



**Tembo Tamu Limited v Kenya Breweries Limited & another (Civil Suit E767 of 2021)
[2021] KEHC 86 (KLR) (Commercial and Tax) (21 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 86 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E767 OF 2021
MW MUIGAI, J
SEPTEMBER 21, 2021**

BETWEEN

TEMBO TAMU LIMITED PLAINTIFF

AND

KENYA BREWERIES LIMITED 1ST RESPONDENT

UDV (KENYA) LIMITED 2ND RESPONDENT

RULING

1. On 1st September 2021 this Court granted the following *ex parte* orders during Court vacation following the Applicant's Application of Notice of Motion dated 27th August 2021;

IT IS HEREBY ORDERED:

1. THAT, The Application is certified urgent.
2. THAT, The Application shall be served to Respondents who will file online and physically through DR Commercial & Tax Division, the Replying Affidavits within 14 days.
3. THAT, The Court grants interim injunction only to the extent of paragraph 2 (a) of the Notice of Motion of 27th August 2021, restraining the Respondents, their agents, servants and/or employees from accessing /entering the Plaintiff's premises LR 23947/4 and removing, /destroying or dealing with the brands stored within the Plaintiff/Applicant's premises pending hearing interpartes of the instant Application.
4. THAT, interpartes mention for directions shall be on 20th September 2021.

GIVEN under my hand and seal of the Honorable Court this 1st September 2021.



2. On 9th September 2021 this Court granted further orders following the Notice of Motion Application of 6th September 2021;

IT IS HEREBY ORDERED:

1. THAT, the matter is certified urgent
2. THAT, the Application shall be served to the Plaintiff/ Respondent who shall file and serve Response on line and physically through DR Commercial & Tax Division and serve the Applicant.
3. THAT, the Court grants temporary injunction in terms of Prayer 5 & 7 of Notice of Motion of 6th September 2021 that the Plaintiff/Respondent agents/ officers or representatives shall not dispose, transfer, remove or interfere with the Defendant's stock held in its premises and shall allow conduct of Stock Valuation Report within 7 days pending hearing interpartes.
4. The Stock Valuation Report & the Distribution Agreement (s) that contain the Arbitration Agreement(s) /Clause(s) to be availed by the Applicant in physical form to this Court through DR Commercial & Tax Division before interpartes mention/directions/hearing of both Applications by Plaintiff and Defendants on 20th September 2021.

GIVEN under my hand and seal of the Honorable court this 9th September 2021.

3. On 20th September 2021, the parties availed to the Court two Distribution Agreements and the Joint Stock Valuation Report. The first Distribution Agreement is dated 1st June 2019 between UDV (Kenya) Limited and Tembo Tamu Limited. The second Distribution Agreement is dated 1st June 2019 between Kenya Breweries Limited and Tembo Tamu Limited. The said Agreements each contain a Dispute Resolution Clause that reads as follows;

Clause 9.13

The Company and the Distributor will endeavor to resolve any disputes concerning this Agreement or the construction, meaning, operation or effect of all or any part thereof which arises between the parties through good faith negotiations as follows;

The Head of Route to Consumer (RTC) of the Company and Distributor representative will attempt to resolve the matter within fourteen (14) days of the matter being referred to them, or any other period agreed upon by the parties;

If the matter is not resolved by those persons within fourteen (14) days of the matter being referred to them, or any other period agreed upon by the parties, the matter will be referred to the Sales Director (or comparable officer) of the Company and the Distributor;

If those persons are unable to resolve the matter amicably within fourteen (14) days of the matter being referred to them, or any other period agreed upon, such matter shall be referred to a single arbitrator to be agreed upon by the parties hereto, or failing such agreement the arbitrator shall be appointed by the Chairman for the time being of the Kenyan branch of the Chartered Institute of Arbitrators. The award or finding of any such arbitrator shall be final and binding on the parties hereto, and the hearing of the arbitration shall take place in Nairobi.

4. The parties have agreed on the choice of forum for dispute resolution. The Court has no jurisdiction to hear and determine the subject matter of the dispute. The matter is referred to arbitration in accordance with the Dispute Resolution Clauses 9.13 of the Distribution Agreements mentioned above. Failure to do so within 60 days the matter shall be referred by the Deputy Registrar to the Chartered Institute



of Arbitrators for the appointment of an arbitrator. The above interim orders shall be maintained for 60 days in accordance with the provision of Section 7 of the *Arbitration Act*; -

Section 7. Interim measures by court

- (1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.
- (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

5. Section 7 of the Arbitration Act grants an Applicant an opportunity to apply to the Court to grant interim orders to preserve the subject matter and/or maintain *status quo* so as to ensure that there is a dispute for hearing and determination before the Arbitrator. The interim orders envisaged are in form of injunctions, deposit and/or holding of funds and any other relevant and legal interim order to freeze/stop/ remain as is situation so as to enable parties pursue Arbitration proceedings.

Disposition

1. The Court lacks jurisdiction to hear and determine the dispute as there is a valid Arbitration Agreement that parties shall resolve disputes through Arbitration.
2. The interim orders given on 1st September 2021 and 9th September 2021 shall be maintained for 60 days.
3. Parties to appoint an Arbitrator failure to which the matter shall be referred by Deputy Registrar to the Chartered Institute of Arbitrators.

DELIVERED SIGNED & DATED IN OPEN COURT ON 21ST SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO COVID-19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MS. OGULA FOR THE DEFENDANTS – PRESENT

MS. MURIRANJA FOR THE PLAINTIFF – PRESENT

COURT ASSISTANT: TUPET

