REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE. NO. 40 OF 2016

EVEREADY EAST AFRICA LIMITED.....PLAINTIFF

VERSUS

ENERGIZER MIDDLE EAST AND

AFRICA LIMITED.....1ST DEFENDANT

ENERGIZER HOLDINGS INC.....2ND DEFENDANT

RULING

Introduction

1. I am asked to adjudicate a dispute between related companies.

2. The dispute concerns mainly the distributorship of the 2nd Defendant's branded products ("the energizer products"), with the Plaintiff insisting that its life is pegged mainly on the said distributorship. The dispute before the court is still at its intermediary stage and the Plaintiff only seeks interim reliefs.

Narrative background

3. The background facts do not appear to invite controversy and may be easily retrieved from the affidavits filed in support of and in opposition to the Plaintiff's application for interim relief.

4. I may restate the same as follows.

5. The Plaintiff is a public company. It was incorporated in 1967 (originally as a private company) with the 2nd Defendant as one of its promoters. The 2nd Defendant is also a corporate entity. It is a manufacturer of batteries. It is registered and headquartered in the United States of America. The 1st Defendant, also a corporate entity with its registration origins traceable to the state of Delaware U.S. It also manufactures and exports batteries from its Middle East base. The 2nd Defendant currently holds a 10.5% shareholding stake in the Plaintiff.

6. For nearly 50 years the Plaintiff has also been involved in the production, manufacture, marketing, sale,

promotion and distributorship of the 2nd Defendant's Energizer products.

7. The relationship between the Plaintiff and the 2nd Defendant however traverses the shareholding or the marketing and distributorship of the energizer products. The 2nd Defendant also plays a management role in the Plaintiff Company. The 2nd Defendant has been involved in the appointment of not only the Plaintiff's Chief Executive Officer but also other key management officers. The 2nd Defendant has also always had two representatives on the Plaintiff's Board of Directors.

8. The Plaintiff became a public limited company in 2006. Prior to floated a prospecting. The prospectus was focused mainly on the manufacture and marketing of the Energizer products. The manufacture like the marketing and distribution was then being undertaken by the Plaintiff at and from its plant in Nakuru, Kenya. The manufacturing ceased some five years later. The Plaintiff then moved to importing and distributing the energizer products as supplied by the 1st Defendant.

9. More particularly, in October 2011 with the 2nd Defendants blessings as well the Plaintiff was formally engaged by the 1st Defendant to promote sale and distribute energizer products for a period of three (3) years. All was well until January 2016 when the 1st Defendant notified the Plaintiff that the existing distributorship agreement would not be renewed. Instead a new agreement for the marketing and distributorship of the energizer products was subsequently offered by the 1st Defendant.

10. The new distributorship agreement offered after January 2016 was non-exclusive. It also sought cash payments for any energizer products supplied to the Plaintiff and not letters of credit in assurance. The distributorship agreement limited the Plaintiff's territory from the original East and Central African region and beyond. It restricted the products the Plaintiff could distribute or trade in. The new distributorship agreement offered by the 1st Defendant also restricted and withheld pricing of the products. The term was limited to six (6) months (later varied to 1 year) instead of three years.

11. The new distributorship agreement was apparently prompted by, the non-settlement of some of the 1st Defendant's invoices in 2015. The invoices were ultimately settled in 2016. Attempts to renegotiate the terms fell through and later the 1st Defendant declined to supply the Plaintiff with energizer products when requested. In the midst of all this, the Plaintiff had its own and other products to supply, market, promote and distribute.

The Plaintiff's case and claim

12. The Plaintiff seeks at an intermediary stage injunctive orders to restrain the Defendants from breaching, reneging on or acting in a self-serving manner in any way as to undermine the pre-existing defacto distributorship agreements between the Plaintiff and the 1st Defendant and also from making the energizer products available in East Africa and Central Africa until determination of the case. The Plaintiff also seeks to restrain the Defendants or their agents from distributing the energizer products in the Plaintiff's East African territory pending hearing of the case. The Plaintiff also seeks an order to restrain the Defendants or their agents from distributing, selling or marketing any energizer products in the Plaintiffs territory through any third party or from breaching, reneging or acting in any way as to undermine the representations made to the Plaintiff.

13. The Plaintiff's claim is an apprehensive action. It based on the fact that there has been a violation and breach of a fiduciary responsibility when the 1st Defendant declined to renew the already existing agreement but instead opted to introduce onerous and unconscionable terms. In the midst, the 2nd Defendant failed to exercise its influence and control to ensure that a favorable renewal was granted and this was in breach of the 2nd Defendant's fiduciary trust.

14. The Plaintiff further contends that the Defendants offered the Plaintiff unconscionable terms with the aim of themselves getting the business of marketing, promoting, distributing the energizer products.

15. Additionally, the Plaintiff contends that the 1st Defendant had unilaterally withdrawn the Plaintiff's defacto territorial exclusivity and introduced a competitor thus undermining the Plaintiff's profit and market established over the years. The Plaintiff also accuses the 1st Defendant of unilaterally imposing purchase requirements for the energizer products. It is also contended that the terms of the new distributorship agreement were unfair and unconscionable as they were imposed by the Defendants without any regard to the fact that the 2nd Defendant actually controls both the 1st Defendant as well as the Plaintiff and also due to the fact that it was the Defendants' intention to take over the Plaintiff's territory all to the shareholders detriment. This was notwithstanding the representation which had been made to the shareholding at the first offer of shares to the public.

16. It was added that the Defendants were determined to fight off the Plaintiff with a view to securing the energizer products all alone and to the Plaintiff's exclusion. This, it was asserted, is evident in the fact that there were no arms-length negotiations even when both Defendants are aware that the 2nd Defendant has interests in both the Plaintiff and the 1st Defendant.

17. In the result the Plaintiff contends that the Defendants engagement in self- dealing is to the detriment of the Plaintiff's shareholders.

18. The Plaintiff contends that the suit seeks to protect its business from destruction by a controlling shareholder besides also seeking to protect members of the Plaintiff. The suit, the Plaintiff contends, is aimed at ensuring that the Plaintiff Company is not compromised to the point of having to start from scratch where the business will have to be disrupted and be completely down stated and staff laid off. For this latter reason the Plaintiff contends that it has had to engage with other product suppliers even as it pursues its remedies in court.

Defendants' case

19. The Defendants filed separate affidavits in response to the Plaintiff's application for emergency interim relief. Mark Lavigue deposed on behalf of the 1st Defendant while the Replying Affidavit on behalf of the 2nd Defendant was sworn by Kathryn A. Dugan.

20. In summary, the Defendants contend that they are two separate entities even though the 2nd Defendant is a subsidiary of the 1st Defendant. Whilst confirming that the 2nd Defendant manufactures and distributes energizer products, the Defendants however assert that the Eastern Africa Market for energizer products is under the control of the 1st Defendant.

21. According to the Defendants, the distributorship agreement between the 1st Defendant and the Plaintiff executed in October 2011 superseded all previous arrangements that the Plaintiff had for the promotion, distribution, marketing and sale of the energizer products. The distributorship agreement also constituted the entire bargain between the Plaintiff and the 1st Defendant including terms as to alteration and termination of the commercial relationship. The relationship was to last for an initial period of three years and then renewed annually until either party terminated it by notice. Both Defendants contended that the agreement and, *a priori*, the relationship was effectively terminated when the 1st Defendant gave notice of termination in January 2016. There were therefore no rights or obligations to be enforced or pursued by either party. There could also thus be no incident of breach.

22. The Defendants also asserted that no assurances had been given to the Plaintiff that the distributorship agreement would be perpetually renewed. By the same vein the 2nd Defendant also denied that any representations had been made to members of the public by either the 2nd Defendant or the Plaintiff of a continued distributorship arrangement with the 1st Defendant.

23. The Defendants contended that the Plaintiff had failed to establish a prima facie case as what was evident were failed negotiations at obtaining a commercial bargain and the court could not be engaged in drawing a contract for the parties.

24. Secondly, the Defendants contended that the new terms of the agreement which had been offered to the Plaintiff were not unconscionable and had been informed by the previous experiences which had seen the Plaintiff default in settling invoices issued by the 1st Defendant for goods supplied and also had seen the Plaintiff perform below the expected par.

25. The Defendants denied that the Plaintiff had ever controlled the Eastern Africa market exclusively even under all previous agreements.

26. It was also the Defendants case that the Plaintiff was guilty of delay and could not thus obtain equity's help as the 1st Defendant had already engaged another entity in Hasbah Kenya Ltd to market, promote, distribute and sell energizer products. The new entity had already largely performed its part of the bargain.

The arguments in court

27. Both parties filed written submissions which were highlighted before me by Mr. Andrew Musangi of Mukite Musangi & Co Advocates and Mr. Ogunde of Walker Kontos Advocates, for the Plaintiff and Defendants respectively on 27 February 2017

Plaintiff's submissions

28. Laying the background to the application, Mr. Musangi submitted that when the Plaintiff's company opened its shares to members of the public in 2006 the then shareholders represented to the public and regulatory authorities that the Plaintiff would continue to distribute the 2nd Defendants energizer products. Then in 2011 when the Plaintiff closed its manufacturing plant it switched solely to the distribution of the energizer products as its main corporate asset. It then entered into an agreement with the 1st Defendant. But in breach of the 2nd Defendant's fiduciary duties and out of covert action by the Defendants, the distributorship agreement was terminated and the Defendants failed to negotiate any renewal in good faith.

29. Mr. Musangi contended that the Plaintiff had established a prima facie case by the fact that the Defendants were evidently in breach of their fiduciary duties. According to Mr. Musangi, there existed a fiduciary relationship between the 1st and 2nd Defendant and also between the 2nd Defendant and the Plaintiff and by extension between the Plaintiff and the 1st Defendant. The 2nd Defendant was, in Mr. Musangi's submissions, the controlling shareholder. Then referring to the scholarly article **"Fiduciary Duties of controlling Shareholders; A Comparative view" U.Pa. J. Int'l Business Law 379** by Zipora Cohen, Mr. Musangi submitted that control exists where a shareholder has powers to affect the rights of others and not only where one has majority shareholding.

30. In the instant case, the Respondents controlled the trading relationships of the Plaintiff and also the managerial facets of the Plaintiff through appointment of management officials and being represented on the board of directors.

31. According to Mr. Musangi, the Respondents had used their controlling powers to abuse the business relationships of the Plaintiff and the court ought to intervene as did the privy council in the case of **Cook *vs.* Deeks [1916-17] All E R 285.** In **Cook *vs.* Deeks *(supra)*** directors who were also controlling shareholders formed a new company and then used it as a vehicle to obtain a railway construction contract when they should have ensured that the original company obtained the contract. The privy council held that directors are bound by fiduciary duties and

> ***"are not at liberty to sacrifice the interest which they are bound to protect and while ostensibly acting for the company, divert in their own favour business which should properly belong to the company".***

Attempts by the majority shareholders to ratify the directors and shareholders actions were rejected by the

court.

32. Mr. Musangi submitted that a similar situation obtained in the instant case as the 2nd Defendant having participated in the building of the Plaintiff's brand and business through the energizer products was now using its influence to exclude the Plaintiff. To this, counsel added that there were no grounds to terminate the distributorship rights of the Plaintiff save that the Defendants now sought to expropriate the business for themselves.

33. Secondly, counsel submitted that the Defendants were in breach of their fiduciary duties as controlling shareholders in the Plaintiff. Referring to the case of **Lebold –v- Inland Steel Company 316 US 675(1942),** Mr. Musangi contended that the Defendants were under a duty to act with loyalty, fairness, reasonableness and in good faith but had not done so towards the Plaintiff. Instead, the Defendants had undermined the Plaintiff's interests and further the Defendants had sought only to confer benefit for themselves while undermining the members of public. This, it was submitted, was exhibited when the Defendants offered the Plaintiff a new distributorship agreement with onerous terms and then failed to engage the Plaintiff in any negotiations at an arm's-length or in good faith. The bad faith, it was further submitted, was also exhibited in the fact that the Defendants had engaged in negotiations with third parties in June 2016 even when the distributorship agreement with the Plaintiff still subsisted.

34. Mr. Musangi then invited the court to invoke the principles of the corporate opportunity doctrine to intervene and protect the Plaintiff. According to Mr. Musangi, the corporate opportunity principle is a common law doctrine which is to the effect that directors and controlling shareholders cannot take for themselves business opportunity that would benefit the company without first offering the opportunity to the company. It was submitted that in the instant case the 2nd Defendant had participated in the process of establishing the Plaintiff's business line, yet when there was now available a commercial business opportunity which the Plaintiff was capable of successfully undertaking the Defendants had themselves opted to appropriate the opportunity.

35. Finally, while making reference to the case of **Bia Tosha Distributors Ltd –v- Kenya Breweries Ltd & 3 Others [2016]eKLR,** Mr. Musangi urged the court to intervene even if there was no contract between the parties as there is always "the need to do simple justice between contacting parties".

Defendants' Submissions

36. Mr. Ogunde submitted that the Plaintiff had not established a prima facie case to warrant an interim injunction.

37. According to counsel, it was not in dispute that the agreement which formed the basis of the relationship between the Plaintiff and the 1st Defendant had been lawfully terminated. The Plaintiff had acknowledged this fact and indeed opted out of the relationship completely only for the Plaintiff to belatedly turn around and move the court on the basis of alleged violation of a fiduciary duty and breach of the doctrine of corporate opportunity.

38. Mr. Ogunde submitted that the Plaintiff's claim could not succeed as it was based on rights which purportedly accrued before the agreement of October 2011 was executed, yet the agreement had clearly stipulated that the parties' (1st Defendant's and Plaintiff's) rights, duties and obligations were fully and completely stated in and captured by the agreement. According to counsel, the terms of the agreement were therefore conclusive and the Plaintiff was simply being "disingenuous". As the agreement provided for and contemplated that it could end, it had since been ended.

39. Additionally, Mr. Ogunde stated that the court could not draw or redraw a contract for the parties as was sought by the Plaintiff. For this proposition counsel relied on the case of **National Bank of Kenya Ltd *vs.* Pipe Plastic Samkolit (K) Ltd & Another [2001] E.A 503**.

40. With regard to the fiduciary relationships of the parties, counsel contended that the 1st Defendant had

no relationship whatsoever with the Plaintiff and that the two Defendants were distinct entities with the 2nd Defendant never trading in Kenya or her environs. Counsel added that the 2nd Defendant was a minority shareholder and had no control over the Plaintiff.

41. It was also the Defendants' contention that the orders sought by the Plaintiff were bound, if granted, to offend express statutory provisions. In particular counsel referred to the Competition Act, No 12 of 2010 which prohibits restrictive trade practices as well as exclusivity.

42. Mr. Ogunde further contended that the Plaintiff was guilty of unreasonable and unnecessary delay in moving the court and thus equity could not be called to the Plaintiff's aid. Additionally, the Plaintiff was accused of not being before the court with clean hands as it had failed to disclose that the terms of the new agreement were dictated by the Plaintiffs previous breaches and below par performances. Further the Plaintiff had also failed to disclose that it had already rebranded and was selling products under a brand name "Turbo".

43. For completeness, counsel submitted that the Plaintiff had not shown that it would suffer irreparably. Mr Ogunde also asserted that the balance of convenience favoured the Defendants as they had already engaged a third party to market and distribute the energizer products and the orders sought if granted would only see the Plaintiff selling its new brand Turbo without competition.

44. Then submitting that the cases of **Cook *vs.* Deeks** and **Bia Tosha Distributors *vs.* Kenya Breweries Ltd & Others** were distinguishable from the instant case, counsel wrapped up his submissions with a reference to the case of **CMC Holdings Ltd & CMC Motors Group Ltd *vs.* Jaguar Land Rover Exports Ltd [2013]eKLR** for the proposition that the Plaintiffs claim could not be rendered nugatory as it at liberty to trade in and source other similar products.

Discussion and Determination

45. The Plaintiffs counsel at the oral hearing of the motion stated to the court that the Plaintiff would not be pursuing the declaratory orders at the intermediary stage. The core question consequently is whether the Plaintiff is entitled to the following interlocutory injunction(s)

> ***i. Pending the hearing and determination of this suit the Respondents jointly and severally, whether by themselves, their servants, agents, subsidiaries, associates, third parties or in any other manner be restrained from further breaching, reneging on, and/or acting in a self-serving manner in any way so as to undermine the pre-existing de facto Distribution Agreement/s between the 1st Respondent and the Applicant Company and/or in any other way or manner making the Energizer Products available in the East Africa territory including Rwanda and Burundi until the matter is heard and finally determined.***
>
> ***ii. Pending the hearing and determination of this application the Respondents jointly and severally. Whether by themselves, their servants, agents, subsidiaries, associates, third parties or otherwise, be restrained from distributing Energizer Products in the Applicant's East Africa territory, including Rwanda and Burundi and/or in any other way or manner making the Energizer Products available in the East Africa territory including Rwanda and Burundi until the matter is heard and finally determined.***
>
> ***iii. Pending the hearing and determination of this suit the Respondents jointly and severally whether by themselves, their servants, agents, subsidiaries, associates, third parties or otherwise, be restrained from distributing Energizer products in the Applicant's East Africa territory, including Rwanda and Burundi until the matter is heard and finally determined.***

46. I must however point out that it is not incompatible or inconsistent with judicial proceedings for a party to seek and the court to grant interim declaratory orders, even though an interim injunction will in most instances achieve the same objective as an interim declaration: see **Bank of Scotland –v- A Ltd [2001] 1 WLR 751** where it was generously explained that the courts power to grant interim declarations

is inherent and may occasionally prove very useful.

47. The procedure to be adopted by court in hearing an application for an interlocutory injunction and the principles to be applied are relatively clear.

48. To succeed, a Plaintiff must establish a prima facie case with a probability of success. The Plaintiff must also be in a position to show that in the absence of the injunction sought damages would not suffice to compensate the Plaintiff. And where the court is in doubt, the hardships to be suffered by the Plaintiff (where an injunction is not issued) or by the Defendant (where one is issued) must be weighed on the basis of the material availed to the court: see **Giella *vs.* Cassman Brown** & **Co. Ltd [1973] 1 EA 358** and **Mrao Ltd *vs* First American Bank of Kenya Ltd & Others [2013] 2 E A 8.**

49. The grant of an interlocutory injunction is a discretionary matter. The court must keep in mind that the evidence available to the court is still incomplete (affidavit) evidence not tested on cross-examination. Consequently, it is not part of the courts' function at such intermediary stage to try and resolve conflicts of evidence and make any definitive findings of fact or of law: see **Bonde *vs.* Steyn & Others [2013] 2 EA 8.** It may actually sometimes be impossible to make an order which does not do some injustice to one party or the other but as the grant of an interlocutory injunction is a relatively important matter which may lead to a party being sent to prison for disobedience, there is always is need for deeper interrogation by the court. As an equitable remedy as well, the court is enjoined to look at the conduct of the parties, the surrounding circumstances and whether the orders sought are likely to affect the interests of non-parties to the suit.

50. In casu, the Plaintiff's claim is basically two-fold. First, the Plaintiff contends that the 2nd Defendant is in breach of its fiduciary duties. Secondly, is the contention that the Defendants are taking a corporate opportunity for their (personal) benefit. To these are added the contentions that the Defendants are bent on destroying a business the Plaintiff has built over the years, by offering the Plaintiff a new distributorship agreement filled onerous, unconscionable and unacceptable terms and conditions.

Of fiduciary duties, emasculation of companies and controlling shareholders

51. It is not in dispute that the 2nd Defendant holds approximately 10.5% of the Plaintiff's shares. It is also not in dispute that the Plaintiff is a public company. Additionally, it is not disputed that the 1st and 2nd Defendant companies are related by virtue of shareholding, even though at this stage it is unclear how the shareholding structures of the 1st Defendant are laid out. Besides, it is also a common cause that the marketing, promotion, distribution and, previously, manufacture of the energizer products have for a lengthy period of time, spanning a few decades, been the backbone of the Plaintiff's business. It is stated that they formed 90% of the Plaintiffs core corporate assets.

52. The Plaintiff complains that the action or inaction of 2nd Defendant as a controlling shareholder has been prejudicial to the Plaintiff.

53. According to the Plaintiff even though the 2nd Defendant only has just about 10.5% shareholding and thus does not qualify as a majority shareholder the 2nd Defendant is still a controlling shareholder in the Plaintiff as it controls the business run by the Plaintiff and also appoints the Plaintiff's chief executive as well other senior management staff. The 2nd Defendant also has at least two members seated on the Plaintiff's Board of Directors hence an ability to influence board decisions. The control of business is alleged from the perspective that the 2nd Defendant is a majority shareholder in the 1st Defendant and therefore can, if it so wills and it often should, ensure that it influences any trading to be offered by the 1st Defendant to the Plaintiff. The Plaintiff urges that the 2nd Defendant can actually influence even the terms and conditions of any contract to be entered into by the 1st Defendant.

54. The time- honoured and democratic principle in company law is that the general rule is majority rule. The law basically allows members to treat their rights to vote as an incident of property which they may

exercise to their advantage. Indeed the fact that minority share holders find themselves outvoted is not taken as evidence of autocracy: see **Re Eryeza Bwambale & Co Ltd[1969] 1 EA 430** . Even the fiduciary duties of directors do not prohibit a director from voting as he may like in his capacity as a shareholder. Thus in **North-west Transportation Co. Ltd –v- Beatty [1887] 12 AC 589 (PC)** it was held that :

> ***"unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, only covered, upon any question with which the company is legally competent to deal is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject matter opposed to, or different from, the general or particular interests of the company. On the other hand a director of the company is precluded from dealing on behalf of the company with himself and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict with interests of those whom he is bound by fiduciary duty to protect, and this rule is applicable to the case of one of several directors as to a managing or sole director".***(emphasis)

55. Substantial power is placed in the hands of those who control more than half of the votes on the board or at members' meeting. The holders of the majority or management shares are under no legal obligation to exercise their voting rights but neither should they be forced to exercise the same when they opt to self-deny. In contrast with the rule which normally governs the acts of directors, I am not aware of any rule that a vote or abstention by an interested shareholder renders a decision invalid or even raises a presumption of mala fides. Of course if there is fraud or a question as to validity of the voting member's shares, then the decision may be open to challenge.

56. No doubt I am aware the rule has led to orthodoxy and inequity but the courts have consistently upheld the majority's voting rights (see the rule in **Foss *vs.* Harbottle)** even where they appear not to be in the interest of the company. This is so even as the courts also alongside the legislature seek to reconcile the opposing needs and interests of controllers (majority) and minorities: see for example Part IV of the Companies Act as to special resolution requirements for purposes of alteration of the status of the company. See also the various exceptions to the rule in **Foss *vs.* Harbottle.**

57. The scenario is different and unusual in the instant case when the Plaintiff accuses its minority shareholder of not acting in the interest of the company. The Plaintiff actually urges that the 2nd Defendant should have emasculated the 1st Defendant to ensure the Plaintiff benefited. Certainly, the law would not favour such a situation, in my view, as it has been the courts mission to encourage the protection of minorities rather than their emasculation and frustration by the majority. Likewise, the policy of non-intervention in company management would not allow any intervention.

58. More critically, I have not been able to see how it may be stated, on the basis of contradicted evidence that the 2nd Defendant was in a position to act but failed to act. The 2nd Defendant has asserted that it is a different entity from the 1st Defendant. That is the uncontested affidavit evidence currently before me. The Plaintiff has not also placed any evidence before me to show the 2nd Defendant as a majority shareholder in the 1st Defendant. Another piece of relevant evidence is the fact that the 2nd Defendant states that it does not have any of its products out for sale in East Africa. All would point to fact that 2nd Defendant was operating rather independently and I am ready to accept that position for now.

59. I must admit that *Zipora Cohen's* thesis that a minority shareholder can actually be a controlling shareholder [29] forms a relatively interesting read. It is a good corporate governance theory. The thesis must have to be placed to test in light of the various legal principles as to majority rule which I have already alluded to before placing any reliance upon it. For now both statute and common law would not reveal that it is a thesis easily acceptable in practice and in theory within the common law jurisdiction.

60. While reminding myself that the Plaintiff is a public company, it may perhaps be important to point out that, in my preliminary view, the structure of a corporate entity, at least in the case of public

companies whose shares are dealt with at the stock exchange or whose shares are dealt with minus any restrictions means that the holding of shares may not be static for long periods. The shares may and often will be widely distributed. The personal involvement of individual shareholders in the daily management of a company or control of the company may be impossible. In public companies. it would effectively mean that the management would have to be separated from the ownership. The theory(I have not come across a practical case) that a minority share holder may thus control a public company is thus doubtful.

Of corporate opportunities and conflict of interest

61. As a general rule both directors are barred from acting in particular ways when there is conflict of their interest(s) with the interests of a company. There is a duty not to profit from a position of trust which directors hold. That duty has been extended to protect opportunities available to a company. Thus a director , even where he is a shareholder should not take any corporate opportunities for personal benefits: see **Cooks –v- Deeks (supra)** and also **Regal (Hastings) Ltd –v- Gulliver [1967] 2 AC 134.** The conflict will arise even where the company is not pursuing the opportunities in question and they are presented to the directors on their personal capacity. Where the director appropriates the opportunity, he is deemed as a trustee for the company of any profits made and he will be held liable to account in any action by the company for restitution.

62. The Plaintiff contends that the 2nd Defendant has acted in violation of the doctrine of corporate opportunity. The Plaintiff points out that there was an active commercial opportunity to distribute the energizer products as that line of business fell directly in the Plaintiff's corporate plans. Instead, the 2nd Defendant has appropriated the business.

63. Unfortunately, the evidence currently before me does not seem to completely establish the Plaintiff's case and invite an imagination of success at trial.

64. The evidence does not reveal any dealings with the 2nd Defendant. The 1st Defendant has been dealing with the Plaintiff. It has now opted to deal with other third parties who are neither directors nor shareholders of the Plaintiff Company. It is another entity now with the opportunity, and not the shareholder /director.

65. It was also the Plaintiff's contention that, the 2nd Defendant's actions were in breach of various representations made to members of the public in 2006. One such representation, it was alleged, was that the Plaintiff would continue distributing the energizer products. The 2nd Defendant denied making any such representation and I would agree for now. I saw no such explicit representation. Besides, the Plaintiff also used to manufacture energizer products in 2006 as it floated its shares to the public. The manufacturing ceased in 2011. I did not hear the Plaintiff to cry foul with regard to this. From a commercial perspective public companies which are going concerns are not static in their business at all and perhaps that is why the Plaintiff did cease manufacturing the energizer products in 2011.

66. I am not for the moment satisfied that there could have existed a representation, an irrevocable one for that matter, given by the 2nd Defendant that the Plaintiff would be distributing the 2nd Defendants energizer products. There is force too in the argument that when the Plaintiff entered into an agreement with the 1st Defendant in 2011 for the distribution of the energizer products the Plaintiff seemed to have resigned and submitted to fate which could be terminated at either the Plaintiff's or the 1st Defendant's prompting.

67. I earlier posited that when faced with an interlocutory application for injunction the court must consider all the circumstances including the conduct of the parties. The Plaintiff has been accused by the Defendants of inequitable and odd handed conduct. The Plaintiff is also accused of delay.

68. On the affidavit evidence before me, I discerned even- handedness on the part of the Plaintiff. The Plaintiff was evidently not happy at the fact that the 1st Defendant had opted to terminate the distributorship agreement. It attempted to negotiate the same but failed as it found the terms too onerous.

69. On the other hand, it is my view that the Plaintiff did not move with the requisite alacrity to avoid being caught up with the equitable maxim that equity does not assist the indolent. Largely, the Plaintiff asserts that it had exclusivity rights in so far as the marketing and distributorship of the 2nd Defendant's energizer products are concerned in East Africa. Certainly, the moment such a right was to be interfered with the Plaintiff ought to have moved to secure the same. Signs of alleged interference may be traced back to January 2016 when the termination notice was issued. The Plaintiff then did not move to court until twelve months later. In the respects the delay appears inordinate and inexplicable. Such a delay robs the court of its discretion.

The Bia Tosha principle

70. It would be inappropriate to conclude my determination without making reference to the case of **Bia Tosha Distributors Ltd –v- Kenya Breweries Ltd & 3 Others [2016] eKLR** which was copiously referred to by the Plaintiff's counsel. The basic principle reiterated by the *Bia Tosha* decision was that the court will not hesitate to grant a conservatory order where it is shown that a party's right to property was being violated contrary to the provisions of Article 40 of the Constitution. The claimant in the *Bia Tosha* case was able to establish prima facie that its goodwill was unlawfully being expropriated minus any compensation. The court preserved the goodwill. Goodwill is not been alleged or claimed in the instant suit. The claimant in Bia Tosha had also moved to court with alacrity. The *Bia Tosha case* is distinguishable on both fact and law from the instant case.

Conclusion

71. I am not satisfied that the Plaintiff has proven a prima facie case with a probability of success. The Plaintiff's claim also largely lay in breach of fiduciary duties as well as lost corporate opportunity. The line of authorities in such cases reveal that the alleged perpetrator will always be held as trustee and called to account in damages to the company for any lost profit: see **Rai and others *vs.* Rai and others [2002] 2 EA 537 (CAK).** Any proprietary claim is to be based on profits made by the perpetrator.

72. In the result, the Plaintiff has not shown the court that any damages sustained will not be adequately compensated by an order for the payment of damages.

73. In the circumstances of this case, it is unnecessary for me to weigh the facts and settle the matter on a balance of convenience**.**

Disposal

74. The Plaintiff's application dated 26th January 2017 is dismissed.

75. I however make no order as to costs.

Dated, signed and delivered at Nairobi this 10th day of March, 2017.

J. L. ONGUTO

JUDGE