



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 1503 OF 2005**

**MOONLIGHT SERVICE STATION LIMITED.....PLAINTIFF**

**VERSUS**

**TOTAL KENYA LIMITED.....DEFENDANT**

**JUDGMENT**

1. Vide the Amended Plaintiff dated 12<sup>th</sup> February, 2014 the Plaintiff who was licenced to operate a Service Station by the Defendant claims to have been supplied by the Defendant with contaminated fuel. The Plaintiff prayed for judgment against the Defendant as follows:

- (a) A mandatory injunction directing the Defendant to forthwith remove the contaminated products.**
- (b) Special damages for Ksh.800,000/= as pleaded in paragraph 10 above.**
- (c) General damages arising from the Plaintiff's loss of business to be computed at the hearing hereof.**
- (d) Costs of this suit.**
- (e) Interest on (b),(c) and (d) above at court rates.**
- (f) Any other relief this honourable court may deem fit to grant.**

2. The Defendant filed an Amended Defence and Counterclaim dated 27<sup>th</sup> February, 2014. The Defendant denied having delivered the contaminated fuel to the Plaintiff. In the Counterclaim, the Defendant prays for judgment against the Plaintiff as follows:

- (a) That the Plaintiff Company deliver possession of the premises on L.R. No. 1144/321 Naivasha Town Old Nairobi-Nakuru road along Moi Avenue.**
- (b) An order for eviction of the Plaintiff Company.**
- (c) A permanent injunction to restrain the Plaintiff Company, its servants and/or agents from using, dispensing from or in any way dealing with tanks, pipes or any of branded products and equipment situate on L.R. No.1144/321 Naivasha Town Old Nairobi-Nakuru road along Moi avenue.**
- (d) A mandatory injunction compelling the Plaintiff Company, its servants and/or agents to move out of the premises known as L.R.1144/321 Naivasha Town old Nairobi-Nakuru road along Moi Avenue.**
- (e) General damages for breach.**
- (f) Mesne profits for loss of business.**
- (g) Costs of the counterclaim**

**(h) Interest at 14%p.a.**

**(i) Any other relief that this court will deem fit and just to grant.**

3. During the hearing of the case, the Plaintiff called three witnesses. PW1 Jayesh Shanghrjka testified and adopted his two Witnesses Statements as his evidence. The agreement entered into between the Plaintiff and the Defendant forms part of the documents that PW1 produced as exhibits. The agreement licenced the Plaintiff to operate a Service Station as per the agreement at the premises belonging to the Defendant.

4. PW1 testified that on 20<sup>th</sup> August, 2004 fuel was delivered to their Service Station by the Defendant as per the Plaintiff's order. That an invoice No. 4630099478 which accompanied the fuel was signed and the fuel offloaded after being tested. That the testing was carried out using a specific gravity test using the Defendant's equipment. That both the Plaintiff's and Defendant's representatives were present during the testing.

5. PW1's further evidence was that on 25<sup>th</sup> August, 2004 Kenya Revenue Authority (hereinafter KRA) and Societies General Surveillance (hereinafter SGS) officials visited the Petrol Station and carried out tests on the fuel and found the same to be contaminated. That the test carried out by KRA could detect up to 1% of impurities whereas the test carried out by the Defendant could only detect up to 10% of impurities.

6. That the KRA Officer issued them with a **"Notice of Goods Deposited in a Customs Warehouse"** and sealed the fuel pumps. That a hearing was later conducted by KRA and PW1 attended the proceedings on behalf of the Plaintiff and they were fined Ksh.300,000/= and the Defendant was fined Ksh.500,000/= though not in attendance. PW1 stated that the Plaintiff paid it's fine of Ksh.300,000/= and requested the Defendant to remove the contaminated fuel but the Defendant failed to do so and blamed the Plaintiff for the contamination and the Defendant ended up debiting the Plaintiff's account with the Ksh.500,000/= fine imposed on the Defendant.

7. According to PW1, they had informed the Defendant of the KRA and SGS findings of contamination so that the Defendant could carry out its own investigations. That the Plaintiff had retained samples of the fuel in question in-line with the agreement. That on 8<sup>th</sup> September, 2004 the Plaintiff delivered the said samples to the Defendant vide delivery note No. 0183 but that the Defendant did not inform them of the results.

8. PW1's further evidence was that it was not until the expiry of the contract that following consent orders recorded in court on 25<sup>th</sup> January, 2007 that the Defendant removed the contaminated fuel. That the Plaintiff had lost business from the time the Service Station was closed in August 2004 to the time the Defendant took over the Service Station in December 2006. PW1 testified that the loss of business during the said period came to Ksh.31,597,094/=.

9. PW2 Peter Kanyungo Waithera who worked at the Service Station as Supervisor Quality and Control Checks testified. His evidence was that the fuel was delivered on 20<sup>th</sup> August, 2004 and the Service Station Manager Kasim Mwachiozuga and the Defendant's Supervisor, Eliud Kimani (PW3) were present. That the Manager Quality and Control Checks signed the invoice and the seals of the truck were checked and found intact and fuel samples taken and the density test carried out as per the Defendant's procedures. That the fuel was found to be okay and was offloaded. That on 25<sup>th</sup> August, 2014 KRA officials carried out tests on the fuel in the tanks. That the KRA officials used a dye test and found the fuel to be contaminated and sealed the pumps.

10. PW3 Kimani Eliud Njenga gave evidence that he was at the material time working for Sheer Logic Management Consultant Company which company had been contracted by the Defendant to work in it's Service Stations across the county. That he was stationed at the Plaintiff's Service Station as a supervisor and his duties included quality checks and offloading, training and maintaining health and safety standards among other duties. That he was present on 20<sup>th</sup> August, 2004 when the fuel in question was delivered and tested using the density test and found to meet the specifications required by the Defendant and he sealed the samples and handed the same over to the management for storage and the samples were later handed over by the Plaintiff to the Defendant.

11. PW3 further testified that on 25<sup>th</sup> August, 2004 KRA officers carried out a test on the same fuel using the dye test and found the same to be contaminated. That the test carried out by KRA could detect very minimal contamination of even less than 2% whereas the density test could establish a contamination of 10%. PW3 further testified that according to his training before being posted, the dye test was not being used at the Defendant's Service Stations. That he had no training on the use of the dye test and has never handled the same.

12. DW1 Arthur Ombima testified and adopted his witness statement as his evidence. He stated that as per the terms of the Operators Agreement, the Defendant delivered fuel to the Plaintiff on 20<sup>th</sup> August, 2004. That the fuel was delivered through an elaborate control system called Puretex. That the control system was established from the depot to the Plaintiff and the Plaintiff's representative was required to be present at the time of offloading. That there was no need of the Defendant's representative to be present during the offloading.

13. DW1 described the Defendant's testing equipment as of standard quality and stated that the Plaintiff failed to maintain samples for cross checking in case of any dispute. DW1 further stated that there was no complaint ever raised by the Plaintiff during the offloading exercise. DW1 further testified that it was the Plaintiff's responsibility to remove the contaminated products and meet the attendant costs. That the Defendant removed the same at the Plaintiff's cost as the Plaintiff refused to accept responsibility.

14. DW3 stated that the Defendant was the owner of the property and the brand name and that the Defendant suffered loss of business following the closure of the Service Station and suffered loss of the reputation and loss of customers. DW3 blamed the Plaintiff for the contaminated fuel and stated that the Defendant was entitled to debit the Plaintiff's account with the money imposed by KRA as fines.

15. It is common ground that the relationship between the parties herein was governed by Operators Agreement. From the evidence from

both the Plaintiff's and the Defendant's side it is not in dispute that the fuel was delivered by the Defendant to the Service Station on 20<sup>th</sup> August, 2004. The Crux of the matter is whether it was the Plaintiff or the Defendant who was liable for the contamination of the fuel.

16. All the three witness from the Plaintiff's side have given a corroborative account of evidence on the delivery of the fuel on 20<sup>th</sup> August, 2004. PW2 & PW3 who were present during the offloading testified on how the fuel was tested as per the Defendant's procedures using the Defendant's equipment and samples kept. Indeed PW3's evidence is that he was the Plaintiff's representative at the Service Station. Although the Defendant's witness (DW1) testified that the Plaintiff did not maintain samples, during Cross-examination he conceded that he was not aware if the Plaintiff retained samples or whether the samples were handed over to the Defendant.

17. DW1's evidence is contradictory. Although DW1's evidence was that none of the tests applied at the Service Station and by KRA and SGS were superior to the other, he admitted that his training was in sales and marketing and he was not trained on the technical aspects of the Defendant Company. DW1 in his evidence in chief testified that the contaminated fuel was removed at Plaintiff's cost but during cross-examination turned around and admitted that the fuel was removed at Defendant's costs and that the Plaintiff was refunded the costs of the contaminated fuel as per the consent entered by the parties.

18. From the foregoing analysis of the evidence, this court is satisfied that the Plaintiff has proved on a balance of probabilities that the Defendant Company was liable for the contamination. I therefore find the claim for the Ksh.800,000/= special damages proved.

19. The Plaintiff has prayed for general damages arising from the loss of business. PW1 is the Plaintiff's witness who testified on the loss of business. He reflected the period the Service Station was not operating as 28 months and stated that they went through the sales with the auditors who calculated the profits then deducted the expenses and arrived at the profits. PW1 referred to the supplementary bundle of documents produced as an exhibit as the one that contained the extracts of the purchase records. Although PW1's evidence was that the Plaintiff was guided by the auditors in arriving at the figure reflected in the supplementary bundle of documents, the said document is signed and stamped by the Plaintiff.

20. I have perused the Plaintiff's list and bundles of documents (exhibit 1) and found no documents therein that the extract in the supplementary bundle of documents has been derived from. Consequently, I agree with the submissions by the Defendant that no previous accounts for the past years were produced. The extract of accounts contained in the supplementary bundle of documents (exhibit 5) is therefore in the circumstances of no evidential value in proving the loss of business. Prayer No. (c) which seeks a mandatory injunction directing the Defendant to remove the contaminated fuel has already been overtaken by events.

21. The counterclaim has also been overtaken by events in prayer No.(a)(b) (c) and (d) which sought possession of the Service Station premises, eviction of the Plaintiff Company, permanent injunction restraining the Plaintiff from dealing with the equipment's and products at the service station and to compel the Plaintiff to move out of the service station. With this court having found the Defendant liable for the contamination the prayer for general damages for any breach and for *mesne* profits for loss of business fail.

22. With the foregoing, this court enters judgment in favour of the Plaintiff against the Defendant for the special damages claim of Ksh.800,000/= plus interest and costs. The counterclaim is dismissed with costs.

**Date, signed and delivered at Nairobi this 26<sup>th</sup> day of Nov., 2020**

**B. THURANIRA JADEN**

**JUDGE**