



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

Civil Case 5366 of 1993

EVANSON NJIRI WANJIHIA.....PLAINTIFF

VERSUS

CALTEX OIL (K) LIMITED.....DEFENDANT

JUDGMENT

On or about 29th October 1991 following an application for Petrol Station Dealership the Plaintiff was appointed as a dealer for the Defendant's Petrol Station on Waiyaki Way Nairobi. The letter of offer stated as follows:-

EVANSON NJIRI WANJIHIA

P.O. BOX 50151

NAIROBI.

Dear Sir,

RE: PETROL STATION SERVICE DEALERSHIP

This is to inform you that further to our recent application and subsequent interviews for the above, we have decided to offer you the Dealership for our station on Waiyaki Way opposite the Army Camp and next to ABC Shopping Centre. If the offer is acceptable to you, please sign the copy of this letter in the spaces provided and return the same to us. Please also let us have the following to enable us prepare the Agreement Preparations –

- (a) The name that you would like to call the station and post office address
- (b) A Bankers Cheque for Shs.1,000,000/=.

We look forward to hearing from you.

Yours truly

CALTEX OIL (K) LTD

C.L. DOGLAS – MANAGING DIRECTOR

For this appointment the Plaintiff was required to meet the above named conditions in order to qualify for the Dealership. The Plaintiff immediately sought and secured a loan of Shs.1,000,000/= as required by the Defendant. He also supplied the name of ENWA as the name he chose for Petrol Station. After meeting the above conditions he was also required to run the station personally. This forced him to resign from his post as a Senior Manager with a private corporation to take over the management of the petrol station which was officially handed over to him on or about the 30th October 1991.

The Plaintiff had to put in more resources to put the station in a running state. The deposit of Shs.1,000,000/= he had paid to the Defendant was for the supply of fuel and he was on his own to meet the expenses for oils, furniture, payment of salaries for staff, stationary and all that appertains to the running of the petrol station. Those requirements made the Plaintiff to plough all his savings to the business. Two months after taking over the running of the petrol station, a major road construction on Waiyaki Way along Nairobi – Nakuru Road commenced. This was in January 1992.

The Defendant who was to put the Plaintiff on a contractual target waived that condition due to the virtual closure of the Plaintiff's business while the road was under construction.

By letter dated 16th December 1992, the Defendant noting that the road construction had been completed and the road opened then placed the Plaintiff on contractual targets and also placed him on 6 months probation.

During the probation period he was required to achieve a monthly minimum sales target of 177,000 litres total products broken down as follows:-

Premium Petrol	60,000 litres
Regular Petrol	30,000 litres
Diesel Gasoil	70,000 litres
Kerosine	15,000 litres
Lubricants	2,000 litres

He was also required to maintain adequate stocks of all petroleum products at accepted levels (i.e. three days stock on fuel). He was also required to maintain a high standard of cleanliness both on the forecourt, pump attendants and station compound. A high standard of service was required to be offered to the esteemed customers without any deviations.

Further the Plaintiff was required to provide a bank guarantee of Shs.400,000/= which he did provide.

On 3rd August 1993 the Defendant wrote the Plaintiff informing him about the Defendant's plans to reconstruct the petrol station and the request to hand over the petrol station for that purpose. The letter read as follows:

MR. EVANSON W. NJIRI

ENWA SERVICE STATION

P.O. BOX 50151

NAIROBI.

Dear Sir,

RE: RECONSTRUCTION OF ENWA PETROL SERVICE STATION

We write to inform you that the applications for reconstruction of your service station were approved and consequently tenders have already been awarded . The constructor is expected to move on site in the next two weeks or so effective today 3rd August 1993.

Taking into consideration that the station is going to be rebuilt afresh with all the facilities changed or provided new, we wish to advise you to make arrangements to temporarily wind up your operations in the next two weeks and hand over the site to Caltex and the contractor to embark on the major works. The reconstruction may take up to 4 months due to the scope of works to be done before completion. However it may take shorter or longer period. It is our hope that you will appreciate our commitment to rebuilt the site to give it a new and fresh look in line with our ongoing '**Project Bright Star**'. Please feel free to consult our Retail Representative Mr. Khaemba and our Project Engineer Mr. Sultani on any issues that you may deem necessary.

Yours truly

CALTEX OIL (KENYA) LIMITED

C.L. DOGLAS MANAGING DIRECTOR

By M.J. O'REILLY – MANAGER

RETAIL MARKETING & OPERATIONS.

On 10th August 1993 the Plaintiff received yet another letter which read as follows:-

M/S EVANSON W. NJIRI

ENWA SERVICE STATION

P.O. BOX 50151

NAIROBI.

Dear Sir,

RE: REVAMP OF YOUR STATION

Further to our letter dated 3rd August 1993 and the discussions you had with Mr. Sultani and J. Khaemba on 6th August 1993 we write to advise you that the contractor will be moving on site from 17th August 1993. We shall expect you to have cleared your stocks on the 17th August 1993 paving way for the works to start without delay.

Yours very truly,

CALTEX OIL(KENYA) LIMITED

C.L. DOGLAS – MANAGING DIRECTOR

By M.J. O'REILLY – MANAGER

RETAIL MARKETING & OPERATIONS

On 25th October 1993 the Plaintiff received surprisingly terminating his dealership a shocker. The letter read:-

MR. EVANSON N. WANJIHIA

P.O. BOX 50151

NAIROBI.

Dear Sir,

**RE: TERMINATION OF OPERATORS LICENCE FOR ENWA SERVICE STATION –
WAIYAKI WAY, NAIROBI**

Reference is made to our letter of December 16th 1992 granting you licence to operate the company's service station along Waiyaki Way, Westlands Nairobi called ENWA SERVICE STATION.

The said licence expired on 23rd July 1993 and the company does not intend to extend the same for any further period. We believe that you do not have any personal goods lying on or about the service station since you collected them all prior to the demolition of the service station for reconstruction.

This notice reconstitutes one Calendar Months' Notice. Please sign the extra copy of this letter enclosed herewith and return it to us as an acknowledgement of receipt by 29th October 1993.

Yours very truly

CALTEX OIL (KENYA) LIMITED

C.L. DOUGLAS – MANAGING DIRECTOR

By M.J. O'REILLY – MANAGER

RETAIL MARKETING & OPERATIONS

This is what triggered this suit.

The Plaintiff in his evidence told the court that he resigned from his lucrative job after he had been offered the dealership to start business. He had ploughed all his savings into the business. But before he started operations the road construction along Waiyaki Highway was commenced. When the road construction was completed, before he could start operations, the Defendant wrote him requesting him to surrender the service station to them for revamping and give it a new and fresh look and make it more lucrative. The Defendant gave the Plaintiff two weeks to make arrangement to hand over the service station to contractor to start the reconstruction work. While the reconstruction was going on the Plaintiff being anxious to see that the reconstruction work was completed in time to enable him move in and start business spent most of his time at the site.

But a few months later before even he moved in, he was served with a letter of termination of the contract. This is really a clear breach of the contract and the Defendant had used a trick to have the Plaintiff out so that they could lease the service station to another dealer and which they did. The Plaintiff is entitled to damages for the breach of the contract. The Defendant did not offer any evidence although it had instructed a lawyer who attended the proceedings throughout.

What I have to do now is the assessment of damages for the breach of the contract. The law must intervene in a situation like this where Defendants abandon contracts so casually. The law must prevent the gain by the defaulting promisor at the expense of the promisee hence to prevent unjust enrichment by

disgorging the value he received from the breach. On the other hand the law may compel the Defendant to render the promised performance to the Plaintiff.

But this suit having been in court for the last 15 years, and the service station having been leased to another person who has been operating it for that period, the Plaintiff abandoned the prayer for specific performance and rightly so.

The purpose of the law is to put the Plaintiff in as good a position as he would have been in had the Defendant kept his contract. The Plaintiff having abandoned the prayer for specific performance the only prayer now left is the assessment of damages for the breach of the contract.

In *Adais vs. Gramophone Co. Ltd* 1909 AC 408 at p.496 Lord Atkin said:

“In many other cases of breach of contract there may be circumstances of malice fraud, defamation, violence which would sustain an action for tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress, he may no doubt recover exemplary damages, or what is sometime vindictive damages, but if he should seek to redress the form exaction for breach of contract, he let in all the consequences of that form of an action.

Thorpe vs. Thorpe one of those consequences I think is this, that he is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept and no more.”

In *V.R. Chande and Others vs. E.A. Airways Corporation* [1964] EA 78 at pp 90-81 Mayer J held:

“The general rule as to quantum of damages to be awarded for breach of contract was stated by ALDERSON, B in *Hadley Basendale* [1854] 9 Ex 341 (156 ER 145 at p.151) in the following terms.

Now we think a proper rule in such a case as the present in this; 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 a breach of contract itself or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contracts the probable result of the breach of it.”

The Plaintiff called one witness (PW2) who told the court that he is an accountant by profession and registered with the Institute of Certified Public Accountants. At the request of the Plaintiff he audited the books of ENWA CALTEX PETROL STATION for the year 1992-1993 and compiled a reported dated 31st December 1993. The Plaintiff's net profit of Ksh.93,512/= per month and in his view that was the true state of affairs of the enterprise. The report was produced as (Ex.8). This translates to a figure of Shs.15,055,432/= in a period of 161 months.

The Plaintiff and the Defendant entered into a contract for the dealership of ENWa Caltex Service Station and the Plaintiff had successfully attended the interview and requested to resign from his lucrative job. The Plaintiff was required to deposit Shs.1,000,000/= which he obtained through a loan and provide a bank guarantee of Shs.400,000/= before he was handed over the business. There was a road construction along Nairobi/Nakuru Highway which interrupted the business.

When the road construction was over, he operated the service station for only 8 months before the Defendant asked him to surrender the service station to the Defendant for revamping the station as the business looked good. He was given two weeks to make arrangements to hand over the service station and he was promised that the reconstruction would take upto 4 months due to the scope of work to be done. He stopped his workers at the station but who kept on drawing their monthly salaries. Immediately after completion, the Defendant gave the dealership to another person purporting to terminate the Plaintiff's dealership. This forced the Plaintiff to come to court. While the case was pending, there were negotiations in which the Defendant offered the Plaintiff another petrol station called LIKONI CALTEX

PETROL STATION. But strangely enough he was asked to pay another deposit of Shs.8,000,000/= while the Defendant retained the earlier deposit of Sh.1,000,000/= he had paid for the ENWA Service Station and unfortunately this never went through.

It is evident that the Defendant used trickery to remove the Plaintiff from the suit premises and in breach of the contract. This is a fit case in which the court could order specific performance as prayed by the Plaintiff but as the Plaintiff has elected to abandon that prayer and rightly so on the ground that immediately the reconstruction of the service station was completed the Defendant gave the dealership to another person who has been operating the service station for the last 15 years when this case was in court, specific performance was not possible.

As I have stated above the Plaintiff has proved that the Defendant was in breach of the contract and he is entitled to damages for the whole duration he has been waiting which was assessed at Shs.15,055,423/=.

Accordingly there shall be judgment for the Plaintiff and against the Defendant for Sh.15,055,423/= with costs and interest.

Dated and delivered at Nairobi this 31st day of May 2007.

J.L.A. OSIEMO

JUDGE