



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO. 7 OF 2017

KERICHO GUEST HOUSE ENTERPRISES LIMITED.....APPLICANT

VERSUS

KENYA BREWERIES LIMITED.....RESPONDENT

RULING

1. The parties to this suit had entered into a distributorship agreement under which the plaintiff would distribute the defendant's products in certain areas in Kericho County. The agreement was for a period of 12 months commencing on 1st May 2017. It was therefore to expire on 30th April 2018.

2. However, disputes appear to have arisen with respect to the sums due to the plaintiff. It accordingly filed the present suit on 16th August 2017 seeking payment of Kshs.30,374,625/- being the amount deducted by the defendant from the plaintiff's beer account equivalent of empty bottles, crates and kegs returned to the defendant and not credited to the plaintiff's account. On 13th November 2017, the parties entered into a consent order to refer the matter to arbitration in accordance with the terms of the distribution agreement.

3. It would appear that the parties did not move forward with the arbitration as anticipated, and their dispute over distributorship seems to have escalated. The plaintiff therefore filed an application brought by way of Notice of Motion dated 12th April 2018 in which it sought the following orders:

(1) That the instance application be certified as extremely urgent and the same be dispensed with in the first instance.

(2) That for reasons to be recorded, pending the hearing and determination of the application interpartes, the Honourable Court be pleased to issue and grant a temporary injunction restraining the defendants, their servants, employees, agents, and/or any other person or persons acting on their own instruction from distributing and/or selling the defendants product the subject of the distribution agreement within the plaintiff's territory to wit; Kapsoit, Sosiot, Kiptere, Sigowet, Litein and town, Kapsuser, Kabianga, Chepseon, Londiani, Total, Kapsoit, Sosiot and Roret being the Plaintiff's territorial distribution and or selling of the defendant's products and/or in any manner prejudicial to the plaintiff distribution as per the distribution agreement commencing 1/05/2017 for 12 succeeding months.

(3) That for reasons to be recorded, pending the hearing and determination of the suit, the honourable court be pleased to issue and grant an injunction restraining the defendants, their servants, employees, agents and/or any other person or persons acting on their own instructions from distributing and/or selling the defendants product the subject of the distributorship agreement within the plaintiff's territory to wit; Kapsoit, Sosiot, Kiptere, Sigowet, Litein and town, Kapsuser, Kabianga, Chepseon, Londiani, Total, Kapsoit, Sosiot and Roret being the Plaintiff's territorial distribution and or selling of the defendant's products and/or in any manner prejudicial to the plaintiff distribution as per the distribution agreement commencing 1/05/2017 for 12 succeeding months.

(4) That the arbitration proceedings be set aside and the matter proceed before this court for hearing and determination.

(5) That the costs of this application be provided for.

4. The application was supported by an affidavit sworn by a director of the plaintiff, Mr. Wesley Koech, on 12th April 2018. Mr. Koech deposed to the essential facts relating to the agreement between the plaintiff and the defendant. He averred that there had been no complaints over the plaintiff's performance as it had been meeting its targets in accordance with the terms and conditions of the agreement.

5. However, the plaintiff had filed the present suit over the unresolved issue of an amount of Kshs.30,374,625 due and owing to the plaintiff. By a consent recorded in court, the parties had agreed to stay the proceedings and refer the matter to arbitration and/or mediation. According

to Mr. Koech, the defendant had since gone silent and was unresponsive to calls and requests to initiate the arbitration proceedings.

6. Further, after the present proceedings had been stayed, sometimes in January and February 2018, the defendant had, by itself, its servants, agents, or employees commenced parallel distribution, selling, or stocking of the products the subject of the suit in the areas that were covered by the distribution agreement. They were also engaged in unfair business practices which included selling the products at reduced prices and offering incentives to the plaintiff's customers to woo them to reject products from the plaintiff. The contravention of the assigned business territories by the defendant without clear cut policies or communication, according to the plaintiff, was employing unfair business practices which is a recipe for business chaos.

7. When the matter came up before the court on 13th April 2018, the court certified it urgent and granted a temporary injunction restraining the defendants, their servants, employees, agents, and/or any other person or persons acting on their own instruction from distributing and/or selling the defendants' product the subject of the distribution agreement within the plaintiff's territory set out in the application. It also restrained the selling of the defendant's products in any manner prejudicial to the plaintiff as provided in the distribution agreement.

8. In an affidavit in reply sworn by Ms. Karen Mate-Gitonga on 3rd May 2018, the defendant averred that the court had no jurisdiction to grant the reliefs sought by the plaintiff in the application dated 12th April 2018. This was for the reason that the parties had entered into a consent order recorded on 13th November 2017 staying the present proceedings and referring the matter to arbitration. Until the consent order had been set aside, no act may be taken or relief granted to the plaintiff in these proceedings.

9. Ms Mate-Gitonga further averred that the plaintiff had failed to seek an order to set aside the consent order, or to plead any grounds upon which the consent order may be set aside. Further, it had not placed any sufficient material before the court to warrant an order setting aside the consent order. It was also her averment that the injunction obtained by the plaintiff is actuated by malice and is designed to inflict heavy financial losses and damage on the defendant by ensuring that the market is out of stock and to further lock out the defendant from ameliorating the situation by appointing another distributor to meet the market demands and/or lock out the duly appointed distributors to serve the said market.

10. The defendant also filed an application dated 30th April 201. In its application, the defendant sought to set aside the orders issued by the court on 13th April 2018. Mr. Miruka appeared for the plaintiff while Mr. Okoth represented the defendant at the hearing of the applications.

11. In his submissions with respect to the application dated 12th April 2018, Mr. Miruka conceded that there was no longer a binding agreement between the parties capable of conferring enforceable rights and liabilities. He therefore limited his arguments to prayers 4 and 5 of the application in which the plaintiff was seeking to set aside the consent order dated 13th November 2017 referring the matter to arbitration.

12. Counsel submitted that the defendants acts have not shown any commitment to having the arbitration proceedings commence. He cited a letter which he had sent on behalf of the plaintiff to the defendant's Counsel to which there was no response.

13. It was his submission further that the defendant had come to court with unclean hands and was not interested in the arbitration as it had commenced parallel distributorship immediately after the parties left court on the date the matter was referred to arbitration.

14. Mr. Miruka further submitted that the defendant was relying on clause 2.1.1, 2.3.2 and 2.3.3 of the distributorship agreement selectively without referring to clause 2.3.6, which requires the defendant to issue a policy guideline. The defendant had not considered the welfare of the plaintiff when it brought in another distributor.

15. It was also the plaintiff's submission that the distributorship agreement defined the territory within which a distributor is to operate. For the defendant to bring in another distributor without notice to the plaintiff negates the distributorship agreement. In his view, clause 15.2 and 15.3 of the distributorship agreement which required disputes to be referred to arbitration are untenable as the parties cannot resort to mediation or arbitration in the absence of a distributorship agreement, but that clause 15.3 gives the parties a right to move the court even where there is a mediation process ongoing. Mr. Miruka therefore urged the court to allow the plaintiff's application dated 12th April 2018 with cost, and that the defendants application be dismissed with costs.

16. Mr. Okoth for the defendant opposed the application to set aside the consent referring the dispute to arbitration. Counsel cited the decision in **Flora Wasike vs Destimo Wamboko [1988] eKLR** in which the court set out the grounds on which a consent order can be set aside. His submission was that the plaintiff had not placed any of these grounds before the court.

17. It was his submission further that the only ground raised before the court for setting aside the consent was what the defendant is alleged not to have done. He referred the court to clause 15.2 of the distributorship agreement which provides for the appointment of an arbitrator. It was his submission that the said clause also provides for what should happen where parties fail to agree on an arbitrator, and the plaintiff had not moved in accordance with clause 15.2. The parties having consented to arbitration, this court is bound by section 10 of the Arbitration Act, and it can only interfere in the circumstances set out in the Act. His further submission was that parties failing to agree on an arbitrator is not one of the circumstances warranting the court's interference. He relied in this regard on the decision in **CMC Holdings Limited & Another vs Jaguar Landrover Exports Ltd [2013] eKLR**.

18. According to the defendant, the plaintiff had not complied with the termination process under the distribution agreement. While the contract did provide for mediation, the time for mediation was past and what was left was arbitration. Counsel relied on the decision in **Futureway Ltd vs National Oil Corporation of Kenya Misc Civil Appl. No. 550 of 2016 [2017] eKLR** to submit that whether a party is entitled to terminate a contract is a question to be determined by the arbitrator. He therefore urged the court to dismiss the application dated 12th April 2018 with costs.

19. With regard to the defendant's application dated 30th April 2018, the submissions of Counsel were that it had been compromised by the admission by Counsel for the plaintiff that the orders issued on 13th April 2018 had lapsed on 30th April 2018 and there are no orders to be set aside.

20. In his submissions in response, Mr. Miruka argued with regard to the consent order to refer the matter to arbitration that the plaintiff's hands were tied if the defendant was not committed to arbitration. As for the defendant's reliance on the case of **Futureway vs National Oil Corporation** (supra), his submission was that the grounds for setting aside in that case related to a contract. In this case, he had demonstrated the grounds for setting aside a consent. In his view, this was a court of competent jurisdiction and therefore the matter should proceed before it.

Determination

21. Counsel for the plaintiff conceded at the hearing of the application that the other prayers sought in the application dated 12th April 2018 were now moot as the distribution agreement between the plaintiff and the defendant had expired. Further, in light of the fact that the distribution agreement between the parties had expired on 30th April 2018, the orders issued on 13th April 2018 had lapsed. By the same facts, the application dated 30th April 2018 was compromised. What remains for consideration with regard thereto is only the issue of costs.

22. I therefore believe that the sole issue before me is whether the plaintiff has satisfied the conditions for setting aside the consent order dated 13th November 2017.

23. In its decision in **S M N vs Z M S & 3 Others [2017] eKLR**, the Court of Appeal stated as follows:

“17. There is no dearth of authorities on the law governing the setting aside of consent judgments or orders, and we are grateful to counsel for citing some of them before us. Generally a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties.”

24. The court went on to cite with approval various cases on grounds for setting aside consent judgment and orders as follows:

“18. We may highlight a few of the authorities to illustrate the approach attendant to the issue at hand:-

In Flora N. Wasike vs Destimo Wamboko [1988] eKLR this Court stated:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this Court in J M Mwakio vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.”

In Purcell vs F C Trigell Ltd [1970] 2 All ER 671, Winn LJ said at 676;

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons..”.

See also Hirani vs Kassam (1952) 19 EACA 131, at Page 134; Brooke Bond Liebig Ltd vs Mallya [1975] EA 266 at 269 and Seaton on Judgments and Orders (7th Edn), Vol 1, at Page 124.

19. In Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd [1982] KLR 485, Harris, J correctly held, inter alia, that

“1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”

25. In **Board of Trustees National Social Security Fund v Micheal Mwalo [2015] eKLR**, the Court of Appeal stated as follows:

“A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”

26. Finally, in **Setton on Judgments and Orders (7th Edn), Vol.1 pg 124** the author states that:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them... it cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

27. In this case, the plaintiff and its Counsel did not place before the court any evidence to demonstrate that the consent entered into between the parties on 13th November 2017, which was adopted as an order of the court, was obtained illegally or through fraud.

28. Its argument seems to be that the consent should be set aside as the defendant commenced parallel distributorship agreements after the consent was recorded. It therefore contends that the consent was entered into for ulterior motives. However, as demonstration of fraud or any of the grounds for setting aside a consent order has not been placed before the court, I find the orders sought at prayer 4 and 5 of the application dated 12th April 2018 to be without merit. The parties hereto are bound by their consent order to refer the matter to arbitration in accordance with their distributorship agreement. Accordingly, the application is dismissed with costs to the defendant.

29. There shall be no order as to costs with respect to the application dated 30th April 2018.

Dated, Delivered and Signed at Kericho this 1st day of November 2018

MUMBI NGUGI

JUDGE