REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
[CORAM: NYAMWEYA, ALI-ARONI & MATIVO JJ. A]

CIVIL APPEAL NO. E403 OF 2020
CONSOLIDATED WITH
CIVIL APPEAL NO. E404 OF 2020
BETWEEN

HEINEKEN EAST AFRICA IMPORT
COMPANY LIMITED……..1ST APPELLANT
HEINEKEN INTERNATIONAL B.V……..…2ND APPELLANT

VERSUS

MAXAM LIMITED……..……RESPONDENT

(Appeals from the Judgment and decree of the High Court of Kenya at Nairobi (A. Makau J.) dated and delivered on 29th July 2019
in
Nairobi Civil Suit No. 29 of 2016)

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JUDGMENT OF THE COURT

1. On 21st May 2013, Heineken East Africa Import Company Limited wrote a letter to Maxam Ltd, appointing it as its exclusive distributor of Heineken products in Kenya with effect from 1st May 2013. The terms of the appointment were contained in an agreement incorporated in the said letter and schedules attached thereto (hereinafter referred to as the" Kenyan Distribution Agreement"). By a letter dated 28th February 2023 Heineken International B.V, acting on behalf of Heineken East Africa Import Company, also appointed Modern Lane Ltd, trading as Maxam Ltd, to be the distributor of Heineken Lager in Uganda as from 1st February 2012, pending the preparation of a formal distribution contract. Similarly, by a letter dated

11th August 2014 Heineken Brouwerijen B.V wrote a letter to Olepasu Tanzania Ltd, confirming that the latter was the current importer of Heineken Lager beer to Tanzania, and that the relationship started in April 2012.

2. The said business relationships proceeded as set out in the respective agreements until 27th January 2016, when Heineken International B.V, (hereinafter "Heineken B.V") on behalf of Heineken East Africa Import Company Limited (hereinafter "Heineken E.A") and on "*a without prejudice*" basis, wrote a letter to Maxam Ltd stating as follows:

> ***"We hereby give maximum limited notice, that pursuant to clause 17 of the Kenyan Distribution Agreement, HEAIC will terminate the Kenyan Distribution Agreement with effect from 1st May 2016 (the third anniversary of the Effective Date). Please note that the provisions of clause 21 of the Kenyan Distribution Agreement shall apply on termination, and that the Maxam Tanzania export letter will terminate on the same date."***

3. On 5th February 2016, Maxam Ltd, Modern Lane Ltd, and Olepasu Tanzania Ltd filed a suit in the High Court of Kenya at Nairobi by way of a plaint of the same date against Heineken B.V, Heineken Brouwerijen B.V and Heineken E.A. from which this appeal originates. We will however, in this appeal, limit ourselves to the Kenyan Distribution Agreement entered into between Heineken E.A and Maxam Ltd, and the suit filed therefrom by Maxam Ltd, for the reason that during the pendency of the proceedings in

the High Court, Modern Lane Ltd and Olepasu Tanzania Ltd withdrew their respective claims, while Maxam Ltd also withdrew its claim against Heineken Brouwerijen B.V. The plaint was accordingly amended on 12th May 2016 and Re-amended on 18th December 2017, leaving Maxam Ltd as the sole plaintiff as against Heineken E.A and Heineken B.V.

The Case by Maxam Ltd

4. The case by Maxam Ltd was that the termination notice was illegal, unprocedurally issued, invalid, null and void for the following reasons:
   a) The notice was issued on a "without prejudice" basis meaning therefore, that it had no legal implications as regards Clause 17 of the Kenyan Distribution Agreement between Maxam Ltd and Heineken E.A.
   b) There was no privity of contract between Maxam Ltd and Heineken B.V. which issued the purported termination notice since the Kenyan Distribution Contract was exclusively between Maxam Ltd and Heineken E.A.
   c) In light of the above, the three (3) months termination notice under the Kenyan Distribution Agreement was not available to Heineken E. A and Heineken B.V. since no legally binding notice has been issued as required by law and the subject agreement.

5. Additionally, that Heineken E.A and Heineken B.V. had not given any reasons whatsoever for the termination of the agreement. Maxam Ltd

further claimed that following its appointment as the exclusive distributor of the products of Heineken E.A, it embarked on setting up elaborate infrastructure so as to fulfil and/or discharge its obligations under the agreement, and particularised the financial investments it had made in its plaint. In addition, it contracted third parties including landlords in respect of warehouses, sub-distributors for the products, and hiring of lorries for the delivery and transport of the products. That as a result, the market for Heineken products in Kenya expanded and grew significantly leading to the profitability of the business for both parties. Maxam Ltd tabulated the evaluation of their business as at the date of filing suit using various valuation methods, and averred that the average valuation from the said methods was Kshs 1,799,978,868/=, and claimed that it stood to lose the value of its business if the Kenyan Distribution Agreement was allowed to terminate without compensation. As such, any purported termination of the contracts without any valid, genuine, and viable reason exposed it to substantial loss and damage in its own accord and with regards to its liabilities to the third parties and thereby has serious legal and financial ramifications and consequences.

6. Furthermore, subsequent to the filing of the suit, the trial Court, ***(E. Ogola J.)*** issued orders on 26th April 2016 prohibiting and restraining Heineken E.A and Heineken B.V. from *inter alia* terminating the distribution agreement dated 21st May 2013 between Maxam Ltd and Heineken E.A

relating to the distribution of Heineken Beer brand lager in Kenya, pending the hearing and determination of this suit. That the said orders were vacated by the High Court on 31st July 2017, and immediately thereafter, Heineken E.A and Heineken B.V. proceeded to appoint one of Maxam Ltd's sub-distributors as their distributor, thereby entirely circumventing Maxam Ltd's exclusive distributorship role under the Kenyan Distribution Agreement, and altering the subsisting relationship that Maxam Ltd had moved to Court to protect.

7. Maxam Ltd further pleaded that by a ruling delivered on 28th August 2017, the High Court (***J. L. Onguto J.)*** reinstated and extended the interim orders of injunction earlier issued on 21st April 2016, save for the exclusivity clause which was vacated in view of the appointment of a new distributor by the Heineken E.A and Heineken B.V. Maxam Ltd averred to the subsequent actions by Heineken E.A and Heineken B.V. of appointing additional distributors including its customers, thus greatly reducing its margins and supply of products; and of Heineken E.A and Heineken B.V. personally selling and distributing the Heineken Lager beer brand directly to the market at a lower price than that allowed it, in a scheme to circumvent the interim court orders and stifle Maxam Ltd's business. In addition, that arbitrarily and without any consultation, and by a notice dated 20th September 2017 and took effect on 20th October 2017, Heineken E.A and Heineken B.V. increased Maxam Ltd's buying price in respect of Heineken

products and while reducing the recommended selling price, thus effectively terminating its business and distributorship role in breach of the distribution agreement and the interim orders that were in place. Maxam Ltd asserted that this action was exploitative as it left it with little or no profit margins, nor recovery of its business costs, and was being done by Heineken E.A and Heineken B.V. to unfairly compel it to capitulate to the illegal termination notice.

8. It was thus claimed by Maxam Ltd that its cost prices were now at par with the prices available to their reseller customers, which was not the case before the order of 28th August 2017, and consequently, that it suffered substantial loss on decreased volumes of sale totalling to Kshs 11,495,674.00/-; as well as loss of profits totalling to Kshs 5,116,514.00/-, which losses were particularised in the plaint as arising between August 2017 and November 2017.

9. Lastly, Maxam Ltd pleaded that the conduct of Heineken E. A and Heineken B.V. of offering lower market prices to other distributors of the Heineken Lager beer, issuing higher market prices to it on the same products and arbitrarily reducing its approved margins was discriminatory and offended the provisions of Article 19 and Article 27 (2) of the Constitution, as there was no rationale of the disparate treatment of persons and business in the same category and situation. Additionally, the actions by Heineken E. A and

Heineken B.V. were oppressive, unreasonable and they were not acting *bona fide.* Further, the constitutional requirement to act in good faith and the contractual underpinnings of their arrangement precluded Heineken E.A and Heineken B.V. from being distributors themselves, from reducing Maxam Ltd's stock, and from selling Heineken Lager products to other distributors at lower market prices than those approved for Maxam Ltd, and that they thereby knowingly and discriminately drove Maxam Ltd out of business and subjected it to unjustifiable losses.

10. Maxam Ltd accordingly sought the following sets of relief from the High Court: Firstly, permanent injunctions restraining Heineken E.A and Heineken B.V. from terminating the distribution agreement dated 21st May 2013 between Maxam Ltd and Heineken E.A relating to the distribution of the Heineken larger beer brand in Kenya and from appointing any other distributor for the distribution of the Heineken larger beer brand in Kenya. Secondly, declarations that the notice of termination dated 27th January 2016 from Heineken B.V. to Maxam Ltd is unlawful, irregular, procedural and therefore null and void *ab initio*; that the Kenyan Distribution Agreement dated 21st May 2013 between Maxam Ltd and Heineken E.A is in full force and effect as per the terms and conditions set out therein; that the actions of Heineken E.A and Heineken B.V. aforesaid have infringed on Maxam Ltd's rights as protected by Article 19 of the Constitution; that conduct of Heineken E.A and Heineken B.V. of offering lower market prices

to other distributors of the Heineken Lager Beer, approving higher market prices to Maxam Ltd's approved margins is discriminatory and offends the provisions of Article 27 (2) of the Constitution; and that the pricing models imposed on Maxam Ltd by Heineken E.A and Heineken B.V. without prior consultation and/or express consent and which models were issued subsequent to the Court order of 28th August 2017 are exploitative, oppressive, unfair, null and void. Thirdly, special damages for loss of business of Kshs. 1,799,978,868.00 as tabulated in the plaint, and for loss of profits as tabulated in the plaint. Fourthly, an order directing the taking of accounts in respect of loss of profit occasioned to Maxam Ltd by reason of reduced volumes of sales as well as reduced profit margins from September 2017 until the hearing and final determination of this suit. Fifthly, general damages, and lastly, costs of the suit.

The Case by Heineken E.A and Heineken B.V.

11. In response, Heineken E.A and Heineken B.V. filed a statement of defence dated 17th February 2016 as amended on 31st August 2017 and re-amended on 26th March 2018. While admitting to a limited extent that on 21st May 2013, Heineken E.A and Maxam Ltd entered into a distribution agreement of Heineken lager beer in Kenya, it was stated that Heineken E.A is the marketing and sales company for the Heineken lager beer in Kenya, and that Heineken B.V. was a stranger to the contents of the plaint as it was not privy to the Kenyan Distribution Agreement. Furthermore, whilst Heineken E.A

was a wholly owned subsidiary of Heineken B.V and holding company for the majority of the Heineken Group's non Dutch business internationally, it was a separate legal entity from Heineken B.V.

12. Heineken E.A and Heineken B.V. stated that Maxam Ltd was expected to invest in infrastructure to fulfil its obligation under the Kenya Distribution Agreement, and while generally aware of the financial investments made by Maxam Ltd in its distribution business of Heineken lager beer in Kenya, they put it to strict proof as to the quantum of the alleged massive substantial financial investment. Additionally, that Maxam Ltd was aware, at the time of contracting, of the investment it would have to make to fulfil its part of the bargain of the contract and the commercial risks of its contractual obligations, and having considered the risk and benefits, willingly entering into the Kenya Distribution Agreement notwithstanding the termination clause. Heineken E.A and Heineken B.V denied that as a result of the Maxam Ltd's engagement and commitments in Kenya, the market for Heineken Products expanded and grew within a short period of time resulting in profitability. It was their assertion that any growth or profitability, if any, arose from the parties fulfilling their respective obligations under the terms of the Kenyan Distribution Agreement.

13. Heineken E.A and Heineken B.V. further asserted that they were strangers to any agreement that Maxam Ltd entered into with third parties. Heineken

E.A in addition stated that if any contracts were entered into with other parties as provided under clause 16 of the Kenya Distribution Agreement, Maxam Ltd did so as an independent contractor and it acted in its own name and for its own risk and account, without any right to represent Heineken E.A and Heineken B.V. Therefore, any liability arising as a result of the contracts with the third parties could not be extended to or claimed against Heineken E.A and Heineken B.V.

14. Heineken E.A and Heineken B.V. denied that Maxam Ltd stood to lose business and profits as tabulated in its plaint, and averred that the sums claimed were not supported by true facts neither were they a true reflection of its financial affairs or business, and that the astronomical amounts claimed appeared to be purely speculative and designed to unlawfully fetter Heineken E.A's right to terminate the commercial relationship. They further averred that Maxam Ltd deliberately foiled the growth of sales for Heineken lager beer in Kenya, to enable it continue enjoying warehouse facilities being paid for by Heineken E.A, and it was their case that on 27th January 2016, Heineken B.V., acting on behalf of Heineken E.A and in compliance with clause 17, 28 and 32 of the Kenya Distribution Agreement issued a notice of termination which was to take effect on 1st May 2016.

15. Furthermore, that under the terms of the Kenya Distribution Agreement, Heineken B.V. had no obligation when terminating the Kenya Distribution

Agreement to negotiate the terms of the termination with Maxam Ltd, or to compensate it following the termination, or to give any reasons for terminating the agreement, if the termination notice was issued within three months of the 3rd anniversary of the Effective Date of the agreement. Therefore, that the termination notice was rightfully issued by Heineken B.V., and that Maxam Ltd was legally represented during the extensive negotiations prior to the termination that culminated in a meeting held by the parties on 27th January 2016, and were fully aware that Heineken E.A and Heineken B.V. would be terminating the Kenya Distribution Agreement upon the expiry of the three (3) year period.

16. Heineken E.A also averred that Maxam Ltd was in breach of clause 26 of the Kenya Distribution Agreement by failing to engage its representatives in amicable dispute resolution deciding to move to Court which was the last resort, and placed a premium on clause 27 while completely disregarding clause 26. Thus, it could not seek to enforce an agreement that it had breached Further, that the "without prejudice" term on the termination notice dated 27th January 2016, was intended and limited to the compensation offer made in the said notice by Heineken B.V. on behalf of Heineken E.A, in the event that negotiations for compromise were unsuccessful, and it was not intended to be referred to any subsequent trial, nor did it in any way negate the notice of termination. If however the termination notice is found to be defective (which they denied), Heineken

E.A and Heineken B.V. averred that a fresh termination notice was issued to Maxam Ltd in accordance with the Kenya Distribution Agreement.

17. While admitting that interim orders were issued by the High Court (***Ogola J.)*** on 26th April 2016 restraining them from terminating the Kenya Distribution Agreement with Maxam Ltd, Heineken E. A. and Heineken B.V. asserted that ***Onguto J.*** on 31st July 2017 vacated the injunctive orders, thereby lifting the restriction prohibiting them from appointing additional distributors, and which effectively terminated the exclusivity of the Kenya Distribution Agreement. They further pleaded that after the vacation of the injunctive orders, Heineken EA was at liberty to appoint additional distributors, which they did by appointing ten (10) additional distributors, and that they were not privy to the alleged contractual arrangement between the said distributors and Maxam Ltd, and were strangers to the averment that the additional distributors were its key accounts and customers. Heineken E.A and Heineken B.V. averred that the appointment of additional distributors and acquisition of key accounts by Heineken E.A did not circumvent any Court order or the exclusive distributorship. Further, that on 28th August 2017, in recognition of the appointment of additional distributors, ***Onguto J.*** delivered a ruling reinstating the limbs of the injunctive orders which prohibited them from terminating the distributorship arrangement in Kenya, but vacated the limb that prohibited

the appointment of the new distributors in Kenya, which re-affirmed the liberty of the Appellants to appoint additional distributors.

18. Additionally, that the reduced margins and supply of products were an obvious consequence of the termination of Maxam Ltd's exclusivity in its distribution role. Heineken E.A and Heineken B.V. pleaded that they were strangers to the calculations provided by Maxam Ltd, and averred that the Kenya Distribution Agreement provided that no compensation was to be accorded to by Maxam Ltd when it was terminated, and that in the unlikely event that the Court found that the said agreement was in place, that the alleged profit and loss (which was denied) was suffered by Maxam Ltd was after appointed additional distributors after the vacation of the restriction imposed on them. It was their claim that before 20th October 2017, Maxam Ltd's profit margin was Kshs 1,640/- compared to Kshs 220/- for the additional distributors for the same product, and that the huge profit margin enabled it to offer lower prices to third parties, thereby discouraging additional distributors from buying products from Heineken E.A and effectively prohibiting other outlets from buying products from the additional distributors, thus crippling and paralysing the business operations of the entire supply chain.

19. On the price changes, Heineken E.A and Heineken B.V stated that Maxam Ltd started promotions designed at undercutting both the new distributors

and Heineken E.A, thereby changing the in-market pricing of Heineken Lager Beer with a view to maintaining *de facto* exclusivity in Kenya contrary to the Kenya Distribution Agreement, and a notice of breach of contract was consequently sent to it. Further, under the said agreement, Heineken E.A was entitled to vary the prices of Heineken Lager beer product and this was the reason for the letter requesting a price review by Maxam Ltd dated 8th September 2017. Subsequently, on 20th September 2017, Heineken E.A notified Maxam Ltd of the harmonization of the prices effective 20th October 2017, and that the price adjustment was necessary to ensure all distributors were placed on an equal footing and purchased products for the same price, in accordance with the Competition Act of Kenya.

20. Lastly, Heineken E.A and Heineken B.V maintained that they did not breach any law or contract between Maxam Ltd and themselves by appointing additional distributors, neither were they under an obligation to consult Maxam Ltd before reviewing its price. That it was therefore ridiculous for Maxam Ltd to aver that a legitimate action was exploitative, and besides, that the prices Maxam Ltd found exploitative were the same prices that attracted additional distributors to join the Heineken supply chain. Heineken E.A and Heineken B.V therefore denied infringing any of Maxam Ltd's constitutional rights, and claimed that the purchase and sale prices of Heineken beer lager products has been standardized and the

treatment afforded to all the distributors is similar. Therefore, that in the premises, Maxam Ltd was not entitled to the relief claimed or to any relief.

The High Court Proceedings

21. In the ensuing trial at the High Court at Nairobi, Maxam Ltd called two witnesses to testify, namely Mr. Ngugi Kiuna, its Managing Director (PW1), and its auditor, Mr. Daniel Kabiru (PW2). The gist of PW1's evidence was that he was a signatory to the Kenya Distribution Agreement entered into on 21st March 2013 which agreement was to last for three years; that he was invited to a meeting on 27th January 2016 and was told the purpose was to terminate the agreement; that he received an email terminating the agreement and a copy of a letter dated 27th January 2016 terminating the agreement. He relied on his witness statements dated 5th February 2016 and 21st May 2018 in which the claim was reiterated, as well as various documents that he produced as exhibits, including the subject agreement. On cross-examination, PW1 confirmed that the agreement was not registered and that stamp duty was not paid on it, and was examined on various clauses of the said agreement.

22. PW2 on his part testified that he received instructions in 2016 to undertake evaluation of maximum limited business based on the distribution of Heineken products. That he prepared the valuation and statement which was produced as an exhibit, and on which he relied as his evidence in chief.

On cross examination, he indicated that he did not see it necessary to compare Maxam Ltd with any another company as it was a trading company, and that he did not use the audited accounts but the management accounts in his evaluation.

23. Heineken E.A and Heineken B.V similarly called two witnesses to testify during the trial namely Uche Unigwe (DW1), the then general manager of Heineken E.A and Kish James S. Sentry (DW2), the director of legal affairs in charge of Africa and Middle East Region in Heineken B.V. The two witnesses both adopted their respective witness statements one dated 7th May 2017 and the other filed on 19th July 2017 as their evidence in chief. DW1 confirmed that he was a signatory to the Kenya Distribution Agreement entered into on 21st March 2013, and reiterated the averments made in the statement of defence filed by Heineken E.A and Heineken B.V, while relying on various documents that he produced as exhibits. He was cross-examined on the circumstances in which the agreement was made and terminated, and on various aspects of his statement.

24. DW2 on his part testified that he signed the notice of termination dated 27th January 2016 and explained the circumstances under which it was sent to Maxam Ltd. He maintained that the termination notice was correctly issued, and proffered reasons for this position that were similar to those

provided in the statement of defence. He was similarly cross-examined on the notice of termination.

25. Upon hearing the parties and considering their pleadings, evidence and submissions, the High Court at Nairobi (***A. Makau J.***) delivered a judgment on 29th July 2019 in favour of Maxam Limited. The specific findings on the issues identified by the learned Judge were firstly, that the agreement was not invalid for not being stamped for reasons that stamping was a procedural technicality, it was not raised during the hearing of the suit but in submissions, it has been held severally by Courts that failure to have a document stamped is not fatal, and that under section 19(3) and 20 of the Stamp Duty Act, there exists a statutory right for unstamped documents to be stamped out of time and for payment of requisite penalties, and therefore for them to be relied upon.

26. Secondly, that the promise and arrangement of automatic extensions in clause 17 of the Kenyan Distribution Agreement served as motivation for Maxam Ltd to keep performing in accordance with the assigned obligations, resulting in it investing heavily in their business, and this created a legitimate expectation that the agreement would be automatically renewed. In addition, the expectations created under clause 17 of the agreement were aptly captured in the ruling by Justice Ogola dated 26th April 2016, which was not appealed, to the effect that it was expected that the agreement had

been automatically renewed for one (1) year after expiry of the 3-year period, in view of the fact that the business was profitable.

27. Thirdly, that the termination notice was invalid, and that even though the doctrine of privity to contract did not apply in this case and that Heineken B.V acted within the provisions of the law by issuing the termination notice, the said notice was not issued in accordance of clause 18 of the agreement as no reason was given for termination of the agreement; it was headed "without prejudice" and therefore did not bear any binding legal obligation and did not result in termination of the subsisting agreement of 21st May 2013 or at all; the refusal by Heineken E.A and Heineken B.V to supply Maxam Ltd with their products, notwithstanding the subsistence of the agreement, breached clause 26 of the agreement; and that they constructively terminated the agreement by their deliberate actions of proceeding in appointing numerous other distributors even after the reinstatement of interim orders by the High Court on 28th August 2017 without the issuance of any fresh legally binding termination notice.

28. Lastly, that having found that the subject agreement was constructively terminated, the circumstances of the breach under which the special damages arose had been successfully demonstrated, and there was no dispute that Maxam Ltd had been completely been driven out of business and lost their entire Heineken beer distribution business. For that reason, special

damages would be the only award that would compel itself to the Court. In addition, under Clause 26 of the agreement, Heineken E.A was required to continue performing its obligations according to the terms and conditions of the agreement, pending the resolution of the dispute but acted contrary and completely cut the supply, leading to the immediate collapse and extinguishing of Maxam Ltd's business and investment. Lastly, that the evidence of the expert witness who produced a valuation report proved the special claim of damages of Kshs. 1,799,978,868/= which was not challenged nor controverted by any expert witness of equal measure on the part of Heineken E.A and Heineken B.V.

29. The learned Judge proceeded to make the following orders:-

1) *Maxam Ltd is directed to submit its Distributorship agreement dated 21st March 2013 to the Stamp Duty Collector for assessment of the duty payable, upon which Maxam Ltd was to pay the amount in the normal manner within 7 days from the date of the judgment, and a copy of the stamped document bearing stamp duty collector's stamp and court stamp be submitted to the Deputy Registrar within 4 days from such stamping by court for record purposes.*
2) *An injunction order is issued restraining Heineken E.A and Heineken B.V from;*
    a) *Terminating the distribution agreement dated 21st May 2013 between Maxam Ltd and Heineken E.A relating to the distribution of the Heineken larger beer brand in Kenya contrary to the terms of the agreement.*
    b) *Appointing any other distributor for the distribution of the Heineken larger beer brand in Kenya contrary to the terms and conditions of the agreement.*

3) *A declaration is issued that the Notice of Termination dated 27th January 2016 from Heineken E.A to Maxam Ltd was unlawful, irregular, unprocedural and therefore null and void ab initio.*
4) *A declaration is issued that the Kenyan Distribution Agreement dated 21st May 2013 between Maxam Ltd and Heineken E.A is in full force and effect as per the terms and conditions set out therein.*
5) *A declaration is issued that the aforesaid actions and breaches by Heineken E.A and Heineken B.V had infringed on Maxam Ltd's rights as protected by Article 19 of the Constitution.*
6) *A declaration is issued that the conduct of Heineken E.A and Heineken B.V of offering lower market prices to other distributors of the Heineken Larger Beer, approving higher market prices to Maxam Ltd on the same products and arbitrarily reducing Maxam Ltd's approved margins is discriminatory and offends the provisions of Article 27(2) of the Constitution.*
7) *A declaration is issued that the pricing models imposed on Maxam Ltd by Heineken E.A and Heineken B.V without Maxam Ltd's prior consultation and/or express consent, and which models were issued subsequent to the Court order of 28th August 2017 were exploitative, oppressive, unfair, null and void.*
8) *Special damages for loss of business as more specifically tabulated in paragraph 12 of the plaint of Kshs. 1,799,978,868.00 are awarded to the Maxam Ltd.*
9) *An order is issued directing the taking of accounts in respect of loss of profits occasioned to Maxam Ltd by reason of reduced volumes of sales as well as reduced profit margins from September 2017 until the date of the judgment.*
10) *Special damages for loss of profits as tabulated in prayer (i) in the plaint are awarded to Maxam Ltd.*
11) *Costs of the suit were awarded to Maxam Ltd.*

The Appeals

30. Heineken E.A thereupon filed an appeal against the decision, being **Civil Appeal No. E403 of 2020,** as did Heineken B.V, which filed **Civil Appeal No. E404 of 2020.** The two appeals were consolidated for hearing and determination together, hence the description of Heineken E.A and Heineken B.V as the 1st and 2nd Appellants in the consolidated appeal. The two appellants have raised similar grounds of appeal in their Memoranda of Appeal dated 26th October 2020 and 23rd October 2020 respectively. Heineken EA has raised twelve (12) grounds of appeal namely:

1) *The learned Judge erred in fact and in law by failing to take consideration of the express terms of the Distributorship Agreement*
2) *The learned Judge erred in fact and in law by misapplying the law on the doctrine of legitimate expectation.*
3) *The learned Judge erred in fact and in law by ignoring the express provision of the Stamp Duty Act and, admitting as an exhibit, a document that had not been duty stamped*
4) *The learned Judge erred in fact and in law by failing to consider that the Plaintiffs had not pleaded nor prove any special damages*
5) *The learned Judge erred in fact and in law by failing to apply the provisions of the Evidence Act*
6) *The learned Judge erred in fact and in law by ignoring the evidence tendered in Court.*
7) *The learned Judge erred in fact and in law by binding the Appellants to a ruling by Justice Ogola which was made at interlocutory stage of the Trial*
8) *The learned Judged erred in law and in fact in failing to consider that other third parties have been appointed as distributors.*
9) *The learned Judge erred in fact and law by failing to prepare a complete judgment*
10) *The learned Judge erred in fact and in law by awarding excessive and unwarranted damages*

11) *The learned Judge erred in fact and in law by becoming an active participant in the proceedings and showing bias in favour of the Respondent*
12) *The learned Judge erred in fact and in law by deliberately misapplying the law in order to deliver a favourable judgment in favour of the Respondent.*

31. Heineken B.V on its part raised eleven (11) grounds of appeal as follows:

1) *The learned Judge erred in law and in fact by failing to consider the express terms of the Distributorship Agreement*
2) *The learned Judge erred in law and in fact by holding that the Respondent had a legitimate expectation that the Distribution Agreement would not be terminated*
3) *The learned Judge erred in law and in fact by ignoring the express provision of the Stamp Duty Act and, admitting as an exhibit, a document that had not been duly stamped as required under law*
4) *The learned Judge erred in law and in fact by failing to apply the provisions of the Evidence Act*
5) *The learned Judge erred in law and fact by ignoring the evidence tendered by the Appellants in Court.*
6) *The learned Judge erred in fact and in law by relying on an interlocutory decision issued by Justice Ogolla on 21st April 2016 as a final decision on the validity of the termination notice dated 27th January 2016 instead of appreciating and considering the evidence adduced during the hearing as directed in the said interlocutory decision.*
7) *The learned Judge erred in law and in fact in failing to consider that the Plaintiffs had neither pleaded nor proven any special damages*
8) *The learned Judge erred in law and in fact by issuing orders affecting the third parties who are not parties to the suit*
9) *The learned Judge erred in law and fact by failing to prepare a complete judgment*
10) *The learned Judge erred in law and in fact by awarding excessive and unwarranted damages*
11) *The learned Judge erred in law and in fact by holding that the Appellants constructively terminated the distribution agreement by*

appointing additional distributors despite the reinstatement of injunctive orders o 28th August 2017 and that the injunctive order barring the appointment of additional distributors was not reinstated.

32. We heard the consolidated appeals on the Court's virtual platform on 14th November 2023, learned counsel ***Mr. James Singh*** appearing with ***Mr. Victor Mailu*** were present representing Heineken E.A; learned counsel, ***Mr. Ikoha Muhindi*** was present representing Heineken B.V; while learned counsel ***Mr. Philip Nyachoti***, appeared for Maxam Ltd. The counsel highlighted their respective written submissions dated 25th February 2021 and 9th February 2021 filed by Heineken E.A and Heineken B.V respectively, and 15th February 2021 and 2nd March 2021 filed by Maxam Ltd. This being a first appeal, the duty of this Court is reiterated as was set out in the decision of **Selle & Another vs Associated Motor boats Co. Ltd & others (1968) EA 123** which is to reconsider the evidence, evaluate it and draw our conclusion of facts and law, and we will only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as held in **Jabane vs Olenja (1968) KLR 661;** or where its discretion was exercised injudiciously as was held in **Mbogo & Another v Shah (1968) EA 93.**

33. A number of preliminary issues were raised by the parties, that we need to address. Firstly, the counsel for Heineken E.A raised the issue of alternative dispute resolution clause in its submissions, and urged that Maxam Ltd failed

to invoke the said clause and therefore acted inequitably in filing the suit. Although the said submissions refer to Clause 21 of the Agreement, we note that this Clause 21 provided for the effect of termination, and the applicable clause was Clause 26 which provided for friendly consultations between the parties in the event of a dispute. Quite apart from the fact that this is an issue being raised for the first time on appeal, the proper time to object to jurisdiction on this ground is before the tendering of a defence. Once parties accept the jurisdiction of the court and tender pleadings an objection cannot subsequently be taken that the dispute ought to have been referred to another forum.

34. Secondly, Maxam Ltd also raised a preliminary issue in its submissions, namely that a Notice of Change of Advocates ought to have been filed between the interval of the filing of a Notice of Appeal and the Record of Appeal, since there was a change in the representation for Heineken E.A and that it is only **Nairobi Civil Appeal No. E404 of 2020** which is was therefore properly filed before this court and **Nairobi Civil Appeal No. E403 of 2020** is defective and should therefore be struck out with costs. The proper procedure in this regard is to apply for the striking out of the appeal under Rule 86 of the Court of Appeal Rules of 2022 within the time limits set out therein, and we also note that the said counsel consented to the two appeals being consolidated and heard together, and is therefore

deemed to have waived any objection he had as regards the propriety of **Nairobi Civil Appeal No. E403 of 2020** .

Our Analysis and Determination

35. The grounds of appeal and the submissions made thereon revolve around the findings by the learned Judge of the High Court on five issues. The first is that of the validity of the Notice of Termination. Both Heineken E.A and Heineken B.V have challenged the reliance by the learned Judge on the doctrine of legitimate expectation and on the interlocutory rulings by the High Court to find that the Kenya Distribution Agreement was in effect. The second issue was whether the existence of the Kenya Distribution Agreement was illegal, for want of stamping and for being contrary to the provisions of the Competition Act. The third issue was the legal effect of the appointment of third-party distributors by Heineken E.A and Heineken B.V. The fourth issue was whether the remedies awarded are justified, and in this respect Heineken E.A and Heineken B.V challenged the award of special damages which they termed excessive and unwarranted, and the incomplete judgment. Lastly, there is a fifth issue raised by Heineken E.A alleging bias on the part of the learned Judge of the High Court, and we shall commence our determination with this issue, as it has jurisdictional implications.

On Bias

36. It is opportune at this point to commence our determination by addressing the issue raised of bias on the part of the learned Judge of the High Court. Allegations of bias or of a reasonable apprehension of bias are serious, as they call into question not only the personal integrity of the judge, but the integrity of the entire administration of justice. There is an express constitutional requirement of judicial impartiality, and the applicable standard and test is that one must establish a reasonable apprehension of bias to be able to demonstrate judicial bias. The East Africa Court of Justice adopted this test in **Attorney General of Kenya vs Prof Anyang' Nyong'o & 10 Others, EACJ Application No. 5 of 2007** when it stated as follows:

> *"We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially."*
> *The Supreme Court of Canada expounded the test in the following terms in R. v. S. (R. D.) [1977] 3 SCR 484:*
> *"The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the*

judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence."

37. Therefore, there must be an evidentiary basis for the grounds of bias, either based on statements and conduct made by the judge during the proceedings or arising from the judge's personal interest or relationship, and an inquiry of bias is therefore contextual and fact-specific. In addition, a judge's comments during a trial should not be viewed in isolation but reviewed in the context of the entirety of the trial, and as stated by a 7-Judge bench of this Court in **Rawal vs Judicial Service Commission & Another; Okoiti (Interested Party); International Commission of Jurists & Another (Amicus Curiae) (Civil Appeal (Application) 1 of 2016) [2016] KECA 717 (KLR)** " *the applicant bears the duty of establishing the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the judge is biased. It is not enough to just make a bare allegation*."

38. As a matter of procedure the party alleging bias may seek to have the judge withdraw from the case by way of an application for recusal, or alternatively, seek an invalidation of the judgment on the basis that the

judge should have been disqualified when the issue of bias was raised. A judge may, on his or her own initiative, also withdraw from the case, or seek submissions from the parties on whether or not to withdraw. Great caution is exercised by Courts where the issue of bias is raised for the first time on appeal, especially where there is no record of the issue of bias having been raised in the trial Court, since a finding that a decision was tainted by a reasonable apprehension of bias is a jurisdictional error. In the context of appellate review, it was held in **R.vs S. (R.D.) (supra)** at paragraph 99 that a "*properly drawn conclusion that there is a reasonable apprehension of bias will ordinarily lead inexorably to the decision that a new trial must be held*".

39. The basis of the alleged bias of the learned Judge of the High Court were stated in the opening remarks of the written submissions filed by the counsel for Heineken E.A titled "preamble" as follows:

> ***"Multinational companies have, to Kenya's detriment, often expressed reluctance to invest in the country arguing that in the event of a dispute arising, litigating in some Kenyan Courts is a lottery. Unfortunately, the Judgment of 29 July 2019 (the Judgment) that is subject to this Appeal confirms this for reasons particularised in the Grounds of Appeal. The Judge deliberately ignored the pleadings, evidence, and submissions except when they were in favour of the Respondent. Not only did the Learned Trial Judge, Justice Makau (the Trial Judge) err in law, but he was so biased in favour of the Respondent that typographical errors and grammatical mistakes contained in the Respondent's Submissions were repeated, word for word in the impugned Judgment.***

The most glaring replication of the Respondent's errors is where the Trial Judge, in the Judgment, whilst quoting an excerpt from an authority, omitted the words 'public authority' as had been done by the Respondent. This changed the entire import of the authority which was on legitimate expectation. (Record of Appeal, Vol. II (Vol. II), Page 824, line 1 – 3 and Vol. III, Page 1330, lines 24 to 17). For other examples see, Vol. III, Page 1330 -1332 and Vol. II, Page 826 and 827."

Should the Court uphold the Judgement of the Trial Judge particularly on the issue of Legitimate Expectation, we may as well discard our Law of Contract as codified, understood and practiced."

40. The counsel for Maxam Ltd took exception to the said submissions, which he termed as an "*outright and vicious personal attack*" on the trial Judge, this Court as well and the entire Judiciary as an institution, and submitted that the remarks, innuendos, and demeaning language penned down in the said submissions were "*extremely unfortunate, unethical, uncalled for and should not be encouraged at all*".

41. Needless to say, the submissions made by the counsel for Heineken E.A are capable of a myriad of computations and meanings, including an embedded intimidating tenor that unless we accept the conclusion of this broad swipe, we too would fit perfectly into the "lottery" classification, and confirm Kenya is a country with no functioning independent judiciary. We could say a lot more but choose to restrain ourselves and believe we have said enough to express our concern and view on the nature of the submissions

made by the counsel, with the hope that we shall not encounter such submissions again.

42. For the purposes of this appeal, however, we note that the counsel has relied on findings made in the judgment based on submissions made by one of the parties to impugn the learned trial Judge's conduct, and that of the entire institution of the Judiciary without any evidence of bias. Just to reiterate and for the record, we adopt the position laid out by Deane J. in the Australian case of **Webb vs The Queen (1994) 181 CLR 41, 74** on the nature of evidence that is required to be adduced to demonstrate either actual or apparent bias. Firstly, that a judge has an interest, whether direct or indirect and whether pecuniary or otherwise, in the outcome of a decision; secondly, that a judge is associated with a party or other person involved in the proceedings; thirdly, that the conduct of the judge, either in the course of or outside the proceedings gives rise to a reasonable apprehension of 'prejudice, partiality or prejudgment'; and lastly, that the judge has knowledge of some extraneous information that prevents him or her from bringing an impartial mind to the decision.

43. It is also notable in this respect that in delivering a reasoned judgment, courts are not required to give a detailed answer to every argument, and they have a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties' submissions,

as guided by the rules of evidence and applicable law. In exercising the judicial function, a judge chooses the more meritorious legal position after taking into account evidence that is properly admitted, evaluating evidence, and where required, resolving uncertainties and filling gaps in the law by considering the applicable legal principles and values. In the event that a judge applies an insufficient judicial decision-making method, the avenue available to a litigant is to appeal or seek a review of the decision on legal grounds, and not as in the present case, to engage in a personal assault of the Judge in the name of bias.

44. We accordingly find that having not provided any evidence of interest, association, conduct, or extraneous knowledge on the part of the learned Judge of the High Court that would give rise to a reasonable apprehension of bias to an informed and reasonable observer, no bias has been established by the counsel for Heineken E.A.

The Validity of the Notice of Termination

(a) Application of Legitimate Expectation Doctrine

45. Turning to the substantive issues raised in the consolidated appeals we have already stated that counsel for Heineken E.A and Heineken B.V challenged the findings of the learned trial Judge on the validity of the Notice of Termination along various limbs. The first limb was that of the application of the doctrine of legitimate expectation by the learned trial Judge. It was

submitted by the said counsel that despite the clear, express, and unambiguous provisions of Clauses 21 and 17 of the Kenya Distribution Agreement, the learned Judge held that Maxam Ltd had a legitimate expectation that the agreement would be automatically extended from year to year. This finding was faulted by both counsel along various fronts. Firstly, that the issue of a legitimate expectation that the Kenya Distribution Agreement would be automatically renewed was not pleaded by Maxam Ltd, and was first introduced as an afterthought in its written submissions. It was also urged that Maxam Ltd did not set out the particulars of any kind of promise made by Heineken E.A and Heineken B.V concerning the purported automatic renewal of the Agreement. Counsel, while citing the decision by the Supreme Court of Kenya in **Raila Amolo Odinga & Another vs IEBC & 2 Others (2017) eKLR,** submitted that it is trite law that a party is bound by its pleadings and cannot introduce issues not pleaded.

46. Secondly, that legitimate expectation cannot be invoked to modify or vary the express terms of a contract, and the findings by the trial Court were patently contrary to the facts and the express contractual agreement between the parties, which the trial Court was bound to interpret and apply and not to re-write. In particular, the express terms of the Kenya Distribution Agreement demonstrate that it was terminable by 3 months' notice at the expiry of its 3-year term which was communicated to Maxam Ltd at a meeting of 27/1/2016, an email of the same date and followed up by

the Notice of Termination dated 27/1/2016. In addition, that the trial Court clearly erred in holding that the Notice of Termination was not issued in accordance with Clause 18 as no reasons were given, when on the face of it, the said Notice was issued pursuant to Clause 17 of the Distribution Agreement. Furthermore, that pursuant to the entire agreement clause (Clause 31) of the Kenya Distribution Agreement, the parties were explicitly excluded from making any purported reliance on previous distribution agreements or business arrangements to impute a legitimate expectation of automatic renewal.

47. Moreover, that clauses 7 and 8 as read with the Second Schedule of the Distribution Agreement obligated Maxam Ltd to prepare sales and distribution plans each year and ensure that it had the technical and infrastructure capability, including warehousing, to support the distribution of Heineken B.V's products. Various judicial authorities were cited in support of the submissions made, including **Asstt. Excise Commissioner vs Issac Peter 1994 SCC (4) 104; Alliance One Tobacco Kenya Limited vs Kenya Union of Commercial, Food and Allied Workers and 5 Others [2015] eKLR; Pius Kimaiyo Langat vs Co-operative Bank of Kenya Limited [2017] eKLR; National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd [2001] eKLR;** and **Lipisha Consortium Limited & Another vs Safaricom Limited [2015] eKLR .**

48. Thirdly, that the trial Court did not have jurisdiction to hear a claim of legitimate expectation while exercising its civil jurisdiction in a purely private commercial contract between commercial parties. Further,that the Trial Court relied on a chain of judicial review decisions from the High Court and other foreign courts including **Keroche Industries vs KRA & others [2007] eKLR** and **South Bucks District Council vs Flanagan [2002] EWCA Civ. 690** for the application of legitimate expectation, but failed to distinguish that the authorities involved the exercise of public authority or quasi-judicial functions, and ignored the submissions on this point. Counsel made reference to binding precedent from the Supreme Court of Kenya that one of the conditions that must be met for an applicant to invoke the principle of legitimate expectations is that "there must be an express clear and unambiguous promise given by a public authority" as held in **Communications Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others, (2015) eKLR**.

49. Comparative jurisprudence was cited by counsel where claims founded on the principle of legitimate expectation have been declined in cases where the courts are exercising their ordinary civil jurisdiction on commercial disputes based on contract law. Reference was made to the decision by the Seychelles Court of Appeal in **Felix & Ors vs Jean & Ors (SCA 22 /2013) [2015] SCCA 51**, and by the Supreme Court of India in **Asstt. Excise Commissioner vs Issac Peter (supra)** and **A.C. Roy Co. And Others vs Union**

of India and Others AIR 1995 Cal 246. Furthermore, the only Court to find that the principle of legitimate expectation was applicable to private entities was the Seychelles High Court in **Jean & Ors vs. Felix & Ors Civil Case 15 of 2000,** which decision was later overturned on appeal in **Felix & Ors v Jean & Ors (supra).**

50. Counsel for Maxam Ltd in response submitted that the issue of legitimate expectation was extensively submitted upon by the parties before the trial Court, and that counsel for Heineken E.A and Heineken B.V had not demonstrated how the learned trial Judge failed to consider the express terms of the Distribution Agreement *vis-a-vis* the legitimate expectation aspect of the matter. Counsel submitted that the learned trial Judge addressed the foundational basis of legitimate expectation in the interpretation of the various terms and clauses of the Distribution Agreement, and found that the same was anchored in Clauses 5 and 17 of the Agreement. Further, that in arriving at his findings on the issue, the learned Judge took cognizance of testimony that the execution of the Distribution Agreement codified a formal and exclusive relationship which then required Maxam Ltd to invest heavily and set up substantial infrastructure to solely distribute Heineken E.A and Heineken B.V. products under Clause 5 of the Distribution Agreement.

51. Additionally, that the learned Judge cannot be faulted for considering that Maxam Ltd who had previously been a distributor without a contract for five (5) years, had a legitimate expectation that the scope of investments after the execution of the Distribution Agreement was aimed at beginning a mutually beneficial and/or profitable relationship which would not subsequently be terminated after a mere three (3) years, without any cause whatsoever, and its testimony that any reasonable person would otherwise have been reluctant to invest so heavily for a mere three (3) year period without adequate and sufficient consideration on offer. Counsel urged us to take into consideration and adopt the reasoning and findings of the Supreme Court of Seychelles in **Jean & Anor vs Felix & Anor (supra)** on the role of the doctrine of legitimate expectation in contract law and in awarding damages.

52. There is little doubt that the doctrine of legitimate expectation is typically applicable in public law and would not apply where both disputants are private parties who are not seeking reliefs from a public body. Both the Supreme Court of Kenya as well as this Court have variously discussed the applicability of this doctrine, and in the Supreme Court decision in **Communication Commission of Kenya vs Royal Media Services & 5 Others (supra) eKLR,** which this court has on many occasions commented on and applied, elaborately established the applicability of this doctrine as the Appellants have correctly submitted.

53. These decisions are unequivocal in holding that for legitimate expectation to arise and be recognized, an established set of criteria must exist, most important of which is that the alleged representation must originate from a public body and concomitantly, the doctrine can only be applied against a public body. Indeed, the trial judge recognized the elements necessary to establish a bona fide legitimate expectation in law and accurately enumerated them in the judgment, and further referred to the appropriate case law. We think it is important that we look at the origin and history of the doctrine of legitimate expectation to better appreciate the context in which the trial court attempted to apply it. The doctrine is rooted in consideration of fairness, reasonableness, and a "*higher public interest beneficial to all*" parties which "*in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation*" because "*an abrupt change as was intended in this case, targeted at a particular company or industry is certainly an abuse of power.*" See **Keroche Industries Limited vs Kenya Revenue Authority & 5 Others [2007] eKLR** which was considered by the trial judge in his judgment. Having faithfully interrogated the elements necessary for the application of the doctrine of legitimate expectation, the trial judge appears to have been derailed by a decision introduced by the Respondent, which decision appears to have caused much confusion by not laying a sufficient basis or

linkage between the proper understanding of the doctrine and the purported "exception" that the said decision was purportedly introducing.

54. The material decision was that of the Seychelles High Court in **Jean vs Felix (supra),** and by substantively basing his conclusions on this judgment, the learned trial Judge failed to establish a cogent basis for crossing from public law imperatives to transplanting the doctrine of legitimate expectation in the middle of a purely private law dispute. In the Seychellois High Court case, the court was struggling with the means of providing relief and justice in a commercial dispute between two private parties. Finding that the law of contract governing private parties was awfully inadequate to deal with what the court considered to be justifiable and merited grievances by a deserving plaintiff, the Seychellois High Court Judge ***(Karunakaran J.)*** felt compelled to look outside contract/private law for a fair and reasonable solution: expanding and applying a comparable legal doctrine from another branch of the law. The Judge accordingly stated as follows:

> *"[17] At the outset, I note that the instant case breaks a new ground in our contract law. The Court is called upon to determine in this matter, whether a "legitimate expectation" of a party based on fairness/reasonableness and to an extent, based on an implied consensus ad idem would give rise to an implied term in a private contract and vice versa. This new question is an inevitable development in the evolution of contract law. This development though seemingly a new vista in contract law, is necessary for the advancement of justice in this time and age, especially when we are embarking on the voyage of revising our Civil Code and to meet the*

changing and challenging needs of time and society. Indeed, all social contracts governing the individual interactions in society eventually metamorphose into legal contracts or relationships such as marriage, family, trade unions, associations, government (vide Rousseau's - 1712-1778 - social contract theory), etc. Hence, contract law has to evolve as society progressively evolves more and more from Status to Contract as Henry Sumner Maine observed in his book Ancient Law (1861) thus "we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.

[18] The concept of legitimate expectations originally developed in English law. It is generally applied only in matters of Judicial Review and falls within the domain of public law. It is truism that this concept is not traditionally applied in matters of contracts, which entirely falls within the domain of private contract law. This concept cannot on its own constitute a valid cause of action in contract; and the courts cannot directly apply this concept to do justice in contracts invoking the principle of fairness or reasonableness.

[19] However, now time has come to rethink, remould and extend its application to other branches of law such as contract, as it constantly evolves. In my considered view, a legitimate expectation of a party to a contract and a breach thereof shall constitute a valid cause of action in law provided that:

i) the said expectation is based on an implied term of the contract;

ii) such terms are implied on the ground of fairness or reasonableness; or an implied consensus ad idem;

iii) the aggrieved party to that contract had relied and acted upon that implied term (as has allegedly happened in this matter); and

iv) *there had been a breach thereof, by the other party to the contract."* (Emphasis ours).

55. This background captures the competing principles and doctrines at play. In attempting to reconcile this conflict the Seychelles High Court Judge

"crafted" a relief; extending a well-known judicial review remedy to contact law thus:

> *"[20] The courts of the 21st Century cannot deny justice to anyone for lack of precedents or case law in a particular branch of jurisprudence due to stagnancy in adaptation and advancement. We cannot afford our civil law to remain stagnant in the statute-books; simply because our jurisprudence is not advancing with the rest of the legal world. As judges, we cannot simply fold our hands on the bench to say that no case has been found in which it has been done before on the ground of legitimate expectations in contract law.*
> *[21] This reminds me of the great remark once Lord Denning LJ made in Packer v Packer [1954] P 15 at 22, which runs thus:*
> *What is the argument on the other side? Only this: that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both.*
> *[22] In English law, the concept of legitimate expectation undoubtedly arises from administrative law, a branch of public law. The phrase "legitimate expectation" first emerged in its modern public law context in the judgment of Lord Denning in Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149. The fundamental idea behind this concept - especially in matters of Judicial Review - is the application of the principles of fairness and reasonableness to the situation (vide Wednesbury Principles of Reasonableness) where a person has an expectation or interest in a public body retaining a long-standing practice or keeping a promise.*
> *[23] It is well established that if a public body has led an individual to believe that he will have a particular procedural right, over and above that generally required by the principles of fairness and natural justice, then he is said to have procedural legitimate expectations that can be protected; in modern times, it appears that the courts in the UK do not hesitate to extend this concept further to protect the substantive*

legitimate expectations of the individuals vide R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213.

[24] However, the concept of legitimate expectations in the private law of contract as claimed by the plaintiffs in the instant case, presents some difficulty in tailoring it to suit our needs, jurisprudence and to accord with our civil code. This concept as such is unknown to our jurisprudence. It is nowhere to be seen in the Civil Code of Seychelles. Our judges by and large do not apply or use the language of 'legitimate expectations' in the context of any private law of contract particularly, in breach of contracts.

[25] This is not, however, the end of the story. Once we have understood the purpose and the role played by the concept of legitimate expectations in other jurisdictions, where it was conceived and developed, we will be able to circumvent the difficulty in our jurisdiction and deliver justice by applying the underlying principles of fairness and reasonableness to the situation where a person had an expectation or interest in his or her dealings or interactions with others in pursuance of any contractual or other legal relationships. The underlying principles or ideas behind this concept can indeed be found as a hidden treasure in our law of contract, particularly, in our Civil Code though it appears in different names and forms and using a different language of description.

[26] In fact, art 1135 of the Civil Code articulates this principle that "terms in a contract may be implied inter alia, for fairness/reasonableness" and a party to that contract may legitimately expect, rely and act upon that implied term, in respect of all consequences and in accordance with its nature. The courts have unfettered jurisdiction to impute or imply a term which is reasonable and necessary - as suggested by Scrutton LJ inReigate v Union Manufacturing (Ramsbottom) [1918] 1 KB 592 at 605- in the interest of justice and fairness and grant remedies accordingly. This article reads in clear terms thus:

> *Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness,*

practice or the law imply into the obligation in accordance with its nature." (Emphasis ours.)

56. We have recited the sentiments of the Seychelles High Court Judge *in extenso* because we shall advert to the logic in that judgment shortly. On appeal, the Seychelles Court of Appeal gave the High Court Judge short shrift, admonishing him in rather harsh and colourful language:

> *"[1] This was a simple case of the application of Article 555 and the provisions relating to leases and hire in Chapter II of Title VIII of the Civil Code of Seychelles but for reasons best known to themselves the parties in this case spent nearly five years together with the trial judge in exploring legal options which had no application to this case or to this jurisdiction.*
>
> *[2] The learned trial judge wrote a long essay on the necessity of importing a concept of administrative law, that of legitimate expectation, not only to contracts internationally but also into the contract law of Seychelles. It was unwise, unresearched and unnecessary. Yet so much ink need not have been spilled. The answer to the issues raised in the present case was staring everyone in the face and it should have been obvious had the provisions of the Civil Code been read. It is hoped that in future this simple exercise may be followed by all concerned."* (Emphasis ours.)

57. Another similar attempt is found geographically closer home. In the Tanzanian case of **Mohan's Oysterbay Drinks Limited vs BAT (K) Ltd Comm. Case No. 90 of 2014, Mansoor J.** of the Commercial Division of the High Court of Tanzania, faced with what she considered to be a clearly unconscionable business arrangement, concluded that:

"If now, BAT is allowed by simply writing a letter of termination without there being any cause, then such an action on the part of BAT is nothing but a colorable exercise of arbitrary powers used in bad faith and with ulterior motive. This act is unjust and unconscionable. It cannot be sustained by the Court. There were reasonable expectation(sic) by MOHAN'S and it was sounder stood (sic) that this contract would continue unless some serious breach going to the roots of the contract were committed by MOHAN'S. No sane person would have incurred huge expenditure and his life savings in this venture in order to earn goodwill for BAT [Bavaria], had he any inclination that this contract is terminable at the will of BAT [Bavaria] or for simply being a buyer." (Emphasis ours.)

58. In language akin to that used by the Seychellois High Court Judge, ***Mansoor, J.***, tried to expand the law in Tanzania by seeking to anchor the equities of the case as follows:

"This case raises questions of far-reaching public importance concerning the right of the parties to the contract. This is a case where a gigantic manufacturing company enjoying the production of cigarettes with popular brand names is keen to take advantage of the capital, the investment, the labour, the effort, the marketing knowledge and managerial skill of the distributor for the purpose of avoiding the investment of their own capital on these matters. Mohan's may not be in a position to negotiate the terms of contract with such a gigantic corporation's much less unequal bargaining power. The multinational companies with international brand names in this case wanted to dictate to the local entrepreneurs to sign standard form of contract, the terms of which are not negotiated, i.e. take it or leave it. BAT could have simply negotiated better terms of distributorship agreement with Mohan's and continue business with its long-time partner, and have a termination clause inserted in the agreement. … The agreement cannot be terminated unilaterally, arbitrarily, or at the

whim and fancy of BAT so as to completely ruin and destroy MOHAN'S, deprive it of its proprietary right in the goodwill much less that it is open to BAT to act in bad faith. No party has a right to act against justice, equity, and good conscience." (Emphasis ours.)

59. The judgment of *Mansoor J.* was reversed by the Tanzania Court of Appeal which decided the case on different considerations, and concluded that there was no privity of contract existing between the parties at the time the purported breach occurred, stating as follows:

> *"Was there, prior to 2010, an implied contract between the parties to this appeal? No doubt, as argued by Mr. Nyika, there was a contract between PW2's companies and the appellant, but there was none between the appellant and the respondent, even if it seems, the former was somehow aware of the existence of the latter. The appellant was supplying PW2's companies with its products, and by a separate arrangement between PW2's companies and the respondent, the latter was the distributor of those products. If we concluded that there was, at this period, a contract between the appellant and the respondent, it would be against the evidence on record and against the principle of privity of contract, which we recently emphasized in the case of Austack Alphonce Mushi vs Bank of Africa Tanzania Limited & Another, Civil Appeal No. 373 of 2020 (unreported). The Court stated: "However, by way of emphasis, we would add that contract, as a juristic concept, is the intimate if not exclusive relations between the parties who made it".*
>
> *It is, therefore, inconceivable, that the distributorship relationship between the respondent and PW2's companies before 2010 would form a basis for the respondent suing the appellant, whose direct obligation was to those importers and not to the respondent."*

60. The Tanzanian court of appeal eschewed discussions on the expanded jurisprudence that Mansoor J. had attempted to invent, but there is little

doubt in our minds that had the Tanzanian Court of Appeal interrogated that aspect of the judgment of Mansoor J., it would have probably come to the same conclusion as the Seychellois Court of Appeal.

61. Historically, we have had similar struggles in our own jurisdiction. Perhaps the most conspicuous legal introspection has been around the hitherto interpretation and enforcement of section 6 of the Land Control Act. In the celebrated 1982 judgment of this court in **Ngobit Estate Limited vs Violet Mabel Carnegie, Civil Appeal No. 57 of 198**1 and presided over by the eminent bench of Madan, Miller & Potter JJA, this court expressed its frustrations as follows:

> *"This case once again demonstrates the tyranny which the draconian provisions of the Land Control Act could inflict upon an innocent party. In Leonard Njonjo Kariuki v Njoroge Kariuki alias Benson Njono, Civil Appeal No 26 of 1979 (unreported) we said that it vividly illustrated the injustice which so often flowed from the operation of the Land Control Act. I doubt very much that the plaintiffs would have agreed to sell their farm but for the lure of the lease together with the purchase price.*
>
> *…*
>
> *The case of the respondent plaintiffs unhappily founders on the merciless rock of the Land Control Act. In the appeals which come before this court in which the Land Control Act is involved, it is invariably the case that the Act is not being relied upon by a party in order to fulfill the intended purposes of the Act but by a vendor of an interest in land in order to deprive the purchaser of the benefit of his contract.*
>
> *However, the function of the judiciary is to interpret the statute law, not to make it. Where the meaning of a statute is plain and*

unambiguous, no question of interpretation or construction arises. It is the duty of the judges to apply such a law as it stands. To do otherwise would be to usurp the legislative functions of Parliament." [emphasis ours)

62. This court, like the Seychelles and Tanzania Courts of Appeal, was applying the same judicial discipline, namely that absent a proper jurisdictional competency, it is not possible to fashion reliefs outside of express statutory provisions or settled law. The jurisprudential landscape has however since changed in Kenya, with the enactment of the Constitution of Kenya of 2010, which upended the previous *status quo* and jurisprudence. In a series of cases culminating in the decision by this Court (differently constituted) in **Willy Kimutai Kitilit vs Michael Kibet, Civil Appeal No. 51 of 2015,** the competing legal principles were evaluated and summarised thus:

"[23] The Land Control Act does not, unlike Section 3 (3) of the Law of Contract Act and Section 38 (2) of the Land Act save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the

consent of Land Control Board will largely depend on the circumstances of each particular case.

[24] There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the Land Control Act. By Article 10(2) (b) of the Constitution of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law (Article 10(1) (b)). Further, by Article 159(2) (e), the courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution. Moreover, as stated before, by virtue of clause 7 of the Transitional and Consequential Provisions in the Sixth Schedule to the Constitution, the Land Control Act should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with the Constitution.

[25] The word equity broadly means a branch of law denoting fundamental principles of justice. It has various meanings according to the context but three definitions from Black's Law Dictionary, Ninth Edition will suffice for our purpose:

> *"1. ---*
>
> *2.The body of principles constituting what is fair and right.*
>
> *3.The recourse to principles of justice to correct or supplement the law as applied to particular circumstances ---*
>
> *4. The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called "Law" in the narrower sense) when the two conflict"*

Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.

[26] For the reasons in paragraphs 20, 21, 22, 23, 24 and 25 above, we are in agreement with the Macharia Mwangi Maina decision that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance."

63. Whereas the High Court Judges in Seychelles, Tanzania and Malaysia desperately sought to provide answers to the inequities before them, as is demonstrated above, they lacked the necessary legal framework to fashion valid and legal reliefs. In Kenya, it has since been held that the law of contract must now be read and applied inside the baseline threshold prescribed by Article 10(2)(b) of the Constitution. We shall come back to the implications of Article 10 (2) (b) in this appeal later on in this judgment.

64. Coming back to the issue at hand, we remind ourselves that Heineken E.A and Heineken B.V contend that the learned trial Judge applied a public law doctrine (legitimate expectation) to a private law contract dispute. Maxam Ltd asserted before the trial court that Heineken E.A and Heineken B.V, by knowingly encouraging and compelling it to make the massive investment in infrastructure to promote their products, this created an "expectation" that the relationship would be renewed, ostensibly to permit Maxam Ltd to recoup its investment and, further, by refusing to extend the distributorship contract, and instead cancelling the contract, amounted to the inevitable

conclusion that "*no sane person would have incurred huge expenditure and his life savings in this venture in order to earn goodwill for* " Heineken E.A and Heineken B.V. The counsel for Maxam Ltd characterised this head of claim as "legitimate expectation". This nomenclature was however wrong and inapplicable as we have stated above, because the parties herein were all private parties.

65. From his reasoning that "*the promise and arrangement of automatic extensions served as motivation for the plaintiff to keep performing in accordance with the assigned obligations resulting to investing heavily in the business*", it is our view that the learned trial Judge appears to have conflated the doctrine of legitimate expectation with the principle of reasonable expectation, which can support a proper cause of action for damages in a contract, provided that the reasonable expectations arise from the terms of the contract. In an article by **Catherine Mitchell** in the **Oxford Journal of Legal Studies Vol. 23 No.4 (2003) pages 639-665** titled "*Leading a Life of its Own? The Roles of Reasonable Expectation in Contract Law*," the distinction between "*legitimate expectation*" and "*reasonable expectation*" is discussed and the author notes that reasonable expectations, legitimate expectations, and legal entitlements are three different steps in the recognition of legal rights.

66. Further, that reasonable expectation is the objectively justified belief in the likelihood of some future event or entitlement, whereas legitimate expectation entails a further justificatory argument for recognizing the expectation whether to remedy arbitrariness, protect detrimental reliance, or uphold some other requirement of morality or fairness. Legal entitlement on the other hand is the recognition that the legal system accords to the legitimate expectation, for example by requiring the payment of compensation if the expectation is disappointed.

67. The author concludes as follows at page 644:

> *"In administrative law legitimate expectation is a substantive doctrine, specifically concerned with the extent to which citizens may rely on, and public bodies may resile from, representations made (either expressly or through past practice) by the public body of the citizen. While this is one broad way of understanding the idea in the private law context – the principles of estoppel are based on similar grounds – the notion of reasonable/legitimate expectation is not confined to describing such a doctrine. In contact law for example, no real distinction has been drawn between reasonable and legitimate expectations –commentators and judges use the terms interchangeably. The result is that the notion of reasonable expectation in contract law vacillates between the three different steps articulated above. In particular, the notion is used in relation to both expectation that is generated by a legal right and the expectation that is generated and justified on some other ground (whether normative or empirical) which might be contrasted with the legal right. Because these differently grounded expectations are usually the precise site of conflict in litigation between contracting parties an argument based only on*

reasonable expectation will not distinguish the more compelling claim." (Emphasis ours.)

68. It follows that reasonable expectations tend to concretise within a contract as opposed to a relationship outside of contract, and this is another way of appreciating the Tanzania Court of Appeal decision in the **Oysterbay vs BAT Case** above; that reasonable expectations could not be construed in the absence of a contractual relationship between the parties having first been established. At this stage it suffice to emphasise that the doctrine of legitimate expectation was inapplicable to the contractual relationship between Heineken E.A, Heineken B.V and Maxam Limited, and the learned trial Judge fell into error in basing the continued operation of the Distribution Agreement on the said doctrine.

69. Similar considerations therefore arise with the trial Court's decision to look to the Constitution for relief, and the trial court's declarations under Articles 19 and 27(2) of the Constitution were unnecessary under the principle of constitutional avoidance as declared by the Supreme Court of Kenya in **Communications Commission of Kenya & Other vs Royal Media Services & Others Petition No. 14 of 2014:**

"[256] …. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the

principle of avoidance in his minority Judgment as follows [at paragraph 59]:

"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

70. For the avoidance of doubt, we restate that it was in error for the trial Court to base its findings on the renewal of the Kenya Distribution Agreement on the application of public law principles or interpretation of the Constitution. We in this respect find that our law of contract is sufficient in the adjudication of contractual cases when applied in the context of the procedural imperatives contained in Article 159(2)(d) (without undue regard to procedural technicalities) and Article 10 (national values) of the Constitution.

(b) On Reliance on the Interlocutory Ruling

71. The second limb urged by counsel for Heineken E.A and Heineken B.V to challenge the findings of the learned trial Judge on the validity of the Notice of Termination was that the trial Court exclusively relied on the interlocutory ruling dated 26/4/2016 delivered by ***Ogola J.,*** without considering the evidence adduced at the trial. It was urged that it is settled law that a Court cannot make a final determination in an interlocutory application, and that the learned trial Judge made an erroneous presumption that the findings by ***Ogola J.*** that the Notice of Termination was invalid on

account of having been headed *"without prejudice"* were binding because they had not been challenged on appeal.

72. The decision by the Court of Appeal in **Uhuru Highway Development Limited vs Central Bank of Kenya & 2 Others [1996] eKLR** was cited for the submission that a trial court is bound to apply its own mind to all the facts and evidence on record without regard to what may have been expressed at an interlocutory ruling, and that conclusions reached at interlocutory stage must be re-evaluated afresh by the trial court at full hearing. According to counsel, a proper re-evaluation of the facts and evidence on record would have shown that the admissibility of the Notice of Termination was not in issue and both parties relied on it in their respective cases, with the contest being the effect of the *"without prejudice*" heading on the notice. Reference was made to the English Court of Appeal decision in **Avonwick Holdings Limited vs Webinvest Limited & Anor [2014]** that there are many usages of the phrase "without prejudice", apart from facilitating to the settlement of contemplated disputes by enabling parties to communicate openly, it is also used where parties do not intend to give up any rights that they may have and agree that communication made is without prejudice and should not be used in civil proceedings. However, that neither of these usages was intended by Heineken E.A and Heineken B.V in the termination of the Kenya Distributorship Agreement, and that it is trite law that the effect of

communication made on a “without prejudice” basis should be determined by its context.

73. According to the counsel, the context of the present case was that the letter of termination was written following a meeting where PWl was informed on the intention to terminate the Distributorship Agreement, and the notice was subsequently issued pursuant to clause 17 of the Distribution Agreement. Further, that the words "without prejudice" could only apply to the offer for compensation in respect of the Tanzania and Uganda distributors, for whom there were no distribution agreement. Therefore, that from the contents of the Notice of Termination and the context of its issuance the intention of the Heineken E.A to terminate the Distributorship Agreement was identifiable, clear, and understood by the Respondent.

74. The counsel for Maxam Ltd on his part submitted that the learned Judge independently considered, not only the evidence of the parties' respective witnesses and all the documents adduced in evidence during the trial, but also the elaborate respective written submissions and authorities filed by the parties in support of their respective positions. Further, that the references by the learned trial Judge to the earlier findings of ***Ogola J.*** as contained in the ruling delivered on 21st April 2016 were minimal to express his concurrence and not as the basis for his judgment, and were in addition to the evidence that had been adduced by the respective parties. Counsel

urged that there is nothing in law that precluded the learned trial Judge from referring to findings of fact in the same matter which findings in any event had not been challenged and/or overturned by the Court of Appeal. Therefore, that the effect as at the time the learned Judge was making his judgment after the full trial, and as such, the same meant that the letter dated 27th January 2016 issued on a "without prejudice" basis had not terminated the arrangement of the parties but that instead, there had been an automatic extension of the Distribution Agreement for subsequent one (1) year periods as per Clause 17 of the Agreement.

75. We will first address the arguments made on the reliance in the judgment on findings made in the interlocutory ruling by *Ogola J.* The relevant findings by the learned trial Judge in the impugned judgment were as follows:

> *"69. Upon considering the facts of this case and considering the appointment of the plaintiff was by the defendants agent I find that the doctrine privity (sic) to contract did not apply in this case and hold that the 2nd defendant acted within the provisions of the law by issuing termination notice. However, the notice was not issued in accordance of clause 18 of the Agreement as no reason was given for termination of the agreement. In the Ruling of Hon. Justice Ogola of 26th April 2016 at paragraph 39 and 40 he noted ambiguity created by purported Termination Notice of 27th January 2016. It is noted that the termination notice was headed "without prejudice" contrary to submissions by the defendants that "without prejudice" as a legal concept solely governs admissibility of documents to evidence, I find*

that the defendants had no intention to have the notice bear any binding legal obligation whatever. I find the defendants unlawfully and unfairly purported to unilaterally terminate the agreement. The defendants in their action were giving and hold back at the same time. I find as in giving and holding nothing changes hands. The purported Termination Notice did not in my few (sic) result in termination of the subsisting Agreement of 21st May 2013 or at all (see the holding in the Ruling of Hon. Justice Ogola) which has not been appealed against nor challenged."

76. It is evident that the learned Judge did undertake his own analysis of the legal import and effect of the words "without prejudice" as used in the Notice of Termination, and after taking into account the submissions of the parties on the issue, which he detailed in the judgment. The learned Judge then referred to the ruling of *Ogola J.* in concurrence, and also as additional support of his findings, and not in exclusive reliance as urged by the counsel for Heineken E.A and Heineken B.V. We note that paradoxically, the counsel for Heineken E.A also sought to rely on an interlocutory ruling delivered in this appeal of 23rd June 2017 in its submissions on the interpretation of the termination clauses of the Kenya Distribution Agreement. The purpose of interlocutory rulings and orders, which are the rulings and orders made by a court between the commencement and final resolution of a cause of action while the case is still ongoing, is to provide temporary or provisional decision on an issue or remedies. The English Court of Appeal in **Bozson vs Altrincham Urban District Council [1903] 1**

KB 547 at 548 held that a judgment or order is final if it finally disposes of the rights of the parties, and is interlocutory if it does not.

77. Comparatively, the Supreme Court of India in **Shankar vs. Chandrakant, AIR 1995 SC 1211** defined a preliminary decree as follows:

> *"A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is final. Both the decrees are in the same suit. Final decree may be said to become final in two ways: (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest court; (ii) when, as regards the court passing the decree, the same stands completely disposed of.*

78. Since an interlocutory ruling does not dispose of a cause of action with finality, the issues it addresses may become moot by the time of the final judgment, or may still be live, and as held in **Shankar vs. Chandrakant (supra),** it is possible that the final decree merely carries into fulfilment the preliminary decree. There is thus no legal bar to a judge relying on or adopting the reasoning and findings made in an interlocutory ruling, if it supported by the evidence and law adduced during trial, and in a reasoned judgment. The only operative and legal bar with respect to interlocutory rulings and orders is as stated by the Supreme Court of Kenya in its ruling in **Kensalt Limited vs Water Resources Management Authority Petition No.**

8 of 2016, namely that the parties' ultimate rights are not to be decided at an interlocutory stage, except in the clearest of circumstances.

79. Turning to the issue before us of the validity of the Notice of Termination, it is necessary to reproduce the letter dated 26th January 2016 which was alleged to contain the said notice, to appreciate the arguments made by the parties herein. The said letter was addressed to Maxam Limited, Modern Lane Limited and Olepasu Tanzania Limited and signed by a signatory from Heineken International B.V, acting on behalf of Heineken East Africa Import Company Limited and Heineken Brouwerijen B.V. The letter stated as follows:

> "*27 January 2016*
> *Without Prejudice*
> *Dear Mr Ngugi Kiuna,*
> *We write to you on behalf of Heineken East African Import Company Limited ("HEAIC") and Heineken Brouwerijen B.V. ("HBBV") following a meeting between Mr Kiuna, Mr Linck and Mr Unigwe in Nairobi on Wednesday 27 January 2016.*
> *We refer to the following documents:*
> - *Distribution Agreement entered into between HEAIC and Maxam Limited ("Maxam") on 21 May 2013 relating to the distribution of the Heineken lager beer brand in Kenya (the "Kenyan Distribution Agreement");*
> - *Letter from HBBV to Maxam dated 26 July 2012, relating to the export of the Heineken lager beer brand from Kenya to Tanzania (the "Maxam Tanzania Export Letter");*
> - *Letters from HBBV to Modern Lane Limited dated 28 February 2013 and 11 August 2014 relating to the distribution of the*

Heineken lager beer brand in Uganda (the "Ugandan Appointment Letters"); and

- *Letter from HBBV to Olepasu Tanzania Limited dated 11 August 2014 relating to the distribution of the Heineken lager beer brand in Tanzania (the 'Tanzanian Appointment Letter").*

We hereby give Maxam notice, that pursuant to clause l7 of the Kenyan Distribution Agreement, HEAIC will terminate the Kenyan Distribution Agreement with effect from 1 May 2016 (the third anniversary of the Effective Date). Please note that the provisions of clause 21 of the Kenyan Distribution Agreement shall apply on termination, and that the Maxam Tanzania Export Letter will terminate on the same date.

We hereby give each of Modern Lane Limited and Olepasu Tanzania Limited notice that HBBV will terminate the distribution of the Heineken lager beer brand to them in Uganda and Tanzania (respectively) under the Ugandan Appointment Letters and the Tanzanian Appointment Letter, in each case with effect from 1 May 2016.

While we do not admit that we have any legal or contractual obligation to pay any compensation under any of the Ugandan Appointment Letters and the Tanzanian Appointment Letter, we are prepared, as a sign of goodwill to pay you an amount of EU 450,000 by way of an ex-gratia payment for the termination of the Ugandan Appointment Letters and the Tanzanian Appointment Letter (the "Compensation Offer").

The Compensation Offer will be available for acceptance until the close of business on Wednesday 10 February 2016. In the event that you accept the Compensation Offer by such date, we will send to you a settlement agreement which will set out in detail the basis on which the Compensation Offer will be made and paid. In the event that you do not accept the Compensation Offer by such date: it shall be withdrawn: Note that the Compensation Offer is made on a without prejudice basis.

This letter is delivered to you on the understanding and on the condition that its existence and its content will be treated as strictly confidential and will not be disclosed to any person or entity unless we have first consented to any such disclosure in writing."

80. Clause 17 of the Kenya Distribution Agreement in this respect provided as follows with respect to the term of the agreement and notice of termination:

"This Agreement comes into force on the Effective Date, and shall remain in force until the third anniversary of the Effective Date. This Agreement will be automatically extended for a period of one year (and subsequent one year periods), unless it is terminated by either party giving the other party written notice of termination within three months of the third anniversary of the Effective Date or one year extension (as the case may be)"

81. The point of contestation in this appeal is the legal effect of the words "without prejudice" in the letter of termination. **Black's Law Dictionary Ninth Edition** defines the said phrase as follows at page 1740:

"Without loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party".

82. The basic legal effect of 'without prejudice' communication is that statements made therein in the context of an existing dispute cannot be relied upon as evidence against the interests of the relevant party. This rule is codified in section 23(1) of the Evidence Act which provides that no admission may be proved in civil cases if it is made either upon an express condition that evidence of it is not to be given or in circumstances from

which the court can infer that the parties agreed together that evidence of it should not be given. The rule is based on the express or implied agreement of the parties involved that communications in the course of their negotiations should not be admissible in evidence if, despite their negotiations, a contested hearing ensues.

83. We are in this respect persuaded by the decision of the Supreme Court of the United Kingdom in **Oceanbulk Shipping and Trading SA vs TMT Asia Limited and 3 others [2010] UKSC 44** which detailed the history of the legal principles that apply to "without prejudice" communication as follows:

> *" 19. The approach to without prejudice negotiations and their effect has undergone significant development over the years. Thus the without prejudice principle, or, as it is usually called, the without prejudice rule, initially focused on the case where the negotiations between two parties were regarded as without prejudice to the position of each of the parties in the event that the negotiations failed. The essential purpose of the original rule was that, if the negotiations failed and the dispute proceeded, neither party should be able to rely upon admissions made by the other in the course of the negotiations. The underlying rationale of the rule was that the parties would be more likely to speak frankly if nothing they said could subsequently be relied upon and that, as a result, they would be more likely to settle their dispute.*
>
> *20. Thus in Walker v Wilsher (1889) 23 QBD 335 at 337 Lindley LJ asked what was the meaning of the words "without prejudice" in a letter written "without prejudice" and answered the question in this way:*
>
> > *"I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If*

the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one."

21. It is now well settled that the rule is not limited to such a case. This can be seen from a series of decisions in recent years, including most clearly from Cutts v Head [1984] Ch 290, Rush & Tompkins Ltd v Greater London Council [1989] AC 1280, Muller v Linsley & Mortimer [1996] PNLR 74, Unilever plc v The Procter & Gamble Co [2000] 1 WLR 2436 and most recently Ofulue v Bossert [2009] UKHL 16, [2009] AC 990.

22. In particular, in Unilever Robert Walker LJ (with whom Simon Brown LJ and Wilson J agreed) set out the general position with great clarity at pp 2441- 2444 and 2448-2449. He first quoted from Lord Griffiths' speech in Rush &Tompkins, with which the other members of the appellate committee agreed. Rush & Tompkins is important because it shows that the without prejudice rule is not limited to two party situations or to cases where the negotiations do not produce a settlement agreement. It was held that in general the rule makes inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made with a genuine intention to reach a settlement and that admissions made to reach a settlement with a different party within the same litigation are also inadmissible, whether or not settlement is reached with that party."

84. As regards the arguments by counsel for Heineken E.A and Heineken B.V that the "without prejudice" communication only referred to certain segments of the letter, notably the offer of compensation to the Uganda and Tanzania distributors, we again are persuaded by, and wholly adopt the holding by Robert Walker LJ in **Unilever PLC vs The Procter & Gamble Co. [2000] 1 WLR 2436**, at pp 2448-2449 as follows:

"…the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties in the words of Lord Griffiths in Rush & Tompkins [at p 1300] 'to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts'. Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders."

85. Lastly, counsel for Heineken E.A and Heineken B.V urged that the "without prejudice" letter is admissible in evidence in order to ascertain its true construction as part of a factual matrix of the surrounding circumstances. In particular, that the notice was given after various meetings held with PW1 on the termination of the Distribution Agreement. It is notable that the contents of a communication made "without prejudice" are only admissible in certain exceptional circumstances, including when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached, and to the fact that such communications have been made is also admissible to show that negotiations have taken place, but not is contents, which are otherwise not admissible. With due respect to counsel, the circumstances they rely on to

admit the letter dated 26th January 2016 are events that took place before the said letter was written and do not fall within these exceptions.

86. Any doubts, conflicts, differing interpretations with regard to the "without prejudice" notice of termination must in the circumstances therefore be construed against the originator of the notice. In this regard, Heineken E.A and Heineken B.V had the opportunity to, and option of issuing two notices to ensure that there was no misunderstanding regarding which portion of the "without prejudice" considerations applied to which market. The submission by their counsel that there was no "doubt" as to which portion of the business was covered by the "without prejudice" segment of the letter is also not sufficient to remove the pleaded ambiguity. We are in this respect guided by the requirements as regards giving of a notice of termination as set out in **Chitty on Contracts, 32nd Edition, Volume I: General Principles** at paragraph 22-051:

> ***"Where the terms of the contract expressly or impliedly provide that the right of termination is to be exercised only upon notice given to the other party, it is clear that notice must be given for the contract be terminated pursuant to that provision. Any notice must be clear sufficiently and unambiguous in its terms to question constitute a valid notice"***

87. Our finding and conclusion therefore, is that the letter and Notice of Termination dated 27th January 2016 which was issued by Heineken E.A and Heineken B.V on a "without prejudice" basis was inadmissible as evidence of any negotiations, acceptance or admission on the part of Maxam Limited

as regards termination of the contract, just as it was not evidence of any negotiations and admission as regards payment of compensation on their part. In light of this effect, and the ambiguity as to its intent, the letter accordingly cannot be construed as amounting to a lawful or valid Notice of Termination under Clause 17 of the Distribution Agreement. The Kenya Distribution Agreement. was therefore legally still subsisting as at 27th January 2016 and was not validly terminated.

88. We also find that the said Notice of Termination could not be the basis of any findings with regards to termination of the agreement by dint of Clause 18 of the Kenya Distribution Agreement, which provided for the instances when the agreement could be terminated immediately by notice in writing for various reasons. This is for the reason, as we have already found, that the said letter was not admissible as evidence of any termination, and in any event, it was clear therein, as urged by counsel for Heineken E.A and Heineken B.V that it was being issued pursuant to Clause 17. Put differently, both Clauses 17 and 18 would only have become operational if there was a valid notice of termination given, which we have found was not the case in this instance. The trial Court therefore did err in its finding that the notice of termination was not issued in accordance of Clause 18 of the Agreement for want of reasons for the termination.

The Legality of the Kenya Distribution Agreement

(a) On the Stamping of the Agreement

89. The counsel for Heineken E.A and Heineken B.V submitted that the Kenya Distribution Agreement was inadmissible as it was not duty stamped as required under the Stamp Duty Act, and alleged that despite their submissions on the issue, the learned trial Judge "entered into the arena of litigation", introduced his own authorities and argued the case in favour of Maxam Ltd, going as far as admitting the Agreement for stamping after judgment. It was asserted by counsel that it is trite law that a Court cannot grant prayers not prayed for, as held **in Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR**. We have perused the record of appeal, and note that the issue of the stamping of the Kenya Distribution Agreement was indeed not pleaded, either by Maxam Ltd or Heineken E.A and Heineken B.V. We also note that both Maxam Ltd and, Heineken E.A and Heineken B.V admitted in their pleadings that the said agreement was entered into, and even cited various clauses of the agreement in reliance thereon. We are therefore perplexed by the contradictory position taken by counsel of Heineken E.A and Heineken B.V, and also note that the issue of the stamping of the agreement was first raised by the said counsel for Heineken E.A and Heineken B.V in their submissions in the trial Court. The learned trial Judge duly addressing the arguments they had raised, and made findings thereon, including the impugned order.

90. It is indeed trite that a court should only determine issues raised before it by way of pleadings, and the principle is well settled that a court, even when it has jurisdiction, will not base its decision on unpleaded issues. However, where the parties lead evidence and address the unpleaded issues, and from the cause adopted at trial it appears that the unpleaded issues have been left for the decision of the court, the court will validly determine the unpleaded issues. This exception was set out in **Odd Jobs vs Mubia (1974) EA 476,** wherein it was held that a court may base its decision on an unpleaded issue where it appears from the course followed at the trial, that the issue has been left to the court for determination. (See also **Mapis Investment (K) Ltd v. Kenya Railways Corporation (2005) 2 KLR 410**). It is also notable that counsel for Heineken E.A and Heineken B.V do not challenge the propriety of the findings of the learned trial Judge as regards the effects of the agreement not having been duty stamped, which as underscored in the decision of this Court (differently constituted) cited by the learned Judge in in **Abok James Odera t/a A.L. Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** that non-compliance with the provisions of the Stamp Duty Act is not fatal to the enforcement of an agreement, and that the courts are enjoined under section 19 (3) (a) (b) and (c) not to reject such an agreement in totality, but to receive it and either assess the stamp duty itself and direct that it be paid, or can impound such an agreement and direct that it be delivered to the stamp duty collector for him to assess the stamp duty payable and demand its payment.

91. It seems to us, that having raised the issue of stamping of the agreement late in the day during the hearing in the trial Court, the counsel for Heineken E.A and Heineken B.V cannot run away from the consequences thereof because they turned out to be to their disadvantage. We therefore find no reason to interfere with the findings and orders granted by the learned trial Judge in this respect.

(b) On the Competition Act

92. The next challenge on the legality of the Kenya Distribution Agreement raised by counsel for Heineken E.A and Heineken B.V was that the agreement was contrary to section 21 of Kenya's Competition Act and that the learned trial Judge ought not to have reinstated an illegal contract, and reliance was placed on the Court of Appeal decisions in **Patel vs Singh [1987] eKLR** and **Mohamed vs Attorney General [1989] eKLR** to this effect. In addition, that the trial Court, by directing Heineken E.A and Heineken B.V to effect an exclusive distribution arrangement contrary to section 21 of the Competition Act, which prohibits agreements between undertakings which have as their object or effect the prevention, distortion or lessening of competition in any trade or any goods or services in Kenya, effectively directed them to engage in criminal activity that attracts punitive criminal sanctions.

93. Counsel for Maxam Ltd submitted that the Agreement dated 21st May 2013 was entered into after the Competition Act had become operational on 1st August 2011, and therefore complied with the provisions of the Act, whereas the termination notice was issued on 27th January 2016. Therefore, the Competition Act could not have been the reason for terminating the Agreement.

94. The contract Heineken E.A and Heineken B.V signed with Maxam Ltd contained clauses which expressly declared that Maxam Ltd "*would exclusively distribute Heineken Lager products in Kenya*" [clause 1] and that "*would not during the duration of the Agreement import any other beer products*" (Clause 5). Our understanding of the argument by counsel for Heineken E.A and Heineken B.V is that notwithstanding having entered into the agreement on those terms, they now would like this Court to void it for illegality on the grounds that these clauses were contrary to section 21 of the Competition Act, and the trial judge's decision to award exclusive distributorship to Maxam Ltd amounted to aiding and abetting an illegality. The philosophical underpinnings of the Competition Act are found in the preamble to the legislation, which proclaims that the overriding intention was "*to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct*." Section 21 of the Act prohibits restrictive trade practices which attract a penalty of imprisonment for a term not exceeding five years or to a fine not exceeding

ten million shillings, or both, if found to exist. The relevant provisions of the sections as follows:

> *(1) Agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section D of this Part.*
> *(2) Agreements, decisions and concerted practices contemplated in subsection (1), include agreements concluded between—*
> *(a) parties in a horizontal relationship, being undertakings trading in competition; or*
> *(b) parties in a vertical relationship, being an undertaking and its suppliers or customers or both.*
> *(3) Without prejudice to the generality of the provisions of subsection (1), that subsection applies in particular to 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;

(i) otherwise prevents, distorts or restricts competition.

(4) Subsection (3)(d) shall not prevent a supplier or producer of goods or services from recommending a resale price to a reseller of the goods or a provider of the service, provided—

(a) it is expressly stipulated by the supplier or producer to the reseller or provider that the recommended price is not binding; and

(b) if any product, or any document or thing relating to any product or service, bears a price affixed or applied by the supplier or producer, and the words "recommended price" appear next to the price so affixed or applied.

(5) An agreement or a concerted practice of the nature prohibited by subsection (1) shall be deemed to exist between two or more undertakings if:

(a) any one of the undertakings owns a significant interest in the other or has at least one director or one substantial shareholder in common; and

(b) any combination of the undertakings engages in any of the practices mentioned in subsection (3).

95. Unfortunately, counsel for Heineken E.A and Heineken B.V did not avail additional evidence to support their submissions, other than to make bare reference to section 21 of the Competition Act, nor did they relate the circumstances of their contract with the requirements of the Competition Act. Similar and related legislation to section 21 of the Competition Act have had wide judicial consideration in many jurisdictions, particularly on the legal question of whether 'exclusivity' on its own invites a *per se*

prohibition. The wording of most anti-competition/anti-trust statutes tends to mirror section 21 of the Competition Act and it is useful to compare and be guided by the treatment of exclusive territorial contracts in the light of these provisions by other jurisdictions. It is generally accepted that whereas exclusive vertical terms and horizontal terms are ordinarily presumed to import anticompetitive considerations, there is an additional qualification which is necessary for an absolute prohibition to arise. That additional element is the factual existence of a lessening of competition. In Canada, "*providing for an exclusive territory or other market restrictions in a distribution or agency agreement would not be prohibited, but would be subject to oversight by competition authorities. Unless the restrictions substantially lessen competition, they would not be enjoined.*" (See "*At a Glance: Competition Issues with Distribution and Agency Agreements in Canada",* by La Pointe Rosinstein Marchand Melançon LLP, Canada, published on February 18 2022 in **Lexology**). The prohibition must therefore be tied to a "lessening of competition" outcome.

96. In **U.S. vs Dentsply International Inc. Del. Dist. Ct., No. 99-005 ("the Dentsply Case")**, the court held that Dentsply's monopoly power was maintained in large part by its exclusive dealing arrangements with its dealer network and that although not illegal in themselves, such exclusive dealing arrangements, when orchestrated by a monopolist, can be an unlawful means to maintain a monopoly. According to the court, Dentsply

was motivated by an explicitly anticompetitive intent: to reserve for itself the key dealers in the industry thus foreclosing its competitors from using this vital market channel to reach customers. The same type of arrangement with dealers may pass antitrust scrutiny where the manufacturer does not have such monopoly power. In the instant case, for example, Heineken E.A and Heineken B.V have emphasised in their submissions that "*in contrast, the Respondent was a trading company with one product with less than 1% market share*" which, applying the rule in the **Dentsply Case**, would mean that granting Maxam Ltd territorial exclusivity would not attract a prohibition. However, the submissions by counsel for Heineken E.A and Heineken B.V that "*it was wrong to compare the Respondent's finances with EABL as the latter was a brewing company, selling over 15 products with a 96% market share*" would automatically offend the rule in the **Dentsply Case** if EABL were to grant territorial exclusivity on account of its clear monopoly.

97. This position also obtains in South Africa. In the case of the **Competition Commission vs South African Breweries Limited, Case No. 129/CAC/Apr14**, the court accepted the following test:

> *"Characterisation*
> *[25] This finding requires an analysis of the characterisation problem as it has evolved in South African jurisprudence.*
> *[26] The concept of characterisation was incorporated into our law as a result of the judgment in American Natural Soda Ash Corporation and another v Competition Commission and others 2005 (6) SA 158*

(SCA) paras 43 – 47. In their judgment, Cameron and Nugent JJA observed that an agreement that involves, amongst other things, price fixing, is prohibited in terms of s 4(1)(b). Nothing can be advanced to justify it. However, this raises the question 'when has prohibited price fixing occurred? This is not always simple to determine' (para 43) To answer this question, the following enquiry was required:

> *'[44] In the United States the enquiry is approached by 'characterising' the conduct complained of to determine whether it constitutes that form of conduct that the Courts have through case precedents labelled "price-fixing" but have not comprehensively defined. In this country, where the prohibitions is decreed by legislation rather than by judicial intervention, the prohibited form of conduct must be established by construing s 4(1)(b).*
>
> *[45] Once the ambit of sub-para (b)'s prohibition has been established the enquiry can move to whether or not the conduct in issue falls within the terms of the prohibition. That is a factual question that must be answered by recourse to relevant evidence.'*
>
> *Cameron and Nugent JJA then concluded (para 47):*
>
> *'Whichever approach is adopted, the essential enquiry remains the same. It is to establish whether the character of the conduct complained of coincides with the character of the prohibited conduct: and this process necessarily embodies two elements. One is the scope of the prohibition: a matter of statutory construction. The other is the nature of the conduct complained of: this is a factual enquiry. In ordinary language this can be termed 'characterising' the conduct – the term used in the United States, which Ansac has adopted.'"* (Emphasis ours.)

98. Heineken E.A and Heineken B.V accept that Maxam Ltd does not possess monopoly influence, and they have also failed to establish that the exclusivity granted to Maxam Ltd can be characterised as one that invites a

per se prohibition, for example, "*price-fixing*", "*transfer of costs*", "*transfer of commercial risk*", "*demand for the payment of goodwill" by* distributors, setting "*market or sales targets*" for a distributor, "*embossing bottles*", "*gifting branded refrigerators in exchange for sales*", etc., all of which are *per se* prohibited practices because they are "*plainly anticompetitive*", and are conclusively presumed illegal without further examination or necessity to produce evidence. These practices are deemed to be without any "*redeeming virtue*" and in the words of the European Commission in **Case No. AT40134 on Antitrust Procedure**:

> ***"85. Moreover, in Hoffman-La Roche, the Court confirmed that certain practices are by their very nature capable of restricting competition and accordingly are considered to be contrary to Article 102 of the Treaty, without the need to prove the concrete anticompetitive effects of such practices."***

99. Applying this test, it is our finding that the trial Court's judgment did not, in the absence of other material evidence denoting restriction of competition, facilitated a breach of the Competition Act by reinstating the Maxam Ltd to its original exclusive distributorship of Heineken E.A and Heineken B.V products in Kenya. The submission that the trial court's judgment offends section 21 of the Competition Act cannot therefore be sustained. We also find it prudent to add that there is also no prohibition in our law against a distributor maintaining more than one exclusive territorial distributorship. A distributorship that is circumscribed by a distributorship agreement from dealing with competing products or one which, in practice,

produces such an outcome, is to be characterised as belonging to the class of *per se* prohibited practices. If in actual fact it can be shown that the distributor overwhelming distributes for one manufacturer, an anti-competitive *per se* prohibition is automatically presumed entitling such a distributor to damages on an opportunity cost basis, because there can be no other reasonable inference that can be drawn other than the distributor has been prevented from dealing with competing brands. Such a threshold can be inferred where a distributor's business is more than fifty percent of its turnover in favour of a dominant monopoly, this being the threshold set by the Competition Act itself in its definition of "*dominant undertaking/position*" under sections 23, 24 and 24A.

100. Lastly, as submitted by the counsel for Heineken E.A and Heineken B.V, conduct which lessens competition in the beer market can be investigated by the Competition Authority and penalties imposed against the offending undertaking. However, recent judicial decisions and literature on the topic have added another relief, being that such an investigation and imposition of fines and penalties will not bar an affected party from separately, simultaneously or subsequently suing for damages. Parties seeking to enforce compliance or seeking damages under the Competition Act are therefore entitled to "gains-based" reliefs in addition to loss-based reliefs, which will allow for a shift in focus from victims to the perpetrators. A breach of competition/anti-trust law therefore now provides a cause of

action to sue for damages for claimants who suffer loss from anti-competitive behaviour, as held in **Devenish Nutrition Ltd vs Sanofi-Aventis SA (France) & Others [2008] EWCA Civ. 1086**, where the regulatory fines and penalties were deemed inadequate to achieve any deterrence.

The Legal Effect of Appointment of Third Party Distributors.

101. The counsel for Heineken EA and Heineken BV challenged the findings by the learned trial Judge that there was constructive termination of the agreement by the appointments of other distributors without issuing a fresh legally binding Termination Notice, which they stated was in error arising from the facts that on 31/07/2017, the Trial Court on its own motion vacated the injunctive orders in totality and Heineken EA was therefore free to appoint additional distributors, and indeed appointed additional distributors on this basis. Further, that on 28/08/2017, the trial Court delivered a ruling reinstating and extending the injunctive orders but only with regard to the first four limbs, while the fifth limb was vacated in view of the appointment of third party distributors who were not before the court. Therefore, that as from 31/07/2017, the order restraining Heineken E.A and Heineken B.V from appointing additional distributors was no longer in force and they were free to appoint additional distributors.

102. Further, and contrary to the learned trial Judge's finding, Heineken E.A and Heineken B.V issued a fresh termination notice on 31/01/2018, and the final

orders which *inter alia* declared that they constructively terminated the Distribution Agreement and that the Distribution Agreement was in full force and effect as per the terms and conditions set out therein was made in error. Lastly, counsel submitted that the learned Judge's order to that Heineken E.A and Heineken B.V restores the exclusive distributorship arrangement with Maxam Ltd will greatly prejudice them as they will be required to unilaterally terminate the contracts it legally entered into with 99 additional distributors following the lifting of the injunctive orders and will result in a floodgate of similar litigation from other distributors whose contracts would have to be terminated.

103. The position by the counsel for Maxam Ltd was that the interim orders notwithstanding, Heineken E.A and Heineken B.V had an obligation to keep the Distribution Agreement of 21st May 2013 alive during the pendency of the case at the High Court, and that parties were to continue performing their respective obligations (including supply of the full volumes agreed and the agreed price to the Respondent as the sole exclusive distributor) as stipulated under Clause 26 of the Distribution Agreement, which they blatantly ignored and failed to do.

104. Furthermore, that if at all there were third parties concerned or affected by the proceedings which was obviously within the knowledge of Heineken

E.A and Heineken B.V, nothing could have been easier than for those parties joining the proceedings so that their respective position and/or grievances could be addressed and considered then during the trial. In any event that the alleged third parties were appointed by the Appellants in breach of Clause 26 of the Distribution Agreement and that the said third parties only have recourse in a claim against Heineken E.A and Heineken B.V.

105. It is not disputed that there was an express contractual provision at Clause 26 of the agreement between Heineken E.A and Heineken B.V and Maxam Ltd which obligated the parties to continue performing their obligations until the final resolution of any registered dispute. Heineken E.A and Heineken B.V justify the appointment of third-party distributors on the basis of the orders by the trial Court vacating the injunction restraining it from appointing any other distributor. It is necessary to confirm the reasoning and nature of orders granted by the trial Court *(Onguto J)* in the ruling delivered on 28th August 2017 in this regard. The reasoning was as follows:

> *"29. The hearing has been affirmed by the court and the parties to take place on 6 November 2017. This is hardly two months away. On the other hand, in under two weeks after the court order was discharged, the Defendants moved with expedition to- execute new distributorship agreements. I have perused the distributorship agreements. They are not exclusive to the new distributors. The old state of affairs has somewhat been disturbed and it may be untidy, if not impossible, to wholly revert to it. The litigation herein may now also be disturbed. Thirdly, I also take note of the fact that the Plaintiff has moved to*

specifically also seek damages. All these facts do not however obviate the fact that the court still has powers to issue orders as may be necessary for the ends of justice.

30.It is however apparent to me that reinstating the interim orders wholly may not fit well the circumstances of this case. I will consequently shortly address the issue of what order if any ought to issue as I quickly take note of the fact that the orders were vacated, not at the Defendants' prompting but of the court's own motion…"

106. ***Onguto J.*** then proceeded to order that "*the order is reinstated and extended but only with regard to the first four limbs of the order. The fifth limb stands vacated in view of the appointment of third party distributors who are not before the court.*" The fifth limb of the order had restrained Heineken E.A and Heineken B.V from appointing any other distributor for the distribution of Heineken Larger Beer in Kenya, Uganda and Tanzania. A plain reading of the reasoning and order by the trial Court does not lend support to the argument that as a result thereby, Heineken E.A and Heineken B.V was given the go-ahead by the trial Court to appoint third party distributors. It is evident that the trial Court only acknowledged the fact of their appointment and existence, and accordingly gave interim orders which maintained the *status quo*, while expressly noting that matters raised by the parties were for resolution at the trial. It is also notable, as noted by the Court, that the initial decision to vacate the interim orders was of the Court's own motion, and not on any application by Heineken E.A and Heineken B.V.

107. The decision to appoint the third party distributors was therefore solely that of Heineken E.A and Heineken B.V, and in the same manner, they had the choice not to appoint the third-party distributors once the interim orders were discharged. Their counsel cannot therefore seek to base or justify the appointment of third party distributors on the interim orders by the trial Court. In any event it is trite as held by this Court (differently constituted) in **National Bank of Kenya Limited vs Pipe Plastic Samkolit (K) Ltd [2002] 2 EA 503 [2011] eKLR at 507** that:

> *"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 or proved*." See also **Pius Kimaiyo Langat vs Co-operative Bank of Kenya Limited [2017] eKLR.**

108. The appointment of the third party distributors by Heineken E.A and Heineken B.V during the litigation between the parties was accordingly in breach of Clause 26 of the Kenya Distribution Agreement. In addition, since the appointment of the third party distributors essentially terminated the exclusive nature of the Kenya Distribution Agreement, we find it to have been a repudiatory breach by Heineken E.A and Heineken B.V, as it essentially deprived Maxam Ltd of the core benefit of the Kenya Distribution Agreement.

109. The third party distributors could also not acquire any rights as against Maxam Ltd that could legally disrupt vested rights arising out of the Kenya

Distribution Agreement, and not being privy to the said agreement, the cause of action by the third party distributors, if any, lay against Heineken E.A and Heineken B.V without reference to the Maxam Ltd. A third party in such circumstances takes the risk that its rights over the subject matter of a contract that is in litigation will only concretise in the event that the giver of its rights succeeds in the litigation. It is necessary for the giver of these rights to join the third parties in the on-going litigation for any rights they may have to be confirmed or determined, or for the third parties themselves, *locus standi* permitting, to join proceedings where their rights could be affected.

110. No legal obligation in the circumstances attached to Maxam Ltd to join third parties with whom it had no privity of contract or basis for joinder. Even if these third parties were to join ongoing proceedings, their participation would not have detracted from the finding that they aided in the breach of contract by Heineken E.A and Heineken B.V, and on the contrary the only legal purpose that may have been achieved by their joinder would be the recovering of any damages due from them for inducing the breach of contract. The prejudice pleaded by Heineken E.A and Heineken B.V is one that they therefore brought upon themselves by the appointment of the third party distributors in breach of the agreement, and we find no merit in this ground of appeal.

111. What legal options were then available to Maxam Ltd as a result of the repudiatory breach by Heineken E.A and Heineken B.V? The options are explained in **Chitty on Contracts (supra)** at paragraph 24-002 that "*an innocent party, faced by a repudiatory breach, is therefore given a choice: he can either treat the contract as continuing ("affirmation of the contract) or he can bring it to an end ("acceptance of the repudiation). He must "elect" to choose between these options.*" A party who does nothing for too long may be held to have affirmed by the circumstances of the case, and this position was well expressed by Rix L.J. in **Stocznia Gdanska Sa vs Latvian Shipping Company and others (No.2) [2002] EWCA Civ 889** when he stated: .

> ***" 87. In my judgment, there is of course a middle ground between acceptance of repudiation and affirmation of the contract, and that is the period when the innocent party is making up his mind what to do. If he does nothing for too long, there may come a time when the law will treat him as having affirmed. If he maintains the contract in being for the moment, while reserving his right to treat it as repudiated if his contract partner persists in his repudiation, then he has not yet elected. As long as the contract remains alive, the innocent party runs the risk that a merely anticipatory repudiatory breach, a thing "writ in water" until acceptance, can be overtaken by another event which prejudices the innocent party's rights under the contract – such as frustration or even his own breach. He also runs the risk, if that is the right word, that the party in repudiation will resume performance of the contract and thus end any continuing right in the innocent party to elect to accept the former repudiation as terminating the contract.."***

112. In the present appeal, the appointment of third party distributors basically also meant that Maxam Ltd was unable to continue with the performance of its obligations under the contract in the original terms, and its witness gave evidence on the frustrations it faced from Heineken E.A and Heineken B.V in this regard. As submitted by counsel for Heineken E.A and Heineken B.V, Maxam Ltd in effect became just "one of the distributors". Therefore, even though there was no express affirmation or acceptance by Maxam Ltd, one of the legal effects of the appointment of the third-party distributors was that it was deemed that Maxam Ltd had accepted the repudiation, and hence the remedies it subsequently sought in its Re-Amended Plaint. The breach therefore effectively discharged the parties from the contract, and what remained was the issue of compensation and damages arising from the breach.

<u>On the Reliefs</u>

(a) On Proof of Special Damages

113. The last issue is whether the relief granted by the trial Court was merited. Counsel for Heineken E.A and Heineken B.V submitted that it is trite that in order to succeed in a claim for specific damages, the same must be specifically pleaded and proven. According to counsel, Maxam Ltd did not specifically prove the special damages for the reasons that firstly, it did not incur any such expenses or any loss up to the date of trial, since it was granted interim injunctive orders on 5/02/2016 which were extended on

18/02/2016 and confirmed on 21/04/2016, and therefore continued to operate as the exclusive distributor of Heineken products up until 31/07/2017, when the trial Court vacated the injunctive orders. Further, that the vacated injunctive orders were later partially reinstated on 28/08/2017, and only the fourth limb which sought to injunct Heineken E.A and Heineken B.V from appointing additional distributors was not reinstated. Therefore, that Maxam Ltd continued to operate as exclusive distributor of Heineken products from 5/02/2016 to 31/07/2017 and thereafter as a distributor from 28/08/2017.Counsel cited the decision by this Court in **Attorney General vs Waiyera [1983] eKLR** that for a claim for special damages to stand, a party must provide sufficient evidence showing that the expenses had been incurred up until trial was cited.

114. Secondly, that the prayer for Kshs 1,799,978,868/= was not particularized by Maxam Ltd in its pleadings, and Mr. Daniel Kabiru, Maxam Ltd's second witness (PW2), was unable to justify how he arrived at the figure of Kshs 1,799,978,868/= either in his valuation report or during cross-examination, and his evidence was marred with inconsistencies. In addition, and the voluminous set of inventories justifying the heavy investments purportedly made by Maxam Ltd pursuant to the Distribution Agreement were fabricated. Counsel for Heineken E.A and Heineken B.V gave the particulars of the inconsistencies and alleged fabrication, and made

reference to the shortcomings of the evidence of PW2 and the Valuation Report dated 4 May 2016 brought out in his cross examination.

115. Lastly, that the trial Court opted to place sole reliance on PW2's evidence without considering all other evidence tendered by the witnesses called by Heineken E.A and Heineken B.V, who were extensively cross examined on the issue of damages. However, it is trite law that expert evidence does not trump all other evidence, and counsel in this regard made reference to the decisions in **Stephen Kinini Wang'ondu vs The Ark Limited [2016] eKLR**, **Elizabeth Kamene Ndolo vs George Matata Ndolo [1996] eKLR** and **Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau [2016] eKLR** to submit that the trial Court ought to have examined PW2's expert report along with all the other facts and evidence tendered during the hearing and in the submissions.

116. The position taken by the counsel for Maxam Ltd was that the claim for special damages was extensively pleaded and tabulated under paragraph 12 of their Re-Amended Plaint, prayed for in prayer (x) therein, and the basis for the award of the special damages was substantively submitted upon by both parties. In addition, that Maxam Ltd produced a substantive expert Valuation Report through PW2 to prove and justify the award on special damages sought on account of loss of profits and business. On the other hand, Heineken E.A and Heineken B.V chose not to produce any expert

opinion and/or testimony whatsoever to counter PW2's expert testimony, and that in the circumstances, PW 2's testimony was wholly uncontroverted. Lastly, that the learned Judge carefully analyzed the testimony of PW2 including the methodologies used to value the loss of Maxam Ltd's business, which was previously an exclusive arrangement.

117. The general principle that applies to damages awarded for breach of contract is that they are compensatory, for the damage, loss, or injury a claimant has suffered through the breach, as restated in **Halsbury's Laws of England Fourth Edition Reissue Vol 12(1)**:

> "*941…The normal function of damages for breach of contract is compensatory. Damages are awarded, not to punish the party in breach, or to confer a windfall on the innocent party, but to compensate the innocent party and repair his actual loss. Compensation is normally achieved by placing the innocent party in the same position, so far as money can do, as if the contract had been performed. Only in exceptional circumstances do courts depart from this policy and award some greater or lesser sum. Ordinarily there is just one measure of damages in contract, which is the loss truly suffered by the promisee".*

118. The compensable heads of damages upon breach of contract are explained in **Chitty on Contracts (supra)** at paragraph 26-019 as follows;

> *"It has been pointed out that the victim of a breach of contract has a number of interests which may protected by an award of damages. First, he may have paid money or conferred some other benefit on the other party, and he will have an interest in recovering the money or the value of the benefit conferred. This has been termed the*

"restitution interest and there is a very strong moral argument for protecting it, as it represents both a loss to the claimant and a corresponding gain to the defendant. Secondly, the victim may have incurred expense or loss in reliance on the promised performance and which is wasted by the defendant's breach. This is termed the "reliance interest" of the claimant; and it merits protection because it represents the extent to which the victim is left worse off than before the contract was made. Thirdly, the victim has an "expectation interest", i.e. the gains or benefits which he expected to receive from the completion of the promised performance of the other party's obligation but which were in the event prevented by the breach of contract committed by the latter.*"

119. Maxam Ltd in this respect claimed damages under three heads in its plaint. The first was loss of business, whose average value was particularised in the plaint as being Kshs 1,799,978,868/= and it averred that it had expanded its business in order to fully discharge its obligations under the Distributorship Agreement. The second was loss of profits, which were to be computed by the taking of accounts of reduced volumes of sales as well as reduced profit margins from September 2017 until the final determination of the suit. The third was general damages. Therefore, the head of damages of the value of business is properly claimed by Maxam Ltd, firstly, as a reliance interest in terms of the expenditure and costs it incurred in the performance of its obligations, and secondly under the expectation interest, being that the other party would perform its part of the contract, from which it would make profits and then offset its costs from the consideration received.

120. It is also noted in **Chitty on Contracts (supra)** that the limitation on the recovery of expenditure is subject to the normal limitations of remoteness of damage and mitigation or where the other side shows that the claimant would not have recouped the expenditure even if the contract had been broken. Once it is proved that the damage and loss incurred flows from the breach, the expenditure that can be recovered includes wasted expenditure, the costs of performance of the contract, expenditure incurred before the making of the contract in the expectation that it would be needed for the performance of the contract and recouped from the benefit of the other party's performance or profits expected to be made from the activity in question, and that a claim can be made for both reliance and profits losses, so long as a claimant is not compensated twice for the same loss (see paragraphs 26-022 to 26-031).

121. The specific obligations placed on Maxam Ltd in the Kenya Distribution Agreement as regards the infrastructure that was required to put in place were set out in Clause 7 thereof, which made reference to the operating manual in Schedule two of the agreement for the detailed terms and conditions relating to the finance, supply, ordering, storage, quality commercials and stocks of the product. Of note was paragraph 3.3 of the operating manual on warehousing required Maxam Ltd to operate and maintain its warehouses in accordance with Heineken's conditions and standards on tidiness and environment (temperature), and to install and

utilize temperature recorders in the storage areas in which Heineken products are stored and keep records of such temperature readings for a minimum of 12 months. Paragraph 3.4 on delivery and transport required the distributor to establish an existing set of delivery routes, have a route planning system distribution, and provided conditions as regards distribution and handling of Heineken products, their land transport, including the loading and unloading, and that the transport vehicle should be covered with tarpaulins or more permanent covers.

122. Paragraph 3.6 on "vehicles" provided as follows.

> *"3.6.1 Distributor shall properly maintain its vehicles.*
> *3.6.2 Distributor shall ensure that any vehicle bearing Heineken graphics reflects a quality image and upholds the trademark integrity of the products.*
> *3.6.3 Vehicle shall be properly painted, free of body damage, dirt and rust and otherwise represent the quality image of Heineken.*
> *3.6.4 The percentage of Distributor vehicles painted with Heineken graphics shall be, at minimum, in direct proportion to the revenue percentage that the products represent of the Distributor's total value.*
> *3.6.5 Distributors shall paint and decal such sales, merchandising, delivery and other over the road vehicles, generally every three years, to the then current graphic standards as established by Heineken, using decal graphics provided by Heineken.*
> *3.6.6. Distributor shall ensure a number of vehicles in line with business as it develops."*

123. Heineken E.A and Heineken B.V have urged that these investments were a risk that Maxam Ltd was willing to take arising from the provisions of Clause

16 of the Agreement that "in *executing this Agreement you shall be an independent contractor and act in your own name and for your own risk and account without any right to represent Heineken in any manner whatsoever*". We disagree with the above argument for two reasons. The first is that the provisions as regards the infrastructure required to be put in place were in specific terms and condition of the Distribution Agreements that Maxam Ltd was obligated to observe, and which would have attracted adverse consequences in the event of non-observance on its part and also required consideration on the part of Heineken E.A and Heineken B.V. The second reason is that the provisions illustrate the nature and tenets of exclusive beverage distributorship, which **Barry Kurtz and Bryan H. Clements** in the context of American jurisprudence, describe in their article on "*Beer Distribution Law as Compared to Traditional Franchise Law"* published in **Franchise Law Journal Vol. 33, No.3 [2014]** 397-409 at 402 follows:

> "…. ***Not unlike franchising, which requires franchisees to make a substantial initial investment, beer distribution requires a substantial investment in infrastructure by beer distributors, which is one of many reasons why most states have an array of statutes, rules, and regulations aimed at balancing power in favor of distributors.***"

124. It is necessary to distinguish the applicable legal prerequisites and outcomes of a traditional distributorship and an exclusive distributorship. A traditional distributorship is described by **Barry Kurtz and Bryan H. Clements (supra)** as one that *"operates an independent business under its*

own trade name and purchases and resells the supplier's products according to its own procedures, not according to the supplier's system or prescribed marketing plan. Customers generally do not associate a supplier's trademark with the distributor's business, and it is unlikely that the distributor pays a fee to sell the supplier's products." Under this traditional distributorship model, a distributor does not make any company-specific investment on account of any manufacturer, nor promote or market any of the products it is distributing, but only responds to market demands originating from retailers/consumers. The distributor is also free to distribute various other competing brands. This traditional model operates under terms and conditions mirroring what obtains in retail supermarkets. Retail supermarkets typically have a beverage section where various brands are displayed, and shoppers select the brands they prefer. The supermarket charges an agreed margin on every sale. In this traditional distributorship model, no goodwill is created, and no damages can be claimed for the termination of the relationship, as the manufacturer is responsible for all the marketing of its products with sales attributable to a market pull and not through a push demand. This the only model which can be defined as possessing the attributes of an "independent contractor."

125. The model in an exclusive distributorship and in the present appeal is however different. Maxam Ltd was appointed the exclusive beer distributor in Kenya for a period of three years with an option to extend the

distributorship for one-year term, and prohibited from dealing with any competing beer brands during the life of the distributorship. On this basis, according to the evidence of PW1 and PW2, Maxam rented warehouses in Nairobi and several depots across the country and invested in a fleet of vehicles in addition to employing staff to manage the distributorship. Maxam Ltd's remuneration in this regard was through an agreed margin for every beer sold, and the Kenya Distribution Agreement in this respect had geographical and sales targets. More importantly, the capital investment in an exclusive distributorship agreement also creates goodwill, comprising the capital invested in the infrastructure deployed, opportunity cost in not being able to sell competing products, goodwill in the customers the distributor has attracted, goodwill in the profits that the supplier derives from the sales the distributor makes.

126. It is for this reason that **Pelin Baysal** , **Cansu Akbıyıklı** and **Edanur Atlı,** associates at the firm of **Gun & Partners**, describe a distributorship agreement as *"a sui generis agreement"* in their article on " *Compensation Claims Arising out of Distributorship Agreements under Turkish Law"*, and state that the agreement *"mainly contains the characteristics of a sales and purchase agreement; however, it also differs from the same since the distributor's role is not limited to simply purchasing the products from the supplier/principal and selling them to customers and end-users. Instead, in a distribution agreement, the distributor is incorporated into the*

distribution chain of the supplier with having the right and duty to sell and market the supplier's products usually in a specific geographical region on its own behalf."

127. Likewise, **Thomas E. Carbonneau** in his article on *"Exclusive Distributorship Agreements in French Law*" "published in The **International and Comparative Law Quarterly, Vol. 28, No. 1 (Jan., 1979)** pp 91-116, extensively describes the *sui generis* commercial and legal dynamics at play in an exclusive distributorship agreement as follows at page 93:

> ***"Generally, the manufacturer will contract with several retailers throughout a large area, assigning each to a particular zone. By creating such a network of distributors, the manufacturer assures himself that his products will be sold according to a uniform sales technique and that the services provided by each distributor will conform to a single pattern of high quality. In return for their participation in the network, the distributors not only benefit from the co-operation of its other members, but also gain the added protection of the manufacturer's regulation and supervision of the network. Thus, both parties profit from the fact that the distributorship network functions as an integrated economic unit.***
>
> ***This rather neutral description of the respective positions of and exchanges of benefits between a manufacturer and his distributors under the terms of an exclusive distributorship agreement conceals the more austere economic character of the agreement-at least from the distributor's point of view. Although in legal terms the distributor retains his status as an independent merchant, from a commercial point of view, he loses much, if not all, of his autonomy and occupies a position of definite inferiority in his contractual dealings with the manufacturer. In various cases involving distributorship agreements, the French courts have ruled that the distributor freely assents to the***

terms of the agreement and acts in his own name and on his own behalf when he sells the manufacturer's products. No judicial account, then, is taken of the indisputable economic fact that the distributor functions more in the manner of an " employed " than that of an " independent " merchant. For example, under the provisions of a typical distributorship agreement, the manufacturer usually retains the right to dictate the distributor's commercial policy often, in fact, controlling the latter's business organisation and investment procedure."

128. There is an acceptance in a number of jurisdictions that exclusive distribution agreements attract a different consideration from other commercial contracts, and that this differentiation is most profound when analysing the relative power dynamics of the parties, especially when it comes to termination of these agreements and restriction on, or compensation upon, such termination. This position is mainly informed by the extensive capital investments required of distributors in exclusive distribution agreements to perform their part of the contract, and terminating an exclusive distributorship agreement without proper consideration of this investment can be a costly process for distributors. In the article on "*Terminating Distribution Agreements - Know Where You Stand*" by Herbert Smith Freehills LLP, Japan, published in **Lexology** on January 11 2013, it is noted that in common law jurisdictions, courts will generally respect the express terms of the distribution agreement between the parties, and in terms of damages, in the event that the supplier terminates the distribution agreement in breach of its terms, then the

distributor will have an action for breach of contract and may claim for damages for loss caused as a consequence of the unlawful termination or breach. The position is similar in the USA although a number of state statutes prescribe minimum notice periods for termination, and often also for non- renewal of distributorships.

129. The position obtaining in civil law countries is on the other hand explained as follows:

> *"By way of example, under Japanese law, a contract is generally enforceable in accordance with its written terms, especially if it is made between sophisticated parties on equal commercial footing. However, rules have been developed to protect the distributor in cases of non-renewal or termination so that, even where a contract is ended in accordance with its terms, the distributor may have a claim for unlawful termination or non-renewal. Various factors will be taken into consideration to determine whether a contract has been lawfully terminated or not renewed, including:*
>
> - *whether the relationship of mutual trust has broken down;*
> - *which party has a dominant bargaining position;*
> - *whether the distributor has had the opportunity to recoup its investment;*
> - *whether the distributor is solely reliant on this business for its livelihood and if it can compete in the market post termination;*
> - *length of notice of termination or non-renewal;*
> - *the duration of the distribution agreement, its original term and number of renewals.*
>
> *In a similar way, under French law, suppliers can be liable for terminating a distribution agreement without giving sufficient written notice, irrespective of whether the supplier has complied with the contractual notice period. Sufficient notice is determined by taking*

into account similar factors to those listed above. In other jurisdictions, like Germany and Italy, reasonable notice periods are dictated by law and range from 1 to 6 months depending on the length of the relationship (including any renewals).”

130. Common throughout these jurisdictions is the reliance on essentials of “good faith”, “equity”, and “fairness.” These are the same imperatives imposed by Article 10 of the Constitution which provides as follows:

“(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
(a) applies or interprets this Constitution;
(b) enacts, applies or interprets any law; or
(c) makes or implements public policy decisions.
(2) The national values and principles of governance include—
(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
(c) good governance, integrity, transparency and accountability; and
(d) sustainable development.

131. The definition of law in **Black’s Law Dictionary, Ninth Edition** at page 962 includes *“…2. The aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action, esp. the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them… 3. the set of rules or principles dealing with a specific area of a legal system…..*” The courts are therefore bound by the imperatives

set out in Article 10 when applying or interpreting contract law. We therefore find that in the assessment of damages arising from a breach of exclusive beer distribution agreements, being a *sui generis* class, requires that the special commercial and legal characteristics of these agreements are taken into account. We also accept the proposition that, consistent with the *sui generis* nature of this commercial relationship, and as an imperative of Article 10(2) of the Constitution, investments made by beer distributors in Kenya constitute irrebuttable goodwill, automatically qualifying as property. We also accept the preponderant view obtaining in most jurisdictions that the special relationship existing between beer manufactures and beer distributors invites the clear presumption that unilateral termination is unavailable to beer manufacturers given the inherent power dynamics obtaining in the relationship between manufactures and distributors which is invariably tilted in favour of manufacturers and, further, that any mutual separation has to be guided by, conform and be consistent with, the imperatives of Article 10(2) of the Constitution.

132. Heineken E.A and Heineken B.V submit that the award of damages was excessive, against the weight of evidence submitted, and that the credibility of the Respondent's witnesses was put to serious doubt during cross-examination. They also question the trial judge's wholesome acceptance of the Respondent's valuation report, despite what their counsel stated were

many discrepancies. However, Heineken E.A and Heineken B.V concede that they did not tender any expert evidence of their own to counter the expert witness report by Maxam Ltd.

133. The specific shortcomings of the evidence of PW2, which counsel for Heineken E.A and Heineken B.V submitted arose from the cross-examination of the expert witness, were as follows:

a) PW2 claimed he had prepared the Report but admitted it was signed by a third party, a Mr. Mwai Mbuthia, and confirmed that he was not given a Letter of Instruction outlining the scope of his brief.

b) PW2 claimed he had not done any other work for PW1 or Companies associated by him, including TransCentury, until it was pointed out that TransCentury was listed as a client on his Company website.

c) PW2 confirmed that when preparing the Report, he had neither seen the Agreement between the parties nor been informed it has been terminated or had a termination clause which would have affected his projections.

d) That in preparing the Report, PW2 did not ask for, nor was he provided with the Profit and Loss account nor the balance sheets which would be the foundation of preparing any valuation report.

e) In preparing the Report, PW2 purportedly relied on financial reports which were missing.

f) PW2 prepared the Report on the assumption that the Company traded in Heineken products, but was not aware it traded in cigarettes and wines as well.

g) PW2 was not aware that the agreement had been terminated or had a termination clause, which he confirmed would have affected his projections.

h) PW2 confirmed it was wrong to compare Maxam Ltd's finances with EABL as the latter was a brewing company, selling over 15 products with a 96% market share. In contrast, Maxam Ltd was a trading company with one product with less than 1% market share.

i) PW2 confirmed that the Report was based on data which was not attached and was purportedly based on information obtained from the management Reports dated 31st December 2016, the same date of the Report.

134. To counter these arguments, counsel for Maxam Ltd submitted that it was PW2's testimony during cross-examination that the engagement by Maxam Ltd for valuation of its Heineken business was of UHY Kenya an audit firm in which PW2 is a partner, and not of PW2 as an individual in his personal capacity. In the circumstances, any of the three (3) partners of the audit firm could have signed the valuation report on behalf of the firm, which is a

general practice in the industry and the same cannot invalidate the valuation report. In addition, that PW2 confirmed during cross-examination that he is the one who prepared the subject valuation report and took the Court through the elaborate methodologies he adopted in arriving at a final valuation. Further, he also testified that he is a Bachelors of Commerce (Accounting option) graduate and also a registered member of the Association of Chartered Certified Accountants (ACCA), and his credentials were never discredited by the counsel for the Heineken E.A and Heineken B.V during the trial. As such, he was adequately and properly qualified to prepare the said valuation report and the same is reliable and therefore valid.

135. On the contents of the report, the counsel for Maxam Ltd submitted that Maxam Ltd's profit and loss accounts and audited financial statements of were indeed factored in the valuation and are highlighted as part of the working papers in the said report. PW2 testified that in preparation of the valuation report he relied on financial reports and management accounts for the period ending 31st March 2016 prepared by Maxam Ltd because the audit of the 2016 accounts had not been conducted by the time of the valuation. Lastly, that the report further highlighted that it only relates to the Heineken sales and not any other products, and that the figures tabulated in the valuation together with the methodology applied for the valuation of

Maxam Ltd's business were not put to scrutiny or challenged at all during the cross-examination of PW2.

136. We are alive to the possibility that there will be instances where an expert's report might be of little probative value, especially where such a report is inconsistent with established norms in the subject matter of the report, or where, as acknowledged by the Supreme Court of the United Kingdom in **Griffiths vs TUI (UK) Ltd [2023] UKSC 48,** where a party invites the court to reject written expert evidence adduced by the opposing party by challenging the expert directly in cross-examination. A party however still takes the risk of not displacing the expert evidence by cross-examination, and by not tendering expert evidence of its own to dispute such a report, as the Supreme Court of Kenya has noted in **Attorney General vs Zinj Limited, 2021 KESC 23 (KLR):**

> *"29. Having determined that the respondent's right to property had been violated by the Government, the trial court, and later the appellate court, made orders for compensation in favour of the respondent. Both courts granted special and general damages. As we have arrived at a similar conclusion, we see no reason to interfere with the findings of the two superior courts in this regard. We take note of the appellant's submission to the effect that in arriving at the quantum of special damages, the trial court placed reliance upon a Valuation Report by a private valuer. Such Report, in the view of the appellant, was not only unreliable, but could very likely have been tailored to support the respondent's claim. However, in answer to this court's question as to whether, the appellant had tabled in court, a Government Valuation Report to counter the contents of the impugned*

one, counsel for the appellant stated that no such Report was ever tabled at the trial court. The main basis upon which special damages can be granted for the deprivation of property, is the market value of the said property. In case of general damages, a court of law exercises discretion guided by the circumstances of each case. In granting special damages, the trial judge was guided by the Valuation Report tabled by the respondent. In the absence of a contrary report on record, we have no basis upon which to interfere with the award. Even if there had been one such other report, our jurisdiction to interfere would still have been largely circumscribed, unless the award had clearly ignored the fundamental principles of valuation as demonstrated by the counter-report". (Emphasis ours).

137. We have carefully examined the valuation report and other evidence tendered by Maxam Ltd before the trial court and note that we cannot proficiently conclude that the evidence was plainly unbelievable, or that the expert report presented conclusions that are contrary to fundamental principles. The objective of the valuation report was "*to determine the loss of business to Maxam Ltd if Heineken were to discontinue the distributorship contracts*" using various valuation methods. The methods were indicated as the Discounted Future Cash Flow method, which used the company's discounted future cash flows to value the business; the PE Multiple Method, which used the price earnings ratio as a multiple of the base year earnings; the Discounted Future Earnings method, which used the expected future earnings to value the business the company; and the Dividend discount method, which valued the company based on the dividends the company paid its shareholders.

138. The average valuation from the four methods was found to be Kshs 1,799,978,868/=, and the financial statements and balance sheets that were attached as the basis for the calculations used were the actual ones for 2015, the management accounts for 2016 and the projected accounts for 2017 to 2021. There were also a projected cash flow for 2011 to 2015, sales and productions costs for 2011 to 2016 and net book value of property, plant and equipment for the year ended 31st March 2015 that was annexed to the report. In our view, a counter-report was required to effectively contradict the contents of the report, and the Appellants' cross-examination of Maxam Ltd's witness was not sufficient to jettison the findings in the report, particularly in the areas of the validity of the methodology used and reliability of the findings. It is notable that the attempt to challenge the reliability of the findings during cross-examination was based on irrelevant considerations and a misunderstanding of the data used by PW2.

139. Nonetheless, we wish to evaluate the trial court's assessment of damages in line with the principles we have set out above. We have noted that the there are three distinct types of damage arising from the relationships between the parties in this matter, namely the damages arising from the breach of the contract including recovery of expenditure incurred and expected profits, and goodwill compensation. The evidence presented by Maxam Ltd and accepted by the trial Court arose from expected returns from its

investment in the distributorship, which created reasonable expectations that the distributorship contract would be extended for a period necessary for the Maxam Ltd to recover this investment. Therefore, irrespective and notwithstanding the provisions of the Distribution Agreement, from the workings and reality of their business relationship, Maxam Ltd was in fact and in law a business joint-venture of Heineken E.A and Heineken B.V, and entitled to a share of Heineken E.A and Heineken B.V profits from the sales it made. It deployed its capital for the benefit of Heineken E.A and Heineken B.V, who clearly derived benefit from utilising and appropriating that investment.

140. Maxam Ltd also created substantial goodwill for the Heineken E.A and Heineken B.V which established reasonable expectations of compensation. Goodwill, once vested cannot be extinguished even if the agreement has an expiry term, and retains its separate character as an enforceable property right. Put differently, once goodwill legally vested, it could not be unilaterally annulled. In our view given the loss and damage arising from the circumstances of the breach by Heineken E.A and Heineken B.V, the projection of profits by PW2 for the period 2017 to 2021 was reasonable and adequate to enable Maxam Ltd to recoup its expenditure and goodwill.

141. It is also settled law that the loss of business and expected profits can be established based on reasonable estimations as held by the Indian Supreme

Court in the case of **MSK Projects India (JV) Limited vs State of Rajasthan & Another (2011) 10 SCC 573**:

> *"30. In M/s. A.T. Brij Paul Singh & Ors. v. State of Gujarat, AIR 1984 SC 1703, while interpreting the provisions of Section 73 of the Indian Contract Act, 1972, this Court held that damages can be claimed by a contractor where the government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages, court should make a broad evaluation instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was further observed that what would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid.*

142. It is in this regard that we also understand the approach is also put forth in **McGregor on Damages, Nineteenth Edition** at page 349 paragraph 10-002, wherein it is stated that:

> *"Indeed if absolute certainty were required as to the precise amount of loss that the claimant had suffered, no damages would be recovered at all in the great number of cases. This is particularly true since so much of damages claimed are in respect of prospective, and therefore necessarily contingent, loss…Generally, therefore, although it remains true to say that 'difficulty of proof does not dispense with necessity of proof', the standard demanded can seldom be that of certainty. Even if it is said that that the damage must be proved with reasonable certainty,*

the word 'reasonable' is really the controlling one, and the standard of proof only demands evidence from which the existence of damage can be reasonably inferred and which provides adequate data for calculating the amount."

143. As to whether this extent of special damages was within the reasonable expectation of the parties, **Catherine Mitchell** identifies three bases for reasonable expectation in her article on "*Leading a Life of its Own? The Roles of Reasonable Expectation in Contract Law*," **(supra).** The first is the institutional or contractual basis, which she explains at page 647 as "*the parties' shared understandings about the agreement based, for example, on previous dealings between them or the trade practices in the particular market with which they are familiar*". It is notable in this regard that Clause 20 of the Distribution Agreement provided as follows:

> ***"If Heineken wishes to terminate this agreement before the end of the term, it shall discuss and agree with you (in good faith) a fair and reasonable monetary amount to compensate you for such early termination (taking into account the length of time you have been the distributor of Heineken in Kenya and the profitability of your business.)***

144. We are of the view that even though Clause 21 of the Kenya Distribution Agreement excluded payment of compensation for losses incurred from loss of profits, goodwill and investments made among other, it is notable that this clause only became applicable where the contract was validly terminated, which was not the case in this appeal. The author of the above

cited article then proceeds at pages 654 -655 to explain the second and third bases for reasonable expectations, namely the empirical and normative bases, as follows:

> *"Apart from the institutional basis to reasonable expectation (written contracts and contract law), there are at least two quite different, possibly incompatible, broad grounds upon which reasonable expectations can be based. First, they may be based on experience. These empirical expectations may arise through previous dealing and trade customs, for example. In the commercial context, such reasonable expectations may be compelling because, if shared, they are an important foundation upon which the parties build their relationship, even if these expectations are not expressed in the written terms. Second, reasonable expectations may be based on normative grounds. We may think it important that contracting processes and outcomes reflect some requirement of fair dealing. The normative basis for the expectation justifies attributing the expectation to the parties: they have an entitlement to fair treatment, whatever the legal 'contract' dictates and whatever their experience may lead them to expect. Of course, this does not necessarily tell us anything about what fairness requires. Such expectations may be grounded upon some substantive general moral principle that provides the background standard for all contracting behaviour, even if the standard is unknown to the parties and not articulated in their agreement (for example, 'it is a reasonable expectation that all contractors will act in accordance with the requirements of good faith')"*

145. In our case this normative basis is equity, as set out in Article 10 of the Constitution and defined by this Court in **Willy Kimutai Kitilit vs Michael Kibet (supra)** to include *"the body of principles constituting what is fair and*

right", which are therefore implied and reasonably expected in contracts. There is therefore no compelling legal or factual basis that would necessitate our questioning the award of Kshs 1,799,978,868.00 awarded under this head. We however note that the claim for special damages for loss on decreased volumes of sale totalling to Kshs 11,495,674.00/-; as well as loss of profits totalling to Kshs 5,116,514.00/-, which were particularised in the plaint as arising between the months of August 2017 and November 2017 were actual losses incurred which ought to have been specifically proved. No such evidence was brought by Maxam Ltd to justify the award of this head of special damages.

(b) On the Incomplete Judgment

146. While still on the issue of the reliefs granted by the trial Court, counsel for Heineken E.A and Heineken B.V submitted that by giving an order directing the "...taking of accounts in respect of loss of profits occasioned to the Plaintiff by reason of reduced volumes of sales as well as reduced profit margins from September 2017 until the date of this judgment..." the learned trial Judge failed to prepare a complete judgment and it is trite law that once a court issues its judgment, it becomes *functus officio* and cannot purport to issue further directives or orders in the suit. Further, that should the learned Judge have wanted to depart form the *functus officio* doctrine, then the same should have been done within the confines of the legal exceptions namely, to correct clerical errors in the judgement. It was

accordingly urged that by ordering that Maxam Ltd take accounts of losses of profits, the trial Judge pronounced an incomplete and inconclusive judgment and delegated the judicial function of computation of special damages to the parties, implicitly acknowledging that the Respondent did not strictly plead and prove special damages. In addition, that the order amounted to an irregular re-opening of the case, which infringed on the rights of Heineken E.A and Heineken B.V to a fair hearing enshrined under Article 50 of the Constitution of Kenya, 2010. Reliance was placed by the counsel on the decision by the Supreme Court of Kenya in the case of **Raila Odinga & 2 others vs Independent Electoral & Boundaries Commission & 3 others [2013] eKLR**, and the decisions by this Court in **Menginya Salim Murgani vs Kenya Revenue Authority [2014] eKLR** and **Telkom Kenya Limited vs John Ochanda (2014) eKLR.**

147. Counsel for Maxam Ltd submitted that the taking of accounts in respect of loss of profits was one of the prayers sought in the Re-Amended Plaint in prayer (xi) as a matter of necessity, in view of the fact that this was a continuously changing claim in character in light of passage of time, and could not be ascertained and/or quantified before Judgment. Furthermore, that the order for taking of accounts is available to a party under the Civil Procedure Rules and the same can only be granted after a trial of the subject matter, and that the order for taking of accounts given by the trial Judge is not same as an order for "assessment" or "calculating" of damages. As such,

the order for taking of accounts did not render the judgment incomplete and in any event, even if this Court was to be persuaded by the argument, then only that portion of the judgment ordering for accounts on loss of profit can be termed as a nullity and not the entire judgment.

148. The prayer for accounts sought by Maxam Ltd in the re-amended Plaint was as follows:

> *"xi. An Order of this Court directing the taking of accounts in respect of loss of profits occasioned to the Plaintiff by reason of reduced volumes of sales as well as reduced profit margins from September 2017 until the hearing and final determination of this suit."*

The taking of accounts is a process where the court conducts a hearing to determine the monetary amount involved in a dispute and involves the examination of financial documents with the aim of allocating to the respective parties their share of the amount concerned, hence the holding in **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR**, that:

> *"Taking and settlement of accounts is not done normally by judges. Order XIX rule 1 of the Civil Procedure Rules provides that if a plaint prays for an account or where the relief sought or the plaint involves taking of an account, an order for proper accounts with all necessary inquiries and directions usual in similar cases shall be made …. We reiterate that it is not for a judge to take accounts. The reason is clear. It is not the job of a judge to be an accountant. That is why Order XX rule 16 of Civil Procedure Rules gives special directions as to taking of accounts. Elaborate provisions have been made therein."*

149. In this regard, it is notable that taking of accounts under Order 20 Rule 3 of the Civil Procedure Rules is an interlocutory procedure, and an application is made by chamber summons and supported by an affidavit stating the grounds of the claim to an account; and such application may be made at any time after the time for entering an appearance has expired. It is only in exceptional circumstances that such an account can be made after judgment, as enunciated in this Court's decision in **Telkom Kenya Limited vs John Ochanda (supra)**:

> *"Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of CHANDLER vs ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);*
> *"The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:*
> *Where there had been a slip in drawing it up, and,*
> *Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186"*
> *The Supreme Court in RAILA ODINGA v IEBC cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 in which the learned author stated;*
> *..."The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making*

powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued..."

150. An account for profits is also a specific equitable remedy for breach of contract and is an action taken against a defendant to recover the profits taken as a result of the breach of duty, in order to prevent unjust enrichment. In conducting an account of profits, the plaintiff is treated as if they were conducting the business of the defendant, and made those profits which were attributable to the defendant's wrongful actions. The House of Lords decision in **Attorney-General vs Blake, 4 All ER 385** introduced this new head of claim, 'account of profits', which was explained by Lord Nichols of Birkenhead as follows:

"Remedies are the law's response to a wrong (or, more precisely, to a cause of action). When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the Plaintiff for the benefits he has received from his breach of contract.

The Court of Appeal expressed the view, necessarily tentative in the circumstances, that the law of contract would be seriously defective if the court were unable to award restitutionary damages for breach of contract. The law is now sufficiently mature to recognise restitutionary claim for profits made from a breach of contract in appropriate situations." (Emphasis ours).

151. The law had hitherto measured damages in the law of contract by the plaintiff's loss and not by the defendant's gain. However, in the leading speech by Lord Birkenhead in the **Attorney-General vs Blake (supra)** this separation was finally eliminated as follows:

> *"My conclusion is that there seems to be no reason, in principle, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract.…*
> *The main argument against the availability of an account of profits as a remedy for breach of contract is that the circumstances where this remedy may be granted will be uncertain. This will have an unsettling effect on commercial contracts where certainty is important. I do not think these fears are well founded. I see no reason why, in practice, the availability of the remedy of an account of profits need disturb settled expectations in the commercial or consumer world. An account of profits will be appropriate only in exceptional circumstances. Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are an inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed. The court will have regard to all circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought."* (Emphasis ours).

152. This position is now settled law, and given the characteristics of exclusive beer distribution agreements they qualify as "*exceptional cases*" necessarily invite the relief of "account of profits" as an effective remedy to balance the rights of the parties in the context of a gain-based award requiring the brewer/manufacturer to account to a distributor for the benefits received during the life of the distributorship agreement. We accept Lord Nicholls'

summation in **Attorney-General vs Blake** that the wrongdoer must be compelled to give up all such gains irrespective of whether the violation had caused the plaintiff any financial immeasurable loss, because gains must be disgorged even though they were not shown to correspond to a disadvantage suffered by the plaintiff. We must however emphasise that this is not a principle of general application, and the applicability of this head of claim must be determined on a case-by-case basis in all other circumstances. We only assert that "account of profits" in the context of exclusive beer distribution cases satisfy the "exceptional case" standard in **Attorney-General vs Blake**.

153. Maxam Ltd laid out a justifiable basis for this relief. It was entitled to an order of account of profits compelling Heineken E.A and Heineken B.V to account for the profits they derived from the utilisation of Maxam Ltd's capital and infrastructure and therefore the share of Heineken E.A's and Heineken B.V's profits which ought to accrue to Maxam Ltd. However, and as clearly established in **Attorney-General vs Blake**, the relief is sought and granted at an interlocutory stage, and is not granted as a final order in a judgment. Heineken E.A and Heineken B.V therefore succeed on this ground of appeal for this reason.

154. We find that the judgment could not remain "open" for the taking of account of profits after final judgment was rendered by the trial Court,

absent any exceptional circumstances to justify the order of taking of accounts. However, we do not agree with the submissions that the entire judgment is a nullity because it is an "open judgment", since the offending portion was but one of the orders granted by the trial Court, and is therefore severable.

The Disposition

155. In the end, arising from our findings we accordingly decide as follows:

1. **The consolidated appeals by Heineken E.A and Heineken B.V are hereby dismissed, save for the grounds on the application of the doctrine of legitimate expectation and on the order for account for profits.**
2. **The following orders of the High Court are hereby set aside consequent to the findings made in this judgment:**

(a) The injunction order restraining Heineken E.A and Heineken B.V from;

i. Terminating the distribution agreement dated 21st May 2013 between Maxam Ltd and Heineken E.A relating to the distribution of the Heineken larger beer brand in Kenya contrary to the terms of the agreement.

ii. Appointing any other distributor for the distribution of the Heineken larger beer brand in Kenya contrary to the terms and conditions of the agreement.

(b) The declaration issued that the Kenyan Distribution Agreement dated 21st May 2013 between Maxam Ltd and Heineken E.A is in full force and effect as per the terms and conditions set out therein.

(c) The declaration issued that the aforesaid actions and breach by Heineken E.A and Heineken B.V had infringed on Maxam Ltd's rights as protected by Article 19 of the Constitution.

(d) The declaration issued that the conduct of Heineken E.A and Heineken B.V of offering lower market prices to other distributors of the Heineken Larger Beer, approving higher market prices to Maxam Ltd on the same products and arbitrarily reducing Maxam Ltd's approved margins is discriminatory and offends the provisions of Article 27(2) of the Constitution.

(e) The declaration issued that the pricing models imposed on Maxam Ltd by Heineken E.A and Heineken B.V without Maxam Ltd's prior consultation and/or express consent, and which models were issued subsequent to the Court order of 28th August 2017 were exploitative, oppressive, unfair, null and void.

(f) The order issued directing the taking of accounts in respect of loss of profits occasioned to Maxam Ltd by reason of reduced volumes of sales as well as reduced profit margins from September 2017 until the date of the judgment of the High Court.

(g) The special damages for loss of profits as tabulated in prayer (i) of the plaint that were awarded to Maxam Ltd.

3. We affirm and uphold the order by the High Court directing Maxam Ltd submit the Distributorship Agreement dated 21st March 2013 to the Stamp Duty Collector for assessment of the duty payable, upon which Maxam Ltd was to pay the amount in the normal manner within 7 days from the date of the judgment, and a copy of the stamped document bearing stamp duty collector's stamp and court stamp be submitted to the Deputy Registrar within 4 days from such stamping by court for record purposes.

4. We affirm and uphold the declaration issued by the High Court that the Notice of Termination dated 27th January 2016 from Heineken E.A to

Maxam Ltd was unlawful, irregular, unprocedural and therefore null and void.

5. We affirm and uphold the award by the High Court to Maxam Ltd of special damages for loss of business of Kshs. 1,799,978,868.00 to be paid by Heineken E.A and Heineken B.V, arising from their repudiatory breach of the Kenya Distribution Agreement.
6. Heineken E.A and Heineken B.V shall pay Maxam Ltd the costs of the trial in the High Court and of the consolidated appeals herein.

156. Orders accordingly.

Dated and Delivered at Nairobi this 24th day of May, 2024

P. NYAMWEYA

……..
JUDGE OF APPEAL

A. ALI-ARONI

……..…
JUDGE OF APPEAL

J. MATIVO

……..
JUDGE OF APPEAL

I certify that this is a true copy of the original
Signed
DEPUTY REGISTRAR