



Bia Tosha Distributors Limited v Kenya Breweries Limited & 3 others; Cogno Ventures Limited (Interested Party); Kamahuha Limited & another (Proposed Interested Parties); Cowan & 2 others (Alleged Contemnors) (Petition 249 of 2016) [2023] KEHC 4108 (KLR) (Constitutional and Human Rights) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 4108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 249 OF 2016

HI ONG'UDI, J

APRIL 28, 2023

BETWEEN

BIA TOSHA DISTRIBUTORS LIMITED PETITIONER

AND

KENYA BREWERIES LIMITED 1ST RESPONDENT

UDV (KENYA) LIMITED 2ND RESPONDENT

EAST AFRICAN BREWERIES LIMITED 3RD RESPONDENT

DIAGEO PLC 4TH RESPONDENT

AND

COGNO VENTURES LIMITED INTERESTED PARTY

AND

KAMAHUHA LIMITED PROPOSED INTERESTED PARTY

FOUR WINDS TRADING COMPNAY LIMITED PROPOSED INTERESTED PARTY

AND

ANDREW COWAN ALLEGED CONTEMNOR

JANE KARUKU ALLEGED CONTEMNOR

ANDREW KILONZO ALLEGED CONTEMNOR



RULING

1. The basis of the applications stems from the Supreme Court decision in *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others (Petition 15 of 2020) [2023] KESC 14 (KLR) (Constitutional and Judicial Review)* (February 17, 2023) (Judgment). As captured in the synopsis of the case, the matter emanated from commercial agreements between the petitioner and the 1st and 2nd respondents concerning the distribution of the 1st respondent's products. In reaction to the 1st respondent's imposed measures, the appellant preferred to pursue the constitutional path by instituting the petition before the High Court.
2. The issue at the High Court was whether the court had jurisdiction to determine the matter considering the arbitration clause in the contract. The High Court ruled that it had jurisdiction considering that the petition raised constitutional issues and there were third parties enjoined in the suit who were not privy to the suit. The High Court as well issued conservatory orders.
3. The Court of Appeal on the other hand held that the High Court did not have jurisdiction and overturned the High Court's decision. The Court of Appeal not only overturned the ruling of the High Court, but also granted relief in favour of the respondents which had an adverse impact on the appellant.
4. Aggrieved by the Court of Appeal decision the petitioner filed the Supreme Court petition which overturned the Court of Appeal decision and upheld the High Court's decision. In its finding dated February 17, 2023, the Supreme Court held as follows:

' 129. Having overturned the Court of Appeal judgment and having established that there was contempt of court, the same should not go unpunished. The Supreme Court has, under Section 28(4) of the *Supreme Court Act* the same powers and authority as those of the High Court to punish for contempt of court. The Supreme Court may also, under section 22 of the *Supreme Court Act*, remit proceedings that began in a court or tribunal to any court that has jurisdiction to deal with the matter. We have already stated that the dispute is live before the High Court. We also note that the application for contempt was promptly filed by the appellant both at the High Court and at the Court of Appeal once the appellant noticed that the respondents had altered the obtaining status.

130. For these reasons we direct the High Court to, on the basis of our finding on contempt, issue suitable punishment for contempt of court on priority basis as it deals with the petition pending before it on its merits. We note that there is a pending application before the High Court for contempt arising out of what we have now set out to be the status quo. The said respondents can only appear at this point before the High Court to purge the contempt before they can be allowed audience before the court, now seized with the matter. This is not novel.'

5. The Supreme Court went on to issue the following orders:

' 134. Consequently, upon our conclusion, we order that:



- i. The appeal dated August 20, 2020 be and is hereby allowed;
- ii. The judgment and orders of the Court of Appeal in Civil Appeal No 163 of 2016 delivered on the July 10, 2020 be and are hereby set aside in entirety;
- iii. The High Court orders of June 29, 2016 be and are hereby reinstated and the court do consider the consequences of any disobedience of those orders;
- iv. The matter be and is hereby remitted to the High Court for disposal of the amended petition dated June 20, 2016 pending before the High Court on priority basis; considering the age of this matter;
- v. Costs in the Court of Appeal and in this court are awarded to the appellant as against the 1st and 2nd respondents.'

6. The late Justice JL Onguto in his ruling dated June 29, 2016 in the matter determined as follows:

- ' 133. The application dated June 14, 2016 succeeds on the following terms:
- 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 February 2, 2006.
 - b. The order herein above shall be applicable to the 1st Respondent's products but shall not apply to product known as Keg Beer.
 - c. Each party shall bear its own costs of the application and is at liberty to apply.'

7. Since the matter was remitted back to this Court, the parties have filed a number of applications. The same are outlined below for ease of reference.

2.

- (i) Notice of Motion dated February 23, 2023 filed by the 2nd Respondent seeking clarity on the orders of June 29, 2016.
- (ii) Notice of Motion dated February 23, 2023 filed by the 1st & 4th Respondents also seeking clarity on the orders of June 29, 2016.
- (iii) Notice of Motion supposedly dated March 8, 2023 filed by the petitioner seeking to have the two applications dated February 23, 2023 expunged from the record.
- (iv) Application seeking summons to attend Court for contempt punishment dated April 11, 2023 filed by the petitioner.



- (v) Notice of Motion dated April 11, 2023 filed by the Petitioner seeking compensation from the contemnors in line with the Supreme Court Judgment.
- (vi) Notice of Motion dated April 25, 2023 filed by 1st, 2nd & 3rd Contemnors (seeking orders of stay of proceedings in respect of the two applications dated April 11, 2023 pending the determination of their application for Review by the Supreme Court.

9. In my view a number of issues arise from the foregoing account. To begin with, the Supreme Court in its decision was clear that this Court is to punish for contempt of Court as attributed to the respondents. In its judgement, the Court indicated that the respondents had altered the obtaining status as preserved by the court order dated June 29, 2016. As such the Court directed that the said respondents could only appear before this Court on the basis of purging the contempt before being granted audience. Within the setting of the Supreme Court holding it is manifest that the respondents were jointly cited for contempt.
10. On the other hand the scope of the orders dated June 29, 2016 by the High Court stated that ‘the order herein above shall be applicable to the 1st Respondent’s products but shall not apply to the product known as Keg Beer’. I am of the view that while the High Court Order specified the scope of the conservatory order to be the 1st respondent’s products the Supreme Court’s pronouncement found that the respondents had collectively altered the obtaining status with reference to the conservatory orders.
11. Against this background, the 1st, 2nd, 3rd and 4th respondents with a view to purge the contempt filed their applications dated February 23, 2023. This was objected to by the petitioner who asserted that they have no audience before this Court before purging the contempt. The 1st, 2nd and 3rd alleged contemnors in addition sought stay of the instant proceedings pending hearing and determination of Nairobi Supreme Court Application No E006 of 2023 Andrew Kilonzo & 2 others v Bia Tosha Distributors Limited & others. A perusal of the affidavits in addition indicates a divergence of views in the manner the orders should be complied with.
12. Bearing this in mind, I find that the key issue revolves around the interpretation of the cited Court Order to enable the Respondents purge the contempt. This ultimately is the substratum of all the applications herein. It is perceivable that the parties have different perspectives on the meaning and scope of the said Court order. This as a result becomes problematic in attaining compliance.
13. In light of this, I take it that the manner of compliance is an issue that ought to be addressed first so as to allow the respondents purge the contempt. Palpably this Court is the one charged with the mandate to interpret the same as the orders originated herein and the Supreme Court in its judgement referred the matter herein for disposal and determination.
14. From the foregoing, I find that staying of the instant proceedings pending the applications before the Supreme Court would not be prudent. At this juncture, this Court’s directions (after considering the parties pleadings and submissions on the applications filed to appreciate the matter fully) are imperative so as to allow the parties comply with the Supreme Court orders without further delay.
15. I therefore issue the following directions:
 - i. Parties to file responses to the application dated March 8, 2023 within 7 days.



- ii. Brief submissions limited to 6 pages to be filed and exchanged within 14 days. The petitioner to have the first 7 days.
- iii. Parties to file responses to the rest of the applications within 14 days.
- iv. Directions on the applications dated 23rd February 2023 have been complied with. The Court will hear the parties on the applications dated February 23, 2023 and March 8, 2023 simultaneously, on priority basis.
- v. Highlighting of submissions on the same shall be on June 5, 2023.
- vi. Parties who have already complied should, await the hearing date.

16 Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 28TH DAY OF APRIL 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

