



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.165 OF 2002

TOTAL KENYA LIMITED.....PLAINTIFF

VERSUS

MACCU MOTORS LIMITED.....1ST DEFENDANT

KOBIL PETROLEUM LIMITED.....2ND DEFENDANT

MERU CENTRAL FARMERS

CO-OPERATIVE UNION LIMITED.....3RD DEFENDANT

JUDGEMENT

1. Total Kenya Ltd (the Plaintiff) brings this Suit against three Defendants namely Maccu Motors Limited (the 1st Defendant), Kobil Petroleum Ltd (the 2nd Defendant) and Meru Central Farmers Co-operative Union Ltd (the 3rd Defendant) in respect to the events that are said to have happened on premises known as Meru Town Block 11/10 and Meru Town Block 11/11 (jointly referred to as 'the premises') on the night of 9th February 2002.

2. It is the Plaintiff's case that the 1st Defendant is the registered proprietor as lessor of the premises for a term of 99 years with effect from 1st January 1960. On the premises is erected a Petrol Station with all necessary buildings and facilities. These would include a service bay, offices and toilets.

3. It is contended for the Plaintiff that prior to 9th February 2002, it occupied the premises as a tenant, first from 1960 pursuant to a Deed of Agreement dated 18th April 1963 made between the Plaintiff's predecessor Total Oil Products E.A Limited of the one part and the then Proprietor of the premises Chadwick Limited of the other part. There was then a subsequent sublease dated 23rd September 1993 made between the Plaintiff and the 1st Defendant to lease the premises for a term of 20 years commencing from 1990.

4. In addition, it is alleged that by dint of a Marketing Licence Agreement dated 1st November 2000, the Plaintiff granted to the 3rd Defendant Licence and permission to use the said premises for purposes of selling, by retail, the Plaintiff's Petroleum products or such other services as are commonly rendered at Service Stations.

5. The events complained of are said to have happened on the night of 9th February 2002. The Plaintiff avers that the 2nd Defendant by itself, its agents, employees and/or servants forcibly entered into the premises, evicted the Plaintiff and took possession thereof. In a word, the 2nd Defendant wrongfully, unlawfully and illegally evicted the Plaintiff. The Acts and particulars of eviction are set out in paragraphs 8 and 9 of the Plaintiff.

6. The 2nd Defendant is also accused of wrongfully and maliciously inducing and procuring the 3rd Defendant to abandon or breach its Contract with the Plaintiff. This, without Notice and in breach of the Marketing Licence Agreement.

7. Resulting from these Acts, the Plaintiff claims that it has suffered loss and Damage and seeks the following prayers:-

a) An order compelling the Defendants, their servants and/or agents to forthwith deliver possession of the premises known as Meru Town/Block 11/10 and Meru Town/Block 11/11 to the Plaintiff.

- b) An order do issue compelling the 2nd Defendant its servants and/or Agents to forthwith vacate the premises known as Meru Town/Block 11/10 and Meru Town/Block 11/11.
- c) An injunction to restrain the Defendants whether by themselves the agents and servants from interfering with the Plaintiff's quiet possession of the petrol station on the suit premises.
- d) Damages in addition to the above at the rate of Khs.42,664/= per day from 9th February 2002 to the date possession is given to the Plaintiff or to the date of expiry of the sublease.
- e) Exemplary damages.
- f) An order that the Defendants whether by themselves their servants or agents or otherwise do forthwith deliver up to the Plaintiff possession of the Plaintiff's equipment as set out in Paragraph 12 above.
- g) The sum of Khs.2,405,714/= as set out in Paragraph 13 above.
- h) Costs of the suit.
- i) Interest on (d) and (h) above at Court rates until delivery of possession.
- j) Any other axillary relief the Court may be pleased to grant.

The Claim for Kshs.2,405,714 is really against the 3rd Defendant on account of supply of Petroleum Products to the 3rd Defendant by the Plaintiff for the period of April 1997 to 7th February 2002.

8. The 1st and 3rd Defendants filed a Joint Statement of Defence in which they generally deny the allegations in the Plaint and raise some specific issues. It is their case that the 1st Defendant holds the said premises for a term of 66 years from 1st January 1993 and those leases were granted and took effect from their respective dates of Registration being 16th November 2001 in respect to Block 11/11 and 3rd January 2002 for Block 11/10. As an alternative therefore, it is averred that the sublease referred to by the Plaintiff is invalid, void and ineffectual as the 1st Defendant had no title to the premises on the date of execution. Secondly, that the same had no commencement date and that it was not registered as required by law.

9. The Defendants further deny that the Plaintiff was in possession of the suit premises on 9.2.2002 as alleged in the Plaint and the issue of eviction does not arise.

10. On the part of the 2nd Defendant, it points out that possession of the premises was handed over to it by the 1st Defendant who is the registered proprietor thereof pursuant to the Provisions of a duly registered sub-lease dated 6th February 2002 in its favour. That the grant of possession was with the consent of the 3rd Defendant who was in occupation of the premises.

11. The 2nd Defendant otherwise denies all the other allegations made in the Plaint some of which it states it has no knowledge of. In this latter category is the supposed Marketing Licence Agreement entered between the Plaintiff and the 3rd Defendant.

12. The hearing of this matter has been chequered and not without difficulty. Although filed on 13th February 2002, it was not until 6 years later or so that the matter proceeded for hearing before Hon. Khaminwa J. Hearing before the Judge closed on 22nd July 2009 and submissions were made on several days and finalized on 19th November 2010. Hon. Khaminwa J. then reserved judgement for 11th February 2011. The Court Record is that on 18th April 2013, Hon. Kimondo J. indicated that Hon. Khaminwa J was unavailable to conclude the matter. The matter had to be assigned to another Judge. Eventually, on 5th February 2015, Hon. Gikonyo J. observed,

“Proceedings were taken by late Justice Khaminwa and I am not able to write a Judgment on those proceedings. I will need parties to appear before me on 16.2.2015 for directions on the way forward. It is so directed”.

As happens the good Judge had to proceed for duty elsewhere before giving those Directions.

13. The matter first came before me on 21st June 2016 and I observed that I would have to read the proceedings before giving further Directions on disposal. I took a view that I could conclude the matter on the basis of the proceedings on record. On 28th June 2016, I directed that parties proceed to make Oral Submissions to enable me render a Judgment. On 9th December 2016, Mr. Muchemi appearing for the Plaintiff addressed Court as follows,

“The proceedings are difficult to follow, this might prejudice the Plaintiff”.

The Defendants protested and in particular Mr. Kuruaka for the 1st and 3rd Defendants told Court that his witness was Deceased. In consequence, the Court chose to restudy the file to see whether the difficulty raised by Mr. Muchemi was apparent from the proceedings. It turned out that I did not need to impose any directions. On 8th February 2017 the parties, themselves, provided a solution on how the matter should proceed. On that day it was agreed, by consent of Counsel for all parties that the matter be heard De novo.

14. I give this history because, as will become apparent shortly, the prospects of the Plaintiff succeeding in the matter may have all but vanished when it was agreed that the matter begins afresh. The Plaintiff called one witness Mr. Stephen Atenya. The Defence did not tender any evidence.

15. Mr. Atenya is an Advocate of the High Court of Kenya and an inhouse Counsel working for the Plaintiff. He had worked with the Plaintiff for 5 years at the time of giving evidence. He had no personal knowledge of the issues in dispute and gave evidence on the basis of files placed in his custody by virtue of his office. In this desktop evidence, he reiterated the contents of the Plaintiff's bundle of Documents.

16. The Plaintiff on the one part and the 1st and 3rd Defendants on the other had agreed on the issues for determination. The 2nd Defendant was not signatory thereof. The parties agreed on a multiple of Issues (16) which can and are abridged as follows:-

1. Whether the sublease dated 23rd September 1993 is void or invalid and of no effect as alleged for want of;

(i) Registration

(ii) Commencement date

(iii) Title by the 1st Defendant as at the date of execution.

2. Whether the 3rd Defendant was in possession and carrying on business on the premises on its own right and for its own profit and not as a licensee of the Plaintiff.

3. Whether the Plaintiff was in possession of the premises on or before 9th February 2002 and whether the 2nd Defendant forcibly entered and evicted the Plaintiff and took possession of the premises on or about 9th February 2002 and if so whether such entry and eviction was wrongful, unlawful and/or illegal.

4. Whether the Plaintiff is entitled to the damages sought and other reliefs.

5. Costs.

17. The Defendants first denied all the material averments made by the Plaintiff in the Plaintiff's Complaint and in some instances made alternative pleadings. It was therefore incumbent upon the Plaintiff to prove all elements of its cause. These elements include that it had possession of the premises upto the night of 9th February 2002, that it was unlawfully evicted by the 2nd Defendant on that night and that it is entitled to the Damages it claims.

18. The allegation by the Plaintiff (see paragraph 8 of the Plaintiff's Complaint) is that it is the 2nd Defendant by itself, its agents, employees and/or servants who forcibly entered into the premises and evicted it. Was there evidence in this regard? On 7th February 2002 (P Exhibit page 205) the 1st Defendant wrote to the Plaintiff as follows:-

Maccu Motors ltd

P.O Box 6

MERU

February 7, 2002

The Managing Director

Total Oil (K) Limited

P.O Box 30736

NAIROBI

RE: TITLE NUMBERS MERU MUNICIPALITY/BLOCK 11/10 AND 11

As you are well aware, there has never been an executed and registered legal Lease on the above Service Station Plot, between yourselves as tenants and us as the Landlords. The property comprising of; Office, Showroom and store, compressor room, canopy, garage and service bay, buildings and improvement erected thereon has been sub-leased to Kobil Petroleum Limited, effective 6th February, 2002.

Since you have not removed your equipment, we have appointed a contractor to remove your equipment from the station. Your equipment will be kept in the Contractor's custody for seven (7) days free of charge from the date of removal for your collection.

after which you will become liable for storage; costs and any loss and/or damage to your equipment will be at your own risk.

We take this opportunity to thank you for our working relationship and we trust that you will be co-operative in view of the new changes.

Yours faithfully

Signed

as pleaded removed the sting from the Plaintiff's case.

21. A second element of the Plaintiff's case is that the 2nd Defendant knew or ought to have known that the Plaintiff was in lawful possession of the premises and for that reason the 2nd Defendant procured or induced a Breach of Contract. The evidence available is that at the time of Registration of Leases in favour of the 2nd Defendant, on 6th February 2002, there was no Registered Lease in favour of the Plaintiff (see P Exhibit page 196,197,198). These are copies of Title or Certificate of Official Search to the two properties. They do not show any lease in favour of the Plaintiff as at 6th February 2002 when the lease for the 2nd Defendant was registered. On 8th February, 2002, the 2nd Defendant writes as follows to the Plaintiff:-

February 8, 2002

The Marketing Manager

Total Oil (K) Limited

P.O Box 30736

NAIROBI

RE: TITLE NUMBERS MERU MUNICIPALITY/BLOCK 11/10 AND 11

We refer to the letter dated 7th February, 2002 addressed to your Managing Director by Maccu Motors Limited of P.O. Box 6, Meru and copied to us on the above issue, copy attached.

As already advised, Kobil Petroleum Limited has leased the above plot, from the Lessors comprising of the buildings and improvements erected thereon, with effect from 6th February, 2002.

We have signed a Dealership Agreement with Maccu Motors Limited who have been appointed to run our Service Station and provided them with all the necessary Kobil equipment, after your equipment had been removed by the Landlord's contractor, for your collection.

Attached, please find the following copies:-

1. Pages 1 and 11 of the Registered Lease
2. Copy of Official White Card – Particulars of Lease
3. Copy of Official Search

For any further information regarding the above Petrol Station, please do not hesitate to get in touch with the Landlord or us.

Yours faithfully,

Signed

Isaac Gachuria

Marketing Manager

cc.

The Chairman

Maccu Motors Ltd

P.O. Box 6

MERU

22. This Court is unable to find any evidence that the 2nd Defendant was aware that the 3rd Defendant was engaged by the Plaintiff to operate the Petrol Station at the time it entered into a Lease Agreement with the 1st Defendant or that it maliciously induced and procured the 3rd Defendant to abandon or breach its Contract with the Plaintiff without Notice and in breach of the Marketing Licence Agreement.

23. The Plaintiff has sought for the following sets of damages:-

i) Damages at the rate of Kshs.42,664/= per day from 9th February 2002 to the date possession is given to the Plaintiff or to the date of expiry of the sublease.

ii) Exemplary damages.

iii) The sum of Kshs.2,405,714/=

In respect to the loss of income, there was no evidence as to how the daily rate of Kshs.42,664/= was arrived at. The only witness who gave evidence does not elaborate on the damages.

24. Exemplary Damages are awarded whenever the Defendants conduct is sufficiently outrageous as to merit punishment where, for instance, it discloses malice, fraud, cruelty, insolence and flagrant disregard of the law (Rookes vs. Bernard [1964] 1 ALL ER 367). That English decision was strongly approved locally in Obongo vs. Municipal Council of Kisumu [1971] EA and page 94 where Spry J. held,

“The decision in Rookes v Barnard (5), so far as it relates to exemplary damages, is of outstanding importance in English law both because it defines the circumstances in which such damages may be awarded, overruling certain earlier decisions, and because it indicates the correct approach to the assessment of such damages. It was a decision of the House of Lords and the opinion of Lord DELVIN, who dealt with this aspect of the case, was endorsed by all the other members of the House. It is a decision, therefore, which must command the highest respect in any country which has adopted the English Law of tort”.

Having evaluated the evidence, I have been unable to find anything that suggests any unlawful conduct on the part of the 2nd Defendant who was accused of unlawful eviction. If there is no breach, then there can be no flagrant breach and exemplary damages is not deserved.

25. As to the Special Damages of Kshs.2,405,714 a bundle of invoices was produced by the Plaintiff with no explanation at all. How Kshs.2,465,714 has been worked out is not explained. It is not the duty of the Court to make out the numerous invoices without any assistance by the party who seeks to rely on it. I am afraid, I am unable to make the award.

26. This Court was also asked to compel the Defendants to deliver up possession of the premises to the Plaintiff yet even if accepted, argued, that there was a valid lease in favour of the Plaintiff, it was for 20 years from 1990 and would have expired sometime in the year 2010 (a date well past). It would therefore be against common sense to make an Order for delivery up of possession as the Plaintiff's possession of the premises would have to be undergirded by a subsisting lease. As the Plaintiff had failed to obtain possession when Hon. Mbaluto J. declined to grant it the mandatory Order of Injunction sought in the Ruling of 4th October 2002. , the only plausible remedy available to the Plaintiff would be damages. Sadly the Plaintiff has failed to furnish proof of those damages.

27. I reach a decision that the Plaintiff's Claim must fail, not in the least, because it has not laid a basis for grant of the Orders and Damages it seeks. The outcome therefore would not change even if I was to find that as between the Plaintiff and the 1st Defendant the lease of 23rd September 1963, though unregistered, was valid interse between the two. Neither would it change even if the Court was to hold that the commencement date of the Plaintiff's sub-lease was 23rd September 1993 being the date of the first execution of the lease by dint of the provisions of Section 50(2) of the Registered Land Act (cap 300)now repealed which was then in operation. Section 50 read:-

“50 (1) where the period of a lease is expressed as commencing on a particular day, that day is excluded in computing that period.

(2) where no day of commencement is named, the period commences on the date of first execution of the lease, and that day is excluded in computing that period.

28. Indeed it would not change even if I rejected the argument by the Defence that the sublease of 23rd September 1993 was void allegedly because the 1st Defendant did not have Title on the date of execution. The basis of the argument was that by the date of execution (being 23rd September 1993) the Lease over the premises in favour of the 1st Defendant had expired and had not been extended. There is common evidence that the extended leases from the County Council of Meru in favour of the 1st Defendant in respect to Meru Municipality Block 11/10 was registered on 3rd January 2002 and that in respect to Block 1/11 was registered on 16th November 2001. Both dates being way after the date of execution of the subleases. However, and crucial, is that by 2nd September 1993 (P Exhibit page 79) the Council had approved the extension of Lease and that the Leases themselves were declared to be for terms of 66 years from 1st January 1993. It could therefore be argued for the Plaintiff, and in my view correctly, that as at 23rd September 1993, the 1st Defendant had a Lease which it could sublet.

29. The outcome may not come as a surprise to Total as its Counsel had beseeched this Court not to condemn his client to costs in that eventuality as it was not to blame for not producing witnesses as the matter had to commence de novo. I think I ought to be sympathetic with Total. The Record shows that at the hearing before Hon. Khaminwa J, the Plaintiff had called three witnesses whose evidence could possibly have established the Plaintiff's Claim. But as even noted by Hon. Gikonyo J., following the proceedings before Hon. Khaminwa J. was not without difficulty. And so the concern by the Plaintiff's Counsel ,on 9th December 2016, that the Proceedings were difficult to follow was not a trifle. The matter, on the agreement of Counsel, had to start de novo 14 years after it had been filed. The Plaintiff may not be to blame for failing to marshal the same witnesses. For this reason I am inclined to order that the burden of this litigation be shared equally by all the parties.

30. The Plaintiff's case is dismissed but each party will bear its own costs.

Dated, Signed and Delivered in Open Court this 22nd day of June 2018.

F. TUIYOTT

JUDGE

In the presence of:

Majau h/b for Muchemi for Plaintiff

Karanja h/b for Kamundi for 1st and 3rd Defendant

Karanja for 2nd Defendant

Nixon-Court Assistant