enhanced an award of 2.5 to 12 million observing that an award of damages is not an exact science and no monetary sum shall erase the scarring of the soul and deprivation of dignity. The plaintiff urges this court to consider that the defendant knowingly exceeded his powers and caused frustrations and suffering to the plaintiff for a period of 2 years.

19. The defendant in its amended pleadings avers that the plaintiff's claim on special damages is not maintainable in law, is statute barred as it was pleaded 12 years after filing of the suit. The Attorney General asserts that the plaintiff has no cause of action against him as the Minister in its view had powers under **Section 5(b)** of the Act to exempt KWAL.

20. The defendant denies the particulars of damages as pleaded under paragraph 5 and avers that there were no losses after the Minister revoked the exemption order in early 1992.

21. The defendant further pleads that under the provisions of Section 20 of the Act losses are not recoverable. The defendant has stated that the Plaintiff should have under **Section 20** of the Act appealed the decision of the Minister and having not appealed, his right was extinguished by lapse of time and that this court lacks jurisdiction to entertain this suit. According to the defendant, the Plaintiff has no cause of action as no notice to sue pursuant to **Section 13A** of Government proceedings Act was issued and that the notice issued was in relation to loss of profits as a result of exemption and not a forced sale of properties.

22. This court has considered this suit by looking at both the pleadings and the evidence tendered. The Plaintiff's suit is based on tort which the plaintiff alleges occurred between 1st August 1990 and 31st December 1992 when the Vice President and Minister of Finance issued an exemption to KWAL from the provisions of the Act. Before I consider the proper approach needed to challenge the said Minister's action I find it convenient to deal with the issue of jurisdiction which has been raised in the defence.

23. The issue of jurisdiction of this court to entertain and determine this matter has previously been raised before as per the proceedings in this case. It was raised as a preliminary objection before **Nambuye J** (as she then was) in 1992 and in 1999 before **E.O O'Kubasu J** (as he then was). The basis of P.O (Preliminary Objection) by the defendant was that this court lacked jurisdiction to entertain the suit filed given the provisions of **Sections 20** and **64** of the Act (**Cap 504 Laws of Kenya).** The record of proceedings show that Nambuye J vide a ruling dated 19th May 1992 found that this court had jurisdiction to entertain and determine this matter and THAT she could not refer the matter back to the tribunal. The same issue of jurisdiction cropped up again in 1999 this time before **O'Kubasu J** but the Judge dismissed vide a ruling dated 8th October 1999 the Preliminary Objection on the ground that the matter had been determined by **Nambuye J.**

24. I have looked at the ruling of **Hon. Nambuye J** (as she then was) and IT IS quite clear that her decision was based on the provisions of **Section 64** as read with **Section 20** of the Act.

25. It must however not be lost that the plaintiff in this suit is really challenging the mandate of the Minister of Finance to issue the exemption order to KWAL. In my considered view, the proper way to do so is to apply for a prerogative order either certiorari to quash such decision or prohibition to prohibit the operation of the impugned order by the Minister. This is because a public body, or authority or any of its officials acting in their official capacity and exercising their statutory powers and functions should be

supervised by this court through Judicial Review. In the case of ***Nicholas Njeru –vs- Attorney General & 8 Others [2013] eKLR*** the Court of appeal made the following observations;

> ***"We think the first issue to address is whether the Judge was wrong in finding that the Appellants could only challenge the decision of the Minister by way of Judicial Review. It is well settled principle of law that the High Court is given supervisory powers to check the excess of jurisdiction and compliance with the rule of law by inferior tribunals and other public bodies or persons discharging such public acts. For example an order of certiorari is a quashing order issued by the High Court to quash decision of an inferior court or tribunal public authority or other body which is susceptible to judicial Review."***

The court of appeal then went on to find that though the prayers sought.

> " ***Could have perfectly fitted the bill under Judicial Review as they as they seek to supervise the powers of persons exercising public authority," they "knew of no limit to the powers of the court to grant a declaratory order except such limit as it may in its discretion impose upon itself."***

The court of Appeal in the above decision was sitting on appeal on a decision of the High Court in a case where in that suit it was alleged that the Chief Registrar of Lands unlawfully entered restrictions of some parcels of land in as Adjudication Area in Embu and the restrictions were entered pursuant to a decision by the Minister of Lands. The aggrieved parties filed suit seeking declaratory orders and the question then arose as whether the Minister's action could be challenged or impugned through declaratory suit or by way of Judicial Review Hon. **Karanja J** decided *inter alia* as follows:-

> ***" My considered finding on this issue, therefore, is that this coaurt has no jurisdiction through a declaratory judgment to fault the judgment of Minister which it has otherwise no civil jurisdiction to impugne. The Plaintiffs' missed that chance when they failed to move the court on time on Judicial Review in its "sui generis" jurisdiction."***

26. As observed above the Court of Appeal overturned the above decision and further held as follows:-

> ***" We are not aware of any statutory underpinning that bars parties from seeking reddress by way of declarations save that it must be done according to the set down procedure. We must point out that this case could not only be settled on procedure, there were other issues the Judge considered."***

27. The decision of the Court of Appeal is binding to this court because of doctrine of ***"stare decisis"*** In so far as this court's jurisdiction to give declaratory reliefs against a public authority or its officers are concern. But this suit is somewhat different in character from the above cited decision. I have looked at the provisions of **Section 72** of Restrictive Trade Practices Monopolies and Price Control Act which provide as follows:-

> ***" No legal proceedings shall be instituted in any court against the Minister or Commissioner or any person authorized by the Minister or Commissioner for anything done or intended to be done in good faith under this Act."***

This begs the question, is the Plaintiff proper to institute a suit by way of a plaint against the Minister when the Statute expressly shields the same Minister? I do not think so. Where a statue expressly bars a party from instituting civil proceedings against a public servant such as the above sections provides immunity the only way in my considered view to around that is:-

First, seek for a declaration that the impugned section is unconstitutional for whatever reason and seek for the removal of immunity.

Secondly, and only then can you then sue or seek redress. A court of law cannot overlook a clear provision of the law. If the Minister overshot his mandate or authority the proper way was to invoke the

supervisory powers of this court is through Judicial Review.

28. This court is alive to the fact that a consent order in respect to prayer A in the original plaint was entered with the consent of the defendant. It was on the basis of that consent that the court directed that prayer B was to proceed for hearing. The question then arises if the consent by parties in so far as prayer (a) of the plaint should be binding. Before I address my mind to that question, I will first deal with the contested reliefs sought by the Plaintiff which is general damages as well as special damages.

29. The provisions of Section 4 (2) of the Limitation of Actions Act provide as follows:

> ***" An action founded on tort may not be brought after the end of 3 years from the date on which the cause of action occurred."***

The defendant has pleaded that the Plaintiff's claim on special damages is statute barred as it was pleaded 12 years after filing of the suit. The suit herein was filed on 15th August 1991 and the prayer initially sought were three namely:-

> ***(a) A declaration that the exemption by the Minister of Finance to KWAL from the Act was null and void.***
>
> ***(b) General damages***
>
> ***(c) Costs and interests of the suit.***

As I have noted above the exemption notice was dated 30th July 1990 and it was in operation between 1st August 1990 to 25st March 1992. The cause of action therefore arose in between that period. The plaintiff amended its plaint on 30th June 2003 introducing special damages in paragraph c and interests on special damages in paragraph d thereof. The plaintiff's new claim therefore was brought to court 13 years after the cause of action had arisen and to that extent, I find that the claim of special damages as particularized under paragraph 5A, 5B and 5C of the amended plaint is statue barred. The claim is based on tort as I have observed and the law (Limitation of Actions Act) provides that such claims must be brought before the end of 3 years from the date on which the cause of action occurred.

30. I also agree with the defence plea that the claim on special damages ought to have been included in the notice of Intention to institute civil proceedings against the Government under **Section 13 A** of the Government Proceedings Act. Although that Section was declared unconstitutional in 2008, the declaration cannot be applied retrospectively and in any event the Plaintiff did not seek to have the said section declared unconstitutional in respect of its claim.

31. I must also state that even if I had found the claim on special damages to have been made properly before this court. I would still have hesitated to give the awards sought because of the following reasons;

> (i) It is trite that special damages need not only be specifically pleaded but specifically proved. I am not satisfied by the projections of sales made by the plaintiff is supported by any empirical research that takes into account other socio economic factors. The document authored by Joy Bhatt & Company for example shows that the period between 1988 and 1992 were characterized by fluctuations on the figures of projected sales and the actual sales. In 1988 before the exemption, projected sales were indicated at almost 40 million but actual sales were just under 25 million. There is no supporting documents to show that taxes were paid for the actual sales. In 1989 still in the absence of exemption, projected sales were 46.5 million while actual sales is indicated as 22 million. Again no record of taxes or tax declaration to show that it is true that the actual sales figures are authentic. In 1990 with the exemption in force, they realized Kshs.2 million less in sales than the previous year. In 1991 with the exemption in force actual declared sales was over 26 million which was higher than 1988 and 1989 when the exemption had not been introduced. In 1992 they also had increased sales compared to 1991.

(ii) The projected sales includes the sales of a sister company known as MML which is noted is the distribution company for the plaintiff and it is difficult to know if the projected losses relate to plaintiff or its sister company.

(iii) The period of 1993 onwards after removal of the exemption, shows no records of projected sales for comparison purposes.

(iv) The Plaintiff has not supported his accounts or tabulations and projections with audited accounts supported by tax returns to prove that the figures exhibited are bona fide and a true reflection of the performance of its business in the two environments.

32. I have also noted that the plaintiff has filed a table of interest offered on treasury bills. However the source of that table is unknown and unverified. Besides this, the plaintiff has not shown that prior to 1990, it had made such profits that it decided to invest in treasurer bills and got so much as a result.

33. In regard to the properties that the plaintiff says it was forced to sell, this court finds the claim a bit remote because the title deeds of the 16 properties were not availed. As per a letter by KCB dated 24th July1991 the bank notified the plaintiff that on the properties listed, it could make a maximum offer of Kshs.26,000.000/-. There is no information how the figure of Kshs.62,000,000/- which the properties is said to have fetched was arrived at. Did the properties fetch same prices or different prices depending on their location and sizes. The letter dated 30th January 1989 by BKM Estate Services seems to give a ***"recommended"*** price for plots at Athi River. However the letter does not say how many plots are there and does not mention the descriptions of the properties. The valuation report is therefore unreliable. The document filed and titled ***"losses suffered on transfer of plots to KCB"*** is undated and the basis is not established certainly it is not a valuation report because it has not described the actual properties. The author of that document is also uncertain as it is not indicated and what is really left are mere speculations which I would have found to be short of threshold required for me to make a finding that on a balance of probabilities the plaintiff has proved its claim on special damages.

34. The plaintiff has urged me to find that its case has been proved because of absence of rebuttal by the defence. It is true that when this matter came up for hearing, the defendant was absent despite service. But the absence of a defendant in civil proceedings does not shift the burden of proof or lower the standard of proof.

In the case of ***Gitobu Imanyara & 2 others –vs- AG [2016] eKLR*** the court stated that;

> ***" The fact that the Respondent admitted liability ab initio does not in any way shift the burden of proof from the Appellants. It is a firmly settled procedure that even where a defendant has not denied the claim by filing defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side."***

The plaintiff's claim on special damages herein is based on lost income which they say they expected but due to illegal directive put in place, they suffered massive losses. The claim no doubt is massive and it was upon the plaintiff to set the claim concisely with proof in order to succeed. In ***David Njuguna Ngotho –vs- Family Bank Ltd & Another [2018] eKLR*** the court was faced with similar factors and the court questioned the source of the financial report tabled before it. The court felt that the plaintiff in the matter relied heavily on stock taking and reports which were secondary evidence to original book of accounts. The court said that it was unable to give weight to the evidence of the audited accounts owing to huge figures in the cash flow shown, the plaintiff ought to have been tax payer but no evidence was tabled to show how much tax was paid as a result of the income reflected.

35. The same position obtains in this case. In the case of ***Macharia and Waiguru –vs- Murang'a***

Municipal Council and Another (2014) eKLR and ***Provincial Insurance Co. EA Ltd –vs- Mordekai Mwanga Nandwa (Kisumu Court of Appeal 179 of 1995)***. The court posed the question; ***"How then are these special damages to be proved?***

> ***……………………. a plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before court………….. unless a consent is entered into a specific sum, then it behoves the claiming party to produce evidence to prove the special damages claimed. Submissions as he correctly observed are not evidence. The only way the receipts would have been produced and acted upon by the court would have been by the plaintiff taking the stand producing them on oath or the parties agreeing expressly that they be the basis for special damages. This did not occur."***

This court as I have observed above, based on the evidence tendered and the above decisions, I would have still found that the Plaintiff did not discharge its burden of proof despite having no opposition to challenge this evidence.

In conclusion, this court finds that this suit is unsustainable in law for the

aforestated reasons which can be summarized as follows:-

> i. This suit is incompetent- and bad in law as the Minister of Finance was protected and/or immunized against such action by dint of **Section 72(1)** of the **Act**.
>
> ii. The claim of general damages is unavailable because it barred by operation of **Section 72(2) of the Act.**
>
> iii. The claim on special damages is statutory time barred by dint of **Section 4 of Limitation of Actions Act.**

Alternatively there has also not been proved to the required standard and besides that **Section 13 A** of **Government Proceedings Act** renders the claim incompetent as the statutory notice to sue did not reveal the claim.

In the premises this suit is hereby dismissed but I will not make any order as to costs.

Dated and signed at Nairobi this 30th day of January 2020.

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HON. JUSTICE R. K. LIMO