REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 29 OF 2016

MAXAM LIMITED……..…....…..1ST PLAINTIFF

MODERN LANE LIMITED…….....2ND PLAINTIFF

OLEPASU TANZANIA LIMITED…….…....3RD PLAINTIFF

VERSUS

HEINEKEN EAST AFRICA IMPORT CO. LTD…….....1ST DEFENDANT

HEINEKEN BROUWERIJEN B.V…….....2ND DEFENDANT

HEINEKEN INTERNATIONAL B.V……..…..3RD DEFENDANT

RULING

Introduction

1. There are two Motions before me. One was filed by the Plaintiffs on 12 April 2017 the other by the Defendants on 19 April 2017. They are not cross-applications.

2. The Plaintiffs' application seeks to extend certain interim orders which were issued by this court (Ogolla J) on 21 April 2016 and which by dint of the provisions of Order 40 Rule 6 of the Civil Procedure Rules are alleged to have lapsed on 20 April 2017. These orders restrained the Defendants, inter alia, from terminating the distribution agreement dated 21 May 2013 between the Plaintiff and the 1st Defendant. The distribution agreement was in relation to the distribution of Heineken Lager Beer in Kenya. The orders also restrained the Defendants from appointing any other distributor for the distribution of Heineken Larger Beer in Kenya, Uganda and Tanzania. The orders were on 21 April 2016 stated to subsist until the determination of the suit.

3. The Defendants' application, on the other hand, seeks the court's indulgence through enlargement of time or period within which the Defendants may file an Amended Defence.

4. Both applications were contested.

Arguments

The Plaintiffs submit

5. The Plaintiffs' submissions were effectively that the court has an unfettered discretion to extend the interim orders post the twelve month period. Counsel Mr. P. Nyachoti whilst urging the Plaintiffs' case was clear that the parties had essentially from the inception of their relationship agreed to maintaining the status quo pending the resolution of any dispute between them. Counsel added that the Plaintiffs were always anxious to prosecute their claim but for the delay prompted and occasioned by the Defendants and their counsel. Counsel further pointed out that the delay had also been occasioned by the court process when a reserved ruling took some while to be delivered. Mr. Nyachoti urged the court to allow the application and ensure that the substratum of the case was not defeated.

6. With regard to the Defendants' application, it was the Plaintiffs' submission that the application was *res judicata* as similar applications had been dealt with and duly disposed of previously by the court. Counsel pointed to applications allowed and denied on 16 June 2016 and 17 March 2017 respectively.

The Defendants respond

7. In response to the Plaintiffs' application, Mr. J. Singh, acting for the Defendants, contended that the application had been overtaken by events as the Defendants had since engaged other distributors. Counsel pointed to a Replying Affidavit filed in court on 24 August 2017 wherein counsel as the deponent indexed the various third parties engaged by the Defendants after 31 July 2017 as non-exclusive distributors.

8. Mr. Singh then proceeded to heap blame upon the Plaintiffs' counsel for failing to prosecute the application of 11 April 2017 and further that as the Plaintiffs had now quantified their loss, an order declining to extend the interim orders would not be prejudicial at all to the Plaintiffs.

9. Finally, it was Mr. Singh's contention that as the court had already vacated the interim orders the same could not now be extended and the Plaintiffs' recourse lay in seeking to review the court's orders of 31 July 2017 or appealing against the said order.

10. With regard to the application for amendment of the Defence statement, the Defendants' counsel contended that the application was merited and had never been determined on its merits and or with finality. Mr. Singh pointed to the ruling of 17 March 2017 (Nzioka J) which expressly exhorted the Defendants to seek extension of the time to file the amended Defence statement.

Analysis

11. I have considered both applications as well as the relevant affidavits sworn in support and in opposition to the applications. I have also considered the arguments advanced by the parties. I hold the following view of the matter.

12. Both applications essentially seek condonation. The courts discretion is sought by either party. The condonation and discretion sought is in the form of time extension. Whilst the Plaintiffs seek extension of time within which the interim orders, which effectively lapsed upon this court's orders of 31 July 2017, should continue to subsist, the Defendants on the other hand seek time within which to file their amended Defence Statement(s).

13. With regard to the Plaintiffs' application, the Defendants insist that there is no sufficient reason advanced for the interim orders of 21 April 2016 to be extended any further or for that matter to be reinstated. The Defendants also contend that the subject matter of the suit is a termination letter of 27 January 2016 which has since been spent and any further extension of the court order would amount to a perpetual agreement being created between the parties as the Defendants' right to terminate the agreement would be taken away.

14. Finally, the Defendants also insist that the Plaintiffs would not be prejudiced if the orders are not extended.

15. The Plaintiffs contend that they will suffer extreme prejudice if the application is not allowed and the interim orders of 21 April 2016 reinstated and extended. According to the Plaintiff the entire substratum of the suit would be vacated and defeated. According to the Plaintiffs, if the Defendants proceed to terminate the agreement(s) which the orders of 21 April 2016 sustained there will be no need to proceed any further with the trial.

16. An application for the extension of interim orders post the prescribed period or post the twelve month period under Order 40 Rule 6 of the Civil Procedure Rules is a purely discretional matter. The discretion is however to be judiciously exercised.

17. Where however the court has expressly stated that the interlocutory injunction is to last until the hearing and determination of the suit, then I see no reason why it should be argued that the order will lapse at the end of 12 months. The Civil Procedure Rules state that the order should last for twelve months but not where the court states otherwise. This clearly should mean that where the court does not state how long the order is to last then at the expiry of twelve months any affected party may move the court to have the order vacated. Besides, I am also conscious of the fact that the purpose of interlocutory injunctions is to prevent the ends of justice from being defeated: see **Bonde *v* Steyn [2013] 1 EA 16**. An argument that an interlocutory injunction lapses automatically may thus be without logic both in law and equity.

18. I must however also appreciate that Order 40 Rule 6 of the Civil Procedure Rules anticipates that where an interlocutory injunction has been issued on merit then the suit is to be determined and the parties respective rights asserted within one year of the interlocutory order being made. The Rule appreciates and seeks to ensure that neither party is placed at an indefinite hardship through an intermediary order. The mischief was to guard against sluggish and dawdling litigants who seek to delay the prosecution of their claims: see **Nguruman Ltd *v* Jan Bonde Neilsen & 2 Others [2014]eKLR.** In my view however, the rule was not intended to occasion injustice to either party and thus a mere lapse of twelve months alone should never be enough to see the interlocutory order vacated.

19. It is thus critical that in determining whether or not to have the interim orders to continue to last beyond twelve months, the court has, *firstly,* to interrogate why trial was not commenced and finalized within twelve months. *Secondly,* there ought to exist special circumstances to warrant the extension.

20. In the instant suit, trial is already now fixed for 6 November 2017.

21. I took the rather uncanny approach and fixed the hearing date on 12 May 2017 even with shadowy reluctance exhibited by both parties who contended that there were pending applications. The litigation history of this cause prompted the approach. The history is chequered. There are multiple applications seeking amendment of pleadings. They were contested. Some were allowed yet pleadings were not amended within the prescribed timelines. The parties also seemed contented with objections, mostly technical. There were also applications to strike out pleadings and for judgment to be entered. There is no doubt that the applications dictated reasoned rulings. For reasons explained to the parties, there was delay in rendering the ruling(s).

22. The cumulative effect was delay in the prosecution of the main suit.

23. Ultimately, even when the court on 17 March 2017 directed that the suit be fixed for hearing on a priority basis, the current (fresh) applications flew in. And again, they were not prosecuted expeditiously. Time is not static and quickly the 12 month window under Order 40 Rule 6 lapsed.

24. Order 40 Rule 6 naturally, and as already stated, was intended to ensure that indolent and static litigants are kept in check. I do not hold the view that in the circumstances of this case and in the cumulative litigation history, the Plaintiffs may objectively be deemed to have been lethargic and static in their approach to the prosecution of their suit.

25. There was delay prompted by the Defendants. There was also delay occasioned by the reserved

reasoned rulings and decisions on the applications by the parties. I cannot say that either the court or the Defendants promoted the active prosecution of the suit, with the consequence that blame ought not to be fetched wholly upon the Plaintiffs for the lapse of 12 months prior to settling the suit down for hearing and determination, as the Defendants may also otherwise end up benefitting from their own inequity.

26. Secondly, in my view and as already pointed out, besides considering the litigation history whilst determining whether intermediary orders ought to continue subsisting, the court must be satisfied that the circumstances are special enough to warrant the extension. In this respect, the conduct of the parties in relation to the court process counts. The stage the litigation has reached is also relevant. Likewise any demonstrable irreparable prejudice is also relevant. But potential detriment stemming from the extension or refusal to extend does not constitute one of the special circumstances. Potential detriment already constituted the merit of the interlocutory order which the rules now dictate must be lapsed.

27. I must consequently not venture into the merits or demerits of the interim orders. Consequently the issue as to whether the letters of January 2016 which purported to terminate the relationship between the parties has taken effect is currently irrelevant. Likewise arguments that extending the order would equate indefinitely engaging the parties in a commercial relationship is also of little relevance currently as the court on 21 April 2016 was conscious of this fact of an enforced relationship.

28. I view it that there exist special circumstances in this case.

29. The hearing has been affirmed by the court and the parties to take place on 6 November 2017. This is hardly two months away. On the other hand, in under two weeks after the court order was discharged, the Defendants moved with expedition to execute new distributorship agreements. I have perused the distributorship agreements. They are not exclusive to the new distributors. The old state of affairs has somewhat been disturbed and it may be untidy, if not impossible, to *wholly* revert to it. The litigation herein may now also be disturbed. Thirdly, I also take note of the fact that the Plaintiff has moved to specifically also seek damages. All these facts do not however obviate the fact that the court still has powers to issue orders as may be necessary for the ends of justice to be met.

30. It is however apparent to me that reinstating the interim orders wholly may not fit well the circumstances of this case. I will consequently shortly address the issue of what order if any ought to issue as I quickly take note of the fact that the orders were vacated, not at the Defendants' prompting but of the court's own motion. The Defendants on 31 July 2017 only objected to the adjournment and complained of the delay. I thought there was merit in the application for adjournment but also figured that a vacation of the order would move the suit forth. Both the Defendants and the court were however well conscious that the application to have the interim orders in place would still be heard on its merits.

31. I will now move to consider the Defendants' application dated 18 April 2017 before making any final orders in disposal.

32. The Defendants do not seek leave to amend their Defence Statement. Leave had previously been granted on 9 May 2016. What the Defendants seek is condonation. There was admittedly a delay on the part of the Defendants in filing and serving their amended Defence Statement. The reasons advanced for the delay are that the Defendants wanted to retain another lead counsel to lead the counsel on record and this took some while.

33. The reason has not been challenged or doubted by the Plaintiffs. I also do not doubt that the reason is worthy given that the time was limited and two of the Defendants are non-resident corporations.

34. The Plaintiffs however oppose the application for extension of time on the basis that the application is *res judicata*. According to the Plaintiffs, the court has previously pronounced itself on the issue and this court ought not to revisit the same.

35. The defence of *res judicata* and the history thereof has been severally considered by our courts. The classic formulation of the requirements for the defence of *res judicata* is a judgment or ruling in an action

with respect to the same subject matter based on the same ground and between the same parties:see *s.*7 of the Civil Procedure Act. The principle also applies to interlocutory applications, in appropriate circumstances: see **Kanorero River Farm Ltd & 3 Others *v* National Bank of Kenya Ltd [2002] 2 KLR 207**.

36. The courts have also for many years recognized the principle that *res judicata* does not only cover express judicial declaration in the earlier proceedings but also points that should have been raised but were omitted to be raised in the earlier proceedings: see **Henderson –v- Henderson 67 E.R 313.**

37. Both logic and equity would militate against the application of the *Henderson* principle or the general *res judicata* principle in the instant case.

38. While it is true that the Defendants had sought extension of time within which to file their amended Defence Statements, the court never determined the issue with any finality. I have read the ruling of Nzioka J delivered on 17 March 2017. The parties did submit on the issue of time, the court however held the clear view that the court could not consider the issue given that the Defence(s) sought to be filed out of time had already been filed albeit irregularly. The court then proceeded to strike out the Defences and direct the Defendants to file a fresh application for time extension if they were so minded. The court was alive to the issue of extension of time but never determined the issue with finality.

39. I hold the view that a plea of issue preclusion should thus not succeed in the circumstances.

40. On the merits of the application, I must state from the onset that amendments ordinarily are freely allowed and encouraged where they would assist in bringing forth all the issues in the dispute. I am also aware that time for doing anything may be extended even where the period prescribed has expired. The discretion is with the court. The Defendants in the instant case have adequately explained the delay. With a view to ensuring delivery of substantive justice and in view of the uncontested reasons explaining away the delay, I hold the view that a limited extension of time would do the Plaintiffs no harm or prejudice. I take note too that the Plaintiffs may also be at liberty to file an amended reply to Defence.

Conclusion and disposal

41. I have found that the Plaintiffs were not to blame for the delay in prosecuting the suit. They should not suffer the wrath of the court. I have also found that the order vacating the interim order was made without the Defendants' prompting. It is also common cause that the state of affairs has somehow been changed with the appointment of three non-exclusive distributors of the Heineken Lager beer. Likewise, I have held the view that the Defence Statement may be amended and filed in the interest of justice.

42. I have no doubt that the court may reinstate interim orders vacated on its own motion if circumstances so dictate. It could actually do so *suo moto* to give effect to the overriding objectives of both the Civil Procedure Act and rules and by so doing facilitate the just and proportionate resolution of any dispute.

43. Invoking the "Oxygen principle" enshrined under *ss.*1A, 1B, 3A & 3B of the Civil Procedure Act and with a view to attaining fairness so that the parties are in equal footing as much as possible come the trial, the orders which best lend themselves to me in the circumstances of this case and in view of the above analysis are as follows:

a. I allow the application dated 11 April 2017 to the extent that the order is reinstated and extended but only with regard to the first four limbs of the order. The fifth limb stands vacated in view of the appointment of third party distributors who are not before the court.

b. The order as extended shall subsist until 6 November 2017

c. I allow the application dated 17 April 2017. The Defendants shall file and serve their amended joint statement of defence within the next 7 days and the Plaintiffs shall have leave to file and serve a Reply to the amended Defense within 7 days of service. The time lines to be strictly complied

with notwithstanding the court's current recess.

d. The Plaintiffs are to bear the costs of the application dated 11 April 2017 and the Defendants shall also bear the costs of the application dated 17 April 2017.

44. Orders accordingly.

Dated, signed and delivered at Nairobi this 28th day of August, 2017.

J. L. ONGUTO

JUDGE