



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 27 OF 2016

REUBEN MULWA KIOKO PLAINTIFF/APPLICANT

VERSUS

TOTAL KENYA LTD DEFENDANT/RESPONDENT

RULING

The application dated 31.10.2016 seeks the following orders: -

1. (1 and 2) Spent

3. THAT an order of prohibitory injunction do issue against the defendant by itself, its servants, its agents and/or employees prohibiting and restraining the defendant from declining to supply, refusing to supply and withholding supply of petroleum products to the plaintiff's premises known as Malindi Arcade petrol station pending the hearing of this application inter-partes and thereafter pending the hearing and final determination of this suit or further orders of the court.

4. THAT his Honorable Court be pleased to refer the dispute in this suit to arbitration and settlement in terms of Article IX (IV) if the marketing Licensing Agreement (MLA) dated 1.10.2014.

The application is supported by the applicant's affidavit sworn on 31.10.2016 and a further affidavit sworn on 29.11.2016. The respondent filed a replying affidavit sworn by David Humphrey Okelo on 16.11.2016. Counsel for the applicant filed written submissions in support of his application while counsel for the respondent tendered oral submissions.

The applicant's case is that he entered into a marketing license agreement with the defendant on 1.10.2014. The applicant is running a petrol station in Malindi which sells the defendant's products. It is submitted that on 28.10.2016 the defendant served the plaintiff with a notice to terminate the marketing license agreement. The termination was to take effect from the 1.11.2016 which period was too short to even sell the products that were on stock. It is submitted that the purported termination was issued on the basis that the plaintiff was operating a similar business with a competitor of the defendant. According to the defendant the other business is contrary to the provisions of Article VIII (1) of the agreement. That allegation constitutes a dispute which ought to be referred to arbitration in accordance with the provisions of the agreement. One month's notice was to be issued before the termination.

It is further submitted that the plaintiff operates the petrol station in Malindi under the names of Kioko Enterprises Limited. His first-born son Alfred Nyamu Mulwa Kioko is the one operating a petrol station for Oil Libya at Gede under the names of Kioko Enterprises. This latter business is not a limited liability

company whereas the business in Malindi is a limited liability. The defendant bought products worth Kshs.350/= from the Gede Petrol station which is different from the Malindi Petrol Station. The two entities are totally different. No contract between the plaintiff and Oil Libya Company was produced. The applicant submit that he has fulfilled the conditions necessary for the granting of an interlocutory injunction as enshrined in the case of **GIELLA VS CASSMAN BROWN CO. LTD [1973] E.A. 358**. The applicant has established a prima facie case with a probability of success as the dispute ought to have been referred to arbitration and there is no evidence that the applicant is running the Oil Libya Petrol station at Gede. The applicant is likely to suffer irreparable damage if the orders being sought are not granted. The applicant has established a huge good will at the Malindi total petrol station and has invested heavily in petroleum products. The petrol station is the only source of his livelihood and the livelihood of his employees.

Miss Wambani, counsel for the defendant opposed the application. Counsel submit that parties entered into the marketing license agreement. The agreement introduced an exclusivity clause under Article 6. Article 8 of the agreement provides for termination without notice. A termination notice was delivered to the plaintiff on 28.10.2016. The license was terminable. It was found that the plaintiff was operating another petrol station for oil Libya. The defendant purchased engine oil from the Oil Libya petrol station and an E.T.R. receipt was issued which bears the plaintiff's name and PIN. That demonstrate that the applicant is dealing with competing products. The defendant is not disputing that there is an arbitration clause. It is submitted that the arbitration clause cannot preclude the respondent from terminating the agreement. Counsel relies on the case of **JAMES HEATHER-HAYES VS AFRICAN MEDICAL AND RESEARCH FOUNDATION (AMREF) Nairobi Industrial Court Case No. 626 of 2013**. In that case the court observed that ... **an arbitration agreement is contractual undertaking by which the parties agree to settle disputes by way of arbitration rather than proceedings in court. When a dispute arises both parties are bound to comply with terms therein. The court cannot rewrite the contract.** Counsel further relies on the case of **LALJI KARSAN RABADIA & 2 OTHERS V COMMERCIAL BANK OF AFRICA LIMITED [2015] eKLR**. It was held by the Court of Appeal in that case that the court has no power to rewrite a contract for the parties.

I have read the application dated 31.10.2016 together with its two supporting affidavits. I have equally read the affidavit in reply to the application. I have noted the submissions by counsels for both parties. What is to be decided is whether the applicant has fulfilled the conditions for granting an injunction as stated in the case of **GIELLA V CASSMAN BROWN (supra)**. The Applicant has to show that he has a prima facie case with a probability of success. It has to be established that if the order of injunction being sought is not granted the applicant will suffer an irreparable damage that cannot be compensated monetarily. If the court is in doubt, then the balance of convenience shall be considered.

There is no dispute that the parties herein entered into the Marketing License Agreement. Clause IV of the agreement titled **Commercial Terms** states as follows: -

i. Exclusivity of supply

The Licensee shall purchase petroleum-based products commercialized by the Licensor exclusively from the Licensor for sale at the station. The licensee shall not sell any brand of any product other than that of the Licensor at the station without the written consent of the Licensor.

In the event that the Licensor has entered into a contract with any third party obliging the exclusive supply or sale of any merchandise or service at its network of stations, the Licensor shall notify the Licensee of this obligation in writing and the Licensee shall thereafter obtain exclusive supply of or sell the merchandise or service exclusive of other like merchandise or service as the case may be.

Clause VIII of the agreement titled **Termination** states as follows: -

i. Termination by advance notice of either party

Either party may terminate this license without indicating any cause or reason (to) the other party one month's prior notice, effective at any date, in writing of its intention to terminate the License and the License shall cease to be effective at the expiration of one-month notice period, which shall be the handover date.

ii. Termination by Licensor without notice

If the Licensee is found to have received sold or delivered any other company's petroleum products through the station or elsewhere.

If the licensee participates elsewhere, directly or indirectly in any activity, similar to or analogous with any of the activities at the station.

If the Licensee operates or participates in any activity at the station without the prior written approval of the Licensor.

Paragraph IX of the agreement titled **General** provides for other terms of the license. Paragraph IX (iv) provides for **Settlement of Disputes**. It states as follows: -

If at any time during the continuance of this Agreement any dispute, difference or question relating to the construction meaning or effect of this Agreement or of any clause herein shall arise between the parties, then the aggrieved or affected party shall give written notice of no less than 21 days to the other party herein. Each party shall within fourteen days of the date of expiry of the written notice aforementioned appoint an arbitrator. The matter shall thereafter be referred to the two arbitrators. If any party shall fail to appoint an arbitrator within the given fourteen days, then such arbitrator as shall be appointed by the other party shall be the sole arbitrator for the purpose of the hearing and determination of the matter in accordance with and subject to the arbitration Act (1995) or any amendment or re-enactment for the time being in force. Where the need so arises, the arbitrators may appoint an umpire who shall determine such issues as shall be referred to him/her by the arbitrators.

From the pleadings, herein it is clear that the agreement was terminated on the basis that the applicant is dealing with products of a competitor namely Oil Libya. A receipt was exhibited dated 1.11.2016. It was for the purchase of one litre of engine oil at the Oil Libya petrol station at Gede. There is an accompanying E.T.R. receipt for the same amount of Kshs.350/= of the same date. The termination letter annexed to the affidavit in support of the application is dated 19.10.2016. Parties are in agreement that the termination letter was delivered on 28.10.2016. It is not clear as to why the termination letter was written in October 2016 yet the alleged competing products were bought at a future date on 1.11.2016. The E.T.R. receipt is computer generated and the date given on that receipt is 1.11.2016. It is therefore not clear how the termination could have been based on that receipt. The termination letter makes reference to a meeting held on 17.10.2016 at the suit premises in Malindi and also makes reference to the contention that the applicant is operating a petrol station which is affiliated to a competitor. It is apparent that the issue in dispute was being discussed between the parties and the receipt of 1.11.2016 could not have been the cause of the termination.

The applicant has denied that he acknowledged that he was selling competitor's products. He has explained that he personally runs the Total Petrol station in Malindi while his son runs the Oil Libya petrol station at Gede. It is also stated that the petrol station at Gede is under the name of Kioko Enterprises while the one in Malindi is under the name of Kioko Enterprises Limited. A certificate of incorporation for Kioko Enterprises Limited which is under the name of Allred Nyamu Mulwa Kioko was annexed. It is submitted that the two entities are different. One is a business name while the other one is a limited liability company. The Marketing License agreement started on 1.10.2014 and by the time of the termination had lasted for over two years. The applicant contends that he has established goodwill while running the petrol station and he will suffer irreparable damage. I do agree with that contention as two years of operation is sufficient to establish goodwill. Apart from the receipt dated 1.11.2016 there is no other evidence to show that the applicant was engaging in selling products of a competitor. There is

no direct evidence that a competitor's products are being sold at the Malindi Total petrol station. The argument by the applicant that it is his son who is running the Gede Oil Libya petrol station is reasonable and there is need to grant the applicant an opportunity to explain that position. The applicant and his son are using the same surname **Kioko**. There is the issue of the same PIN number being used for both petrol stations. There is no other receipt or document giving the PIN number for the Malindi petrol station. That contention will have to be subjected to a full hearing.

Given the pleadings herein and the submissions by counsels for both parties, I do find that the applicant has established a prima facie case with a probability of success. There is a running license agreement and there is no complaint in relation to the running of the Malindi Total petrol station. It is evident that since 2014 when the agreement was signed, the applicant must have fulfilled his part of the obligations under the terms of the agreement. There is no warning letter or a complaint given to the applicant to the effect that he was selling a competitor's products. All what happened was an abrupt termination of the agreement which had served the parties for two (2) years. I do find that the applicant has fulfilled the conditions for granting interlocutory injunctions. Should the agreement be terminated abruptly, the applicant will suffer irreparable damage.

In the end, I do find that the application dated 31.10.2016 is merited and the same is granted as prayed. Costs shall follow the outcome of the main suit.

Dated, signed and delivered in Malindi this 27th day of March, 2017.

S.J. CHITEMBWE

JUDGE