REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 114 OF 2019

SQUISHY DRINKS LTD..PLAINTIFF

-VERSUS-

KEVIAN KENYA LIMITED..DEFENDANT

RULING

1. The plaintiff herein is **SQUISHY DRINKS LIMITED** (hereinafter called SDL). The defendant is **KEVIAN KENYA LIMITED** (hereinafter called KKL).

2. The plaint hereof was filed on **16th May 2019**. Despite being a relatively recent case the parties have filed a total of four applications and the defendant has filed a preliminary objection. What is in dispute is the use of trademark known as **'SQUISHY'**. Each party seeks by their application to injunction each other from manufacturing, packaging, supply, distribution or offering for sale juice bearing the trademark of SQUISHY.

3. The issue I am to determine is which party is entitled to the injunction orders. The parties have, by their affidavits and submissions, brought before court arguments that, if the court was to entertain them fully, would lead to final determination of the disputes between them. That would not be the proper manner of dealing with the matter. This was made clear by the court of appeal in the case **Mbuthia v Jimba Credit Finance Corporation & another[1988] eKLR** viz**:**

> "The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits."

THE PLAINTIFF'S CASE

4. The SDL described itself in the plaint as a business which carries out the manufacture and sale of children's juices under the name of SQUISHY.

5. In October 2018, as pleaded in the plaint, SDL and KKL negotiated towards the merging of their business interests. That they agreed that the merger would be through consolidation of the manufacturing process, the creation of a new entity for the sale of the juices and vesting that new entity with exclusive rights to sell the juices on behalf of the merged parties. To put into effect that merger parties agreed to enter into the following agreements:

a) an asset purchase agreement;

b) a shareholder agreement for the creation of the new entity Squishy Distribution Limited; and

c) an exclusive distribution agreement granting Squishy Distribution Limited exclusive rights to sell the juices on behalf of the parties in this case.

6. SDL pleaded in its plaint as follows:

> **"In good faith, the plaintiff [SDL] duly transferred all its assets listed in the Asset Purchase Agreement to the defendant**

[KKL] and awaited the defendant to perform its obligation"

7. SDL proceeded to plead that despite its conclusion of its obligation under the Asset Purchase Agreement the merger had not been completed because of the delays occasioned by KKL. That further communication had broken down between the parties. That SDL had sought restitution of the plant equipment and machinery, which had been delivered to KKL, but KKL had failed to deliver them.

8. It was pleaded in the plaint that KKL has been passing off squishy juices which are in identical packaging and bearing with SDL's trademark and has distributed the same to unsuspecting members of the public. That KKL's packaging bears SDL's Tradmark and that they intend to ride on SDL's goodwill and reputation which SDL has created over years.

9. SDL by this action seeks permanent injunction to restrain KKL from manufacturing, packaging, supplying, distribution, seeking or offering for sale juices in packaging bearing the plaintiff's trademark SQUISHY. SDL also seeks damages for infringement on its trademark 'SQUISHY' number 87240.

10. It is on that foundation that's SDL seeks an interlocutory injunction.

11. SDL has filed Notice of Motion applications dated 15th May and 9th September 2019. By the first application SDL seeks injunction to restrain KKL use of its trademark and also seeks an *Anton pillar* order permitting it to enter into KKL's premises for the purpose of seizing all the packaged juices or packaging paper bearing the mark similar or confusingly similar in get up to the trademark allegedly owned by it. By the second application SDL sought orders to restrain KKL from registering the revoked assignment of trademark No 87240, an order stopping KKL from tampering with the Register of trademark and an order restraining the KKL from manufacturing or distributing the product under the trademark of squishy.

12. The affidavit evidence of SDL is that it is has been in the business of manufacturing and selling the children's juice under the brand name of Squishy and that it holds the registered trademark No 87240. That since the merger was not completed between it and KKL, SDL terminated their relationship through a letter dated 2nd May 2019. That however KKL has been passing off juices looking identical to those of SDL. It that which SDL terms as infringement of its trademark.

13. SDL also though the affidavit of its director Evelyn Wairimu, dated 6th September, 2019 stated that despite the ongoing court action KKL was engaging in fraudulent registration of the revoked assignment of trademark no 87240. SDL termed the acts of KKL as economic sabotage of SDL.

<u>THE DEFENDANT'S CASE</u>

14. The affidavit of KKL was sworn by Richar Kimani Rugendo its director and chief executive. He stated that the transaction between SDL and KKL was not a merger. That KKL had honored its contractual obligations to SDL under the asset purchase agreement and had commenced the manufacture, packaging and distribution of the product with the full knowledge of SDL. The deponent stated that SDL had deceitfully misled the court in an attempt to get injunctive orders. He therefore stated that it was KKL that was deserving in protection of the court.

15. KKL has filed two applications and a preliminary objection. By the application dated 4th June 2019 KKL for injunctive order to restrain SDL from interfering with its manufacture, packaging and distribution of products under the trade name of Squishy, an order that KKL do deposit in a joint account of the advocates Ksh.7,271,507 which is the balance due under the asset purchase agreement. The other application dated 26th September 2019 seek to set aside interim orders that were issued barring the Registrar of Trademark from registering the deed of assignment in respect of the trademark Squishy.

<u>ANALYSIS</u>

16. Parties have brought to court, at this interlocutors hearing, copious information which I have had an opportunity to read and consider. It is necessary to consider whether any party has met the conditions of granting an injunction as discussed in the case of **<u>Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & another [2019] eKLR</u>** as follows:

> "The conditions for consideration further in granting an injunction is now well settled in the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358,** where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction:-

> **"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."**

17. What is at stake in the applications before me is the trademark namely squishy. Parties entered into an the asset purchase agreement dated 30th august 2018. By that agreement SDL agreed:

> ".... to sell, transfers and assign to the purchaser [KKL],.....all the vendor's [SDL's] interest in the moveable assets (plant, equipment and machinery as hereinafter further defined and intellectual property."

18. It will be recalled that SDL pleaded through its plaint that *"in good faith the plaintiff duly transferred all its assets listed in the asset*

purchase agreement". The question that immediately arises is, if indeed as SDL pleaded it had transferred all its assets what right does it then have in seeking, as it does by this action, to restore to its self those assets?

19. I believe that is where the crux of the matter lies. On prima facie basis I do find that SDL has not shown a prima facie case with probability of success because having transferred the assets, even if it purported to terminate the agreement, I am unable to find that it had the right to claim it still owned those assets, which include the trademark. There is indeed a deed of assignment of that trademark, which has been executed by, the directors of SDL, even though the plaintiff's company seal has to not been affixed. Since i find that SDL has not shown a prima facie case with probability of success ,and because the principle of granting an injunction discussed above are surmounted sequentially, I will not proceed to consider the other two principles of injunction. This is what the Court of Appeal state in the case **Yellow Horse Inns Limited v Nduachi Company Limited & 2 others [2017] eKLR** thus:

> "All the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. So that if the applicant establishes a prima facie case, that alone will not avail him an injunction. The court must further be satisfied that the injury the applicant will suffer if an injunction is not granted, will be irreparable. Therefore, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If a prima facie case is not established, then irreparable injury and balance of convenience need no consideration and the matter ends there." (Underlining mine).

20. KKL on the other hand has shown a prima facie case with probability of success because it has sown that the asset, namely the trademark was part of the assets that were the subject of the asset purchase agreement. There is, on prima facie basis, evidence that KKL had manufactured and distributed the products bearing the trademark with the acquiescence of SDL. There is also evidence, not contradicted by SDL, that KKL will suffer loss, in view of the investment it has undertaken, if the injunction it seeks is not granted. It is because I make that finding that I hold KKL is entitled to the prayer for injunction.

21. Further having perused the asset purchase agreement, in particular clause 9, parties had agreed on the mode of resolving their dispute, that is through mediation and if that failed through arbitration. KKL's preliminary objection, in that regard, succeeds. The fact that there is in existence an arbitration clause was recognized by SDL's then advocate who by their letter dated 15th May 2019 issued a Dispute Notice and proposed the names of three arbitrator for consideration by KKL.

CONCLUSION

22. Having considered the parties submission, their affidavits and the list of authorities I find that it is necessary to grant injunctive orders as sought by KKL which orders will subsist for a limited period to enable parties begin arbitration process where the arbitrator seized with the matter will determine what orders to grant. I am of the view that the costs should follow the event, in this matter.

23. I therefore grant the following orders:

> i. The interim orders of injunction granted to Squishy Drink Limited are hereby vacated and set aside.
>
> ii. For 90 days from this date hereof an injunction directed at Squishy drinks Limited is issued restraining it whether by its Directors, it servants or agents from interfering in any manner with Kevian Kenya Limited's manufacturing, packaging and distributing of products under the trademark SQUISHY.
>
> iii. The Notice of Motions dated 15th May and 6th September 2019 are dismissed with costs to Kevian Kenya Limited.
>
> iv. Kevian Kenya Limited is awarded the costs of the Notice of Motion dated 4th June and 26th September, 2019 and the preliminary objection dated 4th June 2019

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **4TH** day of **DECEMBER, 2019.**

MARY KASANGO

JUDGE

***Ruling Read** and **Delivered** in **Open Court** in the presence of:*

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

.... **FOR THE PLAINTIFF**

.... **FOR THE DEFENDANT**