



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 52 OF 2014

PLATINUM CATERING SERVICES LTD.....PLAINTIFF

- V E R S U S -

KOBIL PETROLEUM LTD.....DEFENDANT

JUDGEMENT

1) Platinum catering Services Ltd, the plaintiff herein, filed an action against Kobil Petroleum Ltd, the defendant herein, vide the plaint dated 10th July 2009, whereof it sought for judgment as follow:

1. *Ksh.31,724,863/=*
2. *General damages for trespass*
3. *General damages for inducing breach of contract.*
4. *Any other or further reliefs this court deems fit to grant.*

2) When served, the defendant filed a defence to deny the plaintiff's claim. When the suit came up for hearing, the plaintiff summoned two witnesses to testify in support of its case while the defendant closed its case without calling for any witnesses to buttress its case.

3) It is the plaintiff's case that by a lease agreement dated 4th September 2007 made between it and the defendant, the defendant demised to the plaintiff the restaurant business for a term of five (5) years with effect from 01.11.2007 and lapsing on 31.10.2012 and subject to a further renewal of term from 1st November 2012 to 3rd October 2017. It is said that on 24.12.2008 the aforesaid petrol station was razed down by fire whereof the plaintiff's restaurant business was directly affected by sudden drop in customers and the public having assumed that the restaurant was also destroyed or had closed down as the petrol station occupied a prominent position to the main roads on either side. As a result of the business downturn, the plaintiff stated that it became extremely difficult to meet its contractual obligations like paying rent. The plaintiff avers that on 6th June 2009, the defendant forcefully re-entered the plaintiff's premises and wrongfully took possession with no notice nor any reference to arbitration as obliged in the lease agreement. The plaintiff has now sought to recover ksh.31,724,863/= from the defendant.

4) I have considered both the written and oral evidence of the plaintiff's witnesses (PW1 & PW2). I have also considered the written submissions. I think the following issues were left for the determination of this court:

- a) **Whether the plaintiff was in breach of the licence agreement terms?**

b) Whether the plaintiff relied on the good condition and accessibility to the road for its investment?

c) Whether the defendant was obliged to maintain the petrol station in good condition and keep the plaintiff's restaurant accessible to the public?

d) Whether the defendant's negligence caused the losses incurred by the plaintiff?

5) On the first issue as to whether the plaintiff was in breach of the licence agreement terms, it is important to take into account the evidence of Ngethe Chege (PW1). It is the evidence of PW1 that the plaintiff leased the defendant's premises and began to renovate the same between December 2007 and January 2008 to operate a restaurant. It is said that on 24.12.2008 the defendant's petrol station got burnt and the defendant's premises got destroyed and sealed off from the public. PW1 stated that the premises were sealed with iron sheets which were opaque and as a result the plaintiff's restaurant experienced direct drop of customers and the public shun the restaurant thinking the same was also closed. This turn of events forced the plaintiff to experience financial strain thus making it difficult to pay rent to the defendant nor pay its suppliers in good time.

6) The plaintiff argued that the sealing off of the premises affected business in Q1 and Q2 of 2009 and the plaintiff lost profit which it might have otherwise derived therefrom. PW1 further stated that the plaintiff's management made plans to pay rent for Q1 2009 and the defendant's management had agreed to consider a waiver of rent in Q2 2009 under the prevailing circumstances. Unfortunately the arrangement never materialised and on 9.6.2009 the defendant's officials accompanied by police officers and Wells Fargo Security guards visited the plaintiff's restaurant known as Treasurer's restaurant along Langata Road. Upon entry into the premises, the defendant's officials ordered the plaintiff's employees who were inside to surrender their mobile phones and advised them that the premises was being seized by the defendant because of outstanding rent arrears. The defendant's officials barred people from accessing the restaurant. They further took possession of furniture, seats, stools and signages. It is said that the defendant's personnel with the help of the plaintiff's employees, took stock of the remaining items, stock, food, cutlery, electronics and food. It is said that the defendant caused the plaintiff's staff to be released after holding them for several hours. The evidence of PW1 is not controverted. I therefore find from the evidence that the plaintiff did not breach the licence agreement terms.

7) It is clear from the evidence presented that the plaintiff discharged its burden of proof and shifted the burden to the defendant to rebut. The defendant failed to rebut.

8) The second issue is whether the plaintiff's business relied on the good condition and accessibility to the road for its survival. The defendant knew that the plaintiff's restaurant was dependent for business on the defendant's operation of the adjacent petrol station therefore it was obligated to ensure that its petrol station was in operation for the plaintiff's restaurant to thrive. The fire outbreak adversely affected the plaintiff's business. The third issue is interrelated to the second issue therefore the answer to the second issue has determined the third issue.

9) The final issue is whether the defendant's negligence caused the losses incurred by the plaintiff. The evidence of Sam Sangura Simiyu (PW2) corroborates the evidence of PW1. It is the evidence of Sam Sangura Simiyu (PW2), a financial consultant of Platinum Catering Services, that he engaged the plaintiff's directors to understand the operations of the restaurant and the relationship with the defendant. PW2 stated that after reviewing the plaintiff's claim and documents touching on the claim he formed the opinion that the plaintiff was entitled to the claim. He produced a detailed investigative report and factual findings of May 2011 in which he arrived at a figure of ksh,31,724,863/=. The evidence of PW2 was never controverted and I have no reason to doubt veracity. There is no dispute that the defendant forcefully repossessed the plaintiff's business premises. It is also not in dispute that no notice was given to the plaintiff. I find the defendant's forceful entry into the plaintiff's premises to be unlawful hence amounting to trespass. Since the defendant failed to traverse its indebtedness as shown by the plaintiff I find that the plaintiff is entitled to claim from the defendant ksh.31,724,863/=.

10) In the end, I find the plaintiff has proved its claim against the defendant on a balance of probabilities. Consequently judgment is entered in favour of the plaintiff and against the defendant as follows:

i. Ksh.31,724,863/=

ii. General damages for trespass Ksh.100,000/=

iii. General damages for inducing

breach of contract Ksh.100,000/=

Total Ksh.31,924,863/=

11) Since there was no prayer for costs I make none.

Dated, Signed and Delivered in open court this 24th day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant