

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 496 of 2008

ISAAC MHIGA CHANZU T/A CHANZU ENTERPRISES.....PLAINTIFF

- VERSUS -

KENYA SHELL LIMITED.....DEFENDANT

RULING

The plaintiff entered into a dealer's licence agreement with the defendant. The defendant is a multinational corporation in the petroleum retail business. The defendant is a leading retailer of petroleum products in the country. The defendant owns several petrol stations. The petrol stations are operated on licence by dealers. The plaintiff was issued with a dealers' licence by the defendant vide a dealer's licence agreement dated 15th April 2004. The agreement was initially for a period of two years. It was extended for a further two years to February 2008. Upon expiry of the further term, the defendant, vide its letter dated 20th February 2008 extended the period of the licence for a further period of seven months. The agreement shall, if not extended, expire on 1st October 2008. During the subsistence of the licence, the plaintiff raised several complaints concerning the state of the underground tanks in the said service station. According to the plaintiff, as a result of poor maintenance by the defendant, he lost 27,545 litres of diesel and 51,985 litres of petrol. He deponed that the said losses were caused by leakages from the said underground tanks. The plaintiff deponed that the defendant failed to address his complaint by paying him compensation for the loss. The plaintiff is apprehensive that the defendant may terminate the contract before his complaints are addressed.

On 28th August 2008, the plaintiff filed an application under the provisions of **Order XXXIX Rules 1, 2, 3 and 9** of the **Civil Procedure Rules** seeking orders of injunction to restrain the defendant from terminating the dealer licence agreement in respect of the service station operated by the plaintiff going by the name Rongai Highway Shell & BP station. The grounds in support of the application are on the face of the application. The plaintiff contends that the defendant had threatened to terminate the dealer's licence contrary to the provisions of the dealers licence agreement. The plaintiff complained that the defendant was seeking to terminate licence without issuing the requisite notice of the intended termination. It was the plaintiff's further contention that he had suffered immense loss as a result of the defendant's negligence, which unless remedied, the plaintiff's source of income would be greatly diminished.

The plaintiff was of the view that if the defendant is allowed to proceed and terminate the dealers licence agreement, the plaintiff would suffer irreparable loss and damage. The application is supported by the annexed affidavit of Isaac Chanzu, the plaintiff. He swore a further affidavit in further support of his application. In the said affidavits, the plaintiff narrated the frustration caused by the defendant's inaction in addressing the complaints relating to the leakage of the underground tanks. He deponed that, although the defendant denied that there were leaks in the said tanks, he had hired an expert who examined the said tanks and indeed confirmed that they were leaking. He swore that as a result of the said leakages, he had suffered irreparable loss and damage which the defendant had refused to pay compensation. He deponed that if the dealers licence agreement is terminated, he would suffer irreparable loss on account of the fact that he had heavily invested in the said business. He swore that he would be prejudiced by the contemplated termination because he would lose his only source of income.

He urged the court to allow the application with costs.

The application is opposed. The defendant filed grounds in opposition to the application. The defendant's maintenance engineer, Alfonse Ogulla swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that the complaints which were raised by the plaintiff were addressed by the defendant to the satisfaction of the plaintiff. He stated that when the plaintiff first raised the issue of petroleum loss through leakages in the underground tanks. The defendant hired a contractor who carried out a full system integrity test of the said tanks. The contractor established that all the tanks save for one, which had a minor leakage problem, were functioning properly in accordance with the defendant's exacting standards. He deponed that whenever the plaintiff raised any complaints regarding maintenance, the defendant promptly addressed the same to the satisfaction of the plaintiff. He annexed copies of the works/service orders which were signed by the plaintiff upon the completion of the maintenance works signifying that the plaintiff's satisfaction with the said undertaken maintenance works.

Mr. Ogulla deponed that it was highly improbable that the said tanks could have leaked to the extent that it resulted in the loss of 79,503 litres taking into consideration the fact that the said storage tanks held only a total of 80,000 litres. He swore that the plaintiff had not placed before the court any evidence of a threat to terminate the dealers licence agreement. He further swore that it was the plaintiff who was in fact in breach of the said agreement in that he had failed to order any petroleum products from the defendant from 28th August 2008. The defendant was of the view that the plaintiff was, by filing the present suit, attempting to renegotiate the terms of the dealers agreement so that the licence could be extended beyond the period contemplated by the said agreement. It was the defendant's case that the plaintiff had totally failed to satisfy the conditions for the grant of interlocutory injunction pending the hearing of the main suit. The defendant was of the view that if indeed it was established that the plaintiff suffered any loss, then the same would adequately be compensated by an award of damages.

At the hearing of the application, counsel for the parties agreed to file written submissions prior to highlighting them in court. I have carefully considered the said submissions, both oral and written. I have also considered the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff established a case to enable this court grant him the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled. In **Michael Gitau –vs- Pamela Salvage & 4 others CA Civil Appeal No. 244 of 1999 (Nairobi) (unreported)**, the Court of Appeal held at page 7 of its judgment as hereunder:

*“The principles which guide the court in dealing with such an application are well settled and are clearly spelt out in the often cited case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A. 358**. The applicant must first show he has a *prima facie* case with the probability of success upon trial. Secondly, he must show that in the event that he is refused an injunction and he were eventually to succeed that damages would not adequately compensate him for any loss which he would have suffered. Thirdly, that if the court is in doubt on either of the two principles above then it should consider the application on the balance of convenience.”*

Certain facts are not in dispute in this case. As stated earlier in this ruling, the plaintiff and the defendant entered into a dealer licence agreement which licence entitled the plaintiff to operate a petroleum retail business in the premises comprising the petrol station. The defendant constructed the said petrol station at its own cost. The plaintiff, as a condition of operating the said petrol station, had to purchase petroleum products exclusively from the defendant. The plaintiff was required to purchase a certain minimum amount of petroleum products from the defendant within a specified period. It appears that the relationship between the plaintiff and the defendant soured in 2007 when the plaintiff made claims that he was losing his profit margins due to the leakage in the underground tanks. The dealer licence agreement provided that the defendant would maintain the equipment. The plaintiff duly notified the defendant of the problem.

According to the plaintiff, the defendant did not address his complaints. On the other hand, the

defendant insisted that it had addressed the all the complaints raised by the plaintiff to the satisfaction of the plaintiff. I looked at the works/service orders prepared by Messrs Rand Engineering Works and Services Limited which were annexed to the affidavit of Alfonse Ogulla. It was evident that on each occasion that the plaintiff complained about leakage in the underground tanks and the suction pumps, the defendant promptly addressed the problem. On each occasion, the plaintiff signed the said works/service order confirming that he was satisfied with the work that had been done. It is also apparent that, when the plaintiff complained about loss of petroleum products in the underground tanks, the defendant undertook extensive tests which confirmed the loss from the said tanks as minimal and not to the extent as alleged by the plaintiff. It was clear from the said affidavit evidence that the plaintiff appeared to have been fixated by the issue regarding compensation allegedly as a result of the loss of petroleum products to such an extent that he was literally prepared to jeopardize his business relationship with the defendant.

Whereas the plaintiff will be expected to prove his claim of loss of over 79,000 litres of petroleum products, such loss and plea for compensation cannot form a basis for the grant of injunction. Indeed by quantifying the amount that he anticipates to be paid as compensation in the event that he would be successful in his claim, the plaintiff established that he would not suffer any irreparable loss that is unlikely to be compensated by an award of damages. The fact that the plaintiff has a pending claim for compensation against the defendant, is not sufficient ground to entitle this court to grant the injunction sought. Whether the plaintiff is paid compensation or not, has no bearing whatsoever on the legal obligations imposed on both the plaintiff and defendant by the dealer licence agreement.

The plaintiff argued that the defendant intended to terminate the dealer licence agreement without following the procedure laid down in the dealer licence agreement. **Clauses 20, 21, 22 and 23** of the agreement sets out the circumstances under which the agreement may be terminated at the instance of either party. One of the grounds upon which the agreement may be terminated is on expiration of the term of the agreement (*See Clause 21.1*). The agreement could also be terminated by either party giving sixty (60) days notice (*See Clause 22*). The agreement between the plaintiff and the defendant expires on 1st October 2008. Although the plaintiff alleged that the defendant had threatened to terminate the said agreement, it was clear from the evident placed before court that the defendant had not formally issued a such threat to terminate the agreement. The plaintiff failed to annex any document to back up his claim that the defendant has the intention to terminate the agreement in breach of the terms of agreement. It was evident to this court that due to the soured business relationship between the plaintiff and the defendant, it is clear that the plaintiff is aware that there is a possibility that the defendant may exercise its option to terminate the agreement upon expiration of its term on 1st October 2008.

Can this issue an injunction to restrain the defendant from exercising its option as provided in the dealer licence agreement? I do not think so. This court cannot issue orders whose effect would be to rearrange or to renegotiate a business relationship that had been agreed between two consenting parties. This court's concern is limited to determining whether there has been breach of the agreement which requires enforcement by the court especially putting into consideration that such an agreement was entered freely between the parties. In the present application, I hold that the plaintiff failed to establish any breach of the dealer licence agreement on the part of the defendant. It appeared that the plaintiff is appealing to the sympathy of this court to enable him retain possession of the service station after the expiration of the term of the dealer's licence. This court lacks jurisdiction to impose on the defendant a dealer whom it would have no option but to deal with on a day to day basis. I hold that the plaintiff failed to establish a prima facie case to enable this court grant him the interlocutory injunction sought. In any event, even if this court were to find that the plaintiff breached the terms of the contract, I am of the view that damages would be an adequate remedy. I have said enough. The application lacks merit and is hereby dismissed with costs to the defendant.

DATED at NAIROBI this 29th day of SEPTEMBER, 2008.

L. KIMARU

JUDGE