REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 249 OF 2016

BETWEEN

BIA TOSHA DISTRIBUTORS LIMITED…….PETITIONER

AND

KENYA BREWERIES LIMITED……1ST RESPONDENT

UDV (KENYA) LIMITED……...2ND RESPONDENT

EAST AFRICAN BREWERIES LIMITED……3RD RESPONDENT

DIAGEO PLC……4TH RESPONDENT

RULING

Introduction

1. For several years now the Petitioner has been a distributor of the 1st and 2nd Respondent's liquor products in a various areas within the Republic of Kenya. In particular, the Petitioner has been distributing beer and spirits in Nairobi and its environs. It is not the products which is the subject of contest but the distribution areas or zones which is under dispute in this Petition. The Petitioner claims to have an exclusive interest over certain areas, the Respondents will hear none of that, prompting the Petitioner to move the court for conservatory orders.
2. The Petition was filed on 14th June 2016. Alongside the Petition was also filed an application for conservatory orders. The reliefs prayed for read as follows:

i. …*[spent]*
ii. ***THAT*** *pending the hearing and final determination of the Petition herein a conservatory order in the nature of an injunction do issue directed at the Respondents, their agents, servants, employees or any person acting for or connected with the Respondents barring them from interfering with the exclusive management, control and distributorship of the Respondents' products in the following routes, that is to say, Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong road, Hurlingham, Kawangware, Satellite, Dagoretti, UDV A, UDV B, UDV C, which are owned by the Petitioner by virtue of valuable goodwill paid.*

iii. ***THAT*** *the costs of this Application be in the cause.*

Factual background

3. The commercial relationship between the Petitioner and the Respondents dates back to June 1997 when the Petitioner was appointed as the sole distributor of the 1st Respondents products in an area comprising "Gachie, Mwimuto, Kanunga, Kiambaa, Banana, Karura, Gathanga, Ndenderu, Ndumberi, Tinganga, Riabai, Kanguya, Wangige, [and] Ridgeways". The relationship was then through the Petitioner's sister company Bia Yetu Agencies Ltd. A strict distributorship agreement was executed then. The agreement contained a termination clause and the distributor was obligated not to hold itself out as an agent of the 1st Respondent.
4. The relationship blossomed. Both parties appeared to benefit from the economic activity. The Petitioner grew as a business entity. In 2000, the Petitioner was offered new distribution areas namely Baba Dogo, Kariobangi North, Dandora I and Dandora II. It gleefully accepted to be the distributor of the Respondents products in those areas. Attached to the new arrangement was a requirement for the payment of goodwill of kshs. 6,630,000/=. The new distributorship agreement was accepted and the goodwill sum of kshs. 6,630,000/= paid. It was non-refundable.
5. Fast forward, in 2006 the Petitioner was offered other areas. The Petitioner states that the areas included Again the areas now were Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong road, Hurlingham, Kawangware, Satellite, Dagoretti, UDV A, UDV B and UDV C. Together, they were called,the Bia Tosha Territory.
6. A goodwill amount of Kshs. 31,668,000/= was required to be paid. An amount of Kshs. 27,300,000/= was paid by the Petitioner as goodwill. The Bia Tosha Areas were then allocated to the Petitioner.
7. Correspondence availed, reveal that some of the distribution areas earlier allocated to the Petitioner including Baba Dogo, Kariobangi North, Dandora I and Dandora II were repossessed by the Respondents . Leading to a demand for refund of the goodwill earlier paid. The Petitioner insisted that it was be entitled to a refund of the goodwill paid or to recoup the goodwill if for any reason any of the areas they paid the goodwill was taken away. In particular in a letter dated 8th September 2011 to the Respondents, the Petitioner stated inter alia as follows vis-a vis the goodwill paid:

   > *"…*
   >
   > *As these payments were capital payments/investment made by our companies to acquire the right to be appointed as a distributor in the named areas, it is our considered view that should the dictatorship for any reason be terminated in any of the areas, Kenya Breweries Ltd would be duty bound to make a refund of the amounts paid as goodwill and or should allow our company to recover the payments from the person who would be succeeding our company as the appointed distributor of Kenya Breweries Ltd in the specific area.*
   >
   > *In business, the person who pays goodwill for a particular business is entitled to recoup the goodwill paid from the new entrant to the business and have Bia Tosha and Bia Yetu would look forward to recoup the initial goodwill/commitment fees paid in the event they for any reason cease to be Distributors for any of the areas assigned under goodwill/ commitment fees".*

8. The tone and purport of the Petitioners letter of 8th September 2011 appeared to remain the same as recently as March 2016 when the Petitioners once again insisted on a refund even as they negotiated a new distributorship agreement with the Respondents.
9. Fast forward again.
10. In June 2016 a new distributorship agreement was entered into. The Respondents again limited the Petitioners distributorship areas. Several of the areas for which the Petitioner had paid goodwill and had been granted distributorship rights were not included in the new distributorship agreement.

11. It is to be noted that in between the foregoing, the 4th Respondent, impleaded by the Petitioner on 21st June 2016 vide an amended Petition on 21st June 2016 vide an amended Petition as the 1st, 2nd and 3rd Respondents' controlling company had joined the operations. Payment of goodwill in all business concerning and touching on the Respondents then ceased as the 4th Respondent code of business practices and ethics prohibited such payments.
12. The 4th Respondent is a foreign entity incorporated and organized under the laws of the United Kingdom with a majority shareholding in the 3rd Respondent. The 3rd Respondent wholly owns the 1st and 2nd Respondents.
13. It is the refusal by the Respondents to refund the Petitioner the paid goodwill coupled with the repossession by the Respondents of the various distributorship areas which prompted the Petition herein.

Brief Litigation history

14. It would be appropriate to re-state a brief judicial history of the application.
15. The application was filed simultaneously with the Petition. It was brought before me under a certificate of urgency. I not only certified the application as urgent but also exercised my discretion and issued ex parte interim conservatory orders. I fixed the application for hearing inter parties on 28th June 2016.
16. On 20th June 2016, the Respondents filed a Motion under certificate of urgency seeking to vacate and or discharge the ex parte conservatory orders. I certified the application as urgent.
17. On the same day the Interested Party also filed an application seeking to be enjoined to the proceedings and also for orders varying or discharging the conservatory orders. I also certified the application by the Interested Party as urgent.
18. The third application to be filed on 20th June 2016 was by the Petitioner. It sought the court's assistance in enforcing the orders of 14th June 2016.
19. The first two applications mentioned above were heard on 20th June 2016. I rendered myself on the same day. I noted that there was not good enough reason for me to interfere with or vary/ vacate my ex parte orders of 14th June 2016. I held and expressed the view that the parties could urge the grounds raised at the inter parties hearing of the application for conservatory orders on 28th June 2016.
20. At the parties' request, I mentioned the matter on 21st June 2016. All the parties wanted the application fast-tracked. I obliged noting that all the parties had come to court under certificates of urgency. The application was consequently re-fixed for hearing on 22nd June 2016.
21. The application for conservatory orders was argued on 22nd June 2016 but not before the Petitioner had filed on 21st June 2016 an amended Petition impleading the 3rd and 4th Respondents. Then also a Supplementary Affidavit filed by the Respondents on 21st June 2016 and served upon the Petitioner's counsel as the hearing commenced on 22nd June 2016 was expunged from the record after the Petitioner raised issue with the same and the Respondent's counsel, unwilling to have the Petitioner file any further affidavits and anxious to have the application heard agreed to have the supplementary affidavit expunged from the record.

Petitioner's case

22. The Petitioner's case may be gathered from both the Petition and the Affidavit sworn in support. It may be stated as follows.
23. That following agreements with the 1st Respondent in 2000 and 2005-6, the Petitioner acquired for valuable consideration from the Respondents proprietary rights over certain areas for purposes of distribution of the 1st Respondent's products. The Petitioner contends that the proprietary right was in the form of goodwill and that the areas originally covered were Baba Dogo, Kariobangi North, Dandora I and Dandora II. That subsequently these areas were ceded by the Petitioner in further consideration for the following routes as areas namely South B, Industrial Area, Kenyatta Market, Nairobi West. Langata, Upperhill, Ngong Road, Dagoretti, Satellite, Kawangware,

Upperhill, Hurlingham, Rongai, Kiserian, Kitengela, Athi River, Kajiado, Namanga, Magadi and Bissil.

24. The Petitioner contends that it paid a total amount of kshs. 38,298,000/= and on exchange acquired proprietary rights from the Respondents over the areas. The amount was non-refundable and according to the Petitioner too the interest acquired through goodwill was also absolute. The Respondents or anybody else were not to take it back save for a consideration.
25. The Petitioner contends further that the Respondents have arbitrarily and without any compensation taken away the proprietary interest conferred to the Petitioner between the year 2000 and 2006. The Petitioner stated that this has been done through 'overt and covert' pressure and that it has been denied the benefit of enjoying its property. The Petitioner dubbed the Respondent's tactics, "iron tactics" in close simulation with the sayings and tactics of Lee Kuan Yew, the celebrated first prime Minister of Singapore who, during his reign, transformed the small port city into a global hub. The Petitioner added that the 'iron tactics' have been invoked by the Respondents every time the Petitioner sought to negotiate or negotiated distributorship agreements with the Respondents . According to the Petitioner this has led to a denial or deprivation of the Petitioner's proprietary rights .
26. The Petitioner contends that the acquisition of goodwill itself was in any event discriminatory as the Respondent selectively chose which distributors were to pay the goodwill. This, according to the Petitioner, was unconstitutional.
27. It is the Petitioner's case that the goodwill it acquired was a constitutionally protected property as goodwill is an asset. The Petitioner then states that it could only be appropriated in the manner contemplated under Article 40 of the Constitution. In these respects, the Petitioner contends that the routes or areas the subject matter of the goodwill payments by the Petitioner could not be taken away unless equal payment for the value thereof was made and in the Respondents interfering with and taking away the routes or areas, there was action in a manner not contemplated by the Constitution which not only resulted in the Petitioner being arbitrarily deprived of its property but also in the Respondents unjustly enriching themselves. Such conduct on the part of the Respondents has been dubbed arbitrary and extortionate.
28. Additionally, it is the Petitioner's case that the Respondents action offends both Articles 10 and 19 of the Constitution and this applies to the processes of negotiating the new contracts as well, which are bulldozed by the Respondents to be executed by the Petitioner within "three hours" and imposition of illegal contractual terms.

Respondents' case

29. The Respondents' case may be retrieved from the Replying Affidavit sworn on 20th June 2016 and filed in court on the same day. The prolix affidavit may be stated to be of the following effect.
30. That the parties' relationship is purely commercial regulated by express provisions of a written contract which invites a commercial rather than a constitutional resolution.
31. The Respondents contend that the court lacks jurisdiction to entertain, hear and determine the issues raised by the Petitioner, as the Petition was filed in violation of the dispute resolution procedure set out in the agreement between the Petitioner and the Respondents.
32. The agreed dispute resolution mode according to the Respondents is mediation and arbitration. The Respondents state that they are ready and willing to have any dispute between them resolved by an arbitrator pursuant to the agreement between the parties.
33. Additionally, the Respondents also contend that the Petitioner was guilty of material non-disclosure when it first appeared before the court on 14th June 2016. In particular, the Respondents have faulted the Petitioner's failure to disclose the existence of the arbitration clause and agreement.
34. The Respondents further contend that the Petitioners cannot claim any refund of the goodwill paid as all the agreements under which the payments were made expressly provided that the amounts would be non-refundable. The Respondents however admit that the non-refundable commitment fees paid by the Petitioner aggregated kshs. 33,930,000/= but adds that the Petitioner by agreement was barred from claiming any refund.
35. The Respondents further contend that the Petitioner did not acquire any exclusive rights to the routes or areas for which the Petitioner paid the goodwill amount. In their respects, the

Respondents refer to the agreements executed by the parties both in 2001 and 2006. The agreements were made on 1st July 2001 and 13th October 2006.

36. Additionally, the Respondents contend that the Competitions Act prohibited any such arrangement which would have conferred exclusivity to the Petitioner.
37. It is also the Respondents' case that all the negotiations with the Petitioners have been above board and the Respondents have clearly never arm –twisted the Petitioner as the various correspondence reveal. The exhibited correspondence reveals various exchanges on the draft agreements between the parties counsel as well as meetings between the parties. As an example, the Respondents pointed to the latest agreement executed on or about 3rd June 2016. The Respondents assert that this agreement was negotiated between September 2015 and May 2016 with the parties meeting and exchanging various correspondences.
38. For completeness, the Respondents contend that the Petitioner does not service the twenty two (22) areas which are the subject of the claims in court and further that there are already six distributors serving these areas. The Interested Party is acknowledged as one of the distributors. Besides, other distributors have also been serving the area under dispute but the Respondents will not for contractual confidentiality reasons disclose such other distributors. As a result the Respondents contend that any orders to be issued by the court would expose them to unnecessary legal disputes for breach of contract.
39. The Respondents finally contend that the Petitioner has not met the threshold for the issuance of a conservatory order and further that, on any event, the balance of convenience tilts in favour of the conservatory orders not being granted and the interim orders being vacated.

The Interested Party's case

40. The Interested Party was joined to these proceedings without any protest or contest by the substantive parties.
41. The Interested Party contends that it has a genuine and valid distributorship agreement with the Respondents. The agreement it is contended by the Interested Party came into life in 2005 and that it was reviewed again in May 2016 for a period of three years.
42. The Interested Party contends that its rights to also enjoy and use its property will be affected if the court grants orders in favour of the Petitioner.

Arguments in court

43. Dr. Kenneth Kiplagat urged the Petitioner's case. Mr. Kamau Karori assisted by Ms. Odari argued the Respondents' cause. The Interested Party's case was presented to the court by Mr. Tom Macharia.

Petitioner's submissions

44. Dr. Kiplagat submitted that the Petitioner seeks to secure its proprietary rights which it acquired from the Respondents for valuable consideration. The Petitioner's counsel asserted that the Respondents were now interfering with the rights and had purported to acquire the same in a manner not contemplated by the Constitution. Making reference to Articles 19, 21 & 23 of the Constitution, counsel submitted that the court was enjoined to preserve and protect the Petitioner's proprietary rights.
45. On the issue of jurisdiction, counsel submitted that the issues raised by the Petition were not arbitrable, as they were statutory and Constitutional rights being litigated over and which invited considerations of public policy. Counsel referred the court to the case of **Rose Wangui Mambo & 2 Others –vs- Limuru County Club & 15 Others [2014]eKLR** for the proposition that even where parties have agreed to a specific forum to resolve their disputes privately, the court's jurisdiction where constitutional issues were raised could not be taken away. Counsel also referred to the Court of Appeal case of **Judicial Service Commission & Another –vs- Kaplana H. Rawal [2015]eKLR** for the proposition that in all matters concerning the Bill of Rights the issue had to be originated from the High Court with rights of appeal to both the Court of Appeal and the Supreme Court.

46. Additionally, Dr. Kiplagat also drew inspiration from the Australian case of **Metrocal Inc –v- Electronic Tracking Systems Pty Ltd [2000] NSWLR Comm 136** for the proposition that disputes over statutory and constitutional rights could not be determined by private persons or arbitrators as such disputes were not arbitrable.
47. On the substantive issue as to whether the Petitioner was entitled to the conservatory orders sought, Dr Kiplagat submitted that the Petitioner had a prima facie case with a likelihood of success.
48. Foremost counsel submitted that all contracts including private contracts had to adhere to constitutional values and principles and any contract inconsistent with the Constitution could be questioned. For this proposition counsel referred the court to the case of **Barkhuizen –v- Napier [2007] ZACC 5** where it was held that even private contracts ought to respect Constitutional values and principles.
49. Counsel submitted that in the instant case the Respondents had behaved contrary to the provisions of the Constitution and in particular Articles 10 and 19 as there was always need to deal with 'fairness, justice and reasonableness' all which virtues, values and principles had been missing in the Respondents dealings with the Petitioner. Quoting from the case of **Barkhuzein –v- Napier (supra)**, the Petitioner's counsel stated that "*while public policy endorses the freedom of contract, it nevertheless recognizes the need to do simple justice between the contracting parties*" and the court had the powers to do justice in the instant case.
50. Then looping in, the Petitioner submitted that there was no justice if the Respondents could for valuable consideration transfer property to the Petitioner only to turn around and re-posses or acquire the same without any recompense to the Petitioner.
51. Additionally, counsel submitted that its rights to property had been violated. The Petitioner's counsel pointed to the routes or areas for which goodwill amount as the violations. In this regard, the Petitioner referred the court to the case of **Shoprite Checkers (Pty) Ltd –v- Members of the Executive Council for Economic Development [2015] ZACC 23** where it was held that permission to sell food or wine was a proprietary right, which was protected as 'property' in the Constitution.
52. Dr. Kiplagat summed up his submissions by stating that the Petitioners right to property had been arbitrarily violated. The property in question was both the goodwill acquired or in the alternative the right to restitution which was not being honoured. While insisting that the routes or areas given to the Petitioner in 2000 and 2006 were exclusive and that it would be absurd to pay for the areas or territories only for the Respondents to take them back.
53. On the Interested Party's claims counsel submitted that the contracts submitted by the Interested Party involved the distribution of 'keg beer' which was not the same product as those distributed by the Petitioner. Then referring to the Interested Party's alleged evidence of long standing distribution, which is a write up on the Interested Party, Dr. Kiplagat submitted that the evidence is inadmissible and unreliable as it is not owned by any author.

Respondents' submissions

54. Mr. Kamau Karori, advocating for the Respondents, firstly focused on the provisions of the Arbitration Act (Cap 49).
55. The main plank of objection to the application by the Respondents was that the court had no jurisdiction to adjudicate over the matter.
56. Mr Kamau Karori, firstly, submitted that where there was an arbitration agreement, then the court had no alternative but to stay all proceedings pending the arbitration. Counsel asserted that stay could only be denied where the arbitration agreement was null and void or incapable of performance and secondly, where there was no dispute with regard to the matters to be referred to arbitration. Mr Kamau Karori made a copious reference to Section 6 of the Arbitration Act in this regard and added that in the instant case there was an arbitration agreement and the dispute fell within the matters to be referred to arbitration.
57. Counsel, additionally, submitted that the proprietary right of goodwill in perpetuity claimed by the Petitioner did not exist and that in any event it was an arbitrable matter.
58. On the merits, Mr. Kamau Karori submitted that the Petitioner had failed to establish that it was entitled exclusively to the distribution routes or areas claimed. Further while not denying the

payment of the goodwill or commitment fees of Kshs. 27,300,000/= and Kshs. 6,630,000/= , counsel stated that the same was non- refundable as provided in the agreements. According to Mr. Karori, claims for restitution or refund were arbitrable. In Mr. Karori's view, the Petitioner had only filed the Petition to avoid the law on limitations of actions.

59. In a quick sum up, counsel stated that this was a purely commercial issue and it was important to exercise the doctrine of constitutional avoidance and refuse to assume jurisdiction. For this proposition counsel relied on the cases of **Lipisha Consortium Ltd & Another –v- Safaricom Ltd [2015]eKLR** and also the Supreme Court of Kenya decision in **Communications Commission of Kenya & 5 Others –v- Royal Media Services Ltd & 5 Others [2014]eKLR.**
60. The Respondents also referred to the case of **Nyutu Agrovet Ltd –v- Airtel Networks Ltd [2015]eKLR** for the proposition that where parties have agreed to take the path of arbitration then the court pursuant to the provisions of Article 159 should be supportive of such a choice and refer parties to arbitration whilst staying any proceedings commenced in court.
61. On the core issue as to conservatory order sought, the Respondent's counsel submitted that the Respondents were equally entitled to the protection of the law and the Constitution while asserting that Article 19(3) recognized the right to freedom of contract.
62. Further counsel submitted that the orders sought by the Petitioner offended Section 21 of the Competitions Act which prohibits restrictive trade practices. Counsel noted that the Petitioner on seeking exclusivity was infringing on the rights of others.
63. Mr. Karori then submitted that the Petitioner was not seeking to maintain status quo but rather to have new contracts drawn by the court in so far as the Petitioner sought to include other areas additional to the ones allotted to the Petitioner vide a distributorship executed on 5th June 2016.
64. Additionally, the Respondent stated that other distributors had been appointed to the areas and that in any event the Respondents were willing to provide a guarantee for any sums claimed by the Petitioner.
65. For completeness and referring to the case of **Gatirau Peter Munya *vs.*Dickson Mwenda Kithinji & Ors [2014]eKLR,** the Respondent's counsel submitted that the Petitioner had failed to establish a prima facie case with a likelihood of success and that it would not be proportionate to grant the orders. Counsel also urged that the application be rejected as it would not be in the public interest.
66. Accordingly, counsel urged the court to decline jurisdiction and stay the proceedings in this Petition or in the alternative dismiss the application for want of merit.

Interested Party's submissions

67. Mr. Tom Macharia submitted on behalf of the Interested Party that the monopoly sought by the Petitioner to distribute the Respondents products was not and could not be a constitutional right. Counsel noted that the Competitions Act prohibits monopolies.
68. Referring to the case of **Mapis Investments Ltd –vs- Kenya Railways Ltd [2005]eKLR,** counsel then submitted that the property claimed by the Petitioners had been unlawfully and illegally acquired, if at all, as exclusivity was prohibited and outlawed by statute. Finally, Mr. Macharia stated that the Petitioner was simply seeking to vary a written agreement through the use of parole evidence and this was contrary to well known principles of law as laid out in the case of **Kenya Corporation Finance Company –v- Kipngeno Arap Ngeny [2002]eKLR.**
69. Mr. Macharia wound up his submissions by stating that the orders sought if granted would be disproportionate and further that no goodwill had been paid to the 2nd Respondent with whom the Interested Party also had a contract for the distribution of beer.
70. For completeness, Mr. Macharia also stated that it would be contrary to public policy to grant the orders sought by the Petitioner.

Petitioner's rejoinder

71. In a pithy rejoinder, Dr. Kiplagat for the Petitioner conceded that quasi-judicial bodies, following the decision of the Supreme Court in **Communications Commission of Kenya & Others –v- Royal Media Services Ltd & Others (Supra)** could adjudicate Constitutional issues. He however reiterated his earlier submission that private individuals could not.

72. Dr. Kiplagat also stated that the routes claimed had always been served by the Petitioner until June 2016 and that in any event the routes assertions had not been controverted at all save for a denial from the bar. Dr. Kiplagat however also conceded that the Petitioners claim did not involve keg beer which was under the 2nd Respondent's patronage.

Discussion and Determination

73. I have considered the pleadings filed and the submissions by the parties. At this stage of the proceedings two core issues arise for determination. Firstly is whether the court has jurisdiction to entertain the instant Petition. Secondly, is whether the Petitioner is entitled to the conservatory orders sought.

Of the court's jurisdiction

74. Jurisdiction is everything and without it the court ought not move a single step. That principle of the law is well engrained in our jurisprudence: see the case of **Owners of Motor Vessel "Lilian S" –vs- Caltex Oil (K) Ltd [1989] 1 KLR 1, 14 (**per Nyarangi JA**)** and also **Boniface Waweru – vs- Mary Njeru & Another HC Misc. Application No. 639 of 2005,** per Ojwang J (as he then was).
75. The Respondents with the support of the Interested Party submitted that the court had been divested of its jurisdiction through the parties' agreement to refer their disputes to arbitration. The Respondents pointed to various arbitration clauses contained in the agreements between the Petitioner or its predecessor in title Bia Yetu Agencies Ltd on the one hand and the Respondents on the other hand. The Respondents then pointed to Section 6 of the Arbitration Act and urged that the proceedings be stayed and the parties referred to arbitration, which the Respondents stated they were willing to attend to. The Respondents then added that the dispute herein was a purely commercial matter best left to be adjudicated before a commercial dispute forum rather than as raising constitutional issues.
76. The Petitioners brief in regard to issue of jurisdiction was that the issues raised by the Petition are not arbitrable and also are outside of the ambit of the arbitration agreement as they involve public policy issues. The Petitioner also contended that the court's jurisdiction could not be taken away by the parties where the matter involved litigation over the Bill of Rights.
77. There is certainly no doubt that the Courts jurisdiction is conferred by the law. The High Court's jurisdiction is conferred by the Constitution under Article 165. Article 165 (3) (b) of the Constitution expressly confers upon the High Court the "*jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened*". Article 165(3)(d)(ii) additionally expressly also confers upon the High Court the jurisdiction to determine "*the question whether anything said to be done under the authority of the Constitution or of any law is consistent with or in contravention of, the Constitution."*
78. The Petitioner states that the Respondents have acted contrary to the provisions of the Constitution. The Respondents on the other hand deny so acting and state that there is an agreement between the two parties and if the Petitioner views it that there has been a breach then pursuant to the same agreement, the dispute must be referred to arbitration and not the court. The Respondent additionally states that Article 159 of the Constitution which itself advocates arbitration must be promoted by giving force to Section 6 of the Arbitration Act.
79. I have previously been confronted by a similar issue where a party seeks to horizontally enforce constitutional provisions and another party states that for want of jurisdiction and by virtue of an arbitration agreement the remit of the court is limited to simply staying the court proceedings. Other courts of equal or superior hierarchy have also confronted the same question. Though there has already been much debate on the issue, there has been no unison on the point.
80. It is for that lack of union that in the case of **Lipisha Consortium Ltd & Another –v- Safaricom Ltd [2015]eKLR** , which was cited by the Respondent's counsel, the court reviewed various decided case law including **International Centre for Policy and Conflict & 5 Others –v- Attorney General & 4 Others [2014] eKLR, Parpinder Kaur Atwol –v- Marijit Signh Arurit HCCP No. 236 of 2011, COD & Another –v- Nairobi City Water & Sewerage Co Ltd [2015] eKLR, Wanainchi Group (Kenya) Ltd –v- The Communications Commission of Kenya &**

Another [2013] eKLR, Naftaly Rugara Muigai –v- Jomo Kenyatta University of Agriculture & Technology [2015] eKLR, Isaac Mumbi & 2 Others –v- Nairobi Hospital & Others [2013] eKLR and **Rose Mambo Wangui & 2 Others –v- Limuru County Club & 17 Others [2014] eKLR.**

81. In ***Lipisha Consortium Ltd*** , the court also reviewed decisions from outside our jurisdiction namely **Harrikissoon –v- Attorney General of Trinidad & Tobago [1979] 3 WLR 62** and the Supreme Court of India decision of **In Re An Application by Bahadur [1986] LRC (Const) 307** as well as the South African decision of **Minister of Home Affairs –v- Bickle & Others [1985] LRC (Const)** and concluded that there were two schools of thought. One in favour of the court exercising jurisdiction even in the light of a private personal relationships where parties had settled on a private dispute resolution forum and another urging reticence in such cases.

82. In ***Lipisha Consortium Ltd*** (Supra) it was stated as follows:

> ***[52]Evidently, the two schools of thought are loudly asymmetrical. Certainly too, in my judgement, it was never the intention of the framers of the Constitution to substitute common law and other existing statutory reliefs with constitutional actions and reliefs. There is a thin line which divides both schools of thought.***
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> ***[53]The court is though cognizant of the fact that enforcement of the Bill of Rights is and must be both horizontal and vertical if the constitutional aspirations of the Kenyan people are to be achieved. In Rose Wangui Mambo & 2 Others v Limuru Country Club & 17 Others (supra) the court observed that horizontal application of fundamental rights and freedoms is not an open cheque and each case must be individually reviewed to ensure that the court is properly seized. It is for the court to undertake a proper scrutiny based on the pleadings to determine whether the dispute and indeed the claim has taken a constitutional trajectory and the alleged violations are evident. The scrutiny needs to be painless as the principle in Anarita Karimi Njeru v Republic [1979] KLR 154 dictates that pleadings be reasonably precise to reveal alleged breaches or violations. "***

83. I still view that as a sound approach.

84. The court should not be in a hurry to simply invoke the principle of *pacta sunt servanda* (the agreement must be kept) and dispatch the parties away from the court process. The court ought to be holistic enough in considering the private personal agreements together with Article 159 on the one hand and the extent of Article 165 on the other hand. Painlessly, the court must seek to find out especially where one party alleges so, whether the dispute genuinely concerns violations of the Constitution. In this light one must also not forget the principle of constitutional supremacy for which 'Wanjiku' voted in 2010. By recognizing the Constitution to be supreme, the Kenyan people could not have intended to again leave alone matters done by parties to the parties themselves but rather appeared under Article 165 to empower the court with the task to define limits of any rights whether entrenched under the Bill of Rights or by common law, modifying the latter where necessary to attain an appropriate blend with Constitutionalism. It is little wonder that Article 2(4) of the Constitution states as follows:

> ***(4) Any law including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid***.

85. In ***Lipisha Consortium Ltd & Another*** (*Supra*) the court stated additionally as follows:

> ***"[57] Even as one reads Article 165 of the Constitution, Article 159 must always be taken into consideration. The court in exercising judicial authority must be guided by various principles as outlined under Article 159 of the Constitution. The application of alternative forms of dispute resolution is one of the principles. It has not been suggested that even constitutional disputes and questions cannot be mediated or resolved amicably and outside court. Quite the contrary, they can in appropriate cases."*** (emphasis)

86. Is this an appropriate case for referral to arbitration?
87. The Respondents say it is, the Petitioner says nay.
88. The Petitioner's counsel urged forth the ever-interesting point that the matter could not be referred to arbitration as Constitutional rights and freedoms are not arbitrable as they invite a consideration of both public interest and policy and those are matters a private arbitrator cannot set: see **Metrocall Inc –v- Electronic Tracking Systems Pty Ltd [2000] NSWLR Comm 136**
89. Once again I would invite the dictates of Article 159 into play and state the importance of promoting alternative dispute resolution as a principle that guides the exercise of judicial authority. The Constitution itself has not offered any exceptions to matters to be resolved by way of alternative dispute resolution and I am not particularly prepared to adopt the reasoning in **Metrocall Inc –v- Electronic Tracking Systems (Pty) Ltd (Supra)** that private arbitrators may not arbitrate over Constitutional and Statutory rights. I hold so not only out of deference to the Supreme Court of Kenya's decision in **Communications Commission of Kenya & 5 Others –v- Royal Media Services Ltd & 5 Others [2014]eKLR** but also due to the appreciated fact that the Constitution does not just take a meddlesome interest in the private affairs and relationships of individuals or legal entities. It is now always part of it and if disputes were to arise some may actually take a 'Constitutional trajectory' while still maintaining a purely commercial avenue or both and the dispute resolver is then expected to deal with the dispute in its entirety rather than think of a separationalist approach.
90. Where however a dispute or claim is laid out as a constitutional issue then the High Court must deal with the dispute. Little wonder then that in **Communications Commission of Kenya & 5 Others –v- Royal Media Services Ltd & 5 Others [supra],** the Supreme Court after a review of various authorities held as follows:

> ***"[258]From the foundation of principle well developed in the comparative practice, we hold that the 1st , 2nd and 3rd Respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright infringement claim and it was not properly laid before that Court as a constitutional issue. This was therefore not a proper question falling to the jurisdiction of the Appellate Court"*** (emphasis)

91. The Supreme Court, in my view, was simply reiterating the point that in appropriate cases notwithstanding the principle of constitutional avoidance and settled dispute resolution forums, the court may, depending on how a dispute is framed, still decline to send the parties to another forum. It all depends on how the issue is laid before the court.
92. Secondly, and still on the issue of arbitrability, there does exist the jurisprudential doctrine of *kompetenz – kompentenz* in arbitration. Under the principle, it is for the arbitral forum to determine, whether it has jurisdiction. Jurisdiction of an arbitral forum includes the arbitrability of any issue or dispute before it. If the dispute is referred to arbitration, the arbitrator(s) will have the competence to determine whether the dispute or any issue is arbitrable. It would thus be inappropriate for the court to determine what is arbitrable and what is not: see **Safaricom Ltd –v- Ocean View Beach Hotel Ltd & 2 Others [2010]eKLR (**per Njamu JA generally). Rather the court is only to intervene when the arbitral tribunal assumes jurisdiction when it does not have the same: see Section 17 as read together with Section 35(2) (a) (iv) and Section 35 (5) (i) of the Arbitration Act (Cap 49).
93. I would consequently find it inappropriate to decline to refer a matter to arbitration simply because a party states that an issue is not arbitrable even in the face of a binding and valid arbitration agreement as it should not be the court to decide who decides what in arbitration.
94. Even as I appreciate that there are the two schools of thought as to when the court entertains horizontal enforcement of the Bill of rights even in the face of an arbitration agreement , I am further cognizant of the principle that not every question in dispute raises a constitutional issue. See for example **Republic –v- National Environmental Management Authority [2011]eKLR** where it was stated that:

> ***"It is for the court to undertake a proper scrutiny based on the pleadings before it to determine whether the dispute has a complete Constitutional trajectory"***.

95.In the instant case, the Petitioners case is, as I understand it as follows.

96.The Petitioner having purchased goodwill from the Respondents acquired the same absolutely. That it became a proprietary interest which the Respondent could not arbitrarily take back. If they had to take the proprietary interest back then the Petitioner was entitled to compensation either in the form of refund or in the form of payment of the same goodwill in its current value. The Petitioner states that any such approach of divesting the Petitioner of its property (the goodwill) would be unconstitutional as a violation of the Petitioners rights under Article 40 of the Constitution. The Petitioner is firm that they do not contest the agreements entered into with the Respondents but rather that some of the terms of the contract appear unconstitutional.

97.My view is that the Petition as drawn reveals that there did and do exist commercial agreements between the parties. For stated consideration certain proprietary rights are alleged to have been acquired and the same rights are also alleged to be taken away. Relevant Articles of the Constitution have been identified and stated. The question for the court at the hearing of the Petition will be whether what has been identified as constituting proprietary interest is "property" within the provisions of Article 40 and whether the same has been arbitrarily expropriated or whether the expropriation is, if at all, justified. That is the core question in this Petition and it is a purely a question of constitutional interpretation and determination, in my view.

98.This court has the requisite remit in my view.

99.It would also not be appropriate to dispatch the parties to arbitration for one more reason.

100.There are third parties now already impleaded and enjoined to these proceedings who were not and still are not parties to the arbitration agreement. The Interested Party has joined the fray and so too are the 3rd and 4th Respondents. How would their interest if at all be covered through arbitration? Arbitration principles discourage involving parties who are not part of the arbitration agreement to arbitral proceedings or even the ultimate Award.

101.I am acutely aware of the far reaching consequences of my conclusive finding that purely constitutional issues and questions have been borne out of a hitherto commercial relationship and hence the court's jurisdiction rather than agreed mode of dispute resolution. I however do not for a moment view it that the framers of our Constitution intended the rights and obligations defined in our common law, in this regard, the right to freedom of contract, to be the only ones to continue to govern interpersonal relationships.

Conservatory order

102.I now come to the second core question in the application.

103.Even assuming that I was wrong on the issue of jurisdiction, would the Petitioner still have been entitled to ask the court for interim conservatory orders, a stay of proceedings notwithstanding?

104.Article 23(3) of the Constitution donates powers to the court to grant appropriate relief 'including' a conservatory order. The list of possible reliefs run some five items. The list is however not exhaustive. Section 7 of the Arbitration Act on the other hand provides that

> ***"It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure".***

105.An "interim measure of protection" under the Arbitration Act (Cap 49) is not expressly defined but the inkling derived from Section 7(2) is that it may be wide enough not just to cover the arbitral process but also any interests vested or claimed to have vested in the parties or any of them. An interim measure of protection may thus very well be the equivalent of a conservatory order issued by the court under Article 23(3) of the Constitution and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

106.Besides, I do not hold the view that where a court refers a matter to arbitration then the court's jurisdiction under Article 23(3) is also divested. The reasoning should be simple: a statutory provision under Section 7 should not claw-back the Courts jurisdiction under the Constitution.

107.With regard to the Conservatory orders sought before me, I must of course first caution myself that at this stage of the proceedings, I need not make any definitive findings of fact or law. Thus while I must review closely the parties respective cases I must avoid over-detailed discussions of

the same. The court at trial is to be given a complete liberty to hear the Petition without any pre-emption.

108. Firstly, though, a quick reflection on the principles of conservatory orders.

109. It is unnecessary to rehash the principles at length. The principles are relatively clear nowadays. Suffice to point out that the court will act when an applicant demonstrates a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation. Secondly, the grant of the conservatory order ought to enhance constitutional values and objects specific to the rights and freedoms in the Bill of rights. Further, the grant of a conservatory order should ensure that the Petition or claim is not rendered nugatory. As well public interest should favour the grant of a conservatory order.

110. These principles were all well laid out in the cases of **Centre for Rights Education and Awareness & 7 Others –v- The Attorney General HCCP No. 16 of 2011, Muhuri –v- Attorney General & Others HCCP No. 7 of 2011, Peter Musimba –v- The National Land Commission & Others (No. 1) [2015]eKLR** and **Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014]eKLR** amongst other cases. Additionally, I hasten to add that the court is always well placed to balance any conflicting positions and proportionately decide in the exercise of its discretion. The above principles are not catalogued and must be considered generally together and not necessarily in an itemized manner.

111. With regard to the purpose of a conservatory order Braithwaite JA could not have put it better than he did in the oft- cited case of **Attorney General –vs- Sumair Bansraj [1985] 38 WIR 286** when he stated as follows:

> ***"…the only judicial remedy is that of what has become to be known as the 'conservatory order' in the strictest service of the term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact" the order would not then be in the nature of an injunction but on the other hand it would be well within the competence of and jurisdiction of the High Court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of … the provisions" of the Constitution". (Emphasis).***

112. In the instant application, the Petitioner asserts having paid the amount of Kshs. 33,930,000/= to acquire a goodwill over certain distribution routes or areas of the 1st Respondent's products. The Respondents certify this uncontested payment, first via a letter dated 20th July 2000 together with a distribution agreement to boot. And secondly by the 1st Respondents official receipt dated 2nd February 2006. The receipt acknowledged the sum of kshs. 27,300,000/= and was endorsed thus:

> ***"Being contribution to meet sales and marketing expenses incurred by KBL in developing & maintaining Bia Tosha Ltd territory".(****emphasis)*

113. The Respondents called the payment 'commitment fees' but the letter of 20th July 2000 was clear that such payments was goodwill.

114. It was and still is the Petitioners claim that the goodwill for which value was paid to the first Respondent was acquired absolutely through the payment of a non-refundable amount. To the Petitioner the fact that the amount paid was meant the proprietary goodwill was also absolute. The Respondents deny this. True, the exact nature must be left to trial, suffice to point out that the determination will also have to be made as to whether 'goodwill' is property which is protected under Article 40 of the Constitution.

115. I understand 'goodwill' generally to mean an intangible and assumed asset or right that assists in generating sales revenue in a business. A more legal definition was offered by Lord Macnaughten in the case of **Inland Revenue Commissioners -v- Muller and Co's Margarine Ltd [1901] AC 217** at **223-224** when he defined it as:

> ***"the benefit and advantage of the good name, reputation and connection of a business".***

116. Later in **Reckitt and Colman Ltd –v- Borden Inc and others [1990] 1 WLR 59**, Lord

MacNaughtens's definition was adopted with the House of Lords confirming that goodwill is proprietary right which is protected by action. The same position was also adopted by the court in **Supa Brite Ltd –v- Pakad Enterprises Ltd [2001] 2 EA 563.**

117. As value can be placed on goodwill as a proprietary interest, I am prepared to find on a prima facie basis that goodwill once paid for and acquired is 'property' and is protected under Article 40 of the Constitution. In these respects, therefore, I find that the Petitioner is entitled to state that it acquired a proprietary interest for what he paid for and when the Respondents state that the amount paid could not be refunded it could only be because the proprietary interest in the form of goodwill was also transferred or assigned upon and receipt of the payment to the Petitioner. My view is that the Petitioner has established a prima facie case with a likelihood of success, when it states that it acquired goodwill for value and which the Respondents have arbitrarily taken away without any compensation.

118. I am also satisfied that the Petition may be rendered nugatory if the stated territory is disturbed before the ultimate determination of the Petition. Good will dissipates if interfered with.

119. Clearly in interpreting, defining and protecting the rights and freedoms under the Bill of rights, the tilt ought to be towards ensuring that such rights are upheld rather than that they may be violated simply because a compensatory value can be placed on them.

120. There is also the claim advanced by the Petitioners that they are entitled to restitution. It is the Petitioner's claim that if the Respondents have to take back the goodwill routes and areas then it is entitled to be restituted. The Respondents response is that the goodwill payment was non-refundable. I hold the view that the question to be asked and answered at the hearing of the Petition will be whether the Respondents by selling to the Petitioner the goodwill routes unjustly enriched themselves.

121. The right to restitution is a common law chose of action or bundle of right over personal property being money paid. It would fall under the definition of "property" under Article 260 of the Constitution. As to whether any specific right of restitution is protected depends on the peculiar circumstances of each case: see **National Credit Regulator –v-Pillipus Albertus Opperman & 3 Others [2012] ZACC 29** at para **63.** See also the recent case of **Makate –v-Vodacom (Pty) Ltd [2016] ZACC 13** where the constitutional court having appreciated that the Petitioner's contractual rights gave rise to a chose in action ("a debt") directed the parties to negotiate over the compensation to the Petitioner for his "please call me" innovation to the cell phone technology.

122. For now, I would be more contended to state that a firm finding as whether or not the Petitioners right to restitution is protected or that it was long taken away as contended by the Respondent is best left to trial.

123. In the totality of the claim and in the matrix of facts, I am satisfied that the investment by the Petitioner in the routes and areas in question referred to by both parties as the Bia Tosha territory deserves the protection of the court. The Petitioner has injected cash. The Petitioner has also employed many Kenyans, all on the basis of the territory granted to the Petitioner some 10 years ago.

124. The Petitioner contended that it has exclusively commanded this territory. No evidence was placed before me to controvert this. I would for now uphold the Petitioner's contention that it did command the territory exclusively notwithstanding statements to the contrary endorsed as terms in the distributorship contracts. The Petitioner's affidavit evidence that it has controlled the territory for the last ten years remains uncontroverted.

125. I have also read the Competitions Act. I found no contradiction with the contention that a distributor may acquire goodwill over an area, place or route exclusively. Indeed, the Competitions Act recognizes goodwill as an asset. So long as any competitor is not locked out, my preliminary view would not be, as I was urged by the Interested Party, that an agreement with exclusivity is illegal for being contrary to statute. No evidence is before me that the respondents competitors were being locked away.

126. That brings me finally to the Interested Party's position.

127. The Petitioner has conceded, and I believe rightly so, that its territory did not cover the 'keg beer' distribution. Keg beer is a product of the 2nd Respondent. I note also that no goodwill consideration was paid to the 2nd Respondent. The Petitioner's goodwill claim only stands in good stead against and in relation the 1st Respondent, in the circumstances of this case.

128. I was however not particularly convinced even by the unsigned write up on the Interested Party, produced by the Interested Party. The write up talks of the Interested Party having had a commercial association with the Respondents since 2005. The Interested Party's counsel also stated that the commercial relationship has span some ten years. Amazingly though, a copy of the Interested Party's Certificate of Incorporation also availed reveals that the Interested Party was incorporated in 2007. I need say no more at this interlocutory stage.
129. Before concluding, I hasten to add that on the face of the documentary evidence availed I did not discern any sense of high-handedness on the part of the 3rd and 4th Respondents. I also did not identify and neither was my attention drawn to any arbitrary impositions by the 3rd and 4th Respondents. Terse messages do not necessarily amount to arbitrary impositions.

Conclusion and disposition

130. I come to the conclusion that the petitioners have established on a prima facie basis that their proprietary right has been and is in the process of being violated. The Bill of rights ought to be interpreted in the most liberal and expansive as well as favourable manner with the objective of vindicating human rights.
131. For a relatively immense amount the Petitioners acquired a goodwill over certain areas dubbed by the parties as the Bia Tosha territory. The Petitioner has also invested heavily it says. The same ought to be preserved. It is not enough as has been suggested by the Respondents that a cash guarantee will secure the same as well as the Petitioners claim. Constitutional principles and values under and applicable to Article 40 of the Constitution would dictate that the court proceeds on the basis of protection of any proprietary rights rather than assenting to arbitrary acquisitions and impositions on the basis that compensation can be made. The essence of Article 40 was not to encourage compensation. In my view, it was to help in the avoidance of arbitrary deprivations. That is what the Petitioner has asked the court for and I will oblige the Petitioner for now.
132. The nature of the proprietary rights involved implores me to grant conservatory orders. It is a right which without protection dissipates in the dawn of every day. It may not be there come the hearing day.

Dispoasl

133. The application dated 14 June 2016 succeeds on the following terms:

a) Pending the hearing and final determination of the Petition herein a conservatory order will issue preserving the Petitioner's Bia Tosha territory exclusively to the Petitioner under the area of operation arrangement obtaining as at 2nd February 2006.

b) The order herein above shall be applicable to the 1st Respondent's products but shall not apply to product known as Keg Beer .

c) Each party shall bear its own costs of the application and is at liberty to apply.

Dated, Delivered and Signed at Nairobi this 29th day of June 2016

J.L. ONGUTO

JUDGE