



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

**Civil Case 942 of 2005**

**BENARD GAITHUMA NJUGUNA.....**  
**.....PLAINTIFF**

**VERSUS**

**B.P. KENYA LTD.....**  
**.....DEFENDANT**

**RULING**

The defendant, a limited liability company owns Karen Service Station. The plaintiff entered into a Dealer Licence Agreement on 21<sup>st</sup> April 2004 wherein the plaintiff was inter alia granted a licence to enter upon and operate a petrol station and filling station and the Allied Retailing Businesses and facilities. On or about January 2004 the plaintiff began experiencing huge losses due to product losses which led to cashflow problems which led to the plaintiff defaulting in rent payment.

On or about 26<sup>th</sup> July 2005 the Defendant threatened to move in and take over the Karen Service Station. The plaintiff filed this suit against the defendant seeking (1) A permanent order of injunction to restrain the defendant either by itself, jointly or any of them or by its agents, servants or employees and accomplices from entering, taking over repossessing, closing down or interfering in any manner that business known as B.P. Karen Service Station on Plot No.23377 Karen Nairobi that consists of a petrol station restaurant. Barber shop and a mini-market. (2) That a permanent order do issue restraining the Defendant from doing the following acts or any of them, that is to say interfere with the plaintiff's running an operation or otherwise interfering with all that business known as B.P. Karen Petrol Station that consists of Petrol Station, Restaurant Barber Shop and Mini Supermarket.

- (3) A declaration that the Defendant is liable to compensate the plaintiff for all the product losses which he has incurred due to the Defendants inefficiency.
- (4) General damages for trespass and harassment and
- (5) Costs of the suit.

On the 1<sup>st</sup> August 2005 the parties signed a Memorandum of Understanding where it was agreed as follows:

- (1) The value of the plaintiff's stock at the service station exclusive of the dry stock in the shop petroleum fuels and lubricants but inclusive of working capital is Kshs. 1,600,000/=.

(2) The defendant agrees to give credit to the plaintiff for the said sum of Kshs.1,600,000/= which will be offset against the sum due from the plaintiff to the defendant.

(3) The plaintiff and the defendant hereby agree to immediately and not later than 2<sup>nd</sup> August 2005 proceed to the service station to consent a stock take to ascertain:

(a) The quantity and value of all dry stock in the shop and lubricants at the service station, which shall be deducted from and off set against the sums owned to the defendant by the plaintiff.

(b)The quantity and value of all the petroleum fuels in the tanks at the service station which shall be off set in accordance with clause 6 below.

4. The plaintiff and the defendant will discuss the valuation report produced by their respective valuers in accordance with the consent order to agree on the value to be affixed to the developments made by the plaintiff at the service station. In the event of their being unable to reach an agreement on the value by the 3<sup>rd</sup> day of August 2005, their respective valuers do appoint a third valuer in accordance with the consent order.

5. The value arrived at in accordance with Clause 4 above be off set against sum due to the defendant from the plaintiff.

6. The sum due to the defendant from the plaintiff on account of petroleum products supplied to the plaintiff at B.P. Karen Service Station is agreed at Kshs.5,072,322/88 a further sum of Kshs.2,402,430/- the later being the value of product supplied to the station on 27<sup>th</sup> July 2005. The plaintiff shall issue to the defendant a banker's cheque for the latter sum, less the sum as shall be arrived at 3(b) above by the hour of 1700 on the 3<sup>rd</sup> August 2005. The plaintiff is further indebted to the defendant in the sum of Shs.1,314,870/93 in respect of suppliers made to Baraka Service Station. Upon the plaintiff and the defendant taking stock as set out in paragraph 3 above the plaintiff do immediately deliver possession of the station at Karen to the defendant.

For the avoidance of doubt the parties have agreed that the following steps are to be taken to finalize the suit:

(a) The valuation of the developments erected by the plaintiff at the service station is to be completed in the manner set out herein above.

(b) The sum due to the defendant by the plaintiff is agreed at Kshs. 8,789,623/81 out of which the sum of Shs.2,402,420/= shall be off set and paid in accordance with Clause 6 above and the remainder in accordance with Clauses 1, 3(a) and 5 above.

(c) The plaintiff is to give vacant possession of the service station in accordance with Clause 7 above.

Each party to instruct its advocate to have appropriate order recorded in the suit to give effect to this agreement and thereafter to have the suit marked as settled with no order as to costs. The agreement was signed by both parties.

On 10<sup>th</sup> June 2006 the defendant brought this Notice of Motion expressed to be brought under Order XXIV Rule 6 of the Civil Procedure Rules for an order That Judgment be entered for the defendant in terms of the Memorandum of Understanding signed by parties on 1<sup>st</sup> August 2005 as hereunder:-

(1) The plaintiff acknowledges being indebted to the defendant in the sum of Kshs.7,125,495.90 (hereinafter the said Sum).

(2) Judgment be and is hereby entered in favour of the defendant against the plaintiff for the said sum.

(3) Credit be given to the plaintiff for the following sums:

(a) Kshs.1,600,000/= being the value of the plaintiff's stock at the service station known as Karen Service Station (being the subject matter of the suit) exclusive of dry stock in the shop, petroleum fuels and lubricants but inclusive of working capital.

(b) The sum of Kshs.1,531,597/72 being the value of all dry stock in the shop at the service station, petroleum fuels LPG and Lubricants.

(c) The sum of Kshs.2,400,000/= being the agreed value of the developments made by the plaintiff at the service station.

4. The plaintiff do pay the sum of Kshs.2,269,899.81 in part satisfaction of the said sum by 5.00 p.m. on 3<sup>rd</sup> August 2005 by way of a bank cheque. The sum has since been paid.

5. The balance of the said sum being Kshs.855,596.09 be paid within 14 days of the determination of this application.

6. In default of payment within the time stipulated by the court, the full amount to become immediately due and payable and the defendant to be a liberty to execute the decree herein without any reference to the plaintiff whatsoever.

7. The plaintiff do immediately deliver possession of the service station known as Karen Service Station to the defendant.

8. Each party to bear his own costs of the suit upon the point of judgment being entered herein.

**On the ground that:**

(1) The plaintiff and the defendant executed a Memorandum of Understanding on 1<sup>st</sup> August 2005 in settlement of this suit.

(2) The plaintiff has failed to submit any payment proposal or make any payment.

The application is supported by an affidavit sworn by Mr. Joseph Kering on 12<sup>th</sup> January 2006 in which he has deponed that:

(1) Following the consent order recorded in court on 29<sup>th</sup> July 2005 the plaintiff and the defendant executed a Memorandum of Understanding on 1<sup>st</sup> August 2005.

(2) By letter dated 5<sup>th</sup> August 2005 the plaintiff's advocates Mwaniki Gachoka & Company requested Hamilton & Mathews the defendant's advocates to forward a consent letter for their signature.

(3) By letter dated 11<sup>th</sup> August 2005 Hamilton Harrison forwarded the consent letter to Mwaniki Gachoka & Co Advocates.

Copies of the letters are annexed herein. Despite correspondences exchanged between the defendant's advocates and the plaintiff's advocates dated 5<sup>th</sup> August 2005 and 22<sup>nd</sup> August 2005 the plaintiff has not signed the consent letter.

The defendant applies to this court for orders that judgment be entered for the defendant in terms of the Memorandum of Understanding as stated above and which was signed by both parties. On perusal of the contents of the said Memorandum of Understanding and the correspondences exchange by the advocate for the defendant and the advocate for the plaintiff thereafter and coupled with the facts that the plaintiff did not file any papers to resist this application is clear confirmation that the suit herein was

compromised.

Judgment is therefore entered as prayed in terms of the Notice of Motion dated 10<sup>th</sup> January 2005.

Dated at Nairobi this 21<sup>st</sup> day of June 2006.

**J.L.A. OSIEMO**

**JUDGE**