

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**COMM CASE NO. E018 OF 2025**

**BETWEEN**

**KEVITA INTERNATIONAL COMPANY LIMITED.....**  
**PLAINTIFF**

**AND**

**SAMYANG FOODS COMPANY LIMITED.....**  
**DEFENDANT**

**RULING**

**Introduction and Background**

1. By an application dated 16<sup>th</sup> January 2025 the Plaintiff seeks an interlocutory injunction to restrain the Defendant from appointing or dealing with any other distributor in Kenya for the products listed in their contract dated 1<sup>st</sup> September 2023, pending the hearing of the suit.
2. The application is supported by the affidavits of the Plaintiff's General Manager, MAURICE OYUGI, sworn on 16<sup>th</sup> January 2025 and that of the Plaintiff's director, LEE BOK SOON, sworn on 12<sup>th</sup> March

2025 and 25<sup>th</sup> April 2025. It is opposed by the Defendant through the affidavits of its Head of MEA/SA Sales Team, JINGONG KIM sworn on 6<sup>th</sup> March 2025 and 25<sup>th</sup> March 2025. The application was canvassed by way of written submissions which I have considered and I will be making relevant references to the same in my analysis and determination below.

### **Analysis and Determination**

3. I have carefully gone through the application, the responses and the submissions. I note that the main issue that arises for determination is whether the court ought to grant the injunction sought by the Plaintiff. The parties agree that for an order of injunction to be granted, the Plaintiff must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience tilts in its favour (See **Giella v Cassman Brown & Co., Ltd. [1973] E.A. 358**).
4. The Plaintiff rightly submits that in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2013] KECA 347 (KLR)**, the Court of Appeal reiterated these conditions and further clarified that they are to be applied as separate, distinct and logical hurdles which an

applicant is expected to surmount sequentially. This means that if the applicant does not establish a *prima facie* case, then irreparable injury and balance of convenience do not require consideration. On the other hand, if a *prima facie* case is established, then the court will consider the other conditions.

5. As to what constitutes a *prima facie* case, the parties have rightly submitted that the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KECA 175 (KLR)** explained that it is, “....a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.” The Plaintiff’s case is that the parties had an initial Distribution Agreement from 1<sup>st</sup> October 2022 to 31<sup>st</sup> March 2023 but that a new contract was signed on 1<sup>st</sup> September 2023, with no expiry date, granting the Plaintiff exclusive distribution rights in Kenya for specific noodle products of the Defendant.
6. The Plaintiff claims that this contract is still valid and has not been terminated but that the Defendant has allegedly started the process of appointing a new distributor and it has declined to sell further products to the Plaintiff. The Plaintiff states that it has

existing stock in Kenya for distribution and that the Defendant's actions are of the said breach of contract and, if the situation is allowed to continue, it would cause significant financial prejudice to their business.

7. In response, the Defendant depones that the Distribution Agreement dated 1<sup>st</sup> September 2023 was non-exclusive and the Plaintiff was appointed as "one of the official distributors," not the sole distributor, meaning the Defendant was free to contract with others. It states that the agreement was valid only for the period during which the specific products listed in the proforma invoice dated 31<sup>st</sup> August 2023 were being distributed and it was not a perpetual or long-term general distribution agreement.
8. The Defendant asserts it fully supplied the entire consignment of goods as agreed and that the contract was tied to the shelf-life of that specific batch of products and that since the goods have been supplied and their shelf-life has expired, the Defendant argues the agreement has lapsed automatically due to the effluxion of time. Therefore, it argues that no contractual relationship existed at the time of the alleged breach.

9. Going through the pleadings, whereas the Plaintiff claims exclusivity of the distributorship, the terms of the Distribution Agreement of 1<sup>st</sup> September 2023, which the Plaintiff itself annexed in its deposition, explicitly grants non-exclusive distributorship. The Defendant has rightly deponed that the most definitive proof this non-exclusivity is found under the "Scope of Distribution" where it is stated that "*1. Distributor is one of the official distributors assigned by Samyang...*" which is a clear and unambiguous statement of a non-exclusive relationship. It explicitly indicates that the Defendant could appoint other distributors in the same territory. Further reinforcing this, under "Obligation", "*4. Samyang grants Distributor non-exclusive license to use Samyang's trademarks, logos and other words and designs...*" This clause specifically grants a "non-exclusive license" for the use of intellectual property, which is consistent with a non-exclusive distribution arrangement.
10. The initial Distribution Agreement of 1<sup>st</sup> October 2022 which the Plaintiff also annexed and relies on also stated that "*The Manufacturer desires to appoint the Distributor as non-exclusive distributor of the Manufacturer's products...*" While this is a previous agreement, it establishes the consistent intent and framework of the relationship between the parties. It is therefore my finding that

the Plaintiff's own evidence directly contradicts its claim of exclusivity.

11.Regarding the validity and duration of the Distribution Agreement, the same states under "Scope of Distribution" on "*...Term of validity: this agreement is valid only when the products in KEVITA 23-003 are distributed*" . The Defendant has demonstrated and it has not been substantially disputed that the specific batch of products under the said reference KEVITA 23-003 was supplied, and its shelf life has expired. The Plaintiff's attempt to rely on subsequent shipments in 2024 is unavailing, as the Defendant has demonstrated, at least on a *prima facie* basis, that these were separate transactions conducted on a proforma invoice basis and do not fall under the specific KEVITA 23-003 Agreement which is the subject of this suit.

12.In light of the above, it is my finding that the Plaintiff has failed to demonstrate the existence of an exclusive distributorship or a breach of an ongoing agreement. The Defendant's actions in seeking to appoint another distributor were within its contractual rights under a **non-exclusive arrangement**, and the Agreement, being tied to a specific consignment, had lapsed. Consequently, the Plaintiff has not established a prima facie case with a probability of

success and following the dicta in the **Nguruman (Supra)**, its quest for an injunction is halted at this point. Even if I am to consider the other limbs for the granting of an injunction including irreparable harm and the balance of convenience, I note that the Plaintiff's alleged harm is primarily financial loss of revenue, investment in marketing, and goodwill. The Plaintiff itself has quantified its alleged losses, seeking USD 25 million in its demand letters. Harm that is quantifiable in monetary terms is, by its nature, not irreparable, as it can be adequately remedied by an award of damages should the Plaintiff succeed at trial (See **Esso Kenya Ltd v Mark Makwata Okiya [1992] KECA 53 (KLR)**).

13. In contrast, restraining the Defendant from appointing other distributors in a non-exclusive market would inflict greater harm on the Defendant, infringing upon its economic rights to freely conduct its business and distribute its products. It is my finding that therefore the balance of convenience decidedly tilts in favour of the Defendant. Granting the injunction would effectively rewrite the parties' Agreement by imposing exclusivity where none existed and preventing the Defendant from distributing its products in Kenya through other channels, despite its contractual right to do so. This

would cause irreparable harm to the Defendant's market presence and business operations.

### **Conclusion and Disposition**

14. In the upshot, the Plaintiff's application dated 16<sup>th</sup> January 2025 is hereby dismissed with costs to the Defendant. The interim orders in placed are vacated and discharged forthwith.

**DATED SIGNED and DELIVERED virtually at NAIROBI this 1<sup>ST</sup> DAY of DECEMBER 2025**

.....  
**J.W.W. MONGARE**  
**JUDGE**

### **IN THE PRESENCE OF**

- 1.Mr. Ojienda for the Plaintiff/Applicant.
- 2.Ms. Athman holding brief for Mr. Munyu for the Defendant/Respondent.
- 3.Ivan - Court Assistant

ORIGINAL