Case Number:	Civil Appeal 205 & 239 of 2008
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Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Samuel Elikana Ondari Bosire, John walter Onyango Otieno, Kalpana Hasmukhrai Rawal
Citation:	Kileleshwa Service Station Ltd v Kenya Shell Ltd [2012] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
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Case Outcome:	Appeal 205 of 2008 Allowed. Appeal 239 of 2008 Partially Allowed.
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, ONYANGO OTIENO & RAWAL, JJ.A)

CIVIL APPEAL NO. 205 & 239 OF 2008

BETWEEN

KILELESHWA SERVICE STATION LTD……….…APPELLANT

AND

KENYA SHELL LTD …………………………......RESPONDENT

(An appeal from the judgment, decree & Ruling of the High Court of Kenya at Milimani Commercial Courts, Nairobi (Ochieng J.) dated 6th June, 2006

in

H.C.C.C. NO. 594 OF 2004

****

JUDGMENT OF THE COURT

By its plaint dated 15th March 2000 **Kileleshwa Service Station,** prayed for a prohibitory injunction as well as a mandatory injunction respectively, to restrain **Kenya Shell Ltd**, the defendant, by itself, or through its employees, servants and whomsoever, from repossessing, tampering with or interfering with its occupation of the Kileleshwa Service Station, and to compel the defendant to continue supplying to it petroleum products as per the agreement between the parties.

As pleaded the Plaintiff's case was that it had, as at the date of the suit, operated the Service Station for over 30 years without causing any major breach of the contract between it and the defendant. That notwithstanding, the defendant cut off the supply of petroleum products and had threatened to reposess the Petrol Station.

In its statement of defence Kenya Shell Limited averred that the plaintiff was a licensee whose license was terminable by it at short or no notice to it, and it had terminated the licence due to the failure of the plaintiff to meet its financial obligations to it, the defendant, when its cheque for **Kshs.873,556/=** dated 29th March 2000 was dishonoured, and two other cheques it had drawn in favour of the defendant were stopped. For those and other breaches the defendant averred that it had the right to terminate the licence and to repossess the station. It therefore counterclaimed for vacant possession of the petrol station erected on **L.R. NO. 4858/16,** mesne profits and damages for trespass.

The plaint was amended but the substance of the claim remained unchanged. In its reply to defence and defence to the counterclaim the plaintiff denied it was in breach and averred, *inter alia,* that

its dishonoured and stopped cheques were replaced with bankers cheques. The pleadings talk about a further amended plaint, but we cannot find any on record, for **Civil Appeal No. 205 of 2008**.

The relationship between the parties started way back in 1971 or thereabouts when defendant allegedly, by an oral agreement with the plaintiffs for the latter to sell the former's petroleum products. It was also allegedly agreed between the parties, that the plaintiff would effect minor changes on the station. At no time was the agreement reduced into writing. Acting on that agreement the plaintiff continued buying the products of the defendant. It also installed equipment allegedly worth **Kshs.13,088,000/=**. Adequate stocks were to be maintained and the plaintiff was precluded from obtaining products from any other source. In turn the defendant would supply the plaintiff with all petroleum products upon payment. The plaintiff also paid rent for the station, which was changed to a service charge with effect from 2nd July 1985.

Nizarali Husein Mohamed (P W I) testified on behalf of the plaintiff. It was his evidence that in 1986 or thereabouts the defendant required of the plaintiff to execute a written agreement but which the plaintiff refused because it did not accord with the existing arrangement between the parties. The written agreement was a standard operator's license which apparently was used in other Shell petrol stations.

P W 1 testified that on 10th March 2000, the plaintiff was served with a letter terminating the license. Upto that time the plaintiff was making payment to the defendant by personal cheques and one of its cheques for **Kshs.873,566./=** had, prior to the receipt of the aforesaid letter, been dishonoured. The dishonor of the cheque was given as one of the reasons for terminating the licence. The other reasons were that the plaintiff had breached its obligations as a dealer and the station had been dry for four days, which reason P W 1 denied was true. The defendant stopped making any delivery of petroleum products to the plaintiff unless payment was made upfront for any petroleum products the plaintiff wanted. Arising out of that development the plaintiff stopped payment of two cheques it had issued to the defendant for **Kshs.782,330/**= and Kshs. **828,870/**= respectively. It happened that as at the 10th March 2000, the fuel tanks were not dry. Rent payment was up todate. The rent, which was initially Kshs.11/= per every litre sold, had been increased from time to time notwithstanding that there was no agreement on the rate of the increase. The defendant was regularly maintaining the equipment.

By 14th March 2000, the station was dry. The defendant stopped making delivery of the petroleum products to the plaintiff's station. Its position was that the license given to the plaintiff had been terminated because it lacked sufficient capital to run the station. The cheques which had bounced were allegedly evidence of that. Likewise, according to the defendant, there was default in satisfying certain essential requirements of the license.

In his judgment Njagi J. found as fact that the agreement between the parties was oral notwithstanding the defendant's insistence through Mr. Duncan Irungu (D W 1) that a standard written dealer's licence had been executed by the parties. In reaching that conclusion the learned Judge cited with approval the decision in **Shell –Mex and BP Ltd v. Manchester Garages Ltd** [1971] 1 ALL ER. 841, in which Lord Denning stated that a licence to operate a filling station could be either on the basis of an oral licence or a tenancy, and that what is significant in such a relationship is not whether the relationship is one of a licence or a tenancy, but rather the substance of the transaction. The learned Judge then held that apart from the substance of the transaction the intention of the parties is also important. After evaluating the evidence the learned Judge (Njagi J.) concluded that the parties were not *ad idem* on whether or not the relationship between them was that of a licence or tenancy. He examined the evidence and concluded that the defendant had all along demonstrated that its intention was to have the relationship of a licensor and licensee. He held that there was no evidence that monthly rent was payable or paid and where ordinarily the intention is not clear the court has the power to presume a

tenancy. In the end the learned Judge held that the relationship between the parties was that of licensor and licensee.

On whether the defendant's letter of 10th March 2000 terminated the licence, the learned Judge found as fact that the plaintiff replaced the bounced cheque and the two which it had stopped with a composite banker's cheque for **Kshs.1,611,200/=** at about 10 a.m. on the same day the letter of termination was received. He did not think the defendant behaved well by withholding deliveries of petroleum products to the plaintiff and by its demand to be paid upfront before any products could be delivered to the plaintiff. He expressed the view that the defendant, having not checked the tanks to ascertain whether or not they were empty had no basis for concluding that the plaintiff lacked financial ability to run the station.

In the end, the learned Judge held that the issuance of a termination notice was unreasonable, harsh, burdensome and oppressive, in view of the fact that there was payment made before the letter was served upon the plaintiff at 11 a.m. on 10th March 2000. He then proceeded to declare the termination letter of no effect. The court ordered that because the plaintiff had served the six (6) months probationary period the parties would revert to the positions they were in before the letter of termination. He dismissed the defendant's counterclaim and ordered the defendant to be continually supplying the plaintiff with the petroleum products.

Kenya Shell Limited filed **Civil Case No. 594 of 2004** following the aforesaid decision and after it had served another termination notice giving Kileleshwa Service Station Ltd (Kileleshwa) as defendant, a 90 days notice terminating its licence and after the notice had lapsed. In that suit Kenya Shell Limited (Shell), prayed for a permanent injunction restraining Kileleshwa Service Station from dealing with the plaintiff's tanks, pumps, pipes and equipment, and a mandatory injunction compelling the latter to move out of the service station and deliver vacant possession of the premises known as **L.R. No. 4858/16** in Kileleshwa , Nairobi, and damages.

In its written statement of defence and counterclaim, Kileleshwa Service Station, the respondent in the second of the two appeals before us, while admitting it received the letter dated 28th July 2004 purporting to terminate its dealer's licence, averred that the said letter was of no legal effect and sought an order declaring it as of no legal effect. It also claimed re-imbursement of all losses it had allegedly incurred arising out of Shell's actions. It further averred that it had operated the petrol station for over 33 years on the basis of an established course of dealings based on an oral arrangement. It attacked the notice as being too short, and, that it was unreasonable. It also averred that in view of the decision in **Nairobi High Court Civil Case No. 462 of 2000,** the matter was *res judicata*. It then counterclaimed for a declaratory order that the termination letter dated 28th July 2004 was of no legal effect; a permanent prohibitory injunction to restrain the plaintiff, its agents, employees or servants from repossessing, tampering with or interfering with the petrol station; reimbursement of all losses resulting from Shell's action against it. As expected Shell denied the counterclaim in a reply to defence, but admitted that it stopped supplying petrol products to Kileleshwa. It however, denied the latter had suffered any loss or that the letter of termination dated 28th July 2004 had no legal effect.

Pleadings closed, and, after a number of interlocutory applications, the suit was set down for hearing. Three issues were identified, namely, whether the termination notice dated, 28th July 2004, was valid; whether Shell was entitled to possession and whether the suit was *res judicata*. As in the previous suit to wit **High Court Civil Case No. 462 of 2004**, Duncan Irungu testified on behalf of Shell. However, for Kileleshwa, Nizar Ali Hussein testified on its behalf.

Shell's case was that it issued and served upon Kileleshwa a termination notice of 90 days

which was based on an operator's licence. It relied on the finding by Njagi J. in **High Court Civil Case No. 462 of 2000,** that the relationship between the parties was one of licence. Shell wanted Kileleshwa to cease operating the petrol station at Kileleshwa, and to deliver vacant possession of it to Shell. At the expiry of the notice Shell stopped supplying Kileleshwa with petroleum products. A standard operator's licence had a clause providing for a 90 days notice. The witness testified that Shell relied on that clause when it issued that notice notwithstanding that Kileleshwa had not executed any written agreement. In substance the witness admitted that Shell's claim in its suit was the same as its counterclaim in **Nairobi High Court Civil Case No. 462 of 2000.**

In his evidence Nizar Ali Hussein testified that he was the managing director of Kileleshwa. He entered into an oral agreement with Shell to operate Kileleshwa Petrol Station. He could not sign an operator's licence, he said, because his circumstances were different from those obtaining in other petrol stations. It was his evidence that the operator's licence was applicable to vacant sites, in which appointed dealers got all facilities ready and did not need to invest their money in providing facilities. In his company's case, he said, the company had to install a perimeter fence, security grills, adjustable metal shelves, wooden shelves in stores to accommodate lubricants, attic in the main office for storage, electronic security locks, gates at entrance and exist, sliding gates at the workshop area, washrooms for customers; wheel alignment and wheel balancing machines, and many other facilities. It was his further evidence that he asked Shell to modify the operator's licence to suit Kileleshwa's peculiar circumstances, but Shell refused. It was its company's case that a termination notice to it could not possibly be limited to 90 days as in the other dealer's situations. Besides, he said, Shell, was frustrating it because it deliberately delayed making delivery of petroleum products and engaged in acts of harassment purposely to force his company out of the petrol station. Despite several written protestations the situation did not change.

Hussein testified further that previously he had been awarded certificates for exemplary service, and had worked at the station for about 35 years; he knew no other occupation and had spent considerable sums of money for the benefit of Shell, and he wondered why, there had been a change of attitude towards his company. Shell had oftentimes sought his advice on how to run other sites and that in view of his faithful service to Shell, he pleaded that he should be let to continue operating the petrol station. It was his view that if Shell was desirous of terminating his operations then a reasonable compensation should be paid for his investment which in his view should be negotiated. If he were to carry away the things he had installed at the Service Station, they will be of no benefit to him.

There are certain aspects of the case we need to highlight. The notice of 28th July 2004 was issued while the order of Njagi J. was still in force. Later on, the High Court (Azangalala. J.) issued an order whose effect was stopping Kileleshwa from continuing operations. Kileleshwa, however continued operating the petrol station on the basis that Njagi J.'s order was still in force. As at the date Shell's case came up for a hearing, a year had lapsed since the making of the order by Njagi J. Kileleshwa, considered that had Shell given a year's termination notice, it would have been regarded as reasonable notice.

In his judgment Ochieng J. held that the 90 days' notice was not reasonable in the circumstances, and in his view the licence to operate the petrol station persists until a valid notice is given, or the licensor re-enters the petrol station. He considered a reasonable notice to be a period of not less than six months. He also ordered Shell to compensate Kileleshwa to the tune of **Kshs.13,088,000/=** for the equipment it had installed at the petrol station as the same would be of no benefit to it if it were to quit the station. The learned Judge ordered, in the alternative, that in lieu of a six months notice, Shell was at liberty to pay to Kileleshwa the equivalent of 6 months profits based on the difference between the wholesale and retail prices on the sale of motor fuel made by it at the petrol

station during the period of six months prior to 28th July 2004.

Shell was aggrieved by the decision and on 16th June 2006 filed a notice of appeal indicating that it would challenge the whole of Ochieng J.'s decision. **Civil Appeal No. 239 of 2008** is the resultant appeal.

Although Shell filed the aforesaid notice of appeal, by its motion dated 7th but filed in the High Court on *10th July, 2006*, respectively, it moved that court for Orders that the judgment of Ochieng, J. be reviewed, the order directing the payment of ***K.Shs.13,088,000/=*** be set aside, and the order directing Shell to pay the costs of the suit be set aside. The grounds relied upon were mainly two fold, firstly, that the prayer for the payment of profits in lieu of notice was made suo moto, and, secondly, that the order for payment of Kshs.13,088,000/= to Kileleshwa had not been prayed for and had not been made an issue at the trial.

Lesiit, J. heard that motion and in her view the Order directing Shell to pay Kshs.13,088,000/= being the cost of equipment was erroneously made and ought to be set aside. It was further her view that costs being at the discretion of the court the order on payment of costs of the suit by Shell was not reviewable.

That order is the subject matter of Civil Appeal No. 205 of 2008. One of the issues raised in both this and Civil Appeal No. 239 of 2008, is whether in view of the notice of appeal which Shell, filed, the review application could properly be entertained. By rules of this Court the filing and service of a notice of appeal commences the appellate process. What follows thereafter is the lodging and serving of a record of appeal. That is what happened here. Shell, after it filed and served a notice of appeal, lodged the record of appeal which was assigned Civil Appeal No. 239 of 2008. The order for Shell to pay Kshs.13,088,000/= is one of the two main grounds for Civil Appeal No. 239 of 2008. It was also the main reason for seeking review. It was a point which, in our view, was a good ground for an appeal. That is so, because Shell was, in both cases, attacking Ochieng, J.'s view of the evidence and law. We will revert to this issue later on in this judgment.

In ***Civil Appeal No. 205 of 2008,*** Kileleshwa as the appellant attacks Lesiit J.'s decision as having been taken without jurisdiction and on the mistaken belief that there was a mistake apparent on the face of the record.

In dealing with the two appeals which, as has by now probably become apparent because both of them arise from Ochieng J.'s decision, the starting point is the termination notice dated 28th July, 2004. It was signed by one Otiti Martin, Retail Manager of Shell. Kileleshwa was given 90 days with effect from 29th July, 2004, to vacate the Petrol Station at Kileleshwa. The expiry date of the notice was given as *26th October, 2004* and on *27th October, 2004*, Shell was to take over the premises. This is the notice which Ochieng, J. held to be inadequate and ineffective in view of the circumstances of the case and the relationship then existing between the parties. He further held that a reasonable notice would have been six months.

In his submissions before us, Mr. Kiragu Kimani, for Shell submitted that Njagi, J. having ruled in High Court Civil Case No. 462 of 2000, that the relationship between Shell and Kileleshwa was one of a licensor and licensee, the licence was terminable at will and Shell was entitled to give the three months notice or any shorter period. In his view, Ochieng, J. improperly treated the relationship as if it was one of lessor and lessee. In his view reasonableness of the notice was not an issue before Ochieng, J.

On the other hand, Mr. Odhiambo Adala, for Kileleshwa expressed the view that the period of

the notice had to take cognizance of the fact that the parties had related with each other for a very long time and any notice of termination shorter than one year would be unreasonable. In his view Ochieng, J. had in mind the long relationship between the parties when he suggested a notice period of six months. In his view, the length of the termination notice was one of the central issues before Ochieng, J.

In his opening, remarks Mr. Kiragu, identified three issues as central in determining the dispute between the parties, one of which was whether the notice to terminate the licence "is valid and lawful". In his final submissions with regard to the notice period he is recorded as having stated thus:-

"(b) The 90 day notice given by the plaintiff was not only reasonable, but the defendant having continued selling petroleum upto 14th September, 2008 – which was more than a year after the notice was given – the defendant has had sufficient notice".

Mr. Kiragu did clearly appreciate at the trial that the length of the notice of termination was an issue before Ochieng, J. It may not have been specifically stated to be an issue, but considering the course the parties took at the trial, it was clearly a matter which was left to the court for its determination. See ***ODD JOBS V. MUBIA [1970] EA 476***.

Where an issue has been left to the court for determination it is immaterial that it was not part of the agreed issues. In such an event, the provisions of ***Order 20 rules 4*** and ***5*** of the Civil Procedure Rules apply with modification. The modification is like a variation of contractual terms. By agreeing on issues the parties bind themselves as to the course the trial is to take. So when an issue outside the agreed issues is discussed, and possibly, evidence is called on it, it is taken as though the parties have varied the agreed issues to include the new one. That we think is what happened here. The parties had agreed on the issue whether the termination notice was valid and/or legal. The issue of its length, was discussed in the course of the trial and it cannot be said it was not an agreed issue, when neither party raised objection to the issue being made the subject matter of a determination by the Court.

As regards the length of the notice, the question raised before us, was whether the court has jurisdiction to determine the issues in cases where the relationship between the parties is one of licensor and licensee. The High Court held that the notice period of 90 days was based on an operator's licence which Kileleshwa did not sign and for that reason it was not reasonable in view of the terms under which Kileleshwa was managing the Service Station. In arriving at that conclusion that Court considered the fact that the relationship between the parties was contractual and that the said relationship had existed for quite a long time. The court appears to us to have invoked equitable principles to hold that a notice period in the circumstances, would depend on the peculiar circumstances of the case. Hence the court's holding that six months would be a reasonable period.

We have considered the issue of length of notice. The parties relationship was based on an oral agreement whose full terms were not disclosed. Kileleshwa knew that other petrol station operators were governed by a standard Dealers licence whose terms were spelled out in a document referred to as the operator's licence. That document provided for a notice period of 90 days according to Mr. Irungu. The notice had to be in writing. The Dealer's licence did not govern the operations of Kileleshwa. Instead the oral agreement it entered into with shell, did. In absence of clear terms of the oral agreement, Shell could not properly argue that the 90 days notice it allegedly gave applied. General principles governing a contractual licence applied. For such a licence, no specific period of time is

specified for the termination of a licence. Njagi, J. held that a notice of 3 months which had been given by Shell was not reasonable and ordered that it was ineffective. Shell did not appeal against that decision. Ochieng, J. also held that a similar notice given to Kileleshwa was not reasonable. Shell argues through its Counsel, Mr. Kiragu, that the period was sufficient, more so because Kileleshwa did not vacate the premises at the expiry of the notice and held over for about a year from the expiry date of the notice, and therefore Kileleshwa was obliged to vacate the suit premises forthwith.

We are of the considered view that it would be inequitable for Shell to give such a short notice of 90 days to a party with which it had related for a period in excess of 30 years. While we appreciate that a licence is terminable at the will of the licensor, we are of the view that the period of the notice is determinable based on the circumstances of each case, unless the parties had by agreement set the period of the notice. In the matter before us, the parties were unclear as to the length of the notice applicable to them. In actual fact, the way the parties operated was such that one would think their relationship was that of lessor and lessee. The High Court was perfectly entitled to determine what was a reasonable notice in absence of an agreed period between the parties.

An issue which follows, although not specifically raised by the parties, is whether Kileleshwa, is irremovable from the suit premises. Shell thinks that the notice it gave dated 28th July, 2004 became effective upon its expiry and consequently Kileleshwa should vacate without much ado. That notice was challenged and contempt proceedings were commenced against officers of Shell. We think that had Shell given reasonable notice, Kileleshwa would have been hard placed to resist it. As matters stand, and the High Court made a decision on it, the notice of 90 days in the circumstances of this case was grossly inadequate. It gave the guideline that six months would have been reasonable. It is true that since the notice was issued a period in excess of six years has gone by. There are still several outstanding issues between the parties which we are not going to go into as they do not flow from the two appeals before us. What is however, clear is that Shell does not need Kileleshwa any longer and would want to have its property back. The relationship between the parties has not been smooth and in actual fact it has been at times violent. It will be inequitable, in view of the long passage of time since the termination notice was issued to require Shell to again issue a fresh notice. In the circumstances, it is in the interest of justice that Kileleshwa be given ample time to clear from the suit premises and deliver the same in vacant possession to Shell within six months of the date of this judgment.

Having come to the foregoing conclusion, we now revert back to the issue concerning Lesiit, J.'s order. Review was sought by Shell of the judgment of Ochieng, J. on the basis that there was an error on the face of the record. We earlier stated that Shell having given notice of its intention of appealing against that decision there was probably no jurisdiction on the part of the High Court to entertain a review application. That fact was brought to the Court's attention but Lesiit, J. did not think there was any impediment to review. In her view the claim of Kshs.13,088,000/= was neither pleaded nor was it an agreed issue. In that event, she held, Ochieng, J. improperly adjudicated upon it. That, in her view, was an error on the face of the record. We stated earlier that the issue was canvassed by the parties. Hussein was examined and cross-examined on it. It was also the subject-matter of Shell's appeal against Ochieng, J.'s judgment. In effect, therefore, the matter was being canvassed both before the High Court and the Court of Appeal at the same time.

Besides, on the assumption that the issue was neither pleaded nor made an issue at the trial, it was a matter in which Ochieng, J. expressed a view, which view could only properly be vacated on appeal. It was not a clear case of an error on the face of the record because as earlier stated a court has jurisdiction to determine an issue which though not agreed upon, has been left to the court for determination. The matter was in dispute, and it was one of the reasons why Kileleshwa was resisting any attempt to remove it from the suit premises without being compensated for what it considered to be

a heavy investment at the premises for the mutual benefit of Shell and itself.

Considering all the circumstances of the case, review was improperly granted and the reasons relied upon were the basis of Shell's appeal against Ochieng, J.'s decision. Order 44 rule 1(i) of the Civil Procedure Rules under which the application for review was made provided thus:-

"1 (i) Any person considering himself aggrieved-

a. *by a decree or order from which an appeal is allowed but from which no appeal has been preferred; or*

b. *by a decree or order from which no appeal is hereby allowed,*

and whom from the discovery of new and important matter or ………. on account of some mistake or error apparent on the face of the record ……desires to obtain a review of the decree or order, may apply for a review ……...."

Paragraph (b) above is inapplicable as Ochieng, J.'s decision was appealable as of right. Indeed as stated earlier Shell lodged an appeal against that decision and more specifically against the decree relating to the payment of Kshs.13,088,000/=. At some point in time, there were concurrent proceedings relating thereto, and it is a situation like that which the policy of the law seeks to obviate, namely, where a party is being vexed twice. Shell quite improperly pursued both the remedy of an appeal as well as review at the same time, and Lesiit, J. erred in allowing review when Shell had already elected to appeal against the judgment of Ochieng, J. She sat on appeal upon a decision of a court of the same jurisdiction as hers. That was in our view not proper.

Before we wind up this judgment there are two grounds of appeal in Shell's appeal which merit consideration. They are grounds **(4)** and **(5)** of its memorandum of appeal, and are as follows:

"4. The Honourable Judge erred in fact and in law in ordering that the plaintiff compensate the defendant the sum of Kshs.13,088,000/= whereupon the appellant would get to retain all the equipment purchased by the respondent for use on the suit premises.

5. The Honourable Judge further erred in law in ordering that the appellant pay the respondent the equivalent of profits which the respondent would have earned over a period of six (6) months in lieu of notice to terminate the licence."

In his judgment Ochieng J. addressed his mind to the question whether it would be reasonable for Shell to require Kileleshwa to remove the equipment it installed at the service station. He came to the conclusion that it would not be reasonable as Kileleshwa would not have use for them after moving out of the service station. He did not, however, consider whether the value Kileleshwa quoted for the equipment was reasonable in the circumstances.

In his evidence, Nizar Ali Hussein itemized the improvements he carried out at the Service Station and the equipment he bought for use there. He did not however, indicate what each item cost. He gave a block figure of Kshs.13,088,000/= as the costs of all those improvements. In view of this, Ochieng J. erred in giving judgment for that sum to Kileleshwa without proof of the cost. It cannot be gainsaid, though, that there were some improvements which Kileleshwa carried out some of which may not be easily removed and some whose use may have been spent. It is also possible some of the equipments Kileleshwa bought may have depreciated to such a degree that it would not be reasonable to award to Kileleshwa its original value. In view of the foregoing factors, we consider it in the interest of justice for a physical check and valuation to be carried out to establish what those improvements and equipment are worth. An independent valuer or assessor mutually acceptable to the parties to be appointed by the High Court to carry out the valuation and file his report within fourteen days of his appointment. Depending on what value he comes to, Ochieng J's judgment shall be varied to reflect that figure instead of Kshs.13,088,000/=.

With regard to the 5th ground of appeal, in view of the fact that we have granted Kileleshwa 6 months to clear from the Service Station in issue, there is no necessity of paying any compensation by way of profits. We set aside the order on profits, but direct that parties continue their relationship as before for the said 6 months granted by this Court to facilitate a smooth and amicable handover of the Station.

The foregoing being our view of the matter, we allow the appeal by Kileleshwa to wit **Civil Appeal No. 205 of 2008** and partially allow Shell's appeal to wit **Civil Appeal No. 239 of 2008** to the extent indicated above.

As regards costs, we award Kileleshwa the costs of its appeal, but because both its appeal and the appeal by Shell were to a large extent intertwined, and considering that Shell's appeal has partially succeeded, we make no order as to the costs of *Civil Appeal No. 239 of 2003.* It is so ordered.

Dated and delivered at Nairobi this 20th day of April 2012.

S.E.O. BOSIRE

…………………….

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…………………

JUDGE OF APPEAL

K.H. RAWAL

…………………

JUDGE OF APPEAL

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