

REPUBLIC OF KENYA
THE ADVERTISING STANDARDS BODY OF KENYA
THE STANDARDS APPEAL COUNCIL
APPEAL NO. 2 OF 2005

BETWEEN

EAST AFRICAN BREWERIES LIMITED ('Appellant')

AND

NACADA & 19 OTHERS ('Respondent')

RULING

On 11th February 2005 the Advertising Standards Committee (ASC) after hearing and considering a complaint against East African Breweries Limited (EABL) lodged by the National Agency for the Campaign Against Drug Abuse (NACADA) acting as an umbrella for and on behalf of nineteen other groups and individuals handed down a decision whose effect was to preclude EABL from engaging in outdoor advertising of any nature in Kenya within a radius of 3 kilometres from schools or other learning institutions where the majority of the population would most likely constitute young persons below the age of 18 years. EABL being aggrieved by that ruling and decision intends to appeal to the Standards Appeal Council (SAC) and has lodged notice of appeal dated 25th February 2005. Indeed EABL has already lodged its memorandum of appeal. EABL now asks the SAC to grant a stay of the ruling of the ASC pending the hearing and determination of the proposed appeal.

We must observe from the outset that the Code of Advertising Practice and Direct Marketing (the Code) pursuant to which the complaint was lodged and which establishes both the ASC and the SAC whilst providing for the process of appeal against a decision such as the one now sought to be appealed against makes no provision for the grant of stay of execution or of the effect of a ruling pending the hearing and determination of an appeal. Counsel for EABL have therefore submitted that the Code is not intended as a rigid Code and that we should find that there is jurisdiction to grant the stay. For our part we are satisfied that the fact of the existence of an appeals board must necessarily translate into a jurisdiction vested in that appeals board to entertain an application for stay. Otherwise a real risk exists of appeals by aggrieved parties being rendered nugatory if they were to be compelled to effect the decisions of the ASC notwithstanding that they were aggrieved by the same and have referred an appeal. The other consideration is that the Code which is intended as a self regulation mechanism for practitioners of advertising and marketing in Kenya depends for its efficacy on the willingness of all parties to abide by the provisions of the Code as well as decisions made by the ASC and the SAC. Accordingly it is of the utmost importance that all parties are given as full an opportunity as possible to ventilate their grievances as well as to appeal against decisions which may have been rendered against them. Part of the opportunity which is sought to be afforded is that parties must be confident that where they are appealing against a decision any success in their appeal will not be nugatory and the victory pyrrhic. It is therefore the view of the SAC that the request for a stay is in order and should be entertained.

EABL has submitted that it has a proper and well founded appeal. In this respect it argues inter alia that the effect of banning all forms of outdoor liquor advertisements within a 3 kilometre radius of schools amounts to a total ban on all liquor advertisements in all urban settings in Kenya. It is submitted therefore that the ASC's decision amounts to a fundamental breach of EABL's constitutional right to advertise and that this is contrary to the law. We are of the view that this is a substantial point that needs to be argued and considered comprehensively.

In respect of the reasons for seeking a stay EABL cites the expense that would be incurred in removing the billboards at various places where it has placed outdoor advertising. It is submitted that EABL would suffer double expense if its appeal were to be successful as it would have to re-erect these billboards. It says that any expense incurred in this regard is unlikely to be recouped from NACADA or any of the nineteen other groups or individuals who are respondents to EABL's appeal. EABL also cites the reduced brand awareness which would lead to a loss of revenue if it had to remove the billboards in question. It is also submitted on behalf of EABL that no prejudice would be occasioned to NACADA in any event as the hearing which is already scheduled for 23rd and 24th March 2005 is less than a fortnight away and accordingly on a balance it is perhaps better that the status quo be maintained until the appeal has been heard and determined.

Having given consideration to the basis upon which this application for stay is made and bearing in mind the fact that NACADA was not represented at the preliminary hearing at which the application was made we are for our part prepared to grant a stay of execution only on the basis that the hearing of the appeal is less than a fortnight away and accordingly it is unlikely that any delay in effecting the ruling of the ASC would be significant and the prejudice occasioned if any negligible at most. In view of the fact that the basis of the complaint was for the protection of children and young persons from the effects of advertisements for the use of alcohol and having regard to the fact that the complaint was spearheaded by NACADA which is a national institution established to campaign against drug (which they have argued includes alcohol) abuse we do not consider that it is proper that we should grant the stay on the basis of negative effects to EABL's monetary position. The position would be different were we considering an application between two entities in the commercial sphere. We think that the basis of the complaint transcends considerations such as these, but having said that and being cognizant of the fact that EABL is a company conducting a legitimate business for profit our role must be to hold the scales as between the interests of NACADA and those of EABL in order that none of them is unduly prejudiced by the process of appeal. We have already done this by setting the earliest possible hearing dates.

In the result we grant the request for a stay of the decision of the ASC pending the consideration and determination of the appeal.

DATED at Nairobi this _____ day of March 2005

SIGNED:

John M. Ohaga
Chairman

Jane Delorie
Member

John Mramba
Member

