



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 277 of 2009

CHEVRON KENYA LIMITED ::: PLAINTIFF

(formerly Caltex Oil (K) Ltd.

- VERSUS -

OSHWAL SERVICE STATION LTD. ::: 1ST DEFENDANT

NEMCHAND BHARMAL SHAH ::: 2ND DEFENDANT

BHARAT N. SHAH ::: 3RD DEFENDANT

J U D G E M E N T

1. The suit herein was commenced by a Plaintiff filed in court on **23rd April 2009** praying for Judgement against the Defendants jointly and severally the following:-

- a) The sum of **Kshs.3,822,268,85.**
- b) Interests.
- c) Costs of the suit.
- d) Further relief

2. The claim is based on an alleged breach of the terms of an Operator's Agreement entered into on **1st October 2000** between the Plaintiff and the 1st Defendant for the sale of the Plaintiff's products and the operation of the Plaintiff's Petrol and Filling Station situate on Plot No. 209/2386 on Kimathi Street in Nairobi.

3. It is further alleged that it was *inter-alia* an express term of the contract between the Plaintiff and the 1st Defendant that:-

- i. The 1st Defendant would pay cash on delivery for all products unless otherwise agreed by the Plaintiff;
- ii. The 1st Defendant would provide a Bank Guarantee from a reputable bank to the Plaintiff to secure any indebtedness arising from the supply to the 1st Defendant of any products on

credit terms;

iii. 2nd and 3rd Defendants should also provide their personal Director's Guarantee to secure any such indebtedness as aforesaid.

The 1st Defendant provided the Plaintiff with Bank Guarantees of an aggregate value of **Kshs.1,500,000/=**.

The 2nd and 3rd Defendants provided the Plaintiff with their Director's Guarantee dated **9th June 1998**. Under the terms of the said guarantee in consideration of the Plaintiff granting credit facilities to the 1st Defendant the 2nd and 3rd Defendants jointly and severally guaranteed the punctual payment by the 1st Defendant to the Plaintiff of all monies due and owing by 1st Defendant for all goods sold and supplied and/or delivered to the 1st Defendant by the Plaintiff. The 2nd and 3rd Defendants further indemnified the Plaintiff against all loss and damage resulting from any breach by the 1st Defendant of its payment obligations thereunder.

The said Operator's agreement was terminated by the 1st Defendant by its Notice of Termination dated **1st December 2006**. The termination was effective from **28th February** when the premises was handed over to the Plaintiff by the 1st Defendant.

At the time of the termination of the Operator's Agreement and handing over by the 1st Defendant of the premises to the Plaintiff, the 1st Defendant was allegedly indebted to the Plaintiff in the sum of **Kshs.5,742,772.30** being the value of petroleum products sold and supplied and/or delivered by the Plaintiff to the 1st Defendant at its express request on credit terms on diverse dates from **January 2006 to February 2007** during the term of the Operator's Agreement.

The Plaintiff succeeded in reducing the said debt to **Kshs.3,822,268.85** through:-

- i.** realizing the aforesaid bank guarantees amounting to an aggregate value of **Kshs.1,500,000.00**;
- ii.** taking over stocks from the premises amounting to **Kshs.351,069.70**; and
- iii.** through adjustments by setting off the remaining debt of **Kshs.69,433.75** against "*Caltex Starcard Credits*" held by the 1st Defendant under the Plaintiff's then existing fuel credit card scheme.

In breach of the terms of the Operators Agreement and the terms of the aforesaid Director's Guarantee and despite expressly acknowledging the said debt as being due and owing to the Plaintiff, it is the Plaintiff's case that the Defendants as at the date of filing suit have not paid the Plaintiff products sold and supplied to the 1st Defendant by the Plaintiff and the Defendants have thereby jointly and severally occasioned the Plaintiff loss and damage.

The Plaintiff now claims the sum of **Kshs.3,822,268.85** against the 1st Defendant being the value of products sold and delivered to the 1st Defendant.

4. The above allegations are totally denied by all the Defendants through their defence filed in court on **7th July 2009**. In their defence the Defendants deny the existence of the alleged control or the existence of any guarantee or any debt as alleged at all and urged the court to dismiss the suit with costs.

5. The Plaintiff filed its list of issues on **13th May 2011** together with its list of documents. The Plaintiff also filed its witness statement on **18th April 2012** and a supplementary list of documents on **25th July 2012**. There is no evidence on record that the Defendants filed any issues, witness statements or

other documents. However, both parties filed their submissions with the Plaintiff filing theirs on **27th August 2012** and a reply submissions on **11th October 2012**, while the Defendants filed their submission on **28th September 2012**.

6. The hearing commenced on **19th April 2012** and proceeded on **26th July 2012**. The Plaintiff called two witnesses – P.W. 1 Mr. Gerald Matola and P.W. 2 Mr. Benson Mulolo. The defence did not call any witnesses.

7. P.W. 1 adopted his witness statement dated **18th April 2012**. He testified that he was the Marketing Services Manager of Total Kenya Limited which acquired the Plaintiff Company in 2009 and took over the prosecution of this case. At the time of termination of the Operators Agreement dated **1st October 2000** in **2006**, the witness was the Retail Co-ordinator of the Plaintiff Company and personally dealt with issues in dispute herein. He testified that the Plaintiff was and still is the registered proprietor/lessee of the service station premises located in L.R. No. 209/2386/Kimathi Street - Nairobi. He confirmed the existence and particulars of the contract dated **1st October 2000** i.e. the Operator's Agreement. He further testified of the agreement and the breach stated in the Plaint. The witness widely testified about that agreement, the director's guarantee which were provided by the Defendants and the claim which he said was owed of **Kshs.3,822,268.85/=**.

8. P.W. 2 testified that he was a Sales Administration Accountant of Total Kenya Limited which acquired the Plaintiff Company in 2009. He adopted his witness statement filed in court on **18th April 2012**. His testimony corroborated that of P.W. 1 and proved the particulars of the claim in the suit.

9. The two witnesses appeared to me credible and I believed their testimony to be true. Even in cross-examination they remained focused and appeared to me to be truthful.

10. I have considered the suit, the witness testimony and submissions of the parties. I have looked at the issues as drafted by the Plaintiff. I will adopt those issues. They are

1) Whether the Plaintiff and the **1st Defendant** entered into an Operator's Agreement on or about **1st October 2000** and whether the **1st Defendant** was a retailer of the Plaintiff's petroleum products.

2) If the answer to number 1, above, is "yes", whether the express terms thereof are as pleaded in the Plaint.

3) Whether the **1st Defendant** provided the Plaintiff with a Bank Guarantee for the amount of **Kshs.1,500,000/=**.

4) Whether the **2nd** and **3rd** Defendants provided the Plaintiff with their personal guarantees as pleaded in the Plaint or at all.

5) Whether the said Operator's Agreement was terminated by the Defendant on **1st December, 2006**.

6) Whether the Defendants are currently indebted to the Plaintiff in the sum of **Kshs.3,822,268.85**.

7) Whether the Plaintiff's advocates duly issued Legal Demand and Notice of intention to Sue in Default by the Defendants.

11. All these issues were canvassed at the hearing and the two Plaintiff Witnesses covered them. Although the Defendants, both in their defence and submissions have denied the existence of the Operator's Agreement dated about **1st October 2000**, the existence of the said agreement was proved together with its terms as pleaded in the Plaint. It is also proved by evidence that the **1st Defendant**

provided the Plaintiff with a Bank Guarantee for amount of **Kshs.1,500,000/=** and that the 2nd and 3rd Defendants also provided the Plaintiff with their personal guarantees. I also accept the testimony of the witnesses that the said Operator's Agreement was terminated by the Defendant on **1st December 2006** and that the Defendants are indeed currently indebted to the Plaintiff in the sum of **Kshs.3,822,268.85** which they have not paid despite receipt of a legal demand notice from the Plaintiff.

12. Finally, the Defendants in their submissions objected to the production of photocopy documents as proof of the case. This objection in my view is not merited, firstly, for the reason that the defence did not raise the issue at the trial, and cannot now challenge the same in submissions. Those secondary documents had already been admitted into evidence and no objection can now be entertained.

Secondly under **Section 64** of the **Evidence Act, Cap 80**, the contents of documents may be proved either by primary or by secondary evidence.

Section 64 of the **Evidence Act** (Chapter 80 of the Laws of Kenya) states that:-

“The contents of documents may be proved either by primary or by secondary evidence.”

Section 66 (b) of the **Evidence Act** states that secondary evidence includes

“ . . . copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies.”

Section 68 (1) (g) of the **Evidence Act** states that:-

“Secondary evidence may be given of the existence, condition or contents of a document . . . when the original consists of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.”

13. In conclusion, the Defendants chose not to produce any evidence or testimony to discredit the Plaintiff's claim. The position in law is that where a party chooses not to give evidence, it can be concluded that there is no evidence, and that any evidence would not support the party's position.

It is trite law that the person who alleges the existence of certain facts must prove the same. Section 107 (1) of the Evidence Act, Cap 80 states thus:-

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

14. For the foregoing reasons, I dismiss the Defendant's defence and enter judgement in favour of the Plaintiff against the Defendants jointly and severally for:-

- a) Kshs.3,822,268.85.
- b) Interest thereon at court rates from the date of filing of this suit to the date of payment in full.
- c) Costs of the suit and interests therein.

That is the Judgement of the court.

DATED, READ AND DELIVERED AT NAIROBI

THIS 6TH DAY OF FEBRUARY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Ahmed H/B for Amin for the Plaintiff

Ondieki H/B for Arum for the Defendants

Teresia – Court Clerk