



Tony West Limited & another v Kenya Breweries Limited & another; Bia Tosha Distributors Limited (Proposed Interested Party) (Civil Suit E075 of 2023) [2025] KEHC 1475 (KLR) (Commercial and Tax) (14 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1475 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E075 OF 2023
RC RUTTO, J
FEBRUARY 14, 2025**

BETWEEN

TONY WEST LIMITED 1ST PLAINTIFF

OUTLOOK INDEX LIMITED 2ND PLAINTIFF

AND

KENYA BREWERIES LIMITED 1ST RESPONDENT

UDV (KENYA)LIMITED 2ND RESPONDENT

AND

BIA TOSHA DISTRIBUTORS LIMITED PROPOSED INTERESTED PARTY

RULING

1. Before this Court is a Plaintiffs’/Applicants’ Notice of Motion application filed under Certificate of Urgency dated 24th February 2023 seeking the following orders, that:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. Pending the hearing and determination of the dispute between the parties through arbitration, the High Court be pleased to issue of an order for interim measures by way of injunction restraining the defendants/ respondents and their respective agents, servants, privies and proxies from terminating, suspending or in any other way whatsoever interfering with the 1st



plaintiff's rights to distribute the defendants products in the following routes covered by the distributorship agreements of 17th October 2016 and 15th May 2019: Kawangware, Kitengela, Athi River, Ngong Road, Bissil, Satellite, Kenyatta market, Hurlingham, Upper Hill, Dagoretti Ndonyo, Kajiado and Namanga .

- e. Pending the hearing and determination of the dispute between the parties through arbitration, the High Court be pleased to issue of an order for interim measures by way of injunction restraining the defendants/ respondents and their respective agents, servants, previes and proxies from terminating, suspending or in any other way whatsoever interfering with the 1st plaintiffs' rights to distribute the defendants products in the following routes covered by the distributorship agreements of 15th November 2016 and 1st June 2019: Industrial Area, South B, Nairobi West, Lang'ata and Rongai.
 - f. Pending the hearing of the suit, a temporary injunction be and is hereby issued restraining the defendants/ respondents and their respective agents, servants, previes and proxies from terminating, suspending or in any other way whatsoever interfering with the 1st plaintiffs' rights to distribute the defendants products in the following routes covered by the distributorship agreements of 17th October 2016 and 15th May 2019: Kawangware, Kitengela, Athi River, Ngong Road, Bissil, Satellite, Kenyatta market , Hurlingham, Upper Hill, Dagoretti Ndonyo, Kajiado and Namanga
 - g. Pending the hearing of the suit, a temporary injunction be and is hereby issued restraining the defendants/ respondents and their respective agents, servants, previes and proxies from terminating, suspending or in any other way whatsoever interfering with the 1st plaintiffs' rights to distribute the defendants products in the following routes covered by the distributorship agreements of 15th November 2016 and 1st June 2019: Industrial Area, South B, Nairobi West, Lang'ata and Rongai.
 - h. Costs of this application be provided for.
2. The Application was supported by the affidavit of Shadrack Oriah and Catherine Muchai all sworn on 24th February 2023. It was deposed that through distributorship agreements dated 17th October 2016 and 15th May 2019, the company was granted distributorship rights to sell and distribute alcoholic and non-alcoholic beverage products from Kenya Breweries Limited and UDV (Kenya Limited) in the following territories: Kawangware, Kitengela, Athi River, Ngong Road, Bissil, Satellite, Kenyatta market, Hurlingum, Upper Hill, Dagoretti Ndonyo, Kajiado and Namanga.
 3. It was contended that after execution of the distributorship agreement the 1st plaintiff invested more than 550 million in the distributorship business in recruitment, infrastructure and raising working capital.
 4. It was averred that the company has operated without problems since inception of the business in 2019 until 20th February 2023 when a representative of Kenya Breweries Limited informed the company that it should cease operations because the defendants/respondents intended to grant exclusive distributorship rights to another party on the territories/routes already covered by the 1st plaintiff. The 1st plaintiff was specifically to cease operations in the following routes: Kawangware, Kitengela, Athi River, Ngong Road, Bissil, Satellite, Kenyatta market , Hurlingum, Upper Hill, Dagoretti Ndonyo, Kajiado and Namanga.



5. This prompted the plaintiffs to move to court seeking to protect its commercial, legal and constitutional rights granted by the distributorship agreements. On 2nd March 2023 an order was issued maintaining the status quo among the parties pending hearing and determination of this application.

Applicants' Submissions

6. The Applicants also seek to rely upon their submissions dated 31st March 2023 in which they set out a single issue for determination namely; whether this court should grant an injunction restraining the defendant/respondents from interfering with the 1st and 2nd plaintiffs' distributorship agreements.
7. The Applicants make reference to Order 40 Rule 2 of the Civil Procedure Rules; and the Court of Appeal's decision in Director of Public Prosecution vs Justus Mwendwa Kangethe & 2 Others [2016] eKLR to urge that an injunction is a vital tool intended to preserve the property in dispute until legal rights and conflicting claims are established. It was their submission that a prima facie case had been established by proving the existence of valid contracts between parties, and that by the letter of 20th February 2023, they have shown that the defendants will be in blatant breach of the distributorship agreements which has an adverse impact of completely locking out the plaintiffs from distributorship business in their respective territories. Numerous authorities were referred to buttress this argument.
8. While referring to the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others (2014) eKLR on definition of irreparable injury, it was submitted that the Applicants would suffer irreparable loss as monetary compensation can never be an adequate remedy in respect to the investment made on account of the distributorship agreement. This is because they have made investments and executed several multi-billion shillings contracts with multiple third parties to facilitate the performance of their duties under the agreements. While relying on the case of Joseph Siro Mosioma v Housing Finance Company of Kenya & 3 Others [2008]eKLR it was contended that the plaintiffs' investments will be obsolete if distributorship agreements are interfered with. Thus, they urged that monetary compensation cannot be adequate remedy in respect of the investments made on account of the distributorship agreements.
9. On the balance of convenience, it was urged that the Plaintiffs/Applicants had everything to lose because they will be completely locked out of their distributorship business in their respective territories despite faithfully performing their obligations. They urged the court to issue an injunction restraining the Defendants from interfering with the Plaintiffs' distributorship agreements and give exclusive distributorship right to another company.

1st Respondent's Replying Affidavit

10. In response to the application, the 1st Respondent filed a Replying Affidavit sworn on 9th March 2023 by Nadida Rowlands, the Group Legal Director. It was averred that between the years 2001 and 2016, the 1st Respondent and Bia Tosha Distributors Limited (Bia Tosha) entered into various distribution agreements for the supply and distribution of the 1st Respondent's products in certain agreed territories and the last distribution agreement was a short-term contract that was set to lapse on 3rd August 2016. That on 14th June 2016, 2 months before the lapse of the contract, Bia Tosha filed a petition before the High Court challenging the impending termination of the short-term contract and alleging that it acquired exclusive ownership rights over 22 distribution routes on account of goodwill.
11. Also filed with the petition was a notice of motion application seeking various conservatory orders. It was deposed that on 14th June 2016, Hon Justice Onguto issued ex-parte conservatory orders restraining the 1st and 2nd Respondents from interfering with Bia Tosha's exclusive management,



control and distributorship of the 1st Respondent's products in the indicated areas. On the 20th June 2016, the 1st and 2nd Respondents filed an application seeking stay, discharge, variation or setting aside of the ex-parte conservatory orders and referral of the matter to arbitration in accordance with the arbitration clause in the distributorship agreement. On 29th June 2016 a ruling was delivered dismissing the 1st and 2nd Respondents' application, varied the ex-parte orders and issued a new conservatory order preserving Bia Tosha's territory (under the area of operation arrangement obtaining as at 2nd February 2006), exclusively pending the hearing and determination of the petition. The order issued was not to apply to the product known as Keg Beer.

12. The 1st Respondent states that they were aggrieved by the ruling, and together with the 2nd Respondent moved the Court of Appeal seeking to set aside the ruling. The Court of Appeal ordered that status quo obtaining on 11th August 2016 be maintained pending the hearing and determination of the appeal.
13. On 10th June 2020 the Court of Appeal allowed the appeal, set aside the conservatory orders and referred the issue to arbitration in accordance with the distributorship agreements. Bia Tosha then lodged an appeal to the Supreme Court, (Petition No 15 of 2020) and by a judgement delivered in 17th February 2023 the Supreme Court allowed the petition and reinstated the conservatory orders issued by the High Court. The judgment also directed that the High Court considers the consequences of any disobedience.
14. The 1st Respondent stated that as a result of this decision, by a letter dated 18th February 2023, it notified all its business partners in the affected areas of the judgment with a view of establishing the implications of the judgment and how it would impact its business. By a letter dated 20th February 2023, they notified the affected parties of the exclusive distributorship rights over twenty-two routes to Bia Tosha had been reinstated and Bia Tosha would be entitled to distribute the 1st Respondent's product on an exclusive basis. It was also stated that they too received a letter from Bia Tosha demanding reinstatement of "Bia Tosha territory" and they were obligated to comply with the orders of the Supreme Court judgment. The 1st Respondent further stated that it is its communication with regard to the compliance of the judgment that led to the filing of this suit.
15. It was also averred that the 1st Respondent has filed an application before the High Court in Petition No. 249 of 2016 seeking clarification of the Supreme Court orders in order to facilitate compliance.

2nd Respondent's Replying Affidavit

16. In response to the application, the 2nd Respondent filed a replying affidavit sworn on 12th April 2023 by Karen Mate – Gitonga, its legal manager. It was averred that the proceedings herein arise from the judgment of the Supreme Court dated 17th February 2023 in Supreme Court Petition No. 15 of 2020 Bia Tosha Distributors Limited v Kenya Breweries Limited & Others. That pursuant to this judgment, the Supreme Court reinstated the conservatory orders issued in High Court on 29th June 2016 in High Court Constitutional Petition No 249 of 2016 Bia Tosha Distributors Limited v Kenya Breweries Limited & Others.
17. It was averred that the High Court's conservatory orders of 29th June 2016 which formed the crux of the Supreme Court judgment were in the following terms;
 - i. Pending hearing and determination of the petition herein a conservatory order be and is hereby issued preserving the petitioner's Bia Tosha territory exclusively to the petitioner under the area of operation arrangement obtaining as of 2nd February 2006.



- ii. The order herein shall be applicable to the 1st respondent's products but shall not apply to the product known as Keg Beer.
18. In addition, it is averred that they received a letter from Bia Tosha warning them that should Bia Tosha's contracted investigators see any vehicle distributing the Respondents' products, it would file contempt proceedings for further disobedience and this prompted them to file Constitutional Petition No. 249 of 2016.
19. It was also stated that UDV (the 2nd Respondent) moved the court in Constitutional Petition No 249 of 2016 seeking inter alia, a declaration that there was no order granted against UDV by the ruling of the High Court dated 29th June 2016 and confirmation of the terms upon which the orders made by the High Court in its Ruling dated 29th June 2016 can be implemented so as to enable UDV to purge its contempt (if any). Directions on the application had been issued and it was set to be mentioned on 26th April 2023.

Proposed Interested Party Submissions

20. This Court notes that Bia Tosha Distributors Limited, the Proposed Interested Party, filed an application on the 8th March 2023 seeking joinder as an interested party. Bia Tosha further filed the following pleadings in response to the plaintiffs' application; replying affidavit sworn by Ann Marie Burugu on 12th July 2024; proposed grounds of opposition and submissions all dated 12th July 2024.
21. Subsequently, a notice of intention to withdraw the application dated 17th October 2023 for joinder as interested party was filed. Consequently, the intended interested party has not yet been admitted to these proceedings. This is also evident by the title of the documents filed in respect where they indicate "proposed interested party". As such the documents filed by them cannot be considered by this court. They remain documents filed by an unrelated party and they are therefore not subject to use or consideration by this Court. The Court will therefore not rely on them or make any further reference to them.

Analysis and Determination

22. I have considered the Application, the affidavits and the submissions of both parties on record and find that the main issue for determination is whether an order of temporary injunction should be issued pending determination of the suit and the determination of the suit by arbitration clause in the distributorship agreement.
23. The three conditions for grant of such an order were well set out in the leading case of Giella vs. Cassman Brown (1973) E.A 358 and later reiterated in Mrao Ltd V First American Bank of Kenya Ltd& 2 Others [2003] eKLR where it was held inter alia, that:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”
24. In this instance, while the Applicants argue that they had established a prima facie case justifying the granting of injunctive orders. They submitted that they would suffer irreparable loss that cannot be adequately compensated by way of costs and that the balance of convenience favoured grant of the



orders. On the other hand, the respondents emphasized on the circumstances leading to the filing of this suit by providing a detailed chronology of events that culminated in this suit and this application. In summary, the respondents maintained that the application and relief sought were a direct result of the Supreme Court decision, which reinstated the orders granted in Nairobi Constitutional High Court in Petition No 249 of 2016.

25. Indeed, it is not in contention that this application is an offshoot of the judgment of the Supreme Court dated 17th February 2023 in Supreme Court Petition No. 15 of 2020 Bia Tosha Distributors Limited v Kenya Breweries Limited & Others. In the event the injunctive order in this instance is granted, it will in effect hamper the implementation of the orders issued in the High Court on 29th June 2016 in High Court Constitutional Petition No 249 of 2016 Bia Tosha Distributors Limited v Kenya Breweries Limited & Others and which were reinstated by the Supreme Court.
26. With the above context, it is evident that if granted, an injunctive order would prohibit the Respondents from interfering with the Plaintiffs' rights to distribute the Defendants' products along the routes covered by the distributorship agreements of 17th October 2016 and 15th May 2019. The Plaintiffs intends that the substantive dispute be determined by way of arbitration. The Respondents did not object to this argument but instead raised the issue of compliance with the Supreme Court decision. What then is the effect of this decision by the Supreme Court. According to the Respondents, the decision automatically binds this Court and the parties to the extent that no further action can be undertaken.
27. On my part, I do not think that the decision by the Supreme Court conclusively determined the dispute between the parties. To the contrary, it returned the parties to the status quo ante. This means the parties were placed before the High Court to proceed from where they were at the time the orders issued on 29th June 2016 were granted. The High Court was thus bestowed with the mandate to urgently resolve and determine the amended petition as opposed to the arbitration process. In particular, the Supreme Court issued the following orders:
 - “(iii) The High Court orders of 29th June, 2016 be and are hereby reinstated and the Court do consider the consequences of any disobedience of those orders;
 - (iv) The matter be and is hereby remitted to the High Court for disposal of the Amended Petition dated 20th June 2016 pending before the High Court on priority basis; considering the age of this matter”
28. In my view, the High Court whose decision was litigated all the way to the Supreme Court remains the best placed court to not only address the compliance of the court orders but also proceed with the disposal of the dispute between the parties. This in my view involves the consideration of any interim reliefs and measures, including non-compliance thereof. Notably, none of the parties found it prudent to inform the court of the current status of the Constitutional Petition No 249 of 2016 which would have guided this court further in determining whether or not to grant the orders.
29. Moreover, the consequences of any orders issued herein have an implication on the orders reinstated by the Supreme Court as well as other parties beyond the present proceedings including the proposed interested party. Granting the interim orders would result in the possible issuance of parallel and conflicting orders further complicating an already intricate situation and creating a legal conundrum, noting that the Plaintiffs intends to proceed for arbitration once the sought orders are granted leaving the likely affected parties without recourse. As such, I will refrain from doing so until the proper proceedings are concluded between all the affected parties.



30. Guided by the circumstances outlined above, I find that the Applicants has not satisfied the granting of the orders as sought. While there is indeed a prima facie case/dispute between the parties herein, it has not been shown to this Court that the Applicants stand to suffer irreparable damage unless the conservatory orders are granted. Lastly, it is evident that there is a Supreme Court order which order stands to be impugned or thrown in limbo were this Court to issue the conservatory orders sought. It thus follows that the balance of convenience leans towards this Court exercising deference to the decision of the Supreme Court and not creating an absurdity.
31. As a result, I find that the Plaintiffs’/Applicants’ Notice of Motion dated 24th February 2023 lacks merit and the same is dismissed with no orders as to costs, consequently, the interim stay orders in place stand vacated.

Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 14TH DAY OF FEBRUARY 2025

For Appellants:

For Respondent:

Court Assistant:

