REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 502 OF 2017

SCOTCH WHISKY ASSOCIATION.....1ST PLAINTIFF/RESPONDENT

DIAGEO BRANDS BV.....2ND PLAINTIFF/RESPONDENT

UDV (KENYA) LIMITED.....3RD PLAINTIFF/RESPONDENT

VERSUS

AFRICA SPIRITS LIMITED.....DEFENDANT/APPLICANT

RULING

1. The defendant/applicant herein filed two applications on 14th and 15th May 2019. In the first application, the applicant seeks orders for the deposit of security for costs while the second application is for the empanelment of an expanded bench to hear the main suit.

2. Both application are supported by the applicant's advocates affidavit and are premised on the grounds that:

> ***a) Admittedly, the 1st and 2nd plaintiffs are not Kenyan Companies. They are incorporated in the United Kingdom and the Netherlands respectively. (I refer to annex marked "HK 1" in the affidavit of K.M. Mwangi).***
>
> ***b) The 1st and 2nd plaintiffs do not have any known property in Kenya, real or movable.***
>
> ***c) In the event that the defendant/applicant herein is successful in this case, it will experience extreme difficulties recovering the costs of the proceedings herein.***
>
> ***d) The 3rd plaintiff is a mere distributor for the 2nd plaintiff without any proprietary interests in the brand names or products of the 1st and 2nd plaintiffs.***
>
> ***e) The suit herein raises novel and complex issues of law among them:-***
>
> > ***i. Whether the Kenya law regularizes geographical indications and to that extent;***
> >
> > ***ii. What is the probative evidence to prove goodwill for purposes of passing off;***
> >
> > ***iii. Whether the European Economic Community Regulations on branding is applicable in Kenya;***
> >
> > ***iv. Whether the judicial decision from non-common wealth countries have any binding force in Kenya. If so, to what extent;***
> >
> > ***v. Whether the geographical indications may exist and be enforced without registration."***

3. The plaintiffs opposed the applications through the replying affidavit of the first plaintiff's Senior Legal Counsel, **Kenneth Murray Cobb Gray**, sworn on 2nd August 2019. He avers that the defendant has not demonstrated that it will not be able to recover the costs.

4. He states that all the plaintiffs are financially solvent companies and ongoing concerns. He adds that the mere fact that the plaintiffs are

foreign companies is not sufficient reason for an order for security for costs. He further avers that the first plaintiff currently has 71 members companies in different countries and that over 90% of the Scotch whisky sold in the world is produced by the 1st plaintiff's members.

5. He avers that even though the 1st plaintiff is a non-profit company, it is solvent; while the 2nd plaintiff is a multinational company with several brands and products in over 60 countries around the world with a turnover of USD 12.163 Billion and that the 3rd plaintiff is a company in corporated and operating in Kenya. He contends that the sum of Kshs 8,941,056 sought by the defendant for security for costs is unreasonable, excessive and aimed at frustrating the plaintiff's claim.

6. In response to the applicant's prayer for an expanded bench, he states that the same is an abuse of the process of court as the suit is not complex and that the application does not satisfy the test for the empanelment of a bench of an uneven number of judges.

7. Parties filed written submissions to the applications which I have carefully considered. The main issue for determination is whether the defendant/applicant has made out a case for the granting of orders for security for costs and for the empanelment of an expanded bench.

Security for Costs

8. Order 26 Rule 1, 5 and 6 of the Civil Procedure Rules stipulate as follows :

> 1**.** ***In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.***

Effect of failure to give security.

> ***5. (1) If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit.***
>
> ***(2) If a suit is dismissed under subrule (1) and the plaintiff proves that he was prevented by sufficient cause from giving the required security for costs the court may set aside the order dismissing the suit and extend the time for giving the required security.***
>
> ***6. (1) Where security by payment has been ordered, the party ordered to pay may make payment to a bank or a reputable financial institution in the joint names of himself and the defendant or in the names of their respective advocates when advocates are acting.***

9. The purpose of an order for security for costs is to protect the Defendant from situations in which he is dragged to Court, and made to lose even the costs of litigation. It is also meant to prevent frivolous and useless litigation by persons. Courts are however required to ensure that parties with just claims are not prevented from accessing the seat of justice for their claims to be determined.

10. It is trite law that security for costs can be ordered by a trial Court in its discretionary power. In the case of ***Marco Tools & Explosives Ltd v Mamujee Brothers Ltd***, [1988] KLR 730 it was held:

> ***"…the Court has unfettered judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though the guidance is that the final result must be reasonable and modest".***

11. In an application for security of costs the Applicant must demonstrate that the Plaintiff will not be able to satisfy an order for costs made at the end of trial should he loose the case. In ***Europa Holdings Limited v Circle Industries* (UK) BCLC 320 CA,** it was held that it must be proved that the Plaintiff would not be able to pay the costs at the end of the case. Mere inability is however not enough, the Court must satisfy itself that it will be just to make the order for costs on the facts and circumstances of the case. Other factors that the Court would consider are the residence of the Plaintiff as well as the conduct of the parties.

12. In ***Kibiwott & 4 others v The Registered Trustees of Monastery of Victory Nakuru,* HCCC No 146 of 2004** the court observed that for a party to succeed in an application for security of costs he has to prove that the opposing party will not be able to pay the costs to be awarded in the event of the suit filed by such a party being dismissed.

13. In ***Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others,* CA No. 38 of 2013 [2014] eKLR**, the Supreme Court emphasized that:

> ***"In an application for further security for costs, the Applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a Respondent will be unable to pay costs in the event that he is unsuccessful. And the onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable."***

14. In the present case, the defendant alleged that the plaintiffs do not have any known property in Kenya, and that in the event that the defendant is successful in the case, it will experience difficulties in recovering costs that may be awarded in the suit.

15. On their part, the plaintiffs maintained that they are all on-going concerns that are financially sound. To buttress their claim of financial stability, the 1st plaintiff's deponent attached copies of the 1st plaintiff's Certificate of Standing, the 2nd plaintiff's and published Annual

Report of 2018 showing after tax profit of USD 3.144 billion and the 3rd plaintiff's Certificate of Incorporation to the replying affidavit as annexures **"KG -1", "KG-2"** and **"KG-4"** respectively. The plaintiffs' position on their financial standing was not challenged by the defendant.

16. I note that the defendant did not furnish this court with any evidence to support its claim that the plaintiffs are financially unstable so as to justify its claim that it will experience difficulties in recovering costs from the plaintiffs should it be successful in the suit. In other worlds, no material was placed before this court to show that the plaintiffs are in dire straits such that they will be unable to meet their financial obligations for costs should they lose the case.

17. I find that the application for security for costs on unmerited and I therefore dismiss it with orders that costs shall be in the cause.

Empanelment of an expanded bench.

18. The defendant sought for the empanelment of an expanded bench to hear the instant suit on the basis that it raised novel, substantial and complex issues of law.

19. On their part, the plaintiffs argued that the instant suit can be competently determined by a single judge and that it would be waste of judicial resources to have an expanded bench when no constitutional issues of public importance arise. The plaintiffs argued that the precedential value of an expanded bench or a single judge is the same and that the defendant will not suffer any prejudice if the matter is heard by a single judge.

20. What amounts to a substantial question of law was discussed in ***Chunilal V. Mehta v Century Spinning & Manufacturing Company Air*** [1962] SC 1314 as follows:-

> ***"A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which has not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion or alternative views. The question involved in the present case as to the construction of the agreement was not only one of law but it was neither simple nor free from doubt and was a substantial question of law within the meaning of article 133(1)."***

21. The test for the empanelment of a bench of more than one judge was discussed in ***Wycliffe Oparanya & 2 Others v Director of Public Prosecutions & Another*** [2016]eKLR as follows:-

> "***As has been held this court before, the decision whether or not to empanel a bench of more than one judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant constitutional and statutory provisions.***
>
> ***……Accordingly, this country still does not enjoy the luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are still very scarce and although the time taken for hearing a petition by a single judge may not be any different from that taken by a bench empanelled pursuant to Article 165(4) of the Constitution, it must be appreciated that the empanelling of such a bench invariably leads to delays in determining cases already in the queue hence worsening the backlog crisis in this country. I with respect associate myself with the position adopted by Majanja, J in Harrison Kinyanjui –vs- Attorney General & Another [2012]e KLR where held that:***
>
> ***"the meaning of 'substantial question' must take into account the provisions of the constitution as a whole and the need to dispense justice without delay particularly given specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges."***

22. In ***Okiya Omtatah Okoiti & Another v Anne Waiguru, Cabinet Secretary Devolution and Planning & 3 Others*** [2017] e KLR, the Court of Appeal laid down the principles governing the determination of the issue of substantial questions of law in the following terms:

> ***i. " For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;***
>
> ***ii. The applicant must show that there is a state of uncertainty in the law;***
>
> ***iii. The matter to be certified must fall within terms of Article 165(3) (b) 0r (d) of the Constitution;***
>
> ***iv. The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought."***

23. I have perused the plaintiffs' suit file herein on 29th August 2017. I note that they seek to restrain the defendant from using or dealing with the product sold under the mark **"Glen Rock No. 1 Whisky"** in any manner, packaging or form.

24. Applying principles set in the above cited cases to the instant case, I find that the suit before the court is an ordinary commercial dispute between private companies that can be heard and determined by a single judge. I further find that the defendant did not demonstrate how a determination of the instant case will transcend the circumstances of this case or have a significant bearing on the public interest so as to warrant the empalment of a bench of more than a single judge.

25. For the above reasons, I find that the application for the empalment of a bench is not merited and I similarly dismiss it with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered in open court at Nairobi this 13th day of February 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Omondi for Mwangi for the plaintiffs/respondents

Mr. K. M. Mwangi for the defendant/applicant

Court Assistant: Sylvia