REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(Milimani Commercial Courts Commercial and Tax Division)

CIVIL SUIT 1981 OF 2000

SUPREME SERVICE STATION LIMITED.....PLAINTIFF

-VERSUS-

AGIP (K) LIMITED.....DEFENDANT

JUDGMENT

THE PLAINTIFF'S CASE

The Plaintiff filed this suit against the Defendant on the 7th November, 2000. Since then, the Plaintiff has amended its plaint twice. The Further Amended Plaint, upon which the Plaintiff case depends, was filed with leave on 26th June, 2008.

The suit arises out of an Operator's Licence Agreement (hereinafter to as OLA) entered into between the Plaintiff and the Defendant, and which was dated 1st December, 1995. The OLA was produced as Plaintiff Exh. 1 pages 1-8. Under the OLA the Plaintiff was granted a license to operate a petrol station erected along Langata Road on LR No. 209/12013/2. The Plaintiff was to run the petrol station in the name and style of Supreme Service Station. The contract could be terminated by either party with notice, or by the Defendant without notice, the later only on the happening of any of the events outlined under Clause 16 of the OLA. The Plaintiff's complaint is that the Defendant terminated the OLA without notice and that the same was unlawful. The Plaintiff also claims that its goods were detained. He claims special and general damages for detinue and other losses.

THE PLAINTIFF'S CLAIM

The Plaintiff claims that the Defendant breached the contract by terminating the OLA without notice and it claims the following:

(a) A declaration that the Plaintiff is entitled to at least one month's notice by the Defendant before its operator's licence the agreement can be determined

(b) Cost of the suit.

(c) ……..

(d) General damages

(d1) Special damages as follows:

(i) Staff payments made consequent upon the termination of their employment this due to the Defendant's unlawful ejectment and takeover Kshs. 650,000/=

(ii) Loss of capital investments/loss of goods seized by the Defendant and returned in unusable/nonuse able condition Kshs. 4,200,000/=

(iii) Loss of stocks/fuel lubricants in Plaintiff's possessions at takeover Kshs. 131,528.50/=

(iv) Loss of stock in Plaintiff's shop when it was forcibly taken over Kshs. 650,00/=

(v) Loss in the value of shares liquated consequent upon realization of the security held for an overdraft facility with Messrs Standard Chartered Bank Kshs. 19,985,068 TOTAL Kshs. 26,616,614.50

(e) Interest on (d) and (d1).

(f) Any other remedy that this Honourable Court may deem fit to award.

THE DEFENDANT'S CASE

The Defendant, by its Further Amended Defence contests the Plaintiff's claim. It has also counterclaimed against the Plaintiff for products delivered but not paid for. The Defendant contends that the termination of the OLA by the Defendant without notice was justified on the facts of the case. The Defendant's case is that it terminated the OLA without notice pursuant to clause 16(a), (g) and (h) of the OLA. The termination letter was D. Exh.1 page 32 and was dated 1st November, 2000. The Defendant also contends that upon termination of the OLA, the Defendant took over the station together with a number of machinery, stock and equipment, the property of the Plaintiff which remained at the station under a caretaker manager until they were subsequently collected in 2001, August.

THE DEFENDANT'S CLAIM

The Defendant counter claims for:

(a) The sum of Kshs. 3, 340,829.25 together with interests thereon at Court rates from 9.10.2000 until payment in full.

(b) Costs of this claim together with interest thereon from the date of judgment until payment in full.

THE ISSUES FOR DETERMINATION

A Statement of Agreed Issues, which is signed by both parties, was filed on 16th February, 2006. It raises 13 issues as follows:

1. Did the Plaintiff achieve all the targets set by the Defendant in accordance with their agreement?

2. Were there any circumstances substantively and materially that hindered the performance of the contract herein?

3. Did the Plaintiff have any control of the circumstances in 2 above and were such circumstances foreseeable at the time the parties entered into the agreement?

4. If the answer in 2 above is in the affirmative, what effect do/did those circumstances have on the

Plaintiff's obligations under the license agreement?

5. Was there any oral agreement between the Defendant and Plaintiff directors to review the targets?

6. Did the Plaintiff as requested by the Defendant via a letter dated 4th August, 2000 forward a proposal on ways of improving the running of the station on 25th August, 2000 and/or at all?

7. Ws a thirty days notice a requirement before termination of the contract by either party in the circumstances herein obtaining?

8. Did the Defendant herein illegally takeover the petrol station or was it done strictly in accordance with the laid down procedure?

9. Does the Plaintiff owe the Defendant the sum of Kshs. 3,340,829.25?

10. Is the Defendant entitled to a 23% interest from 9th October, 2000 on any monies allegedly owed to it by the Plaintiff?

11. Did the Plaintiff serve notice of intention to sue on the Defendants?

12. Is the Plaintiff entitled to the prayers in the Further Amended Plaint?

13. Who should pay the costs of this suit?

THE EVIDENCE

The plaintiff called two witnesses, Eunice Wambui Kamotho and James Mwai Kamotho. Both witnesses told the Court that at the time the Plaintiff was granted the OLA to operate Supreme Service Station Ltd., it was the only petrol station along Langata Road. That situation changed with the opening of three service stations, the closing down of Langata Road for construction, power and water rationing and other factors which affected the business, until the time the Defendant terminated the OLA.

The Defendant called one witness Joseph Kimutai Kering. His testimony was that the Defendant was justified to terminate the OLA for the reasons given in the termination letter. This witness admitted that he was not there at the time the OLA was signed or during the period it was in operation, and that he was not involved at any time with the Plaintiff's business. Mr. Kering relied on documents to know what transpired. Mr. Kering admitted that the Defendant made a mistake when it cited Clause 16 (h) of the OLA as one of the reasons for terminating the OLA, because it was the duty of the Defendant to obtain the necessary insurance covers for the Plaintiff business. The witness said that the Defendant has counterclaimed for debt owed to it as the Plaintiff for products sold to it but not paid for. Mr. Kering admitted that the invoices relied upon did not add up to the sumes claimed, falling far too short of what is pleaded in the Further Amended Defence.

THE FACTS WHICH ARE NOT IN DISPUTE

I have adopted these facts from the submissions made by counsels.

(a) That the Plaintiff and Defendant had a contractual relationship wherein the Plaintiff was granted by the Defendant an Operator's License to run and operate a petrol station along Langata Road, Nairobi which station was known as the Supreme Service Station. The terms governing the contract between the two parties were captured in an Operator's License Agreement (hereinafter 'the OLA') which agreement was produced as a part of Plaintiff's exhibit one to be found at pages 1 to 8 of the exhibit thereof.

(b)The OLA, could be terminated by:

(i) either party, upon giving the other party a thirty (30) day written notice, or

(ii) the Defendant, without notice, on the occurrence of any of the events outlined in Clause 16 of the OLA.

The Plaintiff was given certain targets which it had to keep. These were minimum quarterly quantities which it was required to sell in order to meet the targets as spelt out under Clause 16(i) of the OLA as follows:

16(i) If the Operator during the continuance of the agreement fails to sell the following minimum quarterly quantities of petroleum products:

690,000 liters of motor spirits, i.e.

390,000 liters of super motor spirit

180,000 liters of regular motor spirit

120,000 liters of automotive gasoil

Nil liters of illuminating kerosene

15,000 liters of lubricating oil;

Or such other quantity as may be communicated to the Operator by Agip from time to time having regard to the situation of the station and throughput records thereat.

(c) The parties herein would in addition to the terms spelt out in the agreement, correspond on any changes affecting the terms of the agreement which were effected in writing include changes made to clause 13 of the Operator's License Agreement (OLA), which clause required the Plaintiff to provide a bank guarantee in the sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000) to secure the performance and discharge of the Operator's (Plaintiff's) obligation, a condition which was later changed to allow the Plaintiff's performance and purchase of product from the Defendant vide cash orders or by payment of bankers cheque

(d) It was also common ground in evidence, that after the termination of the OLA the Defendant held onto the Plaintiff's moveable equipment which goods are more particularly detailed in paragraph 5A of the Further Amended Plaint, and which movables were not returned to the Plaintiff until the 22nd day of August, 2001

I have carefully considered the oral and documentary evidence adduced by both parties; the submissions by counsel and the cases relied upon.

Both the Plaintiff and the Defendant agree that the OLA was terminated by the Defendant without notice pursuant to Clause 16(a), (g) and (h) of the OLA. These sib-clauses provide thus:

(a) 'If the Operator shall commit or permit or suffer to be committed a breach of any of the obligations on the Operator's part herein contained; ……..

(g) If the Operator fails to operate the station in a diligent and efficient manner;

(h) If the Operator fails and or neglects to take out any of the insurance covers required to be taken by the Operator under this agreement;'

The reasons given for the termination are alleged breaches by the Plaintiff as provided under the sub clauses invoked by the Defendant. These breaches are contested by the plaintiff in the oral

evidence. There are those which are admitted in the pleadings to the effect the Plaintiff did not meet the set targets.

Having carefully considered the termination letter, it emerges that the reasons for the termination of the OLA were given at the conclusion part of the letter. However in the body of the letter, other complaints are raised concerning the performance of the Plaintiff in the manner in which the business was ran. I shall consider this in detail in this judgment.

The question whether the Defendant was justified in terminating the OLA without notice is dependent on the answers to the issue whether the plaintiff breached the terms of the OLA invoked in the termination letter.

As already stated the contract was terminated on the grounds cited in the concluding remarks of the Defendant's letter of 1st November, 2000 as breach of Clause 16(a), 16(g) and 16(h).

The Defendant's letter of 1st November, 2000 where relevant states:

"…RE: TERMINATION OF OPERATORS LICENCE AGREEMENT (OLA)

The operator's Licence Agreement (OLA) dated 15th December 1995 between Supreme Service Station Limited and Agip (K) Limited refers.

It is evident that you have failed and neglected to adhere to the terms and conditions of the said Agreement despite numerous requests both in writing and verbal and have committed the following breaches:

1. Failing to maintain on various dates adequate stocks of products in the station resulting in total produce run-out. …This is violation of Clause 10(L) of the OLA.

2. Failing on account of lack of products to keep, open and operate the station and equipment in an efficient and proper manner. …This is violation of Clause 10(j) and 16(g) of the OLA.

3. Failing to sell the minimum monthly quantities of petroleum products stipulated in the OLA and specifically in our letter ref. Mar/mm/jbm dated 20/1/2000. This is violation of Clause 16(i) of the OLA.

4. Failing to pay for fuel deliveries valued at Kshs. 3,173,762.25.

As a consequence of the foregoing and in accordance with Clause 16(a), (g) and (h), your Licence to operate the station is terminated forthwith.

It is clear that the termination letter mentions several other clauses in the body as having been breached by the Plaintiff. These are Clause 16(l), 16(j) and 16(i). At the conclusion of the termination letter however it clearly stated that the termination was made pursuant to Clause 16(a), (g) and (h).

Paragraph 4B of the Further Amended Plaint captures the basis of the termination thus:

4B. In breach of the agreement without lawful cause and without giving the Plaintiff the requisite notice, the Defendant, by its letter dated 1st November 2000 unilaterally terminated the agreement on the alleged grounds:

(a) That the Plaintiff was in breach of the agreement;

(b) That the Plaintiff was not running the station in the diligent and efficient manner;

(c) That the Plaintiff has failed to take out the insurance covers required by the Defendant.

Clause 16(a) of the OLA provides:

"If the Operator shall commit or permit or suffer to be committed a breach of any of the obligations on the Operator's part herein contained"

This sub clause is a general provision and cannot stand on its own. I think it should be read together with any other sub clause the Defendant invoked as reason to terminate the contract. In the instance case Clause 16(a) should be read together with the two invoked sub clauses of (g) and (h).

In regard to the termination of the OLA pursuant to Clause 16(h) Mr. Kahonge urged that the Defendant did not adduce any evidence to show that they required the Plaintiff to take out any of the insurances alleged and that therefore termination on the ground must fail.

Clause 16(h) of the OLA provides:

"If the Operator fails and or neglects to take out any of the insurance covers required to be taken by the Operator under this agreement."

The Defendant invoked Clause 16(h) to the effect that the Plaintiff did not take out insurance covers it was required to have. Mr. Kering, the Defendant's witness, in his evidence admitted that under the OLA the responsibility of taking out insurance cover lay entirely on Agip (K) (the Defendant). Mr. Kering testified that in the circumstances the Defendant was in error when it invoked Clause 16(h) as one of the grounds for terminating the OLA.

The Defendant has admitted that the invocation of Clause 16 (h) was a mistake and I so find. Having made such an admission, it follows that the only basis upon which the OLA was terminated was failure to run the Plaintiff station in a diligent and efficient manner.

Clause 16(g) provides:

"if the Operator fails to operate the station in a diligent and efficient manner."

Regarding the termination pursuant to Clause 16(g) Mr. Kahonge submitted that the Defendant failed to adduce any evidence to show that the Plaintiff service station was completely run out of products and was either closed or not running. Mr. Kahonge drew the Court's attention to D. Exh. 1 page 33, the document which shows that at the time of the take-over of the station, there was 2500 liters of fuel and 150 gas cylinders and that in the circumstances the allegation there was complete run out of products was not supported by evidence.

The Plaintiff contends that it operated the station in a diligent and efficient manner in the circumstances it found itself in. Mr. Kahonge urged the Court to consider the evidence of DW1 Mr. Kering, and D. Exh. 1page 31 where it is stated that some pumps at the station were broken down. Mr. Kahonge submitted that maintenance and repair of the pumps was the responsibility of the Defendant and therefore by failing to repair the pumps the Defendant was contributing to the inefficiency.

Mr. Kahonge submitted that the Court should note that the Defendant carefully selected the records of Visitor's Book it produced and brought those which were self serving, leaving the rest of them out.

The Defendant explained what it meant by diligence and efficiency. It explained that is the fact there was little if any fuel products for sale at the station on the two days in question. The Defendant on its part contends that there was absence of diligence and efficiency. The Defendant relies on the Visitor's Book at pages 30 and 31 of D. Exh. 1. These are records of stock found at the station on 24th October 2000 and 30th October, 2000. Mr. Kering, D.W. 1. testified that the Visitor's Book though not provided for under the OLA was a tool of trade used to keep a record of observations by the Defendant's

representatives. The two records were countersigned by a representative of the plaintiff's company. Mr. Imende urged that any issues raised at this stage challenging the Visitor's Book was an afterthought.

The Defendant's contention is that the Plaintiff station was at most times found to have run out on all the products in the tanks. Mr. Imende urged Court to consider P. Exh.1 pages 30 and 31, the Visitors Books records. Mr. Imende submitted that these records were proof that on those occasions, as explained by DW1, the station had dead stock which could not be sold. Mr. Imende relied on the case of **KORA CONTRUSTION V. MUMIAS CIVIL APPL. NO. 22 OF 2000** were Omolo, Bosire & O'kubasu JJA reserved:

"Clearly the appellant and not the respondent was in breach of the contract by its failure to complete the sewer project as had been agreed upon between the parties. It is the appellant who went to court to sue for damages for breach of contract, allegedly by the respondent. It not only failed to establish by evidence any breach on the part of the respondent but also to prove loss arising from that breach. The appellant was also unable to prove frustration as the reason for its failure to complete the project. It therefore knew the nature of the soil in the area and it should not therefore lie in its mouth to say that the nature of the soil was an unforeseen factor.

It is also noteworthy that the appellant concedes it did not complete the works, either within the agreed period or at all. It is doubtful in the circumstances, whether it would be entitled to payment for any works it may have executed but for which payment had not been made.

There is no dispute that Visitor's Book was not mentioned anywhere in the OLA. However I took note of the fact that the Plaintiff did not object to the production of the Visitor's Book during the trial. Neither did it issue the necessary Notice that it will be objecting to the production of these documents at the trial. The Plaintiff cannot turn around and object to them at this late stage. The two records of documents are therefore part of the record and should in the circumstances be considered.

The Defendant has by the two documents adduced evidence to support the contention that the Plaintiff station was not being run in a diligent and efficient manner. In other words, the Defendant is using these two records of the Visitor's Book for 24th and 30th October, 2000 to urge the Court to make a finding that indeed there was absence of diligence and efficiency on the Plaintiff station was run. The two records of the Visitor's Book show that the station did not have fuel products in the quantities necessary to enable the Plaintiff to sell. That is the basis upon which the Defendant relies on to support the contention that the Plaintiff lacked diligence and efficiency. I noted that the Defendant has shown that the plaintiff had very little fuel products, it any, to sell on the two days quoted in the Visitors Book. Nothing is said of the records of the rest of other days forming part of the five years in which the contract ran. It is also noteworthy that nothing is said about meeting set targets in these two records.

I have considered the undisputed fact that the OLA was signed on 15th December 1995 and that the Plaintiff station started operating soon thereafter. By the time the OLA was terminated it had been operational for at least five years. It means therefore that out of the five years the Plaintiff operated the station, the Defendant terminated the OLA on the basis that on two days, (as supported by the Visitors Book out of the hundreds other days) the Plaintiff station had insufficient products at its disposal to offer for sale. That evidence is not sufficient proof of lack of diligence and efficiency. I find that to content that the Plaintiff did not run the service station in a diligent and efficient manner because in two days out of hundred others the Plaintiff was found to have run out of fuel products is harsh, unconscionable and unreasonable. I agree with the Plaintiff that it does appear that the Defendant handpicked from the records of the Visitor's Book those two which served their case and purpose to support the termination of the OLA pursuant to Clause 16(g). To terminate on that basis was harsh, inequitable, capricious and in my view not without malice. On a balance of probabilities I do not find the termination of the contract under that clause proved is not justifiable.

Regarding the issue of the monthly targets, Mr. Kahonge for the Plaintiff submitted that at the close of the Defendant's case those targets were not disclosed. Mr. Kahonge submitted that the several references to letters made by the Defendant to demonstrate various minimum monthly targets or

quantities set out in them were not adduced in evidence as exhibits. Mr. Kahonge invoked S. 107 and S. 119 of the Evidence Act and urged the Court to make a twofold presumption (a) that if such letters existed, the evidence in them was adverse to the Defendant's case, and , (b) the Defendant failed to call the person who was directly responsible for its dealings with the Plaintiff, one Eugene Kisuya because his evidence could have been adverse to the Defendant's case.

Counsel relied on the case of **KITUU –V- NZAMBI [1984] KLR 411** for the proposition that in regards to the minimum monthly targets the burden of proof lay on the Defendant being the party having special knowledge of the issue and who was likely to fail if no evidence to support it was adduced.

Mr. Kahonge also relied on **NGUKU –V- REP [1985] KLR 412** for the proposition that the Court may draw an adverse inference against a party failing to produce evidence that the evidence left out, if it were adduced could tend to be adverse to its case.

In regard to the issue of targets whether they were met or not met, Mr. Imende drew the Court's attention to paragraph 3D of the Further Amended Plaint in which counsel urged, the failure given, and that the Plaintiff went further to say that the circumstances were beyond its control.

Mr. Imende urged that the reasons for the failure to meet the targets were pleaded at paragraph 3C of the Further Amended Plaint. Counsel posed the question whether the reasons given were valid to take away the Plaintiff's obligations under the OLA. Mr. Imende gave his views on each of the reasons cited. I have considered these views.

Paragraph 3D of the Further Amended Plaint states as follows:

"Owing to the matters aforesaid, (which matters were not within the control of the Plaintiff and which matters were with the Defendant), the Plaintiff was unable to meet the targets set by the Defendant."

I agree with the Defendant that the Plaintiff admitted in its pleading that it did not meet the set targets. It cannot be heard to deny this in its oral evidence. It is however an issue for determination whether infact the OLA was terminated for the failure by the Plaintiff to meet the set targets.

The Defendant has drawn the Court's attention to paragraph 3D of the Further Amended Plaint which provides:

"Owing to the matters aforesaid, (which matters were not within the control of the Plaintiff and which matters were with the Defendant), the Plaintiff was unable to meet the targets set by the Defendant."

Mr. Imende submitted that pursuant to paragraph 3D, the Plaintiff admitted the failure to meet targets set under OLA and should not be heard to say that it was unaware of what these targets were.

I have considered paragraph 3D of the Further Amended Plaint and I do not regard this as an issue arising out of the termination letter. The termination of the OLA was pursuant to Clause 16(a), (g) and (h). I have quoted in full these sub clauses within this judgment. These clauses have nothing to do with the set targets the Plaintiff was to meet periodically in terms of products it was expected to sell at the station. That being the case the admission under paragraph 3D does not appear to be relevant since clearly the Defendant did not terminate the OLA for failure of the Plaintiff to meet set targets.

Clause, 16(i), was not invoked by the Defendant as one of the reasons for terminating the OLA. That being the case, the Plaintiff's admission under paragraph 3D of the Further Amended Plaint is immaterial. The OLA was terminated because the Plaintiff service station was not run in a diligent and efficient manner. The Defendant has demonstrated what it meant by these two terms, that there were insufficient products to offer for sale at the Plaintiff station. As I have already stated herein above, the termination had nothing to do with lack of meeting set targets. It had to do with lack of products to sell on

two days as demonstrated by the documents produced by the Defendant in support of its case.

The minimum targets are provided under Clause 16(i) of the OLA in the following terms:

16(i) If the Operator during the continuance of the agreement fails to sell the following minimum quarterly quantities of petroleum products:-

690,000 liters of motor spirits i.e.

390,000 liters of super motor spirit

180,000 liters of regular motor spirit

120,000 liters of automotive gasoil

Nil liters of illuminating kerosene

15,000 liters of lubricant oil....

or such other quantity as may be communicated to the Operator by Agip from time to time having regard to the situation of the station and throughput records thereat."

The Plaintiff pleaded issues to do with targets set by the Defendant under paragraph 3B, 3D, 3E and 3F. The Defendant has replied to these paragraphs in its paragraphs 5, 6, 7, 8 and 9 of the F/A Defence.

It is clear from the pleadings that the parties made the whole question of targets an issue for the court's determination; whether or not they were met and whether the Plaintiff can plead frustration.

The Plaintiff pleaded that it was unable to meet targets for the reasons pleaded in paragraph 3C of the F/A/Plaint.

The Plaintiff has pleaded frustration of contract as the reason it failed to meet the set targets by the Defendant for the business. The pleading of frustration for the reason to breach the terms of the contract between the parties does not help the Plaintiff as that cannot give rise to a cause of action for a claim in breach of contract. The part of the Plaintiff's claim which is based on frustration cannot in the circumstances succeed. The Plaintiff's claim based on frustration is prayer (a) where the Plaintiff seeks a declaration that the plaintiff is entitled to at least one month's notice by the Defendant before its operator's licence under the agreement can be determined. Prayer (e) and (d) which sought for a mandatory injuction and general damages for breach of contract were amended to remove them in the last amendment by the Plaintiff. These were the prayers that depended on frustration of the contract, which as I have said, cannot succeed because frustration of a contract cannot give rise to a cause of action.

Since the parties made it an issue for determination I shall now consider the reasons given by the Plaintiff as having contributed to its inability to meet the targets that were under the OLA. Paragraph 3C of the F/A/Plaint, the Plaintiff pleaded as follows:

"3C Upon taking over the running of the station in accordance with the terms of the agreement the Plaintiff duly achieved all the targets set by the Defendant until the circumstances surrounding the situation of the station were substantively and materially altered to such extent that the said situation was not the same as when the agreement was signed – these were:-

(a) Closure of Langata Road due to construction from 1998.

(b) Erection of a Caltex petrol station on Langata Road 500 meters from the station in 1996.

(c) Erection of Kenol petrol station on Langata Road 600 meters from the station in 1999.

(d) Erection of Kobil petrol station on Haile Selassies Avenue in 1998.

(e) Power and water rationing from July 2000.

(f) Malfunctioning of the equipment described in the agreement and failure by the Defendant to repair the same when called upon to do so by the Plaintiff.

(g) Failure by the Defendant to deliver its products to the Plaintiff on time.

EUNICE, PW1 in this case told the court that the pumps at the service station were not just faulty but had last been calibrated in 1995. The witness produced letters to the effect from WEIGHTS AND MEASURES DEPARTMENT.

On the issue of the malfunctioning of the pumps/equipment at the petrol station, Mr. Imende submitted that results of investigations carried out by the Defendant revealed that it was the Plaintiffs employees who were tampering with the equipment for their own benefit. Counsel referred the Court to D.Exh. Page 42 and urged the Court to note that it was very close to the date of termination (July, 2000).

Mr. Imende submitted that due to that discovery, the Plaintiff\'s employees concerned left employment. Mr. Imende urged that even though the Plaintiff denied the allegation in evidence, no letter refuting the Defendant\'s said allegation was produced by the Plaintiff. Mr. Imende urged the Court to find that the Defendant\'s allegations regarding the equipment were indeed true.

The Plaintiff\'s evidence that the malfunctioning of the machines and equipment was not about mere tampering but a failure to calibrate them as required by the relevant government department is not controverted. The Plaintiff\'s testimony that the maintenance required was technical (calibration) was not denied by the Defendant. I find that the Defendant failed to keep the equipment at the Plaintiff\'s station as required.

The Plaintiff at paragraph 3C pleaded that it failed to meet the targets because of the closure of Langata Road for purposes of construction into a dual carriage way.

In regard to the closure of the road, Mr. Imende submitted that no evidence was tendered to show how proximate the date of closure was to the date of termination. Mr.Imende urged that the letter of termination specified that targets were not met between February and October, 2006 and that therefore the Plaintiff had the burden to make a connection between the duration of the closure of Langata Road and the duration of the alleged breach to meet the targets.

The issue is whether the closure of this road was foreseeable at the time the parties entered into the contract. The closure of Langata Road at the time in question is a matter the court can take Judicial Notice of as it is of public notoriety. The Defendant cannot be allowed to deny it ever happened. Was the closure foreseeable at the time the parties entered into the contract? No it was not foreseeable. That having been said, I must hasten and add that this ground cannot be used as a cause of action. Reason being the events complained of occurred in 1996, the other in 1998 and the last in1999.The Plaintiff should have pleaded frustration at the happening of the events complained of. It did not. The plea is an afterthought and cannot be sustained.

The Plaintiff pleaded that it could not perform its part of the contract due to the opening of new service stations near it. Mrs. EUNICE supported this evidence by adding that the new stations were bigger, better located and had superior services than the Plaintiff.

In regard to the erection of three new petrol stations along Langata Road and Haile Sellasse Avenue, Mr. Imende urged the Court to note that the years of opening of the stations were 1996, 1998 and 1999. Mr. Imende urged that the Plaintiff failed to make a connection between the opening of the petrol stations and its failure to meet the targets.

The only comment I wish to make here is that the opening of these stations was foreseeable since competition in business is always expected. Secondly that ground cannot be pleaded to support a cause of action but only as a defence.

EUNICE in her evidence expressed frustration at the hands of the Defendant who, she claimed, failed to entertain her plea for the improvement of the station in order to attract business and perform better. This witness had a myriad of letters to the Defendant expressing those feelings.

In regard to review of set targets by the two parties Mr. Imende submitted that both witnesses for the Plaintiff referred to P.Exh.1 page 46 in which the Plaintiff was asked to make proposals to upgrade and improve the station to the expected levels but that no response was ever received from the Plaintiff in that regard. Mr. Imende urged that the burden of proving that the Plaintiff made any such proposals lay with the Plaintiff and that it failed to produce it and that the Court should find it failed to establish that fact.

I agree with the Defendant. The Plaintiff had the evidential burden to prove that it made the proposals as the parties had agreed it should. The Defendant\'s letter to the Plaintiff dated 4thAugust, 2000 requested the Plaintiff to forward its proposals for review of targets and suggestions on ways of improving the service station. That request remained pending until the OLA was terminated. The Plaintiff clearly failed to discharge this burden to prove that it gave the said proposals.

PW1 in her evidence testified that the Defendant was in a habit of failing to supply products the Plaintiff ordered within a reasonable time.

In regard to allegation the Defendant failed to deliver products in time, Mr. Imende urged that Clause 10(k) of the OLA required the Plaintiff to give two clear working days notice for the delivery of the produces. Mr. Imende drew the Court\'s attention to P.Exh.1 pages 19, 20 and 31 which are letters from the Plaintiff. Mr. Imende urged that the directions in those letters were not in compliance with Clause 10(k) of the OLA and that in the circumstances the Plaintiff could not allege breach.

The manner in which products were to be ordered by the Plaintiff from the Defendant was subject of the OLA, Clause 10 (k). That Clause provided that the Plaintiff was to give the Defendant two clear days to deliver the order. I agree with the Defendant. The Plaintiff did not comply with the provisions of the OLA in the occasions shown in the letters in that it did not give the requisite notice for the supply of the products by the Defendant.

Regarding the issue whether the Plaintiff\'s pleading in paragraph 3C and 3D of the Further Amended Plaint pleaded frustration of the contract, Mr. Imende submitted that frustration should have been raised at the time it occurred, otherwise it should be considered as an afterthought Mr. Imende urged that if there was frustration the Plaintiff should have asked for either a termination or a variation of the terms of the contract.

Mr. Imende also urged that Plaintiff was given option for renegotiation but never took it up. Mr. Imende referred Court to *Chitty on Contract page 1167* where the author states:

"A contract may be discharged on the ground of frustration when something occurs after the formation of the contract that makes it impossible to fulfill the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract."

Counsel also relied on the case of **KENYA COMMERCIAL FINANCE CO. LTD V. NGENY & ANOTHER 1\'2002] 1 KLR 106** where GICHERU, LAKHA & OWOUR BA held:

"In holding that the contract between the parties to this appeal was frustrated, the trial judge was altering the contract and imposing a new contract, which he had no authority to do.

The letter of offer and acceptance was the basis of the contractual relationship between the parties,

and there is no implication that the loan repayment was to be derived from the proceeds of sale of the produce from the project the 2nd respondent was undertaking and in respect of which the loan facility in question was sought and obtained from the appellant.

To hold that the contract between the parties to this appeal was frustrated because of the failure of the project would therefore be incorrect.

The court cannot make a finding or determination on a pleaded, canvassed or made an issue by either parties. The fact that there was no resolution to create a debenture and legal charge in this instance was not canvassed.

The court will not interfere where parties have contracted on arms-length basis. However by its equitable jurisdiction, this Court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional terms upon the other party. Equity can intervene to relieve that party of such conditions.

Any party who wishes to rely on a frustrating event cannot simply mention it in the claim, the particular facts resulting in frustration must be clearly set out in the pleadings."

I have ruled in regard to the opening of new petrol stations that the Plaintiff ought to have raised the issue of frustration at the time the event complained of happened. That was not done in regard to the new petrol stations. If it was raised at the correct or opportune time the Plaintiff should have sought either a termination or a variation of the contract. The Plaintiff asked for a variation for inability to meet the set targets. However it did not follow through the request. I find that frustration was raised too late, was an afterthought and cannot vitiate the OLA between the parties. The frustration pleaded by the Plaintiff was in the circumstances of no effect to the OLA.

The next issue to consider is whether the Defendant should have given 30 days notice. Having found that the grounds invoked for the termination of the OLA without notice were capricious, harsh and inequitable in all circumstances of the case, it follows then that the Defendant was not justified in terminating the OLA without notice. The Defendant should have given the requisite 30 days notice before terminating the OLA.

There is no dispute that the Defendant terminated the OLA without notice. The termination letter states that ***"Your licence to operate the station is terminated forthwith."*** In their ordinary sense the words *"terminated forthwith"* means that the contract between the parties stood terminated immediately. Under paragraph 5A of the Further Amended Plaint, it is pleaded that the Defendant took over the Plaintiffs station on 7th November, 2000. Three days after the date of the termination letter the Defendant took over stock, equipment and machinery of the Plaintiff at the Plaintiff service station. That is not disputed. It means the Defendant took over the station six days after it terminated the OLA. Having found that the Defendant should have given 30 days termination notice in the circumstances of this case, the takeover of the station was illegal. That finding is independent of findings regarding the breach, if any, by the Plaintiff as it has to do with whether, for the reasons given by the Defendant for the termination, the Defendant acted strictly in compliance with the OLA. The answer is that it did not.

The next issue to consider is whether the Plaintiff is entitled to the prayers sought. I will consider the special damages sought by the Plaintiff. It is trite law that special damages must not only be pleaded but must also specifically proved. The other principle to bear in mind is that the Plaintiffs claim for detinue and conversion of its goods by the Defendant is irrespective of the issue whether the Plaintiff was in breach of the OLA or not. If I find that the Defendant, by a wrongful act dealt with the Plaintiff\'s goods in a manner inconsistent with its rights as the owner, then the Defendant will be held liable to the Plaintiff for that wrongful act.

Under paragraph (dl) of the prayers under the plaint, the Plaintiff seeks staff payment made consequent upon the termination of their employment in the sum of Kshs. 650,000.00. The Plaintiffs\' evidence is that the Defendant forcefully took over the Plaintiff business and thereby rendered the Plaintiffs\' employees

jobless. The Plaintiff contends that it was contractually bound to pay them three months salary in lieu of notice of termination in order to honour the contracts it had with these employees.

The Defendant has contested the Plaintiffs claim under this head. The Defendant\'s submission was that the claim by the Plaintiff was tenuous because the OLA was very specific that the Plaintiff\'s employees were its sole responsibility. The Defendant invoked clause 10(W) of the OLA which provided that the Plaintiff was mandated to employ at its own expense and sole responsibilities employees and attendants at the suit premises.

I have considered the Plaintiffs\' claim for the payment of the salaries it made to its employees in lieu of notice upon termination of the OLA. The agreement between the parties was very clear that the Plaintiff was expected to employ staff and attendants at the service station at its own expense. It was also a part of the contract between the Plaintiff and the Defendant that the OLA could be determinable with or without notice. The Plaintiff was therefore on notice that the OLA, if determined without notice would obligate the Plaintiff to pay its employees their dues in the agreement between itself and those employees. I do not think that the Plaintiff is deserving of a refund of the sums paid to its employees in the circumstances.

Under prayer dl (ii), (iii) and (iv) the Plaintiff claims loss of Capital Investment and goods seized at Ksh. 4,200,000.00, loss of stock/fuel lubricants at Kshs.131,528.00 and loss of stock in the Plaintiff\'s shop at Kshs.650,000.00.

I have considered the evidence adduced by both parties in regard to these claims, together with the submissions by counsel. There was no serious dispute that the Defendant forcefully took over the Plaintiffs\' service station on the 7th November 2000 and it is not in dispute that the Defendants manager went to the station on the said date and took over the fuel products, the stock in the shop/cafeteria, equipment at the vehicle garage and all other goods and accessories within the service station. Both the witnesses for the Plaintiff were very clear that they were not allowed to take any of the goods or equipment from the service station. Those goods are particularized at paragraph 5A of the Further Amended Plaint. The Plaintiff\'s evidence was that the goods were eventually released to them on the 22nd August 2001, ten months after their seizure. The Plaintiff\'s contention is that at the time the goods and equipment were released to them there were in an unusable/non-usable condition.

The documents at D. Exh. 1 pgs 33 and 34 is the Visitor\'s Book titled \'HANDOVER\'. These two documents contain a list of all the fuel that was in the tanks and the pumps, all the stock, the equipment, the machinery, the lubricants, gas cylinders that were taken over by the Defendant on the 3rd November, 2000. The document is signed by a representative of the Defendant. The Plaintiff\'s representative has not signed signifying they did not consent to the takeover of their equipment and goods. There is therefore no dispute in my view that the said items were taken over by the Defendant and signed for by one Kisuya Eugene on behalf of the defendant.

The Defendant has contested this claim and it is the Defendant\'s submission that this claim has been overtaken by Limitations of Actions Act for reason that the claim was introduced in 2008, while the cause of action arose in 2000. Mr. Kering for the Defendant also testified that under the OLA and the termination letter gave the Plaintiff notice to collect their goods within 15 days from the date of termination. The Defendant therefore submitted that any losses incurred by the Plaintiff under this head were due to the Plaintiff\'s own failure to collect the goods within the stipulated time.

Mr. Imende for the Defendant submitted that even if this claim is maintainable the Plaintiff could only be awarded what could put it in the same position it was before the violation of its rights, and not the kind of damage that the Plaintiff pleaded. Counsel relied on the case of **VICTORIA LAUNDRY (WINDSOR), LTD. VS NEWMAN INDUSTRIES, LTD. (COULSON & CO., LTD. [THIRD PARTY1) 1949, 1 All ER 997:-**

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from

such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

Mr. Kahonge in response to the submissions by Mr. Imende urged that the Plaintiff was claiming under the tort of detinue arising out of a contractual relationship. Mr. Kahonge submitted that in a claim under the tort of detinue and conversion, the Plaintiff is entitled to damages for the detention of his goods and also for the value of the goods. Counsel submitted that the measure of the damages is ascertained at the date of judgment. Counsel relied on the evidence of PW 2 who produced documentary proof of the value of the goods detained by the Defendant as of the date he testified in court. Mr. Kahonge relied on a text **LAW OF TORT** by **EWAN McKENDRICK** para 30.4 on conversion where it is stated:

"Conversion was defined by Atkin 3 in LANCASHIRE & Yorkshire Ry v MacNicoll (1919) 88 LJKB 601 as \'dealing with goods in a manner inconsistent with the rights of the true owner ... provided ... there is an intention on the part of the defendant in so doing to deny the owner\'s right or to assert a right which is inconsistent with the owner\'s right.\' A more modern, but similar, definition was given by Lord Templeman in the Privy Council case of Maynegrain Pty Ltd. Vs Campafina Bank (1984) 1 NSWLR 258, when he said that conversion is committed whenever one person performs a positive wrongful act of dealing with goods in a manner inconsistent with the rights of the owner.\'

In one sense, conversion is a tort of strict liability: provided the defendant actually intends to deal with the goods in a manner which in fact interferes with (or is inconsistent with) the owner\'s rights, the mere fact that the defendant does not intend to violate these rights is no defence."

Mr. Kahonge relied on the case of **DHARAMSHI - VS - KARSAN, 1974 EA41**

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"(iii) Damages for detention of chattels maybe allowed in addition to their value.

(3) Shs.3,500/=,damages for detention of plaintiff\'s tools and equipment. The plaintiff was awarded a sum which represented the value of the tools and equipment wrongfully taken possession of by the defendant. The plaintiff also claimed damages for the detention of the said goods, and was awarded Shs.3, 5001= as damages for such detention. In an action for detinue a plaintiff is entitled prima fade to the value of the goods, together with any special loss which is the natural and direct result of the wrong. The valuation of the goods should be assessed as at the date of the judgment, see Clerk and Lindsell on Torts, 13th Ed, pg. 675, Articles 1150- 1151. A plaintiff can recover the return or value of his detained goods as well as damages for their detention, see McGregor on Damages, 13th Ed, pg. 695, Art. 1032. If the goods are profit earning and are normally hired out, then a plaintiff can recover as damages the full market value of such hiring during the whole period of such detention."

In regard to the issue of limitation, this was a matter that was considered at the time the Plaintiff\'s application to further amend its plaint was made and a ruling delivered on the 23rd June 2008. I need not to go over the ruling of the court at the time because it is on record. Suffice it to say that the court was satisfied at that time that the amendment sought was necessary in order to bring out the real issues in controversy and because the Plaintiff was not acting mala fide.

In regard to any injury that the Defendant suffered due to the application being brought more than six years since the previous amendment the court ordered the Plaintiff to pay the Defendant thrown away costs. These took care of any injury or prejudice suffered by the Defendant as a result of the amendment including introduction of a claim at a late stage. It is also trite law that a party can be allowed to amend its pleadings in order to introduce a claim for an award for damages even where the claim is overtaken by limitation.

In regard to the issue of detention and conversion of the Plaintiff\'s goods, machinery and equipment, PW 1 and 2 were present at the time the station was taken over by the Defendant. Mr. Kering for the

Defendant admitted that he was not present at the time. I have considered that the Visitor\'s Book entry at page 33 and 34 of the Defendant\'s exhibit shows very clearly that the Defendant signed the handover list of all the equipment, machinery and goods that were at the Plaintiffs service station at the time of take over. One Eugene Kisuya signed the Visitor\'s book on behalf of the Defendant to signify that he had taken over the said goods and machinery.

I find that the Defendant took over the Plaintiff\'s goods, equipment and machinery forcefully and wrongfully. The Defendant by its own documents has authenticated the said detention and conversion of the Plaintiffs goods.

Mr. Eugene Kisuya was not called as a witness to explain why he signed the handover document to signify that he had taken over all the goods at the service station if in fact he had not done so. The documents speak for themselves and they cannot be contradicted by the oral evidence of Mr. Kering, who in the first place was not present at the time of the takeover of the service station.

I find that the evidence of PW 1 and 2 that they were not allowed to take over the goods and equipment and that the same were released to them 10 months later in an unusable and non-usable condition is unchallenged and uncontroverted. Some of the goods were never released. I find that the Plaintiff has proved this claim for the detinue and conversion.

In Plaintiff\'s exh.1 pg 55, a list of the things that were returned to the Plaintiff on the 22nd August 2001 is given. A cursory look at the list makes it very clear that the stock, fuel lubricants and in the stock in the shop were not returned to the Plaintiff on the said date. The Plaintiff therefore suffered a total loss of the stock and the lubricants that are claimed under prayer dl (iii) and (iv).

In regard to this claim it is the Defendant\'s contention that what the Plaintiff\'s claim is excessive. Mr. Imende has relied on the case of **VICTORIA LAUNDRY,** supra, for this proposition. With due respect to the learned counsel for the defendant, the case does not apply to the issue at hand. The case cited by Mr. Kahonge for the plaintiff is the one applicable to this case in all its facts and circumstances. The Plaintiff is entitled to general damages for the detention of the goods, stock, equipment and machinery. It is also entitled to special damages for the value of the goods.

The Plaintiff has adduced documentary evidence in support of the special damages for the value of the goods. It establishes the claim for Kshs. 4.2 million for Capital Investment and loss of goods; Kshs.131, 528.50, for loss of stock/fuel lubricants; and Kshs.650,000 for loss of stock in the plaintiffs shop. These documents were quotations for goods and equipment similar to those taken over by the Defendant. They give the value of the goods as of 2008. These were not challenged by the Defendant. The Plaintiff explained that the receipts for the goods in question were not restored to it by the Defendant at the time some of the goods were returned.

I find that the Plaintiff has proved its claim under this head. The quotations given are significant since it is the value of the goods at the date of judgment that is awardable for detinue/conversion and detention, in addition to damages.

I will allow the Plaintiffs claim in special damages for detinue in the sum claimed. I will also allow general damages for the detention and/or conversion of the said goods.

In regard to the general damages for detention of the Plaintiffs good, Mr. Imende has proposed that since the goods were old, a 30 % depreciation rate should be applied to the sum. In my view depreciation does not arise because the Plaintiff is entitled to the value of the goods as at the date of judgment, in addition to damages for the detention. A depreciation rate cannot be applied to either the special damages in detinue or general damages for detention or conversion of the goods.

I have considered that the equipment and goods detained by the Defendant were shop/cafeteria stock and

goods, garage equipment and machinery, fuel stock and lubricants used for business at the service station. The Defendant continued to enjoy the use of these items to sell some of them and to do business with them for the 10 months they were detained. In addition, the Defendant did not restitute most of these items including equipment for the garage. Clearly the Plaintiff is entitled to damages for the detention/conversion of these goods.

None of the counsels suggested the sum awardable under this head. I access the damages awardable at Kshs. 1, 000,000.

Under prayer dl (v), the Plaintiff sought the loss in the value of shares liquidated consequent upon realization of the security held for an overdraft facility with Messrs Standard Chartered Bank.

I have considered the submissions by both counsels in regard to whether this claim is awardable or not. In my view, the case of **VICTORIA LAUNDRY,** supra, cited by Mr. Imende applies to this claim. I think that the Plaintiff\'s claim for this loss is too remote. The Plaintiff has not been able to show that the said loss could reasonably be contemplated by both parties at the time they entered into the contract as a probable result of any breach of the contract. The Plaintiff did not even allege that the shares in question were directly connected to the running of the Plaintiff Co. There is no evidence of any connection, even remotely, to the contract in issue in this case. I will therefore not allow this claim.

In regard to the plaintiffs\' prayer (a), I find that this prayer does not lie. I have explained the reason for this in the judgment.

In regard to the issue whether the Plaintiff gave notice to the Defendant before filing this suit, none of the counsels addressed this in their submissions and I consider that the parties abandoned same as a non-issue.

The Defendant counter claims for:

(a) The sum of Kshs.3, 340,829.25 together with interests thereon at Court rates from 9.10.2000 until payment in full.

The Defendant relies on several invoices in support of this claim and contends that these remained unpaid. The invoices relied upon are contained in the Defendant\'s Exhibit at pages 5 to 28.

The Plaintiff has contested the Defendant\'s counter claim on the grounds that the Plaintiff obtained goods and fuel products on strictly cash and or Bankers cheque on delivery basis. The Plaintiff even produced some Bankers cheques of same date as the Invoices/Delivery Notes as proof of payment for some of the invoices produced by the Defendant as un paid. The Invoices before court totaled for less (by almost a million) to sum counter claimed.

I have carefully considered the evidence by both parties and submissions by counsel on the same. The Defendant admitted that the invoices before the court did not add up to the sum claimed in the counter claim. The explanation for this was that some of the documents were lost during the take over from Agip Co. to Shell Co.

The Defendant was at pains to explain how come some of the invoices claimed as un paid had a Bankers cheque of the same date in its regard. Mr. Kering admitted that he was not there when the transactions in question took place. Mr. Kering stated that the two parties had an agreement in which any monies paid by the Plaintiff would be used to pay old debt even though made against a latter invoice. No evidence was adduced to establish that such an agreement existed. The Plaintiff contested such an agreement and produced documentary proof that all products obtained from the Defendant was against cash or bankers cheque. That evidence was not controverted.

The Plaintiff was able to demonstrate through documentary proof, that its Bank Guarantee for Credit Supplies relating to this business was cancelled in 1999 because of being unnecessary since there was a

discontinuation of credit purchase of the Defendant\'s products. PW 1 and 2 contended in their evidence that Invoices and Debit Notes were only generated after payment was made.

The Defendant relied on the document at P exhibit 1 item 3 at page 13 to 15 to support its claim that the Plaintiff acknowledged part of the debt in question and should not be heard to deny the same PW 1 and 2 denied that the debt referred to in the two letters related to the Plaintiff Co. PW 1drew the courts attention to the fact that the letters at page 13 to 15 of the P. exhibit 1 were dated 1997. The amounts claimed are for 2000. Further PW 1 said the debt admitted was for Kalco Enterprises Ltd. and relied on P. Exh 1 pg. 36 a letter in which she stated as much to the Defendant.

I fail to see the relationship between the invoices before the court and the letters at page 13 to 15 of the Plaintiff\'s document. There is no clear unequivocal admission of the alleged Plaintiff\'s debt to the Defendant. I also find that the Defendant\'s counter claim is not supported by the documents before the court. Being a special damages claim, the Defendant needed to specifically prove its claim, which it has failed to do. I find that o a balance of probabilities this claim must fail.

Having come to the conclusions I have in this case, I enter judgment for the Plaintiff against the Defendant as follows:

1. Special damages

(a) Kshs. 4 .2 million for Capital Investment and loss of goods;

(b) Kshs.131, 528.50, for loss of stock/fuel lubricants;

(c) Kshs. 650, 000 for loss of stock in the plaintiffs shop.

2. General damages for the detention and/or conversion of goods in the sum of Kshs. 1,000,000.

3. Interest at court rates for 1 and 2 from the date of judgment until payment in full.

4. Costs of the suit.

5. The Defendant’s counter claim is dismissed with costs to the plaintiff.

Dated at Nairobi this 7th day of July 2010.

LESIIT, J.

JUDGE

Read signed and delivered in the presence of:

Jane …….. Court Clerk

Mr. Kahonge …….For the Plaintiff

Mr. Imende ……For the Defendant

LESIIT, J.

JUDGE