



**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION**

**MILIMANI LAW COURTS**

**HCCC NO. 96 OF 2005**

**ELVIS MAINA MINJU.....1<sup>ST</sup> PLAINTIFF**

**ELV KENYA LIMITED .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**TOTAL (K) LIMITED .....DEFENDANT**

**JUDGMENT**

1. A crucial issue to be determined in this dispute is the inventory of goods and items at hand and its value when Elvis Maina Minju (Minju or the 1<sup>st</sup> Plaintiff) surrendered a petrol station referred to as Ngong Road Total Service Station to Total (K) Limited (Total or the Defendant).
2. In 2001, Minju signed a Market License Agreement (MLA) with Total valid for a period of 2 years (D. Exhibit 1). Upon expiry, the agreement was extended to the year 2004. On or about 24<sup>th</sup> December 2004, Minju terminated the contract and handed over the station to Total. Total contends that the termination was without notice and in breach of its terms and has set up a counterclaim.
3. Anyhow, there is common evidence that on the day of termination Minju and a representative of Total met at the station for the taking of an inventory of items and goods. Details and how the exercise proceeded will be discussed in the course of this Judgment. For now, it is enough to say that following the valuation, Minju asserts that Total owed him Kshs.2,836,079.90 while Total sent him a Statement of account dated 27<sup>th</sup> January 2005 stating that Kshs.1,972,394.24 was due to it from him.
4. Subsisting during the life of the MLA was a Bank Guarantee of Kshs.1,500,000.00 issued by Standard Chartered Bank Limited for and on behalf of Minju as a security to goods supplied to him on credit by Total. Though issued for Minju's benefit, the Guarantee was obtained by ELV Kenya Limited (ELV or the 2<sup>nd</sup> Plaintiff).
5. Prior to the termination of the contract, ELV had issued two cheques for Kshs.1,818,114.35 and Kshs.1,500,000.00 in favour of Total. After the termination, payment of these cheques was stopped. ELV justifies it on account of the termination following a standoff between the Minju and Total. Total called in the Bank Guarantee of Kshs.1,500,000.00 towards part settlement of what it claimed was owed to it by Minju.
6. In the further Amended Plaintiff dated 31<sup>st</sup> May 2018, Minju claims the sum of Kshs.2,863,079.90. While ELV's claim is for Kshs.1,500,000.00 and loss of profit and earnings as a result of the debit to its account.
7. On the other hand, Total counterclaims for special damages of Kshs.519,208.55 said to be comprised as follows:-
  - a) A sum of Kshs.276,408.25 said to have been due and owing after a reconciliation of account.
  - b) Kshs.242,800.10 in form of Electricity, Water and Telephone Bills and Bon Voyage Charge Back.
8. In addition, Total seeks damages for breach of contract and more particularly for the inconvenience, anxiety and loss said to have been suffered as a result of Minju's termination of the contract without notice.

9. At the hearing, two witnesses testified. Minju for the Plaintiffs and one Christopher Wangui for Total. Their evidence will be discussed in so far as they aid the Court address the issues for determination. As the Court frames these issues it makes two observations. First, the parties did not agree on a common set of issues, each making different proposals. Second, although part of Total's case was for breach of contract, Total did not seem to press it at hearing and indeed did not make any submissions in that regard. I take it to be an abandoned cause.

10. So, the issues for determination are:

- a) What was the outcome of the inventory taking carried out on 24<sup>th</sup> December 2004?
- b) Was the Plaintiff entitled to make further adjustments to accounts resulting from the aforesaid exercise?
- c) Has the Defendant proved its claim for Bon Voyage Charge Back, Water Bill, Electricity and Telephone?

11. The undisputed evidence is that the inventory taking was undertaken by or in the presence of the supervisor of Minju and one Fred Patta on behalf of Total. The inventory that was generated is found on page 23 of the Plaintiffs exhibits. In addition is a valuation that was taken (P. Exhibit Pages 45-58) and returned by Total at Kshs.428,636.41 (P. Exhibit Page.58).

12. The evidence of Minju is that, with his authority, his supervisor signed the inventory.

13. Following that exercise, Total sent a statement dated 27<sup>th</sup> January 2005 (P. Exhibit Page 20) to Minju which showed that Kshs.1,972,394.24 was owed by him to Total. The reconciliation prepared by Minju (D. Exhibit Page 8) shows that he started by giving a credit of Kshs.1,972,394.24 being the amount demanded by Total and then he raised specific items for which saw to be in his favour. The reconciliation yields a credit balance of Kshs.2,425,923.05 to his favour. In respect to the main claim, it is the Plaintiffs who assert and they shoulder the task of proving those assertions.

14. The Court starts with a claim that clearly seems untenable. Minju raises a claim of Kshs.1,145,980.00 allegedly on abnormal product losses. First, Minju does not lay any basis for making the claim nor sets out how he arrives at the sum claimed. In addition, he did not prove that he had ever raised this issue, which would have arisen prior to termination, before he gave the termination letter.

15. Two letters catch the attention of the Court. Of 12<sup>th</sup> October 2004 (P. Exhibit Page 3 and 4). In this letter Minju writes to Total seeking, inter alia, a review of the license charges. In that letter he makes no claim on account of abnormal losses. Again, he is singularly silent on that issue in his letter of 24<sup>th</sup> December 2004 terminating the Agreement. It has to be asked why Minju raised such a fundamental issue only after he received the statement from Total. He made no explanation and I hold that he has not proved this item.

16. I turn to the items for Rent of October, November and December 2004. Regarding this Minju testified:-

“Rent charged for October, November, and December. They had not been charging rent, this was new.”

17. In his written statement Mr. Minju states that the MLA provided that Total would charge all dealers OM and Rent monthly levied in advance. On its part, the Court sees Article III clause i of the Agreement which obligates the Licensee to pay royalties and licensee fees to the Licensor for, among other things, the use of the filing station. This is read in conjunction with Clause (iii) of Article III which requires those amounts to be paid monthly in advance. This Court is therefore unable to fault the charges levied and earmarked as “OM and Rent” for October 2004 and November 2004 and royalty for December 2004.

18. In respect to the terminal dues of Kshs.208,001.00, Wangui explained that this was the amount paid to the station staff as terminal dues and salaries and which was to be paid by Minju. It is said that Minju left the station without paying those services and in accordance with the MLA, Total was entitled to debit his account. Wangui was not challenged at all and neither did Minju refute it in his testimony. Again, I cannot fault Total.

19. There is a sum of Kshs.72,299.17.00 levied by Total ostensibly for loss of revenue in respect of the car wash and tyre centre owing to the dealer leaving without notice. Total has not explained how it reached the figure. While Total may have been entitled to seek compensation for that loss, I did not see sufficient effort to prove the quantum.

20. The Double Billings of Kshs.5,962.00 and Kshs.1,500.00 and Bon Voyage Double up of Kshs.3,500.00 were explained by Wangui. His explanation was not challenged or debunked.

21. As regards the claim of Kshs.7,650.00 on account of repairs to a fridge, Wangui explains that under Article VII sub-article VI all repairs on equipment are carried out by Total (k) Limited. It reads:-

“Losses arising from faulty equipment

In the event that any equipment develops a fault leading to loss of products, the Licensee shall immediately discontinue the use of the said equipment and inform the Licensor who shall use its best endeavours to rectify such fault expeditiously.

The Licensee shall not be entitled to any claim from the Licensor for the loss of product or revenue caused by any faulty equipment or the Licensee's inability to sell products due to the discontinuation of use of the equipment pending rectification by the Licensor.

The Licensee undertakes to pay the full cost of any investigation by the Licensor of a report of defective equipment made by the Licensee should the report prove false at the end of the investigation.”

22. That appears to be a complete answer to the claim on repairs. There is no evidence that the dealer had advised Total of the need for the repairs.

23. On items allegedly not included in the stock taking or valuation, Minju’s supervisor was part of the inventory taking and it is not clear why or how the items would be missing from an inventory jointly taken.

24. Two items in Minju’s reconciliation can be dealt with together. These are on deposits allegedly collected by Total but paid to the station and Barclays Bank cards allegedly paid to Total and not refunded. I take the view that Minju squarely bore the onus of proving the alleged collections and payments. This was not done at all.

25. On a claim of Kshs.122,993.00 referenced as “Card and Otake Elf Ngong Road Dec 04” Minju testified:-

“No. 8 Commission. Barclays was to give us commission however it credited the Total Account (P. Exhibit 13). Receipt was ELF later turned out to be Total. Taken over by Total.”

26. The Court has looked at the letter of 15/01/02 (P. Exhibit Page 13) from Barclays Bank of Kenya Ltd to ELF Oil (K) Ltd stating that Kshs.139,951.60 had been paid into the account of ELF. What Minju fails to do is to prove that this amount was eventually taken over by Total. That is not proved.

27. Let me consider the counterclaim. The claim is on five (5) items:-

i. *On reconciliation of the account of Minju ..... Kshs. 276,408.45*

ii. *Bon Voyage Charge Back ..... Kshs. 21,547.50*

iii. *Water Bill .....Kshs. 123,000.00*

iv. *Electricity Bill ..... Kshs. 66,130.00*

v. *Telephone Bill ..... Kshs. 32,122.60*

A distinct feature on the counterclaim is that Total made no effort to prove any of the items. I must wonder, for instance, why Total would not produce receipts for payments made, if any, towards the water, electricity and telephone bills.

28. In the end I find, and hold, that the 1<sup>st</sup> Plaintiff only proved that the sum of Kshs.72,299.00 being an alleged loss of revenue should not have been debited to his account.

29. As to the counterclaim Total failed to prove it at all.

30. I enter Judgment for the 1<sup>st</sup> Plaintiff against the Defendant for the sum of Kshs.72,299.00 plus interest thereon at Court rates from the date of filing of this suit. Costs as well on this sum to the Plaintiff. The counterclaim is dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 5<sup>th</sup> Day of October 2020**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Judgment has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

**Nyaencha for Plaintiff.**

**No appearance for the Defendant.**