IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 163 OF 2016

BETWEEN

KENYA BREWERIES LIMITED.....1ST APPELLANT

UDV (KENYA) LIMITED.....2ND APPELLANT

AND

BIA TOSHA LIMITED.....1ST RESPONDENT

COGNO VENTURES LIMITED.....2ND RESPONDENT

EAST AFRICAN BREWERIES LIMITED.....3RD RESPONDENT

DIAGEO PLC.....4TH RESPONDENT

KAMAHUHA LIMITED.....5TH RESPONDENT

FOUR WINDS TRADING COMPANY LIMITED.....6TH RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (Onguto, J.) delivered on 29th June 2016

in

H. C. Pet. No. 249 of 2016)

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JUDGMENT OF THE COURT

[1] This is an interlocutory appeal. The main Petition has not been canvassed and as such, our determination on the core issue in dispute, whether the Judge had jurisdiction to entertain the petition and to issue conservatory orders, will be highly circumscribed. By a Notice of Motion dated 14th June 2016, ***Bia Tosha Ltd*** (1st respondent) moved the High Court **(Onguto, J.)** seeking conservatory orders barring the appellants from interfering with several distributorship areas known as the '***Bia Tosha Territory'*** which the 1st respondent claimed exclusive control and ownership over. The 1st respondent also accused the appellants of unfair trade practices for refusing/neglecting to refund monies paid as distributorship goodwill.

[2] A brief overview to contextualize this appeal is: the appellants and the 1st respondent entered into a commercial relationship in 1997 when the appellants appointed the 1st respondent as a beer distributor within the Kiambu general area. Subsequently, in a letter dated 20th July, 2000, the appellants offered the 1st respondent a larger distributorship territory comprising ***Baba Dogo, Kariobangi North, Dandora I*** and ***Dandora II*** areas on condition that the 1st respondent pays the 1st appellant's goodwill amounting to

Ksh. 6,630,000 which terms the 1st respondent readily accepted.

[3] On or about **13th October, 2006** the appellants again offered the 1st respondent a larger territory comprising the areas of ***Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong Road, Hurlingham, Kawangware, Satellite, Dagoretti, UDV A, UDV B*** and ***UDV C*** (collectively known as the *Bia Tosha Territory*). For the new territories, the 1st respondent was asked to pay goodwill amounting to Ksh. 31,668,000. The 1st respondent accepted the new terms and paid a goodwill of Ksh. 27,300,000.

[4] What seems to have ignited the dispute and perhaps triggered the 1st respondent to file suit was the 1st appellant demanding that it gives up previous distributorship routes comprising ***Baba Dogo, Kariobangi North, Dandora I*** and ***Dandora II*** areas so as to serve the new areas. This did not go well with the 1st respondent as it wrote a letter dated **8th September, 2011** addressed to the appellants requesting to be refunded the money paid as goodwill for the territories the appellants had repossessed. The appellants declined to refund the goodwill indicating that the amounts were non-refundable and further that it was within their discretion to appoint other distributors as the agreement was non-exclusive.

[5] Refusal by the appellants to refund the said goodwill and appointment of other distributors in some of the areas that the 1st respondent used to cover is what prompted the 1st respondent to file **High Court Petition No. 249 of 2016** on 14th June, 2016. The petition was filed alongside an application for conservatory orders whose outcome is the subject matter of this appeal. The 1st respondent asserted that it had exclusive ownership of the distribution routes for which it had paid for the goodwill; it also accused the appellants of trade practices that were unreasonable, unfair, anti-competitive and contrary to public policy and fundamental freedoms enshrined in the Constitution.

[6] A detailed affidavit in support of the application was deposed by the 1st respondent's managing director one ***Mrs. Anne-Marie Burugu***. She averred that the appellants had used threats, intimidation and other unconventional means which she referred to as '*iron tactics'*, to force the 1st respondent out of the distributorship market and had refused to refund the good will for the repossessed areas. It was further contended that the requirement to pay goodwill was done in a discriminatory fashion as it was only the 1st respondent who had been required to pay goodwill and not other distributors. This, according to the 1st respondent, was differential treatment which was unconstitutional.

[7] In the application for conservatory orders, the 1st respondent prayed as follows:

> ***"THAT pending the hearing and final determination of the Petition herein a conservatory order in the nature of an injunction do issue directed at the Respondents, their agents, servants, employees or any person acting for or connected with the Respondents barring them from interfering with the exclusive management, control and distributorship of the Respondents' products in the following routes, that is to say, Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong road, Hurlingham, Kawangware, Satellite, Dagoretti, UDV A, UDV B, UDV C, which are owned by the Petitioner by virtue of valuable goodwill paid."***

[8] Objecting to the application, the appellants alleged that the 1st respondent had failed to make full disclosure of the fact that the contract between the 1st appellant and the 1st respondent was non-exclusive and that the appellants had the right to appoint other distributors in any area including what was termed as '**Bia Tosha Territory'**. The appellants, conceded that the 1st respondent had paid goodwill amounting to Ksh. 33,630,000 but termed it as some commitment fees tied to specific agreements that had expired with the agreements of 2000 and 2006 contracts respectively. It was further contended by the appellants that the 1st respondent had failed to disclose the existence of an arbitration clause within the said agreements and even the one that was not signed in June, 2016. Finally, referring to the correspondence between the appellants and the 1st respondent, the appellants denied having arm-twisted or using 'iron tactics' to coerce the 1st respondent to accept unfavorable contractual terms as suggested in the 1st respondent's claim stating that they are guided by a code of conduct that promotes not only responsible drinking but respect of the law and ethical business.

[9] The High Court **(Onguto, J.)** upon hearing the application for conservatory orders, which seems to have been considered alongside the 1st appellant's notice of motion dated 20th June, 2010 that principally sought orders to stay the proceedings and referral of the dispute to arbitration, the learned Judge mainly zeroed on two issues: whether the court had jurisdiction to entertain the petition, in view of the arbitration clause; and whether the 1st respondent who was the petitioner was entitled to conservatory orders. By an extensive ruling, issued on 29th June, 2016 the learned Judge ruled that the dispute raised some constitutional issues touching on the violation of

proprietary rights and granted conservatory orders in respect to the disputed distribution territory the subject of the goodwill. In granting the order sought, the learned Judge made some far-reaching conclusions in paragraphs 96 - 101 as follows:

> ***"The Petitioner having purchased goodwill from the Respondents acquired the same absolutely. That it became a proprietary interest which the Respondent could not arbitrarily take back. If they had to take the proprietary interest back, then the Petitioner was entitled to compensation either in the form of refund or in the form of payment of the same goodwill in its current value. The Petitioner states that any such approach of divesting the Petitioner of its property (the goodwill) would be unconstitutional as a violation of the Petitioners rights under Article 40 of the Constitution. The Petitioner is firm that they do not contest the agreements entered into with the Respondents but rather that some of the terms of the contract appear unconstitutional.***
>
> ***97. My view is that the Petition as drawn reveals that there did and do exist commercial agreements between the parties. For stated consideration certain proprietary rights are alleged to have been acquired and the same rights are also alleged to be taken away. Relevant Articles of the Constitution have been identified and stated. The question for the court at the hearing of the Petition will be whether what has been identified as constituting proprietary interest is "property" within the provisions of Article 40 and whether the same has been arbitrarily expropriated or whether the expropriation is, if at all, justified. That is the core question in this Petition and it is a purely a question of constitutional interpretation and determination, in my view.***
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> ***98. This court has the requisite remit in my view.***
>
> ***99. It would also not be appropriate to dispatch the parties to arbitration for one more reason.***
>
> ***100. There are third parties now already impleaded and enjoined to these proceedings who were not and still are not parties to the arbitration agreement. The Interested Party has joined the fray and so too are the 3rd and 4th Respondents. How would their interest if at all be covered through arbitration" Arbitration principles discourage involving parties who are not part of the arbitration agreement to arbitral proceedings or even the ultimate Award.***
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> ***101. I am acutely aware of the far-reaching consequences of my conclusive finding that purely constitutional issues and questions have been borne out of a hitherto commercial relationship and hence the court's jurisdiction rather than agreed mode of dispute resolution. I however do not for a moment view it that the framers of our Constitution intended the rights and obligations defined in our common law, in this regard, the right to freedom of contract, to be the only ones to continue to govern interpersonal relationships."***

[10] Finally, the following order was made which is the gravamen of this appeal: -

> ***"a) Pending the hearing and final determination of the Petition herein a conservatory order will issue preserving the Petitioner's Bia Tosha territory exclusively to the Petitioner under the area of operation arrangement obtaining as at 2nd February 2006."***

[11] The appellants filed the instant appeal challenging the High Court's jurisdiction when there was in existence an arbitration clause; the granting of orders that went against the existing *status quo* and the making of final determination on disputed issues of proprietorship of good will which were denied. The appellant raised a total of some seventeen (17) grounds of appeal which are stated in the memorandum of appeal. In brief, the appellants faulted the learned Judge for: granting the application for conservatory orders; elevating a purely commercial dispute to a constitutional dispute thus breaching the cardinal rule of party autonomy and freedom of contract; making a ruling that went contrary to the provisions of ***Section 21*** of the **Competitions Act**; violating the appellants' right to property; misinterpreting provisions of ***Article 159(1)(c)*** of the Constitution; interfering with the dispute resolution procedure set out in the agreement between the 1st appellant and the 1st respondent; violating the appellants' fundamental freedom of contract; and for exceeding the court's jurisdiction by entertaining, hearing and determining issues raised by the 1st respondent in the application dated 14th June, 2016.

[12] Pending the hearing of the appeal, the appellants also sought orders, under ***Rule 5(2)(b)*** of this Court's Rules, to stay execution of the High Court orders pending the hearing and determination of the appeal. On 11th August, 2016 this Court ordered that, in view of the parties' longstanding business relationship, the *status quo* be maintained pending the hearing and determination of the appeal. Nonetheless before the appeal could be heard, the 1st respondent filed a motion dated 23rd August, 2016 seeking to cite the appellants for contempt of the Court orders issued on 11th August, 2016. The 1st respondent also filed a notice of motion dated 7th December, 2016 seeking to adduce additional evidence. Another notice of motion dated 20th January, 2017 for joinder of the Chartered Institute of Arbitrators was also filed but it is not clear on whose behest.

[13] In an Extempore ruling dated 30th May, 2017, this Court reiterated the directions given on 1st November, 2016 by the Court, regarding a priority hearing date to be given for the main appeal in lieu of all the applications. This is what the Court stated

in a pertinent paragraph of the said Ruling: -

> **"Having given the matter full and anxious consideration, we are quite clear that this Court (differently constituted) did direct in unequivocal terms on 1st November, 2016 (and in answer to an attempt to agitate an application in lieu of the appeal**

proper on that day) that the dispute between the parties herein must be fully and finally resolved by the hearing and determination of the appeal itself and that interlocutory matters or issues cannot take precedence over hearing of the appeal itself."

[14] This prompted the 1st respondent to file an application before the Supreme Court seeking a declaration that its constitutional rights had been violated by the Court. However, the Supreme Court held that the petition before the Supreme Court failed to properly invoke the provisions of **Article 163(4)(a**) of the Constitution since the main petition before the High Court was still pending and the Court of Appeal was as yet to exercise its appellate jurisdiction, thus there was no substantive decision from which the 1st respondent could appeal. Declining to exercise its jurisdiction, the Supreme Court remitted the matter to this Court for hearing on priority basis.

[15] Even in the face of the said Ruling by the Supreme Court, and prior directions given by this Court on the hearing of the appeal in lieu of the applications, when the appeal came up for hearing before us on 4th March, 2020, ***Mr. Nowrojee***, ***Senior Counsel*** appearing with ***Dr. Kiplagat*** for the 1st respondent still insisted that the notice of motion dated 23rd August, 2016 seeking to commit the appellants for contempt of court be heard first. This argument was met by stiff opposition by **c**ounsel for the appellants who urged us to follow the earlier directions of this Court and proceed with the main appeal which was also in line with the direction made by the Supreme Court. We stuck to the directions given earlier by this Court and proceeded to hear the main appeal.

[16] ***Mr. Kamau Karori*** appeared for the 1st appellant, ***Mr. Oraro, SC*** appeared for the 2nd appellant, ***Mr. Nowrojee, SC*** teaming up with ***Dr. Kiplagat*** appeared for the 1st respondent***, Mr. Mansur Issa*** teaming up with ***Mrs. Ahumo*** appeared for the 2nd respondent, ***Ms. Jalega*** for the 3rd and 4th respondents, ***Mr. Kamara*** for Kamahuha Ltd who were joined as the 1st interested party (5th respondent) and ***Mr. Wambua*** for the Four Winds Trading Co. Ltd, who was 2nd interested party (6th respondent). The 5th and 6th respondents were joined as interested parties in the High Court and also before this Court as parties who would be affected by the orders made in this appeal. Since the Court of Appeal Rules has no provision for 'interested parties' we will refer to them as 5th and 6th respondents respectively.

[17] Rising on his feet, ***Mr. Oraro, SC***, relied on the written submissions filed for 2nd appellant and emphasized three key issues surrounding the dispute between the 1st appellant, the 1st respondent and the 5th and 6th respondents who were impleaded. First, there were distributorship agreements between the 1st appellant and the 1st respondent as well as all the impleaded respondents indicated as interested parties. Those individual agreements clearly stipulated that the good will paid for the distributorship was non-refundable and specified the distributorship territory, and most importantly made provision for alternative dispute resolution. Thus, the terms were reduced into a statutory document and as provided by ***Section 97*** of the **Evidence Act** parties cannot depart from the agreements.

[18] Secondly, it was counsel's contention that goodwill does not constitute a proprietary right as provided under ***Article 40***, and even if it did, it fell squarely within a realm of a commercial dispute where parties needed to prove their claim. Thus, it was not a clear blatant violation of a constitutional right but serious commercial disputes that had no public interest connotation. The learned Judge was faulted for failing to note that there were no entrenched proprietary rights, and by granting a conservatory order which was final in nature, created a new contract for the parties. Counsel argued that the dispute revolves around a contract, entered between two private entities and there were no constitutional issues in respect of the same. He therefore urged us to allow the appeal and order the matter be referred to arbitration.

[19] In addition, counsel went on to submit that, the impugned order purported to create and preserve *'a Bia Tosha territory'* which was at variance with what was agreed upon. Counsel referred to a letter on page 32 of the record of appeal which indicated the areas of distribution and gave the 1st appellant the discretion to extend, reduce or otherwise vary the areas by notice in writing served on the 1st respondent; that upon appointment, the 1st respondent was asked to pay goodwill as per letter at page 38 and a distributorship agreement was entered into on 1st July, 2001. The said agreement stated under ***clause 4(1)*** that the goodwill was non-refundable, and provided an arbitration clause; and since the agreement was for a specific period, the goodwill expired with the agreements. Counsel cited cases of **Kenya Breweries Limited vs. Kiambu General Transport Agency Limited [2000] eKLR** and **Communication of Kenya & 5 others vs. Royal Media Services Ltd & 5 others [2015] eKLR** to bolster the argument that the learned Judge had erred by ignoring the agreement which governed the distributorship relationship. Moreover, it was held in the said cases that a claim to recover goodwill cannot be equated with a property right.

[20] In support of the above submissions, ***Mr. Kamau Karori***, learned counsel for the 1st appellant, relied on the written submissions and added that according to the notice of motion that was filed, the 1st respondent sought orders to protect an area for which it had paid for goodwill, however the order granted, was contrary to what was prayed for as the learned Judge erroneously reasoned that it was not the products that were in dispute, thus the order preserved territories and routes which had nothing to do with the products. He argued that the conservatory order was vague in that it preserved a territory and routes despite the fact that in the agreements, the same were not included. The whole claim by the 1st

respondent as stated in the Petition was about a distributorship agreement; it was a commercial relationship and an allegation of a breach of an agreement does not amount to a constitutional matter but a commercial dispute where parties are given an opportunity to adduce evidence.

[21] Counsel went on to submit: that the distributorship agreement referred to by the 1st respondent was based on the distribution of the appellants' products and not just a mere allocation of territory and routes; that there was no mention of exclusive territory and routes as all the agreements were non-exclusive; and that the appellants were at liberty to appoint other distributors and stockist in the same territory. Counsel argued that the claim by the 1st respondent for restitution of goodwill is purely a commercial matter that falls for arbitration as agreed by the parties. Counsel further faulted the learned Judge for misdirecting himself that the 1st appellant had refused to refund the goodwill as this was a contested issue. Counsel urged that the conservatory order issued was out of tune with the claim which was for refund of goodwill; that at best, the order which would have resonated with the pleading was to preserve the money paid for good will which was in dispute. The learned Judge also acknowledged that the routes that the 1st respondent was claiming had been allocated to other distributors, but nonetheless, he went ahead to issue an order over the same areas.

[22] Finally counsel submitted that the agreements with the 1st respondent had expired by effluxion of time, and the appellants cannot be faulted for taking the full benefit of the terms contained therein. Counsel cited the case of **Nyutu Agrovet vs. Airtel Networks Ltd [2015] eKLR** to support the proposition that under the distributorship agreement, arbitration was agreed upon as the mode of resolving any dispute arising out of the agreement and therefore the first point of call was arbitration. Counsel went on to argue that the learned Judge had no jurisdiction to adjudicate on the matter but to refer it to arbitration. Counsel also faulted the learned Judge for making orders that impacted against the 2nd appellant **UDV (Kenya) Ltd** who were not a party to the impugned agreements. For those reasons counsel urged us to allow the appeal.

[23] ***Mr. Issa***, learned counsel for the 2nd respondent, concurred and associated his client with the submissions made on behalf of the appellants. In his brief highlights, he faulted the learned Judge for failing to refer the dispute to arbitration. Referring to the case of **Communications Commission of Kenya vs. Royal Media Services Ltd** (supra), he posited that if a dispute can be determined without invoking provisions of the Constitution, courts should adhere to the relevant statutory provisions. In this case, he pointed to ***Section 6 (1)*** of **Arbitration Act**, urging that goodwill was paid, and distributorship agreements entered into, which had arbitration clauses, and the parties were thereby bound. Regarding the conservatory order, counsel argued that it created a new contract that affected areas covered by the 2nd respondent. As regards the *status quo* obtaining when the order was made, counsel argued that it was the 2nd respondent who had prior thereto entered into a distributorship agreement with the appellants who was carrying on business in the areas covered by the impugned order because the agreement with the 1st respondent had lapsed. Thus, according to counsel, the impugned order contravened ***Section 21(1)*** of The **Competition Act** which prohibits restrictive trade practices. Counsel urged the order to be set aside as it is contrary to statute.

[24] ***Mr. Kamau***, appearing together with ***Ms. Jalega*** also appearing for the 3rd and 4th respondents, supported the appeal based on the submissions made and prayed for costs.

[25] Opposing the appeal was ***Mr. Nowrojee***, ***SC,*** he relied on the written submissions filed by 1st respondent and the list of authorities and made some oral highlights. Counsel made reference to the distributorship agreement of October, 2006; payment invoices that indicated the 1st respondent paid goodwill for exclusive routes and territories which in counsel's view, constituted property rights. Further, that the terms of the said agreements were adopted and took the place of all other previous and future agreements. Faulting the appellants for stating that there was no business relationship nor was there a no territory defined, counsel urged that the appellants had clearly disobeyed a *status quo* order. According to counsel there was a business relationship as at 2nd February, 2016 and a 'Bia Tosha Territory' for which the 1st respondent had paid 27 million and that, this was supported by evidence that was not at all disputed. This is the relationship that the *status quo* order preserved as counsel strongly urged that if the 27 million plus paid by the 1st respondent was not for exclusive territory to be reserved, then it was extortion by the 1st appellant.

[26] Counsel added that the 1st respondent was able to demonstrate that there was a business relationship with the 1st appellant which was protected under ***Article 40 (1)*** of the Constitution; that ***Article 159 (2)*** does not require the matter to be taken to alternative dispute resolution as ***Article 165 (3) (d)*** mandated the High Court to determine whether an act is done in contravention of the Constitution; that the learned Judge properly exercised his discretion and granted an interlocutory order which as a matter of principle cannot be challenged except in very rare cases; and that it is the High Court that has the mandate to interpret the Constitution and where a matter entails constitutional interpretation, it must go to the High Court first. For this preposition counsel cited **In the matter of the interim Independent Electoral Commission (applicant) Constitutional Application No. 2 of 2011 pp. 23-24.**

Summing that the High Court was the proper forum for determination of the issues raised in the petition as they touch on unfair, discriminatory, exploitative trade practices that are being forced on local business by a multinational company. Counsel urged us not to heed to the reliefs sought by the appellants which neatly fit into a strategy of perpetuating uneven power relationship and complete capture by foreign multinationals. He concluded that the High Court orders were not based on contract but constitutional underpinnings and the issue of going to arbitration did not arise.

[27] ***Mr. Kamara***, appearing for the 5th respondent submitted that his client just like the 1st respondent, was one of the beverage distributors who was allocated an exclusive area called *'Kamahuha Territory'* where they distributed the 1st appellant's products from the 1990's and his clients also paid good will for the exclusive territory and therefore it acquired proprietary interest which deserves protection under **Article 40** of the Constitution. Counsel therefore supported the impugned ruling as his client's case is similar to that of the 1st respondent and it faced the same unfair treatment when it was served with a letter dated 2nd February, 2016 by the 1st appellant purporting to vary the terms and requiring them to read and sign the contract on the same day notwithstanding the many years of cordial business relationship. The twenty-six (26) years long standing relationship with the appellants was terminated unceremoniously when the ***5th respondent*** refused to accept oppressive terms of contract which went contrary to the statute and Constitution. It was counsel's prayer that the appeal be dismissed.

[28] In support of the prayer towards dismissing the appeal, ***Mr. Wambua***, learned counsel for **Four Winds Trading Co. Ltd** (6th respondent), submitted that his client was also a distributor of the appellants' products since 2001; that this longstanding relationship was brought to an abrupt when his client refused to be compelled to succumb to unfair trade terms by the 1st appellant who demanded that a new distributorship agreement that the 6th respondent considered had unfair trade practices be signed on the same day and be returned within a spate of three (3) hours.

Counsel also supported the ruling which protected the goodwill paid for exclusive distributorship within the areas that were assigned to his clients urging that by paying the goodwill, his clients too acquired proprietary interests which are protected under the Constitution.

[29] In a brief rejoinder, ***Mr. Oraro, SC*** stressed that the central issue that was pleaded is a claim for restitution of goodwill which was elevated by the Court to a constitutional issue; that some crucial information was not presented before the trial court including a letter allowing the 1st respondent to continue servicing its territory which came to an end on 31st May, 2016; and that the remedies for deprivation of property fall under private law.

[30] In conclusion, ***Mr. Karori*** reiterated that key evidence was not disclosed to the trial court, that the 1st respondent was offered new contract terms in an unsigned letter dated 13th October 2016; that the 5th and 6th respondents were not parties to the main suit, in that they had no claim but were merely impleaded and that the territories subject of the conservation order were not clear.

[31] We have considered and deliberated on the record of appeal, the grounds of appeal, the detailed submissions and the volumes of authorities cited and urged before us. We have deciphered some three key issues for determination. These issues which seem to be cross-cutting are whether the learned Judge wrongly assumed jurisdiction and granted orders while ignoring party autonomy and freedom of contract in the face of an arbitration agreement; whether the learned Judge issued final orders which conferred rights not in the contract before the petition was heard and evidence tested; and whether the dispute was purely a commercial dispute elevated to a constitutional petition against established principles. It is also our considered view that many other issues arising from the grounds of appeal not considered in this judgment were deliberately left out for the obvious reason that we must consider only issues that do not compromise the actual hearing and determination of the dispute.

[32] It is common ground that this appeal challenges the learned Judge's exercise of discretion under ***Rule 23 (1)*** of the **Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012)**. It has been stated time without number that discretionary powers, must be exercised judicially. Also, this Court is usually slow to interfere with the exercise of discretion by a Judge unless the Judge misdirected himself in law, or misapprehended the facts and either took into account or failed to take into account matters which he ought not to; or that he arrived at a decision that is plainly wrong in the circumstances. See the case of

United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd 1985] E.A 898 where **Madan J.A** (as he then was) enunciated the principle as follows:

> **"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of**

which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

[33] That said, the respondent's case that persuaded the learned Judge to grant the orders appealed against was predicated on a Petition that cited various Articles of the Constitution as having been violated by the appellants to wit ***Articles 2, 3, 10, 19, 22, 24, 27, 36*** and 40. ***Article 40*** which was the main Article relied upon, protects property ownership and enjoyment, and forbids any person from "arbitrarily depriving a person of property of any description or any interest in, or right over, any property of any description". Other matters pleaded included a commercial relationship under which in the year 2000, the appellants offered the 1st respondent, then operating under the name and style of **Bia Yetu Agencies Ltd** a distributorship of beer and spirits in a geographical territory of **Baba Dogo, Kariobangi North, Dandora I** and **Dandora II** areas. This came with what the 1st respondent called a distributorship agreement, the terms of which were spelt out in written correspondence and reduced into a written agreement dated 1st July, 2001. As a condition precedent, to the said distributorship agreement the 1st appellant was required to pay Ksh. 6,630,000 as goodwill.

[34] In 2005, the parties negotiated another distributorship agreement which covered more routes. For that, the appellants demanded that the 1st respondent should pay an additional good will of Ksh. 31, 668,000 and also cede its previous routes so as to serve the larger area. The terms of this contract were covered in the distributorship agreement dated 13th October, 2006 that defined how the parties were to operate.

The 1st respondent stated that with the advent of the **Competition Act, 2011**, it had to change its mode of operation as it was no longer permissible for it to commit to exclusively serve the appellants. In 2012, distributors came together and registered a new association to address matters of common interest in the beverage industry. This did not augur well with the appellants whom they accused of stifling the 1st respondent's constitutional right to associate in compliance with the **Competition Act**. The 1st respondent stated that the Constitution also protects private contracts and cited ***Article 19 (1)*** which mainstreams the Bill of Rights in "social, economic, and cultural policies"; **Article 36** that provides for freedom of association; and ***Article 27 (2)*** which provides for non- discrimination. The 1st respondent was given differential treatment which was unfair and contrary to public policy.

[35] The 1st respondent's case and the prayers sought are principally a claim that the goodwill paid entitled them to the routes stated in their prayer in the notice of motion restated under paragraph 7 above. It urged that the said routes and territories be declared to **"belong to and owned by the Petitioner exclusively and to the exclusion of the respondents, their employees, agents, servants, or any person acting for or connected with the respondents"** and a declaration that the goodwill paid by the 1st respondent for distributorship routes creates protected property over the said routes under **Article 40** of the Constitution.

[36] On the other hand the crux of the appellants' case was that there were distributorship agreements entered into by the parties which provided that any dispute arising under the said contracts was to be resolved by way of mediation and arbitration. In addition, it was stated that the 1st respondent failed to disclose that this was a business relationship governed by written agreements starting with an agreement dated 1st July, 2001 which expressly stipulated that the contract was granted on a non-exclusive basis and allowed the 1st appellant to be at liberty to appoint other distributors or stockist in the territory. Again in 2006, the 1st appellant entered into a distributorship agreement with the 1st respondent and the contract was also granted on a non-exclusive basis. Even the agreement that was dated 3rd June, 2016 was indeed titled 'non-exclusive'.

[37] The reason for payment of goodwill by the 1st respondent was contested by the 1st appellant who insisted that it was non-refundable. The 1st appellant said goodwill, was a commitment fee as reflected in the following clauses in the agreement including: -

Clause 4.1 of the 2001 agreement that provided: -

> **"The Distributor shall pay to the Company a non-refundable commitment fee of six million sis hundred and thirty thousand only-(6,630,000). The commitment fee shall be paid to the company in equal instalments over a period of 48 months on the last working day of the month in which this agreement is signed"**

Clause 6.3

> **"The expiry or termination of this Agreement shall be without prejudice to any rights which have already accrued to either of the parties under this agreement but any right to compensation for loss of distribution rights, loss of goodwill or any such similar loss which may arise is hereby excluded. The distributor hereby agrees that the provisions and periods of notice for termination stipulated in this Agreement are sufficient and reasonable."**

[38] Further, the agreement of 2006 where the appellant recognizes that the 1st respondent paid a sum of Ksh. 27,300,000 as

goodwill, and the 1st respondent undertook not to claim for loss of goodwill against the 1st appellant upon termination of the agreement. It was the 1st appellant's case that the goodwill was extensively negotiated, and that the 1st respondent paid the total sum of Ksh. 33,930,000 by way of contribution to meet sales and marketing expenses incurred by the 1st appellant in developing and maintaining the non-exclusive territories.

[39] The 1st appellant also denied that the 1st respondent was not given adequate notice to sign the agreement dated 3rd June, 2016. The 1st appellant detailed a chronology of exchanges of correspondence since the distributorship contract of 2012 was about to expire, which started the renewal process on or about 18th September, 2015 when the parties agreed to extend the term of the 2012 agreement until 29th February, 2016. Several meetings were also held between the parties and their lawyers as detailed in the affidavit sworn on 20th June, 2006 by ***Jane Karuku***, the Managing Director of the 1st appellant (see paragraphs 23-25). It was the position of the 1st appellant that after consultation the agreement was extended up to 31st May, 2016, but the 1st respondent refused to sign it, even after the 1st appellant acceded to many of its requests. This is why on the morning of 31st May, 2016 the 1st appellant requested the 1st respondent to sign and return the agreement the same day. As the 1st respondent did not sign the renewal, the 1st appellant appointed other distributors to serve the market within the routes previously served by the 1st respondent.

[40] It is against this background that we have to answer the first issue of whether the learned Judge ought to have referred the matter for arbitration while considering the principle of party autonomy. The learned Judge appreciated in his ruling that the genesis of the dispute was commercial, but there arose some constitutional issues which he found the High Court was mandated to entertain pursuant to the provisions of **Article 165(3)(b**) which expressly confers upon the High Court the ***"jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened"***. In addition, **Article 165(3)(d)(ii)** confers upon the High Court jurisdiction to determine: -

> **"the question whether anything said to be done under the authority of the Constitution or of any law is consistent with or in contravention of, the Constitution."**

[41] There is no dispute that the parties signed those distributorship agreements spanning over many years. There is no indication that the 1st respondent or even the impleaded parties did challenge the clause that provided for mediation and arbitration of any dispute arising in those agreements. In our considered view therefor in as much as the constitutional breaches complained about by the 1st respondent which are supported by the 5th and 6th respondents, were predicated on the distributorship agreements which provided mediation and arbitration as a medium for dispute resolution, that avenue ought to have been exhausted first. It is apparent from the record that the appellants filed a motion under ***Section 6 (1)*** of the **Arbitration Act** seeking *inter alia* stay and/or dismissal of the court proceedings; and the dispute being referred to arbitration as per the agreement.

[42] ***Section 6 (1)*** of the Act provides as follows: -

> **"(1) A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds:-**
>
> > **(a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or**
> >
> > **(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.**
>
> **(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.**
>
> **(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."**

[43] The obligation of the Court upon being moved under the above provision has been crystalized by case law. We find it prudent to highlight the case of **Niazsons**

(K) Ltd vs. China Road & Bridge [2001] eKLR in which this Court stated *inter alia*:

> **"All that an applicant for a stay of proceedings under section 6 (1) of the Arbitration Act of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things:**

(a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;

(b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and

(c) Whether the suit intended concerned a matter agreed to be referred to arbitration."

[44] In **Corporate Insurance Company vs. Loice Wanjiru Wachira [1996] eKLR**, this Court also stated *inter alia* that the existence of an arbitration clause is a defence to a claim filed against a party, save that a party seeking to rely on the existence of such an arbitration clause as a defence cannot be allowed to use it to circumvent a statutory requirement with regard to the mode of applying for a stay of proceedings. In ***UAP Provincial Insurance Company Ltd vs. Michael John Beckett*** (supra), the court added that the current legal position with regard to applications for stay of proceedings pending arbitration was introduced by the 2009 amendment to ***Section 6*** of the **Arbitration Act**.

[45] It is clear to us that the learned Judge did address himself extensively to the issue of arbitration. He took the view that there are two schools of thought; one in favour of the court not exercising jurisdiction in the face of a private personal relationship where parties have settled on a dispute resolution forum, and the second one in favour of the court seizing the moment to deal with the allegations of constitutional breaches. He went on to state that there has been much debate but with no consensus. In a pertinent portion of his ruling, the learned Judge expressed himself as follows;

"Once again I would invite the dictates of Article 159 into play and state the importance of promoting alternative dispute resolution as a principle that guides the exercise of judicial authority. The Constitution itself has not offered any exceptions to matters to be resolved by way of alternative dispute resolution and I am not particularly prepared to adopt the reasoning in Metrocall Inc -v-Electronic Tracking Systems (Pty) Ltd (Supra) that private arbitrators may not arbitrate over Constitutional and Statutory rights. I hold so not only out of deference to the Supreme Court of Kenya's decision in Communications Commission of Kenya & 5 Others -v- Royal Media Services Ltd & 5 Others [2014]eKLR but also due to the appreciated fact that the Constitution does not just take a meddlesome interest in the private affairs and relationships of individuals or legal entities. It is now always part of it and if disputes were to arise some may actually take a 'Constitutional trajectory' while still maintaining a purely commercial avenue or both and the dispute resolver is then expected to deal with the dispute in its entirety rather than think of a separationalist approach.

90. Where however a dispute or claim is laid out as a constitutional issue then the High Court must deal with the dispute. Little wonder then that in Communications Commission of Kenya & 5 Others -v-Royal Media Services Ltd & 5 Others [supra], the Supreme Court after a review of various authorities held as follows:

"[258] From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd Respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright infringement claim and it was not properly laid before that Court as a constitutional issue. This was therefore not a proper question falling to the jurisdiction of the Appellate Court" (*Emphasis added)*

[46] We differ with the learned Judge's conclusion that the issues of constitutional rights raised by the 1st respondent were not suitable for arbitration as the said issues arose from the distributorship agreement. There is no way the infringement of the alleged constitutional rights can be divorced from the written agreements they are embedded in, and which is allegedly breached. The parties were brought together by the trade agreements, the claim for unfair trade practices and payment of goodwill are emanating from the agreements. Moreover, there is a plethora of cases, some cited by the learned Judge, that reiterate the principle that parties are bound by the terms of their contracts; that a court of law cannot purport to rewrite a contract between the parties, and that where there is no ambiguity in an agreement, it is to be construed according to the words used by the parties. (See ***Section 97*** of the **Evidence Act)**. The learned Judge also failed to give due consideration to the provisions of ***Article 159 (2) (c)*** of the Constitution that mandates courts to promote alternative dispute resolution such as mediation and arbitration by disregarding the terms contained in the distributorship agreement. It is clear to us the learned Judge did not heed to the dictates thereto to promote alternative dispute resolution in this matter, but rather downgraded it.

[47] This now takes us to the issue of whether the learned Judge exercised his discretion judicially when he granted the conservatory order. We acknowledge that the High Court can issue interim orders or conservatory orders and then refer a dispute for arbitration. It is in that context that we will examine this issue by first setting out the guiding principles on interlocutory applications for conservatory orders within the framework of ***Article 23*** of the Constitution. The leading authority on this issue is the Supreme Court case in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR** as follows: -

"[86] "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to

such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

[48] The learned Judge identified the question for its determination as follows: -

> "***The question for the court at the hearing of the Petition will be whether what has been identified as constituting proprietary interest is "property" within the provisions of Article 40 and whether the same has been arbitrarily expropriated or whether the expropriation is, if at all, justified. That is the core question in this Petition and it is purely a question of constitutional interpretation and determination, in my view."***

[49] In granting the impugned conservatory order, this is what the learned Judge posited in his own words: -

> "***123. In the totality of the claim and in the matrix of facts, I am satisfied that the investment by the Petitioner in the routes and areas in question referred to by both parties as the Bia Tosha territory deserves the protection of the court. The Petitioner has injected cash. The Petitioner has also employed many Kenyans, all on the basis of the territory granted to the Petitioner some 10 years ago.***
>
> ***124. The Petitioner contended that it has exclusively commanded this territory. No evidence was placed before me to controvert this. I would for now uphold the Petitioner's contention that it did command the territory exclusively notwithstanding statements to the contrary endorsed as terms in the distributorship contracts. The Petitioner's affidavit evidence that it has controlled the territory for the last ten years remains uncontroverted.***
>
> ***125. I have also read the Competitions Act. I found no contradiction with the contention that a distributor may acquire goodwill over an area, place or route exclusively. Indeed, the Competitions Act recognizes goodwill as an asset. So long as any competitor is not locked out, my preliminary view would not be, as I was urged by the Interested Party, that an agreement with exclusivity is illegal for being contrary to statute. No evidence is before me that the respondent's competitors were being locked away."***

[50] The 1st respondent's contention was that the decision or action taken by the appellants to repossess certain **Bia Tosha** territories, and at the same time declining/ refusing to refund the goodwill paid in respect of those areas, flew in the face of the constitutional provisions, in particular ***Articles 40(1)*** of the Constitution which provides that:

> **"Subject to Article 65, every person has the right, either individually or in association with others to acquire and own property- (a) of any description; and (b) in any part of Kenya."**

[51] The learned Judge grappled extensively with the question whether the goodwill paid, was indeed property as envisaged by ***Article 40(1)*** deserving of protection and preservation**.** It is common ground that the 1st respondent paid goodwill, therefore we have no problem with the holding that goodwill is private property **if it is proved there were no conditions attached to it.** This emphasis is crucial because the 1st appellant has strenuously denied that the said goodwill was refundable and that the routes or territories that were assigned to the 1st respondent were exclusive. It is a matter for trial. Although we agree with the learned Judge that goodwill is a species of personal property which can be bought and sold, disposed of by will and charged, the owner has to vindicate his exclusive right to the goodwill by process of law, and therefore must discharge the burden of proof of ownership.

[52] We emphasize the party so claiming goodwill must prove there were no conditions attached to it. This is in line with the persuasive decision of the House of Lords **Inland Revenue Commissioners vs. Muller & Co's Margarine Ltd[1901] AC 217** where at 223, **Lord MacNaghten stated**:

> **"*It is very difficult, as it seems to me, to say that goodwill is not property. Goodwill is bought and sold every day. It may be acquired, I think, in any of the different ways in which property is usually acquired. When a man has got it he may keep it as his own. He may vindicate his exclusive right to it if necessary, by process of law. He may dispose of it if he will – of course under the conditions attaching to property of that nature."***

[53] Having said that, it is our considered view that there are serious triable issues on whether the goodwill was refundable and whether the routes were exclusive to the 1st respondent. The issue of exclusivity required serious interrogation because the 1st respondent on one hand accused the appellants of creating a monopoly which is anti-competition; on the other, the appellants claim the routes or territories were non- exclusive in view of the same provisions of the **Competition Act**. In addition, a perusal of the pleadings shows there were many distributorship agreements that parties entered into over the years and the terms were not the same. It is therefore, a debatable issue whether the terms of the distributorship agreement of 2nd February, 2006 which was

restored by the conservatory order was the one which was operational as at 31st May, 2016. We think we have said enough about disputed matters that require evidence to resolve before a determination can be made one way or the other.

[54] On the prejudice to be suffered if the conservatory order is not granted, we are cognizant that a party requires to demonstrate that it will suffer prejudice as a result of the violation or threatened violation of the Constitution. However, as stated in the ***Gatirau Munya case*** (supra), this must be weighed against the public interest, which in this matter would appear to be an adherence to the agreements that the parties had entered into, and the protection of the Rule of Law which entails the fundamental right to a fair hearing. The 1st respondent deposed in the supporting affidavit sworn by ***Ms. Burugu*** that the repossession of some of its exclusive territories had serious consequences on its business because in addition to payment of goodwill for the routes they had acquired, the 1st appellant had also required them to secure its distribution business by acquiring the 1st appellant's prime property inIndustrial Area at the cost of Ksh. 108 million so that the 1st respondent could better serve the business and commercial needs of the appellants. Consequently, the 1st respondent was servicing huge business loans and therefore required to be in constant business to meet its regular financial obligations to its customers, creditors, as well as hundreds of its employees. It was also the 1st respondent's case that in any event, the 1st appellant had already repossessed some territories and allocated them to other distributors, including the 5th and 6th respondents, who had also paid goodwill, therefore, there was no justification for continuing to retain the 1st respondent's goodwill.

[55] To us, the situation as presented by all the parties including the interested parties impleaded and enjoined to the proceedings, are all matters that are diametrically opposed. They all claim to have the right to protection under ***Article 40(1)*** of the Constitution. Their various claims can only be determined by evidence, in particular, the respective routes or territories allocated; whether they were exclusive and whether the goodwill is refundable. As matters stand, the conservatory order issued tends to give the 1st respondent exclusive control over some disputed territories where there may be other distributors. If that be the case, the conservatory order would effectively lock other distributors out of the market.

Section 21(3) of the **Competition Act** effectively prohibits any;

> **"…agreement, decision, or concerted practice which (a) directly or indirectly fixes purchase or selling prices or any other trading conditions; (b) divides markets by allocating customers, suppliers, areas or specific types of goods or services; (c) involves collusive tendering; (d) involves a practice of minimum resale price maintenance; (e) limits or controls production, market outlets or access, technical development or investment; (f) applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (g) makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject of the contracts; (h) amounts to the use of an intellectual property right in a manner that goes beyond the limits of fair, reasonable and non-discriminatory use; or (i) <u>otherwise</u> <u>prevents, distorts or restricts competition</u>."**(Emphasis provided)

[56] Weighted against the facts of this case, we have no doubt that the 1st respondent, may suffer significant losses if it is not allowed to carry on with the distributorship for which they have invested heavily, in addition to paying a goodwill amounting to Ksh. 33,930,000 as confirmed by the 1st appellant. However, the 1st respondent and the 5th and 6th respondents' cases are seriously contested by the 1st appellant who claim that the goodwill was non-refundable and denies the claim by the 1st respondent that it had exclusive rights over routes or territories. We repeat that these matters are seriously contested and it is only a trial that can resolve them. As if that is not enough, the matter is further compounded by the claim by the 2nd respondent who made a case for themselves, that they would be adversely affected by the orders as they had pre-existing contracts with the appellants. Allowing the conservatory orders to stand will occasion financial loss to the other distributors and inconvenience their customers and employees.

[57] Until all those issues are determined, the Court cannot re-write the contract for the parties by imposing terms. See **National Bank of Kenya Ltd vs. Pipeplastic Samekolit (K) Ltd [2002] EA 503**: -

> **"A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."**

[58] For the above reasons, we find that the learned Judge misdirected himself in coming to the conclusion that the dispute between the parties raised purely constitutional issues that were not appropriate for arbitration. In addition, in issuing the conservatory order, the learned Judge failed to take into account the respective interest of the parties and the fact that the 1st respondent would be entitled to damages and/or restitution as an alternative remedy. Of more importance, the learned Judge did not take into account the public interest element as stated in the ***Gatirau Munya vs Dickson Mwenda Kithinji & 2 others*** (supra). In the circumstances, we allow this appeal and make orders as follows: -

(i) That the conservatory order made on 29th June, 2016 be and is hereby set aside and substituted with an order staying the proceedings before the High Court pending the dispute being referred to arbitration.

(ii) That the dispute between the 1st appellant and 1st respondent shall be referred to arbitration in accordance with the respective parties' distributorship agreements.

(iii) This being an interlocutory appeal, costs shall abide the outcome of the dispute.

Dated and delivered at Nairobi this 10th day of July, 2020

M. K. KOOME

……..

JUDGE OF APPEAL

HANNAH OKWENGU

……..

JUDGE OF APPEAL

J. MOHAMMED

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR