



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. E 475 OF 2020

DAVID KAMAU NGURE.....PLAINTIFF

VERSUS

COMMISSIONER FOR DOMESTIC TAXES.....1ST DEFENDANT

TOTAL KENYA PLC.....2ND DEFENDANT

RULING

1. This Ruling determines the Notice of Motion dated 16th November 2020 for a multiple of prayers:-

a). *SPENT*

b). *THAT this Honourable Court be pleased to issue a temporary injunctive Order to restrain the 1st Defendant by themselves, agents, representatives or any other person acting on their behalf and instructions or claiming through them from holding out as proprietors of Dasken Enterprises under Certificate of Registration Number BN-6GCKL95 or at all pending the inter-parties hearing of this application.*

c). *THAT this Honourable Court be pleased to issue a temporary Order of injunction to restrain the 1st Defendant by themselves, agents, representatives or any other persons acting on the behalf and instructions or claiming through them from use of the Applicant's KRA PIN Number A006943115Q in the conduct of the 1st Defendant's business or at all pending the inter-parties hearing of this application.*

d). *THAT this Honourable Court be pleased to issue a temporary Order of injunction to restrain the 1st Defendant by themselves, agents, representatives or any other persons acting on their behalf and instructions or claiming through them from use of the Applicant's e-mail address being likonirdtotalyd@gmail.com in the conduct of the 1st Defendant's business or at all pending the inter-parties hearing of this application.*

e). *THAT this Honourable Court be pleased to issue an Order directing the 1st Defendant to immediately yield and surrender to the Applicant the credentials and password to the Applicant's e-mail address being likonirdtotalyd@gmail.com pending the inter-parties hearing of this application.*

f). *THAT this Honourable Court be pleased to issue an Order directing the 2nd Defendant to immediately render to the Court an account of all pending and unpaid annual income tax obligations, P.A.Y.E obligations, value added tax and withholding tax generated from sale of fuel and fuel products from any of the 1st Defendant's businesses and ascribed to the use of the Applicant's KRA PIN Number A006943115Q pending the inter-parties hearing of this application*

g). *THAT upon the inter-parties hearing hereof and pending the hearing and determination of the main suit herein, the Honourable Court be pleased to issue an interim injunctive order to restrain the 1st Defendant by themselves, agents, representatives or any other person acting on the behalf and instructions or claiming through them from holding out as proprietors of Dasken Enterprises under Certificate of Registration Number BN-6GCKL95.*

h). *THAT upon the inter-parties hearing hereof and pending the hearing and determination of the main suit herein, the Honourable*

Court be pleased to issue an interim injunctive order to restrain the 1st Defendant by themselves, agents, representatives or any other persons acting on their behalf and instructions or claiming through them from use of the Applicant's KRA PIN Number A006943115Q in the conduct of the 1st Defendant's business or at all.

i). THAT upon the inter-parties hearing hereof and pending the hearing and determination of the main suit herein, the Honourable Court be pleased to issue an interim injunctive order to restrain the 1st Defendant by themselves, agents, representatives or any other persons acting on their behalf and instructions or claiming through them from use of the Applicant's e-mail address being likonirdtotalyd@gmail.com, in the conduct of the 1st Defendant's business or at all.

j). THAT upon the inter-parties hearing hereof and pending the hearing and determination of the main suit herein, the Honourable Court be pleased to issue an Order directing the 1st Defendant to immediately yield and surrender to the Applicant the credentials and password to the Applicant's e-mail address being likonirdtotalyd@gmail.com

k). THAT upon the inter-parties hearing hereof and pending the hearing and determination of the main suit herein, the Honourable Court be pleased to issue an Order directing the 2nd Defendant to issue the Applicant with a tax clearance certificate for the year 2020.

l). THAT the costs of this Application be provided for.

2. In a Complaint dated 16th November 2020 the Plaintiff states that at all material times to the suit he was employed by the 1st Defendant as a 'Young Dealer' to manage and run the 1st Defendant's service station known as Likoni Road Service Station in Nairobi Industrial area. The arrangement was under a Marketing License Agreement (MLA) signed by the Plaintiff and the 1st Defendant. The Plaintiff operated under his business name "Dasken Enterprises".

3. It is the Plaintiff's case that the station and all assets on the premises including all staff employed were the "property" of the 1st Defendant. He further states as the 1st Defendant's manager his telephone number 0714261154 was subscribed to the 1st Defendant fuel systems platform.

4. The relationship was terminated through a Notice of 3rd December 2019.

5. The Plaintiff's grievance is that even after the termination, Total unlawfully and without authority or consent continued to trade and operate the station under the Plaintiff's business name; has taken control and use of the Plaintiff's KRA PIN Number A006943115Q and email address.

6. The Plaintiff has joined Kenya Revenue Authority (KRA) to these proceedings. The Plaintiff complains that notwithstanding notifying the Authority of the unauthorized access and use of the Plaintiff's KRA by Total, the authority has not taken any action against the 1st Defendant.

7. In the end the Plaintiff prays for the following prayers:-

a). An order directing the 1st Defendant to render an account to this Honourable Court on the filing of Value Added Tax returns in respect of Sale of petroleum and petroleum products at the Likoni Road Service station with the Kenya Revenue Authority for the years 2018-2020;

b). An Order directing the 1st Defendant to render an account to this Honourable Court on the filing of annual income Tax returns in respect of sale of petroleum and petroleum products at the Likoni Road service station with the Kenya Revenue Authority for the years 2017-2020

c). An Order directing the 1st Defendant to immediately file and settle with 2nd Defendant all V.A.T obligations and accrued penalties for the period of 1st January 2017-31st December 2020 transacted on the Plaintiff's KRA 0-tax portal in respect of the 1st Defendant's business under the Likoni Road Service Station;

d). An order directing the 1st Defendant to immediately settle with the 2nd Defendant all P.A.Y.E obligations and accrued penalties for the period of 1st January 2020-31st December 2020 in respect of the 1st Defendant's employees under the Likoni Road Service Station;

e). An Order directing the 1st Defendant to immediately settle with the 2nd Defendant all annual income tax obligations and accrued penalties for the period of 1st January 2019-31st December 2019, and for the period 1st January 2020-31st December 2020 transacted on the Plaintiff's KRA I-Tax portal in respect of the 1st Defendant's business under the Likoni Road service station;

f). An Order directing the 1st Defendant to immediately settle with National Social Security Fund (NSSF) all payment obligations and accrued penalties in respect of the 1st Defendant's employees under the Likoni Road Service Station for the period of 1st January 2020-31st December 2020;

g). An Order directing the 1st Defendant to immediately settle with National Hospital Insurance Fund (NHIF) all payment

obligations and accrued penalties in respect of the 1st Defendant's employees under the Likoni Road Service Station for the period of the 1st January 2020-31st December 2020;

h). An Order directing the 1st Defendant to immediately relinquish the client's passwords and access to his e-mail address likonirdtotalyd@gmail.com;

i). An Order directing the 1st Defendant to immediately unsubscribe the Plaintiff's telephone number 0714261154 from the 1st Defendant's fuel systems platform;

j). An Order directing the 1st Defendant to compensate the Plaintiff for the unauthorized use of his business, KRA PIN and e-mail address assessed in the amount of Kshs. 90,000/- per day from the 1st of January 2020 until the date of judgment together with interest at court rates;

k). An Order directing the 2nd Defendant to delete all tax liabilities incurred and assigned to the Plaintiff's KRA PIN in furtherance of the 1st Defendant's business and apportion such liabilities to the 1st Defendant's KRA PIN;

l). Costs of the suit

m). Any further relief that the Honourable Court may deem fit and appropriate in the circumstances of the case.

8. Total responds to the Plaintiff's allegation through a Statement of Defence dated 14th December 2020. It takes the position that the Plaintiff was its licensed dealer under the name and style of Dasken and was so licensed under a Young Dealer Marketing License Agreement dated 23rd February 2018. That under the terms of the MLA, an obligation was imposed on the Plaintiff to employ adequate and suitable staff for the proper operation and management of the business and the responsibility for the employee's recruitment, training, termination, prompt payment of wages and compliance with any statutory provisions or regulations in respect to such employment.

9. Total denies that it has access or control of the Plaintiff's tax PIN Number or related email address and avers that the same were in control of the Plaintiff's employees before termination of the MLA.

10. Although KRA filed a long statement of Defence, I think that for purposes of the interlocutory application at hand, two lines of Defence can be highlighted. First, that KRA is not a party of the MLA entered between the Plaintiff and the 1st Defendant and therefore cannot be invited to the dispute. Second, under Article IV Paragraph X of the MLA the responsibility of payment of taxes fell to the Plaintiff.

11. In support of the Application the Plaintiff reiterates contents of the Complaint and annexes copies of ETR receipts and invoices allegedly raised by the 1st Defendant in the operation of its business.

12. This Court has considered the arguments made for and against the Motion. Some of the prayers must be considered on the principles set out in **Giella vs Cassman Brown [1973] E.A 358** which are:-

i. An application must show a prima facie case with a probability of success;

ii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparably injury;

iii. When the court is in doubt, it will decide the application on the balance of convenience.

13. Some other prayers like that seeking an order directing the 1st Defendant to immediately yield and surrender to the Applicant the credentials and password to email address likonirdtotalyd@gmail.com is in mandatory terms and the test is more stringent. See **Kenya Breweries Limited and Another v Washington Okeyo NRB CA Civil Appeal No. 332 of 2000 [2002] eKLR.**

14. It is common ground that at all material times the relationship between the Plaintiff and the 1st Defendant was governed by the Marketing License Agreement. Although the Plaintiff asserts that he was employed by the 1st Defendant, clause III on the objective and scope of grant of the license provides that the objective of the grant of the license was to permit the Young Dealer to enter, operate and utilize the station together with the facilities provided by the 1st Defendant there and sell and carry on ancillary businesses approved by the 1st Defendant. The Plaintiff does not point out any provision in the MLA which provides for an employer-employee relationship and this Court, on its own, is unable to find any.

15. At core of the Defence by the 1st Defendant is that it is not operating in the name of the Dasken nor does it have access or use of the Plaintiff's PIN or email portal. The onus was on the Plaintiff to prove that the 1st Defendant is responsible for the alleged infraction. The proof required at this stage is merely on a prima facie basis.

16. As I understood it, the Plaintiff seeks to provide this proof by the invoices and ETR receipts allegedly issued in favour of or in the name of Dasken. What the Plaintiff does not state is from where he obtained these ETR receipts and invoices. The 1st Defendant asserts that the station was always operated by Plaintiff and his employees and they are the ones who had access to the Plaintiff's Tax PIN Number and related email. The manner in which the MLA contemplated the control and management of the station supports that assertion. The Plaintiff has not explained how that access and control moved to the 1st Defendant.

17. Some other evidence does not help the Plaintiff's cause. In a letter dated 13th October 2020 by the Plaintiff's advocates to Total, they complain that Total unlawfully used the Plaintiff's business name, PIN and email address during the period January 2020 to August 2020. The contents of this letter, written on 13th October 2020, suggests that the infraction was only upto August 2020. Indeed even the ETR receipts and invoices alluded to earlier in this decision do not go beyond August 2020. Why would the Plaintiff be seeking to restrain acts which had ceased in August 2020?

18. This Court comes to the conclusion that the Plaintiff has not made out a prima facie case with probability of success and dismisses the Notice of Motion of 16th November 2020 with costs.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 21ST DAY OF MAY 2021.

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Maina for Plaintiff

Koile for 1st Defendant

Chelangat for 2nd Defendant

Court Assistant: Nixon