



**Jovet (Kenya) Limited v Bavaria N.V (Civil Appeal 158 of 2019)
[2024] KECA 1900 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1900 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 158 OF 2019
SG KAIRU, S OLE KANTAI & A ALI-ARONI, JJA
OCTOBER 11, 2024**

BETWEEN

JOVET (KENYA) LIMITED APPELLANT

AND

BAVARIA N.V RESPONDENT

*(Being an appeal against the Judgment of the High Court of Kenya at Nairobi
(Mary Kasango, J.) delivered on 5th March, 2019 in H.C. Petition NO. 491 of 2017)*

JUDGMENT

1. This is a first appeal from the judgment of the High Court of Kenya at Nairobi (Kasango, J.) delivered on 5th March, 2019 where the appellant’s petition was dismissed. Our mandate as a first appellate court is to reappraise the evidence and reach our own conclusions in the case as was laid out in the celebrated case of *Selle and Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123 as follows:

“...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

2. The appellant, Jovet (Kenya) Limited filed a petition at the Constitutional & Human Rights Division of the High Court where it named Bavaria N.V., a company incorporated in the Netherlands as the respondent. Various articles of *the Constitution* of Kenya, 2010 were cited as legal foundation of the Petition- Article 2 where all persons and all State organs are bound by *the Constitution*, Article 3 which obligates all persons to respect, uphold, and defend *the Constitution*; Article 10 on National Values and Principles of governance; Article 19 which grants rights and fundamental freedoms in the Bill of



Rights to each individual; Article 22 which provides mechanisms for vindications of any violation of *the Constitution*; Article 24 on narrow grounds under which a constitutional right on fundamental freedom may be limited; Article 27 which outlaws any form of discrimination not sanctioned by law; Article 40 which protects property ownership and enjoyment and Article 159 which obligates courts in exercising judicial authority to administer justice so that the purpose and principles of *the Constitution* are protected and promoted.

3. On the facts of the case the appellant stated in the Petition, inter alia, that it had in 2006 been offered by the respondent sole importation, distributorship and marketing of the various alcoholic and non-alcoholic drinks “under the Bavaria Label N. V. Holland (Bavaria)”; at paragraphs 3.1.2 and 3.1.3 of the petition:

“3. 1.2 The contractual relationship between the Petitioner and the Respondent was unwritten but was, however, evidenced by numerous written testaments, quite apart from a long association buttressed by unambiguous conduct. In any event, the doctrine of estoppel by conduct and/or representation forbids the Respondent from denying this relationship.

3.1.3. During the course of other proceedings and other communication between the Petitioner and the Respondent, the latter has variously attempted to assert that there is no independent relationship between the parties herein and that the Petitioner derives its mandate from an assignment from an entity, Jovet (Tanzania) Limited, under a distributorship contract dated the 27th June, 2011. The Petitioner, however, asserts that the alleged contract between Jovet (Tanzania) Limited and the Respondent is a self contained contract whose clear terms amount to the following incontrovertible Legal inferences:

- a. The Agreement was neither assignable nor transferable. No valid appointment as a so-called subsidiary could be made by Jovet (Tanzania) Limited with respect to the said Agreement. Whenever the Respondent intended to assign rights to a subsidiary entity it expressly stipulated so and, in actual fact, the Respondent has expressly restricted to itself the right to such assignment to a subsidiary company and has denied such assignment to its customers. The Respondent is estopped from asserting a contradictory view.
- b. the “To whom it may concern” letters of 09th September, 2005 and 28th August, 2006 were expressly made integral parts of the Agreement. It means that other letters were not incorporated into the Agreement. Expressio unius est exclusio alterius.
- c) the Respondent’s letter styled “To whom it may concern” and dated 30th May, 2014 could not, in that regard, be considered an integral part of the Agreement but, in fact, represents a stand-alone and independent bargain supported by independent consideration.”

4. The appellant gave as further facts in the petition that before its engagement by the respondent the latter’s products were hardly known in Kenya; that at its own costs it had popularized the respondent’s products throughout Kenya by reason of which Bavaria had acquired a massive goodwill



both with retail and wholesale establishments and with the Kenyan consuming public; that the appellant had deployed its funds and capital in rolling out an elaborate network of outlets across Kenya including a warehouse at Dar-es-Salam road on L.R No. 209/79947/7; Bavaria Gardens on L.R. No. 1870/111/160 on Karuna Close, Westlands; Hillside Grill on L.R. No. 209/8575 Ngong road; and Soiree Gardens on Plot No. 1/468 Kindaruma road. The appellant stated in the petition that in order to service the said network of outlets it had invested heavily in infrastructures and equipment including a fleet of transport delivery sales vehicles, planning tools, and services designated to effectively prescribe and monitor sales routes for optimized route to market sales and marketing tools to actualize the respondent's sale targets. For all those efforts the appellant claimed that in 2014 the respondent's Bavaria products had attained an exponential growth in Kenya of 65% over the previous year. The appellant stated at paragraph 3.1.8 and 3.1.9 of the petition:

3.1.8. "The Petitioner financed this generated and acquired goodwill, and the market share that the Respondent's products gained aforesaid, from its own resources. In order to achieve the rigorous and ambitious targets set by the Respondent, the Petitioner was compelled to seek financing from local institutions which institutions demanded collateralization of borrowing made by the Petition. The Petitioner was, therefore, compelled to offer its own collateral and personal guarantees (including those of the Petitioner's directors as is usual and customary in any corporate borrowing). Presently, the Petitioner and its guarantors are exposed in the manner detailed below solely on account of the Respondent's business.

Outstanding facilities:

- i. Chase Bank Loans:
 - Hire Purchase facility on KBZ 135B Kshs.1,430,148.00
 - Hire Purchase facility on KBW 893B Kshs.374,938.00
 - Hire Purchase facility on KBZ 392W Kshs.374,971.00
 - SME unsecured loan Kshs.2,856,000.00
- ii. Equity bank
 - Secured loan over Bucon Furniture Kshs.11,979,000.00
- iii. Tshusho Capital (K) Limited (Toyota) KBP 004 Kshs.450,665

3.1.9. It was clear to the Respondent that running such an elaborate stocking, distribution and marketing enterprise solely dedicated to the Respondent's Bavaria products would require the infrastructure and investment made aforesaid.

In addition it was clearly known to the Respondent that the Petitioner had contracted third party contractors in order to achieve the sale targets and necessary expansion of the Respondent's products, to wit, leases over warehouses, transport contracts, delivery contracts, sub-distributorship engagements, etc."

5. Further, that by a letter dated 28th August, 2015 addressed to Jovet Tanzania Limited the respondent purported to terminate the distributorship contract between the appellant and the respondent which the appellant termed illegal, inequitable and unconstitutional because it was addressed to an entity apart from the appellant, when at all material times the respondent contracted, invoiced, traded and dealt with the Kenyan market through the appellant directly and exclusively; that the respondent's products were consigned directly to the appellant and paid for directly by the appellant; that all communication, correspondence and/or directions were exchanged and/or issued by the respondent



directly to the appellant; that the respondent's ascertain that the relationship was not terminated but expired through effluxion of time could not apply as the relationship of the appellant and the respondent was independent and governed by well settled conduct, representation and custom; that no prior complaint had been recorded by the respondent against the appellant.

6. The appellant stated, without prejudice, that in so far as the respondent purported to derive rights from the impugned agreement, the agreement was unenforceable, null and void, as it offended express provisions of *the Constitution* which disallowed contracts which were oppressive, in bad faith and against public policy. It was averred by the appellant that the respondent's conduct was a violation of the tax laws of Kenya; that the respondent could not terminate the unwritten agreement through a third party but through mutual separation which had not occurred. The appellant stated that because of its massive investment to promote the respondent's products it was entitled to special damages as follows:

“Particulars of special damages

- i. Payment to Bavaria but no supplies made €365,000
 - ii. Amounts owed to financiers on account of capital injection €44,000
 - iii. Capital invested in distribution of Bavaria products €650,000
 - iv. Damaged consignment €20,000
 - v. Establishment costs for dedicated outlets €1,320,000
 - vi. Committed investment costs under business plan €595,000
 - vi. Redundancy costs €550,000
 - viii. Opportunity cost €3,800,000
- Total: €7,344,000”

And the Petitioner seeks general damages.”

7. Paragraph 4 of the petition titled “*The Constitution* and Private Contracts” set out Article 19 of *the Constitution* on the “Bill of Rights” which according to the appellant encompassed all sectors of society and all endeavours, private contracts falling under the purview of *the Constitution*. The appellant asserted that it had acquired valuable goodwill on account of the goodwill it had generated for the respondent's products which was an asset and therefore property. It was further asserted that such goodwill being an asset property it could not be appropriated in any other manner apart from as contemplated by Article 40 of *the Constitution*.
8. The appellant stated further that the respondent had entered into a fraudulent contract with the appellant's Tanzanian majority shareholder, Jovet (Tanzania) Limited, with the intent that the respondent had induced the Tanzanian's company to breach its fiduciary duty to the appellant; that the respondent had entered into a secret arrangement with the Tanzanian company to cede control of the appellant's Kenyan operation; that “... the respondent and the petitioner's majority shareholder have used their influence and position to exclude, the company whose interest it was their first duty to protect.”; that the Tanzanian company, which was a majority shareholder of the appellant, had not acted in the best interest of the appellant and was in breach of its fiduciary obligation to the appellant.
9. The appellant had previously filed a suit being Milimani Chief Magistrate's Court at Nairobi Civil Suit No. 1756 of 2016 which was withdrawn before it was heard or determined on merits.



10. The appellant prayed in the petition for a declaration that it had continued to have exclusive distributorship of all the respondent's products in the territory of Kenya; a declaration that the goodwill generated, acquired and produced by the appellant in respect of the respondent's products in Kenya is properly and is protected under Article 40 of the Constitution; a declaration that the respondent's imposed terms of trade in relation to the distributorship were arbitrary, unfair, unconscionable, discriminatory, coloured in bad faith and otherwise violate the public policy of Kenya and are to that extent null and void; a declaration that the respondent's conduct with regard to the purported termination of the appellant's distributorship or the purported expiry of the said distributorship is null and void on the grounds that such termination or expiry offends the Constitution of Kenya for being unreasonable, unfair, lacking in bona fides and is contrary to public policy; there was a prayer for injunction preserving the appellant's distributorship in Kenya in respect of all the respondent's products, general damages and any other relief.
11. In a replying affidavit Jeroen Beijer, the respondent's Managing Director for the African region, including Kenya, deponed amongst other things that the respondent was an independent brewery based in the Netherlands that produced alcohol-free and specialty beers to various countries in the world, amongst them Tanzania and Kenya. His company had a long-term business association with Jovet (Tanzania) Limited since 1st December, 2004 under which the two parties had entered into a number of distributorship agreements, in particular, in June 2011, the respondent and Jovet (Tanzania) Limited had entered into a distributorship agreement dated 27th June, 2011 providing for the distributorship of the respondent's product under the Bavaria branch in the Kenyan and Tanzanian markets. The deponent stated at paragraphs 6, 7 and 8 of the affidavit:
 6. By the 2011 Distributorship Agreement, Jovet (Tanzania) Limited was, amongst other terms, engaged by the Respondent to act as the sole distributor and importer of its products under the Bavaria brand in Tanzania and Kenya. Further, Jovet (Tanzania) Limited was accorded the exclusive rights to sell the Respondent's products under the Bavaria brand in these territories.
 7. The 2011 Distributorship Agreement was to be valid up to the end of December 2015 and around the end of December 2015, it (upon agreement of both parties) could be renewed for a period of 5 years.
 8. In response to the averments contained at paragraph 4.3 of the Petition and of my own knowledge, I am aware that the Petitioner was a subsidiary company of Jovet (Tanzania) Limited and operated under the control and direction of Jovet (Tanzania) Limited. I am further aware that Jovet (Tanzania) Limited was a majority shareholder in the Petitioner."
10. He denied the existence of any distributorship agreement between the appellant and the respondent stating that the 2011 distributorship agreement granted exclusive rights to Jovet (Tanzania) Limited to import and distribute the respondent's products in Tanzania and Kenya stating that: "...this also prevented the respondent from granting such rights to a different party like the petitioner." He knew of a private arrangement between the appellant and Jovet (Tanzania) Limited in order for the latter to meet its distributorship obligations for the Kenyan market under the 2011 agreement but, according to him, his company was never involved in those arrangements which remained the responsibility of the Tanzanian company. He went on to state that under those private arrangements the appellant had been unable to achieve its sales targets as specified in the 2011 agreement and did not make payments



timeously from sales in Kenya to Jovet (Tanzania) Limited. He deponed at paragraphs 13 and 14 of the affidavit:

“ 13. Further, such conversations did not in any way constitute an assignment of Jovet (Tanzania) Limited’s right under the Distributorship Agreement to the Petitioner, which is not possible without the consent of the Respondent. All communications with regard to orders for products for Kenya took place through Jovet (Tanzania) Limited. Orders were never placed by the Petitioner itself.

14. As far as I am concerned, the Petitioner had a private arrangement with Jovet (Tanzania) Limited through which Jovet (Tanzania) Limited would meet its targets under the 2011 Distributorship Agreement. This private arrangement was all for the own risk and account of Jovet (Tanzania) Limited and the Petitioner.”

11. He denied that the appellant had acquired any assets, infrastructure, or equipment on behalf or with the respondent’s sanction stating that such acquisition was within the arrangement with the Tanzanian company. According to him, the respondent had always acted within Kenyan laws including tax statutes; he denied that the appellant was entitled to payment of any damages; he asserted that Jovet (Tanzania) Limited had failed to meet targets set by the 2011 agreement leading the respondent not to renew the same by a notice served on 28th August, 2015; that the respondent and Jovet (Tanzania) Limited had entered into a new distributorship agreement for the Tanzanian market making Jovet (Tanzania) Limited the exclusive distributor in Tanzania commencing 1st January, 2016; and that the Tanzanian company had confirmed that it had no claims against the respondent; that under the 2011 agreement the distributor was not entitled to any form of goodwill compensation and the applicable law in case of dispute was the law of Netherlands:

“...and that the applicable law is the law of Netherlands and that only the Court in Netherlands have the exclusive jurisdiction to handle any disputes in relation to the Agreement.”

12. According to the deponent the appellant had entered into a distribution agreement with United Dutch Breweries Limited, the 3rd largest beer company in the Netherlands, and the respondent’s direct competitor and the appellant could not suffer any prejudice so no injunctive orders should be granted. The respondent had, meanwhile, to protect its market share, and appointed a distributor for its Kenyan market. The respondent stated further that the appellant had failed to disclose circumstances that had led to withdrawal of Chief Magistrate’s Court Case No. 1756 of 2016 where it had obtained an injunctive order which had occasioned the respondent loss and damage. The deponent thought that given the withdrawn suit, the petition was an abuse of the process of the court stating:

“...that this dispute is a commercial matter disguised as a properly constitutional petition and which should have been filed at the commercial division of the High Court.”

13. The deponent stated that the appellant’s breach of fiduciary duty by Jovet (Tanzania) Limited could not be addressed in the constitutional court but should be determined by the commercial division of the High Court and only against the majority shareholder but not against a third party. He asked that the petition be dismissed.



14. We hope that we have done justice in the summary of the opposing positions taken by the appellant and the respondent in the pleadings that they presented before the High Court.
15. As we have seen the petition was presented to the Constitutional and Human Rights Division of the High Court where various declarations, and general damages prayed for. There is a letter at page 653 of the record. It is dated 16th November, 2017 executed by advocates of the petitioner and those of the respondent to the Registrar, High Court of Kenya Constitutional & Human Rights Division, Nairobi and it states partly:

“By consent of the Parties herein-

- a. ...
- b. The Petition dated 4 April 2017 (“The Suit”) be transferred to the Commercial and Admiralty Division of the High Court of Kenya at Nairobi; and
- c. Parties do appear before the High Court’s Commercial and Admiralty Division for directions on the disposal of the suit.”

We shall come to this consent letter later in this judgment.

16. As we have seen the petition was dismissed, for lack of merits, the Judge finding that there was no contract between the appellant and the respondent. There are 11 grounds of appeal set out in Memorandum of Appeal before us drawn for the appellant by its lawyers’ M/s Okoth & Kiplagat Advocates. The appellant sets out grounds 1 and 2 of the appeal as:

- “1. The Superior Court erred in law in failing to appreciate the fact that the Appellant’s cause of action before the Superior Court was a Constitutional Petition. The Superior Court proceeded to deal with a different cause of action unrelated to the Appellant’s pleaded case.
2. The Superior Court erred in law by totally refusing to address the constitutional claims pleaded and argued by the Appellant. The Superior court shockingly failed to provide even a single determination or analysis of the constitutional claims meaning that the Appellant’s constitutional claims remained totally undecided.”

17. The appellant faults the Judge for limiting her decision “... to a determination of the Respondent’s case by ignoring the pleaded case of the Appellant contrary to the dictates of Article 50 of *the Constitution* entitling all parties to a fair hearing of their respective cases; that the Judge by taking a singular defence raised by the respondent and deciding on that singular defence without reference to the totality of the Appellant”; that the petition should have been determined on all legal and factual issues raised in the petition; that the doctrine of “privity of contract” cannot defeat a constitutional claim; that the Judge erred in law by not applying relevant precedent cited before her; that:

“... the Superior Court was clearly stuck in a pre- 2010 mindset in formulating the impugned judgment, which is a clear affront to the Appellant’s constitutional rights under the current constitutional dispensation.”

18. Further, the appellant faults the Judge for failing to appreciate that the appellant’s petition was a novel and landmark case affecting a total paradigm shift and inviting a different jurisprudential analysis. The appellant in the penultimate ground faults the Judge for failing to recognize that the parties who had



elected by consent to proceed by way of affidavit evidence were bound by the consequence of that consent and, finally, that the decision reached was wholly against the weight of law and evidence. It is therefore proposed that the appeal be allowed so that the decision of the High Court is set aside and replaced by a judgment in favour of the appellant as prayed in the petition or, in the alternative, the appeal be allowed so that the petition be remitted for a fresh hearing by a different Judge.

19. When the appeal came up for hearing before us on 3rd May, 2024 the appellant was represented by learned counsel Dr. Kiplagat while learned counsel Mr. Kuyo appeared for the respondent. Both sides had filed written submissions and in a highlight of the same counsel for the appellant faulted the Judge for determining the petition on what counsel saw as only one issue. According to learned counsel the Judge should have listed all issues and then made a determination on each of them and that failure to make a determination on each issue rendered the judgment wrong under Order 20 Civil Procedure Rules. Counsel submitted that once goodwill is pleaded it is outside privity of contract doctrine. Counsel cited articles of *the Constitution* to support his submissions that once the appellant had invested in motor vehicles, warehouses and other infrastructure the respondent could not be permitted to claim that the investment was at the appellant's risk. According to counsel beer distribution involves a strong party on one side and weak a party on the other, and the strong party should not be permitted to oppress the weak party.
19. Counsel for the respondent did not agree. He submitted that although the petition had been filed at the Constitutional & Human Rights Division of the High Court it was transferred to the Commercial Division. According to counsel, there was nothing wrong with the Judge identifying one issue in a case and determining it, if its determination could dispose of the whole case. Counsel submitted further, that there was no relationship between the appellant and the respondent; that the agreement being referred to was between the respondent and Jovet (Tanzania) Limited. Counsel submitted that goodwill could not be found or protected if no relationship existed between parties.
20. Dr. Kiplagat, in a rejoinder, submitted that a matter can be concluded by the determination of one point, however the judgment must decide on all points.
21. We have considered the whole record, submissions made and the law and this is how we determine this appeal.

The Judge identified as an issue for her determination whether there was a contractual relationship between the appellant and the respondent and found, on analysis, that there was none.
22. The appellant complains in the first set of grounds of appeal that the Judge erred by failing to find that the petition before her was a constitutional petition; that the appellant's constitutional claims remained undecided; that the Judge ignored the appellant's case as pleaded thereby not according the appellant a fair hearing.
23. As we have seen and as set out at the outset of this judgment the appellant in the petition made various claims relating to alleged breaches of its constitutional rights. It sought various prayers in the petition. As we have shown, however, in the course of the proceedings the parties agreed by consent dated 16th November, 2017 that the petition be transferred to the Commercial and Admiralty Division of the High Court. That alone was an acknowledgment by the appellant that the dispute it had lodged against the respondent was a commercial dispute, and not a dispute on any alleged breach of constitutional rights. The consent letter which was filed in court and forms part of the record asked the High Court Constitutional & Human Rights Division to transfer the petition to the Commercial Division where it follows that the matter was to be tried and determined as a commercial dispute. Further evidence, if necessary, that the appellant considered the dispute as purely a commercial one is to be found in two documents-



i) letter dated 9th September, 2015 (way before the filing of the petition) by the appellant's lawyers Kangethe, Waitere & Company Advocates addressed to the respondent where various demands were made on behalf of the appellant. That letter concluded in its paragraphs 4, 5, and 6 as follows

4. "From the foregoing it is very clear that the Good will of the Bavaria product in the Kenyan market has been built solely by our client. Our client deserves recognition for this and compensation should you go ahead to stop using our client as the sole importer and distributor for Bavaria products in Kenya.
5. Your demand for outstanding invoices is receiving due attention and the same will be addressed shortly. Your threat of legal action is therefore unfounded. However, should you institute any legal action against our client we are ready to defend your claim.
6. Our client hopes you will agree to negotiate on an amicable exit plan in light of the foregoing."

ii. The prayers sought in Chief Magistrate's Court at Nairobi Civil Suit No. 1756 of 2016 were that:

A permanent injunction restraining the Defendants, their agents, servants, employees and/or any other person whomsoever and/or howsoever acting on their instructions in any manner whatsoever from:

- a. Terminating the sole importation and distributorship agreement between the Plaintiff and the 2nd Defendant relating to the distribution of the Bavaria Alcoholic & Non Alcoholic products in Kenya.
- b. Appointing any other importer and distributor for the distribution of the Bavaria Alcoholic & Non Alcoholic products in Kenya."

24. Although that suit was withdrawn, which the appellant had the right to do, it still formed part of the record and the Judge was right to refer to it.

25. So the dispute was always a commercial one and there is no merit in the complaint by the appellant that the Judge erred in not treating the petition as one raising constitutional questions and in identifying the issue in dispute and to making a determination.

26. On the merits of the dispute, that the Judge had to determine there is an agreement for the period ending December 2015 which replaced an earlier agreement dated 28th September, 2006. It stated, inter alia, that the agreement could be renewed for a period of 5 years if parties agreed. This agreement was made between the respondent and Jovet (Tanzania) Limited and it confirmed appointment of the latter as the sole distributor and importer for the respondent's products in the territory of Tanzania and Kenya. That agreement ended at the end of 2015 and was replaced by the "Exclusive Distribution Agreement" made between the respondent and Jovet (Tanzania) Limited which describes the respondent as "Principal" and Jovet (Tanzania) Limited as "Distributor." It entered into force on 1st January, 2016 and it defines "Territory for distribution of the respondent's products as Tanzania, Burundi and Rwanda." By that agreement the respondent appointed Jovet (Tanzania) Limited as its exclusive distributor of products in the territory and it stated at Article 1 clause 5:

5. "Principal agrees not to appoint any other distributors, agents, salesman or any other middlemen in the Territory during the term of this Agreement and not to sell itself the



Products there otherwise than through Distributor, unless with the written consent of Distributor. Furthermore Principal shall refer to Distributor any inquiry received from a third party concerning the Products in the Territory.”

27. The agreement allowed Jovet (Tanzania) Limited to appoint sub- distributors by stating at Article 2 clause 1:
 1. "Distributor is entitled to appoint any sub- distributors and/or agents in the Territory. In the event Principal has serious objections against an appointed sub-distributor and/or agent, Distributor will do his utmost best to terminate the appointment of the sub-distributor and/or agent."
 2. If Distributor has appointed a sub-distributor and/or agent in the Territory, Distributor undertakes to impose the rights and obligations of this Agreement on the appointed sub-distributors and/or agents in so far as these are applicable. Distributor shall procure and warrants that all sub-distributors and/or agents will adhere to the terms and conditions of this agreement and shall compensate Principal for all possible damages resulting from infringement of the terms and conditions of this Agreement by any sub-distributor and/or agent. All legal and financial consequences of such sub-distributors and/or agents shall be the sole responsibility of Distributor."
28. On applicable law and dispute resolution, the agreement stated that it was governed by the laws of the Netherlands and all disputes arising in connection with the contract, or further contracts resulting therefrom were to be settled in accordance with the rules of the Netherlands Arbitration Institute (Netherlands Arbitrage Instituut).
29. In a letter dated 28th August, 2015 the respondent informed Jovet (Tanzania) Limited amongst other things that it was not willing to continue the distribution with Jovet (Tanzania) Limited or its representative for the territory of Kenya after 31st December, 2015 for various reasons given in the said letter. That letter prompted the letter by the appellant's lawyers' M/s Kangethe, Waitere & Company Advocates (which we have earlier referred to) which made various demands to the respondent including demands for compensation.
30. The position therefore was that at no point in time at all did the respondent appoint the appellant as a distributor of its products or all; the record shows that the appellant had a distributorship relationship with its major shareholder, Jovet (Tanzania) Limited. The Judge was therefore right to find that there was a private relationship between Jovet (Tanzania) Limited and the appellant for the appellant to distribute the respondent's products in Kenya on behalf of Jovet (Tanzania) Limited and further finding there was no contract between the appellant and the respondent that could be breached as none existed. We agree with those findings. We find no merit in this appeal which we dismiss with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL ALI-ARONI



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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

