**Kenya Breweries Ltd v Kiambu General Transport Agency Ltd**

**Division:** Court of Appeal of Kenya at Nairobi **Date of judgment:** 11 August 2000 **Case Number:** 9/00 **Before:** Gicheru, Akiwumi and Lakha JJA **Sourced by:** LawAfrica **Summarised by:** C Kanjama *[1] Contract – Variation of terms – Estoppel – Whether subsequent letter varied terms of written contract – No consideration – Whether subsequent letter would found cause of action.*

**JUDGMENT**

**GICHERU JA:** Addressing this Court on 28 June 2000, Mr *Gatonye* who appeared with Mr *Kimani* for the Respondent submitted that the heart of the dispute between the parties to this appeal was the letter dated 17 October 1980 and addressed to Honourable JN Karume, Member of Parliament (PW 1) by the Appellant’s managing director, Mr BH Hobson. That letter was tendered in evidence in the superior court and marked exhibit 4. Its contents which were on a paper bearing the letterheads of East Africa Breweries Limited were as follows: “The Hon JN Karume MP Kiambu General Transport Agency Ltd P O Box 134 Kiambu Dear Hon Karume I refer to your letter of 4 November 1978 addressed to our Chairman. Delay in replying to it due to oversight on our part is regretted. As you know, we have a standard contract for all our distributors. Generally speaking, we do not take away business from our distributors except in the cases where they are unable to distribute our products for one reason or the other. We believe in keeping our distributors for as long as possible so long as their performance remains satisfactory. It sounds as if you are concerned that your distributorship could be terminated without notice. This is not the case. You have been our long serving distributor and we have had a very happy association. Consequently, I would give assurance that so long as you continue to perform satisfactorily we have no intention of terminating your agency. In the unlikely event of circumstances arising for us to want to terminate your services, we would no doubt give you a reasonable notice and the ten years would be reasonable to enable you to make the necessary adjustments in your businesses. I sincerely hope that that would not be necessary as it is not even contemplated. Yours sincerely, BH Hobson Managing Director”. In his evidence in the superior court in connection with this letter, PW 1 who has been one of the directors of the Respondent since its inception had this to say: “In 1980, Hobson was managing the breweries. He knew me as a customer. I look at page 3 clause 17 in the 1980 agreement. The termination period was 12 months. I produce the agreement as exhibit 3. I was happy with the termination clause at that time. After awhile I went to see Hobson the managing director. I saw him and we discussed as we had worked for so long. I thought the period was too short. I said so, because since 1958, I had invested heavily and the time could not allow me to dispose of the motor vehicles. I put to him my problem and first he said he was happy with our relation. He told though (the) agreement was 12 months or 1 year, nobody from Kenya Breweries could come and tell me you go because of the long period. That 12 months was only a formality. He told me that nobody could terminate my business of 12 years. I told him to give me a note. I look at a letter dated 17 October 1980. This letter was written to me by Mr Hobson. He told me that considering all those years, the only reasonable period I could be given was 10 years”. PW 1 further testified that in 1980 BH Hobson was the managing director of the Appellant and exhibit 4 was written in connection with his distribution agency. He also said that it was possible that he might have written to Mr Hobson on 4 November 1978. The Respondent was incorporated on 23 December 1966 with two subscribers, one of whom was PW 1 who was and still is one of its directors. Prior to its incorporation, PW 1 was trading in beer distribution in the name and style of Kiambu General Transport Agency and his first letter of appointment as a distributor for the products of Allsop (EA) Limited and dated 28 February 1963 was from the Brewers’ Association of East Africa amongst whose members was East African Breweries Limited which later became Kenya Breweries Limited and has now reverted back to its original name of East African Breweries Limited. He confirmed his acceptance of the terms of that letter of appointment by his endorsement on it on 1 March 1963. That letter was tendered in evidence in the superior court and marked exhibit 2. Clause 9 of the eleven terms in this exhibit read as follows: “9 This appointment can be terminated by either party giving the other one month’s notice in writing, except in the event of non-compliance with the above terms in which case either party shall be entitled to terminate the arrangements immediately”. These arrangements were superseded and revoked by the Appellant’s letter of appointment to the Respondent as a distributor of its beer products, namely, Tusker, Pilsner, White Cap, City, Tusker Export and Guiness Stout in almost the whole of the old Kiambu District. This letter was dated 12 June 1980 and was received by the Respondent on 25 August 1980. PW 1 as a director of the Respondent accepted on its behalf the appointment as the Appellant’s distributor of its beer products on the terms and subject to the conditions set out in that letter. That letter was tendered in evidence in the superior court and marked exhibit 3. Clause 17 of this exhibit stipulated that: “17 Subject to the provisions of clause 18 hereof, your appointment, hereunder will remain in force until termination by not less than twelve (12) months notice, expiring on the last day of any calendar month, served in writing by either party on the other”. Clause 18 related to the Respondent’s distributorship being terminated for breaches of certain terms and conditions set out in exhibit 3 and clause 19 of the said exhibit clearly stated that: “This letter of appointment supersedes and revokes any and every letter or agreement of similar nature previously accepted by you or entered into between us”. It would seem therefore from the foregoing clauses that after exhibit 3 superseded and revoked the arrangements in exhibit 2, save for breaches of certain terms and conditions set out in the former exhibit, termination of the Respondent’s distributorship was otherwise well taken care of, for in terms of clause 17, it was to remain in force until a notice in that regard of not less than twelve (12) months expiring on the last day of any calendar month was served in writing by either party to the distributorship agreement on the other. It would appear to me therefore that the anxieties referred to in exhibit 4 that the Respondent’s distributorship of the Appellant’s beer products could be terminated without notice cannot have been in connection with exhibit 3 for a termination notice of not less than twelve (12) months expiring on the last day of any calendar month as is referred to above could well have been more than twelve (12) months and thus take care of the parties’ long and happy relationship as testified to by PW1 in his evidence in the superior court and as is referred to in exhibit 4. In referring to PW 1’s letter of 4 November 1978, it looks like the focus of exhibit 4 was exhibit 2 wherein the distributorship of Kiambu General Transport Agency could be terminated by its being given one (1) month’s notice in writing or without notice in the event of non-compliance with the terms of the said exhibit. When PW 1 was re-examined in the superior court by counsel then appearing for the Respondent herein in that court, Mr *Kimani*, who is now being led by Mr *Gatonye* for the same party in this appeal, had this to say in relation to exhibits 3 and 4: “I am looking at exhibit 3 – agreement dated 12 June 1980. I see clause 17. It provided a period notice of 12 months. I was not satisfied with that period notice, that’s why I went to the Defendant’s office and was given 10 years. That agreement was altered by a letter exhibit 4. To date the period notice I know of to terminate any distribution agreement is 10 years. That letter was signed by a senior person BH Hobson, the managing director, who later became chairman of KBL. Exhibit 4 came from the Defendant company and was signed by Hobson who was with KBL for over 40 years. Exhibit 4 was written subsequent to my negotiation with Hobson. Our discussion related to my dissatisfaction with the period notice. We discussed and I said that because I had invested heavily a period of 12 months was not enough. I am looking at exhibit 3. KBL used to be EABL before it changed its name. The Defendant used to use these letterheads”. According to PW 1, exhibit 4 was subsequent to his negotiation with BH Hobson over the period of notice stipulated in clause 17 of exhibit 3. Peter Gachathi Wanjama (DW 3), the Appellant’s marketing director, however, when cross-examined in the superior court by Mr *Oraro*, the leading counsel then appearing for the Respondent in that court, over exhibit 4 testified that the same was a response by BH Hobson to a letter dated 4 November 1978 addressed to the then chairman of East African Breweries Limited, Mr KSN Matiba. It re-assured PW 1 that his distributorship agreement would not be terminated without notice and that he would be given reasonable notice. At the hearing of this appeal on 26, 27, 28, 29 and 30 June 2000, the submission of counsel for the Appellant, Mr *Kilonzo*, on exhibit 4 was that it made no reference to Exhibit 3. Indeed, according to him, it related to exhibit 2 which was then in force when the anxieties contained in it were expressed by PW 1. It had no relevance to exhibit 3 and was not a variation of the same for uncertainty. It was not submitted to the Appellant’s board of directors for approval. According to counsel, exhibit 4 was no more than a letter of comfort from one good friend to another. Mr *Gatonye*’s submission on this document, however, was that it constituted a variation of exhibit 3 so that the Respondent was entitled to a period of 10 years’ notice from the Appellant before the termination of its distributorship of the Appellant’s beer products. It was a binding contract between the parties and the consideration on the part of the Respondent was the undertaking to perform satisfactorily in its distributorship. Exhibit 4 changed the period of notice of termination in clause 17 of exhibit 3 from 12 months to 10 years. Thus, the parties’ business and legal relationship was given effect by exhibit 4 as they so intended. Exhibit 2 was signed for the Brewers’ Association of East Africa and on the acceptance of its terms and subsequent by PW 1 on behalf of Kiambu General Transport Agency, it constituted a binding contract between the parties thereto. Similarly, exhibit 3 was signed for the Appellant by the latter’s sales and marketing manager and on the acceptance of its terms and conditions set out therein coupled with the subsequent endorsement by PW 1 on behalf of the Respondent, it too constituted a binding contract between the Appellant and the Respondent. Exhibit 4 which from the date-stamped on it was received by PW 1 on 22 October 1980 though authorised on a paper with East African Breweries Ltd letterheads by BH Hobson, managing director, it is noteworthy that the latter neither authorised it for East African Breweries Ltd nor on behalf of the Appellant. As Mr *Kilonzo* for the Appellant pointed out in his submission on it, it may well have been no more than a letter of comfort from one good friend to another. A variation of an existing contract involves an alteration as a matter of contract of the contractual relations between the parties. Hence, the agreement for variation must itself possess the characteristics of a valid contract. To effect a variation therefore, the parties must be *ad idem* in the same sense as for the formation of a contract. Indeed, the agreement for variation must further be supported by consideration – see *Halsbury’s Laws of England* (4 ed) Volume 9 at 391 paragraph 569. If the agreement is a mere *nudum pactum* it would give no cause of action for breach particularly if its effect was to give a voluntary indulgence to the other party to the agreement – see the voluntary indulgence to the other party to the agreement – see the case of *Vanbergen v St Edmunds Ltd* [1933] 2 KB 223. Although Mr *Gatonye* for the Respondent submitted that the undertaking by the Respondent to perform satisfactorily in its distributorship of the Appellants’ beer products constituted the consideration on its part in relation to exhibit 4, clause 18(b)(v) of exhibit 3 required the Respondent to do so. Indeed, the same was couched in the following terms: “18 (*b*) Your appointment as our distributor may be terminated forthwith upon service on you of notice in writing to that effect … If in the opinion of KBL as it may in its absolute discretion determine you are not maintaining sufficient stocks as may be specified by KBL in its absolute discretion of our products to adequately supply your area with our products within 14 days of the receipt by you of a notice in writing from KBL specifying the stocks of our products to be carried by you”. Clearly the undertaking by the Respondent as is referred to above constituted no consideration on its part in relation to exhibit 4. In its form, the said exhibit was no more than to give the Respondent a voluntary indulgence. In any event, from what I have attempted to outline above, it had no bearing on exhibit 3. If anything, it looked towards exhibit 2 which later was abrogated by exhibit 3. Exhibit 3 was superseded and revoked by the letter dated 18 July 1996 addressed to the Respondent by the Appellant. That letter appointed the Respondent as a distributor of the Appellant’s products with effect from the date above-mentioned in certain areas of Kiambu District. That letter generated some controversy between the Respondent and the Appellant and eventually sparked off the Respondent’s claim against the Appellant. Its terms and conditions had after some discussion between the Respondent and the Appellant been accepted and endorsed by PW 1 on behalf of the Respondent. It was tendered in evidence in the superior court and marked exhibit 6. Clause 19(a) of that exhibit provided as follows: “19 (a) This Agreement may be terminated by either party giving to the other ninety (90) days notice”. Pursuant to that clause, the Appellant by a letter dated 5 March 1997 and addressed to the Respondent gave to the latter ninety (90) days’ notice of termination of their distributorship agreement – exhibit 6. This letter was tendered in evidence in the superior court marked exhibit 7. At the expiry of that notice on 2 June 1997 the aforementioned distributorship agreement was terminated. As I indicated at the beginning of this judgment, the dispute between the Appellant and the Respondent was predicated on exhibit 4. Indeed, this exhibit was the fixed point upon which the judgment of the superior court was grounded. Without reliance on it, that judgment which awarded the Respondent damages in the sum of KShs 241 586 711-58 together with costs and interest would tumble down like a house of cards. If as I have held this document had no bearing on exhibit 3, then, it was of no relevance to the execution of exhibit 6 and all the energy expended and the expense incurred by the parties to this appeal in relation to the said document was sadly wasted. In my view, the Respondent could not lay a claim against the Appellant based on Exhibit 4 for the termination of its distributorship agreement with the Appellant in terms of exhibit 6. Having come to this conclusion, I consider that to engage in any further debate in this appeal is superfluous and I do not intend to do so. Consequently, I would allow the Appellant’s appeal, set aside the judgment and decree of the superior court and award the costs of this appeal and of the trial in the superior court to the Appellant. As Akiwumi JA agrees, there will be a majority judgment of the Court in these terms.