



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 34 OF 2014

KEROCHE BREWERIES LIMITED. PLAINTIFF

VERSUS

CORETTA LIMITED. DEFENDANT

R U L I N G

There are three applications for determination. The first is dated 20th June, 2014 by the Plaintiff who sought Anton Pillar orders among other prayers. The second application is dated 4th March, 2014 by the Defendant who sought the stay or suspension of the Anton Pillar interim orders made under the first application. The third application is dated the 23rd March, 2014 by the Defendant and seeks transfer of this suit to Commercial Division on the basis that this court has no jurisdiction.

The parties herein agreed to and filed written submissions. It was agreed between the parties and the court that the court should first determine the third application date March, 2014 on jurisdiction before embarking on the other two earlier applications aforesated.

The Applicant/Defendant in respect to the application dated 24th March, 2014, sought the transfer of this suit to the Commercial & Admiralty Division of this court. Defendant's argument is that the issues for settlement in this suit solely relate to a commercial dispute between the parties. The Defendant further stated that the suit relates to the process of arbitration in that the contract existing between the parties herein and dated the 21st March, 2013, contains an arbitration clause No. 20 which requires that any dispute arising, should be sent to arbitration.

The Defendant secondly argues that the dispute which has arisen between the parties relates to the issue of counterfeit of the product, the subject of distribution by the Defendant under the relevant contract between the parties. As, such, the Defendant argued, counterfeit issue relates to intellectual property of the plaintiff and therefore falls squarely within the Commercial & Admiralty Division. Subject to the arbitration clause being relevant and effective in respect of this case, therefore, the Defendant concluded its argument by urging the court to uphold its arguments and transferring this suit and proceedings to the Commercial & Admiralty Division.

On the other hand the Plaintiff saw a different situation altogether. Mr. Mutange for the plaintiff argued that while there might be a breach of contract signed between the parties herein, there is however, more to it. That the counterfeit alleged to have been committed by the Defendant entailed the adulterating of the

product, the Summit Lager Beer, which is consumed by members of the public whose interest, therefore, is in issue and can only be protected not only by this court of law but also draws in the Counterfeit Commission or Board. That the Government, both local and national must or are already drawn in to investigate the incident that led to the cause of action being filed in this court.

In addition, the Respondent urged, the alleged conduct of the Defendant is likely to amount to a criminal offence. The situation created therefore cannot be left to a simple arbitrator, notwithstanding the arbitrator's powers to adjudicate a matter referred to it under the relevant Arbitration law. Mr. Mutange in addition said that the Arbitration Clause No. 20 in the Agreement would not apply in this situation where the conduct of the distributor complained of, also gives other third party bodies the right to investigate and act, to rectify the situation.

I have carefully considered the arguments from both sides. I will first consider the arbitration clause in the Agreement signed between the parties herein. The clause reads as follows: -

“20. Any dispute arising out of this contract shall be referred at the 1st instance to mediation and thereafter to arbitration. If the parties are not able to agree on one arbitrator, each party shall appoint its own arbitrator and the two shall appoint an umpire. The arbitrator's award shall be final.”

Clearly and on the face of things any dispute between the parties to the contract would appear to have been intended to be referred to arbitration. However, there is Clause 18 of the Agreement which states as follows: -

“The distributor will not tamper, adulterate, dilute and/or in any way contaminate Keroche's products but will distribute them in the condition in which they are supplied. Breach of this clause shall lead to immediate termination of this agreement. Keroche will seek legal redress of any damages ensuing there-from.”

The express reading of the above clause of the contract would tend to show that tampering, adulterating diluting or contaminating of the Plaintiff's products by the Defendant, would lead to immediate termination of the contract in question. The clause gives no space for negotiations or arbitration. The decision whether or not the plaintiff's products have been adulterated or contaminated is left in the hands of the Plaintiff who has a right to act to terminate the contract immediately it decides that there has been adulteration or contamination. The court notices several similar clauses which favour the Plaintiff's immediate action and which therefore, do not allow the Defendant any room for negotiation or reference to arbitration. These include Clause 21 as read with Clause 22.

Furthermore, from the material before me, in respect to the alleged conduct by the Defendant which amounts to the alleged deliberate, adulterating, or contaminating, of the Plaintiff's product indicate that (beer), a third party in the name of the Kenya Counterfeit Agency, is also involved or would be involved. The Defendant herein claimed that under Anti –Counterfeit Act, Section 33(1), the Plaintiff ought to have reported to the Director of the Anti-Counterfeit Agency any suspected counterfeiting, or any contamination of the product, instead of filing this suit. In stating the above, the Defendant, thus conceded the serious role played by the Anti-Counterfeit Agency in matters of this kind.

Section 33(1) of the Anti Counterfeit Act, 2008, provides as follows: -

“33(1)....Any holder of an intellectual property right, his successor in title, licensee or agent may, in respect of any protected goods, where he has reasonable cause to suspect that an offence under Section 32 has been or is being committed, or is likely to be committed, by any person, lay a complaint with the Executive Director.”

It is clear to me accordingly that the holder of an intellectual property and those others claiming under such holder, have a right to lay complaint with the Executive Director of the Anti-Counterfeit Agency where there is reasonable cause to suspect that a counterfeit offence has been committed. It is also clear

that even after laying such a complaint, the holder of the intellectual property is not forbidden from also seeking an investigation through the court or by any other relevant or competent tribunal. What comes out clearly therefore, is that in a case such as this, there are other parties apart from the Plaintiff and Defendant who are involved. In considering whether or not to refer a suit to arbitration, therefore, the court has to decide whether such an order would suit the role played by those other parties who are not party to the case before the court.

In this case, further, there is the role or position held by the members of the public who consume the products which are distributed by the Applicant/Defendant allegedly being responsible for the counterfeiting and contaminating of the products. While the Anti-counterfeiting Agency can be said to be representing the public, it is not clear whether it alone has adequate power and authority to fully rectify the “**misconduct**” in the public interest without going through the court. Would an arbitrator have sufficient authority to direct the Anti-counterfeit Agency to rectify the situation, where tempering, or contamination of the products is shown to have been committed?

Taking into account all the issues raised herein I find that the Arbitration clause in the Agreement between the Plaintiff and Defendant does not govern the whole contract. It first allows the Plaintiff in certain cases to be the sole decision-maker as to what should happen when there arises a dispute. For example it allows the Plaintiff to terminate the contract once it decides that the Defendant has adulterated or counterfeited the product. Secondly, the act of counterfeiting or adulterating products is by law a jurisdiction of the Anti-Counterfeiting Agency which is not party to the Contract between the parties herein. It is not clear, therefore, whether an Arbitrator per se, would have sufficient authority to make orders which would bind the parties and the Agency and be in a position to fully settle the dispute between the parties.

Thirdly, the court considers the deliberate acts of counterfeiting, adulterating, tampering, diluting and/or contamination of the products in the contract as a criminal conduct, which would suitably and effectively be investigated by the court rather than an arbitrator. The resolution of disputes as contemplated under section 6 of the Arbitration Disputes Act, may not extend to all that is due for resolution in this suit.

Furthermore, the possibility of conflicting decisions between the different tribunals as contemplated herein, is imminent and if allowed, would likely jeopardize the rights of the parties and eventually embarrass the due process of the law; hence the suitability of having this suit investigated and resolved by a court of law.

I now turn to the main issue of this application, whether or not this suit is properly before this court or whether the court has no jurisdiction because the suit is said to be commercial in nature.

The main dispute before the court arises from the Plaintiff’s allegation that the Defendant at the given time allegedly tempered, diluted, contaminated or in one way or other, adulterated the Plaintiff’s product – the Summit Lager Beer – which under their contract in question, was being distributed by the Defendant. The conduct, subject of dispute is clearly a conduct amounting to a tort besides it being criminal. The fact that an arbitration clause was included to the terms governing the Defendant’s conduct in the performance of his obligation, is in my view merely incidental and only liable to be considered after the carrying out of the contract obligations in one way or the other.

I accordingly have no hesitation in stating that the investigation of the conduct of the parties in respect to the alleged tortious conduct of the Defendant properly before this court.

I accordingly, find that this court has proper jurisdiction to hear this suit and so order.

Dated and delivered at Nairobi this 4th day of March, 2015.

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D A ONYANCHA

JUDGE