REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 3398 OF 1980

JAMES NJORO KIBUTIRI.....PLAINTIFF

VERSUS

KENYA SHELL LTD.....DEFENDANT

RULING

This is an application for an interlocutory injunction to restrain the defendant from repossessing or evicting the plaintiff from the Kilimani Petrol Station.

By an agreement dated July 5, 1968, the defendant agreed to permit the plaintiff to enter the said Petrol Station as Licensee and to operate the same under certain terms and conditions. The main condition so far as the defendant was concerned was that they would instal and maintain the petrol and oil pumps and other installations which shall remain the sole property of the company. So far as the plaintiff was concerned, he was to purchase all petroleum products from the defendant, operate the station efficiently and pay a hire rent for the equipment. Clause 4 of the Agreement provides:

"4. This Agreement shall be deemed to have commenced on the 1st day of July one thousand nine hundred and and shall remain in force until terminated by either party giving to the other calendar month's notice in writing in that month provided always that the company shall be entitled to terminate this agreement at any time on giving to the operator written notice in that behalf in any of the following events:

a) if the operator commits any breach of the obligations on his part hereinbefore contained;

or

b) if the operator commits any act of bankruptcy or compounds with his creditors or being a company goes into liquidation (other than voluntary liquidation for the purpose of amalgamation or reconstruction);
or

c) if the operator shall be convicted of any offence against the laws for the time being in force in Kenya regulating the storage or sale of petroleum and other products; or

d) if the operator shall be convicted of any offence against the laws for the time being in force in Kenya

the punishment for which is a fine exceeding shillings two thousand or imprisonment exceeding three calendar months or both such fine and such imprisonment."

On November 5, 1980, the defendant wrote to the plaintiff in the following terms:

"November 5, 1980

Mr James Njoro Kibutiri,

PO Box 21214,

NAIROBI.

Dear Sir,

RE : TERMINATION OF OPERATOR'S

AGREEMENT KILIMANI SERVICE STATION

We refer to the Operators Agreement between yourself and this Company and hereby give you Notice in accordance with Clause 4 of the said Agreement that this agreement will terminate on December 7, 1980. The company will take back the station from you on December 8, 1980. Kindly remove all your personal belongings from the station by that date and hand over company's keys and premises to our Sales Rep Mr Waweru who will be contacting you for this exercise.

Yours faithfully,

for : KENYA SHELL LIMITED

VA NYAMODI (MRS)

cc Resale Manager."

By his amended plaint the plaintiff says that the agreement of July 5, 1968 created a landlord/tenant relationship and that the provisions of the landlord and tenant (Shops Hotels and Catering Establishments) Act are applicable to the tenancy. He seeks a declaration that he is controlled tenant protected by the Act. He says secondly that the Notice of Termination dated November 5, 1980 is not a valid notice under Clause 4 because the plaintiff has not been guilty of any of the matters specified in paras (a) to (d) of Clause 4.

The defendant says the plaintiff is not a tenant but a licensee. As regards the second point, he says that the plaintiff has committed a breach of obligations under paragraph (a) of Clause 4, but that he does not rely on this, but upon the first part of Clause 4 which entitles him to terminate on one month's notice.

The conditions for granting a temporary injunction in East Africa are well known.

"First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (See *EA Industries v Trufoods* [1972] EA 420)."

I am satisfied that the applicant has not fulfilled any of those conditions in this case. He is clearly not a protected tenant but a licensee. Apart from the fact that the agreement says so in terms there is clearly no landlord/tenant relationship under the Agreement read as a whole. There is also nothing in the second point made by Mr Khaminwa. Clause 4 clearly has 2 parts, the first dealing with a period of notice by which the agreement can be terminated by either side and the second dealing with a situation where the company only can terminate if the operator is guilty of certain matters. In this case, the company terminated under the first part of Clause 4 as the letter of November 5, 1980 clearly shows. But, says Mr Khaminwa, the word one is left blank in the agreement. Therefore the whole first part of Clause 4 goes and one must construe the first part of Clause 4 as providing no agreement for termination by notice on either side. Whilst the point is arguable, I do not think it has a probability of success. It seems to me that common sense dictates that the blank is obviously the word one for the publication which follows says "month's notice", which can only refer to one month's notice. It is pertinent in this connection to compare the working in para (d) of the same clause which speaks of "Three calendar months."

Even if I am wrong on this point it seems to me that the applicant does not fulfill the second condition for the grant of a temporary injunction. If he should actually be successful at the trial, he would not suffer irreparable damage if he is evicted now. The defendant company is a rich multinational. They are in a position to compensate him in damages and even reinstate him in this or other petrol station. Contrary, wise, if he should fail at the trial, I very much doubt whether the defendant will be able to recover any damages from him.

I am of the view that the balance of convenience dictates against granting an interlocutory injunction in this case and the application is therefore dismissed with costs.

I would only add that if Mr Khaminwa is still of the view that his client is a protected tenant, and that the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act are applicable to him, he is of course at liberty to go to the Tribunal and try his luck there.

Dated and Delivered at Nairobi this 6th day of January 1981.

E.COTRAN

JUDGE