



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 33 OF 2015**

**SOROYA MOTOR SPARES LTD ..... PLAINTIFF**

**VERSUS**

**SHANGAI AUTO TYRES ..... 1<sup>ST</sup> DEFENDANT**

**THUNDERSTONE TYRES LTD ..... 2<sup>ND</sup> DEFENDANT**

**FOUZI TYRES LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**PAK SOUNDS LIMITED ..... 4<sup>TH</sup> DEFENDANT**

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**RULING OF THE COURT**

1. The application before the court is a **Notice of Motion** dated 18<sup>th</sup> August 2015 and filed in court on 11<sup>th</sup> September 2015 by the Plaintiff/ Applicant. The application seeks as the main prayer an order of review of this court's decision made on 20<sup>th</sup> March 2015 which dismissed the Applicants Notice of Motion dated 29<sup>th</sup> January 2015. The rest of the prayers are consequential prayers should the said prayer of review be allowed.

2. The application is premised on the grounds set out therein inter-a-lia that there is an error apparent on the face of the court's record that warrants the review of the order of this court made on 20<sup>th</sup> March 2015, and that there has arisen a new and important evidence which could not be produced by the applicant at the time the order was made.

3. The application is supported by affidavit of Mohamed Yusuf Yasif Soroya sworn on 18<sup>th</sup> August 2015 and a Further Affidavit of the same person sworn on 12<sup>th</sup> October 2015.

4. All the Respondents have opposed the application.

5. The 1<sup>st</sup> Respondent has opposed the application through a Replying Affidavit sworn by its director MOHAMED ABDULLAHI NOR on 12<sup>th</sup> October 2015.

6. The 2<sup>nd</sup> Respondent has filed a Replying Affidavit sworn by its director Ismail owner Abdi on 21<sup>st</sup>

September 2015.

7. The 3<sup>rd</sup> Respondent has opposed the application through a Replying Affidavit sworn by its director Addullahi Adan Jimale on 12<sup>th</sup> October 2015.

8. The 4<sup>th</sup> Respondent opposes the application vide Grounds of Opposition filed herein on 22<sup>nd</sup> September 2015.

9. Only the Plaintiff/Applicant filed submissions to the application on 4<sup>th</sup> March 2016 while all the Respondents relied solely on the Replying Affidavits and the said grounds of opposition.

## **ANAYSIS**

10. I have considered the application and the Opposing Affidavits and the Submissions of the Applicant. The following are the issues I raise for determination.

*(i) Whether there is an error on the face of the record.*

*(ii) Whether there is new and important evidence to warrant a review.*

*(iii) Whether there were other considerations raised in the decision of this court dated 20<sup>th</sup> March 2015 other than the finding that the Applicant was not indicated to be the sole and exclusive distributor of Kenda Brand Tyres in Kenya.*

## **WHETHER THERE IS AN ERROR ON THE FACE OF RECORD**

11. On the first issue, as to whether there is an error on the face of the record, I have considered the submissions of the applicant on the same. It has not been shown or pointed out to this court where that error is or the content of the error, and there being non to my knowledge, issue number one is answered in the negative.

## **WHETHER THERE IS NEW AND IMPORTANT EVIDENCE**

12. The law on review is captured under Order 45, and enables every aggrieved party, who has not preferred an appeal, access to court and request for review on the grounds that there is an error on the face of the record or that there is a new and important evidence which could not have been adduced at the time of the hearing. That new and compelling evidence is one which, if the court had considered it, the court would have arrived at a contrary decision. The new and compelling evidence, then, must stand in isolation in order to alter the outcome of the ruling or the order. At paragraph 12 of the ruling of this court dated 20<sup>th</sup> March 2015, this court stated that;

***“I have seen the Distributorship agreement between the Applicants and Kenda Rubber Industrial Company Limited which is not in dispute. The Agreement is brief and simply appoints the Applicant as an authorised Distributor of the Kenda brand tyres. In my interpretation of the Agreement, there is no indication that the Applicant was to be the sole and exclusive distributor of the said brand of tyres in Kenya”.***

13. It is pursuant to above finding by this court that the Applicant has now availed a letter dated April 24, 2015 addressed to **“whom it may concern”**, and to the Applicant, by Kenda Rubber Inco Ltd purporting to appoint the applicant as the sole distributors of Kenda brand of tyres in Kenya. The Respondents have stated in their Replying Affidavit and the grounds of opposition that there is no new and compelling evidence in this letter. The Respondents’ views are that this letter or its contents was always within the grasp of the Applicant and there was no reason why it was not produced in the first place in the earlier application. However, this court notes the following content of the letter,

***“Kenda Rubber Ind. Co., Ltd, were pleased to appoint Soroya Motor Spares Ltd as our authorized distributor for sale of Kenda brand automobile tires in Kenya and had an agreement with Soroya Motor Spares Ltd, the validity was from March 1<sup>st</sup>, 2014 to February 28<sup>th</sup>, 2015. Soroya Motor Spares Ltd has to reach a target of 13,000 pcs for the year 2014, and then Kenda may consider issuing exclusive agreement for the year 2015. Unfortunately, due to unscrupulous and parallel traders, Soroya could not meet that target for 2014.***

***Kenda confirms that in 2014 Soroya was the ONLY Company authorized to distribute, sell and warrant Kenda tires. Due to all this complications, Kenda has agreed to give Soroya Exclusive Distributorship for 2015 (the validity is from January 1<sup>st</sup>, 2015 to December 31<sup>st</sup>, 2015) with reduced target of 8,000 pcs.***

***With this 2015 exclusive Agreement, we hope the court gives a permanent injunction to these unscrupulous traders which cannot deal with any sort of Kenda tires”.***

14. From the contents of this letter, it is clear that from the period of appointment of the Plaintiff i.e from 1<sup>st</sup> March 2014 to February 28<sup>th</sup> 2015, the Applicants merely had a distributorship agreement which was not exclusive, and indeed they were required to meet a target of 13,000 pcs for the year 2014, which they did not. The letter states that only if they met the said target would Kenda consider issuing exclusive agreement for the year 2015. Kenda merely confirms that during the year 2014 the Applicant was the only company authorised to distribute the Kenda brand of tyres. It is noteworthy that this suit was filed in January 2015 at the end of the alleged dealership appointment. So the finding of this court that there was no evidence that the Applicant was the sole and exclusive distributor is actually confirmed by this letter. In fact the letter goes ahead to acknowledge possible existence of other traders in the Kenda brand of tyres, but brands those other traders as unscrupulous. In my view, this letter dated April 24<sup>th</sup> 2015 is so contradictory that it cannot amount to “new and compelling evidence”. It is clear that the letter is an afterthought, a facility resorted to in collusion between the Applicant and the said Kenda, to defeat justice in this court. This is more so, as we consider issue number three herein.

#### **WHETHER THERE WERE OTHER CONSIDERATIONS IN THE RULING DATED 20 MARCH 2015**

15. At paragraph 13 of the said ruling, the court observed as follows:

***“The Respondents averred that they lawfully imported the brand of tyres from Dubai. The same has not been challenged. This court is not in a position to know whether or not the dealers in Dubai are authorized distributors of the said tyres. There is no evidence on record to show what kind of arrangement, if any, the dealers in Dubai have with the manufactures of Kenda brand tyres. In short, there is nothing to show that the importation and sale of the Kenda brand tyres by the Respondents is unauthorized or unlawful. It is not clear what legal rights the Applicant sought to enforce in this matter”.***

16. Indeed, the observation of the court in that regard was informed by the Kenda letter dated January 13, 2014 which appointed the Applicant as distributors. Part of the said letter reads thus:

***“We take note of your concerns regarding suspicious traders who are importing the Kenda Branded Tires through illegal means into Kenya territory. We have raised this concern with all our other Distributors worldwide. We would like to clarify that Kenda does not have no (sic) control over movement of tires from one country to another. Thus we would not Guarantee if in the future there will still be movement of Kenda tires into Kenya market...”.***

17. The observation by this court that it was not able to know whether or not the dealers in Dubai are authorised distributors of Kenda brand of tyres is confirmed by Kenda itself. It still remains unchallenged the Respondents allegation that they lawful imported the said tyres from Dubai. It is still not clear what kind of arrangement, if any, the dealers in Dubai have with the Kenda institution. It remains a possibility, which has now been confirmed by Kenda, that there are many legal distributors worldwide, and the

Respondents' allegation that they bought the tyres in Dubai could be perfectly true. Even if that is not true, this court will find it difficult to injunct the Respondents purely upon facts which are at best speculative.

18. This court has also observed that there is no spectacularly and exclusive letter of appointment of the Applicant by Kenda to be exclusive dealer. The letters of Kenda reveal one very worrying attribute: an institution that is concerned with high purchases of its products. In both letters Kenda castigates the Applicant for not meeting its target. Kenda is more concerned with the Applicant meeting its purchase target. I get the impression that for Kenda it would not matter how this target is met, and that Kenda would welcome any distributor of its products in Kenya, provided Kenda does not categorically accept such distributors. This could be the reason that Kenda is unable to give the Applicant a clear, unequivocal letter of exclusive appointment to dealership in Kenda brand of tyres.

19. Pursuant to the foregoing, the application by the Plaintiff/Applicant for review is dismissed with costs to the Respondents.

Orders accordingly.

**READ, DELIVERED AND DATED, AT NAIROBI THIS 25<sup>th</sup> DAY OF APRIL 2016.**

**E. K. O. OGOLA**

**JUDGE**

**Ruling Read in open court in the presence of:**

Mr. Makori hb Onyango for Plaintiff

Mr. Wambola hb Kigen for 4<sup>th</sup> Defendant

No Appearance for 1<sup>st</sup> – 3<sup>rd</sup> Defendant

Teresia – Court Clerk