



THE SUPREME COURT OF KENYA
JOVET (KENYA) LIMITED VS BAVARIA N.V.
SC PETITION NO. E039 OF 2024
DATE OF JUDGMENT: 16th MAY 2025
MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Order: Appeal Dismissed

Background

The appellant, Jovet (Kenya) Limited, is a limited liability company incorporated in Kenya and undertaking the business of distribution of certain beverages in Kenya. The respondent (formerly Bavaria N.V. and now Swinkels Family Brewers N.V.) is a company incorporated in the Netherlands and describes itself as an independent brewery in Netherlands and produces and export alcohol-free and specialty beers to various countries around the world including Tanzania and Kenya. The dispute concerns the importation, distribution and marketing of the various alcoholic and non-alcoholic drinks “under the Bavaria Label N. V. Holland (Bavaria)” in Kenya with the appellant contending that it had sole rights to distribute those drinks and that the respondent breached their unwritten agreement when it improperly terminated the same by a notice of 28th August, 2015; a claim the respondent, Bavaria continues to deny.

The Court of Appeal upheld the High Court’s finding that the appellant had not proved its claim on the right to payment of goodwill emanating from the alleged distribution arrangement for the respondent’s beverages by the appellant. The appellant in that regard urged this Court to interpret the definition of goodwill, determine whether it constitutes property that is protectable under Article 40 of the Constitution and assess whether the trial court and the Court of Appeal erred by overlooking the constitutional dimensions of the dispute, thereby infringing on its rights under Article 50 of the Constitution.

The Court delineated the following issues for its determination:

- i. Whether this Court has jurisdiction to hear and determine the appeal.***
- ii. Whether the superior courts below were duty-bound to address all the issues raised by the appellant, and whether their failure to do so amounted to a violation of the appellant’s rights under Article 50 of the Constitution.***
- iii. Whether goodwill is intangible property and ought to be protected under Article 40 of the Constitution.***
- iv. Whether the appellant is entitled to the reliefs sought including costs.***

Issue 1; One of the reliefs sought before the High Court was a declaration that the goodwill allegedly generated, acquired, and developed by the appellant in relation to the respondent’s products in Kenya constitutes property under Article 40 of the Constitution. The appellant further invoked Article 50 of the Constitution, contending that the superior courts failed to address the constitutional issues raised in the original petition. In our view, these two matters constitute constitutional questions that form the basis of the present appeal and we therefore have the jurisdiction to determine them.

Issue 2: The Court finds that the transfer of the dispute from the Constitutional and Human Rights Division to the Commercial and Admiralty Division did not divest the court of its jurisdiction to hear and determine the constitutional issues raised in the matter. The reliefs pleaded by the appellant, at the trial court and specifically a declaration that the goodwill it generated, acquired, and established in relation to the respondent's products in Kenya constituted property protected under Article 40 of the Constitution of Kenya called for an interpretation and application of applicable constitutional principles, if at all. Both the High Court and the Court of Appeal therefore fell into error by not considering and answering the constitutional issue(s) raised by the appellant.

Issue 3: Although goodwill is not strictly considered property in the usual sense, as it is intangible and merely incidental to real and tangible property, it is often more valuable than the tangible assets to which it is connected. In many cases, goodwill is the key factor that motivates individuals to purchase an established business, often at a price significantly higher than the actual value of its physical assets. For this reason, we hold that goodwill qualifies as property only when it is identifiable, whether independently or alongside other assets, and when a measurable value can be attributed to it. Accordingly, this form of goodwill is entitled to protection under Article 40 of the Constitution and we can only but conclude that goodwill constitutes a form of property that is capable of constitutional protection under Article 40 of the Constitution.

Issue 4: The appellants argument is that the absence of a contractual relationship does not preclude the court from addressing the constitutional issues raised and that the terms of trade amounted to an unconscionable bargain and were contrary to public policy. The Court finds that there was a clear agreement between the respondent and Jovet (Tanzania) Limited, which agreement was specific that the rights are neither assignable nor transferrable. This privity of contact limits contractual rights and obligations to the parties directly involved in the agreement. A sub- distributor cannot therefore claim goodwill from the parent company unless explicitly stated in the agreement. Demonstrating a direct working relationship does not necessarily imply an agency relationship by analogy. An agency relationship often requires a principal to authorize an agent to act on his behalf, creating legal authority, a direct working relationship, while conversely, demonstrating a working arrangement does not inherently involve this delegation of authority or legal power.

After reviewing the agreement and the nature of the working relationship between the appellant and the respondent, we find no evidence that would lead us to make any finding that the terms of trade regarding distribution were arbitrary, unfair, unconscionable, or made in bad faith so as to contravene public policy in Kenya. The appellant was fully aware that the agreement was the basis of its engagement with the respondent, and the terms were unambiguous. Any claims involving the respondent and Jovet Tanzania Limited could only arise under and be governed by the terms of the Distribution Agreement and nothing else. Accordingly, the appellant has failed to demonstrate a violation of Articles 10, 19, and 27 of the Constitution. And even if the terms were to be viewed as potentially unfair under the agreement, we find no nexus or proximate connection between the respondent and the alleged constitutional violations. The respondent has also not been shown in any way to have breached its terms of the Distribution Agreement to attract any legal sanction including any finding that it breached any rights under Article 40 of the Constitution.

Consequently, the final orders are as follows:

- i. The Petition of Appeal dated 22nd November 2024 and filed on 25th December 2024 is hereby dismissed.***
 - ii. There shall be no orders as to costs.***
 - iii. We hereby direct that the sum of Kshs. 6,000/= deposited as security for costs upon lodging of this appeal be refunded to the appellant.***
-