IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & KIAGE, JJ.A)

CIVIL APPLICATION NO. 1 OF 2017 (UR 1/2017)

HEINEKEN UGANDA LIMITED……..……..……..…….1ST APPLICANT

HEINEKEN TANZANIA LIMITED……..……..…….2ND APPLICANT

AND

MAXAM LIMITED……..……..…..……..….1ST RESPONDENT

MODERN LANE LIMITED……..……..……..…..2ND RESPONDENT

OLEPASU TANZANIA LIMITED……..……..……..…….3RD RESPONDENT

HEINEKEN EAST AFRICA IMPORT COMPANY LIMITED…….....….4TH RESPONDENT

HEINEKEN BROUWERIJEN B.V. ……..……..……..……..5TH RESPONDENT

HEINEKEN INTERNATIONAL B.V. ……..……..……..……6TH RESPONDENT

*(Being an application for extension and enlargement of time within which to file a notice of appeal against the Ruling and Order of the High Court of Kenya at Nairobi (**E.K.O. Ogola, J**.) delivered on 21st April, 2016*

in

H.C. C.C. No. 29 of 2016)

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RULING OF THE COURT

On 21st May 2013 the 1st respondent and the 4th respondent executed an agreement for the distribution of the Heineken beer products in Kenya. The agreement came into effect on 1st May 2013 and was to remain in force for a period of 3 years and would thereafter automatically be renewed for a period of 1 year and subsequent 1 year periods unless terminated by either party, giving the other written notice of termination within 3 months of the 3rd anniversary or 1 year extension as the case may be; that in the event that the 4th respondent wished to terminate the agreement before the end of the term, then it would discuss and agree with the 1st respondent on a fair and reasonable monetary compensation, taking into account the length of time taken by the 1st respondent in the distribution of the brand in Kenya and the profitability; that the agreement would be governed by and construed in accordance with the Laws of Kenya and that in the event of a dispute, the parties would proceed to perform their obligations in accordance with the agreement pending the resolution of the dispute; that nothing in the agreement would preclude either party from obtaining relief from a court of law and that the parties recognised that monetary damages alone would not adequately compensate in the event of breach by the parties of the agreement and was mutually agreed; that in addition to all other remedies available in law or in equity, the parties would be entitled to injunctive reliefs.

On 28th February, 2013, the 6th respondent at the behest of the 4th respondent appointed the 2nd respondent as the distributor of the same products in Uganda. Similarly on 11th August, 2014 the 3rd respondent was appointed by the 5th respondent as its importer and distributor of the same products in Tanzania.

However it is not clear whether these latter contracts were on similar terms as that between the 1st and 4th respondents. All was well though until 27th January 2016,when out of the blue the 6th respondent purported to terminate the 3 agreements. The 1st to 3rd respondents were aggrieved by the decision and moved to the High Court of Kenya at Nairobi for various reliefs and in particular temporary relief of injunction as contemplated in the agreements.

Prior to this move by the 6th respondent, the applicants had come into the picture. With the support and encouragement of the 6th respondent, the applicants had taken over the importation and distributorship of the products for the Uganda and Tanzania markets.

The application for injunction was successfully prosecuted before **Ogola, J** who issued an injunction in favour of the 1st to 3rd respondents barring the 4th, 5th and 6th respondents respectively from terminating the contracts and or appointing any other distributor for the products in Kenya, Uganda and Tanzania. The applicants thinking that they should have been made parties to the suit having adversely been affected, aggrieved and prejudiced by the order of Ogola, J aforesaid, opted to challenge it by way of an appeal. Towards that end they filed a notice of appeal and an application dated 5th January, 2017 for leave to file the intended appeal out of time.

The application was opposed by the 1st to 3rd respondents on the grounds that they were never parties to the suit in the first place and had never made attempts to be enjoined in the suit; that having not participated in the injunction application, the notice of appeal filed by the applicants was a nullity; that in any event the applicants were agents of disclosed principals being the 4th to 6th respondents and therefore lacked the *locus standi* to file any appeal which affected their principals directly; that this Court not being a court of original jurisdiction, any grievances by the applicants in respect of the ruling could only be ventilated in the High Court and not this Court. As such, the notice of appeal filed by the applicants was irregular and invalid *ab initio* that in any event the applicants were guilty of laches and inordinate delay that had not been explained.

Being the sort of application that should be canvassed before a single judge of this Court pursuant to rule 4 of this Court's rules, the application was eventually heard *inter-partes* by **Warsame J.A**. In a reserved ruling delivered on 23rd January 2017 the learned single Judge allowed the application holding that under Rule 75 of this Court's rules, the Court has the discretion and power to join or allow any party to contest a

decision of the High Court even though they were not parties to the proceedings in the High Court; that the applicants were affected and necessary parties to contest the orders of Ogola j as they fell within the ambit of rule 75 aforesaid aforesaid.

As for the delay, the judge was of the view that it was not inordinate and in any event it had been explained satisfactorily. He directed the applicants to file all their documents including the appeal within the next 60 days. Costs of Kshs 30,000 were added to the 1st to 3rd respondents to be paid within 7 days. Not happy with the outcome, the 1st to 3rd respondents, pursuant to rule 55 of this Court's rules asked that the application be revisited by a full bench of this Court.

Warsame J.A. granted leave and this is how the application has found its way before us.

The arguments made before us in support of and in opposition to the application and indeed the reference were the very arguments made before the single Judge by **Mr. Singh** and **Mr. Nyachoti,** learned counsel for the applicants and 1st to 3rd respondents respectively, and we therefore need not rehash them here.

This Court has in numerous decisions reiterated the nature and discretionary jurisdiction exercised by a single Judge in an application brought before him under rule 4 of this Court's rules. In the case of **Mwangi vs Kenya airways Ltd (2003) KLR 486**, for instance this Court observed:

> ***"Over the years, the court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the rules."***

For instance in **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997)** (unreported), the Court expressed itself

thus***:-***

> ***"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted"***

These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of words:

> ***"In general, Rule 4 gives the single judge an unfettered discretion and as long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above as long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in anyway"***

See also **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others** (2014) eKLR, **Paul Wanjohi Mathenge v Duncan Gichane Mathenge** (2013) eKLR, **Edward Njane Nganga &Another v Damaris Wanjiku Kamau & Another** (2016) eKLR and **Winston Makokha v Aggrey Wanjala Musima** (2016) eKLR.

We must once again reiterate that the exercise of discretion in extending time must be exercised judicially, and not whimsically, capriciously or on sympathy. Of course each case must turn on its own set of facts. And as Nambuye JA stated in **Mugure Mahinda v Ali Mohammed Farah** (2016) eKLR;

> ***"For the court to exercise its discretion in favour of an applicant the latter must demonstrate to***

the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanations to the satisfaction of the court why it occurred. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous and courts are not blind to this fact"

However in the event that a single Judge exercises his discretion improperly, then on reference to the full court, that decision may be reviewed and set aside. As the Court stated in the case of **Trans National Bank of Kenya v Hasam Said Amdun (2006) eKLR**;

"... in exercising the discretion under rule 4, a single member of the court is doing so on behalf of the whole court..... the court has now settled the circumstances under which it will interfere with the exercise of the discretion by a single judge. The full court will only interfere where it is shown that in coming to his decision, a single judge has taken into account a matter which he ought not to have taken into account, or that he has failed to take into account a matter which he ought to have taken into account, or that he misunderstood some law or principle of law and thus misapplied the law, or that there was no evidence at all before him to support a particular conclusion , or that he failed to appreciate the weight or bearing of the circumstances, admitted or proved, or that everything taken into account , the decision is plainly wrong"

These are the well known principles that we must apply to the reference before us. As already stated, before us counsel merely reiterated the submissions they had made before the single judge. They never addressed us on the question of proper or improper exercise of discretion by the single judge in the application. That is to say, whether the single Judge wrongly or judicially exercised his unfettered discretion, the closest that the 1st to 3rd respondents came to faulting the single Judge was when they submitted that the applicants were guilty of laches and inordinate delay. However, they never pointed out any issue or material that the single judge took in to account or failed to do so in this regard. The single judge's reasoning was that the delay was not inordinate on the basis that having not been parties to the suit they were not aware that the order would affect them and that the dispute would spill over to them.

The suit was initiated by the 1st to 3rd respondents. At the time, they were aware of the applicants' interest in the dispute but elected not to join them in the suit. How were they to infer the presence of the suit, how it would pan out and eventually spill over and affect them? It matters not that according to the 1st to 3rd respondents, the applicants were surrogates of the 4th to 6th respondents. Had they been made parties to the suit as they should this proceedings should have been unnecessary. Indeed, as evidence that they were necessary affected parties, they are now threatened with contempt proceedings with regard to alleged disobedience of the order of injunction. Should the applicants be denied audience before this Court on a mistake not of their making and that the 1st to 3rd respondents should benefit from their mischief? We do not think so. And these are some of the considerations that went through the mind of the single judge as he considered the application and cannot be faulted. They were relevant considerations for the exercise of his discretion.

The learned Judge also considered the import of rule 75 of this Court's rules. That rule gives discretion and power to allow any party to contest a decision of the High Court even though he was not a party to the proceedings in the High Court. The learned Judge was of the clear view that the applicants had a role to play in the determination of the real dispute in the High Court and indeed in the intended appeal. This being the case, the applicants were affected and necessary parties as contemplated by rule 75. This again was a relevant consideration.

The other reason advanced by the 1st to 3rd respondents in opposing the application was that the entry of applicants in the proceedings will only serve to convolute and complicate an otherwise a simple and straightforward dispute which does not affect them directly. We do not think that a deserving party should be locked out of proceedings merely because his presence would convolute a matter. Indeed we do not see how the alleged convolution will play out.

On the whole, we agree with the assessment of the single judge in allowing the application. We further

find that there would be no prejudice occasioned to the 1st to 3rd respondents if the applicants are allowed to participate in the intended appeal.

Ultimately, we are satisfied that the single Judge had enough material upon which he exercised discretion in favour of the applicants. We are not persuaded at all that the single Judge injudiciously exercised his discretion. In the result, this reference is bereft of merit and we accordingly order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 23rd day of June, 2017.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

……..……

JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR