



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E157 OF 2020

BETWEEN

OBAMANA TRAVELLERS SACCO..... PLAINTIFF

AND

KENOL KOBIL PLC.....1ST DEFENDANT

RUBIS ENERGY KENYA PLC..... 2ND DEFENDANT

RULING

1. The plaintiff and the 1st defendant entered into a Dealership Agreement (“the Licence”) dated 18th April 2020. Following internal organization, the 1st defendant changed its name to Rubis Energy Kenya PLC hence the defendants refer to one company which I shall refer to them as the Defendant. Under the Licence, the Plaintiff was entitled to use the Defendant’s name, equipment, furniture and other chattels, fixtures and fittings to sell petroleum products supplied by the 1st defendant on terms set out in the Licence at the premises known as Njiru Petrol Station (“the Petrol Station”).

2. The Plaintiff’s case is set out in the plaint dated 19th May 2020, the Notice of Motion dated 19th May 2020 and two depositions sworn on 19th May 2020 by the Secretaries General of the Plaintiff, Josephat Akweli Oyoya and Mathew Alex Ambogo. The Plaintiff complains that on 15th May 2020, goons raided the Petrol Station, stalled its operations including the operations of its contractors running ancillary facilities like the car wash, tyre centre, Mpesa shop and carried away goods of unknown value belonging to the Plaintiff. On 15th May 2020, the Defendant delivered to the station manager a letter purporting to take over the running of the Petrol Station. The Plaintiff contended that the purported termination was illegal and in violation of the Licence as the Defendant did not issue a notice to terminate the Licence and that the process of taking over the Petrol Station was carried out in breach of the process of terminating the agreement. The Plaintiff avers that it has always complied with the terms of the Licence. In that regard it deposited with the Defendant Kshs. 1,000,000.00 for purposes of supply of fuel but the Defendant never supplied the fuel ordered.

3. The Plaintiff therefore moved the court by the Notice of Motion dated 19th May 2020 made *inter alia*, under **Order 40 rule 2** of the **Civil Procedure Rules** seeking a temporary injunction restraining the Defendant from interfering with its business and operation of the Petrol Station pending the hearing and determination of the suit. It also sought an order directing the Defendant to supply fuel products amounts to Kshs. 1,000,000.00 as ordered by the station manager on 27th April 2020 or in the alternative refund Kshs. 1,000,000.00 deposited on 27th April 2020 by the Plaintiff. The Plaintiff also seeks an order directing the Defendant to avail the actual inventory and audited accounts of the dealership between 18th April 2019 and 15th May 2020.

4. In response to the Plaintiff’s case, the Defendant relied on the replying affidavit of Fred Patta, its retail manager, who deponed that in December 2019, the Plaintiff defaulted and persisted in defaulting on the terms of the Licence by failing to maintain the minimum fuel stock ratios. The fuel stock out problem persisted into the year 2020. The Defendant informed the Plaintiff of the default in several letters dated 17th December 2019, 9th January 2020, 17th February 2020, 30th March 2020 and 30th April 2020. Despite acknowledging these demands, the Plaintiff failed to comply. Concerned that continued breach of the licence was tarnishing its name and brand as most consumers could not procure fuel or fuel products from the Petrol Station, the Defendant issued the termination letter dated 14th May 2020.

5. It is the Defendant’s case, that despite receiving the termination letter, the Plaintiff declined to effect a smooth handing over of the Petrol

Station, which led to the Defendant proceeding with the take-over in the absence of the Plaintiff, but accompanied by Police Officers who ensured that the take-over was done legally and peacefully. Mr Patta deponed that an inventory was taken of all the Plaintiff's assets and monies at the Petrol Station.

6. The Defendant's position is that the License has been effectively terminated hence the orders sought have been overtaken by events. It contends that the Defendant is now legally and contractually in possession of the Petrol Station.

7. The Plaintiff does not deny that the Licence was terminated by the letter dated 14th May 2020 addressed to it on the ground that the Petrol Station had been stocked out for a period of 3 weeks contrary to the Licence. According to the notice, the Plaintiff was required to hand over the Petrol Station on 15th May 2020. The Defendants' position set out in the replying affidavit is that it took over the Petrol Station on 15th May 2020.

8. The parties filed written submissions which they highlighted. The issue is whether or not I should grant the injunction sought in the application. It is common ground that the Defendant has now taken over the Petrol Station. In these circumstances, the court can only issue a mandatory injunction to reverse the process which the Plaintiff had sought to restrain quite apart from the other orders which it has sought.

9. In **Kenya Breweries Limited and Another v Washington Okeyo NRB CA Civil Appeal No. 332 of 2000 [2002] eKLR**, the Court of Appeal summarized the principles applicable for the grant of a mandatory injunction as follows:

The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edn. para 948 which reads:

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application".

Also in Locabail International Finance Ltd v Agroexport and others [1986] 1 ALL ER 901 at pg. 901 it was stated:

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

10. Since the Licence was terminated by the letter dated 14th May 2020, the termination was completed once the Defendant took over the premises. The parties' relationship cannot be restored by a mandatory injunction as it would require the supervision of the court to ensure that the parties are meeting their obligations on a day to day basis. The termination, in this case, cannot constitute special circumstances as termination is a matter contemplated by the Licence. Under Clause 4, the Licence may be terminated by either party giving notice or immediately by the Defendant for certain breaches by the Plaintiff.

11. While the process and manner of termination is contested and will be the subject of resolution by the court hearing evidence from both sides, what is clear is that any loss arising from wrongful or irregular termination would be remedied by an award of damages. In fact, the Plaintiff has claimed Kshs. 23,000,000/- in the plaint being the projected profit lost for the contractual period and security deposit banked by the Defendant.

12. For the reasons I have given, I dismiss the Notice of Motion dated 19th May 2020 with costs to the defendants.

DATED and DELIVERED at NAIROBI this 14th day of AUGUST 2020.

D. S. MAJANJA

JUDGE

Mr Osewe instructed by Odero Osiemo and Company Advocates for the Plaintiff.

Mr Njoroge by Igeria and Ngugi Advocates for the Defendants.