REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI LAW COURTS

CASE NUMBER: HCCOMMARB/E016/2022

CITATION: ARENA LOGISTICS LIMITED VS TOTAL KENYA LIMITED

RULING

Introduction and Background

1. Sometime in 2015, the parties herein entered into a Dealership Marketing License Agreement ("the Agreement") where the Respondent, as a licensor and possessor of rights to the 'Total' registered trade brands, trade names, trademarks and goodwill associated therewith, licensed the Applicant to operate a Petrol Filling / Service station at the Central Business District in Nairobi, along Kimathi Street ("the Station"). The Applicant was also licensed to sell such products and conduct business at the Station on the terms and conditions specified in the Agreement including paying a license fee of Kshs. 160,000.00 per month. The Agreement which was initially for a period of 18 months was subsequently renewed on 1st December 2017 for a period of 24 months.

2. On diverse dates between October 2017 and February 2018, the Applicant complained to the Respondent over product losses at the Station which it largely attributed to the Respondent's storage tanks. For instance, in its letter of 14th December 2017, the Applicant stated that it was experiencing an average product loss of 4,300 litres on a sale volume of 200,000 litres which it averred was 2.5% of the sale with a street value of Kshs. 400,000.00 and further translated to a net operating loss of Kshs. 350,000.00.

3. By a demand letter dated 5th February 2018, the Applicant formally declared a dispute and demanded Kshs. 12,189,287.40 being the value of the products allegedly short delivered by the Respondent for the years 2015, 2016 and 2017. The Applicant also demanded that the Respondent perform a tank pressure test, ultrasound and calibration tests urgently and that it ceases the operation of one of the tanks until the necessary tests are done.

4. On 20th November 2018, Paul Ngotho, HSC was by appointed the sole arbitrator ("the Arbitrator") by the parties. The Applicant sought Kshs. 14,773,730.20 as special damages, interest, general and aggravated damages and costs of the arbitration. In its defence, the Respondent contended, inter alia, that in as much as it received five complaints from 2016 to 2017, they were incomplete and unsubstantiated, contrary to the provisions of the Agreement. This notwithstanding, the Respondent stated that it always dealt promptly will the Applicant's complaints and that it conducted various tests and maintenance exercises at the Station in accordance with the Agreement and confirmed that its equipment and tanks were in good working condition. It prayed that the

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Applicant's claim be dismissed.

5. After considering the parties' arguments through their pleadings and witnesses, the Arbitrator published an award on 12th November 2021("the Award"). The Arbitrator identified 8 issues for determination as follows:
i. Whether or not the Applicant had locus standi to institute the suit against the Respondent;
ii. Whether the Agreement was terminated by the Respondent. If so; was the termination lawful?
iii. Whether the Applicant suffered product loss through leakages at the Station and/or through truck losses. If so, is the Respondent liable for those losses?
iv. Whether the Applicant mitigated its losses, if any;
v. Whether the Applicant was to be awarded Kshs 14,773,730.20 as claimed or any other sum as Special Damages?
vi. Whether the Applicant was to be awarded interest for any sum awarded as Special Damages. If so, whether the same ought to be simple or compound? At what rate? From when to when?
vii. Whether the Applicant was to be awarded General and/or Aggravated Damages? If so, how much?
viii. Costs; liability and quantum

6. On the issue of standing, the Arbitrator found that the Applicant had, in the unique circumstances of this case, capacity to institute the proceedings for four reasons. First, that the Agreement was drawn by the Respondent, which must, therefore, bear the primary responsibility for the untidy state of affairs and the implication was that the Applicant should not be prejudiced because of the Respondent's "original sin". Second, the Respondent was, from the beginning, aware that the Applicant's director, Mr. Yasin Jamal would be operating the Station through Arena Logistics Ltd and so it could not, after so many years deny knowledge or involvement of that company in operating the Station. Third, recognition of Arena Logistics Ltd did not absolve Mr Jamal from liability and that he remained equally liable as his company. Fourth, Arena Logistics Ltd was not a stranger to the Agreement as it is expressly named therein.

7. On the issue of termination, the Arbitrator did not find any evidence to suggest that the Respondent terminated the Agreement despite several warning letters to the Applicant which the Arbitrator evaluated in light of the evidence. The Arbitrator noted that the Agreement was executed by the parties on 1st December 2017 and expired on 30th November 2019 during the course of the proceedings and thus it was no longer in force.

8. As to whether the Applicant suffered product losses occasioned by truck losses and leakages of the storage tanks, the Arbitrator considered the Monthly Sales and Stock Reports for the period December 2015 to September 2018 together with other evidence which indicated product loss or variance in the data as tabulated by the Applicant for the said period. The Arbitrator noted that this was confirmed by the Fuel Stock Control Reports prepared by the Applicant's Territory Manager, however, there was no proof that this product loss or variance could be directly attributed to leakages at the Station specifically leakages on PMS Tank 2 as alleged by the Applicant. The Arbitrator further noted that following the complaints by the Applicant concerning product loss, the Respondent conducted various tests on the tanks and equipment to verify their integrity and that on 20th and 21st November 2017, an idling test was carried out for 24 hours on the tank together with a dry-to-dry test. The Arbitrator found that from the tests, no product losses were recorded and the Applicant was advised to monitor the deliveries and sales processes using the template shared during the tests. The Arbitrator further found that no leakages were detected from the tests conducted by Tanzanite Petroleum Services Limited and Western Pumps Services Limited and that the Applicant's own Environmental Self-audit report for the Station prepared by SGS Kenya Limited and which audit was conducted in August 2017 concluded that all leak monitoring systems were

working properly. However, the Arbitrator stated that the remarks about losses at the Station were couched as reports received, impliedly from the Applicant or third parties, not as the opinion of SGS Kenya Ltd.

9. The Arbitrator found that even though the Applicant was dissatisfied with all the above tests, it did not produce a contrary independent test on the tanks in question, specifically PMS Tank 2 or obtain any independent or expert opinion to verify that the product loss it was experiencing as evidenced by its Monthly Sales and Stock Reports, from 2015 to 2018, were as a direct result of leakages on PMS Tank 2. Further, that the Applicant did not challenge or identify any inconsistencies or irregularities in the TPS Report or the WPS Report, save for the fact that its own expert was not involved in the preparation of the said reports. The Arbitrator noted that the Applicant had stated that it had difficulties identifying an independent expert as, in its view, all the experts available in Kenya had worked with the Respondent at one time or another. Assuming that was so, the Arbitrator opined that the Applicant could have sourced an expert from neighbouring countries or beyond. As such, the Arbitrator concluded that the Applicant had not proved its allegation that it suffered product loss through leakages at the Station.

10. On whether the Applicant suffered losses during the process of offloading fuel from the trucks, the Arbitrator noted that in as much as the Applicant produced 10 invoices together with the RTW Loading, Quantity & Sealing Reports together with the Truck Loss and Gain Reports for the period 2016 -2017, there was no evidence to suggest that it was forwarded to Respondent while complaining about the product loss via truck losses. Further, that it had not demonstrated before the Arbitrator that it followed the procedure as outlined in Article III Clause(iii) on page 11 of the Agreement together with the procedure outlined in the Respondent's manuals to report its complaints of product loss through truck losses to the Respondent to facilitate investigations on these complaints. For these, the Arbitrator concluded that the Applicant had not proved that it suffered product loss through leakages at the Station and through truck losses and so the question of whether the Respondent was liable for those losses did not arise.

11. On the question of mitigation of losses by the Applicant, the Arbitrator relied on Article VI Clauses (v) and (vi) on page 18 of the Agreement which provided that the Applicant was responsible for the cost of maintenance and repairs of buildings and equipment at the Station. However, in the event of an equipment fault leading to product loss, the Applicant was required to immediately discontinue the use of the equipment and inform the Respondent who was to then rectify the said fault expeditiously. The Arbitrator noted that the Applicant, in spite of allegedly incurring colossal product losses from January 2015 to December 2017 unconditionally renewed the Agreement on 1st December 2017, which provided at Article IV Clause (iii) on page 14 that the Applicant shall prepare or cause to be prepared a statement of account covering his purchases, current stock, stock, sales, receipts, revenues, authorized expenses and the financial position of all his activities at the station for the preceding year. That it was not clear whether the Applicant sought to prepare the said statement of accounts and address any outstanding issues with the Respondent, in order to address the losses incurred during this period amounting to Kshs 14,773,730.20 and no such evidence was presented before the Arbitrator. The Arbitrator therefore held that the Applicant did not mitigate its losses, if any.

12. On the issue of special damages, the Arbitrator held that special damages must not only be pleaded but also proved and in the circumstances, the Applicant could not be awarded either Kshs 14,773,730.20 as claimed or any other sum as special damages. As a consequence of lack of proof, the Arbitrator dismissed the Applicant's claims for general and/or aggravated damages. He further held that since the Respondent had lost on one issue, it was awarded 80% of its costs and was held liable for 20% of the Arbitrator's fees and disbursements.

13. The Arbitrator then reserved the issue of the quantum of the Respondent's costs and directed to agree on this issue and revert to the Arbitrator for determination within 30 days of receiving the Award if they could not agree. In sum, all the Applicant's claims were dismissed and prayers rejected.

14. The Award has prompted the Applicant to file the Chamber Summons dated 10th February 2022 made pursuant to section 35 of the Arbitration Act, 1995 seeking to set aside the Award for being contrary to public policy. The application is supported by the affidavits of Abdiakil Hassan Dubat, a director of the Applicant, sworn on 10th February 2022 and 16th June 2022 respectively. The Respondent has opposed the application through the replying affidavit of Rosemary Wakaba, its legal officer, sworn on 22nd March 2022. The parties have also filed their respective submissions which are along the lines I have already highlighted above.

Analysis and Determination

15. What the court is being called upon to determine is whether the Award ought to be set aside for being contrary to public policy. It is common ground that under section 35(2)(b)(ii) of the Arbitration Act an award can be set aside if it is contrary to public policy. The Applicant rightly submits that the Arbitration Act does not define what "public policy" entails but that the court can borrow from the dictum of Ringera J., (as he was then) in Christ for All Nations v Apollo Insurance Co Ltd [2002] 2 EA 366, where the learned judge explained the scope of public policy as a ground for setting aside an arbitral award as follows:

I take the view that although public policy is a most broad concept incapable of precise definition, … an award will be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality……

16. The nature of public policy in relation arbitral awards was further elucidated by the court in Mall Developers Limited v Postal Corporation of Kenya ML Misc. No. 26 of 2013 [2014] eKLR where it stated that:

Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties herein as it was only the Claimant and the Respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not both demonstrate to this court how the decision by the Arbitrator would negatively affect, impact or infringe the rights of third parties and thus offend public policy.

17. The Applicant avers that the Award is contrary to public policy to the extent that the Arbitrator held that the Applicant was not entitled to any of its prayers despite having tendered evidence to support their claims and that he arrived at a decision based on an expert Report submitted by the Respondent only, contrary to the consent adopted in court and dated 11th October, 2018 signed by both parties requiring that the parties undertake a joint report to determine whether there was any leakage from the PMS tanks.

18. I have considered the Award whose contents I have highlighted in the introductory part of this ruling and I find that the Applicant's grounds for impugning the Award as being contrary to public policy are insufficient. The Applicant claims that it tendered evidence to support its claim but the proceedings and evidence before the Arbitrator demonstrate otherwise. The Arbitrator observed that while the Applicant was dissatisfied with the tests conducted by Tanzanite Petroleum Services Limited and Western Pumps Services Limited, it did not produce any contrary independent test on the tanks in question, specifically PMS Tank 2 or obtain any independent or expert opinion to verify that the product loss it was experiencing as evidenced by its Monthly Sales and Stock Reports, from

2015 to 2018, were as a direct result of leakages on PMS Tank 2. Further, the Applicant did not challenge or identify any inconsistencies or irregularities in the two Reports, save for the fact that its own expert was not involved in the preparation of the said reports.

19. Furthermore, the Arbitrator did not solely rely on these two reports to find that the Applicant had not proved its claim. The Arbitrator considered the Applicant's Monthly Sales and Stock Reports, from 2015 to 2018 and an Environmental Self-audit report for the Station prepared by SGS Kenya Limited to conclude that there were no reported or proven leakages. Thus, it can be stated that the Applicant's claim failed after an examination of the entirety of the evidence before the Arbitrator.

20. The aforesaid finding goes to show that the Arbitrator evaluated the material produced by the parties and came to a reasoned conclusion. It is firmly established that an arbitral tribunal is the master of facts and is entitled to review the evidence and come to its own conclusion and even if it is wrong, or that the court might have a different opinion to his findings. Section 35 of the Arbitration Act was never intended to elevate the court to sit as an appellate court in arbitration matters and translate findings of fact and conclusion therefrom to matters of public policy. While the Supreme Court in Nyutu Agrovet limited vs Airtel Networks Kenya Limited [2019] eKLR stated that there could be legitimate instances where a party can appeal a decision stemming from arbitration, the apex court cautioned that courts must draw a line between legitimate claims which fall within the ambit of the exceptional circumstances necessitating an appeal and claims where litigants only want a shot at an opportunity which is not deserved and which completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice.

21. I hold that what the Applicant seeks is for the court to review the Award and uphold its factual propositions. The Arbitrator's conclusions of fact cannot be elevated to matters of public policy merely because the Applicant or the court could have different opinions on them. It is for these reasons that I reiterate that the Award is not in conflict with public policy of Kenya.

Disposition

22. The Applicant's Originating Summons dated 10th February 2022 lacks merit. It is dismissed with costs assessed at Kshs. 60,000.00 only which shall be borne by the Applicant.

DATED and DELIVERED at NAIROBI this 9th day of DECEMBER 2022.

D. S. MAJANJA
JUDGE

SIGNED BY: HON. MR. JUSTICE D. S. MAJANJA