



Gamma Zenith Kenya Limited v Trinity Biotech Manufacturing Ltd & 3 others (Civil Case E442 of 2023) [2023] KEHC 23057 (KLR) (Commercial and Tax) (6 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23057 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E442 OF 2023
A MABEYA, J
OCTOBER 6, 2023

BETWEEN

GAMMA ZENITH KENYA LIMITED PLAINTIFF

AND

TRINITY BIOTECH MANUFACTURING LTD 1ST DEFENDANT

MINISTRY OF HEALTH 2ND DEFENDANT

RADIANCE PHARMACEUTICAL LIMITED 3RD DEFENDANT

THE HON. ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. The application before the Court was brought pursuant to sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 40 Rule 2 and Order 51 Rule 1 of the [Civil Procedure Rules](#) 2010.
2. The plaintiff sought an interlocutory injunction, pending the determination of the suit, to restrain the 1st defendant and/or its agents from appointing any other representative, distribution partner apart from the plaintiff herein, for the promotion, sale and distribution of TrinScreen HIV products and/or any other comparable product within the territory of the Republic of Kenya.
3. Further, the plaintiff sought that the 2nd defendant be restrained from procuring and/or purchasing any TrinScreen HIV products and/or any other comparable product produced by the 1st defendant from any other party apart from the plaintiff.
4. The grounds for the application were that via a Letter of Authorisation dated 8/11/2021 and an Exclusive Distribution Agreement between the plaintiff and the 1st defendant, the plaintiff was duly



appointed by the 1st defendant to be the latter's exclusive representative distribution partner for TrinScreen HIV products and kits within Kenya for a period of seven (7) years.

5. That pursuant to the said Exclusive Distribution Agreement, the plaintiff expended a substantial amount of time and resources to fulfil its obligations including obtaining the necessary approvals and registrations from the Government of Kenya.
6. That the 1st defendant proceeded to unjustly terminate the said Exclusive Distribution Agreement without just cause and further appointed the 3rd defendant as its exclusive representative distribution partner for the aforesaid TrinScreen HIV products within Kenya. That the said actions of the 1st defendant were to the detriment of the plaintiff and in breach of clauses 1.1, 6.1, 6.4 and 10.10 of the Exclusive Distribution Agreement and were in bad faith.
7. In opposition, the 1st defendant filed a preliminary objection dated 19/9/2023. The 2nd and 4th defendant also filed a preliminary objection dated 22/9/2023. The 3rd defendant opposed the application through grounds of opposition and a preliminary objection dated 19/9/2023.
8. In its preliminary objection, the 1st defendant asserted that the court lacks jurisdiction to determine the suit and application as it offends clauses 10.6, 10.7 and 10.8 of the Exclusive Distribution Agreement upon which the claim is based.
9. In its objection, the 3rd defendant contended that the Court lacks jurisdiction to entertain the application and the entire suit. That the plaintiff has no cause of action against the 3rd defendant and that the suit offends the mandatory provisions of the law for misjoinder.
10. In the 2nd and 4th defendant's objection, it was contended that by dint of Clause 10.8 of the Exclusive Distribution Agreement, this Honourable Court lacks the requisite jurisdiction to hear and determine the instant suit in its entirety or any accompanying interlocutory application as the said clause provides that any dispute arising from the said Agreement is to be mandatorily resolved between the parties through arbitration to be conducted in Ireland.
11. The two argued that there is no privity of contract between the plaintiff and the Government of Kenya (through the Ministry of Health) for any orders to bind the Republic of Kenya.
12. Further that there is no legal authority by way of lawful resolutions and/or any other legal instruments under the seal of the plaintiff company duly executed by known directors and accompanied by the requisite minutes authorising the institution of the instant suit by the company against the 2nd and 4th defendant.
13. It is well settled that jurisdiction is everything and without it the court must down its tools. See Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR.
14. Clause 10.8 of the Exclusive Distribution Agreement which is annexed as 'AN2' in the Plaintiff's supporting affidavit provides: -

"Any dispute, controversy, or claim arising out of or in connection with this Agreement, or the breach, termination, or validity thereof, shall be settled by final and binding arbitration conducted in English in accordance with the United Nations Commission on International Trade Law Arbitration Rules as then in force. Arbitration shall be conducted in the Republic of Ireland. The arbitration shall be heard and determined by three arbitrators, all of whom shall be attorneys and shall have at least 15 years of experience in international commercial matters. The award shall include interest from the date of any breach or other violation to the date when the award is paid in full. The parties agree that the award of the



arbitral tribunal will be the sole and exclusive remedy between them regarding any and all claims and counterclaims presented to the tribunal. All notices to be given in connection with the arbitration shall be given pursuant to Section 9 of this Agreement.”

15. Clause 10.6 and 10.7 provides that the judicial courts of the Republic of Ireland would have exclusive jurisdiction on any dispute, claim or controversy arising out of the Agreement.
16. Clause 9.5 thereto provides that in the event of breach by any party of the terms of the agreement, the party alleging violation may be entitled to specific performance, including immediate issuance of a temporary restraining order or preliminary injunction and to any other remedies provided for by the applicable law.
17. In my view, the forgoing provisions are clear that in the event of a dispute arising from the Exclusive Distribution Agreement, the parties would resort to arbitration to be held in the Republic of Ireland. Further, if the parties want to seek interim measures of protection, it has to be from the courts of the Republic of Ireland which have exclusive jurisdiction.
18. Informed by the forgoing, this Court has no choice but to down its tools as it lacks the jurisdiction to determine the application and the entire suit.
19. Accordingly, I uphold the objections and strike out the application and suit with costs to the defendants. The interim orders are hereby discharged.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

A. MABEYA, FCI Arb

JUDGE

