



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 29 OF 2016

MAXAM LIIMITED.....1ST PLAINTIFF/APPLICANT

MODERN LANE LIMITED.....2ND PLAINTIFF/APPLICANT

OLEPASU TANZANIA LIMITED.....3RD PLAINTIFF/APPLICANT

VERSUS

HEINEKEN E.A. IMPORT CO. LTD.....1ST DEFENDANT/RESPONDENT

HEINEKEN BROUWERIJEN B. V.....2ND DEFENDANT/RESPONDENT

HEINEKEN INTERNATIONAL B. V.....3RD DEFENDANT/RESPONDENT

RULING OF THE COURT

INTRODUCTION

1. The **Notice of Motion** application before the court is dated 5th February 2016 and filed herein on the same date by the Plaintiffs. The application is brought under Order 40 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rule and Section 1 A, 1B and 3D of the Civil Procedure Act. The application seeks to secure upto 14 orders prayed for. It is not easy to summarize these orders and so I will state them as they are.

1. THAT this Application be and is hereby certified urgent, be heard *ex-parte* in the first instance and service of the same be dispensed with.

2. THAT pending the hearing and determination of this Application *inter-parties*, the Defendants/Respondents, their agents, servants, employees and/or any other person whomsoever and howsoever acting on their instructions be and are hereby restrained by an injunction order of this court from terminating and/or purporting to terminate the distribution agreement dated 21st May 2013 between the 1st Plaintiff/Applicant and the 1st Defendant/Respondent on the distribution of the Heineken beer brand lager in Kenya.

3. THAT pending the hearing and determination of this Application *inter-parties*, the Defendants/Respondents, their agents, servants, employees and/or any other person whomsoever and howsoever acting on their instructions be and is hereby restrained by an injunction order of

this court from terminating the letters of appointment dated 28th February 2013 and 11th August 2014 between the 2nd Plaintiff/Applicant and the 2nd Defendant/Respondent respectively, on the distribution of Heineken beer brand lager in Uganda.

4. THAT pending the hearing and determination of this Application *inter parties*, the Defendants/Respondents their agents, servants, employees and/or any other person whomsoever and howsoever acting on their instructions be and are hereby restrained by an injunction order of this court from terminating a Letter of Appointment dated 11th August 2014 between the 3rd Plaintiff/Applicant and the 2nd Defendant/Respondent on the distribution of Heineken beer brand lager in Tanzania.

5. THAT pending the hearing and determination of this Application *inter-parties*, the Defendants/Respondents, their agents, servants, employees and/or any other person whomsoever and howsoever acting on their instructions be and are hereby restrained by an injunction order of this court from terminating the Tanzania export letter dated 26th July 2012 between the 1st Plaintiff/Applicant and the 2nd Defendant/Respondent on the export of Heineken beer brand lager from Kenya to Tanzania.

6. THAT pending the hearing and determination of this Application *inter-parties*, the Defendants/Respondents, their agents, servants, employees and/or any other person whomsoever and/or howsoever acting on their instructions in any manner whatsoever be and are hereby restrained by an injunction order of this court from appointing any other distributor for the distribution of the Heineken beer brand lager in Kenya, Uganda and Tanzania being the business currently carried out by the Plaintiffs/Applicants.

7. THAT pending the hearing and determination of this suit, Defendants/Respondents, their agents, servants, employees and/or any other person whomsoever and/or howsoever acting on their instructions in any manner whatsoever be and are hereby restrained by an injunction order of this court from terminating the distribution agreement dated **21st May 2013** between the 1st Plaintiff/Applicant and the 1st Defendant/Respondent relating to the distribution of the Heineken beer brand lager in Kenya.

8. THAT pending the hearing and determination of this suit, the Defendants/Respondents, their agents, servants, employees and/or any other person whomsoever an/or howsoever acting on their instructions in any manner whatsoever or howsoever be and are hereby restrained by an injunction order of this court from terminating the letters of appointment dated 28th February 2013 and 11th August 2014 between the 2nd Plaintiff/Applicant and the 2nd Defendant/Respondent respectively, relating to the distribution of Heineken beer brand lager in Uganda.

9. THAT pending the hearing and determination of this suit, the Defendants/Respondents, their agents, servants, employees and/or any other person whomsoever and/or howsoever acting on their instructions in any manner whatsoever, be and are hereby restrained by an injunction order of this court from terminating the letter of appointment dated 11th August 2014 between the 3rd Plaintiff/Applicant and the 2nd Defendant/Respondent on the distribution of Heineken beer brand lager in Tanzania.

10. THAT pending the hearing and determination of this suit, the Defendants/Respondents, their agents, servants, employees and/or any other person whomsoever and howsoever acting on their instructions in any manner whatsoever be and are hereby restrained by an injunction order of this court from terminating the Tanzania export letter dated 26th July 2012 between the 1st Plaintiff/Applicant and the 2nd Defendant/Respondent on the export of Heineken beer brand lager from Kenya to Tanzania.

11. THAT pending the hearing and determination of this suit, the Defendants/Respondents, their

agents, servants, employees and/or any other person whomsoever and howsoever acting on their instructions be and are hereby restrained by an injunction order of this court from appointing any other distributor for the distribution of the Heineken larger beer brand lager in Kenya, Uganda and Tanzania.

12. THAT an order be and is hereby issued that this Application, all the pleadings filed herewith and the entire Court process herein be effected upon the 2nd and 3rd Defendants/Respondents through their locally appointed and recognized agent, the 1st Defendant/Respondent herein.

13. THAT this court does issue any such further Orders and directions as it deems fit in the circumstances.

14. Costs of this Application be provided for.

2. The application is premised on the grounds set out therein and is supported by the affidavit of Ngugi Kiuna sworn on 5th February 2016 and a Further Affidavit of the same person sworn on 1st March 2016.

BRIEF HISTORY

3. On 21st May 2013, the 1st Plaintiff/Applicant and the 1st Defendant/Respondent executed an agreement for the distribution of Heineken beer brand in Kenya. The said agreement provided inter-alia that the same came into force on the effective date being 1st May 2013 and is to remain in full force and effect until the third anniversary of that effective date and will automatically be extended for a period of one year and subsequent one year periods unless terminated by either party by giving the other written Notice of Termination within three (3) months of the third anniversary of the effective date or one year extension as the case may be; that in the event that the 1st Defendant/Respondent wishes to terminate the agreement before the end of the term, then it shall discuss and agree with the 1st Plaintiff/Applicant a fair and reasonable monetary amount for compensation taking into account the length of time taken by the 1st Plaintiff/Applicant in the distribution of Heineken beer brand larger in Kenya and the profitability of its business under the agreement; that the agreement and all subsequent distribution of Heineken beer brand larger in Kenya shall be governed by and construed in accordance with the laws of Kenya; that in the event of a dispute, the parties shall proceed to perform their obligations in accordance with the agreement and with due diligence, pending the resolution of the dispute; that nothing in the agreement shall preclude either party from obtaining relief from a Court of law and that parties recognize that monetary damages alone would not adequately compensate in the event of breach by parties of the agreement and it was therefore mutually agreed that in addition to all other remedies available at law or in equity the parties shall be entitled to injunctive relief in addition to other remedies available in law and in equity.

4. It is also not contested that on 28th February 2013, the 3rd Defendant/Respondent acting on behalf of the 1st Defendant/Respondent confirmed the appointment of the 2nd Plaintiff/Applicant as distributor of Heineken larger beer brand in Uganda effective 1st February 2013. However, it is in controversy whether a formal distribution contract was to be prepared and executed between the 2nd Plaintiff/Applicant and the 3rd Defendant/Respondent. If that is the position as postulated by the Applicants, it appears the same was never prepared and/or executed. Nevertheless, the 2nd Plaintiff/Applicant states that it has been and still is the distributor of Heineken larger beer brand under the said letter of appointment and has invested heavily and substantially on warehousing, delivery and transport equipment including lorries and other vehicles of all sorts and all other related and necessary infrastructure so as to enhance the distribution of Heineken beer brand larger in Uganda and particularly as contracted.

5. It is also not contested, and in fact it is asserted by the 3rd Plaintiff/Applicant that on the 11th August 2014, the 3rd Plaintiff/Applicant was appointed by the 2nd Defendant/Respondent as its importer and distributor of Heineken larger beer brand in Tanzania through a letter of appointment of even date and a formal agreement and/or contract was to be drafted and executed between the two parties but none was prepared and/or executed as contemplated thereby leaving the said Appointment Letter as the contract

document and the terms and conditions therein as the governing contract. The said Appointment Letter provided *inter alia*, that the 3rd Plaintiff/Applicant is to import the Heineken product into Tanzania and pay any duty, tariff, deposit or clearance charges on the Heineken products and is to indemnify and hold the 2nd Defendant/Respondent harmless from any claim in that respect; that the 3rd Plaintiff/Applicant is to ensure that the Heineken product is sold as a premium brand and all its activities and sales are carried out in accordance with the specific instructions from time to time from the 2nd Defendant/Respondent; and that the 3rd Plaintiff/Applicant is to distribute the Heineken product throughout Tanzania and in the event of engaging sub-distributors for the product to ensure that the distribution of the Heineken product in areas outside its current distribution area and the choice of appointing of sub-distributors is formally approved in writing by the 2nd Defendant/Respondent. The Plaintiff annexed and marked “NK-1” copies of the said contracts and letters of appointment, forming page 1 – 30 of the Plaintiffs Supporting Affidavit of Mr. Ngugi Kiuna sworn on 5th February 2016.

THE PLAINTIFFS CASE

6. The Plaintiffs’/Applicants’ case is that following the said appointments as set out hereinabove, the Plaintiffs/Applicants in their respective territories of appointment within East Africa embarked on setting up massive and elaborate infrastructure so as to fulfil and/or discharge their obligations as appointed and/or contracted as set out above. The Plaintiffs’ case is that the financial investments particularly for the 1st Plaintiff/Applicant involved but was not limited to procuring an irrevocable and unconditional, and payable on demand, a bank guarantee of 250,000.00 Euros issued by a reputable Kenyan bank and the format acceptable to the 1st Defendant/Respondent; acquiring, operating and maintaining numerous warehousing units in the respective territories in accordance with the 1st Defendants/Respondents conditions and standard of the environment including installing and utilizing temperature records in the storage areas and keeping records of such temperatures readings for a minimum of twelve (12) months; establishing an existing set of delivery routes using a route planning system and acquiring and maintaining numerous Lorries and other vehicles in line with the distribution business; developing an operational plan in conjunction with the Defendants/Respondents planning processes and focus on execution of the Defendants/Respondents marketing strategies; and ensuring that any debts are recoverable and the liability ratio is at least positive in the ratio of two (2) or higher.

7. It is the Plaintiffs/Applicants case that as a result of their respective engagement and commitments as set out herein above, the market for the Heineken product in the three (3) countries being Kenya, Uganda and Tanzania has expanded and extensively grown within a short period of time leading to profitability of the business for both the Defendants/Respondents and the Plaintiffs/Applicants to a large extent compared to the business gains made by the Defendants/Respondents and the territory covered in the three (3) countries so far, before the Plaintiffs/Applicants were contracted or appointed to perform the same business. The Plaintiffs state that in order for them to fully discharge their respective obligations and enhance profitability of the Heineken product within the three (3) countries respectively, the Plaintiffs/Applicants contracted other third parties including landlords in respect of warehouses, sub-distributors for the product but with approval of the 1st and 2nd Defendants/Respondents, hiring of lorries for the delivery and transport of the product among others. As such, any purported termination of the respective contracts without any valid, genuine and viable reason and/or ground exposes the Plaintiffs/Applicants to substantial loss and damage both to them and to the third parties, and has serious legal and financial ramifications and consequences to be borne by the Plaintiffs/Applicants as regards their liabilities to the said third parties. In support of this position the applicants annexed and marked “NK- 4” copies of the various leases and log-books, forming pages 44 – 113 of the aforesaid supporting affidavit.

8. On 27th January 2016, the 3rd Defendant/Respondent purported to terminate the three contracts in total breach of the terms and conditions therein and the Plaintiffs/Applicants are aggrieved by the said termination hence this Application. The Plaintiffs case is that in any event the purported termination notice dated 27th January 2016 to the Plaintiffs/Applicants in respect of the respective contracts is invalid and therefore null and void for the reasons that the Notice is issued on a “**Without Prejudice**” basis

meaning therefore that it has got no legal implications whatsoever as regards clause 17 of the Kenyan Distribution Agreement between the 1st Plaintiff/Applicant and the 1st Defendant/Respondent on the basis of which it is issued to all the Plaintiffs/Applicants; that there is no privity of contract between the 1st Plaintiffs/Applicants and the 3rd Defendant/Respondent who has issued the purported Termination Notice since the Kenyan Distribution Contract was exclusively between the 1st Plaintiff/Applicant and the 1st Defendant/Respondent; that the Letter of Appointment dated 26th July 2012 relating to the exports of Heineken beer brand lager from Kenya to Tanzania is between the 1st Plaintiff/Applicant and the 2nd Defendant/Respondent and as such, the 3rd Defendant/Respondent has no *locus standi* to terminate the same as purported; that there is no privity of contract between the 2nd Plaintiff/Applicant and the 3rd Defendant/Respondent regarding the Ugandan appointment letters dated 28th February 2013 and 11th August 2014 respectively since the appointment was done by the 2nd Defendant/Respondent, that the 3rd Defendant/Respondent lacks locus to terminate the Letter of Appointment dated 11th August 2014 to the 3rd Plaintiff/Applicant on Distribution of Heineken beer brand product in Tanzania since the appointment and agreement was done by the 2nd Defendant/Respondent; that there is a specific contract dated 17th February 2014 between the 1st and 2nd Defendants/Respondents wherein the 2nd Defendant/Respondent appointed the 1st Defendant/Respondent as its distributor of Heineken beer brand lager products in Kenya meaning therefore that the two are separate and distinct legal entities. ***(The Plaintiff annexed and marked “NK-3” a copy of the said agreement at pages 33-43 of the aforesaid Supporting Affidavit)***; and finally that in light of the above, the three (3) months Termination Notice under the Kenyan Distribution Agreement is now not available to the 1st Defendant/Respondent or any of the other Defendants/Respondents since no legally binding notice has been issued as required by law and the subject agreement. ***(The Plaintiffs annexed and marked “NK-2” at pages 31 - 32 a copy of the said termination notice).***

9. The Plaintiff's case is that the Defendants/Respondents have not given any reasons whatsoever for the termination of the three (3) contracts and that they are justifiably apprehensive and indeed have credible information that the Defendants/Respondents intend to appoint different distributors on different terms and conditions to operate in a market which has already been set up and extensively established by the Plaintiffs/Applicants with the intention of denying them any gain from their hard work and investments as set out hereinabove to their detriment. The Plaintiffs/Applicants allege that they have made massive and substantial financial investments in the Respondents' business of Heineken beer brand lager distribution in Kenya, Uganda and Tanzania since their respective appointments and engagements as per the subject the respective contracts and have also entered into numerous contracts with third parties to ensure availability of proper infrastructure and equipment for the distribution business in order to fully discharge the obligations and mandate as contracted and in 2015 have had a turnover of Kshs.1,869,638,747.00 in the three (3) countries compared to Kshs.1,389,810,339.00 in 2014. ***(The Plaintiffs annexed and marked “NK-5” are statements of the turnovers over the years, see pages 114-117).***

10. In view of all the foregoing the Plaintiffs have urged the court to intervene by way of temporary relief of injunction as contemplated and agreed between the parties particularly the 1st Plaintiff/Applicant and the 1st Defendant/Respondent in the Kenyan Distribution Agreement aforesaid regarding the right of a party to an injunction against the other by the Kenyan Courts pending the resolution of the dispute. The Plaintiffs submit that there is no prejudice to be occasioned on the Defendants/Respondents in the event the injunctive reliefs sought herein are granted since the Kenyan Distribution Agreement makes provision for the same in **“Clause 27”** and that indeed all parties concur on the issuance of an injunction. The 2nd and 3rd Plaintiff's case is that in any event, if at all an agreement was prepared and executed as contemplated in the Ugandan and Tanzanian distribution arrangement the same could have similar provisions, terms and conditions as the Kenyan distribution contract taking into account the contents of the other agreements involving the 1st, 2nd and 3rd Defendants/Respondents regarding distributorship of Heineken product.

THE DEFENDANTS' CASE

11. The Defendants have filed a defence to the suit on 18th February 2016 in which they totally deny the Plaintiffs' case and refute all the prayers the Plaintiffs have sought. In respect to this application the Defendants have opposed the same through a Replying Affidavit by UCHE UNIGWE, sworn on 17th February 2016 and another affidavit sworn by the same person on 1st March 2016. Mr. Uche Unigwe described himself in the said Replying Affidavit as the general manager of the 1st Defendant, and that he is duly authorised by the 1st, 2nd and 3rd Defendants to swear the replying affidavit on their behalf. ***(The deponent annexed and mark as "UU-1" a copy of the letter of authority from the 1st, 2nd and 3rd Defendants).***

12. The Defendants' case is that HEAIC and HBBV, the 1st and 2nd Defendants/Respondents respectively, are both wholly owned subsidiaries of HIBV, the 3rd Defendant/Respondent. As is customary in large multinational companies, HIBV, the 3rd Defendant/Respondent controls the strategic business decisions of its wholly owned subsidiaries. ***(The deponent annexed and marked as "UU-2" the certificate of incorporation of HEAIC, HBBV and HIBV. Also attached is a copy of proof of shareholding of the three companies).*** On 21st May 2013, the 1st Plaintiff/Applicant and HEAICL, the 1st Defendant/Respondent entered into a distribution agreement of Heineken lager beer in Kenya (the Kenya distribution agreement). The distribution agreement was signed by Koen Marshuis and Rob Marijen on behalf of HEAIC, the 1st Defendant in their capacity as directors of HEAIC. Mr. Ngugi Kiuna and Ms. Catherine Gachukia signed the distribution agreement on behalf of the 1st Plaintiff as the directors.

13. As with the Plaintiffs, the Defendants also identified key terms of the Kenya distribution Agreement, including the following; at clause 1 that the ***"1st Plaintiff will be Heineken's exclusive distributor of Heineken products in Kenya (the "Territory") with the exception of duty free and travel retail markets."*** At clause 16 that ***"in executing this Agreement, the 1st Plaintiff shall be an independent contractor and act in its own name and for its own risk and account without any right to represent Heineken in any manner whatsoever."*** At clause 17 that the ***"agreement comes into force on the effective date (1st May 2013) and shall remain in force until the third anniversary of the effective date. This agreement will be automatically extended for a period of one year (and subsequent one year periods) unless it is terminated by either party giving the other party written notice of termination within three months of the third anniversary of the effective date or one year extension (as the case may be)."*** At sub-clause 21(c) that ***"upon termination of this agreement for any reason whatsoever other than with respect to the circumstances envisaged in clause 20, no compensation shall be payable to you (1st Defendant) for losses, cost or third party claims for advertising costs, samples, termination of employment contracts, employees', salaries, investments made in your business (including but not limited to, any marketing contributions) or for any other reason or cause whatsoever, and nothing in this agreement or understanding, whether express or implied, on the part of Heineken with respect to such compensation."*** At clause 26 that ***"any dispute, controversy or claim of any kind whatsoever in relation to anything or matter arising under, out of or in connection with this agreement shall be settled through friendly consultation between the parties. In case no settlement can be reached by consultation within a period of 30 days from the date of commencement of such consultation, any interested party will give the other party written notice of any such dispute not resolved, after which the dispute may be referred by either party to the competent court of Kenya. In the event of a dispute, the parties will proceed to perform their obligations in accordance with the agreement and with due diligence pending resolution of the dispute."*** At clause 28 that ***"notices shall be sent by courier services or by facsimile (with the original copy sent by courier services) to the appropriate address of each of the parties. Any notice dispatched shall be deemed to have been effected on the date of posting or transmission. Each of the parties chooses the address referred in this clause 28 as its domicile for the purposes of Court process and legal notification."*** At clause 32 that ***"Heineken shall be entitled to appoint any affiliated company to perform this agreement or any part thereof."***

14. The Defendants' case is that through a letter dated 28th February 2013 (Uganda confirmation letter), HIBV, the 3rd Defendant/Respondent, as the holding company of the 1st Defendant and acting on behalf

of the 1st Defendant, appointed the 2nd Plaintiff as the distributor of Heineken lager in Uganda. The Uganda confirmation letter, from the 3rd Defendant, was issued following a request from the 1st Plaintiff's director, to enable the 1st Plaintiff to clear Heineken products imported into Uganda. The said letter is a standard letter issued as a matter of routine to various distributors of Heineken products in Africa to assist in clearing imported products. Some of the key clauses from the letter of the Uganda confirmation letter are as follows: *The 2nd Plaintiff was confirmed as the distributor of Heineken lager in Uganda as of 1st February 2012 and will remain so until the 3rd Defendant notifies the 2nd Plaintiff otherwise. Either party may terminate the appointment letter on giving three months' notice in writing. No compensation is payable by the 3rd Defendant to the 2nd Plaintiff on termination.*

The Uganda confirmation letter was duly accepted by Ms. Catherina Gachukia, the General Manager of the 2nd Plaintiff, who signed the letter on behalf of the 2nd Plaintiff. Through a letter dated 11th August 2014 (second Uganda confirmation letter), the 2nd Plaintiff/Respondent was simply confirmed as the current importer of Heineken lager beer in Uganda by HBBV, the 2nd Defendant/Respondent. It was submitted for the Defendants that the second Uganda confirmation letter was issued upon request by the 2nd Plaintiff's director, to reduce the delay in getting the goods cleared by the Uganda Revenue Authority. Among the key terms of the second Uganda confirmation letter are: *The importer shall not sell or distribute the product in a region or country outside the territory without the prior written consent of Heineken (2nd Defendant). The importer will distribute the product throughout the whole territory (Tanzania). In case the importer should use sub-distributors to ensure the distribution of the product in areas outside of its current distribution area, the choice and appointment of sub-distributor must be formally approved by Heineken (2nd Defendant). Marketing activities/advertising, POS material and activation in retail outlets) will be managed and financed exclusively by Heineken.*

15. The Defendants' case is that a similar letter with a corresponding date of 11th August 2014 (Tanzania confirmation letter) was also sent to the 3rd Plaintiff confirming it as the current importer of Heineken in Tanzania by HBBV, the 2nd Defendant with similar terms as the letter sent to the 2nd Plaintiff, as highlighted above. The Tanzania confirmation letter was issued upon request by the 3rd Plaintiff's director to reduce the delay in getting the goods cleared by the Tanzania Revenue Authority.

16. The Defendants deny that the Second Uganda confirmation letter and the Tanzania confirmation letter by the 2nd Defendant, appointed the 2nd and 3rd Plaintiffs as the importers and distributors of Heineken lager beer in Uganda and Tanzania, and that it is not correct that the letters of confirmation did provide for a formal agreement and/or contract to be drafted and executed between the two parties, but none was prepared and/or executed as contemplated. The Defendants' case is that on the 26th July 2012, HBBV, the 2nd Defendant, granted the 1st Plaintiff its consent to export Heineken lager beer to Tanzania. A key term of this letter was that *HBBV granted its consent to Maxam to export the product to Tanzania until HBBV informs the 1st Plaintiff otherwise.* This letter was signed by Kevin Santry on behalf of HBBV, the 2nd Defendant. ***(The said letter was annexed as a copy and marked as "UU – 10")***. The Defendants' case is that this letter was a normal routine letter which granted consent from the 2nd Defendant to the 1st Defendant. The 3rd Defendant being the company which is in charge for the majority of non-Dutch business is therefore the right entity and has the *locus standi* to cancel the consent given.

17. The Defendants case is that on 27th January 2016, HIBV, the 3rd Defendant in compliance with the following terms:

- a. clause 17, 28 and 32 of the Kenya distribution agreement dated 21st May 2013 between HEAIC and 1st Plaintiff;
- b. terms of the letter dated 26th July 2012 to the 1st Plaintiff;
- c. terms of the Uganda confirmation letter and second Uganda confirmation letter to the 2nd

Plaintiff; and

d. terms of the Tanzania confirmation letter to the 3rd Plaintiff issued a three months notice of termination of the above agreements and letters of confirmation. The notice was to take effect on the 21st May 2016.

18. The Defendants case is that under the above terms of the Kenya distribution agreement and confirmation letters, the Defendants had no obligation when terminating the Kenya distribution agreement and confirmation letters, to discuss and agree with the 1st Plaintiff prior to termination, if the notice of termination under the agreement of distribution is issued within three months of the third anniversary of the effective date; or to compensate the Applicants following termination of the Kenya distribution agreement, or to give any reasons for terminating the Kenya distribution agreement if the termination notice is issued within three months of the third anniversary of the effective date; and/or to give any reasons for termination of the Uganda confirmation letter, second Uganda confirmation letter and the Tanzania confirmation letter.

19. The Defendants case is that during the extensive negotiations of the Kenya distribution agreement, the directors of the Plaintiff companies were made fully aware by the representatives of the Defendants in unequivocal terms that no compensation was to be accorded to them as and when the contracts are terminated. The Plaintiffs were legally represented during the extensive negotiations. It was clearly agreed that the three year term of the contract would be sufficient time to allow the 1st Plaintiff to recover its investments. It was also further agreed as provided under clause 20, that if the Defendants terminate this agreement before the end of three years, then the 1st Plaintiff was to be compensated for such early termination. It is the Defendants' case that the Plaintiffs being fully aware of these terms chose to proceed at their own risk and cannot now seek to re-write the terms of their agreement. The termination notices were therefore rightly issued as provided for under the distribution agreement and confirmation letters and cannot be faulted by the plaintiffs. It is illogical for the Plaintiffs, to acknowledge the 3rd Defendant's action on behalf of the 1st and 2nd Plaintiffs when issuing the confirmation letters, but refuses to acknowledge the notice of termination issued by the 3rd Defendant on behalf of the 1st and 2nd Plaintiffs.

20. It is the Defendants' case that as provided for under clause 26 of the Kenya distribution agreement, it was expected that directors for the Plaintiffs would engage the representatives of the defendants in consultation in case a dispute arises following the issuance of the notice of termination. The directors of the Plaintiff companies, in blatant breach of clause 26 decided to move Court, which is the last resort of dispute resolution in the agreement choosing not to engage in any consultations. The Plaintiffs therefore moved to Court prematurely and breached the dispute resolution mechanism under the distribution agreement. The Plaintiffs cannot therefore be entitled to benefit from an agreement which they have breached by seeking to be granted the interim injunction sought.

21. The Defendants further deny that the "without prejudice" rule cannot apply to a valid notice issued pursuant to a binding agreement between parties. The notice of termination having been issued pursuant to the binding distribution agreement between the 1st Plaintiff and the 1st Defendant, has legal effect, which is to have the distribution agreement dated 21st May 2013 terminated by the HEAIC, the 1st Defendant, within three months from when it was issued. In the Defendants' opinion, the "without prejudice" phrase on the termination notice dated 27th January 2016, was strictly limited to the compensation offer under paragraph 5 of the letter. The "without prejudice" phrase does not in any way negate the notice of termination. This compensation offer was made out of goodwill by way of an ex-gratia payment for the termination of the Uganda confirmation letters and the Tanzania Confirmation letter. The "Without Prejudice" compensation offer was made by the 3rd Defendant, so that in the event of the negotiations for compromise being unsuccessful, it was not to be referred to at any subsequent trial.

22. The Defendants have also argued that during various meetings sometimes in December 2014, with the first meeting being held on 23rd December 2014, the Defendants' representatives informed the Plaintiffs'

representatives that the Defendants are looking at terminating the exclusivity of the Kenya distribution agreement. The Defendants in addition, made the Plaintiffs' representatives aware that despite having intentions to terminate the exclusivity of the Kenya distribution agreement, the Plaintiffs were still eligible to enter into another distribution agreement with the Defendants. This was to illustrate that the Defendants were still keen to maintain the business relationship with the Plaintiff and were not acting out of bad faith. The Defendants' case is that the 3rd Defendant, HIBV, has *locus standi* to issue the notice, being the holding company of the 1st Defendant and thus an affiliate, terminating the Kenya distribution agreement dated 21st May 2013 between the 1st Defendant and 1st Plaintiff. The 3rd Defendant, HIBV, also had the right to terminate the Uganda confirmation letter, as it is the party that issued the letter to the 2nd Plaintiff. The notice of termination of 27th January 2016, terminating the Uganda confirmation letter was a three month notice which was issued pursuant to the letter of appointment. The second Uganda confirmation letter and the Tanzania confirmation letter to the 2nd and 3rd Plaintiffs were confirmation letters issued by the 2nd Defendant. The said letters were not appointing them as distributors. The 3rd defendant, being the company among the affiliates of the Heineken Companies for non-Dutch business internationally, is the company that appoints and terminates any business arrangement between the Heineken Group of companies and other entities. The 3rd Defendant therefore had the *locus standi* to issue the notice of 27th January 2016 pursuant to earlier confirmation letters. The 3rd Defendant in issuing the notice to terminate the distribution agreement was acting in accordance with the new business model, which is to terminate exclusive distribution agreements.

23. The Defendants, however, acknowledge that they are generally aware of any financial investments by the Plaintiffs in their distribution business of Heineken lager beer in Kenya, Uganda and Tanzania. The quantum of the investments is, however, contested. The Defendants' case is that the Huge margins enjoyed by the Plaintiffs, arising from the Kenya distribution agreement, adequately cover the Plaintiffs investments over the term of the agreement. This is among the reasons why no compensation was to be accorded to the Plaintiffs at the end of the three year term, when the Defendants terminate the agreement. In any event, the Defendants state that the alleged financial investments by the 1st Plaintiff were required to fulfil contractual obligation on its part as set out in clause 5 (d) and schedule 2- clauses 3.3, 3.4, 3.6, 5.1 and 8.8 of the Kenya distribution agreement. The Kenya distribution agreement was extensively negotiated over many months and entered into on an "arms-length" basis, and therefore the Plaintiffs were fully aware of the commercial risks of their contractual obligations. In addition, the 1st Plaintiff was legally represented during the negotiations of the distribution agreement.

24. As regards third party contractual obligations between the Plaintiffs and the Defendants, the Defendants acknowledge that they are generally aware of the contracts between the Plaintiffs and third parties, but not privy or aware of the specific nature and terms of the numerous contracts between third parties and the Plaintiffs. Under clause 16 of the distribution agreement, the 1st Plaintiff is an independent contractor and was to act on its own name and for its own risk and account without any right to represent Heineken (the defendants) in any manner whatsoever. Further, the Defendants deny that the turnovers achieved in 2014 and 2015 were out of the sole efforts of the Plaintiffs. According to the Defendants, the turnover results are in fact as a result of the Defendants managing the sub-distributors of its products in Tanzania. The turnover results appearing as annexure "NK-5" to the affidavit sworn by Mr. Ngugi Kiuna are not accredited by the Defendants and can therefore not be relied upon as the actual results of the turnover.

25. The Defendants case is that the Plaintiffs have breached their obligation in the agreement as to dispute resolution and cannot enjoy the interim *ex-parte* injunction in place or a temporary injunction as sought in the application as they are acting in breach of an agreement that they seek to benefit from. They have failed to consult in good faith and these proceedings are premature. The Defendants will be prejudiced if the interim relief is granted as the issuance of the said order will negate the principle of freedom of contract by the Plaintiff being imposed as the single exclusive distributors of the Plaintiff for eternity thus going against the principles of fair competition. The Defendants allege that they will in addition, suffer immense prejudice if the injunction is issued as it will greatly affect the Defendants market share in the three regions because of having a single exclusive distributor who cannot adequately cover the beer

market which has cut throat competition. This will result in the Defendants suffering, loss of revenue due to the reduction in its market share.

26. Finally, the Defendants' case is that they have the right to choose the terms, to include in any subsequent contract they enter into with any party to distribute the Heineken lager beer. It is not correct as averred by the Plaintiffs that if an agreement was prepared and executed in Uganda and Tanzania it would be on the same terms as the Kenya distribution agreement dated 21st May 2013.

SUBMISSIONS

27. Parties filed submissions which were highlighted in court. I have considered the application and the submissions of the parties. I have also considered issues for determination as set forth by the parties. I have reconciled those issues, and in my view the following are the issues which this court will determine.

- i. whether there was a breach of the agreement dated 21st May 2013.*
- ii. Privity of contract – whether the 3rd Defendant can issue termination Notice.*
- iii. effect of the “without prejudice” Notice of Termination.*
- iv. whether the various appointing letters amounted to contract.*

WHETHER THERE WAS A BREACH OF THE AGREEMENT DATED 21ST MAY 2013

28. Both sides to the suit before the court have annexed a copy of the Agreement dated 21st May 2013. Each party is determined to give the agreement an interpretation which suit their purpose. However, for the purposes of issue number one above, this court is more concerned with the termination clause, because it is under this clause that the said Agreement has been terminated. Clause 17 of the Agreement states that:

“This agreement comes into force on the Effective Date, and shall remain in force until the third anniversary of the Effective date. This Agreement will be automatically extended for a period of one year (and subsequent one year periods) unless it is terminated by either party giving the other written notice of termination within three months of the third anniversary of the Effective Date of one year extension (as the case may be)”.

29. The effective date is established in the Agreement as 1st May 2013. This means that the agreement would be in force until 1st May 2016, and would be automatically extended for a period of one year, and subsequent one year periods until terminated by either party giving the other party written notice of termination within three months of the said anniversary of the effective date or one year extension. It appears that the 3rd Defendant issued the letter of termination dated 27th January 2016 pursuant to clause 17 of the Agreement dated 21st May 2013, with the effect that the said agreement would stand terminated on 1st May 2016. It is now the legality of the said termination letter that is in issue. The said termination letter also purported to terminate the Letters of Appointments given to the 2nd and 3rd Defendants in pursuant to clause 21 of the said Agreement. The Plaintiffs now aver that the said termination notice is in breach of the said contract, and that the “automatic” clause in clause 17 of the said Agreement means that there is at least one chance for automatic renewal for one year. This would not be so, however, if the termination was due to other reasons given under clause 18 of the Agreement.

30. In my view, clause 18 of the Agreement does not apply as it deals with situations where one party would terminate the Agreement due to various breaches or misconduct by the other party. This is not the case at hand. In the present case the Agreement has been running smoothly without any hitches, and the need to terminate it is not due to any stated shortcomings of the Plaintiffs. If that is the case, as it seems to me to be, then it is important to determine the context in which the word “automatic” was used in

clause 17. It states that the Agreement would be automatically renewed. Now, to my mind, when one has an agreement which has run its course smoothly, one would expect that the same would be automatically renewed as per that clause. However, it is not that simple, because the clause also states that the Agreement shall remain in force until the third anniversary of the Effective Date. Clearly there needs to be a reconciliation of these two positions. It is not the duty of the court to give a construction to terms in an agreement, which construction the parties may never have intended. However, the confusion suffices enough to uphold, for the time being, that the Plaintiffs/Applicants have established a case for the continuation of the Agreement for at least another year from the effective Date of Termination, pursuant to the said word “automatic”, subject, of course, to a contrary interpretation in a full hearing of the evidence to be brought by the parties. It is the view of this court that it is not possible at this stage to establish it as a fact whether or not the said Agreement was breached. That is a determination to be made after a full trial in which relevant evidence has been tendered. What the court is, however, certain about is that the Plaintiffs/Applicants have an ongoing contract, under which they are carrying what appears to this court to be a profitable business. It is the position of this court that the said business must be protected pending the full hearing of this suit.

31. The principles for the grant of an injunction are well settled as set out in the celebrated case of **Giella –vs- Cassman Brown**. This court is also guided by the decision in the case of **East African Industries vs Trufoods [1972] EA 420** where the court held that:

“The principles guiding the grant of interlocutory injunctions are well settled. Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

32. On the requirement of proof of a *prima facie* case, the court stated in the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** as follows:

“In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter...”

33. In the same matter the court further observe that:

“Prima facie case was defined by the Court of Appeal as where an applicant establishes that his legal right has been infringed by a Defendant thereby calling for a rebuttal by the latter.”

34. The second limb of the principle, after establishing a *prima facie* case, is to make an inquiry as to whether damages would be adequate compensation if injunction is not granted, and the suit property goes to waste. This issue was considered in the case of **Martha Khayanga Simiyu -vs- Housing Finance Co. Of Kenya & 2 Others Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540** held:

“The law is not that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them. That is the normal course but not the invariable course. The court has to take into account the conduct of the Respondent and the gravity of the breaches of law or contract alleged otherwise it would confer a carte blanche on those who are rich enough to pay all quantum of damages to ride roughshod over the rights of other persons. The rich do not fear to pay damages and they must be compelled to submit to the authority of the law by being put to other perils”

35. I am therefore satisfied that the Plaintiffs/Applicants have fulfilled the Principles set out under the above cited authorities. However, before I leave this section, I am persuaded to refer to Clause 27 of the same Agreement. The clause states as follows;

Clause 27:

“Nothing in this Agreement shall preclude either party from obtaining interim relief from a court of law. The parties recognise that monetary damages alone would not adequately compensate in the vent of breach by a party of this Agreement, and therefore it is agreed that, in addition to all other remedies available at law or in equity, the parties shall be entitled to inflective relief for the enforcement hereof”.

36. Although clause No. 27 gives any party a right to seek an injunction in case of a breach by any party, it would be proper to say that even where a clear breach has not been established, a party seeking a remedy arising from an alleged breach can still go to court under clause 27. This clause then buttresses the law as cited above, and gives this court greater confidence that the sought injunctive remedy is justified in the circumstances of this case.

PRIVITY OF CONTRACT – WHETHER THE 3RD DEFENDANT CAN ISSUE TERMINATION NOTICE

37. It is the Plaintiffs’ case that the 3rd Defendant cannot issue Termination Notice to the 2nd and 3rd Plaintiffs because of lack of privity of contract between the 3rd Defendant and the said Plaintiffs. On the other hand, the 3rd Defendant submitted that they can in fact issue the said termination notices since in the first instance, it is the 3rd Defendant who issued the said Letters of appointment to the 2nd and 3rd Plaintiffs. Although this issue appears to be controverted, it seems to me at this stage that the continuation of the 2nd and 3rd Plaintiffs businesses was dependent on the 1st Plaintiffs business being in force, and that a termination of the Plaintiff’s business ipso factor terminated the 2nd and 3rd Plaintiffs businesses. If that is so, as I believe it is, then it not at this stage relevant whether there was privity of contract between the 3rd defendant and the 2nd and 3rd Plaintiffs. What is relevant for now is the legality of the said Notice of Termination issued to the Plaintiffs on 27th January 2016. However, until adequate evidence is provided in a full trial, it would make legal sense that a party who issues a letter confirming certain rights to another party, would also be legally right to issue another letter revoking, varying and/or terminating those rights. Also, as to whether those appointing letters issued by the 3rd Defendant amounted to contract is a matter to be determined in a full hearing. It is not the province of the court to impose terms into contracts without evidence.

EFFECT OF “WITHOUT PREJUCICE” NOTICE OF TERMINATION

38. It is the Plaintiffs contention that the Notice of termination dated 27th January 2016 is invalid and cannot convey the intended intention to terminate the said Agreement because the said Notice is written under the banner “Without Prejudice”. However, according to the Defendants/Respondents, the said notice is effective to convey the intention of the Defendants to terminate the said Agreement. In support of this view the Defendants refer to the 4th last paragraph Of the said Notice of Termination. The paragraph alludes to some ex-gratia payments to be made to the Plaintiffs if they accepted the notice of termination. In the previous paragraph, a sum of EU 450,000 had been offered. It is the Defendants case that the use of the word “Without Prejudice” was merely meant to protect this offer during the possible negotiation period, and that, it was never intended that the phrase should cover the whole notice.

39. In legal language, the phrase “without prejudice” in communication between parties is used as a legal device to protect communications between parties which involve negotiations, or matters which a party may not wish to be made public for the fear that if the negotiations break down the communications could be used against them in legal proceedings. The use of the phrase also admits the impression that a party is willing to negotiate on the issue at hand, and connotes an invitation to the other party to make any proposals. “Without Prejudice” then can perfectly be used in a communication to protect a particular proposal. Indeed, at the 4th last paragraph of the Notice of termination the 3rd Defendant states that the said ex-gratia offer was made purely without prejudice, and that is understandable as it protected that very proposal.

40. However, in the opinion of this court the use of the phrase “Without Prejudice” at the top of the

Notice of Termination denied it the effect it was intended to achieve. This is so because under the Agreement dated 21st May 2013, clause 17 provides for termination, in clear and effective manner. Once the notice is issued under that clause it assumes its legal status without question. Now, to use the phrase “Without Prejudice” on top of the letter conveys a contrary intention to the recipient. The first impact is that it divests the notice of the legality and authority derived from the termination clause, and implants in the mind of the recipient a more care free attitude, less legally binding, and an invitation to negotiate on the effect of the notice. A recipient of that notice under “Without Prejudice” banner would be excused if he or she thought the intention was to negotiate the terms of termination, rather than to comply with the termination clause No. 17. Matters are made more difficult when the same notice carries also in its body proposals for terms of disengagement. The position of this court is that pending the evidence to be availed in the cause of full trial, the Notice of Termination dated 27th January 2016 under the banner “without prejudice” was not the kind of Termination Notice required or envisaged under the said clause No. 17 of the said Agreement, and that, that lack of legal clarity divests the said purported Termination notice of all legality as regards the message or intention it was required to convey under the said clause No. 17.

41. For the foregoing reasons of this ruling, the Plaintiffs’/Applicants’ Notice of Motion dated 5th February 2016 and filed herein on the same date is herewith allowed as prayed with costs to the Plaintiffs/Applicants.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 21st DAY OF APRIL 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

Mr. Nyachoti for Plaintiffs

Mr. Aisi for Defendants

Teresia – Court Clerk