



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, SICHALE & KANTAL, J.J.A)

CIVIL APPEAL NO. 97 OF 2017

BETWEEN

EVEREADY EAST AFRICA LIMITED.....APPELLANT

AND

ENERGIZER MIDDLE EAST

& AFRICA LIMITED.....1ST RESPONDENT

ENERGIZER HOLDINGS INC.....2ND RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (J. L. Onguto, J.) delivered on 10th March, 2017

in

H.C.C.C. No. 40 of 2016)

JUDGMENT OF THE COURT

Eveready East Africa Limited (“the appellant”) is the plaintiff in the suit filed at the High Court of Kenya, Nairobi, being HCCC No. 40 of 2017. It sued the 1st respondent, Energizer Middle East and Africa Limited, a Delaware Corporation with its principal place of business at Dubai in the United Arab Emirates, and the 2nd respondent, Energizer Holdings Inc., a St. Louis Corporation in the United States of America. It was stated in the said plaint, inter alia, that the 1st respondent is a wholly owned subsidiary of the 2nd respondent; that the 1st respondent manages the 2nd respondents’ Middle East and Africa business; that the 1st respondent has oversight over the same and that the activities of the 1st and 2nd respondents were inseparable. For those reasons the High Court was invited to lift the corporate veil. It was also averred that the appellant is a publicly listed company where the 2nd respondent owned 10.5% of issued shares and that the appellant and the 2nd respondent had a long standing business relationship since the year 1967 when the 2nd respondent launched its business through the establishment of a manufacturing facility located at Nakuru in Kenya which was owned by various entities. The appellant further stated in the plaint that it had, over the years, been involved in the exclusive production, marketing, sale and distribution of the 2nd respondent’s products in the territory of East Africa including Rwanda and Burundi where it had developed formidable brand equity in the products it marketed in the said territory. Further, that in the said operations, the 2nd respondent maintained control over the appellant in that the 2nd respondent appointed key personnel of the appellant and had 2 seats in the appellant’s board of directors.

The appellant had become a publicly limited company in the year 2006 when the appellant’s existing shareholders invited the public to invest in the appellant by purchasing a proportion of shares held by the shareholders and that the public had purchased 30% of the shares in the appellant company. In the year 2011, the appellant ceased manufacturing of the 2nd respondent’s products because, as stated in the plaint, it had become unviable to continue such manufacture due to escalating and unsustainable energy costs and an unrestricted influx of cheap and uncustomed imports, among other factors. For those and other reasons, the appellant on 1st October, 2011 entered into a Distributorship Agreement with the 1st respondent by which the appellant was engaged as the authorised distributor of the 2nd respondent’s products in the said existing territory, where the appellant retained responsibility for the promotion of the brands, sale, and distributorship functions for an initial period of 3 years renewable annually unless written notice of non-renewal was issued by either party. However, on 14th January, 2016 the 1st respondent issued a notice of non-renewal of the distributorship agreement “...*without citing any cause...*”. It was further stated in the plaint that the 1st respondent had declared in the said notice that it would be looking to sign a new Distributorship Agreement with the appellant but that the 1st respondent had submitted to the appellant a draft Distribution Agreement whose terms were “...*extremely onerous and detrimental to the viability of the plaintiff’s business...*” It was admitted at paragraph 21 of the plaint that there had been some delays in payment of the 1st respondent’s invoices which, averred the appellant, was occasioned by the appellant’s cash flow constraints in the year

2015. On negotiations on the draft Distributorship Agreement, the appellant stated that it was unable to agree to certain clauses in the said draft particularly because it was not assured of exclusivity in the Kenyan market it had hitherto enjoyed as lack of exclusivity would undermine its (the appellant's) business. The appellant averred that the previous Distributorship Agreement was its major corporate asset governing the bulk of its business and reminded the 2nd respondent, as a shareholder and director of the appellant:

“...especially in a publicly limited company to act with loyalty, good faith, due diligence and in the best interests of the company, but to no avail...”

It was pleaded at paragraphs 28, 29 and 30 of the plaint that the appellant had on 26th September, 2016 placed an order with the 1st respondent to be supplied with the 1st respondent's products as had happened before but that the 1st respondent had declined to service the order and, according to the appellant, that showed that the 1st respondent was intent on unilaterally breaching the commercial understanding that had existed between the parties in disregard of the fiduciary position the 1st respondent occupied as a shareholder of the appellant. Various particulars of breach of fiduciary responsibility and/or representations, and of what the appellant called 'unconscionable business practices', by the respondents were set out in the plaint. It was further averred that the Distributorship Agreement entered into between the appellant and the 1st respondent accounted for up to 90% of the appellant's business and that the attempt by the respondents to impose the new Distributorship Agreement on the appellant would significantly impair the financial performance of the appellant because the appellant had hitherto been the *de facto* exclusive distributor of the respondent's products. For all that, various reliefs were sought – firstly, a declaration that the general conduct of the respondents in offering to the appellant an unconscionable Distribution Agreement was a wilful and oppressive act perpetrated by a controlling shareholder exploiting its leverage to effectively undermine the business of the appellant; secondly, a declaration that the said conduct amounted to an effective capricious refusal to renew the Distribution Agreement and was a material and wilful breach of the 2nd respondent's fiduciary duties owed to the appellant's company and its shareholders; thirdly, a declaration that the said conduct was in breach of the respondent's representations implied and expressly made to the appellant; fourthly, an injunction to permanently restrain the respondents jointly and severally, whether by themselves, or parties acting under them, from further breaching, reneging on, and/or acting in a self-serving manner so as to undermine the pre-existing *de facto* Distribution Agreement between the 1st respondent and the appellant or in any way making the respondent's products available in the East Africa territory including Rwanda and Burundi until the suit was heard and finally determined; fifthly, an injunction to permanently restrain the respondents from distributing their products in the said territory until the suit was heard and determined; sixth, an injunction to permanently restrain the respondents from breaching, reneging or acting in any way as to undermine the representations made to the appellant; seven;

“in the alternative and/or in addition to prayers D, E and F, an award of general damages, exemplary damages and aggravated damages against the 1st Defendant for breach of its fiduciary duties outlined herein and misrepresentation both express and implied,”

and finally, costs of the suit and interest thereon.

The plaint was filed in court on 27th January 2017. On the same day the appellant filed a Notice of Motion under **Order 40 rule 2 and 4, Order 51 Civil Procedure Rules and Section 63 (e) Civil Procedure Act** and the inherent powers of the High Court where the prayers in the plaint were repeated. In the grounds in support of the motion and in a supporting affidavit of **Jackson Mutua**, the appellant's Managing Director, the history we have set out in the averments in the plaint was reproduced. It was stated, in addition, that the respondents, unless restrained as prayed in the motion, intended to terminate the Distributorship Agreement and/or compete with the appellant in the market it had worked so hard to establish and develop for over 40 years of its growth as a business entity.

Further, as part of the grounds in support of the motion:

“4. Accordingly, the purported notice of termination of the Distributorship Agreement was not proper and valid under law as prior to the notice being issued, the 1st respondent through its board nominee engaged in actions that were detrimental to the operations of the appellant.

5. That the applicant continued to discharge its bargain under the Distributorship Agreement in good faith notwithstanding the contract was terminating on 30th September, 2016 and because the parties were engaged in a negotiation of the new terms of the Distributorship Agreement.

6. The new Distributorship Agreement has been drafted without considering the applicant's interests, proposed with oppressive terms solely aimed at getting the applicant out of the market without any exit strategy.

7.”

Mark Lavigne of St. Louise, Missouri, USA, a Director of the 1st respondent, in a replying affidavit opposing the motion deponed, amongst other things, that the 2nd respondent was a separate and distinct legal entity but that the 2nd respondent was an indirect subsidiary of the 1st respondent. It was deponed at paragraphs 8-12 (inclusive) of that affidavit:

“8. The agreement further provided that it would initially be for a term of 3 years and it would thereafter automatically continue for periods of 1 year unless, either of the parties would issue a notice to terminate it, 6 months before the end of the initial period or such extended period. Importantly, the Agreement did not contain an exclusivity clause.

9. It is therefore perplexing that the Plaintiff is now looking to establish claim, based on rights it purports accrued to it from dealings with the Defendants before the Agreement was executed. Clause 22.4 of the Agreement explicitly precludes such a claim as it expressly provides that the Agreement reflects the full and complete agreement of the parties. The terms of the

Agreement were therefore conclusive regarding its rights and duties as distributor of Energizer Products and Plaintiff's current claims are therefore disingenuous and unfounded.

10. It is undisputed that the agreement was terminated in accordance with its provisions. Even though the Plaintiff attempted to obscure this key point on the Certificate of Urgency and Chamber Summons it filed, it acknowledged this at paragraphs 25 and 26 of the supporting affidavit, where it stated, in part, that it had received the termination notice and "was not unduly concerned."

11. The plaintiff's claim that it was assured that there would certainly be another agreement executed is not true.

12. The 1st defendant did attempt to negotiate a new agreement with the Plaintiff, but it never agreed that one would certainly be executed. The parties had to agree on terms, mutually. They were not contractually bound to agree."

It was further deponed that the Distributorship Agreement had come to an end and that the decision to enter into a contract or not was a commercial decision entered into through a meeting of the minds on the terms of an agreement and that, after notice to terminate had been served, no agreement had been reached by the parties. Further, that upon failure to agree on terms of a new Distributorship Agreement, the 1st respondent had appointed another company, **Hasbath Kenya Limited**, with which it had entered into agreement for distributorship of the 1st respondent's products in the territory earlier covered by the Distributorship Agreement with the appellant and that, at the time of hearing of the motion, that other company had invested heavily in the commercial undertaking it had agreed with the 1st respondent. It was therefore deponed that no *prima facie* case had been made out to warrant grant of the reliefs sought in the motion, and finally, that the appellant was undeserving of injunctive relief:

"...for serious delay in bringing the matter to court, at this stage, having acknowledged in a public announcement that it made on 17th October, 2016 that the Agreement was at an end and its advocates having received correspondence from the defendant's advocates on 18th and 31st October, 2016 clearly indicating that there was nothing left to negotiate around a new distribution agreement..."

Kathryn A. Dugan of Maryville University Drive, St. Louis in the United States of America, who was the Assistant General Counsel of the 2nd respondent, in a replying affidavit sworn in that City on 9th February, 2017 essentially repeated the depositions made by the 1st respondent and it is not necessary to repeat them here at all.

The motion was heard by **J.L. Onguto, J.** who in a ruling delivered on 10th March, 2017 did not find merit in it and dismissed it. Those findings provoked this appeal which is premised on the Memorandum of Appeal drawn by the appellant's lawyers, **M/s Mukite Musangi & Company Advocates**. Eight grounds of appeal are set out. The appellant faults the learned judge for not holding that the 1st respondent was a wholly owned subsidiary of the 2nd respondent and was thus under its effective control. The appellant further faults the learned judge for finding that majority voting rights were in issue whereas, says the appellant, the issue before the court was the abuse of a controlling position by a shareholder and not corporate democratic process *per se*. Further, that the learned judge erred in law and fact in reaching the conclusion that there could not be effective control of a company by a minority shareholder. In the fourth ground, the appellant faults the learned judge for holding that the appellant was dealing with the 1st respondent and not the 2nd respondent yet the 1st respondent was a wholly owned subsidiary dealing on behalf of the principal. The fifth ground is an attack on the findings of the learned judge who is said to have turned a blind eye to the:

"...open and apparent misconduct of the respondents in abuse of their controlling position and further in breach of their fiduciary duties of loyalty and good faith to the appellant..."

In the last grounds the appellants complaints are that:

(vi) The learned Judge completely misconstrued and/or failed to appreciate the fundamentals of the Corporate Opportunity Doctrine and thus failed to find that the respondents were guilty of unconscionable and wrongful expropriation of the appellant's business.

(vii) The learned Judge erred and misdirected himself in law and fact by finding that the appellant was guilty of inordinate delay and should have filed the suit in January, 2016 when the Termination Notice was issued, yet negotiations were going on after the Notice and the 1st respondent had stated that it had every intention of issuing a new Distributorship Agreement.

(viii) The learned Judge erred and misdirected himself in law and fact in finding that damages could be an adequate remedy yet he did not address his mind to the actual non-recoverability of the damages given that the respondents are foreign entities."

For all that it is proposed that the appeal be allowed; that we set aside the ruling and order of the High Court and we grant injunctive relief in terms of the prayers set out in the motion which was dismissed by the High Court.

When the appeal came up for hearing before us on 5th December, 2017 the appellant was represented by learned counsel **Mr. Mukite Musangi**, assisted by **Miss Rachel Nderu**. The respondents were represented by learned counsel **Mr. Paul Ogunde**. Parties had filed written submissions as had been ordered in a pre-hearing conference and they had also filed lists of authorities in support of the rival positions they took in the appeal. What was left was for learned counsel to highlight those written submissions and point out relevant case law. In doing this, Mr. Musangi submitted that the learned Judge erred in denying the appellant injunctive relief at interlocutory stage, pointing out that there was evidence before the learned Judge to show that the 2nd respondent was in effective control of the 1st respondent. According to learned counsel, the learned Judge should not have taken what counsel thought was a narrow interpretation of effective control - since it was

shown that the 2nd respondent appointed 2 board members to the appellant's board of directors and also appointed senior managers of the appellant. In further submissions, it was Mr. Musangi's view that the 2nd respondent, as a shareholder and director of the appellant, owed the appellant duties of loyalty, fairness and reasonableness and it should never act in conflict with those duties. Learned counsel concluded his submissions by faulting the learned Judge for holding that damages were an adequate remedy in the case before him when, according to learned counsel, the respondents were foreign companies with no known assets in Kenya and that the appellant would have to sue the respondents in court in the United States of America if damages were to be awarded, a feat learned counsel thought was fraught with difficulty and expense.

It was then Mr. Ogunde's turn. He submitted that the 2 respondents were distinct legal entities and he supported the learned Judge's finding that neither of the respondents was in effective control of the appellant. Learned counsel further submitted that the Distributorship Agreement between the appellant and the 1st respondent had ended through effluxion of time and was not renewed because the parties were unable to agree on terms of a new agreement. On the issue of damages, it was learned counsel's view that the 1st respondent's products were readily available in Kenya and the appellant would therefore recover damages if awarded, without difficulty or expense. Of the 2nd respondent, it was Mr. Ogunde's view that it (the 2nd respondent) was a shareholder of the appellant and damages could be recovered from the 2nd respondent's shares in the appellant. Learned counsel concluded his submissions by stating that the learned Judge was right to deny injunction where the Distributorship Agreement had ended and another distributor had been appointed.

In a brief reply, Mr. Musangi submitted that fiduciary duties of directors are recognized by the common law. He requested us to order stoppage of importation of the respondents' products to the relevant territory by any other entity save the appellant.

We have considered the record of appeal, the grounds of appeal raised, submissions of counsel, the case law cited and the law, and having done so, this is what we think of this appeal.

The appeal is interlocutory and the suit is pending for hearing before the High Court. The learned Judge was being asked to grant injunctive relief. Grant of such relief is an exercise of discretion of a Judge and in the famous words of

Newbold, P., in the case of **Mbogo & Another v Shah [1968] EA 93:**

“..A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice”.

We also remind ourselves that, as already stated, the suit in the High Court is pending and we should not make definitive findings of facts, a function we must surrender to the trial judge who will have the benefit of taking and considering evidence when the case is heard on the merits.

The learned Judge who heard the motion and made the orders subject of this appeal found that the 2nd respondent held about 10.5% of the appellant's shares and that the 1st and 2nd respondents were related companies by virtue of shareholding, but that:

“...at this stage it is unclear how the shareholding structures of the 1st defendant are laid out...”

The learned Judge then recognized the time honoured principle in company law that the general rule in management of companies was majority rule, the law allowing members of a company to treat their rights to vote as an incident of property exercisable to the members advantage and that minority shareholders finding themselves outvoted was not evidence of autocracy – **Re Eryeza Bwambale & Co Limited [1969] EA 430**. The learned judge also considered the holding in **North-West Transportation Co. Limited v Beatty [1887] 12 AC 589** by the Privy Council to the effect that fiduciary duties of directors do not prohibit a director from voting as he may like in his capacity as a shareholder.

The learned Judge held that the evidence placed before him was contradictory on the position of the 2nd respondents in the affairs of the appellant and that he could not at that interlocutory stage, on the basis of affidavit evidence make a definitive finding on whether the 2nd respondent was in a position to affect the affairs of the appellant. The learned Judge found that the Distributorship Agreement had been terminated; that the appellant attempted to negotiate for a new agreement but found the terms offered to be onerous but that the appellant:

“...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 (sic) the delay appears inordinate and inexplicable. Such a delay robs the court of its discretion...”

We have perused the Distributorship Agreement dated 1st October, 2011. That agreement appointed the appellant as a distributor of 1st respondent's products for a territory defined in the agreement. On “**Term and Termination**” it was stated that the agreement was for an initial period of 3 years, thereafter it would automatically be continued for further periods of 1 year unless written notice of termination was given by one party to the other at least 6 months before the end of the initial period or such extended period.

By a letter dated 14th January, 2016, under the heading “**Notice of Non-renewal of Distributorship Agreement**” the 1st respondent informed the appellant that the agreement entered on 1st October, 2011 would not be renewed, and that the same would stand terminated on 30th September, 2016.

There is evidence on record that the 1st respondent forwarded to the appellant a draft of a new agreement but the appellant opposed some terms of that agreement and no agreement was reached by the parties on terms for a new distributorship agreement.

It is evident from the record that by the time the suit was filed on 27th January, 2017 accompanied by the motion for injunctive relief, notice of non-renewal of the agreement had been served more than a year earlier and the agreement had terminated on 30th September, 2016, more than 3 months to filing of the suit. The learned Judge examined the material before him and did not find a *prima facie* case having been made to entitle him to exercise his discretion in favour of the appellant.

We have considered all the material on record and the submissions made before us. Having done so, we did not detect any error in the way the learned Judge exercised his discretion to deny the appellant the reliefs sought in the motion. The learned Judge considered the material before him and was unable to find that a minority shareholder could have a controlling effect on a company. The learned Judge also found the appellant to have sat back on its rights and not moved to court with the necessary speed to secure its rights, if any. The material before us shows, *prima facie*, that the Distributorship Agreement entered into between the appellant and the 1st respondent had been terminated well before the suit was filed. There was no material placed before the learned Judge to entitle him to grant the orders sought.

Having reached these conclusions, we disagree with learned counsel for the appellant that the learned Judge erred in the way he handled the matters before him. The learned Judge considered all the material before him; he did not misdirect himself in any matter and he was not wrong in the way he exercised his discretion. There was no mis-justice. In the event, we should not interfere with the exercise of discretion of the learned Judge which, it is our finding he exercised properly.

We do not find any merit in this appeal which we accordingly dismiss with costs to the respondents.

Dated and delivered at Nairobi this 16th day of February, 2018.

P. N. WAKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR