

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
DAR ES SALAAM

COMMERCIAL CASE NO 157 OF 2013

BETWEEN

SAMWEL MGONJA -----PLAINTIFF

VERSUS

TOTAL TANZANIA LTD-----DEFENDANT

JUDGMENT

Date of the Last Order: 28/8/2015
Date of the Judgment: 24/11/2015

SONGORO, J

Total Tanzania Ltd is a licensed company dealing with importation, purchase, storage, selling, and distribution of Petroleum Products. On the 18/9/2011 under Marketing Licensed Agreement, (MLA) licensed Samwel Mgonja, the Plaintiff to operate its Total University Service Station.

Later on the 18/11/2011, the Management of Total Tanzania Ltd noted operations problems on the Plaintiff's business of Petrol Station and, they decided to terminate his Marketing Licence Agreement, and repossess the Total University Service Station.

In the light of the above, the Plaintiff instituted the instant suit seeking court orders, and reliefs as follows:

1. *The notice of suspension of the new MLA trial, was addressed to the Plaintiff be declared illegal, hence null and void.*
2. *The Defendant be condemned to pay the Specific Damages amounting to shs 869,000,000/=*
3. *The Defendant be condemned to pay the Plaintiff General Damages amounting to shs 600,000,000/=.*
4. *The Defendant be ordered to pay the Plaintiff interests of 25% to the Decretal sum from the date of filing the suit to the date of Judgment.*
5. *The Defendant be ordered to pay the Plaintiff interest at the court's rate to the Decretal sum from the date of Judgment to the date of full settlement of the decree amount, and*
6. *Any other relief(s) that, this court may deems fit to grant*

In response to the Plaintiff's claim, Defendant also filed the Written Statement of Defence, and firmly opposed Plaintiff's claims by stating that, the signing of the Marketing Licensed Agreement, (MLA) allowed the business to be carried on probation period of 6 months and it was subject to the Plaintiff's fulfilment of requisites conditions stated in the Licence Agreement.

In addition, the Defendant further replied that, due to the fact there was inability and ineffectiveness of running the Defendant's University Petrol Station then there was justification for the Defendant to terminate the Marketing Licence Agreement.

In view of the above, the Defendant's prayed for the dismissal of the Plaintiff suit for lack of merit.

In the light of the above, Defendant's prayed that, the Plaintiff's suit be dismissed for lack of merit;

In the light of the Plaintiff claims, and Defendant's Defence, the court after consulting the parties, framed up six issues, as matters for determination before the court. The Agreed issues were as follows;

1. *Whether there was a Marketing Licensing Agreement to operate Mlimani Petrol Station between the Plaintiff and Defendant,*
2. *Whether the Defendant breached the terms and condition of the Marketing Licence Agreement.*
3. *Whether the Plaintiff suffered any damages as a result of the breach*
4. *What reliefs both parties are entitled too.*

In the light of the above, the Plaintiff suit was heard, and concluded on the basis of the above-mentioned four agreed issues.

During the hearing of the suit, Mr. Lloyd, Learned Advocate, appeared for the Plaintiff, where as Mr. Onesmo Kyauke Learned Advocate represented the Defendant.

In presenting his claim, Samwel Mgonja the Plaintiff testified as PW1 and informed the court that, he has file his Witness Statement in court and would like the court to rely on it.

Further PW1 then tendered in court a Deed of Settlement of suit, of the Commercial Case No 37 of 2011 which was admitted as Exhibit P1. Further, the PW1 tendered his letter on suspension of Marketing

Licence Agreement which was admitted as Exhibit P2, and a reply letter reference 002/MS/DSMU/2011 dated 18/11/2001, from the Defendant to the Plaintiff was admitted as Exhibit P3.

Next, the Plaintiff tendered a letter Ref; LLoyd/Total/01/2011 dated 5/12/2011 which was on transfer of Tanzania shillings fifty two million which was alleged to have been sent to the Defendant-Exhibit P5, and other several letters commenting and remarking on terminations of Marketing Licence Agreement, Plaintiff demand letter was admitted as Exhibits P6, P7, and a letter from Total dated 17/2/2012 was admitted as Exhibit P8.

While being cross examined PW1 told the court that, he signed the agreement with the Plaintiff, to manage Total University Petrol Station. But when he returned the same agreement to the Defendant's company also to signed it after he signed it, he was not given its copy.

He then briefed the court that, from the business of Petrol Station, he was getting profits of shs 480,000/= daily from the sales of 9000 litres of fuel, lubricants. Also, he had Mini super market which he was getting some earnings. On who was managing the business PW1 said Mr. Niteshi was his Manager and Agent, who was running his business.

The witness then said it is true that, his Manager Niteshi wrote a letter to take fuel on loan, on the basis that, the Plaintiff will deposit the money. But before I deposited the money, the Defendant terminated my licence.

Regarding the Defendant's contention that, the Plaintiff did not have money to buy Petroleum Products, the Plaintiff replied that, by the moment his agreement was terminated he had a sum of shs 50,000,000/ into the Defendant's Accounts. So, the monies for buying and supplying petroleum products were in the Defendant's Accounts, but they did not supply them with fuel.

Responding to the Defendant's complaint that, after opening the Petrol Station, he was persistent absent not attending the business, PW1 told the court that, after his petrol station was operational, he put sufficient monies and went to attend his other business. In view of the above, PW1 closed his testimony and Mr. LLoyd, Learned Advocate closed the Plaintiff's case.

After the closure of the Plaintiff's case the Defendant also opened his case and summoned Ms. Masha Msuya who testified as DW1.

Relying on her testimony DW1 told the court that, she has a letter which has the title of Explanation to the current situation at University Petrol Station which was a deliberation on the Meeting

which was held on the 7/10/2011. Then the witness tendered the document and it was admitted as Exhibit D1. Further, the DW1 briefed the Court that, as an officer of the Defendant she met several times with the Plaintiff to discuss about the dispute.

Then the witness clarified that, the Defendant's officials did not follow procedure of terminating the contract. DW1 then briefed the court that, the Plaintiff had a Marketing Licence Agreement and was required to have a working capital of shs 120,000,000/=. The witness then said the Defendant entered into another Contract and they increased their working capital to shs 220,000,000/-

Regarding Mr. Nitesh , DW1 said, he came to their office and introduced himself as the Plaintiff's Manager at the Petroleum Station. She then explained that, they first suspend the Plaintiff from doing business after realising some operational problems of cash deficit on the Plaintiff business which were reported to them.

DW1 then clarified that, their business operation with all their customers including the Plaintiff is based on "Principle Coded as "D Plus" which requires two days before their customer anticipate the Petrol Station will run out of fuel, then he must deposit the money for buying fuel. After making deposit of money then he may places the order, requesting to be supplied with fuel. She then said if their client do not follow, D Procedure in placing his order always there is

a risk, that, the Petrol Station will experience shortage of fuel and dry up completely.

The witness stated that, the incident which prompted suspension letter, was the Plaintiff letter submitted by Niteshi the Plaintiff's Manager, which requested to be supplied with fuel on credit basis. After the Plaintiff was suspended there was a reconciliation and stock taking which was conducted.

Also, the witness informed the Court that, the Plaintiff wrote a letter to the Defendant requesting explanation on the outstanding sum of shs 22,243, 000 which were deposited on the 23/9/2011, and shs 29, 871,000 which were deposited to the Defendant.

DW1 said the Plaintiff deposited the said monies by using names of his other companies which were unknown to the Defendants, and that, is why the deposited monies were not detected as monies which were paid by the Plaintiff's company recognised by Defendant company.

Further, DW1 told the court that, the Plaintiff after making the two deposits, he did not notify the Defendant that, he had made deposits, for the purpose of buying fuel, and did not even furnish them with bank deposit pay slips. So the deposited sum was just hanging in the Defendant's Accounts and no one else knew if the Plaintiff had money

in the Defendant's Accounts. The witness then explained that, Defendant's Company always stays with monies from their client as security in case there is a breach of contract. Then the witness said they investigated the Plaintiff ability to operate the station for six days, and he was unable.

On the position of Niteshi as a Manager, DW 1 said, he was operating the Petrol Station under the dealer. She then clarified that, the Dealer is the one who is supposed to manage the Petrol Station. She pointed out that, any negative report from the Petrol Station particular the one which may turn the Petrol Station to dry up, they take it seriously, and take intervention because they have clients who depends in "Total" for supply of fuel.

Regarding ownership of University Petrol Station, DW1 said it was built by Total Tanzania Ltd, and its their investments. She finally told the court that, in the event their Petrol Station do not operate it amount to zero Investment.

Finally, the witness then said while the Plaintiff was managing their Petrol Station, there were certain periods, the station did not have fuel to sale, and it was dry up, and they had to interven.

After the Plaintiff and Defendant's case were closed both counsels with the leave of the court filed their final submissions. In his

submissions, Mr. Nchunga for the Plaintiff submitted that, it appears even from the testimony of DW1 that, she has admitted that, the Plaintiff and Defendant were parties to the Marketing Licence Agreement, and the Plaintiff was allowed to run the Petrol Station.

He then submitted that, suspension and termination were unfair because were not based on any inefficiency inspection report on the part of the Plaintiff. Next Mr. Nchunga argued that, the attempt to borrow fuel was insufficient enough to constitute the basis of suspension. He insisted that, the suspension caused the pleaded losses and damages. The Plaintiff's Counsel maintained that, the Plaintiff is entitled to loss, and damages pleaded in the Plaint.

Also, the Defendant counsel in his submissions, submitted that, the Plaintiff did not tender the Marketing Licensing Agreement as Exhibit to prove that, the licensing agreement exists. He then explained that, the annexure is not exhibit which may be relied upon by the court. It was submission of the Defendant's counsel that, there was no proof if the Plaintiff and Defendant signed the Marketing Licence Agreement. Further, the Defendant's Counsel very briefly submitted that, there is no evidence of breach of contract and there is no proof if the Plaintiff suffered any damages. Finally, Mr. Kyauke maintained that, the Plaintiff did not prove his claim on the balance of probability. He then prayed for the dismissal of the suit.

The court has carefully considered the Plaintiff's claims on the breach of contract, Defendant's defence, and submissions, from both parties, and find all four agreed issues, are key for the determination of the suit, and it is worth to consider them, one after another.

Turning to the first agreed issue of whether or not there was a Marketing Licensing Agreement to operate Mlimani Petrol Station between the Plaintiff and Defendant, honestly, I find there was copy of the University Service Station Marketing Licence Agreement which was annexed to the Witness Statement Ms. Masha Msuya DW1 made under Oath, and pursuant to Rule 48 (1) of the High Court (Commercial Division) Procedure Rule GN 250 of 2012.

The witness statement of DW1 was made on behalf of Total Tanzania Limited, the Defendant and the Contract was marked Annexure TTL 2.

Under Rule 49(1) of the High Court (Commercial Division) Procedure Rule GN 250 of 2012 the legal status of the Witness Statement and its annexure is considered as evidence in chief of DW1. By annexing a copy of the licence, DW1 was admitting that, there was such agreement. More, in paragraph 10 of her Witness Statement DW1 firmly admitted that, on the 26/3/2011, the Plaintiff and Defendant executed the Marketing Licence Agreement. Then in Paragraph 12, of

the her statement again DW1 admitted that, on the 18/9/2011 the Plaintiff and Defendant signed a new Marketing Licensing Agreement and she then stated that, a copy of the Agreement was annexed to her statement as Annexure TT2.

Together with Witness Statement of DW1, I revisited Annexure TT2, and find it had the title of "Total University Service Station Marketing Licence Agreement Granted on the 18/9/2011 by the Total Tanzania Limited, Licensor, to Samwel Mgonja of P.O. Box 6308 Dar es Salaam, the Licensee. The objective of the licence are in Article 1 the Licence as;

To permit the Licensee to enter, operate at and utilise the station together with the facilities provided by the Licensor whereat to sell the products , and carry on ancillary business approved by the Licensor subject to the terms and condition herein.

Also, under Article 1 of Annexure TTL 2, its commencement date was 18/9/2011, it has a probation period is 6 months, and its duration is 12 months. Also, the Licence states that, after the probation period the licence shall continue for further period of 12 months. Further, at page 31 of the Marketing Agreement Licence, I find it has both the signatures of Total Tanzania Limited as "*Licensor*" and that, of the Plaintiff, the Licensee on all 35 pages.

Honestly, the court find even if Original or certified copy of the Licence was not furnished to the court as Mr. Onesmo Kayuke stated

in his submission, but the point to be considered is that, DW1 in her Witness Statement on behalf of the Defendant has admitted that, there was New Marketing Licence Agreement between the Plaintiff and Defendant. So relying on the Witness Statement of DW1 and Annexure TTL 2 the court is satisfied that, there is sufficient evidence from the Defendant, DW1 and PW1 which established that, Plaintiff and Defendant executed the Marketing Licence Agreement with the Defendant.

Therefore I answer issue No 1 in affirmative that, there was a Marketing Licensing Agreement to operate Mlimani Petrol Station between the Plaintiff, and Defendant.

Moving to the 2nd issue Whether the Defendant breached the terms and condition of the Marketing Licence Agreement, honestly, I find Plaintiff claim for breach of contract is based on Defendant's actions, of issuing a Notice of suspension dated 7/10/2011 of Marketing Licence Agreement, which is Annexure SAM2 of the Plaintiff.

I have perused the details of the Notice of Suspension, Annexure SAM 2 to the Plaintiff, which was not even contested by the Defendant and DW1 and find its net effect was to suspend the licence as per Article 1 (v) of the Marketing Licence Agreement.

Also, the reasons for suspension of the Licence, Defendant, stated that, was inability on the part of the Plaintiff, to purchase fuel products and to continue sales at the Station.

Responding to the Plaintiff claim for breach of contract, Defendant, defended himself by saying, he did not breach a contract, but has exercise his contractual right under Article 1(v) of the Marketing Licence Agreement to suspend the Plaintiff.

In view of the above, it is obvious, the line of contention between the Plaintiff and Defendant, is whether or not the suspension, and subsequent termination of the Marketing Licence done by the Defendant amounted to breach of contract.

In addressing the above, I have no doubt in my mind that, a notice of suspension of the Defendant from operating the Petrol Station lead to three legal and business consequences.

First, the Marketing Licensing Agreement between the Plaintiff, and Defendant was suspended and was halted by Exhibit P2 a suspension letter reference No 0001/MS/DSMU/2011.

Secondly, the Plaintiff's business on running and managing the Petrol Station was halted.

Thirdly, the main objective of the licence and contract which were to enter, operate, and utilise the facilities of the Petrol Station stated in Article 1 (i) of the Licence, could no longer be performed by the Plaintiff.

So going by the wording of paragraph 3 of the suspension notice and the fact that, they suspended and ultimately terminated the Plaintiff's contractual right's of managing Petrol Station the court is satisfied that, the Defendant's notice of stopping the Plaintiff to operate the Petrol Station was termination and breach of contract. The court finding is supported by the fact that, the notice prevented all what was stated in Article 1 of the License on the performance of the Licensing Marketing Agreement, and prevented the License to operate the Petrol Station.

On the Defendant's and DW1 argument's that, the suspension and termination of the licence was due to none performance and repetitive none observance of the Marketing Licence Agreement, I find those were merely allegations, which were not substantiated by any credible report, such as inspection reports, daily sales, or Plaintiff financial statements from the Petrol Station.

It seems to me, a mere letter seeking for credit facilities of supply of fuel may not be a basis of proof of inability on the part the Plaintiff to run the Petrol Station effectively or to perform his contractual