



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 762 OF 1998

KENYA SHELL LIMITED.....PLAINTIFF

VERSUS -

JOSPHAT M. NDUTI

T/A BIDII SERVICE STATION.....DEFENDANT

JUDGMENT

1. The plaintiff, **KENYA SHELL LIMITED**, has sued the defendant, **JOSEPHAT M. NDUTI** who was trading as **BIDII SERVICE STATION**. The claim against the defendant was that in 1996 and 1997 the plaintiff sold and delivered goods to the defendant, but the defendant did not pay for the said goods. It was for that reason that the plaintiff asked the court to order the defendant to pay to the plaintiff, the sum of Kshs. 4,329,394/90.
2. The plaintiff also prayed for interest at the rate of 40% per annum, with effect from 31st July 1998, until the debt was paid in full.
3. Finally, the plaintiff prayed for costs of the suit.
4. In his defence, the defendant denied each and every allegation which the plaintiff had made.
5. The defendant then proceeded to put forward his own counter-claim. First, the defendant asserted that the plaintiff breached the terms of the contract, by forcefully evicting the defendant from the suit property. The eviction was said to have taken place without the plaintiff giving any Notice to the defendant.
6. The forced eviction was said to have caused the defendant to suffer loss and damage. The defendant therefore claimed the sum of Kshs. 2,878,222/- in respect to the Special Damages he suffered.
7. In the result, the defendant asked the court to grant him judgment in the sum of Kshs. 2,878,222/-, plus interest at the rate of 35% per annum, and costs of the suit.
8. At the trial, each of the parties called one witness.
9. **PW1, WINNIE WANGUI NJERI**, was the Territory Manager, Retail, with **VIVO ENERGY KENYA**, in its Nairobi East territory. PW1 explained that the plaintiff, **KENYA SHELL LIMITED**, was purchased by **VIVO ENERGY KENYA**, in the year 2012.
10. Winnie joined Kenya Shell in the year 2004.
11. She testified that the plaintiff and the defendant had executed a Licence Agreement dated 22nd October 1996.
12. However, the defendant insisted that he had only signed the Licence Agreement dated 24th June 1985.
13. Pursuant to Agreement cited by the plaintiff, it was a requirement that the plaintiff would supply

- goods to the defendant, upon receipt of payment.
14. It was an agreed term of the contract between the parties that the petrol station which the defendant was operating was to have sufficient supplies of products which the plaintiff was selling through that outlet.
 15. PW1 said that the defendant would give post-dated cheques to the plaintiff. Thereafter, the plaintiff would make purchases, by placing an order with the plaintiff.
 16. At the time when the plaintiff was dispatching the product which the defendant had ordered for, the plaintiff's cashier would fill-in the cheque which the defendant had left with the plaintiff. Simultaneously with the filling-in of the cheque with the cost of the product supplied, the cashier would issue a receipt to the defendant.
 17. PW1 testified that although the defendant was supposed to make payment by cheques, the plaintiff did extend to the defendant, some Credit Support. By "*Credit Support*", PW1 meant that the plaintiff provided goods to the defendant on credit.
 18. The plaintiff was asked by the defendant, to give the credit support.
 19. According to PW1, the cheques which the defendant issued, to pay for the products which were supplied to him on credit, were dishonoured.
 20. The plaintiff provided the particulars of the six dishonoured cheques, whose value totalled Kshs. 1,577,392/-. That was the sum owed as at 13th December 1995.
 21. By a letter dated 9th April 1996, the plaintiff informed the defendant that his request for Credit Support of 4 loads (not exceeding Kshs. 1,600,000.00) would be maintained by the plaintiff.
 22. That letter was written in answer to the defendant's letter dated 21st March 1996. In the said letter, the defendant had stated, *inter alia*, as follows;

“a) My statement of A/c shows an outstanding figure of Kshs. 4,000,000/-. I request to be given time to settle the bill by instalments of Kshs. 500,000/- per month”.
 23. The plaintiff told the defendant that he could be allowed a period of four (4) months to pay that amount.
 24. However, PW1 said that the defendant failed to keep his word.
 25. It was the testimony of PW1 that a meeting was held between the two parties, at which they carried out a process of reconciliation of the account. Thereafter, on 13th March 1997, the plaintiff wrote to the defendant, pointing out that the balance outstanding, as at 12th March 1997, was Kshs. 5,944,033.23.
 26. PW1 also testified that the defendant failed to keep adequate stock at the petrol station. She said that the minimum monthly quantities which the defendant was required to have at the petrol station was 323,000 litres of fuel.
 27. In effect, the average quantities which the defendant was supposed to have was 10,000 litres of fuel.
 28. However, according to the plaintiff, the defendant had only 1,510 litres of fuel on the day when the plaintiff repossessed it. Therefore, the plaintiff believed that it was perfectly entitled to take over the station as the defendant was in breach of the contract.
 29. As regard the actual process of taking over the petrol station, PW1 testified that it was not conducted forcibly. She said that the son of the plaintiff was present, and that he signed the take-over documents on behalf of his father.
 30. The plaintiff exhibited a document which indicated that the value of the fuel which was at the petrol station when the plaintiff took it over was Kshs. 315,033/46. The said document is called the "*Take over List*", and it was signed by the defendant's son and a representative of the plaintiff.
 31. **DW1, JOSEPHAT MWANGI NDUTI**, testified that his association with **SHELL BP** commenced in 1965, when he was their employee.
 32. In 1969 DW1 became a dealer for the plaintiff, at the petrol station in Eastleigh Section 7: the name of the station was **WATKIN'S SERVICE STATION**. It is the station which was later renamed **BIDII SERVICE STATION**.
 33. It was the evidence of DW1 that he had good relations with the plaintiff until 1996, when some of the plaintiff's employees ruined the said relations.
 34. DW1 confirmed that the defendant used to sign cheques, which were then given to the plaintiff. Thereafter, whenever the defendant purchased products, he would be given the products together

- with invoices. Meanwhile, the plaintiff would pay itself using the pre-signed cheques.
35. When asked about the Agreement which he signed with the plaintiff, DW1 indicated that he only signed one document, which was dated 1969. He expressly denied knowledge of the Agreement dated 27th September 1996.
 36. As regards credit facilities, DW1 testified that the defendant never bought anything on credit from the defendant. In his testimony, the defendant only got credit notes from the plaintiff which were used to pay the defendant for goods which the defendant had sold to companies that the plaintiff had introduced to the defendant.
 37. DW1 denied knowledge of the letter dated 21st March 1996, which had indicated that the defendant had offered to pay the outstanding balance by monthly instalments of Kshs. 500,000/-. DW1 denied owing any money to the plaintiff.
 38. If anything, DW1 believed that it was the plaintiff which owed him Kshs. 2,878,222/-. That sum was said to be owed by the plaintiff, in respect to the stocks which were at the petrol station when the plaintiff took it over.
 39. DW1 testified that the person who forced him out from the petrol station is a Mr. Irungu, who was an employee of the plaintiff.
 40. Although DW1 testified that the plaintiff forced him out of the petrol station, he also testified that stock-taking was done. The said stock taking was done in the presence of Josephat's son.
 41. When the defendant's lawyer asked Josephat (DW1) about the person who indicated the cost of the various products on the "Take-over List" DW1 said;

"Page 19 shows the stock at the Take-over. It is Shell who cited the cost of each of the products. I am not complaining about the said costs".

42. The defendant told this court that he was demanding the value of the stock, plus General Damages for breach of contract.
43. When elaborating on the issue of compensation, the defendant said that he was looking to the plaintiff to pay him the money which some customers of his did not pay him by the time the plaintiff evicted him.
44. DW1 also said that he had been forced to sell his shamba and plots, so as to be able to pay the financial facility which he could no longer service.
45. During cross-examination, DW1 confirmed that his children were present during the time when the plaintiff was taking over the petrol station.
46. DW1 also emphasized that the whole business was his: he denied the suggestion that the petrol station was his family business. His sons, Dalmas Nduati and David Kuria, only used to join him during the times when they were on holiday, from school.
47. When DW1 was shown the Operator's Licence dated 24th June 1985, he confirmed that he did sign that Agreement.
48. He also identified the signature of **WINNIE WANGUI** on that Agreement. He said that Winnie Wangui used to be his partner. She was not his wife.
49. His wife was **ROSE WANJIKU**. It is thus clear that both parties are in agreement about the existence of a written Agreement.
50. DW1 confirmed that in the Agreement which he signed, there was a requirement that the defendant should meet some set targets. The said targets were the minimum quantities of stock which the defendant was required to have during each month.
51. As an example, the defendant said that he was expected to have 40,000 litres of Super petrol, per month. And he believed that he used to exceed that quantity.
52. By his calculations, the monthly requirement of 40,000 litres implied that, on an average, the defendant should have had about 1,000 litres daily.
53. However, DW1 also said that the quantities of the stock could vary from day to day. There would be days when all fuel was sold out, whilst there would be days when there were no sales.
54. DW1 testified that the petrol station was taken-over on 21st October 1997. However, he also confirmed that the "Take-over List", which was signed by his son, was dated 28th October 1997.
55. After DW1 testified the defendant closed his case.
56. In determining the case, I note that both parties are in agreement about the existence of a contract between them. However, the parties are not in agreement about the date of the contract. The

plaintiff insists that there were two contracts dated 25th June 1985 and 27th September 1996, respectively. Meanwhile, the defendant insists that the only contract he signed was dated 25th June 1985.

57. In the event, I find that the issues for determination are as follows:-

- a. *Did the contract in force have provisions for the minimum quantities of petroleum products which the defendant was required to have?*
- b. *If the answer to (a) is in the affirmative, did the defendant breach the said requirement?*
- c. *Did the defendant owe the plaintiff the sum of Kshs. 4,329,394.90 in respect to products which the plaintiff had sold and supplied to the defendant?*
- d. *Was the eviction of the defendant from the petrol station lawful or unlawful?*
- e. *If the said eviction was unlawful, is the plaintiff liable to compensate the defendant in the sum of Kshs. 2,878,222/- with interest at 35% from 21st October 1997?*
- f. *Who should pay the costs of the suit?*

58. From the evidence on record, it does appear that the defendant may have signed the Agreements dated 25th June 1985 and 27th September 1996. I say so because, on a *prima facie* basis, the signatures on the two sets of documents appear to belong to the defendant and his partner **WINNIE WANGUI**.

59. However, as the defendant had all along denied having signed the document dated 27th September 1996, the plaintiff ought to have led more evidence to positively prove that the signature was that of the defendant. Such evidence could have been from a hand-writing expert or that from the persons who witnessed the actual process of signing.

60. As no such evidence was provided by the plaintiff, the court cannot positively state that the defendant signed the Agreement dated 27th September 1996.

61. But then, I do remind myself that in civil cases, the parties do not need to prove facts beyond any reasonable doubt. Parties need only prove facts on a balance of probabilities.

62. Bearing in mind the standard of proof, I note that in the Agreement executed in 1985, Schedule Two does not specify the minimum purchases of the Premium Motor Spirit (or Premium petrol) which the defendant was required to have in any month.

63. Yet, when Mr. Nduti testified, he said that the defendant was supposed to have 40,000 litres monthly. That quantum tallies with the minimum monthly quantities cited in the Agreement dated 27th September 1996.

64. Whilst the evidence of the defendant may simply have coincided with what is specified in the Agreement, I find that the evidence is not simply coincidental. I hold the view that that evidence is more probable than not, an indication that the defendant had signed the Agreement dated 27th September 1996.

65. Ultimately, however, it does not matter whether or not the defendant signed the Agreement dated 27th September 1996. The important factor is that in the contract between the parties, there was a provision requiring the defendant to purchase products of quantities which did not go below those agreed upon.

66. There is evidence that the defendant was awarded recognition for exceeding his target in 1995. That is suggestive of the possibility that the defendant's sales were good; and the sales were not likely to be good if the defendant did not have sufficient stock.

67. I also take note of the defendant's evidence that there were days when he sold all the stock, whilst on some days there were no sales.

68. In the circumstances, it is possible that if the stock-taking was conducted on a day when all stocks had been sold, there would be nothing at the petrol station. On the other hand, if stock-taking was done on a day when there were no sales, there could be large volumes of the product at the petrol station.

69. It is therefore not, necessarily accurate to peg the sufficiency of otherwise of stock for any month, upon the quantities which were found on just one day. In my considered view, the sufficiency or otherwise of stock could only be properly established by making available records of purchases made from the plaintiff and the sales made by the defendant.

70. Neither of the parties have placed before me, any records which would have proved the

per annum from 31st July 1998. I will therefore award interest on the principal sum, at court rates, with effect from the date of judgment, until payment in full.
94. The defendant will pay to the plaintiff the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 25th day of March 2015.

FRED A. OCHIENG

JUDGE

Judgment read in open court in the presence of

Miss Muraguri for the Plaintiff

Miss Waitere for the Defendant.

Collins Odhiambo – Court clerk.