



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**MISCELLANEOUS CASE NO. E015 OF 2020**

**BETWEEN**

**SIMON MARANGA WANG'OMBE T/A**

**BEYOND THE HORIZON VENTURE.....APPLICANT**

**AND**

**TOTAL KENYA PLC.....RESPONDENT**

**RULING**

1. What is before me today, 3<sup>rd</sup> February 2020, is the Notice of Motion dated 24<sup>th</sup> January 2020 in which the applicant seeks several orders primarily under **section 7** of the **Arbitration Act** as follows: -

*(1) That this application be certified as urgent and service thereof be dispensed within the first instance. Hearing of this application to proceed ex-parte in the first instance.*

*(2) A temporary injunction be issued restraining the Respondent, its employees, servants, agents, or any other person claiming through them from recalling the bank guarantee dated 56<sup>th</sup> March 2019 by Family Bank Kenya Limited, or representing to the said bank that the Plaintiff is in default of the Agreement dated 12<sup>th</sup> May 2016, or in any way, or by any device, taking any action that may lead to the interference of status quo regarding Land Title LR. No. Kiambu/Municipality Block 5 (Kiamumbi) 384 in the name of Chrispus Wang'ombe Maranga only an account of these proceedings, pending the hearing and determination of this Application inter partes.*

*(3) A temporary injunction be issue restraining the Respondent, its employees, servants, agents, or any other person claiming through them from harassing the Applicant in any way or making any demands in connection with the Marketing Licence Agreement entered into on 1<sup>st</sup> April 2019 pending the hearing and determination of this Application inter partes.*

*(4) A temporary injunction be issued restraining the Respondent, its employees, servants, agents, or any other person claiming through them from recalling the bank guarantee dated 6<sup>th</sup> March 2019 by Family Bank Kenya Limited, or representing to the said bank that that the Plaintiff is in default of the Agreement dated 12<sup>th</sup> May 2016, or in any way, or by any device, taking any action that may lead to the interference of status quo regarding Land Title LR. No. Kiambu/Municipality Block 5 (Kiamumbi) 384 in the name of Chrispus Wang'ombe Maranga only an account of these proceeding, pending the hearing and determination of the intended arbitration proceedings.*

*(5) A temporary injunction be issued restraining the Respondent, its employees, servants, agents, or any other person claiming through them from harassing the Applicant in any way or making any demands in connection with the Marketing Licence Agreement entered into on 1<sup>st</sup> April 2019 pending the hearing and determination of the intended Arbitration proceedings.*

*(6) That costs of this application be provided for.*

2. The application is supported by the affidavit of the applicant, Simon Maranga Wang'ombe, sworn on 29<sup>th</sup> January 2020. It is opposed by the respondent through the affidavit of it legal counsel, Soila Kigera, sworn on 30<sup>th</sup> January 2020.

3. The subject of this application is Marketing License Agreement (“the Agreement”) dated 2<sup>nd</sup> June 2016 in which the applicant was granted exclusive right to operate the Naromoru Total Service Station situated on LR No. 5118/36 located in Naromoru Township along the Nyeri - Nanyuki Road within Nyeri County. Under the Agreement the applicant was required to sell and market the defendant’s petroleum products on the terms set out thereunder.

4. The Agreement has a dispute resolution clause at Article IX (iv) which provides for arbitration. Although the respondent argues that this application is premature as the arbitration clause has not been invoked, I take a different view. **Section 7** of the **Arbitration Act** entitles a party to apply for interim measures of protection even before the arbitration clause is invoked. The application is therefore properly before the court.

5. I now turn to the substance of the application. The applicant depones that he has two claims against the respondent. The first concerns losses he had incurred during delivery of petroleum products to the station which he attributes to the respondent. He states that the loss between June 2016 and December 2019 amount to Kshs. 7,237,489.39. He also claims Kshs. 354,090.00 being illegal deductions made by the respondent. Because of such heavy losses which made his business uneconomical, he discussed the matter with respondent’s representative and proposed that pending resolution of the issues, operation of the Agreement be suspended in line with the provisions of Article 1(viii) thereof in order for a third party to take over temporary running of the station as they attempted to resolve the matters.

6. The applicant stated that instead of acceding to this request, the respondent directed him via email to hand over the station on 23<sup>rd</sup> January 2020. Since he was not available, he could not hand over. He received a phone call from the officer in charge of Naromoru Police Station informing him that a complaint had been lodged that he had refused to hand over the station. He avers that the police continue to harass him. He was also apprehensive that the guarantee he had issued and which was secured by his family property, LR No. KIAMBU/MUNICIPALITY BLOCK 5 (Kiamumbi), would be recalled to his detriment. He therefore seeks the interim measures of protection pending arbitration.

7. The thrust of the replying affidavit is that the respondent exercised its right to terminate the Agreement as provided under Article VII(ii) (e). It added that the application was brought mischievously as the applicant owes the respondent, Kshs. 21,487,123.81 as at 22<sup>nd</sup> January 2020 for products supplied to him and unpaid for. The respondent further stated that the applicant issued bouncing cheques causing it to report the matter to Naromoru Police Station. In its view, the respondent was merely exercising its legal right hence there is no basis to issue the orders sought.

8. Both counsel for the applicant and the respondent made oral submissions to support their respective positions. The following matters emerged as common ground. First, the Agreement has already been terminated. Second, the respondent has taken over the service station. Lastly, the respondent has already called in the guarantee. In the circumstances prayer 4 of the Notice of Motion cannot be granted as the bank is a necessary party and adverse orders cannot be issued in its absence.

9. The only prayer remaining is whether the court can grant an order restraining the respondent from harassing the applicant as stated in prayer 5 of the Notice of Motion. As I understand from the applicant’s deposition, the issue of harassment arises from the fact that the respondent reported the matter to the police. At paragraphs 31 to 36 of his deposition, the applicant states as follows: -

*[31] That unfortunately I was unavailable for the hand over as I spent the whole day giving instructions to my Advocates on record.*

*[32] That on 23<sup>rd</sup> January 2020 at around 11am I received a call from one of my staff, one Mr. Joseph Maina who informed me that a representative from the Defendant was on site with a new dealer and they had conducted a stock take, but he could not sign off. He was seeking authority from me on the way forward. I advised him not to sign off, as I needed to present for a proper handover, if any.*

*[33] That on the same day, at around 2pm I received a call from the Officer in Charge, Naromoru Police Station, and he informed me that the representatives from the Defendant had lodged a complaint that I had refused to hand over the station, among many other accusations.*

*[34] That I explained my predicament to the OCS whereupon he advised me to avail myself on Saturday 23<sup>rd</sup> January 2020 for the stock take.*

*[35] That I then received email from the representative of the Defendant confirming that the stock take is to take place on Saturday 25<sup>th</sup> January 2020 and I should avail myself, accordingly.*

*[36] That this undue harassment is causing me untold suffering and there is a real and present danger that unless stopped the Defendant will persist in harassment and the Defendant may recall the bank guarantee as well as use the Police to continue harassing me.*

10. It appears from the deposition that the calls from the police were in respect of the taking over of the service station. Since the station has been taken over, I do not see any further contact with the police on that issue. The respondent admitted that it lodged with the police a complaint regarding the bouncing cheques. This is a matter that may be investigated and I am not in a position to restrain the police from carrying out its statutory duty to investigate complaints. Lastly, the guarantee has now been called. Since the acts complained of have already taken place, it is clear that I cannot grant prayer 5 of the Notice of Motion. Further, such an order premised on harassment would be vague in its terms and unenforceable.

11. For reasons that I have set out, the Notice of Motion dated 24<sup>th</sup> January 2020 lacks merit. It is dismissed with costs to the respondent.

**DATED and DELIVERED at NAIROBI this 3<sup>RD</sup> day of FEBRUARY, 2020.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr. M. Onyango

Mr Githinji instructed by D. K. Githinji and Company Advocates for the applicant.

Mr Kuloba instructed by CFL Advocates for the respondent.