



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 125 of 2010

MUNGI FARMERS TOBACCO CO. LTD. PLAINTIFF

VERSUS

BRITISH AMERICAN

TOBACCO KENYA LTD.DEFENDANT

RULING

This application is brought by a chamber summons dated 26th February, 2010, and taken out under **Order XXXIX Rules 1, 2, 3 and 9** of the **Civil Procedure Rules; Sections 63 (c) and 3 A of the Civil Procedure Act**, and all other enabling provisions of the law. The Applicant applies for two main orders –

1. ***That this honorable Court do grant a temporary injunction restraining the Defendant by itself, its agents and/or servants from in any way terminating the distributorship agreement dated 1st September, 2009, so as to safeguard the Plaintiff from the Defendant's breach of contract pending the hearing and determination of this application inter partes.***
2. ***That the Defendant be restrained by itself, its agents and/or servants from introducing a new distributor into the Plaintiff's territory until the hearing and full determination of this application and suit.***

The Applicant also prays that the costs of this application to be provided for.

The application is supported by the annexed affidavit sworn by Sophia Mukami Muthengi, a Director of the Plaintiff company, sworn on 26th February, 2010. It is based essentially on the ground that the plaintiff has been a distributor of the Defendant's products for well over 10 years in Eastern Province. On 1st September, 2009, the Plaintiff signed a new distributorship agreement with the Defendants and thereafter complied with all the terms thereof. However, in alleged breach of the said contract, the Defendant ceased to deliver stock to the Plaintiff despite the latter's willingness to receive and pay for the same.

Opposing the application, the Defendant filed a replying affidavit whose main thrust was that the application was misconceived and an abuse of the Court process, and that the Plaintiff's remedy if any, lay in damages. It was also the Defendant's case that no sufficient grounds had been disclosed to warrant the orders sought as the contract had expired by effluxion of time.

At the oral canvassing of the application, Mr. Mtange appeared for the Applicant while Mr. Gichuhi appeared for the Respondent. After considering the pleadings and the respective submissions of Counsel, I find that the issues to be determined are whether there was a contract

between the parties along the lines alleged by the Plaintiff; whether there was a breach of that contract; and whether the Plaintiff is entitled to the orders sought.

There is no denying that there was a contract between the parties as this fact appears plainly both in the plaint as well as in this application. To this effect, paragraph 7 of the plaint states as follows –

“That on the 1/9/2009 the Defendant required the Plaintiff company to sign a fresh distributorship agreement running for a period of (6) months.”

This agreement is subsequently confirmed to in paragraph 10 of the plaint wherein the Plaintiff states –

“That the distributorship contract of 1/9/2009 provided for a notice period upon termination to enable the Plaintiff company make formal transitions within the market and the Defendant’s failure to give such notice amounted to a breach of contract which resulted in the Plaintiff suffering loss of business as it was holding on to stock it had no sure way of knowing how to dispose off given the change in circumstances.”

From a copy of the agreement between the parties which is attached as an exhibit to the replying affidavit sworn by Edward Kimathi, the Defendant’s Route to Market (RTM) Implementation Manager, the commencement date of the agreement between the parties was 1st September, 2009. The term of the contract was for a period of six (6) months starting from the date of commencement unless terminated earlier pursuant to Clause 7 of the Agreement which accorded the Defendant company the right at any time during the term to terminate the agreement with immediate effect by written notice to the Plaintiff.

From the evidence on record, it is quite clear that the term of the agreement between the parties was six (6) months from the commencement date of 1st September, 2009 as acknowledged by the Plaintiff in paragraph 7 of the plaint. That fact is corroborated by the supporting affidavit of Sophia Mukami Muthengi, the Plaintiff’s Director, when she states in paragraph 7 of her supporting affidavit that **“... on 1/9/2009 the Defendant required us to sign a new distributorship contract which was to run for a period of six (6) months, commencing the 1/9/2009.”** The Defendant stopped its supplies to the Plaintiff at the end of February, 2010, which coincided with the end of six (6) months from 1st September, 2009. Since the contract was for a fixed period of six (6) months, it came to an end by effluxion of time after the end of that period. As the contract was not terminated prematurely, there was no need to give any notice and consequently, I hold that there was no breach of contract.

In the case of **GIELLA v. CASSMAN BROWN & CO. LTD.** [1973] EA 358, the three conditions to be satisfied before the grant of an interlocutory injunction are that –

- (a) An Applicant must show a prima facie case with a probability of success.***
- (b) 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; and***
- (c) If the Court is in doubt it will decide an application on the balance of convenience.***

On the basis of these conditions, having found that there was no breach of contract, I therefore hold that the Applicant has not demonstrated a *prima facie* case with a probability of success. I further note from the pleadings that if there was a breach of contract, the Applicant has already quantified the loss it would sustain. This in effect means that the injury, if any, that the Applicant may suffer can be compensated by an award of damages. As this Court is not in any doubt, I don’t find it necessary to consider the balance of convenience.

For the above reasons, I find that the Applicant has not made out a case deserving the interlocutory injunction sought, and its application is hereby dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 1st day of July, 2010.

**L. NJAGI
JUDGE**