



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 239 of 2005

MVITA BEVERAGES DISTRIBUTORS LTD.....PLAINTIFF

VERSUS

KENYA BREWERIES LTD.DEFENDANTS

R U L I N G

In a summons dated 3rd November 2005, Mvita Beverages Distributors Ltd., the plaintiff herein, sought the following orders against Kenya Breweries Ltd., the defendant herein:

- (a) A temporary order of injunction to restrain the defendant from acting or taking any bids which may receive in response to the Daily Nation advertisements of the 26th and 28th day of October, 2005.
- (b) An order compelling the defendant to honour the existing agreement or arrangement on the territory of the plaintiff of supplying the plaintiff with the defendant's products and a further order compelling the Defendant to allow the plaintiff to go selling and or distributing the defendant's products.
- (c) Costs of the application

The summons is supported by affidavit and further affidavit of Lenny K. Mbogori.

When served, the defendant, opposed the application by filing the replying affidavit of Sheila Ngari. The defendant contemporaneously filed a motion dated 25.11.2005 in which it sought to set aside the ex parte order issued by this court on 3/11/2005.

The history leading to this application is fairly short and straightforward. The plaintiff and the defendant executed a distribution agreement dated 22nd October 2001 to last for four years with effect from 1.7.2001 and ending on 30th June 2005. The agreement is so elaborate on how the relationship between the parties is to be guided. In the Distribution Agreement, the plaintiff company was allocated a territory to distribute the defendant's brand of products on conditions set out in the agreement. One of the conditions was to the effect that the plaintiff was to give a bank guarantee to the defendant. The plaintiff was to also provide an insurance cover to the motor vehicles transporting the products, the stock and cash on the premises used.

The plaintiff's complaint is that it complied with all the requirements set out in the Distribution Agreement and that its business relationship with the defendant was good until the plaintiff's account

with Akiba Bank Ltd was overdrawn to the tune of Kshs.22 million which comprised of stock worth Kshs.10,000,000/- and other liabilities inherited earlier as a result of fire and uninsured stocks which were burnt down in a fire which broke out in August 2000 and some of which were lost in robberies. The plaintiff claims that in April 2004, the defendant company guaranteed the plaintiff company stocks worth Kshs.32 million which amount was payable within seven (7) days from the date of delivery and upon which the plaintiff issued Cheques of Kshs.32 million to Tibbet & Britten (K) Ltd. It is alleged by the plaintiff that it sold the products and banked the money (Kshs.32 M) with Akiba Bank Ltd. It is said that immediately the plaintiff banked that money Akiba Bank Ltd recalled the loan and called upon Tibbet and Britten (K) Ltd to present their guarantee for payment which directive was complied with. It is the plaintiff's belief that by so doing the bank had used the money to repay itself the existing overdraft of Kshs.22 million apart from the Kshs.8 million paid by Tibbet & Britten (K) Ltd. It is said thereafter the combined team of Tibbet & Britten (K) Ltd moved to the plaintiff's warehouse and took away stock worth about Kshs.9 million. This action is said to have left the plaintiff with a liability of about Kshs.17 million in favour of Tibbet & Britten (K) Ltd. As a result of this it adversely affected the operations of the plaintiff's business since the plaintiff did not have any stock to trade in and as an emergency measure the defendant annexed the plaintiff's territory. It is the submission of the plaintiff that the defendant's measure was temporary. The defendant's annexure of the plaintiff's territory is expressed in a letter dated 21st April 2004 attached to the affidavit of Lenny Mbogori sworn on 3rd November 2005. By 21st April 2004 the plaintiff was effectively driven out of business. The plaintiff claimed that negotiations between itself and Tibbet & Britten (K) Ltd began and in early May 2005 it is said the defendant represented to the plaintiffs that they were ready to do business with the plaintiff under the existing agreement as long as the plaintiff and Tibbet & Britten (K) Ltd were in agreement on the repayment of liability. On the 2/9/2005, the defendant wrote to the plaintiff asking it to raise the necessary working capital and purchase the required stock within 14 days and in default the defendant was at liberty to appoint another distributor on a permanent basis to service the territory. The plaintiff said it took up the challenge and on 24/10/2005 it informed the defendant that it was ready to commence operations as of 15th November 2005. It is said that the defendant did not reply to the aforesaid letter. The plaintiff was surprised to see an advertisement for a new distributor to cover the plaintiff's territory. It is the complaint of the plaintiff that it acted on the defendant's representation hence the defendant is estopped from going behind their word to allocate the territory to another distributor. It is averred by the plaintiff that it has heavily invested on the business, motor vehicle repairs, maintenance of security and other expenses to the tune of Kshs.8 million. The plaintiff also complained that the effect of sourcing for another distributor meant that there is a loan of Kshs. 17 million which is yet to be repaid by the plaintiff and the only way the plaintiff can settle the debt is for it to be allowed to carry on with the business.

On its part the defendant opposed the application. It is the submission of the defendant that the plaintiff can be compensated by damages hence an order of injunction should not be granted. It is also the argument of the defendant that there was no contract in existence hence the application has no basis in law. It is further the argument of the defendant that there was no contract in existence hence the application has no basis in law. It is further the argument of the defendant that even if it was said that the agreement of 22.10.2001 was extended still the position will not change because the plaintiff breached the terms of the contract by failing to settle the debts, and failing to provide insurance cover to the stock.

I have considered the able submissions tendered by learned counsels on both sides. I have also carefully considered the application plus the supporting and opposing affidavits. I have further considered the motion dated 25th November 2005 plus the supporting affidavit. What is clear is that the relationship between the plaintiff and the defendant started or was renewed by the Distributors Agreement of 22nd October 2001. It is an agreement containing several clauses. I am also alive of the fact that what I am dealing with now is an interlocutory application pending the hearing of the main case hence care must be taken not to make final and conclusive orders. I appreciate the fact that it is very difficult at times to draw the line.

The principles of injunction are well settled. In the case of **Giella =vs= Cassman Brown Co. Ltd. [1973] E.A. 58** the court of Appeal set out the principles of injunctions as follows:-

(a) probability of success

(b) Irreparable harm which would not be adequately compensated for by damages

(c) If in doubt then on a balance of convenience.

On the first principle the plaintiff is of the view that it has shown it has a prima facie case with a probability of success. The defendant is of the contrary view. At this stage I am of the view that it was incumbent upon the applicant to show that there existed an agreement of Distribution between itself and the defendant. It was also incumbent upon it to show that it complied with all the terms of the Distribution agreement. It is clear that the agreement executed on 22/10/2001 lapsed on 30/6/2005. It was necessary for the applicant to show that the same was renewed. The affidavit evidence presented show that when the plaintiff faced financial difficulties, the defendant annexed the plaintiff's territory of service. The plaintiff to say the least had breached the terms of the Distribution agreement. The plaintiff has also attached to the affidavit in support annexures of offers and counter offers. There was no concrete evidence that these offers and counter offers culminated into an agreement. The agreement of 22/10/2001 had lapsed on 30/6/2005 and there is no credible evidence to show that the same was renewed. Even assuming that the same was renewed pursuant to the various negotiations, still the applicant must show that it was given exclusive rights over the territory. A reading of Clause 2.1 of the Distribution agreement paints a different picture of the whole issue. Clause 2.1 provided as follows:

“Subject to the terms and conditions of this agreement the company grants to the Distributor the territory rights on a non-exclusive basis with effect from the commencement date.”

No evidence were tendered to controvert this provision. It means that the plaintiff did not enjoy exclusive rights over the territory of service.

Even assuming for a while that the distribution agreement of 22/10/2001 was renewed and that the plaintiff had exclusive rights over the territory, still it was important for the plaintiff to show that the defendant had no right to appoint another distributor or to advertise for application from interested persons to be appointed as such. In fact clause 2.2.1 clearly gives the defendant the discretion to appoint other distributors in the territory of service in direct competition with the plaintiff. To conclude on this issue it is important to note that the defendant gave the plaintiff a chance of 14 days to start its operations within the territory of service upon meeting certain conditions in a letter dated 2/9/2005. The plaintiff has not shown that it met the conditions set in that letter within 14 days. In the absence of any explanation to counter that submission then I do not see what wrong the defendant committed in inviting bids from interested persons to be appointed as distributors in the plaintiff's territory. The sum total of the above conclusions is that the plaintiff has not shown that it has a prima facie case with a probability of success.

The second principle is to the effect that the applicant must show that it will suffer substantial loss which cannot be compensated by damages. It is said that the plaintiff will be unable to repay Kshs.17 million if other persons are allowed to be appointed as distributors in its place. It is clear that the plaintiff has volunteered information to the effect that the amount the plaintiff is likely to suffer is ascertainable in monetary terms. To sum up on this principle let me refer to the case of American Cynamid Co. Ltd vs Ethicon Ltd [1975] A.C. 396 in which Lord Diplock said:

“The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial If damages in the measure recoverable in common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the plaintiff's claim appeared to be at that stage.”

In this case I am of the considered view that the plaintiff can be compensated by damages. There is no averment that the defendant will not be in a financial position to compensate the plaintiff. The court of Appeal of Kenya

dressing the instant principle in the case of Mureithi vs City Council of Nairobi [1981] K.L.R. 332 stated at Pg. 336 as follows:

“In this case there is also no question but that the defendant would be in a financial position to pay any damages that may be awarded to the plaintiff. If her action succeeds, she could be adequately compensated in damages including loss of profits if she is advised to amend her plaint accordingly.”

I do not intend to consider the third principle because I am not in doubt.

The upshot of the summons dated 3/11/2005 and the motion dated 25.11.2005 is that the summons is ordered dismissed for lacking in merit and the motion is allowed in that the interim orders given on 3/11/2005 are discharged and set aside. Costs of the summons and motion are given to the defendant.

Dated and delivered at Mombasa this 19th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Gikandi for the plaintiff/Applicant and Mr. Ambwere h/b Yalwala for defendant.