REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Suit 186 of 2000

AMALO COMPANY LIMITED …….....……. PLAINTIFF

VERSUS

SMITHKLINE CONSUMER HEALTHCARE LTD .....DEFENDANT

GLAXO SMITHKLINE LIMITED …….....…….. DEFENDANT

JUDGMENT

The plaintiff herein Amalo Company Limited is a Company that engages and/or deals in whole selling and retailing of general commodities. In an amended plaint dated 24th October 2005, it states the defendant is the successor in title to SmithKline Beacham Consumer Health Care Limited and had taken over the name, all the assets and liabilities of the said company. The defendant is now Glaxo SmithKline Limited. The plaintiff states that the defendant communicated to the plaintiff by way of a letter dated 2nd August 1995, that the plaintiff will be the selling and distributing as an agent of the defendant's goods and/or products in Kisumu, Bondo, Busia, Kakamega, Siaya, Kendu Bay, Sugar belt and Kaimosi. It is stated that, that was done by way of an express agreement between the

parties on 10th August 1995, when the defendant duly appointed the plaintiff as the sole selling and distributor agent of its products within the stipulated area.

It is alleged that between the year 1995 and 1996, the plaintiff purchased various goods from the defendant to the value of Kshs. 131,620,617.16, for distribution and resale in the designated area stated hereinabove.

The plaintiff also state that in due reliance of the said Agency agreement it purchased various motor vehicles to ensure the agreement runs smoothly and according to the expectation of the defendant. It is also the case of the plaintiff that the defendant company made it to relocate its majority Business Banking operation from Trade Bank limited to a more reputable Bank Standard Chartered Bank (K) Limited. In 1996, the plaintiff in anticipation of good business relationship with the defendant requested for a financial facility of Kshs. 100 Million from the Standard Chartered Bank (K) Limited to finance the purchase of the defendant's products. The facility was granted.

According to the plaintiff, what triggered the dispute is the action of the defendant in supplying goods directly to one of its rivals carrying business in Kisumu in the month of March 1997. It is alleged that the goods were supplied without prior knowledge of the plaintiff. It is the case of the plaintiff that the decision of the defendant to breach the distribution Agency Agreement was unilateral, unlawful and without any prior notification to the plaintiff. And as a result of the said breach, the plaintiff suffered immense loss and damages. The plaintiff therefore prays for :-

(a) Loss of profits

(b) Kshs. 4,335,996 being reliance loss suffered by the plaintiff due to expenditure on motor vehicles

(c) Kshs. 4,079,101.50 being compensation for the expired stocks currently in possession of the plaintiff which stocks have expired directly as a result of the defendant's breach of the distribution agency agreement.

(d) Kshs. 5,396,661.10 being the refund for the unexpired stocks currently in possession of the plaintiff which stocks are due to expire and not marketable since the defendant has unlawfully increased competition for the plaintiff by breaking the distribution Agency Agreement by directly supplying its products to the plaintiff's major competitors and business rivals within the plaintiff's designated territory and/or areas.

(e) An order compelling the defendant to collect all its expired and unexpired products from the plaintiff's warehouse after compensation and refund for the same.

(f) General damages

The defendant filed a defence and a counterclaim for the

amount of Kshs. 4,892,482/=. The defendant states and admits that the plaintiff was appointed a distributor of some of its products but denies ever having signed an agreement with the plaintiff making the plaintiff a sole distributor of its products. It is the case of the defendant that the plaintiff applied to be appointed a distributor for its products in its defence, the defendant denies that it appointed the plaintiff its sole selling and distributor agent for its products in the Nyanza region or as a sole distributor in any other place. And that the letter dated 10th August 1995, did not constitute a distribution agreement but was merely an offer, which stipulated the requirements and conditions to be met by the plaintiff in order to be appointed a distributor. And in any case the plaintiff did not fulfil all the conditions as stipulated in the said letter.

The defendant states further that if the plaintiff purchased any products from the defendant, it was on a willing – buyer willing – seller basis and in furtherance of its own business interest and was under no compulsion to purchase the said products. The defendant also denied that it expressly or impliedly caused the plaintiff to purchase motor vehicles as alleged. And if the plaintiff purchased any vehicle, it did so on its own volition and not in pursuance of any agency agreement. And that in any case the plaintiff in its letter of application to be appointed as a distributor of the defendant's products, stated that it had a fleet of vehicles that would enable it to carry out any distribution business.

It is also the contention of the defendant that if there were any alleged arrangements between the plaintiff and the Standard Chartered Bank (K) Limited, the same were in furtherance of its own business interest and that the plaintiff was not obliged to relocate its banking business to the said bank in order to do business with the defendant.

The defendant also denies that it ever appointed the plaintiff as a sole distributor of its products. And that the letter dated 8th August 1996, was simply a letter of comfort, as the defendant had not signed a distribution agreement. The defendant further avers that the plaintiff continued to do business with the defendant during and after the time when the alleged breach of the alleged contract is supposed to have taken place, therefore the plaintiff is estopped by its said business dealings with the defendant from alleging any breach of any alleged contract. It is also contended that the plaintiff failed to meet the defendant's business objectives failed to or make adequate sales. And in view of that problem the defendant was using other distributors to adequately cover the area in which the plaintiff was operating. In short the defendant denies that it is in any way responsible for nor obliged to compensate the plaintiff for any products that expired in the plaintiff's warehouse as title in the products passed to the plaintiff on delivery. And in any case the plaintiff barred the defendant's representatives from carrying out a free and

regular inspections of expiry coding on products in its warehouse, which inspection the plaintiff had agreed to. It is alleged that the inspection would have assisted the plaintiff, without any obligation on the defendant in moving near – expiry products to any area that may have immediately required them. It is also the contention of the defendant that it had and has always been willing to take back products that have not expired or are near – expiry and are in good and sellable condition, but the plaintiff refused to return the said products and bared the agents of the defendant from collecting the same and issuing it with a credit note.

The defendant further denies having fraudulently and /or knowingly misrepresented to the plaintiff that the plaintiff was its sole distributor within the areas stated. And that the plaintiff knew all along that it had no area distribution contract with the defendant with specific demarcated areas as alleged. Furthermore the plaintiff never even requested to be made a sole distributor of the defendant's products in its initial application. And that there was no misrepresentation made to the plaintiff that the defendant would not supply its products to the plaintiff's rivals and competitors.

The defendant made a case for counterclaim alleging that it sold and delivered goods at the request of the plaintiff on diverse dates during the years 1995 to 1997. The defendant then made a claim of Kshs. 4,892,482/= being the agreed balance due and owing to the defendant for products sold and delivered upon order and request of the plaintiff during the trading period.

The brief evidence of Mr. Anil Kumar Devshi Shah, a director of the plaintiff company is as follows. That the plaintiff company deals in distribution of general commodities in Kisumu for various companies. He produced three letters concerning the issue in dispute as P1, P2 and P3. I will revert to the contents of the said letters later in this judgment. He stated that the defendant company would give all distributors five (5%) commission on all goods sold. And that the agents of the defendant company would come regularly to inspect the goods to find out whether their goods had expired or were unsellable. He stated that the defendant would then take the goods if they were expired or were in unsellable condition and give a credit note to the plaintiff. He then produced a letter dated 10th July 1997 as exhibit P5 to confirm that position.

He also stated that the banker's of the plaintiff were Trust Bank Limited and that the defendant requested him to change to Standard Chartered Bank (Kenya) limited. He produced a letter dated 11th June 1996 as exhibit P6 to confirm the said position. He thereafter received a letter dated 14th June 1996 from Standard Chartered Bank (Kenya) limited for distributor's finance whereby, the bank was to provide key distributors of the defendant's products with a finance scheme for the sole object of purchasing goods of the defendant. This meant the commission given, was changed from 5% to 8%. The plaintiff was given a trade finance scheme with a limit of Kshs. 100 Million to assist in the purchase and payment of the defendant's goods. The sum was to act as and assist in normal working capital for the plaintiff.

Mr. Shah further contended that in March 1997, the defendant without informing the plaintiff supplied its products to another competitor known as Shah Sojper and brothers in Kisumu. The defendant allegedly supplied goods worth over 16 Million to the said competitor. The plaintiff complained and in response the defendant wrote a letter dated 27th January 1997 produced as exhibit P10. The said letter allegedly notified the plaintiff that they were the sole distributors of the defendant's products within the stipulated and designated area. According to the witness the supply of goods to the other competitor affected their business financially. He alleged that the plaintiff company were unable to pay its debts. The witness stated that the company purchased several vehicles for the sole purpose of making good the distributorship of the defendant's goods.

The defendant called two witnesses in its defence and counterclaim. The first witness is William Charles Namwakira whose job description is accounts receivable supervisor, employed on 10th January 1996. He stated that the defendant company has a business of selling pharmaceutical and consumer goods. And that the plaintiff was ordering goods for resale after he was appointed a distributor, through a letter dated 2nd August 1995. The defendant's witness denied categorically that the plaintiff was appointed as the sole selling and distribution agent of the defendant's products. And the whole

relationship was that of a willing – buyer – willing seller. The witness also presented evidence in support of the counterclaim. In respect of the letter dated 8th August 1996 the witness stated that at that time the defendant was not dealing with another distributor. And that the defendant company was not bound to deal with only one distributor but had a discretion to bring on board any other distributor if the need and circumstances dictate or arises.

The witness further contended that the plaintiff in its application stated that it had the capacity to do the distributorship as they had enough sales staff and a fleet of vehicles which they would use for the business. They further indicated that they were distributors for eleven (11) other companies for various products. And that was the basis of appointing the plaintiff as a distributor.

On the counterclaim the witness stated that the defendant had seven (7) outstanding invoices unpaid by the plaintiff amounting to Kshs. 4,892,482 and he listed the invoices numbers and value of the goods against those invoices. The witness also produced the minutes of the meeting held on 12th February 1998, wherein after various credit notes and discounts accorded to the plaintiff, the final outstanding amount was agreed at Kshs. 4,892,482.02. The plaintiff allegedly signed the document acknowledging indebtness to the defendant. According to DW1, there were no conditions set for the plaintiff signing the document.

The other witness who gave evidence on behalf of the defendant is James Watenga Kamau (DW2) who is a regional sales manager based at Nairobi and who was employed in 1995. he states that in 1995 he was a sales representative in Nyanza. And his duties and responsibilities were:-

(1) To evaluate the performance of a particular distributor

(2) Stock management

(3) Sales management

He stated that the plaintiff had a problem dealing with the products of the defendant in the region. And as a result he advised the defendant company that he was not getting access to stock held by the plaintiff. He also stated that the director of the plaintiff company Mr. Shah had a public relation problem with customers. And after a thorough evaluation he advised the company to appoint another distributor. According to DW2, the plaintiff did not have vehicles solely dedicated to the distributorship of the defendant's products. He also stated that during his stay of one year and eight (8) months, he did not get stock returns from the plaintiff.

The first issue for my determination is whether the plaintiff lost any expected profits due to the conduct of the defendant. And in essence that would mean whether the plaintiff is entitled to loss of profits. The plaintiff stated that its total purchase for the period of July 1995 to June 1997 was Kshs. 181,260,379.40. Miss Omollo Advocate urged me to award a sum of Kshs. 50,752,906/= on the other hand Mrs. Wambui Kyama Advocate for the defendant submitted that loss of profits are clarified as special damages, which must be specifically pleaded and proved. I agree with Mrs. Wambui Kyama that the plaintiff did not plead the net particulars of the loss of profits. I do not understand how the plaintiff's Advocate arrived at the sum of Kshs. 50,752,379.40. The plaintiff did not produce evidence whether documentary or otherwise to show the amount of profits he was making when the distributorship was in place and performing to the satisfaction of both parties. The basis of that figure is the eight percent (8%) commission, which the plaintiff was entitled to and which was given by the defendant. According to DW1 the commission agreed was discounted on the face value of the invoices. He further stated that all the invoices produced would bear that truth. In my view the plaintiff cannot be allowed to benefit twice by claiming eight percent (8%) of its lost profits. It is also my decision that the failure of the plaintiff to produce a profit and loss account is fatal to the claim of loss of profits. There is no evidence to show that the plaintiff made profits from the business relationship with the defendant. The amount of goods and the value of such invoices cannot be a basis to show that profits was being made. And that it was lost subsequently as a result of the conduct of the defendant. As was rightly pointed by Mrs. Wambui Kyama the amount of purchases allegedly made cannot be used to assess and claim loss of profits.

The law is that where a party is claiming loss of profits in a continuing basis, he must strictly plead the facts giving rise to the loss of profits. The minute details and quantification of the profits must be found in the pleadings of the party seeking globolized figure. The evidence tendered must be in support of the pleadings and it is not within the powers of the parties to get a figure from nowhere without any basis. In essence it means loss of profits must be specifically pleaded and specifically proved to the satisfaction of the court. I think for the reasons stated the claim for loss of profits cannot succeed and the same is rejected as having no basis in law.

Secondly, the plaintiff claim the sum of Kshs. 4,335,996/= being reliance loss suffered due to expenditure on motor vehicles. It is stated that in due reliance of the agency agreement the plaintiff purchased three (3) motor vehicles for the distribution and re-sale of the defendant's products. And since the agency was breached by the defendant the plaintiff is entitled to compensation for the value of the vehicles purchased in due reliance of the future success of the business. Miss Omollo Advocate for the plaintiff submitted that the plaintiff indeed suffered loss by purchasing motor vehicles to distribute the defendant's goods, while the defendant in turn frustrated its effort of distributorship. She contended that it is true that the plaintiff had three (3) motor vehicles and as he continued to work with the defendant, there was a need to buy motor vehicles to carry out the distributorship business effectively. She further asserted that since the relationship between the plaintiff and defendant was strained then the plaintiff had no purpose for the motor vehicles he bought purposely to distribute the defendants goods.

It is also the case of the plaintiff that it had three (3) pick ups and two (2) lorries but when it got the distributorship contract they felt the need to buy more vehicles to efficiently and effectively distribute the products of the defendant. The plaintiff's witness produced logbooks of the three motor vehicle and attached a particular value to each motor vehicle totalling to the sum claimed.

The defence of the defendant is that the plaintiff cannot allege in his pleadings and in evidence that the defendant requested them to purchase motor vehicles to distribute its products and yet the plaintiff in its application stated that it already had motor vehicles capacity to conduct the distribution. And that the application to be appointed as a distributor was approved on the basis that the plaintiff already owned motor vehicles to conduct the business. Mrs. Wambui Kyama Advocate submitted that the plaintiff did not tender any evidence to show that the alleged motor vehicles were solely committed to distributing the defendant's products. DW2, who was the defendant's manager in Kisumu at the time clearly stated that the plaintiff did not have any specific vehicles committed and set aside for distributing the defendant's products as it was distributing for other companies as well.

In answering the rival positions of the parties herein, it is important to assess the case of each party. In exhibit D1, the plaintiff made an application through that letter dated 20th June 1995. The plaintiff indicated that it owns several vehicles to enable it conduct and/or carry out the distributorship business it was seeking to acquire from the defendant. In fact the plaintiff mentioned five (5) vehicles in its profile to convince the defendant to grant and/or appoint them as its official distributors. It suffices to mention that the plaintiff mentioned 12 other companies it was distributing and indicated it was in a position to carry an effective distribution of the defendant's goods. The letter in part read:-

" ***We may also mention that in case you appoint us as your distributors, we are willing to invest in more manpower and vehicles to further enhance marketing and sales of your products within or stipulated areas including Uganda and Tanzania where we have patronage of some big customers….. we feel confident that given opportunity we shall be able to efficiently handle your distributorship and look forward to your favourable decision in the matter".***

And in a letter dated 24th June 1995 produced as exhibit D2, the plaintiff company stated in part:-

" ***Distribution is organized by the managing director and facilitated by trained staff and fleet of three (3) pick ups and two (2) lorries".***

The said letter also, indicated that the plaintiff company was in possession of stocks and was distributing for various other companies. The letter further stated that the plaintiff company had over thirty (30) years

of experience in distribution and sales. And as a precondition to the appointment as a distributor, the plaintiff company was given certain conditions and regulators, which the plaintiff accepted as a prerequisite for appointment: condition 8 states:-

" ***Must have operational van/vans and salesman who will service S. B. customers as per standard agreed".***

It was a fundamental requirement for the plaintiff to have a fleet of motor vehicles before it could be appointed a distributor of the defendant's products. By signing the condition of appointment of distributor and by accepting the offer, which stipulated the requirement and conditions of the defendant, the plaintiff willingly accepted to trade with the defendant.

In my humble view the letter of offer and acceptance was the basis of the contractual relationship between the parties to this dispute. Indeed it was that letter that set out the terms and conditions of that contractual relationship. By offering to distribute on the stipulated conditions, the plaintiff approved and sanctioned the position taken by the defendant. Before the distributorship was granted, the plaintiff had several vehicles and was distributing for various other companies. In fact the letter dated 10th August 1995 had attached conditions for appointment of distributorship. The plaintiff received and signed the said conditions as an acceptance of the conditions set by the defendant.

It is my decision that there was no compulsion by the defendant company that made the plaintiff to purchase certain vehicles for the operation of the business. It is not correct to say the defendant would be liable for the value of the motor vehicles purchased by the plaintiff before the commencement of the distributorship. The defendant never wrote and/or required the plaintiff to purchase certain vehicles for the running of its own business. As a matter of good practice, it was a requirement before a party is appointed a distributor that they ought show the ability and capacity to undertake the new engagement it was about to undertake. It was a requirement that the plaintiff do have motor vehicles to effectively and efficiently carry out the distributorship of the defendant's goods. In my view there were no motor vehicles that were specifically and exclusively designed for the distribution of the defendant's products. It is therefore not right to asset that the plaintiff bought vehicles as a result of the defendant's business. As was rightly pointed by Mrs. Kyama, the plaintiff bought the motor vehicles willing to expand and/or enlarge its distribution business. In my view the alleged vehicles have no connection with the defendant's business and it is unlikely that they were meant to promote the interest of the defendant. The said vehicles had no beneficial and/or monetary benefits or value to the defendant. It was the duty of the plaintiff to distribute the goods it bought from the defendant. Ownership passed the moment the goods left the premises of the defendant.

In any case, the defendant was not different from the other companies the plaintiff was distributing for in Nyanza region. I think the plaintiff cannot blow hot and cold as it alleged initially, it was equipped to undertake the distributorship. And I believe the essential tools to undertake a proper and efficient distribution is the possession of motor vehicles. If the plaintiff had no capacity to undertake a distribution of the defendant's goods, then the proper thing was to request the defendant to avail motor vehicles to be used for distribution of its products within the designated areas. It was incumbent upon the plaintiff to demonstrate that it had the capacity to do distribution job before they were appointed as a distributor. And upon assessment and evaluation of that capacity, the plaintiff was appointed with conditions and requirement set by the defendant. There was nothing compelling and/or obligatory about the motor vehicles allegedly bought by the plaintiff. In any case the plaintiff derived beneficial interest from the distribution contract and it was bound to get anything that would increase and/or enhance its beneficial interest in the relationship with the defendant. I think the claim for compensation of the three (3) motor vehicles is invalid and a gross exaggeration of the distributorship agency entered into by the parties. The defendant cannot be held liable for additional motor vehicles that the plaintiff purchased to conduct its general distribution business. I find and hold that the defendant is blameless and is not responsible for the additional motor – vehicles that the plaintiff purchased to conduct and improve its business venture. The defendant was not consulted and it did not give consent to the plaintiff to purchase a particular motor vehicle for the expansion and distribution of its products. The purchase was the baby of the plaintiff and the defendant cannot be required to father a child which it had no relationship. The baby must remain on

the lap of the plaintiff, as the defendant was not involved in the initial conception of the child. The defendant did not encourage and/or permit the plaintiff to conceive and/or conceptualise in the purchase of the motor vehicles. The defendant was not consulted and it was not aware that the said vehicles were to be purchased on its own behalf and for enhancement of its business. I think I have said enough to discourage the plaintiff in pursuing that line of compensation, therefore my decision is that I cannot penalise the defendant for an issue it was not concerned. The brainchild of the motor vehicles must keep his babies and expect no benefit from the defendant. And with the powers of this court, the plaintiff is allowed to keep his motor vehicles with all beneficial and monetary proceeds, attaching thereto.

Now let me determine the twin issues of expired and unexpired goods in which the plaintiff is seeking compensation. The plaintiff seeks a sum of Kshs. 4,079,101.50 being compensation for the expired stocks currently in possession of the plaintiff, which stocks have expired directly as a result of the defendant's breach of the distributor agency agreement. The plaintiff also seeks a sum of Kshs. 5,396,661.10 being refund for the unexpired stocks, which stocks are due to expire and not marketable since the defendant has unlawfully increased competition for the plaintiff by breaching the distributorship Agency agreement by directly supplying its products to the plaintiff's major competitors and business rivals within the plaintiff's designated territory and/or areas.

It is the contention of the plaintiff that it had stopped all its dealings with the defendant when they started distributing to another competitor company around January 2000. And since the defendant had unilaterally appointed another distributor there were goods which were left in the stores of the plaintiff, which were expired or were due to expire. PW1 produced the list of the goods in possession and/or in custody of the plaintiff as exhibit P14. Each of the goods had invoices and the invoice indicated the value of the said goods.

There is no dispute that the defendant sent a letter dated 6th January 2000, addressed to the plaintiff and which was produced by the plaintiff as exhibit P13. In the said letter the defendant stated that it would collect the goods shown in the letter from the plaintiff's warehouse. The defendant was going to collect the unexpired goods from the plaintiff's premises and offset their value against the plaintiff's dues to the defendant. In the same letter the defendant stated that the expired goods would be collected for destruction and without any compensation. Earlier in a letter dated 10th July 1997, produced as exhibit P5, the defendant stated in part:-

" ***After this reconciliation, we will then take back all goods that are in good and saleable condition and such will be used to compensate the account outstanding, if any and the balance if any will be settled by cheque either way. It is also important to note that regular inspection of goods in your warehouse by our sales personnel is crucial in order to avoid expiries or damages. This has not been possible as you have not allowed them to do so. Please not that SmithKline Beecham will not be responsible for any expires for goods in your warehouse since the TSR and the ASM have been unable to establish the nature and quantities of the said goods".***

The above letter was followed by another letter dated 6th January 2000, produced as D10. It read in part:-

" ***I am glad to inform you that we have decided to collect the following goods from your premises and offset their value against outstanding payments due to us from yourselves".***

The said letter indicated the quantity of the goods which were near or about to expire and which were to be collected by the defendant. According to the letter dated 10th July 1997, the defendant warned the plaintiff that denial of access would mean that the defendant would not be liable for the loss resulting from the refusal. The witness of the plaintiff stated that the defendant stopped selling to the plaintiff in 1997 but upto 2000 the defendant was willing to collect unexpired goods and give compensation to sustain the previous relationship. Under cross – examination PW1 sated:-

" ***When goods are about to expire the sales representative would take the goods and a memo would be written. They would issue me credit notes. Access was denied after a dispute arose".***

The plaintiff alleges that it was the duty of the defendant to collect goods with near or about expiry dates from its warehouse but he further confirms that he denied the defendants agents, the responsibility to collect those goods by refusing to give access. Under such circumstances, I think to hold defendant liable would be to punish them for the action and/or omission of the plaintiff. I think such situation would be contrary to justice and fairness. The plaintiff produced a list containing all the goods in its possession in respect of goods which expired or were due to expire with a corresponding value attached to each item as exhibit P14. Each of the goods had their invoices produced as exhibit P12. First, the list containing the expired or due to expire goods is hand written and some of the goods allegedly expired even the parties had cordial relationship.

The defendant through DW1 stated that its policy was that a distributor should alert and notify the defendant of goods that were in its possession that were almost expiring six (6) months before the expiry, provided the goods were in a good and saleable condition. The defendant would then assist the distributor by facilitating the redistribution of those goods to other areas that required them. And consequently the defendant would issue a credit note to the distributor for the goods that had been returned to the defendant. It means the plaintiff is liable for any goods that expired while in its possession or for goods that were almost expiring that it did not report within the stipulated period or that it did deny the agents of the defendant access to verify the position of the goods in its store. It is clear beyond doubt that the plaintiff did not make any reports to the agents/servants of the defendant of any goods that were about to expire. It is also, clear that the defendant denied access to the employees of the defendant to its stores, to enable them to evaluate the condition and expiry dates of the goods in its possession. The plaintiff disregarded the shield and weapon given to it by the plaintiff by failing to report and by failing to give access to its stores. It is my decision that at the plaintiff's denial to allow access to its warehouse was a fundamental breach of the terms and conditions of appointment of a distributorship.

The defendant set a benchmark for both sides to adhere to. The defendant was to carry out regular and routine inspection of the goods in possession of the plaintiff through its sales personnel in order to protect the primary interest of the plaintiff and safeguard its reputation not to expose hazardous products to the consumers. This was crucial in order to avoid the nature of complainants, now raised by the plaintiff. The defendant could not perform its mandate of collecting goods with near expiry dates due to the conduct of the plaintiff in refusing to grant access. In essence the defendant was unable to establish the nature and quantities of any goods with expiry or near expiry dates. It can be safely stated that the refusal stems from the fact that there may be no expired goods in possession of the plaintiff to warrant either collection or compensation. I think the position taken by the plaintiff is inconsistent with good commercial practice and standard. This court cannot allow the plaintiff to derive a benefit from its own misconduct or misbehaviour. The law is that a person cannot be allowed to approbate and at the same time retrobate to gain a benefit or advantage for that inconsistency to the detriment of the opposite party. I think the plaintiff cannot on one hand deny the agents of the defendant access to its warehouse to determine or verify the position of the goods in its possession. And upon refusal seek compensation for the goods it failed to show to the manufacturer. Such conduct is to adopt a disadvantageous positions to the interest of the defendant. In such, circumstances the court cannot sanction or permit two contrasting position in order to confer benefits to one of the parties. I think it would be against the good principles of commercial practice to allow the plaintiff to benefit from its own misdeeds or inaction.

In a nutshell, I have no evidence that the plaintiff is in possession of goods with expired or near expiry dates, no such evidence was tendered by the plaintiff to show actually that goods are in its possession and they are expired. In my view a list prepared by the aggrieved party cannot be a basis to say that the plaintiff is in actual and constructive possession of the alleged goods. There is no independent witness to verify the contention of the plaintiff. It is not just enough to allege and prepare a list but there must be proper and imperical evidence to support the allegation of the party seeking beneficial interest. The plaintiff did not call any witness from the public health department, who may have witnessed the condition of the goods to verify and authenticate its allegation. I am satisfied that the plaintiff did not prove that it is in possession of the said goods. The case of the plaintiff remains a mere allegation with no documentary proof.

It was the plaintiff which refused access to the employees of the defendant some 8 years ago and now

it is too late in the day for the defendant to participate in the programme set by the plaintiff. The plaintiff failed to participate in the drama or play when the defendant was willing to play its leading role in the drama. The plaintiff refused to play according to the set rules. It can now play the comedy alone. The defendant gave several fantastic opportunities to the plaintiff but the plaintiff refused and left the theatre. The defendant had no supporting actor in the transaction and it did what was reasonable and possible under the circumstances. The plaintiff cannot collect awards when it refused to participate in the whole transaction. The court cannot give a supporting role by honouring the plaintiff for its own misdeeds. For the reasons stated prayers c, d and e in the plaint fails. It also means that this court cannot give an order compelling the defendant to collect non-existent goods, whether expired or unexpired.

The only issue that now remains for my determination is the question of sole distributorship. It is clear that through a letter dated 10.8.95 the plaintiff was appointed as a distributor of the defendant's products in a designated area. The said letter was preceded by an application made by the plaintiff to the defendant seeking to be appointed as a distributor. In its own letter, the plaintiff did not bargain to be appointed a sole distributor of the defendant's products. The letters dated 2nd August 1995, exhibit P1 and the one dated 10th August1995, exhibit P2 did not in anyway appoint the plaintiff as sole distributor of the defendant's goods. The letter of appointment as a distributor dated 10th August 1995 reads in part:

"Further to the last discussion in your offices between our Marketing Director and National Sales Manager, and after a thorough review of your performance in the market place we are pleased to inform you that we would like to appoint you a distributor of the combined sterling Health and SmithKline Beecham consumer health products in the Nyanza Region, subject to your signing the attached offer which stipulates the requirements and conditions of appointment."

It is essential to point out that the plaintiff did not bargain or apply to be appointed the sole distributor of the defendant's products. It is also important to note that the plaintiff upon receipt of the letter of appointment did not protest or complain about its contents and implications. If the plaintiff wanted to be appointed a sole distributor, then its initial application did not incorporate that contention and the letter of appointment did not contain such agreement or arrangement. The plaintiff signed the letter of offer which stipulated the rules of engagement between the parties. And it is clear that the letter to the defendant, the letter of appointment as distributor and the subsequent conditions did not talk of sole distributorship granted to the plaintiff. If it was the intention of the parties to restrict their dealings in a particular way then that should have been done from the start.

It is imperative to note that the conditions of appointment as a distributor did not stipulate that the plaintiff was appointed as a sole distributor. If the plaintiff wanted to be appointed as a sole distributor, it should not have accepted the offer made to it by the defendant through the letter dated 10th August 1995. That letter in my view determined the relationship and the way forward for the parties. The basis of the plaintiff's claim is governed by a subsequent letter dated 8th August 1996, which allegedly informed the plaintiff that it was the sole distributor of the defendant's products. The letter was also telling the plaintiff to disregard the claims made by other person claiming to have been appointed as distributors in the area.

It is my decision that the letter dated 8th August 1996, cannot be used to vary and/or alter the initial arrangement or agreement between the parties, which was reached as a result of a comprehensive bargain. The instruments constituting a valid and operative contract between the parties was already in place. The initial contract clearly defined the terms and conditions of transacting together in a business venture. I think the letter dated 8th August1995, was meant to give assurance to the plaintiff that the defendant was still willing to transact with the plaintiff despite the claims made by other parties. By then the intention, rights, duties, obligations and responsibilities of the parties was well defined and known to the parties. There was no consideration that resulted from the letter dated 8th August 1996, to make me vary the contractual obligation and boundaries of the parties. The plaintiff knew that it was expecting from the appointment therefore it cannot be true to say the plaintiff was appointed a sole and exclusive distributor of the defendant’s products. It is my decision that there was no breach of the terms and conditions of appointment of distributor, hence no damages can accrue to the plaintiff.

It is my humble view that the letter of offer and acceptance was the basis of the contractual relationship between the plaintiff and defendant. The said documents set out the intention, requirement, expectation and conditions of the parties. The parties were in a position to incorporate their respective positive and expectation in the said letters, which was properly and efficiently done. There is no indication that the plaintiff bargained and/or wanted to be made a sole distributor of the defendant's products. And if there was no such undertaking and/or intention mutually between the parties then a letter written one year after the horse has bolted cannot be used to contradict the clear and unambiguous intention of the parties. The letter of appointment and subsequent acceptance encompassed the conditions and regulations the parties intended. And anything imposing a new term altogether without mutual consent and intention can be disregarded as foreign to the contract. In the premises, the plaintiff's case has no merit and the same is dismissed with costs to the defendant.

Now let me now address the counterclaim made out by the defendant. The defendant is claiming a sum of KSh.4,892,482/= from the plaintiff being the issue of goods supplied and delivered at the request of the plaintiff. According to DW1, the plaintiff has not settled 7 invoices totalling to the sum claimed. The defendant's witness produced the unpaid invoices as exhibits D8 (a) - 8(g). DW1 further stated that PW1 attended a meeting on 12th February 1998, between the parties herein in a bid to resolve the outstanding issues. And in that meeting the defendant gave some credit notes to the plaintiff. Due to the credit notes that were issued the amount outstanding or owed by the plaintiff to the defendant was reduced from Kshs. 8,683,277.42 to Kshs.4,892,482/= PW1 under cross-examination stated:-

"I have not paid the sum of KSh.4,892,487/= and is still outstanding.

I did sign the minutes."

The plaintiff's witness admitted that he signed certain minutes i.e. D6 acknowledging that the plaintiff was indebted to the defendant to the sum of Kshs.4, 892,482/= subject to proof of two invoices. The evidence of DW1 proved that the goods in those invoices were delivered to the plaintiff. The said invoices formed part of the exhibits produced by the plaintiff to prove purchases in its bid to get loss of profits. PW1 voluntarily and freely signed the minutes in agreement to the analysis and confirmation of the issues that were discussed during the meeting. The plaintiff through PW1 having accepted and agreed on their own accord, that they were indebted to the defendant to the tune of Kshs. 4,892,482/= cannot again turn around and say that they do not owe the sum. The plaintiff derived substantial benefit from that agreement having gotten credit notes for various contested items. In any case the two invoices was sufficiently established to warrant the success of the defendant's claim. I am satisfied beyond doubt that the defendant has proved its counterclaim to the required standard. I therefore enter judgment for the defendant against the plaintiff for the sum claimed with interest at court rate plus costs.

Dated and delivered at Kisumu this 23rd day of January 2007

M. WARSAME

JUDGE

MW/aao