



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO. 491 OF 2017

JOVET (KENYA) LTD.....PETITIONER

VERSUS

BAVARIA NV.....RESPONDENT

J U D G M E N T

1. Jovet (Kenya) Limited (the Petitioner) is a limited liability incorporated under the provisions of the Kenyan Companies Act. It describes itself as business of beverage distributorship within Kenya. Bavaria N. V. (the Respondent) is a company incorporated under the Laws of Netherlands. It too describes itself as an independent brewery based in Netherlands and produces and exports alcohol-free and specialty beers to various countries in the world. Amongst the countries it exports to is Tanzania and Kenya.

2. The Petitioner filed this Constitutional Petition seeking the following prayers:

- a. A declaration that the Petitioner has and continues to have exclusive distributorship of all of the Respondent's products within the territory of Kenya.*
- b. A declaration that the goodwill generated, acquired and produced by the Petitioner in respect of the Respondent's products in Kenya is property and is protected under Article 40 of the Constitution of Kenya.*
- c. Declaration the Respondent's imposed terms of trade in relation to the distributorship herein are arbitrary, unfair, unconscionable, discriminatory, coloured in bad faith and otherwise violate the public policy of Kenya and are to that extent null and void.*
- d. A declaration that the Respondent's conduct with regard to the purported termination of the Petitioner's distributorship or the purported expiry of the said distributorship is null and void on the grounds that such termination or expiry/offends the Constitution of Kenya for being unreasonable, unfair, lacking in bona fides and is contrary to public policy.*
- e. Pending the hearing and determination of the Petition herein that a temporary and subsequent permanent conservatory/injunctive orders do issue preserving the Petitioner's distributorship in Kenya in respect of all the Respondent's products.*
- f. Damages as particularized in the Petition.*
- g. Any other or further reliefs that this honourable Court may deem fit to grant.*
- h. Costs.*

THE PETITION

3. The Petition is founded on Article 2 of the Constitution which states that all persons and state are bound by the Constitution; it is based on Article 3 of the Constitution which obligates all persons to respect, uphold and defend the Constitution; it is based on Article 10 of Constitution which sets out the National Values and principles of governance; it is based on Article 19 of the Constitution which grants to each individual rights and fundamental freedoms in the bill of Rights; it is based on Article 22 of the Constitution which provides vindication of violation of Constitution; it is based on Article 24 of the Constitution which provides the circumstances under which there would be limitation of Constitutional rights or fundamental freedom; it is based on Article 27 which provides equality and freedom from discrimination; it is based on Article 40 of the Constitution which provides for Constitutional protection of property ownership; and it is based on Article 159 which provides for judiciary authority and how that authority should be exercised.

4. The Petition is opposed by the Respondent through a replying affidavit sworn by Jeroen Beijer, the Respondent's Managing Director African region.

5. I have considered the parties pleadings, affidavits, submissions and authorities. Having so considered, I am of the view there are only two issues for determination from which will flow all the parties contention.

The issues are:

a. Was there a contractual relationship between the Petitioner and the Respondent?

b. If (a) above is in the affirmative, did the Respondent breach that contract?

c. If (b) is in the affirmative, what remedy is available to the Petitioner?

d. Who bears the costs?

6. At the centre of this dispute is whether the Respondent had appointed the Petitioner the sole importer, distributor and marketer of the various alcoholic and non-alcoholic drinks under the Bavaria Label N. V. Holland. The Petitioner contends that the contractual relationship between it and the Respondent was unwritten and was evidenced by various written documents, evidenced by a long association and by conduct.

7. One of the documents the Petitioner relies upon, as evidence of that contractual relationship is a letter written by the Respondent dated 30th May 2014. The content of that letter is in the following terms:

“LIESHOUT, 30TH MAY 2014

TO WHOM IT MAY CONCERN

DEAR SIRs

THIS IS TO CONFIRM THAT JOVET KENYA LIMITED, WHICH IS A SUBSIDIARY OF JOVET TANZANIA LIMITED, IS THE AUTHORIZED IMPORTER AND DISTRIBUTOR OF ALCOHOLIC & NON ALCOHOLIC DRINKS UNDER THE BAVARIAL LABEL, FROM BAVARIA N.V. HOLLAND.

THEY HAVE BEEN OUR AUTHORIZED IMPORTER AND DISTRIBUTOR SINCE JANUARY 2006.

THE APPLICABLE AGREEMENT BETWEEN JOVET TANZANIA LTD AND BAVARIAL N.V. HOLLAND IS ENCLOSED FOR REFERENCE.

WE REQUEST YOU TO EXTEND ANY NECESSARY ASSISTANCE TO PERMIT THEM TO IMPORT AND DISTRIBUTE OUR PRODUCTS IN KENYA BY FOLLOWING THE RULE OF LAW.

YOURS FAITHFULLY

(SIGNED)

V.A.A.J. SWINKELS

COMERCIAL COORDINATOR

BAVARIA NV”

8. It is important to state, and it is accepted by the Petitioner, that the Respondent had a written contract between it and a company known as Jovet Tanzania Limited (hereinafter referred to as Jovet Tanzania). Indeed the Respondent through its Replying Affidavit deponed that it had a long term business association with Jovet Tanzania, from December 2004. It deponed that from the year 2004 it, the Respondent, and Jovet Tanzania entered into a number of distribution agreement whereby Jovet Tanzania was to provide distribution of the Respondent's products under the Bavaria brand and in particular in the year 2011 Jovet Tanzania was to provide distribution of products in Kenya and Tanzania. That the agreement entered into in the year 2011 provided that Jovet Tanzania was to act as the sole distributor and importer in both Kenya and Tanzania. That agreement was valid up to December 2015.

9. It is important to state, as the name suggests, that Jovet Tanzania is a company incorporated in Tanzania.

10. The Petitioner contends that the agreement between the Respondent and Jovet Tanzania was a “self-contained” contact and was neither assignable nor transferable. The Petitioner therefore denied, as it is contended by the Respondent, that its distribution of the Respondent's products was by a private arrangement between the Petitioner and Jovet Tanzania.

11. The Respondent, by its affidavit, deponed that the distribution agreement between it and Jovet Tanzania granted Jovet Tanzania exclusive rights to Jovet Tanzania to import and distribute the Respondent's products in both Kenya and Tanzania. That because it was an exclusive right Jovet Tanzania could not grant such a right to another party such as the Petitioner. The Respondent stated that it was aware that Jovet Tanzania, in order to meet its obligations to distribute their products in the Kenyan market it entered into private arrangements with the Petitioner. The Respondent denied it was involved in those arrangements.

12. The Petitioner, however, pleads that the Respondent engaged it to distribute its products in Kenya, which contract was independent of the one the Respondent had with Jovet Tanzania. On being so engaged, the Petitioner stated that it deployed its own funds and capital to ensure an elaborate network and outlet of Respondent's products was built in Kenya. That prior to then the Respondent's products were hardly known in the Kenyan market.

13. The Petitioner stated how he set out to market the Respondent's products. That his sourcing of those markets created branded assets bearing the Respondent's brand, by having a warehouse in L.R. NO. 209/79947/7, a Bavaria Garden on L.R. No. 1870/111/160; a Hillside Grill on L.R. NO. 209/8575; and Soiree Gardens on Plot No. 1/468.

14. The Petitioner also stated that he invested heavily in infrastructure and equipment which included a fleet of transport delivery and sales vehicles; planning tools and devices designed to efficiently prescribe and monitor sales route for optimized route to market sales; and marketing tools to actualize Respondent's sale targets.

15. That as result of the Petitioner's efforts sales of the Respondent's Bavaria products attained exponential growth in Kenya.

16. That it was the Petitioner financing which generated and acquired goodwill and market share for the Respondent's product. That to provide the financing, the Petitioner had to borrow from financial institutions and its Directors provided guarantees for that financing. The Petitioner gave details of the financing, which it undertook, solely for the Respondent's business, namely;

“Outstanding facilities:

i. Chase Bank Loans:

- ***Hire Purchase facility on KBZ 135B Kshs. 1,430,148.00***
- ***Hire Purchase facility on KBW 893B Kshs. 374,938.00***
- ***Hire Purchase facility on KBZ 392W Kshs. 374,971.00***
- ***SME unsecured loan Kshs. 2,856,000.00***

ii. Equity bank Kshs. 11,979,000.00

iii. Tshusho Capital (K) Limited (Toyota) KBP 004 Kshs. 450,665

The Petitioner annexed to its Petition advertisements of the Respondent's products that it placed in the Nation newspaper on 23rd March, 25th August and 28th August 2015. There was also annexed to the Petition evidence of distribution of the Respondent's product to various outlets such as Nakumatt, Uchumi and Chandarana supermarkets amongst others. The Petitioner also attached evidence of the Respondent's personnel having visited Kenya. That was evidenced by exchange of emails between the Petitioner and the Respondent.

17. The Petitioner seeks, by its Petition, general damages, and special damages tabulated as follows:

“PARTICULARS OF SPECIAL DAMAGES

<i>i. Payment to Bavaria but no supplies made</i>	<i>€365,000</i>
<i>ii. Amounts owed to financiers on account of capital injection</i>	<i>€44,000</i>
<i>iii. Capital invested in distribution of Bavaria products</i>	<i>€650,000</i>
<i>iv. Damaged consignment</i>	<i>€20,000</i>
<i>v. Establishment costs for dedicated outlets</i>	<i>€1,320,000</i>
<i>vi. Committed investment costs under business plan</i>	<i>€595,000</i>
<i>vi. Redundancy costs</i>	<i>€550,000</i>
<i>viii. Opportunity cost</i>	<i>€3,800,000</i>
<i>TOTAL:</i>	<i>€7,344,000”</i>

18. Attached to the Petition is also the agreement between the Respondent and Jovet Tanzania dated 27th June 2011. It is useful to consider some of the terms of that agreement. That agreement amongst other terms provided:

“That Bavaria N. V. herewith confirms having given JOVET TANZANNIA LIMITED sole rights of distributorship and importation of the following products in the territory of Tanzania and Kenya. This agreement does not cover any goods that have to cross Tanzania and Kenya in transit to meet other destinations outside Tanzania and Kenya.

Bavaria N. V. shall, to the best of its endeavor, ensure that the interests of Jovet Tanzania Limited are not infringed upon, and shall copy Jovet Tanzania Limited with any enquiries for the below mentioned products emanating out of the territory of Tanzania and Kenya...

This agreement is valid up to the end of December 2015 and replaces agreement ... dated 28 September 2006. At around end of December 2015 (provided both parties agree) this agreement can be renewed for a period of five years...

This contractual agreement does not constitute an agency relationship between Bavaria N. V. and Jovet Tanzania Limited can claim no right relating to any agency relationship of any kind.

This agreement is exclusively subject to Dutch Law.”

19. The Respondent by letter dated 28th August 2015, addressed to Jovet Tanzania, withdrew distribution in relation to Kenya. This was stated, in part, in that letter:

“The agreement signed between Bavaria N. V. (hereinafter “Bavaria”) and Jovet Tanzania Ltd. (hereinafter “Jovet”) on 27 June 2011 is valid up to the end of December 2015. Provided that both parties agree, this distribution agreement can be renewed for a period after 1 January 2016. In that respect, Bavaria hereby informs you about the following.

Kenya

By this letter we inform you that Bavaria is not willing to continue the distribution relation with you or one of your companies for the territory of Kenya after 31 December 2015.”

20. That letter triggered the Petitioner to file a case before the Chief Magistrate’s Court, Milimani, being case number CMCC No. 1756 of 2016. By that action, the Petitioner sought injunction be issued stopping the Respondent from terminating the distribution agreement and stopping the appointment of another importer/distributor of Respondent’s products in Kenya. That suit was withdrawn, by the Petitioner, and this Petition was then filed.

21. It is on the alleged basis that the Petitioner claims the Respondent wrongly terminated the Petitioner’s distribution and that the Petitioner seeks general and special damages.

ANALYSIS AND DETERMINATION

22. The parties, on 30th January 2018, agreed before Court that this Petition be heard by affidavits and written submissions.

23. The Petitioner by its written submissions relies on the letter of 30th April 2014, reproduced above, the long association/conduct between it and the Respondent and the fact that it was directly invoiced by the Respondent as the basis of alleging it had a contractual relationship with the Respondent.

24. The Respondent denied, by its submissions and affidavit, that there was such a contractual relationship. Rather it contends that it contracted with Jovet Tanzania for Jovet Tanzania to have an exclusive right to sell the Respondent’s products in Kenya and Tanzania. That it was not involved in the arrangements between Jovet Tanzania and the Petitioner on the distribution of the Respondent’s products. That on Jovet Tanzania failing to fulfil its contractual obligation in Kenya the Respondent decided not to renew the 2011 distributorship agreement for Kenya.

ISSUE (a): WAS THERE A CONTRACTUAL RELATIONSHIP BETWEEN THE PETITIONER AND THE RESPONDENT?

25. The Petitioner’s case will succeed or fail on the finding of this issue.

26. The Petitioner pleads that there was a distributorship agreement between it and the Respondent. It relies on the letter dated 30th April 2014 as one of the evidence of such contract. That letter begins with an opening statement that the Petitioner is a subsidiary company of Jovet Tanzania. It is worth pondering on that statement.

27. The Respondent in a replying affidavit of Florent Renders dated 3rd August 2016, filed in Chief Magistrate’s Court in case No. 176 of 2016, deponed that Jovet Tanzania was a majority shareholder of the Petition. I did not see in the bundle of documents before me the Petitioner rebutting that assertion. Indeed in a letter dated 9th September 2015 written by the then advocate of the Petitioner, Kangethe, Waitere & Company Advocates, it was stated:

“Our client (the Petitioner) has seen the letter addressed to Jovet Tanzania Ltd of which our client (the Petitioner) is a subsidiary and the sole distributor in Kenya.”

The Petitioner, through the affidavit of Daniel Kimanyo Munene of 23rd March 2016, filed in the Chief Magistrate’s Court at paragraph 3 deponed:

“That until the year 2015 the 1st defendant (Jovet Tanzania) was at all material times the share hold of the Plaintiff.”

28. What these statements shows is that there was a close association between Jovet Tanzania and the Petitioner which seem to have ended when the Respondent withdrew the distributorship of Jovet Tanzania in the Kenyan market.

29. The Petitioner relied on the fact that it was being billed by the Respondent, for the products it was distributing, as evidence of a contractual relationship.

30. In my view, the fact the Petitioner was billed by the Respondent, or received the Respondent’s personnel when they visited Kenya or that the Respondent wrote the letter dated 30th April 2014 does not suffice to create a contractual relationship which, as pleaded by the Petitioner, gave the Petitioner exclusive distributorship in Kenya. The Petitioner, it would seem, even from its own documents relied on Jovet Tanzania for the Respondent’s products. This is clear from a letter attached to the Petition written by Jovet Tanzania to the Petitioner and dated 15th February 2016. That letter stated thus:

“15th February, 2016

Attn: Mr. D. K. Munene

RE: INVENTORY STATUS & NEW ORDER

We acknowledge receipt of your inventory report.

However, I would like to inform you that, Jovet Tanzania shall not be able to supply you or order for Jovet Kenya Ltd. From Holland (Bavaria N. V.), reasons being that we are aware of the new appointed distributor for Kenya Market since January, 2016.

Thanking you.

Yours Sincerely,

JOVET (T) LIMITED

(SIGNED)

John C. K.

MANAGING DIRECTOR”

31. It follows from that letter that the Petitioner was receiving the Respondent’s product from or through Jovet Tanzania.

32. In my consideration of the evidence presented before me and the parties’ submissions, I find that there was no contractual relationship between the Petitioner and the Respondent. It is , I believe, apt to cite here the case relied upon by the Respondent namely **BAIRD TETILES HOLDINGS LTD VS MARKS & SPENCER PLC [2001] EWCA CIV 274** as follows:

“The alleged obligation on M&S to acquire garments from Baird is insufficiently certain to found any contractual obligation because there are no objective criteria by which the Court could assess what would be reasonable either as to quantity or price. This is not in which, the parties having evidently sought to make a contract, the Court seeks to uphold its validity by construing the terms to produce certainty. Rather it is a case in which the lack of certainty confirms the absence of any clear evidence of an intention to create legal relations.

It cannot be said, let alone with confidence, that the conduct of the parties is more consistent with the existence of the contract sought to be implied than with its absence. The implication of the alleged contract is not necessary to give business reality to the commercial relationship between M&S and Baird.”

33. More importantly, the Petitioner was all along aware that the Respondent had an exclusive distributorship agreement with Jovet Tanzania for Jovet Tanzania to distribute the Respondent’s products in Kenya. With that knowledge the Petitioner could not have obtained an exclusive distributorship with the Respondent for the very same market Jovet Tanzania was contracted to distribute. The evidence before me much more shows that there existed a private arrangement between Jovet Tanzania and the Petitioner which arrangement cannot be enforced against the Respondent.

34. I need to state that it is paradoxical for the Petitioner deny that it was bound by the agreement between the Respondent and Jovet Tanzania and then seem to argue that the terms of that contract were unconstitutional.

35. The Petitioner relied on a Tanzanian case **MOHAN OYSTERBAY DRINKS LIMITED VS BRITISH AMERICAN TOBACCO KENYA LIMITED, HIGH COURT TANAZANIA COMMERCIAL DIVISION CASE NO. 90 OF 2014.** The facts of that case are distinguishable to the facts of this Petition. In that case, Mohan distributed British American Tobacco (BAT) products over 18 years. Mohan ordered and was supplied with BAT products directly for all these years. He build infrastructure and invested heavily on distributing BAT products. BAT after more than 18 years stopped supplying products to Mohan. The Tanzanian High Court found that a contract existed between Mohan and BAT and also found that BAT's termination of that contract was in bad faith, against equity, justice and good conscience and at the same time that BAT had unjustly enriched itself. I am not persuaded that that case has relevance or application to this Petition.

36. Having found that no contract existed between the Petitioner and the Respondent, it follows that the Respondent did not breach the contract, since it did not exist, and it follows that the Petitioner is not entitled to any remedy. On the issue of costs, I am of the view that costs should follow the event.

Accordingly, the costs will be awarded to the Respondent.

37. Finally, the orders of the Court are the Petition is dismissed with costs to the Respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 5th day of MARCH, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie.....**COURT ASSISTANT**

.....**COUNSEL FOR THE PETITIONER**

.....**COUNSEL FOR THE RESPONDENT**