REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 135 OF 2011

TWIGA CHEMICAL INDUSTRIES LIMITED ……..…….. PLAINTIFF

VERSUS

ROTAM LIMITED ……..…….. DEFENDANT

R U L I N G

The application before the Court is made by a Notice of Motion dated 7th April, 2011, and taken out under **Section 3A** of the **Civil Procedure Act; Order 26 Rule 1** of the **Civil Procedure Rules; Section 7 (1)** of the **Arbitration Act** and all other enabling provisions of the law. The Applicant thereby prays for orders that:-

1. … (spent).

2. This Honourable Court be pleased to issue an order of temporary injunction restraining the Defendant from terminating the Distribution Agreement dated 10th April, 1997 pending

hearing of this application.

3. This Honourable Court be pleased to issue an order of injunction restraining the Defendant from appointing another distributor and/or agent of its products solely distributed by the Plaintiff in Kenya, Tanzania, Zambia, Malawi and Uganda, pending the hearing and determination of this application.

4. This Honourable Court be pleased to refer this matter to arbitration in accordance with Clause 13 of the Distribution Agreement dated 10th April, 1997.

5. Prayers 2 and 3 above be granted pending the intended arbitral proceedings and its final award.

6. This Honourable Court be pleased to order the Defendant to deposit into Court security for costs of the intended arbitration.

7. Costs of this application be borne by the Defendant.

The application is supported by the annexed affidavit sworn on 7th April, 2011, by Hezekiah Mwangi Macharia, the Director of Manufacturing and Human Resources of the Plaintiff Company, and is based on the following grounds:-

(a) That on 10th April, 1997 the Plaintiff entered into an exclusive distribution agreement with the Defendant to be renewed annually. The Defendant appointed the Plaintiff as the sole/exclusive distributor of the Defendant's products in Kenya, Tanzania, Zambia, Malawi and Uganda.

(b) That the Distribution Agreement provided that it was the Distributor's duty to actively and diligently promote the sale of the products in the said territories. Pursuant to this, the Plaintiff exclusively established, built and sustained a market for the Defendant's products in the territories.

(c) That due to the extensive and admirable work by the Plaintiff, the Distribution Agreement has been renewed every year for the last fourteen (14) years and the original Distribution Agreement has been revised severally to expand the distribution territory and increase the number of products distributed by the Plaintiff.

(d) That after the Plaintiff had pain strikingly built and sustained a market for the Defendant's products, the Defendant proposed that the parties enter into a new distribution agreement. The terms of the proposed Distribution Agreement only protect the interests of the Defendant and therefore were not agreeable to the Plaintiff.

(e) That in the effort to strong-arm the Plaintiff into accepting the new Distribution Agreement, the Defendant's via a letter dated 7th January, 2011, gave a Notice of Non-renewal of the original Distribution Agreement despite the fact that the Plaintiff had in no way conducted itself in a manner that would cause the Distribution Agreement to be terminated.

(f) That the Plaintiff has in fact for the last fourteen (14) years aligned its business practices towards exemplary performance of the Distribution Agreement. The Plaintiff has continued to invest heavily in the marketing and sale of the Defendant's product to the tune of Kshs.43,872,198/=, on the premise that the contract would continue to be renewed.

(g) That should the purported Notice of Non-renewal be allowed to stand, the Plaintiff will suffer massive losses on account of all the investments into the marketing and sale of the products it has made and will bring the business of the Plaintiff to a halt.

(h) That should the Defendant be allowed to appoint another distributor or agent it would be unjust and contrary to the principles of natural justice to allow another to benefit from intensive work the Plaintiff has put into marketing and selling the Defendant's products.

(i) That the Defendant is a foreign company which has no assets within Kenya. It is therefore only just and equitable that the Defendant be ordered to deposit security for costs with the Court pending arbitration of the matter.

(j) That the Plaintiff has a prima facie and sustainable case against the Defendant and should an injunction not be granted as prayed, this suit shall be rendered nugatory.

(k) That no prejudice would be occasioned on the Defendant should the orders sought be granted.

(l) That it is in the interest of justice that this application be allowed.

Opposing the application the Respondents filed a replying affidavit Sworn on 21st April, 2011 by Niu Ben Bin, the President (Manufacturing and Supply Chain) of the Defendant Company. In that affidavit, the deponent avers that the suit was instituted after the expiration of the 3 months' notice. It was therefore overtaken by events and is no longer maintainable as the distribution contracts have already been given out to other distributors. He further avers that the Defendant has not terminated the contract as alleged by the Plaintiff but has only chosen to exercise its right "not to re-new" the contract which right is unfettered and cannot be challenged in any way. Furthermore, "dispute" can only refer to a dispute concerning the performance and administration of the contract when the contract is still in force.

During the oral canvassing of the application, Mr. King'ara assisted by Mr. Kariuki appeared for the Applicant while Mr. Wananda appeared for the Respondent. After considering the pleadings and the respective submissions of Counsel, I find that there are three main issues to be determined. These are whether the Applicant is entitled to an injunction restraining the Respondent from terminating distributorship contracts and appointing someone else; whether the matter ought to be referred to arbitration, and whether an order ought to be made for security for costs.

Regarding the order for injunction, the principles governing the grant of interlocutory injunctions are firmly ingrained in **GIELLA v. CASSMAN BROWN & CO. LTD. [1973] E.A. 358**, in which the Court of Appeal observed that :-

"The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

Regarding the first condition, I note that Article 7 of the distribution agreement made between the parties is very significant in the context of the prayer for injunction. It provides for the duration of the agreement and is couched as follows:-

"ARTICLE 7. <u>TERM</u>

This Agreement shall come into force on the date first above written and, unless earlier terminated under the terms given in Article 9, remain in force for a period of one (1) year, and shall be automatically renewed and continued year to year unless either party gives to the other notice of non-renewal at least three (3) months before the end of the term then in effect provided that during the initial term of 1 year either party may terminate this Agreement by giving the other a two (2) month's written notice."

As there is an Arbitration Clause in this Agreement, I feel bound to be very economical with my words in respect of matters which might well be a preserve of the Arbitrator. Suffice it to say that according to the above Article, the parties were at liberty to bring to an end the distributorship agreement by complying with the requirements of that Article. Indeed, it is for this reason, I think, that the Respondents contend that they have not terminated the contract as alleged. All they did was to exercise their right not to renew the contract. In my view, I think that the Respondents are, *prima facie,* in the right inasmuch as the distributorship agreement was terminable and provided that it was terminated in accordance with the provisions of Article 7 (supra). For that reason, I would take the stand that the Respondents have a better case on that issue. Secondly, it is their contention that they have already awarded the distributorship to some third party/parties. Should that be so, it would not be proper for the Court to grant an injunction restraining the Respondents from terminating the distributorship contract and appointing somebody else in the place of the Applicants. Such a request would amount to asking the Court to issue an order in vain. For these reasons, I find that the Applicants have not made out a *prima facie* case for the grant of a preservation order.

If the Applicants had made out such a *prima facie* case with a probability of success, they would still have to contend with the second condition for the grant of an interlocutory injunction. That condition ordains that an interlocutory injunction will not normally be granted unless the Applicant might

otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. In the light of that condition, I note that in the last paragraph of the plaint that the Applicants pray that judgment be entered against the Respondent for –

(a) ***…***

(b) ***Special damages of Kshs.39,922,151/=.***

(c) ***General damages for loss of business and future expected earnings and indemnity for clientele.***

(d) ***Exemplary punitive and aggravated damages.***

(e) ***…***

These prayers suggest to me that by asking for damages, the Applicants themselves treat their alleged losses as quantifiable which further means that such losses may be compensated by damages. If so, the Applicants would not suffer irreparable injury which would not adequately be compensated in monetary terms by an award of damages. For that reason, the Applicants have not satisfied the second condition for the award of an interlocutory injunction. Against that background, I find that the balance of convenience lies against the grant of a preservatory injunction.

Regarding the issue as to whether this matter should or should not be referred to arbitration, I note that Article 13 of the Distribution Agreement between the parties specifically provides for arbitration. It reads as follows:-

"ARTICLE 13. <u>ARBITRATION</u>

In the event of any dispute arising out of or relating to this Agreement or in case of breach thereof the parties shall try in the first instance to arrive at an amicable settlement. Should this fail the dispute or breach shall be referred to and finally settled by arbitration by an arbitrator agreed by the parties. Failing such agreement the arbitrator shall be appointed by the Chairman of the Kenyan Branch of the Chartered Institute of Arbitrators. Such arbitration shall be held in Nairobi in accordance with the Arbitration Act of 1995 as amended from time to time (Cap. 49, Laws of Kenya) and all rules prevailing thereunder. The Arbitrator shall have power to rule on his own competence and on the validity of the Agreement to submit to arbitration. The costs of Arbitration shall be borne by the party against whom the judgment is entered and the ruling of the arbitrator shall be final and binding on both parties."

I understand it to be the Respondent's case that this matter should not be referred to arbitration for two reasons. First, it was the intention of the parties that any matters in dispute regarding the agreement

between them were to be referred to arbitration during the subsistence of the agreement. Secondly, since the agreement between the parties has already been terminated, there is nothing to be referred to arbitration. It is my humble view that this point in itself falls within the purview of the arbitrators' jurisdiction and that it ought to be determined by the arbitrator. The Clause referring disputes to arbitration ought to be respected by observance and not in breach.

Finally is the issue as to whether the Applicants are entitled to security for costs. The prayer for costs is made by the Applicants under **Order 26 Rule 1** of the **Civil Procedure Rules.** That Rule states as follows:-

"1. In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party."

Without going into unnecessary details, it is obvious from the wording of this Rule that it provides for security for costs, not for the Plaintiff, but for the Defendant. As the Applicants in this matter are also the Plaintiffs, they are not entitled to security for costs under this Rule and their requests accordingly fails.

By reason and wholly on account of the foregoing, I find that the application for an interlocutory injunction pending arbitration is not deserved. This matter is accordingly referred to arbitration and the costs of this application shall be costs in the cause.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 20th day of December, 2011.

L. NJAGI

JUDGE