REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 661 of 2007

NASSER AHMED T/a AIRTIME BUSINESS SOLUTIONS……....PLAINTIFF

VERSUS

CELTEL KENYA LIMITED…….……. DEFENDANT

RULING

On 20th December 2007, the plaintiff filed suit seeking judgment to be entered against the defendant for the sum of KShs.119,290,737/= on account of certain payments that the plaintiff claimed were owed to him. The plaintiff further prayed for an order of injunction seeking to restrain the defendant from interfering with the plaintiff's ownership or operation of his business outlets, shops, containers and other business assets or from recalling or realizing the bank guarantees issued in favour of the plaintiff. Contemporaneous with filing suit, the plaintiff filed an application for injunction under the provisions of **Order XXXIX Rules 1, 2** and **9** of the **Civil Procedure Rules** seeking to restrain the defendant by itself or its agents from interfering with the plaintiff's business, business assets, shops, containers or other assets, or from recalling the bank guarantees issued in favour of the plaintiff pending the hearing and determination of the suit.

The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of Nasser Ahmed, the plaintiff. In the said affidavit, the plaintiff deponed that he entered into an agreement with the predecessor of the defendant, Kencell Communications Ltd, in which he was appointed to be a distributor of the defendant's products. The plaintiff enumerated the regions which he was authorized to operate by the defendant which included *inter alia*, Malindi, Taveta, Voi, Eastleigh Section III, Westlands and Hilton Arcade. He deponed that he was paid commission by the defendant on the basis of sales that he was able to achieve in each particular month. He was further paid consumption remuneration based on the rates determined by the defendant. The plaintiff was further paid incentives by the defendant on the basis of certain set targets.

The plaintiff deponed that the defendant required him to obtain a bank guarantee of KShs.20,000,000/= before any stocks could be released to him. In compliance with the requirement, the plaintiff gave the said guarantee. The plaintiff deponed that as a result of this business arrangement, he had invested heavily in the business. He deponed that he made the investment on the understanding that he was going to have a long term business relationship with the defendant. In his view, he was one of the best performing distributors of the defendant. It is on account of achieving the targets set by defendant that he claims that he is entitled to be paid incentives and bonuses that were put in place by the defendant. He deponed that he was entitled to a percentage of the sales that he was able to achieve in the particular period. He swore that the defendant obliged him to rent containers for which he paid a deposit of KShs.2,000,000/=. He was therefore surprised when on 10th December 2007, without any prior

consultation or notice, the defendant terminated the agreement. In his view, the said termination was entirely without provocation or legal justification and was vexatious, unreasonable and in breach of the said agreement. He deponed that the defendant should have given him a reasonable notice of between six months and one year to enable him fulfill commitments that he had made as regard the rented business premises and other financial commitments made prior thereto. He urged the court to allow his application, since in his opinion it was the defendant that was in breach of the agreement and who had set in motion events that would likely threaten and disrupt his business and therefore cause him serious financial loss and damage.

The application is opposed. When the defendant was served, it duly entered appearance, filed a defence and counterclaimed for a sum of KShs.21,972,954/25 which it claimed was owed in respect of goods supplied on credit to the plaintiff. The defendant further prayed for an order of the court to direct the plaintiff to return to the defendant certain assets *(which were listed)* which were availed to the plaintiff in the course of the subsistence of the agreement. In response to the application, Jocelyn Muthoka, the legal officer of the defendant, swore a lengthy replying affidavit in opposition to the application. She conceded that the plaintiff and the defendant had entered into a distributorship agreement which was terminated by the defendant after the plaintiff had allegedly failed to meet his monthly performance targets in the regions that he was assigned. She deponed that the plaintiff failed to put in stock sufficient merchandise of the defendant's products and thus inconvenienced the customers. She swore that the defendant properly invoked a clause in the agreement which allowed it to terminate the agreement if it was of the opinion that the plaintiff was in breach of the same.

She deponed that the plaintiff was required to give a bank guarantee of KShs.20,000,000/= which gave the defendant confidence to advance its products to the plaintiff on credit. She was of the view that the plaintiff had filed the present suit to frustrate the defendant from recalling the guarantees from the bank. She deponed that this court should not grant the application sought in view of the plaintiff's non-disclosure of a material fact which was in relation to the fact that the plaintiff owned the defendant the sum of KShs.21,972,954.23 on account of products sold and delivered to the plaintiff. She urged the court to compel the plaintiff to return to the defendant all equipment that it had availed to the plaintiff during the subsistence of the business relationship. She swore that this court could not grant the order of injunction sought since the defendant had already withdrawn the licence that it had issued to the plaintiff to market its products. She urged the court to find that the defendant had legally exercised its option to terminate the agreement. She insisted that the plaintiff had failed to establish any breach of contract that would entitle it to be paid damages. She urged the court to dismiss the application because in her view the plaintiff was attempting to renegotiate and re-write the terms of the agreement which is not the purview of the court.

At the hearing of the application, I heard the submission made by Mr. Mutubwa on behalf of the plaintiff and Mr. Ojiambo on behalf of the defendant. The two counsel, apart from citing several decided cases, basically reiterated the contents of the application and the affidavits sworn thereof in support of their respective client's cases. The issue for determination by this court is whether the plaintiff established a case to enable this court grant the order of interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the application for interlocutory injunction sought are well settled. In **Fina Bank Ltd vs. Spares and Industries Ltd [2001] 1EA 52**, the Court of Appeal held that the conditions for the grant of an interlocutory injunction were:

(i)that the applicant had to show a prima facie case with a probability of success,

(ii)the injunction would not normally be granted unless the Applicant stood to suffer irreparable injury or loss which could not be adequately compensated by an award of damages and

(iii)if the court was in doubt, the application would be decided on the balance of convenience; **Giella vs. Cassman Brown [1973] EA 358** followed.

In the present application, certain facts are not in dispute. It is not disputed that the plaintiff and the defendant's predecessor, Kencell Communications Limited entered into a distributorship agreement on

26th February, 2004. In the agreement, the defendant granted the plaintiff exclusive rights to distribute its products within certain areas of Coast Province. The area of distribution was later extended to cover other areas of the country. The agreement was reviewed and updated periodically depending on the demands of the market. The defendant introduced incentives schemes for its distributors. The defendant was inducted into the said incentive schemes. The purpose of the said incentive schemes was to increase the sales of the defendant's products. The plaintiff was required to give two bank guarantees of KShs.10,000,000/= each to enable the defendant supply to the plaintiff its products on credit. The plaintiff was supplied with containers and other materials to enable the plaintiff effectively market the defendant's products.

According to the defendant, the plaintiff failed to meet its set targets hence the defendant's decision to terminate the distributorship agreement on 10th December 2007. The material part of the said letter stated that:

"*[the plaintiff's] failure to deliver monthly targets has denied Celtel Kenya business revenue due to stock-outs in your assigned market. Our customers have also been greatly inconvenienced by your poor market service and this contravenes our distribution contract which states that you shall be responsible for product availability in your assigned market(s).*"

The plaintiff denies that it was in breach of the distributorship contract. He took issue with the defendant's decision to terminate the contract without giving him sufficient notice. He was further of the view that the said termination of the distributorship agreement would result to loss and damage to his business. I have carefully evaluated the reasons advanced by the defendant for terminating the distributorship agreement and the plaintiff's objection to the said termination. Under the distributorship agreement, either party was at liberty to terminate the agreement where there was breach, insolvency/bankruptcy, change of shareholding or upon effluxion of time *(see clause 22 of the agreement)*. Under clause 22.5, the defendant would have the right to terminate the agreement if it was of the view that the distributor *(in this case the plaintiff)* had committed breach of the terms and conditions of the agreement.

The plaintiff complained that the defendant had no right to unilaterally terminate the agreement without giving him adequate notice. It is clear from the said clause of the agreement that the agreement could be terminated by the defendant without any notice being issued. It could similarly be terminated by the plaintiff by giving a 15 day notice. There is therefore no period specified in the agreement that would entitle either party to six months or one year notice before the termination of the agreement. Further, this court took into account the fact that the relationship created by the said distributorship agreement was a business agreement of a personal nature. This court cannot be called upon to force parties who are no longer willing to engage in a business relationship to remain in such relationship. It is clear that the premise of the plaintiff's case is the breakdown of the business relationship with the defendant. The defendant no longer wishes to deal with the plaintiff. The plaintiff cannot seek orders of this court to force the defendant to engage with him. The plaintiff's remedy, if it is of the view that it was aggrieved by the decision of the defendant to terminate the said distributorship agreement, lies in damages. Indeed, the plaintiff has done just that; he has quantified the damages that he allegedly incurred on account of the alleged breach of contract by the defendant.

Has the plaintiff established a prima facie case as to entitle this court grant him the orders of interlocutory injunction sought? I do not think so. This court cannot grant an injunction to compel the defendant to continue with a business relationship with the plaintiff, which in its view is neither beneficial to it nor to its customers. I agree with the defendant that a distributorship agreement is akin to a licence which once withdrawn cannot form a basis for enforcement of terms beyond the said licence. I think the plaintiff's remedy lies in damages. Damages would be adequate remedy in the circumstances. The balance of convenience tilts in favour of the defendant who would now have an opportunity to appoint new distributors to cover the areas previously assigned to the plaintiff. I therefore find no merit with the application filed by the plaintiff. The fact that both the plaintiff and the defendant claim to owe each other money, is no basis for this court to grant the order of injunction sought.

The application for injunction filed by the plaintiff on 18th December, 2007 is hereby dismissed with costs.

DATED at **NAIROBI** this **27th** day of **MAY, 2008.**

L. KIMARU

JUDGE