REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 594 of 2004

KENYA SHELL LIMITED ……..…..….PLAINTIFF

VERSUS

KILELESHWA SERVICE STATION LTD…… DEFENDANT

JUDGEMENT

The plaint by which this suit was commenced is dated 29th October 2004. It was also filed on that every date.

It is the plaintiff's case that the defendant had failed to vacate the suit premises notwithstanding the lapse of a 90 days' termination notice which the plaintiff had served upon it, on 28th July 2004. The defendant's refusal to vacate the premises is said to be causing the plaintiff to suffer irreparable damage. Consequently, the plaintiff has come to this court, asking that the defendant be permanently restrained from using, dispensing or in any other way dealing with the plaintiff's tanks, pumps, pipes and equipment. The plaintiff also wishes to have the court order the defendant to deliver up vacant possession of the suit property.

In order to put the case within perspective, it is important to note that the suit property is L. R. No. 4858/16,

KILELESHWA, NAIROBI. On that piece of land, which is registered in the plaintiff's name, there stands a Petrol Service Station.

It is common ground that the plaintiff built the said Petrol Service Station, and that it then gave it to the defendant to operate, as an outlet for the sale of the plaintiff's petroleum products. It is also not in dispute that the defendant had operated the said station since 1971. Therefore, there is absolutely no doubt whatsoever that the two parties herein had had a longstanding relationship.

However, the said relationship begun to falter in or about the year 2000. A clear sign of the difficulty that the relationship ran into is the issuance of a termination notice dated 10th March 2000.

Upon receipt of that notice, the defendant herein instituted legal action, in an endeavour to ensure that it was not kicked out of the station. It was the defendant's case, in that case (which was **KILELESHWA SERVICE STATION LIMITED –VS-KENYA SHELL LIMITED HCCC NO. 462 OF 2000)** that the relationship between the parties therein was one of a Landlord and Tenant. But, the plaintiff herein contended that the relationship was no more than that of a Licensor/Licensee.

After a full trial, the HON. L. NJAGI J. delivered his judgement on 8th April 2004. By his said judgement the learned judge held that the defendant herein was a licensee, even though it had refused to sign the necessary documents to formalise that status. The court also held that the termination notice dated 10th March 2000 was of no legal effect.

Six months after the court had delivered its verdict in that case, the plaintiff herein issued a termination notice dated 27th October 2004. By that notice, the plaintiff asked the defendant to hand over vacant possession of the suit property after the expiry of ninety (90) days. In effect, the notice lapsed on 27th October 2004.

On its part, the defendant holds the view that the notice dated 28th July 2004 was of no legal effect. It was for that reason that the defendant had declined to hand over the vacant possession of the suit property. If anything, the defendant lodged a counter-claim, through which it seeks a declaration that the termination notice dated 28th July 2004 was of no legal effect. The defendant also prayed for a permanent injunction to restrain the plaintiff from repossessing, tampering and/or interfering with the petrol station. In addition, the defendant requests for reimbursement for all the losses occasioned by the plaintiff's actions.

In its "Reply to Defence and Counterclaim" dated 9th August 2005, the plaintiff takes issue with the defendant's assertion that the termination notice dated 28th July 2004 was unreasonable and illegal.

An the trial, both parties called one witness each. PW1 was Mr. DUNCAN IRUNGU, who had worked with the plaintiff for a period of eight-and-a-half years. As at the time when he testified in this case PW1 was the plaintiff's Retail Territory Manager; a position he had held even in 2000, when the plaintiff first sought to obtain vacant possession of the suit property. Indeed, PW1 had also testified in the earlier case, **HCCC NO. 462 OF 2000.**

It was his evidence that following the judgment in that earlier case, neither of the parties appealed against the decision. However, the plaintiff did issue a new notice dated 28th July 2004. Upon the expiry of the notice period, the plaintiff stopped providing supplies to the defendant, said PW1.

As the petrol station had stopped making sales of the plaintiff's products PW1 testified that the image of the plaintiff had been injured, as customers felt that the plaintiff lacked finances to stock the petrol station. Yet, as far as PW1 was concerned, the plaintiff wished to carry out renovations at the station.

When asked what the plaintiff pegged the 90 days' notice on, PW1 said that it was based on the "Operator's Licences" which the plaintiff normally issues to all persons who were operated the plaintiff's petrol stationS.

But the witness also conceded that the defendant had not executed any operator's licence. He admitted that as the defendant had started operating the petrol station in question, in 1971, he did not know the terms under which it entered the station.

He then explained that in his opinion this case was different from the earlier case, **HCCC No. 462 of 2000**, because in the said earlier case the claim against the defendant was for vacant possession, whilst in this case it was for an injunction to compel the defendant to move out of the petrol station.

Frankly, I do not appreciate the distinction, through that piece of evidence. In both instances, the plaintiff herein wanted to have the defendant move out of the petrol station, so that the plaintiff could have it back.

PW1 then went on to concede that in the earlier case, the learned trial judge had made a finding to the effect that the defendant had invested the sum of Kshs.13,088,000/= in the petrol station. In the opinion of the witness, having invested such a tidy sum, if he were in the defendant's shoes, he would not have necessarily agreed to move out of the station. But then again, PW1 said that even if the defendant did move out, it could always lodge a claim against the plaintiff.

After the plaintiff closed its case, the defendant's witness, Mr. NIZAR ALI HUSSEIN testified. He said that he had been in occupation of the petrol station from 1971. He explained that the parties herein had an oral agreement.

During the operation of the petrol station, the Defendant did invest in it, whenever necessary, so as to improve the business. The reason why the defendant needed to invest in the station was that the plaintiff had only erected it, but it lacked some essential equipment. However, whilst the defendant installed some pieces of equipment, it did ask the plaintiff to provide the more expensive equipment.

DW1 testified that the defendant installed the perimeter fencing; security grills; adjustable metal shelves; wooden shelves in the stores to accommodate lubricants; an arctic in the main office, for storage; electronic security locks; gates at the entrance and the exit; gardening tools and lawn mower; sliding doors for the workshop area; washrooms for customer's convenience; tools; and wheel alignment and wheel balancing machines. He also said that there were many other items, although he did not list them. However, his calculations showed that the cost of the said investments was Kshs.13,088,000/=.

The defendant says that it invested that sum in the station even though it was not his, because in those days gone by, the petrol company did not provide to operators everything necessary to operate a station, as they do today. For that reason, the defendant felt that the relationship between it and the plaintiff could not be equated to that which the plaintiff has with other operators. It was for that reason that DW1 refused to have the defendant execute the operators licence which the plaintiff presented to him. DW1 believed that the plaintiff should have treated the defendant differently from other operators who did not need to invest money on equipment.

DW1 says that he asked the plaintiff to amend the standard operators licence, so as to reflect the existing reality as between the parties herein. However, the plaintiff is said not to have reverted to the defendant with an appropriately amended operators licence.

Thereafter, when the plaintiff served the defendant with a termination notice, DW1 felt that it was not fair, as the said notice equated him to the other operators, whose circumstances were different from those of the defendant. The notice in contention, at that stage was the one dated 10th March 2000. And, it prompted the defendant herein to institute proceedings in court, being **HCCC No. 462/00** (the earlier case).

In a well considered judgement, the HON. L. NJAGI J. held, inter alia, that the notice dated 10.3.2000, was unreasonable and of no legal effect. The learned trial judge also directed the parties to revert to the position in which they were, prior to the notice.

In the defendant's understanding, the court orders meant that the parties herein would relate to each other as they had done prior to 10th March 2000. In particular, the defendant felt that it could purchase fuel in such quantities as it deemed necessary, and would pay for it by cheque.

However, the plaintiff is accused of harbouring a different agenda altogether. DW1 testified that the plaintiff insisted that purchases be paid for by bankers cheques. The plaintiff was also said to have deliberately delayed in repairing the only diesel pump at the petrol station, thus occasioning loss to the defendant. The delay was from 29th April 2004 to 7th May 2004.

Another change which the plaintiff is said to have introduced is that the defendant had to purchase at least 18,000 litres of petroleum products, at any one time.

When the defendant complained about the issue of payment by personal cheque, the plaintiff reinstated the system, but only for a day. Therefore, DW1 felt that the plaintiff was harassing and penalising the defendant.

Another example of the defendant's harassment was cited by DW1 as being the failure by the plaintiff to supply fuel to the petrol station over the two long weekends of 1.5.2004 and 1.6.2004.

Then, on 28th July 2004, the plaintiff served the defendant with a termination notice. The said notice required the defendant to vacate the petrol station on 27th October 2004. In other words the notice gave the defendants some 90 days to move out of the station.

The defendant felt that the notice was not only unfair but also contrary to the judgement in the earlier case. Therefore, even after the notice expired, the defendant continued to sell fuel at the petrol station.

According to DW1, the defendant used to purchase fuel from other dealers of the plaintiff, as the plaintiff had stopped to supply fuel directly to the defendant. The said action continued until September, 2005, when the defendant was served with an injunction order. However, even though the defendant was no longer using the plaintiff's equipment at the petrol station, DW1 said that the defendant had continued to protect the equipment. In that regard, the defendant had insured the pumps, pipes and gauges; and also employed security to protect them. In the assessment of DW1, the defendant has spent about 1.6 million, in that respect.

The defendant feels that the plaintiff has treated it very shabbily. DW1 said that prior to March 2000, the plaintiff had

never complained about the defendant's services. If anything, the defendant had been awarded certificates of merit, and the plaintiff had sought its advice on how to run other petrol stations.

DW1 asked the court to allow the defendant continue running the petrol station, in view of his longtime faithful service to the plaintiff. However, DW1 appreciates that he cannot run the station forever. It is his view that if the plaintiff wished to terminate the relationship, it should hold negotiations with the defendant. And when asked what he considered to be a reasonable notice, DW1 said, at least a year.

During cross-examination, DW1 admitted that the defendant had remained in possession of the petrol station for a year, since the notice expired. The witness also conceded that the plaintiff had only insisted that purchases be paid for by bankers cheques, after a personal cheque issued by the defendant had been dishonoured. In the circumstances, the defendant's complaint of harassment, on the grounds that it was required to pay for fuel by bankers cheques, was not a legitimate complaint. The defendant had all along known, as was admitted by DW1, that if its cheque was dishonoured, the plaintiff was entitled to insist that all subsequent payments be made by bankers cheques, for a period of six months.

Having given due consideration to the evidence tendered herein as well as the submissions made by both parties, I hold the considered view that the suit herein and the counter-claim are not res judicata. Although the issues which are central in both the earlier case and this one were the questions about the validity of the termination notices, which if valid should lead to the defendant herein handing over vacant possession of the petrol station, the termination notices are different. In the earlier case, the termination notice was dated 10.3.2000, and it required the defendant herein to vacate the petrol station forthwith. The judgement in relation to that notice was delivered by the court on 8.4.2004. Thereafter, the plaintiff issued a 90 days' termination notice, on 28th July 2004.

In effect, the notice dated 28th July 2004 could not have been, nor was it the subject of consideration by the court in the earlier case.

In **GREENFIELD LIMITED –VS- BABER MAWJI CIVIL APPEAL NO. 160 OF 1997**, the HON. J. E. GICHERU J.A (as he then was) quoted with approval the following words of SOMERVELL L. J. in **Greenhalgh –Vs- Mallard [1947] 2 All E.R. 255 at 257:**

"… res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but … it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

The issue of the notice dated 28th July 2004 could not have been raised in the earlier suit as that suit was determined prior to the issuance of the said notice. Therefore, that issue cannot be caught up by the doctrine of res judicata.

However, to the extent that the earlier case had settled the issue as to the nature of the relationship between the parties herein, that particular issue cannot be re-litigated anew.

In the case of **NGUGI –VS- KINYANJUI & 3 OTHERS, [1989] KLR 146 at 149,** APALOO J. A. (as he then was) expressed himself thus, when discussing the doctrine of res judicata;

"Although only a common law doctrine whose objective is the prevention of repetitive litigation, it was put on firm statutory basis by Section 7 of the Civil Procedure Act which enacts that:;

"No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties and has been heard and finally decided by such court."

In the earlier case, the learned trial judge had noted that **"the most**

pertinent issue is whether the relationship between the

parties to the suit is that of landlord and tenant or whether

it is that of licensor and licensee, and in either case what

were the terms thereof""

Having analysed the evidence tendered before him, he then went on to state as follows;

"My view of the above phenomenon in its entirety is that the plaintiff was meant and intended to be a licensee, but he has refused to sign the requisite documents to formalise that relationship."

Notwithstanding the fact that the defendant herein was licensee, the court did find that by requiring it to vacate the petrol station forthwith, the plaintiff's conduct was callous. The termination notice was described as being "harsh, burdensome and oppressive." Therefore, it was held to be of no legal effect.

The plaintiff herein has now given a 90 days' notice. The defendant wished me to declare that, in the circumstances prevailing in this case, the said notice was also of no legal effect.

But DW1 did concede that in the earlier case, the court did not rule that the plaintiff could not issue any termination notices subsequent to April 2004. His only concern is that in determining what notice was reasonable, regard should be had to the "fact" that the relations as between the parties herein was akin to a partnership.

Pausing there for a moment, I am not entirely sure that the witness did appreciate how a partnership ceases to exist. I say so because, in my understanding, a partnership may be dissolved without any notice.

I therefore believe that by saying that the relationship between the parties was akin to a partnership, the witness was trying to impress upon court, the fact that the parties had worked closely for a long period of time, so that when their relationship was being terminated, the defendant ought to be adequately compensated.

As DW1 readily admitted that the relationship could be terminated, provided there was adequate notice and appropriate compensation, I find that the defendant could not be entitled to an order for a permanent injunction to restrain the plaintiff from repossessing the petrol station. In that regard, I found the submissions of Mr. Arwa, advocate for the defendant to be at variance with the evidence tendered by his client.

He cited **HURST –VS- PICTURE THEATRES LTD [1915] 1 K.B 1,** as authority for the proposition that a licence coupled with a grant was not revocable.

Whilst that might be the legal position generally, in this case the defendant did concede that the relationship between the parties was terminable.

In **CROSSLAND SERVICES LTD –VS- MUNICIPAL COUNCIL OF NAKURU HCCC NO. 128/04 (NAKURU),** the HON. L. KIMARU J., dealt with a case in which the applicants had contended that the Municipal Council did not have powers to revoke the licence issued to them, especially when it touched on the livelihood of the applicants. On the other hand, the Council insisted that a specific licence could always be revoked for the common good of the community at large. The said common good was said to be the need for the Council to reorganize "the passenger service transport business commonly known as 'the matatu industry', with a view to making Nakuru a better town.

Having given the issue due consideration, the learned judge held that;

"If the Respondent would want to alter the terms of the issuance of the licence, like in the instant case, it would be required to apply the principles of natural justice, that is, it has to notify the Applicants of its intention to alter the terms and conditions of the said licence.

Further, the Respondent is required to give the Applicants a reasonable period before the said altered conditions can come into effect."

Of course, the nature of licence discussed in that case is different from that in this case. In that case, the licence was a document which authorised the licensee to operate a public service vehicle from a place within the

municipality of Nakuru. Whereas, the licence in this case is merely descriptive of the nature of the relationship between the two parties.

But, in any event, even in that case, the court did acknowledge the fact that the municipal council could alter the conditions of the licence, provided only that it issued a reasonable notice to the licensee.

Was the 90 days' notice, issued by the plaintiff herein, reasonable" The plaintiff says that it was, whilst the defendant found it to be woefully inadequate. Where did the plaintiff get the notice period"

According to PW1, it was from the standard form operators licence which the plaintiff usually issues to its operators.

Inasmuch, as it is common ground that the defendant did not execute the said operators licence, the terms thereof are not binding on it. However, one could conceivably argue that the plaintiff was treating the defendant in the same manner as its other dealers, and that that was not unreasonable. But, I do not think that that argument would be right, as the defendant did ably demonstrate that its circumstances were not the same as that of those other dealers. I therefore find that, to the extent that the notice given was in line with that of the other operators, it was not reasonable to the defendant.

DW1 struck me as being an honest gentleman. He did not exaggerate. I was therefore persuaded that his complaints of harassment were realistic.

In that regard, I note that in a ruling delivered on 22nd February 2005, the HON. A. EMUKULE J. held as follows, on an application seeking to commit the plaintiff's Managing Director to civil jail, for contempt of court;

"In my understanding of the status quo as at that date included the operation of the terms of the Standard Operator's Licence which regulated the established course of business dealing.

…..

I do believe , and hold that the orders of the Court were not a substitute for the parties contractual basis of business dealings."

Therefore, I hold that when the plaintiff imposed new conditions, such as the requirement that the defendant must purchase at least 18,000 litres of fuel, that was not in keeping with the judgement in the earlier case.

The HON. A. EMUKULE J. went on to hold as follows;

"I do however find the Defendant/Respondent's tactics drying up the Plaintiff/Applicant's station, and dismantling the station's sign boards and pumping gear unacceptable, and may, in appropriate circumstances, where a plaintiff acts with a little more circumspection and seeks the court's intervention, lead to citation and committal to civil jail. The Defendant/Respondent is accordingly warned to stay far away from those stratagems which are plainly intended to squeeze oxygen from the plaintiff's business."

Notwithstanding that stern warning, the plaintiff herein appears to have continued to starve the station on occasions, such as those cited by DW1. The plaintiff also took its time to repair the only diesel pump, thus causing the defendant losses. Such conduct was unbecoming.

But, the fact that the operations of the petrol station would only be successfully carried out by the defendant, if the plaintiff was co-operative, makes it unwise to insist, as the defendant would like to do, that it continues to run the business. In

KENYA SHELL LIMITED –VS- ELIZABETH W. NJENGA T/A MOLO FARMERS SERVICE STATION, (NAKURU) HCCC NO. 22 OF 2003, the HON. D. MUSINGA J. ably summarised the legal position thus;

"While it is not desirable to compel parties to remain in contract if one of them has decided to opt out, a court of law will not allow a party to adopt a flippant attitude and flagrantly breach a binding Agreement in an arbitrary manner, in the guise of being able to pay damages. If that were to be allowed, then contracts would not be worth the paper they are written on particularly where one of the parties thereto is financially much more endowed than the other."

So, having decided that the 90 days' notice was not reasonable in the circumstances, cannot the period of almost a year (between 28th October 2004 and September 2005), when the defendant remained in possession after the notice had expired, not be considered sufficient"

In **RAJWANI –VS- RODEN [1990] KLR 4 at 10 – 11** the HON. LAW J. A. held as follows;

"A tenant cannot, without giving a valid notice, put an end to a tenancy from month to month, which persists until a valid notice is given, or the landlord re-enters."

In like manner, the licence in this case persists until a valid notice is given, or the licensor re-enters the petrol station.

The defendant insists that it is only a twelve-months' notice that would be reasonable. Having given due consideration to the circumstances in this case, I hold that a six months' notice would be reasonable.

Meanwhile, the defendant has poised an important question. It said that whereas it might be in a position to remove the equipment which it installed at the station, he would have nowhere to take them. I find that that is a reasonable position to take. Therefore, I order that the defendant shall be compensated by the plaintiff to the tune of Kshs.13,088,000/=, whereupon the plaintiff would retain all the equipment which was purchased by the defendant, for use at the petrol station.

And whereas the defendant is entitled to six months' notice as already held, I appreciate the fact that the parties herein no longer have cordial working relations. Therefore, in lieu of the notice, the plaintiff may obtain possession of the petrol station upon paying to the defendant the equivalent of profits which the defendant would have earned over the period of six months. The calculation of the profits shall be based on the difference between the wholesale and retail prices on the sale of motor fuel made by the defendant, at the petrol station in issue, during the period of the period of six months prior to 28th July 2004.

The costs of the suit and of the counterclaim are awarded to the defendant.

Dated and delivered at Nairobi, this 6th day of June 2006.

FRED A. OCHIENG

JUDGE