



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**Civil Suit 34 of 2007**

**OILNET PETROLEUM LIMITED .....PLAINTIFF**

**VERSUS**

**SHELL & BP (MALINDI) KENYA LIMITED ....DEFENDANT**

**RULING**

The applicant herein, M/S Oilnet Petroleum Ltd, sought for a mandatory order of injunction seeking for the reinstatement of pumps and machines at Shell Radiant Service Station Nakuru. The application is premised on the grounds that the applicant entered into a license agreement with the respondent to run the station sometime in October, 2006. The applicant signed the agreement and invested Kshs.2.2 million into the business. On the 9<sup>th</sup> February 2007 the respondent wrote a letter to the applicant terminating the dealership and the respondent proceeded to lock up the station and took away the machines and pumps without prior notice.

It was the applicant's contention that said closure was irregular and actuated by malice and unless the respondent is restrained by an order of injunction the applicant is bound to suffer irreparable loss.

This application was opposed by the respondent on the grounds that the applicant has failed to establish a prima facie case with a probability of a success to warrant this court grant the orders sought. The respondent took over the suit premises which is the subject matter of this suit, on the 10<sup>th</sup> of February, 2007. This was as a result of a breach of the license agreement between the applicant and the respondent.

Counsel for the respondent submitted that, if the applicant is seeking for a mandatory order of injunction it is incumbent upon them to establish the special circumstances in their favor which would warrant the granting of the order in mandatory terms.

Counsel contended that the applicant withheld material information from this court as the plaintiff was given the license agreement for signature in October, 2006 but never returned it to the respondent despite several reminders. The applicant has also not annexed a copy of the said license agreement to enable this court establish the terms and conditions of the said contract which he claims was breached by the respondent. It is the plaintiff who should prove its own case and not the respondent, and in this regard, counsel for the respondent therefore, contended that the applicant has not even established whether it has any proprietary interest over the business premises.

The respondent relied on the replying affidavit by **Jonathana Kinisu**, the Area Business Manager of the respondent. The affidavit shows that, the applicant was in breach of terms and conditions of the license agreement for selling products from other sources other than those from the respondent. Following that breach the applicant was duly informed by a letter dated 9<sup>th</sup> February, 2007. On the 10<sup>th</sup> February, 2007, the respondent took over possession of the their premises. The applicant was called to take over whatever possessions it had in the premises, but failed to show up on the appointed time. The respondent denied

that the pumps and machinery belonged to the applicant. Moreover if the applicant has any claim against the respondent the same can be adequately compensated by way of damages.

I have considered the rival submissions and all the material that was presented in this application. It is obvious this is an application for a mandatory order of injunction. There is no dispute that the respondent took possession of the business premises on the 10<sup>th</sup> of February, 2007 from the applicant who is no longer in active possession.

The test to be applied on whether to grant a mandatory injunction is correctly stated *in Vol.24 Halbury's Laws of England 4th Edition para 948* which reads:

***“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ..... a mandatory injunction will be granted on an interlocutory application.”***

Also in **Locabail International Finance Ltd. V Agroexport and others [1986] ALL ER 901 at pg.901** it was stated:

***“A mandatory injunction sought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed as a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”***

The above principles have been approved by the Court of Appeal in the case of; **Kenya Breweries Limited & Another V Washington Okeyo Civil Appeal No.332 of 2000 (unreported)**.

Has the applicant in this case established ownership of the suit premises for which he is seeking a mandatory order of injunction, or any special circumstances that can warrant the court to grant the orders in mandatory term. The answer to the above is in the negative. No material by way of documentary evidence was availed to this court to enable the court appreciate the nature of the **breache[s]** of contract complained about by the applicant. When this application was first brought to court **ex-parte** under certificate of urgency, this court declined to grant the interim orders for reasons that no copy of the license agreement was exhibited to enable the court appreciate the terms of the contract.

This court can only go by what is in the respondent's affidavit that shows a copy of the license agreement that was sent to the applicant for signature as per the draft copy exhibited by the respondent. This therefore, further lends credence to the submission by the respondent that the applicant has withheld material information to this court. The order sought being an equitable order, the applicant is under an obligation to make full disclosure of all the relevant materials. In the circumstances I find the applicant application lacks merit, the applicant has not established a prima-facie case with a probability of success.

On the issue of the applicant's suffering irreparable loss, if this order is not granted I find that its claim is that his properties worth kshs.2.2 million will be lost. This is a claim which is quantifiable and which can be compensated by way of damages if proved after the hearing.

In conclusion, I dismiss the applicant's application dated 12<sup>th</sup> February, 2007 with costs to the respondent.

It is so ordered

**Ruling read and signed on 4<sup>th</sup> day of May, 2007.**

**M. KOOME**

**JUDGE**