



Sawand Care Products Limited v Nestlé Kenya Limited (Commercial Case 31 of 2019) [2023] KEHC 17272 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17272 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL CASE 31 OF 2019**

OA SEWE, J

MAY 12, 2023

BETWEEN

SAWAND CARE PRODUCTS LIMITED PLAINTIFF

AND

NESTLÉ KENYA LIMITED DEFENDANT

RULING

1. The Plaintiff filed this suit on May 2, 2019 on the basis of a Distributorship Agreement entered into between the parties on September 20, 2016. The plaintiff contended that, sometime in late 2017, it noticed falsified entries and other irregularities in accounting for the products supplied by the defendant and brought these concerns to the defendant's attention. That the parties thereupon agreed to carry out a proper reconciliation exercise that would resolve all the discrepancies. The plaintiff further contended that, without resolving the issues, the defendant issued a demand letter dated 15th May 2018, seeking payment of Kshs 25,244,160.09 which was thereafter reduced to Kshs 17,436,329.87 without any explanation whatsoever.
2. At paragraphs 11, 12 and 13 of the Plaintiff, the plaintiff averred that, in spite of good faith on its part in seeking a justification for the sum claimed, the defendant persisted in its course and proceeded to serve it with a Statutory Notice dated April 4, 2019, threatening to institute a liquidation petition against the company unless the sum of Kshs 17,436,329.87 was paid within 21 days. The plaintiff further contended that, if the liquidation petition was filed as threatened, it would suffer irreparable loss which cannot be adequately compensated by an award of damages. Accordingly, the plaintiff filed this suit praying, inter alia, for a permanent injunction, to restrain the defendant, its employees, agents, servants or employees from instituting or in any way prosecuting any liquidation petition against the plaintiff pursuant to the Statutory Notice dated April 4, 2019 or any other statutory notice whatsoever arising relating to any debt under the Distributorship Agreement dated September 20, 2016.



3. Concomitantly, the plaintiff filed a Notice of Motion dated May 2, 2019 and thereby sought orders of temporary injunction to restrain the Respondent from instituting any liquidation proceedings pending the inter partes hearing of the application as well as the suit. The application was placed before Hon. Otieno, J. on the May 3, 2019, whereupon interim orders were granted in terms of Prayer (2) of the application. The application was thereafter heard inter partes and a ruling thereon delivered on November 29, 2019. The Court allowed the application and granted a temporary injunction on the following conditions: -
 - (a) The Plaintiff shall pay to the defendant a sum of Kshs 10,000,000.00/= within 45 days from today.
 - (b) Parties shall within 14 days agree on a joint auditor to reconcile the books and determine the sum due between them.
4. Thereafter, on the March 3, 2020, the plaintiff filed the instant application under a Certificate of Urgency pursuant to the provisions of Section 1A, 1B, 3, 3A & 63(e) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 40 Rule 6 of the *Civil Procedure Rules, 2010*, for orders that:
 - (a) Spent
 - (b) The Court be pleased to set aside and/or vary the condition requiring the plaintiff to pay Kshs 10,000,000/= within forty-five (45) days and substitute it with an order allowing the plaintiff to liquidate the sum in monthly instalments of Kshs 250,000/= until the ascertained debt is paid in full.
 - (c) The Court be pleased to set aside the order for appointment of a joint order and in its place allow the parties to appoint their independent auditors.
 - (d) The costs of the application be provided for.
5. The application was supported by the affidavit of the plaintiff's director and shareholder, Samuel Wambugu, sworn on 3rd March 2020 in which a justification was made for the proposed variations. In particular, it was deposed on behalf of the plaintiff that it was unable to raise Kshs 10,000,000.00/= within the 45 days as required because it had various financial facilities that it was servicing at Family Bank Limited, Equity Bank Limited, HFC Limited and Barclays Bank Limited. The plaintiff contended that for it to be able to raise Kshs 10,000,000/= it would have to neglect all the other facilities, thereby exposing itself not only to the risk of the sale of its assets, but also liquidation petitions by secured creditors.
6. Mr. Wambugu further averred that the plaintiff was ready and willing to pay the sum of Kshs 250,000/= per month; and that the same was communicated to the defendant in an effort to negotiate the matter out of court, but the defendant had refused to translate their agreements into writing; which thus necessitated the filing of the instant application. He further deposed that the parties herein were unable to agree on a joint auditor as ordered by the court and had instead settled on different auditors. He indicated that the plaintiff had proposed the firm of M/s. Orina Makori & Company while the defendant preferred KPMG East Africa. Thus, Mr. Wambugu averred that, unless the conditions set by the court are varied or set aside, the plaintiff risked having the injunction issued by the court set aside for non-compliance.
7. The defendant opposed the application, to which end, it filed Grounds of Opposition on the March 9, 2020, contending, inter alia, that:



- (a) The application before the court lacked merit and ought to be dismissed for being vexatious as the orders of the court issued on the 29th November, 2019 were conditional and; the plaintiff having failed to comply with the said court orders, the said orders lapsed, and therefore the defendant is within its legal rights to pursue liquidation proceedings.
 - (b) The injunction order has lapsed and there is therefore nothing before the court to be varied or set aside.
 - (c) There had been an inordinate delay in filing the present application as the 45 days' condition granted in the Ruling of November 29, 2019 lapsed on January 13, 2020.
 - (d) The plaintiff is estopped from relying on alleged financial facilities that date back to 2012 to support its alleged inability to comply with the conditions set by the Court, yet it had authoritatively submitted that it is capable and willing to settle its debts, including the debt owed to the defendant; which factor was taken into consideration by the Court in granting the temporary injunction.
8. In their submissions, the plaintiff has acknowledged that the injunction issued by the court was time bound. It however took the posturing that the order had not lapsed for the reason that there was no default clause imposed by the court; and therefore the said orders on November 29, 2019 are still in force.
 9. It appears, from a perusal of the record, that no submissions were filed by the plaintiff. I have nevertheless given careful consideration to the application and its Supporting Affidavit in the light of the response and submissions filed herein by the defendant as well as the proceedings to date. Before engaging in a merit consideration of the application with a view of determining whether justifiable cause has been shown for variation of the conditions set by the Court on November 29, 2019, it is vital for the court to answer the pertinent question posed by the defendant, namely, whether the temporary injunction lapsed due to non-compliance and therefore not amenable for variation.
 10. The ruling dated November 29, 2019 is explicit that the court granted a temporary injunction but on conditions that were to be complied with within set timelines. The first condition required that Kshs 10,000,000.00/= be paid within 45 days; and the second condition was that a joint auditor be appointed within 14 days. To date, the plaintiff is yet to comply with any of the said orders. There is no indication either that the plaintiff has been paying the Kshs 250,000/= that he proposes to be allowed to pay per month.
 11. Needless to say that the conditions set in the ruling of November 29, 2019 were simple, clear and unambiguous; and therefore it was imperative that the conditions be complied with by the plaintiff within the set timelines as a prerequisite for the temporary injunction, failing which the order for temporary injunction would lapse automatically. Thus, the amount of Kshs 10,000,000.00/= was to be paid by the January 13, 2020 and the opportunity for extension or variation of the said order in terms of the amount and the appointment of a joint auditor was only available before and not after the January 13, 2020.
 12. Consequently, it is my finding that the temporary injunction issued by the court, having lapsed on the January 13, 2020 due to non-compliance is therefore not amenable to variation. That being my view, the application dated March 3, 2020 is devoid of merit and is dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 12TH DAY OF MAY 2023



**OLGA SEWE
JUDGE**

