



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

Civil Case 998 of 2002

MOBIL OIL KENYA LIMITEDPLAINTIFF

VERSUS

JOHN KHAMISI SHABAAN.....DEFENDANT

JUDGEMENT

The Plaintiff claims from the Defendant a sum of Kshs.3,161,610.60 in respect of which the Plaintiff's witness gave evidence for products supplied. In his Amended Defence, the Defendant by way of general denial denied requesting any products and being supplied with the same. However, specifically the Defendant seeks to set off monies which he claims are due to him from the Plaintiff. The particulars are as follows:-

- a) **Credit note number CN000001870 dated 27/01/2000 for Kshs.108,500/=**
- b) **Refund for 2 boreholes sunk by the defendant at the stations he was operating at a cost of Kshs.886,500/=**
- c) **Refund of rent amounting to Kshs.1,500,000/=.**
- d) **Deduction from the amount of rent claimed for the months that the defendant was not operating the station between January 1999 and March 2000 (3 months each at Kshs 70,000/=) amounting to Kshs.210,000/=.**
- e) **Deduction of disputed amount of Kshs 128,522.85 for goods that were never supplied.**

In so far as the sum claimed by the Plaintiff is concerned, I am satisfied that this is justly due on the evidence of the Plaintiff's witness. I will, however, deal with the sums sought to be set off by the Defendant.

The Defendant had an agreement with the Plaintiff to run a petrol station known as Mobil Old Station Road Service Station formerly owned by Esso (K) Limited.

The Plaintiff terminated the Defendant's licence to run the petrol station and as a result the dispute

between them arose as to how much money was due to the Plaintiff.

The Defendant did, however, prior to the termination of the agreement sign what was called an Old Station Final Reconciliation dated the 25.8.99 in which he admitted owing Kshs.2,109,000/= and promising to pay this sum by installments none of which were paid.

Two items were excepted from this reconciliation one of which is included as item (e) in the set off set out above and the other relates to a borehole, mentioned later.

The amount of Kshs.108,500/= referred to in item (a) for which a credit note was given was in fact credited to the Defendant's account and he cannot have two credits for the same amount.

The Defendant gave evidence that due to lack of water he dug two boreholes one at the service station leased to him by the Plaintiff and another formerly owned by Esso at another place in Mombasa. There was an agreement with Esso in respect of the borehole called "Letter of Disclaimer" which was produced. This document is dated the 22.1.1995 and signed by the Defendant. The Disclaimer states as follows:-

"in the event of termination of the operator's agreement either by effluxion of time and or otherwise as provided under the agreement, the right to operate the borehole will cease and I shall yield vacant possession to Esso (K) Limited unconditionally and that upon such termination Esso (K) Limited will not be liable to compensate us for any investment associated and/or related to setting up of the borehole and I shall at my own cost renovate and make such modifications as may be necessary to restore the building to its original state to the satisfaction of Esso Kenya Limited."

This disclaimer applied to the subsequent operations agreement with the Plaintiff.

Further the Defendant produced no agreement whereby the Plaintiff agreed to reimburse the Defendant the costs of the borehole and in the absence of any such agreement the costs of the borehole cannot be recovered from the Plaintiff. I accept that the Defendant paid for the borehole, which has now reverted to the Plaintiff, and that he is aggrieved at not being compensated but no legal basis for compensation has been shown.

The operators agreement which was extant when the Defendant left the service station provided for rental. This rental was payable up to the date of termination of the agreement and there was no justification shown as to why the Defendant should be given a refund of rent.

Again as the service station was not handed over to the Plaintiff until 7th April, 2000, a fact which I find proved, the Defendant is not entitled to the deduction of Kshs.210,000/=.

With regard to the sum of Kshs.128,522.85 for goods which the Defendant claimed to have supplied to the Plaintiff, the Defendant adduced no evidence in support of this contention and I therefore reject it.

In the result the sums claimed by the Defendant by way of set off have not been proved and I, therefore, give judgement to the Plaintiff for the sum claimed plus interest thereon at court rates from the date of the filing of this suit and costs of the suit.

Dated and delivered at Nairobi this 25th day of May, 2006.

P. J. RANSLEY

JUDGE