REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO.42 OF 2003

SARNAGAR SINGH HAYER …..PLAINTIFF

VERSUS

NATIONAL OIL CORPORATION OF KENYA...DEFENDANT

J U D G M E N T

1. The plaintiff in his amended plaint prays for judgment against the defendant for:

a. **An order of permanent injunction directed at the defendant either by its agents, servants, employees or any of them and restraining it from granting the license to any persons over that petrol station situate upon Kisumu Municipality Block 3/163 and known as Lakeview Service Station from revoking the plaintiffs license or in any other way interfering with the plaintiff's occupation and operation of the said station on the allegation of handling of petrol for export on the 23.2.2003.**
b. **An order of declaration that the plaintiff has dutifully and diligently complied with the terms of the dealers license dated 30.9.1999 by only buying from and taking delivery from the defendants only and nobody else.**
c. **A declaration that the defendant act of purported revocation of handling fuel for export was baseless unlawful, null and void;**
d. **Kshs.19,191,774**
e. **Costs of the suit and any other remedy from this court.**

2. After being served with the amended plaint the defendant did file its defence as well as a counter-claim which prayed for the following reliefs against the plaintiff:

a. **Judgment on its counter-claim against the plaintiff for Kshs.4,794,514;**
b. **Interest on (a) above at court rates from the date of filing the counter-claim;**
c. **costs of the counterclaim with interest thereon at court rates;**
d. **In the alternative and without prejudice to prayer (a) (b) and (c) above set off against the plaintiff's claim herein;**
e. **any other reliefs that this court may deem fit to grant.**

3. Both parties testified and called their witnesses and it is worthwhile at this juncture to summarise their case.

PLAINTIFF'S CASE

4. **PW1 S. S. HAYER** testified that he entered into a contract with the defendant on 30.9.1999 after making a relevant application to be its dealer. He produced the contract as part of his exhibit. Part of the

terms of the contract was that he was to buy fuel products from the defendant only and that the mode of purchase was cash on delivery. He then deposited Kshs..1.2 million as the requisite deposit. This deposits attracted 5% interest per annum.

5. The plaintiff testified that the defendant was to deliver the fuel products using its own vehicle and that its employees were to regularly check and monitor the station. On 21.3.2003 the plaintiffs did order 5000 litres of supper petrol and 2000 litres of diesel which were delivered by the defendants motor vehicle.

6. On 22.2.2003 the officer came from SGS Kenya Limited to inspect the products and though the plaintiff was not at the stations that time he was informed that the inspection showed that the fuel was adulterated or contaminated. It showed that the fuel which was present in the tanks was meant for export.

7. The plaintiff was then charged by Kenya Revenue Authority (KRA) and fined Kshs.20,000/= which amount he duly paid or else he was to be taken to court.

8. The plaintiff in his testimony blamed the local personel of the defendant but exonerated those in the head office. He went ahead to claim Kshs.19,191,000 from the defendant which was for loss of stocks at the station, termination dues, loss of business and the deposit of Kshs.1.2 million among others. The plaintiff further produced various exhibits including invoices and delivery notes to back up his claim. He said that the cheques which had been issued to the defendant and dishonoured were later paid on various dates and he produced bank statements to that effect.

9. On cross-examination he admitted that its the defendant which owns the petrol station. He said that in the agreement he was to abide by the conditions in the contract including not contaminating the fuel. He said that during the delivery of the contaminated fuel nobody raised any complaint. He said that the defendant did not supervise the petrol station throughout. He also admitted that the SGS Kenya Limited would come randomly and it was not present on the material day.

10. He on cross-examination abandoned his prayer for injunction. He was also given credit for the goods taken over by the defendant amounting to Kshs.456,430.50. He admitted also that by the time fuel was bought there was also fuel inside the tank amounting to 1,100 litres and consequently more fuel was added to the same tank.

11. P**W2 EDWIN OGUTU NDEGE** is the plaintiff's accountant for the last 14 years. He confirmed the deposit of Kshs.1.2 million made to the defendant by the plaintiff. He said that at the time of termination of the contract there was fuel worth Kshs.453,700/=, shop items of worth Kshs.26,238 among other enumerated items. He also endeavoured to prove that the plaintiff was entitled to a good will of Kshs.3.9 million based on the annual turnover. He further asked for the terminal dues paid to the workers as a result of the closure of the station by the defendant.

12. On cross-examination he said that at the station the manager and the supervisor does the dippings as well as check the seals during offloading. He makes the payments to the transporter once verifications are done. He further stated that they left the station intact as they did not remove any items including fixed assets

DEFENDANT'S CASE

13. DW1 WILSON KIPTOO testified on behalf of the defendant. He said that previously between 1999-2002 he was the depot supervisor and that he was aware of the contract between the plaintiff and the defendant. Fundamentally the plaintiff was to buy products from the defendant only and was to adhere to all the terms of the agreement.

14. In the course of time SGS Kenya Limited carried out an inspection and found the products sold by the plaintiff to be laced with a marker which normally is put for the products designed for export. This was according to him export products which was contrary to the dealership agreement. This led the

defendant to close the station for further investigations. Under the direction of KRA the plaintiff was charged and fined Kshs.20,000/= which he duly paid. He denied that the defendant supplied the plaintiff with export products.

15. On cross examination he said that prior to the date when SGS did the inspection there had not been any complaint against the plaintiff.

16. DW2 ANTHONY GATEHI is the Credit Control Manager of the defendant. He said that the defendant was demanding Kshs.4,440.314 not paid for by the plaintiff. He produced the bank statements showing that the 6 cheques by the plaintiff were not honoured

17. DW3 DISHON MUNGA NJUGUNA works with KRA as an assistant Manager in charge of Customers and Boarder Control Department. He testified that he knew the plaintiff and the circumstances regarding the issues at hand. He produced the "Offence Register" which was essentially a summary of the offences and the relevant section of the law.

18. He said that SGS had found that the plaintiff had products meant for export contrary to Section 196(c) and (e) of Cap 472 and consequentially dealt with as per the provisions of Section 240 of the Act. He was fined Kshs.20,000/= which he duly paid.

19. DW4 PIUS OLUNGA works with SGS and he told the court that on 23.2.2003 at around 11 a.m. he carried out inspection at the plaintiff's station in the presence of one Patel. He drew out samples from the tanks and found that the same was positive after carrying out the test. The said fuel had a maker which is normally put for products destined for export. The said products are usually duty free. A confirmatory test was done in Mombasa and found to be positive.

20. On cross-examination he said that the fact that he paid the fine goes to indicate the plaintiff culpability.

ANALYSIS AND DETERMINATION

21. Having heard both parties together with their respective witnesses and the documentary evidence presented as well as the submissions by the plaintiff, the issues that clearly emerge from the dispute herein are two fold:

a. **Whether there was a breach of contract dated 30.9.1999 by the plaintiff or not.**
b. **Whether as a consequence of the said breach the plaintiff is entitled to the damages as prayed in the plaint as well as whether or not the defendant is entitled to the prayers in the counter-claim.**

The dealership agreement dated 30.9.1999 is clear for all intend and purposes. The terms spelt therein are clear for both parties and nothing can be termed ambiguous. The petroleum products was to be supplied to the plaintiff upon request by the defendant alone and no one else. To this end the same was supplied on 21.2.2003 wherein 5000 litres of super and 2000 litres of diesel were supplied vide motor vehicle reg. No. KAM 086Z. The owner and or driver of the lorry was paid by the defendant.

22. On 23.2.2003 the officers from SGS led by DW4 carried out a routine inspection at the petrol station and found the products namely diesel contaminated. It had the marker which is normally placed for the products meant or destined for export. The exercise was done in the presence of one Mr. Patel the plaintiff's representative. The test proved positive and the plaintiff was then charged with the offence of locally retailing petroleum products meant for export contrary to Section 196(c) and (e) of the Customs and Excise Act. He admitted the offence and was fine Kshs.20.000/= which he duly paid.

23. Against the above background the big question is who was responsible for placing the products destined for export at the plaintiff's station. The defendant does not deny that its supposed to be the sole supplier of the petroleum products to its dealer the plaintiff. If this is so did it supply products meant for

export to the plaintiff?

23. Is it possible that the plaintiff through its own means procured the said product to its station without the knowledge of the defendant? Is it conceivable that the products were altered by the owner of the lorry that delivered the products?

24. These are questions that both parties have denied vehemently by standing their grounds. This court in the absence of any direct evidence of contamination shall rely on the prevailing circumstances to arrive at a fair finding. The SGS Kenya Limited is an independent company with the sole duty to carry out inspection of fuel products as directed by the Ministry of Energy. Its independence is verified by the testimony of all the witnesses herein who too confirmed that they do random checks without any notice to the parties. In short both the plaintiffs and the defendants have control no of its operations.

25. The said SGS carried out its operation and found that the plaintiff had fuel meant for export The exhibits produced were not denied by the plaintiff. In fact he went ahead to pay the requisite fine. He did qualify this stating that he did so, so as to avoid being taken to court. This admission *prema facie* showed the guilt by the plaintiff.

26. I respectfully do not find any reason why he had to hurriedly admit his guilt if indeed he was not the cause of the problem. In any event the remification of such admission were far reaching which included breaching of the agreement between him and the defendant.

27. My above conclusion is founded on an admission by the plaintiff that the defendant generally did not supervise the station throughout and that by the time the fuel was being delivered there was already about 1.100 litres of fuel inside the tanks.

28. Consequently in the absence of any nexus between the delivery of fuel for export by the defendant to the plaintiff, I do conclude that it is the plaintiff who ought to explain where this fuel came from. Perhaps the other option was to include the transporter in this suit who perhaps would have explained what happened between the deport and the plaintiff's station. In any case there is no documentation by the plaintiff to exhibit the source of the fuel in namely that it originated from the defendant. Mere mention that it came from the defendant and transported by motor-vehicle Reg. No.KAM 086Z as authorised by the defendant in my respectful view is not sufficient. As stated earlier in the absence of the transporter being enjoined in the suit or at least called to testify and in the absence of any documentary evidence this court is unable to find that the defendant was actually the source of the said fuel products.

29. Does the plaintiff deserve any special damages in the absence of proof that its the defendant who breached the contract?

30. In N**AKANA TRADING COMPANY LIMITED VRS COFFEE MARKETING BOARD 1990-1994 E.A.** The high court in Kampala stated as follows on the question of breach of contract:

"...........in contract, a breach occurs when one or both parties fail to fulfill the obligation imposed by the terms. Since the contract between the parties was reduced into writing, the duty of the court is to look at the documents itself and determine whether it applies to existing facts. No evidence can be adduced to vary the terms of the contract if the language is plain and unambiguous."

31. The court went further to quote HUD**LEY PAXENDALE (1854) 9 EXCH 341** which stated that:

"Where two parties have made a contract which one of them had broken the damages which the party ought to receive in receipt of such breach of contract should be such as may fairly and reasonably be considered either naturally that is in accordance to the usual course of things from such a breach itself or such as may reasonably be supposed to having been in the counter-petition of both parties at the time they made the contract as the probable result of the breach."

32. Article 36 of the Dealer License Agreement clearly spelt out what was to be done in the event of any breach of the terms of the agreement by the dealer. This included taking over the station and undertaking such act that are necessary for the preservation of its property. This is apparently what the defendant did when it realised that the plaintiff had breached part of the agreement.

33. The plaintiff in laying out his claim has set out several headings which he feels that he should be compensated by the defendant. These include the deposit of Kshs.1.2 million paid to the plaintiff, fixed assets taken by the defendant,goodwill loss of stock, in the shop, loss of fuel, insurance premium, loss of profits among others all totaling to Kshs.19,191,774/=.

34. Having heard the plaintiff and his witnesses in respect to the various subheading enumerated above, I do not find any basis for the alleged damages. It is the plaintiff first of all that breached the contract by selling products meant for export. For it to turn around and ask for special damages yet its the author of its own misfortune is superfluous.

35. Further it appears from its operation that although the plaintiff claims to operate an overdraft facility, there is nothing substantial to back up. The terms of the agreement between him and the defendant was on cash on delivery basis. The loss he incurred including laying off the staff and all the related incidentials, was of his own making. Moreover there is no evidential proof that he had employed them.

36. Credit was given by the defendant of the value of the fuel and goods recovered at the shop (duka) and other products during the take over and this cannot be said to be a pending liability from the defendant.

37. In respect to the deposit of Kshs.1.2 million the same is well answered by Article 3 of the Dealership Agreement which states that:

“.............Breach of any express or implied condition of the license by the Dealer leading to revocation/surrender of license by National Shall lead to forfeiture of the deposit to National Oil by the Dealer. Where Bank Guarantee is given the same will only be returned to the Dealer upon satisfactory performance by the Dealer of all obligatIons herein contained. The bank guarantee to be supplied will be as per Nationals own design and draft.”

38. The court cannot rewrite the contract afresh. The forfeiture of the deposit was well within the mandate of the defendant.

39 In the premises I do not find any basis to allow the plaintiff's suit. The same was not proved on a balance of convenience as required. The same is dismissed with costs to the defendant.

40. Turning now to the counter-claim, the defendant has demanded a sum of Kshs.4,414,314 as per the amended counterclaim. The defendant in an attempt to prove its claim has produced several invoices as well as dishonoured cheques. The plaintiff on his part has produced documentary evidence to show that the following cheques although dishonoured were later paid namely:

cheque No.206629 for Kshs.1,356,340,

No.220558 for Kshs.339,940

No.220550 for Kshs.341,960;

No.220554 for 341,960;

No.220559 for 293,740 and cheque

No.220575 for Kshs.392,600 which was cleared before seizure of the station.

41. The court has carefully perused annexure P19 and its satisfied that this cheques totaling Kshs.26739.40 were replaced and or cleared. Consequently what seemed to be pending is the sum of Kshs.1,740.374 which was never paid by plaintiff.

42. In the premises I do enter judgment against the plaintiff and for the defendant for the sum of Kshs.1,740,374/= together with interest from the date of the filing of the counter-claim.

CONCLUSION

1. **The plaintiff's suit is hereby dismissed with costs to the defendant.**
2. **The defendant's counter-claim is hereby allowed for the sum of Kshs.1,740,374/= together with interest at courts rate from the date of the filing of the counter-claim till payment in full.**
3. **The defendant shall have half costs of the counter-claim.**

Orders accordingly.

Dated, signed and delivered this 23rd March, 2016

H. K. CHEMITEI

J U D G E