



Ngong Matonyok Wholesalers Limited & another v Kenya Breweries Limited & another; Bia Tosha Distributors Limited (Interested Party) (Miscellaneous Application E127 of 2023) [2025] KEHC 1135 (KLR) (Commercial and Tax) (3 March 2025) (Ruling)

Neutral citation: [2025] KEHC 1135 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E127 OF 2023**

JWW MONG'ARE, J

MARCH 3, 2025

BETWEEN

NGONG MATONYOK WHOLESALERS LIMITED 1ST PLAINTIFF

MANARA LIMITED 2ND PLAINTIFF

AND

KENYA BREWERIES LIMITED 1ST DEFENDANT

UDV (KENYA) LIMITED 2ND DEFENDANT

AND

BIA TOSHA DISTRIBUTORS LIMITED INTERESTED PARTY

RULING

1. On 19th December 2024, this court delivered a ruling in which it dismissed the Plaintiffs' injunction application. The Plaintiffs being dissatisfied with the said Ruling and have evinced their intention to appeal against the same at the Court of Appeal but in the meantime, they have filed the Notice of Motion dated 22nd December 2024 seeking to suspend the Ruling and an injunction pending the hearing and determination of its application for interlocutory relief at Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules.
2. This application is supported by grounds on its face and the affidavits of the 2nd Plaintiff's director, Joseph William Nduva Muli, sworn on 22nd December 2024 and 13th January 2025. It is opposed by the Interested Party through the Grounds of Opposition dated 6th January 2025 and the replying affidavit of its Managing Director, Anne-marie Burugu sworn on the same date. The Defendants chose not to



participate in the application. As the application was canvassed by way of written submissions, I will make relevant references to the same in my analysis and determination below.

Analysis and Determination

3. The Plaintiffs rightly submit that the court has already rendered itself on the injunction application and that it will be an exercise in futility to rehash and reargue the same as this is now a preserve of the Court of Appeal. What the Plaintiffs seek is an injunction pending appeal, which the Court of Appeal in *Madhupaper International Ltd v Kerr* [1985] KECA 76 (KLR) held that this court has jurisdiction to grant to an unsuccessful Applicant who had sought an interlocutory injunction.
4. The Plaintiffs have also rightly submitted that the purpose of the court granting an injunction pending an appeal having just refused to do so, is to prevent the decision of the Court of Appeal being rendered nugatory should it reverse this court's ruling, which sometimes happens. While it is correct that an Applicant for an injunction pending appeal is also to demonstrate that it has an arguable appeal, such a decision is best deferred to the Court of Appeal as this court, as the trial court, cannot be expected to sit an appeal from its own decision (see *Julius Musili Kyunga V Kenya Commercial Bank Limited & Another* [2012] KEHC 342 (KLR)).
5. The Plaintiffs have stated that they intend to challenge the Ruling on grounds that it was based on an in-personam interlocutory relief granted to the Interested Party and the court converted it to an in-rem order that is binding on persons who were not parties to the earlier litigation. Further, that this court misapplied the Supreme Court's decision in *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* [2023] KESC 14 (KLR) that was clarified by the Apex Court's ruling of 26th May 2023 (*Cogno Ventures Limited & 4 others v Bia Tosha Distributors Limited & 15 others; Kenya Breweries Limited & 6 others (Interested Parties); Ferran & 24 others (Contemnor)* [2023] KESC 33 (KLR)).
6. I have reviewed the Apex Court's ruling of 26th May 2023 (*Cogno Ventures Limited & 4 others v Bia Tosha Distributors Limited & 15 others; Kenya Breweries Limited & 6 others (Interested Parties); Ferran & 24 others (Contemnor)* [2023] KESC 33 (KLR) and note that the Supreme Court at paragraph 39 of the Ruling invoked its inherent jurisdiction to resolve the misunderstanding with respect to the import of paragraphs 128 to 131 of the Judgement 17th February 2023 and explained as follows:-While considering the contempt application, the Supreme Court

appreciated that this was a factual contest and the Supreme Court was limited in what was before it. The Court also cautioned itself that the main dispute before the parties was pending before the High Court. (paragraph 41)

The Supreme Court clarified that it remitted the matter back to the High Court, which is seized of the issue, to: SUBPARA a.

Contemporaneously address the contempt application on merit;
SUBPARA b.

not only establish what was the status quo but also punish for contempt; and
SUBPARA c.

in the event the High Court was satisfied with the nature and extent of the contempt, to expect that the same be purged before the contemnors could be allowed audience. (paragraph 42).

The Supreme Court addressed the need to leave the affected parties with an avenue for appeal in the event that either of them is dissatisfied with a finding that results in the potential deprivation of personal liberty by way of civil jail. (paragraph 67).



7. In effect, I note that there is a point of clarification issued by the Supreme Court as pertains the effect of its orders which effectively varied the finding that contempt had been proved and the matter was remitted back to the High Court for the hearing on the issue of whether there was contempt or not.
8. The Ruling of 19 December 2024 turned on the fact that the Defendants has been convicted of contempt in the Supreme Court Judgment of 17th February 2023 which issue is now the subject of determination by another

Court. I shall say no more on that issue.

9. Returning to the application before me and taking cognisance of the clarification above and further noting that I have rendered myself on the issue of the injunction, I shall limit myself to the prayers sought.
10. The considerations for grant of an injunction pending appeal were well articulated in James Juma & Partners Limited v Barclays Bank of Kenya Limited [2011] Eklr as follows: -
 - a. The discretion will be exercised against an Applicant whose appeal is frivolous (See Madhupaper International Limited –Vs- Kerr [1985] KLR 840 which cited Venture Capital). The Applicant must state that a reasonable argument can be put forward in support of his appeal (J. K. Industries –Vs-KCB 1982 – 88) KLR 1088 (also cited in Venture Capital).
 - b. The discretion should be refused where it would inflict greater hardship that it would avoid (See Madhupaper supra).
 - c. The Applicant must show that to refuse the injunction would render his appeal nugatory (See Butt –Vs- Rent Restriction Tribunal [1982] KLR 417).
 - d. The Court should also be guided by the principles in Giella –Vs- Cassman Brown & Company Ltd [1973] EA 358 as set out in the case of Shitukha Mwamodo & Others (1986) KLR 445 (also cited in Venture Capital).” See also Mukoma –Vs-Abuoga [1988] KLR 645.”
11. Further guidance on the first principle is provided by the Court in Equip Agencies Limited v I & M Bank Limited [2017] eKLR, when it stated thus:-

“Having given due consideration to the foregoing, I do not doubt, first of all, that the Plaintiffs may have an arguable appeal. A cursory perusal of the draft memorandum of appeal annexed to the supporting affidavit reveals serious questions regarding some of the findings of this court in its impugned ruling. In addition, there are allegations of prejudice and/or bias on the part of the court. A litigant who expresses such a serious assertion against the court appealed from, must be given opportunity to ventilate the grievance before the appellate court, in my view, as an exercise of his undoubted right of appeal.”
12. Upon a careful review of the Supreme Court’s ruling dated 26th May 2023, I am persuaded that the Plaintiffs have presented sufficient grounds to establish that there is an arguable appeal concerning whether, in its 26th May 2023 ruling, the Supreme Court (either directly or indirectly) reversed its findings from the judgment of 17th February 2023 (specifically paragraphs 128-130), which had held the Defendant in contempt of court and had precluded it from being granted audience.
13. The Plaintiffs also submits that the Interested Party raised in the Supreme Court the same argument it has raised in the present matter, namely, that granting the injunction orders would circumvent the



- Supreme Court's order and the conservatory order that had been reinstated by the Supreme Court. The Plaintiffs contend that the Supreme Court dismissed this argument in its ruling of 26th May 2023.
14. It is noted that in paragraphs 25 and 54 of the Supreme Court's ruling of 26th May 2023, the Interested Party sought an order to strike out, among other things, the current suit, on the grounds that it was based on contracts granted in violation of the status quo order issued by the Court of Appeal and the reinstated High Court order of 29th June 2016.
 15. In paragraph 55 of the same ruling, the Supreme Court declined to strike out the suit and affirmed that it was properly before a court of competent jurisdiction.
 16. Given that my initial ruling was based on the premise that the Defendant was in contempt of court and had no audience, and having considered paragraphs 41, 42, and 67 of the Supreme Court's ruling of 26th May 2023, I am of the view that this is a matter that should be resolved by the Court of Appeal.
 17. The Plaintiffs assert that the irreparable harm it stands to suffer if the injunction is not granted would effectively negate the purpose of its appeal. Specifically, should the Plaintiffs' distributorship agreements be terminated, the substance of its application for interlocutory relief would be wholly undermined, and the appeal would no longer serve its intended purpose. This would render the appeal nugatory, meaning the Plaintiffs would have no meaningful remedy available on appeal.
 18. The Plaintiffs' claim is that the termination of the distributorship agreements would strip it of its ability to conduct its business, making any appeal concerning the injunction orders ineffective and inconsequential. The risk of such an outcome justifies the granting of interlocutory relief to preserve the Plaintiffs' position pending the resolution of the appeal, as any delay in granting the injunction would effectively frustrate the Plaintiffs' ability to benefit from the appeal should it succeed.
 19. The Plaintiffs have produced in Court their current distributorship agreements, providing clear evidence of its ongoing and substantial involvement in the distribution of the Defendant's products. These agreements demonstrate that the Plaintiffs have invested considerable time, resources, and effort into establishing and maintaining its business operations, which are deeply intertwined with the Defendant's products. The Plaintiffs assert that the failure to grant the injunction it seeks would cause immediate and irreparable harm to its business, depriving it of the fruits of its long-standing operations and customer base.
 20. Should the injunction not be granted, the Plaintiffs will be unable to continue their business activities, resulting in the loss of established market share, client relationships, and goodwill that have been built over many years. This would not only disrupt the Plaintiffs' operations but would also inflict significant and irreparable financial damage, as the Plaintiffs' business model relies heavily on the uninterrupted distribution of the Defendant's products. The magnitude of such harm would far exceed any potential monetary compensation that could be awarded in damages.
 21. The harm to its operations would, in effect, negate the Plaintiffs' ability to enjoy the benefit of the legal relief it seeks on appeal.
 22. It is therefore clear that without the injunction, the very substratum of the Plaintiffs' business and appeal will be destroyed, rendering any future remedy ineffectual and its appeal nugatory.
 23. I am persuaded therefore that this substantial risk of irreparable harm underscores the necessity of granting the requested injunction to avoid the appeal being rendered nugatory.



Conclusion and Disposition

24. Consequently, I am persuaded that the Plaintiffs have satisfied the principles for the grant of an injunction pending appeal. In the circumstances, I allow the application dated 22nd December 2024 and issue an injunction in terms of prayer No. 5 of the application. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF MARCH 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Dr. Muthomi Thiankolu for the Plaintiffs/Applicants.

Ms. Arora holding brief for the Defendants/Respondents.

Mr. Omondi for the Interested Party.

Amos - Court Assistant

