REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 686 OF 2010

CITY CLOCK (K) LTD.....PLAINTIFF

VERSUS

KENYA WINE AGENCIES LTD.....DEFENDANT

JUDGMENT

1. At the heart of this dispute between City Clock (K) Limited (**City Clock or the Plaintiff**) and Kenya Wire Agencies Limited (**KWAL or the Defendant**) is whether there has been breach of a Contract executed by KWAL on 5th September 2008 and City Clock on 8th September 2008 (thereinafter '**The 2008 Contract**').

2. City Clock is an advertising Firm while KWAL manufactures and imports a variety of Alcoholic products and Brands. Desirous of advertising a Brand known as 'Breeze', KWAL entered into a series of advertising contracts with City Clock. The Contract that is under discussion herein is the 2008 Contract although reference will, on occasion, be made to the other Contracts.

3. The 2008 Contract is a short 10 paragraph Agreement and provides as follows:-

Kenya Wine Agencies Ltd

P.O Box 40550 -00100

Nairobi ….hereinafter called "CITY CLOCK"

and

City Clock (K) Ltd …hereinafter called "CITY CLOCK"

P.O Box 45776 – 00100

Nairobi

1. CITY CLOCK will rent out their advertising clock units to KWAL. The CITY CLOCK advertising units remain the sole property of CITY CLOCK.

2. KWAL will rent Ten (10) CITY CLOCK advertising clock units for a period of three years, from the 1st of March 2008 to the 28th February 2011. KWAL will also rent Ten (10) advertising LIGHTBOXES located along the Carnivore Drive from 31st May 2008 to 30th April 2011.

3. CITY CLOCK has quoted KWAL a rental charge of Kshs. 486,000.00 per clock and 120,000.00 per Light box exclusive VAT, for a period of three (3) years, payable on the day of signing the contract/LPO and/or on the day of the fitting of the panels, whichever is earlier.

4. The contract shall extend itself by another twelve months on the same terms and conditions if no notification has been received by CITY CLOCK three months prior to the expiry date.

5. KWAL will undertake and pay for the making of the advertising panels at Kshs. 7,000/- per panel excluding VAT, printed on Vinyl film, which is thereafter cut, trimmed and applied onto 3mm Perspex sheets. The panels shall remain the property of KWAL.

6. All costs for the maintenance of the CITY CLOCK advertising unit will be borne by CITY CLOCK and, for the duration of this agreement, CITY CLOCK will be responsible for all maintenance and repairs that may become necessary to keep the advertising unit in good working order. CITYCLOCK is furthermore responsible for ensuring that the clock remains clean and show the accurate time all the times.

7. CITY CLOCK will do everything to guarantee an electricity connection for the illumination of the solar powered clock unit at nighttime. Nevertheless, the illumination has to be considered to be an additional service, which is not guaranteed mainly due to the fact that the power is being sourced from a third party from whom uninterrupted power supply cannot be guaranteed.

8. CITY CLOCK has signed an insurance cover for each individual CITY CLOCK advertising unit, for all damages to the unit, as well as a liability cover up to initially ten million shillings for third parties.

9. If in the unforeseeable, the clock gets damaged, stolen, burnt, or tampered with, CITY CLOCK will either replace the complete unit or replace the damaged parts within the shortest time possible.

10. Any alterations made to this agreement are to be made in writing and must be countersigned by both parties.

4. The evidence of City Clock was given by Winnie Taka Awori (**PW1 or Awori**), who from 3rd January 2018 was the Regional General Manager of City Clock. She gave the history of the relationship between KWAL and City Clock which began sometime in 1988. But let us fast forward to the events of 9th October 2007 and 11th November 2007. It was on these two days that City Clock and KWAL respectively signed a Contract (The 2007 Contract). The Contract was to run from 1st April 2007 to 31st March 2008 and covered 5 City Clock advertising units from 1st April 2007. These first 5 units were paid for. From 1st April 2008, KWAL increased the number of units from 5 to 10. This was done through LPO No. 19476 (P Exhibit Page 1). This LPO is said to have errors which were corrected through LPO No. 20390.

5. The 2008 Contract was for a period of 3 years starting from 1st March 2008 to 28th February 2011 and was for 10 City Clock units and 10 light boxes. City Clock takes the position that it was a fundamental term of the Contract that the entire amount due from KWAL in respect of the rental charges was due and payable on the signing of the Contract, LPO and/or on the day of fitting of the panels, whichever is earlier.

6. Under The 2008 Contract, a first LPO dated 10th April 2008 (P Exhibit Page 1) was raised for the 5 City Clock advertising units. But the LPO had an error as it was raised for a quarter and not a year and for that reason KWAL made payments on a quarterly basis. In the second year of the contract were 2 LPOs as follows:-

a) LPO No. 21854 (P Exhibit page 5) of 31st March 2009 for 11 City Clock for the period 1st April 2009 to 30th March 2010;

b) LPO No. 22097 (P Exhibit page 6) of 25th may 2009 for 10 City Clock Light Boxes for the period 31st May 2009 to 30th may 2010.

Again it is averred by City Clock, KWAL made quarterly payments instead of annual payments.

7. City Clock states that for LPO No. 21854, KWAL paid for 3 quarters (P Exhibit page 3) for 1st April 2009 to 31st December 2009 and did not pay for the 4th quarter. In regard to LPO No. 22097 KWAL paid for only 2 quarters (from 1st June 2009 to 30th November 2009) and did not pay for the 3rd and 4th quarters. The case is for recovery of these unpaid amounts and other payments of the 3rd year.

8. Through an email of 26th November 2009 (P Exhibit page 13) KWAL wrote to City Clock allegedly terminating the contract with effect from 27th October 2009. This letter is assailed by City Clock for two reasons:-

a) That clause 4 of the 2008 Contract provides;

> "The Contract shall extend itself by another twelve months on the same terms and conditions if no notification has been received by City Clock three months prior to the expiry date"

It is argued by KWAL that this infact is not a termination clause.

b) Even if it's accepted that the contract was validly terminated, KWAL was still liable to pay all the amounts due under clause 3 of the contract.

9. It is on this basis that City Clock seeks payment of Kshs 8,208,160/- and General Damages for breach of contract.

10. KWAL's defence is that it settled all amounts due as at 27th October 2009, when it issued the Plaintiff with Notice of its Intention to Terminate the Contract. KWAL also mounts a counterclaim. It is stated that vide terms of the 2008 Contract the Defendant paid for the making of advertising panels at the rate of Kshs 7,000/- per panel which were to remain the sole property of KWAL. KWAL complains that City Clock has unlawfully retained the said panels and seeks the following prayers by way of counterclaim:-

a) A declaration that the advertising panels which are in the custody of the Plaintiff are the sole property of the Defendant;

b) An order for the delivery of the advertising panels by the Plaintiff to the Defendant;

c) Special damages of Kshs 640,000/-;

d) General damages;

e) Costs of the suit.

11. The Parties filed a list of agreed issues on 9th November 2011. That list contained 28 issues and was repetitive. It could not be helpful in resolving this rather straightforward matter. Wisely, the Parties separately framed much shorter issues in their written submissions. The Court has considered the proposed issues and is able to isolate the following as deserving of determination:-

a) Was there intention of the parties to depart from clause 4 of the 2008 Contract?

b) Whatever the answer to (a) above did the Defendant breach the 2008 Contract?

c) Is the Plaintiff entitled to the prayers sought?

d) Is the Defendant entitled to the counterclaim?

12. The 2008 Contract was the third written Contract entered between KWAL and City Clock. The first two Contracts had similar termination clauses. The termination clause in the Contract of 14th May 2007, read this:-

> *"In case of termination, either party shall be required to give a notification of two months. Furthermore, City Clock shall be required to give KWAL 1st option to renew. The Contract shall mutually be reviewed by both parties upon renewal."*

There was a slight variation in the second Contract which read;

> *"4. In case of termination of the contract, either party shall be required to give a notification of two months, furthermore, City Clock shall be required to give KWAL first option to renew, two months before the current contract ends. The contract shall mutually be reviewed by both parties upon renewal."*

13. These two Contracts had exit clauses. There was however a curious break in the 2008 Contract because it did not propose an exit before the end of the lease period. Instead clause 4 read;

> *"The Contract shall extend itself by another twelve months on the same terms and conditions if no notification has been received by City Clock three months prior to the expiry date."*

By the terms of this clause there was the possibility of a renewal for another twelve months unless the intention not to do so was given by KWAL and received by City Clock 3 months prior to the expiry date.

14. The parties having engaged in the past were obviously entitled to review the terms and conditions of their engagement. The review in clause 2 was explained as follows by the witness for KWAL:-

> *"The previous Contracts contained exit clause. They were for short periods (1 year)"*

15. Both sides of the divide appreciate and accept the changed position of clause 4 of the 2008 Agreement. I however understand KWAL to be making the argument that by subsequent conduct of parties they departed from this position and instead chose to be governed by the spirit of the earlier Contracts on the question of termination. An argument was pressed that it was manifestly absurd that the 2008 Contract did not have a termination clause and the Court was duty bound to find that by their conduct, the parties had agreed that the contract could be terminated in a similar manner as the previous contracts.

16. KWAL is asking this Court to look beyond the written agreement and find that the agreement between the parties went beyond that written Contract. This Court does not doubt the validity and correctness of the following proposition set out by the Court of Appeal in Nairobi Civil Appeal No. 61 of 2013 Fidelity Commercial Bank Limited –vs- Kenya Garage Vehicle Industries Limited *[2017]eKLR;*

> *"The rule of exclusion the parole evidence rule are subject to a number of exceptions as noted by court in… The court stated;*

> *"For instance, evidence of surrounding circumstances will be admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible to more than one meaning, but not to contradict the language of the contract when it has a plain meaning. Extrinsic evidence of terms additional to those contained in the written documents will be admitted if it is shown that the parties. If the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement. In Gillepsie Bros. & Co. –vs- Cheney, Eggar 7 Co. (1896) 2 QB 59 Lord Russell C.J expressed this a*

follows;

"…although when the parties arrive at a definite written contract the implication or presumption is very strong (sic) and such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement."

Today it cannot therefore be argued that the mere production of a written agreement, however complete it may look, will as a matter of law render inadmissible evidence of other terms not included expressly or by reference in the document.in other words, it must first be determined that the terms of the parties' agreement are wholly contained in the written document. Whether the parties did so agree or intend is a matter to be decided by the Court upon considered of all the relevant evidence. See Savings and Loan Kenya Limited –vs- Mayfair Holdings Limited Civil Appeal 152 of 2006 and Twiga Chemicals Industries Limited –vs- Allan Stephen Reynolds Civil Appeal No. 300 of 2006."

KWAL has sought to rely on City Clocks reply of 17th December 2009 to the KWAL's letter of 27th October 2009 as constituting a reviewed position on termination. The Court turns to look at these letters.

17. By a letter dated 27th October 2009, KWAL writes as follows:-

"KWAL/PRO/02/09

October 27, 2009

City Clock (K) Ltd

P. O. Box 45770 – 00100

NAIROBI

Dear Sir,

RE: TERMINATION OF CONTRACTS (ADVERTISING)

We refer to the City Clock advertising contract between KWAL and yourselves supported by the LPO No. 22097 and 21854.

We regret to inform you of our decision to terminate the contract and hereby give two months notice with effect from 27th October 2009, as stipulated in clause 4 of the contract. The contract will therefore lease to be in force on 27th December 2009.

We take this opportunity to thank you for the support you have granted us over the years and corporation that was mutual beneficial.

Yours faithfully

KENYA WINE AGENCIES LTD

Moses Sudi

PROCUREMENT MANAGER

CC. Managing Director - KWAL

Company Secretary"

The purported termination was obviously out of step with clause 4 of the 2008 Contract which did not contemplate termination before the expiry period.

18. But there is the response by City Clock which is dated 17th December 2009:-

" The Managing Director 17th December 2009

Kenya Wine Agencies

P. O .Box 45770 – 00100

NAIROBI

Your Ref: KWAL/PRO/02/09

Our Ref: TWP/ra

Dear Sir,

RE: TERMINATION OF CONTRACTS

Reference is made to your letter dated 27th of October received via email on the 26th November.

We would like to bring to your attention that our contracts are normally on a three year basis, but then company issues an LPO on a yearly basis. Clause 3 also stipulates that we should be paid in advance for the whole year.

City Clock accepted the request from KWAL that although the contract says we are to be paid one year in advance for the rental of the Clocks that KWAL can pay us on a quarterly basis for the same.

With regard to the light boxes, LPO should have been paid on a yearly basis though in view of our good business relationship, however we accepted to be paid on a quarterly basis.

The clause for termination says 3 months as stated by yourselves. The light boxes were invoiced No. 1536 which was delivered to your offices on the 3rd November 2009. This was replaced with a new invoice due to an error on the period.

The Notice we have received takes effect on the date of receipt and not the date of the letter as per the laws of contracts in Kenya.

We also received payment for the Clocks for the 1st October to the 31st December 2009 this being the third quarter.

We understand that you have changed your marketing strategy but we would like to understand how we should treat all the issues raised above in order to reach an amicable settlement.

Yours faithfully

City Clock (K) Ltd

Mr. T. W. Proske

Group Chief Executive

CC. Marketing Department

Procurement Department"

There is lack of clarity about this letter. While clause 4 of the 2008 Contract required the giving of a 3 months' notice prior to the expiry date if there was no intention to renew the Contract for another 12 months after the expiry date, the 3 months' notice was not to be a notice to terminate before the expiry date .That being so a question arises as to the legal effect of that response and the following words by City Clock in its letter of 17th December 2009;

> *"The Notice we have received takes effect on the date of receipt and not the date of the letter as per the Laws of Contracts in Kenya"*

Could this be taken as an acceptance by City Clock to a changed position in respect to the termination clause?

19. I would have to think that if one has to infer these two letters as being conduct amounting to departure of the terms of clause 4 then one has to find that there was consensus between the two parties on the changed position. But there are two aspects where there was no convergence:-

a) KWAL's position was that the notice period ought to be 2 months yet City Clock took the position that it was 3 months;

b) KWAL took the effective date of the notice to be 27th October 2009 (the date of the letter) but City Clock insisted that it was 26th November 2009 (the date of receipt of the letter)

There is no letter after 17th December 2009 indicating that these differences had been overcome. For instance there is no letter by KWAL

accepting the position taken by City Clock in their letter of 17th December 2009. In addition there is no evidence that either party conducted themselves in such a way that it can be construed that they had accepted the position taken by the other.

20. In the circumstances this Court is unable to find that the conduct of the parties through these two letters amounted to a variation or departure from the terms of clause 4 of the 2008 Agreement.

21. The next question is therefore easy to answer. From the pleadings and evidence KWAL would not be indebted to City Clock if its letter of 27th October 2009 was a proper termination of the Contract. But because the only manner in which the Contract would come to an end was as provided under clause 4, the attempt by KWAL to terminate it by any other way was a breach of the Contract. That is my answer to that question.

22. Under the terms of the Contract, the Rental was payable on the day of signing the Contract or LPO and/or on the day of fitting of the panels, whichever was earlier. Although the Parties may not have adhered to this agreement on payment, there is no evidence that it was varied or otherwise changed either by written agreement or consensual conduct. The earliest date in respect to the 2008 Contact would have to be 8th September 2008 when the Contract was signed by City Clock. On that date, the rental became due and payable.

23. Now although the Notice of 27th October 2009 issued by KWAL could not terminate the Contract (a holding I have made), it can be taken as a Notice declining the extension of the Contract beyond the expiry date. Clause 2 of the Contract provides for different expiry dates for the Clock Units and the Lightboxes. For the Clocks the expiry date is 28th February 2011 and that for lightboxes is 30th April 2011.

24. The evidence is that for the Clocks, payment was tendered upto 31st December 2009 and for the lightboxes upto 30th November 2009. Starting with the Clocks, rent for the period 1st January 2009 to 28th February 2011 was unpaid. A period of 14 months. The outstanding rent is:-

14 x Ksh. 405,000/- = Ksh.5,670,000

The unpaid period for the Lightboxes was from 1st December 2009 to 30th April 2011. A period of 17 months. The unpaid rent is:-

17 x Ksh.10,000/- = Khs.1,700,000

The total sum unpaid is Kshs.7,370,000/=. This what the Court is am able to gather on the basis of the evidence. And this amount, in accordance with the express terms of Payment clause (clause 3), would be exclusive of VAT.

25. One other issue requires the Courts attention. Did City Clock have a Right of Lien over the Advertising Panels against the unpaid rental? The Advertising Panels are the property of KWAL and are provided for in clause 5 of The Contract in the following terms:-

> "5. KWAL will undertake and pay for the making of the advertising panels at Kshs. 7,000/- per panel excluding VAT, printed on Vinyl film, which is thereafter cut, trimmed and applied onto 3mm Perspex sheets. The panels shall remain the property of KWAL".

26. City Clock was to make the Advertising Panels at Khs.7,000/= per Panel. These Panels would be deployed for advertising on the rented Clocks and Lightboxes. The Panels were an integral part in the scheme of things. Without the Panels there would be no adverts. It would therefore seem that when City Clock retained the Panels against its unpaid rent then it was exercising a Right of Particular Lien. A Particular Lien is described as follows:-

> "*A particular lien at common law is the right to retain goods for which charges have been incurred until those charges have been paid; if the owner of the goods is willing to pay these charges, the goods may not be retained until payment of any general balance due to the person having the particular lien.*
>
> *Being consistent with the principle of natural equity, particular lien are favoured by the law, which is construed liberally in such cases. As general liens may arise from general usage, or by express contract, it follows that particular lien may arise in the same manner.*
>
> *The terms of contract may be such as to negative a particular lien which might otherwise have arisen, but a particular lien cannot be extended by contract so as to become a general lien against the goods of strangers to the contract". (Halsbury's Laws of England 4th Edition vol.28).*

27. In the same book the Authors say as follows about lien for work done:-

> "*The right of particular lien has been extended to agency and to all cases where a person has expended labour and skill in the improvement or repair, as distinct from mere maintenance, of a chattel bailed to him for that purpose. It is common law principle that if a man has an article delivered to him on which he has to do some work and to bestow trouble or expense, he has a right to retain it until his charge is paid. Thus, the artificer to whom goods are delivered for the purpose of being worked up, the farrier by whose skill an animal is cured of disease and the horse breaker by whose skill an animal is rendered manageable, have liens on the chattels for their charges. The lien applies only to the chattel produced or on which the work is done, but where the article upon which the work is to be done is sent in different parcels and at different times, there is a lien upon the whole if it is all done under one contract*".

28. City Clock made the Panels from specified materials and expended Labour and Skill on them. If the Panels were made and used in the advertisement (and therefore intimately connected) and the advertisement had not been paid for, then City Clock would have a Right to retain the Panels until the services offered by them had been paid.

29. The outcome of the Suit is as follows:-

a) The Counterclaim is dismissed with costs to the Plaintiff.

b) Judgement is entered for the Plaintiff for Khs. 7,370,000/= with interest thereon at Court rates from the date of filing. The Plaintiff shall also have costs on this Claim.

Dated, Signed and Delivered in Court at Nairobi this 26th day of October, 2018.

F. TUIYOTT

JUDGE

PRESENT;

Chania h/b Musau for Plaintiff

Terer for Olando for Defendant

Nixon - Court Assistant