



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO 453 OF 2016

TITUS KITONGA.....PLAINTIFF

VERSUS

TOTAL KENYA LIMITED.....DEFENDANT

RULING

1. At the heart of the Dispute between Titus Kitonga (**the Plaintiff**) and Total Kenya Limited (**Total or the Defendant**) is the letter of 8th November 2016 in which Total purported to terminate the Market License Agreement (**MLA**) it had with the Plaintiff with immediate effect.

2. In the Plaint dated 9th November 2016 and filed on 11th November 2016 the Plaintiff sought the following Orders against the Defendant:-

1. A declaration that the Defendant's termination of the Marketing License Agreement was illegal.

2. The Defendant be and is hereby restrained by way of an injunction, either by themselves, their agents and or servants, from interfering with the Plaintiff's running of business at Machakos Total Service Station.

3. Costs of this Suit.

4. Any other relief that may be deemed fit in the circumstances.

3. At the same time, the Plaintiff, through a Notice of Motion dated 9th November 2016, requested Court to temporarily injunct the Defendants from effecting the termination pending the hearing and determination first of the Applications interpartes and generally pending the hearing and determination of the suit.

4. At the first interpartes Proceedings before Court on 15th November 2016, I granted temporary restraining Orders that were to last upto 29th November 2016. Those orders were again extended upto 1st December 2016 when the Application was heard. This latter date is of significance!

5. It is common ground that what constitutes the Contract between the Plaintiff and Total is the Marketing License dated 1st December 2014. Total drew this Court's attention to the Article 1(iii) of the License which reads:-

“The TOTAL manual and operating procedures and all the schedules attached to this License or any amendments thereof shall form an integral part of this License and any reference to the “the Marketing License” shall be deemed to refer to this Agreement together with the manual, operating procedures and schedules referred to herein. The License constitutes the entire Agreement between the parties and upon the execution of this License all previous agreements, contracts or understanding in relation to the subject matter of this License between the parties hereto, or the assignors, shall cease and be of no more effect PROVIDED THAT this License, the manual, operating procedures and schedules may be altered at any time by the Licensor upon giving notice of at least 14 days or such alteration to the Licensee. The headings to the articles and paragraphs herein are inserted for ease of reference only and shall not affect the interpretation or construction of this License”.

At a glance, this provision is to the effect that while the MLA constitutes the entire Agreement between the parties, the Total Manual and operating procedures and all schedules to the MLA form an integral part of the License. The duration of the License is captured in Article 1 clause II as follows:-

“The License shall commence on the date first above written and shall continue thereafter for a probationary period of 6 months. During the probationary period either party may terminate this License by written notice delivered to the other party in which case, this License shall terminate forthwith PROVIDED THAT any and all accrued rights of both parties prior to such termination shall remain binding. At the expiration of the probationary period, this License shall continue in force for a further period of Eighteen (18) months only unless and until terminated by either party in accordance with the provisions herein”.

6. It is an argument of Total that as the MLA is dated 1st December 2014 it would come to an end by effluxion of time on 1st December 2016. The Plaintiff on the other hand submits that the expiry date on the agreement is erroneous and should be left for the determination at the hearing of this issue.

7. For that argument the Plaintiff has deponed as follows in paragraphs 49,50 and 51 of his affidavit of 30th November 2016:-

49. THAT it is a tradition that every agreement, since I have been operating the petrol, has been expiring on the 31st August every after two years. Therefore, according to tradition the 2010 agreement lapsed on 31st August 2012. Another agreement was done on 1st September 2014 and was valid up to the 31st August 2014.

50. THAT therefore the current agreement was to commence on 1st September 2014 and lapse on 31st August 2016. I verily believe that the indication on the current agreement that it was to be effective on the 1st December 2014 is an error that should not be ignored.

51. THAT based on the Defendant’s tradition and the above, I verily believe that I am currently operating on an oral agreement whose contents have not yet been agreed upon and whose start date is 1 September 2016 to 31 August 2018 as per tradition and hence the matter of contract lapse is not true. This tradition is based on the fact that the contract renewals are never submitted to the Plaintiff before their end date but at all times several months after the end of the agreements.

8. Although the controversial termination of 8th November 2016 was effected under a different Article VIII of the Agreement there has arisen the question whether the License really exists after 30th November 2016 or 1st December 2016.

9. The contention by the Plaintiff that by dint of the Defendant’s tradition the License runs upto 31st August 2018 and not for 24 months from 1st December 2014 upto 1st December 2016 (now past), will be confronted with the Provisions of Clause III of Article I (cited above) of the MLA that discontinues all

previous agreements, Contracts or understanding between the parties upon its execution. In the face of that answer, this Court is not certain that the Plaintiff has made out a prima facie case that the License subsists after 30th November 2016 or 1st December 2016 (now past).

10. Secondly, the License is a Commercial Contract whose breach can be adequately compensated by an award of damages.

11. On the conditions set out in the often cited case of **Giella Vs. Cassman Brown**, the Plaintiffs Notice of Motion of 9th November 2016 lacks merit and is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 17th day of February ,2017.

F. TUIYOTT

JUDGE

PRESENT;

N/a for Plaintiff/Applicant

Kingata for Muchemi for Respondent/Defendant

Alex - court clerk