



**Ikigai Health Kenya Limited & another v B. Braun Medical
Kenya Limited & 2 others (Commercial Case E350 of 2025)
[2025] KEHC 12493 (KLR) (Commercial and Tax) (1 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12493 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E350 OF 2025
JWW MONG'ARE, J
SEPTEMBER 1, 2025**

BETWEEN

IKIGAI HEALTH KENYA LIMITED 1ST PLAINTIFF

TRIPLE BIOVITALS LIMITED 2ND PLAINTIFF

AND

B. BRAUN MEDICAL KENYA LIMITED 1ST DEFENDANT

B. BRAUN PHARMACEUTICALS EPZ LIMITED 2ND DEFENDANT

B. MELSUNGEN, AG MELSUNGEN/GERMANY 3RD DEFENDANT

RULING

Introduction and Background

1. By an application dated 23rd May 2025, the Plaintiffs seek several temporary court orders against the Defendants. The application is supported by two affidavits by Martha Njeri Thairu, the Plaintiffs' Operations and Administrator, sworn on 23rd May 2025 and 18th June 2025 respectively. The Plaintiffs are seeking an injunction to prevent the Defendants from denying or withholding supplies of the Defendants' pharmaceutical and medical products to the Plaintiffs' customers, including hospitals like The Nairobi Hospital, Aga Khan University Hospital, Kenyatta University Teaching, Referral & Research Hospital, and others. They also seek to stop the Defendants from: terminating existing supply contracts for the B. Braun products to the Plaintiffs; blocking the Plaintiffs' distributor accounts, specifically account No. 00XXX, and to ensure they have free and full access to all necessary platforms and systems. Further, that the Defendants be prevented from directly selling, approaching, or contracting with any of the Plaintiffs' customers.



2. The Plaintiffs also seek a court order to compel the 1st and 2nd Defendants to release withheld high-specification medical machines for immediate delivery to Jaramogi Oginga Odinga Teaching And Referral Hospital and for the court to authorize service of the legal documents to the 3rd Defendant, a foreign entity, through their local agent, the 1st Defendant. The Plaintiffs argue that a distributorship contract was established with the Defendants through various Market Authorization Letters and Placement Agreements. That the Defendants, who are subsidiaries of the German-based 3rd Defendant, appointed the Plaintiffs as formal distributors of their pharmaceutical and medical products in Kenya. The Plaintiffs have, in turn, entered into supply contracts with numerous hospitals and institutions claiming that they have been fulfilling their obligations without any breach.
3. In response, the Defendants rely on the replying affidavit of Nelson Muikia, the Chief Financial Officer of the 1st and 2nd Defendants, sworn on 4th June 2025 and Grounds of Opposition dated 5th June 2025. They oppose the application based on the Plaintiffs' alleged failure to pay a substantial debt and a lack of a valid case for an injunction. Their position is that the Plaintiffs, as purchasers, must pay for goods received. The Defendants contend that they are willing to continue supplying products, but only if the Plaintiffs pay for them. The Defendants aver that the Plaintiffs have not approached the court with clean hands and are not entitled to equitable relief like an injunction. They accuse the Plaintiffs of material non-disclosure, specifically failing to inform the court that they owe the 1st Defendant a substantial sum of Kshs.71,332,680.17/= and that the Plaintiffs also failed to disclose that they are not exclusive distributors. As evidence of bad faith, the Defendants note that the Plaintiffs' proposal to pay Kshs.20,000,000.00/= to reduce the debt was not honored and that immediately after a court order was issued, the Plaintiffs submitted their single largest order ever, worth Kshs.86,347,023/=, while already in debt.
4. The Defendants state that the Plaintiffs have not demonstrated a prima facie case with a probability of success. They assert that the Plaintiffs do not have a right to order goods from the Defendants without paying and that their relationship with the Plaintiffs is one of a wholesaler purchasing a manufacturer's products, not a formal distributorship. They claim no distributorship agreement has been produced in court to prove otherwise and that the Market Authorization Letters relied upon by the Plaintiffs were simply to confirm that the products originated from the manufacturer and did not grant exclusive distributorship rights. The Defendants assert that they have been supplying hospitals and institutions directly for five years, long before their engagement with the Plaintiffs. That they continued to supply products in parallel to the Plaintiffs and that they also issued authorization letters to other wholesalers.
5. The Defendants contend that the Plaintiffs have not proven they would suffer irreparable harm that cannot be compensated by an award of damages and they argue that any alleged damage from a breach of contract is quantifiable and could form the basis for a liquidated claim. The Defendants also urge that the balance of convenience tilts in their favor and that granting the injunction would compel the Defendants to supply goods to a party that is already heavily indebted. That this would force the Defendants to finance the Plaintiffs' operations at their own cost, risking their business viability and potentially increasing the debt to over Kshs. 150 million with little to no prospect of recovery. In conclusion, the Defendants urge the court to dismiss the Plaintiffs' application, arguing that the plaintiffs have failed to meet the legal requirements for an injunction and are acting in bad faith.
6. When the Plaintiffs filed their application, they also sought temporary injunctive orders pending hearing of the application which orders were granted on 27th May 2025. This precipitated the filing of an application dated 29th May 2025 by the Defendants seeking to stay and/or vary the said orders. The Plaintiffs also filed an application dated 17th June 2025 claiming that the Defendants are in contempt



of the said orders. The applications have been canvassed by way of written submissions which are on record and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

7. I propose to first deal with the contempt application by the Plaintiff accusing the Defendants of deliberately disobeying the interim orders of 27th May 2025 that restrained the Defendants from restraining the Defendants from withholding supplies of their pharmaceutical and medical products, terminating supply contracts, blocking the Plaintiffs' distributor accounts and dealing directly with the Plaintiffs' customers. The Plaintiff contends that these orders were served on the Defendants via email and physical delivery and they allege that the Defendants willfully disobeyed the court orders by directly supplying and installing a dialysis machine at Aga Khan Hospital, delivering pharmaceutical products to Nairobi Hospital, failing to fulfil the Plaintiffs' orders for dialysis machines and consumables and supplying incorrect machines to Jaramogi Oginga Odinga Teaching and Referral Hospital. As such, they seek to commit the 1st Defendant's Managing Director, Torsten Doenhoff and Wycliffe Kipro Choge, its Head of Regulatory Affairs and Compliance to civil jail for 6 months. That the court should issue a citation for them to appear in court and show cause why they should not be punished for contempt and restrain the Defendants from any further court proceedings until they comply with the orders.
8. In response, Mr. Doenhoff and Mr. Choge filed replying affidavits all sworn on 20th June 2025 denying that they willfully or deliberately disobeyed the court's orders and they assert the Defendants are not in contempt of that order. On the alleged supplies to Aga Khan University Hospital, the Defendants admit to delivering one demonstration dialysis machine to the Hospital on 27th May 2025, before being served with the court order later that same day. They deny delivering any dialysis machines on 2nd June 2025, which they say was a public holiday and that no staff were working and they challenge the Plaintiffs to provide evidence.
9. The Defendants acknowledge receiving a massive order from the 1st Plaintiff on 28th May 2025 for 30 dialysis machines and infusion solutions worth over Kshs. 86 million but that the same were not in stock and they had to check with the parent company, 3rd Defendant, for availability timelines. The Defendants states that they refused to supply the order on credit due to the plaintiff's existing debt of over Kshs. 71 million, offering to supply only upon full payment or provision of a bank guarantee. The Defendant denies that its staff Silas Khayumbi and Serah Koigi were delivering pharmaceutical products to The Nairobi Hospital on 10th June 2025 and they explain that the visit was to deliver a letter explaining the supply interruption, as requested by the hospital.
10. The Defendants depone that the Plaintiffs' exhibited documents are either pre-dating the court order or are addressed to another distributor and not the 1st Defendant, and thus do not prove any breach. They further deny any obligation to replace supplies to Jaramogi Oginga Odinga Teaching and Referral Hospital, stating the court order did not contain such a directive and they deny the existence of an exclusive product supply agreement between the parties for the Hospital, challenging the Plaintiffs to produce it. They urge that a letter to the Hospital only appointed the 1st Plaintiff as a non-exclusive distributor and explicitly reserved the hospital's right to procure directly from the 1st Defendant.
11. The Defendants contest the Plaintiffs' claim that patients are suffering due to supply issues, stating no evidence has been provided and they reiterate that the Plaintiffs were never exclusive distributors, and there are other wholesalers capable of supplying the required products to hospitals. As such, the Defendants conclude by firmly stating that the Defendants have not acted mischievously and are not in contempt of the court order dated 27th May 2025.



12. I have gone through the rival depositions and the evidence adduced. From the affidavit of service annexed, the orders were physically served upon the Defendants on 28th May 2025 at 11.45 am and as per the email correspondence of 27th May 2025, the orders were electronically served upon them on the same day at 4.35 pm. The Defendants have contended that the dialysis machine was delivered to Aga Khan before the orders were served upon them and that the same was just but a demonstration machine as per the delivery note annexed. No evidence was tendered to counter this position by the Defendants and it is therefore my finding that the machine was delivered before the orders of the court were served upon the Defendants.
13. On the failure to supply the order requisitioned by the Plaintiffs, the Defendants have annexed communication where they informed the Plaintiff that they were not in a position to deliver on the order for reasons of unavailability of the machines and the Plaintiffs' outstanding arrears. It is therefore not correct that the Defendants refused to fulfill the order sought by the Plaintiffs and therefore, the Defendants were not in contempt of the court's order. On delivering pharmaceutical products to Nairobi Hospital, the Defendants have denied that its staff were delivering pharmaceutical products to the Hospital on the said 10th June 2025 and they explain that the visit was to deliver a letter explaining the supply interruption, as requested by the Hospital. This letter has been exhibited in the Defendants' deposition and has a receiving stamp of Nairobi Hospital and I find the explanation plausible and the Defendants were not in contempt of the court's orders in this regard. I agree with the Defendants that the documents annexed by the Plaintiffs (MNT-6, MNT-7, MNT-8) are either pre-dating the court order or are addressed to another distributor and not the 1st Defendant, and thus do not prove any breach.
14. On supplying incorrect machines to Jaramogi Oginga Odinga Teaching and Referral Hospital, the Defendants denied any obligation to replace supplies to the Hospital stating the court order did not contain such a directive. They further deny the existence of an exclusive product supply agreement between the parties for the Hospital and they challenged the Plaintiffs to produce it, which they did not do. The Defendants asserted that a letter to the Hospital only appointed the 1st Plaintiff as a non-exclusive distributor and explicitly reserved the hospital's right to procure directly from the 1st Defendant. As this was not controverted, I find that the Plaintiffs failed to prove that the Defendants were in contempt of the court's order in this regard. For these reasons, I find that the Plaintiffs' application dated 17th June 2025 lacks merit and the same is dismissed.
15. Turning to the Plaintiffs' application for the injunctive orders, I do not think it is disputed that the conditions required to be satisfied by the Plaintiffs for the same to be granted were set out in the case of *Giella v Cassman Brown & Co., Ltd.* [1973] EA 358. The Plaintiffs are required to demonstrate a prima facie case with a probability of success, that they will suffer irreparable injury which would not adequately be compensated by an award of damages and that if the Court is in doubt, it should decide the application on the balance of convenience. These conditions are to be applied as separate, distinct and logical hurdles which the Plaintiffs are expected to surmount sequentially which means that if the Plaintiffs do not establish a prima facie case, then irreparable injury and balance of convenience do not require consideration (see *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2013] KECA 347 (KLR))
16. The parties also agree that what constitutes "a prima facie case" was set out by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR) as follows:

A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case 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 as to call for an explanation or rebuttal from the latter.

17. A prima facie case flows from what has been pleaded in the plaint. The Plaintiffs' primary grievance is that the Defendants are unlawfully and abruptly terminating their distribution agreements and cutting off the supply of critical medical products, causing severe financial loss and endangering public health. In response, the Defendants accuse the Plaintiffs of material non-disclosure, specifically failing to inform the court that they owe the 1st Defendant a substantial sum of Kshs.71,332,680.17/= and that they also failed to disclose that they are not exclusive distributors. That as evidence of bad faith, the Defendants noted that the Plaintiffs' proposal to pay Kshs.20,000,000/= to reduce the debt was not honored and that immediately after a court order was issued, the plaintiffs submitted their single largest order ever, worth Kshs. 86,347,023/=, while already in debt.
18. Going through the parties' arguments, I note that in as much as the Plaintiffs acknowledge that their account with the Defendants is in arrears, they dispute the level of indebtedness. However, it is now settled that a court cannot grant an injunction solely on the ground that there is a dispute as to the amount due under an agreement (see *J. L. Lavuna and Others v Civil Servants Housing Co. Ltd. & Savings and Loan Kenya Ltd* [1995] KECA 111 (KLR)). I am also in agreement with the Defendants that the Plaintiffs did not disclose this fact in its application and only commented on the same after the Defendants raised it in their deposition. It should always be remembered that in all cases of ex parte proceedings, there must be full and frank disclosure to the court of all material facts known to the applicant and that injunctions are equitable remedies where an applicant must come to court with clean hands hence a party must disclose every relevant fact in the case in order to benefit from the remedy (See the Court of Appeal in *Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 Others* [1998] KECA 255 (KLR)).
19. In any case, as the Plaintiffs are admittedly indebted to the Defendants, an injunction cannot issue in the circumstances. Further, even if the Defendants have been in breach of the parties' existing agreements or that the Defendants are likely to terminate the same unlawfully, an injunction is still not available to the Plaintiffs. The only redress available to it is an award of damages for the alleged breach (See *Esso Kenya Ltd v Mark Makwata Okiya* [1992] KECA 53 (KLR)).
20. As the Plaintiffs are indebted to the Defendants, it will be unfair and improper for the court to order the Defendants to fulfill orders solely due to the medical nature of the equipment and public health concerns as advanced by the Plaintiffs. In any case, I find that Plaintiffs have not demonstrated that a sudden halt in supply of essential medical products like dialysis machines, infusion solutions, anesthesia, and nutrition products by the Plaintiffs is causing patients in hospitals to suffer and not receive treatment and that this is putting their lives at imminent risk. The Defendants have been able to demonstrate that the agreements between the parties are non-exclusive and that alternative suppliers including the Defendants themselves are available to fill any gaps left by the Plaintiffs.
21. However, whereas the Plaintiffs are not legally or equitably entitled to an injunction in the circumstances, the Defendants have stated through their application dated 29th May 2025 that they are amenable to a conditional injunction. I would therefore allow this application by granting the Plaintiffs an injunction as sought by them but on condition that they make payment of Kshs. 31,500,000 being 50% of the sums due and owing to the 1st Defendant.

Conclusion and Disposition

22. In the foregoing, I now issue the following orders:



1. The Plaintiff's application dated 27th May 2025 is dismissed.
2. The Plaintiffs' application dated 23rd May 2025 is hereby allowed on the condition that the Plaintiffs pay a sum of Kshs. 31,500,000.00 being 50% of the disputed sum due and owing to the 1st Defendant and that payment be made within fourteen (14) days from the date of this order.
3. Upon compliance with Order No 2) above, a temporary injunction is hereby granted restraining the Defendants/Respondents, their agents, servants, employees, and/or any other person acting on their instructions from:
 - a. Denying and/or withholding supplies of the agreed pharmaceutical products, medical machines, and equipment under the existing agreements to the Plaintiffs.
 - b. Terminating the contracts in place for the supply of the 3rd Defendant's products to the Plaintiffs
 - c. Blocking the Plaintiffs/Applicants' subject distributor accounts, including account No. 00XXX, and to allow free and full access to all associated platforms, portals, and operational systems.
 - d. Directly or indirectly selling, approaching, contacting, soliciting, engaging, contracting, or supplying the subject pharmaceutical products, medical machinery, and equipment to the Plaintiffs' customers as listed in the application.
4. Upon compliance with Order No. 2) above, the 1st and 2nd Defendants/Respondents are hereby compelled to release the withheld high-specification medical machines to the Plaintiffs/Applicants for immediate supply and delivery to Jaramogi Oginga Odinga Teaching And Referral Hospital.
5. In default of the Plaintiff paying the sum of Kshs.31,500,000.00/= as ordered above, their application dated 23rd May 2025 shall stand dismissed and all the prayers sought therein shall be deemed vacated without further reference to this court.
6. The Plaintiffs shall bear the costs of all the applications.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2025

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J.W.W. MONGARE

JUDGE

In the presence of:-

1. Ms. Mayega holding brief for Mr. Nyachoti for the 1st and 2nd Plaintiff.
2. Mr. Lawson Ondieki for the Defendant.
3. Amos- Court Assistant

