REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Appeal 81 of 2005

BARRACK OPWAPO .....APPELLANT

-VERSUS-

KENYA SHELL LTD. .....1ST RESPONDENT

WINAM PETROLEUM PRODUCTS LTD .....2ND RESPONDENT

JUDGMENT

Coram J. W. Mwera, Judge,

Kopot for Appellant,

Okeyo Respondent,

Raymond CC.

On 23.6.2005, the learned Senior Resident Magistrate delivered a judgment in KSM CMCC 1125/2003, which the appellant/plaintiff had filed against the respondents/defendants, dismissing it - hence this appeal.

The prayers in the plaint before the learned trial magistrate were for the return of a certain pump, tank and 800 litres of petroleum products which, it was alleged, the respondents took from the appellant's premises at a place called Usenge Market. The plaint had in the pertment parts **inter alia,** that:

"**5.** Pursuant to the said wholesale and retailer arrangement between the plaintiff and the defendant, the defendant gave the plaintiff one set of fuel dispensing pump to enable him to draw and retail fuel for customers from the plaintiff's underground tanks. **The defendants were yet to install the said tank and pump upon the plaintiff's premises**" (*underlining supplied, see below)*

And in the following paragraph 7, the plaintiff pleaded in part:

"7. On ------ 25th July 2000, the 2nd defendant's marketing manager (accompanied with another person) ---- went to the plaintiff's premises at Usenge market and instead unearthed and took away the plaintiff's underground storage tank which had 8000 litres of PMs petroleum and also dismantled the plaintiff's --- dispensing pump (on instructions of the 1st defendant)."

That the defendants took away the defendants' tank and pump, leaving their own tank and pump of a smaller capacity lying on the plaintiff's premises.

And because the plaintiff claimed that he suffered loss and damage following the defendant's acts, it is prudent at this stage and gleaning from the pleadings, above to condense what the appellant placed before the lower court thus: He had his own pump and large tank in the ground at his filling station at Usenge even before the deal to sell the 1st defendant's goods was entered into. That after that deal, the 1st defendant supplied the appellant with a tank and pump (of a smaller capacity). This equipment was not installed by the time the acts complained of took place on 25.7.2000. That the trading deal fell through and the defendants proceeded to the appellant's place, dug up and took away his own large tank with 8000 litres of fuel plus a pump, leaving their own small capacity tank and pump there.

In their defence, the defendants said that prior to 25/7/2000, they had issued a notice to the appellant (probably that he had breached the terms of their agreement and the equipment would be taken away). This related to paragraph 5 (plaint above). Regarding paragraph 7 of the plaint, the defendants pleaded:

"7. The contents of paragraph 7 of the plaint in particular that the storage tank contained 8000 litres of product are denied -------."

When the trial opened before the lower court, the appellant gave evidence (PW1) while the defendants called four (4) witnesses. Submissions were heard and the learned trial magistrate adjourned the hearing. She followed it with the judgment of 23.6.2005. Mr. Kopot argued the two - ground appeal, split in several sub-grounds while, Mr. Okeyo opposed it and also argued the notice of cross - appeal which in essence was to the effect that the learned trial magistrate ought to, but did not award costs to the successful defendants after the suit was dismissed.

Mr. Kopot faulted the learned trial magistrate on the points that, she found that the respondents took their own tank and pump from the appellant's premises. That he had not proved that the tank that was taken away contained 8000 litres of petroleum, when the appellant had proved that by tendering in evidence stock and purchases receipts. Further that the learned trial magistrate was wrong to find that a tank was taken from where it lay above the ground but not dug up from the ground. That the tank belonged to the appellant and he had proved that by tendering purchase receipts, yet the lower court found that he had not proved ownership. And that the appellant was competent to testify on the fact of digging up and taking away the tank full of 8000 litres of petrol.

As to ground two, the court was told that the learned trial magistrate ought to have found for the appellant and awarded damages for conversion. That the lower court ought to have given due attention to the appellant's evidence and decided the case accordingly by granting the reliefs sought - the return of the pump and tank together with the 8000 litres of fuel or pay the appellant Kshs 840,000/= - the value of all those; damages for breach of contract and for conversion; costs and interest.

The appellant who was not at his premises the day the tank and pump were taken away on 25.7.2000, told the lower court that indeed the defendants took away those things. He did not tell the court whether they dug up the tank full of 8000 litres of fuel, dismantled the pump and took them away or how that was done. If that had been done or it is shown so, then it was the appellant's property which the respondents carted away. But he maintained that the tank taken away had fuel worth Kshs 400,000/=. However, the appellant laid before the learned trial magistrate photographs showing holes in the ground where his tank was allegedly removed from. He did not call any of his staff who were on the premises on 25/7/2000 to tell the court whether actually the respondents unearthed his tank and took it away when full of petrol. But that his wife told him so. She did not testify.

On the defence side, Silvanus Nyawaga (DW1), a contractor supplying to and installing tanks for 1st defendant's customers though the 2nd respondent, said that he knew the appellant and once delivered a tank to his premises. He did so but did not install it. This was in 2000. Few months later, he was instructed by the 2nd respondent to retrieve that tank. He was not present on the day of the retrieval but he sent his men to do so. He sent them with a 3 tonne canter plus a chain block equipment to lift the tank. This witness told the court that if the tank being taken away contained 8000 litres of fuel, then an 8 tonne lorry could have been required - not a 3 tonne one like the canter he sent. And his people took 2 hours at the appellant's premises at Usenge to accomplish the carrying away of the tank. According to DW1, a pump was not taken.

Samuel Sande (DW2) went to Usenge twice in 2000 to get the petrol tank in issue. He succeeded on the second trip. He used a canter 3.3. Number K TV 149. It was a 3 - tonne tanker. On the first trip, the station owner declined to allow DW2 and his crew to take the tank. On the second day the proprietor (or should it be the person appearing in that capacity) allowed them to take the tank. It had been removed from the ground and it took the gang 1 ½ hrs to lift and carry it away. It weighed 1 ½ tones. It had no fuel. If it was heavier, DW2 would require a fork lift hired to lift the tank. As the tank was being lifted away, somebody was taking photographs - quite likely those the appellant produced in the lower court showing holes in the ground.

The other relevant evidence came from Moses Marimba (DW4) who told the lower court that he used to work for the 1st respondent Kenya Shell. He coordinated that company's petroleum sales work through the 2nd respondent. He told the lower court that the appellant's (their customer) business was performing below average and so the equipment supplied to him (tank and pump) would be repossessed. That due notices were sent to him, the last one on 25.7.2000 when the equipment given to the appellant was taken back.

"It is not true that we took the plaintiff's underground tank. What was taken was disused tank lying idle at (sic) the premises. It is also not true that we took 8000 litres of fuel. We cannot remove equipment when there is product in it. 5000 litres is equivalent to 10 tonnes. One would need a crane to remove it because of the weight involved ---- The contractor does not own a crane".

This court then went over the lower court judgment. It began, albeit in a condensed manner, much no longer than this court has set out, by laying out the appellants claim and what he said basically. That after trading for some time, the appellant was surprised when these respondents had come and take away his tank with 8000 litres of fuel. She then moved onto the defence evidence as it has been done above. The learned trial magistrate found that the litigants had a contractual agreement in their dealings - on conditions. That the appellant did not prove that the tank in question had been installed. Instead, he pleaded as he did in paragraph 5 (above, underlined). She did not accept as of probative value the appellant's evidence by producing photographs of the holes allegedly left when the tank was dug up. He was not present at time of removal of the tank and he did not bring those who were present to say so. This court similarly opined.

On the contents - 8000 litres of fuel, the attempt at proof with receipts could not be conclusive. This court agrees. There is the respondents' evidence (see DW2 Sande) that the tank he took was empty and on the ground. Both DW2 and DW4 Marimba say that 8000 litres of fuel are too heavy a load to lift and carry on a 3 tonne - canter. The lower court did not accept the assumptions presented by the appellant, like the one immediately recounted, and this court agrees. He did not prove his case. And so the suit was lost. On account of the 2 grounds of appeal and the submissions heard the appeal fails.

As for the cross - appeal, it must succeed. The respondents were dragged to court on a made - up story. It was not proved; it failed. No conduct on the part of the respondents would disentitle them from their costs. If the learned trial magistrate was minded to deny them that in exercise of her discretion (See Section 27 CPA) she was bound to give reasons for so denying them. She dismissed the cause with "no orders" as to costs. She did not assign any reason for that. She exercised her discretion in error *(see* KISKA LTD -VS- DE ENGELS [1969] EA 6). Accordingly, that order on costs is set aside and

substituted with one, giving costs to the respondents here and in the court below.

Judgment accordingly.

Delivered on 30/5/2006.

J. W. MWERA

JUDGE

JM/hao